KHATRI HOTELS PRIVATE LIMITED AND ANOTHER
v.
UNION OF INDIA AND ANOTHER
(Civil Appeal No. 7773 of 2011)

SEPTEMBER 09, 2011

[G.S. SINGHVI AND H.L. DATTU, JJ.]

Limitation Act, 1963 – Article 58 – Suit for declaration of title and injunction – Period of limitation – Held: Period prescribed under Article 58 of the 1963 Act begins to run when the right to sue first accrues – If a suit is based on multiple causes of action, the period of limitation will begin to run from the date when the right to sue first accrues – Successive violation of the right will not give rise to fresh cause and the suit will be liable to be dismissed if it is beyond the period of limitation counted from the day when the right to sue first accrued – In the instant case, the right, if any, of the plaintiffs-appellants over the suit land stood violated with the issue of notification u/s.507 of the DMC Act in 1966(whereby the same automatically vested in the Central Government) and, in any case, with the issue of notification u/s.22(1) of the DD Act in 1974(whereby the Central Government transferred the suit land to DDA) – Even if the appellants were to plead ignorance about the two notifications, it is impossible to believe that they did not know about the violation of their so-called right over the suit land despite the receipt of copy of the written statement filed on behalf of the DDA in December, 1990 – Therefore, the cause of action will be deemed to have accrued to the appellants in December, 1990 and the suit filed on 14.2.2000 was clearly barred by time – Although, the suit of 2000 was cleverly drafted to convey an impression that the right to sue accrued to the appellants in November/December, 1998 when they learnt about the wrong recording of entries in Khasra Girdawris/Revenue Records, but falsity of the

appellants claim that the cause of action accrued to them in November/December, 1998 is established beyond any doubt – The suit filed by the appellants on 14.2.2000 was clearly beyond the period of limitation of 3 years prescribed under Article 58 of the 1963 Act – The findings and conclusions recorded by the trial Court that the appellants had not approached the Court with clean hands inasmuch as they withheld Aks Sijra, site plan and the demarcation report and award are also approved – Not only this, they raised illegal construction despite the injunction order passed by the High Court and that too without obtaining permission from the competent authority – The appellants, who not only made encroachment on the public land, but also abused the process of the Court are saddled with cost, which is quantified at Rs.5 lacs – Delhi Municipal Corporation Act, 1957 — s.507 – Delhi Development Act, 1957 – s.22(1).

Limitation Act, 1963 – Article 58 – Differences between Art.58 of the 1963 Limitation Act and Art.120 of the 1908 Limitation Act – Discussed – Indian Limitation Act, 1908 – Article 120.

Appellant No.2-'L' and his three brothers, who claim to have purchased land comprised in khasra Nos.2728/1674/2 and 2728/1674/3 total measuring 4 bighas 4 biswas by a registered sale deed dated 15-10-1963, raised construction thereon and started a restaurant. With a view to secure judicial approval of such occupation of land, appellant No.2 – 'L' filed Suit No. 2576/1990 in the High Court for grant of permanent injunction against the MCD and the DDA by asserting that he was co-owner of house No.80, Ward No.IX, Kishangarh, Mehrauli, which formed part of khasra No.1674 and was purchased vide registered sale deed and that the officials of MCD and the DDA came to the suit premises along with the Tahsildar on 10.8.1990 without serving any notice and threatened to demolish the superstructure on the ground that the

same was unauthorized. In the written statement filed on behalf of the DDA, it was averred that the suit land belonged to Gaon Sabha and with the urbanization of rural areas of Kishangarh, the same automatically vested in the Central Government and further that vide notification dated 20.8.1974 issued under Section 22(1) of the Delhi Development Act, 1957, the Central Government had transferred the suit land to the DDA and the plaintiff had no right, title or interest in the same. The High Court granted interim injunction and thereafter, the suit was transferred to District Judge, Delhi, who assigned the same to Civil Judge, Delhi for disposal. The Civil Judge dismissed the suit observing that the plaintiff failed to prove that he and his brothers were owners of the suit land. The Civil Judge also held that the plaintiff was not entitled to relief of injunction because the suit filed for determination of title of the disputed land was pending adjudication.

In the meanwhile, 'S', one of the brothers of appellant No.2, filed another suit for injunction against the MCD and the DDA. He claimed that he was co-owner of land measuring 1200 square yards forming part of khasra No. 1674, village Kishangarh. He alleged that on 29.2.1992, the officials of the defendants came to the suit land with large police force and illegally demolished number of premises including the boundary wall of his property and on the next date, i.e., 1.3.1992, the officials of the defendants again came and threatened to take forcible possession of the property. The suit of 'S' was dismissed by the Civil Judge with the findings that the suit land belonged to Gaon Sabha and with the urbanization of the rural area of the village the same automatically vested in the Central Government and that the plaintiff encroached the same. The appeal filed by 'S' was dismissed by Additional District Judge, Delhi who held that the suit land belonged to Gaon Sabha and that after vesting of the land in it, the

Central Government had transferred the same to the DDA.

During the pendency of the aforementioned two suits, appellant No.1- company and appellant No.2-'L' filed third suit being Suit No.313 of 2000 (renumbered as Suit No.473 of 2004) for grant of a declaration that the entries made in the revenue records in respect of land comprised in khasra Nos.2728/1674/2 and 2728/1674/3 situated in the revenue estate of Mehrauli, village Mehrauli Kishangarh, Tehsil Mehrauli were wrong and illegal. The appellants further prayed for grant of a decree of mandatory injunction directing the respondents to correct the revenue record and enter their names in the columns of ownership and possession. Another prayer made by the appellants was for restraining the respondents, their servants and agents from demolishing the superstructures and sealing or interfering with their possession of the suit property or running of the restaurant. In the written statement filed on behalf of the DDA, several objections were taken to the maintainability of the suit as also on merits. The trial Court held that the plaintiffs (appellants) succeeded in showing that appellant No.2 and his brothers had purchased land comprised in khasra Nos. 2728/1674/2 and 2728/1674/3, but they could not prove that the land on which appellant No.1 was running `Sahara Restaurant' was a part of those khasra numbers or that they were otherwise in lawful possession of the suit land. The trial Court then held that the suit was barred by time because cause of action had accrued 16 years ago when the suit land was transferred to the DDA. The trial Court also held that the appellants had not approached the Court with clean hands inasmuch as they suppressed material facts relating to the vesting of the suit land in the Central Government and transfer thereof to the DDA and the documents like Aks Sijra, site plan and demarcation report as also the facts relating to the acquisition of an

area of 1512 square yards forming part of khasra No.2728/1674/3 and receipt of compensation at the rate of Rs.50/- per square yard. The trial Court also held that the suit was barred by the provisions of Order II Rule 2 CPC. The appeal preferred by the appellants was dismissed by the Single Judge of the High Court. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1.1. The Limitation Act, 1963 prescribes time limit for all conceivable suits, appeals etc. Section 2(j) of that Act defines the expression "period of limitation" to mean the period of limitation prescribed in the Schedule for suit, appeal or application. Section 3 lays down that every suit instituted, appeal preferred or application made after the prescribed period shall, subject to the provisions of Sections 4 to 24, be dismissed even though limitation may not have been set up as a defence. If a suit is not covered by any specific article, then it would fall within the residuary article. In other words, the residuary article is applicable to every kind of suit not otherwise provided for in the Schedule. [Para 21] [323-D-F]

1.2. Article 58 of the 1963 Act has bearing on the decision of this appeal. While enacting Article 58 of the 1963 Act, the legislature has designedly made a departure from the language of Article 120 of the Indian Limitation Act, 1908. The differences which are discernible from the language of Article 58 of the 1963 Act and Article 120 of the Indian Limitation Act, 1908 are: (i) The period of limitation prescribed under Article 120 of the 1908 Act was six years whereas the period of limitation prescribed under the 1963 Act is three years and, (ii) Under Article 120 of the 1908 Act, the period of limitation commenced when the right to sue accrues. As against this, the period prescribed under Article 58 begins to run when the right to sue first accrues. [Paras 22, 24 and 27] [323-G; 324-F-G; 325-A]

1.3. The word 'first' has been used between the words `sue' and `accrued'. This would mean that if a suit is based on multiple causes of action, the period of limitation will begin to run from the date when the right to sue first accrues. To put it differently, successive violation of the right will not give rise to fresh cause and the suit will be liable to be dismissed if it is beyond the period of limitation counted from the day when the right to sue first accrued. [Para 27] [325-G-H; 326-A]

Rajinder Kakkar v. Delhi Development Authority **54 (1994) DLT 484 – referred to.**

Mt. Bolo v. Mt. Koklan **AIR 1930 PC 270;** *Annamalai Chettiar v. A.M.K.C.T. Muthukaruppan Chettiar* **(1930) I.L.R. 8 Rang. 645;** *Gobinda Narayan Singh v. Sham Lal Singh* **(1930-31) L.R. 58 I.A. 125 – referred to.**

Rukhmabai v. Lala Laxminarayan **(1960) 2 SCR 253 – cited.**

2.1. In the instant case, the appellants have not controverted the fact that in the written statement filed on behalf of the DDA in Suit No.2576 of 1990- Lal Chand v. MCD and another, it was clearly averred that the suit land belonged to Gaon Sabha and with the urbanisation of the rural areas of village Kishangarh vide notification dated 28.5.1966 issued under Section 507 of the DMC Act, the same automatically vested in the Central Government and that vide notification dated 20.8.1974 issued under Section 22(1) of the DD Act, the Central Government transferred the suit land to the DDA for development and maintaining as Green. This shows that that the right, if any, of the appellants over the suit land stood violated with the issue of notification under Section 507 of the DMC Act and, in any case, with the issue of notification under Section 22(1) of the DD Act. Even if the appellants were to plead ignorance about the two notifications, it is

impossible to believe that they did not know about the violation of their so-called right over the suit land despite the receipt of copy of the written statement filed on behalf of the DDA in December, 1990. Therefore, the cause of action will be deemed to have accrued to the appellants in December, 1990 and the suit filed on 14.2.2000 was clearly barred by time. [Para 28] [326-B-E]

2.2. The issue deserves to be considered from another angle. Although, Suit No.313/2000 was cleverly drafted to convey an impression that the right to sue accrued to the appellants in November/December, 1998 when they learnt about the wrong recording of entries in Khasra Girdawris/Revenue Records, but if the averments are read in conjunction with the pleadings of the earlier suits, falsity of the appellants' claim that the cause of action accrued to them in November/December, 1998 is established beyond any doubt. In the first suit filed by him, appellant No.2-'L' had pleaded that the cause of action accrued on 10.8.1990 when the officials of the respondents came to the suit premises and threatened to demolish the same. In the second suit filed by 'S' (brother of appellant No.2-'L'), it was claimed that the cause of action accrued on 29.2.1992 when the officials of the respondents demolished the boundary wall of the property on the ground that the same was Gaon Sabha land. The appellants have not explained starking contradictions in the averments contained in three suits on the issue of cause of action and in the absence of cogent explanation, it must be held that the statement contained in the suit no.303/2000 was *per se* false and, as a matter of fact, the cause of action had first accrued to the appellants on 10.8.1990 when their so called right over the suit land was unequivocally threatened by the respondents. Therefore, the suit filed by the appellants on 14.2.2000 was clearly beyond the period of limitation of 3 years prescribed under Article 58 of the 1963 Act and

was barred by time. [Para 29] [326-F-H; 327-A-D]

2.3. What is most surprising is that even though appellant No.2 – 'L' was cited as the first witness in the suit of 2000, he did not step into the witness box. This appears to be a part of calculated strategy. He knew that if he was to appear as a witness, it will not be possible for him to explain the apparent contradictions in the pleadings of the three suits on the issue of cause of action and falsity of the averments contained in suit no.303/2000 will be exposed. This is an additional reason for holding that the trial Court and the High Court did not commit any error by recording a conclusion that the suit was barred by limitation. [Para 32] [331-C-D]

3.1. The conclusion recorded by the trial Court that the appellants failed to prove that the suit land formed part of khasra Nos. 2728/1674/2 and 2728/1674/3 does not suffer from any error because they did not adduce any evidence to establish that the land on which restaurant was being run formed part of those khasra numbers. [Para 34] [335-A-C]

3.2. The findings and conclusions recorded by the trial Court that the appellants had not approached the Court with clean hands inasmuch as they withheld Aks Sijra, site plan and the demarcation report and award Exhibit PW4/1 are also approved. Not only this, they raised illegal construction despite the injunction order passed by the High Court and that too without obtaining permission from the competent authority. [Para 35] [335-C-D]

4. The appellants, who not only made encroachment on the public land, but also abused the process of the Court are saddled with cost, which is quantified at Rs.5 lacs. Of this, Rs.2.5 lacs be deposited with the Supreme Court Legal Services Committee within two months. The

balance amount of Rs.2.5 lacs be deposited with the Delhi State Legal Services Committee within the same period. If the appellants fail to deposit the cost, the Secretaries of the two Legal Services Committees shall be entitled to recover the same as arrears of land revenue. [Para 37] [335-F-G]

Case Law Reference

54 (1994) DLT 484	**referred to**	**Para 17**
(1960) 2 SCR 253	**cited**	**Para 18**
AIR 1930 PC 270	**referred to**	**Para 25**
(1930) I.L.R. 8 Rang. 645	**referred to**	**Para 26**
(1930-31) L.R. 58 I.A. 125	**referred to**	**Para 26**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7773 of 2011.

From the Judgment & Order dated 21.8.2009 of the High Court of Delhi at New Delhi in RFA No. 123 of 2009.

Harin P. Raval, ASG, Mukul Rohtagi, Amrendra Saran, Sushil Kumar Jain, Ashish Aggarwal, Anuradha Jain, M.C. Dhingra, Ashwani Kumar, Iti Sharma, Indra Sawhney, Naresh Kaushik, Sushma Suri, Harsh N. Parekh, Anando Mukherjee for the appearing parties.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. Leave granted.

2. This is an appeal for setting aside judgment dated 21.8.2009 of the learned Single Judge of the Delhi High Court whereby he dismissed the appeal preferred by the appellants against the judgment and decree passed by Additional District Judge-13 (Central), Delhi (hereinafter described as, 'the trial

Court') in a suit for declaration of title, mandatory and permanent injunction filed by them.

3. The suit land belonged to Gaon Sabha of village Kishangarh and formed part of the revenue estate of that village. By notification dated 28.5.1966 issued under Section 507(a) of the Delhi Municipal Corporation Act, 1957 (for short, 'the DMC Act'), the Municipal Corporation of Delhi (for short, 'the Corporation'), with the previous approval of the Central Government, declared that the localities mentioned in the Schedule forming part of the rural areas shall cease to be the rural areas. The area of village Kishangarh (Mehrauli) was shown at serial No.37 under the heading "South Zone Delhi". As a consequence of this and by virtue of Section 150(3) of the Delhi Land Reforms Act, 1954 (for short, 'the Land Reforms Act'), the suit land stood automatically vested in the Central Government. After 8 years, the same was transferred by the Central Government to the Delhi Development Authority (for short, 'the DDA') vide notification dated 20.8.1974 issued under Section 22(1) of the Delhi Development Act, 1957 (for short, 'the DD Act') for the purpose of development and maintenance as Green. The relevant portions of that notification are extracted below:

"MINISTRY OF WORKS & HOUSING

New Delhi, the 20th August, 1974

S.O. 2190 - - - Whereas the terms and conditions upon which nazul lands specified in the schedule annexed below will be taken over by the Delhi Development Authority have been agreed upon between the Central Government and the Authority.

Now, therefore, in exercise of the powers conferred by sub-section (1) of Section 22 of the Delhi Development Act, 1957 (61 of 1957), the Central Government hereby places with immediate effect, the lands which had vested

in the Central Government on the urbanization of the villages specified in the said Schedule at the disposal of the Delhi Development Authority for the purpose of development and maintenance of the said lands as green and for taking such steps as may be required to serve the said purpose, subject to the condition that the Delhi Development Authority shall not make, or cause, or permit to be made any constructions on the said lands and shall when required by the Central Government so to do, replace the said lands or any portion thereof as may be so required, at the disposal of the Central Government.

SCHEDULE

Sr.No.	Name of the Village
17.	Mehrauli (Kishangarh)

(F.No.13021/370-II)

S. CHAUDHARY
Jt. Secy."

4. Appellant No.2-Lal Chand and his three brothers, namely, S/Shri Ran Singh, Dhannu and Surat Singh, who claim to have purchased land comprised in khasra Nos.2728/1674/2 and 2728/1674/3 total measuring 4 bighas 4 biswas from Om Prakash and Mahinder Pal (sons of Parma Nand), Tej Nath, Tej Prakash, Gokal Chand and Ram Dhan by registered sale deed dated 15.10.1963 encroached upon the suit land, raised construction and started a restaurant under the name and style "Sahara Restaurant".

5. With a view to secure judicial approval of the illegal occupation of the suit land, appellant No.2 – Lal Chand filed Suit No. 2576/1990 in the Delhi High Court for grant of permanent injunction against the Corporation and the DDA by asserting that he is the co-owner of house No.80, Ward No.IX, Kishangarh, Mehrauli, which forms part of khasra No.1674 and

was purchased vide registered sale deed dated 10.10.1963; that the suit premises comprise of 3 rooms and one hall surrounded by a boundary wall; that the entire superstructure is in existence for last over 15 years; that he has been residing in the suit premises and is paying property tax since 1968-69; that the suit land has not been acquired; that the officials of the Corporation and the DDA came to the suit premises along with the Tahsildar on 10.8.1990 without serving any notice and threatened to demolish the superstructure on the ground that the same is unauthorized. According to appellant No.2, when he questioned the jurisdiction of the Corporation and the DDA to take action for demolition of the structures, the officials went away with the threat that they will come again with the police force and demolish the same. Paragraph 10 of the plaint and prayer (a), which have bearing on the decision of this appeal are reproduced below:

"10. That the cause of action accrued in favour of the plaintiff against the defendants on 10.8.1990 when the officials of the defendants came to the suit premises and threatened to demolish the same. The cause of action is continuing till the threat of the defendants to demolish the suit property persists."

Prayer

"(a) That a decree of permanent injunction be granted in favour of the plaintiff and against the defendants restraining the defendants, their officers, servants, representatives and agents from dispossessing, interfering in the possession of the plaintiff and from demolishing or sealing, any part of existing structure at House No.80, Ward IX, Kishan Garh, Mehrauli New Delhi more particularly shown red in the plan annexed to the plaint."

6. In the written statement filed on behalf of the DDA, it was averred that the suit land belonged to Gaon Sabha and with the urbanization of rural areas of Kishangarh, the same

automatically vested in the Central Government. It was further averred that vide notification dated 20.8.1974, the Central Government had transferred the suit land to the DDA and the plaintiff has no right, title or interest in the same. The relevant portions of the written statement are extracted below:

"PRELIMINARY OBJECTIONS:

1. That the suit as filed is false, frivolous and not maintainable. The plaintiff has no legal right to file the present suit. The land forms a part of Khasra No.1674 of Village-Mehrauli. This land belong to the Gram Sabha and on the urbanization of Village-Mehrauli, all the Gram Sabha land vested in the Central Govt. and the Central Govt., later transferred this land at the disposal of the defendant-D.D.A. vide notification No.S.O. 2190 dated 20.8.1974. Therefore, it is clear that the plaintiff has no right, title or interest in the property. In this view of the matter, this suit may be dismissed.

PARAWISE REPLY ON MERITS.

1. That the contents of para-1 are wrong and denied. It is denied that the plaintiff is a co-owner of the premises commonly known as House No.80, Ward-IX, Kishan Garh, Mehrauli, New Delhi forming part of Khasra No.1674. It is further denied that the plaintiff purchased the suit property vide sale deed dated 10.10.63. It is submitted that as per the sale deed dated 10.10.65 supplied by the plaintiff, the suit land forms a part of Khasra No.1674 of Village-Mehrauli. The Sale deed is in respect of Khasra No.2728/1674/2(3-3) and 2728/1674/3(1-1) of Village-Mehrauli. Both these Khasras are a part of the Gram Sabha land. On the urbanization of Village-Mehrauli (Kishangarh), all the Gram Sabha land vested in the Central Govt. and later on the Central Government transferred this Gram Sabha land at the disposal of DDA for maintenance as green

development vide notification No.S.O. 2190 dated 20.8.1974. In this view of the matter, the plaintiff has no right or title in the land. It is further submitted that, recently the plaintiff has unauthorisedly occupied this land and constructed a boundary wall on it with 3 temporary rooms. It is submitted that the plaintiff has not annexed any site-plan to the plant, as alleged by him.

2. That the contents of para 2 are wrong and hence denied. It is submitted that the construction of the suit land is recent and unauthorized. It is denied that the superstructure over the suit land has been in existence for the last 15 years. It is further denied that the tin shed and 2 rooms over the land were constructed sometime in the year 1959-60.

4. That the contents of para-4 are again wrong and therefore denied. It is submitted that the suit land belongs to the DDA. It is further submitted that previously, the land formed a part of Khasra No.2728/1674/2 and 2728/1674/3, which was a part of the Gram Sabha land. At the time of urbanization of Village-Mehrauli, the Gram Sabha land vested in the Central Govt. and later, the Central Govt. transferred this Gram Sabha land at the disposal of D.D.A. vide notification No.S.O.2190 dated 20.8.1974. It is submitted that there is no requirement of any acquisition proceedings in respect of this land, the land being at the disposal of defendant-D.D.A. In this view of the matter it is submitted that, no notification for acquisition need be issued. It is further submitted that as the land does not belong to the plaintiff, he is not entitled to be given any compensation whatsoever."

7. On 20.8.1990, the High Court granted interim injunction, which was confirmed vide order dated 14.7.1998. Thereafter, the suit was transferred to District Judge, Delhi, who assigned the same to Civil Judge, Delhi for disposal. After considering the pleadings of the parties, the Civil Judge framed the following issues:

"1. Whether the plaintiff is co-owner of H.No.80, Kishangarh, Mehrauli (part of Kh. No. 1674) as alleged in para 1 of the plaint? OPP.

2. Whether the plaintiff is in occupation of the suit premises for the last 15 years as alleged? OPP.

3. Whether the plaintiff has any legal right to file the present suit? OPP.

4. Whether the suit is barred under Sections 477/478 of the DMC Act? OPD.

5. Whether the suit is bad for mis-joinder of parties? OPD.

6. Whether this Court has jurisdiction to entertain and try the present suit? OPD.

7. Whether the plaintiff is entitled for the relief claimed? OPP.

8. Relief."

8. Appellant No.2 did not appear in the witness box. Instead, one of his sons, namely, Vinod Kumar Khatri gave evidence as PW-2 in the capacity of the power of attorney. Two other witnesses examined in favour of the suit were Prem Prakash (PW-1) from the office of Kanungo and Shri Kulwant Singh (PW-3), Assistant Zonal Inspector. On behalf of the DDA, Prem Chand (Tehsildar) was examined as DW-1, Constable Prabhu Singh of Police Station Vasant Kunj was examined as DW-2 and Khem Chand (Patwari) as DW-3.

9. After considering the pleadings of the parties and evidence produced by them, the learned Civil Judge dismissed the suit vide judgment dated 3.3.2003 by observing that the plaintiff has failed to prove that he and his brothers were owners of the suit land. The learned Civil Judge also held that the plaintiff was not entitled to relief of injunction because the suit filed for determination of title of the disputed land was pending

adjudication. The findings recorded by the learned Civil Judge on issue Nos. 3, 6 and 7 read as under:

"12. Issue No.3,6 and 7:- All these issues being connected together are discussed together. PW1 has proved the khasra girdawari but it may be mentioned that khasra girdawari is not the document of title. Even these khasra girdawari are for the year 1957-59, which are prior to the urbanization of vill. Kishan Garh and same also shows that the land is shamlat land. DW1 deposed that vill. Kishan Garh was urbanized vide notification ExDW1/2 and land was placed at the disposal of DDA vide notification ExDW1/1. Nothing material has come out of the cross examination of DW1. DW3 is another Patwari from Halka Mehrauli who also deposed that as per khasrra paimaish it is the document of title the land belongs to gaon sabha and same has been transferred to DDA. He proved the certified copy of record as ExDW3/1 which also shows that the land belongs to the gaon sabha and has been placed at the disposal of DDA. PW2 who is the attorney of plaintiff himself has admitted that in the correction of revenue record they have also filed suit in the Hon'ble High Court of Delhi. Thus, there is admission on the part of plaintiff himself that at present in the revenue record the plaintiff or his predecessor interest have no right title and the land belongs to the gaon sabha which has been transferred to DDA. Nothing material has come out of the cross examination of DW3 and merely because the user of the land has been shown as gair mumkin pahar and gair mumkin abadi does not make much difference as the main controversy is regarding the ownership that the land belongs to the gaon sabha and as such plaintiff has failed to prove his right, title over the same. There is also a judgment of the Hon'ble High Court in *Rajender Kakkar v. DDA* CW No. 3355/93 it is also for the village Kishan Garh in the revenue estate of Mehrauli in that judgment also the Hon'ble High Court has held that whole of vill. Kishan

Garh was urbanized and after urbanization as per sec. 150 of DLR Act the land whole of gaon sabha ceases to be the rural area and the land belongs to gaon sabha in vill. Kishan Garh vested with the Central Govt. and the Central govt. vide notification dt. 20.8.74 placed same at the disposal of DDA. In this authoritative pronouncement also the Hon'ble High Court held that petitioners have no right title over the land and it was further held that :

> 'Time has now come where the society and the law abiding citizens are being held to ransom by persons who have no respect of law. The wheels of justice grind slowly and the violators of law are seeking to the advantage of the laws delays. That is why they insist on the letter of the law being complied with by the respondents while at the same time showing their complete contempt for the laws themselves. Should there not be a change in the judicial approach or thinking when dealing with such problems which have increased in recent years viz., large scale encroachment on public land and unauthorized construction thereon, most of which could not have taken place without such encroachers getting blessing or tacit approval from the powers that be including the municipal or the local employees. Should the courts give protection to violators of the law? The answer in our opinion must be in negative. Time has come when the courts have to be satisfied, before they interfere with the action taken or proposed to be taken by the governmental authorities qua removal of encroachment or sealing or demolishing unauthorized construction specially when such construction like the present, is commercial in nature.'

13. In the present case also the plaintiffs have failed to show their right, title or interest over the land in dispute. In such circumstances as the plaintiff has failed to show his legal right over the land in dispute therefore, plaintiff is mere encroacher upon the Govt. land. It seems that under the garb of present suit the plaintiffs are indirectly challenging the notification by which the village Kishan Garh was urbanized or land was placed at the disposal of DDA. But it may be mentioned that this court has no jurisdiction to try cases challenging Govt. notification to place the land at the disposal of DDA.

14. Furthermore, the plaintiff has already filed suit in the Hon'ble High Court challenging the entries in the revenue records and therefore there is an admission on the part of the plaintiff themselves that at present land is not shown in their ownership. Question of suffering an irreparable loss or injury does not arise as plaintiff is already pursuing legal remedy available to them by challenging the revenue record. It is well settled principle of law that no injunction can be grand against a true owner. In the present case as the plaintiffs are mere encroacher upon the DDA land as on todays date therefore they are not entitled for any relief as prayed by them. As such, all these issues are decided against the plaintiff and in favour of defendant."

10. RFA No.651 of 2003 filed by appellant No.2 was disposed of by the Division Bench of the High Court vide order dated 24.11.2008, the operative portion of which reads as under:

> "In that view of the matter, we are of the opinion that no interference is called for as far as the impugned judgment and decree is concerned, save and except to record that nothing stated in the impugned judgment and decree dated 3.3.2003 pertaining to the issues of title would be construed as binding between the parties; needless to state the title dispute would be adjudicated in the suit filed

by the appellant by the learned Judge who is seized of the suit as per evidence before the learned Judge and law applicable."

11. In the meanwhile, Surat Singh, one of the brothers of appellant No.2, filed another suit for injunction against the Corporation and the DDA. He claimed that he is the co-owner of land measuring 1200 square yards forming part of khasra No. 1674, village Kishangarh. He pleaded that the premises were surrounded by a boundary wall and till January 1991 the same were being used for tethering cattle by one Ved Prakash. He alleged that on 29.2.1992, the officials of the defendants came to the suit land with large police force and illegally demolished number of premises including the boundary wall of his property and on the next date, i.e., 1.3.1992, the officials of the defendants again came and threatened to take forcible possession of the property.

