SHRI AMBYA KALYA MHATRE (D) THROUGH LEGAL HEIRS & ORS.

v.

THE STATE OF MAHARASHTRA

(Civil Appeal No. 7784 of 2011)

SEPTEMBER 12, 2011

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

Land Acquisition Act, 1894 – ss. 18 and 23 – Lands belonging to appellants acquired for New Bombay project – Reference to civil Court u/s.18 – Right of the landowner to amend the amount claimed in the reference application and seek higher compensation – Limitation period for such amendment – Held: As the Land Acquisition Act does not require the person aggrieved/landowner to specify the amount of compensation sought, when objecting to the amount of compensation and seeking a reference, mentioning of the amount of compensation sought is optional – Since there is no obligation to specify the amount in the application for reference, it can be specified in the claim statement filed before the Reference Court – The period of limitation in s.18 has nothing to do with specifying the amount of compensation claimed – Consequently if the reference is in regard to objection to the amount of compensation, the Reference Court can permit amendment of the claim relating to compensation – What is not permitted after the expiry of the period of limitation specified in s.18, is changing the nature of objections from one category to another – If the reference had been sought with reference to objection to amount of compensation, the land owner cannot after the period of limitation, seek amendment to change the claim as objection to measurement or objection to apportionment – State of Maharashtra has a special provision in the Bombay Court

Fees Act which requires every claimant who makes an application to the Collector for reference to court u/s.18 to pay one half the ad valorem fee on the difference between the amount awarded by the Collector and the amount claimed by the claimant – Thus application u/s.18 objecting to the compensation by implication is required to disclose the amount of compensation sought and pay court fee on the increase sought – But this is only a requirement in regard to the said Court Fees Act – This only means that if the claim is amended later, additional court fee may have to be paid – This requirement under the said Court Fees Act cannot be read as a requirement under the Land Acquisition Act – So long as Land Acquisition Act is not amended to require the person aggrieved to specify the amount of compensation claimed by him in the reference application, the bar of limitation will not apply even if the amount is specified in the application for reference and subsequently a higher amount is sought by way of amendment – Time limit u/s.18 is only for seeking the reference by raising the objection to the amount of compensation or any of the other three objections – The land owner or persons aggrieved will have to give only the nature of objection to the award, that is whether it is with reference to measurement or compensation or person to whom it is payable or apportionment, and briefly mention the grounds in support of it – Though the land owner can give the details of his claim and quantum, he is not bound to do so – When the reference is made, he can give the particulars of the claim for compensation or additional particulars or even increase the claim – Bombay Court Fees Act, 1959 – Schedule I, Entry 15.

Land Acquisition Act, 1894 – ss. 18 and 23 – Reference to civil Court u/s.18 – Where the landowner sought increase in compensation for only the land, in application u/s.18, whether he can seek increase in compensation for the trees or structures also, before the Reference Court – Held: When

the Act refers to acquisition of 'land', the reference is not only to land but also to land, building, trees and anything attached to the earth – In the absence of any restriction in s.18, and the respective roles assigned by the Act to the Land Acquisition Collector and the Reference Court in the context of making a reference and determining the compensation, it is clear that once the reference is made in regard to amount of compensation, the Reference Court will have complete jurisdiction to decide the compensation for the land, buildings and trees and other appurtenances – The Reference Court will also have the power to entertain any application for increasing the compensation under whatever head – The fact that the landowner had sought increase only in regard to the land in the application for reference, will not come in the way of the landowner seeking increase even in regard to trees or structures, before the Reference Court.

Land Acquisition Act, 1894 – s.23 – Where compensation is awarded for the land, whether no compensation can be awarded for trees or well separately – Held: If the land value had been determined with reference to the sale statistics or compensation awarded for a nearby vacant land, then necessarily, the trees will have to be valued separately – But if the value of the land has been determined on the basis of the sale statistics or compensation awarded for an orchard, that is land with fruit-bearing trees, then there is no question of again adding the value of the trees – Further, if the market value has been determined by capitalizing the income with reference to yield, then also the question of making any addition either for the land or for the trees separately does not arise – In the instant case, determination of market value was not with reference to the yield – Nor was the determination of market value in regard to the land with reference to the value of any orchard but was with reference to vacant agricultural land – In the circumstances, the value of the trees could be added to the value of the land.

Land Acquisition Act, 1894 – s.18(3) – Role of Land Acquisition Collector – Held: The Land Acquisition Collector is not a court – When he determines the compensation, he does not adjudicate, but merely makes an offer for the acquired land, on behalf of the government – If the land owner considers the amount offered by the Land Acquisition Collector to be inadequate and makes a request within the prescribed period, for reference to the civil court u/s.18, the Land Acquisition Collector is bound to refer the matter to the Civil Court for determination of the compensation – Neither the act of making an award offering compensation nor the act of referring the matter to a civil court for determination of compensation at the request of the land owner are judicial functions, but are administrative functions – Sub-section (3) of s.18 of the Act (added in Maharashtra) providing that the Land Acquisition Collector shall be deemed to be a court subordinate to the High Court, is only for the limited purpose of enabling a revision under s.115 of CPC to be filed against the order of the Collector u/s.18, and not for any other purpose.

Land Acquisition Act, 1894 – s.18 – Acquisition of land – Court fee while seeking reference to civil court – In Maharashtra and Gujarat, land losers required to pay half of the ad valorem court fee – Suggestion made to the State Government – State Government asked to consider giving appropriate relief to the land losers by providing for a nominal fixed court fee, on the application for reference, instead of ad valorem court fee – Court Fees – Bombay Court Fees Act, 1959 – Schedule I Entry 15.

In the instant appeal, the following three questions arose for consideration:

(i) Whether in a reference made to the Reference Court under section 18 of the Land Acquisition Act, 1894, the land owner is barred from amending the

amount claimed in the reference application and seeking higher compensation; and even if he could seek amendment, whether such application should be made within the period of limitation mentioned in section 18 of the Act;

(ii) Where the landowner has sought increase in compensation for only the land, in the application under section 18 of the Act, whether he can seek increase in compensation for the trees or structures also, before the Reference Court and

(iii) Where compensation is awarded for the land, whether no compensation can be awarded for trees or well separately.

Allowing the appeal, the Court

HELD:

Re : Questions (i) and (ii)

1. An analysis of Section 18 of the Land Acquisition Act, 1894 (as amended in Maharashtra), which relates to reference to court, would show that any person interested who does not accept the award can, by written application to the Land Acquisition Collector, require the matter to be referred for determination of the court in regard to any one of the following matters:(a) Objection to the measurement of the land; (b) Objection to the amount of compensation; (c) Objection as to the persons to whom the compensation is payable; or (d) Objection to the apportionment of the compensation among the persons interested. [Para 11] [22-C-D]

1.2. The Land Acquisition Collector is not a court. When he determines the compensation, he does not adjudicate, but merely makes an offer for the acquired

land, on behalf of the government. If the land owner considers the amount offered by the Land Acquisition Collector to be inadequate and makes a request within the prescribed period, for reference to the civil court under section 18 of the Act, the Land Acquisition Collector is bound to refer the matter to the Civil Court for determination of the compensation. He has no choice of refusing to make a reference, when the request is in time. Neither the act of making an award offering compensation nor the act of referring the matter to a civil court for determination of compensation at the request of the land owner are judicial functions, but are administrative functions. Sub–section (3) of section 18 of the Act (added in Maharashtra) providing that the Land Acquisition Collector shall be deemed to be a court sub – ordinate to the High Court, is only for the limited purpose of enabling a revision under section 115 of the Code to be filed against the order of the Collector under section 18 of the Act, and not for any other purpose. [Para 12] [23-E-G; 24-F-G]

1.3. The assumption made by the High Court that when a reference is sought objecting to the amount of compensation, the claim for increase will have to be frozen with reference to the amount claimed in the application under section 18 of the Act and therefore the quantum of the claim cannot subsequently be revised or increased is misconceived. Similarly, the assumption that if the claim for increase in an application for reference (relating to an acquisition involving a property consisting of land, building and trees), was only in regard to the compensation for the land, the land owner cannot thereafter make a grievance seeking increase in regard to the building or trees in the pleadings before the Reference Court and that in such a case, the Reference Court gets the jurisdiction to determine only the market

value in regard to the land and not in regard to the building and trees, is also not correct. Section 18 does not require a land owner objecting to the amount of compensation, to make a claim for any specific amount as compensation, nor does it require him to state whether the increase in compensation is sought only in regard to the land, or land and building, or land, building and trees. A land owner can seek reference to civil court, with reference to any one or more of the four types of objections permissible under section 18 of the Act, with reference to the award. His objection can either be in regard to the measurement of the acquired land or in regard to the compensation offered by the Collector or in regard to persons to whom it is shown as payable or the apportionment of compensation among several claimants. Once the land owner states that he has objection to the amount of compensation, and seeks reference to the civil court, the entire issue of compensation is open before the Reference Court. Once the claimant satisfies the Reference Court that the compensation awarded by the Land Acquisition Officer is inadequate, the Reference Court proceeds to determine the compensation, with reference to the principles in section 23 of the Act. As the Act does not require the person aggrieved/landowner to specify the amount of compensation sought, when objecting to the amount of compensation and seeking a reference, mentioning of the amount of compensation sought is optional. As there is no obligation to specify the amount in the application for reference, it can be specified in the claim statement filed before the Reference Court. The period of limitation in section 18 of the Act has nothing to do with specifying the amount of compensation claimed. It therefore follows that if the reference is in regard to objection to the amount of compensation, the Reference Court can permit any application for

amendment of the claim relating to compensation. [Para 13] [24-H; 25-A-H; 26-A-B]

1.4. The High Court lost sight of the scheme of the Act. When a land is acquired, the Land Acquisition Officer makes an offer on behalf of the State government, in regard to the compensation. The offer made by the Land Acquisition Officer is not an adjudication of the market value or the compensation payable to the land owner. When such offer is made, the land owner has the choice of either accepting the compensation in full and final satisfaction or to seek a reference to the civil court for determination of the amount of compensation. Where the land owner does not seek a reference within the time specified in section 18 of the Act, he is deemed to have accepted the award and the award of the Land Acquisition Officer attains finality under section 12 of the Act. Section 18 of the Act enables the land owner or person interested to make a written application to the Collector requiring his objection to the award, to be referred for determination by the court. In the application, he has to state whether his objection is in regard to measurement, quantum of compensation, persons entitled to compensation, or apportionment. He is also required to state the grounds on which the objection to the award, is taken. But the section does not require the land owner while seeking a reference, to specify the quantum of compensation demanded by him. Section 18 merely requires a land owner who has an objection to the amount of compensation awarded by the Land Acquisition Officer to require the matter to be referred to reference court for determination of compensation by specifying the grounds of objections to the award. [Para 14] [26-C-G]

1.5. Section 19 of the Act provides that on receipt of the application seeking reference made in accordance

with section 18 of the Act, the Collector is required to make the reference by forwarding the application for reference (or a copy thereof) with his statement setting out the grounds on which the amount of compensation was determined by him. When the reference is received, the court causes notice specifying the date of hearing for determining the objection of the land owner/person aggrieved (section 20 of the Act). The Reference Court has to call upon the claimants to file their statement of claim and call upon the Collector to file his objections to the claim statement and then proceed with the matter. Where the application under section 18 contains the necessary particulars, the Reference Court may treat the application for reference under section 18 and the Collector's statement under section 19 of the Act as the pleadings. The land owner is entitled to specify the amounts claimed by him as compensation and the heads of compensation for the first time in such claim statement before the Reference Court. He can also file an application amending the claim. What is not permitted after the expiry of the period of limitation specified in section 18 of the Act, is changing the nature of objections from one category to another. If the reference had been sought with reference to objection to amount of compensation, the land owner cannot after the period of limitation, seek amendment to change the claim as objection to measurement or objection to apportionment. [Para 15] [26-H; 27-A, G-H; 28-A-C]

1.6. A land owner, particularly a rural agriculturist, when he loses the land may not know the exact value of his land as on the date of the notification under section 4(1) of the Act. When he seeks reference he may be dissatisfied with the quantum of compensation but may not really know the actual market value. Many a time there may not be comparable sales, and even the courts face difficulty in assessing the compensation. There is no

reason why a land owner who has lost his land, should not get the real market value of the land and should be restricted by technicalities to some provisional amount he had indicated while seeking the reference. The Act does not require him to specify the quantum and all that he is required to say is that he is not satisfied with the compensation awarded and specify generally the grounds of objection to the award. Under the scheme of the Act, it is for the court to determine the market value. The compensation depends upon the market value established by evidence and does not depend upon what the land owner thinks is the value of his land. If he has an exaggerated notion of the value of the land, he is not going to get such amount, but is going to get the actual market value. Similarly if the land owner is under an erroneous low opinion about the market value of his land and out of ignorance claims lesser amount, that can not be held against him to award an amount which is lesser than the market value. When the Act does not require the land owner to specify the amount of compensation, but he voluntarily mentions some amounts, and subsequently, if the market value is found to be more than what was claimed, the land owner should get the actual market value. One fails to see why the land owner should get an amount less than the market value, as compensation. Consequently, it follows that if the land owner seeks amendment of his claim, he should be permitted to amend the claim as and when he comes to know about the true market value. When the Act is silent in regard to these matters, to impose any condition to the detriment of an innocent and ignorant land owner who has lost his land, would be wholly unjust. [Para 16] [28-D-H; 29-A-C]

1.7. The Collector making the offer of compensation on behalf of the State is expected to be fair and reasonable. He is required to offer compensation based

on the market value. Unfortunately Collectors invariably offer an amount far less than the real market value, by erring on the safer side, thereby driving the land owner first to seek a reference and prove the market value before the reference court and then approach the High Court and many a time this Court, if he does not get adequate compensation. In most land acquisitions, the land acquired is the only source of his livelihood of the land owner. If the compensation as offered by the Collector is very low, he cannot buy any alternative land. By the time he fights and gets the full market value, most of the amount would have been spent in litigation and living expenses and the price of lands would have appreciated enormously, making it impossible to buy an alternative land. As a result, the land owner seldom has a chance of acquiring a similar land or an equal area of similar land. It would be adding insult to injury, if the land owner should be tied down to a lesser value claimed by him in the reference application, even though he was not required by law to mention the amount of compensation when seeking reference. The Act contemplates the land owner getting the market value as compensation and no technicalities should come in the way of the land owner getting such market value as compensation. [Para 17] [29-D-H; 30-A]

1.8. Section 3(a) of the Act provides that the expression "land" includes benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth. Therefore when the Act refers to acquisition of 'land', the reference is not only to land but also to land, building, trees and anything attached to the earth. In the absence of any restriction in section 18 of the Act, and the respective roles assigned by the Act to the Land Acquisition Collector and the Reference Court in the context of making a reference and determining the compensation, it is clear that once the

reference is made in regard to amount of compensation, the Reference Court will have complete jurisdiction to decide the compensation for the land, buildings and trees and other appurtenances. The Reference Court will also have the power to entertain any application for increasing the compensation under whatever head. The fact that the landowner had sought increase only in regard to the land in the application for reference, will not come in the way of the landowner seeking increase even in regard to trees or structures, before the Reference Court. [Para 18] [30-B-E]

1.9. The State of Maharashtra has a special provision in the Bombay Court Fees Act, 1959 (Entry 15 in Schedule I) which requires every claimant who makes an application to the Collector for a reference to court under section 18 of the Act to pay one half the ad valorem fee on the difference between the amount awarded by the Collector and the amount claimed by the claimant. Thus the application under section 18 objecting to the compensation by implication is required to disclose the amount of compensation sought and pay court fee on the increase sought. But this is only a requirement in regard to the Court Fees Act. This only means that if the claim is amended later, additional court fee may have to be paid. This requirement under the Court Fees Act cannot be read as a requirement under the Land Acquisition Act. So long as Land Acquisition Act is not amended to require the person aggrieved to specify the amount of compensation claimed by him in the reference application, the bar of limitation will not apply even if the amount is specified in the application for reference and subsequently a higher amount is sought by way of amendment. [Para 19] [30-F-H; 31-A-B]

1.10. The time limit under section 18 of the Act is only for seeking the reference by raising the objection to the

amount of compensation or any of the other three objections. The land owner or persons aggrieved will have to give only the nature of objection to the award, that is whether it is with reference to measurement or compensation or person to whom it is payable or apportionment, and briefly mention the grounds in support of it. Though the land owner can give the details of his claim and quantum, he is not bound to do so. When the reference is made, he can give the particulars of the claim for compensation or additional particulars or even increase the claim. [Para 20] [30-C-E]

Chimanlal Hargovinddas vs. Special Land Acquisition Officer, Poona **1988 (3) SCC 751 : 1988 (1) Suppl. SCR 531 – relied on.**

State of Maharashtra v. Sitaram Narayan Patil **2010 (2) Mh.L.J. 387;** *State of Maharashtra vs. Ambya Kalya Mhatre* **2009 (1) Mh.LJ 781 – referred to.**

Re : Question (iii)

2. If the land value had been determined with reference to the sale statistics or compensation awarded for a nearby vacant land, then necessarily, the trees will have to be valued separately. But if the value of the land has been determined on the basis of the sale statistics or compensation awarded for an orchard, that is land with fruit – bearing trees, then there is no question of again adding the value of the trees. Further, if the market value has been determined by capitalizing the income with reference to yield, then also the question of making any addition either for the land or for the trees separately does not arise. In this case, the determination of market value was not with reference to the yield. Nor was the determination of market value in regard to the land with reference to the value of any orchard but was with

reference to vacant agricultural land. In the circumstances, the value of the trees could be added to the value of the land. [Para 22] [32-D-F]

State of Haryana vs. Gurcharan Singh **1995 Supp (2) SCC 637 : 1995 (1) SCR 408 – referred to.**

A suggestion to the State Government

3. Only in Maharashtra and Gujarat, the land losers are required to pay half of the *ad valorem* court – fee while seeking reference to the civil court. In all other States, *ad valorem* court – fee is payable only when an appeal is filed against the award of the Reference Court, seeking higher compensation and not in regard to applications for reference under section 18 of the Act. Most of the land – losers are agriculturists. For many of them, the only source of livelihood is taken away by acquisition of their lands. Though, the Collector is expected to award compensation based on the market value, quite often, it is seen that in actual practice, the compensation offered by the Collector is far less than the actual market value, thereby forcing the land – losers to seek references to civil court. In such cases, the amount awarded by the Collector being comparatively small, the requirement to pay ad – valorem court – fee on the application for reference causes irreparable hardship, forcing the land loser to seek a lesser increase than what is warranted. The State Government may therefore consider giving appropriate relief to the land losers by providing for a nominal fixed court – fee, on the application for reference, instead of ad valorem court fee. [Para 23] [32-H; 33-A-D]

4. The matter is remanded to the High Court for consideration of the appeal on merits. [Para 24] [33-E]

Case Law Reference:

2010 (2) Mh.L.J. 387	**Referred to**	**Para 10**
2009 (1) Mh.LJ 781	**Referred to**	**Para 10**
1988 (1) Suppl. SCR 531	**Relied on**	**Para 12**
1995 (1) SCR 408	**Referred to**	**Para 21**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7784 of 2011.

From the Judgment & Order 11.11.2008 of the High Court of Judicature at Bombay in F.A. No. 226 of 1994.

A. Mariamputham, Shivaji M. Jadhav, Brij Kishor for the Appellants.

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

The Judgment of the Court was delivered by

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

2. Lands belonging to Ambya Kalya Mhatre ('A.K.Mhatre' for short, now represented by his LRs.) situated at Dapoli village, Panvel taluk, Raigad district, bearing Sy. Nos.89/1, 85/1, 27/1, 41/1B, 41/1A, 152/3, 155/7, 18/7, 89/3, 23/2 and 99/1 in all measuring 1.73.6 Hectares (17360 sq.m.) with a large number of fruit bearing trees and a well therein, were acquired for New Bombay project in pursuance of preliminary notification dated 3.2.1970 (read with corrigendum dated 5.9.1970) and final notification dated 29.7.1979.

3. The special Land Acquisition Officer (for short 'the Collector') awarded the following compensation by award dated 4.7.1986:

S. No.	Descr-iption	Market value	Solatium (30%)	Additional amount @ 12% per annum	Total
1.	Land	Rs. 24,898.32	Rs. 7469.49	Rs. 49,049.69	Rs. 81,417.50
2.	Trees	Rs. 83,629.00	Rs. 25,088.70	Rs. 1,65,586.40	Rs. 2,74,303.10
3.	Well	Rs. 500.00	Rs. 150.00	Rs. 990.00	Rs. 1,640.00

Possession of the land was taken on 9.9.1986. Not being satisfied with the compensation awarded, A.K.Mhatre made an application dated 10.11.1986 under section 18 of the Land Acquisition Act, 1894 ('Act' for short) to the Special Land Acquisition Officer (also referred as 'Collector' or 'LAO') seeking a reference to a District Court for enhancement of compensation by Rs. 90,273/- in regard to the acquired lands and paid a court fee of Rs. 1610/- in regard to the increase demanded. In pursuance of the said request, a reference was made to the Civil Court by the LAO on 25.11.1986. During the pendency of the reference before the reference court, A.K. Mhatre died and his legal representatives came on record on 30.9.1988.

4. The appellants made an application on 13.9.1990 before the Reference Court seeking following amendments to the application for reference :

(i) As against the compensation of Rs. 24,898.32 for the entire land (at the rate Rs. 6500, Rs. 7000 and Rs. 7500 per acre for different kinds of land) awarded by the LAO, and the compensation claimed at the rate of Rs. 50,000/- per acre in regard to some of the lands, in the application seeking reference, the appellants sought compensation of Rs. 3,47,200/- for the acquired lands measuring 17360 sq.m. (at the rate of Rs.20 per sq.m.) that is an increase of Rs. 3,22,302/-.

(ii) As against the compensation of Rs. 83,629/- awarded

for the trees, the appellants sought Rs. 10,48,400/-, that is an increase of Rs. 9,64,771/-. (The appellant had not sought any increase in regard to trees in the application for reference).

(iii) As against the compensation of Rs. 500/- awarded for the well, the appellants sought Rs. 50,000/-, that is an increase of Rs. 49,500/- (Note: The appellant had not sought any increase in regard to the well in the application seeking reference).

The appellants thus sought in all Rs. 43,83,959/- towards additional compensation with solatium and additional amount. The appellants also paid the additional court fee for the increase in the claim. The reason given in the application for amendment seeking increase was that A.K. Mhatre was not then in a position to pay the court fee on a higher claim, and had therefore restricted the claim for a lesser amount in the application for reference.

5. The said application for amendment was allowed by the Reference Court on 19.9.1990 and the claims in the reference application were modified as per the amendment application. After evidence, the Reference Court by award dated 2.5.1991, determined the compensation as Rs. 1,21,520/- (at Rs. 7/- per sq.m.) for the land, Rs. 4,46,600/- for the trees and Rs. 2,000/- for the well, with statutory benefits. This works out to an increase of '96,631/- for the land, Rs. 3,62,971/- for the trees and Rs. 1500/- for the well. Both sides were aggrieved by the judgment and award of the Reference Court. The appellants filed Ap. No.104/1992 seeking further increase and the LAO filed FA No.226/1994 challenging the increase. The appeals came up for hearing on different dates before the High Court of Bombay.

6. The appeal filed by the appellants came up for hearing first. On 4.3.2003, the said appeal was allowed in part and the compensation in regard to the land was increased to Rs. 10 per sq. m., by following its earlier decision in *State of*

Maharashtra vs. Tulsiram Krishna Mungaj (FA No.462 of 1990 decided on 18.7.2001). The claim for increase in regard to the trees and well was rejected.

7. Subsequently the State's appeal came up for hearing before another Bench of the High Court and was allowed by the impugned judgment dated 11.11.2008. The High Court held that the claim of appellants for enhanced compensation in regard to the trees and well, made by amending the application for reference under section 18 of the Act was barred by limitation prescribed under section 18 of the Act, as A.K.Mhatre had sought in the application for reference, only increase in regard to the land and not in regard to the trees and well. The High Court also held that once compensation was awarded for the land, no separate compensation could be awarded for the trees. However, the High Court did not disturb the compensation that had been awarded by the LAO for the trees and the well, apparently in view of section 25 of the Act which provides that the amount awarded by the Collector as compensation cannot be reduced by the reference court. The High Court therefore set aside the award of additional compensation of Rs. 3,62,971/- towards the trees and Rs. 1500/- towards the well awarded by the Reference Court. The said judgment is challenged in this appeal by special leave.

8. On the contentions raised, the following questions arise for our consideration:

(i) Whether in a reference made to the Reference Court under section 18 of the Act, the land owner is barred from amending the amount claimed in the reference application and seeking higher compensation; and even if he could seek amendment, whether such application should be made within the period of limitation mentioned in section 18 of the Act?

(ii) Where the landowner has sought increase in compensation for only the land, in the application under

section 18 of the Act, whether he can seek increase in compensation for the trees or structures also, before the Reference Court?

(iii) Where compensation is awarded for the land, whether no compensation can be awarded for trees or well separately?

Re : Questions (i) and (ii)

9. The High Court held that the amendment was barred by limitation on the following reasoning :

"The Award of the Collector was made on 4th July, 1986. The possession of the acquired lands was taken on 9th September, 1986 and the payment of compensation was made on 29th September, 1986. The reference came to be filed within the prescribed period of limitation. However, about four years thereafter, i.e. on 19th September, 1990 the reference was amended for enhancing the claim of compensation for trees and well situate on the land. If the date of amendment of the reference i.e. 19th September, 1990 is to be taken into consideration, the claim for further enhancement made by way of amendment is clearly barred by limitation. Even the respondents do not dispute that if the date of amendment of reference is to be taken into consideration, the claim for enhanced compensation in respect of the trees and well would be barred by limitation. x x x x Ordinarily, amendment of pleadings relates back to the date of filing of the proceedings. However, the proposition cannot be extended to the question of limitation, because despite grant of leave to amend proceedings, the court is duty bound to consider whether the claim is within the prescribed period of limitation, just as the original claim. Therefore, we find no substance in the submission that the appellant ought to have challenged the order of amendment of the reference to enable it to contend that the claim for enhanced compensation is

barred by limitation. Since the amendment of the reference for claiming enhanced compensation fort he trees and the well situate on the land does not relate back to the date of filing of the reference, for the purpose of limitation, it must be held that the claim made on 19th September, 1990 is barred by limitation provided under Section 18 of the Land Acquisition Act."

10. During the pendency of the special leave petition, the issue whether the reference court can permit a claimant to amend his claim so as to increase the compensation claimed, came up for consideration before a Full Court of the Bombay High Court in *State of Maharashtra v. Sitaram Narayan Patil* [2010 (2) Mh.L.J. 387]. The Full Court overruled the impugned judgment dated 11.11.2008 (which is reported in *State of Maharashtra vs. Ambya Kalya Mhatre*– 2009 (1) Mh.LJ 781) and held that a claimant whose land is acquired, can be allowed to amend his claim application so as to enhance the compensation claimed in an application for reference under section 18 of the Act and that the "amendment to increase the compensation claimed in the application for reference under section 18 of the Act can be allowed before the Reference Court as well as at the stage of an Appeal in the High Court arising out of the decision of the Reference Court." The Full Court further held that while granting an amendment so as to enhance the claim for compensation, the general principles for considering an application for amendment made under Order 6 Rule 17 of the Code of Civil Procedure, 1908 would be applicable. The Full Bench arrived at the said findings on the following reasoning :

"Section 18 can be invoked by any person interested who has not accepted the award. He may by written application to the Collector require that the matter be referred by Collector for determination of the Court and his objections are of the nature specified in section 18(1). Sub-section 2 of section 18 states that the application which is to be

made in writing shall state the grounds on which the objections to the Award is raised. On receipt of this application, under section 19, while making a reference, the Collector shall state for the opinion of the Court in writing under his hand, the particulars of the case, …. Sub-clause (d) of section 19(1) states that if the objection be to the amount of compensation, the grounds on which the amount of compensation is determined. Thus, the Collector in his statement to the Court gives an opinion in writing under his hand about the grounds on which the amount of compensation was determined by him……

Under the scheme of section 18 of the Act, the reference is required to be filed within a period of limitation. The period of limitation depending upon the facts of a given case would be six weeks to six months. Six months being outer limit, in either of the events, when the applicant was present before the Collector at the time when the award was made or when he was served with notice under sub-section (2) of section 12 of the Act. It is now fairly a settled law that this specific period of limitation is mandatory and is not flexible. As stated above, *in order to refer the matter before the Collector for determination to the Court, the claimant is required to raise objections regarding the amount of compensation. He is not under an obligation to specify the amount of compensation. Once his objection as to the amount of compensation is filed within a prescribed period under sub-section (2) of section 18 of the said Act, before the Collector, then the Collector is duty bound to refer the matter to the Court along with his statement as contemplated under section 19 of the said Act.* The claimant thereafter, cannot introduce any other objections as contemplated under section 18 of the Act either before the Court or in an appeal under section 54 of the said Act. *However, the claimant once take objection to amount of compensation within a prescribed period is at liberty to claim enhancement in the*

compensation, thereafter."

(emphasis supplied)

The learned counsel for the respondent contended that the impugned judgment dated 11.11.2008 of the High Court lays down the correct legal position and that the reasoning in the full bench in *Sitaram Narayan Patil* is not sound.

11. Section 18 of the Land Acquisition Act, 1894 (as amended in Maharashtra) relating to reference to court is extracted below :

"18. **Reference to Court**.—(1) Any person interested who has not accepted the award (or the amendment thereof) may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested.

(2) The application shall state the grounds on which objection to the award (or the amendment) is taken:

Provided that every such application shall be made,—

(a) if the person making it was present or represented before the Collector at the time when he made his award (or the amendment), within six weeks from the date of the Collector's award;

(b) in other cases, within six weeks of the receipt of the notice from the Collector under section 12, sub-section (2), or within six months from the date of the Collector's award (or the amendment), whichever period shall first expire.

(3) Any order made by the Collector on an application under this section shall be subject to revision by the High Court,

as if the Collector were a court sub-ordinate to the High Court, within the meaning of section 115 of the Code of Civil Procedure, 1908."

An analysis of section 18 of the Act would show that any person interested who does not accept the award can, by written application to the Land Acquisition Collector, require the matter to be referred for determination of the court in regard to any one of the following matters :

(a) Objection to the measurement of the land;

(b) Objection to the amount of compensation;

(c) Objection as to the persons to whom the compensation is payable; or

(d) Objection to the apportionment of the compensation among the persons interested.

12. The Land Acquisition Collector is not a court. When he determines the compensation, he does not adjudicate, but merely makes an offer for the acquired land, on behalf of the government. If the land owner considers the amount offered by the Land Acquisition Collector to be inadequate and makes a request within the prescribed period, for reference to the civil court under section 18 of the Act, the Land Acquisition Collector is bound to refer the matter to the Civil Court for determination of the compensation. He has no choice of refusing to make a reference, when the request is in time. Neither the act of making an award offering compensation nor the act of referring the matter to a civil court for determination of compensation at the request of the land owner are judicial functions, but are administrative functions. The legal position of an award by the Land Acquisition Officer vis-à-vis the proceedings in a reference to the civil court under section 18 of the Act is explained thus by this Court in *Chimanlal Hargovinddas vs. Special Land Acquisition Officer, Poona* - 1988 (3) SCC 751:-

"4. The following factors must be etched on the mental screen :

(1) A reference under Section 18 of the Land Acquisition Act is not an appeal against the award and the court cannot take into account the material relied upon by the Land Acquisition Officer in his award unless the same material is produced and proved before the court.

(2) So also the award of the Land Acquisition Officer is not to be treated as a judgment of the trial court open or exposed to challenge before the court hearing the reference. It is merely an offer made by the Land Acquisition Officer and the material utilized by him for making his valuation cannot be utilized by the court unless produced and proved before it. It is not the function of the court to sit in appeal against the award, approve or disapprove its reasoning, or correct its error or affirm, modify or reverse the conclusion reached by the Land Acquisition Officer, as if it were an appellate court.

(3) The court has to treat the reference as an original proceeding before it and determine the market value afresh on the basis of the material produced before it."

Sub-section (3) of section 18 of the Act (added in Maharashtra) providing that the Land Acquisition Collector shall be deemed to be a court sub-ordinate to the High Court, is therefore only for the limited purpose of enabling a revision under section 115 of the Code to be filed against the order of the Collector under section 18 of the Act, and not for any other purpose.

13. The assumption made by the High Court that when a reference is sought objecting to the amount of compensation, the claim for increase will have to be frozen with reference to the amount claimed in the application under section 18 of the Act and therefore the quantum of the claim cannot subsequently

be revised or increased is misconceived. Similarly, the assumption that if the claim for increase in an application for reference (relating to an acquisition involving a property consisting of land, building and trees), was only in regard to the compensation for the land, the land owner cannot thereafter make a grievance seeking increase in regard to the building or trees in the pleadings before the Reference Court and that in such a case, the Reference Court gets the jurisdiction to determine only the market value in regard to the land and not in regard to the building and trees, is also not correct. Section 18 does not require a land owner objecting to the amount of compensation, to make a claim for any specific amount as compensation, nor does it require him to state whether the increase in compensation is sought only in regard to the land, or land and building, or land, building and trees. A land owner can seek reference to civil court, with reference to any one or more of the four types of objections permissible under section 18 of the Act, with reference to the award. His objection can either be in regard to the measurement of the acquired land or in regard to the compensation offered by the Collector or in regard to persons to whom it is shown as payable or the apportionment of compensation among several claimants. Once the land owner states that he has objection to the amount of compensation, and seeks reference to the civil court, the entire issue of compensation is open before the Reference Court. Once the claimant satisfies the Reference Court that the compensation awarded by the Land Acquisition Officer is inadequate, the Reference Court proceeds to determine the compensation, with reference to the principles in section 23 of the Act. As the Act does not require the person aggrieved/ landowner to specify the amount of compensation sought, when objecting to the amount of compensation and seeking a reference, mentioning of the amount of compensation sought is optional. As there is no obligation to specify the amount in the application for reference, it can be specified in the claim statement filed before the Reference Court. The period of limitation in section 18 of the Act has nothing to do with

specifying the amount of compensation claimed. It therefore follows that if the reference is in regard to objection to the amount of compensation, the Reference Court can permit any application for amendment of the claim relating to compensation.

14. The High Court has lost sight of the scheme of the Act. When a land is acquired, the Land Acquisition Officer makes an offer on behalf of the state government, in regard to the compensation. The offer made by the Land Acquisition Officer is not an adjudication of the market value or the compensation payable to the land owner. When such offer is made, the land owner has the choice of either accepting the compensation in full and final satisfaction or to seek a reference to the civil court for determination of the amount of compensation. Where the land owner does not seek a reference within the time specified in section 18 of the Act, he is deemed to have accepted the award and the award of the Land Acquisition Officer attains finality under section 12 of the Act. Section 18 of the Act enables the land owner or person interested to make a written application to the Collector requiring his objection to the award, to be referred for determination by the court. In the application, he has to state whether his objection is in regard to measurement, quantum of compensation, persons entitled to compensation, or apportionment. He is also required to state the grounds on which the objection to the award, is taken. But the section does not require the land owner while seeking a reference, to specify the quantum of compensation demanded by him. Section 18 merely requires a land owner who has an objection to the amount of compensation awarded by the Land Acquisition Officer to require the matter to be referred to reference court for determination of compensation by specifying the grounds of objections to the award.

15. Section 19 of the Act provides that on receipt of the application seeking reference made in accordance with section 18 of the Act, the Collector is required to make the reference

by forwarding the application for reference (or a copy thereof) with his statement setting out the grounds on which the amount of compensation was determined by him. Section 19 is extracted below :

> *"19. Collector's statement to the Court.*—(1) In making the reference, the Collector shall state, for the information of the Court, in writing under his hand, —
>
> (a) the situation and extent of the land, with particulars of any trees, buildings or standing crops thereon;
>
> (b) the names of the persons whom he has reason to think interested in such land;
>
> (c) the amount awarded for damages and paid or tendered under sections 5 and 17, or either of them, and the amount of compensation awarded under section 11;
>
> (cc) the amount paid or deposited under sub-section (3A) or section 17; and
>
> (d) *if the objection be to the amount of the compensation, the grounds on which the amount of compensation was determined.*
>
> (2) To the said statement, shall be attached a Schedule giving the particulars of the notices served upon, and of the statements in writing made or delivered by, the parties interested, respectively."
>
> (emphasis supplied)

When the reference is received, the court causes notice specifying the date of hearing for determining the objection of the land owner/person aggrieved (section 20 of the Act). The Reference Court has to call upon the claimants to file their statement of claim and call upon the Collector to file his objections to the claim statement and then proceed with the

matter. Where the application under section 18 contains the necessary particulars, the Reference Court may treat the application for reference under section 18 and the Collector's statement under section 19 of the Act as the pleadings. The land owner is entitled to specify the amounts claimed by him as compensation and the heads of compensation for the first time in such claim statement before the Reference Court. He can also file an application amending the claim. What is not permitted after the expiry of the period of limitation specified in section 18 of the Act, is changing the nature of objections from one category to another. If the reference had been sought with reference to objection to amount of compensation, the land owner cannot after the period of limitation, seek amendment to change the claim as objection to measurement or objection to apportionment.

16. A land owner, particularly a rural agriculturist, when he loses the land may not know the exact value of his land as on the date of the notification under section 4(1) of the Act. When he seeks reference he may be dissatisfied with the quantum of compensation but may not really know the actual market value. Many a time there may not be comparable sales, and even the courts face difficulty in assessing the compensation. There is no reason why a land owner who has lost his land, should not get the real market value of the land and should be restricted by technicalities to some provisional amount he had indicated while seeking the reference. As noticed above, the Act does not require him to specify the quantum and all that he is required to say is that he is not satisfied with the compensation awarded and specify generally the grounds of objection to the award. Under the scheme of the Act, it is for the court to determine the market value. The compensation depends upon the market value established by evidence and does not depend upon what the land owner thinks is the value of his land. If he has an exaggerated notion of the value of the land, he is not going to get such amount, but is going to get the actual market value. Similarly if the land owner is under an

erroneous low opinion about the market value of his land and out of ignorance claims lesser amount, that can not be held against him to award an amount which is lesser than the market value. When the Act does not require the land owner to specify the amount of compensation, but he voluntarily mentions some amounts, and subsequently, if the market value is found to be more than what was claimed, the land owner should get the actual market value. We fail to see why the land owner should get an amount less than the market value, as compensation. Consequently, it follows that if the land owner seeks amendment of his claim, he should be permitted to amend the claim as and when he comes to know about the true market value. When the Act is silent in regard to these matters, to impose any condition to the detriment of an innocent and ignorant land owner who has lost his land, would be wholly unjust.

17. The Collector making the offer of compensation on behalf of the state is expected to be fair and reasonable. He is required to offer compensation based on the market value. Unfortunately Collectors invariably offer an amount far less than the real market value, by erring on the safer side, thereby driving the land owner first to seek a reference and prove the market value before the reference court and then approach the High Court and many a time this Court, if he does not get adequate compensation. In most land acquisitions, the land acquired is the only source of his livelihood of the land owner. If the compensation as offered by the Collector is very low, he cannot buy any alternative land. By the time he fights and gets the full market value, most of the amount would have been spent in litigation and living expenses and the price of lands would have appreciated enormously, making it impossible to buy an alternative land. As a result, the land owner seldom has a chance of acquiring a similar land or an equal area of similar land. It would be adding insult to injury, if the land owner should be tied down to a lesser value claimed by him in the reference application, even though he was not required by law to mention the amount of compensation when seeking reference. The Act

contemplates the land owner getting the market value as compensation and no technicalities should come in the way of the land owner getting such market value as compensation.

18. It is relevant to notice the definition of land in section 3(a) of the Act. It provides that the expression "land" includes benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth. Therefore when the Act refers to acquisition of 'land', the reference is not only to land but also to land, building, trees and anything attached to the earth. In the absence of any restriction in section 18 of the Act, and the respective roles assigned by the Act to the Land Acquisition Collector and the Reference Court in the context of making a reference and determining the compensation, we are of the view that once the reference is made in regard to amount of compensation, the Reference Court will have complete jurisdiction to decide the compensation for the land, buildings and trees and other appurtenances. The Reference Court will also have the power to entertain any application for increasing the compensation under whatever head. The fact that the landowner had sought increase only in regard to the land in the application for reference, will not come in the way of the landowner seeking increase even in regard to trees or structures, before the Reference Court.

19. We are conscious of the fact that the State of Maharashtra has a special provision in the Bombay Court Fees Act, 1959 (Entry 15 in Schedule I) which requires every claimant who makes an application to the Collector for a reference to court under section 18 of the Act to pay one half the ad valorem fee on the difference between the amount awarded by the Collector and the amount claimed by the claimant. Thus the application under section 18 objecting to the compensation by implication is required to disclose the amount of compensation sought and pay court fee on the increase sought. But this is only a requirement in regard to the Court Fees Act. This only means

that if the claim is amended later, additional court fee may have to be paid. This requirement under the Court Fees Act cannot be read as a requirement under the Land Acquisition Act. So long as Land Acquisition Act is not amended to require the person aggrieved to specify the amount of compensation claimed by him in the reference application, the bar of limitation will not apply even if the amount is specified in the application for reference and subsequently a higher amount is sought by way of amendment.

20. We therefore hold that the time limit under section 18 of the Act is only for seeking the reference by raising the objection to the amount of compensation or any of the other three objections. The land owner or persons aggrieved will have to give only the nature of objection to the award, that is whether it is with reference to measurement or compensation or person to whom it is payable or apportionment, and briefly mention the grounds in support of it. Though the land owner can give the details of his claim and quantum, he is not bound to do so. When the reference is made, he can give the particulars of the claim for compensation or additional particulars or even increase the claim.

Re : Question (iii)

21. The High Court has also held that once the compensation is awarded for the land, there cannot be additional or separate compensation for the trees. For this purpose, the High Court has relied upon the following observations of this Court in *State of Haryana vs. Gurcharan Singh* – 1995 Supp (2) SCC 637 :

> "It is settled law that the Collector or the court who determines the compensation for the land as well as fruit bearing trees cannot determine them separately. The compensation is to the value of the acquired land. The market value is determined on the basis of the yield. Then necessarily applying suitable multiplier, the compensation

> needs to be awarded. Under no circumstances the court should allow the compensation on the basis of the nature of the land as well as fruit-bearing trees. In other words, market value of the land is determined twice over; once on the basis of the value of the land and again on the basis of the yield got from the fruit-bearing trees. The definition of land includes the benefits which accrue from the land as defined in section 3(a) of the Act. After compensation is determined on the basis of the value of the land as distinct from the income applying suitable multiplier, then the trees would be valued only as firewood and necessary compensation would be given."

22. We are afraid that the High Court has misread the said decision in regard of valuing the land and trees separately. If the land value had been determined with reference to the sale statistics or compensation awarded for a nearby vacant land, then necessarily, the trees will have to be valued separately. But if the value of the land has been determined on the basis of the sale statistics or compensation awarded for an orchard, that is land with fruit-bearing trees, then there is no question of again adding the value of the trees. Further, if the market value has been determined by capitalizing the income with reference to yield, then also the question of making any addition either for the land or for the trees separately does not arise. In this case, the determination of market value was not with reference to the yield. Nor was the determination of market value in regard to the land with reference to the value of any orchard but was with reference to vacant agricultural land. In the circumstances, the value of the trees could be added to the value of the land.

A suggestion to the State Government

23. In all other States, *ad valorem* court-fee is payable only when an appeal is filed against the award of the Reference Court, seeking higher compensation and not in regard to applications for reference under section 18 of LA Act. Only in

Maharashtra and Gujarat, the land losers are required to pay half of the *ad valorem* court-fee while seeking reference to the civil court. Most of the land-losers are agriculturists. For many of them, the only source of livelihood is taken away by acquisition of their lands. Though, the Collector is expected to award compensation based on the market value, quite often, it is seen that in actual practice, the compensation offered by the Collector is far less than the actual market value, thereby forcing the land-losers to seek references to civil court. In such cases, the amount awarded by the Collector being comparatively small, the requirement to pay ad-valorem court-fee on the application for reference causes irreparable hardship, forcing the land loser to seek a lesser increase than what is warranted. The State Government may therefore consider giving appropriate relief to the land losers by providing for a nominal fixed court-fee, on the application for reference, instead of ad valorem court fee.

24. We therefore allow this appeal, set aside the judgment dated 11.11.2008 of the High Court, and remand the matter to the High Court for consideration of the appeal on merits. As the matter relates to a 1970 acquisition and the appeal was of the year 1994, we request the High Court to dispose of the appeal expeditiously.

B.B.B. Appeal allowed.

RAKESH & ANOTHER

v.

STATE OF MADHYA PRADESH

(Criminal Appeal No. 339 of 2008)

SEPTEMBER 19, 2011

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

Indian Penal Code,1860 – s.302 – Death of PW11's uncle due to assault by sharp edged weapons – Testimony of PW11 – Conviction of accused-appellants – Challenge to – Held: It was improbable that the appellants had been enroped falsely as promptness in lodging the FIR showed that there was no time for manipulation – Prompt and early reporting of the occurrence by PW11 with all its vivid details gave assurance regarding truth of its version – PW.11 faced grilling cross-examination – However, no discrepancy or error could be shown in spite of the fact that he was nephew of the deceased – PW11 gave full account of the overt acts of the accused while causing injuries to the deceased – He was a natural witness and his testimony inspired confidence and was, thus, worth acceptance – The other circumstances particularly, the statements of the Investigating Officer (PW.21) and PW.9, the arrest of the accused, and recovery of weapons on their disclosure statements proved the prosecution case – Conviction of accused-appellants accordingly upheld.

Criminal Trial – Murder – Time of death – Determination of – Post mortem examination conducted by PW-8 – Opinion of PW-8 as to time of death – Held: The opinion of PW-8 that death had occurred within 3 to 6 hours prior to post-mortem examination, does not mean that PW.8 was able to fix any exact time of death – The physical condition of the body after death would depend on a large number of circumstances/ factors and nothing can be said with certainty – In determining

the issue, various factors such as age and health condition of the deceased, climatic and atmospheric conditions of the place of occurrence and the conditions under which the body is preserved, are required to be considered – The exact time of death cannot be established scientifically and precisely.

Evidence – Inconsistency between medical evidence and ocular evidence – Effect of – Held: The ocular evidence would have primacy unless it is established that oral evidence is totally irreconcilable with the medical evidence.

Evidence – Witness – Related witness – Held: Evidence of related witness can be relied upon provided it is trustworthy – Mere relationship does not disqualify a witness – Witnesses who are related to the victim are as competent to depose the facts as any other witness – However, such evidence required to be carefully scrutinised and appreciated before reaching to a conclusion on the conviction of the accused in a given case.

Evidence – Contradictions between narrations of witnesses – Effect of – Held: Even if there are minor discrepancies between the narrations of witnesses when they speak on details, unless such contradictions are of material dimensions, the same should not be used to discard the evidence in its entirety – Trivial discrepancy ought not to obliterate the otherwise acceptable evidence.

The prosecution case was that the two appellants alongwith another accused caused the death of PW11's uncle by assaulting him with sharp edged weapons. All the weapons allegedly used in the crime were recovered on the disclosure statements made by the appellants and the other accused. PW.8 conducted post-mortem on the body of the deceased. In his opinion, there were three incised wounds on the body- one on the neck, one on the chest and another in the abdomen and all the injuries had been caused by sharp edged weapons. PW11

testified to have witnessed the incident.

The trial court convicted the two appellants as also the other accused under Section 302 IPC and sentenced them to rigorous imprisonment for life. The conviction was upheld by the High Court.

The appellants challenged their conviction before this Court *inter alia* on grounds 1) that the ocular evidence was contradictory to the medical evidence as regards the time of death; and 2) that the alleged eye witness PW.11 was closely related to the victim and none of the independent witnesses examined by the prosecution supported its case to the extent that PW.11 could be present on the place of occurrence at the relevant time.

Dismissing the appeal, the Court

HELD:1.1. It is a settled legal proposition that the ocular evidence would have primacy unless it is established that oral evidence is totally irreconcilable with the medical evidence. Where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence if proved, the ocular evidence may be disbelieved. [Para 9] [45-C-E]

1.2. The opinion of PW-8 that death had occurred within 3 to 6 hours prior to post-mortem examination, does not mean that PW.8 was able to fix any exact time of death. The physical condition of the body after death would depend on a large number of circumstances/ factors and nothing can be said with certainty. In determining the issue, various factors such as age and health condition of the deceased, climatic and atmospheric conditions of the place of occurrence and the conditions under which the body is preserved, are required to be considered. The exact time of death cannot be established scientifically and precisely. DW.1,

examined by the appellants in their defence, deposed that incident occurred at 11.00 a.m. which is consistent with the prosecution case and does not tilt the balance in favour of the appellants. [Paras 10, 11] [45-F-H; 46-A-E]

State of U.P. v. Hari Chand **(2009) 13 SCC 542: 2009 (7) SCR 149;** *Abdul Sayeed v. State of Madhya Pradesh* **(2010) 10 SCC 259: 2010 (13) SCR 311;** *Bhajan Singh @ Harbhajan Singh & Ors. v. State of Haryana,* **(2011) 7 SCC 421;** *Mangu Khan & Ors. v. State of Rajasthan* **AIR 2005 SC 1912: 2005 (2) SCR 368 and** *Baso Prasad & Ors. v. State of Bihar* **AIR 2007 SC 1019: 2006 (9) Suppl. SCR 431 – relied on.**

2. Evidence of related witness can be relied upon provided it is trustworthy. Mere relationship does not disqualify a witness. Witnesses who are related to the victim are as competent to depose the facts as any other witness. Such evidence is required to be carefully scrutinised and appreciated before reaching to a conclusion on the conviction of the accused in a given case. [Para 13] [46-G-H; 47-A]

Kartik Malhar v. State of Bihar **(1996) 1 SCC 614: 1995 (5) Suppl. SCR 239;** *Himanshu @ Chintu v. State (NCT of Delhi)* **(2011) 2 SCC 36: 2011 (1) SCR 48 and** *Bhajan Singh @ Harbhajan Singh & Ors. v. State of Haryana,* **(2011) 7 SCC 421 – relied on.**

3. PW.11 was closely related to the victim being his nephew. His evidence requires a very careful and close scrutiny. The deposition of PW.11 clearly reveals that incident occurred at 10.30 a.m. and the appellants alongwith 'D' caused injuries to the deceased with weapons such as knife, gupti and 'katarna' on the neck, chest and stomach. At the time of incident, PW.11 had been at a short distance from the victim. He also deposed about the motive that appellant no.1 wanted utensils from

the deceased, who refused to oblige him and that appellant no.1 had threatened the deceased to face dire consequences. In cross-examination, he admitted that at the time of the incident, PW.6, PW.12 and PW.15 etc., were with him. He denied that he reached the place of occurrence on being informed by DW.1 and further denied the suggestion that he had not seen the quarrel between the accused persons and the deceased. He gave a full account of the overt acts of the accused while causing injuries to the deceased. His evidence has to be examined taking into consideration that the site plan prepared by the Patwari make it clear that the incident occurred on a main road and the victim as well as PW.11 were on the same road. There was no obstruction in between, thus PW.11 could clearly view the incident. Though, there has been some dispute regarding the distance between the two, but taking into consideration the fact that the accused had been very well known to the witness being resident of the same village, the distance becomes immaterial for the reason that the witness could recognize him even from that distance. Deposition of PW.6 corroborated the case of the prosecution to the extent that PW.11 was at the place of occurrence earlier to him. [Para 14-15] [47-B-D-H; 48-A-C]

4. It is evident that incident occurred at 11.30 a.m. The victim was taken to the hospital where he was examined by the doctor and declared dead. PW.11 went from hospital to police station and lodged the FIR at 12.30 p.m. wherein all the three accused were specifically named. The distance of the police station from the place of occurrence had been only 1 k.m. The overt acts of the accused had been mentioned. The motive was also disclosed. It is improbable that the appellants had been enroped falsely as promptness in lodging the FIR shows that there was no time for manipulation. Prompt and early

reporting of the occurrence by the informant with all its vivid details gives an assurance regarding truth of its version. Allegations may not be an after-thought or having a colourable version of the incidents. [Para 16] [48-E-G]

Kishan Singh (dead) thr. Lrs. v. Gurpal Singh & Ors. **AIR 2010 SC 3624: 2010 (10) SCR 16 – relied on.**

5. It does not appeal to reason as to why the witness would falsely enrope the appellants and other accused in such a heinous crime and spare the real culprits to go scot-free. In the FIR, PW.11 has disclosed that his father PW.10, PW.6 and PW.12 reached the place of occurrence at a later stage. As the parties were known to each other being the residents of the same village, the identity etc. was not in dispute. [Para 16] [48-H; 49-A-B]

6. The Trial Court had appreciated the evidence on record, and reached the conclusion to the effect that PW.11 was a trustworthy witness and had been an eye-witness of the incident. He had faced grilling cross-examination. However, no discrepancy or error could be shown in spite of the fact that he was nephew of the deceased. On careful scrutiny of his deposition, his statement was found trustworthy. The court further held that even if the other witnesses on the spot had not supported the prosecution case, PW.11 was a natural witness and had seen the incident. The other circumstances particularly, the statements of the Investigating Officer (PW.21) and PW.9, the arrest of accused, recovery of weapons on their disclosure statements proved the prosecution case. The depositions of PW.21 had been natural. There was no proof that the I.O. (PW.21) had any animosity or any kind of interest and closeness to the deceased. Therefore, the question of not believing the statement of I.O. (PW.21) does not arise. [Para 17] [49-C-F]

7.1. There are concurrent findings of fact by the two courts below. Unless the findings so recorded are found to be perverse, this Court should not generally interfere. Even if there are minor discrepancies between the narrations of witnesses when they speak on details, unless such contradictions are of material dimensions, the same should not be used to discard the evidence in its entirety. The trivial discrepancy ought not to obliterate the otherwise acceptable evidence. [Paras 18, 19] [49-G; 50-A-B]

7.2. The courts below reached the correct conclusion in accepting the prosecution case. PW.11 is a natural witness and his testimony inspired confidence and is, thus, worth acceptance. The facts and circumstances of the instant case do not warrant any interference by this Court. [Para 21] [50-F-H]

Manju Ram Kalita v. State of Assam **(2009) 13 SCC 330: 2009 (9) SCR 902 and** *Leela Ram (Dead) thr. Duli Chand v. State of Haryana & Anr.* **(1999) 9 SCC 525: 1999 (2) Suppl. SCR 280 – relied on.**

Case Law Reference:

2009 (7) SCR 149	relied on	Para 9
2010 (13) SCR 311	relied on	Para 9
(2011) 7 SCC 421	relied on	Para 9, 13
2005 (2) SCR 368	relied on	Para10
2006 (9) Suppl. SCR 431	relied on	Para 11
1995 (5) Suppl. SCR 239	relied on	Para 12
2011 (1) SCR 48	relied on	Para 13
2010 (10) SCR 16	relied on	Para 16
2009 (9) SCR 902	relied on	Para 18

1999 (2) Suppl. SCR 280 relied on Para 20

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 339 of 2008.