12. The suit of Shri Shri Surat Singh was dismissed by the Civil Judge vide judgment dated 1.5.2004 with the findings that the suit land belonged to Gaon Sabha and with the urbanization of the rural area of the village the same automatically vested in the Central Government and that the plaintiff encroached the same. The appeal filed by Surat Singh was dismissed by Additional District Judge, Delhi vide judgment dated 5.8.2004. The lower appellate Court held that as per Khatoni Paimaish Exhibit DW1/2, the suit land was a waste land being Gairmumkin Pahar and the same belonged to Gaon Sabha and that after vesting of the land in it, the Central Government had transferred the same to the DDA. Paragraph 6 of that judgment is reproduced below:

"6. the Appellant claims himself the coowner of the land, forming part of the khasra no.1674, Village Kishangar on the basis of the Sale Deed dated 10.10.1963. A photocopy of the Sale Deed was placed on the record by the Appellant through which the Appellant along with the others claims to have purchased 4 bighas and 4 biswas

of land bearing Khasra No.2728/167/4 and 2728/167/3. As per the scheme of the Delhi Land Reforms Act, 1954 (for short the DLR Act) on coming into the force of the DLR Act the proprietor of the agricultural land seized to exist. If any land was the part of the holding of a proprietor, he became the Bhumidar of it, if it was the part of the holding of some other person, such as a tenant or sub-tenant etc. he became either a Bhumidar or an Asami whereupon the rights of the proprietor in that land ceased. The land which was not holding of either of the proprietor or any other person vested in Gaon Sabha. A perusal of Kahatoni Paimaish, Ex.DW1/2 would show that the suit land was a waste land that is Gairmumkin Pahar in Union of India v. Sher Singh & Ors. II (1997) CLT 58, it was held by the Hon'ble Supreme Court of India that except the land which for the time being comprised the holding or a grove whether cultivable or otherwise, vests in Gaon Sabha from the date of commencement of the Act. The onus was on the appellant to show that the suit land was a part of the holding or a grove and the predecessors of the appellant had become a 'Bhumidar' in respect of the suit land on coming into force of the DLR Act. A notification dated 3.6.1977 was issued by the government under Section 507 of the DMC Act whereby, the area of Kishan Garh in the revenue estate of Mehrauli was urbanized, consequently in accordance with the provisions of Section 150(3) of DLR Act, the land which had vested in Gaon Sabha came to vest in the Central Government on urbanization of the village. The Central Government, vide notification under Section 22(1) of the DD Act Dated 20.8.1974 (Ex DW1/1) had placed the entire land which had vested in the Central Government, on the urbanization of the village specified in the schedule, at the disposal of the DDA for the purpose of development and maintenance of the said land. Therefore, all land, including the suit land which had vested in Gaon Sabha, came to vest in the Central Government and was ultimately placed at the disposal of the DDA."

13. During the pendency of the aforementioned two suits, appellant No.1 which is said to have been incorporated under the Companies Act, 1956 in 1994-95 with Harbir Singh Khatri another son of Lal Chand as its Managing Director and appellant No.2-Lal Chand filed third suit being Suit No.313 of 2000 (renumbered as Suit No.473 of 2004) for grant of a declaration that the entries made in the revenue records in respect of land comprised in khasra Nos.2728/1674/2 and 2728/1674/3 situated in the revenue estate of Mehrauli, village Mehrauli Kishangarh, Tehsil Mehrauli are wrong and illegal. The appellants further prayed for grant of a decree of mandatory injunction directing the respondents to correct the revenue record and enter their names in the columns of ownership and possession. Another prayer made by the appellants was for restraining the respondents, their servants and agents from demolishing the superstructures and sealing or interfering with their possession of the suit property or running of the restaurant.

14. In the written statement filed on behalf of the DDA, several objections were taken to the maintainability of the suit including the following:

(i) The plaintiffs have not challenged notification dated 20.8.1974vide which the Central Government transferred the suit land tothe DDA.

(ii) The suit was barred by limitation because the same has beenfiled after 16 years of the accrual of cause of action.

(iii) The suit is barred by the provisions of Order II Rule 2 of the Code of Civil Procedure, 1908.

(iv) The plaintiffs not only made encroachment on the suit land, but also abused the process of Court by filing different suits.

On merits, it was pleaded that the suit land belonged to

Gaon Sabha and with the urbanization of village Kishangarh, the same automatically vested in the Central Government. It was further pleaded that the appellants do not have any right, title or interest in the suit land and they do not have the locus to question the revenue entries. Another plea raised on behalf of the DDA was that the suit was barred by limitation.

15. On the pleadings of the parties, the trial Court framed the following issues:

"1. Whether the plaintiff no.2 along with his brother is the owner and in possession of suit land?

2. Whether the suit land is a government land as alleged in para no.1 of the preliminary objections? If so, whether the suit is liable to be dismissed on this ground?

3. Whether the suit is within limitation?

4. Whether the suit is barred under Order 2 Rule 2 CPC?

5. Whether the plaintiffs have not come to the court with clean hands and are not entitled to the equitable relief of injunction as stated in para VI of the preliminary objections?

6. Whether the suit land is a government land was placed at the disposal of the DDA under Section 22(1) of the DDA vide notification dated 20.08.1974?

7. Relief."

16. On a comprehensive analysis of the pleadings and evidence of the parties, the trial Court held that the plaintiffs (appellants herein) have succeeded in showing that appellant No.2 and his brothers had purchased land comprised in khasra

Nos. 2728/1674/2 and 2728/1674/3, but they could not prove that the land on which appellant No.1 was running 'Sahara Restaurant' is a part of those khasra numbers or that they were otherwise in lawful possession of the suit land. The trial Court then held that the suit was barred by time because cause of action had accrued 16 years ago when the suit land was transferred to the DDA. The trial Court also held that the appellants had not approached the Court with clean hands inasmuch as they suppressed material facts relating to the vesting of the suit land in the Central Government and transfer thereof to the DDA and the documents like Aks Sijra, site plan and demarcation report as also the facts relating to the acquisition of an area of 1512 square yards forming part of khasra No.2728/1674/3 and receipt of compensation at the rate of Rs.50/- per square yard. The trial Court returned affirmative finding on issue No.4 and held that the suit was barred by the provisions of Order II Rule 2 CPC.

17. The appeal preferred by the appellants was dismissed by the learned Single Judge of the High Court, who relied upon the judgment of the Division Bench in *Rajinder Kakkar v. Delhi Development Authority* 54 (1994) DLT 484 and held that with the issuance of notification under Section 507, Gaon Sabha land of Kishangarh automatically vested in the Central Government and transfer thereof to the DDA was valid. The learned Single Judge also agreed with the trial Court that the suit was barred by limitation and that the appellants had not approached the Court with clean hands.

18. Shri Mukul Rohtagi, learned senior counsel appearing for the appellants extensively referred to the evidence produced by the parties to show that the land in question was Shamlat Thok and argued that such land does not vest in Gaon Sabha. Learned senior counsel further argued that the notification issued under Section 507 of the DMC Act and the provision contained in Section 150(3) of the Land Reforms Act have no bearing on the appellants' case because the suit land did not

belong to Gaon Sabha and the trial Court and the High Court committed serious error by recording a finding that the suit land automatically vested in the Central Government and that the same was validly transferred to the DDA. Shri Rohtagi pointed out that the suit land was owned by Smt. Kasturi widow of Jhuman Singh and Rattan Lal son of Trikha Ram, who sold it to S/Shri Parma Nand, Tej Nath, Tej Prakash, Gokal Chand and Ram Dhan by registered sale deed dated 7.10.1959 and legal heirs of Parma Nand and other vendees sold the same to appellant No.2 and his brothers vide sale deed dated 10.10.1963. Learned senior counsel assailed the concurrent finding recorded by the trial Court and the High Court on the issue of limitation and submitted that the suit filed in the year 2000 was within time because the cause of action accrued to the appellants for the first time in 1998 when they came to know about the entries made in the revenue records in favour of the DDA. In support of this argument, Shri Rohtagi relied upon the judgment of this Court in *Rukhmabai v. Lala Laxminarayan* (1960) 2 SCR 253.

19. Shri Harin P. Raval, learned Additional Solicitor General and Shri Amarendra Sharan, learned senior counsel appearing for the DDA argued that the concurrent finding recorded by the trial Court and the High Court that land on which the appellants were running a restaurant does not form part of khasra Nos. 2728/1674/2 and 2728/1674/3 is a pure finding of fact based on correct analysis of the pleadings of the parties and evidence produced by them and the same does not call for interference under Article 136 of the Constitution. Shri Sharan submitted that the suit filed by the appellants for declaration of title and injunction was rightly dismissed by the trial Court because they had not produced any evidence to prove that the suit land forms part of land purchased by appellant No.2 and his brothers. Shri Sharan then argued that the suit filed in the year 2000 was barred by limitation because the cause of action had accrued to the appellants on 10.8.1990 when the officials of the Corporation and the DDA are said to

have visited the suit premises and threatened to demolish the superstructure and, in any case, the cause of action accrued to them in December 1990 when the written statement was filed on behalf of the DDA with a categorical assertion that with the urbanisation of the rural areas of village Kishangarh, the suit land automatically vested in the Central Government, which transferred it to the DDA vide notification dated 20.8.1974. Learned senior counsel lastly submitted that the appellants are not entitled to any relief because they had not approached the Court with clean hands and suppressed material facts and documents.

20. We shall first consider the question whether the suit filed by the appellants on 14.2.2000 was within limitation and the contrary concurrent finding recorded by the trial Court and the High Court is legally unsustainable.

21. The Limitation Act, 1963 (for short, 'the 1963 Act') prescribes time limit for all conceivable suits, appeals etc. Section 2(j) of that Act defines the expression "period of limitation" to mean the period of limitation prescribed in the Schedule for suit, appeal or application. Section 3 lays down that every suit instituted, appeal preferred or application made after the prescribed period shall, subject to the provisions of Sections 4 to 24, be dismissed even though limitation may not have been set up as a defence. If a suit is not covered by any specific article, then it would fall within the residuary article. In other words, the residuary article is applicable to every kind of suit not otherwise provided for in the Schedule.

22. Article 58 of the 1963 Act, which has bearing on the decision of this appeal, reads as under:

"*THE SCHEDULE*

PERIODS OF LIMITATION

[*See* sections 2(j) and 3]

FIRST DIVISION – SUITS

Description of suit	Period of limitation	Time from which period begins to run
PART III – SUITS RELATING TO DECLARATIONS		
58. To obtain any other declaration	Three years	When the right to sue first accrues."

23. Article 120 of the Indian Limitation Act, 1908 (for short, 'the 1908 Act') which was interpreted in the judgment relied upon by Shri Rohtagi reads as under:

"Description of suit	Period of limitation	Time from which period begins to run
120. Suit for which no period of limitation is provided elsewhere in this Schedule.	Six years	When the right to sue accrues."

right to sue accrues."

24. The differences which are discernible from the language of the above reproduced two articles are:

(i) The period of limitation prescribed under Article 120 of the 1908 Act was six years whereas the period of limitation prescribed under the 1963 Act is three years and,

(ii) Under Article 120 of the 1908 Act, the period of limitation commenced when the right to sue accrues. As against this, the period prescribed

under Article 58 begins to run when the right to sue first accrues.

25. Article 120 of the 1908 Act was interpreted by the Judicial Committee in *Mt. Bolo v. Mt. Koklan* AIR 1930 PC 270 and it was held:

> "There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement, or at least, a clear or unequivocal threat to infringe that right, by the defendant against whom the suit is instituted."

26. The same view was reiterated in *Annamalai Chettiar v. A.M.K.C.T. Muthukaruppan Chettiar* (1930) I.L.R. 8 Rang. 645 and *Gobinda Narayan Singh v. Sham Lal Singh* (1930-31) L.R. 58 I.A. 125. In *Rukhmabai v. Laxminarayan* (supra), the three-Judge Bench noticed the earlier judgments and summed up the legal position in the following words:

> "The right to sue under Article 120 of the 1908 Act accrues when the defendant has clearly or unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Every threat by a party to such a right, however ineffective or innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardizes the said right."

27. While enacting Article 58 of the 1963 Act, the legislature has designedly made a departure from the language of Article 120 of the 1908 Act. The word 'first' has been used between the words `sue' and `accrued'. This would mean that if a suit is based on multiple causes of action, the period of limitation will begin to run from the date when the right to sue first accrues. To put it differently, successive violation of the right will not give rise to fresh cause and the suit will be liable to be dismissed if it is beyond the period of limitation counted from

the day when the right to sue first accrued.

28. In the light of the above, it is to be seen as to when the right to sue first accrued to the appellants. They have not controverted the fact that in the written statement filed on behalf of the DDA in Suit No.2576 of 1990-Lal Chand v. MCD and another, it was clearly averred that the suit land belonged to Gaon Sabha and with the urbanisation of the rural areas of village Kishangarh vide notification dated 28.5.1966 issued under Section 507 of the DMC Act, the same automatically vested in the Central Government and that vide notification dated 20.8.1974 issued under Section 22(1) of the DD Act, the Central Government transferred the suit land to the DDA for development and maintaining as Green. This shows that that the right, if any, of the appellants over the suit land stood violated with the issue of notification under Section 507 of the DMC Act and, in any case, with the issue of notification under Section 22(1) of the DD Act. Even if the appellants were to plead ignorance about the two notifications, it is impossible to believe that they did not know about the violation of their so-called right over the suit land despite the receipt of copy of the written statement filed on behalf of the DDA in December, 1990. Therefore, the cause of action will be deemed to have accrued to the appellants in December, 1990 and the suit filed on 14.2.2000 was clearly barred by time.

29. The issue deserves to be considered from another angle. Although, paragraph 19 of Suit No. 303/2000 was cleverly drafted to convey an impression that the right to sue accrued to the appellants in November/December, 1998 when they learnt about the wrong recording of entries in Khasra Girdawris/Revenue Records, but if the averments contained in that paragraph are read in conjunction with the pleadings of the earlier suits, falsity of the appellants' claim that the cause of action accrued to them in November/December, 1998 is established beyond any doubt. In the first suit filed by him, appellant No.2-Lal Chand had pleaded that the cause of action

accrued on 10.8.1990 when the officials of the respondents came to the suit premises and threatened to demolish the same. In the second suit filed by Surat Singh (brother of appellant No.2-Lal Chand), it was claimed that the cause of action accrued on 29.2.1992 when the officials of the respondents demolished the boundary wall of the property on the ground that the same was Gaon Sabha land. The appellants have not explained starking contradictions in the averments contained in three suits on the issue of cause of action and in the absence of cogent explanation, it must be held that the statement contained in paragraph 19 of Suit No.313 of 2000 was *per se* false and, as a matter of fact, the cause of action had first accrued to the appellants on 10.8.1990 when their so called right over the suit land was unequivocally threatened by the respondents. Therefore, the suit filed by the appellants on 14.2.2000 was clearly beyond the period of limitation of 3 years prescribed under Article 58 of the 1963 Act and was barred by time.

30. While considering the question whether the suit was barred by time, the trial Court noticed the averments contained in paragraphs 9 and 10 of the plaint that during the course of preparation of the trial of Suit No. 2576/1990 – Lal Chand v. MCD and another, the appellants applied for a copy of Khasra Girdawaris of the suit land and they were shocked to learn that the revenue records have been incorrectly maintained and they were neither shown as owners/bhumidars nor in possession of the suit land, referred to the pleadings of the suit filed by appellant No.2 – Lal Chand in 1990 and observed:

> "Therefore, as per the pleadings that the cause of action accrued when according to plaintiff he applied for the copies of the Khasra Nos which was in Nov.-Dec, 1998 during the course of trial in the earlier suit.
>
> This claim of the plaintiff however does not appear to be factually correct. It is evident from the judgment dated 03.03.2003 that the detailed written statement had been

filed by the DDA before the Ld. Civil Judge when the suit filed by Lal Chand Plaintiff No.2 on 18.08.1990 wherein the DDA had specifically pleaded that the land form part of Khasra No.2728/1674/2 & 2728/1674/3 situated in the revenue estate of village Kishangarh, Teh Mehrauli, New Delhi and the urbanization of village Mehrauli, all the Gaon Sabha land vested in the central govt, but later on transferred this land at the disposal of the defendant DDA for development and maintenance as green, vide notification dated 20.08.1974 and the plaintiff has no right, title or interest over the suit land. It was further pleaded that the plaintiff had wrongly and unauthorizedly occupied the land and constructed the boundary wall alongwith three temporary room which construction was unauthorized and it was denied that the suit property existed for the last 16 years. It is further evident from the said judgment that after the plaintiff filed the replication continuing the aforesaid issue were framed by the Ld. Civil Judge on 11.03.1997. *This being so, it is unbelievable that the date of knowledge by the plaintiff was of Nov-Dec, 1998. Rather the plaintiffs were fully aware of the land being at the disposal of the DDA from the proceeding in suit No.211/02/90 when the DDA filed its written statement when the limitation started to run more so as the plaintiff No.2 had also filed replication continuing the aforesaid and therefore as per the provisions of the limitation act, Article 58 of the schedule, challenging to the same should have been made within the period of limitation which is within 3 years from the date of knowledge and limitation which has started running, it is not extended by the plaintiff by obtaining certified copy or by giving notice to the defendants.* This suit which has been filed only on 11.02.2000 is clearly not within the period of limitation of 3 years from the date when the DDA filed its written statement in suit No.211/02/90 and the plaintiff No,2 is first assumed to have acquired knowledge and in attempt to cover up this delay the plaintiff is trying to falsely create

the cause of action in Nov-Dec, 1998 attributing the advantage as during the trial when he applied for the copies of the revenue record despite the fact that the period of limitation started to run when the written statement was filed by DDA to which the plaintiff No.2 filed replication pursuant to which the issue framed was, whether the plaintiff has any legal rights to file the present suit. This being the case, I hereby held that the present suit is clearly beyond the period of limitation and I decide the issue No.3 against the plaintiff."

(emphasis supplied)

31. The High Court agreed with the trial Court and held that the suit was barred by time. The reasons assigned by the High Court for coming to this conclusion are contained in paragraphs 38 to 45, which are extracted below:

"38. First suit filed by Lal Chand (Appellant no.2 in the present proceedings), being suit (no. 2576 of 1990), was suit for Injunction simplicitor. That suit was dismissed by judgment/ order dated 3.3.2001. As per findings given in that suit, the Plaintiff was never the owner; the land was Government land; the land vested in Central Government after issuance of notification under Section 507 of DMC Act and thereafter, the land was transferred to DDA.

39. Against dismissal of that Suit for Injunction, an appeal bearing (No. RFA 651/2003) was filed and this Court disposed of the Appeal, vide order dated 24th November 2008.

40. In that suit, it was alleged in plaint that;

"It was sometime in March 1990 that Tehsildar along with officers of DDA came to the site of Plaintiff with dispossession and demolition."

41. Now after 10 years, appellant being a co-owner, cannot

seek relief against alleged threat of demolition or dispossession and present suit is clearly barred by limitation.

42. In that suit in written Statement, a specific plea was taken by answering respondent herein, that land in question by virtue of issuance of notification under Section 507 of DMC Act, on urbanization, came to be vested with Union of India and thereafter, transferred to answering respondent. Relevant preliminary objection taken therein the written statement is as under;

"That the suit as filed is false, frivolous and not maintainable. The plaintiff has no legal right to file the present suit. The land forms a part of Khasra no. 1674 of Village- Mehrauli. This land belong to the Gram Sabha and on the urbanization of village Mehrauli, all the Gram Sabha land vested in the Central Government, later transferred this land at the disposal of the defendant DDA vide notification No. S.O. 2190 dated 208-1974. Therefore, it is clear that the plaintiff has no right, title or interest in the property. In this view of the matter, this suit may be dismissed. "

43. It is also contended that second suit was filed by Surat Singh, one of the co-owners. That was again a Suit for Injunction, which was dismissed and against this, an appeal (No. RCA No. 29/2004) was preferred before Additional District Judge on 5th August 2004 and same was also dismissed.

44. The appellate court, while dismissing the suit of Surat Singh, referred to the pleadings made in the plaint,

"That on 29-2-1992, police officials along with the officials of DDA visited the site and proceeded to demolish inter alia the boundary wall of the disputed

land. Clearly, therefore, the cause of action had matured and limitation, which necessarily commenced from the date of the demolition of the premises."

45. That suit was filed in 1992 and surely, a subsequent suit by another co-owner, cannot be maintained after a lapse of 8 years."

32. What is most surprising is that even though appellant No.2 – Lal Chand was cited as the first witness in Suit No.303/2000 (renumbered as 473/2004), he did not step into the witness box. This appears to be a part of calculated strategy. He knew that if he was to appear as a witness, it will not be possible for him to explain the apparent contradictions in the pleadings of the three suits on the issue of cause of action and falsity of the averments contained in paragraph 19 in Suit No.303/2000 will be exposed. This is an additional reason for holding that the trial Court and the High Court did not commit any error by recording a conclusion that the suit was barred by limitation.

33. The next question which requires consideration is whether the finding recorded by the trial Court on issue Nos.1 and 2 is legally correct and the High Court rightly declined to interfere with the same. The trial Court adverted to the pleadings of the parties and evidence produced by them and observed:

"…. The plaintiff has not placed on record any document nor has examined any witness to prove the location and boundaries of the said land. It is unbelievable that sale of the immoveable properties could have taken place without identification of the property with regard to its location. As per existing practice all such transactions of immoveable properties either bear the complete details of the boundaries to assist location of the property sold alongwith the site plan or is accompanied by aks-shijra. However, in the present case this has not been done and the plaintiff has not adduced in evidence to prove boundary of the suit

land. *Therefore, on the basis of the aforesaid, I hold that the plaintiff No.2 had purchased the land falling in Khasra No. 2728/1674/2 & 2728/1674/3 but he has not been able to prove the location of the said land comprising of Khasra No. 2728/1674/2 & 2728/1674/3. The plaintiff has further not been able to connect the land over which the plaintiff No.1 is running Sahara Restaurant to the land comprise in Khasra No. 2728/1674/2 & 2728/1674/3 of which the plaintiff No.2 and his brother are stated to be the owners.*

That the DDA has placed on record the complete area location plan Ex.D2W1/4 to which there is no rebuttal. Only simply suggestion has been given to the witness of the defendant that the aforesaid plan is incorrect but the plaintiff has not placed on record any other alternative plan which according to him, is according to plan, therefore, in these circumstances I find no reason to discard the aforesaid documents which shows that Sahara Restaurant has been constructed in front of the community centre No.1, Nursery School No.2 and Group Housing Janta Flats – 952 on the road and is shown to be away from abadi of village Kishangarh, Mehrauli, New Delhi.

Annexure-A of the award Ex.PW4/1 shows that Khasra No.2728/1674 falls in old abadi of village Kishangarh and in these circumstances it is not possible to believe that the aforesaid khasra No.2728/1674 would be located away from the main village abadi. There it appears that the plaintiff has deliberately tried to create confusion with regard to the khasra No.2728/1674 and as admitted, to show that the land on which the Sahara Restaurant is constructed is bearing khasra No. 2728/1674/2 and 2728/1674/3 which is no the case and apparently it was for this reason that he has deliberately no placed on record any site plan, aks-shijra, demarcation report made in plan document to prove the khasra numbers.

In view of the above I hereby hold that the plaintiff has proved that he has purchased the land falling in Khasra No. 2728/1674/2 and 2728/1674/3 but has not been able to prove that the land on which the plaintiff No.1 is running Sahara Restaurant is comprise of Khasra No. 2728/1674/2 and 2728/1674/3 or that he is in legal possession of the suit land over which the Sahara Restaurant is constructed."

(emphasis supplied)

The trial Court then proceeded to observe:

"Vide my above findings with regard to issue No.1, I have already held that the plaintiff has not been able to prove hat the land on which a large restaurant is made falls in Khasra No. 2728/1674/2 and 2728/1674/3 and that in fact Khasra No. 2728/1674/2 and 2728/1674/3 is a part of old abadi which is situated at distance and away from the place where the Sahara Restaurant is constructed. The notification u/s. 22(1) of the DDA dated 20.8.1974 which is Ex.DWW1/2 is not disputed by both the parties. Firstly the plaintiff has not produced any document in the form of demarcation report or aks-shijra which show that the land on which Sahara Restaurant is situated false in Khasra No. 2728/1674/2 and 2728/1674/3 and is same land which has been purchased by the plaintiff No.2. The sale deed so relied upon by the plaintiff is Ex.PW3/4 does not show the boundaries and identification of the land initially sold by Ratan Singh and Kasturi Devi so purchased by the plaintiff No.2 later vide Ex.PW3/3. Secondly no explanation is forthcoming with regard to the acquisition award/ proceedings placed before this court which are Ex.PW4/1, showing that Khasra No.1673 min(0-12) and Khasra No. 2728/1674/3 min plus 2(14-14) then the area of 1512 sq. yards has been acquired with the rte of claim as Rs.50/- per sq. yard and the compensation is awarded at Rs.1,55,600/- in all which is in respect of acquisition of land of Ran Singh, Dhan Singh, Lal Chand, Suraj Singh all sons

of Mam Raj as shown in sl. No.66……...*Annexure-A to the award Ex.PW4/1 shows Khasra No. 2728/1674 to be falling in old village abadi and no explanation is forthcoming as to how the land on which Sahara Restaurant has been constructed is situated away from the Abadi which according to Dx.D2W1/4 is constructed on the road in front of the Group Housing Janta Flats-952, Nursery School-II and community center-I. It is unbelievable that khasra No.2728/1674 which falls in old village abadi can be situated away from the said award.* Fourthly, in the earlier suit filed by the plaintiff No.2 in the year 1990 before Ld. Civil Judge the plaintiff No.2 had claimed that he is in possession of two rooms and tin shed which he is using for residential purpose and no explanation is forthcoming as to how this huge construction of a big restaurant was made which is being used by the plaintiff No.1 for commercial purposes. *It is evident from the order dated 24.11.2008 in RFA No.651/03 that the High Court was apprised of the earlier report of the local commissioner in suit No.211/02/90 and the large scale construction raised by the plaintiff over the said land despite the status quo order without the sanction of the municipal authority.* Even otherwise no permission can be granted by the DDA for any been uncontroverted by the plaintiff, has constructed restaurant by encroaching upon the govt. land meant for road. Under the garb of the present suit the plaintiff are indirectly challenging notification by which village Kishangarh was urbanized and the land was placed at the disposal of the DDA without specifically challenging the same as the entries made in the revenue record are only pursuant to the said notification. Therefore, in view of the aforesaid, I hereby decide this issue No.2 against the plaintiff and in favour of the defendants."

(emphasis supplied)

34. Though, the High Court did not examine the issue in detail as was done by the trial Court, the learned Single Judge

did make a note of the two notifications, the judgment in *Rajinder Kakkar's* case and held that by virtue of Section 150(3) of the Land Reforms Act, the suit land automatically vested in the Central Government and the same was transferred to the DDA under Section 22(1) of the DD Act. In our view, the conclusion recorded by the trial Court that the appellants have failed to prove that the suit land formed part of khasra Nos. 2728/1674/2 and 2728/1674/3 does not suffer from any error because they did not adduce any evidence to establish that the land on which restaurant was being run formed part of those khasra numbers.

35. We also approve the findings and conclusions recorded by the trial Court that the appellants had not approached the Court with clean hands inasmuch as they withheld Aks Sijra, site plan and the demarcation report and award Exhibit PW4/1. Not only this, they raised illegal construction despite the injunction order passed by the High Court and that too without obtaining permission from the competent authority.

36. In view of the above discussion, we do not consider it necessary to deal with the question whether the suit filed by the appellants was barred by Order II Rule 2 CPC.

37. In the result, the appeal is dismissed. The appellants, who have not only made encroachment on the public land, but also abused the process of the Court are saddled with cost, which is quantified at Rs.5 lacs. Of this, Rs.2.5 lacs be deposited with the Supreme Court Legal Services Committee within two months from today. The balance amount of Rs.2.5 lacs be deposited with the Delhi State Legal Services Committee within the same period. If the appellants fail to deposit the cost, the Secretaries of the two Legal Services Committees shall be entitled to recover the same as arrears of land revenue.

B.B.B. Appeal dismissed.

EMPLOYEES PROVIDENT FUND COMMISSIONER
v.
O.L. OF ESSKAY PHARMACEUTICALS LIMITED
(Civil Appeal No. 9630 OF 2011)

NOVEMBER 8, 2011

[G. S. SINGHVI AND H. L. DATTU, JJ.]

Employees' Provident Funds and Miscellaneous Provisions Act, 1952:

Object of its enactment – Discussed.

s.11(2) – Priority of payment of contributions over other debts – Non-obstante clauses contained in s.11(2) of the EPF Act and s.529A of the Companies Act – Interpretation of the provisions – Held: By virtue of non-obstante clause contained in s.11(2) of the EPF Act, any amount due from an employer is deemed to be first charge on the assets of the establishment and is payable in priority to all other debts including the debts due to a bank, which falls in the category of the secured creditors – It cannot be said that the non-obstante clause contained in subsequent legislation i.e. s.529A(1) of the Companies Act prevails over the similar clause contained in s.11(2) of the EPF Act – While inserting s.529A in the Companies Act, Parliament, in its wisdom, did not declare the workmen's dues (which includes various dues including provident fund) as first charge – The effect of the amendment is only to expand the scope of the dues of workmen and place them at par with the debts due to secured creditors and there is no reason to interpret this amendment as giving priority to the debts due to secured creditor over the dues of provident fund payable by an employer – Of course, after the amount due from an employer under the EPF Act is paid, the other dues of the workers will be treated at par with the debts due to secured creditors and payment thereof will

be regulated by the provisions contained in s.529(1) read with s.529(3), 529A and 530 of the Companies Act – Companies Act, 1956 – s.529A.

Companies Act, 1956:

ss.529, 530 (as amended) and s.529A – Interpretation of – Held: By Companies (Amendment) Act, 1985, proviso was added to s.529(1) – By the same amendment, ss.529(3) and 529A were inserted – Simultaneously, the expression "subject to the provisions of s.529A" was inserted in s.530(1) – The object of the amendments was to ensure that the legitimate dues of workers should rank pari passu with those of secured creditors – What Parliament has done by these amendments is to define the term "workmen's dues" and to place them at par with debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to s.529(1) – However, these amendments, though subsequent in point of time, cannot be interpreted in a manner which would result in diluting the mandate of s.11 of the EPF Act – Interpretation of statutes – Employees' Provident Funds and Miscellaneous Provisions Act, 1952.

s.529(1), proviso – Object of – Discussed.