From the Judgment & Order dated 15.12.2006 of the High Court of Judicature at Jabalpur in Criminal Appeal Nos 518 & 890 of 1997.

Siddharth Aggarwal, Aditya Wadhoa, Stui Gujral, Senthil Jagadeesan for the Appellant.

Vibha Datta Makhija for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This criminal appeal has been preferred against the judgment and order dated 15.12.2006 passed by the High Court of Judicature at Jabalpur in Criminal Appeal Nos. 518 and 890 of 1997.

2. Facts as explained by the prosecution have been that:

A. On 5.3.1996, on the day of 'Holi' at around 11.30 a.m., one Kailash @ Killu was assaulted by the appellants alongwith another accused in front of the house of one Rama Tailor. Anil (PW.11), nephew of the deceased, who had been following Kailash (deceased), raised an alarm and the assailants were caught at the spot. Various persons gathered at the place of occurrence but the assailants managed to flee. The injured Kailash was taken to the hospital but succumbed to his injuries. In view of the above, an FIR was lodged under Section 302 of Indian Penal Code, 1860 (hereinafter called as 'IPC') and Section 25 of the Arms Act, 1959, within one hour of the incident at 12.30 p.m., wherein both the appellants and other accused were named. In the FIR it was also stated that two policemen, namely, Ramdas Havaldar and Pannalal Sainik came at the scene and got the accused persons released from the mob and, thus, they succeeded in running away.

B. Dr. R.K. Singhvi (PW.8), conducted the post-mortem on the body of the deceased on the same day. In his opinion, there were three incised wounds found on his body, one on the neck, one on the chest and another in the abdomen. All the injuries had been caused by sharp edged weapons and Kailash had died within three to six hours prior to conducting the post-mortem examination.

C. During the course of investigation, the appellants were arrested and the weapons used in the offence were recovered on their disclosure statements. After concluding the investigation, chargesheet was filed.

D. The case was committed for Sessions trial. The prosecution examined a large number of witnesses in support of its case. One Halle (DW.1) was examined in defence and after conclusion of the trial, all the three accused were convicted for the offence punishable under Section 302 IPC vide judgment and order dated 21.2.1997 and were awarded sentence of rigorous imprisonment for life and a fine of Rs. 2,000/- each, in default thereof, to serve further sentence of one year.

E. Being aggrieved, all the three accused/convicts preferred two appeals i.e. Criminal Appeal Nos. 518 & 890 of 1997 before the High Court of Judicature at Jabalpur, which were decided by judgment and order dated 10.2.2005 in absence of their counsel.

F. Being aggrieved, the present two appellants preferred criminal appeals before this Court i.e. Criminal Appeal Nos. 1463-64 of 2005 which were allowed vide judgment and order dated 20.7.2006 and this Court after setting aside the judgment and order dated 10.2.2005 of the High Court of Judicature at Jabalpur, remanded the appeals to be heard by the High Court afresh.

G. In pursuance of the said judgment and order of this Court dated 20.7.2006, the appeals have been heard afresh

and dismissed vide judgment and order dated 15.12.2006 by the High Court.

Hence, this appeal.

3. Before proceeding with the case on merit, it may be pertinent to mention here that so far as the case of the appellant Rakesh is concerned, he had already served the sentence of more than 14 years and has been granted premature release by the State. Appellant Rajesh has served about 7 -1/2 years and is still in jail. The third person Dinesh did not prefer any appeal so we are not concerned with him so far as this appeal is concerned.

4. Shri Siddharth Aggarwal, learned counsel appearing for the appellants, has submitted that the Trial Court had placed very heavy reliance upon the alleged eye-witnesses Khemchand (PW.10) and Anil (PW.11) who, in fact, could not be the eye-witnesses at all. The deposition of other witnesses examined by the prosecution, falsify the prosecution's case in entirety. There have been material inconsistencies in the depositions of Khemchand (PW.10) and Anil (PW.11), and their entire evidence has to be discredited. The High Court after considering the circumstances, did not find the evidence of Khemchand (PW.10) trustworthy, however, failed to appreciate that the evidence of Anil (PW.11) was also liable to be treated similarly. The ocular evidence is contradictory to the medical evidence as the incident had occurred at 11.30 a.m., FIR had been lodged at 12.30 p.m. The post-mortem examination was conducted at 1.00 p.m. on the same day i.e. 5.3.1996. The Doctor opined that Kailash @ Killu had died within 3 to 6 hours before the post-mortem examination. Anil (PW.11) relied upon by the High Court, is closely related to the deceased Kailash @ Killu and none of the independent witnesses examined by the prosecution supported its case to the extent that Anil (PW.11) could be present on the place of occurrence at the relevant time. Thus, the appeal deserves to be allowed.

5. Per contra, Ms. Vibha Dutta Makhija, learned counsel appearing for the State, has vehemently opposed the appeal contending that there is no rule of law prohibiting reliance upon the evidence of the close relatives of the victims, however, such evidence has to be carefully scrutinised. The medical evidence may not be conclusive regarding the time of death as the physical condition of a body after death depends upon various factors i.e. age, geographical and climatic conditions of the place of occurrence etc. The facts and circumstances of the case do not warrant interference with the concurrent findings of the facts recorded by the courts below. The appeal lacks merit and is liable to be dismissed.

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

7. According to the prosecution case, Rakesh hit on the right side of the neck with knife, Rajesh on the right portion of the chest by gupti and Dinesh hit by 'Katarna' (Axe having long wooden handle of 42 inches) on the right portion of the stomach of Kailash @ Killu, deceased. This evidence stands duly supported by the medical evidence as Dr. R.K. Singhvi (PW.8), on conducting the post-mortem examination found the following injuries on his person:

(i) Incised wound on the right portion of right clerical bone of 1.5x2x5 cms with regular edges. Faciea muscle, blood vessel lungs was torn, blood was deposited in the chest.

(ii) Incised wound on the right chest on third inter-coster space of 5 cm x 1.5 cm x 5 cm. Faciea muscle and blood vessels had been cut.

(iii) Incised wound in the right chest on ninth intercoster space of 4 cms x 2 cm x 4 cms.

In the opinion of Doctor Singhvi, all the injuries appeared to have been caused within 3 to 6 hours by sharp edged weapons prior to the post-mortem examination.

8. All the weapons used in the crime had been recovered in the disclosure statements made by the appellants and other accused. In the opinion of Dr. R.K. Singhvi (PW.8), injuries nos.1, 2 and 3 could be caused by the weapons used in the offence. The question does arise as to whether there is inconsistency/contradiction in the medical and ocular evidence. The evidence on record clearly reveal that injuries had been caused to Kailash @ Killu, deceased, on his neck, chest and right portion of the stomach.

9. It is a settled legal proposition that the ocular evidence would have primacy unless it is established that oral evidence is totally irreconcilable with the medical evidence. More so, the ocular testimony of a witness has a greater evidentiary value vis-a'-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence if proved, the ocular evidence may be disbelieved. (Vide: *State of U.P. v. Hari Chand,* (2009) 13 SCC 542; *Abdul Sayeed v. State of Madhya Pradesh,* (2010) 10 SCC 259; and *Bhajan Singh @ Harbhajan Singh & Ors. v. State of Haryana,* (2011) 7 SCC 421).

10. So far as the opinion of the doctor that death had occurred within 3 to 6 hours prior to post-mortem examination, does not mean that Dr. R.K. Singhvi (PW.8) was able to fix any exact time of death. The issue raised by the learned counsel for the appellants is no more *res integra*.

In *Mangu Khan & Ors. v. State of Rajasthan,* AIR 2005 SC 1912, this Court examined a similar issue wherein the post-mortem report mentioned that the death had occurred within 24 hours prior to post-mortem examination. In that case, such an opinion did not match with the prosecution case. This Court examined the issue elaborately and held that physical condition of the body after death would depend on a large number of

circumstances/factors and nothing can be said with certainty. In determining the issue, various factors such as age and health condition of the deceased, climatic and atmospheric conditions of the place of occurrence and the conditions under which the body is preserved, are required to be considered. There has been no cross-examination of the doctor on the issue as to elicit any of the material fact on which a possible argument could be based in this regard. The acceptable ocular evidence cannot be dislodged on such hypothetical basis for which no proper grounds were made.

11. In *Baso Prasad & Ors. v. State of Bihar,* AIR 2007 SC 1019, while considering a similar issue, this Court held that exact time of death cannot be established scientifically and precisely.

Halle (DW.1), examined by the appellants in their defence, deposed that incident occurred at 11.00 a.m. which is consistent with the prosecution case. Thus, in view of the above, the submission so advanced by the learned counsel for the appellants, is not tenable and thus, does not tilt the balance in favour of the appellants. The argument does not require any further consideration.

12. This Court in *Kartik Malhar v. State of Bihar,* (1996) 1 SCC 614, defined 'interested witness' as:

> "A close relative who is a natural witness cannot be regarded as an interested witness. The term 'interested' postulates that the witness must have some direct interest in having the accused somehow or the other convicted for some animus or for some other reason."

13. Evidence of related witness can be relied upon provided it is trustworthy. Mere relationship does not disqualify a witness. Witnesses who are related to the victim are as competent to depose the facts as any other witness. Such evidence is required to be carefully scrutinised and appreciated

before reaching to a conclusion on the conviction of the accused in a given case. (See: *Himanshu @ Chintu v. State (NCT of Delhi),* (2011) 2 SCC 36; and *Bhajan Singh @ Harbhajan Singh & Ors.* (supra)**.**

14. Anil (PW.11), undoubtedly, has been closely related to the victim being his nephew. His evidence requires a very careful and close scrutiny in the light of the aforesaid settled legal propositions.

15. The main thrust of the argument of the learned counsel for the appellants has been that the statements of Khemchand (PW.10) and Anil (PW.11) have been mutually destructive, thus both are liable to be discarded altogether. The High Court has disbelieved Khemchand (PW.10) to the extent that he was present at the time of incident and thus, could not be an eye-witness. Deposition of Anil (PW.11) clearly reveals that incident occurred at 10.30 a.m. in front of the house of Rama Tailor and the appellants alongwith Dinesh caused injuries to Kailash (deceased) with weapons such as knife, gupti and 'katarna' on the neck, chest and stomach. At the time of incident, Anil (PW.11) had been at a short distance from the victim. Ishwar Nayak (PW.6), Dharmendra (PW.12) and other persons had also gathered there. He also deposed about the motive that Rakesh, accused, wanted utensils from Kailash (deceased), who refused to oblige the accused. Rakesh, accused had threatened Kailash to face dire consequences. In cross-examination, he has admitted that at the time of the incident, Ishwar Nayak (PW.6), Dharmendra (PW.12) and Pradeep Pathak (PW.15) etc., were with him. He denied that he reached the place of occurrence on being informed by Halle (DW.1) and further denied the suggestion that he had not seen the quarrel between the accused persons and the deceased. He gave a full account of the overt acts of the accused while causing injuries to Kailash. His evidence has to be examined taking into consideration that the site plan prepared by the Patwari make it clear that the incident occurred on a main road and the victim

as well as Anil (PW.11) were on the same road. There was no obstruction in between, thus Anil (PW.11) could clearly view the incident. Though, there has been some dispute regarding the distance between the two, but taking into consideration the fact that the accused had been very well known to the witness being resident of the same village, the distance becomes immaterial for the reason that the witness could recognize him even from that distance. The other eye-witnesses, particularly, Ishwar Nayak (PW.6), Dharmendra (PW.12) and Pradeep Pathak (PW.15) did not support the case of the prosecution appropriately. Dharmendra (PW.12) stood declared hostile. Deposition of Ishwar Nayak (PW.6) has corroborated the case of the prosecution to the extent that Anil (PW.11) was at the place of occurrence earlier to him. In cross-examination, he deposed as under:

> "Half the boys ran towards the spot of incident immediately. Amongst them was Anil also. I did not go with Anil."

16. In view of the above, it is evident that incident occurred at 11.30 a.m. Kailash, injured was taken to the hospital where he was examined by the doctor and declared dead. Anil (PW.11) went from hospital to police station and lodged the FIR at 12.30 p.m. wherein all the three accused were specifically named. The distance of the police station from the place of occurrence had been only 1 k.m. The overt acts of the accused had been mentioned. The motive was also disclosed. It is improbable that the appellants had been enroped falsely as promptness in lodging the FIR shows that there was no time for *manipulation*. Prompt and early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding truth of its version. Allegations may not be an after-thought or having a colourable version of the incidents. (See: *Kishan Singh (dead) thr. Lrs. v. Gurpal Singh & Ors.,* AIR 2010 SC 3624).

It does not appeal to reasons as to why the witness would falsely enrope the appellants and other accused in such a

heinous crime and spare the real culprits to go scot-free. In the FIR, Anil (PW.11) has disclosed that his father Khemchand (PW.10), Ishwar Nayak (PW.6) and Dharmendra (PW.12) reached the place of occurrence at a later stage. As the parties were known to each other being the residents of the same village, the identity etc. was not in dispute.

17. The Trial Court had appreciated the evidence on record, and reached the conclusion to the effect that Anil (PW.11) was a trustworthy witness and had been an eye-witness of the incident. He had faced grilling cross-examination. However, no discrepancy or error could be shown in spite of the fact that he was nephew of Kailash (deceased). On careful scrutiny of his deposition, his statement was found trustworthy.

The court further held that even if the other witnesses on the spot had not supported the prosecution case, Anil (PW.11) was a natural witness and had seen the incident. The other circumstances particularly, the statements of B.M. Dubey, Investigating Officer (PW.21) and Balram (PW.9), the arrest of accused, recovery of weapons on their disclosure statements proved the prosecution case. The depositions of B.M. Dubey (PW.21) had been natural. There was no proof that the I.O. (PW.21) had any animosity or any kind of interest and closeness to the deceased. Therefore, the question of not believing the statement of B.M. Dubey, I.O. (PW.21) does not arise. The High Court in spite of the fact of dis-believing Khemchand (PW.10), found the prosecution case wholly proved on the sole testimony of Anil (PW.11).

18. There are concurrent findings of fact by the two courts below. Unless the findings so recorded are found to be perverse, this Court should not generally interfere. This "Court cannot embark upon fruitless task of determining the issues by re-appreciating the evidence." (See : *Manju Ram Kalita v. State of Assam,* (2009) 13 SCC 330).

19. Even if there are minor discrepancies between the narrations of witnesses when they speak on details, unless such contradictions are of material dimensions, the same should not be used to discard the evidence in its entirety. The trivial discrepancy ought not to obliterate the otherwise acceptable evidence.

20. In *Leela Ram (Dead) thr. Duli Chand v. State of Haryana & Anr.,* (1999) 9 SCC 525, this Court observed as under:

> "The Court shall have to bear in mind that different witnesses react differently under different situations: whereas some become speechless, some start wailing while some others run away from the scene and yet there are some who may come forward with courage, conviction and belief that the wrong should be remedied. As a matter of fact it depends upon individuals and individuals. There cannot be any set pattern or uniform rule of human reaction and to discard a piece of evidence on the ground of his reaction not falling within a set pattern is unproductive and a pedantic exercise."

21. In view of the above, we reach the inescapable conclusion that the courts below reached the correct conclusion in accepting the prosecution case. Anil (PW.11) is a natural witness and his testimony inspired confidence and is, thus, worth acceptance.

The facts and circumstances of the instant case do not warrant any interference by this Court. Appeal lacks merit and is, accordingly, dismissed.

B.B.B. Appeal dismissed.

HIGH COURT OF JUDICATURE, PATNA
v.
SHIVESHWAR NARAYAN AND ANR.
(Civil Appeal No. 6103 of 2005)

SEPTEMBER 22, 2011

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

Constitution of India, 1950 – Article 226 – Judicial review – Scope of –Benefit of increase of retirement age from 58 years to 60 years – Denied to Judicial Officer 'S' on basis of report of Evaluation Committee (constituted by the High Court) as accepted and approved by the Full Court of the High Court – 'S' filed writ petition – Division Bench of High Court allowed the same and directed the High Court on its administrative side to re-evaluate the case of 'S' for extension of service upto 60 years – Whether the Division Bench of the High Court was justified in its power of judicial review under Article 226 of the Constitution to interfere with the unanimous administrative decision of the Full Court – Held: The Division Bench of the High Court considered the matter as if it was sitting in appeal over the decision of the High Court on administrative side which was not permissible – The Division Bench failed to keep in mind the distinction between judicial review and merit review and, thereby committed a serious error in examining the merits of the decision of the Full Court – Even if, some other view was possible on the material that was considered by the Evaluation Committee and the Full Court to evaluate the case of 'S' for extension of superannuation age to 60 years, that did not justify interference in the decision of the Full Court which was founded on material and relevant considerations – There was not even an iota of allegation of bias or mala fides- nor it could have been- against the decision making authority – The Division Bench of the High Court was, thus, clearly in error in interfering with the decision of the High Court on

administrative side in not extending the benefit of enhancement of retirement age of the Judicial Officer from 58 to 60 years – Judicial Service.

Judicial Service – Benefit of increase in retirement age of Judicial Officer from 58 years to 60 years – Grant of – Considerations of continued usefulness in service – Held: A Judicial Officer may have a service record not tainted by many adverse remarks; he may have got promotion from time to time but still he may be found to be lacking in potential for continued useful service – In assessing potential for continued useful service, the entire record of service, character rolls, quality of judgments are of considerable importance – At the same time, over-all reputation of a Judge in the entire period of service, his judicial conduct, objective and impartial performance throughout his career are the relevant factors which also have to be kept in mind.

'S', a Judicial officer prayed for extension of his retirement age from 58 years to 60 years. In light of the decision in *All India Judges' Association* case, the Chief Justice of the Patna High Court constituted an Evaluation Committee for assessment and evaluation of the service records of sixteen judicial officers including 'S', to find out whether they had potential for continued useful service upto 60 years. The Evaluation Committee finally resolved that 'S' did not have the potential for continued useful service after attaining the age of 58 years. The report of the Evaluation Committee was unanimously accepted by the Full Court of the High Court and thus 'S' was denied the benefit of increase in retirement age. 'S' filed writ petition before a Division Bench of the High Court which allowed the same and directed the High Court on its administrative side to re-evaluate his case for extension of service from 58 to 60 years.

The question which arose for consideration in the instant appeal was whether the Division Bench of the

High Court was justified in its power of judicial review under Article 226 of the Constitution of India to interfere with the unanimous administrative decision of the Full Court.

Allowing the appeal filed by High Court of Judicature, Patna and dismissing the appeal filed by Judicial officer 'S', the Court

HELD: 1. The primary consideration for the High Court in extending benefit of increase in the retirement age of the Judicial Officer is his continued usefulness in the service based on entire service record, quality of judgments, his conduct, integrity and all other relevant factors. A Judicial Officer may have a service record not tainted by many adverse remarks; he may have got promotion from time to time but still he may be found to be lacking in potential for continued useful service. In assessing potential for continued useful service, the entire record of service, character rolls, quality of judgments are of considerable importance. At the same time, over-all reputation of a Judge in the entire period of service, his judicial conduct, objective and impartial performance throughout his career are the relevant factors which also have to be kept in mind. [Para 11] [60-A-E]

All India Judges' Association and Ors. vs. Union of India and Ors. **(1993) 4 SCC 288: 1993 (1) Suppl. SCR 749 – referred to.**

2. A Judicial Officer is not an ordinary government servant; he exercises sovereign judicial power. Like Caesar's wife; he must be above suspicion. The personality of an honest judicial officer is ultimate guarantee to justice. The judicial officers hold office of great trust and responsibility and their judicial conduct must not be beyond the pale. A slightest dishonesty (monetary, intellectual or institutional) by a judicial officer

may have disastrous effect. The repeated complaints of judicial impropriety and questionable integrity against a judicial officer – although not proved to the hilt – may be sufficient basis to disentitle such judicial officer the benefit of extension of retirement age to 60 years. [Para 11] [60-F-G]

3.1. From the material on record, it is apparent that in the course of service, ten complaints were received against 'S' from time to time. In the complaints, there were allegations that he decided cases on considerations other than judicial; he indulged in mis-behaviour and use of unparliamentary language while conducting court proceedings; he granted bail in a triple murder case where the High Court had rejected the bail thrice; he committed irregularities in the judicial proceedings etc. In relation to some of the complaints, inquiries were instituted. In one of the inquiries relating to grant of bail orders, it was found that the bail orders, passed by the Judicial Officer, were not sound but the inquiry was dropped as there was delay in making a complaint. In yet another complaint relating to grant of bail orders, although it was found that the bail orders were not sound but no action was taken on the administrative side as it was opined that the merits of these orders would be seen on judicial side. In respect of his mis-behaviour with a member of the Bar, in inquiry, the District & Sessions Judge did find that unpleasant words were used by the Judicial Officer but the advocate was also found to have used unpleasant words and, therefore, no action was taken. He was also found lazy in the confidential roll of the year 1982-1983. In a service span of almost 30 years, most of the time, the Judicial Officer was adjudged as an "average officer". It is true that entry "below average officer" was expunged but the fact of the matter is that he was never adjudged an "outstanding" or "very good officer". [Para 16] [62-A-F]

3.2. In the backdrop of the material as abovesaid, if the Evaluation Committee formed an opinion that Judicial Officer did not have potential for continued service and that decision has been accepted and approved by the Full Court unanimously, it cannot be said that the decision of the Full Court in not extending benefit of increase of retirement age to 60 years is based on irrelevant considerations or no material. The use of the expression by the Evaluation Committee in its resolution viz; 'further continuance in service will not be in public interest' has to be read in the context of the subsequent expression immediately following i.e. 'as he does not have the potential for continued useful service'. The Evaluation Committee evaluated and assessed the case of the Judicial Officer with a primary object to find out as to whether Judicial Officer has potential for continued useful service and having regard to the entire service record, character rolls, quality of judgments and other relevant factors, concluded that he does not have potential for continued useful service. The Full Court unanimously accepted and approved the view of the Evaluation Committee. The decision making process is, thus, not at all flawed. The Division Bench considered the matter as if it was sitting in appeal over the decision of the High Court on administrative side which was not permissible. The consideration of the matter by the Division Bench shows that it went into the correctness of the decision itself taken by the High Court on the administrative side and not the correctness of the decision making process. The Division Bench of the High Court failed to keep in mind the distinction between judicial review and merit review and, thereby committed a serious error in examining the merits of the decision of the Full Court. [Paras 17, 18] [62-G-H; 63-A-F]

3.3. To find out the potentiality of a Judicial Officer for continuation in service beyond the age of 58 years

following the decision of this Court in *All India Judges' Association*, the entire record of service, character rolls, quality of judgments and other relevant circumstances like general reputation, integrity, efficiency, performance, conduct etc. do form the basis but at the same time, it is not 'proved dishonesty' or 'proved mis-conduct' that is determinative but doubtful integrity or suspicious judicial conduct may be sufficient to deny a judicial officer benefit of enhancement of superannuation age to 60 years. It is in totality of the circumstances available from the entire service record and all other relevant circumstances that an opinion has to be formed whether or not the Judicial Officer deserves to be given benefit of increase of superannuation age to 60 years. [Para 19] [63-G-H; 64-A-B]

3.4. The present case is a case where the Division Bench embarked upon exercise of examining each complaint and material against the Judicial Officer to find out the correctness of the decision of the Full Court which was legally not permissible. The weight of the material is not capable of re-assessment while sitting in judicial review over such decision. Even if, some other view is possible on the material that was considered by the Evaluation Committee and the Full Court to evaluate the case of 'S' for extension of superannuation age to 60 years, that did not justify interference in the decision of the Full Court which was founded on material and relevant considerations. [Para 20] [64-C-D]

State of U.P. and Ors. vs. Maharaja Dharamander Prasad Singh and Ors. **(1989) 2 SCC 505: 1999 (1) SCR 37 and *Centre for PIL and Anr. vs Union of India and Anr.* (2011) 4 SCC 1 – referred to.**

Chief Constable of the North Wales Police vs. Evans **(1982) 3 All ER HL 141 – referred to.**

4. There is not even an iota of allegation of bias or

mala fides- nor it could have been- against the decision making authority. The Division Bench of the High Court was, thus, clearly in error in interfering with the decision of the High Court on administrative side in not extending the benefit of enhancement of retirement age of 'S' from 58 to 60 years. [Paras 21, 22] [64-E-F]

Case Law Reference:

1993 (1) Suppl. SCR 749	**Referred to.**	**Para 4**
1982 (3) All ER HL 141	**Referred to.**	**Para 13**
1999 (1) SCR 37	**Referred to.**	**Para 14**
(2011) 4 SCC 1	**Referred to.**	**Para 15**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 6103 of 2005.

From the Judgment and Order dated 20.05.2005 of the Division Bench of the High Court of Judicature at Patna in Writ Petition being Civil Writ Jurisdiction Case No. 9325 of 2003.

WITH

Civil Appeal No. 7372 of 2005

P.H. Parekh and Sunil Kumar, Ajay Kr. Jha, Vishal Prasad, Kshatrshal Raj (for Parekh & Co.) Parkash Sinha, S. Chandra Shekhar, Sarla Chandra for the appearing parties.

The Judgment of the Court was delivered by

R.M. LODHA, J. These two appeals, by special leave, are from the judgment dated May 20, 2005 of the High Court of judicature at Patna (for short "the High Court") whereby the Division Bench of that court allowed the Writ Petition filed by Shri Shiveshwar Narayan (for short "Judicial Officer") and quashed the communication dated July 30, 2003 and directed the High Court on its administrative side to re evaluate the case of the Judicial Officer (petitioner therein) for extension of service upto the age of 60 years.

2. One appeal has been filed by the High Court through its Registrar General and the other by the Judicial Officer.

3. In appeal filed by the High Court, challenge is to the judgment dated May 20,2005 whereby its communication on the administrative side dated July 30, 2003 refusing extension of service to the Judicial Officer beyond the age of 58 years has been quashed. In the other appeal, the grievance of the Judicial Officer is that on allowing the Writ Petition, the Division Bench was not justified in directing the High Court on its administrative side to reevaluate the case of Judicial Officer for extension of service for two years.

4. In *All India Judges' Association and others vs. Union of India and others*[1], this Court directed the enhancement of the superannuation age of the judicial officers to 60 years. While directing so, this Court made it clear that the benefit of increased age to 60 years shall not be available automatically to all the judicial officers and the benefit will be available to those who, in the opinion of the respective High Courts, have a potential for continued useful service.

5. In light of the decision in *All India Judges' Association*[1], the Chief Justice of the High Court constituted the Evaluation Committee for assessment and evaluation of service record concerning sixteen judicial officers, the present Judicial Officer being one of them, to find out whether they have potential for continued useful service upto 60 years. The case of the present Judicial Officer was required to be considered for extension of service as he was attaining the age of 58 years on July 15, 2003 and by virtue of the State Government's decision dated September 29, 1973 he was entitled to work till the last date of July, 2003 only. The Evaluation Committee on consideration of the present Judicial Officer's entire service record and also having considered the quality of judgments, character rolls and other relevant material including general reputation, efficiency, integrity and honesty, finally resolved on July 10, 2003 that he was not fit for further continuance in service in public interest as he does not have the potential for continued useful service.

6. The report of the Evaluation Committee came up for

1. (1993) 4 SCC 288.

consideration before the Full Court of the High Court on July 26, 2003 and the Full Court unanimously, on that day, accepted and approved the decision of the Evaluation Committee denying the benefit of increase of retirement age to the present Judicial Officer.

7. On July 30, 2003, Judicial Officer received a communication from the Registrar General of the High Court informing him that he was not being given the benefit of enhancement of retirement age from 58 to 60 years.

8. The Judicial Officer challenged the Communication dated July 30, 2003 in a Writ Petition before the High Court and the Division Bench of that Court, as indicated above, by its judgment dated May 20, 2005, quashed the communication dated July 30, 2003 and further directed the High Court on its administrative side to re-evaluate his case for extension from 58 to 60 years.

9. In para 30 of the *All India Judges' Association*[1], this Court stated as follows:

> ".....The benefit will be available to those who, in the opinion of the respective High Courts, have a potential for continued useful service. It is not intended as a windfall for the indolent, the infirm and those of doubtful integrity, reputation and utility. The potential for continued utility shall be assessed and evaluated by appropriate Committees of Judges of the respective High Courts constituted and headed by the Chief Justices of the High Courts and the evaluation shall be made on the basis of the judicial officer's past record of service, character rolls, quality of judgments and other relevant matters."

10. The direction for increase of retirement age to 60 years by this Court on consideration of the factors as indicated therein was basically of transitory nature until the statutory rules were

1. (1993) 4 SCC 288.

put in place by respective State governments. However, no statutory rules were framed nor the rules governing superannuation were amended in the State of Bihar until 2003 and, therefore, the case of the present Judicial Officer for increase of retirement age to 60 years had to be considered in accordance with the judgment of this Court in *All India Judges' Association*[1].

11. The primary consideration for the High Court in extending benefit of increase in the retirement age of the Judicial Officer is his continued usefulness in the service based on entire service record, quality of judgments, his conduct, integrity and all other relevant factors. A Judicial Officer may have a service record not tainted by many adverse remarks; he may have got promotion from time to time but still he may be found to be lacking in potential for continued useful service. In assessing potential for continued useful service, obviously entire record of service, character rolls, quality of judgments are of considerable importance. At the same time, overall reputation of a Judge in the entire period of service, his judicial conduct, objective and impartial performance throughout his career are the relevant factors which also have to be kept in mind. A Judicial Officer is not an ordinary government servant; he exercises sovereign judicial power. Like Caesar's wife; he must be above suspicion. The personality of an honest judicial officer is ultimate guarantee to justice. The judicial officers hold office of great trust and responsibility and their judicial conduct must not be beyond the pale. A slightest dishonesty (monetary, intellectual or institutional) by a judicial officer may have disastrous effect. The repeated complaints of judicial impropriety and questionable integrity against a judicial officer – although not proved to the hilt – may be sufficient basis to disentitle such judicial officer the benefit of extension of retirement age to 60 years.

12. The Evaluation Committee comprising of eight Judges

1. (1993) 4 SCC 288.

including the Chief Justice on examination of the past service record, character rolls, quality of judgments and matters like general reputation, efficiency, integrity and honesty did not consider the present Judicial Officer fit for continued useful service after attaining the age of 58 years. The Full Court unanimously accepted and approved the decision of the Evaluation Committee. The question to be considered by us, is whether the Division Bench was justified in its power of judicial review under Article 226 of the Constitution of India to interfere with the unanimous administrative decision of the Full Court?

13. Lord Hailsham in Chief Constable of the *North Wales Police vs. Evans*[2] made the following statement:

> ".....The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised or enjoined by law to decide for itself a conclusion which is correct in the eyes of the court."

14. In *State of U.P. and others vs. Maharaja Dharamander Prasad Singh and others*[3], it was held by this Court that judicial review is directed, not against the decision, but is confined to the examination of the decision-making process.

15. Recently, in the case of Centre for *PIL and another vs Union of India and another*[4], a three Judge Bench of this Court stated that a difference between judicial review and merit review has to be kept in mind.

16. The present Judicial Officer joined the judicial service on April 8, 1974 as a Munsif and over the years got promotion. He was promoted to the post of Additional District & Sessions

2. (1982) 3 ALL ER HL 141.

3. (1989) 2 SCC 505.

4. (2011) 4 SCC 1.

Judge on July 2, 1987 and confirmed as such on March 1, 1991. He was further promoted to the post of District & Sessions Judge on May 1, 1998. From the material on record, it is apparent that in the course of his service, ten complaints were received against him from time to time. In the complaints, there were allegations that he decided cases on considerations other than judicial; he indulged in mis-behaviour and use of unparliamentary language while conducting court proceedings; he granted bail in a triple murder case where the High Court had rejected the bail thrice; he committed irregularities in the judicial proceedings etc. In relation to some of the complaints, inquiries were instituted. In one of the inquiries relating to grant of bail orders, it was found that the bail orders, passed by the Judicial Officer, were not sound but the inquiry was dropped as there was delay in making a complaint. In yet another complaint relating to grant of bail orders, although it was found that the bail orders were not sound but no action was taken on the administrative side as it was opined that the merits of these orders would be seen on judicial side. In respect of his mis-behaviour with a member of the Bar, in inquiry, the District & Sessions Judge, Sasaram did find that unpleasant words were used by the Judicial Officer but the advocate was also found to have used unpleasant words and, therefore, no action was taken. He was also found lazy in the confidential roll of the year 1982-1983. In a service span of almost 30 years, most of the time, the Judicial Officer has been adjudged as an "average officer". It is true that entry "below average officer" was expunged but the fact of the matter is that he has never been adjudged an "outstanding" or "very good officer".

17. In the backdrop of the above material, if the Evaluation Committee formed an opinion that Judicial Officer did not have potential for continued service and that decision has been accepted and approved by the Full Court unanimously, can it be said that the decision of the Full Court in not extending benefit of increase of retirement age to 60 years is based on irrelevant considerations or no material? In our view, the answer

has to be no. The use of the expression by the Evaluation Committee in its resolution viz; 'further continuance in service will not be in public interest' has to be read in the context of the subsequent expression immediately following i.e. 'as he does not have the potential for continued useful service'. The Evaluation Committee evaluated and assessed the case of the Judicial Officer with a primary object to find out as to whether Judicial Officer has potential for continued useful service and having regard to the entire service record, character rolls, quality of judgments and other relevant factors, concluded that he does not have potential for continued useful service. The Full Court unanimously accepted and approved the view of the Evaluation Committee. The decision making process is, thus, not at all flawed. Unfortunately, the Division Bench considered the matter as if it was sitting in appeal over the decision of the High Court on administrative side which, in our view, was not permissible. The consideration of the matter by the Division Bench shows that it has gone into the correctness of the decision itself taken by the High Court on the administrative side and not the correctness of the decision making process.

18. On a careful reading of the judgment of the High Court, we are of the view that the Division Bench failed to keep in mind the distinction between judicial review and merit review and, thereby committed a serious error in examining the merits of the decision of the Full Court.

19. To find out the potentiality of a Judicial Officer for continuation in service beyond the age of 58 years following the decision of this Court in *All India Judges' Association*[1], obviously, the entire record of service, character rolls, quality of judgments and other relevant circumstances like general reputation, integrity, efficiency, performance, conduct etc. do form the basis but at the same time, it is not 'proved dishonesty' or 'proved mis-conduct' that is determinative but doubtful integrity or suspicious judicial conduct may be sufficient to deny

1. (1993) 4 SCC 288.

a judicial officer benefit of enhancement of superannuation age to 60 years. It is in totality of the circumstances available from the entire service record and all other relevant circumstances that an opinion has to be formed whether or not the Judicial Officer deserves to be given benefit of increase of superannuation age to 60 years.

20. The present case is a case where the Division Bench embarked upon exercise of examining each complaint and material against the Judicial Officer to find out the correctness of the decision of the Full Court which was legally not permissible. The weight of the material is not capable of re-assessment while sitting in judicial review over such decision. Even if, some other view is possible on the material that was considered by the Evaluation Committee and the Full Court to evaluate Judicial Officer's case for extension of superannuation age to 60 years, in our opinion, that did not justify interference in the decision of the Full Court which was founded on material and relevant considerations.

21. We may observe that there is not even an iota of allegation of bias or mala fides-nor it could have been-against the decision making authority.

22. The Division Bench of the High Court was, thus, clearly in error in interfering with the decision of the High Court on administrative side in not extending the benefit of enhancement of retirement age of the Judicial Officer from 58 to 60 years. 23 Consequently, Civil Appeal No. 6103 of 2005, High Court of Judicature, Patna vs. Shiveshwar Narayan and another is allowed and Civil Appeal No. 7372 of 2005, Shiveshwar Narayan vs. High Court of Judicature at Patna and another is dismissed. Parties shall bear their own costs.

B.B.B. Appeals disposed of.

K. BALARAMA RAJU

v.

CH. V. SUBRAMANYA SARMA & ORS.

(Civil appeal No. 8200 of 2011)

SEPTEMER 26, 2011

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

Service Law:

Andhra Pradesh High Court Service Rules, 1975:

rr. 7(7), 8(4), 15, 16, 23 – Seniority – Claim of, by first respondent – Posts of computer operators – Applicants to possess requisite qualification – Appellants as well as first respondent applied for the post and appeared for the test – Appellants obtained higher marks than respondent but only first respondent possessed the requisite qualification – Appellants given time to acquire the said qualification failing which they would be reverted – Said period extended by one year during which they acquired the necessary qualification – First respondent shown junior to the appellants in the gradation/seniority lists of computer operators – Appellant and first respondent promoted to the next post but first respondent placed much junior to the appellants – Writ petition – High Court set aside the gradation list and directed the High Court administration to re-fix their seniority and grant consequential benefits – On appeal, held: Governing rules have to be read and applied meaningfully such that no prejudice would be done to a candidate who otherwise had the qualifications and is appointed after passing the test – One should have the qualifications on the date when the applications are invited – Any such relaxation to permit unqualified candidates cannot be to the prejudice of the qualified candidates – On facts, first respondent had the necessary qualification when he appeared for the examination, and on his appointment by direct recruitment, his probation started immediately u/r.10(1) – Appellants did not have the necessary qualification when they

appeared for examination – Their appointments were purely temporary and on adhoc basis, and were liable to be reverted for not acquiring the necessary qualification – Also the appointments were without any preferential claim to future re-promotion or seniority –Their probation will start only when they get the qualification – Thus, order of the High Court accepting the legitimate seniority of the first respondent above the appellants is correct.

r. 5(2) – Selection by direct recruitment – Held: Under r. 5(2) the Chief Justice to determine the proportion of vacancies to be filled by each method where appointment to any category or post is provided by more than one method and also specify the manner in which such appointment shall be made.

r.5(3) – Seniority – Determination of – Held: Seniority of a member of the service in a Category or post shall unless he has been reduced to a lower rank as a punishment, be determined by the date of his first appointment to the service, category or post – If any portion of the service of such person does not count towards probation u/r. 16, his seniority shall be determined by the date of commencement of the service, which counts towards probation.

r. 10 – Probation – Every person appointed to the service otherwise than by promotion, or by transfer shall be on probation for a total period of two years on duty within a continuous period of three years – The probation of the appointee starts only after they obtain their qualification.

The High Court administration issued a circular for filling up the posts of Computer operators from the members of the High Court establishment. The promotion was to be effected on the basis of a written and an oral test. Three appellants and first respondent at the relevant time were working on the administrative side of the High Court as Assistants/Examiner and Typist/Copyists. They all applied for the post and cleared the exam. Among the applicants only first respondent had the requisite

qualification of post graduate diploma in computer programming or post graduate diploma in computer application. The High Court Administration issued an order dated 07.11.2000 permitting appellants alongwith two others to acquire the requisite prescribed qualification within one year failing which they were to be reverted. In the said order appellants were shown at Serial No.1,2,3 and first respondent at Serial No.4. The period for passing of the examination was further extended by the High Court for the candidates during which they acquired the necessary qualification. Respondent objected to the fact that the appellants who did not possess the requisite qualifications at the outset were shown senior to him and submitted his representation for getting his correct seniority in the category of computer operators but the High Court rejected the same. Thereafter, the Registrar (Administration) finalised the seniority list of the computer operators for consideration for promotion to the next higher post-Deputy Section Officer, wherein two appellants of SLP No. 5318/2009 were shown senior to respondent No. 1. Appellant 'KB' in Appeal No. 598/2009 was at Serial No.1 in the earlier order and was already promoted to the higher post by the order of High Court. Another representation of the respondent No.1 was rejected. However, he was promoted to the post of Deputy Section Officer but was placed much junior to the appellants. Aggrieved, respondent No. 1 filed a writ petition. The Division Bench allowed the writ petition holding that since the first respondent had those qualifications right at the outset, the first respondent ought to have been shown senior over the three appellants and set-aside the gradation list published. It directed the Registrar (Administration) to refix the seniority of the computer operators, taking the date of their acquiring requisite qualifications as per rules 7 (7) and 8 (4) of the Andhra Pradesh High Court Service Rules, 1975, and accord consequential benefits arising

therefrom. Thus, the three appellants and the High Court administration filed the instant appeals.

Dismissing the appeals, the Court

HELD: 1.1.The first respondent had the necessary qualifications when he appeared for the examination of Computer Operators. His appointment was pursuant to the order dated 7.11.2000 with immediate effect and his probation would start immediately thereafter under Rule 10(1) of the Andhra Pradesh High Court Service Rules, 1975 on probation. As far the three appellants are concerned, their appointments were purely temporary and on adhoc basis, and they were liable to be reverted if they were not to acquire the necessary qualification within one year. The order dated 7.11.2000 further stated that their appointments are without any preferential claim to future re-promotion or seniority. These three appellants did not obtain the necessary qualification within the period of one year. On their request they were given a further extension of time of one year by subsequent order dated 22.11.2001 issued by the Chief Justice. [Paras 26, 27] [87-H; 88-A-D]

1.2. The three appellants did not have the diploma certificates when they appeared for the examination, yet in view of their marks in the examination they were appointed as computer operators since the High Court did not get adequate number of qualified persons. They were therefore, appointed under Rule 16 (1) on purely temporary basis and were liable to be reverted, if they did not get the qualification in the time provided. Rule 16 (2) (b) states that such a person who is appointed under Rule 16 (1) shall not be regarded as a probationer by reason of any such appointment to any preferential claim to future appointment to such division, category or post. Second part of Rule 16 (2) (b) states if such a person is subsequently appointed to the division, category or post in accordance with these rules, he shall commence his

probation from the date of his subsequent appointment or from such earlier date as the appointing authority may determine. The power of the Chief Justice under Rule 23 states that if relaxation under the rule is made applicable to the case of any person, the case shall not be dealt with in any manner, less favourable to the candidate than that provided by that rule. However, this rule cannot be read to mean that while granting the benefit under this rule, the beneficiary can be placed at an advantage as against the one who is otherwise qualified and does not need the relaxation. The first respondent had the necessary qualification when he appeared for the examination, and on his appointment by direct recruitment under the order dated 7.11.2000, his probation would start immediately thereafter under Rule 10 (1). The probation of the three appellants would start only after they obtain their qualification. The power of relaxation exercised by the Chief Justice in their case can only get them into the service since adequate number of computers operators were not available and their appointments would get regularized when they get their qualification. The selection was done after a test and on the basis of merit. Possessing the necessary diploma certificate was a part of the qualification and merit. The passing of the examination required minimum 45 marks. Obviously those who had the qualification and who obtained 45 marks and above would have to be placed at the top of the list in seniority. Those who did not have the qualification at that time but obtained it later on, even if they had obtained higher marks in the test would be placed at a position lower than these candidates having qualification, and necessary marks. As far as the first respondent is concerned, his probation having started earlier he would complete the same earlier to the appellants no.1, 2 and 3 and would have to be reckoned senior to them. The governing rules would have to be read and applied meaningfully in this manner so that no prejudice would be done to a candidate who otherwise had the

qualifications and who is appointed after passing the test. One should have the qualifications on the date when the applications are invited. Any such relaxation to permit unqualified candidates cannot be to the prejudice of the qualified candidates. They can be taken into the service but cannot steal a march over the qualified and the selected candidates. [Para 28] [89-E-H; 90-A-H]

1.3. The three appellants contended that the petition filed by the first respondent suffered on account of laches and delay in moving the High Court. When the order dated 7.11.2000 was issued, the first respondent represented on 2.11.2001, but the representation was rejected on 15.11.2003. He moved for a review on 19.2.2004, but the same was not responded. When the seniority of the Computer Operators was published by notification dated 23.9.2005 and objections were invited, the first respondent submitted his objection on 10.10.2005. That representation was rejected by the High Court's proceeding dated 6.11.2007 and the first respondent was placed junior to the three appellants. He challenged that communication by his W.P. No.11920/ 2008. Thus, there was no delay or laches on the part of the first respondent in moving the High Court. [Para 29] [91-A-C]

1.4. In the circumstances, there is no error in the judgment and order of the High Court which accepted the legitimate seniority of the first respondent above the three appellants. The High Court allowed the writ petition filed by the first respondent, set aside the gradation list of computer operators as on 1.7.2005 and further directed the High Court administration to re-fix their seniority and to grant the consequential benefits. The judgment and order passed by the High Court is upheld. [Para 30] [91-D-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8200 of 2011.

From the Judgment and Order dated 19.12.2008 of the High Court of ANdhra Pradesh at Hyderabad in W.P. No. 11920 of 2008.

WITH

Civil Appeal Nos. 8201 and 8202 of 2011.

V. Sridhar Reddy, Ch. Leela Sarveswar, V.N. Raghupathy and C.K. Sucharita for the Appellant.

P.S. Narsimha, K. Maruthi Rao, K. Radha and Anjani Aiyagari for the Respondents.

The Judgment of the Court was delivered by

H.L. GOKHALE, J. 1. Leave granted.

2. These three appeals arise from the judgment and Order dated 19.12.2008 passed by a Division Bench of the Andhra Pradesh High Court allowing Writ Petition No. 11920/2008 filed by Ch. V. Subramanya Sarma who is joined as respondent No. 1 in all these three matters. The appellant in the first Appeal arising out of SLP No. 598/2009 and the two appellants in Appeals arising out of SLP No. 5318/2009 were respondents to the aforesaid Writ Petition. All the three appellants and the first respondent are employees of the Andhra Pradesh High Court, and the aforesaid Writ Petition No. 11920/2008 was concerning their seniority and promotion. The said Writ Petition challenged the decision of the Andhra Pradesh High Court on its administrative side granting seniority to these three appellants over the first respondent. The Writ Petition having been allowed, these three appellants have filed SLP Nos. 598/2009 and 5318/2009. The third SLP is filed by the Andhra Pradesh High Court.

3. All the aforesaid three appellants and the first respondent at the relevant time were working on the administrative side of the High Court at Hyderabad in categories (4) and (5) alongwith other employees of Division-II i.e. Assistants/Examiner & Typist/Copyists. They were interested in their promotion to the immediately higher post of

Computer Operators which is in Category 3 (b) of Division-II.

4. The service conditions of all these three appellants as well as the first respondent are governed under the Andhra Pradesh High Court Service Rules, 1975 framed by the Chief Justice of the High Court of Andhra Pradesh in exercise of his powers conferred under Article 229 (1) and (2), of the Constitution of India. The High Court administration issued a circular dated 24.10.2000 calling for particulars from the members of the High Court establishment for filling up these posts of Computer operators in accordance with the above referred rules. As far as this promotion is concerned, it was to be effected on the basis of a written and an oral test which were to be conducted by the officials of the National Informatics Centre (NIC).

5. It was the case of the first respondent that under Rules 7 (7) and 8 (4) of the aforesaid rules the requisite qualification for the post of a Computer Operator was to possess a degree in Typewriting, capability in English in higher grade, and post-graduate diploma in computer programming or post graduate diploma in computer applications. He had this qualification and therefore he applied for that post, and when the test was conducted on 1.11.2000, he cleared that examination. Nine other candidates also cleared the said test including the three appellants in SLP Nos. 598/2009 and 5318/2009. However, they did not posses the aforesaid requisite qualification of post graduate diploma in computer programming or post graduate diploma in computer application. The High Court Administration however issued an order dated 7.11.2000 permitting them alongwith two others to acquire the requisite prescribed qualification within one year failing which they were to be reverted. In this order dated 7.11.2000 the three appellants in SLP Nos. 598 and 5318/2009 were shown at Serial Nos. 1, 2 and 3, whereas the first respondent was shown at Serial No. 4. The order issued by the Registrar (Administration) dated 7.11.2000 reads as follows:-

"PROCEEDINGS OF THE HIGH COURT OF ANDHRA PRADESH ::

HYDERABAD

SUB-ESTABLISHMENT – HIGH COURT OF A.P. HYDERABAD – Promotion to Category 3 (b) of Division II i.e. Computer Operators-Orders – Issued.

READ:- 1. G.O.MS.NO. 156 Law (LA & J Courts.C) Department, Dated 18.10.2000

2. High Court's Circular ROC NO. 6017/2000/ Estt., dated 24.10.2000 …

ORDER ROC NO. 6939/200/Estt. 2 dated 7.11.2000

The Hon'ble the Chief Justice is pleased to pass the following order:-

The following members working in Category 4 and 5 of Division II i.e Assistants/ Examiners and Typists/Copyists who have appeared for the Written and Oral Test conducted by the N.I.C. officials on 1.11.2000 and who have qualified in the tests, are promoted and appointed as Computer Operators on temporary basis.

S.No.	Name	Designation
	Sarvasri	
1.	*K. Balarama Raju*	*Assistant*
2.	Mohd. Sanaullah Ansari	Assistant
3.	T. Tirumala Devi	Typist
4.	Ch. V. Subrahmanya Sarma	Typist
5.	M.V.S. Navinchandra	Copyist
6.	N. Chandrasekhar Rao	Copyist
7.	V. Satyanarayana	Typist
8.	L. Lakshmi Babu	Typist
9.	P. Nagarjuna Rao	Assistant
10.	L. Ramachandra Rao	Assistant

The members shown at S.Nos. 1, 2 ,3, 9 and 10 shall acquire the requisite prescribed qualifications within one year failing which they shall be reverted.

The above said appointments are made purely on temporary and on an adhoc basis without any preferential claim to future re-promotion or seniority and are liable to be reverted at any time without any notice and without assigning any reason."

Sd/-

Registrar (Administration)

6. It so transpired that this period for passing of the examination was further extended by the High Court for all the five candidates at Sr. Nos. 1, 2, 3, 9 & 10 above by one more year by a further notification of Registrar (Administration) dated 23.11.2001, during which period they acquired the necessary qualification. The respondent No. 1 objected to the fact that the candidates who did not possess the requisite qualifications at the outset were shown senior to him. He submitted his representation for getting his correct seniority in the category of computer operators. He made a representation on 2.11.2001, but that was rejected by the order passed by the High Court on 15.11.2003. He then sought the review of that order by his application dated 19.2.2004 but he did not receive any response.

7. Thereafter, the Registrar (Administration) prepared the gradation/seniority list of computer operators as on 1.7.2005 and invited the objections/representations on or before 10.11.2005 vide his notification dated 23.9.2005. The respondent No. 1 once again submitted his objection on 10.10.2005. In the meanwhile, the Registrar (Administration) proceeded to finalise the seniority of the computer operators for consideration for promotion to the next higher post namely that of Deputy Section Officer. In the gradation list of 19 employees that was finalized, the two appellants of SLP No. 5318/2009 were shown senior to respondent No. 1 herein. Since we are concerned with these three persons, we reproduce the entries with respect to them.

"HIGH COURT OF ANDHRA PRADESH, HYDERABAD GRADATION (SENIORITY) LIST IN THE CATEGORY 3(B) OF DIV. II i.e. COMPUTER OPERATORS AS ON 01-07-2005

Sl. No.	Name Sarvasri:		Date of Birth	Date of entrance into Govt. service/ Date of Apptt. To the Category	Educational Qualifications
1.	**Mohd. Sanaullah Ansari**		14-07-1963	21-02-1990 *07-11-2000	B.SC, LL.B, Type (E) (H) PGDCA
Departmental Tests	Pay Rs.	Status of the Employee	Whether qualified for the next promotion	Punishments and detents	Remarks
Accounts Translation	Rs. 5640	Approved Probationer	Qualified	Nil	Nil
Sl. No.	Name Sarvasri:		Date of Birth	Date of entrance into Govt. service/ Date of Apptt. To the Category	Educational Qualifications
2.	**T. Tirumala Devi**		13-06-1966	12-07-1994	M.Com, BAL,

			*07-11-2000		PGDCP, Type (E) (H)
Departmental Tests	Pay Rs.	Status of the Employee	Whether qualified for the next promotion	Punishments and detents	Remarks
CPC, Accounts Translation	Rs. 5150	Approved Probationer	Qualified	Nil	Nil
Sl. No.	Name Sarvasri:		Date of Birth	Date of entrance into Govt. service/ Date of Apptt. To the Category	Educational Qualifications
3.	**Ch. V.Subrahmanya Sarma**		24-04-1961	20-12-1985 *07-11-2000	B.Com, LLB. Type (E) (H), Type (T) (H) PGDCA, PGD in Cyber Laws & legal information System
Departmental Tests	Pay Rs.	Status of the Employee	Whether qualified for the next promotion	Punishments and detents	Remarks
CPC, Accounts Translation	Rs. 6950	Approved Probationer	Qualified	Nil	Nil

As far as the appellant of Appeal No. 598/2009 K. Balarama Raju is concerned he was at Sl. No. 1 in the earlier order dated 7.11.2000. He was already promoted to the higher post in Category 1 of Division-II i.e. Translators & Deputy Section Officers by High Court order dated 11.3.2005 and therefore, his name did not figure in this seniority list of Computer Operators.

8. The further representation of the respondent No. 1 dated 10.10.2005 was rejected by the High Court by its proceedings dated 16.11.2007. He was however, subsequently promoted to the post of Deputy Section Officer under High Court order dated 10.12.2007, but was placed much junior to these appellants. He therefore, challenged the proceeding of the High Court dated 16.11.2007, communicating rejection of his representation in response to the gradation list of computer operators as on 1.7.2005 by filing Writ Petition No. 119/2008.

9. The first respondent contended before the High Court that he had the necessary qualification when the examination for the posts of computer operators was conducted, whereas the appellants of SLP Nos. 598 and 5318/2009, did not have those qualifications at the outset, but acquired the same within the subsequent period of two years which was permitted by the High Court. He submitted that therefore, the High Court was wrong in giving the ranks in the gradation list, and he should have been shown senior to these three appellants. As against that, the submission of the three appellants was that they had passed the preliminary examination conducted by the High Court alongwith the first respondent, and had obtained more marks than him. It is therefore, that they were shown at S.Nos. 1, 2 and 3 above the first respondent in the order dated 7.11.2000, although they had acquired the requisite diplomas subsequent to the preliminary examination. They had been granted the relaxation to obtain the qualification which was permissible. The subsequent seniority list of the computer operation as on 1.7.2005 was based on this order dated

7.11.2000, and the decision of the High Court administration was correct.

10. The Division Bench has taken the view that since the first respondent had those qualifications right at the outset, the first respondent ought to have been shown senior over the three appellants in SLP Nos. 538/2009 and 5318/2009. The High Court therefore allowed the Writ Petition filed by the first respondent, and set-aside the gradation list published under notification dated 23.9.2005. It directed the Registrar (Administration) to refix the seniority of the computer operators, taking the date of their acquiring requisite qualifications as per rules 7 (7) and 8 (4) of the relevant rules, and accord consequential benefits arising therefrom.