Interpretation of statutes:

Contextual interpretation – Held: It is a well recognized rule of interpretation that every part of the statute must be interpreted keeping in view the context in which it appears and the purpose of legislation – Another rule of interpretation of statutes is that if two special enactments contain provisions which give overriding effect to the provisions contained therein, then the Court is required to consider the purpose and the policy underlying the two Acts and the clear intendment conveyed by the language of the relevant provisions.

Social welfare legislation – Interpretation of – Held: A legislation made for the benefit of workers must receive a liberal and purposive interpretation keeping in view the Directive Principles of State Policy contained in Articles 38 and 43 of the Constitution – Constitution of India, 1950 – Employees' Provident Funds and Miscellaneous Provisions Act, 1952.

Non-obstante clause – Interpretation of.

Words and phrases:

Expression 'workmen dues' – Meaning of, in the context of s.529(3)(b) of the Companies Act, 1956.

The question which arose for consideration in these appeals was whether priority given to the dues payable by an employer under Section 11 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPF Act) is subject to Section 529A of the Companies Act, 1956 in terms of which the workmen's dues and debts due to secured creditors are required to be paid in priority to all other debts.

Allowing the appeals, the Court

HELD: 1. An analysis of Section 11 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 shows that it gives statutory priority to the amount payable to the employees over other debts. Section 11(1) relates to an employer who is adjudged insolvent or being a company against whom an order of winding up is made. It lays down that the amount due from the employer in respect of any contribution payable to the Fund or, as the case may be, the Insurance Fund, damages recoverable under Section 14B, accumulations required to be transferred under Section 15(2) or any charges payable by him under any other provision of the Act or the Scheme or the Insurance Scheme shall be paid in priority to all other debts in the distribution of the

property of the insolvent or the assets of the company being wound up, as the case may be. Section 11(2) contains a *non obstante* clause and lays down that if any amount is due from an employer whether in respect of the employee's contribution deducted from the wages of the employees or the employer's contribution, the same shall be deemed to be the first charge on the assets of the establishment and shall, notwithstanding anything contained in any other law for the time being in force, be paid in priority to all other debts. To put it differently, sub-section (2) of Section 11 not only declares that the amount due from an employer towards contribution payable under the EPF Act shall be treated as the first charge on the assets of the establishment, but also lays down that notwithstanding anything contained in any other law, such dues shall be paid in priority to all other debts. [Para 18] [354-G-H; 355-A-D]

2. *The Companies Act.* Part VII of the Companies Act, which consists of 5 Chapters contains provisions relating to winding up of a company. The provisions contained in Chapter V (Sections 528 to 560), which deal with proof and ranking of claims are applicable to every mode of winding up. Section 528 lays down that in every winding up, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company. This is subject to the rider that in the case of insolvent companies, law of insolvency will be applicable in accordance with the provisions of the Companies Act. Section 529 deals with application of insolvency rules in winding up of insolvent companies. Section 530, as it existed prior to the amendment of the Companies Act by Act No.35 of 1985, gave priority to revenue of the State and local authorities and various amounts payable to

employees including the dues payable from a provident fund, a pension fund, a gratuity fund or any other fund maintained by the company for the welfare of the employees. By the Companies (Amendment) Act No.35 of 1985, proviso was added to Section 529(1). By the same amendment, Sections 529(3) and 529A were inserted in the Companies Act. Simultaneously, the expression "subject to the provisions of Section 529A" was inserted in Section 530(1). By inserting proviso in Section 529(1), Parliament ensured protection of the interest of the workmen in winding up proceedings. The object of this amendment is to place the legitimate dues of workers at par with those of secured creditors. This is also a legislative recognition of the fact that the workmen contribute to the growth of the capital and industry and in the event of winding up of the company, they are entitled to get their legitimate share in the assets of the company by being treated at par with other secured creditors. With the insertion of Section 529(3)(a), the definition of the term `workmen' contained in the Industrial Disputes Act, 1947 has been incorporated in the Companies Act for the purposes of Sections 529, 529A and 530. The expression "workmen's dues" has been defined in Section 529(3)(b) to mean all wages or salary including wages payable for time or piece work and salary earned wholly or in part by way of commission of any workman in respect of services rendered to the company and any compensation payable to any workman under the Industrial Disputes Act, 1947, all accrued holiday remuneration payable to any workman, or in the case of his death to any other person in his right upon the termination of his employment before the passing of winding up order and all sums due to any workman from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the workmen, which is maintained by the company. The

definition also takes within its fold funds capable of being transferred to and vested in the workman under a contract with insurers under Section 14 of the Workmen's Compensation Act as also the amounts due in respect of any compensation or liability for compensation under the Workmen's Compensation Act in respect of the death or disablement of any workman of the company. By virtue of the *non obstante* clause contained in sub-section (1) of Section 529A, statutory priority has been given to the workmen's dues and debts due to secured creditors over all other dues. [Paras 19, 21] [355-E-H; 356-A-B; 360-C-H; 361-A]

Organo Chemical Industries v. Union of India **(1979) 4 SCC 573: 1974 (3) SCR 813;** *Central Bank of India v. State of Kerala* **(2009) 4 SCC 94: 2009 (3) SCR 735;** *Builders Supply Corporation v. Union of India* **(1965) 2 SCR 289;** *State Bank of Bikaner and Jaipur v. National Iron and Steel Rolling Corporation* **(1995) 2 SCC 19: 1994 (6) Suppl. SCR 566;** *Dena Bank v. Bhikhabhai Prabhudas Parekh & Co.* **(2000) 5 SCC 694: 2000 (3) SCR 50;** *State of M.P. v. State Bank of Indore* **(2002) 10 SCC 441 – relied on.**

3. The EPF Act is a social welfare legislation intended to protect the interest of a weaker section of the society, i.e. the workers employed in factories and other establishments, who have made significant contribution in economic growth of the country. The workers and other employees provide services of different kinds and ensure continuous production of goods, which are made available to the society at large. Therefore, a legislation made for their benefit must receive a liberal and purposive interpretation keeping in view the Directive Principles of State Policy contained in Articles 38 and 43 of the Constitution. [Para 22] [361-B-E]

4. The object of the amendments made in the Companies Act by Act No. 35 of 1985 was to ensure that

the legitimate dues of workers should rank *pari passu* with those of secured creditors. In other words, these amendments are intended to protect the interest of the workmen in winding up proceedings by placing them at par with secured creditors and a statutory charge is created qua their dues on all available securities forming part of the assets of the company in liquidation. There is nothing in the language of Section 529A which may give an indication that legislature wanted to create first charge in respect of the workmen's dues, as defined in Sections 529(3)(b) and 529A and debts due to the secured creditors. [Paras 35-36] [379-G-H; 380-A-F]

5. It is a well recognized rule of interpretation that every part of the statute must be interpreted keeping in view the context in which it appears and the purpose of legislation. Another rule of interpretation of Statutes is that if two special enactments contain provisions which give overriding effect to the provisions contained therein, then the Court is required to consider the purpose and the policy underlying the two Acts and the clear intendment conveyed by the language of the relevant provisions. [Paras 37-38] [380-G-H; 381-A-F]

RBI v. Peerless General Finance and Investment Co. Ltd. **(1987) 1 SCC 424: 1987 (2) SCR 1;** *Shri Ram Narain v. Simla Banking and Industrial Co. Ltd.* **1956 SCR 603;** *Kumaon Motor Owners' Union Ltd. v. State of Uttar Pradesh* **(1966) 2 SCR 121;** *Ashok Marketing Limited v. Punjab National Bank* **(1990) 4 SCC 406: 1990 (3) SCR 649 – relied on.**

6. Even before the insertion of proviso to Sections 529(1), 529(3) and Section 529A and amendment of Section 530(1), all sums due to any employee from a provident fund, a pension fund, a gratuity fund or any other fund established for welfare of the employees were payable in priority to all other debts in a winding up

proceedings [Section 530(1)(f)]. Even the wages, salary and other dues payable to the workers and employees were payable in priority to all other debts. What Parliament has done by these amendments is to define the term "workmen's dues" and to place them at par with debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to Section 529(1). However, these amendments, though subsequent in point of time, cannot be interpreted in a manner which would result in diluting the mandate of Section 11 of the EPF Act, sub-section (2) whereof declares that the amount due from an employer shall be the first charge on the assets of the establishment and shall be paid in priority to all other debts. The words "all other debts" used in Section 11(2) would necessarily include the debts due to secured creditors like banks, financial institutions etc. The mere ranking of the dues of workers at par with debts due to secured creditors cannot lead to an inference that Parliament intended to create first charge in favour of the secured creditors and give priority to the debts due to secured creditors over the amount due from the employer under the EPF Act. Therefore, in terms of Section 530(1), all revenues, taxes, cesses and rates due from the company to the Central or State Government or to a local authority, all wages or salary or any employee, in respect of the services rendered to the company and due for a period not exceeding 4 months all accrued holiday remuneration etc. and all sums due to any employee from provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees maintained by the company are payable in priority to all other debts. This provision existed when Section 11(2) was inserted in the EPF Act by Act No. 40 of 1973 and any amount due from an employer in respect of the employees' contribution was declared first charge on the assets of the establishment and became payable in priority to all other debts. However, while inserting

Section 529A in the Companies Act by Act No.35 of 1985 Parliament, in its wisdom, did not declare the workmen's dues (this expression includes various dues including provident fund) as first charge. The effect of the amendment made in the Companies Act in 1985 is only to expand the scope of the dues of workmen and place them at par with the debts due to secured creditors and there is no reason to interpret this amendment as giving priority to the debts due to secured creditor over the dues of provident fund payable by an employer. Of course, after the amount due from an employer under the EPF Act is paid, the other dues of the workers will be treated at par with the debts due to secured creditors and payment thereof will be regulated by the provisions contained in Section 529(1) read with Section 529(3), 529A and 530 of the Companies Act. [paras 42, 43] [383-C-H; 384-A-E]

Maharashtra State Cooperative Bank Ltd. v. Assistant Provident Fund Commissioner **(2009) 10 SCC 123: 2009 (15) SCR 1;** *Maharashtra Tubes Ltd. v. State Industrial and Investment Corporation of Maharashtra Ltd.* **(1993) 2 SCC 144: 1993 (1) SCR 340;** *Recovery Officer and Asstt. Provident Fund Commissioner v. Kerala Financial Corporation* **ILR (2002) 3 Kerala;** *Allahabad Bank v. Canara Bank* **(2000) 4 SCC 406: 2000 (2) SCR 1102** *UCO Bank v. Official Liquidator, High Court of Bombay* **(1994) 5 SCC 1: 1994 (1) Suppl. SCR 294;** *A.P. State Financial Corporation v. Official Liquidator* **(2000) 7 SCC 291: 2000 (2) Suppl. SCR 288** *Textile Labour Association v. Official Liquidator* **(2004) 9 SCC 741: 2004 (3) SCR 1161;** *ICICI Bank Ltd. v. SIDCO Leathers Ltd.* **(2006) 10 SCC 452: 2006 (1) Suppl. SCR 528;** *Rajasthan State Financial Corporation v. Official Liquidator* **(2005) 8 SCC 190: 2005 (3) Suppl. SCR 1073;** *UCO Bank v. Official Liquidator, High Court, Bombay* **(1994) 5 SCC 1: 1994 (1) Suppl. SCR 294– referred to.**

Case Law Reference:

2009 (15) SCR 1	**referred to**	**Para 11**
1993 (1) SCR 340	**referred to**	**Para 12**
1974 (3) SCR 813	**relied on**	**Para 22**
ILR (2002) 3 Kerala 4	**referred to**	**Paras 23, 28**
2009 (3) SCR 735	**relied on**	**Para 24**
(1965) 2 SCR 289	**relied on**	**Para 25**
1994 (6) Suppl. SCR 566	**relied on**	**Paras 26, 27, 28**
2000 (3) SCR 50	**relied on**	**Paras 26, 27, 28**
(2002) 10 SCC 441	**relied on**	**Paras 26, 27, 28**
2000 (2) SCR 1102	**referred to**	**Paras 28, 32, 33,34**
1994 (1) Suppl. SCR 294	**referred to**	**Paras 29, 31**
2000 (2) Suppl. SCR 288	**referred to**	**Paras 29 31, 34**
2004 (3) SCR 1161	**referred to**	**Paras 29, 31**
2006 (1) Suppl. SCR 528	**referred to**	**Paras 29, 33**
2005 (3) Suppl. SCR 1073	**referred to**	**Para 33**
1994 (1) Suppl. SCR 294	**referred to**	**Paras 29, 31**
1987 (2) SCR 1	**relied on**	**Para 37**
1956 SCR 603	**relied on**	**Para 39**
(1966) 2 SCR 121	**relied on**	**Para 40**

1990 (3) SCR 649	**relied on**	**Para 41**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9630 of 2011.

From the Judgment & Order dated 18.9.2008 of the High Court of Gujarat in O.J. Appeal No. 269 of 2007 in Company Application No. 370 of 2007.

WITH

C.A. Nos. 9632, 9631 & 9633 of 2011.

Aparna Bhat, P. Ramesh Kumar for the Appellant.

Gaurav Agrawal for the Respondent.

The Judgment of the Court was delivered by

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

2. Leave granted.

3. The question which arises for consideration in these appeals is whether priority given to the dues payable by an employer under Section 11 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short, 'the EPF Act') is subject to Section 529A of the Companies Act, 1956 (for short, 'the Companies Act') in terms of which the workmen's dues and debts due to secured creditors are required to be paid in priority to all other debts.

4. For the sake of convenience, we have culled out the facts from the record of the appeal arising out of SLP(C) No. 7642/2011.

5. Messrs Esskay Pharmaceuticals Limited is a company registered under the Companies Act. It falls within the definition of 'employer' under Section 2(e) of the EPF Act. On account

of the company's failure to pay the dues under the EPF Act for the periods from March 1998 to May 1999 and June 1999 to August 2001, the competent authority passed two orders under Section 7A of the EPF Act and held that it was liable to pay Rs.14,96,751/-. The company appears to have paid a sum of Rs.4,02,126/- but did not pay the remaining amount despite the issue of demand notices dated 12.4.2001 and 19.4.2001 by the competent authority. The orders passed under Section 8F of the EPF Act, which were communicated to the bankers of the company also did not yield the desired result. The competent authority then issued warrant for attachment of the company's property. This was followed by sale notice dated 20.9.2001.

6. Although, it is not clear from the record as to what happened to the sale notice, but this much is evident that after 2 years and about 4 months, the Enforcement Officer informed the appellant that the Gujarat High Court has passed order dated 11.3.2004 for winding up of the company and appointed Official Liquidator to look after its properties and clear the debts. The appellant then approached the Official Liquidator for payment of the amount determined under Section 7A of the EPF Act, but the latter did not give any response.

7. Company Application No. 356/2007 filed by the appellant for issue of a direction to the Official Liquidator to pay the amount payable by the employer under the EPF Act was dismissed by the learned Company Judge by relying upon the order passed by the Division Bench of the High Court in Company Application No. 216 of 1997 in Company Petition No.205 of 1996 and order dated 31.8.2005 passed in Company Application No.195 of 2005 - Regional Provident Commissioner-I v. M.A. Kuvadia, O.L. and others.

8. The appellant challenged the order of the learned Company Judge by filing an appeal but could not convince the Division Bench of the High Court to entertain his plea that the amount due from the employer is first charge on the assets of

the company and is payable in priority to all other dues. The Division Bench relied upon the judgment of the co-ordinate Bench and held that the learned Company Judge did not commit any error by dismissing the application filed by the appellant.

9. Since the impugned judgment and the order passed by the learned Company Judge are entirely based on the order passed by another Division Bench in Company Application No. 216/1997 in Company Petition No. 205/1996, it will be appropriate to notice the ratio of that order. The same is as under:

> "Section-530, Sub-section (1), clearly observes that in a winding up matter, subject to the provisions of Section-529(A), there shall be paid in priority to all other debts, dues of the Government, which are in the form of revenues, tax, etc. When Section-530 is made subordinate to Section-529(A), then, a Court is obliged to look into the material provisions as contained under Section-529(A). Section-529(A) clearly provides that notwithstanding anything contained in any other provision of the Companies Act or any other law for the time being in force, in the winding up of a company, workmen's dues and debts due to the secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of Section-529 pari passu with such dues, shall be paid in priority to all other debts.
>
> Section-529(A) has been introduced in the year 1985. It starts with a non-obstante clause. It clearly provides that "notwithstanding anything contained in any other provision of the Act or any other law for the time being in force". A true understanding of Section-529(A) would make clear that the provisions of Section-529(A) shall override the provisions contained in Section-530. Not only this, the provisions contained in Section-529(A) shall override the provisions contained in the ESI Act because the ESI Act

is an Act of 1948, while the amendment in the Companies Act has been made in the year 1985 and with the fullest knowledge that it was to override the provisions contained in Section-530. If Section-94 of the ESI Act and Section-530 of the Companies Act are made subordinate to Section-529(A), then, Section-529(A) shall march over the rights of others to which the others are entitled either under the special laws or under Section-530 of the Companies Act. A combined/conjoint reading of Section-529(A) of the Companies Act would make clear that in a matter of winding up, the workmen's dues and the debts due to the secured creditors to the extent such debts rank under clause (c) of the proviso to Sub-section (l) of Section-529(A) pari passu with such dues, shall be paid in priority to all other debts. If such dues and debts are paid in full and even thereafter, some money is left with the Official Liquidator for its distribution, then, such money can be distributed under Section-530 of the Companies Act. When such a situation crops up, the State Government or the Central Government of the Local Authority may file their claim before the learned Company Judge and at that point of time, they may say that in view of their preferential right, either under the Local Act or under Section-530 of the Companies Act, they be paid."

10. The factual matrix of the other appeals is more or less similar. In all the cases, applications filed by the appellant for payment of the amount due from the employer were dismissed by the learned Company Judge and the appeals were dismissed by the Division Bench of the High Court.

11. Ms. Aparna Bhat, learned counsel for the appellant relied upon the judgment in *Maharashtra State Cooperative Bank Ltd. v. Assistant Provident Fund Commissioner* (2009) 10 SCC 123 and argued that the impugned judgment and the order of the learned Company Judge are liable to be set aside because the High Court's interpretation of Section 11 of the

EPF Act is contrary to the law laid down by this Court. She submitted that even though Section 529A of the Companies Act also contains a *non obstante* clause, the provisions contained therein cannot override Section 11(2) of the EPF Act in terms of which the amount due from an employer in respect of the employees contribution is treated as first charge on the assets of the company and is payable in priority to all other debts. Ms. Bhat further argued that the EPF Act is a special legislation for institution of various types of funds and the schemes and in view of the *non obstante* clause contained in Section 11(2), priority given to the dues payable by an employer will prevail over the priority given under Section 529A of the Companies Act to the workmen's dues and debts due to secured creditors.

12. Shri Gaurav Agrawal, learned counsel for respondent No.1 supported the impugned judgment and argued that the statutory priority given to the dues of the employees under Section 11(2) of the EPF Act cannot override the priority given to the dues of workers and secured creditors under Section 529A(1) of the Companies Act because Parliament had inserted that section in the Companies Act with effect from 24.5.1995 knowing fully well priority given to the dues of the employees under the EPF Act. He further argued that the *non obstante* clause contained in the subsequent legislation, i.e. Section 529A (1) of the Companies Act would prevail over similar clause contained in the earlier legislation, i.e. Section 11(2) of the EPF Act. In support of this argument, Shri Agrawal relied upon the judgment of this Court in *Maharashtra Tubes Ltd. v. State Industrial and Investment Corporation of Maharashtra Ltd.* (1993) 2 SCC 144.

13. We have considered the respective arguments. For deciding the question arising in these appeals, it will be useful to notice the relevant statutory provisions.

The EPF Act

14. Section 11 (unamended) of the EPF Act was as under:

"**11. Priority of payment of contributions over other debts.**– Where any employer is adjudicated insolvent or, being a company, an order for winding up is made, the amount due –

(a) from the employer in relation to an establishment to which any Scheme applies in respect of any contribution payable to the Fund, damages recoverable under Section 14-B, accumulations required to be transferred under sub-section (2) of Section 15 or any charges payable by him under any other provision of this Act or of any provision of the Scheme; or

(b) from the employer in relation to an exempted establishment in respect of any contribution to the provident fund (in so far as it relates to exempted employees), under the rules of the provident fund (any contribution payable by him towards the Family Pension Fund under sub-section (6) of Section 17), damages recoverable under Section 13-B or any charges payable by him to the appropriate Government under any provision of this Act or under any of the conditions specified under section 17,

shall where the liability therefor has accrued before the order of adjudication or winding up is made, be deemed to be included, among the debts which under Section 49 of the Presidency-towns Insolvency Act, 1909, or under Section 61 of the Provincial Insolvency Act, 1920 or under Section 230 of the Indian Companies Act, 1913, are to be paid in priority to all other debts in the distribution of the property of the insolvent or the assets of the company being wound up, as the case may be."

15. The EPF Act was amended by Act Nos. 40 of 1973, 19 of 1976 and 33 of 1988. By Act No. 40 of 1973, Section 11 was renumbered as Section 11(1) and a new sub-section was added as Section 11(2) and it was declared that any

amount due from an employer in respect of the employees' contribution shall be deemed to be the first charge on the assets of the establishment and shall be paid in priority to all other debts. The scope of Section 11(2) was enlarged by Act No. 33 of 1988 by including the employer's contribution.

16. The background in which Amendment Act No.33 of 1988 was passed is discernible from the Statement of Objects and Reasons appended to the Employees' Provident Funds and Miscellaneous Provisions (Amendment) Bill, 1988, the relevant portions of which are extracted below:

"The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 provides for the institution of Compulsory Provident Fund; Family Pension Fund and Deposit Linked Insurance Fund, for the benefit of the employees in factories and other establishments. The Act is at present applicable to 173 industries and classes of establishments employing twenty or more persons. As on 31-3-1987, about 1.66 1akh establishments with about 1.38 crore subscribers were covered under the Act.

2. The Act was last amended in 1976. The Government had set up a high level Committee in April, 1980 to review the working of the Employees' Provident Funds Organisation and to suggest improvements. The Committee had made a number of recommendations involving amendment of the Act. The Central Board of Trustees, Employees' Provident Fund had also, from time to time, made certain recommendations for amendment of the Act. The Standing Labour Committee had at its meeting held in September, 1986 considered inter alia the question of enhancement of the rate of provident fund contribution and recommended suitable enhancement.

3. Based on the above recommendations, it is proposed to carry on certain amendments in the Act. Some of the more important amendments are:—

(i) to (v) xxxx xxxx xxxx

(vi) a provision is being made for treating the entire amount of arrears of provident fund dues as first charge on the assets of an establishment in the event of its liquidation;

xxxx xxxx xxxx"

17. Section 11, as it stands after the amendment of 1988, reads as under:

"11. Priority of payment of contributions over other debts.– (1) Where any employer is adjudicated insolvent or, being a company, an order for winding up is made, the amount due –

(a) from the employer in relation to an establishment to which any Scheme or the Insurance Scheme applies in respect of any contribution payable to the Fund or, as the case may be, the Insurance Fund damages recoverable under section 14B, accumulations required to be transferred under sub-section (2) of section 15 or any charges payable by him under any other provision of this Act or of any provision of the Scheme or the Insurance Scheme; or

(b) from the employer in relation to an exempted establishment in respect of any contribution to the provident fund or any insurance fund (in so far it relates to exempted employees), under the rules of the provident fund or any insurance fund, any contribution payable by him towards the Pension Fund under sub-section (6) of section 17, damages recoverable under section 14B or any charges payable by him to the appropriate Government under any provision of this Act, or under any of the conditions specified under section 17,

shall, where the liability therefore has accrued before the order of adjudication or winding up is made, be deemed to be included among the debts which under section 49 of the Presidency Towns Insolvency Act, 1909 (3 of 1909), or under section 61 of the Provincial Insolvency Act, 1920 (5 of 1920), or under section 530 of the Companies Act, 1956 (1 of 1956), are to be paid in priority to all other debts in the distribution of the property of the insolvent or the assets of the company being wound up, as the case may be.

Explanation. – In this sub-section and in section 17, "insurance fund" means any fund established by an employer under any scheme for providing benefits in the nature of life insurance to employees, whether linked to their deposits in provident fund or not, without payment by the employees of any separate contribution or premium in that behalf.

(2) Without prejudice to the provisions of sub-section (1), if any amount is due from an employer whether in respect of the employee's contribution (deducted from the wages of the employee) or the employer's contribution, the amount so due shall be deemed to be the first charge on the assets of the establishment, and shall, notwithstanding anything contained in any other law for the time being in force, be paid in priority to all other debts."

18. An analysis of Section 11 of the EPF Act shows that it gives statutory priority to the amount payable to the employees over other debts. Section 11(1) relates to an employer who is adjudged insolvent or being a company against whom an order of winding up is made. It lays down that the amount due from the employer in respect of any contribution payable to the Fund or, as the case may be, the Insurance Fund, damages recoverable under Section 14B, accumulations required to be transferred under Section 15(2) or any charges payable by him under any other provision of the Act or the

Scheme or the Insurance Scheme shall be paid in priority to all other debts in the distribution of the property of the insolvent or the assets of the company being wound up, as the case may be. Section 11(2) contains a *non obstante* clause and lays down that if any amount is due from an employer whether in respect of the employee's contribution deducted from the wages of the employees or the employer's contribution, the same shall be deemed to be the first charge on the assets of the establishment and shall, notwithstanding anything contained in any other law for the time being in force, be paid in priority to all other debts. To put it differently, sub-section (2) of Section 11 not only declares that the amount due from an employer towards contribution payable under the EPF Act shall be treated as the first charge on the assets of the establishment, but also lays down that notwithstanding anything contained in any other law, such dues shall be paid in priority to all other debts.

The Companies Act

19. Part VII of the Companies Act, which consists of 5 Chapters contains provisions relating to winding up of a company. The provisions contained in Chapter V (Sections 528 to 560), which deal with proof and ranking of claims are applicable to every mode of winding up. Section 528 lays down that in every winding up, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company. This is subject to the rider that in the case of insolvent companies, law of insolvency will be applicable in accordance with the provisions of the Companies Act. Section 529 deals with application of insolvency rules in winding up of insolvent companies. Section 530, as it existed prior to the amendment of the Companies Act by Act No.35 of 1985, gave priority to revenue of the State and local authorities and various amounts payable to employees including the dues payable from a provident fund, a pension fund, a gratuity fund or any other fund maintained by the company for

the welfare of the employees. By the Companies (Amendment) Act No.35 of 1985, proviso was added to Section 529(1). By the same amendment, Sections 529(3) and 529A were inserted in the Companies Act. Simultaneously, the expression "subject to the provisions of Section 529A" was inserted in Section 530(1). Paragraph 2 of the Statement of Objects and Reasons contained in the Companies (Amendment) Bill, 1985 reads as under:

> "2. Another announcement made by the Finance Minister in his Budget speech relates to the decision of the Government to introduce necessary legislation so that legitimate dues of workers rank pari passu with secured creditors in the event of closure of the company and above even the dues to Government. The resources of companies constitute a major segment of the material resources of the community and common good demands that the ownership and control of the resources of every company are so distributed that in the unfortunate event of its liquidation, workers, whose labour and effort constitute an invisible but easily perceivable part of the capital of the company are not deprived of their legitimate right to participate in the produce of their labour and effort. It is accordingly proposed to amend Sections 529 and 530 of the Companies Act and also to incorporate a new section in the Act, namely, Section 529-A (vide clauses 4, 5 and 6 of the Bill)."

20. Sections 529(1) and (3) and 529A and the relevant parts of Section 530, as they stand after the 1985 amendments read as under:

> *"529. Application of insolvency rules in winding up of insolvent companies.* – (1) In the winding up of an insolvent company, the same rules shall prevail and be observed with regard to—
>
> (a) debts provable;

(b) the valuation of annuities and future and contingent liabilities; and

(c) the respective rights of secured and unsecured creditors; as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent:

Provided that the security of every secured creditor shall be deemed to be subject to a *pari passu* charge in favour of the workmen to the extent of the workmen's portion therein, and, where a secured creditor, instead of relinquishing his security and proving his debt, opts to realise his security,—

(a) the liquidator shall be entitled to represent the workmen and enforce such charge;

(b) any amount realised by the liquidator by way of enforcement of such charge shall be applied rateably for the discharge of workmen's dues; and

(c) so much of the debt due to such secured creditor as could not be realised by him by virtue of the foregoing provisions of this proviso or the amount of the workmen's portion in his security, whichever is less, shall rank *pari passu* with the workmen's dues for the purposes of section 529A.

529(3). For the purposes of this section, section 529A and section 530,–

(a) "workmen", in relation to a company, means the employees of the company, being workmen within the meaning of the Industrial Disputes Act, 1947 (14 of 1947);

(b) "workmen's dues", in relation to a company, means

the aggregate of the following sums due from the company to its workmen, namely:-

(i) all wages or salary including wages payable for time or piece work and salary earned wholly or in part by way of commission of any workman, in respect of services rendered to the company and any compensation payable to any workman under any of the provisions of the Industrial Disputes Act, 1947 (14 of 1947);

(ii) all accrued holiday remuneration becoming payable to any workman, or in the case of his death to any other person in his right, on the termination of his employment before, or by the effect of, the winding up order or resolution;

(iii) unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, or unless the company has, at the commencement of the winding up, under such a contract with insurers as is mentioned in section 14 of the Workmen's Compensation Act, 1923 (8 of 1923) rights capable of being transferred to and vested in the workman, all amounts due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any workman of the company;

(iv) all sums due to any workman from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the workmen, maintained by the company;

529A. Overriding preferential payment.—(1) Notwithstanding anything contained in any other provision of this Act or any other law for the time being in force, in the winding up of a company—

(a) workmen's dues; and

(b) debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of section 529 *pari passu* with such dues,

shall be paid in priority to all other debts.

(2) The debts payable under clause (a) and clause (b) of sub-section (1) shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.

530. Preferential payments.– (1) In a winding up subject to the provisions of section 529A, there shall be paid in priority to all other debts–

(a) all revenues taxes, cesses and rates due from the company to the Central or a State Government or to a local authority at the relevant date as defined in clause (c) of the sub-section (8), and having become due and payable within the twelve months next before that date;

(b) all wages or salary (including wages payable for time or piece work and salary earned wholly or in part by way of commission) of any employee, in respect of services rendered to the company and due for a period not exceeding four months within the twelve months next before the relevant date subject to the limit specified in sub-section (2);

(f) all sums due to any employee from a provident fund,

a pension fund, a gratuity fund or any other fund for the welfare of the employees maintained by the company;

(2) The sum to which priority is to be given under clause (b) of sub-section (1), shall not, in the case of any one claimant, exceed such sum as may be notified by the Central Government in the Official Gazette."

21. By inserting proviso in Section 529(1), Parliament ensured protection of the interest of the workmen in winding up proceedings. The object of this amendment is to place the legitimate dues of workers at par with those of secured creditors. This is also a legislative recognition of the fact that the workmen contribute to the growth of the capital and industry and in the event of winding up of the company, they are entitled to get their legitimate share in the assets of the company by being treated at par with other secured creditors. With the insertion of Section 529(3)(a), the definition of the term 'workmen' contained in the Industrial Disputes Act, 1947 has been incorporated in the Companies Act for the purposes of Sections 529, 529A and 530. The expression "workmen's dues" has been defined in Section 529(3)(b) to mean all wages or salary including wages payable for time or piece work and salary earned wholly or in part by way of commission of any workman in respect of services rendered to the company and any compensation payable to any workman under the Industrial Disputes Act, 1947, all accrued holiday remuneration payable to any workman, or in the case of his death to any other person in his right upon the termination of his employment before the passing of winding up order and all sums due to any workman from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the workmen, which is maintained by the company. The definition also takes within its fold funds capable of being transferred to and vested in the workman under a contract with insurers under Section 14 of the Workmen's Compensation Act as also the amounts due in respect of any compensation or liability for compensation under

the Workmen's Compensation Act in respect of the death or disablement of any workman of the company. By virtue of the *non obstante* clause contained in sub-section (1) of Section 529A, statutory priority has been given to the workmen's dues and debts due to secured creditors over all other dues.

22. The EPF Act is a social welfare legislation intended to protect the interest of a weaker section of the society, i.e. the workers employed in factories and other establishments, who have made significant contribution in economic growth of the country. The workers and other employees provide services of different kinds and ensure continuous production of goods, which are made available to the society at large. Therefore, a legislation made for their benefit must receive a liberal and purposive interpretation keeping in view the Directive Principles of State Policy contained in Articles 38 and 43 of the Constitution. In *Organo Chemical Industries v. Union of India* (1979) 4 SCC 573, this Court negatived challenge to the constitutionality of Section 14-B of the EPF Act. In the main judgment delivered by him, A.P. Sen, J. referred to the Statement of Objects and Reasons contained in the Bill presented before Parliament, which led to the enactment of Amendment Act No. 40/1973 and observed:

> "Each word, phrase or sentence is to be considered in the light of general purpose of the Act itself. A bare mechanical interpretation of the words "devoid of-concept or purpose" will reduce must of legislation to futility. It is a salutary rule, well established, that the intention of the legislature must be found by reading the statute as a whole."

In his concurring judgment, Krishna Iyer, J. observed:

> "The measure was enacted for the support of a weaker sector viz. the working class during the superannuated winter of their life. The financial reservoir for the distribution of benefits is filled by the employer collecting, by deducting from the workers' wages, completing it with his own equal

> share and duly making over the gross sums to the Fund. If the employer neglects to remit or diverts the moneys for alien purposes the Fund gets dry and the retirees are denied the meagre support when they most need it. This prospect of destitution demoralises the working class and frustrates the hopes of the community itself. The whole project gets stultified if employers thwart contributory responsibility and this wider fall-out must colour the concept of 'damages' when the court seeks to define its content in the special setting of the Act. For, judicial interpretation must further the purpose of a statute. In a different context and considering a fundamental treaty, the European Court of Human Rights, in the Sunday Times Case, observed:
>
> > The Court must interpret them in a way that reconciles them as far as possible and is most appropriate in order to realise the aim and achieve the object of the treaty.
>
> A policy-oriented interpretation, when a welfare legislation falls for determination, especially in the context of a developing country, is sanctioned by principle and precedent and is implicit in Article 37 of the Constitution since the judicial branch is, in a sense, part of the State. So it is reasonable to assign to 'damages' a larger, fulfilling meaning."

23. Section 11(2) of the EPF Act was interpreted by the Division Bench of the *Kerala High Court in Recovery Officer and Asstt. Provident Fund Commissioner v. Kerala Financial Corporation,* ILR (2002) 3 Kerala 4. Speaking for the Bench, B.N. Srikrishna, J. (as he then was) observed:

> "The F.P.F. and M.P. Act, 1952 is an Act to provide for the institution of Provident Fund, Pension Fund, Deposit Linked Insurance Fund etc. in factories and other establishments, to carry forward the Constitutional mandate of rendering social justice to the working class.

It is intended to give social security to industrial workers at the end of their careers. The E.P.F. and M.P. Act requires every employer to deduct certain prescribed amounts from the wages payable to employees along with prescribed contribution by the employer and deposit such contributions in the Provident Fund. The Provident |is administered by the Central and Regional Provident Fund Commissioners, who are statutory authorities. What is of importance to us is that section 11 of E.P.F. and M.P. Act, declares the priority of payment of contributions under the Act over other debts. Sub-section (1) of section 11 of E.P.F. and M.P. Act deals with the question of priority where an employer is adjudicated insolvent or being a company subjected to an order of winding up. Sub-section (2) of section 11 deals with other types of priorities and reads as under:

> "11(2) Without prejudice to the provisions of sub-section (1), if any amount is due from an employer, whether in respect of the employee's contribution deducted from the wages of the employee or the employer's contribution, the amount so due shall be deemed to be the first charge on the assets of the establishment, and shall, notwithstanding anything contained in any other law, for the time being in force, be paid in priority to all other debts."

Sub-section (2) of section 11 of the E.P.F. and M.P. Act has two facets. First, it declares that the amount due from the employer towards contribution under the E.P.F. and M.P. Act shall be deemed to be a first charge on the assets of the establishment. Second, it also declares that notwithstanding anything contained in any other law for the time being in force, such debt shall be paid in priority to all other debts. Both these provisions bring out the intention of Parliament to ensure the social benefit as contained in the legislation. There are other provisions in the Act

rendering the amounts of Provident Fund payable immune from attachment of Civil Court's decree, which also indicate such intention of Parliament."

24. The ratio of the afore-mentioned judgment has been noticed in *Central Bank of India v. State of Kerala* (2009) 4 SCC 94 and *Maharashtra State Cooperative Bank Ltd. v. Assistant Provident Fund Commissioner* (2009) 10 SCC 123.

25. The nature of priority given to the taxes payable to the State over other debts was considered by the Constitution Bench in *Builders Supply Corporation v. Union of India* (1965) 2 SCR 289. After noticing the judgments of the Bombay and Madras High Courts, the Constitution Bench held:

> "(i) The common law doctrine of the priority of Crown debts had a wide sweep but the question in the present appeal was the narrow one whether the Union of India was entitled to claim that the recovery of the amount of tax due to it from a citizen must take precedence and priority over unsecured debts due from the said citizen to his other private creditors. The weight of authority in India was strongly in support of the priority of tax dues.
>
> (ii) The common law doctrine on which the Union of India based its claim in the present proceedings had been applied and upheld in that part of India which was known as 'British India' prior to the Constitution. The rules of common law relating to substantive rights which had been adopted by this country and enforced by judicial decisions, amount to 'law in force' in the territory of India at the relevant time within the meaning of Article 372(1). In that view of the matter, the contention of the appellant that after the Constitution was adopted the position of the Union of India in regard to its claim for priority in the present proceedings had been alerted could not be upheld.
>
> (iii) The basic justification for the claim for priority of

government debts rests on the well-recognised principle that the State is entitled to raise money by taxation, otherwise it will not be able to function as a sovereign Government at all. This consideration emphasises the necessity and wisdom of conceding to the State the right to claim priority in respect of its tax dues."

(emphasis supplied)

26. The ratio of the judgment in *Builders Supply Corporation v. Union of India* (supra) was applied to the cases in which statutory first charge was created in favour of the State in the matter of recovery of tax, penalty, interest etc.. – *State Bank of Bikaner and Jaipur v. National Iron and Steel Rolling Corporation* (1995) 2 SCC 19, *Dena Bank v. Bhikhabhai Prabhudas Parekh & Co.* (2000) 5 SCC 694 and *State of M.P. v. State Bank of Indore* (2002) 10 SCC 441. In the last mentioned judgment, i.e. *State of M.P. v. State Bank of Indore* (supra), this Court considered the question whether statutory first charge created under Section 33-C of the M.P. General Sales Tax Act, 1958 would prevail over the bank's charge and held:

"Section 33-C creates a statutory first charge that prevails over any charge that may be in existence. Therefore, the charge thereby created in favour of the State in respect of the sales tax dues of the second respondent prevailed over the charge created in favour of the Bank in respect of the loan taken by the second respondent. There is no question of retrospectivity here, as, on the date when it was introduced, Section 33-C operated in respect of all charges that were then in force and gave sales tax dues precedence over them."

(emphasis supplied)

27. At this juncture, it will be apposite to mention that the nature of statutory first charge and the rule of priority of the

State's dues were considered in *Builders Supply Corporation v. Union of India* (supra), *State Bank of Bikaner and Jaipur v. National Iron and Steel Rolling Corporation* (supra), *Dena Bank v. Bhikhabhai Prabhudas Parekh & Co.* (supra) and *State of M.P. v. State Bank of Indore* (supra) in the context of contra claim made by unsecured creditors. The question whether first charge created by taxing statutes enacted by State legislatures will prevail over the debts due to secured creditors was considered by a three Judge Bench in *Central Bank of India v. State of Kerala* (supra) and answered in affirmative. In that case, this Court was called upon to consider whether the first charge created on the property of the dealer by the legislations enacted by State legislatures for levy and collection of sales tax would prevail over the debts due to banks, financial institutions and other secured creditors, which could be recovered under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and/or the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The Court referred to the relevant provisions contained in the DRT Act, the Securitisation Act and Sales Tax legislations of different States as also Section 14A of the Workmen's Compensation Act, 1923, Section 11 of the EPF Act, Section 74 of the Estate Duty Act, 1953, Section 25 of the Mines and Minerals (Regulation and Development) Act, 1957, Section 30 of the Gift Tax Act, 1958, Section 529A of the Companies Act, 1956, Section 46B of the State Financial Corporations Act, 1951 and observed:

"Under Section 13(1) of the Securitisation Act, limited primacy has been given to the right of a secured creditor to enforce security interest vis-à-vis Section 69 or Section 69-A of the Transfer of Property Act. In terms of that sub-section, a secured creditor can enforce security interest without intervention of the court or tribunal and if the borrower has created any mortgage of the secured asset, the mortgagee or any person acting on his behalf cannot sell the mortgaged property or appoint a Receiver of the

income of the mortgaged property or any part thereof in a manner which may defeat the right of the secured creditor to enforce security interest. This provision was enacted in the backdrop of Chapter VIII of the Narasimham Committee's Second Report in which specific reference was made to the provisions relating to mortgages under the Transfer of Property Act.

In an apparent bid to overcome the likely difficulty faced by the secured creditor which may include a bank or a financial institution, Parliament incorporated the non obstante clause in Section 13 and gave primacy to the right of secured creditor vis-à-vis other mortgagees who could exercise rights under Sections 69 or 69-A of the Transfer of Property Act. *However, this primacy has not been extended to other provisions like Section 38-C of the Bombay Act and Section 26-B of the Kerala Act by which first charge has been created in favour of the State over the property of the dealer or any person liable to pay the dues of sales tax, etc.* Sub-section (7) of Section 13 which envisages application of the money received by the secured creditor by adopting any of the measures specified under sub-section (4) merely regulates distribution of money received by the secured creditor. It does not create first charge in favour of the secured creditor.

By enacting various provisos to sub-section (9) of Section 13, the legislature has ensured that priority given to the claim of workers of a company in liquidation under Section 529-A of the Companies Act, 1956 vis-à-vis the secured creditors like banks is duly respected. This is the reason why first of the five unnumbered provisos to Section 13(9) lays down that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of Section 529-A of the Companies Act, 1956. *This and other*

provisos do not create first charge in favour of the worker of a company in liquidation for the first time but merely recognise the existing priority of their claim under the Companies Act. It is interesting to note that the provisos to sub-section (9) of Section 13 do not deal with the companies which fall in the category of borrower but which are not in liquidation or are not being wound up.

It is thus clear that provisos referred to above are only part of the distribution mechanism evolved by the legislature and are intended to protect and preserve the right of the workers of a company in liquidation whose assets are subjected to the provisions of the Securitisation Act and are disposed of by the secured creditor in accordance with Section 13 thereof."

(emphasis supplied)

28. The Court then referred to the earlier judgments in *Builders Supply Corporation v. Union of India* (supra), *State Bank of Bikaner and Jaipur v. National Iron and Steel Rolling Corporation* (supra), *Dena Bank v. Bhikhabhai Prabhudas Parekh & Co.* (supra), *State of M.P. v. State Bank of Indore* (supra), *Allahabad Bank v. Canara Bank* (2000) 4 SCC 406, the judgment of the Division Bench of the Kerala High Court in Recovery Officer and *Asstt. Provident Fund Commissioner v. Kerala Financial Corporation* (supra) and observed:

"While enacting the DRT Act and the Securitisation Act, Parliament was aware of the law laid down by this Court wherein priority of the State dues was recognised. If Parliament intended to create first charge in favour of banks, financial institutions or other secured creditors on the property of the borrower, then it would have incorporated a provision like Section 529-A of the Companies Act or Section 11(2) of the EPF Act and ensured that notwithstanding series of judicial pronouncements, dues of banks, financial institutions and

other secured creditors should have priority over the State's statutory first charge in the matter of recovery of the dues of sales tax, etc. However, the fact of the matter is that no such provision has been incorporated in either of these enactments despite conferment of extraordinary power upon the secured creditors to take possession and dispose of the secured assets without the intervention of the court or Tribunal. The reason for this omission appears to be that the new legal regime envisages transfer of secured assets to private companies.

The definition of "secured creditor" includes securitisation/ reconstruction company and any other trustee holding securities on behalf of bank/financial institution. The definition of "securitisation company" and "reconstruction company" in Sections 2(1)(*za*) and (*v*) shows that these companies may be private companies registered under the Companies Act, 1956 and having a certificate of registration from Reserve Bank under Section 3 of the Securitisation Act. Evidently, Parliament did not intend to give priority to the dues of private creditors over sovereign debt of the State.

If the provisions of the DRT Act and the Securitisation Act are interpreted keeping in view the background and context in which these legislations were enacted and the purpose sought to be achieved by their enactment, it becomes clear that the two legislations, are intended to create a new dispensation for expeditious recovery of dues of banks, financial institutions and secured creditors and adjudication of the grievance made by any aggrieved person qua the procedure adopted by the banks, financial institutions and other secured creditors, *but the provisions contained therein cannot be read as creating first charge in favour of banks, etc.*

If Parliament intended to give priority to the dues of banks, financial institutions and other secured creditors over the

first charge created under State legislations then provisions similar to those contained in Section 14-A of the Workmen's Compensation Act, 1923, Section 11(2) of the EPF Act, Section 74(1) of the Estate Duty Act, 1953, Section 25(2) of the Mines and Minerals (Regulation and Development) Act, 1957, Section 30 of the Gift Tax Act, and Section 529-A of the Companies Act, 1956 would have been incorporated in the DRT Act and the Securitisation Act.

Undisputedly, the two enactments do not contain provision similar to the Workmen's Compensation Act, etc. In the absence of any specific provision to that effect, it is not possible to read any conflict or inconsistency or overlapping between the provisions of the DRT Act and the Securitisation Act on the one hand and Section 38-C of the Bombay Act and Section 26-B of the Kerala Act on the other and the non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act cannot be invoked for declaring that the first charge created under the State legislation will not operate qua or affect the proceedings initiated by banks, financial institutions and other secured creditors for recovery of their dues or enforcement of security interest, as the case may be.

The Court could have given effect to the non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act vis-à-vis Section 38-C of the Bombay Act and Section 26-B of the Kerala Act and similar other State legislations only if there was a specific provision in the two enactments creating first charge in favour of the banks, financial institutions and other secured creditors but as Parliament has not made any such provision in either of the enactments, the first charge created by the State legislations on the property of the dealer or any other person, liable to pay sales tax,

etc., cannot be destroyed by implication or inference, notwithstanding the fact that banks, etc. fall in the category of secured creditors."

(emphasis supplied)

29. In *Maharashtra State Cooperative Bank Ltd. v. Assistant Provident Fund Commissioner* (supra), the Court was called upon to consider whether dues payable by the employer under Section 11 of the EPF Act will have priority over debts due to the bank. The facts of that case were that Kannad Sahakari Sakhar Karkhana Ltd. and Gangapur Sahakari Sakhar Karkhana Ltd. had pledged sugar bags in favour of the appellant bank as security for repayment of the loan and interest. The respondent initiated proceedings for recovery of the dues payable under the EPF Act. The appellant bank questioned the legality of the orders passed under the EPF Act on the ground that being a secured creditor, the amount due to it was payable on priority vis-à-vis other dues including the dues payable by the employer under the EPF Act. The High Court negatived the challenge. The Court referred to the relevant provisions of the EPF Act including Section 11, the judgments noticed hereinabove as also the judgments in *UCO Bank v. Official Liquidator, High Court of Bombay* (1994) 5 SCC 1, *A.P. State Financial Corporation v. Official Liquidator* (2000) 7 SCC 291, *Textile Labour Association v. Official Liquidator* (2004) 9 SCC 741 and held:

"The priority given to the dues of provident fund, etc. in Section 11 is not hedged with any limitation or condition. Rather, a bare reading of the section makes it clear that the amount due is required to be paid in priority to all other debts. Any doubt on the width and scope of Section 11 qua other debts is removed by the use of expression "all other debts" in both the sub-sections. This would mean that the priority clause enshrined in Section 11 will operate against statutory as well as non-statutory and secured as well as unsecured debts including a mortgage

or pledge. Sub-section (2) was designedly inserted in the Act for ensuring that the provident fund dues of the workers are not defeated by prior claims of secured or unsecured creditors. This is the reason why the legislature took care to declare that irrespective of time when a debt is created in respect of the assets of the establishment, the dues payable under the Act would always remain first charge and shall be paid first out of the assets of the establishment notwithstanding anything contained in any other law for the time being in force. It is, therefore, reasonable to take the view that the statutory first charge created on the assets of the establishment by sub-section (2) of Section 11 and priority given to the payment of any amount due from an employer will operate against all types of debts."

(emphasis supplied)

30. The ratio for the last mentioned judgment is that by virtue of the *non obstante* clause contained in Section 11(2) of the EPF Act, any amount due from an employer shall be deemed to be first charge on the assets of the establishment and is payable in priority to all other debts including the debts due to a bank, which falls in the category of secured creditor.

31. We may now notice some judgments which have bearing on the interpretation of Sections 529 or 529A of the Companies Act. The scope of proviso to sub-section (1) of Section 529 (as inserted by Amendment Act No.35 of 1985) was examined in UCO Bank v. Official Liquidator, High Court, Bombay (1994) 5 SCC 1. The facts of that case were that in Company Petition No.27 of 1971, the learned Company Judge of the Bombay High Court made an order dated 15.11.1972 for winding up of M/s. Glass Carboys and Pressedwares Limited. The Official Liquidator took possession of the assets of the company. Appellant – UCO Bank, which was a secured creditor of the company obtained a decree on 22.4.1976 for recovery of its debt. Thereafter, the High Court's Commissioner

for taking accounts was directed to sell certain movables of the company. In the meantime, the Companies Act was amended by Act No.35 of 1985 and Sections 529 and 530 were amended and Section 529A was inserted. It was argued on behalf of the appellant that the amendment was not applicable to its case because the decree had been passed before the amendment and being a secured creditor, it was entitled to realize its debt in priority to other dues. The learned Company Judge accepted the argument but he was overruled by the Division Bench. While dealing with the argument, which found favour with the learned Company Judge, this Court referred to the Statement of Objects and Reasons contained in the Bill and observed:

> "The proviso to sub-section (1) of Section 529 inserted by the Amending Act clearly provides that "the security of every secured creditor shall be deemed to be subject to a pari passu charge in favour of the workmen". *The effect of the proviso is to create, by statute, a charge pari passu in favour of the workmen on every security available to the secured creditors of the employer company for recovery of their debts at the time when the amendment came into force.* This expression is wide enough to apply to the security of every secured creditor which remained unrealised on the date of the amendment. *The clear object of the amendment is that the legitimate dues of workers must rank pari passu with those of secured creditors and above even the dues of the Government.* This literal construction of the proviso is in consonance with, and promotes, the avowed object of the amendment made. On the contrary, the construction of the proviso suggested by the learned counsel for the appellant, apart from being in conflict with the plain language of the proviso also defeats the object of the legislation.
>
> A debt due to a secured creditor, when recovered by realisation of the security after commencement of the winding up proceedings, results in depletion of the assets in the hands of the Official Liquidator. *This provision is intended to protect the interests of the workmen in proceedings for winding up. In view of the nature of workmen's dues being similar to those of secured creditors, the purpose of this provision is to place the workmen on a par with the secured creditors and create a statutory charge in their favour on all available securities forming part of the assets of the company in liquidation so that the workmen also share the securities pari passu with the secured creditors. The workmen contribute to the growth of the capital and must get their legitimate share in the assets of the company when the situation arises for its closure and distribution of its assets first among the secured creditors due to winding up of the company.* The aforesaid amendment made in the Act is a statutory recognition of this principle equating the legitimate dues of the workmen with the debts of the secured creditors of the company. To achieve this purpose, it is necessary that the amended provision must apply to all available securities which form part of the assets of the company in liquidation on the date of the amendment. The conclusion reached by the Division Bench of the High Court is supported by this reason."
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> (emphasis supplied)

32. In *Allahabad Bank v. Canara Bank* (supra), a two-Judge Bench was called upon to consider the question whether an application can be filed under the Companies Act, 1956 during the pendency of proceedings under the DRT Act. The facts of that case show that Allahabad Bank filed an OA before the Delhi Bench of the DRT under Section 19. The same was decreed on 13.1.1998. The debtor company filed an appeal before DRAT, Allahabad. Canara Bank also filed application under Section 19 before DRT, Delhi. During the pendency of its application, Canara Bank filed an interlocutory application

before the Recovery Officer for impleadment in the proceedings arising out of the OA filed by Allahabad Bank. That application was dismissed on 28.9.1998. In the auction conducted by the Recovery Officer, the property of the debtor company was auctioned and the sale was confirmed. Thereupon, Canara Bank filed applications under Section 22 of the DRT Act. During the pendency of applications, Canara Bank filed company application in Company Petition No. 141 of 1995 filed by Ranbaxy Ltd. against M.S. Shoes Company under Sections 442 and 537 of the Companies Act for stay of the proceedings of Recovery Case No. 9 of 1998 instituted by Allahabad Bank. By an order dated 9.3.1999, the learned Company Judge stayed further sale of the assets of the company. The Allahabad Bank challenged the order of the learned Company Judge and pleaded that in view of the amendment made in Section 19(19) of the DRT Act, Section 529A is attracted for a limited purpose, i.e. recovery of the dues of workmen. While dealing with this plea, the Court observed as under:

> "The respondent's contention that Section 19(19) gives priority to all 'secured creditors' to share in the sale proceeds before the Tribuna1/ Recovery Officer cannot, in our opinion, be accepted. The said words are qualified by the words 'in accordance with the provision of Section 529-A'. Hence, it is necessary to identify the above limited class of secured creditors who have priority over all others in accordance with Section 529-A.
>
> Secured creditors fall under two categories. Those who desire to go before the Company Court and those who like to stand outside the winding up.
>
> The first category of secured creditors mentioned above are those who go before the Company Court for dividend by relinquishing their security in accordance with the insolvency rules mentioned in Section 529. The insolvency rules are those contained in Sections 45 to 50 of the Provincial Insolvency Act. Section 47(2) of that Act states

> that a secured creditor who wishes to come before the Official Liquidator has to prove his debt and he can prove his debt only if he relinquishes his security for the benefit of the general body of creditors. In that event, he will rank with the unsecured creditors and has to take his dividend as provided in Section 529(2). Till today, Canara Bank has not made it clear whether it wants to come under this category.
>
> The second class of secured creditors referred to above are those who come under Section 529-A(1)(b) read with proviso (*c*) to Section 529(1). These are those who opt to stand outside the winding up to realise their security. Inasmuch as Section 19(19) permits distribution to secured creditors only in accordance with Section 529-A, the said category is the one consisting of creditors who stand outside the winding up. These secured creditors in certain circumstances can come before the Company Court (here, the Tribunal) and claim priority over all other creditors for release of amounts out of the other monies lying in the Company Court (here, the Tribunal). This limited priority is declared in Section 529-A(1) but it is restricted only to the extent specified in clause (*b*) of Section 529-A(1). The said provision refers to clause (*c*) of the proviso to Section 529(1) and it is necessary to understand the scope of the said provision."

33. The judgment in *Allabahad Bank v. Canara Bank* (supra) was distinguished by a two-Judge Bench judgment in *ICICI Bank Ltd. v. SIDCO Leathers Ltd.* (2006) 10 SCC 452. In that case, the appellant and Punjab National Bank had advanced loans to respondent No. 1 for setting up a plant for manufacture of leather boards and for providing working capital funds respectively. Respondent No.1 created first charge in favour of the appellant along with other financial institutions, i.e. IFCI and IDBI by way of equitable mortgage by deposit of title deeds of its immovable property. A second charge was

created in favour of Punjab National Bank by way of constructive delivery of title deeds, clearly indicating therein that the charge in favour of the latter was subject to and subservient to charges in favour of IFCI, IDBI and ICICI. On an application filed by respondent No.1, the Allahabad High Court passed winding up order and appointed Official Liquidator. Thereafter, the appellant filed a suit for recovery of the amount credited to respondent. In due course, the suit was transferred to Debts Recovery Tribunal, Bombay. During the pendency of the proceedings before the Tribunal, the Official Liquidator was granted permission to continue the proceedings of the suit. Civil Judge, Fatehpur before whom the suit was pending, ordered sale of the assets of the company. At that stage, the appellants, IFCI and IDBI jointly filed an application before the Company Judge for considering their claim on *pro rata* basis and also for exclusion of the claim of the Punjab National Bank. The learned Company Judge accepted the first prayer of the appellant but rejected the second one by relying upon the judgment in *Allahabad Bank v. Canara Bank* (supra). The intra Court appeal was dismissed by the Division Bench by relying upon Section 529A of the Companies Act. On further appeal, this Court distinguished the judgment in *Allahabad Bank v. Canara Bank* by relying upon an earlier judgment in *Rajasthan State Financial Corporation v. Official Liquidator* (2005) 8 SCC 190 and observed:

> "In fact in Allahabad Bank it was categorically held that the adjudication officer would have such powers to distribute the sale proceeds to the banks and financial institutions, being secured creditors, in accordance with inter se agreement/arrangement between them and to the other persons entitled thereto in accordance with the priority in law.
>
> Section 529-A of the Companies Act no doubt contains a non obstante clause but in construing the provisions thereof, it is necessary to determine the purport and object for which the same was enacted.

> In terms of Section 529 of the Companies Act, as it stood prior to its amendment, the dues of the workmen were not treated pari passu with the secured creditors as a result whereof innumerable instances came to the notice of the Court that the workers may not get anything after discharging the debts of the secured creditors. It is only with a view to bring the workmen's dues pari passu with the secured creditors, that Section 529-A was enacted.
>
> The non obstante nature of a provision although may be of wide amplitude, the interpretative process thereof must be kept confined to the legislative policy. Only because the dues of the workmen and the debts due to the secured creditors are treated pari passu with each other, the same by itself, in our considered view, would not lead to the conclusion that the concept of inter se priorities amongst the secured creditors had thereby been intended to be given a total go-by.
>
> A non obstante clause must be given effect to, to the extent Parliament intended and not beyond the same.
>
> Section 529-A of the Companies Act does not ex facie contain a provision (on the aspect of priority) amongst the secured creditors and, hence, it would not be proper to read there into things, which Parliament did not comprehend."