11. The three appellants are aggrieved by this judgment and order, and have therefore, filed SLP Nos. 598/2009 and 5318/2009. The High Court administration has also filed SLP No. 13379/2009. SLP No. 598/2009 came up for consideration on 23.1.2009 when a notice was directed to be issued therein, and the impugned order was stayed until further orders. The other two petitions have been directed to be tagged along with SLP No. 598/2009. The respondents have filed their counter affidavits and the appellants have filed their rejoinder affidavits.

12. Mr. V. Sridhar Reddy and Mr. V.N. Raghupathy, learned Advocates have appeared in support of SLP NO. 598/2009, Mr. L.N. Rao, Senior Advocate appeared for the appellant in SLP No. 5318/2009 and Ms. C.K. Sucharita, Advocate appeared in support of SLP No. 13379/2009. Mr. Narasimha, Senior Advocate has appeared for the first respondent in all the 3 appeals to defend the judgment and order passed by the High Court.

13. The principle submission of the appellants is that the High Court had granted the time to acquire the necessary additional qualifications. The qualifications were not considered sacrosanct by the High Court at the outset. The Chief Justice

had the necessary power to grant the relaxation. The appellants as well as the first respondent had appeared for the common written and the oral test which included the aspect of capability of computer operation. The appellants have obtained higher marks than the first respondent, and therefore, the High Court administration was right in placing them at a higher position in the gradation list. The appellants and High Court administration are relying on Rule 23 of the above Service Rules. This rule reads as follows:-

"**Rule 23- Relaxation of Rules by the Chief Justice**:- Nothing in these rules shall be construed to limit or abridge the power of the Chief Justice to deal with the case of any member of the service or any other person to be appointed to the service in such manner as may appear to him to be just or equitable;

Provided that where any such rule is applicable to the case of any person, the case shall not be dealt with in any manner, less favourable to him than that provided by that rule."

14. As against that, the submission of the first respondent is that on the basis of the aforesaid rules 7 (7) and 8 (4) the candidates had to have the necessary qualifications and special qualifications at the outset. The first respondent had the necessary qualification, and therefore, he ought to have been shown at a higher seniority position than that of these three appellants, which is what the High Court has done on the judicial side. These rules read as follows:-

"*Rule 7 - Qualifications*

(7) FOR THE POSTS OF COMPUTER OPERATORS:

Must have passed Degree in Arts or Science or Commerce of a University in India Established or incorporated by or under a Central Act, Provincial act or a State Act or from any Institution recognized by the

University Grants Commission.

OR

Must have passed Degree in B.C.A. (Bachelor of Computer Application) of a University in India Established in incorporated by or under a Central Act, Provisional Act or a State Act or from any Institution recognized by the University Grants Commission.

NOTE: If the Candidate passed the Degree in B.C.A, he need not pass the Special Qualifications as prescribed in Schedule-I (Under Rule-8) of the A.P. High Court Service Rules, 1975.

[AMENDMENT-III: Above words shall be added as sub-rule 7 after sub-rule 6 in Rule 7 for the posts of Computer Operators as per A.P. Gazette 412 Part I extraordinary dated 08.10.1999.]

Rule 8 – Special Qualifications

***(4) FOR COMPUTER OPERATORS:** In addition to the Graduation, a Computer Operator must have passed Typewriting English Higher Grade and Post Graduate Diploma in Computer Programming or Post Graduate Diploma in Computer Application (One Year Course) which is recognized by the Central or State Government.

*[AMENDMENT-V: Above words shall be added as sub-rule 4 after sub-rule 3 for the posts of Computer Operators vide A.P. Gazettee No. 412 Par I Extraordinary dated 08.10.1999]."

15. The principle submission of the first respondent before the High Court was that the three appellants did not have the requisite qualifications when the Registrar, Administration issued the circular dated 24.10.2000 calling for the names with particulars for the posts of Computer Operators with

qualifications as per the above rules 7 (7) and 8 (4). This circular clearly stated that:- (i) The applicants had to be graduates; (ii) They had to have passed the typewriting (English) exam by the higher grade; and (iii) they ought to posses Post Graduate Diploma in Computer Programming or Post Graduate Diploma in Computer Application which is recognised by Central Government or State Government. This circular dated 24.10.2000 stated as follows:-

"HIGH COURT OF ANDHRA PRADESH :: HYDERABAD

R.O.C.NO.6017/2000/Estt. Dated: 24.10.2000

CIRCULAR

The members of the High Court Establishment, who are graduates and who have passed Type Writing (English) by the Higher Grade and **Post Graduate Diploma in Computer Programming** OR **Post Graduate Diploma in Computer Application (ONE YEAR COURSE),** which is recognized by the Central Government or State Government are requested to furnish the said information to the Registrar (Administration) by 25.10.2000 along with true copies of the said certificates.

Sd/-

REGISTRAR (ADMINISTRATION)"

16. Pursuant to this circular, the applicants were called for a written test by another circular dated 31.10.2000. This circular stated that the oral interview will also be conducted at the same venue after the written test was over. The circular contained the list of candidates who were called to give that test, and it included the names of the three appellants as well as the first respondent. The circular further informed the candidates as follows:-

"They are further informed that they have to produce their certificates regarding 'Computer Course' and proof regarding the duration of the course attended by them, in original, and in proof of passing of Typewriting English by the Higher Grade, before Sri M.S.K. Prabhu, Deputy Registrar, by 11.00 A.M., without fail. If any candidate fails to produce the concerned certificates and proof, it will be deemed that he/she has no requisite qualification to hold the post.

The staff members are permitted to appear for the Written Examination and interview subject to their holding the requisite qualification, as per rules."

Thus, it was very clear that the staff members were permitted to appear for the written examination and interview subject to their holding the requisite qualifications, as per the rules.

17. The first respondent and three appellants did pass that examination, but the three appellants did not have the requisite diploma. That was also the deficiency with two other employees who otherwise got good marks. It appears that the High Court was in need of ten Computer Operators and, therefore, the Hon'ble Chief Justice was pleased to pass the order dated 7.11.2000 which has been referred to earlier. This order also clearly stated that the three appellants and the two other candidates listed in that order dated 7.11.2000 had to acquire the necessary qualification within one year failing which they were to be reverted. The last part of this order dated 7.11.2000 is relevant and reads as follows:-

"The above said appointments are made purely on temporary and on an adhoc basis without any preferential claim to future re-promotion or seniority and are liable to be reverted at any time without any notice and without assignment any reason."

The first respondent pointed out that the three appellants

did not acquire the necessary qualifications within one year, and they sought extension of one more year during which period they obtained the necessary qualifications. It was submitted that the seniority of the respondent no.1 will have to be counted from the date when he joined as Computer Operator pursuant to the order dated 7.11.2000. The relaxation in the order dated 7.11.2000, clearly stated that as far as the three appellants are concerned, their appointments were purely temporary and without any preferential claim to the future re-promotion or seniority and they were liable to reverted. They could claim their seniority only from the date when they obtained the qualification and could not have a seniority position higher than that of the respondent no.1.

18. The High Court Administration had justified the grant of seniority to the three appellants on the footing that the Chief Justice had the power under the above referred rule 23 to deal with the case of any member of the Court Service or any other person to be appointed to the service in such manner as may appear to him to be just or equitable. The High Court needed ten Computer Operators, and the three appellants had otherwise passed the examination and therefore, although they obtained the diploma certificates later than the first respondent, they were shown at higher position on the basis of the marks they had obtained in the test. The three appellants were to be reverted since they did not obtain the necessary qualification within the initial period of one year. It was a matter of grace and because of the requirement of the High Court that the Chief Justice gave them further extension of one year as sought by them. Such persons were liable to be reverted from the particular post and could not claim seniority over a person who is duly appointed with all necessary qualifications.

19. The three appellants had relied upon the judgments of the Andhra Pradesh High Court in two other connected matters wherein the selections based on the merit list submitted by the NIC reflected in the order dated 7.11.2000 had come to be

challenged. The first one was W.P. No. 22501/2000 wherein the challenge was to the policy decision to fix the cut off marks to 45% to consider the case of the qualified candidates for the post of Computer Operators. In the second petition bearing W.P. No.2217/2001 it was contended that sufficient time had not been given for preparation, and that the ratio of 2:1 between the Assistants/Examiners and Typists/Copyists had not been maintained. The Division Bench which heard those two petitions did not find any substance in those arguments and it was held that there was nothing wrong in keeping appropriate minimum marks, and that the aforesaid ratio would not apply to direct recruitment.

Consideration of the Rival Submissions -

20. To appreciate the rival submission, we may refer to the relevant rules. The Andhra Pradesh High Court Service Rules, 1975 contain in all 29 Rules, three Schedules and one Annexure. Rule 1 gives the short title, commencement and extent of the rules. Rule 2 gives the definitions. Rule 3 is on the constitution of the service. It states that the service shall consist of the divisions, categories and sub-categories of officers, as mentioned therein. Division I consists of the Gazetted Posts, Division II the Non-Gazetted Posts and Division III the Miscellaneous Posts. Division II consists of 5 categories. Category-1 is of Translators and Deputy Section Officers, Category-2 consists of Overseer, Category-3 consists of (a) Assistant Section Officer and (b) Computer Operators, Category-4 consists of (a) Assistants (b) Readers and Examiners (c) Telex Operator (d) Telephone Operator and Category-5 consists of (a) Typists and (b) Copyists.

21. As noted earlier, the three appellants and the first respondent were concerned with their promotion from Categories-4 and 5 to Category-3 (b), viz. that of Computer Operators. Subsequently, they all have been promoted to the posts of Deputy Section Officers which is in Category-1 of Division II. We are, however, concerned with their seniority when

they were selected for the posts of Computer Operators. Their seniority as Computer Operators will be a relevant factor for deciding their subsequent seniority as Deputy Section Officers.

22. Rule 4 defines the appointing authority. Rule 5 gives the method of appointment to the service and states that the appointment to the post and category mentioned in Column (1) of the table below the rule shall be made in the manner specified against them in Column (2) thereof. As far as the Category-3 (a) Assistant Section Officer and (b) Computer Operators are concerned, it will be filled by either of the two methods:-

(i) By direct recruitment; or

(ii) By promotion from categories 4 and 5 in the ratio of 2:1 in every cycle of three vacancies, the second vacancy shall be filled from Category 5 by a person qualified under rule 8. If there is no qualified and suitable member, the turn will lapse and the vacancy shall be filled by next turn in the order or rotation. No account shall be taken of any such lapsed turns in filling future vacancies.

23. It is not disputed that the present selections were by direct recruitment and that is why the test for selection was taken by NIC. Sub-rule 2 of Rule 5 states that the Chief Justice may determine the proportion of vacancies to be filled by each method where appointment to any category or post is provided by more than one method and also specify the manner in which such appointment shall be made in case of direct recruitment. Sub-rule 3 is on seniority and it reads as follows:-

"(3) Seniority:- (a) The seniority of a member of the service in a Category or post shall unless he has been reduced to a lower rank as a punishment, be determined by the date of his first appointment to the service, category or post, where any difficulty or doubt arises in determining

the seniority, is shall be determined by the appointing authority. If any portion of the service of such person does not count towards probation under Rule 16, his seniority shall be determined by the date of commencement of the service, which counts towards probation.

(b) The appointing authority may at the time of passing an order appointing two or more persons simultaneously to a Category of the service fix the order of preference among them and where such order has been fixed, the seniority shall be determined in accordance therewith.

(c) Where a member of any division or Category is reduced to a lower division or Category, he shall be placed at the top of the later, unless the authority ordering such reduction otherwise directs."

24. Rule 6 is on reservation of appointments, and Rule 7 gives the qualification. Rule 7 (7) gives the qualifications for the posts of Computer Operators which rule we have already referred. Rule 8 gives the special qualifications and that Rule 8 (4) gives the qualifications for the Computer Operators which also we have already mentioned.

25. We are concerned with the promotions and they are dealt with in Rule 15 and the temporary appointments and promotions are dealt with in Rule 16. These two Rules read as follows:-

"***Rule-15. Promotions:-*** *(1) All promotions shall be made by the appointing authority in accordance with Rule-5.*

(2) All categories in Division-I and Categories 1 to 3 of Division-II shall be selection categories and promotion there to shall be made on grounds of merit and ability, seniority being considered only where merit and ability are approximately equal.

Provided that "the claims of any member of the Scheduled Castes or the Scheduled Tribes shall be considered for such promotion on the basis of seniority, subject to fitness".

Rule-16. Temporary Appointments and Promotions:-

(1) Where it is necessary to fill a vacancy in any division, category, sub-category, or post in the service and there would be undue delay or administrative inconvenience in appointing a person who is qualified for or entitled to such appointment or a duly qualified person is not available, the appointing authority may appoint any other suitable person temporarily until an appointment is made in accordance with these rules.

(2) (a) A person appointed under sub-rule (1) shall be replaced as soon as possible by a member of the service, who is entitled to promotion, under these rules or the case may be, by a candidate qualified to hold the post under the rules.

(b) A person appointed under sub-rule (1) shall not be regarded as a probationer in such division, category or post or be entitled by reason only of such appointment to any preferential claim to future appointment, to such division, category or post.

If such a person is subsequently appointed to the division, category or post in accordance with these rules, he shall commence his probation in such division, category or post from the date of such subsequent appointment or from such earlier date as the appointing authority may determine."

26. From the narration of facts and reference to the rules above, it is clear that as far as the first respondent is concerned he had the necessary qualifications when he appeared for the

examination of Computer Operators. His appoint is pursuant to the order dated 7.11.2000 with immediate effect and his probation will start immediately thereafter under Rule 10 (1) on probation which reads as follows:

"***Rule 10. Probation****-(1) Every person appointed to the Service otherwise than by promotion, or by transfer shall be on probation for a total period of two years on duty within a continuous period of three years."*

27. As far the three appellants are concerned, their appointments were purely temporary and on adhoc basis, and they were liable to be reverted if they were not to acquire the necessary qualification within one year. The order dated 7.11.2000 further stated that their appointments are without any preferential claim to future re-promotion or seniority. These three appellants did not obtain the necessary qualification within the period of one year. On their request they were given a further extension of time of one year by subsequent order dated 22.11.2001 issued by the Chief Justice. This order reads as follows:-

"PROCEEDINGS OF THE HIGH COURT OF A.P. :: HYDERABAD.

Sub:- ESTABLISHMENT – HIGH COURT OF A.P., HYDERBAD – S/Sri K. Balarama Raju, Mohd. Sanaullah Ansari, T. Tirumala Devi, P. Nagarjuna Rao and L. Ramachandra Rao, Computer Operators, High Court A.P., Hyderabad – Extension of time for passing of the requisite qualifications – Granted – Orders – Issued.

Ref.: Applications submitted by

S/Sri.

1. K. Balarama Raju, dt. 27.10.2001

2. Modh. Sanaullah Ansari, dt. 27.10.2001

3. T. Tirumala Devi, dt. 5.11.2001

4. P. Nagarjuna Rao, dt. 27.10.2001

5. L. Ramachandra Rao, dt. 5.11.2001.

ORDER R.O.C. No.7595/2001 – Estt.2. dt. 22-11-2001.

The Hon'ble Chief Justice is pleased to pass the following order:

In the circumstances stated by Sarvasri K. Balarama Raju, Mohd. Sanaullah Ansari, T. Tirumala Devi, P. Nagarjuna Rao and L. Ramachandra Rao, Computer Operators, High Court of A.P., Hyderabad, in their applications read above, they are granted extension of time for a further period of one year from 7-11-2001 to enable them to acquire the requisite qualifications.

REGISTRAR (ADMINISTRATION)"

28. The three appellants did not have the diploma certificates when they appeared for the examination, yet in view of their marks in the examination they were appointed as computer operators since the High Court did not get adequate number of qualified persons. They were therefore appointed under Rule 16 (1) on purely temporary basis and were liable to be reverted, if they did not get the qualification in the time provided. Rule 16 (2) (b) states that such a person who is appointed under Rule 16 (1) shall not be regarded as a probationer by reason of any such appointment to any preferential claim to future appointment to such division, category or post. Second part of Rule 16 (2) (b) states if such a person is subsequently appointed to the division, category or post in accordance with these rules, he shall commence his probation from the date of his subsequent appointment or from such earlier date as the appointing authority may determine. The power of the Chief Justice under Rule 23 states that if

relaxation under the rule is made applicable to the case of any person, the case shall not be dealt with in any manner, less favourable to the candidate than that provided by that rule. However, this rule cannot be read to mean that while granting the benefit under this rule, the beneficiary can be placed at an advantage as against the one who is otherwise qualified and does not need the relaxation. The first respondent had the necessary qualification when he appeared for the examination, and on his appointment by direct recruitment under the order dated 7.11.2000, his probation will start immediately thereafter under Rule 10 (1). The probation of the three appellants will start only after they obtain their qualification. The power of relaxation exercised by the Chief Justice in their case can only get them into the service since adequate number of computers operators were not available and their appointments will get regularized when they get their qualification. The selection was done after a test and on the basis of merit. Possessing the necessary diploma certificate was a part of the qualification and merit. The passing of the examination required minimum 45 marks. Obviously those who had the qualification and who obtained 45 marks and above will have to be placed at the top of the list in seniority. Those who did not have the qualification at that time but obtained it later on, even if they had obtained higher marks in the test will have to be placed at a position lower than these candidates having qualification, and necessary marks. As far as the first respondent is concerned, his probation having started earlier he will complete the same earlier to the appellants no.1, 2 and 3 and will have to be reckoned senior to them. The governing rules will have to be read and applied meaningfully in this manner so that no prejudice will be done to a candidate who otherwise had the qualifications and who is appointed after passing the test. It is settled law that one should have the qualifications on the date when the applications are invited. Any such relaxation to permit unqualified candidates cannot be to the prejudice of the qualified candidates. They can be taken into the service but cannot steal a march over the qualified and the selected candidates.

29. The three appellants had contended that the petition filed by the first respondent suffered on account of laches and delay in moving the High Court. We have already pointed out that when the order dated 7.11.2000 was issued, the first respondent represented on 2.11.2001, but the representation was rejected on 15.11.2003. He moved for a review on 19.2.2004, but the same was not responded. When the seniority of the Computer Operators was published by notification dated 23.9.2005 and objections were invited, the first respondent submitted his objection on 10.10.2005. That representation was rejected by the High Court's Proceeding dated 6.11.2007 and the first respondent was placed junior to the three appellants. He challenged that communication by his W.P. No.11920/2008. Thus, there was no delay or laches on the part of the first respondent in moving the High Court.

30. In the circumstances, we do not find any error in the judgment and order of the High Court which accepted the legitimate seniority of the first respondent above the three appellants. The High Court has allowed the Writ Petition No. 11920/2008 filed by the first respondent, set aside the gradation list of computer operators as on 1.7.2005 and further directed the High Court administration to refix their seniority and to grant the consequential benefits. We approve this judgment and order dated 19.12.2008 passed by the Andhra Pradesh High Court, although also for the reasons given in this judgment. These three appeals are, therefore, dismissed. The interim stay granted by this court will stand vacated. The High Court administration will now proceed to take steps as directed in the said judgment and order in accordance with the law laid down herein. In the facts of the case, there will be no order as to costs.

N.J. Appeals dismissed.

RAJESH KUMAR

v.

STATE THROUGH GOVT. OF NCT OF DELHI

(Criminal Appeal Nos. 1871-1872 of 2011)

SEPTEMBER 28, 2011

[D.K. JAIN AND ASOK KUMAR GANGULY, JJ.]

Penal Code, 1860 – s.302 – Murder – Death penalty – Concept of 'rarest of rare' case – Mitigating circumstances – Murder of two children - one aged 4½ years, and the other aged 8 months – Trial court convicted accused-appellant u/s.302 and sentenced him to death – Conviction and sentence upheld by High Court – Sustainability of death sentence – Held: In the instant case the State failed to show that the appellant was a continuing threat to society or that he was beyond reform and rehabilitation – This was certainly a mitigating circumstance which the High Court failed to take into consideration – While considering the aggravating circumstances, the High Court was substantially influenced with the brutality in the manner of committing the crime – No doubt the murder was committed in this case in a very brutal and inhuman fashion, but that alone cannot justify infliction of death penalty – For a person convicted of murder, life imprisonment is the rule and death sentence, an exception, and the mitigating circumstances must be given due consideration – Except in 'rarest of rare cases' and for 'special reasons' death sentence cannot be imposed as an alternative option to imposition of life sentence – In the facts of this case, the death sentence imposed by the High Court cannot be sustained and is thus substituted by the sentence of imprisonment for life – Code of Criminal Procedure, 1973 – s.354(3).

Code of Criminal Procedure, 1973 – ss.235(2) and 354(3) – Opportunity of hearing to accused on the question

of sentence at the post-conviction stage – Effect of – Held: It gives the accused an opportunity to raise fundamental issues for adjudication and effective determination by Court of its sentencing discretion in a fair and reasonable manner – The object of hearing u/s.235(2) being intrinsically and inherently connected with the sentencing procedure, the provision of s.354(3) which calls for recording of special reason for awarding death sentence must be read conjointly with s.235(2) – Special reasons can only be validly recorded if an effective opportunity of hearing contemplated u/s.235(2) of Cr.P.C. is genuinely extended and is allowed to be exercised by the accused who stands convicted and is awaiting the sentence – These two provisions do not stand in isolation but must be construed as supplementing each other as ensuring the constitutional guarantee of a just, fair and reasonable procedure in the exercise of sentencing discretion by the court – Sentence/Sentencing.

Sentence/Sentencing – Death Sentence – Evolution of sentencing structure and the concept of mitigating circumstances in India relating to death penalty – Discussed.

Sentence/Sentencing – Changes in sentencing structure – Evolving standards of decency – Concept of dignity of the individual – Paradigm shift in jurisprudence with gradual transition of legal regime from 'rule of law' to 'due process of law' – Constitution of India, 1950 – Article 21.

Appellant was charged with the offence of committing the murder of two children– one aged 4½ years, and the other aged 8 months, in a brutal and inhuman manner. The trial court convicted the appellant under Section 302 IPC and imposed death sentence. On appeal, the High Court confirmed the conviction and the death sentence.

The question which arose for consideration in the instant appeals was whether the Trial Court and the High

Court had improperly balanced the consideration of aggravating and mitigating circumstances and that if mitigating circumstances are properly weighed in accordance with the well-known judicial principles, the death sentence awarded to the appellant cannot be sustained.

Disposing of the appeals, the Court

HELD: 1.1. The Code of Criminal Procedure, 1898 had section 376(5) which required that if an accused is convicted of an offence punishable with death and the court sentences him with any punishment other than death, the court shall, in its judgment, give reasons why death sentence was not passed. This was during the colonial days when the worth and dignity of human life was not the central point in our jurisprudence. Even after the coming of Constitution of India, the aforesaid provision of section 367(5) of the 1898 Code continued for some time. [Paras 34, 35, 36] [110-B-F]

1.2. In 1955, the Code of Criminal Procedure (Amendment) Act, 1955 deleted the aforesaid section 367(5) of the 1898 Code. As a result of this amendment, which came into effect from 1st January 1956, it was no longer necessary for a Court to record in its judgment, in case of conviction in connection with an offence punishable with death, any reason for not imposing the death sentence. [Paras 37] [110-F-G]

1.3. The position substantially changed with the introduction of a changed sentencing structure under the present Code of Criminal Procedure, 1973. Section 309 of 1898 Code provided for the manner in which judgment is to be given in cases tried by the Judge himself. The 41st Law Commission Report (Volume I) dated 24th September, 1969 proposed extensive changes in 1898 Code. With regard to Section 309 of the 1898

Code, the Law Commission recommended that hearing of the accused was most desirable before passing any sentence against him. This recommendation was accepted and incorporated while enacting Section 235 Cr.P.C in 1973 Code within Chapter XVIII of the same under the heading "Trial before a Court of Sessions". [Paras 46, 47, 49] [113-F; 114-A, D-F]

1.4. The most significant change brought about by the incorporation of the recommendation of the Law Commission, is the giving of an opportunity of hearing to the accused on the question of sentence. This is the incorporation of the great humanizing principle of natural justice and fairness in procedure in the realm of penology. The trial of an accused culminating in an order of conviction essentially relates to the offence and the accused under 1898 Code did not get any statutory opportunity to establish and prove in such trial the mitigating and other extenuating circumstances relating to himself, his family and other relevant factors which are germane to a fair sentencing policy. This opportunity of hearing at the post conviction stage, gives the accused an opportunity to raise fundamental issues for adjudication and effective determination by Court of its sentencing discretion in a fair and reasonable manner. [Para 51] [114-H; 115-A-C]

1.5. Similarly the corresponding provision of section 354 of 1973 Code was section 367 of the 1898 Code. Both the sections 354 of 1973 Code and section 367 of 1898 Code have virtually the same title. In section 367 of 1898 Code, it was 'Language of judgment. Contents of judgment' **and in 1973 Code, title of section 354 is** 'Language and contents of judgment'**. But Section 354 of 1973 Code is substantially different from section 367 of 1898 Code as there was no such provision as section 354(3) of 1973 Code in the 1898 Code. [Para 52] [115-D-E]**

1.6. The importance of section 235(2) of 1973 Code can hardly be overemphasized in a case where prosecution demands the imposition of death penalty and the court awards the same. [Para 53] [116-G-H]

1.7. The object of hearing under section 235(2) being intrinsically and inherently connected with the sentencing procedure, the provision of section 354(3) which calls for recording of special reason for awarding death sentence must be read conjointly with section 235(2) of 1973 Code. Special reasons can only be validly recorded if an effective opportunity of hearing contemplated under section 235(2) of Cr.P.C. is genuinely extended and is allowed to be exercised by the accused who stands convicted and is awaiting the sentence. These two provisions do not stand in isolation but must be construed as supplementing each other as ensuring the constitutional guarantee of a just, fair and reasonable procedure in the exercise of sentencing discretion by the court. These changes in the sentencing structure reflect the "evolving standards of decency" that mark the progress of a maturing democracy and which is in accord with the concept of dignity of the individual – one of the core values in our Preamble to the Constitution. In a way these changes signify a paradigm shift in our jurisprudence with the gradual transition of our legal regime from 'rule of law' to the 'due process of law'. [Paras 63, 64, 65 and 66] [120-D-H; 121-A]

1.8. Until the decision of this Court in Maneka Gandhi**, Article 21 of the Constitution was viewed by this Court as rarely embodying the Diceyian concept of rule of law that no one can be deprived of his personal liberty by an executive action unsupported by law. If there was a law which provided some sort of a procedure it was enough to deprive a person of his life or personal liberty. After the**

decision in Maneka Gandhi **which marks a watershed in the development of constitutional law in our country, this Court, for the first time, took the view that Article 21 affords protection not only against the executive action but also against the legislation which deprives a person of his life and personal liberty unless the law for deprivation is reasonable, just and fair. And it was held that the concept of reasonableness runs like a golden thread through the entire fabric of the Constitution and it is not enough for the law to provide some semblance of a procedure. The procedure for depriving a person of his life and personal liberty must be eminently just, reasonable and fair and if challenged before the Court it is for the Court to determine whether such procedure is reasonable, just and fair and if the Court finds that it is not so, the Court will strike down the same. Therefore the 'law' as interpreted under Article 21 by this Court is more than mere 'lex'. It implies a due process, both procedurally and substantively. [Paras 78, 79] [124-C-G]**

1.9. The due process concept and the values of Eighth Amendment of the U.S. Constitution, which have been incorporated in our Constitution, are virtually articulated through the procedural safeguards of section 235(2) read with section 354(3) of 1973 Code. This marks the maturing of our criminal jurisprudence from the stage of rule of law to the realm of due process of law. [Para 80] [124-H; 125-A-B]

Nawab Singh v. The State of Uttar Pradesh **AIR 1954 SC 278;** *Vadivelu Thevar v. The State of Madras* **AIR 1957 SC 614: 1957 SCR 981;** *Jagmohan Singh v. The State of U.P.* **(1973) 1 SCC 20: 1973 (2) SCR 541;** *Santa Singh v. State of Punjab* **(1976) 4 SCC 190: 1977 (1) SCR 229;** *Bachan Singh v. State of Punjab* **(1980) 2 SCC 684;** *Muniappan v. State of Tamil Nadu* **(1981) 3 SCC 11: 1981 (3) SCR 270;** *Allauddin Mian and others v. State of Bihar* **(1989) 3 SCC 5: 1989 (2) SCR 498;** *A.K. Gopalan v. State of Madras* **AIR (37)**

1950 SC 27: 1950 SCR 88; *Sakal Papers (P) Ltd. & ors. v. Union of India* **AIR 1962 SC 305: 1962 SCR 842** *Naresh Shridhar Mirajkar v. State of Maharashtra and another* **AIR 1967 SC 1: 1966 SCR 744;** *Rustom Cavasjee Cooper v. Union of India* **(1970) 1 SCC 248: 1970 (3) SCR 530;** *Maneka Gandhi v. Union of India and another* **(1978) 1 SCC 248: 1978 (2) SCR 621 and** *Sunil Batra v. Delhi Administration & ors.* **(1978) 4 SCC 494: 1979 (1) SCR 392 – referred to.**

William Henry Furman v. State of Georgia **408 US 238 (1972) – referred to.**

2.1. The Constitution Bench in *Bachan Singh* **construed the sentencing structure in Section 235(2) and 354(3) of 1973 Code through the prism of due process concept and only then it upheld the constitutionality of death sentence. In the impugned judgment, the High Court failed to appreciate this ratio in** *Bachan Singh.* **The High Court while discussing the mitigating circumstances as against the aggravating circumstances did not properly follow the principles discussed in** *Bachan Singh's* **case. [Paras 81, 82, 86] [125-C-D; 127-E-F]**

2.2. The categories of mitigating and aggravating circumstances are never close and no court can give an exhaustive list of such circumstances. In the instant case State failed to show that the appellant is a continuing threat to society or that he is beyond reform and rehabilitation. On the other hand, it is clear from the findings of the High Court that there is no evidence to show that the accused is incapable of being reformed or rehabilitated in society and the High Court considered the same as a neutral circumstance. The High Court was clearly in error. The very fact that the accused can be rehabilitated in society and is capable of being reformed, since the State has not given any evidence to the contrary, is certainly a mitigating circumstance and which

the High Court failed to take into consideration. The High Court also failed to take into consideration that the appellant is not a continuing threat to society in the absence of any evidence to the contrary. Therefore, the High Court, took a very narrow and a myopic view of the mitigating circumstances about the appellant. The High Court only considered that the appellant is a first time offender and he has a family to look after. The High Court's view of mitigating circumstance has been very truncated and narrow insofar as the appellant is concerned. [Paras 88, 89, 90] [128-G; 129-A, C-F]

2.3. While considering the aggravating circumstances, the High Court appears to have been substantially influenced with the brutality in the manner of committing the crime. It is no doubt that the murder was committed in this case in a very brutal and inhuman fashion, but that alone cannot justify infliction of death penalty. The High Court fell, in this case, into an error by approving the death sentence as it was swayed by the cruel manner in which the two children were done to death by the appellant. The mitigating circumstances in favour of the appellant, were not properly considered. [Paras 91, 98] [129-G; 132-E]

2.4. The concept of 'rarest of rare' which has been evolved in *Bachan Singh* **by this Court is the internationally accepted standard in cases of death penalty. Taking an overall view of the facts in these appeals, it is clear that death sentence cannot be inflicted on the appellant since the dictum of Constitution Bench in** *Bachan Singh* **is that the legislative policy in Section 354(3) of 1973 Code is that for person convicted of murder, life imprisonment is the rule and death sentence, an exception, and the mitigating circumstances must be given due consideration.** *Bachan Singh* **further mandates that in considering the question of sentence the Court**

must show a real and abiding concern for the dignity of human life which must postulates resistance to taking life through law's instrumentality. Except in 'rarest of rare cases' and for 'special reasons' death sentence cannot be imposed as an alternative option to the imposition of life sentence. In the facts of this case, the death sentence imposed by the High Court cannot be sustained and the death sentence imposed upon the appellant is substituted by the sentence of imprisonment for life. The conviction of the appellant is upheld and he is to serve out the life sentence. [Paras 101, 105-107] [132-G-H; 134-C-G]

Bachan Singh v. State of Punjab **(1980) 2 SCC 684 – followed.**

Dayanidhi Bisoi v. State of Orissa **(2003) 9 SCC 310;** *Ravji alias Ram Chandra v. State of Rajasthan* **(1996) 2 SCC 175: 1995 (6) Suppl. SCR 195;** *Surja Ram v. State of Rajasthan* **(1996) 6 SCC 271: 1996 (6) Suppl. SCR 783;** *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* **(2009) 6 SCC 498: 2009 (9) SCR 90;** *Dharmendrasinh alias Mansinh Ratansinh v. State of Gujarat* **(2002) 4 SCC 679: 2002 (3) SCR 193;** *Panchhi & ors. v. State of U.P.* **(1998) 7 SCC 177: 1998 (1) Suppl. SCR 40;** *Haru Ghosh v. State of West Bengal* **(2009) 15 SCC 551: 2009 (13) SCR 847 and** *Smt. Triveniben v. State of Gujarat* **(1989) 1 SCC 678: 1989 (1) SCR 509 – referred to.**

Case Law Reference:

AIR 1954 SC 278	**referred to**	**Para 38**
1957 SCR 981	**referred to**	**Para 39**
1973 (2) SCR 541	**referred to**	**Paras 41-45**
408 US 238 (1972)	**referred to**	**Para 44**
1977 (1) SCR 229	**referred to**	**Paras 54,55, 56,58**

(1980) 2 SCC 684	**referred to**	**Paras 56,67, 68,71**
(1980) 2 SCC 684	**followed**	**Paras 81,82, 84,85,86, 99,100, 101,105**
1981 (3) SCR 270	**referred to**	**Para 58**
1989 (2) SCR 498	**referred to**	**Para 61**
1950 SCR 88	**referred to**	**Paras 68,78, 80**
1962 SCR 842	**referred to**	**Para 68**
1966 SCR 744	**referred to**	**Para 68**
1970 (3) SCR 530	**referred to**	**Paras 68, 75**
1978 (2) SCR 621	**referred to**	**Paras 68,69, 71,73,74, 75,77,78,**
1979 (1) SCR 392	**referred to**	**Para 75**
(2003) 9 SCC 310	**referred to**	**Para 82**
1995 (6) Suppl. SCR 195	**referred to**	**Paras 82,83, 84**
1996 (6) Suppl. SCR 783	**referred to**	**Para 82**
2009 (9) SCR 90	**referred to**	**Para 84**
2002 (3) SCR 193	**referred to**	**Para 91**
1998 (1) Suppl. SCR 40	**referred to**	**Para 92**
2009 (13) SCR 847	**referred to**	**Paras 93, 94**
1989 (1) SCR 509	**referred to**	**Para 97**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1871-1872 of 2011.

From the Judgment & Order dated 6.8.2009 of the High Court of Delhi at New Delhi in Criminal Appeal No. 635 of 2007.

Trilok Nath Saxena, Vipin Kumar Saxena, Harish Chandra Kharbanda, Krishna Kumar Bhati, Vimal Ray Verma, Vivek Kumar Singh and M.P. Shorawala for the Appellant.

H.P. Rawal, ASG, P.K. Dey, Anando Mukherjee, Anirudh Sharma and Anil Katiyar for the Respondent.

The Judgment of the Court was delivered by

GANGULY, J.1. Leave granted.

2. These Criminal Appeals are preferred from the judgment of conviction under section 302 of the Indian Penal Code (hereinafter "IPC") and the penalty of death sentence, delivered on 6th August, 2009 by the High Court of Delhi in Death Sentence Reference no. 2/2007 and Criminal Appeal no. 635/2007, whereby the High Court upheld the conviction and confirmed the penalty of the death sentence imposed by the Additional Sessions Judge, Rohini Court in Session Case No.178/06.

3. This Court had issued notice on the limited question of quantum of sentence. The facts and circumstances, which are relevant to these appeals, are as under.

4. According to the prosecution, the duty officer in the Police Control Room received a call from number 20056630 at 15:38 hours on 28.7.2003 informing him that a man had entered a house in Subhash Nagar and had assaulted two children and had locked the door of a room from inside. Another call was made to the Police Control Room from mobile No. 9810458303 noting that the informant had informed that a man had murdered two children inside House No. 2/129 Subhash Nagar near Arya Samaj Temple.

5. Each time the duty officer at the police control room, on receipt of afore-noted information, relayed the information to

the concerned police station i.e. P.S. Rajouri Garden, where the duty constable recorded the said information by way of entries in the daily diary register, being DD No. 11, Ex.PW-16/A at 3:35 PM and DD No. 12, Ex.PW-16/B at 3:50 PM.

6. ASI Jagpal PW-22 was handed over a copy of both the DD entries and was deputed to investigate. He took along with him HC Naresh PW-19 and Const. Sukhbir PW-24. The three police officers reached House No. 2/129 Subhash Nagar. A crowd had gathered outside the house. Mr. Bahadur Singh PW-4 a resident of House No. 2/130 Subhash Nagar i.e. the immediate neighbour and one Mr. Negi (not examined as a witness) were present in the gathering and told the police officers that the assailant had locked himself in a room on the second floor of House No. 2/129 Subhash Nagar. The officers climbed up the staircase and reached the second floor and knocked the door. The man inside did not oblige. The three police officers had a peep inside through the ventilator above the door and saw the body of a male child, smeared with blood and the neck badly cut. Blood was splattered all over the room. They had no option but to break open the door and apprehend the man inside who was Rajesh Kumar, the appellant.

7. Inspector Ram Chander PW-32, the SHO of P.S. Rajouri Garden, was given the information about a man killing two children on the second floor of House No. 2/129 Subhash Nagar. He reached the house and by that time the appellant had been apprehended by ASI Jagpal Singh, HC Naresh and Const. Sukhbir.

8. On learning that Harshit, the younger son had been removed to Chanan Devi Hospital, Inspector Ram Chander went to the hospital and learnt that Harshit was in an unconscious state. He collected the MLC Ex.PW-8/A of Harshit and returned to the spot.

9. Inspector Ram Chander recorded the statement Ex.PW-1/A of Sangeeta Sethi and made an endorsement Ex.PW-32/A on the same. He sent the same through Constable Kamal at

6.30 PM for registration of an FIR. HC Rajesh Tyagi PW-17, the duty officer at P.S. Rajouri Garden, recorded the FIR Ex.PW-17/A at 6:50 PM on the basis of the statement of Sangeeta Sethi and sent a copy of the FIR back to the spot with Constable Kamal. Constable Amarender PW-8 was handed over the FIR to be delivered to the Area Magistrate and he left the police station at around 7:20 PM and returned to the police station at 10:10 PM.

10. After the incident, Swanchetan, a Society for Mental Health was informed by the police and they were requested to counsel the family. Dr. Rajat Mitra (P.W.-7), Director of Swanchetan Society for Mental Health found the mother of the children in a state of total shock and she was unable to speak. Dr. Rajat Mitra then talked with the appellant and did not find an abnormality in the behavior of the appellant wherefrom he could be certified as an insane person.

11. The investigation being complete, the police personnel left for the police station. The appellant was formally arrested as recorded in the arrest memo Ex.PW-32/F at 10:00 PM from the place of occurrence.

12. Unfortunately Master Harshit could not survive and died the same night in the Hospital.

13. The appellant was charged under section 302 IPC for committing the murder of two children namely, Anshul and Harshit.

14. At the trial, Sangeeta PW-1, the mother of the two children, deposed that she was a housewife and was living on the second floor of house No. 2/129, Subhash Nagar at the time of the occurrence. Her elder son was named Anshul and the younger one was named Harshit. Their age was 4½ years and 8 months respectively. The incident took place at around 3:00 PM on 28.7.2003 when she was present in her house and her sons were sleeping in the bed room. Appellant came and asked for water. She gave him water. Appellant wanted a meal. She

went to the kitchen and heard cries of Harshit. She returned and picked up Harshit. Appellant told her to give the child to him and cook meals for him. She gave her child to the appellant and went to the kitchen. Her son cried continuously even in the arms of the appellant and suddenly the crying stopped. She went to the bed room and saw that her son was being held from his legs by the appellant who was hitting the child on the floor. Her other son was sleeping on the bed in the same room. She snatched her son from the appellant and rushed to Pinki's house and handed over her unconscious son to Pinki and rushed back, by which time the appellant had bolted the door. She raised an alarm. She heard her son crying Ma Ma.. Suddenly the cries died down. By that time her neighbour Pritam Singh and Bahadur as also a few other persons gathered. The police arrived and a police person climbed a table and through a ventilator saw the dead body of her son and the appellant standing nearby. They pushed and opened the door. She saw her son with his throat slit. A piece of glass, stained with blood, was lying on the chest of her son. The dressing table glass was broken. The walls were stained with blood.

15. PW-1 was cross-examined and she admitted that there was no quarrel between her husband and the appellant qua the demand of any money, but volunteered that the appellant used to demand money from her husband.

16. Mukesh Sethi PW-2, the husband of PW-1, deposed that on the day of the incident i.e. 28.7.2003, he was residing with his wife and children on the 2nd floor of house No. 2/219, Subhash Nagar, and the appellant was the husband of his sister Alka, and was unemployed for the last 2½ to 3 years and during this period the appellant used to demand money for setting up business and that he gave him Rs.15,000/- and Rs.20,000/- on two occasions. 15-20 days prior to the date of the incident the appellant had demanded more money, which he refused because he did not have money to spare. On 28.7.2003 at

around 4-4:15 PM he was sitting in his other house at Rohini and received a call from his wife who rang up from a neighbour's house at 4:45 PM. He reached his house and saw a crowd and the police. His wife was crying that her children had been killed. His younger son had been removed to the hospital and the other son was lying dead inside the house.

17. PW-2 was cross-examined and he admitted that relations between him and the appellant were normal. He stated that he saw the appellant for the first time after the incident in the police station only. He denied that the appellant was mentally sick.

18. The appellant did not lead any evidence in defence.

19. After the appreciation of evidence, the Trial Court observed that the prosecution established the charges against the appellant beyond reasonable doubt. Consequently, the Trial Court vide order-dated 12.03.2007 convicted the appellant under section 302 IPC and vide order dated 24.03.2007 awarded death sentence to the appellant subject to the confirmation of the High Court.

20. Consequently, a petition for confirmation of Death Sentence bearing Death Sentence Ref. no. 2/2007 was filed before the High Court

21. Being aggrieved the appellant also preferred a Criminal Appeal no. 635/2007 before the High Court.

22. By judgment dated 06th August 2009, the High Court after re-appreciation of the entire evidence on record observed that it is beyond reasonable doubt that the appellant committed the murder of two children and upheld the conviction of the appellant under section 302 IPC. The High Court further observed that the case falls in the category of rarest of rare case, dismissed the Criminal Appeal filed by the appellant and confirmed the death sentence imposed upon him.

23. The learned Counsel for the appellant submitted that

the facts of this case do not put the case in the category of the rarest of the rare cases, attracting the penalty of death. Listing the mitigating circumstances in this case, the learned Counsel urged that there are several of them. The first is that the appellant is a first time offender. The second is that he has two sons, a wife and a widowed mother to support. The third is the young age of the appellant who was aged 37 years when he committed the crime. The fourth is the chance of the appellant's rehabilitation in the society being not ruled out. The fifth, which is a corollary of the fourth is, that it cannot be said that the appellant is a continuing threat to the society.

24. The learned Additional Solicitor General appearing on behalf of the State urged that the facts and circumstances of this case clearly bring it within the rarest of rare case and warrants the imposition of death sentence. He argued that the appellant killed two children, one of which was 8 months old and the other was 4½ years of age, who were obviously unarmed and innocent and incapable of giving any provocation to the appellant.

25. The learned Additional Solicitor General also contended that the killing of children is always a heinous crime. The evidence against the appellant is clinching and the appellant has not suffered any remorse.

26. The learned Additional Solicitor General referred to the report from Swanchetan, which is a society for mental health. The said report reflects the opinion of Dr. Rajat Mitra (PW-7), Director of Swanchetan, who examined the appellant after the incident.

27. By placing reliance on the said report, the learned Additional Solicitor General argued that the appellant did not show any sign of remorse to Dr. Rajat Mitra, when he was examined after the incident.

28. The learned Additional Solicitor General also referred to report of All India Institute of Medical Sciences dated

27.05.2009. This report was prepared pursuant to the order of the Delhi High Court dated 04.05.2009. The said Medical Board examined the appellant on 27.05.2009. The Board opined that the appellant is of sound mind and did not want to discuss the issue of the nature of offence but informed the Doctor that he has to spend his life in prison. The Medical Board opined that the appellant was mentally fit.

29. The learned Additional Solicitor General also drew the attention of this Court to Question no. 138 in the examination of appellant under section 313 of Criminal Procedure Code. Both the question and the answer are set out below:

"Q.138 Anything else you want to say?

A. I am unwell since childhood. I am on medicine since then. The problem with me is that I fell anywhere while walking. I also start shouting. I become unaware about myself. My treatment was under going in jail and of late now I have left my treatment, as doctor is not going to change my medicine. The problem, which I was facing in the past has re-surfaced. Even in the past while I use to drive my eyes use to get closed of its own. Mukesh and his relations know about my medical problems.

I do not know how Anshul and Harshit have expired. I am innocent. I have been falsely implicated. My medical documents have been torn apart by my wife and for that reason out of having a sense of guilt she has not come to see me even in jail. I cannot produce these medical papers.

30. In the impugned judgment, the High Court also noted certain mitigating factors which are as follows:

"48. … The first is that the appellant is a first time offender. The second is that he has two sons, a wife and a widowed mother to support. The third is the fact that financial hardship created stress in the mind compelling the

appellant to commit the crime. The fourth is the young age of the appellant who was aged 37 years when he committed the crime. The fifth is the chance of the appellant's rehabilitation in the society being not ruled out."

31. In para 79 of the impugned judgment, the High Court has noted the aggravating circumstances. The first aggravating circumstance which the High Court noted is the brutal, diabolical and dastardly nature of assault by the appellant on the two children. The second aggravating circumstance is the trauma produced on the mother of children. The third aggravating circumstance is that the victims are innocent children. The fourth aggravating circumstance is breach of trust by the appellant. The appellant wanted P.W.1, the mother of the children, to cook food for him and the mother went to the kitchen giving the younger child to the appellant, trusting that no harm would be caused to the child but that trust was breached. The fifth aggravating circumstance was the close relationship between the appellant and the victims. The sixth aggravating circumstance, pointed out by the High Court, is the motive of revenge of the appellant towards the children, as the father of the children did not extend financial help to him. The seventh aggravating circumstance is the lack of remorse on the part of the appellant. The eighth aggravating circumstance is pre-meditation of the appellant in committing the crime and the cruel weapon of offence used namely a piece of glass, which was retrieved by breaking the mirror of the dressing table.

32. The High Court in the impugned judgment while balancing these circumstances confirmed the Death Sentence.

33. In so far as the plea of insanity is concerned, both the Trial Court and the High Court rejected the same. In fact no such plea was taken by the appellant in the Trial Court. Before this Court also the said plea of insanity has been taken half-heartedly. What has been primarily argued in this Court is that the Trial Court and the High Court had improperly balanced the

consideration of aggravating and mitigating circumstances and it has been urged that if mitigating circumstances are properly weighed in accordance with the well-known judicial principles, the death sentence awarded to the appellant cannot be sustained.

34. In this connection, we may consider the evolution of sentencing structure and the concept of mitigating circumstances in India relating to death penalty. The Code of Criminal Procedure, 1898 (hereinafter "1898 Code"), had section 376(5) which required that if an accused is convicted of an offence punishable with death and the court sentences him with any punishment other than death, the court shall, in its judgment, give reasons why death sentence was not passed. The provision of section 367(5) of 1898 Code reads as follows:

> "(5) If the accused is convicted of an offence punishable with death, and the court sentences him to any punishment other than death, the court shall in its judgment state the reason why sentence of death was not passed."

35. This was during the colonial days when the worth and dignity of human life was not the central point in our jurisprudence.

36. Even after the coming of Constitution of India, the aforesaid provision of section 367(5) of the 1898 Code continued for some time.

37. In 1955, the Code of Criminal Procedure (Amendment) Act, 1955 deleted the aforesaid section 367(5) of the 1898 Code. As a result of this amendment, which came into effect from 1st January 1956, it was no longer necessary for a Court to record in its judgment, in case of conviction in connection with an offence punishable with death, any reason for not imposing the death sentence.

38. With the functioning of this Court under the Constitution, several cases of death sentence came before this Court from 1950 onwards. But reference to extenuating or mitigating

circumstances in a case of death penalty was made possibly for the first time by this Court in the case of *Nawab Singh v. The State of Uttar Pradesh* (AIR 1954 SC 278). In that case it was urged that for delay of execution, the death sentence should be commuted to one for transportation of life. This Court rejected the said argument holding inter-alia that it is a matter primarily for the consideration of local Government. This Court, however, opined that in a proper case an inordinate delay in the execution of sentences may be regarded as a ground for commutation. However, this Court held that in the facts of that case murder was a cruel and deliberate one and there were no extenuating circumstances.

39. After the amendment of 1898 Code, in the year 1955, the first case relating to death sentence, which came before this Court was that of *Vadivelu Thevar v. The State of Madras* reported in AIR 1957 SC 614 wherein this Court made the following pertinent observations:

> "13……If the court is convinced about the truth of the prosecution story, conviction has to follow. *The question of sentence has to be determined,* not with reference to the volume or character of the evidence adduced by the prosecution in support of the prosecution case, but *with reference to the fact whether there are any extenuating circumstances which can be said to mitigate the enormity of the crime.* If the court is satisfied that there are such mitigating circumstances, only then, it would be justified in imposing the lesser of the two sentences provided by law. *In other words, the nature of the proof has nothing to do with the character of the punishment.* The nature of the proof can only bear upon the question of conviction - whether or not the accused has been proved to be guilty. If the court comes to the conclusion that the guilt has been brought home to the accused, and conviction follows, the process of proof is at an end. *The question as to what punishment should be imposed is for the court to decide*

> *in all the circumstances of the case with particular reference to any extenuating circumstances……"*

40. It is, therefore, clear that this Court was making a distinction between its formation of opinion on the conviction of the accused for the crime committed and its formation of opinion on the punishment to be imposed for the crime on consideration of extenuating or mitigating circumstances.

41. The next decision of this Court rendered on the constitutionality of death sentence was in the case of *Jagmohan Singh v. The State of U.P.* (1973) 1 SCC 20. The Constitution Bench of this Court in Jagmohan Singh (supra) examined whether total discretion can be conferred on the judges in awarding death sentence, when the statute does not provide any guidelines on how to exercise the same.

42. The decision in *Jagmohan Singh* (supra) was rendered when the present Code of Criminal Procedure, 1973 was not in existence.

43. The Constitution Bench in *Jagmohan Singh* (supra) held that the policy of the law giving a wide discretion to the judges in the matter of imposition of death sentence had its origin in the impossibility of laying down any standards for exercise of such discretion. However, the Court found that such discretion is liable to be corrected by superior courts, but the court did not find that conferment of such discretion on the judges was unconstitutional.

44. The Constitution Bench in Jagmohan Singh (supra) however felt it difficult to follow the ratio of United States Supreme Court in *William Henry Furman v. State of Georgia [reported in 408 US 238 (1972)]*, as this Court found that our Constitution does not have a provision like the Eighth Amendment of the Constitution of United States. This Court also held in Jagmohan Singh (supra) that the test of reasonableness cannot be applied by this Court in the same manner as is done by the United States Supreme Court in view

of the existence of 'due process clause' in the United States Constitution (see para 12 at page 27 of the report). The learned Judges quoting from the commentary by Ratanlal's, Law of Crimes, (Twenty-second edition), referred to certain mitigating and aggravating circumstances in para 22 at page 32 of the report, but opined that the said list is not exhaustive (para 23 at page 32 of the report).

45. In paragraph 28 at page 36 of the report in *Jagmohan Singh* (supra) the Constitution Bench found that the legal position as it stood in 1972 was as follows:-

> "……..The sentence follows the conviction, and it is true that no formal procedure for producing evidence with reference to the sentence is specifically provided. The reason is that relevant facts and circumstances impinging on the nature and circumstances of the crime are already before the court. Where counsel addresses the court with regard to the character and standing of the accused, they are duly considered by the court unless there is something in the evidence itself which belies him or the Public Prosecutor for the State challenges the facts. If the matter is relevant and essential to be considered, there is nothing in the Criminal Procedure Code which prevents additional evidence being taken. It must, however, be stated that it is not the experience of criminal courts in India that the accused with a view to obtaining a reduced sentence ever offers to call additional evidence."

46. However, the aforesaid position substantially changed with the introduction of a changed sentencing structure under the present Code of Criminal Procedure, 1973. If we compare the 1898 Code with 1973 Code, we would discern lot of changes between the two Codes in sentencing structure.

47. Chapter XXIII of 1898 Code under the heading of "Trial before the High Court and Sessions Courts" lays down the procedure for trials conducted before a High Court or Court of sessions. Section 268 of 1878 Code provides for trials before

a Court of sessions either by a Jury or by the Judge himself. Section 309 of 1898 Code provides for the manner in which judgment is to be given in cases tried by the Judge himself.

48. Section 309 of 1898 Code reads as follows :

"309. Judgment in cases tried by the Judge himself.-

(1) When, in a case tried by the Judge himself, the case for the defence and the prosecutor's reply (if any) are concluded, the Judge shall give a judgment in the case.

(2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 562, pass sentence on him according to law."

49. The 41st Law Commission Report (Volume I) dated 24th September, 1969 proposed extensive changes in 1898 Code. In paragraph 23.2 of the said report, the Law Commission recommended a set of new provisions for governing "Trials before a Court of sessions". With regard to Section 309 of the 1898 Code, the Law Commission recommended that hearing of the accused was most desirable before passing any sentence against him. This recommendation was accepted and incorporated while enacting Section 235 Cr.P.C in 1973 Code within Chapter XVIII of the same under the heading "Trial before a Court of Sessions".

50. Section 235 Cr.P.C. reads as follows:

"235. Judgement of acquittal or conviction. – (1) After hearing arguments and points of law (if any), the Judge shall give a judgment in the case.

(2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass sentence on him according to law.

51. The most significant change brought about by the

incorporation of the recommendation of the Law Commission (supra), is the giving of an opportunity of hearing to the accused on the question of sentence. This is the incorporation of the great humanizing principle of natural justice and fairness in procedure in the realm of penology. The trial of an accused culminating in an order of conviction essentially relates to the offence and the accused under 1898 Code did not get any statutory opportunity to establish and prove in such trial the mitigating and other extenuating circumstances relating to himself, his family and other relevant factors which are germane to a fair sentencing policy. This opportunity of hearing at the post conviction stage, gives the accused an opportunity to raise fundamental issues for adjudication and effective determination by Court of its sentencing discretion in a fair and reasonable manner.