34. In *A.P. State Financial Corporation v. Official Liquidator* (supra), the Court rejected the argument that the proceedings initiated by the Financial Corporation under Section 29 of the State Financial Corporations Act, 1951 will not be affected by the *non obstante* clause contained in Section 529A of the Companies Act and observed:

> "The Act of 1951 is a special Act for grant of financial assistance to industrial concerns with a view to boost up industrialisation and also recovery of such financial

assistance if it becomes bad and similarly the Companies Act deals with companies including winding up of such companies. *The proviso to sub-section (1) of Section 529 and Section 529-A being a subsequent enactment, the non obstante clause in Section 529-A prevails over Section 29 of the Act of 1951 in view of the settled position of law.* We are, therefore, of the opinion that the above proviso to sub-section (1) of Section 529 and Section 529-A will control Section 29 of the Act of 1951. In other words the statutory right to sell the property under Section 29 of the Act of 1951 has to be exercised with the rights of pari passu charge to the workmen created by the proviso to Section 529 of the Companies Act. Under the proviso to sub-section (1) of Section 529, the liquidator shall be entitled to represent the workmen and force (*sic* enforce) the above pari passu charge. *Therefore, the Company Court was fully justified in imposing the above conditions to enable the Official Liquidator to discharge his function properly under the supervision of the Company Court as the new Section 529-A of the Companies Act confers upon a Company Court the duty to ensure that the workmen's dues are paid in priority to all other debts in accordance with the provisions of the above section.* The legislature has amended the Companies Act in 1985 with a social purpose viz. to protect dues of the workmen. If conditions are not imposed to protect the right of the workmen there is every possibility that the secured creditor may frustrate the above pari passu right of the workmen."

(emphasis supplied)

35. We have referred to these judgments only for the purpose of showing that the object of the amendments made in the Companies Act by Act No. 35 of 1985 was to ensure that the legitimate dues of workers should rank *pari passu* with those of secured creditors. In other words, these amendments

are intended to protect the interest of the workmen in winding up proceedings by placing them at par with secured creditors and a statutory charge is created qua their dues on all available securities forming part of the assets of the company in liquidation. However, the propositions laid down in these judgments are of little assistance in deciding the question raised in these appeals because in none of the cases the Court considered the so called conflict in the *non obstante* clauses contained in Section 11(2) of the EPF Act and Section 529A of the Companies Act.

36. The argument of Shri Gaurav Agrawal that the *non obstante* clause contained in the subsequent legislation, i.e. Section 529A(1) of the Companies Act should prevail over similar clause contained in an earlier legislation, i.e. Section 11(2) of the EPF Act sounds attractive, but if the two provisions are read in the light of the objects sought to be achieved by the legislature by enacting the same, it is not possible to agree with the learned counsel. As noted earlier, the object of the amendment made in the EPF Act by Act No.40 of 1973 was to treat the dues payable by the employer as first charge on the assets of the establishment and to ensure that the same are recovered in priority to other debts. As against this, the amendments made in the Companies Act in 1985 are intended to create a charge *pari passu* in favour of the workmen on every security available to the secured creditors of the company for recovery of their debts. There is nothing in the language of Section 529A which may give an indication that legislature wanted to create first charge in respect of the workmen's dues, as defined in Sections 529(3)(b) and 529A and debts due to the secured creditors.

37. It is a well recognized rule of interpretation that every part of the statute must be interpreted keeping in view the context in which it appears and the purpose of legislation. In *RBI v. Peerless General Finance and Investment Co. Ltd.* (1987) 1 SCC 424, Chinnappa Reddy, J. highlighted the

importance of the rule of contextual interpretation in the following words :

> "Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."

38. Another rule of interpretation of Statutes is that if two special enactments contain provisions which give overriding effect to the provisions contained therein, then the Court is required to consider the purpose and the policy underlying the two Acts and the clear intendment conveyed by the language of the relevant provisions.

39. In *Shri Ram Narain v. Simla Banking and Industrial Co. Ltd.* 1956 SCR 603, this Court was considering the provisions contained in the Banking Companies Act, 1949 and the Displaced Persons (Debts Adjustment) Act, 1951. Both the enactments contained provisions giving overriding effect to the provisions of the enactment over any other law. After noticing the relevant provisions, the Court observed:

> "Each enactment being a special Act, the ordinary principle that a special law overrides a general law does not afford any clear solution in this case."
>
> "It is, therefore, desirable to determine the overriding effect of one or the other of the relevant provisions in these two Acts, in a given case, on much broader considerations of the purpose and policy underlying the two Acts and the clear intendment conveyed by the language of the relevant provisions therein."

40. In *Kumaon Motor Owners' Union Ltd. v. State of Uttar Pradesh* (1966) 2 SCR 121, there was conflict between the provisions contained in Rule 131(2) (*g*) and (*i*) of the Defence of India Rules, 1962 and Chapter IV-A of the Motor Vehicles Act, 1939. Section 68-B gave overriding effect to the provisions of Chapter IV-A of the Motor Vehicles Act whereas Section 43 of the Defence of India Act, 1962, gave overriding effect to the provisions contained in the Defence of India Rules. This Court held that the Defence of India Act was later than the Motor Vehicles Act and, therefore, if there was anything repugnant, the provisions of the later Act should prevail. This Court also looked into object behind the two statutes, namely, Defence of India Act and Motor Vehicles Act and on that basis also it was held that the provisions contained in the Defence of India Rules would have an overriding effect over the provisions of the Motor Vehicles Act.

41. In *Ashok Marketing Limited v. Punjab National Bank* (1990) 4 SCC 406, the Constitution Bench considered some of the precedents on the interpretation of statutes and observed :

> *"The principle which emerges from these decisions is that in the case of inconsistency between the provisions of two*

enactments, both of which can be regarded as special in nature, the conflict has to be resolved by reference to the purpose and policy underlying the two enactments and the clear intendment conveyed by the language of the relevant provisions therein."

(emphasis supplied)

42. It is also important to bear in mind that even before the insertion of proviso to Sections 529(1), 529(3) and Section 529A and amendment of Section 530(1), all sums due to any employee from a provident fund, a pension fund, a gratuity fund or any other fund established for welfare of the employees were payable in priority to all other debts in a winding up proceedings [Section 530(1)(f)]. Even the wages, salary and other dues payable to the workers and employees were payable in priority to all other debts. What Parliament has done by these amendments is to define the term "workmen's dues" and to place them at par with debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to Section 529(1). However, these amendments, though subsequent in point of time, cannot be interpreted in a manner which would result in diluting the mandate of Section 11 of the EPF Act, sub-section (2) whereof declares that the amount due from an employer shall be the first charge on the assets of the establishment and shall be paid in priority to all other debts. The words "all other debts" used in Section 11(2) would necessarily include the debts due to secured creditors like banks, financial institutions etc. The mere ranking of the dues of workers at par with debts due to secured creditors cannot lead to an inference that Parliament intended to create first charge in favour of the secured creditors and give priority to the debts due to secured creditors over the amount due from the employer under the EPF Act.

43. At the cost of repetition, we would emphasize that in terms of Section 530(1), all revenues, taxes, cesses and rates due from the company to the Central or State Government or

to a local authority, all wages or salary or any employee, in respect of the services rendered to the company and due for a period not exceeding 4 months all accrued holiday remuneration etc. and all sums due to any employee from provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees maintained by the company are payable in priority to all other debts. This provision existed when Section 11(2) was inserted in the EPF Act by Act No. 40 of 1973 and any amount due from an employer in respect of the employees' contribution was declared first charge on the assets of the establishment and became payable in priority to all other debts. However, while inserting Section 529A in the Companies Act by Act No.35 of 1985 Parliament, in its wisdom, did not declare the workmen's dues (this expression includes various dues including provident fund) as first charge. The effect of the amendment made in the Companies Act in 1985 is only to expand the scope of the dues of workmen and place them at par with the debts due to secured creditors and there is no reason to interpret this amendment as giving priority to the debts due to secured creditor over the dues of provident fund payable by an employer. Of course, after the amount due from an employer under the EPF Act is paid, the other dues of the workers will be treated at par with the debts due to secured creditors and payment thereof will be regulated by the provisions contained in Section 529(1) read with Section 529(3), 529A and 530 of the Companies Act.

44. In view of what we have observed above on the interpretation of Section 11 of the EPF Act and Sections 529, 529A and 530 of the Companies Act, the judgment of the Division Bench of the Gujarat High Court, which turned on the interpretation of Section 94 of the Employees' State Insurance Act and Sections 529A and 530 of the Companies Act and on which reliance has been placed by the learned Company Judge and the Division Bench of the High Court while dismissing the applications filed by the appellant, cannot be treated as laying down the correct law.

45. In the result, the appeals are allowed. The impugned judgment as also the order of the learned Company Judge are set aside and the applications filed by the appellant are allowed in terms of the prayer made. The Official Liquidator appointed by the High Court shall deposit the dues of provident fund payable by the employer within a period of 3 months. The parties are left to bear their own costs.

D.G. Appeals allowed.

ANAND

v.

COMMITTEE FOR SCRUTINY AND VERIFICATION OF TRIBE CLAIMS AND ORS.

(Civil Appeal No. 6340 of 2004)

NOVEMBER 8, 2011

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

Maharashtra Scheduled Tribes (Regulation of Issuance and Verification of) Certificate Rules, 2003 – r.11 – Caste Claim – Genuineness of – Determination – Caste certificate issued to appellant by Sub-Divisional Magistrate certifying that he belonged to 'Halbi' Scheduled tribe – Cancelled by Caste Scrutiny Committee – High Court affirmed the order of Caste Scrutiny Committee – Justification – Held: The documentary evidence produced by appellant in support of his claim was lightly brushed aside by the Vigilance Officer as also by the Caste Scrutiny Committee – From the documents produced by the appellant, it appears that his near paternal relatives had been regarded as belonging to the 'Halbi' Scheduled Tribe – The Vigilance Officer's report does not indicate that the documents produced by the appellant in support of his claim are false – It merely refers to the comments made by the Head Master with reference to the school records of appellant's father's maternal brother and his aunt, which had been alleged to be tampered with, to change the entry from Koshti Halba to Halba and nothing more – Neither the Head Master was examined, nor any further enquiry was conducted to verify the veracity of Head Master's statement – Also, in similar cases involving appellant's first cousin and his paternal uncle, the High Court, while observing non-application of mind by the Caste Scrutiny Committee, had decided similar claim in their favour – The documentary evidence produced by the appellant was not examined and

appreciated in its proper perspective and the High Court laid undue stress on the affinity test – The affinity test may be used to corroborate the documentary evidence and should not be the sole criteria to reject a claim – Claim of appellant deserves to be re-examined by the Caste Scrutiny Committee – Case accordingly remitted back to Caste Scrutiny Committee for fresh consideration – Constitution (Scheduled Tribes) Order, 1950.

Appellant was appointed as a field officer by the Maharashtra Pollution Control Board, respondent No.2, on probation against a post reserved for "Scheduled Tribe". The appointment was subject to production of the Caste Validity Certificate. The Appellant made an application to the Caste Scrutiny Committee under Rule 11 of the Maharashtra Scheduled Tribes (Regulation of Issuance and Verification of) Certificate Rules, 2003 (for Short the 'Rules') . Alongwith the application, the appellant submitted several documents, including a copy of his grandfather's school leaving certificate; a copy of school leaving certificate issued to his father; a caste certificate issued to his father; copies of the school leaving certificates issued to the appellant; a college leaving certificate and a copy of school leaving certificate issued to the real brother of his grandfather. All these documents recorded the Caste of those persons as 'Halbi'.

Not being satisfied with the documentary evidence produced by the appellant, the Caste Scrutiny Committee forwarded the application to the Vigilance Cell in terms of Rule 12(2) of the Rules for conducting school, home and other enquiry. The Vigilance Officer submitted its report *inter alia,* reporting that the characteristics, as noticed during enquiry did not resemble that of 'Halbi' Scheduled Tribe. The Vigilance Cell found that the appellant was a member of 'Halbi' sub-caste of the

'Koshti' caste but did not belong to 'Halbi' Scheduled Tribe.

A copy of the report of Vigilance Cell was supplied to the appellant by the Caste Scrutiny Committee and personal hearing was also granted. The Caste Scrutiny Committee came to the conclusion that the appellant did not belong to 'Halbi' Scheduled Tribe. The caste certificate issued by the Competent Authority, viz. the Sub-Divisional Magistrate was thus cancelled and confiscated by the Caste Scrutiny Committee. The High Court upheld the order of Caste Scrutiny Committee. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1. The genuineness of a caste claim has to be considered not only on a thorough examination of the documents submitted in support of the claim but also on the affinity test, which would include the anthropological and ethnological traits etc., of the applicant. However, it is neither feasible nor desirable to lay down an absolute rule, which could be applied mechanically to examine a caste claim. Nevertheless, the following broad parameters could be kept in view while dealing with a caste claim: (i) While dealing with documentary evidence, greater reliance may be placed on pre-Independence documents because they furnish a higher degree of probative value to the declaration of status of a caste, as compared to post-Independence documents. In case the applicant is the first generation ever to attend school, the availability of any documentary evidence becomes difficult, but that *ipso facto* does not call for the rejection of his claim. In fact the mere fact that he is the first generation ever to attend school, some benefit of doubt in favour of the applicant may be given. Needless to add that in the event of a doubt on the credibility of a document, its veracity has to be tested on the basis of

oral evidence, for which an opportunity has to be afforded to the applicant; (ii) While applying the affinity test, which focuses on the ethnological connections with the scheduled tribe, a cautious approach has to be adopted. A few decades ago, when the tribes were somewhat immune to the cultural development happening around them, the affinity test could serve as a determinative factor. However, with the migrations, modernisation and contact with other communities, these communities tend to develop and adopt new traits which may not essentially match with the traditional characteristics of the tribe. Hence, affinity test may not be regarded as a litmus test for establishing the link of the applicant with a Scheduled Tribe. Nevertheless, the claim by an applicant that he is a part of a scheduled tribe and is entitled to the benefit extended to that tribe, cannot *per se* be disregarded on the ground that his present traits do not match his tribes' peculiar anthropological and ethnological traits, deity, rituals, customs, mode of marriage, death ceremonies, method of burial of dead bodies etc. Thus, the affinity test may be used to corroborate the documentary evidence and should not be the sole criteria to reject a claim. [Para 18] [400-E-H; 401-A-F]

1.2. The burden of proving the caste claim is upon the applicant. He has to produce all the requisite documents in support of his claim. The Caste Scrutiny Committee merely performs the role of verification of the claim and therefore, can only scrutinise the documents and material produced by the applicant. In case, the material produced by the applicant does not prove his claim, the Committee cannot gather evidence on its own to prove or disprove his claim. [Para 19] [401-G-H; 402-A]

1.3. Having examined the present case on the

touchstone of the aforesaid broad parameters, it is clear that the claim of the appellant has not been examined properly. The documentary evidence produced by the appellant in support of his claim had been lightly brushed aside by the Vigilance Officer as also by the Caste Scrutiny Committee. Insofar as the High Court is concerned, it has rejected the claim solely on the basis of the affinity test. It is pertinent to note that some of these documents date back to the pre-Independence era, issued to appellant's grandfather and thus, hold great probative value as there can be no reason for suppression of facts to claim a non-existent benefit to the 'Halbi' Scheduled Tribe at that point of time. From the documents produced by the appellant, it appears that his near paternal relatives had been regarded as belonging to the 'Halbi' Scheduled Tribe. The Vigilance Officer's report does not indicate that the documents produced by the appellant in support of his claim are false. It merely refers to the comments made by the Head Master with reference to the school records of appellant's father's maternal brother and his aunt, which had been alleged to be tampered with, to change the entry from Koshti Halba to Halba and nothing more. Neither the Head Master was examined, nor any further enquiry was conducted to verify the veracity of Head Master's statement. It is of some importance to note that in similar cases involving appellant's first cousin and his paternal uncle, the High Court, while observing non-application of mind by the Caste Scrutiny Committee, had decided a similar claim in their favour. The documentary evidence produced by the appellant was not examined and appreciated in its proper perspective and the High Court laid undue stress on the affinity test. Thus, the decision of the Caste Scrutiny Committee to cancel and confiscate the caste certificate as well as the decision of the High Court, affirming the said decision is untenable. Therefore, the claim of the appellant deserves to be re-examined by

the Caste Scrutiny Committee. The decisions of Caste Scrutiny Committee and the High Court are set aside and the case is remitted back to the Caste Scrutiny Committee for fresh consideration. [Paras 20, 21] [402-B-H; 403-A-B]

Kumari Madhuri Patil & Anr. v. Addl. Commissioner, TribalDevelopment & Ors. **(1994) 6 SCC 241 – relied on.**

Director of Tribal Welfare, Government of A.P. v. Laveti Giri & Anr. **(1995) 4 SCC 32 – referred to.**

Sayanna v. State of Maharashtra & Ors. **(2009) 10 SCC 268;** *Gayatrilaxmi Bapurao Nagpure v. State of Maharashtra & Ors.* **(1996) 3 SCC 685– cited.**

Case Law Reference:

(2009) 10 SCC 268	**cited**	**Para 10**
(1996) 3 SCC 685	**cited**	**Para 10**
(1994) 6 SCC 241	**relied on**	**Paras 11,14, 15,17**
(1995) 4 SCC 32	**referred to**	**Para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6340 of 2004.

From the Judgment & Order dated 5.5.2004 of the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in Writ Petition No. 1687 of 2004.

V.A. Mohta, D.M. Nargolkar, Amey Nargolkar, Nilkanth Nayak, Devansh A. Mohta for the Appellant.

Shankar Chillarge, AGA, Vivek Vishnoi, Mukesh Verma, Yash Pal Dhingra, Asha Gopalan Nair for the Respondents.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. This appeal is directed against the

judgment of the High Court of Judicature at Bombay, Nagpur Bench, delivered on 5th May 2004, in W.P. No.1687 of 2004. By the impugned judgment, the High Court has affirmed the order passed by the Committee for Scrutiny and Verification of Tribe Claims, Amravati, (for short "the Caste Scrutiny Committee"), respondent No.1 in this appeal, cancelling the caste certificate dated 2nd January, 2002, issued to the appellant by the Sub-Divisional Magistrate, Pusad, District Yavatmal, certifying that the appellant belongs to the 'Halbi' Scheduled tribe, notified in terms of the Constitution (Scheduled Tribes) Order, 1950.

2. Succinctly put, the material facts giving rise to the present appeal are as follows:

The appellant, who holds a degree of Bachelor of Engineering (BE), was appointed as a field officer by the Maharashtra Pollution Control Board, respondent No.2 herein, against a post reserved for "Scheduled Tribe", on probation with effect from 16th March, 1998. The appointment was subject to production of the Caste Validity Certificate. On a failure to produce the same, respondent No.2 issued a notice of termination of service to the appellant. Aggrieved thereby, the appellant approached the High Court by way of W.P. No. 4688 of 2003 *inter alia*, praying for a direction to respondent No.1 to decide the caste claim of the appellant. The High Court allowed the writ petition and vide order dated 2nd December 2003, directed respondent No.1 to decide the caste claim of the appellant within eight weeks of the date of receipt of the copy of the order. Respondent No.2 was also directed not to act upon the termination notice.

3. In furtherance of the said order, the appellant made an application to the Caste Scrutiny Committee under Rule 11 of the Maharashtra Scheduled Tribes (Regulation of Issuance and Verification of) Certificate Rules, 2003 (for short "the Rules"). Along with the application, the appellant submitted several documents, including a copy of his grandfather's school leaving

certificate dated 8th April, 1929; a copy of school leaving certificate dated 6th July, 1955, issued to his father, Nilkantha Maruti Katole; a caste certificate issued to his father on 19th June, 1969; copies of the school leaving certificates issued to the appellant on 8th May, 1978, 5th July, 1988 and 9th August, 1983; a college leaving certificate dated 9th July, 1990 and a copy of school leaving certificate issued to the real brother of his grandfather on 21st June, 1933 etc. All these documents recorded the Caste of those persons as 'Halbi'.

4. Not being satisfied with the documentary evidence produced by the appellant, the Caste Scrutiny Committee forwarded the application to the Vigilance Cell in terms of Rule 12(2) of the Rules for conducting school, home and other enquiry. The Vigilance Officer interviewed the appellant, collected information about the characteristics of his caste, which included information in relation to his family's ancestral profession; mother tongue; family idols and deities etc. and also verified the school records of his relatives. On the basis of the information so collected, the Vigilance Officer submitted its report *inter alia,* reporting that the characteristics, as noticed during enquiry did not resemble that of 'Halbi' Scheduled Tribe. In so far as the documentary evidence was concerned, referring to the school record of the maternal brother of his father and aunt of the appellant, which showed that as on 13th June, 1958 and 1st June, 1953, their caste was recorded as 'Koshti (which is scored off) Halba' (Koshti), the Vigilance Officer submitted a report unfavourable to the appellant. The Vigilance Cell found that the appellant was a member of 'Halbi' sub-caste of the 'Koshti' caste but does not belong to 'Halbi' Scheduled Tribe.

5. A copy of the report of Vigilance Cell was supplied to the appellant by the Caste Scrutiny Committee and personal hearing was also granted. By order dated 20th March, 2004, the Caste Scrutiny Committee came to the conclusion that the appellant does not belong to 'Halbi' Scheduled Tribe. The caste certificate issued by the Competent Authority, viz. the Sub-

Divisional Magistrate, Pusad, Distt. Yavatmal, was thus, cancelled and confiscated by the Caste Scrutiny Committee, *inter alia* observing as follows:-

> "B. The documents quoted at Sr. No. 2, 4, 5, 6, 13, 26, 28 & 33 are school records in respect of relative of the candidate in which Caste is recorded as Halbi. In view of enquiry report, documents collected by enquiry office and affinity test these documents are rejected.
>
> G. The document quoted at Sr. No.17,19,21, 22, 23, 24 & 34 are the Xerox copies of validity certificates in respect of relatives of the candidate. The ratio of this Validity Certificate cannot be given to the candidate because the concerned person at that time may have deliberately suppressed to bring information now found out by the Inquiry Officer. Thus where there is material suppression of facts, ratio of such order cannot be applied to other. As directed by the Hon'ble Supreme Court, each and every case should be decided on its own. Hence in the light of Vigilance Cell Report, this document is rejected.
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> xxxxx xxxxx xxxxx
>
> 11. The candidate's mother tongue is Marathi which is not so in Halbi, Scheduled Tribe. The Surnames of relatives from their community are reported as Katole, Parate, Naike, Dhakte, Sorate, Nandarwar, Kumbhare etc. These surnames are not associated with the people belonging to Halbi, Scheduled Tribe. The information about family & community deities do not resemble with Halbi, Scheduled Tribe. The marital ceremonies, ceremonies observed after birth, rites performed after death, customary dances, great personalities within their community etc. as stated do not resemble with that of Halbi, Scheduled Tribe. Thus, in view of this information, candidate failed to establish his affinity towards Halbi Scheduled Tribe."

6. It is manifest that the claim of the appellant was rejected mainly on the ground that he had failed to establish his affinity towards 'Halbi' Scheduled Tribe.

7. Being aggrieved with the said order, the appellant once again approached the High Court by preferring W.P. No.1687 of 2004. As aforesaid, the High Court vide impugned judgment upheld the order of Caste Scrutiny Committee, observing thus:

> "In so far as the documents are concerned, it is true that most of the documents on which reliance is placed by the petitioner do (sic) state the caste as Halbi but that by itself is not sufficient to uphold the caste claim of the petitioner unless the petitioner is able to establish his ethnic linkage with the so-called Scheduled Tribe. The Research Officer and Member of the Caste Scrutiny Committee interviewed the petitioner on these aspects and it was found that the petitioner was not able to satisfy the Scrutiny Committee on this aspect of the matter. The particulars furnished by the petitioner claiming to be belonging to caste Halbi Scheduled Tribe do not match with the characteristics, traits, customs, ethnic linkage on anthropological enquiry into the caste status of the petitioner. Therefore, though the petitioner is in possession of certain documents even of prior to the Presidential notification showing the caste claim of his relatives as Halbi, the same are not enough to certify him as belonging to caste Halbi Scheduled Tribe. In the order, it has been observed by the Scrutiny Committee that in some parts of Vidarbha the old M.P. Region, in old records the Sub Caste Halbi of the caste Koshti is recorded as Halbi which is popularly known as Halba Koshti and, therefore, this cannot be treated as such."

8. Thus, according to the High Court also, unless an applicant establishes his ethnic linkage with a Scheduled Tribe, his caste claim cannot be accepted merely on the strength of documentary evidence.

9. Hence the present appeal.

10. Assailing the impugned judgment, Mr. V.A. Mohta, learned senior counsel, appearing on behalf of the appellant, strenuously contended that the report of the Vigilance Cell, on which the Caste Scrutiny Committee had placed heavy reliance, was vitiated because they failed to take into consideration the vital documents, which included school leaving certificate relating to appellant's grand-father issued in the year 1929. According to the learned counsel, these documents clearly show that the appellant belongs to the Scheduled Tribe 'Halbi'. It was urged that the High Court also fell into the same error by ignoring these documents and by solely applying the affinity test. Drawing support from the decision of this Court in *Sayanna Vs. State of Maharashtra & Ors*[1]*.,* learned counsel submitted that in the light of the documents showing that all the close relatives of the appellant were treated as belonging to 'Halbi' Scheduled Tribe, appellant's claim could not be negatived on the sole ground that he did not possess the basic characteristics, knowledge of customs and culture of the said tribe. In aid of the proposition that probative value of all the documents ought to have been taken into consideration by the Caste Scrutiny Committee as also the High Court, reliance was placed on the decision of this Court in *Gayatrilaxmi Bapurao Nagpure Vs. State of Maharashtra & Ors.*[2].

11. *Per contra,* learned counsel appearing on behalf of the Caste Scrutiny Committee, supporting the decision of the High Court, submitted that in the light of the dictum of this Court in *Kumari Madhuri Patil & Anr. Vs. Addl. Commissioner, Tribal Development & Ors.*[3], neither the Caste Scrutiny Committee nor the High Court committed any error or illegality in relying upon the affinity test for invalidating the claim of the appellant. It was asserted that having regard to the findings by the Caste

1. (2009) 10 SCC 268.
2. (1996) 3 SCC 685.
3 (1994) 6 SCC 241.

Scrutiny Committee, which in turn, were based on Vigilance Cell's report, which took into account the ethnological perspective, the impugned judgment cannot be faulted with.

12. Thus, the question that falls for consideration is what parameters are to be applied in determining whether an applicant belongs to a notified Scheduled Tribe?

13. Article 342 of the Constitution of India empowers the President of India to specify the tribes or tribal communities or parts or groups within them which shall for the purposes of the Constitution be deemed to be Scheduled Tribes in relation to a State or a Union Territory, as the case may be. Under clause (2) of Article 342, the power to include in or exclude from the lists of Scheduled Tribes specified in a notification, issued under clause (1) of Article 342 of the Constitution, vests in the Parliament. In exercise of the powers conferred by Article 342 of the Constitution, the President issued an order, called the Constitution (Scheduled Tribes) Order, 1950. This was followed by the Scheduled Castes and Scheduled Tribes Order (Amendment) Act, 1956. In the year 1976, the Parliament enacted the Scheduled Castes and Scheduled Tribes Order (Amendment) Act, 1976. Part IX of the Third Schedule to the Amending Act specifies Scheduled Tribes for the State of Maharashtra. One of the Scheduled Tribes so specified therein is "Halba", "Halbi".

14. In *Kumari Madhuri Patil* (supra), this Court took note of the fact that the benefit of reservation of seats in educational institutions, and other appointments were being denied to the genuine tribals on the basis of false caste certificates. Terming such caste claims as "pseudo status", the Court observed that spurious tribes had become a threat to the genuine tribals. Emphasising the need to ensure that the benefit of reservation must be made available only to genuine persons, who belong to the notified caste or tribe, the Court said that such claims should be judged on legal and ethnological basis. Highlighting

the relevance of affinity test while considering a caste claim, the Court observed thus:

> "The anthropological moorings and ethnological kinship affirmity *(sic)* gets genetically ingrained in the blood and no one would shake off from past, in particular, when one is conscious of the need of preserving its relevance to seek the status of Scheduled Tribe or Scheduled Caste recognised by the Constitution for their upliftment in the Society. The ingrained Tribal traits peculiar to each tribe and anthropological features all the more become relevant when the social status is in acute controversy and needs a decision. The correct projectives furnished in pro forma and the material would lend credence and give an assurance to properly consider the claims of the social status and the officer or authority concerned would get an opportunity to test the claim for social status of particular caste or tribe or tribal community or group or part of such caste, tribe or tribal community. It or he would reach a satisfactory conclusion on the claimed social status."

15. Again in *Director of Tribal Welfare, Government of A.P. Vs. Laveti Giri & Anr.*[4], while reiterating the guidelines laid down in *Kumari Madhuri Patil* (supra), this Court observed that it was high time that the Government of India should have the matter examined in greater detail and bring about a uniform legislation with necessary guidelines and rules prescribing penal consequences on persons who flout the Constitution and corner the benefits reserved for the real tribals, etc., so that the menace of fabricating records to gain unconstitutional advantages could be prevented.

16. In the light of the aforesaid observations, the State of Maharashtra enacted the Maharashtra Scheduled Castes, Scheduled Tribes, De-notified Tribes, (Vimukta Jatis), Nomadic Tribes, Other Backward Classes and Special Backward

4. (1995) 4 SCC 32.

Category (Regulation of Issuance and Verification of) Caste Certificate Act, 2000 (for short "the Act'). The Act made statutory provisions for verification and scrutiny of caste claims by the Competent Authority and subsequently by the Caste Scrutiny Committee. In exercise of its rule making power under the Act, the State notified the Rules laying down a complete procedure for obtaining and verification of Scheduled Tribes Certificate. Therefore, insofar as the State of Maharashtra is concerned, the verification and grant and/or rejection of Scheduled Tribe Certificate by the Caste Scrutiny Committee has to be as per the procedure prescribed in the Rules.

17. Rule 11(2) enumerates a list of documents to be filed along with the application to the Caste Scrutiny Committee. Rule 12 prescribes the procedure to be followed by the Caste Scrutiny Committee on receipt of such application in the prescribed format. It provides that if the Caste Scrutiny Committee is not satisfied with the documentary evidence produced by the applicant, it shall forward the application to the Vigilance Cell for conducting the school, home and other enquiry. Sub-rule (3) of Rule 12 requires the Vigilance Officer to visit the local place of residence and the original place from where the applicant hails and usually resides. The rules further stipulate that the Vigilance Officer shall personally verify and collect all the facts about the social status claimed by the applicant or his parents or guardians, as the case may be. He is also required to examine the parents or the guardians or the applicant for the purpose of verification of their tribe. It is evident that the scope of enquiry by the Vigilance Officer is broad-based and is not confined only to the verification of documents filed by the applicant with the application or the disclosures made therein. Obviously, the enquiry, supposed to be conducted by the Vigilance Officer, would include the affinity test of the applicant to a particular tribe to which he claims to belong. In other words, an enquiry into the kinship and affinity of the applicant to a particular Scheduled Tribe is not alien to the scheme of the Act and the Rules. In fact, it is relevant and

germane to the determination of social status of an applicant. We are of the view that for the purpose of examining the caste claim under the Rules, the following observations of this Court in *Kumari Madhuri Patil* (supra), still hold the field:-

> "…The vigilance officer should personally verify and collect all the facts of the social status claimed by the candidate or the parent or guardian, as the case may be. He should also examine the school records, birth registration, if any. He should also examine the parent, guardian or the candidate in relation to their caste etc. or such other persons who have knowledge of the social status of the candidate and then submit a report to the Directorate together with all particulars as envisaged in the pro forma, in particular, of the Scheduled Tribes relating to their peculiar anthropological and ethnological traits, deity, rituals, customs, mode of marriage, death ceremonies, method of burial of dead bodies etc. by the castes or tribes or tribal communities concerned etc."

18. It is manifest from the afore-extracted paragraph that the genuineness of a caste claim has to be considered not only on a thorough examination of the documents submitted in support of the claim but also on the affinity test, which would include the anthropological and ethnological traits etc., of the applicant. However, it is neither feasible nor desirable to lay down an absolute rule, which could be applied mechanically to examine a caste claim. Nevertheless, we feel that the following broad parameters could be kept in view while dealing with a caste claim:

> (i) While dealing with documentary evidence, greater reliance may be placed on pre-Independence documents because they furnish a higher degree of probative value to the declaration of status of a caste, as compared to post-Independence documents. In case the applicant is the first generation ever to attend school, the availability of any documentary evidence becomes difficult, but that *ipso facto*

does not call for the rejection of his claim. In fact the mere fact that he is the first generation ever to attend school, some benefit of doubt in favour of the applicant may be given. Needless to add that in the event of a doubt on the credibility of a document, its veracity has to be tested on the basis of oral evidence, for which an opportunity has to be afforded to the applicant;

(ii) While applying the affinity test, which focuses on the ethnological connections with the scheduled tribe, a cautious approach has to be adopted. A few decades ago, when the tribes were somewhat immune to the cultural development happening around them, the affinity test could serve as a determinative factor. However, with the migrations, modernisation and contact with other communities, these communities tend to develop and adopt new traits which may not essentially match with the traditional characteristics of the tribe. Hence, affinity test may not be regarded as a litmus test for establishing the link of the applicant with a Scheduled Tribe. Nevertheless, the claim by an applicant that he is a part of a scheduled tribe and is entitled to the benefit extended to that tribe, cannot *per se* be disregarded on the ground that his present traits do not match his tribes' peculiar anthropological and ethnological traits, deity, rituals, customs, mode of marriage, death ceremonies, method of burial of dead bodies etc. Thus, the affinity test may be used to corroborate the documentary evidence and should not be the sole criteria to reject a claim.

19. Needless to add that the burden of proving the caste claim is upon the applicant. He has to produce all the requisite documents in support of his claim. The Caste Scrutiny Committee merely performs the role of verification of the claim and therefore, can only scrutinise the documents and material produced by the applicant. In case, the material produced by the applicant does not prove his claim, the Committee cannot

gather evidence on its own to prove or disprove his claim.

20. Having examined the present case on the touchstone of the aforesaid broad parameters, we are of the opinion that the claim of the appellant has not been examined properly. We feel that the documentary evidence produced by the appellant in support of his claim had been lightly brushed aside by the Vigilance Officer as also by the Caste Scrutiny Committee. Insofar as the High Court is concerned, it has rejected the claim solely on the basis of the affinity test. It is pertinent to note that some of these documents date back to the pre-Independence era, issued to appellant's grandfather and thus, hold great probative value as there can be no reason for suppression of facts to claim a non-existent benefit to the 'Halbi' Scheduled Tribe at that point of time. From the documents produced by the appellant, it appears that his near paternal relatives had been regarded as belonging to the 'Halbi' Scheduled Tribe. The Vigilance Officer's report does not indicate that the documents produced by the appellant in support of his claim are false. It merely refers to the comments made by the Head Master with reference to the school records of appellant's father's maternal brother and his aunt, which had been alleged to be tampered with, to change the entry from Koshti Halba to Halba and nothing more. Neither the Head Master was examined, nor any further enquiry was conducted to verify the veracity of Head Master's statement. It is of some importance to note at this juncture that in similar cases, involving appellant's first cousin and his paternal uncle, the High Court, while observing non-application of mind by the Caste Scrutiny Committee, had decided a similar claim in their favour. We are convinced that the documentary evidence produced by the appellant was not examined and appreciated in its proper perspective and the High Court laid undue stress on the affinity test. Thus, the decision of the Caste Scrutiny Committee to cancel and confiscate the caste certificate as well as the decision of the High Court, affirming the said decision is untenable. We are, therefore, of the opinion that the claim of the appellant deserves

to be re-examined by the Caste Scrutiny Committee. For the view we have taken on facts in hand, we deem it unnecessary to refer to the decisions cited at the bar.

21. Resultantly, the appeal is allowed; the decisions of Caste Scrutiny Committee and the High Court are set aside and the case is remitted back to the Caste Scrutiny Committee for fresh consideration in accordance with the relevant rules and the aforesaid broad guidelines.

22. However, the parties are left to bear their own costs.

B.B.B. Appeal allowed.

SHREENIDHI KUMAR & ORS.
v.
UNION OF INDIA & ORS.
(Civil Appeal No. 9893 of 2011)

NOVEMBER 17, 2011

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

Service Law:

Contract employment – Engagement of Subject Matter Experts (SMEs) in State of Bihar on contract basis for two years – Maximum age limit ranging from 37 to 42 years for different categories – Advertisement challenged as inconsistent with State Government Resolution dated 18.7.2007 which provided 65years as maximum age limit for contract employment – HELD: Resolution dated 18.7.2007 is applicable in a case of delay in regular employment against sanctioned posts and in a case of requirement of employees for short period i.e. for few days or few months – Such appointment has to be for a short period and in no case exceeding one year – The period of employment exceeding 12 months will not be covered by the Resolution – In the instant case, engagement of SMEs was for a period of two years and it was not against any sanctioned posts and, as such, Resolution dated 18.7.2007 was not applicable – As a necessary corollary, the maximum age limit of 65 years provided in the Resolution is not available for employment exceeding one year in temporary schemes .

The Department of Agriculture, Government of Bihar, by an advertisement dated 13.6.2009 invited applications for employment on contract basis for 4062 post of Subject Matter Expert (SME) under the Krishi Prasar 'Sudharikaran' Yojna for a period of two years. The age limit put for different categories ranged from 37 to 42

years. The said advertisement was challenged in a writ petition before the High Court as inconsistent with the Resolution dated 18.7.20007 issued by the Personnel and Administrative Reforms Department, Govt. of Bihar which provided the maximum age limit for employment on contract basis as 65 years. The Single Judge of the High Court directed the writ petitioners to approach the State Government. On such a representation, the Director, Department of Agriculture, Govt. of Bihar declined any alteration in age limit mentioned in the advertisement. The order of the Director was challenged in writ petitions before the High Court. The Single Judge of the High Court by order dated 13.8.2009 quashed the order of the Director and sent the matter back to the Agriculture Production Commissioner to pass fresh order as regards validity of the age limit clause in the advertisement and to bring it in tune with the Resolution. However, meanwhile, the employment list of SME was finalised on 10.8.2009. The names of the appellants appeared in that list, but they were not given employment because of the order dated 13.08.2009 passed by the Single Judge. The appellants, therefore, challenged the order of the single Judge in a Letters Patent Appeal before the Division Bench of the High Court, which dismissed the appeal holding that by finalisation of the Employment List dated 10.8.2009 no vested right accrued in favour of the appellants.

Disposing of the appeal, the Court

Held: 1.1. The Resolution dated 187.2007 provides for procedure and guidelines for employment on contract basis in two contingencies, namely, (i) in a case of delay in regular employment against the sanctioned posts, but such appointment has to be for a short period and in no case, exceeding one year; and (ii) in case of requirement of the employees to work for short period in temporary schemes, i.e. for few days or for few months; it cannot

be few years. The employment period of 'two' years is little long to constitute 'short period' contemplated in para 2(2) of the Resolution. The period of employment in temporary schemes exceeding 12 months, thus, will not be covered by the Resolution. As a necessary corollary, the maximum age limit of 65 years provided in para 2(8) of the Resolution is not available for employment exceeding one year in the temporary schemes. Any other view will be against all norms of public employment. [para 13] [411-G-H; 412-A-D]

1.2. Insofar as the advertisement for appointment of SME to 4062 posts on contract basis under the Yojna is concerned, the employment period is for maximum two years. The Director was, thus, right when he observed in his order that the Resolution providing for upper age limit of 65 years was not applicable for employment on contract basis under the advertisement as the SMEs are not being employed against the approved posts and their employment was being done temporarily for two years. [para 14] [412-E-F]

1.3. The orders dated 13-8-2009 and 23-3-2010 passed by the Single Judge and the Division Bench, respectively, of the High Court are set-aside. However, in the circumstances of the case, it would not be in the interest of justice to unsettle the appointments of SME already made on 24.2.2010 against 4062 posts under the Yojna, since less than four months' contract period is left for those appointees as the maximum period of employment is two years. In case the posts of SME under the Yojna are required beyond two years from 24-2-2010, it is directed that the authorities concerned shall make fresh appointments in accordance with law. [para 15] [412-G-H; 413-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9893 of 2011.

From the Judgment & Order dated 23.3.2010 of the High Court of Judicature at Patna in LPA No. 1310 of 2009.

Nagendra Rai, Shantanu Sagar, Smarhar Singh, Abhishek Singh, Gopi Raman, Priti Roshani (for T. Mahipal) for the Appellants.

Ardhendumauli Kumar Prasad (for Gopal Singh) for the Respondents.

The Judgment of the Court was delivered by

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

2. On July 18, 2007, a Resolution (for short "Resolution") was issued by the Personnel and Administrative Reforms Department, Government of Bihar providing for procedure and guidelines for employment on contract basis. Inter alia, it provided that employment on the contract basis will be done only against the sanctioned posts and on the basis of the advertisement. It further provided that employment on contract basis may be considered under any scheme for special proposal for short period only. In case of delay in regular employment against the permanent posts, the employment on contract basis can be made for short time and for maximum period of one year. It also provided that maximum age limit for employment on contract basis would be 65 years.

3. On June 13, 2009, an advertisement (hereinafter referred to as "advertisement") was issued in the newspaper "Hindustan" by the Department of Agriculture, Government of Bihar inviting applications for employment on contract basis for 4062 posts of Subject Matter Expert (for short "SME") under "Krishi Prasar Sudridhikaran Yojna (for short "Yojna"). The advertisement provided for minimum qualification and also the age limit - on 1.1.2008: 37 years for unreserved; 40 years for extremely Backward and Backward Castes; 40 years for women (unreserved, extremely Back and Backward) and 42

years for SC/ST (Male and Female). The other details like reservation, basis of selection, period of employment etc. were also given in the advertisement along with the format of the application.

4. The above advertisement was challenged by 13 persons in a Writ Petition (being CWJC NO. 7366 of 2009) before the High Court of Patna. The Challenge was to clause (2) relating to age limit. The petitioners therein alleged that the age limit prescribed in the advertisement was inconsistent with the Resolution as the maximum age limit prescribed therein for employment on contract basis was 65 years.

5. The Single Judge of the High Court, by his order dated July 13, 2009, while dealing with the challenge to the age limit prescribed in the advertisement directed the petitioners therein to approach the State Government (Agriculture Department) with a representation to reconsider clause (2) of the advertisement and make it in tune with the Resolution. The Single Judge also observed that while considering the representation, the authorities would bear in mind that the appointment on similar posts in agriculture department had not been made for over 15 years and the petitioners therein had become over-age during those years and considering these aspects, the authorities should fix the maximum age in clause (2) of the advertisement.

6. Consequent upon the order dated July 13, 2009 and the representation made by the persons who were petitioners in the Writ Petition before the High Court, the Director, Department of Agriculture, Government of Bihar (for short "Director") reconsidered the whole issue and held that there was no question of alteration of age limit mentioned in the advertisement. The Director, in his order, observed as follows:

> "The afore stated application and record of the office have been perused. In resolution memo No. - 2401 dated 18.7.07 of Personnel and Administrative Reforms

Department, the upper age limit of 65 years for the approved posts pertaining to employment on contract basis is against. At present expert in subject matter are not being employed against the approved post. This employment is being done temporarily for two years. By this employment of 4062 specialist in subject matter has to be done as per the scheme Krishi Prasar Sudharikaran Scheme, and this scheme is totally temporarily. In this scheme age limit for unreserved is 37 years for most backward and 40 years for backward females (unreserved, most backward and backward) 40 years and for SC & ST (male and female) 42 years has bee fixed by personnel and Administrative Reforms Department and the consent of the group of ministers has been granted. It has been issued vide departmental official order No. 75 dated 6.1.1990. As per the scheme the specialist of subject matter have been planned to be assigned numerous duties such as, scheme sponsored by the centre, preparation of list of macromode, isopomode/atma scheme, scheme to prepare the list of beneficiaries in seed expansion scheme, organising training at village level, technical assistance to the villagers, conduction and supervision of the work of seed production in agricultural areas, constitution of agricultural welfare group at village level and make arrangement for their training to collect specimen from the agriculturist for checking the soil quality and send the same to the laboratory and simultaneously send the examination report to the villagers, for selection of venues for farm field school, to arrange training during the period of travelling of F.F.S. and to collect the data of accounts and also to conduct other works assigned by the department of agriculture. Therefore, there is no question of alteration of age limit mentioned in Memo No. PR-13448 (Agri)9-10 Para 12"."

7. The above order passed by the Director came to be challenged in two Writ Petitions before the High Court of Patna.

The Single Judge of the High Court, vide order dated August 13, 2009, quashed the order of the Director and sent the matter back to the Agriculture Production Commissioner, Bihar with a direction to him to pass fresh order in consultation with the Personnel and Administrative Reforms Department of the State Government about the validity of clause (2) of the advertisement to bring it in tune with the Resolution. It is not necessary to refer to other directions given in the order dated August 13, 2009.

8. Before the order was passed by the Single Judge on August 13, 2009, as noticed above, in view of the order passed by the Director on July 23, 2009, the processing of the applications received pursuant to the advertisement was completed and the Employment List of SME was finalised on August 10, 2009. The present appellants are some of those whose names appeared in that list. However, these appellants were not given employment since immediately thereafter by the order dated August 13, 2009, the High Court had quashed the order passed by the Director and sent the matter back to the Agriculture Production Commissioner, Bihar for passing fresh order as noted above. The appellants, therefore, challenged the order of the Single Judge before the Division Bench in a Letters Patent Appeal.

9. The Division Bench, after hearing the parties, dismissed the appeal on March 23,2010. The main reason given by the Division Bench in dismissing the appeal is that by finalisation of the Employment List dated August 10, 2009, no vested right has accrued in favour of the appellants. As regards the Resolution, the Division Bench observed that the Single Judge in his order had only interpreted the Resolution and directed the State Government to act accordingly and the State Government has not challenged that order.

10. One more fact needs to be noticed here that pursuant to the order of the Single Judge passed on August 13, 2009, the State Government altered the age limit for employment on contract basis for 4062 posts of SME under the Yojna;

increased the age limit to 65 years and gave the employment on that basis on February 24, 2010 for a period of two years.

11. We have heard Mr. Nagendra Rai, learned senior counsel for the appellants and Mr. A.K. Prasad for respondent Nos. 3 and 5.

11. We shall reproduce relevant portion of para 2 of the Resolution. It reads thus:

> "2. In the light of the above referred the State Government has taken the following decision for equalization of policy/ guidelines for employment on the basis of contract.
>
> (1) Employment on the basis of contract will be done only against the sanctioned posts and these kinds of employment will be done only on the basis of advertisement.
>
> (2) These kinds of employment will be done under any scheme for some special proposal and for short period only But in case of delay in regular appointment against the permanent created posts, this kind of employment can be made for short time. But this kind of employment against the permanent post will be done for maximum one year only.
>
> x xx xx xx xx xx xx
>
> (8) Maximum age limit will be 65 years for employment on contact."

13. The Resolution provides for procedure and guidelines for employment on contract basis. It basically provides for employment in the State on the contract basis in two contingencies namely; (i) in case of delay in regular employment against the sanctioned posts and (ii) in case of requirement of the employees to work for short period in temporary schemes. The Resolution, accordingly, has to be considered

being applicable to above two situations. If the regular employment against sanctioned posts has been delayed for one reason or the other, the employment can be made on contract basis. But such appointment has to be for a short period and in no case, exceeding one year. Similarly, if there is requirement of the employees to work in the temporary schemes for a short period then the employment on contract basis can be made. Although, time period of such employment is not stated in the Resolution, but the use of expression "short period only" is not without significance. The employment period of 'two' years is little long to constitute 'short period' contemplated in para 2(2) of the Resolution. 'Short period' referred to in para 2(2), in our opinion, means duration of few days or few months. It cannot be few years. The period of employment in temporary schemes exceeding 12 months, thus, will not be covered by the Resolution. As a necessary corollary, the maximum age limit of 65 years provided in para 2(8) of the Resolution is not available for employment exceeding one year in the temporary schemes. Any other view will be against all norms of public employment.

14. Insofar as the advertisement for appointment of SME to 4062 posts on contract basis under the Yojna is concerned, the employment period is for maximum two years. The Director was, thus, right when he observed in his order that the Resolution providing for upper age limit of 65 years was not applicable for employment on contract basis under the advertisement as the SMEs are not being employed against the approved posts and their employment was being done temporarily for two years.

15. We are, therefore, unable to uphold the order of the Single Judge dated August 13, 2009 and the order dated March 23, 2010 passed by the Division Bench. We set-aside these orders. Having held that, however, in our view, it would not be in the interest of justice to unsettle the appointments of SME already made on February 24, 2010 against 4062 posts

under the Yojna now since less than four months' contract period is left for those appointees as the maximum period of employment is two years. In case the posts of SME under the Yojna are required beyond two years from February 24, 2010, we direct that the concerned authorities shall make fresh appointments in accordance with law.

16. The appeal is disposed of accordingly. No order as to costs.

R.P. Appeal disposed of.

CHANDRASHEKAR (D) BY LRS. & ORS.
v.
LAND ACQUISITION OFFICER & ANR.
(Civil Appeal No(s).1743 of 2006)

NOVEMBER 22, 2011

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

Land Acquisition Act, 1894 – s.23 – Market value – Assessment of – Acquired land, an un-irrigated, undeveloped agricultural land admeasuring 144 acres – Assessment of market value, on basis of the exemplar sale transaction of a developed site measuring 2400 square feet and executed subsequent to the date of publication of preliminary notification – Quantum of deductions to be applied – Determination of – High Court reduced the compensation awarded by the Reference Court from Rs. 1,45,000/- per acre to Rs. 65,000/- per acre, deducting 55 percent of the market value assessed on the basis of the exemplar sale deed, towards developmental charges, 5 percent towards waiting period, and 10 percent towards de-escalation – On appeal held: It is essential to earmark appropriate deductions, out of the market value of an exemplar land, for each of the two components-viz. first component-for keeping aside area/space for providing developmental infrastructure and second component-for developmental expenditure/expense – This would be the first step towards balancing the differential factors – The second step is to classify the nature of the exemplar land as also the acquired land referring to the development activities in connection with the first component as also second component – Comparison of the classifications arrived, would depict the difference in terms of development, between the exemplar land and the acquired land, which would lead to the final step – In the final step, the absence and presence of developmental components, based on such

comparison, would constitute the basis for arriving at an appropriate percentage of deduction, necessary to balance the differential factors between the exemplar land and the acquired land – Upper limit of permissible deduction is 75 per cent –Deduction upto 67 per cent i.e. deduction of 331/3 per cent each can be made for the two components under the head of development – Range of deductions other than the head development would depend on the facts and circumstances of each case – It may exceed 8 per cent but that would only be where deductions for development activities under head development is less than 67 per cent i.e. as long as cumulative deductions do not cross the upper bench mark of 75 percent – High Court limited deductions under the head of "development" to 55 percent, thus, does not call for interference – Deduction of 10 per cent under the head of 'de-escalation' is appropriate specially when the period in question exceeded 1 year 7 months and 17 days – Deduction of 5 per cent towards waiting period is upheld – Cumulatively these deductions would amount to 70 percent (55+10+5=70) which is within the parameters laid down by this Court – Thus, there is no infirmity in the quantum to accumulated deductions applied by the High Court – High Court awarded final compensation at the rate of Rs. 65,000/- per acre to the land losers relying on its own judgment in an earlier case which pertained to acquisition of land out of the same notification under which appellants' land was acquired – Consistency in the judicial determination is of utmost importance – Final compensation determined by the High Court at Rs.65,000/- per acre, was fully justified, even for the land acquired from the revenue estate of the other village – City Improvement Trust Board Act, 1976 – s. 15(1).

Development Authority issued a preliminary Notification under Section 15(1) of the City Improvement Trust Board Act, 1976 for acquisition of land for raising a residential layout. After seven years final notification was issued and the land of the appellants falling in the

revenue estate of village B and R were acquired. The Land Acquisition Officer passed an award. The market value for the village B was fixed at the rate of Rs. 4,100/- per acre and the market value for the village R was fixed at the rate of Rs. 13,500/- per acre respectively, as compensation. Thereafter, on a reference filed for enhancement of compensation, the compensation enhanced from Rs. 4,100/- per acre to Rs. 1,46,000/- per acre. The Reference Court on basis of the sale deed dated 30.12.1983, from the market value of land assessed, applied a deduction of 33 per cent. The Development Authority as also Land Acquisition Officer filed separate appeals before the High Court. The High Court finding the deductions inappropriate remitted the matter to the Reference Court for reconsideration on the issue of deductions to be made from the market value, so as to determine compensation payable to the land losers. The Reference Court re-determined the market value of the acquired land at Rs. 1,45,000/- per acre. The Development Authority and the Land Acquisition Officer filed appeals before the High Court for reducing the quantum of compensation awarded and the landowners filed cross-objections for enhancement thereof. The High Court reduced the compensation awarded by the Reference Court from Rs. 1,45,000/- per acre to Rs. 65,000/- per acre. It deducted 55 percent of the market value assessed on the basis of the exemplar sale deed, towards developmental charges, 5 percent towards waiting period, and 10 percent towards de-escalation. Therefore, the appellants filed the instant appeals.

Dismissing the appeals, the Court

HELD: 1.1. The quantum of deductions (to be made from the market value determined on the basis of the developed exemplar transaction) on account of development is divided into two components. *Firstly,*

space/area which would have to be left out, for providing indispensable amenities like formation of roads and adjoining pavements, laying of sewers and rain/flood water drains, overhead water tanks and water lines, water and effluent treatment plants, electricity sub-stations, electricity lines and street lights, telecommunication towers etc. Besides the said, land has also to be kept apart for parks, gardens and playgrounds. Additionally, development includes provision of civic amenities like educational institutions, dispensaries and hospitals, police stations, petrol pumps etc. This "first component", may conveniently be referred to as deductions for keeping aside area/space for providing developmental infrastructure. Secondly, deduction has to be made for the expenditure/expense which is likely to be incurred in providing and raising the infrastructure and civic amenities, including costs for levelling hillocks and filling up low lying lands and ditches, plotting out smaller plots and the like. This "second component" may conveniently be referred to as deductions for developmental expenditure/expense. [Para 16] [436-F-H; 437-A-C]

1.2. It is essential to earmark appropriate deductions, out of the market value of an exemplar land, for each of the two components. This would be the first step towards balancing the differential factors. This would pave the way for determining the market value of the undeveloped acquired land on the basis of market value of the developed exemplar land. For the "first component" under the head of development, deduction of 33-1/3 percent can be made. Likewise, for the "second component" under the head of "development" a further deduction of 33-1/3 percent can additionally be made. The facts and circumstances of each case would determine the actual component of deduction, for each of the two components. Yet under the head of "development", the applied deduction should not exceed

67 percent. That should be treated as the upper benchmark. This would mean, that even if deduction under one or the other of the two components exceeds 331/3 percent, the two components under the head of development put together, should not exceed the upper benchmark. [Para 17, 18] [437-D-E; 438-C-F]

1.3. In *Lal Chand's* **case and in** *Andhra Pradesh Housing Board's* **case this Court expressed the upper limit of permissible deductions as 75 percent. Deductions upto 67 percent can be made under the head of "development". Further deductions would obviously pertain to considerations other than the head of "development". A deduction could be made keeping in mind the waiting period required to raise infrastructure, as also, the waiting period for sale of developed plots and or built-up areas. This nature of deduction may be placed under the head "waiting period". Deductions could also be made in cases where the exemplar sale transaction, is of a date subsequent to the publication of the preliminary notification. This nature of deduction may be placed under the head "de-escalation". Likewise, deductions may be made for a variety of other causes which may arise in different cases. All deductions should not cumulatively exceed the upper benchmark of 75 percent. A deduction beyond 75 percent would give the impression of being lopsided, or contextually unreal, since the land loser would seemingly get paid for only 25 percent of his land. This impression is unjustified, because deductions are made out of the market value of developed land, whereas, the acquired land is undeveloped (or not fully developed). Differences between the nature of the exemplar land and the acquired land, it should be remembered, is the reason/cause for applying deductions. Market value based on an exemplar sale, from which a deduction in excess of 75 percent has to be made, would not be a relevant sale transaction to**

be taken into consideration, for determining the compensation of the acquired land. In such a situation, the exemplar land and the acquired land would be uncomparable, and therefore, there would be no question of applying the market value of one (exemplar sale) to determine the compensation payable for the other (acquired land). Even though on account of developmental activities (under the head "development"), the upper benchmark of 67 percent is specified, it would seem, that for the remaining deduction(s), the permissible range would be upto 8 percent. That however, is not the correct position. The range of deductions, other than under the head "development", would depend on the facts and circumstances of each case. Such deductions, may even exceed 8 percent, but that would be so only, where deductions for developmental activities (under the head "development") is less than 67 percent, i.e., as long as the cumulative deductions do not cross the upper benchmark of 75 percent. Therefore, the range for deductions, for issues other than developmental costs, would depend on the facts and circumstances of each case, they may be 8 percent, or even the double thereof, or even further more, as long as, cumulatively all deductions put together do not exceed the upper benchmark of 75 percent. [Para 19] [438-G-H; 439-A-H; 440-A-B]

1.4. Before applying deductions for ascertaining the market value of the undeveloped acquired land, it would be necessary to classify the nature of the exemplar land, as also, the acquired land. This would constitute the second step in the process of determination of the correct quantum of deductions. The lands under reference may be totally undeveloped, partially developed, substantially developed or fully developed. In arriving at an appropriate classification of the nature of the lands which are to be compared, reference may be made to the

developmental activities referred in connection with the "first component", as also, the "second component". The presence (or absence) of one or more of the components of development, would lead to an appropriate classification of the exemplar land, and the acquired land. Comparison of the classifications thus arrived, would depict the difference in terms of development, between the exemplar land and the acquired land. This exercise would lead to the final step. In the final step, the absence and presence of developmental components, based on such comparison, would constitute the basis for arriving at an appropriate percentage of deduction, necessary to balance the differential factors between the exemplar land and the acquired land. [Para 20] [440-C-G]