52. Similarly the corresponding provision of section 354 of 1973 Code was section 367 of the 1898 Code. Both the sections 354 of 1973 Code and section 367 of 1898 Code have virtually the same title. In section 367 of 1898 Code, it was *'Language of judgment. Contents of judgment'* and in 1973 Code, title of section 354 is *'Language and contents of judgment'*. But Section 354 of 1973 Code is substantially different from section 367 of 1898 Code as there was no such provision as section 354(3) of 1973 Code in the 1898 Code. Section 354 of 1973 Code runs as under:-

> *"354. Language and contents of judgment.* - (1) Except as otherwise expressly provided by this Code, every judgment referred to in section 353,—
>
> (a) shall be written in the language of the Court;
>
> (b) shall contain the point or points for determination, the decision thereon and the reasons for the decision;
>
> (c) shall specify the offence (if any) of which, and the section of the Indian Penal Code (45 of 1860) or other law under which, the accused is convicted and the punishment to which he is sentenced;
>
> (d) if it be a judgment of acquittal, shall state the offence of which the accused is acquitted and direct that he be set at liberty.
>
> (2) When the conviction is under the Indian Penal Code (45 of 1860) and it is doubtful under which of two sections, or under which of two parts of the same section, of that Code the offence falls, the Court shall distinctly express the same, and pass judgment in the alternative.
>
> (3) When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.
>
> (4) When the conviction is for an offence punishable with imprisonment for a term of one year or more, but the Court imposes a sentence of imprisonment for a term of less than three months, it shall record its reasons for awarding such sentence, unless the sentence is one of imprisonment till the rising of the Court or unless the ease was tried summarily under the provisions of this Code.
>
> (5) When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.
>
> (6) Every order under section 117 or sub-section (2) of section 138 and every final order made under section 125, section 145 or section 147 shall contain the point or points for determination, the decision thereon and the reasons for the decision."

53. The importance of section 235(2) of 1973 Code has been explained by this Court in several decisions and its importance can hardly be overemphasized in a case where prosecution demands the imposition of death penalty and the court awards the same.

54. In *Santa Singh v. State of Punjab* [(1976) 4 SCC 190] this Court held that this new provision is in consonance with the modern trends in penology and sentencing procedures. Noticing the fact that section 235(2) is a new provision introduced by the legislature in 1973 Code, this Court went on to explain that this is an important stage in the process of administration of criminal justice and is as important as the adjudication of guilt and this stage should not be confined to a subsidiary position as if it were a matter of not much consequence.

55. In *Santa Singh* (supra) this Court noted that in most countries of the world problem of sentencing the criminal offender is receiving increasing attention and it is so in view of rapidly changing attitude towards crime and criminal. In many countries, intensive study of sociology of the crime has shifted the focus from the crime to the criminal, leading to a widening of the objectives of sentencing and simultaneously of the range of the sentencing procedures.

56. Bhagwati, J., (as His Lordship then was) giving the judgment in *Santa Singh* (supra) pointed out and which was later on accepted in *Bachan Singh v. State of Punjab* [(1980) 2 SCC 684] that proper exercise of sentencing discretion calls for consideration of various factors like the nature of offence, the circumstances - both extenuating or aggravating, the prior criminal record, if any, of the offender, the age of the offender, his background, his education, his personal life, his social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of his rehabilitation in the life of community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others. After referring to all the aforesaid facts, the learned Judge opined as under:

> "3. …….. These are factors which have to be taken into account by the court in deciding upon the appropriate sentence, and therefore, the legislature felt that, for this purpose, a separate stage should be provided after conviction when the court can hear the accused in regard to these factors bearing on sentence and then pass proper sentence on the accused. Hence the new provision in Section 235(2)."
>
> (para 3, page 195 of the report)

57. After analyzing the aforesaid aspects, the learned Judge posed the question: What is the meaning and content of expression "hear the accused"? By referring to various aspects and also the opinion expressed by Law Commission in its Forty-eighth report, Bhagwati, J. (as His Lordship then was) opined that the hearing contemplated under section 235(2) is not confined merely to oral submissions but it is also intended to give an opportunity to the prosecution and the accused to place before the court facts and material relating to various factors bearing on the question of sentence. However, there was a note of caution that in the name of such hearing, the court proceedings should not be unduly protracted.

58. This Court held in *Santa Singh* (supra) that non-compliance with such hearing is not a mere irregularity curable under section 465 of the 1973 Code. This Court speaking through Bhagwati, J. (as His Lordship then was) emphasized that this legal provision under our constitutional values has acquired new dimension and must reflect "new trends in penology and sentencing procedures" so that penal laws can be used as a tool for reforming and rehabilitating criminals and smoothening out the uneven texture of the social fabric and not merely as a weapon for protecting the hegemony of one class over the other (see para 6, page 197 of the report).

59. In *Muniappan v. State of Tamil Nadu* [(1981) 3 SCC 11] Chief Justice Chandrachud, delivering the judgment again had to consider the importance of section 235(2) and section 354(3) Cr.P.C. in our sentencing procedure. The learned Chief Justice held that the obligation to hear the accused on the

question of sentence under section 235(2) of 1973 Code is not discharged by putting a formal question to the accused as to what he has to say on the question of sentence. The learned Chief Justice made it clear that the Judge must make a genuine effort to elicit from the accused all items of information which will eventually bear on the question of sentence. All such items of information would furnish a clue to the genesis of the crime and the motivation of the criminal are relevant and the learned Chief Justice emphasized that in such an exercise, it is the bounden duty of the Judge to cast aside the formalities of the Court-scene and approach the question of sentence from a broad sociological point of view.

60. The learned Chief Justice further said in the sentencing procedure it is not only the accused but the entire society is at stake and therefore the questions the Judge puts and the answers accused gives may be beyond narrow constraints of the Evidence Act. In the words of the learned Chief Justice the position of Court in an exercise under section 235(2) is as follows:

> "2. ……The Court, while on the question of sentence, is in an altogether different domain in which facts and factors which operate are of an entirely different order than those which come into play on the question of conviction…."
>
> (para 2, page 13 of the report)

61. To the same effect is the judgment of Ahmadi, J. (as His Lordship then was) in *Allauddin Mian and others v. State of Bihar* [(1989) 3 SCC 5]. Explaining the purpose of section 235(2), this Court in *Allauddin Mian* (supra) held that section 235(2) satisfies a dual purpose; first of all it satisfies rules of natural justice by according an opportunity to the accused of being heard on the question of sentence. Under such sentencing procedure the accused is given an opportunity to place before the court all relevant materials having a bearing on the question of sentence. The Court opined that it is a salutary principle and must be strictly observed and is not a

matter of mere formality. This Court further held that in such hearing exercise the accused should be given a real and effective opportunity to place his antecedents, social and economic background etc. before the court, for the court to take a fair decision on sentence as otherwise the sentence would be vulnerable.

62. The Court therefore opined:-

> "10. …… We think as a general rule the Trial Courts should after recording the conviction adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant material bearing on the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender…."
>
> (para 10, page 21 of the report)

63. Therefore, it is clear from the purpose of section 235(2) as explained in the aforesaid cases, that the object of hearing under section 235(2) being intrinsically and inherently connected with the sentencing procedure, the provision of section 354(3) which calls for recording of special reason for awarding death sentence must be read conjointly with section 235(2) of 1973 Code.

64. This Court is of the opinion that special reasons can only be validly recorded if an effective opportunity of hearing contemplated under section 235(2) of Cr.P.C. is genuinely extended and is allowed to be exercised by the accused who stands convicted and is awaiting the sentence.

65. These two provisions do not stand in isolation but must be construed as supplementing each other as ensuring the constitutional guarantee of a just, fair and reasonable procedure in the exercise of sentencing discretion by the court.

66. These changes in the sentencing structure reflect the "evolving standards of decency" that mark the progress of a maturing democracy and which is in accord with the concept of dignity of the individual - one of the core values in our

Preamble to the Constitution. In a way these changes signify a paradigm shift in our jurisprudence with the gradual transition of our legal regime from 'rule of law' to the 'due process of law', to which this Court would advert to in the latter part of the judgment.

67. The main issues which were considered in *Bachan Singh* (supra) are indicated in para 15 of the judgment, which is set out:

> "15. The principal questions that fall to be considered in this case are:
>
> (i) Whether death penalty provided for the offence of murder in Section 302, Penal Code is unconstitutional.
>
> (ii) If the answer to the foregoing question be in the negative, whether the sentencing procedure provided in Section 354(3) of the Cr.P.C., 1973 (Act 2 of 1974) is unconstitutional on the ground that it invests the Court with unguided and untrammelled discretion and allows death sentence to be arbitrarily or freakishly imposed on a person found guilty of murder or any other capital offence punishable under the Indian Penal Code with death or, in the alternative, with imprisonment for life."

68. In upholding the constitutionality of section 302 of Indian Penal Code and also the provisions of section 354(3) of 1973 Code the Constitution Bench in *Bachan Singh* (supra) considered the evolution of our Constitutional Jurisprudence from various decisions of Constitution Bench of this Court in *A.K. Gopalan v. State of Madras* (AIR (37) 1950 SC 27) and then the decisions of this Court in *Sakal Papers (P) Ltd. & ors. v. Union of India* (AIR 1962 SC 305), *Naresh Shridhar Mirajkar v. State of Maharashtra and another* (AIR 1967 SC 1), *Rustom Cavasjee Cooper v. Union of India* [(1970) 1 SCC 248], *Maneka Gandhi v. Union of India and another* [(1978) 1 SCC 248] and several other decisions.

69. After considering all these Constitution Bench decisions of this Court, the learned Judges held that in the evolving mosaic of our Constitutional Jurisprudence, specially after the decision of this Court in *Maneka Gandhi (supra)*, Article 21 of the Constitution which guarantees life and personal liberty has to be interpreted differently.

70. Article 21 as enacted in our Constitution reads as under:

> "No person shall be deprived of his life or personal liberty except according to procedure established by law."

71. But this Court in *Bachan Singh* (supra) held that in view of the expanded interpretation of Article 21 in *Maneka Gandhi (supra)*, it should read as follows:

> "136……No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law.

72. In the converse positive form, the expanded Article will read as below:

> "A person may be deprived of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law."

(See para 136 page 730 of the report)

73. This epoch making decision in *Maneka Gandhi* (supra) has substantially infused the concept of due process in our constitutional jurisprudence whenever the court has to deal with a question affecting life and liberty of citizens or even a person.

74. Krishna Iyer, J. giving a concurring opinion in *Maneka Gandhi* (supra) elaborated, in his inimitable style, the transition from the phase of rule of law to due process of law. The relevant statement of law given by the learned Judge is quoted below:

> "81…….'Procedure established by law', with its lethal

potentiality, will reduce life and liberty to a precarious plaything if we do not ex necessitate import into those weighty words an adjectival rule of law, civilised in its soul, fair in its heart and fixing those imperatives of procedural protection absent which the processual tail will wag the substantive head. Can the sacred essence of the human right to secure which the struggle for liberation, with 'do or die' patriotism, was launched be sapped by formalistic and pharisaic prescriptions, regardless of essential standards? An enacted apparition is a constitutional, illusion. Processual justice is writ patently on Article 21. It is too grave to be circumvented by a black letter ritual processed through the legislature."

(Para 81 page 337 of the report)

75. Immediately after the decision in *Maneka Gandhi* (supra) another Constitution Bench of this Court rendered decision in case of *Sunil Batra v. Delhi Administration & ors.* [(1978) 4 SCC 494] specifically acknowledged that even though a clause like the 8th Amendment of the United States Constitution and concept of 'due process' of American Constitution is not enacted in our Constitution text, but after the decision of this Court in *R.C. Cooper* (supra) and *Maneka Gandhi* (supra) the consequences is the same. The Constitution Bench of this Court in *Sunil Batra* (supra) speaking through Krishna Iyer, J held:

"52. True, our Constitution has no 'due process' clause or the VIII Amendment; but, in this branch of law, after *Cooper (supra)* and *Maneka Gandhi (supra)*, the consequence is the same."

76. The Eighth Amendment (1791) to the Constitution of United States virtually emanated from the English Bill of Rights (1689). The text of the Eighth Amendment reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The English Bill of Rights drafted a century ago postulates, "That excessive bail

ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

77. Our Constitution does not have a similar provision but after the decision of this Court in *Maneka Gandhi's* case (supra) jurisprudentially the position is virtually the same and the fundamental respect for human dignity underlying the Eighth Amendment has been read into our jurisprudence.

78. Until the decision was rendered in *Maneka Gandhi* (supra), Article 21 was viewed by this Court as rarely embodying the Diceyian concept of rule of law that no one can be deprived of his personal liberty by an executive action unsupported by law. If there was a law which provided some sort of a procedure it was enough to deprive a person of his life or personal liberty. In this connection, if we refer to the example given by Justice S.R. Das in his judgment in *A.K. Gopalan* (supra) that if the law provided the Bishop of Rochester 'be boiled in oil' it would be valid under Article 21. But after the decision in *Maneka Gandhi* (supra) which marks a watershed in the development of constitutional law in our country, this Court, for the first time, took the view that Article 21 affords protection not only against the executive action but also against the legislation which deprives a person of his life and personal liberty unless the law for deprivation is reasonable, just and fair. And it was held that the concept of reasonableness runs like a golden thread through the entire fabric of the Constitution and it is not enough for the law to provide some semblance of a procedure. The procedure for depriving a person of his life and personal liberty must be eminently just, reasonable and fair and if challenged before the Court it is for the Court to determine whether such procedure is reasonable, just and fair and if the Court finds that it is not so, the Court will strike down the same.

79. Therefore, 'law' as interpreted under Article 21 by this Court is more than mere 'lex'. It implies a due process, both procedurally and substantively.

80. Thus, the due process concept and the values of Eighth

Amendment of the U.S. Constitution, which have been incorporated in our Constitution, are virtually articulated through the procedural safeguards of section 235(2) read with section 354(3) of 1973 Code. This marks the maturing of our criminal jurisprudence from the stage of rule of law to the realm of due process of law by experiencing the vicissitudes of a fascinating journey for about three decades of judicial decision making by this Court from *A.K. Gopalan* (supra) to *Maneka Gandhi* (supra).

81. In fact the Constitution Bench in *Bachan Singh* (supra) has construed the sentencing structure in Section 235(2) and 354(3) of 1973 Code through the prism of due process concept and only then it upheld the constitutionality of death sentence.

82. However, in the impugned judgment, the High Court failed to appreciate this ratio in *Bachan Singh* (supra). In the instant case to confirm the death sentence of the appellant, the High Court relied on the judgment of this Court in *Dayanidhi Bisoi v. State of Orissa* [(2003) 9 SCC 310], wherein the accused was held guilty of murder of three persons of a family comprising husband, wife and their three year old daughter. In that case, the accused, who is a member of the family of the deceased, committed the criminal act for monetary benefits while the deceased were sleeping. In *Dayanidhi Bisoi* (supra) this Court, while awarding death sentence to the accused, relied on its previous decision in *Ravji alias Ram Chandra v. State of Rajasthan* [(1996) 2 SCC 175] and *Surja Ram v. State of Rajasthan* [(1996) 6 SCC 271].

83. In *Ravji* (supra), a Division Bench of this Court observed that it is only characteristics relating to the crime, to the exclusion of the ones relating to the criminal, which are relevant for sentencing in the criminal trial. In paragraph 24 at page 187 of the report, this Court held:

> "24. .....The crimes had been committed with utmost cruelty and brutality without any provocation, in a calculated

> manner. *It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial.* The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal."

84. *Ravji* (supra) case was followed in as many as six cases where death sentence was imposed. However, this Court in *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* [(2009) 6 SCC 498] pointed out that *Ravji's* (supra) case and the six subsequent cases in which *Ravji* (supra) was followed were decided *per incuriam, as the law laid down therein is contrary to the law laid by the Constitution Bench* of the Supreme Court in Bachan Singh. In Bachan Singh (supra), this Court held that before giving death sentence Court should not confine its consideration principally or merely to the circumstances connected with the particular crime but must also give due consideration to the circumstances of the criminal. His Lordship Sinha, J. in para 63 at page 529 of Bariyar (supra) observed that:

> "63. We are not oblivious that Ravji case has been followed in at least 6 decisions of this Court in which death punishment has been awarded in last 9 years, but, in our opinion, it was rendered per incuriam. Bachan Singh specifically noted the following on this point:
>
> > "163…The present legislative policy discernible from Section 235(2) read with Section 354(3) is that in fixing the degree of punishment or making the

choice of sentence for various offences, including one under Section 302 of the Penal Code, the court should not confine its consideration 'principally' or *merely to the circumstances connected with the particular crime, but also give due consideration to the circumstances of the criminal."*

Shivaji v. State of Maharashtra - (2008) 15 SCC 269, *Mohan Anna Chavan v. State of Maharashtra* – (2008) 7 SCC 561, *Bantu v. State of U.P.* – (2008) 11 SCC 113, *Surja Ram v. State of Rajasthan* – (1996) 6 SCC 271; *Dayanidhi Bisoi v. State of Orissa* – (2003) 9 SCC 310 and *State of U.P. v. Sattan* - (2009)4 SCC 736 are the decisions where Ravji has been followed. It does not appear that this Court has considered any mitigating circumstance or a circumstance relating to criminal at the sentencing phase in most of these cases. It is apparent that Ravji has not only been considered but also relied upon as authority on the point that in heinous crimes, circumstances relating to criminal are not pertinent."

85. The High Court in this case, by following the *Ravji* ratio, therefore, did not properly appreciate the ratio in *Bachan Singh* (supra) in awarding death sentence on the appellant.

86. In the instant case, the High Court while discussing the mitigating circumstances as against the aggravating circumstances has not properly followed the principles discussed in *Bachan Singh's* case. In *Bachan Singh* (supra) this Court at paragraph 206 (at page 750 of the report) sets out certain mitigating circumstances which were suggested by Dr. Chitale, the learned counsel and at paragraph 207 of the report the learned Judge observed that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence. Those circumstances are set out hereinbelow:

"206. Dr. Chitaley has suggested these mitigating factors:

Mitigating circumstances:-In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated.

The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct."

87. In this connection the submission of the learned counsel that the State must by evidence prove that the accused does not satisfy conditions No.3 and 4 above is of great importance as this Court accepted that those submissions must be given 'great weight in the determination of sentence'.

88. However, the categories of mitigating and aggravating circumstances are never close and no court can give an exhaustive list of such circumstances. For instance, a crime involving a terrorist attack may place the case under a

completely different situation.

89. In the instant case State has failed to show that the appellant is a continuing threat to society or that he is beyond reform and rehabilitation. On the other hand, in paragraph 77 of the impugned judgment the High Court observed as follows:

> "We have no evidence that the appellant is incapable of being rehabilitated in society. We also have no evidence that he is capable of being rehabilitated in society. This circumstance remains a neutral circumstance."

90. It is clear from the aforesaid finding of the High Court that there is no evidence to show that the accused is incapable of being reformed or rehabilitated in society and the High Court has considered the same as a neutral circumstance. In our view the High Court was clearly in error. The very fact that the accused can be rehabilitated in society and is capable of being reformed, since the State has not given any evidence to the contrary, is certainly a mitigating circumstance and which the High Court has failed to take into consideration. The High Court has also failed to take into consideration that the appellant is not a continuing threat to society in the absence of any evidence to the contrary. Therefore, in paragraph 78 of the impugned judgment, the High Court, with respect, has taken a very narrow and a myopic view of the mitigating circumstances about the appellant. The High Court has only considered that the appellant is a first time offender and he has a family to look after. We are, therefore, constrained to observe that the High Court's view of mitigating circumstance has been very truncated and narrow in so far as the appellant is concerned.

91. On the other hand, while considering the aggravating circumstances, the High Court appears to have been substantially influenced with the brutality in the manner of committing the crime. It is no doubt that the murder was committed in this case in a very brutal and inhuman fashion, but that alone cannot justify infliction of death penalty. This is held in several decisions of this Court. Reference in this case

may be made to the decision of this Court in *Dharmendrasinh alias Mansinh Ratansinh v. State of Gujarat* [(2002) 4 SCC 679] wherein the accused suspected the character of his wife and under the belief that his two sons were not born of him, murdered those two innocent children. This Court held that the act of accused was heinous, unpardonable and condemnable, but this Court commuted the death sentence to life sentence inter alia on the ground that accused had no previous criminal record and the chances of repetition of such criminal acts at his hands making the society further vulnerable are not apparent. In coming to this conclusion this Court observed:

> "20. …. A number of factors are to be taken into account namely, the motive of the crime, the manner of the assault, the impact of the crime on the society as a whole, the personality of the accused, circumstances and facts of the case as to whether the crime committed, has been committed for satisfying any kind of lust, greed or in pursuance of anti-social activity or by way of organized crime, drug-trafficking or the like. Chances of inflicting the society with the similar criminal act that is to say vulnerability of the members of the society at the hands of the accused in future and ultimately as held in several cases, mitigating and aggravating circumstances of each case have to be considered and a balance has to be struck…"
>
> (Para 20, page 695 of the report)

92. Again in *Panchhi & ors. v. State of U.P.* [(1998) 7 SCC 177] four members of a family comprising two adult male and female, murdered four members of neighbouring family comprising an adult male and female, an old lady and a child of five years of age in most heinous, brutal and diabolical manner to fulfill their vengeance. This Court while commuting their death sentence to life imprisonment observed:-

> "20. ….. No doubt brutally looms large in the murders in this case particularly of the old and also the tender-aged

child. It may be that the manner in which the killings were perpetrated may not by itself show any lighter side, but that is not very peculiar or very special in these killings. *Brutality of the manner in which a murder was perpetrated may be a ground but not the sole criterion for judging whether the case is one of the "rarest of rare cases" as indicated in Bachan Singh's case.* In a way every murder is brutal, and the difference between one from the other may be on account of mitigating or aggravating features surrounding the murder."

(para 20, page 183 of the report)

(Emphasis supplied)

93. In *Haru Ghosh v. State of West Bengal* [(2009) 15 SCC 551] wherein the accused, a previous convict of murder and facing a sentence of life imprisonment was out on bail when his appeal was pending before the High Court, murdered a woman and her child because the deceased woman's husband asked the accused not to sell illicit liquor in the locality.

94. The facts in *Haru Ghosh* (supra) are that one day accused entered the house of deceased and started strangulating the child. On the intervention of the mother the child was released from the clutches of accused. The mother took the child to a nearby tubewell and while she was pouring water on unconscious child's face the accused got hold of a sharp weapon from a by-stander and assaulted the mother and child to death.

95. This Court observed that this was a dastardly murder of two helpless persons for no fault on their part. But this Court commuted the death sentence to life imprisonment taking into consideration following factors, firstly that there was no pre-meditation in the act of the accused. This was at the spur of the moment as accused did not come armed with any weapon. Secondly it is unknown under what circumstances accused entered the house of deceased and what prompted him to

assault the boy. Thirdly the cruel manner in which the murder was committed cannot be the guiding factor in favour of death sentence. Fourthly the accused himself has two minor children.

96. This Court observed as under:

"39. ……. the cruel manner in which the murder was committed and the subsequent action on the part of the accused in severing the parts of the body of the deceased, do not by themselves, become the guiding factor in favour of the death sentence"

(para 39, page 564 of the report)

97. In *Smt. Triveniben v. State of Gujarat* [(1989) 1 SCC 678], the Constitution Bench of this Court, following the *Bachan Singh* ratio, held "death sentence cannot be given if there is any mitigating circumstance in favour of the accused. All circumstances of the case should be aggravating" (Para 25, page 698 of the report).

98. Unfortunately, the High Court contrary to the ratio in the aforesaid cases, fell, in this case, into an error by approving the death sentence as it was swayed by the cruel manner in which the two children were done to death by the appellant. The mitigating circumstances in favour of the appellant, were not properly considered.

99. The ratio in *Bachan Singh* (supra) has received approval by the international legal community and has been very favourably referred to by David Pannick in 'Judicial Review of the Death Penalty: Duckworth' (see page 104-105).

100. Roger Hood and Carolyn Hoyle in their treaties on 'The Death Penalty' Fourth Edition (Oxford) have also very much appreciated the *Bachan Singh* ratio (See page 285).

101. The concept of 'rarest of rare' which has been evolved in *Bachan Singh* (supra) by this Court is also the internationally accepted standard in cases of death penalty.

102. Reference in this connection may also be made to the right based approach in exercising discretion in death penalty as suggested by Edward Fitzgerald, the British Barrister. [Edward Fitzgerald: The Mitigating Exercise in Capital Cases in Death Penalty Conference (3-5, June, Barbados: Conference Papers and Recommendations]

103. It has been suggested therein that right approach towards exercising discretion in capital cases is to start from a strong presumption against the death penalty. It is argued that 'the presence of any significant mitigating factor justifies exemption from the death penalty even in the most gruesome cases' and Fitzgerald argues:

> "Such a restrictive approach can be summarized as follows: The normal sentence should be life imprisonment. The death sentence should only be imposed instead of the life sentence in the 'rarest of rare' cases where the crime or crimes are of exceptional heinousness and the individual has no significant mitigation and is considered beyond reformation."
>
> [Quoted in The Death Penalty: Roger Hood and Hoyle, 4th Edition Oxford, Page 285]

104. Opposing mandatory death sentence, United Nations in its interim report to the General Assembly in 2000 advanced the following opinion:

> "The proper application of human rights law-especially of its provision that 'no one shall be arbitrarily deprived of his life' and that 'no one shall be subjected to….cruel, inhuman or degrading….punishment' – requires weighing factors that will not be taken into account in the process of determining whether a defendant is guilty of committing a 'most serious crime'. As a result, these factors can only be taken into account in the context of individualized sentencing by the judiciary in death penalty cases…The conclusion, in theory as well as in practice, was that

> respect for human rights can be reliably ensured in death penalty cases only if the judiciary engages in case-specific, individualized sentencing that accounts for all of the relevant factors….It is clear, therefore, that in death penalty cases, individualized sentencing by the judiciary is required to prevent cruel, inhuman or degrading punishment and the arbitrary deprivation of life."
>
> [The Death Penalty: Roger Hood and Hoyle, 4th Edition, Oxford, Page 281]

105. Taking an overall view of the facts in these appeals and for the reasons discussed above, we hold that death sentence cannot be inflicted on the appellant since the dictum of Constitution Bench in *Bachan Singh* (supra) is that the legislative policy in Section 354(3) of 1973 Code is that for person convicted of murder, life imprisonment is the rule and death sentence, an exception, and the mitigating circumstances must be given due consideration. *Bachan Singh* (supra) further mandates that in considering the question of sentence the Court must show a real and abiding concern for the dignity of human life which must postulates resistance to taking life through law's instrumentality. Except in 'rarest of rare cases' and for 'special reasons' death sentence cannot be imposed as an alternative option to the imposition of life sentence.

106. For the reasons discussed above, we are of the view that in the facts of this case the death sentence imposed by the High Court cannot be sustained and the death sentence imposed upon the appellant is substituted by the sentence of imprisonment for life.

107. The appeals are allowed to the extent indicated above. The conviction of the appellant is upheld and he is to serve out the life sentence.

B.B.B. Appeals disposed of.

CHATTERJEE PETROCHEM (I) PVT. LTD.
v.
HALDIA PETROCHEMICALS LTD.& ORS.
(Civil Appeal Nos. 5416-5419 of 2008)

SEPTEMBER 30, 2011

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Companies Act, 1956 – ss. 397, 398 and 402 – Company petition under – Grievance of applicant-Chatterjee Group that due to non-registration of transfer of 155 million shares in their favour, and, on the other hand, transfer of 150 million shares in favour of IOC, the character of the Company in question (HPL) was altered from a Private Company into a Government Company and also reduced the Chatterjee Group to a minority shareholder, contrary to promises held out earlier and as incorporated in the agreements between the parties – Held: In order to succeed in an action under ss.397 and 398, the complainant has to prove that the affairs of the Company were being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members – However, the law has not defined as to what would amount to "oppressive" for the purposes of s.397 and it is for the Courts to decide on the facts of each case as to whether such oppression exists which would call for action under s.397 – The conduct of the majority shareholders should not only be oppressive to the minority, but must also be burdensome and operating harshly upto the date of the petition – On facts, although, the Chatterjee Group complained of the manner in which it had been reduced to a minority in the Company in question, it is also obvious that when the Company was in dire need of funds and the Chatterjee Group also promised to provide a part of the same, it did not do so and instead of bringing in equity, it obtained a loan from HSBC through the Merlin Group, which only increased the debt equity ratio of the

Company – It is at a stage when there was a threat to the supply of Naphtha, which was the main ingredient used by HPL for its manufacturing process, that it finally agreed to induct IOC into the Company as a member by transferring 150 million shares to it – If in the first place, the Chatterjee Group had stood by its commitment to bring in equity and had subscribed to the Rights Issue, which was a decision taken by the Company to infuse equity in the running of the Company, it would neither have been reduced to a minority nor would it perhaps have been necessary to induct IOC as a portfolio investor with the possibility of the same being converted into a strategic investment – The failure of West Bengal Industrial Development Corporation (WBIDC) and Government of West Bengal (GoWB) to register the 155 million shares transferred to CP(I)PL could not, strictly speaking, be taken to be failure on the part of the Company, but it was the failure of one of the parties to a private arrangement to abide by its commitments – The remedy in such a case was not under s.397 of the Companies Act – The alleged breach of the agreements, was really in the nature of a breach between two members of the Company and not the Company itself – It is not on account of any act on the part of the Company that the shares transferred to CP(I)PL were not registered in the name of the Chatterjee Group – There was, therefore, no occasion for the Company Law Board (CLB) to make any order either under s.397 or 402 – The appellants failed to substantiate either of the two grounds canvassed by them for the CLB to assume jurisdiction either u/s.397 or s.402, and it could not, therefore, have given directions to WBIDC and GoWB to transfer 520 million shares held by them in HPL to the Chatterjee Group and the High Court rightly set aside the same and dismissed the Company Petition.

M/s Haldia Petrochemicals Ltd. (HPL) was incorporated for establishing a green field petrochemical complex in Haldia in the State of West Bengal to be

established by the West Bengal Industrial Development Corporation (WBIDC) and the R.P. Goenka Group. The Goenka Group left the Company and Tata Chemicals and Tata Tea were inducted into the project. However, since the TATAs were not very keen to continue with the Project, Dr. Purnendu Chatterjee, a Non-Resident Indian industrialist and financier, evinced his interest in implementing the project. Accordingly, a Memorandum of Understanding was entered into between WBIDC and the Chatterjee Petrochem (Mauritius) Company [CP(M)C] and the Tatas.

The appellants filed Company Petition before the Company Law Board under Sections 397, 398, 399, 402, 403 and 406 of the Companies Act, 1956 seeking various reliefs. The main grievance of the appellants was that having been induced into investing large sums of money in establishing the petrochemical complex on various promises, particularly that the Company would continue to retain its private character and the Chatterjee group would have control over its management, such promises, although, reduced into writing in the form of agreements, not only remained unfulfilled, but even the character of the Company was altered with the transfer and sale of 150 million shares by the Company in favour of IOC, a Central Government Company. The other grievance of the appellants was that despite having transferred 155 million shares in favour of CP(I)PL, and having received the full price therefor, the Company had not registered the same in the Company's Register of Share-holders, thereby depriving the Chatterjee Group from exercising its right to vote in respect of the said shares.

The grievance of the Chatterjee Group was that by not registering the transfer of the 155 million shares in their favour, but, on the other hand, transferring 150 million shares in favour of IOC, the character of the

Company was altered from a Private Company into a Government Company and also reduced the Chatterjee Group to a minority, despite the promises held out earlier and as incorporated in the agreements between the parties.

The Company Petition was disposed of by the CLB by upholding the decision of the Company to allot 150 million shares to IOC. Similarly, the transfer of 155 million shares by WBIDC to the Chatterjee Group at Rs.10/- per share was confirmed. A further direction was given to GoWB and WBIDC to transfer the 520 million shares held by them in HPL to the Chatterjee Group.

The Government of West Bengal filed appeal before the High Court against the said order of the CLB. The Single Judge of the High Court held that the agreement entered into between CP(I)PL and WBIDC for transfer of shares, being a private contract between two shareholders, the same could not be the subject matter of a petition under Section 397 of the Companies Act, 1956. On the question of induction of IOC and the allotment of 155 million shares to the said Company, the Single Judge held that the induction of IOC was on the basis of the Debt Restructuring Package and the Refinancing Scheme, which were to the advantage of HPL, and had been decided from time to time at the Board meetings of the Directors, which had been presided over by Dr. Chatterjee himself. The Single Judge held that the order passed by the CLB was contrary to the provisions of Section 402(e) of the Act, since no relief under the said Section could be granted without a finding having been arrived at that a case of oppression had been made out within the meaning of Section 397 of the aforesaid Act. Hence the present appeals.

Dismissing the appeals, the Court

HELD:1.1. In order to succeed in an action under Sections 397 and 398 of the Companies Act, the complainant has to prove that the affairs of the Company were being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members. However, the law has not defined as to what would amount to "oppressive" for the purposes of Section 397 and it is for the Courts to decide on the facts of each case as to whether such oppression exists which would call for action under Section 397. The conduct of the majority shareholders should not only be oppressive to the minority, but must also be burdensome and operating harshly upto the date of the petition. [Paras 93, 94] [194-E-H; 195-G-H; 196-A]

1.2. In order to pass orders under Section 397 of the Companies Act, 1956, the CLB has to be satisfied that the Company's affairs are being conducted in a manner oppressive to any member or members and that the facts would justify the making of a winding-up order on the just and equitable principle, but that such an order would unfairly prejudice the Applicant before the CLB. Unwise, inefficient or careless conduct of a Director cannot give rise to claim for relief under Section 397 of the Act. For relief under this Section, the Applicant would have to prove that the conduct of the majority of the shareholders lacked probity and was unfair so as to cause prejudice to the Applicant in exercising his legal and proprietary rights as a shareholder. Each complaint under Section 397 will have to be judged on its own merit for the CLB to arrive at a conclusion as to whether the ingredients of Section 397 were satisfied and pass appropriate orders thereafter. [Para 96] [197-E-H; 198-A]

1.3. The language of Section 397 suggests that the oppressive manner in which the Company's affairs were being conducted could not be confined to one isolated

incident, but that such acts would have to be continuous as to be part of a concerted action to cause prejudice to the minority shareholders whose interests are prejudiced thereby. [Para 97] [198-B-C]

1.4. It is clear that when Dr. Purnendu Chatterjee expressed his interest in setting up of the Haldia Petrochemicals Ltd., various incentives had been offered to him by the GoWB and WBIDC to invest in the Company and to make it a successful commercial enterprise. Such investments were, however, contingent upon Dr. Chatterjee's bringing in sufficient equity to set up and run the Company. At the very initial stage all the understanding between Dr. Chatterjee and GoWB & WBIDC, both WBIDC and the Chatterjee Group were to hold 433 million shares each, while Tata was to hold 144 million shares. The promise extended by WBIDC and GoWB to the Chatterjee Group to provide at least 60% of the shares held by WBIDC at Rs.14/- per share to the Chatterjee Group so as to give the Chatterjee Group the majority shareholding in the Company, as was indicated in the Agreements dated 12th January, 2002, 8th March, 2002 and 14th January, 2005, did not ultimately materialise and, on the other hand, the Chatterjee Group was reduced to a minority on account of its decision not to participate in the Rights Issue, and, thereafter, by transfer of 150 million shares by WBIDC in favour of IOC. [Para 101] [199-E-H; 200-A]

1.5. Although, the Chatterjee Group has complained of the manner in which it had been reduced to a minority in the Company, it is also obvious that when the Company was in dire need of funds and the Chatterjee Group also promised to provide a part of the same, it did not do so and instead of bringing in equity, it obtained a loan from HSBC through the Merlin Group, which only increased the debt equity ratio of the Company.

Furthermore, while promising to infuse sufficient equity in addition to the amounts that would have been brought in by way of subscription to the Rights Issue, the Chatterjee Group imposed various pre-conditions in order to do so, which ultimately led GoWB and WBIDC to terminate the agreement to transfer sufficient number of shares to the Chatterjee Group to enable it to have complete control over the management of the Company and also to retain its private character. It is at a stage when there was a threat to the supply of Naphtha, which was the main ingredient used by HPL for its manufacturing process, that it finally agreed to induct IOC into the Company as a member by transferring 150 million shares to it. It was on Dr. Chatterjee's initiative that it had been decided to induct the IOC as a member of the Company at meetings of the Directors which were chaired by Dr. Chatterjee himself. If in the first place, the Chatterjee Group had stood by its commitment to bring in equity and had subscribed to the Rights Issue, which was a decision taken by the Company to infuse equity in the running of the Company, it would neither have been reduced to a minority nor would it perhaps have been necessary to induct IOC as a portfolio investor with the possibility of the same being converted into a strategic investment. [Para 102] [200-B-H; 201-A]

1.6. The failure of WBIDC and GoWB to register the 155 million shares transferred to CP(I)PL could not, strictly speaking, be taken to be failure on the part of the Company, but it was the failure of one of the parties to a private arrangement to abide by its commitments. The remedy in such a case was not under Section 397 of the Companies Act. The alleged breach of the agreements, was really in the nature of a breach between two members of the Company and not the Company itself. It is not on account of any act on the part of the Company that the shares transferred to CP(I)PL were not registered

in the name of the Chatterjee Group. There was, therefore, no occasion for the CLB to make any order either under Section 397 or 402 of the aforesaid Act. [Para 103] [201-B-G]

1.7. The appellants failed to substantiate either of the two grounds canvassed by them for the CLB to assume jurisdiction either under Section 397 or 402 of the Companies Act, 1956, and it could not, therefore, have given directions to WBIDC and GoWB to transfer 520 million shares held by them in HPL to the Chatterjee Group and the High Court rightly set aside the same and dismissed the Company Petition. [Para 104] [202-B]

Shanti Prasad Jain Vs. Kalinga Tubes Ltd. **(1965) 2 SCR 720;** *Needle Industries (India) Ltd. & Ors. Vs. Needle Industries Newey (India) Holding Ltd. & Ors.* **(1981) 3 SCC 333 : 1981 (3) SCR 698;** *V.S. Krishnan & Ors. Vs. Westfort Hi-Tech Hospital Ltd. & Ors.* **(2008) 3 SCC 363: 2008 (3) SCR 184;** *Bengal Luxmi Cotton Mills Ltd.* **(1969) CWN 137;** *Sangramsingh P. Gaekwad & Ors. Vs. Shantadevi P. Gaekward & Ors.* **(2005) 11 SCC 314 : 2005 (1) SCR 624;** *R. Ramanathan Chettiar Vs. A & F Harvey Ltd. & Ors.* **1967 (37) Comp. Case 212;** BALCO Employees' Union (Regd.) Vs. Union of India & Ors. **(2002) 2 SCC 333 : 2001 (5) Suppl. SCR 511;** *Hanuman Prasad Bagri Vs. Bagress Cereals Pvt. Ltd.* **(2001) 4 SCC 420 : 2001 (2) SCR 811;** Kilpest Pvt. Ltd. & Ors. Vs. Shekhar Mehra **(1996) 10 SCC 696 : 1996 (7) Suppl. SCR 239;** *Hind Overseas Pvt. Ltd. Vs. Raghunath Prasad Jhunjhunwalla & Anr.* **(1976) 3 SCC 259: 1976 (2) SCR 226;** *Allianz Securities Ltd. Vs. Regal Industries Ltd.* **2002 (11) CC 764;** *Howrah Trading Company Vs. CIT* **AIR 1959 SC 775: 1959 Suppl. SCR 448;** *Life Insurance Corporation of India Vs. Escorts Ltd.* **(1986) 1 SCC 264 : 1985 (3) Suppl. SCR 909;** *Mannalal Khetan Vs. Kadarnath Khetan* **[(1977) 2 SCC 424] : 1977 (2) SCR 190;** *Claude*

Lila Parulekar (Smt.) Vs. Sakal Papers (P) Ltd. **(2005) 11 SCC 73 : 2005 (2) SCR 1063;** *J.P. Srivastava & Sons Pvt. Ltd. Vs. Gwalior Sugar Co. Ltd.* **(2005) 1 SCC 172 : 2004 (5) Suppl. SCR 648;** *Mathrubhumi Printing & Publishing Co. Ltd. Vs. Vardhman Publishers Ltd.* **(1992) 73 CC 80 and** *Satgur Prasad Vs. Harnarayan Das* **AIR 1932 PC 89;** *Dale & Carrington Invt. P. Ltd. Vs. P.K. Prathapan* **(2005) 1 SCC 217;** *Rajahmundry Electric Supply Corporation Ltd. Vs. A. Nageswara Rao & Ors.* **(1955) 2 SCR 1066;** *M.S.D.C. Radharamanan Vs. M.S.D. Chandrasekara Raja & Anr.* **(2008) 6 SCC 750: 2008 (5) SCR 182;** *Sangramsinh P. Gaekwad & Ors. Vs. Shantadevi P. Gaekwad (Dead) through LRs. & Ors.* **(2005) 11 SCC 314 : 2005 (1) SCR 624;** *Kamal Kumar Dutta & Anr. Vs. Ruby General Hospital Ltd. & Ors.* **(2006) 7 SCC 613 : 2006 (4) Suppl. SCR 462;** *New Horizons Ltd. & Anr. Vs. Union of India & Ors.* **(1995) 1 SCC 478 : 1994 (5) Suppl. SCR 310 – referred to.**

O'Neill Vs. Phillips **(1999)2 All ER 961;** *Blisset Vs. Daniel* **68 E.R. 1022;** *Ebrahimi Vs. Westbourne Galleries* **(1972) 2 All ER 492;** *Ebrahimi Vs. Westbourne Galleries Ltd & Ors.* **(1972) 2 All ER 492 and** *Saul D Harrison & Sons plc* **(1995) 1 BCLC 14 – referred to.**

Case Law Reference:

(1965) 2 SCR 720	**referred to**	**Para 22**
1981 (3) SCR 698	**referred to**	**Para 32**
(1999)2 All ER 961	**referred to**	**Para 36**
68 E.R. 1022	**referred to**	**Para 36**
(1972) 2 All ER 492	**referred to**	**Para 36**
(2005) 1 SCC 217	**referred to**	**Para 36**
(1955) 2 SCR 1066	**referred to**	**Para 37**
2008 (5) SCR 182	**referred to**	**Para 38**

2005 (1) SCR 624	**referred to**	**Para 39**
2006 (4) Suppl. SCR 462	**referred to**	**Para 39**
1994 (5) Suppl. SCR 310	**referred to**	**Para 40**
(1972) 2 All ER 492	**referred to**	**Para 40**
2008 (3) SCR 184	**referred to**	**Para 42**
1995 1 BCLC 14	**referred to**	**Para 61**
1969 CWN 137	**referred to**	**Para 64**
2005 (1) SCR 624	**referred to**	**Para 64**
1967 (37) Comp. Case 212	**referred to**	**Para 64**
2001 (5) Suppl. SCR 511	**referred to**	**Para 75**
2001 (2) SCR 811	**referred to**	**Para 82**
1996 (7) Suppl. SCR 239	**referred to**	**Para 83**
1976 (2) SCR 226	**referred to**	**Para 83**
2002 (11) CC 764	**referred to**	**Para 84**
1959 Suppl. SCR 448	**referred to**	**Para 86**
1985 (3) Suppl. SCR 909	**referred to**	**Para 86**
1977 (2) SCR 190	**referred to**	**Para 86**
2005 (2) SCR 1063	**referred to**	**Para 86**
2004 (5) Suppl. SCR 648	**referred to**	**Para 86**
(1992) 73 CC 80	**referred to**	**Para 86**
(AIR 1932 PC 89	**referred to**	**Para 87**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5416-5419 of 2008.

From the Judgment & Order dated 21.9.2007 of the High Court of Calcutta in APO No. 45,46, 73 and 113 of 2007.

WITH

C.A. Nos. 5420 and 5437-5440 of 2008.

Falsi S. Nariman, Dr. A.M. Singhvi, Sudipto Sarkar, Siddharth Mitra, Ashok Desai, Altaf Ahmad, R.S. Suri, K.K. Venugopal and Ranjit Kumar, Neeraj Sharma, Roopali Singh Subhash Sharma, Archana Lakhotia (for Dua Associates, H.K. Puri, Gaurav Duggal, Amit Meharia (for Meharia & Co.), Anuj Bhandari, Sanjay Bhat, Amit Wadha, Aniruddha S. Deshmukh, Sahir Hussain, Yashvardhan Roy, S. Mahendran, Mayank Mishra, Ananya Kumar, Amar Gupta, Vibha Datta Makhija, Jay Savla, Meenakshi Ogra, Sanjeev K. Kapoor, Kumar Mihir, S. Karkrania (for Khaitan & Co.) Nitish Massey, Pinaki Addy, Anu Bindra, K.S. Prasad, Chanchal Kumar Ganguly, Amar Gupta, Ankur Saigal, Bina Gupta, Mayank Mishra, V.D. Makhija, Fox Mandal & Co. and Manik Karanjawala for the appearing parties.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. M/s. Haldia Petrochemicals Ltd., hereinafter referred to as "H.P.L.", was incorporated in 1985 for establishing a green field petrochemical complex in Haldia in the State of West Bengal to be established by the West Bengal Industrial Development Corporation, hereinafter referred to as "WBIDC", and the R.P. Goenka Group. However, the Goenka Group left the Company in 1990 and Tata Chemicals and Tata Tea were inducted into the project between 1990 and 1993. Not much headway was made towards implementing the project till June, 1994 when Dr. Purnendu Chatterjee, hereinafter referred to as "PC", a Non-Resident Indian industrialist and financier, expressed an interest in the project. Accordingly, a Memorandum of Understanding was entered into between WBIDC and the Chatterjee Petrochem

(Mauritius) Company, hereinafter referred to as "CP(M)C" and the Tatas on 3rd May, 1994. According to the said Memorandum, the initial cost of the project was estimated at Rs.3600 crores which was to be funded with a debt of Rs.2400 crores and equity of Rs.1200 crores. Initially, equity capital of Rs.700 crores was to be contributed by WBIDC, CP(M)C and the Tatas in the ratio of 3:3:1 respectively. It was also provided that the Board of the Company would consist of four nominees each of WBIDC, CP(M)C and two from the Tata group. This was followed by a Joint Venture Agreement, hereinafter referred to as "JVA", between the three parties on 20th August, 1994, incorporating the terms which had been agreed upon by the parties. It was decided that both WBIDC and CP(M)C would invest Rs.300 crores each and the Tatas would invest Rs.100 crores, while Rs.500 crores was to be obtained from the public, including Non-Resident Indians and Financial Institutions, towards equity, keeping the debt equity ratio at 2:1. Certain other terms and conditions agreed between the parties were also included in the Agreement, of which one of the specific terms was that in case of disinvestment by WBIDC, the disinvested shares would be offered to CP(M)C. One of the other terms agreed to by the parties is that they would be entitled to seek specific performance of the terms and conditions of the agreement in accordance with the provisions of the Specific Relief Act, 1963, and the agreement would remain in force as long as the parties held the prescribed percentage of shares.

2. After the said agreement was executed, four other letters dated 30th September, 1994, 6th October, 1994 and 5th January, 1995, were exchanged between the parties, whereby it was agreed that between 24 months of commencement of commercial production or within 60 months of the date of the JVA, whichever was later, at least 60% of the shareholding of the WBIDC would be offered to CP(M)C at Rs.14/- per share. It was provided that the role of the Government in the Company would be limited to its promotion and guidance through the initial

phases of the project and that the nominee of CP(M)C would be the Managing Director. In March, 1995, the Articles of Association of the Company were altered to bring it in line with the terms of the JVA. An addendum to the JVA was executed on 30th September, 1996/4th October, 1996, by which the project cost was revised to Rs.5170 crores and the equity participation was revised to Rs.432.857 crores to be provided by WBIDC and by CP(M)C, while Tatas were to provide Rs.144.286 crores. The remaining equity participation of Rs.969 crores was to be from the public.

3. The project started in 1997 and commercial production commenced in August, 2001. Thereafter, further agreements were entered into between the parties and the first of such agreements was entered into on 12th January, 2002, whereby CP(M)C, the Government of West Bengal, WBIDC and HPL, *inter alia*, agreed on a certain course of action in regard to HPL's need of financial and managerial restructuring. The object and exercise of such restructuring was that CP(M)C would acquire a controlling interest of 51% shares in the equity of the Company and would have complete control over the day-to-day affairs of the Company, including the right to appoint key executives. WBIDC also agreed to vote along with CP(M)C on all issues in the shareholders meeting and its nominee would also vote along with the nominee Directors of the CP(M)C. It was specifically agreed that all other rights and obligations of CP(M)C in terms of the earlier agreement would continue till CP(M)C acquired majority shares in the Company.

4. The aforesaid agreement was followed by another agreement dated 8th March, 2002, wherein it was recorded that in terms of the agreement dated 12th January, 2002, 155,099,998 equity shares of WBIDC had been transferred and delivered to CP(I)PL, on 8th March, 2002. It was also mentioned that the said shares were pledged with WBIDC and, accordingly, the shares had been duly lodged along with the share certificates with WBIDC and the pledge had been

acknowledged. Certain other agreements in regard to the shareholding pattern and the management of the Company were entered into, wherein after allotment of shares to Winstar, which had been brought in to infuse Rs.127.4 crores towards equity, the collective shareholding of the Appellants was shown to be 58.62% with a rider that 155 million shares transferred by WBIDC to CP(M)C was subject to registration and lenders' approval. We may have recourse to refer to some of the said agreements at a later stage.

5. One other agreement which is relevant to the facts of this case was entered into between PC and the Government of West Bengal, represented by the Respondent No.8, Shri Sabyasachi Sen, on 14th January, 2005, wherein it was indicated that the Government of West Bengal would sell its entire shareholding in HPL to CP(M)C, and that the price of the shares would be determined by an independent valuer selected by the Government of West Bengal from amongst a panel of firms to be prepared by CP(M)C. It was further declared that the recommendation of the valuer would be binding both on the Government of West Bengal and CP(M)C.

6. In the months of January and February, 2005, HPL had approved the issuance and allotment of equity shares worth Rs.150 crores at par to Indian Oil Corporation (IOC). Objecting to the proposed allotment of shares to IOC and also on the ground that WBIDC and the Government of West Bengal had failed to fulfil their commitment to transfer their balance 36% shares to the Appellants, the Appellants filed Company Petition No.58 of 2009 before the Company Law Board under Sections 397, 398, 399, 402, 403 and 406 of the Companies Act, 1956, inter alia, for the following reliefs :-

"(a) An order be passed directing the company to take immediate steps for modifying and/or altering and/or amending the Articles of Association of the Company to incorporate therein the complete agreement by and between the joint venture

partners and special rights of the petitioner in relation to the Company, as provided in the Agreements dated 20th August, 1994, 12th January, 2002, 8th March 2002 and 30th July, 2004.

(b) Appropriate orders be passed directing the entire shareholding of the respondent No.2 in the Company to be transferred in favour of the petitioner at the agreed price of Rs.14/- per share in respect of such number of shares of HPL registered in the name of Respondent No.2 constituting 60% of the holding of the respondent No.2 in the Company and on such valuation in respect of the balance shares held by Respondent No.2 as this Hon'ble Board may think fit and proper;

(c) Declaration that the resolution passed at the EGM of the Company held on January 14, 2005, is illegal, inoperative, null and void and not binding on the Company or any person connected therewith;

(d) Permanent injunction restraining the respondents whether by themselves or by their servants or agents or assigns or otherwise howsoever from giving any effect or further effect to the resolution passed on the EGM held by the Company on January 14, 2005 in any manner whatsoever;

(e) Permanent injunction restraining the Company from receiving any money or encashing any cheque that may have been issued by the Respondent No.6 to the Company in pursuance of the Memorandum of Association and the resolution passed by the EGM of the Company held on January 14, 2005;

(f) Permanent injunction restraining the Company and its Board of Directors from taking any major decision or policy decision relating to the

management and affairs of the Company before the majority shareholding and management control in the Company is effectively established as per the Agreements dated 12th January, 2002, and 30th July, 2004, including the due recognition of the nominee of petitioner No.2 as Director of the Company pursuant to the letter of Petitioner No.2 dated 1st August, 2005;

(g) Permanent injunction restraining the Company and its present board from dealing with or disposing of or alienating or encumbering any asset or property of the Company except strictly in the course of the business of the Company;

(h) Permanent injunction restraining the Company and its Board of Directors from taking any decision in relation to the management and administration of the Company except with the previous approval of the petitioner;

(i) Permanent injunction restraining the respondents and each of them from in any manner acting in derogation of the petitioner's rights as majority shareholders in the company and the petitioner's right to control the management of the Company, including without limitation by way of sale of shares of the Company held by any of them to any third party except the petitioners;

(j) .....

(k) .....

(l) Direct the reconstitution of the Board of the Company to reflect the majority control and the

special rights accorded under the Agreements between the shareholders to the petitioners;

(m) .....

(n) ....."

Subsequently, on coming to learn that the shares in question had already been allotted to IOC, the Appellants filed an application for amendment of the petition to challenge the allotment in favour of IOC and seeking cancellation thereof.

7. Before the Company Law Board, hereinafter referred to as "the CLB", not only was it reiterated by the Chatterjee Group that PC had to rejuvenate the Company and to implement the project, for which he was recognized as a "promoter" in the Memorandum of Understanding entered into on 3rd May, 1994, but that there was a clear understanding that the Chatterjee Group would have management interest in the Company. Before the CLB it was further contended that the Company was really a quasi-partnership with each of the three groups having financial stakes and management participation. The Chatterjee Group further claimed that the Memorandum of Understanding not only provided for the Appellants to hold 3/7th of the shares of the Company, but also 2/5th of the Directorship therein. WBIDC was also to have a 3/7th share in the Company so that the Company remain as a private company.

8. The Chatterjee Group also reiterated that in the JVA dated 20th August, 1994, the Chatterjee Group had been given a right of pre-emption to acquire the shares of WBIDC if it chose to disinvest its shares. Before the CLB it was also emphasized that at the time of entering into a Memorandum of Understanding on 3rd May, 1994, it had been clearly understood between the parties that the Company would remain in the private sector. Repeating what has been indicated hereinbefore, learned counsel for the Chatterjee Group

submitted before the CLB that in addition to the JVA, 4 letters had been exchanged between the Chatterjee Group and the WBIDC/GoWB providing for the Chatterjee Group to acquire at least 60% of the shares held by WBIDC at Rs.14/- per share upon the happening of certain events within a particular timeframe. Before the CLB the Chatterjee Group also contended that it was understood by the parties that the role of the Government would gradually be confined to promotion and guidance during the initial stages of the project, after which the control of the management would be in the private sector and the nominee of the Chatterjee Group would be the Managing Director of the Company.