1.5. The material sought by the appellant from the Commissioner, Gulbarga Development Authority was irrelevant for the determination of the percentage of deduction to be applied. It is the overall developmental cost, incurred (or incurable) on the entire acquired land which has to be apportioned amongst the landholders In a given case, the developmental cost on a small piece of land, may be far in excess of the cost of the land. That would however not mean, that the landowner in question, would not be entitled to compensation. Again, if no specific developmental activity is carried out on a particular piece of land, it would be improper to conclude, that no deduction should be made while determining the compensation payable to such landowner, even though the acquired land was undeveloped. What the appellant ought to have ascertained, is the developmental cost on the entire acquired land. In such a situation, if the entire developmental activity had been completed, it would be permissible to proportionately apportion the same amongst land holders. Such a situation may not arise in actuality. In most cases development is a continuous and ongoing process, which would be completed over a long

stretch of time extending in some cases to a decade or even more. Therefore, it cannot be said that no deduction should be made in the instant case under the head of "development" because no expense is shown to have been incurred for development of the land acquired from the appellants. [Para 22] [441-G-H; 442-A-F]

1.6. In the absence of inputs as were sought by the appellants from the Commissioner, Gulbarga Development Authority, the deductions can only be based on reasonable and logical norms. Comparison of the state of development of the exemplar land, as also, that of the acquired land can be the only legitimate basis, for a reasonable and logical determination on the issue. Based on the said foundation, an assessment has to be made by applying the parameters delineated. It is proceeded on the assumption that the exemplar sale deed was a fully developed site. In such a situation, keeping in mind the parameters laid down by this Court, and the conclusions drawn as also the facts of the instant case, a deduction of upto 67 percent may have been justified, and the same would fall within the parameters laid down by this Court because the exemplar land could be classified as fully developed, whereas, the acquired land was totally undeveloped land. As against the said, the High Court limited deductions under the head of development to 55 percent. There is no justifiable reason to interfere with the same, specially in an appeal preferred by the land loser, more so, because no justifiable basis for the same was brought to the notice. [Para 23] [442-F-H; 443-A-D]

1.7. The High Court while determining the compensation payable to the appellants on the basis of the sale deed dated 30.12.1983 applied a further deduction of 10 percent under the head of "de-escalation". Even though escalation of market price of land is a question

of fact, which should ordinarily to be proved through cogent evidence. Yet, keeping in mind ground realities, and taking judicial notice thereof, the land prices are on the rise throughout the country. The outskirts of Gulbarga town are certainly not an exception to the rule. The exemplar sale deed dated 30.12.1983 was executed exactly 1 year 7 months and 17 days after the publication of the preliminary notification on 13.5.1982 no fault can be found with the determination rendered by the High Court in making a deduction of 10 percent under the head of "de-escalation", specially when the period in question exceeded one year (as for annual deductions), by 7 months and 17 days. Thus, no fault can be found with the determination rendered by the High Court in making a deduction of 10 percent under the head of de-escalation. [Paras 24 and 25] [443-E-H; 444-A-F]

Delhi Development Authority Vs. Bali Ram Sharma **(2004) 6 SCC 533;** *ONGC Limited Vs. Rameshbhai Jeewanbhai Patel,* **(2008) 14 SCC 748;** *Valliyammal & Anr. Vs. Special Tehsildar (Land Acquisition) & Anr.* **(2011) 8 SCC 91 – relied on.**

1.8. Under the head "waiting period", the High Court allowed a deduction of 5 percent. During the course of hearing, the appellants did not assail the said deduction. Therefore, it is not necessary to record any finding in respect of the deduction applied by the High Court under the head of "waiting period". The "waiting period" is one of the relevant components for making deductions. The instant deduction of 5 percent applied by the High Court is upheld. [Para 26] [444-G-H; 445-A-B]

Chimanlal Hargovinddas vs. Special Land Acquisition Officer Poona & Anr. **(1988) 3 SCC 751: 1988 (1) Suppl. SCR 531:** *Land Acquisition Officer Revenue Divisional Officer,*

Chittor vs. L. Kamalamma (Smt.) Dead by LRs. & Ors. **(1998) 2 SCC 385: 1998 (1) SCR 1153;** *Atma Singh (Dead) through LRs & Ors. Vs. State of Haryana* **(2008) 2 SCC 568: 2007 (12) SCR 1120 – referred to.**

1.9. 55 percent deduction accorded by the High Court towards "development" is upheld. The deduction of 10 percent on account of "de-escalation", as also, the deduction of 5 percent on account of "waiting period" is upheld. Cumulatively these deductions would amount to 70 percent (55+10+5=70). The outer benchmark for deductions laid down by this Court in *Lal Chand's* case and in *Andhra Pradesh Housing Board's case* is 75 percent. Cumulatively also the deduction allowed by the High Court, fall well within the parameters laid down by this Court. Therefore, there is no infirmity in the quantum of accumulated deductions applied by the High Court during the course of making an assessment of the market value of the acquired land. [Para 27] [445-C-E]

1.10. Based on the said deductions, the High Court calculated the market value of the acquired land at Rs.67,954/- per acre. The market value of the acquired land for disbursement of compensation to the land losers was fixed by the High Court at Rs.65,000/- per acre. In allowing final compensation at the rate of Rs.65,000/- per acre to the land losers, the High Court had placed reliance on market value fixed by the High Court itself in an earlier case. The High Court had awarded Rs.65,000/- per acre as compensation payable to the land losers, in an earlier process of litigation pertaining to acquisition of land, out of the same notification (under which the appellants land was acquired). The said determination was rendered in respect of the land acquired from the revenue estate of village B. While recording its final determination the High Court expressed, that it was desirable to arrive at a uniform value, specially when the land in question came

to be acquired out of the same process of acquisition, and had not been shown to be any different from the appellants land. The said view expressed by the High Court is upheld. This sentiment expressed by the High Court should never be breached. Consistency in judicial determination is of utmost importance. Since the judgment relied upon by the High Court has attained finality, the final compensation determined by the High Court at Rs.65,000/- per acre, was fully justified. [Para 28] [445-F-H; 446-A-C]

1.11. The conclusions drawn pertaining to acquisition of land falling in the revenue estate of village B apply equally to land acquired from the revenue estate of village R. The High Court, while making a reference to the land acquired from village R, noticed that village R had a lower market value as it was farther from the nerve centre of Gulbarga town as compared to village B. As such, in the facts and circumstances of the instant case, it would be just and appropriate to uphold the compensation determined by the High Court at Rs.65,000/- per acre, even for the land acquired from the revenue estate of village R. [Para 29] [446-D-F]

Brigadier Sahib Singh Kalha & Ors. v. Amritsar Improvement Trust & Ors., **(1982) 1 SCC 419;** *Administrator General of West Bengal vs. Collector, Varanasi* **(1988) 2 SCC 150: 1988 (2) SCR 1025;** *Chimanlal Hargovinddas vs. Special Land Acquisition Officer, Poona & Anr.* **(1988) 3 SCC 751: 1988 (1) Suppl. SCR 531;** *Land Acquisition Officer Revenue Divisional Officer, Chottor vs. L. Kamalamma (Smt.) Dead by LRs. & Ors.* **(1998) 2 SCC 385: 1998 (1) SCR 1153;** *Kasturi and others vs. State of Haryana* **(2003) 1 SCC 354: 2002 (4) Suppl. SCR 117;** *Land Acquisition Officer, Kammarapally Village, Nizamabad District, A.P. vs. Nookala Rajamallu & Ors.* **(2003) 12 SCC 334: 2003 (6) Suppl. SCR 67;** *V. Hanumantha Reddy (Dead) by LRs. vs. Land*

Acquisition Officer & Mandal R. Officer **(2003) 12 SCC 642;** *Viluben Jhalejar Contractor (Dead) by LRs. vs. State of Gujarat* **(2005) 4 SCC 789: 2005 (3) SCR 542;** *Atma Singh (Dead) through LRs & Ors. vs. State of Haryana and Anr.* **(2008) 2 SCC 568: 2007 (12) SCR 1120;** *Lal Chand vs. Union of India & Anr.* **(2009) 15 SCC 769: 2009 (13) SCR 622;** *Subh Ram & Ors. vs. State of Haryana & Anr.*, **(2010) 1 SCC 444: 2009 (15) SCR 287;** *Andhra Pradesh Housing Board vs. K. Manohar Reddy & Ors.* **(2010) 12 SCC 707: 2010 (11) SCR 1107;** *Special Land Acquisition Officer & Anr. vs. M.K. Rafiq Sahib* **(2011) 7 SCC 714 – referred to**

Case Law Reference:

(1982) 1 SCC 419	**Referred to.**	**Para 15**
1988 (2) SCR 1025	**Referred to.**	**Para 15**
1988 (1) Suppl. SCR 531	**Referred to.**	**Para 15**
1998 (1) SCR 1153	**Referred to.**	**Para 15**
2002 (4) Suppl. SCR 117	**Referred to.**	**Para 15**
2003 (6) Suppl. SCR 67	**Referred to.**	**Para 15**
(2003) 12 SCC 642	**Referred to.**	**Para 15**
2005 (3) SCR 542	**Referred to.**	**Para 15**
2007 (12) SCR 1120	**Referred to.**	**Para 15**
2009 (13) SCR 622	**Referred to.**	**Para 15**
2009 (15) SCR 287	**Referred to.**	**Para 15**
2010 (11) SCR 1107	**Referred to.**	**Para 15**
(2011) 7 SCC 714	**Referred to.**	**Para 15**
(2004) 6 SCC 533	**Referred to.**	**Para 25**
(2008) 14 SCC 748	**Referred to.**	**Para 25**

(2011) 8 SCC 91	**Referred to.**	**Para 25**
1988 (1) Suppl. SCR 531	**Referred to.**	**Para 26**
1998 (1) SCR 1153	**Referred to.**	**Para 26**
2007 (12) SCR 1120	**Referred to.**	**Para 26**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1743 of 2006.

From the Judgment & Order dated 2.4.2004 of the High Court of Karnataka at Bangalore in M.F.A. No. 2615 of 2003 along with Cross Objection 132 & M.F.A. No. 2170 of 2003.

WITH

C.A. No. 8899-8901 of 2011.

Basava Prabhu S. Patil, G.V. Chandrashekar, N.K. Verma, P.P. Singh, B. Subrahmanya Prasad, Nandeesh Patil, Anirudh Sanganeria, A.S. Bhasme, Kiran Suri, S.J. Amith, V.N, Raghupathy, Lagnesh Mishra for the appearing parties.

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. Through this common order, we propose to dispose of Civil Appeal no.1743 of 2006, as also, Civil Appeal nos.8899-8901 of 2011. For convenience, the factual position, as has been depicted in Civil Appeal no.1743 of 2006, has been referred to.

2. Gulbarga Development Authority, consequent upon its desire to acquire land for raising a residential layout, issued a preliminary notification under section 15(1) of the City Improvement Trust Board Act, 1976 on 13.5.1982. Through the aforesaid notification, it was proposed to acquire 144 acres of land falling in the revenue estate of villages Rajapur (71 acres) and Badepur (73 acres). The matter in respect of the acquisition of land crystallized, when the final notification was

issued on 14.12.1989. Thereby the land of the appellants, measuring 8 acres 4 guntas, situated in survey no.63 of the revenue estate of village Badepur, came to be acquired. Insofar as Civil Appeal nos.8899-8901 of 2011 is concerned, the appellants' land measuring 7 acres 7 guntas, falling in survey no.14/2, in the revenue estate of village Rajapur, was acquired.

3. The Land Acquisition Officer announced his award on 7.7.1990. By the aforesaid award, the market value of the land, falling in the revenue estate of village Badepur, was fixed at the rate of Rs.4,100/- per acre. For the land falling in the revenue estate of village Rajapur, the Land Acquisition Officer, assessed the market value at Rs.13,500/- per acre. The landowner, Chandrashekar (whose LRs. are the appellants in Civil Appeal no.1743 of 2006) filed Writ Petition nos.15489-496 of 1990 to assail the acquisition proceedings initiated by the Gulbarga Development Authority, by finding fault with the procedure adopted. The High Court of Karnataka (hereinafter referred to as the High Court), while issuing notice, passed an interim order staying dispossession for a period of 3 weeks. By a motion bench order dated 10.8.1990, the interim order passed on 23.7.1990 was continued, "till further orders". Writ Petition nos. 15489-496 of 1990 came to be dismissed on 12.8.1991. The notification for acquisition of land as also the procedure adopted was held to be in consonance with law.

4. During the pendency of the writ petition referred to in the foregoing paragraph, the original landowner Chandrashekar, filed a protest petition assailing the quantum of compensation assessed by the Land Acquisition Officer. In the aforesaid protest petition dated 24.9.1990, reference was also sought, for enhancement of compensation awarded to the appellant. Since the protest petition filed by the landowner was not referred for adjudication, the landowner filed an application under section 18(3)(b) of the Land Acquisition Act, 1894. The aforesaid application was allowed, and the claim raised by the landowner was registered for adjudication.

5. After adjudicating upon the matter, the Reference Court announced its award on 19.6.1999. The compensation determined by the Land Acquisition Collector at Rs.4,100/- per acre, was enhanced to Rs.1,46,000/- per acre. The Gulbarga Development Authority, as also, the Land Acquisition Officer preferred independent appeals before the High Court. By an order dated 3.11.1999, the High Court allowed the appeals, and remitted the matter to the Reference Court for reconsideration, on the issue of deductions to be made from the market value, so as to determine compensation payable to the land losers. In this behalf, it would be relevant to mention, that while determining the compensation payable to the appellant, the Reference Court had based its assessment on a sale deed dated 30.12.1983. From the market value of land assessed, on the basis of the aforesaid sale deed, the Reference Court had applied a deduction of 33 percent. The High Court having concluded, that the aforesaid deduction was inappropriate, had remanded the matter for re-determination. It is the case of the appellants before this Court, that the only issue, which the Reference Court was called upon to settle, after the High Court by its order dated 3.11.1999 had remitted the matter to the Reference Court was, the percentage of deductions to be made from the market value determined on the basis of the exemplar sale transaction, so as to determine the fair compensation payable to the landowners for acquisition of their land.

6. By its order dated 21.12.2002, the Reference Court re-determined the market value of the acquired land at Rs.1,45,000/- per acre. This determination by the Reference Court was again assailed before the High Court. Whilst the Gulbarga Development Authority and the Land Acquisition Officer filed appeals before the High Court for reducing the quantum of compensation awarded, the landowners preferred cross-objections for enhancement thereof. The appeals filed by the Gulbarga Development Authority and the Land Acquisition Officer were partly allowed, inasmuch as, the High Court

reduced the compensation awarded by the Reference Court from Rs.1,45,000/- per acre to Rs.65,000/- per acre. The instant order passed by the High Court dated 2.4.2004 has been assailed before this Court through Civil Appeal no. 1743 of 2006, as also, through the connected Civil Appeal nos. 8899-8901 of 2011.

7. It would be relevant to mention, that while determining the controversy, the High Court was satisfied in deducting 55 percent of the market value assessed on the basis of the exemplar sale deed, towards developmental charges, 5 percent towards waiting period, and 10 percent towards de-escalation. By virtue of the aforesaid deductions, the High Court determined the market value of the land at Rs.67,954/- per acre. Having done so, by applying the rule of averages, the High Court held, that compensation for the acquired land was payable at Rs.65,000/- per acre.

8. During the course of hearing, learned counsel for the appellants in both set of appeals contended, that the deduction of 55 percent towards developmental charges, was arbitrary, and without application of mind. It was sought to be asserted, that the High Court did not record any reason(s) for applying the aforesaid deduction. Likewise, it was contended, that deduction of 10 percent by way of de-escalation was also arbitrary. In this behalf, it was sought to be contended, that the Reference Court had determined 3 percent as deduction on account of de-escalation, whereas, the High Court had enhanced the aforesaid deduction to 10 percent, without recording any reason(s).

9. For the determination of market value of the acquired land, it is apparent that primary reliance has been placed by the appellants, on the exemplar sale deed dated 30.12.1983 (Exhibit P-18, before the Reference Court). It would also be relevant to mention, that through the aforesaid sale deed, land measuring 2400 square feet (40' x 60') falling in survey no.63/

1, of the revenue estate of Badepur village, was sold for a total consideration of Rs.12,500/-. It would also be relevant to mention, that the Reference Court on the basis of the aforesaid exemplar sale deed, assessed the value of the land at Rs.5.20 per square foot. Having applied a deduction of 33 percent towards developmental charges, the Reference Court had arrived at the figure of Rs.3.47 per square foot. At the aforesaid rate, the value of the acquired land was assessed at Rs.1,51,153.20 per acre. The Reference Court also allowed de-escalation at the rate of 3 percent per annum, as the exemplar sale deed was executed after the issuance of the preliminary notification. Consequent upon the aforesaid deduction, the Reference Court arrived at the figure of Rs.1,44,552.20 per acre, as compensation payable for the acquired land. The said determination was rounded of to Rs.1,45,000/- per acre.

10. According to the appellants before this Court, the determination rendered by the Reference Court, was in consonance with the law laid down by this Court, and accordingly, the compensation determined by the Reference Court, should be restored to the land losers.

11. The issue which falls for our consideration in the present appeal falls in a narrow compass. As already noticed hereinabove, through the impugned notifications, the Gulbarga Development Authority had sought acquisition of 144 acres of land, falling in the revenue estates of villages Rajapur (71 acres) and Badepur (73 acres). As compared to the acquired land, the exemplar sale deed dated 30.12.1983 reflects sale of a small piece of land measuring 2400 square feet (40' x 60' = 2400 square feet). The aforesaid sale transaction (dated 29.12.1983) was executed 1 year 7 months and 17 days after the date of the preliminary notification (dated 13.5.1982).

12. Insofar as the nature of the acquired land of the appellant measuring 8 acres 4 guntas, in survey no.63 of the revenue estate of village Badepur is concerned, reference may be made to the statement recorded by the landowner before

the Reference Court. Chandrashekar recorded his statement before the Reference Court on 16.2.1998. In his statement he asserted, that the acquired land was wet land and was being cultivated by him by taking water from a well situated in survey no.62. It was acknowledged, that the well situated in survey no.62 belonged to his uncle. In his cross-examination, he accepted that he used to grow "jawar" and "togri" in the land. He also affirmed that vegetables were also grown by him on the land in question. He produced 8 bills pertaining to sale of crops grown on the land. In the pleadings filed before this Court, it was sought to be asserted, that the Sedam Gulbarga Highway is located on the northern side of the acquired land. It is also mentioned, that a ring road exists on the southern side of the acquired land. It is also pointed out, that there are some approved residential layouts, in the close vicinity of the acquired land. Based on the statement of the land loser, it is natural to infer, that the appellants' land was undeveloped agricultural land at time of its acquisition. Furthermore, the appellants land did not have any independent irrigation facilities. Since it is not the case of the appellants, that any layout or road abuts or passes through the appellants' land, it is natural to conclude, that the appellants' land was surrounded on all sides, by similar lands.

13. During the course of hearing, learned counsel for the appellants did not invite our attention to any evidence on the basis of which we could ascertain the nature of the land, which was the subject matter of the sale dated 30.12.1983. From the dimensions of land (40' x 60'), it emerges that the same was a developed site meant for use for some urban purpose. The High Court has recorded, that the exemplar sale is of a developed site. The said factual position is not a subject matter of challenge at the hands of the appellants. We shall therefore assume, that the exemplar sale deed was in respect of a developed site measuring 2400 square feet.

14. From the afore-stated deliberations, the following inferences emerge:

Firstly, that the acquired land is a large chunk of land measuring 144 acres.

Secondly, the acquired land owned by the appellants was un-irrigated agricultural land, surrounded on all sides by similar lands, and as such, unquestionably undeveloped land.

Thirdly, the exemplar sale deed dated 30.12.1983, was in respect of a small piece of land measuring 2400 square feet (40' x 60' = 2400 square feet).

Fourthly, the exemplar sale deed dated 30.12.1983, constituted sale of a developed site.

And fifthly, the exemplar sale deed dated 30.12.1983, was executed 1 year 7 months and 17 days, after the publication of the preliminary notification on 13.5.1982.

15. The present controversy calls for our determination on the quantum of the deductions to be applied, to the market value assessed on the basis of the exemplar sale transaction, so as to ascertain the fair compensation payable to the land loser. The only factual parameters to be kept in mind are, the factual inferences drawn in the foregoing paragraph. On the issue in hand, we shall endeavor to draw our conclusions from past precedent. In the process of consideration hereinafter, we have referred to all the judgments relied upon by the learned counsel for the appellants, as well as, some recent judgments on the issue concerned:

(i) In *Brigadier Sahib Singh Kalha & Ors. v. Amritsar Improvement Trust & Ors.,* (1982) 1 SCC 419, this Court opined, that where a large area of undeveloped land is acquired, provision has to be made for providing minimum amenities of town-life. Accordingly it was held, that a deduction of 20 percent of the total acquired land should be made for land over which infrastructure has to be raised (space for roads etc.). Apart from the aforesaid, it was also held, that the cost of raising infrastructure itself (like roads, electricity, water,

underground drainage, etc.) need also to be taken into consideration. To cover the cost component, for raising infrastructure, the Court held, that the deduction to be applied would range between 20 percent to 33 percent. Commutatively viewed, it was held, that deductions would range between 40 and 53 percent.

(ii) Noticing the determination rendered by this Court in *Brigadier Sahib Singh Kalha's* case (supra), this Court in *Administrator General of West Bengal vs. Collector, Varanasi,* (1988) 2 SCC 150, upheld deduction of 40 percent (from the acquired land) as had been applied by the High Court.

(iii) In *Chimanlal Hargovinddas vs. Special Land Acquisition Officer, Poona & Anr.,* (1988) 3 SCC 751, while referring to the factors which ought to be taken into consideration while determining the market value of acquired land, it was observed, that a smaller plot was within the reach of many, whereas for a larger block of land there was implicit disadvantages. As a matter of illustration it was mentioned, that a large block of land would first have to be developed by preparing its lay out plan. Thereafter, it would require carving out roads, leaving open spaces, plotting out smaller plots, waiting for purchasers (during which the invested money would remain blocked). Likewise, it was pointed out, that there would be other known hazards of an entrepreneur. Based on the aforesaid likely disadvantages it was held, that these factors could be discounted by making deductions by way of allowance at an appropriate rate, ranging from 20 percent to 50 percent. These deductions, according to the Court, would account for land required to be set apart for developmental activities. It was also sought to be clarified, that the applied deduction would depend on, whether the acquired land was rural or urban, whether building activity was picking up or was stagnant, whether the waiting period during which the capital would remain locked would be short or long; and other like entrepreneurial hazards.

(iv) In *Land Acquisition Officer Revenue Divisional Officer, Chottor vs. L. Kamalamma (Smt.) Dead by LRs. & Ors.,* (1998) 2 SCC 385, this Court arrived at the conclusion, that a deduction of 40 percent as developmental cost from the market value determined by the Reference Court would be just and proper for ascertaining the compensation payable to the landowner.

(v) In *Kasturi and others vs. State of Haryana,* (2003) 1 SCC 354, this court opined, that in respect of agricultural land or undeveloped land which has potential value for housing or commercial purposes, normally 1/3rd amount of compensation should be deducted, depending upon the location, extent of expenditure involved for development, the area required for roads and other civic amenities etc. It was also opined, that appropriate deductions could be made for making plots for residential and commercial purposes. It was sought to be explained, that the acquired land may be plain or uneven, the soil of the acquired land may be soft and hard, the acquired land may have a hillock or may be low lying or may have deep ditches. Accordingly, it was pointed out, that expenses involved for development would vary keeping in mind the facts and circumstances of each case. In *Kasturi's* case (supra) it was held, that normal deductions on account of development would be 1/3rd of the amount of compensation. It was however clarified that in some cases the deduction could be more than 1/3rd and in other cases even less than 1/3rd.

(vi) Following the decision rendered by this Court in *Brigadier Sahib Singh Kalha's* case, this Court in *Land Acquisition Officer, Kammarapally Village, Nizamabad District, A.P. vs. Nookala Rajamallu & Ors.,* (2003) 12 SCC 334, applied a deduction of 53 percent, to determine the compensation payable to the landowners.

(vii) In *V. Hanumantha Reddy (Dead) by LRs. vs. Land Acquisition Officer & Mandal R. Officer,* (2003) 12 SCC 642, this Court examined the propriety of compensation determined

as payable to the land loser by the High Court. The Reference Court had determined the market value of developed land at Rs.78 per sq. yard. The Reference Court then applied a deduction of 1/4th to arrive at Rs.58 per sq. yard as the compensation payable. The High Court however concluded, that compensation at Rs.30 per sq. yard would be appropriate (this would mean a deduction of approximately 37 percent, as against market value of developed land at Rs.78 per sq. yard). This Court having made a reference to *Kasturi's* case (supra) did not find any infirmity in the order passed by the High Court. In other words, deduction of 37 percent was approved by this Court.

(viii) In para 21 of the judgment in *Viluben Jhalejar Contractor (Dead) by LRs. vs. State of Gujarat,* (2005) 4 SCC 789, it was held that for development, i.e., preparation of lay out plans, carving out roads, leaving open spaces, plotting out smaller plots, waiting for purchasers, and on account of other hazards of an entrepreneur, the deduction could range between 20 percent and 50 percent of the total market price of the exemplar land.

(ix) In *Atma Singh (Dead) through LRs & Ors. vs. State of Haryana and Anr.,* (2008) 2 SCC 568, this Court after making a reference to a number of decisions on the point, and after taking into consideration the fact that the exemplar sale transaction was of a smaller piece of land concluded, that deductions of 20 percent onwards, depending on the facts and circumstances of each case could be made.

(x) In *Lal Chand vs. Union of India & Anr.,* (2009) 15 SCC 769, it was held that to determine the market value of a large tract of undeveloped agricultural land (with potential for development), with reference to sale price of small developed plot(s), deductions varying between 20 percent to 75 percent of the price of such developed plot(s) could be made.

(xi) In *Subh Ram & Ors. vs. State of Haryana & Anr.,*

(2010) 1 SCC 444, this Court opined, that in cases where the valuation of a large area of agricultural or undeveloped land was to be determined on the basis of the sale price of a small developed plot, standard deductions ought to be 1/3rd towards infrastructure space (areas to be left out for roads etc.) and 1/3rd towards infrastructural developmental costs (costs for raising infrastructure), i.e., in all 2/3rd (or 67 percent).

(xii) In *Andhra Pradesh Housing Board vs. K. Manohar Reddy & Ors.,* (2010) 12 SCC 707, having examined the existing case law on the point it was concluded, that deductions on account of development could vary between 20 percent to 75 percent. In the peculiar facts of the case a deduction of 1/3rd towards development charges was made from the awarded amount to determine the compensation payable.

(xiii) In *Special Land Acquisition Officer & Anr. vs. M.K. Rafiq Sahib,* (2011) 7 SCC 714, this Court after having concluded, that the land which was subject matter of acquisition was not agricultural land for all practical purposes and no agricultural activities could be carried out on it, concluded that in order to determine fair compensation, based on a sale transaction of a small piece of developed land (though the acquired land was a large chunk), the deduction made by the High Court at 50 percent, ought to be increased to 60 percent.

16. Based on the precedents on the issue referred to above it is seen, that as the legal proposition on the point crystallized, this Court divided the quantum of deductions (to be made from the market value determined on the basis of the developed exemplar transaction) on account of development into two components. Firstly, space/area which would have to be left out, for providing indispensable amenities like formation of roads and adjoining pavements, laying of sewers and rain/flood water drains, overhead water tanks and water lines, water and effluent treatment plants, electricity sub-stations, electricity lines and street lights, telecommunication towers etc. Besides the aforesaid, land has also to be kept apart for parks, gardens

and playgrounds. Additionally, development includes provision of civic amenities like educational institutions, dispensaries and hospitals, police stations, petrol pumps etc. This "first component", may conveniently be referred to as deductions for keeping aside area/space for providing developmental infrastructure.

Secondly, deduction has to be made for the expenditure/expense which is likely to be incurred in providing and raising the infrastructure and civic amenities referred to above, including costs for levelling hillocks and filling up low lying lands and ditches, plotting out smaller plots and the like. This "second component" may conveniently be referred to as deductions for developmental expenditure/expense.

17. It is essential to earmark appropriate deductions, out of the market value of an exemplar land, for each of the two components referred to above. This would be the first step towards balancing the differential factors. This would pave the way for determining the market value of the undeveloped acquired land on the basis of market value of the developed exemplar land. As far back as in 1982, this Court in Brigadier Sahib Singh Kalha's case (supra) held, that the permissible deduction could be upto 53 percent. This deduction was divided by the Court into two components. For the "first component" referred to in the foregoing paragraph, it was held that a deduction of 20 percent should be made. For the "second component", it was held that the deduction could range between 20 to 33 percent. It is therefore apparent, that a deduction of upto 53 percent was the norm laid down by the Court as far back as in 1982. The aforesaid norm remained unchanged for a long duration of time, even though, keeping in mind the peculiar facts and circumstances emerging from case to case, different deductions were applied by this Court to balance the differential factors between the exemplar land and the acquired land. Recently however, this Court has approved a higher component of deduction. In 2009 in *Lal Chand's* case (supra) and in 2010 in *Andhra Pradesh Housing Board's* case (supra),

it has been held, that while applying the sale consideration of a small piece of developed land, to determine the market value of a large tract of undeveloped acquired land, deductions between 20 to 75 percent could be made. But in 2009 in *Subh Ram's* case (supra), this Court restricted deductions on account of the "first component" of development, as also, on account of the "second component" of development to 33-1/3 percent each. The aforesaid deductions would roughly amount to 67 percent of the component of the sale consideration of the exemplar sale transaction(s).