9. In support of its contention of mismanagement and oppression by the Company towards the Chatterjee Group, it was alleged that the decision to allot 150 million shares to IOC by WBIDC/GoWB had been taken behind its back with the sole intention of preventing the Chatterjee Group from acquiring the control of the Company's affairs, as was promised and understood at the initial stage when PC agreed to participate in the equity holdings of the Company. One of the major acts of oppression complained of by the Chatterjee Group before the CLB was that despite having received payment in respect of 155 million shares and having transferred the same to the Chatterjee Group, it did not complete the transfer by registering the transfer with the Company and altering its Register of Members accordingly, which effectively deprived the Chatterjee Group of having the promised majority shareholding in the Company. Before the CLB it was further contended that had the said shares been registered in the name of the Chatterjee Group, the total shareholding of the Chatterjee Group would have been 51% which would have given them control of the affairs of the Company. Hence, a prayer had been made before the CLB for a direction upon WBIDC/GoWB to complete the transfer of the 155 million shares in favour of the Chatterjee Group.

10. On behalf of the Chatterjee Group it had also been contended before the CLB that it had agreed to induct IOC as a portfolio investor in the Company at the instance of GoWB. However, subsequently, by its letter dated 20th September, 2004, the Chatterjee Group had indicated that in view of the proposed public offer, there was no further necessity of inducting any portfolio investor, but the investment of Rs.150 crores by IOC could be considered. A resolution was adopted by the Company on 2nd November, 2004, to allot shares to IOC, although the Chatterjee Group was against such allotment. In order to maintain the private character of the Company, the Chatterjee Group called upon WBIDC to sell 60% of its shareholding to the CP(M)C at the agreed price of Rs.14/- per share as recorded in the letter dated 30th September, 1994. It was further submitted before the CLB that upon such demand being made, discussions were held and it was mentioned that the GoWB and WBIDC would give in writing that the entire shareholding of WBIDC in the Company would be sold to the Chatterjee Group. It was, therefore, submitted that pursuant to such discussions and representations that an Agreement was reached on 14th January, 2005, between one Dr. Sabyasachi Sen and PC in the presence of Mr. Tarun Das, wherein they agreed to vote in support of the Resolution to allot 150 million HPL equity shares to IOC at par. The grievance of the Chatterjee Group before the CLB was that inspite of several letters written on behalf of the Chatterjee Group, no steps were taken by the Company to give effect to the Resolution dated 14th January, 2005.

11. Another major grievance of the Chatterjee Group before the CLB was that sometime before 15th July, 2005, doubts regarding IOC's investment in HPL were substantiated when the letter dated 10th November, 2004, written by the WBIDC to IOC was discovered. It was contended before the CLB that by deliberately suppressing the discussions between WBIDC and IOC which would give IOC control over the management of HPL, WBIDC/GoWB wrongly obtained the

consent of the Chatterjee Group to the Resolution of the Extra-Ordinary General Meeting held on 14th January, 2005, to allot shares at par to the Respondent No.6 IOC. The Chatterjee Group also complained that neither GoWB nor WBIDC had ever intended to honour the agreement dated 14th January, 2005, and from the letter dated 10th November, 2004, it was clear that GoWB and WBIDC did not intend to sell the HPL shares held by the WBIDC to the Chatterjee Group.

12. It was also contended before the CLB by the Chatterjee Group that since HPL was not in immediate need of funds, the allotment of shares to IOC was not warranted despite the fact that the Chatterjee Group was ready and willing to complete the share purchase deal at the agreed price of Rs.14/- per share. By virtue of the superior bargaining power of the WBIDC and GoWB, the Chatterjee Group could not enforce their special rights on account of their continuing minority status in the Company, nor could it acquire control of the management thereof.

13. It was also contended that even the Articles of Association had not been modified or altered to reflect the rights which the Chatterjee Group enjoyed and the clandestine arrangement arrived at between the GoWB, WBIDC and IOC undermined the very basis on which the request made by GoWB and WBIDC had been accepted by the Chatterjee Group. Accordingly, the said arrangement was required to be brought to an end for resolving the oppressive acts of the GoWB and the WBIDC.

14. On the basis of the aforesaid allegations, the Chatterjee Group contended before the CLB that the affairs of the Company were being conducted in a manner which was prejudicial to the public interest and oppressive to them. It was further contended that winding-up of the Company would unfairly prejudice the parties but that otherwise the facts would justify the making of a winding-up order on just and equitable grounds.

15. The aforesaid stand taken by the Chatterjee Group was opposed on behalf of the Company on the ground that inspite of having made several promises to infuse equity into the Company, it had failed to do so and in view of severe fund crunch faced by the Company on account of such failure, the Company had no other alternative, but to transfer the shares in question to a party which was willing to do so. In fact, it was the joint contention of GoWB and WBIDC that since the Chatterjee Group had failed to abide by its commitments to infuse equity into the Company and as the affairs of the Company were at a point of collapse, with creditors, particularly the Indian Oil Corporation supplying Naphtha, which was the essential ingredient in the manufacturing process of the Company, demanding their outstanding dues even under the threat of taking appropriate action under the provisions of the Companies Act, 1956, the Company had no option but to transfer the 150 million shares to IOC as per the decision taken earlier.

16. In addition to the above, it was also submitted that the Chatterjee Group had agreed to the decision to induct the IOC in the Company as a portfolio investor.

17. The Company Petition was disposed of by the CLB by upholding the decision of the Company to allot 150 million shares to IOC, which would be at liberty to deal with the same in any manner it thought fit. Similarly, the transfer of 155 million shares by WBIDC to the Chatterjee Group at Rs.10/- per share was confirmed. A further direction was given to GoWB and WBIDC to transfer the 520 million shares held by them in HPL to the Chatterjee Group. The Chatterjee Group was also directed to purchase the 271 million preference shares held by GoWB and WBIDC at par. The CP(I)PL was directed to pay a sum of Rs.125 crores to WBIDC towards balance consideration for the 155 million shares on or before 28th February, 2007. It was further directed that on payment of the said amount, the shares in question would be deemed to have been

dematerialized and transferred in the name of CP(I)PL, without any further deed or act or refusal from anyone or production of any instruction to transfer. Significantly, the Chatterjee Group was also given liberty as soon as they paid the consideration for the 155 million shares, to take control of the day-to-day management of the Company as they would then be holding 51% of the equity shares, with the stipulation that no major decisions would be taken without the approval of the Court. The CLB also came to a definite finding that the 150 million shares allotted to IOC had not been so transferred suddenly or surreptitiously or with any ulterior motive and the allegation of a secret agreement between GoWB and IOC, though of very little significance, has been magnified by the Chatterjee Group in the Company Petition.

18. The Government of West Bengal, through its Joint Secretary in the Department of Commerce and Industry, filed an appeal before the Calcutta High Court against the said order of the CLB dated 31st January, 2007 under Section 10F of the Companies Act, 1956, and the same was numbered as A.P.O.No.45 of 2007. Among the various grounds taken in the Appeal, a question was raised as to whether the CLB could have assumed jurisdiction on the Company Petition filed by Chatterjee Petrochem (Mauritius) Ltd. Co., Winstar India Investment Company Ltd., India Trade (Mauritius) Ltd. and Chatterjee Petrochem (India) Pvt. Ltd., to enforce rights under private contracts. Another ground taken was that the CLB had erred in applying the doctrine of *legitimate expectation* in a Petition under Section 397 read with Sections 398 and 402 of the Companies Act, 1956, and in treating the Company to be a quasi-partnership. As a corollary to the said question, the Government of West Bengal also questioned the jurisdiction of the CLB to convert the Company Petition into a Suit for Specific Performance of Contract. It was also contended that the issues raised in the Company Petition were with regard to the disputes of a contractual nature between shareholders and the non-performance of such contracts between the shareholders could

not be treated to be the "Affairs of the Company". The *locus standi* of the Chatterjee Petrochem (India) Pvt. Ltd. to maintain a petition under Section 398 of the Companies Act was also questioned since on the date of filing of the Petition before the CLB, the said Company was not even a member of the Joint Venture Company. It was also reiterated that no case for mismanagement or oppression had been made out and the application under Section 398 of the above Act was liable to be dismissed.

19. Upon hearing the parties, the learned Single Judge held that CP(I)PL had no *locus standi* to maintain a petition under Section 397 of the Companies Act and that CLB could not have assumed jurisdiction on the Company Petition, in which CP(I)PL was a petitioner, since CP(I)PL was not a member of HPL. The learned Single Judge held that such a petition for the purpose of enforcing rights under private contracts would not be maintainable and that the agreement entered into between CP(I)PL and WBIDC for transfer of shares, being a private contract between two shareholders, the same could not be the subject matter of a petition under Section 397 of the Companies Act, 1956. The learned Single Judge also observed that such agreements could not be treated to be "affairs of the Company" and that, in any event, such a ground had not also been pleaded in the Company Petition. The learned Judge held that the order of the CLB, which was based entirely on the question of transfer of the 155 million shares by WBIDC to CP(I)PL, stood vitiated by such jurisdictional error.

20. The learned Single Judge also held that the CLB was not justified in applying the concept of quasi-partnership, which had been urged on behalf of the Chatterjee Group, to HPL. According to the learned Single Judge, the question as to why a Limited Company should be considered to be a quasi-partnership, would have to be decided on the facts of each case. While, on the one hand, it would be easy to apply the said concept to a closely-held Family Company or a Private Limited

Company, as in cases where a partnership is converted into a Company, such an assumption could not be arrived at merely on the ground that the promoters of the Company described themselves as partners.

21. The learned Single Judge further held that from the entire pleadings in the Company Petition no case whatsoever had been made out that in conducting the affairs of HPL, the GoWB and WBIDC had oppressed the Petitioners in any way so as to attract the provisions of Section 397 of the Companies Act. The learned Single Judge also held that the CLB was not right in applying the doctrine of legitimate expectation to the agreement entered into between WBIDC and CP(I)PL on 8th March, 2002, thereby converting the Company Petition into a suit for specific performance of contract. The learned Judge observed that by granting relief in the name of the doctrine of legitimate expectation, the CLB has actually enforced specific performance of the contract and agreements, which was beyond its jurisdiction.

22. Lastly, on the question of the induction of IOC and the allotment of 155 million shares to the said Company, the learned Single Judge held that the induction of IOC was on the basis of the Debt Restructuring Package and the Refinancing Scheme, which were to the advantage of HPL, and had been decided from time to time at the Board meetings of the Directors, which had been presided over by PC. On the basis of his aforesaid findings, the learned Single Judge, relying on the decision of this Court in *Shanti Prasad Jain Vs. Kalinga Tubes Ltd.* [(1965) 2 SCR 720], held that an order granting relief under Section 397 could be made only after affirming and recording an opinion on each of the three conditions mentioned in Section 397(2)(a) and (b) of the Companies Act, 1956. The learned Single Judge held that in the instant case, no such opinion had either been formed or recorded by the CLB relating to the said three conditions. The learned Single Judge also rejected the submissions made on behalf of the Petitioners that an opinion with regard to the said two conditions would

automatically follow from the opinion formed by the CLB on oppression, or such opinion could be gathered from the order of the Board itself. The learned Single Judge, accordingly, held that the order passed by the CLB was contrary to the provisions of Section 402(e) of the above Act, since no relief under the said Section could be granted without a finding having been arrived at that a case of oppression had been made out within the meaning of Section 397 of the aforesaid Act.

23. Appearing for the Chatterjee Group, Mr. Fali S. Nariman, learned Senior Advocate, did not seriously oppose the contention that the prayers in the Company Petition were really for specific performance of the various agreements entered into by the parties, but that the same were on account of the acts of oppression and mismanagement on the part of GoWB, HPL and WBIDC with regard to the non-registration of the 155 million shares which had already been transferred by WBIDC in favour of the Chatterjee Group. Mr. Nariman urged that although the said shares had been transferred in favour of the Chatterjee Group and although the price in respect thereof had been duly received by HPL, the Company had not registered the said 155 million shares with the Company in the name of CP(I)PL and the transfer of the said shares was also not reflected in its Register of Members. Mr. Nariman contended that by not registering the 155 million shares in the name of the Chatterjee Group, which deprived the Chatterjee Group of being the majority shareholder, and, at the same time, allotting 150 million shares to IOC, the acts of the Company reduced the Chatterjee Group from a majority shareholder to a minority shareholder, which amounted to oppressive treatment by the Company.

24. Mr. Nariman submitted that at the time of entry of the Chatterjee Group through the CP(M)C in 1994, the total issued share capital of HPL was 1010 million shares of Rs.10/- each and the shareholding pattern was as under :-

CP(M)C	-	433 million shares
WBIDC	-	433 million shares
Tatas	-	144 million shares

25. However, on 28th September, 2001, at the Board Meeting of HPL, a Resolution was taken to offer a Rights Issue to the existing shareholders so that a further sum of Rs.223 crores could be infused in HPL in the ratio of 107:107:36. Although, the other shareholders subscribed to the Rights Issue, the Chatterjee Group did not on the ground that such equity could be infused once the financial restructuring of HPL had been completed. Accordingly, on 8th March, 2002, the shareholding pattern as per the Register of Members in the share capital of 1153 million shares was :

CP(M)C	-	433 million shares = 37.56%
WBIDC	-	540 million shares = 46.83%
Tatas	-	180 million shares = 15.61%

26. Mr. Nariman submitted that in the Agreement dated 30th July, 2004, which was supplemental to the Agreement dated 12th January, 2002, executed by the GoWB, WBIDC, CP(M)C and HPL, it was specifically mentioned that GoWB had caused WBIDC to transfer to CP(I)PL, an affiliate of CP(M)C, shares worth Rs.155 crores and that CP(I)PL had become the beneficial owner thereof. However, the registration of the said shares in the books of HPL was kept pending till approval was obtained from the Lenders, being the Banks and Financial Institutions. Mr. Nariman submitted that as a result, despite the transfer by WBIDC of 155 million shares in favour of CP(I)PL, WBIDC continued to be shown as owner thereof in the Share Register of the Company. Mr. Nariman submitted that once clearance had been obtained from the Lenders, WBIDC could no longer refuse to register the said 155 million shares in the name of CP(I)PL, which was an integral part of the Chatterjee

Group.

27. Mr. Nariman submitted that the number of shares transferred by WBIDC to CP(I)PL comprised 13.44% of the total number of shares amounting to 1153 shares, which meant that along with the 36.56% of the shares held by the Chatterjee Group, the total worked out to 51% and gave the Chatterjee Group the management control of HPL and reduced the shareholding of WBIDC from 46.83% to 36.9%.

28. Mr. Nariman submitted that on the same day on which the Supplemental Agreement had been signed, a Share Subscription Agreement was executed by HPL, CP(M)C, WBIDC and WINSTAR which, *inter alia*, referred to the agreement entered into by GoWB, WBIDC, CP(M)C and HPL on 12th January, 2002 and that WBIDC, CP(M)C and CP(I)PL had entered into an Agreement on 8th March, 2002, relating to the transfer of shares in the Company at Rs.10/- per share and pursuant to that agreement, CP(M)C came to be in management control of the Company.

29. Mr. Nariman urged that by signing the Share Subscription Agreement dated 30th July, 2004, WBIDC and HPL had acknowledged the fact that pursuant to the Agreements of 12th January, 2002 and 8th March, 2002, 155,099,998 shares had gone out of the holding of WBIDC and were held by CP(I)PL, a part of the Chatterjee Group. However, in the Company Petition filed before the CLB, WBIDC and GoWB denied the same and ascertained that the 155 million shares continued to be part of the holding of the WBIDC and a further stand was taken that at no point of time had the Chatterjee Group held the majority shares in HPL. In addition to the above, by transferring 150 million shares to IOC, the WBIDC/GoWB had reduced the Chatterjee Group from a majority to a minority, which clearly amounted to oppressive treatment by the Company.

30. Mr. Nariman contended that on account of the various

defaults committed by the Chatterjee Group in failing to infuse equity into HPL, in breach of the Agreement dated 12th January, 2002, WBIDC and the GoWB were absolved of the application to register the 155 million shares in favour of CP(I)PL. It was pointed out that under the aforesaid Agreement, CP(M)C had agreed to infuse Rs.107 crores into HPL, of which Rs.53.5 crores was to be paid within 5 working days of signing of the Agreement, which was executed on 25th January, 2002. Taking into account the aforesaid sum, CP(M)C was required to arrange for a minimum amount of Rs.500 cores, either as equity or equity-like instruments and/or advance from outside sources, including strategic partners. The CP(M)C also agreed to organize Letters of Comfort to be issued within 30 days of signing of the Agreement for the purpose of overall debt restructuring of HPL which was concluded by 31st March, 2002. There was a further stipulation that the balance of Rs.53.5 crores, out of the sum of Rs.107 crores, was to be inducted by CP(M)C within 5 days of the acceptance of the Letters of Comfort.

31. Mr. Nariman further contended that the assurance given in Clause 5 of the Agreement, which assured CP(M)C 51% of the total paid-up equity of HPL, was not conditional to the infusion of equity worth Rs.500 crores by the Chatterjee Group. Such assurance was subject to compliance with the requirements of providing Letters of Comfort and acceptance thereof by the GoWB and upon payment of Rs.53.5 crores as stipulated. Mr. Nariman urged that since the said conditions had been fulfilled by the Chatterjee Group, it was incumbent upon GoWB and WBIDC to transfer the 155 million shares to CP(M)C which was the beneficial owner thereof. It was submitted that the failure of WBIDC to effect such registration and at the same time, registering 150 million shares in favour of IOC, thereby reducing the Chatterjee Group to a minority shareholder, was a positive act of oppression on the part of the majority shareholder, which was sufficient to attract the provisions of Sections 397 and 398 read with Section 402 of

the Companies Act, 1956. Mr. Nariman urged that even if the allotment of 150 million shares to IOC was not taken into consideration, the continuous refusal on the part of the Company to register the 155 million shares in the name of CP(I)PL, not only amounted to breach of the agreement dated 12th January, 2002, by which WBIDC and GoWB had agreed to ensure that the Chatterjee Group would remain in majority, but that the same also attracted the provisions of Section 397 of the Companies Act. Mr. Nariman submitted that the said promise contained in the Agreement dated 12th January, 2002, formed the very basis on which PC had brought equity worth Rs.257 crores into HPL, but for which the Company would not have been able to restructure its debts. Learned counsel submitted that for WBIDC and GoWB to contend that the induction of the Chatterjee Group on an understanding that it would always have a majority control over the Company's management, was simply an agreement between two shareholders and not an affair of the Company, was not acceptable. Mr. Nariman urged that the refusal of the WBIDC to register the 155 million shares transferred to the CP(I)PL affected the shareholding pattern of the Company and was, therefore, directly an affair of the Company, which fact had been duly recognized by the CLB. Mr. Nariman submitted that it is on account of the various assurances given by WBIDC and the GoWB that the Chatterjee Group had become the owner of the 155 million shares, that it had been the consistent stand of the Chatterjee Group that they were the majority shareholders of the Company.

32. Relying on the decision of this Court in *Needle Industries (India) Ltd. & Ors. Vs. Needle Industries Newey (India) Holding Ltd. & Ors.* [(1981) 3 SCC 333], Mr. Nariman submitted that in determining a question of oppression under Section 397 of the Companies Act, the Company Law Board was entitled to take into account facts which had come into existence after the company petition had been filed. Learned counsel gave several instances where despite having given

assurances that the shares in question would stand transferred in favour of CP(I)PL, the GoWB and WBIDC had failed to complete the transfer on one ground or the other, despite stating that the GoWB stood committed to the transfer of the shares to the Chatterjee Group as per the Agreements dated 12th January, 2002, 8th March, 2002 and 30th July, 2004.

33. Mr. Nariman submitted that the clandestine manner in which WBIDC had transferred 150 million shares in favour of IOC was in complete breach of the agreement between WBIDC and PC that the Chatterjee Group would remain the majority shareholder and would also have the control and management over the company's affairs. Mr. Nariman submitted that had it been brought to the knowledge of the Chatterjee Group that such a secret agreement to transfer 150 million shares to IOC was being negotiated, it would have never voted at the Extraordinary General Meeting of the Company on 14th January, 2005, in support of the allotment of the said shares to IOC.

34. Although, Mr. Nariman had made certain submissions with regard to the Agreement of 8th March, 2002, read with the requirements of the Depositories Act, 1996, SEBI (Depositories and Participants) Regulations, 1996 and the bye-laws and business rules/operating instructions issued by the depositories, we shall, if need be, refer to the same at a later stage of the proceedings.

35. Mr. Nariman submitted that the concept of oppression for the purposes of Sections 397, 398 and 402 of the Companies Act had been considered by this Court in various cases. Learned counsel pointed out that in the *Needle Industries* case (supra), this Court had observed that the behaviour and conduct complained of must be held to be harsh and wrongful and in arriving at such a finding, the Court has to look at the business realities of the situation and not confine itself to a narrow legalistic view and allow technical pleas to defeat the beneficial provisions of the Section. Mr. Nariman

submitted that when the Company was in substance, though not in law, a partnership, there had to be utmost good faith between the members. Mr. Nariman submitted that this Court had gone even further to indicate that even if no oppression was made out in a Petition under Section 397 of the Companies Act, the Court is not powerless to do substantial justice between the parties.

36. Learned counsel submitted that Company law had developed seamlessly from the law of partnership which is based on mutual trust and confidence, as was observed by the House of Lords in *O'Neill Vs. Phillips* [(1999)2 All ER 961], and in such a situation, the highest standards of honour had to be maintained. It was also submitted that the aforesaid decision of the House of Lords which was based on the earlier decision in *Blisset Vs. Daniel* [68 E.R. 1022], was subsequently reiterated by the House of Lords in *Ebrahimi Vs. Westbourne Galleries* [(1972) 2 All ER 492] and also by this Court in the *Needle Industries* case (supra). Mr. Nariman urged that in *Dale & Carrington Invt. P. Ltd. Vs. P.K. Prathapan* [(2005) 1 SCC 217], this Court had held that if a Member who holds the majority of shares in a Company is reduced to the position of a minority shareholder by an act of the Company or by its Board of Directors, the said act must ordinarily be considered to be an act of oppression to such Member.

37. Reference was also made to the decision of this Court in *Rajahmundry Electric Supply Corporation Ltd. Vs. A. Nageswara Rao & Ors.* [(1955) 2 SCR 1066], wherein, Venkatarama Ayyar, J., as His Lordship then was, while referring to an equitable and just principle, held that when the said doctrine specifying the ground of winding-up by the Court is not to be construed as *ejusdem generis* then whether mismanagement of Directors is a ground for passing of a winding up order under the Indian Companies Act, 1913, becomes a question to be decided on the facts of each case. Mr. Nariman pointed out that in the aforesaid judgment, the

learned Judge had referred to the decision in *Loch Vs. John Blackwood Ld.* [(1924) AC 783], in which an order for winding-up of the Company was ordered on the ground of mismanagement by the Directors and the law was stated as follows :-

> "It is undoubtedly true that at the foundation of applications for winding up, on the 'just and equitable' rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. ……"

38. Mr. Nariman submitted that following the aforesaid principle, this Court had in *M.S.D.C. Radharamanan Vs. M.S.D. Chandrasekara Raja & Anr.* [(2008) 6 SCC 750], observed that once the Company Law Board gave a finding that acts of oppression have been established, an order in terms of Sections 397 and 402 on the doctrine of winding-up of the company on just and equitable grounds, becomes automatic. Accordingly, the interference by the learned Single Judge with the order of the CLB was wholly unwarranted.

39. Appearing for Winstar India Investment Company Ltd., Mr. Sudipto Sarkar, learned Senior Advocate, while adopting the submissions made by Mr. Nariman, emphasized Mr. Nariman's submissions on quasi partnership. In the said context, he submitted that in dealing with a petition under Section 397/398 of the Companies Act the Court has to consider business realities, instead of confining itself to a narrow legalistic view. Learned counsel argued that in the *Needle Industries* case (supra), this Court, *inter alia*, observed that technical pleas should not be allowed to defeat the beneficent provisions of Section 397/398 of the Companies Act. Mr. Sarkar submitted that the said principle had been subsequently followed by this Court in (i) *Sangramsinh P. Gaekwad & Ors. Vs. Shantadevi P. Gaekwad (Dead) through*

LRs. & Ors. [(2005) 11 SCC 314]; (ii) *Kamal Kumar Dutta & Anr. Vs. Ruby General Hospital Ltd. & Ors.* [(2006) 7 SCC 613]; (iii) *M.S.D.C. Radharamanan's* case (supra). Mr. Sarkar submitted that in *Sangramsinh P. Gaekwad's* case (supra) this Court had observed that the jurisdiction of the Court to grant appropriate relief under Section 397 of the Companies Act is of wide amplitude and while exercising its discretion, the Court was not bound by the terms contained in Section 402 of the said Act, if in a particular fact situation a further relief or reliefs was warranted. Furthermore, in a given case, even if the Court came to a conclusion that no case of oppression had been made out, it could still grant such relief so as to do substantial justice to the parties.

40. Mr. Sarkar submitted that a Joint Venture Agreement, in fact, contemplates a partnership, as was indicated by this Court in *New Horizons Ltd. & Anr. Vs. Union of India & Ors.* [(1995) 1 SCC 478], where the expression "Joint Venture" was examined. It was noted that the said expression connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. Mr. Sarkar submitted that the terms and conditions of the Joint Venture Agreement in the instant case satisfies all the requisites of a partnership, which made it evident that the Joint Venture Company was nothing but a quasi-partnership as per the tests laid down by the House of Lords in *Ebrahimi Vs. Westbourne Galleries Ltd & Ors.* [(1972) 2 All ER 492], followed in *Needle Industries* case (supra). Mr. Sarkar submitted that in *Ebrahimi's* case, Lord Wilberforce writing the main judgment indicated that the reliefs prayed for were for a direction upon the Respondent No.2 and his son to purchase the appellant's share in the company. In the alternative, an order for winding up of the company was sought. The learned Judge found that some of the allegations made remained unproved and that the complaint made did not amount to such a course

of oppressive conduct as to justify an order under Section 210 of the Companies Act, 1948, in furtherance of the first relief.

41. Mr. Sarkar then proceeded to the question of legitimate expectation and contended that in Company Law there was sufficient room for recognition of the fact that there could be individuals with rights, expectations and obligations which may submerge in the corporate structure. In this regard, Mr. Sarkar submitted that the said doctrine of an enforceable expectation was considered in *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14, approved in *O'Neill's* case (supra). Several other decisions in this regard were cited by Mr. Sarkar which do not require elaboration.

42. Mr. Sarkar submitted that when joining the Company in 2004, Winstar had a legitimate expectation arising from the Subscription Agreement dated 30th July, 2004, which indicated that the Chatterjee Group was in management and control of the affairs of HPL and that the Company would also have its private auditors and had it not been for the recitals in the Subscription Agreement, Winstar may not have invested funds in HPL at all. Mr. Sarkar submitted that the conclusion was inescapable that even if no case of oppression had been made out in the Company Petition filed by the Chatterjee Group, relief under Section 397/398 could still be granted under Sections 397 and 398, if it was just and equitable to do so. Referring and placing reliance on a decision of this Court in *V.S. Krishnan & Ors. Vs. Westfort Hi-Tech Hospital Ltd. & Ors.* [(2008) 3 SCC 363], Mr. Sarkar urged that once the conduct of the management was found to be oppressive under Sections 397 and 398 of the Companies Act, the discretionary power given to the CLB under Section 402 of the Companies Act to put an end to such oppression was very wide. Mr. Sarkar urged that the expression "legitimate expectation" had found its place in Indian Jurisprudence and has been considered by this Court in *Needle Industries* case (supra), which was followed in *V.S. Krishnan's* case (supra) and several other cases. The

Agreement of WBIDC to transfer its entire shareholding to the Chatterjee Group gave rise to an expectation that such an expectation would be fulfilled. Mr. Sarkar contended that since WBIDC did not fulfil its reciprocal promise to sell its entire shareholding in HPL to CP(M)C, it was not open to either WBIDC or GoWB to contend that the direction given by the CLB upholding the allotment of 150 million shares to IOC and directing WBIDC/GoWB to transfer its entire shareholding to the Chatterjee Group was contrary to law or without jurisdiction or erroneous.

43. Mr. Sarkar submitted that having transferred 155 million shares in favour of the CP(I)PL it was not open to the GoWB and WBIDC to refuse to register the same, despite having received the entire price for the same. Mr. Sarkar also reiterated that it is such a promise which had been incorporated in the agreements dated 12th January, 2002 and 8th March, 2002 as also 30th July, 2004, that had weighed with Winstar to invest Rs.147 crores in the Company. Accordingly, even if it was held that no case of oppression had been made out against the Company, it would still be open to the learned Company Judge to grant suitable relief to iron out the differences that might appear from time to time in the running of the affairs of a Company.

44. While considering the submissions made on behalf of the Chatterjee Group, we might as well refer to the arguments advanced by Dr. Abhishek Manu Singhvi, learned Senior Advocate, appearing for the India Trade (Mauritius) Ltd. (ITML), which is part of the Chatterjee Group and was the co-Petitioner No.3 in Company Petition No.58 of 2005 filed by the Chatterjee Group before the Company Law Board. ITML is also the Appellant in Civil Appeal No.5437-5440 of 2008. Incidentally, Dr. Singhvi also appeared for Dr. Purnendu Chatterjee, who was made Respondent No.20 therein.

45. Dr. Singhvi contended that ITML had infused a sum of Rs.107 crores into HPL, which amount, along with Rs.143

crores separately infused in HPL by the Chatterjee Group of Companies, was vitally necessary for the financial health of HPL and its revival and prosperity. Dr. Singhvi submitted that such investments had been made, without any written agreement or commitment, on the clear understanding and expectation that it would be a partnership and a commercial enterprise where the Chatterjee Group would have a controlling interest and HPL would, therefore, be a non-government company. Dr. Singhvi submitted that the subsequent conduct of GoWB, IOC, Lenders, Chairman and Managing Director of HPL had resulted in grave irreversible damage to ITML, involving breach of fiduciary and corporate obligations which was clearly oppressive and was sufficient ground for interference by the CLB in the proceedings initiated by the Appellants under Sections 397 and 398 read with Section 402 of the Companies Act, 1956.

46. Dr. Singhvi submitted that despite the attempts of GoWB and WBIDC to make an issue of the non-infusion of Rs.107 crores by the Chatterjee Group, at no point of time had the Chatterjee Group refused to invest the amount in HPL, though on certain conditions. Referring to Dr. Chatterjee's letter dated 4th December, 2001, Dr. Singhvi pointed out that in the said letter it had been clearly indicated that CP(M)C was prepared to bring equity into the company in the context of a comprehensive restructuring of HPL's balance sheet and management control in line with the original promise made to the Chatterjee Group for management control of HPL. A suggestion was also made to avail of the corporate debt structuring available under established Reserve Bank of India procedure. Dr. Singhvi submitted that the entire sum of Rs.107 crores which CP(M)C had agreed to invest had, in fact, been infused by the Chatterjee Group, though not by subscribing to the Rights Issue, but by arranging loans for the entire amount. Dr. Singhvi contended that the entire loan amount which had been arranged by the Chatterjee Group was also repaid by it without any liability to the Company. Even the interest accrued

on the loan of Rs.107 crores from 12th June, 2002, till the date of repayment, was discharged by the Chatterjee Group in full, which was duly acknowledged by HPL. Dr. Singhvi submitted that subsequently a further sum of Rs.53.5 crores was made available to HPL through HSBC on the understanding that the interest accrued on the loan, starting from the date of disbursement of the loan until its conversion, would be borne by CP(M)C.

47. Dr. Singhvi urged that Dr. Chatterjee had been invited and had come into the project as an equal co-owner, unlike the other private investors who were neither promised nor given equal partnership. As per the Agreement between GoWB and WBIDC, the character of HPL was always intended to remain a private non-Government Company by projecting a shareholding ratio of 3:1:1 where four out of the seven parts would be held by Dr. Chatterjee and the Tatas.

48. Reiterating all that had been said on behalf of the Chatterjee Group by Mr. Nariman and Mr. Sudipto Sarkar, Dr. Singhvi submitted that the induction of IOC into the Company was contrary to the wishes of the Chatterjee Group since by not registering the 155 million shares in favour of the Chatterjee Group and on the other hand allotting 150 million shares to IOC, an imbalance was created which led to HPL becoming a Section 619-B Company under the Companies Act, 1956, thereby losing its private character. Dr. Singhvi submitted that it had been understood by GoWB, WBIDC and the Chatterjee Group, that IOC would be brought in not as a strategic partner but as a portfolio investor, but ultimately negotiations were commenced by GoWB and WBIDC to bring in IOC as a strategic partner with management control, although such a proposal had earlier been categorically turned down by GoWB on 2nd July, 2002.

49. Dr. Singhvi submitted that the observations contained in the impugned judgment of the High Court that Dr. Chatterjee was not in a position to complete the deal and was trying to

delay matters by asking for transfer of the said 155 million shares to the Chatterjee Group and the IOC's unconditional withdrawal from HPL, as a condition precedent for completion of the deal, was without any foundation, since from the records it would be clear that on 22nd July, 2005, GoWB had indicated that it wanted to conclude the transaction by 25th July, 2005. As a matter of fact, by his letter of 25th July, 2005, Dr. Chatterjee had indicated his willingness to conclude the transaction and provided a letter from the Deutsche Bank, also dated 25th July, 2005, indicating the availability of funds to the tune of 266 million US dollars to conclude the transaction.

50. Dr. Singhvi submitted that it was GoWB and WBIDC which had fraudulently omitted to disclose the secret arrangement for the induction of IOC into HPL as a strategic partner in the Explanatory Statement to the notice for the Extraordinary General Meeting issued on 21st December, 2004. Dr. Singhvi urged that there was no need to induct IOC for effectuating the debt restructuring process, since HPL had also taken steps for IPO of 300 million shares which would have fetched at least Rs.540 crores based on the indicated price of Rs.18/- per share. Dr. Singhvi submitted that Dr. Chatterjee objected to the allotment of shares to the IOC as that would immediately convert the Company into a Section 619-B Company since 155 million shares transferred by WBIDC in favour of the Chatterjee Group was yet to be registered.

51. Dr. Singhvi submitted that the allegation made against Dr. Chatterjee that he had moved in a calculated manner to obtain majority control of the Company and to oppose the allotment of 150 million shares to IOC, was without any foundation, since 155 million shares had already been transferred to the Chatterjee Group and the same was a concluded contract. Furthermore, when GoWB made a commitment to sell to the CP(M)C all the HPL shares held by WBIDC, there was no reason for Dr. Chatterjee to oppose the induction of IOC as a portfolio investor. All that Dr. Chatterjee

wanted was that GoWB and WBIDC should effect registration of the 155 million shares already transferred and for which the price had already been paid. Dr. Singhvi submitted that the observation made by the learned Single Judge was wholly misconceived since the GoWB and WBIDC had in the Agreements dated 12th January, 2002 and 8th March, 2002, already acknowledged that on account of the transfer of the said 155 million shares, the Chatterjee Group was in management and control of HPL. The further finding of the learned Single Judge that IOC had threatened civil and criminal action against HPL and its Directors for its unpaid dues for supply of Naphtha, was also not justified, since Dr. Chatterjee had strongly supported the refinancing package which had been approved by the Board of HPL. Dr. Singhvi submitted that Dr. Chatterjee and the Chatterjee Group had always wanted to act in the interest of the Company upon the assurance given by GoWB and WBIDC that HPL would always remain a private company and that the Chatterjee Group would always have control over the management thereof.

52. Dr. Singhvi then submitted that HPL had played an active role by supporting GoWB and WBIDC in the ongoing litigation, contrary to the understanding in terms of the Agreement dated 12th January, 2002 and the Share Subscription Agreement dated 30th July, 2004, which contemplated that the Chatterjee Group was to be in management of the Company. By allowing the transfer of 150 million shares to IOC and by not registering the 155 million shares transferred to the Chatterjee Group by WBDIC, the Company had created a situation in which the Chatterjee Group, which was admitted to be in control of the Company, was reduced to a minority. Dr. Singhvi pointed out that the direct consequence of the aforesaid acts of GoWB and WBIDC resulted in decline of profit before tax in 2007-08 and 2008-09, thereby adversely affecting the interest of the Company and the shareholders.

53. Dr. Singhvi submitted that the part played by Mr. Tarun

Das, the Chairman of HPL, was also partisan and was contrary to the interest of the Chatterjee Group which, it had been agreed, was to be in management and control of the Company and its affairs. Reiterating the submissions made by Mr. Nariman, Dr. Singhvi submitted that the secret and clandestine move to convert HPL into a 619-B Company by the arrangement entered into between WBIDC and IOC went against the very grain of the agreements entered into between the Chatterjee Group and WBIDC/GoWB in that regard.

54. Dr. Singhvi submitted that in the entire exercise, Mr. Tarun Das, the Respondent No.7, who was also the Chairman of the Company, had precipitated the allotment of 150 million shares to IOC, although, the Re-financing Package approved by IDBI on 27th May, 2005, and by the Board of HPL on 28th May, 2005, did not contemplate allotment of shares to IOC. Mr. Tarun Das had on his personal initiatives obtained and circulated an opinion from a senior counsel relating to the issue of shares to IOC and even the same had not been circulated to the Members of the Board in full, and they were deliberately kept in the dark in respect of certain portions of the opinion. Dr. Singhvi pointed out that under Section 289 of the Act the full opinion was required to be circulated to the Members of the Board and in the absence thereof, the opinion could not be relied upon. Dr. Singhvi repeated his earlier charge that GoWB/WBIDC had acted with the sole intention of reducing the Chatterjee Group from a majority shareholder in HPL to a minority, which was sufficient ground for an application under Sections 397, 398 and 402 of the Companies Act, 1956.

55. Dr. Singhvi contended that despite having acknowledged the Chatterjee Group as a prime sponsor of HPL and that the CDR Package and the Re-financing Package of HPL had been considered because of Dr. Chatterjee, the Lenders sacrificed their own interest by permitting the Chatterjee Group to be ousted from the management of HPL after the complaint was filed before the Company Law Board by the Chatterjee Group.

56. Dr. Singhvi submitted that the appointment of Mr. S.K. Bhowmick as Managing Director of the Company, after being appointed as the Additional Director as there was no vacancy on the Board and his appointment as Managing Director, was wholly illegal since only a Director could be appointed to the said post. Dr. Singhvi submitted that the Company played a dubious role in disallowing the claim of Winstar to have a Director on the Board of HPL on the ground that there was no vacancy, although, a vacancy had arisen on the resignation of Mr. Ratan Tata, which vacancy was utilized for regularization of the irregular appointment of Mr. Bhowmick and his subsequent re-appointment in view of the Agreements entered into on 12th January, 2002 and 30th July, 2004, which provide that CP(M)C is to be in management and control and the Managing Director is to be nominated and appointed by the Chatterjee Group. Dr. Singhvi submitted that the aforesaid acts were sufficient to indicate the manner in which the Company and the majority shareholders had acted against the interest of HPL in general, and had by their acts of oppression and mismanagement, seriously affected the entire scheme on the basis whereof the Chatterjee Group had agreed to invest large amounts in HPL.

57. Learned Senior Advocate, Mr. Ashok Desai, appearing for Haldia Petrochemicals Ltd., the Respondent No.1 in all the appeals, repeated and reiterated the submissions made on behalf of the appellants regarding the manner in which the GoWB conceptualised HPL as a showcase project of the GoWB on its coming into existence. Mr. Desai submitted that apart from equity, for the purpose of starting the project HPL had planned to avail credit from financial institutions and banks to the extent of Rs.2,400 crores. The project involved a total investment of Rs.3,600 crores. Mr. Desai submitted that this in itself would indicate that the principle of quasi-partnership, as urged both by Mr. Nariman and Mr. Sarkar, could not apply to the Company, both at the time when it was conceived and during the subsequent period when the shareholdings of the parties changed periodically. Mr. Desai submitted that, in any

event, HPL is today recognized as a deemed Government Company under Section 619-B of the Companies Act, 1956 and steps have been taken by the Comptroller and Auditor General of India under Section 619(2). However, since its incorporation in 1985, HPL was and continues to remain a Board-managed Company with 16 Directors on its Board with equal representation of the two major promoters, namely, GOWB and the Chatterjee Group having 4 Directors each, 5 Nominee Directors, 2 independent Directors and 1 Managing Director.

58. Mr. Desai submitted that although on behalf of the appellant it was contended that allotment of shares to IOC was highly improper and oppressive, such a course of action had to be resorted to since not only was HPL suffering from severe financial crunch, but that Naphtha, which is the main raw material for production of Polymer and Chemicals, was being supplied by IOC, which has its refinery by the side of the HPL plant at Haldia. Mr. Desai submitted that IOC, therefore, had a strong, commercial and symbiotic relationship with HPL which had developed over the years and HPL had also started procuring Naphtha on credit basis and the dues on such account had also multiplied. It was, therefore, in the interest of HPL that when the Chatterjee Group failed to infuse equity into the Company, 150 million shares were allotted to IOC for providing such equity.

59. Mr. Desai submitted that the case of the Appellants could be summarised into a few specific issues, namely,

(a) that the Chatterjee Group had all along acted on the basis of the promise which had been held out by GoWB, WBIDC and the Company that the Company would always remain a private Company in which the Chatterjee Group would have managerial control and that it was towards that end that 155 million shares were transferred by WBIDC

to the Chatterjee Group, though, ultimately it went back on its word and refused to register the same;

(b) GoWB, WBIDC and HPL beguiled the Chatterjee Group into agreeing to the transfer of 150 million shares to IOC by entering into agreements in which it was admitted that upon transfer of the 155 million shares to the Chatterjee Group its shareholding was 51% and that the Chatterjee Group was in management and control of the affairs of the Company;

(c) even if the ingredients of Sections 397 and 398 of the Companies Act were not proved during the hearing of the Company Petition, the Company Law Board had ample jurisdiction to pass appropriate orders for the benefit of and in the interest of the Company, under Section 402 thereof.

60. Mr. Desai submitted that all the aforesaid submissions made were misconceived and that in order to file a complaint under Section 397 of the above Act, the complainant had to be a *Member* (emphasis supplied) of the Company, having the requisite standing under Section 399 of the Act. It was also urged that the conduct complained of had to be such as to be oppressive to the complainant/complainants as shareholders/ members. Inasmuch as, CP(I)PL was not a member of HPL, it could not have filed and maintained the complaint under Section 397 before the Company Law Board. Mr. Desai submitted that it was no doubt true that upon transfer of the shares, the transferee became the beneficial owner thereof, but till the shares were registered in the Company's Share Register and subsequently, in the records of the Registrar of Companies, the transferee did not acquire the right to vote at a meeting of the Company on the basis of acquisition of the said shares. Mr. Desai submitted that for all practical purposes the transferor remained in control of the transferred shares and also enjoyed the right to vote on the strength thereof. The failure

of the transferor to have the shares registered with the Company, did not amount to an act of oppression of the Company, but was an area of dispute between the transferor and the transferee and it could not be said that the inaction of the transferor amounted to oppression within the meaning of Section 397 of the Companies Act. Mr. Desai also submitted that the oppression complained of should be such as would lead to a conclusion that it would be just and equitable to wind up the Company under Section 433(f) of the above Act.

61. Referring to the decision of this Court in *Shanti Prasad Jain's* case (supra), Mr. Desai submitted that in the said decision it had been emphasized that the oppression complained of had to be shown as having been brought about by a majority of members exercising a predominant voting power in the conduct of the Company's affairs and must relate to the manner in which the affairs of the Company were being conducted. Such conduct must also be shown as being oppressive to a minority of the members in relation to the shareholding in the Company. It was also emphasized that although, the facts disclosed might appear to furnish grounds for the making of a winding up order under the "just and equitable" principle, such facts must be relevant in disclosing that the winding up order would unfairly prejudice the minority members in relation to the shareholders. Referring to the use of the expression "legitimate expectation" by Lord Justice Hoffmann sitting in the Court of Appeal, in the decision rendered in *Ebrahimi's* case (supra), Mr. Desai submitted that subsequently in the case of *Saul D Harrison & Sons Plc* (1995) 1 BCLC 14, after referring to the decision in *Ebrahimi's* case (supra), Lord Justice Hoffmann held that such an expression had been borrowed from public law to describe the correlative right in the shareholder to which such a relationship might give rise.

62. Mr. Desai also urged that the decision in *Kalinga Tubes Ltd.'s* case (supra) was also relied upon by this Court

in the *Needle Industries* case (supra), wherein it was held that on a true construction of Section 397, an unwise, inefficient or careless conduct of a Director in the performance of his duties cannot give rise to a claim for relief under that Section. The person complaining of oppression must show that he has been constrained to submit to a conduct which lacks in probity, conduct which is unfair to him and which causes prejudice to him in the exercise of his legal and proprietary rights as a shareholder. As to the findings of both the Company Law Board and the High Court in relation to the applicability of Section 398 of the above Act, Mr. Desai submitted that since both the Courts had held that the same was not attracted, there was really little to add to the observations of both the forums that there was absolutely no reason to say that GoWB and WBIDC with their associates were conducting the affairs of HPL in any manner prejudicial to HPL's interests. The allotment made in favour of IOC was, in fact, in the interest of the Company and the allotment of shares to IOC was part of the terms and conditions of the debt restructuring package.

63. Regarding the failure of WBIDC to register the 155 million shares in favour of CP(I)PL, Mr. Desai submitted that, in fact, there was no pleading in that regard in the Company Petition filed by CP(I)PL. Accordingly, neither could CP(I)PL maintain the Company Petition, not being a member of HPL, nor could any prayer have been made for a direction upon the Company to register the said shares in the name of CP(I)PL. Mr. Desai pointed out that though such a pleading was subsequently included in the Rejoinder Affidavit, no application was ever made for amendment of the pleadings and the prayers in the Company Petition.

64. To support his submissions, Mr. Desai referred to the decision of the Calcutta High Court in *Re. Bengal Luxmi Cotton Mills Ltd.* [1969 CWN 137], *Sangramsingh P. Gaekwad & Ors. Vs. Shantadevi P. Gaekward & Ors.* [(2005) 11 SCC 314], *R. Ramanathan Chettiar Vs. A & F Harvey Ltd. & Ors.* [967 (37)

Comp. Case 212], wherein the principles laid down in the *Needle Industries* case (supra) had been followed. Mr. Desai submitted that the 155 million shares transferred to CP(I)PL by WBIDC continued to be held by WBIDC and were never lodged with the Company.

65. Lastly, on the question of allotment of 150 million shares to IOC, Mr. Desai referred to the observations of the Company Law Board which recorded that such allotment could not be questioned by the Chatterjee Group, since the same was neither clandestine nor surreptitious and was under contemplation from 2000 itself and the idea of inducting IOC was initiated by Dr. Chatterjee himself, as would be evident from the letter dated 24th March, 2000, addressed to the Chief Minister, as the Company was in dire need of funds. Mr. Desai pointed out that the said view was endorsed by the learned Single Judge of the High Court by observing that the Chatterjee Group had failed to produce any evidence with regard to the allegations that the allotment of shares to IOC was pursuant to a clandestine agreement to permit IOC to participate in the management of HPL.

66. Mr. Desai submitted that the case made out by the appellants before the Company Law Board was not only devoid of substance, but was entirely misconceived, since the same was not maintainable at the instance of CP(I)PL which was not a member of HPL. Even the allegations of oppression remained unproved, since the entire content related to the transaction between WBIDC and CP(I)PL, which was not the act of the Company, as contemplated in Section 397, but a private dispute between two groups of shareholders. Mr. Desai submitted that the appeals were liable to be dismissed with appropriate costs.

67. Mr. Dushyant Dave, learned Senior Advocate, appearing for the Industrial Development Bank of India (IDBI) pointed out that a loan agreement had been entered into between HPL and IDBI for a sum of Rs.12,500 lakhs and in the

event the borrower defaulted on the loan, the Bank would have the right to convert upto 20% of the loan into fully paid up equity of the Company. The Bank was also given the right to appoint a Nominee Director on the Board of HPL. Mr. Dave submitted that in 2003 the question of restructuring of the debt came up for consideration and in its meeting held on 8th August, 2003, the Company agreed to allow IDBI to refer the Company to the Corporate Debt Restructuring (CDR) Cell with a debt restructuring proposal. Subsequently, on a 22nd January, 2004, at a meeting of the Empowered Group, Dr. Chatterjee agreed for conversion of debt to equity to the extent of Rs.140 crores. Thereafter, on 23rd March, 2004, the Board of Directors of HPL approved a CDR package and Dr. Chatterjee's proposal to convert debt to equity. Dr. Chatterhee was, in fact, interested to give effect to the same. Mr. Dave submitted that subsequently the debt restructuring plan failed to fructify and the Bank was informed by the Principal Secretary, Government of West Bengal, on 27th July, 2005, that the permission which had been granted in the credit restructuring package, be treated as annulled.

68. In the pending proceeding before the CLB, Chatterjee Petrochemicals Ltd. had got an interim order in its favour staying further allotment of shares of Rs.135 crores to IDBI. However, IDBI was neither a party to the proceedings nor was any relief, either final or interim in nature sought against IDBI. But by virtue of the interim order of injunction passed by the CLB, the allotment of shares to IDBI was stayed, as that would have reduced the Chatterjee Group to a minority. Mr. Dave submitted that the application filed by IDBI before the CLB was kept in abeyance and no order was passed thereupon as it was likely to hamper the progress of negotiation. Mr. Dave submitted that the writ petition filed by IDBI against the said order before the Delhi High Court was dismissed by the learned Single Judge and the appeal preferred therefrom was also dismissed by the Division Bench. Ultimately, in its final judgment dated 31st January, 2007, the CLB gave directions

to the effect that Chatterjee Group would purchase 155 million shares from GoWB/WBIDC at a minimum price of Rs.28.80 per share. It was also directed that the 155 million shares transferred to the Chatterjee Group would be dematerialized and registered and that the allotment to the IOC would remain.

69. Mr. Dave submitted that the question of CP(I)PL having any legitimate expectation did not arise and such a case was not also pleaded before the Board. Furthermore, since nothing had been proved before the Board that the conduct of GoWB and WBIDC was such as to justify an order of just and equitable winding up, no order could have been passed by the Board on the Company Petition filed by the appellants and the learned Single Judge of the High Court rightly allowed the appeals preferred against the order of the Board.

70. Appearing for the Respondent No.16, Mr. Altaf Ahmed, learned Senior Advocate, submitted that nowhere in the Company Petition had any allegation been made against the Managing Director as to his involvement in any manner in the acts of oppression alleged to have been committed against the complainant. Accordingly, as had been held by the CLB in its final order dated 31st January, 2007, the Company Petition, though filed under Sections 397 and 398 of the Companies Act, was essentially one under Section 397 of the aforesaid Act. Mr. Ahmed submitted that the said finding of the CLB had been duly upheld by the High Court.

71. Mr. Ahmed submitted that the question raised by the Chatterjee Group with regard to the employment of Mr. Bhowmik as the Managing Committee was without any basis whatsoever, since he was appointed unanimously by the Board of Directors consisting of the nominees of the different shareholders. Mr. Ahmed also pointed out that the Respondent No.16 had been responsible for the resurrection of HPL from the brink of financial disaster which had been occasioned by the failure of the promoters to infuse equity into the Company.

It was only after assessment of his performance during the initial two year period of his tenure that the Board of HPL reappointed him for a further period of 3 years, inspite of the objection from the Chatterjee Group.

72. Mr. Ahmed submitted that the Respondent No.16 has moved I.A.Nos.25-28 of 2009 for a direction upon the Company to pay his arrears of salary as per the resolution passed by the Board of Directors on 28th May, 2008, for the period covering 29th March, 2005 to 31st March, 2007. A further prayer has also been made to fix the pay of the said Respondent for the period from 1st April, 2007, till 31st March, 2010, at a rate as might be deemed just, proper and reasonable.

73. As far as the Tatas are concerned, it was submitted that the Tata Group was one of the original promoters of HPL and continues to hold more than 2% of the shares in the Company. It was submitted that the Tatas were keen to see HPL flourishing and had, accordingly, between 1994 and 2000 made significant infusion of funds into HPL, including a sum of Rs.11.89 crores which was given as an interest free loan. Even in 2000 when the Company was in dire financial straits, the Tatas brought in their share of Rs.35.71 crores along with other shareholders, except for the Chatterjee Group which failed to bring in its share of Rs.107.14 crores. It was made clear that the Tata Group had no faith in the Chatterjee Group since from the very inception of HPL the Chatterjee Group wanted control of HPL, without making any effective contribution at times when such contribution was most needed and had, therefore, worked against the interest of the Company, its shareholders and the public at large.

74. Mr. K.K. Venugopal, learned Senior Advocate, who appeared for the Government of West Bengal and its officials, urged that the relief prayed for in the Company Petition for specific relief, could not be granted under Section 397 of the Companies Act. Since the said question had been adequately dealt with on behalf of WBIDC, Mr. Venugopal chose to deal

with the directions given by the CLB to the GoWB to disinvest its entire shareholding in HPL, which was a Company set up in public interest and for which a huge extent of land had been acquired for the public purpose of maintaining supplies and services essential to the life of the community, by setting up a Petro Chemical Complex at Haldia. Mr. Venugopal contended that it was settled law that the decision of the Government to disinvest or not to disinvest was not in the realm of public law and was not, therefore, amenable to challenge or interference, unless it amounted to an abuse of power by the Government.

75. Mr. Venugopal submitted that the order and directions of the CLB would exclude the State Government from having any future role to play in the running and management of HPL. Learned counsel submitted that in a matter of this nature, the public interest should have been considered first before such directions are given. Mr. Venugopal submitted that the proceedings under Section 397 of the Companies Act should not have been allowed to be made a vehicle for relief which was available to the Chatterjee Group under the provisions of the Specific Relief Act, 1963. It was also submitted that the Company Law Board erred in applying the principles of private law in the exercise of its jurisdiction under Sections 397/398 and 402 of the Companies Act, since the decision of the State Government not to disinvest would have to be decided by applying the public law in appropriate proceedings. In this regard, Mr. Venugopal referred to the decision of this Court in *BALCO Employees' Union (Regd.) Vs. Union of India & Ors.* [(2002) 2 SCC 333], wherein it was observed that it is neither within the domain of the courts nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or something better could be evolved. This Court also observed that the courts are not inclined to strike down a policy merely because it has been urged that a different policy was fairer or wiser or more scientific or more logical. This Court went on to observe that the procedure of disinvestment is a policy decision involving complex economic factors and the

courts have consistently refrained from interfering with economic decisions, unless it was demonstrated that economic expediency was so violative of constitutional or legal limits on power or is so abhorrent to reason, that such interference was necessary. The Courts would in given cases interfere if it could be demonstrated that the policy was contrary to any statutory provision or the provision of the Constitution or there was illegality in the decision itself.

76. Mr. K.K. Venugopal submitted that from the very inception, GoWB had played a major role in conceptualizing and setting up of HPL with the primary object of industrial development of the region in particular, and the State in general and subserving the underlying public interest. Mr. Venugopal submitted that HPL had been conceived as a showcase project of the GoWB. It was only because of the active role of the State Government that it was also possible to acquire a total of 1031.305 acres of land for the project at Haldia, without any trouble and disturbance, from the year 1973 onwards. Mr. Venugopal submitted that the direction given by the CLB would be against the very grain of the concept of a Joint Venture between WBIDC, which was owned by GoWB, and the R.P. Goenka Group (RPG) and subsequently, with the exit of the RPG Group, the Tata Group as well as the CP(M)C. It was also submitted that even the financial institutions, namely, IDBI and SBI, etc., who had a total stake of Rs.2989 crores in HPL, drew great comfort from the continued presence of the State Government and its active participation in the management of HPL. On the other hand, on several occasions the very same financial institutions had expressed their concern regarding the capability and intentions of the Chatterjee Group in managing the Company and inducting funds as necessary for the growth and development thereof. Mr. Venugopal submitted that the acts of oppression alleged by the Chatterjee Group and the relief claimed by them, apart from being based on alleged breach of contract, aimed at invoking the jurisdiction of the CLB under Section 397 read with Section 402 of the Companies Act,

1956, to compel the Government to disinvest its shareholding in HPL. Mr. Venugopal submitted that the CLB did not have the jurisdiction to grant such relief and, in any event, in view of the overriding public interest, no relief should be granted to the appellant in the instant appeals.

77. Mr. Anil Dewan, learned Senior Advocate, who appeared for Mr. Tarun Das, who was functioning as the Chairman of HPL, adopted the submissions made by Mr. Desai and Mr. Venugopal and urged that the Company Petition itself was not maintainable as it had been filed by a Company which was not a member of HPL, despite being the owner of 155 million shares thereof. Mr. Dewan submitted that instead of assisting the Company in meeting its financial liabilities, the appellants not only failed to infuse equity into the Company but also confined their focus on acquiring only 51% of the shareholding in order to maintain its control over the management of the Company. Mr. Dewan submitted that the judgment of the High Court did not call for any interference in the instant proceedings.

78. In continuation of Mr. Desai's submissions, Mr. C.A. Sundaram, learned Senior Advocate appearing for the Respondent No.2, reiterated the factual aspect of the case as portrayed by Mr. Desai. Mr. Sundaram, however, urged that the stand now being taken by the Chatterjee Group that the induction of IOC into HPL had adversely affected their interest and had reduced the Chatterjee Group to a minority shareholder in the Company, it was, in fact, Dr. Chatterjee himself, who had initiated the idea of allotting 150 million shares to IOC. Dr. Chatterjee was the Chairman of the Committee which prepared and sent the offer of allotment to IOC which was accepted by its return letter enclosing a cheque for Rs.150 crores in favour of HPL. Between April, 2005 and July, 2005, eight draft Share Purchase Agreements were exchanged between the Chatterjee Group and the GoWB regarding sale of the shares held by WBIDC to CP(M)C. However, the

Chatterjee Group never seemed to be in a position to complete the transaction and repeatedly asked for the inclusion of fresh conditions, such as a pre-condition that IOC should not be allotted any shares of HPL. In the meantime, having accepted the offer of allotment of 150 million shares and having sent the price for the same to HPL, IOC sent legal notices to HPL calling upon the Company to issue and allot the said 150 million shares to IOC and to credit the same to the account of IOC after dematerialization.

79. Mr. Sundaram submitted that in the aforesaid cauldron of events, the GoWB wrote to the Chatterjee Group on 27th July, 2005, stating that it had decided to defer its proposal to disinvest shares in favour of the Chatterjee Group as it was not in a position to conclude matters. On account of the severe financial crunch being faced by HPL and in view of the stand of IOC, which was the main supplier of Naphtha to HPL, on 2nd August, 2005, HPL allotted 150 million shares to IOC and a return of allotment was also filed with the Registrar of Companies in respect thereof. On 3rd August, 2005, the cheque given to IOC for Rs.150 crores was encashed by HPL.

80. Mr. Sundaram submitted that it was no doubt true that at the initial stages it had been the intention of GoWB and WBIDC to involve Dr. Chatterjee and his Group of Companies as the prime stakeholders in HPL with management control, but at crucial times when support in the form of equity was required, the Chatterjee Group failed to provide the same. Mr. Sundaram submitted that even when on 3rd June, 1996, GoWB wrote to Dr. Chatterjee that on account of HPL's financial crunch, all promoters had been requested to induct 50% of the equity and the last date for such infusion was 18th June, 1996, the Chatterjee Group failed to make such investments, although, both the Tatas and WBIDC brought in their respective equity contributions of Rs.35.5 crores and Rs.117 crores. Once again, since the Lenders were insisting on immediate infusion of Rs.581 crores into HPL and HPL was on the threshold of

becoming a Non-Performing Asset, a Rights Issue Offer was made by HPL to the existing shareholders for subscription of 34,99,99,988 shares at the rate of Rs.10/- per share. Despite Dr. Chatterjee's assurance to bring in Rs.53.5 crores immediately along with additional fund of Rs.53.5 crores and a further sum of Rs.300 crores, the Chatterjee Group did not subscribe to the Rights Issue, thereby depriving the Company of Rs.107 crores at a very crucial time. In order to re-assure HPL, the Chatterjee Group on 12th January, 2002, agreed to induct a minimum of Rs.500 crores and such other further funds towards equity and equity-like instruments to effectuate the Corporate Debt Restructuring. However, despite such commitment, till today, the Chatterjee Group has not brought in the amount of Rs.500 crores committed by it. On the other hand, acting on the assurance given by the Chatterjee Group, WBIDC agreed to transfer shares worth Rs.360 crores to the Chatterjee Group to ensure that it controlled 51% of paid-up equity to enable it to remain in the majority. Mr. Sundaram submitted that out of the said number of shares, 155 million shares were, in fact, transferred to CP(I)CL to maintain a shareholding of 51%. However, WBIDC even agreed to transfer shares beyond the said 155 million shares to ensure that the 51% shareholding of CP(M)C was maintained. It was also agreed that the transfer would be effected within 10 days of the acceptance of Letter of Comfort by WBIDC. Mr. Sundaram submitted that although the shares were transferred in the name of CP(I)CL, the said transfers were never completed as they were not registered either in the Company's books or with the Registrar of Companies and WBIDC continued to have voting rights on the said 155 million shares. Mr. Sundaram submitted that to cap it all, instead of bringing in equity of an amount of Rs.53.5 crores, as promised as per the decision taken by the Company on 3rd June, 1996, to induct 50% of its equity, the Chatterjee Group brought in only Rs.61.5 crores and that too as debt and not equity, despite the fact that post-dated cheques issued to vendors were still bouncing and other commitments were not met. In addition, the Corporate Debt Restructuring

could not be implemented since CP(M)C could not induct a strategic investor. Ultimately, out of sheer compulsion in order to save the Company from becoming a Non-Performing Asset, a decision had to be taken to induct IOC as a portfolio investor, though there may have been discussion to bring in IOC as a strategic investor.

81. Mr. Sundaram submitted that one of the questions which arise in these proceedings is whether the Company Law Board, acting under Sections 397 and 398, read with Section 402 of the Companies Act, could direct sale of shares in the absence of a finding that there had been oppression by one body of shareholders against another or mismanagement of the Company. According to Mr. Sundaram, the second question, which is directly connected with the first, is whether in the absence of such a finding the Company Law Board could direct sale of shares in the absence of a further finding that such sale of shares was necessary in the interest of the Company. The third question posed by Mr. Sundaram was whether in addition to the findings indicated above, the Company Law Board could direct sale of shares under Sections 397 and 398 read with Section 402 of the above Act in the absence of a finding that without giving such a direction it might be just and equitable to wind-up the Company.

82. On the aforesaid issues, Mr. Sundaram reiterated the submissions made by Mr. Desai that the said questions have been answered by this Court in *Shanti Prasad Jain's* case (supra) and in the subsequent decisions in *Sangramsinh P. Gaekwad* (supra), *M.S.D.C. Radharamanan* (supra), *V.S. Krishnan* (supra), the *Needle Industries* (supra) and in the case of *Hanuman Prasad Bagri Vs. Bagress Cereals Pvt. Ltd.* [(2001) 4 SCC 420].

83. Mr. Sundaram submitted that the next issue involved the question as to whether the concept of legitimate expectation of a body of shareholders would be applicable to a large public limited company or only in quasi partnerships and family

companies and whether in those situations also the sale of shares could be directed in order to break a deadlock. In this regard, reference was made to the decision of this Court in *Kilpest Pvt. Ltd. & Ors. Vs. Shekhar Mehra* [(1996) 10 SCC 696] and *Hind Overseas Pvt. Ltd. Vs. Raghunath Prasad Jhunjhunwalla & Anr.* [(1976) 3 SCC 259]. In *Hind Overseas Pvt. Ltd.'s* case, this Court had held that when more than one family or several friends and relations together form a company and there is no right as such agreed upon for active participation of members who are excluded from management, the principles of dissolution of partnership cannot be liberally invoked. It was further observed that it is only when shareholding is more or less equal and there is a case of a complete deadlock in the running of the company on account of lack of probity in the management and there is no hope or possibility of smooth and efficient continuance of the company as a commercial concern, a case for winding up may arise. However, in a given case, the principles of dissolution of partnership may apply if the apparent structure of the company is proved not to be the real structure and on piercing the veil it is found that in reality it is a partnership. Mr. Sundaram submitted that, in any event, the application of the just and equitable clause would depend upon the facts and circumstances of each case. A note of caution was also introduced that even admission of a petition could prejudice and cause immense injury to a company in the eyes of the investors, if ultimately the petition is dismissed. Mr. Sundaram urged that in a petition under Section 397/398 of the Companies Act, it was not always incumbent on the CLB to order the winding up of a company on the just and equitable principle, but in order to pass any order under Section 397, the Company Law Board would have to arrive at a specific finding that there was just and equitable reason to order such winding up.

84. The next issue canvassed by Mr. Sundaram is that the Court would have to examine as to whether the direction given for sale of shares was in order to maintain the status quo which

was being disturbed on account of the oppressive measures taken. In this regard, Mr. Sundaram referred to the decisions of this Court in *Dale & Carrington Invt. (P) Ltd. Vs. P.K. Prathapan & Ors.* [(2005) 1 SCC 212] and *M.S.D.C. Radharamanan's* case (supra), along with the decision in *Allianz Securities Ltd. Vs. Regal Industries Ltd.* [2002 (11) CC 764 = (2000) 25 SCL 349 (CLB)]. On the concept of legitimate expectation, Mr. Sundaram submitted that it has to be considered whether the same should be restricted to maintaining the state of affairs at the time when the parties became shareholders or whether any subsequent understanding arrived at by private treaty between the shareholders would fall under the purview of the Company Law Board to enable it to deal with such questions between private shareholders.

85. Mr. Sundaram repeated that in this regard it would have to be decided as to whether the CLB could direct sale and transfer of shares to a group to give it majority control on an application under Section 397/398 read with Section 402 of the Companies Act and to enforce specific performance of agreement between the parties whether legitimate or not, especially when such specific performance was not necessary in the interest of the company, or to prevent winding up of the company. Another question of equal importance in this connection was whether specific performance could be directed at the instance of a party whose own conduct had been inequitable in failing to carry out its promises, to the severe prejudice of the company.

86. Another issue raised by Mr. Sundaram, which has a direct bearing to the facts of this case, is whether a Company can effect transfer of shares in the absence of transfer deeds and a request for transfer, and whether the transfer of shares is complete only when such transfers are duly registered and entered in the Register of Members of the Company. In this regard, Mr. Sundaram referred to the decisions of this Court

in *Howrah Trading Company Vs. CIT* [AIR 1959 SC 775]; *Life Insurance Corporation of India Vs. Escorts Ltd.* [(1986) 1 SCC 264], *Mannalal Khetan Vs. Kadarnath Khetan* [(1977) 2 SCC 424], *Claude Lila Parulekar (Smt.) Vs. Sakal Papers (P) Ltd.* [(2005) 11 SCC 73], *J.P. Srivastava & Sons Pvt. Ltd. Vs. Gwalior Sugar Co. Ltd.* [(2005) 1 SCC 172], *Mathrubhumi Printing & Publishing Co. Ltd. Vs. Vardhman Publishers Ltd.* [(1992) 73 CC 80] and several other decisions to which we shall shortly refer as they have a bearing on the issue involving the rights acquired by the Chatterjee Group on the transfer of 155 million shares by WBIDC, which were not, thereafter, registered in the name of the Chatterjee Group in the Register of Members of the Company, nor was the factum of such transfer communicated to the Registrar of Companies.

87. Mr. Sundaram also raised another question as to why on failure of reciprocal promises in a contract on account of non-performance of the promises made by one of the parties, the benefits accrued to such party through part performance should not be restituted to the other party. In this regard, reference was made to Sections 51 to 54 of the Contract Act and the decision of the Privy Council in *Satgur Prasad Vs. Harnarayan Das* [(AIR 1932 PC 89] and the decision of the Delhi High Court in Suit No.1481 of 1996, to which reference may be made, if required.

88. Lastly, on the question of allotment of the 150 million shares by WBIDC to IOC, Mr. Sundaram submitted that on account of the failure of the Chatterjee Group to bring in equity when the Company was in dire need of funds, such allotment was fully justified under the doctrine of *Indoor Management.* However, even if a legitimate dispute could be raised in regard to such transfer, such transaction could not be avoided by the Company Law Board as the same was in the interest of the Company, which would otherwise have been converted into a Non Performing Asset.

89. What emerges from the materials on record and the

submissions made on behalf of respective parties is that HPL was incorporated in 1985 by the West Bengal Industrial Development Corporation and the R.P. Goenka Group, and their nominees were the subscribers to the Memorandum of Association. Soon thereafter, in 1990, the Goenka Group left the Company and Tata Chemicals and Tata Tea were inducted into the project between 1990 and 1993. However, since the TATAs were not very keen to continue with the Project, in June 1994, Dr. Purnendu Chatterjee, a Non-Resident Indian industrialist and financier, evinced his interest in implementing the project. Accordingly, a Memorandum of Understanding was entered into between WBIDC and the Chatterjee Petrochem (Mauritius) Company and the Tatas on 3rd May, 1994. Certain assurances were given to Dr. Chatterjee that the Company would remain a private enterprise with the Chatterjee Group in control of the management thereof. A further assurance was given to the effect that WBIDC/GoWB would transfer their entire shares in the Company to the Chatterjee Group, which would then acquire a complete majority for the purposes of management and control of the Company.

90. In addition to the above, certain duties and obligations to be performed by the Chatterjee Group were also indicated, mainly confined to the question of bringing in equity in an otherwise cash-strapped situation then prevailing in relation to the Company's finances. It also appears that the assurances given by WBIDC/GoWB were on account of the aforesaid assurances given by the Chatterjee Group to bring in equity. Inasmuch as, the Chatterjee Group failed to abide by its commitments, the Company had no other alternative, but to bring in IOC by selling and transferring 150 million shares to the said Company.

91. The parties also agreed that they would be entitled to seek specific performance of the terms and conditions of the Agreement in accordance with the provisions of the Specific Relief Act, 1963. Various other terms and conditions were

included with the intention of guaranteeing that CP(M)C would acquire a controlling interest to the extent of at least 51% shares which would also give it complete control over the day-to-day affairs of the Company. In addition, it was agreed that in future the composition of the Board would be altered to reflect the revised shareholding structure and WBIDC would vote along with CP(M)C on all issues in the shareholders meeting and its nominee would also vote along with the nominee Directors of the CP(M)C.

92. Despite the concessions given and/or afforded to the Chatterjee Group, it had failed to take advantage of the same and a subsequent Agreement dated 8th March, 2002, had to be entered into for recording the fact that in terms of the Agreement dated 12th January, 2002, 155,099,998 equity shares of WBIDC had been transferred/delivered to CP(I)PL on the same day. It was also indicated in the Agreement that all the aforesaid shares which had been transferred and delivered to the Petitioner No.4 would be pledged with WBIDC and, accordingly, their shares had been duly lodged along with their share certificates with WBIDC and such pledge had been acknowledged.

93. It is in the aforesaid background that we have to consider the Petition filed by the Chatterjee group before the Company Law Board under Sections 397, 398, 399, 402, 403 and 406 of the Companies Act, 1956, and the reliefs prayed for therein.

94. The law relating to grant of relief on a petition under Sections 397, 398 and 402 of the Companies Act, 1956, has been crystallised in various decisions of this Court, including those cited on behalf of the parties. The common refrain running through all these decisions is that in order to succeed in an action under Sections 397 and 398 of the Companies Act, the complainant has to prove that the affairs of the Company were being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members. For better

appreciation of the above, Section 397 of the above Act is extracted hereinbelow :

> "397. Application to [Tribunal] for relief in cases of oppression.—
>
> 1) Any member of a company who complains that the affairs of the company are being conducted in a manner prejudicial to public interest or] in a manner oppressive to any member or members (including any one or more of themselves) may apply to the Tribunal for an order under this section, provided such members have a right so to apply in virtue of section 399.
>
> (2) If, on any application under sub-section (1), the Court is of opinion—
>
> (a) that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members; and
>
> (b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up,
>
> the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit."

However, as was observed by this Court in *Shanti Prasad Jain's* case (supra) the law has not defined as to what would amount to "oppressive" for the purposes of Section 397 and it is for the Courts to decide on the facts of each case as to whether such oppression exists which would call for action under Section 397. It was also emphasized that the conduct of the majority shareholders should not only be oppressive to the minority, but must also be burdensome and operating harshly

upto the date of the petition.

95. The main grievance of the Appellants appears to be that having been induced into investing large sums of money in establishing the petrochemical complex on various promises, particularly that the Company would continue to retain its private character and the Chatterjee group would have control over its management, such promises, although, reduced into writing in the form of agreements, not only remained unfulfilled, but even the character of the Company was altered with the transfer and sale of 150 million shares by the Company in favour of IOC. Coupled with the above, is the other grievance that despite having transferred 155 million shares in favour of CP(I)PL, and having received the full price therefor, the Company had not registered the same in the Company's Register of Share-holders, thereby depriving the Chatterjee Group from exercising its right to vote in respect of the said shares. The third grievance of the Chatterjee Group is that by not registering the transfer of the 155 million shares in their favour, but, on the other hand, transferring 150 million shares in favour of IOC, the character of the Company was altered from a Private Company into a Government Company and also reduced the Chatterjee Group to a minority, despite the promises held out earlier and as incorporated in the Agreements dated 20th August, 1994, 12th January, 2002 and 8th March, 2002.

96. Let us examine as to whether any of the complaints contained in the Company Petition before the CLB make out a case that the affairs of the Company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members, which was sufficient to justify the passing of a winding-up order on the ground that it was just and equitable that the Company should be wound-up, but that to wind-up the Company would prejudice such member or members. In *Shanti Prasad Jain's* case (supra), referred to hereinabove, in a similar situation, it was observed by this Court as follows :-

> "It is not enough to show that there is just and equitable cause for winding up the Company though that must be shown as a preliminary to the application of Section 397. It must further be shown that the conduct of the majority shareholders was oppressive to the minority as members and this requires that events have to be considered not in isolation but as part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up to the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members. The conduct must be burdensome, harsh and wrongful, and mere lack of confidence between the majority shareholders and the minority shareholders would not be enough unless the lack of confidence springs from oppression of a minority by a majority in the management of the Company's affairs and such oppression must involve at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder."

It will be evident that in order to pass orders under Section 397 of the Companies Act, 1956, the CLB has to be satisfied that the Company's affairs are being conducted in a manner oppressive to any member or members and that the facts would justify the making of a winding-up order on the just and equitable principle, but that such an order would unfairly prejudice the Applicant before the CLB. As was discussed by this Court in the *Needle Industries* case (supra), unwise, inefficient or careless conduct of a Director cannot give rise to claim for relief under Section 397 of the Act. For relief under this Section, the Applicant would have to prove that the conduct of the majority of the shareholders lacked probity and was unfair so as to cause prejudice to the Applicant in exercising his legal and proprietary rights as a shareholder. This, in fact, is the golden thread of the various decisions in relation to petitions under Section 397, 398 and 402 of the above Act. All the various decisions cited by the learned counsel for the various

parties are *ad idem* on this issue and applying the said principles, each complaint under Section 397 will have to be judged on its own merit for the CLB to arrive at a conclusion as to whether the ingredients of Section 397 were satisfied and pass appropriate orders thereafter.

97. As has been indicated in some of the cases cited, the language of Section 397 suggests that the oppressive manner in which the Company's affairs were being conducted could not be confined to one isolated incident, but that such acts would have to be continuous as to be part of a concerted action to cause prejudice to the minority shareholders whose interests are prejudiced thereby.

98. In the aforesaid context, what do the facts reveal in the instant case and do they bring the acts of oppression complained of within the purview of Section 397 for grant of relief under Section 402 of the Companies Act?

99. The case of the Chatterjee Group is woven around two particular issues, namely, that it had been induced to invest in HPL so as to make it a successful commercial enterprise on the promise that the Company would always retain a private character and the Chatterjee Group would have control over its management, but such a promise had not been adhered to and, on the other hand, negotiations were undertaken by WBIDC to induct IOC, a Central Government Company, with the intention of ultimately handing over the management of the Company to IOC. The aforesaid case of the Chatterjee Group is also based on the grievance that while keeping the Chatterjee Group under the impression that it intended to ensure that the Chatterjee Group had the requisite number of shares to allow it to have a majority shareholding and thereby control of the Company's management, the Company carried on clandestine negotiations with WIBDC to transfer all the shares held by it in the Company to IOC to give it management and control over the Company's affairs.

100. The second ground, as made out by the Chatterjee Group, was that despite having transferred 155 million shares in favour of CP(I)PL on 8th March, 2002, it did not register the same in the name of CP(I)PL, which remained the beneficial owner, the right to vote on the basis thereof remained with WBIDC. This was done despite the fact that the price for the said shares had been received by way of a private arrangement and the Lenders and financial institutions had given their consent to the same. According to the Chatterjee Group, this one act of omission on the part of the Company was sufficient to attract the provisions of Section 397 of the Companies Act and for the CLB to pass appropriate orders on account thereof. It is on account of the second ground on which the Company Petition was filed that a prayer had been made therein for a direction upon WBIDC and IOC to immediately register the transferred 155 million shares in the name of CP(I)PL.

101. From the facts as revealed, it is clear that when Dr. Purnendu Chatterjee expressed his interest in setting up of the Haldia Petrochemicals Ltd., various incentives had been offered to him by the GoWB and WBIDC to invest in the Company and to make it a successful commercial enterprise. Such investments were, however, contingent upon Dr. Chatterjee's bringing in sufficient equity to set up and run the Company. As would be seen, at the very initial stage all the understanding between Dr. Chatterjee and GoWB & WBIDC, both WBIDC and the Chatterjee Group were to hold 433 million shares each, while Tata was to hold 144 million shares. The promise extended by WBIDC and GoWB to the Chatterjee Group to provide at least 60% of the shares held by WBIDC at Rs.14/- per share to the Chatterjee Group so as to give the Chatterjee Group the majority shareholding in the Company, as was indicated in the Agreements dated 12th January, 2002, 8th March, 2002 and 14th January, 2005, did not ultimately materialise and, on the other hand, the Chatterjee Group was reduced to a minority on account of its decision not to

participate in the Rights Issue, and, thereafter, by transfer of 150 million shares by WBIDC in favour of IOC.

102. Although, the Chatterjee Group has complained of the manner in which it had been reduced to a minority in the Company, it is also obvious that when the Company was in dire need of funds and the Chatterjee Group also promised to provide a part of the same, it did not do so and instead of bringing in equity, it obtained a loan from HSBC through the Merlin Group, which only increased the debt equity ratio of the Company. Furthermore, while promising to infuse sufficient equity in addition to the amounts that would have been brought in by way of subscription to the Rights Issue, the Chatterjee Group imposed various pre-conditions in order to do so, which ultimately led GoWB and WBIDC to terminate the agreement to transfer sufficient number of shares to the Chatterjee Group to enable it to have complete control over the management of the Company and also to retain its private character. It is at a stage when there was a threat to the supply of Naphtha, which was the main ingredient used by HPL for its manufacturing process, that it finally agreed to induct IOC into the Company as a member by transferring 150 million shares to it. It may not be out of place to mention that it was on Dr. Chatterjee's initiative that it had been decided to induct the IOC as a member of the Company at meetings of the Directors which were chaired by Dr. Chatterjee himself. Of course, as explained on behalf of the Chatterjee Group, even the induction of the IOC as a member of the Company is concerned, was part of a conspiracy to deprive the Chatterjee Group of control of the Company since GoWB and WBIDC never intended to keep its promise regarding transfer of at least 60% of its shareholdings in favour of the Chatterjee Group. Such a submission has to be considered in the context of the financial condition of the Company and the response of the Chatterjee Group in meeting such financial crunch. In our view, if in the first place, the Chatterjee Group had stood by its commitment to bring in equity and had subscribed to the Rights Issue, which was a decision

taken by the Company to infuse equity in the running of the Company, it would neither have been reduced to a minority nor would it perhaps have been necessary to induct IOC as a portfolio investor with the possibility of the same being converted into a strategic investment.

103. The failure of WBIDC and GoWB to register the 155 million shares transferred to CP(I)PL could not, strictly speaking, be taken to be failure on the part of the Company, but it was the failure of one of the parties to a private arrangement to abide by its commitments. The remedy in such a case was not under Section 397 of the Companies Act. It has been submitted by both Mr. Nariman and Mr. Sarkar that even if no acts of oppression had been made out against the Company, it would still be open to the learned Company Judge to grant suitable relief under Section 402 of the Act to iron out the differences that might appear from time to time in the running of the affairs of the Company. No doubt, in the *Needle Industries* case, this Court had observed that the behaviour and conduct complained of must be held to be harsh and wrongful and in arriving at such a finding, the Court ought not to confine itself to a narrow legalistic view and allow technical pleas to defeat the beneficial provisions of the Section, and that in certain situations the Court is not powerless to do substantial justice between the parties, the facts of this case do not merit such a course of action to be taken. Such an argument is not available to the Chatterjee Group, since the alleged breach of the agreements referred to hereinabove, was really in the nature of a breach between two members of the Company and not the Company itself. It is not on account of any act on the part of the Company that the shares transferred to CP(I)PL were not registered in the name of the Chatterjee Group. There was, therefore, no occasion for the CLB to make any order either under Section 397 or 402 of the aforesaid Act. If, as was observed in *M.S.D.C. Radharamanan's* case (supra), the CLB had given a finding that the acts of oppression had not been established, it would still be in a position to pass appropriate

orders under Section 402 of the Act. That, however, is not the case in the instant appeals.

104. In our view, the appellants have failed to substantiate either of the two grounds canvassed by them for the CLB to assume jurisdiction either under Section 397 or 402 of the Companies Act, 1956, and it could not, therefore, have given directions to WBIDC and GoWB to transfer 520 million shares held by them in HPL to the Chatterjee Group and the High Court quite rightly set aside the same and dismissed the Company Petition.

105. Consequently, all the appeals are dismissed. Having regard to the peculiar facts of the case, the parties shall bear their own costs.

B.B.B. Appeals dismissed.

PUSHPA KUMARI & ORS.
v.
THE STATE OF BIHAR & ORS.
(Civil Appeal Nos. 8521-8522 of 2011)

OCTOBER 11, 2011

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

National Council for Teacher Education Act, 1993 – Appellants pursued primary teachers training from a Women's Primary Teachers Training College during the sessions 1988-1990, 1991-1993, 1992-1994 and 1993-1995 respectively – Though the College was established in 1985, it was granted recognition by order dated 15.12.1994 by the State Government with retrospective effect for the sessions 1985-1987 to 1993-1995 –Appellants wished to take the teachers training examination conducted by the Bihar School Examination Board – Board did not issue them the examination forms – Appellants filed writ petition which was dismissed by the High Court – High Court held that since the College of the appellants had not applied for recognition under the NCTE Act, the appellants could not be allowed to take the examinations conducted by the Board – Held: As the NCTE Act came into force on 01.07.1995 and the NCTE was established on 17.08.1995, the NCTE Act had no application for any period prior to academic sessions 1995-1996 – The appellants who undertook teachers training course in the College which had a valid recognition of the State Government during the academic sessions 1985-1987 to 1993-1995 were entitled to take the examinations conducted by the Board – Board directed to conduct the examination for the appellants as early as possible.

Appellant Nos. 1, 2, 3 and 4 pursued primary teachers training from a Women's Primary Teachers Training

College during the sessions 1988-1990, 1991-1993, 1992-1994 and 1993-1995 respectively. Though the College was established in 1985, after seven rounds of litigation it was granted recognition by order dated 15.12.1994 by the State Government with retrospective effect for the sessions 1985-1987 to 1993-1995 pursuant to the directions of the Court.

In response to an advertisement dated 26.05.2007 of the Bihar School Examination Board, the appellants approached the Board through the College for examination forms, but the Board did not issue the examination forms. The appellants then filed C.W.J.C. No. 7321 of 2007 before the Patna High Court for a direction to the Board to release the forms and accept the fees and forms of the appellants for the teachers training examination and to allow them to appear in the examination. A Single Judge of the High Court heard the Writ Petition alongwith other Writ Petitions on merits and dismissed the Writ Petitions by common order, after holding that under the National Council for Teacher Education Act, 1993 (the NCTE Act), it is only the National Council for Teacher Education (the NCTE) which can grant recognition for teachers training course and the College had not applied for recognition to the NCTE. Aggrieved by the order, the appellants filed Letters Patent Appeal, but the same was also dismissed by the Division Bench of the High Court. The appellants then filed Civil Review before the Division Bench, but the same was also dismissed.

In the instant appeals, the appellants contended that as the appellants had pursued their training in the College during the period for which the College had recognition, they were entitled to take the teachers training examination conducted by the Board and that the High Court was not correct in taking the view that since

the College had not applied for recognition under the NCTE Act, the appellants could not be allowed to take the examinations conducted by the Board because the NCTE Act came into force with effect from 01.07.1995 and the NCTE was established only on 17.08.1995 after the appellants had undertaken their training courses in the College.

The respondents, on the other hand, relied on the order dated 08.03.1999 of the High Court in C.W.J.C. No. 6950 of 1997 in which a similar relief claimed by the College itself for the students for the sessions 1987-1990 to 1993-1995 for directing the Board to allow them to take examinations was rejected by the High Court and contended that the aforesaid decision of the High Court was binding also on the appellants.

Allowing the appeals, the Court

HELD:1. As the appellants were not parties in C.W.J.C. No. 6950 of 1997, the order dated 08.03.1999 of the High Court in the said Writ Petition will not be binding on the appellants. The appellants had filed C.W.J.C. No. 7321 of 2007 and on perusal of the orders of the Single Judge passed in C.W.J.C. No. 7321 of 2007 and other connected cases, it is found that the only reason given by the Single Judge in dismissing the Writ Petition of the appellants is that the College had not applied for grant of recognition under the NCTE Act. Also the Division Bench of the High Court dismissed the Letters Patent Appeal of the appellants on the ground that the recognition which had been granted to the College had been withdrawn on 16.03.2007. Thus, neither the Single Judge nor the Division Bench of the High Court held that the recognition granted to the College by the order dated 15.12.1994 for the academic sessions 1985-1987 to 1993-1995 was invalid or stood cancelled. As the NCTE Act came into force on 01.07.1995 and the NCTE was

established on 17.08.1995, the NCTE Act will have no application for any period prior to academic sessions 1995-1996. Thus the appellants who undertook teachers training course in the College which had a valid recognition of the State Government during the academic sessions 1985-1987 to 1993-1995 were entitled to take the examinations conducted by the Board. [Para 7] [209-C-H; 210-A]

Sunil Kumar Parimal and Anr. v. State of Bihar and Ors. **(2007) 10 SCC 150: 2007 (9) SCR 890 and** *Kumari Ranjana Mishra and Anr. v. The State of Bihar and Ors.* **(2011) 4 SCC 192 – relied on.**

2. The order of the Single Judge as well as the orders of the Division Bench in the Letters Patent Appeal and in the Civil Review are set aside and the Board is directed to conduct the examination for the appellants as early as possible. [Para 8] [210-B-C]

Case Law Reference:

2007 (9) SCR 890	**Relied on**	**Para 5, 7**
(2011) 4 SCC 192	**Relied on**	**Para 5, 7**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 8521-8522 of 2011.

From the Judgment & Order dated 12.11.2008 of the High Court of Patna in CR No. 289 of 2008 and LPA No. 796 of 2007.

Ravi C. Prakash, Trishna Mohan, C.D. Singh, Gopal Singh, Manish Kumar, Chandan Kumar, Purushottam S.T., Filza Moonis and Amit Pawan for the appearing parties.

The Judgment of the Court was delivered by

A. K. PATNAIK, J. 1. Leave granted.

2. This is an appeal against the order dated 12.11.2008 of the Division Bench of the Patna High Court in Letters Patent Appeal No. 796 of 2007 and order dated 06.02.2009 in Civil Review No. 289 of 2008.

3. The facts very briefly are that Millia Kaneez Fatima Women's Primary Teachers Training College, Rambag, Purnea (for short 'the College') is a minority institution established and maintained by the Millia Education Trust. Though the College was established in 1985 for imparting teachers training course, after seven rounds of litigation it was granted recognition by order dated 15.12.1994 by the State Government with retrospective effect for the sessions 1985-1987 to 1993-1995 pursuant to the directions of the High Court in C.W.J.C. No. 1304 of 1993. Appellant Nos. 1, 2, 3 and 4 pursued their training in the College during the sessions 1988-1990, 1991-1993, 1992-1994 and 1993-1995 respectively. In response to an advertisement dated 26.05.2007 of the Bihar School Examination Board (for short 'the Board') the appellants approached the Board through the College for examination forms, but the Board did not issue the examination forms.

4. The appellants then filed C.W.J.C. No. 7321 of 2007 before the Patna High Court for a direction to the Board to release the forms and accept the fees and forms of the appellants for the teachers training examination and to allow them to appear in the examination. Alongwith the Writ Petition, the appellants also filed an application for interim orders and on 13.06.2007, the learned Single Judge of the High Court passed an interim order directing the Board to accept the fees and forms of the appellants and allow them to appear in the ensuing teachers training examination. The Board, however, did not comply with the interim order. On 24.08.2007, the learned Single Judge heard the Writ Petition alongwith other Writ Petitions on merits and dismissed the Writ Petitions by common order, after holding that under the National Council for Teacher Education Act, 1993 (for short 'the NCTE Act'), it is

only the National Council for Teacher Education (for short 'the NCTE') which can grant recognition for teachers training course and the College had not applied for recognition to the NCTE. Aggrieved by the order dated 24.08.2007 the appellants filed Letters Patent Appeal No. 796 of 2007, but the same was also dismissed by the Division Bench of the High Court by the impugned order dated 12.11.2008. The appellants then filed Civil Review No. 289 of 2008 before the Division Bench, but the same was also dismissed by order dated 06.02.2009 of the Division Bench of the High Court.

5. Learned counsel for the appellants submitted that the College of the appellants was granted recognition by the State Government by order dated 15.12.1994 for the academic sessions 1985-1987 to 1993-1995. He submitted that this recognition was cancelled by memo no. 332 dated 18.11.1999, but the High Court quashed the memo no. 332 dated 18.11.1999 in C.W.J.C. Nos. 4622, 11275 and 11640 of 2009 and against the orders passed in these Writ Petitions no appeal was preferred by any party and all this would be evident from the copy of the order dated 03.07.2009 of the High Court in C.W.J.C. No. 2329 of 2009 filed as an additional document. He submitted that the result is that the recognition of the College granted by the State Government by order dated 15.12.1994 for the sessions 1985-1987 to 1993-1995 has been restored. He submitted that as the appellants had pursued their training in the College during the period for which the College had recognition, they were entitled to take the teachers training examination conducted by the Board. He vehemently argued that the High Court was not correct in taking the view that since the College had not applied for recognition under the NCTE Act, the appellants could not be allowed to take the examinations conducted by the Board because the NCTE Act came into force with effect from 01.07.1995 and the NCTE was established only on 17.08.1995 after the appellants had undertaken their training courses in the College. He relied on the decisions of this Court in *Sunil Kumar Parimal and Another*

v. State of Bihar and Others [(2007) 10 SCC 150] and *Kumari Ranjana Mishra and Another v. The State of Bihar and Others* [(2011) 4 SCC 192] in support of his submissions.

6. Learned counsel for the respondents, on the other hand, relied on the order dated 08.03.1999 of the High Court in C.W.J.C. No. 6950 of 1997 in which a similar relief claimed by the College itself for the students for the sessions 1987-1990 to 1993-1995 for directing the Board to allow them to take examinations has been rejected by the High Court. He submitted that the aforesaid decision of the High Court was binding also on the appellants.

7. We are of the considered opinion that as the appellants were not parties in C.W.J.C. No. 6950 of 1997, the order dated 08.03.1999 of the High Court in the said Writ Petition will not be binding on the appellants. The appellants had filed C.W.J.C. No. 7321 of 2007 and we have perused the orders of the learned Single Judge passed in C.W.J.C. No. 7321 of 2007 and other connected cases and we find that the only reason given by the learned Single Judge in dismissing the Writ Petition of the appellants is that the College had not applied for grant of recognition under the NCTE Act. We also find that the Division Bench of the High Court has dismissed the Letters Patent Appeal of the appellants on the ground that the recognition which had been granted to the College had been withdrawn on 16.03.2007. Thus, neither the learned Single Judge nor the Division Bench of the High Court have held that the recognition granted to the College by the order dated 15.12.1994 for the academic sessions 1985-1987 to 1993-1995 was invalid or stood cancelled. As the NCTE Act came into force on 01.07.1995 and the NCTE was established on 17.08.1995, this Court has held in *Sunil Kumar Parimal and Another v. State of Bihar and Others* and *Kumari Ranjana Mishra and Another v. The State of Bihar and Others* (supra) that the NCTE Act will have no application for any period prior to academic sessions 1995-1996. Thus the appellants who

have undertaken the teachers training course in the College which had a valid recognition of the State Government during the academic sessions 1985-1987 to 1993-1995 were entitled to take the examinations conducted by the Board.

8. We accordingly allow these appeals, set aside the order of the learned Single Judge as well as the orders of the Division Bench in the Letters Patent Appeal and in the Civil Review and direct the Board to conduct the examination for the appellants as early as possible. There shall be no order as to costs.

B.B.B. Appeals allowed.

THE EXECUTIVE ENGINEER AND ANR.
v.
M/S SRI SEETARAM RICE MILL
(Civil Appeal No. 8859 of 2011)

OCTOBER 20, 2011

[S.H. KAPADIA, CJI., K.S. RADHAKRISHNAN AND SWATANTER KUMAR, JJ.]

Electricity Act, 2003:

Salient features of the Act – Discussed.

Legislative history and object of enactment – Discussed.

s.126 – Applicability of – Held: Consumption of electricity in excess of sanctioned load would be unauthorized use of electricity and would attract applicability of s.126 of the Act.

s.126 – Scope of, with reference to construction of the words 'unauthorized use' and 'means' – Discussed.

s.126 and s.135 – Distinction between – Discussed.

s.126 – Assessment and computation under – Manner of – Discussed.

s.127 – Appealable order – Held: In view of the language of s.127 of the Act, only a final order of assessment passed u/s.126(3) is an order appealable u/s.127 and a notice-cum-provisional assessment made u/s.126(2) is not appealable – Thus, the High Court should normally decline to interfere in a final order of assessment passed by the assessing officer in terms of s.126(3) of the Act in exercise of its jurisdiction under Article 226 of the Constitution of India.

s.127 – Statutory alternative remedy available u/s.127 of the Act – Writ petition – Scope of interference with provisional

order of assessment/show cause notice – Held: Keeping in view the functions and expertise of the specialized body constituted under the Act including the assessing officer, it would be proper exercise of jurisdiction, if writ court upon entertaining and deciding the writ petition on a jurisdictional issue, remand the matter to the competent authority for its adjudication on merits and in accordance with law – If exercise of jurisdiction by the Tribunal ex facie appears to be an exercise of jurisdiction in futility then it will be permissible for the High Court to interfere in exercise of its jurisdiction – In the instant case, the respondents-consumers were required to file objections as contemplated u/s.126 (3) of the Act against the provisional order of assessment – It was only when a final order of assessment was passed that the respondents could prefer a statutory appeal which, admittedly, was not done in the case in hand – High Court did not commit any error of jurisdiction in entertaining the writ petition against the order raising a jurisdictional challenge to the notice/provisional assessment order – However, High Court transgressed its jurisdictional limitations while travelling into the exclusive domain of the Assessing Officer relating to passing of an order of assessment and determining factual controversy of the case – Constitution of India, 1950 – Article 226.

Constitution of India, 1950:

Article 226 – Scope of interference with the provisional order of assessment/show cause notice – Discussed.

Article 226 – Alternative remedy – Maintainability of writ petition – Discussed.

Interpretation of statutes:

Purposive interpretation – Held: The statute should be read as a whole – Its different provisions may have to be construed together to make consistent construction of the whole statute relating to the subject matter – A construction

which will improve the workability of the statute, to be more effective and purposive, should be preferred to any other interpretation which may lead to undesirable results.

Expression 'means', 'means and includes' and 'does not include' – Held: When the Legislature has used a particular expression out of these three, it must be given its plain meaning while even keeping in mind that the use of other two expressions has not been favoured by the Legislature.

Fiscal and penal laws – Interpretation of.

Object and reason of enactment – Relevancy of.

Discussions of Standing Committee – Relevancy of.

Words and phrases:

Word 'dishonest', 'authorisation', 'malpractice' – Meaning of.

Word 'means' – Meaning of, in the context of s.126 of the Electricity Act, 2003 – Discussed.

Expression 'unauthorised use of electricity' – Meaning of, in the context of s.126 of the Electricity Act, 2003 – Discussed.

An agreement was entered into between appellant no.1 and the respondent for supply of power to the respondent. The respondent was categorized as medium industry category and accordingly accorded the contracted load. This category dealt with the contract demand of 99 KVA and above but below 110 KVA. On 10th June, 2009, the Executive Engineer inspected the business premises of the respondent's unit and issued a dump report. In the dump report, it was stated that there was unauthorized use of electricity and Maximum Demand (MD) had been consumed up to 142 KVA. On

25th July, 2009, provisional assessment order was issued by the appellants to the respondent by taking the contracted demand as that applicable to large industry and the respondent was required to file objections, if any, and to also pay the amount. On the same day, intimation was also issued to the respondent that there was unauthorized use of electricity falling squarely within the ambit of provisions of Section 126 of the Electricity Act, 2003. The demand was raised assessing the consumer for the period from June 2008 to August 2009 for a sum of Rs.7,77,300/-. This was computed for 15 months at the rate of Rs.200 per KVA (i.e., tariff for large industry) multiplied by two times, aggregating to the claimed amount. The respondent did not file its objections/reply but challenged the said provisional assessment order and the intimation of unauthorized use before the High Court by filing writ petition on the grounds of lack of authority and jurisdiction on the part of the Executive Engineer. It was also contended that no inspection was conducted in the business premises till date of dump, i.e., 10th June, 2009 when alleged unauthorized use of electricity was found. The respondent also challenged the maintainability and sustainability of the order of provisional assessment in calculating the dump charges for a period of 15 months from June 2008 to August 2009 on the basis of dump charges relating to large industry while the respondent was classified as medium scale industry.

The High Court held that the words 'unauthorized use of electricity' and 'means' as provided in Explanation to Section 126 of the 2003 Act were exhaustive; overdrawal of MD would not fall under the scope of 'unauthorized use of electricity' as defined under the 2003 Act, and the appellants had no jurisdiction to issue the intimation and pass the assessment order in terms of Section 126 of the 2003 Act.

In the instant appeal, the questions which arose for consideration were: (1) wherever the consumer consumes electricity in excess of the maximum of the contracted load, would the provisions of Section 126 of the 2003 Act be attracted on its true scope and interpretation; (2) whether the High Court, in the facts and circumstances of the case, was justified in interfering with the provisional order of assessment/show cause notice in exercise of its jurisdiction under Article 226 of the Constitution of India; and (3) was the writ petition before the High Court under Article 226 of the Constitution of India not maintainable because of a statutory alternative remedy being available under Section 127 of the 2003 Act.

Allowing the appeal, the Court

HELD: 1. To address the issues like deterioration in performance of the Boards and the difficulties in achieving efficient discharge of functions, a better, professional and regulatory regime was introduced under the Electricity Bill, 2001, with the policy of encouraging private sector participation in generation, transmission and distribution of electricity and with the objective of distancing regulatory responsibilities from the Government by transferring the same to the Regulatory Commissions. The need for harmonizing and rationalizing the provisions of the earlier statutes was met by creating a new, self-contained and comprehensive legislation. Another object was to bring unity in legislation and eliminate the need for the respective State Governments to pass any reform Act of their own. This Bill had progressive features and strived to strike the right balance between the economic profitability and public purpose given the current realities of the power sector in India. This Bill was put to great discussion and then emerged the Electricity Act, 2003 ('the 2003 Act'). The

2003 Act had notably provided for private sector participation, private transmission licences for rural and remote areas, stand alone systems for generation and distribution, the constitution of an Appellate Tribunal, more regulatory powers for the State Electricity Regulation Commission and provisions relating to theft of electricity. The additional provisions were introduced in the 2003 Act in relation to misuse of power and punishment of malpractices such as over-consumption of sanctioned electric load which are not covered by the provisions relating to theft; all of which had significant bearing upon the revenue focus intended by the Legislature. This is the legislative history and objects and reasons for enacting the 2003 Act. To ensure better regulatory, supervisory and revenue recovery system, as expressed in the objects and reasons of the 2003 Act, there was definite concerted effort in preventing unauthorized use of electricity on the one hand and theft of electricity on the other. The present case falls in the former. [Paras 2, 3] [238-F-H; 239-A-F]

2. Question (1)

2.1.1 It is clear from the object of enactment of Electricity Act, 2003 that 'revenue focus' was one of the principal considerations that weighed with the Legislature while enacting this law. The regulatory regime under the 2003 Act empowers the Commission to frame the tariff, which shall be the very basis for raising a demand upon a consumer, depending upon the category to which such consumer belongs and the purpose for which the power is sanctioned to such consumer. The contention on behalf of the respondent cannot be accepted that the provisions of Section 126 of the 2003 Act have to be given a strict and textual construction to the extent that they have to be read exhaustively in absolute terms. This is a legislation which establishes a

regulatory regime for the generation and distribution of power, as well as deals with serious fiscal repercussions of this entire regime. The two maxims which should be applied for interpretation of such statutes are *ex visceribus actus* (construction of the act as a whole) and *ut res magis valeat quam pereat* (it is better to validate a thing than to invalidate it). It is a settled cannon of interpretative jurisprudence that the statute should be read as a whole. In other words, its different provisions may have to be construed together to make consistent construction of the whole statute relating to the subject matter. A construction which will improve the workability of the statute, to be more effective and purposive, should be preferred to any other interpretation which may lead to undesirable results. [Para 10] [244-G-H; 245-A-E]

2.1.2. It is true that fiscal and penal laws are normally construed strictly but this rule is not free of exceptions. In given situations, this Court may, even in relation to penal statutes, decide that any narrow and pedantic, literal and lexical construction may not be given effect to, as the law would have to be interpreted having regard to the subject matter of the offence and the object that the law seeks to achieve. The provisions of Section 126, read with Section 127 of the 2003 Act, in fact, becomes a code in itself. Right from the initiation of the proceedings by conducting an inspection, to the right to file an appeal before the appellate authority, all matters are squarely covered under these provisions. It specifically provides the method of computation of the amount that a consumer would be liable to pay for excessive consumption of the electricity and for the manner of conducting assessment proceedings. In other words, Section 126 of the 2003 Act has a purpose to achieve, i.e., to put an implied restriction on such unauthorized consumption of electricity. The provisions of the 2003 Act, applicable regulations and the Agreement executed

between the parties at the time of sanction of the load prohibit consumption of electricity in excess of maximum sanctioned/ installed load. In the event of default, it also provides for the consequences that a consumer is likely to face. It embodies complete process for assessment, determination and passing of a demand order. This defined legislative purpose cannot be permitted to be frustrated by interpreting a provision in a manner not intended in law. This Court would have to apply the principle of purposive interpretation in preference to textual interpretation of the provisions of Section 126 of the 2003 Act. This Court would prefer to adopt purposive interpretation so as to ensure attainment of the object and purpose of the 2003 Act, particularly, of the provisions of Section 126 in question. [Para 11] [245-F-H; 246-A-E]

Balram Kumawat v. *Union of India & Ors.* **(2003) 7 SCC 628;** *Superintendent and Remembrancer of Legal Affairs to Government of West Bengal v. Abani Maity* **(1979) 4 SCC 85: 1979 (3) SCR 472 – relied on.**

2.1.3. The relevancy of objects and reasons for enacting an Act is a relevant consideration for the court while applying various principles of interpretation of statutes. Normally, the court would not go behind these objects and reasons of the Act. The discussion of a Standing Committee to a Bill may not be a very appropriate precept for tracing the legislative intent but in given circumstances, it may be of some use to notice some discussion on the legislative intent that is reflected in the substantive provisions of the Act itself. The Standing Committee on Energy, 2001, in its discussion said, 'the Committee feel that there is a need to provide safeguards to check the misuse of these powers by unscrupulous elements'. The provisions of Section 126 of the 2003 Act are self-explanatory, they are intended to cover situations other than the situations specifically

covered under Section 135 of the 2003 Act. This would further be a reason for this Court to adopt an interpretation which would help in attaining the legislative intent. Therefore, the provisions of Section 126 of the 2003 Act should be read with other provisions, the regulations in force and they should be so interpreted as to achieve the aim of workability of the enactment as a whole while giving it a purposive interpretation in preference to textual interpretation. [Paras 13-14] [250-A-E]

2.2. Distinction between Sections 126 and 135 of the 2003 Act.

2.2.1. Upon their plain reading, the mark differences in the contents of Sections 126 and 135 of the 2003 Act are obvious. They are distinct and different provisions which operate in different fields and have no common premise in law. Sections 126 and 127 of the 2003 Act read together constitute a complete code in themselves covering all relevant considerations for passing of an order of assessment in cases which do not fall under Section 135 of the 2003 Act. Section 135 of the 2003 Act falls under Part XIV relating to 'offences and penalties' and title of the Section is 'theft of electricity'. The Section opens with the words 'whoever, dishonestly' does any or all of the acts specified under clauses (a) to (e) of Sub-section (1) of Section 135 of the 2003 Act so as to abstract or consume or use electricity shall be punishable for imprisonment for a term which may extend to three years or with fine or with both. Besides imposition of punishment as specified under these provisions or the proviso thereto, Sub-section (1A) of Section 135 of the 2003 Act provides that without prejudice to the provisions of the 2003 Act, the licensee or supplier, as the case may be, through officer of rank authorized in this behalf by the appropriate commission, may immediately disconnect the

supply of electricity and even take other measures enumerated under Sub-sections (2) to (4) of the said Section. The fine which may be imposed under Section 135 of the 2003 Act is directly proportional to the number of convictions and is also dependent on the extent of load abstracted. In contradistinction to these provisions, Section 126 of the 2003 Act would be applicable to the cases where there is no theft of electricity but the electricity is being consumed in violation of the terms and conditions of supply leading to malpractices which may squarely fall within the expression 'unauthorized use of electricity'. [Para 15] [250-G-H; 251-A-E]

2.2.2. Section 135 of the 2003 Act deals with an offence of theft of electricity and the penalty that can be imposed for such theft. This squarely falls within the dimensions of Criminal Jurisprudence and *mens rea* is one of the relevant factors for finding a case of theft. On the contrary, Section 126 of the 2003 Act does not speak of any criminal intendment and is primarily an action and remedy available under the civil law. It does not have features or elements which are traceable to the criminal concept of *mens rea*. Thus, the expression 'unauthorized use of electricity' under Section 126 of the 2003 Act deals with cases of unauthorized use, even in absence of intention. These cases would certainly be different from cases where there is dishonest abstraction of electricity by any of the methods enlisted under Section 135 of the 2003 Act. A clear example would be, where a consumer has used excessive load as against the installed load simpliciter and there is violation of the terms and conditions of supply, then, the case would fall under Section 126 of the 2003 Act. On the other hand, where a consumer, by any of the means and methods as specified under Sections 135(a) to 135(e) of the 2003 Act, has abstracted energy with dishonest intention and without authorization, like providing for a direct connection

bypassing the installed meter, the case would fall under Section 135 of the Act. Therefore, there is a clear distinction between the cases that would fall under Section 126 of the 2003 Act on the one hand and Section 135 of the 2003 Act on the other. There is no commonality between them in law. They operate in different and distinct fields. The assessing officer has been vested with the powers to pass provisional and final order of assessment in cases of unauthorized use of electricity and cases of consumption of electricity beyond contracted load will squarely fall under such power. The legislative intention is to cover the cases of malpractices and unauthorized use of electricity and then theft which is governed by the provisions of Section 135 of the 2003 Act. [Paras 16-17] [252-D-H; 253-A-C]

2.2.3. Section 135 of the 2003 Act significantly uses the words 'whoever, dishonestly' does any of the listed actions so as to abstract or consume electricity would be punished in accordance with the provisions of the 2003 Act. 'Dishonesty' is a state of mind which has to be shown to exist before a person can be punished under the provisions of that Section. The word 'dishonest' in normal parlance means 'wanting in honesty'. A person can be said to have 'dishonest intention' if in taking the property it is his intention to cause gain, by unlawful means, of the property to which the person so gaining is not legally entitled or to cause loss, by wrongful means, of property to which the person so losing is legally entitled. 'Dishonestly' is an expression which has been explained by the Courts in terms of Section 24 of the Indian Penal Code, 1860 as 'whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing dishonestly'. All these explanations clearly show that dishonesty is a state of mind where a person does an act with an intent to deceive the other, acts fraudulently and

with a deceptive mind, to cause wrongful loss to the other. The act has to be of the type stated under Sub-sections (1)(a) to (1)(e) of Section 135 of the 2003 Act. If these acts are committed and that state of mind, *mens rea*, exists, the person shall be liable to punishment and payment of penalty as contemplated under the provisions of the 2003 Act. In contradistinction to this, the intention is not the foundation for invoking powers of the competent authority and passing of an order of assessment under Section 126 of the 2003 Act. [Paras18-19, 22] [253-D-G; 254-C-D]

Dr. S. Dutt v. *State of U.P.* **AIR 1966 SC 523: 1966 SCR 493 – relied on.**

The Law Lexicon **(2nd Edn. 1997) by P. Ramanatha Aiyar;** *Collins English Dictionary; Black's Law Dictionary* **(Eighth Edition) – referred to.**

2.3. The ambit and scope of Section 126 with reference to the construction of the words 'unauthorised use' and 'means'

2.3.1. The provisions of Section 126 contemplate the following steps to be taken: (i) An assessing officer is to conduct inspection of a place or premises and the equipments, gadgets, machines, devices found connected or used in such place. (ii) The formation of a conclusion that such person has indulged in unauthorized use of electricity. (iii) The assessing officer to provisionally assess, to the best of his judgment, the electricity charges payable by such person. (iv) The order of provisional assessment to be served upon the person concerned in the manner prescribed, giving him an opportunity to file objections, if any, against the provisional assessment. (v)The assessing officer has to afford a reasonable opportunity of being heard to such person and pass a final order of assessment within 30

days from the date of service of such order of provisional assessment. (vi)The person, upon whom the provisional order of assessment is served, is at liberty to pay the said amount within seven days of the receipt of such order and where he files such objections, final order of assessment shall be passed, against which such person has a right of appeal under Section 127 of the 2003 Act within the prescribed period of limitation. [Para 23] [254-F-H; 255-A-E]

2.4. Assessment and Computation

2.4.1. Wherever the assessing officer arrives at the conclusion that unauthorized use of electricity has taken place, the assessment shall be made for the entire period during which such unauthorized use of electricity has taken place and if such period cannot be ascertained, it shall be limited to a period of 12 months immediately preceding the date of inspection and the assessment shall be made at the rate equal to twice the tariff applicable for the relevant category of service specified under these provisions. This computation has to be taken in terms of Sections 126(5), 126(6) and 127 of the 2003 Act. [Para 24] [255-F-G]

2.4.2. The expression 'unauthorized use of electricity' on its plain reading means use of electricity in a manner not authorized by the licensee of the Board. 'Authorization' refers to the permission of the licensee to use of electricity', subject to the terms and conditions for such use and the law governing the subject. The supply of electricity to a consumer is always subject to the provisions of the 2003 Act, State Acts, Regulations framed thereunder and the terms and conditions of supply in the form of a contract or otherwise. Generally, when electricity is consumed in violation of any or all of these, it would be understood as 'unauthorized use of electricity'. But this general view will have to be examined

in the light of the fact that the legislature has opted to explain this term for the purposes of Section 126 of the 2003 Act. The 'unauthorized use of electricity' means the usage of electricity by the means and for the reasons stated in sub-clauses (i) to (v) of clause (b) of Explanation to Section 126 of the 2003 Act. Some of the illustratively stated circumstances of 'unauthorised use' in the section cannot be construed as exhaustive. The 'unauthorized use of electricity' would mean what is stated under that Explanation, as well as such other unauthorized user, which is squarely in violation of the statutory or contractual provisions. [Paras 27-28] [256-E-G; 256-F-G]

2.4.3. 'Unauthorized' is a concept well-recognized under different statutes, for example, under Section 31A of the Delhi Development Act, 1957 (the 'DDA Act') the authority has the power to seal the 'unauthorized' development, if the misuser of the premises would come within the ambit of unauthorized development. But if such misuse does not come within the ambit of 'unauthorized development', such power is not available to the authority. Simplicitor misuse, therefore, may not fall within the ambit of unauthorized development under the provisions of the DDA Act. The unauthorized use of electricity in the manner as is undisputed on record clearly brought the respondent 'under liability and in blame' within the ambit and scope of Section 126 of the 2003 Act. [paras 29, 31] [258-H; 259-A-B; 259-F]

M.C. Mehta v. Union of India **(2006) 3 SCC 391 – relied on.**

2.4.4. The expression 'means' used in the definition clause of Section 126 of the 2003 Act can have different connotations depending on the context in which such expression is used. The word ordinarily includes a mistaken but reasonable understanding of a communication. 'Means' by itself is a restrictive term and

when used with the word 'includes', it is construed as exhaustive. In those circumstances, a definition using the term 'means' is a statement of literal connotation of a term and the courts have interpreted 'means and includes' as an expression defining the section exhaustively. While determining whether a provision is exhaustive or merely illustrative, this will have to depend upon the language of the Section, scheme of the Act, the object of the Legislature and its intent. [Para 32] [259-G; 260-A-C]

Black's Law Dictionary **(Eighth Edition) page 1001 – referred to.**

2.4.5. 'Purposive construction' is certainly a cardinal principle of interpretation. Equally true is that no rule of interpretation should either be over-stated or over-extended. This rule of interpretation can be applied to the instant case. It points to the conclusion that an interpretation which would attain the object and purpose of the Act has to be given precedence over any other interpretation which may not further the cause of the statute. The development of law is particularly liberated both from literal and blinkered interpretation, though to a limited extent. The precepts of interpretation of contractual documents have also undergone a wide ranged variation in the recent times. The result has been subject to one important exception to assimilate the way in which such documents are interpreted by judges on the common sense principle by which any serious utterance would be interpreted by ordinary life. In other words, the common sense view relating to the implication and impact of provisions is the relevant consideration for interpreting a term of document so as to achieve temporal proximity of the end result. Another similar rule is the rule of practical interpretation. This test can be effectuatedly applied to the provisions of a statute of the present kind. It must be understood that an interpretation

which upon application of the provisions at the ground reality, would frustrate the very law should not be accepted against the common sense view which will further such application. [paras 33-35] [260-D-H; 261-A-B]

2.4.6. Once the court decides that it has to take a purposive construction as opposed to textual construction, then the legislative purpose sought to be achieved by such an interpretation has to be kept in mind. Keeping in view the legislative scheme and the provisions of the 2003 Act, it will be appropriate to adopt the approach of purposive construction on the facts of this case. The provisions of Section 126 of the 2003 Act are intended to cover the cases over and above the cases which would be specifically covered under the provisions of Section 135 of the 2003 Act. In other words, the purpose sought to be achieved is to ensure stoppage of misuse/unauthorized use of the electricity as well as to ensure prevention of revenue loss. It is in this background that the scope of the expression 'means' has to be construed. If it is held that the expression 'means' is exhaustive and cases of unauthorized use of electricity are restricted to the ones stated under Explanation (b) of Section 126 alone, then it shall defeat the very purpose of the 2003 Act, inasmuch as the different cases of breach of the terms and conditions of the contract of supply, regulations and the provisions of the 2003 Act would escape the liability sought to be imposed upon them by the Legislature under the provisions of Section 126 of the 2003 Act. Thus, it will not be appropriate for the courts to adopt such an approach. The Legislature has intentionally omitted to use the word 'includes' and has only used the word 'means' with an intention to explain *inter alia* what an unauthorized use of electricity would be. It must be noticed that clause (iv) of Explanation (b) and sub-Section (5) of Section 126 of the 2003 Act were

both amended/substituted by the same amending Act 26 of 2007, with a purpose and object of preventing unauthorised use of electricity not amounting to theft of electricity within the meaning of Section 135 of the 2003 Act. This amendment, therefore, has to be given its due meaning which will fit into the scheme of the 2003 Act and would achieve its object and purpose. The expression 'means' would not always be open to such a strict construction that the terms mentioned in a definition clause under such expression would have to be inevitably treated as being exhaustive. There can be a large number of cases and examples where even the expression 'means' can be construed liberally and treated to be inclusive but not completely exhaustive of the scope of the definition, of course, depending upon the facts of a given case and the provisions governing that law. [Paras 36-38] [261-B-G; 262-A-E]

K.V. Muthu v. Angamuthu Ammal **(1997) 2 SCC 53: 1996 (10) Suppl. SCR 188;** *Union of India v. Prabhakaran Vijaya Kumar & Ors.* **(2008) 9 SCC 527: 2008 (7) SCR 673 – relied on.**

2.4.7. It cannot be stated as an absolute proposition of law that the expression 'means' wherever occurring in a provision would inevitably render that provision exhaustive and limited. This rule of interpretation is not without exceptions as there could be statutory provisions whose interpretation demands somewhat liberal construction and require inclusive construction. An approach or an interpretation which will destroy the very purpose and object of the enacted law has to be avoided. The other expressions used by the Legislature in various sub-clauses of Explanation (b) of Section 126 of the 2003 Act are also indicative of its intent to make this provision wider and of greater application. Expressions like 'any artificial means', 'by a means not authorised by the

licensee' etc. are terms which cannot be exhaustive even linguistically and are likely to take within their ambit what is not specifically stated. For example, 'any artificial means' is a generic term and so the expression 'means' would have to be construed generally. The expressions 'means', 'means and includes' and 'does not include' are expressions of different connotation and significance. When the Legislature has used a particular expression out of these three, it must be given its plain meaning while even keeping in mind that the use of other two expressions has not been favoured by the Legislature. To put it simply, the Legislature has favoured non-use of such expression as opposed to other specific expression. In the instant case, the Explanation to Section 126 has used the word 'means' in contradistinction to 'does not include' and/or 'means and includes'. This would lead to one obvious result that even the Legislature did not intend to completely restrict or limit the scope of this provision. [Paras 41-42] [265-B-E; 267-A-C]

Eureka Forbes Ltd. v. Allahabad Bank **(2010) 6 SCC 193: 2010 (5) SCR 990 – relied on.**

2.4.8. Unauthorised use of electricity cannot be restricted to the stated clauses under the explanation but has to be given a wider meaning so as to cover cases of violation of terms and conditions of supply and the regulations and provisions of the 2003 Act governing such supply. 'Unauthorised use of electricity' itself is an expression which would, on its plain reading, take within its scope all the misuse of the electricity or even malpractices adopted while using electricity. It is difficult to restrict this expression and limit its application by the categories stated in the explanation. It is indisputable that the electricity supply to a consumer is restricted and controlled by the terms and conditions of supply, the

regulations framed and the provisions of the 2003 Act. The requirement of grant of licence itself suggests that electricity is a controlled commodity and is to be regulated by the regulatory authorities. If a person unauthorisedly consumes electricity, then he can certainly be dealt with in accordance with law and penalties may be imposed upon him as contemplated under the contractual, regulatory and statutory regime. The Orissa Electricity Regulatory Commission, in exercise of its powers under Section 181(2)(t), (v), (w) and (x) read with Part VI of the 2003 Act, Orissa Electricity Reforms Act, 1995 and all other powers enabling it in that behalf, made the regulations to govern distribution and supply of electricity and procedure thereof such as system of billing, modality of payment, the powers, functions and applications of the distribution licensees form for supply and/or suppliers and the rights and obligations of the consumers. These were called 'Orissa Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 2004 ('Conditions of Supply) vide notification dated 21st May, 2004. This Agreement was undisputedly executed between the parties. Clause (2) of the Agreement deals with Conditions of Supply. It stated that consumer had obtained and perused a copy of the Grid Corporation of Orissa Ltd. (General Conditions of Supply) Regulations, 1995, understood its content and undertook to observe and abide by all the terms and conditions stipulated therein to the extent they are applicable to him. The respondent was a consumer under the 'medium industry category'. [Para 43] [267-D-H; 268-A-D]

2.4.9. Minimum energy charges are to be levied with reference to 'contract demand' at the rate prescribed under the terms and conditions. These clauses of the Agreement clearly showed that the charges for consumption of electricity are directly relatable to the

sanctioned/connected load and also the load consumed at a given point of time if it is in excess of the sanctioned/ connected load. The respondent could consume electricity up to 110 KVA but if the connected load exceeded that higher limit, the category of the respondent itself could stand changed from 'medium industry' to 'large industry' which will be governed by a higher tariff. Chapter VII of the Conditions of Supply classified the consumers into various categories and heads. The electricity could be provided for a domestic, LT Industrial, LT/HT Industrial, Large Industry, Heavy Industries and Power Intensive Industries, etc. In terms of Regulation 80, the industry would fall under LT/HT category, if it relates to supply for industrial production with a contract demand of 22 KVA and above but below 110 KVA. However, it will become a 'large industry' under Regulation 80(10) if it relates to supply of power to an industry with a contract demand of 110 KVA and above but below 25,000 KVA. Once the category stands changed because of excessive consumption of electricity, the tariff and other conditions would stand automatically changed. The licensee has a right to reclassify the consumer under Regulation 82 if it is found that a consumer has been classified in a particular category erroneously or the purpose of supply as mentioned in the agreement has changed or the consumption of power has exceeded the limit of that category etc. The Conditions of Supply even places a specific prohibition on consumption of excessive electricity by a consumer. The cumulative reading of the terms and conditions of supply, the contract executed between the parties and the provisions of the 2003 Act showed that consumption of electricity in excess of the sanctioned/ connected load shall be an 'unauthorised use' of electricity in terms of Section 126 of the 2003 Act. This is for the reason that overdrawal of electricity amounts to breach of the terms and conditions of the

contract and the statutory conditions, besides such overdrawal being prejudicial to the public at large, as it is likely to throw out of gear the entire supply system, undermining its efficiency, efficacy and even increasing voltage fluctuations. In somewhat similar circumstances, where the consumer had been found to be drawing electricity in excess of contracted load and the general conditions of supply of electricity energy by the Board and clause 31(f) of the same empowered the Board to disconnect supply and even levy higher charges as per the tariff applicable, this Court held that such higher tariff charges could be recovered. [Paras 44-46] [268-F-H; 269-A-D, F-H; 270-A-C]

Bhilai Rerollers & Ors. v. M.P. Electricity Board & Ors. **(2003) 7 SCC 185: 2003 (2) Suppl. SCR 787;** *Orissa State Electricity Board & Anr. v. IPI Steel Ltd. & Ors.* **(1995) 4 SCC 328 – relied on.**

2.4.10. Certain malpractices adopted by the consumer for consuming electricity in excess of the contracted load could squarely fall within the ambit and scope of Section 126 of the 2003 Act as it is intended to provide safeguards against pilferage of energy and malpractices by the consumer. The Regulations framed in exercise of power of subordinate legislation or terms and conditions imposed in furtherance of statutory provisions have been held to be valid and enforceable. They do not offend the provisions of the 2003 Act. In fact, the power to impose penal charges or disconnect electricity has been held not violative even of Article 14 of the Constitution of India. The expression 'malpractices' does not find mention in the provisions under the 2003 Act but is a term coined by judicial pronouncements. Thus, the expression 'malpractices' has to be construed in its proper perspective and normally may not amount to theft of electricity as contemplated under Section 135

of the 2003 Act. Such acts/malpractices would fall within the mischief of unauthorized use of electricity as stipulated under Section 126 of the 2003 Act. [Para 48] [270-G-H; 271-A-C]

Hyderabad Vanaspathi Lts. v. A.P. State Electricity Board & Anr. **(1998) 4 SCC 471 – relied on.**

2.4.11. There is another angle from which the instant case can be examined and obviously without prejudice to the other contentions raised. It is a case where, upon inspection, the officers of the appellant found that respondent was consuming 142 KVA of electricity which was in excess of the sanctioned load. To the inspection report, the respondent had not filed any objection before the competent authority as contemplated under Section 126(3) and had approached the High Court. Limited for the purposes of these proceedings, excess consumption is not really in dispute. The contentions raised by the respondent were to challenge the very jurisdiction of the concerned authorities. Consumption in excess of sanctioned load is violative of the terms and conditions of the agreement as well as of the statutory benefits. Under Explanation (b)(iv), 'unauthorised use of electricity' means if the electricity was used for a purpose other than for which the usage of electricity was authorised. Explanation (b)(iv), thus, would also cover the cases where electricity is being consumed in excess of sanctioned load, particularly when it amounts to change of category and tariff. As is clear from the agreement deed, the electric connection was given to the respondent on a contractual stipulation that he would consume the electricity in excess of 22 KVA but not more than 110 KVA. The use of the negative language in the condition itself declares the intent of the parties that there was an implied prohibition in consuming electricity in excess of the maximum load as it would *per se* be also prejudiced. Not only this, the language of Regulations 82

and 106 also prescribe that the consumer is not expected to make use of power in excess of approved contract demand otherwise it would be change of user falling within the ambit of 'unauthorised use of electricity'. Again, there is no occasion for this Court to give a restricted meaning to the language of Explanation (b)(iv) of Section 126. The contention that only the actual change in purpose of use of electricity and not change of category that would attract the provisions of Section 126 of the 2003 Act is again without any substance. The cases of excess load of consumption would be squarely covered under Explanation (b)(iv) of Section 126 of the 2003 Act. Once this factor is established, then the assessing officer has to pass the final order of assessment in terms of Sections 126(3) to 126(6) of the 2003 Act. [Paras 49-50] [271-E-H; 272-A-E; 273-H; 274-A]

Association of Industrial Electricity Users v. State of A.P. & Ors. **(2002) 3 SCC 711: 2002 (2) SCR 273;** *Punjab State Electricity Board v. Vishwa Caliber Builders Private Ltd.* **(2010) 4 SCC 539 – relied on.**

Question No.2 and 3

3.1. It is a settled canon of law that the High Court would not normally interfere in exercise of its jurisdiction under Article 226 of the Constitution of India where statutory alternative remedy is available. It is equally settled that this canon of law is not free of exceptions. The courts, including this Court, have taken the view that the statutory remedy, if provided under a specific law, would impliedly oust the jurisdiction of the Civil Courts. The High Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India can entertain writ or appropriate proceedings despite availability of an alternative remedy. This jurisdiction, the High Court would exercise with some circumspection in exceptional cases, particularly, where the cases involve a pure

question of law or vires of an Act are challenged. [para 53] [275-D-F]

3.2. It is somewhat difficult to state with absolute clarity any principle governing such exercise of jurisdiction. It always will depend upon the facts of a given case. Interest of administration of justice shall be better subserved if the cases of the present kind are heard by the courts only where it involves primary questions of jurisdiction or the matters which goes to the very root of jurisdiction and where the authorities have acted beyond the provisions of the Act. However, it should only be for the specialized Tribunal or the appellate authorities to examine the merits of assessment or even factual matrix of the case. The High Court should not decline to exercise its jurisdiction merely for the reason that there is a statutory alternative remedy available even when the case falls in the above-stated class of cases. It is a settled principle that the Courts/Tribunal will not exercise jurisdiction in futility. The law will not itself attempt to do an act which would be vain, *lex nil frustra facit,* nor to enforce one which would be frivolous—*lex neminem cogit ad vana seu inutilia*—the law will not force any one to do a thing vain and fruitless. In other words, if exercise of jurisdiction by the Tribunal *ex facie* appears to be an exercise of jurisdiction in futility for any of the stated reasons, then it will be permissible for the High Court to interfere in exercise of its jurisdiction. Applying these principles to the facts of the present case, it is obvious that no statutory appeal lay against a provisional order of assessment and the respondents herein were required to file objections as contemplated under Section 126 (3) of the 2003 Act. It was only when a final order of assessment was passed that the respondents could prefer a statutory appeal which admittedly was not done in the case in hand. [paras 54, 56] [276-B-F; 279-B-C]

Whirlpool Corporation v. Registrar of Trade Marks,

Mumbai **(1998) 8 SCC 1: 1998 (2) Suppl. SCR 359;** *Union of India v. State of Haryana* **(2000) 10 SCC 482 – relied on.**

3.3. In the instant case, the High Court did not fall in error of jurisdiction in entertaining the writ petition but certainly failed to finally exercise the jurisdiction within the prescribed limitations of law for exercise of such jurisdiction. Keeping in view the functions and expertise of the specialized body constituted under the Act including the assessing officer, it would have been proper exercise of jurisdiction, if the High Court, upon entertaining and deciding the writ petition on a jurisdictional issue, would have remanded the matter to the competent authority for its adjudication on merits and in accordance with law. In the facts of the instant case, the High Court should have answered the question of law relating to lack of jurisdiction and exercise of jurisdiction in futility without travelling into and determining the validity of the demand which squarely fell within the domain of the specialized authority. The High Court should have remanded the case to the assessing officer with a direction to the respondent to file its objections including non-applicability of the tariff before the assessing authority and for determination in accordance with law. [Para 57] [279-D-G]

Conclusions:

1. Wherever the consumer commits the breach of the terms of the Agreement, Regulations and the provisions of the Act by consuming electricity in excess of the sanctioned and connected load, such consumer would be 'in blame and under liability' within the ambit and scope of Section 126 of the 2003 Act.

2. The expression 'unauthorized use of electricity means' as appearing in Section 126 of the 2003 Act

is an expression of wider connotation and has to be construed purposively in contrast to contextual interpretation while keeping in mind the object and purpose of the Act. The cases of excess load consumption than the connected load *inter alia* would fall under Explanation (b)(iv) to Section 126 of the 2003 Act, besides it being in violation of Regulations 82 and 106 of the Regulations and terms of the Agreement.

3. In view of the language of Section 127 of the 2003 Act, only a final order of assessment passed under Section 126(3) is an order appealable under Section 127 and a notice-cum-provisional assessment made under Section 126(2) is not appealable. Thus, the High Court should normally decline to interfere in a final order of assessment passed by the assessing officer in terms of Section 126(3) of the 2003 Act in exercise of its jurisdiction under Article 226 of the Constitution of India.

4. The High Court did not commit any error of jurisdiction in entertaining the writ petition against the order raising a jurisdictional challenge to the notice/provisional assessment order dated 25th July, 2009. However, the High Court transgressed its jurisdictional limitations while travelling into the exclusive domain of the Assessing Officer relating to passing of an order of assessment and determining factual controversy of the case.

5. The High Court having dealt with the jurisdictional issue, the appropriate course of action would have been to remand the matter to the Assessing Authority by directing the consumer to file his objections, if any, as contemplated under Section 126(3) and require the Authority to pass a final order of assessment as contemplated under Section 126(5) of

the 2003 Act in accordance with law. [Para 58] [279-H; 280-A-H; 281-A-C]

4. The judgment of the High Court is set aside and the matter is remanded to the Assessing Officer to pass a final order of assessment expeditiously, after providing opportunity to the respondent herein to file objections, if any, to the provisional assessment order, as contemplated under Section 126(3) of the 2003 Act. [para 59] [281-D]

Case Law Reference:

1979 (3) SCR 472	**relied on**	**Para 12**
1966 SCR 493	**relied on**	**Para 20**
(2006) 3 SCC 391	**relied on**	**Para 29**
1996 (10) Suppl. SCR 188	**relied on**	**Para 38**
2008 (7) SCR 673	**relied on**	**Para 39**
2010 (5) SCR 990	**referred to**	**Para 41**
2003 (2) Suppl. SCR 787	**referred to**	**Para 47**
(1995) 4 SCC 328	**referred to**	**Para 47**
(1998) 4 SCC 471	**referred to**	**Para 48**
2002 (2) SCR 273	**referred to**	**Para 49**
(2010) 4 SCC 539	**referred to**	**Para 49**
1998 (2) Suppl. SCR 359	**referred to**	**Para 54**
(2000) 10 SCC 482	**referred to**	**Para 55**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8859 of 2011.

From the Judgment & Order dated 25.10.2010 of the High Court of Orissa at Cuttack in WP No. 12175 of 2009.

Suresh Chandra Tripathy for the Appellants.

Huzefa Ahmadi, Farrukh Rasheed, M. Paikray, V.N. Raghupathy for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Leave granted.

2. Over a period of time, it was felt that the performance of the State Electricity Boards had deteriorated on account of various factors. Amongst others, the inability on the part of the State Electricity Boards to take decisions on tariffs in a professional and independent manner was one of the main drawbacks in their functioning. Cross-subsidies had reached unsustainable levels. To address this issue and to provide for distancing of governments from determination of tariffs, the Electricity Regulatory Commissions Act, 1998 (hereinafter, 'the 1998 Act') was enacted in addition to the existing statutes like Indian Electricity Act, 1910 (hereinafter, 'the 1910 Act') and the Electricity (Supply) Act, 1948 (hereinafter, 'the 1948 Act'). For a considerable time, these three legislations remained in force, governing the electricity supply industry in India. The Boards created by the 1948 Act and the bodies created under the 1998 Act, as well as the State Governments, were provided distinct roles under these statutes. There was still overlapping of duties and some uncertainty with regard to exercise of power under these Acts. To address the issues like deterioration in performance of the Boards and the difficulties in achieving efficient discharge of functions, a better, professional and regulatory regime was introduced under the Electricity Bill, 2001, with the policy of encouraging private sector participation in generation, transmission and distribution of electricity and with the objective of distancing regulatory responsibilities from the Government by transferring the same to the Regulatory Commissions. The need for harmonizing and rationalizing the provisions of the earlier statutes was met by creating a new,

self-contained and comprehensive legislation. Another object was to bring unity in legislation and eliminate the need for the respective State Governments to pass any reform Act of their own. This Bill had progressive features and strived to strike the right balance between the economic profitability and public purpose given the current realities of the power sector in India. This Bill was put to great discussion and then emerged the Electricity Act, 2003 (for short, 'the 2003 Act'). The 2003 Act had notably provided for private sector participation, private transmission licences for rural and remote areas, stand alone systems for generation and distribution, the constitution of an Appellate Tribunal, more regulatory powers for the State Electricity Regulation Commission and provisions relating to theft of electricity. The additional provisions were introduced in the 2003 Act in relation to misuse of power and punishment of malpractices such as over-consumption of sanctioned electric load which are not covered by the provisions relating to theft; all of which had significant bearing upon the revenue focus intended by the Legislature. This is the legislative history and objects and reasons for enacting the 2003 Act.

3. To ensure better regulatory, supervisory and revenue recovery system, as expressed in the objects and reasons of the 2003 Act, there was definite concerted effort in preventing unauthorized use of electricity on the one hand and theft of electricity on the other. The present case falls in the former. According to the appellant, there was breach of the terms and conditions of the Standard Agreement Form for Supply of Electrical Energy by the Grid Corporation of Orissa Ltd. (hereinafter, 'the Agreement') as the consumer (respondent herein) had consumed electricity in excess of the contracted load.

FACTS

4. We may briefly refer to the facts giving rise to the present appeal. Respondent herein, a partnership firm, claims to be a

small scale industrial unit engaged in the production of rice. For carrying on the said business, it had obtained electric supply under the Agreement. Between the present appellant No.1 and the respondent the Agreement dated 9th December, 1997 was executed for supply of power to the respondent. Keeping in view the contracted load, the respondent was classified as 'medium industry category'. This category deals with the contract demand of 99 KVA and above but below 110 KVA. According to the respondent, since the day of connection of power supply, the meter and all other associated equipments had been inspected by the appellants. On 10th June, 2009, the Executive Engineer, Jeypore Electrical Division and SDO, Electrical MRT Division, Jeypore inspected the business premises of the respondent's unit and dump was conducted. These officers issued a dump report by noticing as follows:

> "Dump of the Meter taken. Calibration of meter done and error found within limit. If any abnormality detected in Dump, it will be intimated later on."

5. It is the case of the respondent that no intimation was given to it as to finding of defects if any, in dump. On 25th July, 2009, provisional assessment order bearing No.854 was issued by the appellants to the respondent. Intimation bearing No.853 had also been issued on the same day which informed the respondent that there was unauthorized use of electricity falling squarely within the ambit of provisions of Section 126 of the 2003 Act. In the dump report dated 10th June, 2009, it was stated that there was unauthorized use of electricity and Maximum Demand (hereinafter MD) had been consumed up to 142 KVA. On this basis, the appellant passed the order of provisional assessment by taking the contracted demand as that applicable to large industry. The demand was raised, assessing the consumer for the period from June 2008 to August 2009 for a sum of Rs.7,77,300/-. This was computed for 15 months at the rate of Rs.200 per KVA (i.e., tariff for large industry) multiplied by two times, aggregating to the claimed

amount. Vide the provisional assessment order dated 25th July, 2009, assessment was made under Section 126(1) of the 2003 Act for unauthorized use of electricity, the respondent was required to file objections, if any, and to also pay the amount. The relevant part of the said provisional assessment order reads as under :

> "And Whereas you are entitled to file objections against the aforesaid provisional assessment order under Section 126(3) of Electricity Act, 2003, within 30 days from receipt hereof and further entitled to appear before the undersigned for an opportunity of being heard on 25.08.2009 during working hours from 11.00 AM to 5.00 PM.
>
> And Whereas you are further entitled u/s 126(4) to deposit the aforesaid amount within 7 days and upon such deposit being made within 7 days, you shall not be subject to any further liability or any action by any authority whatsoever.
>
> And Whereas if you fail to file the objection within 30 days from receipt hereof, the undersigned shall presume that you have no objection to the provisional assessment and the undersigned shall proceed to pass final order u/s 126(3) on assessment of electricity charges payable by you.
>
> And Whereas, if you fail to appear before the undersigned at the aforesaid date and time after filing objections, if any, the undersigned shall proceed to pass the final order under section 126(3), based on the objection filed by you and evidence available on record."

6. The respondent did not file its objections/reply but challenged the said provisional assessment order and the intimation of unauthorized use before the High Court of Orissa, Cuttack by filing writ petition No.WP(C) No.12175 of 2009 on the grounds of lack of authority and jurisdiction on the part of

the Executive Engineer to frame the provisional assessment by alleging unauthorized use of electricity since 4th June, 2008. It was also contended that no inspection had been conducted in the business premises till date of dump, i.e., 10th June, 2009 when unauthorized use of electricity was found. The respondent also challenged the maintainability and sustainability of the order of provisional assessment in calculating the dump charges for a period of 15 months from June 2008 to August 2009 on the basis of dump charges relating to large industry while the respondent was classified as medium scale industry. It was also the contention raised by the respondent before the High Court that the provisions of Section 126 of the 2003 Act were not attracted in the present case at all. This claim of the respondent was contested by the appellants, as according to them, unauthorized use of electricity as defined under Section 126 will come into play as per clause (b) of the Explanation appended to Section 126 of the 2003 Act. The dump report dated 10th June, 2009 and the intimation dated 25th July, 2009 had been sent showing overdrawal of MD where, according to the appellants, the respondent had consumed electricity 'by means unauthorized by the licencee (overdrawal of maximum demand)' and thereby breached the Agreement and, therefore, the provisional assessment order and the intimation were fully justified.

7. The High Court, vide impugned judgment, accepted the case of the respondent and held that the words 'unauthorized use of electricity' and 'means' as provided in Explanation to Section 126 of the 2003 Act were exhaustive. Overdrawal of MD would not fall under the scope of 'unauthorized use of electricity' as defined under the 2003 Act, and the appellants had no jurisdiction to issue the intimation in question and pass the assessment order in terms of Section 126 of the 2003 Act. Aggrieved by the judgment of the High Court, the appellants have filed the present appeal by way of a special leave petition before this Court.

Questions for Determination :

1. Wherever the consumer consumes electricity in excess of the maximum of the contracted load, would the provisions of Section 126 of the 2003 Act be attracted on its true scope and interpretation?

2. Whether the High Court, in the facts and circumstances of the case, was justified in interfering with the provisional order of assessment/ show cause notice dated 25th July, 2009, in exercise of its jurisdiction under Article 226 of the Constitution of India?

3. Was the writ petition before the High Court under Article 226 of the Constitution of India not maintainable because of a statutory alternative remedy being available under Section 127 of the 2003 Act?

Discussion on Merits

1. Wherever the consumer consumes electricity in excess of the maximum of the connected load, would the provisions of Section 126 of the 2003 Act be attracted on its true scope and interpretation?

8. On the simple analysis of the facts as pleaded by the parties, it is contended on behalf of the respondent that the provisions of Section 126 of the 2003 Act are not attracted and no liability could be imposed upon them by the authorities in exercise of their power under that provision. Even if the case advanced by the appellants against the respondent without prejudice and for the sake of argument is admitted, even then, at best, the demand could be raised under Regulation 82 of the Orissa Electricity Regulatory Commission Distribution (Condition of Supply) Regulations, 2004 (for short, 'the Regulations'). But recourse to the provisions of Section 126

was impermissible in law. The contention is that the case of a consumer consuming the electricity in excess of maximum and the installed load does not fall within the mischief covered under Section 126 of the 2003 Act. To put it plainly, the argument is that the appellants lack inherent authority to raise such demand with reference to the present case on facts and law both.

9. On the contra, submission on behalf of the appellants is that the case of excessive consumption of power beyond the sanctioned load would be a case falling within the ambit of Section 126 of the 2003 Act. Section 126 of the 2003 Act is incapable of an interpretation which would render the said provision otiose in cases which do not specifically fall under Section 135 of the 2003 Act. In order to answer these contentions more precisely, we find it appropriate to examine the question framed above, under the following sub-headings:

(a) Interpretation;

(b) Distinction between Sections 126 and 135 of the 2003 Act;

(c) The ambit and scope of Section 126 with reference to the construction of the words 'unauthorised use' and 'means'; and

(d) Effect and impact of change in applicability of tariff upon the power of assessment in accordance with the provisions of the 2003 Act and the relevant Regulations in the facts of the case.

1(a) Interpretation

10. First and foremost, we have to examine how provisions like Section 126 of the 2003 Act should be construed. From the objects and reasons stated by us in the beginning of this judgment, it is clear that 'revenue focus' was one of the principal considerations that weighed with the Legislature while enacting this law. The regulatory regime under the 2003 Act empowers

the Commission to frame the tariff, which shall be the very basis for raising a demand upon a consumer, depending upon the category to which such consumer belongs and the purpose for which the power is sanctioned to such consumer. We are not prepared to accept the contention on behalf of the respondent that the provisions of Section 126 of the 2003 Act have to be given a strict and textual construction to the extent that they have to be read exhaustively in absolute terms. This is a legislation which establishes a regulatory regime for the generation and distribution of power, as well as deals with serious fiscal repercussions of this entire regime. In our considered view, the two maxims which should be applied for interpretation of such statutes are *ex visceribus actus* (construction of the act as a whole) and *ut res magis valeat quam pereat* (it is better to validate a thing than to invalidate it). It is a settled cannon of interpretative jurisprudence that the statute should be read as a whole. In other words, its different provisions may have to be construed together to make consistent construction of the whole statute relating to the subject matter. A construction which will improve the workability of the statute, to be more effective and purposive, should be preferred to any other interpretation which may lead to undesirable results.

11. It is true that fiscal and penal laws are normally construed strictly but this rule is not free of exceptions. In given situations, this Court may, even in relation to penal statutes, decide that any narrow and pedantic, literal and lexical construction may not be given effect to, as the law would have to be interpreted having regard to the subject matter of the offence and the object that the law seeks to achieve. The provisions of Section 126, read with Section 127 of the 2003 Act, in fact, becomes a code in itself. Right from the initiation of the proceedings by conducting an inspection, to the right to file an appeal before the appellate authority, all matters are squarely covered under these provisions. It specifically provides the method of computation of the amount that a consumer would be liable to pay for excessive consumption of the electricity and

for the manner of conducting assessment proceedings. In other words, Section 126 of the 2003 Act has a purpose to achieve, i.e., to put an implied restriction on such unauthorized consumption of electricity. The provisions of the 2003 Act, applicable regulations and the Agreement executed between the parties at the time of sanction of the load prohibit consumption of electricity in excess of maximum sanctioned/ installed load. In the event of default, it also provides for the consequences that a consumer is likely to face. It embodies complete process for assessment, determination and passing of a demand order. This defined legislative purpose cannot be permitted to be frustrated by interpreting a provision in a manner not intended in law. This Court would have to apply the principle of purposive interpretation in preference to textual interpretation of the provisions of Section 126 of the 2003 Act. We shall shortly discuss the meaning and scope of the expressions used by the Legislature under these provisions. At this stage, suffice it to note that this Court would prefer to adopt purposive interpretation so as to ensure attainment of the object and purpose of the 2003 Act, particularly, of the provisions of Section 126 in question. We may usefully refer to the judgment of this Court in the case of *Balram Kumawat v. Union of India & Ors.* [(2003) 7 SCC 628] wherein this Court discussed various tenets of interpretation and unambiguously held that these principles could be applied even to the interpretation of a fiscal or a penal statute. This Court held as under :

> "20. Contextual reading is a well-known proposition of interpretation of statute. The clauses of a statute should be construed with reference to the context vis-a-vis the other provisions so as to make a consistent enactment of the whole statute relating to the subject-matter. The rule of 'ex visceribus actus' should be resorted to in a situation of this nature.
>
> 21. In *State of West Bengal v. Union of India* [1964] 1 SCR 371], the learned Chief Justice stated the law thus :

> "The Court must ascertain the intention of the Legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with the other parts of the law, and the setting in which the clause to be interpreted occurs."

22. The said principle has been reiterated in *R.S. Raghunath v. State of Karnataka and Anr.* [AIR 1992 SC 81].

23. Furthermore, even in relation to a penal statute any narrow and pedantic, literal and lexical construction may not always be given effect to. The law would have to be interpreted having regard to the subject matter of the offence and the object of the law it seeks to achieve. The purpose of the law is not to allow the offender to sneak out of the meshes of law. Criminal Jurisprudence does not say so.

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25. A statute must be construed as a workable instrument. Ut res magis valeat quam pereat is a well-known principle of law. In *Tinsukhia Electric Supply Co. Ltd. v. State of Assam* [AIR 1990 SC 123], this Court stated the law thus :

"118. The courts strongly lean against any construction, which tends to reduce a statute to a futility. The provision of a statute must be so construed as to make it effective and operative, on the principle "ut res magis valeat quam pereat". It is, no doubt, true that if a statute is absolutely vague and its language wholly intractable and absolutely meaningless, the statute could be declared void for vagueness. This is not in judicial review by testing the law for arbitrariness or unreasonableness under Article 14; but what a court of construction, dealing with the language of

a statute, does in order to ascertain from, and accord to, the statute the meaning and purpose which the legislature intended for it. In *Manchester Ship Canal Co. v. Manchester Racecourse Co.* (1900) 2 Ch 352, Farwell J. said : (pp. 360-61)

> "Unless the words were so absolutely senseless that I could do nothing at all with them, I should be bound to find some meaning and not to declare them void for uncertainty."

In *Fawcett Properties Ltd. v. Buckingham County Council* [(1960) 3 All ER 503] Lord Denning approving the dictum of Farwell, J. said :

> "But when a Statute has some meaning, even though it is obscure, or several meanings, even though it is little to choose between them, the courts have to say what meaning the statute to bear rather than reject it as a nullity."

It is, therefore, the court's duty to make what it can of the statute, knowing that the statutes are meant to be operative and not inept and that nothing short of impossibility should allow a court to declare a statute unworkable. In *Whitney v. Inland Revenue Commissioners* [1928 AC 37] Lord Dunedin said :

> "A statute is designed to be workable, and the interpretation thereof by a court should be to secure that object, unless crucial omission or clear direction makes that end unattainable."

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27. The Courts will therefore reject that construction which will defeat the plain intention of the Legislature even though there may be some inexactitude in the language used. [See *Salmon v. Duncombe* (1886) 11 AC 827]. Reducing

the legislation futility shall be avoided and in a case where the intention of the Legislature cannot be given effect to, the Courts would accept the bolder construction for the purpose of bringing about an effective result. The Courts, when rule of purposive construction is gaining momentum, should be very reluctant to hold that the Parliament has achieved nothing by the language it used when it is tolerably plain what it seeks to achieve. [See *BBC Enterprises v. Hi-Tech Xtravision Ltd.,* (1990) 2 All ER 118]."

12. Further, in the case of *Superintendent and Remembrancer of Legal Affairs to Government of West Bengal v. Abani Maity* [(1979) 4 SCC 85], this Court held as under :

"Exposition ex visceribus actus is a long recognised rule of construction. Words in a statute often take their meaning from the context of the statute as a whole. They are therefore, not to be construed in isolation. For instance, the use of the word "may" would normally indicate that the provision was not mandatory. But in the context of a particular statute, this word may connote a legislative imperative, particularly when its construction in a permissive sense would relegate it to the unenviable position, as it were, "of an ineffectual angel beating its wings in a luminous void in vain". If the choice is between two interpretations", said *Viscount Simon L.C. in Nokes v. Doncaster Amalgamated Collieries, Ltd.* [(1940) A.C. 1014] :

> 'the narrower of which would fail to achieve the manifest purpose of the legislation we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result'."

13. The relevancy of objects and reasons for enacting an Act is a relevant consideration for the court while applying various principles of interpretation of statutes. Normally, the court would not go behind these objects and reasons of the Act. The discussion of a Standing Committee to a Bill may not be a very appropriate precept for tracing the legislative intent but in given circumstances, it may be of some use to notice some discussion on the legislative intent that is reflected in the substantive provisions of the Act itself. The Standing Committee on Energy, 2001, in its discussion said, 'the Committee feel that there is a need to provide safeguards to check the misuse of these powers by unscrupulous elements'. The provisions of Section 126 of the 2003 Act are self-explanatory, they are intended to cover situations other than the situations specifically covered under Section 135 of the 2003 Act. This would further be a reason for this Court to adopt an interpretation which would help in attaining the legislative intent.

14. By applying these principles to the provisions of this case requiring judicial interpretation, we find no difficulty in stating that the provisions of Section 126 of the 2003 Act should be read with other provisions, the regulations in force and they should be so interpreted as to achieve the aim of workability of the enactment as a whole while giving it a purposive interpretation in preference to textual interpretation.

1(b) Distinction between Sections 126 and 135 of the 2003 Act

15. Upon their plain reading, the mark differences in the contents of Sections 126 and 135 of the 2003 Act are obvious. They are distinct and different provisions which operate in different fields and have no common premise in law. We have already noticed that Sections 126 and 127 of the 2003 Act read together constitute a complete code in themselves covering all relevant considerations for passing of an order of assessment in cases which do not fall under Section 135 of the 2003 Act. Section 135 of the 2003 Act falls under Part XIV relating to

'offences and penalties' and title of the Section is 'theft of electricity'. The Section opens with the words 'whoever, dishonestly' does any or all of the acts specified under clauses (a) to (e) of Sub-section (1) of Section 135 of the 2003 Act so as to abstract or consume or use electricity shall be punishable for imprisonment for a term which may extend to three years or with fine or with both. Besides imposition of punishment as specified under these provisions or the proviso thereto, Sub-section (1A) of Section 135 of the 2003 Act provides that without prejudice to the provisions of the 2003 Act, the licensee or supplier, as the case may be, through officer of rank authorized in this behalf by the appropriate commission, may immediately disconnect the supply of electricity and even take other measures enumerated under Sub-sections (2) to (4) of the said Section. The fine which may be imposed under Section 135 of the 2003 Act is directly proportional to the number of convictions and is also dependent on the extent of load abstracted. In contradistinction to these provisions, Section 126 of the 2003 Act would be applicable to the cases where there is no theft of electricity but the electricity is being consumed in violation of the terms and conditions of supply leading to malpractices which may squarely fall within the expression 'unauthorized use of electricity'. This assessment/proceedings would commence with the inspection of the premises by an assessing officer and recording of a finding that such consumer is indulging in an 'authorized use of electricity'. Then the assessing officer shall provisionally assess, to the best of his judgment, the electricity charges payable by such consumer, as well as pass a provisional assessment order in terms of Section 126(2) of the 2003 Act. The officer is also under obligation to serve a notice in terms of Section 126(3) of the 2003 Act upon any such consumer requiring him to file his objections, if any, against the provisional assessment before a final order of assessment is passed within thirty days from the date of service of such order of provisional assessment. Thereafter, any person served with the order of provisional assessment may accept such assessment and deposit the

amount with the licensee within seven days of service of such provisional assessment order upon him or prefer an appeal against the resultant final order under Section 127 of the 2003 Act. The order of assessment under Section 126 and the period for which such order would be passed has to be in terms of Sub-sections (5) and (6) of Section 126 of the 2003 Act. The Explanation to Section 126 is of some significance, which we shall deal with shortly hereinafter. Section 126 of the 2003 Act falls under Chapter XII and relates to investigation and enforcement and empowers the assessing officer to pass an order of assessment.

16. Section 135 of the 2003 Act deals with an offence of theft of electricity and the penalty that can be imposed for such theft. This squarely falls within the dimensions of Criminal Jurisprudence and *mens rea* is one of the relevant factors for finding a case of theft. On the contrary, Section 126 of the 2003 Act does not speak of any criminal intendment and is primarily an action and remedy available under the civil law. It does not have features or elements which are traceable to the criminal concept of *mens rea*.

17. Thus, it would be clear that the expression 'unauthorized use of electricity' under Section 126 of the 2003 Act deals with cases of unauthorized use, even in absence of intention. These cases would certainly be different from cases where there is dishonest abstraction of electricity by any of the methods enlisted under Section 135 of the 2003 Act. A clear example would be, where a consumer has used excessive load as against the installed load simpliciter and there is violation of the terms and conditions of supply, then, the case would fall under Section 126 of the 2003 Act. On the other hand, where a consumer, by any of the means and methods as specified under Sections 135(a) to 135(e) of the 2003 Act, has abstracted energy with dishonest intention and without authorization, like providing for a direct connection bypassing the installed meter, the case would fall under Section 135 of the Act. Therefore,

there is a clear distinction between the cases that would fall under Section 126 of the 2003 Act on the one hand and Section 135 of the 2003 Act on the other. There is no commonality between them in law. They operate in different and distinct fields. The assessing officer has been vested with the powers to pass provisional and final order of assessment in cases of unauthorized use of electricity and cases of consumption of electricity beyond contracted load will squarely fall under such power. The legislative intention is to cover the cases of malpractices and unauthorized use of electricity and then theft which is governed by the provisions of Section 135 of the 2003 Act.

18. Section 135 of the 2003 Act significantly uses the words 'whoever, dishonestly' does any of the listed actions so as to abstract or consume electricity would be punished in accordance with the provisions of the 2003 Act. 'Dishonesty' is a state of mind which has to be shown to exist before a person can be punished under the provisions of that Section.

19. The word 'dishonest' in normal parlance means 'wanting in honesty'. A person can be said to have 'dishonest intention' if in taking the property it is his intention to cause gain, by unlawful means, of the property to which the person so gaining is not legally entitled or to cause loss, by wrongful means, of property to which the person so losing is legally entitled. 'Dishonestly' is an expression which has been explained by the Courts in terms of Section 24 of the Indian Penal Code, 1860 as 'whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing dishonestly'. [*The Law Lexicon* (2nd Edn. 1997) by P. Ramanatha Aiyar]

20. This Court in the case of *Dr. S. Dutt v. State of U.P.* [AIR 1966 SC 523] stated that a person who does anything with the intention to cause wrongful gain to one person or wrongful loss to another is said to do that dishonestly.

21. *Collins English Dictionary* explains the word 'dishonest' as 'not honest or fair; deceiving or fraudulent'. *Black's Law Dictionary* (Eighth Edition) explains the expression 'dishonest act' as a fraudulent act, 'fraudulent act' being a conduct involving bad faith, dishonesty, a lack of integrity or moral turpitude.

22. All these explanations clearly show that dishonesty is a state of mind where a person does an act with an intent to deceive the other, acts fraudulently and with a deceptive mind, to cause wrongful loss to the other. The act has to be of the type stated under Sub-sections (1)(a) to (1)(e) of Section 135 of the 2003 Act. If these acts are committed and that state of mind, *mens rea*, exists, the person shall be liable to punishment and payment of penalty as contemplated under the provisions of the 2003 Act. In contradistinction to this, the intention is not the foundation for invoking powers of the competent authority and passing of an order of assessment under Section 126 of the 2003 Act.

1(c) The ambit and scope of Section 126 with reference to the construction of the words 'unauthorised use' and 'means'

23. Having dealt with the principle of interpretation of these provisions and the distinction between Sections 126 and 135 of the 2003 Act, we shall now discuss the ambit and scope of Section 126. The provisions of Section 126 contemplate the following steps to be taken :

(i) An assessing officer is to conduct inspection of a place or premises and the equipments, gadgets, machines, devices found connected or used in such place.

(ii) The formation of a conclusion that such person has indulged in unauthorized use of electricity.

(iii) The assessing officer to provisionally assess, to the

best of his judgment, the electricity charges payable by such person.

(iv) The order of provisional assessment to be served upon the person concerned in the manner prescribed, giving him an opportunity to file objections, if any, against the provisional assessment.

(v) The assessing officer has to afford a reasonable opportunity of being heard to such person and pass a final order of assessment within 30 days from the date of service of such order of provisional assessment.

(vi) The person, upon whom the provisional order of assessment is served, is at liberty to pay the said amount within seven days of the receipt of such order and where he files such objections, final order of assessment shall be passed, against which such person has a right of appeal under Section 127 of the 2003 Act within the prescribed period of limitation.

Assessment and Computation

24. Wherever the assessing officer arrives at the conclusion that unauthorized use of electricity has taken place, the assessment shall be made for the entire period during which such unauthorized use of electricity has taken place and if such period cannot be ascertained, it shall be limited to a period of 12 months immediately preceding the date of inspection and the assessment shall be made at the rate equal to twice the tariff applicable for the relevant category of service specified under these provisions. This computation has to be taken in terms of Sections 126(5), 126(6) and 127 of the 2003 Act. The complete procedure is provided under these sections. Right from the initiation of the proceedings till preferring of an appeal

against the final order of assessment and termination thereof, as such, it is a complete code in itself. We have already indicated that the provisions of Section 126 do not attract the principles of Criminal Jurisprudence including *mens rea*. These provisions primarily relate to unauthorized use of electricity and the charges which would be payable in terms thereof.

25. To determine the controversy in the present case, it will be essential to examine the implication of the expression 'unauthorised use of electricity' as contained in Explanation (b) of Section 126 of the 2003 Act.

26. In order to explain these expressions, it will be necessary for us to refer to certain other provisions and the Regulations as well. These expressions have to be understood and given meaning with reference to their background and are incapable of being fairly understood, if examined in isolation. It is always appropriate to examine the words of a statute in their correct perspective and with reference to relevant statutory provisions.

27. The expression 'unauthorized use of electricity' on its plain reading means use of electricity in a manner not authorized by the licensee of the Board. 'Authorization' refers to the permission of the licensee to use of electricity', subject to the terms and conditions for such use and the law governing the subject. To put it more aptly, the supply of electricity to a consumer is always subject to the provisions of the 2003 Act, State Acts, Regulations framed thereunder and the terms and conditions of supply in the form of a contract or otherwise. Generally, when electricity is consumed in violation of any or all of these, it would be understood as 'unauthorized use of electricity'. But this general view will have to be examined in the light of the fact that the legislature has opted to explain this term for the purposes of Section 126 of the 2003 Act. The said provision, along with the Explanation, reads as under: -

"126. Assessment.- (1) If on an inspection of any place

or premises or after inspection of the equipments, gadgets, machines, devices found connected or used, or after inspection of records maintained by any person, the assessing officer comes to the conclusion that such person is indulging in unauthorised use of electricity, he shall provisionally assess to the best of his judgment the electricity charges payable by such person or by any other person benefited by such use.

(2) The order of provisional assessment shall be served upon the person in occupation or possession or in charge of the place or premises in such manner as may be prescribed.

(3) The person, on whom an order has been served under sub-section (2), shall be entitled to file objections, if any, against the provisional assessment before the assessing officer, who shall, after affording a reasonable opportunity of hearing to such person, pass a final order of assessment within thirty days from the date of service of such order of provisional assessment, of the electricity charges payable by such person.

(4) Any person served with the order of provisional assessment may, accept such assessment and deposit the assessed amount with the licensee within seven days of service of such provisional assessment order upon him:

(5) If the assessing officer reaches to the conclusion that unauthorised use of electricity has taken place, the assessment shall be made for the entire period during which such unauthorised use of electricity has taken place and if, however, the period during which such unauthorised use of electricity has taken place cannot be ascertained, such period shall be limited to a period of twelve months immediately preceding the date of inspection.;

(6) The assessment under this section shall be made at a

rate equal to twice the tariff applicable for the relevant category of services specified in sub-section (5).

Explanation : For the purposes of this section,—

(a) "assessing officer" means an officer of a State Government or Board or licensee, as the case may be, designated as such by the State Government;

(b) "unauthorised use of electricity" means the usage of electricity—

(i) by any artificial means; or

(ii) by a means not authorised by the concerned person or authority or licensee; or

(iii) through a tampered meter; or

(iv) for the purpose other than for which the usage of electricity was Authorized; or

(v) for the premises or areas other than those for which the supply of electricity was authorised."

28. The 'unauthorized use of electricity' means the usage of electricity by the means and for the reasons stated in sub-clauses (i) to (v) of clause (b) of Explanation to Section 126 of the 2003 Act. Some of the illustratively stated circumstances of 'unauthorised use' in the section cannot be construed as exhaustive. The 'unauthorized use of electricity' would mean what is stated under that Explanation, as well as such other unauthorized user, which is squarely in violation of the above-mentioned statutory or contractual provisions.

29. The *Black's Law Dictionary* (Eighth Edition) defines 'unauthorized' as 'done without the authority, made without actual, implied or apparent authority'. 'Unauthorized' is a concept well-recognized under different statutes, for example,

under Section 31A of the Delhi Development Act, 1957 (the 'DDA Act') the authority has the power to seal the 'unauthorized' development, if the misuser of the premises would come within the ambit of unauthorized development. But if such misuse does not come within the ambit of 'unauthorized development', such power is not available to the authority. Simplicitor misuse, therefore, may not fall within the ambit of unauthorized development under the provisions of the DDA Act. In *M.C. Mehta v. Union of India* [(2006) 3 SCC 391], this Court held that if the misuse was in violation of the permission, approval or sanction or in contravention of any conditions, subject to which the said permission/approval has been granted in terms of Section 30 of the DDA Act, then it will be 'unauthorized use'.

30. We have primarily referred to this case to support the reasoning that 'unauthorized development' is one which is contrary to a master plan or zonal development plan as was the case under the DDA Act. Just as the right to develop a property is controlled by the restrictions of law as well as the terms and conditions of the permission granted for that purpose, the use of electricity is similarly controlled by the statutory provisions and the terms and conditions on which such permission is granted to use the electricity.

31. The unauthorized use of electricity in the manner as is undisputed on record clearly brings the respondent 'under liability and in blame' within the ambit and scope of Section 126 of the 2003 Act. The blame is in relation to excess load while the liability is to pay on a different tariff for the period prescribed in law and in terms of an order of assessment passed by the assessing officer by the powers vested in him under the provisions of Section 126 of the 2003 Act.

32. The expression 'means' used in the definition clause of Section 126 of the 2003 Act can have different connotations depending on the context in which such expression is used. In terms of *Black's Law Dictionary* (Eighth Edition) page 1001, 'mean' is – 'of or relating to an intermediate point between two

points or extremes' and 'meaning' would be 'the sense of anything, but esp. of words; that which is conveyed'. The word ordinarily includes a mistaken but reasonable understanding of a communication. 'Means' by itself is a restrictive term and when used with the word 'includes', it is construed as exhaustive. In those circumstances, a definition using the term 'means' is a statement of literal connotation of a term and the courts have interpreted 'means and includes' as an expression defining the section exhaustively. It is to be kept in mind that while determining whether a provision is exhaustive or merely illustrative, this will have to depend upon the language of the Section, scheme of the Act, the object of the Legislature and its intent.

33. 'Purposive construction' is certainly a cardinal principle of interpretation. Equally true is that no rule of interpretation should either be over-stated or over-extended. Without being over-extended or over-stated, this rule of interpretation can be applied to the present case. It points to the conclusion that an interpretation which would attain the object and purpose of the Act has to be given precedence over any other interpretation which may not further the cause of the statute. The development of law is particularly liberated both from literal and blinkered interpretation, though to a limited extent.

34. The precepts of interpretation of contractual documents have also undergone a wide ranged variation in the recent times. The result has been subject to one important exception to assimilate the way in which such documents are interpreted by judges on the common sense principle by which any serious utterance would be interpreted by ordinary life. In other words, the common sense view relating to the implication and impact of provisions is the relevant consideration for interpreting a term of document so as to achieve temporal proximity of the end result.

35. Another similar rule is the rule of practical

interpretation. This test can be effectuatedly applied to the provisions of a statute of the present kind. It must be understood that an interpretation which upon application of the provisions at the ground reality, would frustrate the very law should not be accepted against the common sense view which will further such application.

36. Once the court decides that it has to take a purposive construction as opposed to textual construction, then the legislative purpose sought to be achieved by such an interpretation has to be kept in mind. We have already indicated that keeping in view the legislative scheme and the provisions of the 2003 Act, it will be appropriate to adopt the approach of purposive construction on the facts of this case. We have also indicated above that the provisions of Section 126 of the 2003 Act are intended to cover the cases over and above the cases which would be specifically covered under the provisions of Section 135 of the 2003 Act.

37. In other words, the purpose sought to be achieved is to ensure stoppage of misuse/unauthorized use of the electricity as well as to ensure prevention of revenue loss. It is in this background that the scope of the expression 'means' has to be construed. If we hold that the expression 'means' is exhaustive and cases of unauthorized use of electricity are restricted to the ones stated under Explanation (b) of Section 126 alone, then it shall defeat the very purpose of the 2003 Act, inasmuch as the different cases of breach of the terms and conditions of the contract of supply, regulations and the provisions of the 2003 Act would escape the liability sought to be imposed upon them by the Legislature under the provisions of Section 126 of the 2003 Act. Thus, it will not be appropriate for the courts to adopt such an approach. The primary object of the expression 'means' is intended to explain the term 'unauthorized use of electricity' which, even from the plain reading of the provisions of the 2003 Act or on a common sense view cannot be restricted to the examples given in the

Explanation. The Legislature has intentionally omitted to use the word 'includes' and has only used the word 'means' with an intention to explain *inter alia* what an unauthorized use of electricity would be. It must be noticed that clause (iv) of Explanation (b) and sub-Section (5) of Section 126 of the 2003 Act were both amended/substituted by the same amending Act 26 of 2007, with a purpose and object of preventing unauthorised use of electricity not amounting to theft of electricity within the meaning of Section 135 of the 2003 Act. This amendment, therefore, has to be given its due meaning which will fit into the scheme of the 2003 Act and would achieve its object and purpose.

38. The expression 'means' would not always be open to such a strict construction that the terms mentioned in a definition clause under such expression would have to be inevitably treated as being exhaustive. There can be a large number of cases and examples where even the expression 'means' can be construed liberally and treated to be inclusive but not completely exhaustive of the scope of the definition, of course, depending upon the facts of a given case and the provisions governing that law. In the case of *K.V. Muthu v. Angamuthu Ammal* [(1997) 2 SCC 53], this Court was dealing with a case under the Tamil Nadu Rent Act and the expression 'member of his family' as defined under Section 2(6-A) of that Act. Section 2(6-A) provides that 'member of his family' in relation to a landlord means his spouse, son, daughter, grand-child or dependent parents. If the principle of construction advanced by the learned counsel appearing for the respondent is to be accepted, then even in that case, the Court could not have expanded the expression 'members of his family' to include any other person than those specifically mentioned under that definition. The definition and the expression 'means', if construed as exhaustive would necessarily imply exclusion of all other terms except those stated in that Section but this Court, while adopting the principle of purposive construction, came to the conclusion that even a foster son, who is obviously not the

real son or direct descendant of a person, would be included. This Court, observing that there was consensus in precedent that the word 'family' is a word of great flexibility and is capable of different meanings, held as under :

> "While interpreting a definition, it has to be borne in mind that the interpretation placed on it should not only be not repugnant to the context, it should also be such as would aid the achievement of the purpose which is sought to be served by the Act. A construction which would defeat or was likely to defeat the purpose of the Act has to be ignored and not accepted.
>
> Where the definition or expression, as in the instant case, is preceded by the words "unless the context otherwise requires", the said definition set out in the section is to be applied and given effect to but this rule, which is the normal rule may be departed from if there be something in the context to show that the definition could not be applied."

39. Another comparable example of such interpretation by this Court can be traced out in the case of *Union of India v. Prabhakaran Vijaya Kumar & Ors.* [(2008) 9 SCC 527] wherein it was dealing with the provisions of Section 123(c) of the Railways Act, 1989 which read as under :

> "123 (c) "untoward incident" means— (1) (i) the commission of a terrorist act within the meaning of sub-section (1) of section (3) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 ; or
>
> (ii) the making of a violent attack or the commission of robbery or dacoity; or
>
> (iii) the indulging in rioting, shoot- out or arson, by any person in or on any train carrying passengers, or in a waiting hall, cloak room or reservation or booking office or on any platform or in any other place within the precincts of a railway station; or
>
> (2) the accidental falling of any passenger from a train carrying passengers."

40. As is obvious from the bare reading of the above provision, the provision used the expression 'untoward incident means' and under clause (2) of that provision 'accidental falling of any passenger from a train carrying passengers' is included. If it was to be understood as an absolute rule of law that the use of the term 'means' unexceptionally would always require an exhaustive interpretation of what is stated in or can be construed to that provision, then a person who was climbing on the train which was carrying passengers and who meets with an accident, would not be covered. However, this Court, while repelling this contention, held that by adopting a restrictive meaning to the expression 'accidental falling of a passenger from a train carrying passengers' in Section 123(c) of the Railways Act, 1989, this Court would be depriving a large number of railway passengers from receiving compensation in railway accidents. Treating the statute to be a beneficial piece of legislation, this Court applied purposive interpretation, while observing as under :

> "No doubt, it is possible that two interpretations can be given to the expression "accidental falling of a passenger from a train carrying passengers", the first being that it only applies when a person has actually got inside the train and thereafter falls down from the train, while the second being that it includes a situation where a person is trying to board the train and falls down while trying to do so. Since the provision for compensation in the Railways Act is a beneficial piece of legislation, in our opinion, it should receive a liberal and wider interpretation and not a narrow and technical one. Hence, in our opinion the latter of the abovementioned two interpretations i.e. the one which advances the object of the statute and serves its purpose

should be preferred vide *Kunal Singh v. Union of India* [(2003) 4 SCC 524 para 9], *B.D. Shetty v. Ceat Ltd.* [(2002) 1 SCC 193 – para 12) and *Transport Corpn. Of India v. ESI Corpn.* [(2000) 1 SCC 332]"

41. The above judgments clearly support the view that we have taken with reference to the facts and law of the present case. It cannot be stated as an absolute proposition of law that the expression 'means' wherever occurring in a provision would inevitably render that provision exhaustive and limited. This rule of interpretation is not without exceptions as there could be statutory provisions whose interpretation demands somewhat liberal construction and require inclusive construction. An approach or an interpretation which will destroy the very purpose and object of the enacted law has to be avoided. The other expressions used by the Legislature in various sub-clauses of Explanation (b) of Section 126 of the 2003 Act are also indicative of its intent to make this provision wider and of greater application. Expressions like 'any artificial means', 'by a means not authorised by the licensee' etc. are terms which cannot be exhaustive even linguistically and are likely to take within their ambit what is not specifically stated. For example, 'any artificial means' is a generic term and so the expression 'means' would have to be construed generally. This Court in the case of *Eureka Forbes Ltd. v. Allahabad Bank* [(2010) 6 SCC 193], while examining the interpretation and application of the word 'debt', held that it was a generic term and, thus, of wide amplitude :

"50. In this background, let us read the language of Section 2(g) of the Recovery Act. The plain reading of the Section suggests that legislature has used a general expression in contra distinction to specific, restricted or limited expression. This obviously means that, the legislature intended to give wider meaning to the provisions. Larger area of jurisdiction was intended to be covered under this provision so as to ensure attainment of the legislative

object, i.e. expeditious recovery and providing provisions for taking such measures which would prevent the wastage of securities available with the banks and financial institutions.

51. We may notice some of the general expressions used by the framers of law in this provision:

(a) *any liability*;

(b) claim as due from *any person*;

(c) during the course of *any business activity* undertaken by the Bank;

(d) where secured or unsecured;

(e) and lastly legally recoverable.

52. All the above expressions used in the definition clause clearly suggest that, expression 'debt' has to be given general and wider meaning, just to illustrate, the word 'any liability' as opposed to the word 'determined liability' or 'definite liability' or 'any person' in contrast to 'from the debtor'. The expression 'any person' shows that the framers do not wish to restrict the same in its ambit or application. The legislature has not intended to restrict to the relationship of a creditor or debtor alone. General terms, therefore, have been used by the legislature to give the provision a wider and liberal meaning. These are generic or general terms. Therefore, it will be difficult for the Court, even on cumulative reading of the provision, to hold that the expression should be given a narrower or restricted meaning. What will be more in consonance with the purpose and object of the Act is to give this expression a general meaning on its plain language rather than apply unnecessary emphasis or narrow the scope and interpretation of these provisions, as they are likely to frustrate the very object of the Act."

42. The expressions 'means', 'means and includes' and 'does not include' are expressions of different connotation and significance. When the Legislature has used a particular expression out of these three, it must be given its plain meaning while even keeping in mind that the use of other two expressions has not been favoured by the Legislature. To put it simply, the Legislature has favoured non-use of such expression as opposed to other specific expression. In the present case, the Explanation to Section 126 has used the word 'means' in contradistinction to 'does not include' and/or 'means and includes'. This would lead to one obvious result that even the Legislature did not intend to completely restrict or limit the scope of this provision.

43. Unauthorised use of electricity cannot be restricted to the stated clauses under the explanation but has to be given a wider meaning so as to cover cases of violation of terms and conditions of supply and the regulations and provisions of the 2003 Act governing such supply. 'Unauthorised use of electricity' itself is an expression which would, on its plain reading, take within its scope all the misuse of the electricity or even malpractices adopted while using electricity. It is difficult to restrict this expression and limit its application by the categories stated in the explanation. It is indisputable that the electricity supply to a consumer is restricted and controlled by the terms and conditions of supply, the regulations framed and the provisions of the 2003 Act. The requirement of grant of licence itself suggests that electricity is a controlled commodity and is to be regulated by the regulatory authorities. If a person unauthorisedly consumes electricity, then he can certainly be dealt with in accordance with law and penalties may be imposed upon him as contemplated under the contractual, regulatory and statutory regime. The Orissa Electricity Regulatory Commission, in exercise of its powers under Section 181(2)(t), (v), (w) and (x) read with Part VI of the 2003 Act, Orissa Electricity Reforms Act, 1995 and all other powers enabling it in that behalf, made the regulations to govern

distribution and supply of electricity and procedure thereof such as system of billing, modality of payment, the powers, functions and applications of the distribution licensees form for supply and/or suppliers and the rights and obligations of the consumers. These were called 'Orissa Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 2004 (hereinafter referred to as 'Conditions of Supply) vide notification dated 21st May, 2004. The Agreement has been placed on record. This Agreement was undisputedly executed between the parties. Clause (2) of the Agreement deals with Conditions of Supply. It states that consumer had obtained and perused a copy of the Grid Corporation of Orissa Ltd. (General Conditions of Supply) Regulations, 1995, understood its content and undertook to observe and abide by all the terms and conditions stipulated therein to the extent they are applicable to him. The respondent was a consumer under the 'medium industry category'. Clause (A) of the terms and conditions applicable to medium industry category reads as under :

> "This tariff rate shall be applicable to supply of power at a single point for industrial production purposes with contract demand/connected load of 22 KV and above up to but excluding 110 KVA where power is generally utilized as a motive force."

44. Minimum energy charges are to be levied with reference to 'contract demand' at the rate prescribed under the terms and conditions. These clauses of the Agreement clearly show that the charges for consumption of electricity are directly relatable to the sanctioned/connected load and also the load consumed at a given point of time if it is in excess of the sanctioned/connected load. The respondent could consume electricity up to 110 KVA but if the connected load exceeded that higher limit, the category of the respondent itself could stand changed from 'medium industry' to 'large industry' which will be governed by a higher tariff.

45. Chapter VII of the Conditions of Supply classifies the

consumers into various categories and heads. The electricity could be provided for a domestic, LT Industrial, LT/HT Industrial, Large Industry, Heavy Industries and Power Intensive Industries, etc. In terms of Regulation 80, the industry would fall under LT/HT category, if it relates to supply for industrial production with a contract demand of 22 KVA and above but below 110 KVA. However, it will become a 'large industry' under Regulation 80(10) if it relates to supply of power to an industry with a contract demand of 110 KVA and above but below 25,000 KVA. Once the category stands changed because of excessive consumption of electricity, the tariff and other conditions would stand automatically changed. The licensee has a right to reclassify the consumer under Regulation 82 if it is found that a consumer has been classified in a particular category erroneously or the purpose of supply as mentioned in the agreement has changed or the consumption of power has exceeded the limit of that category etc. The Conditions of Supply even places a specific prohibition on consumption of excessive electricity by a consumer. Regulation 106 of the Conditions of Supply reads as under :

> "No consumer shall make use of power in excess of the approved contract demand or use power for a purpose other than the one for which agreement has been executed or shall dishonestly abstract power from the licensee's system."

46. On the cumulative reading of the terms and conditions of supply, the contract executed between the parties and the provisions of the 2003 Act, we have no hesitation in holding that consumption of electricity in excess of the sanctioned/connected load shall be an 'unauthorised use' of electricity in terms of Section 126 of the 2003 Act. This, we also say for the reason that overdrawal of electricity amounts to breach of the terms and conditions of the contract and the statutory conditions, besides such overdrawal being prejudicial to the public at large, as it is likely to throw out of gear the entire

supply system, undermining its efficiency, efficacy and even increasing voltage fluctuations. In somewhat similar circumstances, where the consumer had been found to be drawing electricity in excess of contracted load and the general conditions of supply of electricity energy by the Board and clause 31(f) of the same empowered the Board to disconnect supply and even levy higher charges as per the tariff applicable, this Court held that such higher tariff charges could be recovered. While noticing the prejudice caused, the Court in the case *Bhilai Rerollers & Ors. v. M.P. Electricity Board & Ors.* [(2003) 7 SCC 185], held as under :

> "21. The respondent-Board, therefore, is entitled to raise the demand under challenge since such right has been specifically provided for and is part of the conditions for supply and particularly when such drawal of extra load in excess of the contracted load is bound to throw out of gear the entire supply system undermining its efficiency, efficacy not only causing stress on the installations of the Board but considerably affect other consumers who will experience voltage fluctuations. Consequently, we see no merit in the challenge made on behalf of the appellants. The appeals, therefore, fail and shall stand dismissed but with no costs."

47. Similar view was taken by this Court in the case of *Orissa State Electricity Board & Anr. v. IPI Steel Ltd. & Ors.* [(1995) 4 SCC 328].

48. It will also be useful to notice that certain malpractices adopted by the consumer for consuming electricity in excess of the contracted load could squarely fall within the ambit and scope of Section 126 of the 2003 Act as it is intended to provide safeguards against pilferage of energy and malpractices by the consumer. The Regulations framed in exercise of power of subordinate legislation or terms and conditions imposed in furtherance of statutory provisions have been held to be valid and enforceable. They do not offend the provisions of the 2003 Act. In fact, the power to impose penal

charges or disconnect electricity has been held not violative even of Article 14 of the Constitution of India. The expression 'malpractices' does not find mention in the provisions under the 2003 Act but as a term coined by judicial pronouncements. Thus, the expression 'malpractices' has to be construed in its proper perspective and normally may not amount to theft of electricity as contemplated under Section 135 of the 2003 Act. Such acts/malpractices would fall within the mischief of unauthorized use of electricity as stipulated under Section 126 of the 2003 Act. Cases of pilferage of electricity by adopting malpractices which patently may not be a theft would be the cases that would fall within the jurisdiction of the Board in furtherance to the terms and conditions of supply. Reference in this regard can be made to the judgment of this Court in the case of *Hyderabad Vanaspathi Lts. v. A.P. State Electricity Board & Anr.* [(1998) 4 SCC 471].

49. There is another angle from which the present case can be examined and obviously without prejudice to the other contentions raised. It is a case where, upon inspection, the officers of the appellant found that respondent was consuming 142 KVA of electricity which was in excess of the sanctioned load. To the inspection report, the respondent had not filed any objection before the competent authority as contemplated under Section 126(3) and had approached the High Court. Limited for the purposes of these proceedings, excess consumption is not really in dispute. As stated above, the contentions raised by the respondent were to challenge the very jurisdiction of the concerned authorities. Consumption in excess of sanctioned load is violative of the terms and conditions of the agreement as well as of the statutory benefits. Under Explanation (b)(iv), 'unauthorised use of electricity' means if the electricity was used for a purpose other than for which the usage of electricity was authorised. Explanation (b)(iv), thus, would also cover the cases where electricity is being consumed in excess of sanctioned load, particularly when it amounts to change of category and tariff. As is clear from the agreement deed, the electric

connection was given to the respondent on a contractual stipulation that he would consume the electricity in excess of 22 KVA but not more than 110 KVA. The use of the negative language in the condition itself declares the intent of the parties that there was an implied prohibition in consuming electricity in excess of the maximum load as it would *per se* be also prejudiced. Not only this, the language of Regulations 82 and 106 also prescribe that the consumer is not expected to make use of power in excess of approved contract demand otherwise it would be change of user falling within the ambit of 'unauthorised use of electricity'. Again, there is no occasion for this Court to give a restricted meaning to the language of Explanation (b)(iv) of Section 126. According to the learned counsel appearing for the respondent, it is only the actual change in purpose of use of electricity and not change of category that would attract the provisions of Section 126 of the 2003 Act. The contention is that where the electricity was provided for a domestic purpose and is used for industrial purpose or commercial purpose, then alone it will amount to change of user or purpose. The cases of excess load would not fall in this category. This argument is again without any substance and, in fact, needs to be noticed only to be rejected. We have already discussed in some detail above that the expressions of the Explanation to Section 126 are to be given a wider and amplified meaning so as to ensure the implementation of the provisions in contradistinction to defeating the very object of the 2003 Act. Without being innovative and while predicating, we only state the principles which have been authoritatively pronounced by this Court in different cases. In the case of *Association of Industrial Electricity Users v. State of A.P. & Ors.* [(2002) 3 SCC 711], this Court, while expressing that fixation of tariff in electricity or allied matters can hardly be a subject matter of judicial review. The courts would not venture to examine the tariff on merit and restrict its power of judicial review only to procedural matters that too where it is *ex facie* arbitrary. The Court rejecting the contention raised before it that Section 126 of the Andhra

Pradesh Electricity Reforms Act does not envisage classification of consumers according to the purpose for which the electricity is used and held that the supply of electricity permits differentiation according to the consumer's load factor or power factor, total consumption of energy during the specified period, the time at which the supply is required and the need for cross-subsidisation or such tariff as is just and reasonable and such as to promote economic efficiency in the supply and consumption of electricity. The tariff may also be such as to satisfy all other relevant provisions of the 2003 Act and the relevant conditions of the Agreement. Thus, there is a direct relation between the quantum of electricity demanded, supplied and tariff rate. The purpose, therefore, would include by necessary implication, the category under which the electricity supply is being provided by the licensee to the consumer. Still, in another case of *Punjab State Electricity Board v. Vishwa Caliber Builders Private Ltd.* [(2010) 4 SCC 539], this Court was primarily concerned with the question whether the ombudsman would have the jurisdiction to issue directions for regularization of unauthorized electricity. Answering the same in the negative and dealing with the question of excess load, this Court held as under :

> "The fact that the appellant could not release connection with a load of 2548 KW on account of non-availability of transformer necessary for transfer of 8 MVA load from 66 KV sub station, G.T. Road, Ludhiana had no bearing on the issue of consumption of electricity by the respondent beyond the sanctioned load. Undisputedly, in terms of the request made by the respondent, the Chief Engineer had sanctioned connection on the existing system with a load of 1500 KW, but the respondent used excess load to the tune of 481.637 KW and this amounted to unauthorized use of electrical energy."

50. The consistent view of this Court would support the proposition that the cases of excess load of consumption would

be squarely covered under Explanation (b)(iv) of Section 126 of the 2003 Act. Once this factor is established, then the assessing officer has to pass the final order of assessment in terms of Sections 126(3) to 126(6) of the 2003 Act.

Discussion on Question No.2 and 3

51. Under the procedure prescribed, the person (the consumer) has to be served with the notice inviting him to file objections, if any, within the stipulated time in terms of Section 126(3) and the assessing officer is required to pass a final order within 30 days from the date of service of such order of provisional assessment. If the consumer does not pay the provisional assessment amount, as required under Section 126(4) and file objections under Section 126(3), then after affording opportunity to the consumer, the assessing officer shall assess the amount and pass an order of final assessment, as stated in Section 126(5). Section 126(6) contemplates that the assessment under the Section shall be made at a rate equal to twice the tariff applicable for the relevant category of services specified in Sub-section (5). The reference to the category in Section 126(6) fully substantiate the view that we have taken that change of category by consumption of excess load will automatically bring the defaulter within the mischief of Explanation to Section 126(6). Once the order of assessment is finally passed and is served upon the consumer, he is expected to pay the said charges unless, being aggrieved from such an order, he prefers an appeal under Section 127 of the 2003 Act. The appeal under Section 127 would lie only against the final order passed under Section 126 that too within 30 days of the said order. The appeal shall be filed, maintained and dealt with in accordance with the procedure specified in Section 127 of the 2003 Act. A bare reading of the provisions of Section 127 shows that it is the final order made under Section 126 which is appealable under Section 127 of the 2003 Act. In other words, issuance of a notice or a provisional order of assessment as may be made by the assessing officer in terms

of sub-section (1) to sub-section (3) of Section 126 of the 2003 Act would not be the order against which an appeal would lie.

52. It may be noticed that admittedly the present respondent had not preferred any appeal against the provisional order of assessment dated 25th July, 2009 and, in fact, had preferred a writ petition against the very issuance of a notice issued in terms of Sub-sections (2) and (3) of Section 126 of the 2003 Act. This brings us to the question as to what is the scope of jurisdiction under Article 226 of the Constitution of India in face of the provisions of Section 127 of the 2003 Act.

53. It is a settled canon of law that the High Court would not normally interfere in exercise of its jurisdiction under Article 226 of the Constitution of India where statutory alternative remedy is available. It is equally settled that this canon of law is not free of exceptions. The courts, including this Court, have taken the view that the statutory remedy, if provided under a specific law, would impliedly oust the jurisdiction of the Civil Courts. The High Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India can entertain writ or appropriate proceedings despite availability of an alternative remedy. This jurisdiction, the High Court would exercise with some circumspection in exceptional cases, particularly, where the cases involve a pure question of law or vires of an Act are challenged. This class of cases we are mentioning by way of illustration and should not be understood to be an exhaustive exposition of law which, in our opinion, is neither practical nor possible to state with precision. The availability of alternative statutory or other remedy by itself may not operate as an absolute bar for exercise of jurisdiction by the Courts. It will normally depend upon the facts and circumstances of a given case. The further question that would inevitably come up for consideration before the Court even in such cases would be as to what extent the jurisdiction has to be exercised.

54. Should the Courts determine on merits of the case or should it preferably answer the preliminary issue or jurisdictional issue arising in the facts of the case and remit the matter for consideration on merits by the competent authority? Again, it is somewhat difficult to state with absolute clarity any principle governing such exercise of jurisdiction. It always will depend upon the facts of a given case. We are of the considered view that interest of administration of justice shall be better subserved if the cases of the present kind are heard by the courts only where it involves primary questions of jurisdiction or the matters which goes to the very root of jurisdiction and where the authorities have acted beyond the provisions of the Act. However, it should only be for the specialized Tribunal or the appellate authorities to examine the merits of assessment or even factual matrix of the case. It is argued and to some extent correctly that the High Court should not decline to exercise its jurisdiction merely for the reason that there is a statutory alternative remedy available even when the case falls in the above-stated class of cases. It is a settled principle that the Courts/Tribunal will not exercise jurisdiction in futility. The law will not itself attempt to do an act which would be vain, *lex nil frustra facit,* nor to enforce one which would be frivolous—*lex neminem cogit ad vana seu inutilia*—the law will not force any one to do a thing vain and fruitless. In other words, if exercise of jurisdiction by the Tribunal *ex facie* appears to be an exercise of jurisdiction in futility for any of the stated reasons, then it will be permissible for the High Court to interfere in exercise of its jurisdiction. This issue is no longer *res integra* and has been settled by a catena of judgments of this Court, which we find entirely unnecessary to refer to in detail. Suffices it to make a reference to the judgment of this Court in the case of *Whirlpool Corporation v. Registrar of Trade Marks, Mumbai* [(1998) 8 SCC 1] where this Court was concerned with the powers of the Registrar of Trade Marks and the Tribunal under the Trade and Merchandise Marks Act, 1958 and exercise of jurisdiction by the High Court in face of availability of a remedy under the Act. This Court while referring to various judgments of this Court and

specifying the cases where the alternative remedy would not bar the exercise of jurisdiction by the Court, held as under: -

> "14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution This power can be exercised by the High Court not only for issuing writs in the nature of Habeas Corpus, Mandamus, prohibition, Qua Warranto and Certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".
>
> 15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case law on this point but to cut down this circle of forensic whirlpool we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.
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> XXX XXX XXX
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> 19. Another Constitution Bench decision in *Calcutta Discount Co. Ltd. v. ITO Companies Distt* : [1961] 41 ITR 191 (SC) laid down :
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> > "Though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Court will issue appropriate orders or directions to prevent such consequences. Writ of certiorari and prohibition can issue against Income Tax Officer acting without jurisdiction Under Section 34 Income Tax Act."
>
> 20. Much water has since flown under the bridge, but there has been no corrosive effect on these decisions which command though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation.
>
> 21. That being so, the High Court was not justified in dismissing the writ petition at the initial stage without examining the contention that the show cause notice issued to the appellant was wholly without jurisdiction and that the Registrar, in the circumstances of the case, was not justified in acting as the 'Tribunal'."

55. Even in the case of *Union of India v. State of Haryana* [(2000) 10 SCC 482], this Court took the view that the question raised was a legal one which required determination as to whether provision of telephone connections and instruments amounted to sale and why the Union of India should not be exempted from payment of sales tax under the respective statutes. Holding that the question was fundamental in character

and need not even be put through the mill of statutory appeals in hierarchy, this Court remitted the matter to the High Court for determination of the questions of law involved in that case.

56. Applying these principles to the facts of the present case, it is obvious that no statutory appeal lay against a provisional order of assessment and the respondents herein were required to file objections as contemplated under Section 126 (3) of the 2003 Act. It was only when a final order of assessment was passed that the respondents could prefer a statutory appeal which admittedly was not done in the case in hand.

57. In the present case, the High Court did not fall in error of jurisdiction in entertaining the writ petition but certainly failed to finally exercise the jurisdiction within the prescribed limitations of law for exercise of such jurisdiction. Keeping in view the functions and expertise of the specialized body constituted under the Act including the assessing officer, it would have been proper exercise of jurisdiction, if the High Court, upon entertaining and deciding the writ petition on a jurisdictional issue, would have remanded the matter to the competent authority for its adjudication on merits and in accordance with law. In the facts of the present case, the High Court should have answered the question of law relating to lack of jurisdiction and exercise of jurisdiction in futility without travelling into and determining the validity of the demand which squarely fell within the domain of the specialized authority. The High Court should have remanded the case to the assessing officer with a direction to the respondent to file its objections including non-applicability of the tariff before the assessing authority and for determination in accordance with law.

58. Having dealt with and answered determinatively the questions framed in the judgment, we consider it necessary to precisely record the conclusions of our judgment which are as follows:-

1. Wherever the consumer commits the breach of the terms of the Agreement, Regulations and the provisions of the Act by consuming electricity in excess of the sanctioned and connected load, such consumer would be 'in blame and under liability' within the ambit and scope of Section 126 of the 2003 Act.

2. The expression 'unauthorized use of electricity means' as appearing in Section 126 of the 2003 Act is an expression of wider connotation and has to be construed purposively in contrast to contextual interpretation while keeping in mind the object and purpose of the Act. The cases of excess load consumption than the connected load *inter alia* would fall under Explanation (b)(iv) to Section 126 of the 2003 Act, besides it being in violation of Regulations 82 and 106 of the Regulations and terms of the Agreement.

3. In view of the language of Section 127 of the 2003 Act, only a final order of assessment passed under Section 126(3) is an order appealable under Section 127 and a notice-cum-provisional assessment made under Section 126(2) is not appealable.

4. Thus, the High Court should normally decline to interfere in a final order of assessment passed by the assessing officer in terms of Section 126(3) of the 2003 Act in exercise of its jurisdiction under Article 226 of the Constitution of India.

5. The High Court did not commit any error of jurisdiction in entertaining the writ petition against the order raising a jurisdictional challenge to the notice/provisional assessment order dated 25th July, 2009. However, the High Court transgressed

its jurisdictional limitations while travelling into the exclusive domain of the Assessing Officer relating to passing of an order of assessment and determining factual controversy of the case.

6. The High Court having dealt with the jurisdictional issue, the appropriate course of action would have been to remand the matter to the Assessing Authority by directing the consumer to file his objections, if any, as contemplated under Section 126(3) and require the Authority to pass a final order of assessment as contemplated under Section 126(5) of the 2003 Act in accordance with law.

59. For the reasons afore-recorded, the judgment of the High Court is set aside and the matter is remanded to the Assessing Officer to pass a final order of assessment expeditiously, after providing opportunity to the respondent herein to file objections, if any, to the provisional assessment order, as contemplated under Section 126(3) of the 2003 Act.

60. The appeal is allowed in the above terms, while leaving the parties to bear their own costs.

D.G. Appeal allowed.

JASWANT SINGH

v.

GURDEV SINGH & ORS.

(Civil Appeal Nos. 8879-80 of 2011)

OCTOBER 21, 2011

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

Evidence Act, 1872 – ss.74,76,77 and 78 – Compromise Decree – Admissibility of – Held: Compromise Decree is a public document in terms of s.74 – Certified copy of public document prepared u/s.76 is admissible in evidence u/s.77 – A certified copy of a public document is admissible in evidence without being proved by calling witness – In the instant case, a decree was passed and drafted in the light of the compromise entered into between the parties and a certified copy of such document was produced before the Court, hence, there was presumption as to genuineness of such certified copy u/s.78 – The compromise had merged into a decree and had become part and parcel of it – Judgment and decree passed by lower appellate Court as affirmed by High Court was based upon proper appreciation of the terms of compromise – Thus, interference by Supreme Court not called for.

The appellant had earlier filed a suit for permanent injunction alleging himself to be in possession as a co-sharer of the suit land. In the said suit, the parties entered into a compromise and on the basis of the said compromise dated 27.11.1972, a decree was passed on 08.12.1972.

Subsequently, the appellant filed a civil suit for declaration to the effect that he was the owner and in possession of land situated in village Simbli, Tehsil and District Hoshiarpur and for correction of the revenue

entries in the Jamabandi Register wherein the respondents had been wrongly shown to be the owners. Respondent No. 1 too filed a civil suit in the same Court. The trial court decreed the suit filed by appellant and dismissed the suit filed by respondent No.1. Respondent No.1 filed appeal before the District Judge who allowed the same to an extent in view of the said compromise dated 27.11.1972. The order was upheld by the High Court.

In the instant appeals interpretation of the said compromise dated 27.11.1972 was in dispute.

Dismissing the appeals, the Court

HELD:1. It is seen that based on the terms arrived at in the compromise and the decree dated 08.12.1972, the mutation of the land situated in village Simbli was sanctioned. Even though the appellant raised an objection as to the compromise dated 27.11.1972, (Ex.D3), admittedly, the same has not been challenged by him either in his plaint or in the suit filed by him or in the written statement filed in the suit by the defendant-Respondent no.1. The compromise dated 27.11.1972 was not challenged by the appellant rather it can be said that he also relied upon it because the decree upon which he claims ownership, has been passed only on the basis of this compromise dated 27.11.1992 (Ex. D3). [Para 8] [288-E-G; 289-A-B]

2. The compromise dated 27.11.1972 became the basis of the decree dated 08.12.1972 passed by the Sub-Judge, Hoshiarpur. As rightly observed by the courts below, the compromise merged into a decree and became part and parcel of it. To put it clear, the compromise had become a part of the decree which was passed by the court of Sub-Judge Ist Class, Hoshiarpur. Hence, it was a public document in terms of Section 74 of the Evidence Act, 1872 and certified copy of the public

document prepared under Section 76 of the Act is admissible in evidence under Section 77 of the said Act. A certified copy of a public document is admissible in evidence without being proved by calling witness. Inasmuch as the decree was passed and drafted in the light of the compromise entered into between the parties, viz. the plaintiff and the defendants, and a certified copy of such document was produced before the Court, there is presumption as to the genuineness of such certified copy under Section 78 of the Act. The appellant did not challenge the genuineness of certified copy in any manner. Although the record of the Court was proved to be burnt in a fire in Judicial Record Room, Hoshiarpur on 16.06.1998, but the certified copy of the compromise (Ex.D3), which is the part of the decree was obtained from the record room on 24.08.1988 and the Decree Ex.D4 was got issued on 12.09.1984. In those circumstances, there is no reason to doubt the authenticity of compromise (Ex.D3). Even otherwise, as rightly observed by the courts below, the appellant had not filed any other substitute of the document Ex.D3, on the basis of which the decree (Ex.D4) had been said to be passed. In view of the fact that the decree dated 08.12.1972 clearly says that the suit is partly decreed in favour of the plaintiff as per the terms of the compromise placed on file, there can be no other way to interpret the decree except in terms and conditions of the compromise (Ex.D3). [Para 9] [289-C-H; 290-A-B]

3. The decree dated 08.12.1972 is to be read and interpreted in terms of the compromise (Ex.D3) dated 27.11.1972. The judgment and decree passed by the lower appellate Court as affirmed by the High Court is based upon proper appreciation of the terms of compromise (Ex.D3) and this Court does not find any illegality or irregularity for interference. [Para 10] [290-C-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 8879-8880 of 2011.

From the Judgment & Order dated 24.9.2007 of the High Court of Punjab & Haryana at Chandigarh in 4473 & 4476 of 2004.

A.V. Palli, Rekha Palli, Atul Sharma, Anupam Raina for the Appellant.

Chinmay Khaladkar, Neelam Kalsi, Vimal Chandra S. Dave for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. These appeals are filed against the common final judgment and order dated 24.09.2007 passed by the High Court of Punjab & Haryana at Chandigarh in Regular Second Appeal (RSA) Nos. 4473 and 4776 of 2004 whereby the High Court dismissed both the appeals filed by the appellant herein.

3. Brief facts:

(a) Jaswant Singh-appellant herein filed a Civil Suit being No. 3 of 1997 in the court of Civil Judge, (Jr. Division) Hoshiarpur for declaration to the effect that he was the owner and in possession of land measuring 101 kanals 16 marlas situated in village Simbli, H.B. No. 272, Tehsil and District Hoshiarpur and for correction of the revenue entries in Column No. 4 of Jamabandi Register wherein the respondents herein had been wrongly shown to be the owners. It was claimed in that suit that one Shri Hazara Singh, s/o Shri Nihal Singh was the owner of the properties in village Simbli, Bajraur and Chabbewal and after his death on 06.12.1972, by virtue of a Will dated 05.12.1971, he transferred his properties in favour of the appellant herein and the names of the respondents

mentioned in the Jamabandi Register were wrong, illegal and liable to be corrected.

(b) Even as early as on 05.06.1972, a civil suit was filed by the appellant herein in the court of sub-Judge, First Class, Hoshiarpur seeking permanent injunction against one Amar Kaur and others restraining them from interfering in the land situated in Simbli. During the pendency of the suit, the parties entered into a compromise dated 27.11.1972 and on that basis the suit was decreed on 08.12.1972 and Mutation No. 1536 was sanctioned in favour of the appellant herein with respect to 12-1/2 acres of land and the same was delivered to him which he had been in possession since 16.02.1973. Respondent No. 1 herein and others considered Jaswant Singh to be the owner of 8 acres and regarding the remaining 4-1/2 acres of land, he was considered to be in mere permissive possession as it was given to him in lieu of his father's share in village Simbli, Chabbewal and Bajrawar for the purposes of cultivation only. The appellant took various steps to change the names in the revenue entries but during this whole period, the revenue entries remained unchanged in the name of Hazara Singh and hence the appellant herein filed civil suit for correction of those entries in Jamabandi.

(c) Gurdev Singh-Respondent No. 1 herein, s/o Shri Karnail Singh filed a civil suit being RBT CS No. 145 of 1998 in the same Court and the matter was clubbed with Civil Suit No. 3 of 1997 alleging therein that he was co-sharer in 1/4th share of land of Hazara Singh in village Simbli, ½ share in village Chabbewal and 1/4th share in village Bajraur as Hazara Singh was brother of their grand father. Vide order dated 20.04.2001, the civil Judge decreed the suit filed by Jaswant Singh-appellant herein and dismissed the suit filed by Gurdev Singh-Respondent No. 1 herein.

(d) Aggrieved by the order dated 20.04.2001, Respondent No. 1 herein filed RBT Civil Appeal Nos. 68 & 75 of 07.06.2001/ 04.06.2004 before the court of Additional District Judge (Ad-

hoc), Fast Track Court-II, Hoshiarpur. Vide order dated 28.09.2004, the Additional District Judge set aside the judgment and order dated 20.04.2001 passed by the Civil Judge (Jr. Division), Hoshiarpur and allowed the appeal filed against Civil Suit No. 3 of 1997 to the extent that Jaswant Singh-appellant herein is the owner of 8 acres of land and in possession of 4-1/2 acres of land at village Simbli, in view of compromise dated 27.11.1972. Feeling aggrieved, Jaswant Singh-appellant herein filed RSA Nos. 4473 and 4776 of 2004 before the High Court of Punjab & Haryana at Chandigarh whereby vide common judgment and order dated 24.09.2007, the High Court dismissed both the appeals. The said order is under challenge before this Court in these appeals by way of special leave.

4. Heard Mr. A.V. Palli, learned counsel for the appellant and Shri Chinmay Khaladkar, learned counsel for the respondents.

5. As stated earlier, the appellant filed a suit for permanent injunction on 05.06.1972 alleging himself to be in possession as a co-sharer of land situated in village Simbli. In the said suit, the parties entered into a compromise and on the basis of the said compromise (Ex.P1), a decree was passed on 08.12.1972. The interpretation of the said compromise is in dispute in the present proceedings. As per the appellant, he became the owner and in possession of 12 ½ acres of land situated in village Simbli whereas as per the defendants, the plaintiff was admitted to be the owner of 8 acres of land situated in village Simbli but was given possession of another land measuring 4½ acres of land in respect of his share situated in village Chhabewal and Bajrawar. The compromise decree was produced as Ex. P1 and the compromise deed was produced as Ex.D3.

6. In order to substantiate his claim, the appellant-plaintiff examined one Ajit Kumar Walia as PW-1 who deposed before the Court that the file relating to the decree is not available since

the record was burnt due to fire which broke out in the record room on 16.06.1998. Ashwani Kumar, PW-3, was also examined who in turn, deposed that Rupt No. 242 dated 16.02.1973 is not available in his record despite best efforts made by him.

7. On the other hand, from the side of the respondent-Defendant, one Harbhajan Singh was examined as DW-1, who had endorsed the fact that a compromise had taken place between the parties and a decree was passed on the basis of that compromise. He along with Dhan Kaur, Pritam Kaur, Arjan Singh, Bakshish Singh and Karam Singh were the witnesses to the compromise. He asserted that as per the compromise, the plaintiff-Jaswant Singh was given only 8 acres of land in village Simbli. Ashwani Kumar, Patwari who was examined as DW-3, had brought Mutation No. 1536 of Hazara Singh, certified copy of which is produced as Ex. DW 3/A and the entry of mutation is at S.No. 22.

8. It is further seen that based on the terms arrived at in the compromise and the decree dated 08.11.1972, the mutation of the land situated in village Simbli was sanctioned. Even though the appellant-Jaswant Singh raised an objection as to the compromise dated 27.11.1972, (Ex.D3), admittedly, the same has not been challenged by him either in his plaint or in the suit filed by him or in the written statement filed in the suit by the defendant-Gurdev Singh. It is relevant to point out that in paragraph 3 of the plaint, the appellant-Jaswant Singh categorically mentioned that the parties have compromised and the decree dated 08.12.1972 was passed. In the written statement filed by the defendant-Gurdev Singh and others, it was categorically pleaded that the decree dated 08.12.1972 was passed solely on the basis of the compromise entered into between the parties. The details of the compromise were also given in the written statement filed on 21.01.1999 by Gurdev Singh. Though in the replication to the amended written statement filed by Jaswant Singh, the terms and conditions of

the compromise were not admitted but were also not denied and even it was pleaded that these terms and conditions of the compromise are a matter of record. The compromise dated 27.11.1972 was not challenged by Jaswant Singh rather it can be said that he also relied upon it because the decree upon which he claims ownership, has been passed only on the basis of this compromise dated 27.11.1992 (Ex. D3).

9. Now the other question which remains to be decided is whether the compromise Ex. D3 is admissible in evidence or not? The compromise dated 27.11.1972 has become the basis of the decree dated 08.12.1972 passed by the Sub-Judge, Hoshiarpur. The perusal of Ex. D4 i.e., judgment and decree were passed as per the terms and conditions of compromise placed on file. As rightly observed by the courts below, the compromise has merged into a decree and has become part and parcel of it. To put it clear, the compromise had become a part of the decree which was passed by the court of Sub-Judge Ist Class, Hoshiarpur. Hence, it is a public document in terms of Section 74 of the Indian Evidence Act, 1872 (in short 'the Act') and certified copy of the public document prepared under Section 76 of the Act is admissible in evidence under Section 77 of the said Act. A certified copy of a public document is admissible in evidence without being proved by calling witness. Inasmuch as the decree was passed and drafted in the light of the compromise entered into between the parties, viz., the plaintiff and the defendants, the certified copy of such document which was produced before the Court, there is presumption as to the genuineness of such certified copy under Section 78 of the Act. We have already noted that the appellant-Jaswant Singh has not challenged the genuineness of certified copy in any manner. Although the record of the Court has been proved to be burnt in a fire in Judicial Record Room, Hoshiarpur on 16.06.1998, but the certified copy of the compromise (Ex.D3), which is the part of the decree was obtained from the record room on 24.08.1988 and the Decree Ex.D4 was got issued on 12.09.1984. In those circumstances, there is no reason to doubt

the authenticity of compromise (Ex.D3). Even otherwise, as rightly observed by the courts below, the appellant-Jaswant Singh had not filed any other substitute of the document Ex.D3, on the basis of which the decree (Ex.D4) had been said to be passed. As stated earlier, in view of the fact that the decree dated 08.12.1972 clearly says that the suit is partly decreed in favour of the plaintiff as per the terms of the compromise placed on file, there can be no other way to interpret the decree except in terms and conditions of the compromise (Ex.D3).

10. Thus, in view of the above discussion, it is to be held that the decree dated 08.12.1972 is to be read and interpreted in terms of the compromise (Ex.D3) dated 27.11.1972. We are satisfied that the judgment and decree passed by the lower appellate Court as affirmed by the High Court is based upon proper appreciation of the terms of compromise (Ex.D3) and do not find any illegality or irregularity for interference.

11. Consequently, the appeals fail and are accordingly dismissed. There shall be no order as to costs.

B.B.B. Appeals dismissed.

POONAM & OTHERS
v.
HARISH KUMAR AND ANOTHER
(Civil Appeal No. 9059 of 2011)

NOVEMBER 03, 2011

[ASOK KUMAR GANGULY AND GYAN SUDHA MISRA, JJ.]

Delay/laches – Appeal – Delay of 63 days in filing appeal against the judgment and decree passed by trial court in a civil suit filed by the plaintiffs-appellants – Application for condonation of delay in filing appeal dismissed by the appellate court – Order upheld by High Court in revision – Held: When a Court exercises its discretion in either condoning or refusing to condone delay in filing any proceeding, the Court acts in exercise of its discretion – Normally, Supreme Court in exercise of its discretion under Article 136 of the Constitution may not interfere with the exercise of discretion by the High Court in such matters – However, there is no strait-jacket about this – The discretion of Supreme Court under Article 136 of the Constitution is meant to further the ends of justice and Supreme Court has been using its discretion in appropriate cases when it is satisfied that exercise of jurisdiction by the High Court or other Tribunals has not been on sound judicial principles – In the facts of this case it is clear that of all the three ladies, who were the appellants, one of them was pursuing the case and she fell sick – Therefore, she was not in a position to pursue the legal remedy with due diligence as a result of which the appeal was filed with a delay of 63 days – The delay of 63 days is not a delay for a long period and there was some explanation for the delay – The High Court should have considered the explanation for the delay along with the facts of the case, the position of the parties, the nature of the

litigation and the period of delay – The High Court should also have considered that it has been settled by a catena of cases that, unless the delay is gross, an explanation for the same should be liberally construed – Apparently, the High Court was not able to consider all these relevant facts in their correct perspective before passing the impugned order – Order of the High Court set aside and delay in filing the appeal condoned – Constitution of India, 1950 – Article 136.

Appellants nos. 1 to 3 are sisters of Respondent no. 1, who is their brother. The parents of the parties had died. The appellants filed a civil suit for declaration of their title as 3/9th owner each, of the suit scheduled properties and for permanent injunction restraining Respondent no.1 from interfering with their peaceful possession and creating any third party rights in the said properties. The Trial Court dismissed the suit and accordingly a decree was drawn up.

The appellants-plaintiffs challenged the judgment and decree by filing an appeal before the District Judge. The appellants-plaintiffs also filed an application for condonation of delay of 63 days in filing the appeal stating that appellant no. 2 and 3 were married and illiterate; that appellant no.1 was pursuing the case in the court but during pendency of the case, appellant no.1 fell ill and therefore requested the counsel to intimate to the appellants regarding the position of proceedings; that the counsel assured that he will inform the appellants as and when their presence was needed in the court, but the counsel never informed the appellants for giving their evidence in court, which resulted in dismissal of the case; that later someone from the locality informed the appellants about the dismissal of the case whereafter the appellants rushed to the Court and applied for a certified copy of the judgment and then filed the appeal a little belatedly. The District Judge dismissed the application for

condonation of delay on the ground that the delay was not bona-fide and no reasonable cause has been made out to condone the delay. The reasoning of the District Judge for reaching the above conclusion was that, (i) the appellants were neither illiterate nor rustic villagers as all of them had signed in English and (ii) that during course of proceedings before the trial court, the appellants were careless and negligent. Against this order, the appellants preferred a revision before the High Court. The High Court upheld the order of the District Judge holding that the delay of 63 days in filing the appeal was not properly explained. Hence the present appeal.

Allowing the appeal, the Court

HELD:1. When a Court exercises its discretion in either condoning or refusing to condone delay in filing any proceeding, the Court acts in exercise of its discretion. Normally, this Court in exercise of its discretion under Article 136 of the Constitution may not interfere with the exercise of discretion by the High Court in such matters. However, there is no strait-jacket about this. The discretion of this Court under Article 136 of the Constitution is meant to further the ends of justice and this Court has been using its discretion in appropriate cases when it is satisfied that exercise of jurisdiction by the High Court or other Tribunals has not been on sound judicial principles. It is well settled that judicial discretion shall always be exercised "according to the rules of reason and justice and not according to private opinion" [Para 14] [297-C-F]

Sharpe v. Wakefield **(1891 AC 193) – referred to.**

2. In the facts of this case it is clear that of all the three ladies, who were the appellants, one of them was pursuing the case and she fell sick. Therefore, she was not in a position to pursue the legal remedy with due

diligence as a result of which the appeal was filed with a delay of 63 days. The delay of 63 days is not a delay for a long period and there has been some explanation for the delay. The High Court should have, before passing the impugned judgment, considered the explanation for the delay along with the facts of the case, the position of the parties, the nature of the litigation and the period of delay. The High Court should also have considered that it has been settled by a catena of cases that, unless the delay is gross, an explanation for the same should be liberally construed. It appears that the High Court has not been able to consider all these relevant facts in their correct perspective before passing the impugned order. [Para 15] [297-G-H; 298-A-B]

3. The order of the High Court is set aside and the delay is condoned. The appeal is directed to be restored to its file. [Para 16] [298-C]

Case Law Reference:

(1891 AC 193) referred to Para 14

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9059 of 2011.

From the Judgment & Order dated 01.12.2008 of the High Court of Punjab & Haryana at Chandigarh in Civil Revision No. 3745 of 2008.

M.K. Dua for the Appellant.

Rajesh Tyagi, Dilip K. Sharma, Atishi Dipankar for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. Leave granted.

2. This civil appeal is directed against the order dated

01.12.2008 of the High Court of Punjab and Haryana at Chandigarh in Civil Revision No.3745/2008, whereby the High Court declined to interfere with the order dated 27.07.2007 of the District Judge, Ambala. By order dated 27.07.2007 the District Judge dismissed the application for condonation of delay of 63 days in filing the appeal against the judgment of the trial court in Civil Suit No. 23/2003.

3. The facts and circumstances, which are relevant to this appeal, are as under.

4. All the appellants no. 1 to 3 are sisters of Respondent no. 1, who is their brother. The father of the parties died on 17.01.2003 and the mother had predeceased the father. Eight daughters and one son survived their father. The father during his lifetime arranged the marriage of six daughters except the appellant no. 1 & 2 herein.

5. In the year 2003, the appellants brought a suit (CS no. 23 of 2003) before the Civil Judge, Ambala City for declaration of their title as 3/9th owner each, of the suit scheduled properties and for permanent injunction restraining the Respondent no.1 from interfering with their peaceful possession and creating any third party rights in the said properties. According to the appellants- plaintiffs, the suit schedule properties were their ancestral property in which plaintiffs have got right by birth and all of them have got equal shares in the same.

6. The Respondent no. 1 controverted the aforesaid averment of the appellants-plaintiffs by claiming that the suit schedule properties were not ancestral but were self-acquired by their deceased father. Further case of the Respondent No.1 is that he is the absolute owner of the said properties by virtue of a registered Will dated 18.06.2002 executed by the deceased father in his favour.

7. On the pleadings of the parties, the Trial Court framed

five issues. Thereafter the case was adjourned for evidence of the appellants- plaintiffs. Despite several opportunities, the appellants-plaintiffs allegedly led no evidence. Since there was no evidence of the plaintiffs on record, the Respondent no.1defendant also did not lead any evidence.

8. By order dated 01.12.2006 the Trial Court dismissed the suit filed by the appellants-plaintiffs with costs and accordingly a decree was drawn up.

9. The appellants-plaintiffs challenged the aforesaid judgment and decree by filing an appeal before the District Judge, being Civil Appeal No.12 of 2007. The appellants-plaintiffs also filed an application for condonation of delay of 63 days in filing the appeal by offering an explanation which can be summarized as under:

> "That the appellant no. 2 and 3 were married and illiterate. The appellantno.1 was pursuing the case in the court.During the pendency of the case, appellantno.1 fell ill and therefore requested thecounsel to intimate to the appellantsregarding the position of proceedings. The counsel assured that he will inform the appellants as and when their presence is needed in the court. But the counsel never informed the appellants for giving their evidence in court, which resulted in the dismissal of the case on 1.12.2006. On 26.02.2007, someone from the locality informed the appellants about the dismissal of the case. Thereafter the appellants rushed to the Court and applied for a certified copy of the judgment and then filed the appeal a little belatedly."

10. By order dated 27.07.2007, as noted above, the District Judge dismissed the application for condonation of delay on the ground that the delay was not bona-fide and no reasonable cause has been made out to condone the delay.

11. The reasoning of the District Judge for reaching the

above conclusion was that, (i) the appellants are neither illiterate nor rustic villagers as all of them had signed in English. (ii) During the course of proceedings before the trial court, the appellants were careless and negligent.

12. Against this order the appellants preferred a revision before the High Court.

13. By impugned order dated 01.12.2008 the High Court dismissed the revision petition upholding the order of the District Judge. The High Court expressed the view that the delay of 63 days in filing the appeal has not been properly explained.

14. We cannot accept the view taken by the High Court in the impugned judgment. When a Court exercises its discretion in either condoning or refusing to condone delay in filing any proceeding, the Court acts in exercise of its discretion. Normally, this Court in exercise of its discretion under Article 136 of the Constitution may not interfere with the exercise of discretion by the High Court in such matters. However, there is no straitjacket about this. The discretion of this Court under Article 136 of the Constitution is meant to further the ends of justice and this Court has been using its discretion in appropriate cases when it is satisfied that exercise of jurisdiction by the High Court or other Tribunals has not been on sound judicial principles. It is well settled that judicial discretion shall always be exercised "according to the rules of reason and justice and not according to private opinion" [See *Sharpe Vs. Wakefield* (1891 AC 193)].

15. In the facts of this case it is clear that of all the three ladies, who were the appellants, one of them was pursuing the case and she fell sick. Therefore, she was not in a position to pursue the legal remedy with due diligence as a result of which the appeal was filed with a delay of 63 days. The delay of 63 days is not a delay for a long period and there has been some explanation for the delay. The High Court should have, before passing the impugned judgment, considered the explanation for

the delay along with the facts of the case, the position of the parties, the nature of the litigation and the period of delay. The High Court should also have considered that it has been settled by a catena of cases that, unless the delay is gross, an explanation for the same should be liberally construed. It appears that the High Court has not been able to consider all these relevant facts in their correct perspective before passing the impugned order.

16. We, therefore, are constrained to set aside the order of the High Court and condone the delay. We direct that the appeal should be restored to its file and the hearing of the appeal may proceed as expeditiously as possible.

17. However, nothing said in this judgment should be considered as expression of opinion on the merits of the controversy between the parties. The appeal is allowed. There will be no order as to costs.

B.B.B. Appeal allowed.