18. Having given our thoughtful consideration to the analysis of the legal position referred to in the foregoing two paragraphs, we are of the view that there is no discrepancy on the issue, in the recent judgments of this Court. In our view, for the "first component" under the head of "development", deduction of 33-1/3 percent can be made. Likewise, for the "second component" under the head of "development" a further deduction of 33-1/3 percent can additionally be made. The facts and circumstances of each case would determine the actual component of deduction, for each of the two components. Yet under the head of "development", the applied deduction should not exceed 67 percent. That should be treated as the upper benchmark. This would mean, that even if deduction under one or the other of the two components exceeds 33-1/3 percent, the two components under the head of "development" put together, should not exceed the upper benchmark.

19. In *Lal Chand's* case (supra) and in *Andhra Pradesh Housing Board's* case (supra), this Court expressed the upper limit of permissible deductions as 75 percent. Deductions upto 67 percent can be made under the head of "development". Under what head then, would the remaining component of deductions fall? Further deductions would obviously pertain to considerations other than the head of "development". Illustratively a deduction could be made keeping in mind the waiting period required to raise infrastructure, as also, the

waiting period for sale of developed plots and or built-up areas. This nature of deduction may be placed under the head "waiting period". Illustratively again, deductions could also be made in cases where the exemplar sale transaction, is of a date subsequent to the publication of the preliminary notification. This nature of deduction may be placed under the head "de-escalation". Likewise, deductions may be made for a variety of other causes which may arise in different cases. It is however necessary for us to conclude, in the backdrop of the precedents on the issue, that all deductions should not cumulatively exceed the upper benchmark of 75 percent. A deduction beyond 75 percent would give the impression of being lopsided, or contextually unreal, since the land loser would seemingly get paid for only 25 percent of his land. This impression is unjustified, because deductions are made out of the market value of developed land, whereas, the acquired land is undeveloped (or not fully developed). Differences between the nature of the exemplar land and the acquired land, it should be remembered, is the reason/cause for applying deductions. Another aspect of this matter must also be kept in mind. Market value based on an exemplar sale, from which a deduction in excess of 75 percent has to be made, would not be a relevant sale transaction to be taken into consideration, for determining the compensation of the acquired land. In such a situation the exemplar land and the acquired land would be uncomparable, and therefore, there would be no question of applying the market value of one (exemplar sale) to determine the compensation payable for the other (acquired land). It however needs to be clarified, that even though on account of developmental activities (under the head "development"), we have specified the upper benchmark of 67 percent, it would seem, that for the remaining deduction(s), the permissible range would be upto 8 percent. That however is not the correct position. The range of deductions, other than under the head "development", would depend on the facts and circumstances of each case. Such deductions, may even exceed 8 percent, but that would be so only, where deductions for developmental

activities (under the head "development") is less than 67 percent, i.e., as long as the cumulative deductions do not cross the upper benchmark of 75 percent. We therefore hold, that the range for deductions, for issues other than developmental costs, would depend on the facts and circumstances of each case, they may be 8 percent, or even the double thereof, or even further more, as long as, cumulatively all deductions put together do not exceed the upper benchmark of 75 percent.

20. Before applying deductions for ascertaining the market value of the undeveloped acquired land, it would be necessary to classify the nature of the exemplar land, as also, the acquired land. This would constitute the second step in the process of determination of the correct quantum of deductions. The lands under reference may be totally undeveloped, partially developed, substantially developed or fully developed. In arriving at an appropriate classification of the nature of the lands which are to be compared, reference may be made to the developmental activities referred to by us in connection with the "first component", as also, the "second component" (in paragraph 17 above). The presence (or absence) of one or more of the components of development, would lead to an appropriate classification of the exemplar land, and the acquired land. Comparison of the classifications thus arrived, would depict the difference in terms of development, between the exemplar land and the acquired land. This exercise would lead to the final step. In the final step, the absence and presence of developmental components, based on such comparison, would constitute the basis for arriving at an appropriate percentage of deduction, necessary to balance the differential factors between the exemplar land and the acquired land.

21. We shall now apply the aforesaid parameters to determine the veracity of the deductions allowed by the High Court. First and foremost, it has been the contention of the learned counsel for the appellants, that despite strenuous efforts

having been made at the hands of the appellants, the respondents failed to divulge the expenses incurred towards developmental costs on the acquired land in question. Insofar as the instant aspect of the matter is concerned, it is relevant to notice, that the appellant submitted an application dated 4.11.1999 to the Commissioner, Gulbarga Development Authority, requiring him to furnish to the appellant, interalia, certified copies of expenditure incurred in developing survey no.63 of the revenue estate of Badepur. The appellant had specially sought, the expenditure incurred in developing 8 acres 4 guntas of the land, acquired from the appellant. The aforesaid communication was responded to vide a letter dated 16.12.1999, whereby, the Commissioner, Gulbarga Development Authority declined to furnish the certificate sought by the appellant. Based on the said denial at the hands of the respondents, it is sought to be inferred, that no developmental expenses came to be incurred on the acquired land. As such, it was the vehement contention of the learned counsel for the appellants, that it was impermissible for the High Court to have made the deduction of 55 percent from the market value determined on the basis of the exemplar sale deed dated 30.12.1983 under the head of "development". In fact, based on the aforesaid inference, it was contended, that no deduction whatsoever was permissible under the head. Alternatively it was contended, that the deduction of 33 percent applied by the Reference Court, would have been appropriate in the facts and circumstances of the case.

22. We have given our thoughtful consideration to the contention advanced at the hands of the learned counsel for the appellants, as has been noticed in the foregoing paragraph. The material sought by the appellant from the Commissioner, Gulbarga Development Authority was irrelevant for the determination of the percentage of deduction to be applied. It is the overall developmental cost, incurred (or incurrable) on the entire acquired land which has to be apportioned amongst the landholders. Illustratively, in a given case, the developmental

cost on a small piece of land, may be far in excess of the cost of the land. That would however not mean, that the landowner in question, would not be entitled to compensation. Illustratively again, if no specific developmental activity is carried out on a particular piece of land, it would be improper to conclude, that no deduction should be made while determining the compensation payable to such landowner, even though the acquired land was undeveloped. What the appellant ought to have ascertained, is the developmental cost (based on the components referred to hereinabove), on the entire acquired land. In such a situation, if the entire developmental activity had been completed, it would be permissible to proportionately apportion the same amongst land holders. Such a situation may not arise in actuality. In most cases development is a continuous and ongoing process, which would be completed over a long stretch of time extending in some cases to a decade or even more. We therefore find no merit in the instant contention advanced by the learned counsel for the appellants, that no deduction should be made in this case under the head of "development" because no expense is shown to have been incurred for development of the land acquired from the appellants.

23. In the absence of the actual expenditure incurred towards development, we shall now endeavor to determine whether the deduction of 55 percent allowed by the High Court towards development of the land, out of the market value determined on the basis of the exemplar sale deed, was just and proper. The determination in question, more often than not, has to be in the absence of inputs as were sought by the appellants from the Commissioner, Gulbarga Development Authority. Obviously, deductions can only be based on reasonable and logical norms. Comparison of the state of development of the exemplar land, as also, that of the acquired land can be the only legitimate basis, for a reasonable and logical determination on the issue. Based on the aforesaid foundation, an assessment has to be made by applying the

parameters delineated above. From the inferences drawn by us, on the basis of the statement made by the landowner before the Reference Court in paragraph 12 hereinabove, it is natural to conclude, that the acquired land in question was totally undeveloped. Likewise, even though the High Court had described the exemplar sale transaction as a developed site, the appellants have not disputed the same. We shall therefore proceed on the assumption, that the exemplar sale deed was a fully developed site. In such a situation, keeping in mind the parameters laid down by this Court, and the conclusions drawn by us, as also the facts of this case, a deduction of upto 67 percent may have been justified, and the same would fall within the parameters laid down by this Court because the exemplar land could be classified as fully developed, whereas, the acquired land was totally undeveloped land. As against the aforesaid, the High Court limited deductions under the head of "development" to 55 percent. We therefore find no justifiable reason to interfere with the same, specially in an appeal preferred by the land loser, more so, because no justifiable basis for the same was brought to our notice.

24. The High Court while determining the compensation payable to the appellants on the basis of the sale deed dated 30.12.1983 applied a further deduction of 10 percent under the head of "de-escalation". The contention advanced at the hands of the learned counsel for the appellants was, that the Reference Court had awarded a deduction at the rate of 3 percent per annum, but the same was arbitrarily increased to 10 percent by the High Court, without recording any reasons for the same. It was submitted, that deduction at the rate of 10 percent on account of de-escalation was arbitrary, and was liable to be set aside.

25. Insofar as the contention advanced at the hands of the learned counsel for the appellants on the issue of deduction under the head of "de-escalation" is concerned, reference may be made to the decision rendered by this Court in *Delhi Development Authority Vs. Bali Ram Sharma,* (2004) 6 SCC

533, wherein this Court found it appropriate to allow annual escalation, at the rate of 10 per cent, in order to determine the market value of the acquired land. In *ONGC Limited Vs. Rameshbhai Jeewanbhai Patel,* (2008) 14 SCC 748, this Court held, that provision of 7.5 percent per annum towards escalation of land costs, was appropriate to arrive at the market value of the acquired land. In *Valliyammal & Anr. Vs. Special Tehsildar (Land Acquisition) & Anr.,* (2011) 8 SCC 91, this Court was of the view that 10 percent per annum escalation in price, should be added to the specified price to determine the market value. It is therefore apparent, that escalation in the market value has been determined by this Court at percentages ranging between 7.5 percent per annum to 10 percent per annum. Even though escalation of market price of land is a question of fact, which should ordinarily to be proved through cogent evidence. Yet, keeping in mind ground realities, and taking judicial notice thereof, we are of the view that land prices are on the rise throughout the country. The outskirts of Gulbarga town are certainly not an exception to the rule. The exemplar sale deed dated 30.12.1983 was executed exactly 1 year 7 months and 17 days after the publication of the preliminary notification on 13.5.1982. Keeping in mind the judgments referred to hereinabove, we are of the view, that no fault can be found with the determination rendered by the High Court in making a deduction of 10 percent under the head of "de-escalation", specially when the period in question exceeded one year (as for annual deductions), by 7 months and 17 days.

26. The only other deduction allowed by the High Court was made towards "waiting period". Under this head the High Court allowed a deduction of 5 percent. During the course of hearing, learned counsel for the appellants did not assail the aforesaid deduction. It is therefore not necessary for us to record any finding in respect of the deduction applied by the High Court under the head of "waiting period". Needless to mention, that "waiting period" has been held to be one of the relevant components for making deductions by this Court in *Chimanlal Hargovinddas vs. Special Land Acquisition Officer, Poona &*

Anr., (1988) 3 SCC 751, *Land Acquisition Officer Revenue Divisional Officer, Chittor vs. L. Kamalamma (Smt.) Dead by LRs. & Ors.,* (1998) 2 SCC 385, and *Atma Singh (Dead) through LRs & Ors. Vs. State of Haryana and Anr.,* (2008) 2 SCC 568. We therefore, also uphold the instant deduction of 5 percent applied by the High Court.

27. Our conclusions in respect of the quantum of permissible deductions have been recorded in paragraphs 18 and 19 hereinabove. While determining the validity of individual deductions, it is also imperative to examine whether or not the total deductions put together fall within legal parameters. We have upheld 55 percent deduction accorded by the High Court towards "development". We have also individually upheld deduction of 10 percent on account of "de-escalation", as also, the deduction of 5 percent on account of "waiting period". Cumulatively these deductions would amount to 70 percent (55+10+5=70). The outer benchmark for deductions laid down by this Court in *Lal Chand's* case (supra) and in Andhra Pradesh Housing Board's case (supra) is 75 percent. Cumulatively also the deduction allowed by the High Court, fall well within the parameters laid down by this Court. We therefore find no infirmity in the quantum of accumulated deductions applied by the High Court during the course of making an assessment of the market value of the acquired land.

28. Based on the aforesaid deductions, the High Court calculated the market value of the acquired land at Rs.67,954/- per acre. Inspite of the above, the market value of the acquired land for disbursement of compensation to the land losers was fixed by the High Court at Rs.65,000/- per acre. A perusal of the judgment rendered by the High Court reveals, that in allowing final compensation at the rate of Rs.65,000/- per acre to the land losers, the High Court had placed reliance on market value fixed by the High Court itself in an earlier case. In this behalf, it would be pertinent to mention, that the High Court had awarded Rs.65,000/- per acre as compensation payable to the land losers, in an earlier process of litigation pertaining to acquisition

of land, out of the same notification (under which the appellants land was acquired). The aforesaid determination was rendered in respect of the land acquired from the revenue estate of Badepur village. While recording its final determination the High Court expressed, that it was desirable to arrive at a uniform value, specially when the land in question came to be acquired out of the same process of acquisition, and had not been shown to be any different from the appellants land. We affirm the aforesaid view expressed by the High Court. This sentiment expressed by the High Court should never be breached. Consistency in judicial determination is of utmost importance. Since we are informed that the judgment relied upon by the High Court has attained finality, we are of the view, that the final compensation determined by the High Court at Rs.65,000/- per acre, was fully justified.

29. The conclusions drawn by us hereinabove, apply equally to Civil Appeal nos.8899-8901 of 2011. In this behalf it would also be pertinent to mention, that the conclusions drawn by us pertain to acquisition of land falling in the revenue estate of village Badepur. In so far as the instant set of appeals are concerned, they pertain to land acquired form the revenue estate of village Rajapur. The High Court, while making a reference to the land acquired from village Rajapur, noticed that village Rajapur had a lower market value as it was farther from the nerve centre of Gulbarga town as compared to village Badepur. As such, we are of the view that in the facts and circumstances of the present case, it would be just and appropriate to affirm the compensation determined by the High Court at Rs.65,000/- per acre, even for the land acquired from the revenue estate of village Rajapur.

30. For the reasons recorded hereinabove, we find no cause or justification to interfere in the impugned order passed by the High Court.

31. Dismissed.

N.J. Appeals dismissed.

K.N. GOVINDAN KUTTY MENON
v.
C.D. SHAJI
(Civil Appeal No. 10209 of 2011)

NOVEMBER 28, 2011

[P. SATHASIVAM AND J. CHELAMESWAR, JJ.]

Legal Services Authorities Act, 1987 – s.21 – Interpretation of – When a criminal case filed u/s.138 of the Negotiable Instruments Act, referred to by the Magistrate Court to Lok Adalat is settled by the parties and an award is passed recording the settlement, can it be considered as a decree of a civil court and thus executable – Held: In view of the unambiguous language of s.21 of the Act, every award of the Lok Adalat shall be deemed to be a decree of a civil court and as such it is executable by that Court – The Act does not make out any such distinction between the reference made by a civil court and criminal court – There is no restriction on the power of the Lok Adalat to pass an award based on the compromise arrived at between the parties in respect of cases referred to by various Courts (both civil and criminal), Tribunals, Family court, Rent Control Court, Consumer Redressal Forum, Motor Accidents Claims Tribunal and other Forums of similar nature – Even if a matter is referred by a criminal court u/s.138 of the Negotiable Instruments Act, by virtue of the deeming provisions, the award passed by the Lok Adalat based on a compromise has to be treated as a decree capable of execution by a civil court – Negotiable Instruments Act, 1881– s.138.

An important question as to the interpretation of Section 21 of the Legal Services Authorities Act, 1987 arose for consideration in the instant appeal. The question posed was that when a criminal case filed under Section 138 of the Negotiable Instruments Act, 1881

referred to by the Magistrate Court to Lok Adalat is settled by the parties and an award is passed recording the settlement, can it be considered as a decree of a civil court and thus executable.

Allowing the appeal, the Court

HELD: 1.1. The Legal Services Authorities Act, 1987 empowers Legal Services Authorities at the District, State and National levels, and the different committees to organize Lok Adalats to resolve pending and pre-litigation disputes. It provides for permanent Lok Adalats to settle disputes involving public utility services. Under the Act, "legal services" have a meaning that includes rendering of service in the conduct of any court-annexed proceedings or proceedings before any authority, tribunal and so on, and giving advice on legal matters. The Act provides for a machinery to ensure access to justice to all through the institutions of legal services authorities and committees. These institutions are manned by Judges and judicial officers. Parliament entrusted the judiciary with the task of implementing the provisions of the Act. [Para 7] [454-G-H; 455-A-E]

1.2. Section 21 of the Act contemplates a deeming provision, hence, it is a legal fiction that the "award" of the Lok Adalat is a decree of a civil court. In the case on hand, the Courts below erred in holding that only if the matter was one which was referred by a civil court it could be a decree and if the matter was referred by a criminal court it will only be an order of the criminal court and not a decree under Section 21 of the Act. The Act does not make out any such distinction between the reference made by a civil court and criminal court. There is no restriction on the power of Lok Adalat to pass an award based on the compromise arrived at between the parties in a case referred by a criminal court under Section 138 of the N.I. Act, and by virtue of the deeming provision it

has to be treated as a decree capable of execution by a civil court. [Paras 8, 14] [455-F; 460-G-H; 461-A-B]

1.3. The "award" of the Lok Adalat does not mean any independent verdict or opinion arrived at by any decision making process. The making of the award is merely an administrative act of incorporating the terms of settlement or compromise agreed by the parties in the presence of the Lok Adalat, in the form of an executable order under the signature and seal of the Lok Adalat. [Para 15] [461-C-D]

1.4. In conclusion, the following propositions emerge:

a) In view of the unambiguous language of Section 21 of the Act, every award of the Lok Adalat shall be deemed to be a decree of a civil court and as such it is executable by that Court.

b) The Act does not make out any such distinction between the reference made by a civil court and criminal court.

c) There is no restriction on the power of the Lok Adalat to pass an award based on the compromise arrived at between the parties in respect of cases referred to by various Courts (both civil and criminal), Tribunals, Family court, Rent Control Court, Consumer Redressal Forum, Motor Accidents Claims Tribunal and other Forums of similar nature.

d) Even if a matter is referred by a criminal court under Section 138 of the Negotiable Instruments Act, 1881 and by virtue of the deeming provisions, the award passed by the Lok Adalat based on a compromise has to be treated as a decree capable of execution by a civil court. [Para 17] [461-F-H; 462-A-C]

Subhash Narasappa Mangrule (M/S) and Others vs. Sidramappa Jagdevappa Unnad **2009 (3) Mh.L.J. 857 and** *M/s Valarmathi Oil Industries & Anr. vs. M/s Saradhi Ginning Factory* **AIR 2009 Madras 180 – approved.**

State of Punjab & Anr. vs. *Jalour Singh and Ors*. **(2008) 2 SCC 660: 2008 (1) SCR 922;** ***B.P.*** *Moideen Sevamandir and Anr*. v. *A.M. Kutty Hassan* **(2009) 2 SCC 198: 2008 (17) SCR 905 and** *P.T. Thomas* vs. *Thomas Job* **(2005) 6 SCC 478: 2005 (2) Suppl. SCR 20 – relied on.**

Bhavnagar University vs. *Palitana Sugar Mill* (P) Ltd. and Others **(2003) 2 SCC 111: 2002 (4) Suppl. SCR 517 and** *Ittianam and Others* vs. *Cherichi @ Padmini* **(2010) 8 SCC 612: 2010 (8) SCR 1135 – referred to.**

Case Law Reference:

2009 (3) Mh.L.J. 857	**approved**	**Paras 10,14**
AIR 2009 Madras 180	**approved**	**Paras 11, 14**
2002 (4) Suppl. SCR 517	**referred to**	**Para 12**
2010 (8) SCR 1135	**referred to**	**Para 13**
2008 (1) SCR 922	**relied on**	**Para 15**
2008 (17) SCR 905	**relied on**	**Para 15**
2005 (2) Suppl. SCR 20	**relied on**	**Para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10209 of 2011.

From the Judgment & Order dated 24.11.2009 of the High Court of Kerala at Ernakulam in WP (C) No. 33013 of 2009.

Prashanth P., Prachi Bajpai, S.K. Balachandran, T. Harish Kumar for the Appellant.

V. Giri (AC) for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal raises an important question as to the interpretation of Section 21 of the Legal Services Authorities Act, 1987 (in short 'the Act'). The question posed for consideration is that when a criminal case filed under Section 138 of the Negotiable Instruments Act, 1881 referred to by the Magistrate Court to Lok Adalat is settled by the parties and an award is passed recording the settlement, can it be considered as a decree of a civil court and thus executable?

3. This appeal is directed against the final judgment and order dated 24.11.2009 passed by the High Court of Kerala at Ernakulam in Writ Petition (C) No. 33013 of 2009 whereby the High Court dismissed the petition filed by the appellant herein.

4. **Brief facts:**

(a) The appellant herein filed a complaint being C.C. No. 1216 of 2007 before the Judicial Ist Class Magistrate Court No.1, Ernakulam against the respondent herein under Section 138 of the Negotiable Instruments Act, 1881 (in short 'the N.I. Act'). The Magistrate referred the said complaint to the Ernakulam District Legal Service Authority for trying the case for settlement between the parties in the Lok Adalat.

(b) On 08.05.2009, both parties appeared before the Lok Adalat and the matter was settled and an award was passed on the same day. As per the award, out of Rs. 6,000/-, the respondent herein paid Rs.500/- on the same day and agreed to pay the balance amount of Rs.5,500/- in five equal instalments of Rs.1,100/- per month on or before the 10th day of every month starting from June, 2009 and, in case of default, the appellant herein can recover the balance amount due from the respondent in lump sum.

(c) As the respondent did not pay any of the installments as per the settlement, the appellant filed execution petition being E.P. No….. of 2009 in C.C. No. 1216 of 2007 in the Court of Principal Munsiff, Ernakulam for seeking the execution of the award. On 23.09.2009, the Principal Munsiff Judge, Ernakulam dismissed the petition holding that the award passed by the Lok Adalat on reference from the Magistrate Court cannot be construed as a "decree" executable by the civil court.

(d) Aggrieved by the said order, the appellant filed writ petition being Writ Petition (C) No. 33013 of 2009 before the High Court of Kerala. The High Court, vide order dated 24.11.2009, dismissed the writ petition.

(e) Against the said order, the appellant filed the above appeal by way of special leave before this Court.

5. The respondent, though duly served by this Court, has not chosen to contest the matter either by appearing in person or through counsel. Heard Mr. Prashanth P., learned counsel for the appellant and Mr. V. Giri, learned senior counsel, who, on our request, assisted this Court as *amicus curiae*.

6. In order to find out the answer to the question raised, it is useful to refer the Statement of Objects and Reasons and certain provisions of the Act applicable to the question posed before us.

> *"Statement of objects and Reasons.*- Article 39-A of the Constitution provides that the State shall secure that the operation of the legal system promotes justice on the basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

2. With the object of providing free legal aid, Government had, by Resolution dated the 26th September, 1980 appointed the "Committee for Implementing Legal Aid Schemes" (CILAS) under the Chairmanship of Mr. Justice P.N. Bhagwati (as he then was) to monitor and implement legal aid programmes on a uniform basis in all the States and Union territories. CILAS evolved a model scheme for legal aid programme applicable throughout the country by which several legal aid and advice boards have been set up in the States and Union territories. CILAS is funded wholly by grants from the Central Government. The Government is accordingly concerned with the programme of legal aid as it is the implementation of a constitutional mandate. But on a review of the working of the CILAS, certain deficiencies have come to the fore. It is, therefore, felt that it will be desirable to constitute statutory legal service authorities at the National, State and District levels so as to provide for the effective monitoring of legal aid programmes. The Bill provides for the composition of such authorities and for the funding of these authorities by means of grants from the Central Government and the State Governments. Power has been also given to the National Committee and the State Committees to supervise the effective implementation of legal aid schemes.

For some time now, Lok Adalats are being constituted at various places in the country for the disposal, in a summary way and through the process of arbitration and settlement between the parties, of a large number of cases expeditiously and with lesser costs. The institution of Lok Adalats is at present functioning as a voluntary and conciliatory agency without any statutory backing for its decisions. It has proved to be very popular in providing for a speedier system of administration of justice. In view of its growing popularity, there has been a demand for providing a statutory backing to this institution and the

awards given by Lok Adalats. It is felt that such a statutory support would not only reduce the burden of arrears of work in regular Courts, but would also take justice to the door-steps of the poor and the needy and make justice quicker and less expensive."

"2. (aaa) "Court" means a civil, criminal or revenue Court and includes any Tribunal or any other authority constituted under any law for the time being in force, to exercise judicial or quasi-judicial functions;"

"**2(c)** "legal service" includes the rendering of any service in the conduct of any case or other legal proceeding before any Court or other authority or Tribunal and the giving of advice on any legal matter;"

"**2(d)** "Lok Adalat" means a Lok Adalat organized under Chapter VI."

"**21. Award of Lok Adalat**.- (1) Every award of Lok Adalat shall be deemed to be a decree of a Civil Court or, as the case may be, an order of any other Court and where a compromise or settlement has been arrived at, by a Lok Adalat in a case referred to it under sub-section (1) of section 20, the Court-fee paid in such case shall be refunded in the manner provided under the Court-Fee Act, 1870 (7 of 1870).

(2) Every award made by a Lok Adalat shall be final and binding on all the parties to the dispute, and no appeal shall lie to any Court against the award."

7. Free legal aid to the poor and marginalized members of the society is now viewed as a tool to empower them to use the power of the law to advance their rights and interests as citizens and as economic actors. Parliament enacted the Legal Services Authorities Act, 1987 in order to give effect to Article 39-A of the Constitution to extend free legal aid, to ensure that

the legal system promotes justice on the basis of equal opportunity. Those entitled to free legal services are members of the Scheduled Castes and the Scheduled Tribes, women, children, persons with disability, victims of ethnic violence, industrial workmen, persons in custody, and those whose income does not exceed a level set by the government (currently it is Rs 1 lakh a year in most States). The Act empowers Legal Services Authorities at the District, State and National levels, and the different committees to organize Lok Adalats to resolve pending and pre-litigation disputes. It provides for permanent Lok Adalats to settle disputes involving public utility services. Under the Act, "legal services' have a meaning that includes rendering of service in the conduct of any court-annexed proceedings or proceedings before any authority, tribunal and so on, and giving advice on legal matters. Promoting legal literacy and conducing legal awareness programmes are the functions of legal services institutions. The Act provides for a machinery to ensure access to justice to all through the institutions of legal services authorities and committees. These institutions are manned by Judges and judicial officers. Parliament entrusted the judiciary with the task of implementing the provisions of the Act.

8. Section 21 of the Act, which we have extracted above, contemplates a deeming provision, hence, it is a legal fiction that the "award" of the Lok Adalat is a decree of a civil court. In the case on hand, the question posed for consideration before the High Court was that "when a criminal case referred to by the Magistrate to a Lok Adalat is settled by the parties and award is passed recording the settlement, can it be considered as a decree of civil court and thus executable by that court?" After highlighting the relevant provisions, namely, Section 21 of the Act, it was contended before the High Court that every award passed by the Lok Adalat has to be deemed to be a decree of a civil court and as such executable by that court. Unfortunately, the said argument was not acceptable by the High Court. On the other hand, the High Court has concluded

that when a criminal case is referred to the Lok Adalat and it is settled at the Lok Adalat, the award passed has to be treated only as an order of that criminal court and it cannot be executed as a decree of the civil court. After saying so, the High Court finally concluded "an award passed by the Lok Adalat on reference of a criminal case by the criminal court as already concluded can only be construed as an order by the criminal court and it is not a decree passed by a civil court" and confirmed the order of the Principal Munsiff who declined the request of the petitioner therein to execute the award passed by the Lok Adalat on reference of a complaint by the criminal court. On going through the Statement of Objects and Reasons, definition of 'Court', 'legal service' as well as Section 21 of the Act, in addition to the reasons given hereunder, we are of the view that the interpretation adopted by the Kerala High Court in the impugned order is erroneous.

9. It is useful to refer some of the judgments of this Court and the High Courts which have a bearing on the present issue.

10. In *Subhash Narasappa Mangrule (M/S) and Others vs. Sidramappa Jagdevappa Unnad,* reported in 2009 (3) Mh.L.J. 857, learned single Judge of the High Court of Bombay, considered an identical question. In that case, on 22.06.2001, the respondent filed a Criminal Complaint being S.C.C. No. 923 of 2001 in the Court of Judicial Magistrate, First Class, Akkalkot under Section 138 of the N.I. Act. Later, the said criminal case was transferred to Lok Adalat. The matter was compromised before the Lok Adalat and an award was passed accordingly for Rs. 4 lakhs. The respondent therein filed a Darkhast proceeding No. 17 of 2006 in the Court of C.J.J.D. for execution of the award passed by the Lok Adalat in the criminal case as there was no compliance of the compromised order/award. The learned C.J.J.D., issued a notice under Order XXVII Rule 22 of the Code of Civil Procedure, 1908 (in short 'the Code'). The petitioner therein raised an objection stating that the Darkhast proceeding is not maintainable as the award

has been passed in criminal case. By order dated 18.07.2007, the learned Civil Judge, (Jr. Division) disposed off the objection and directed to proceed with the execution by the Judgment and order. Aggrieved by the same, the petitioners therein filed a revision before the High Court. After adverting to Section 20 and other provisions of the Act, the learned single Judge has concluded thus:-

> "16. The parties were fully aware that under the Act, the District Legal Services Authority may explore the possibility of holding pre-litigation Lok Adalats in respect of the cheque bouncing cases. The compromise in such cases would be treated as Award having force of a decree. All objections as raised with regard to the execution in view of above statutory provisions itself is rightly rejected. Having settled the matter in Lok Adalat and now after more than 3 years raising such plea is untenable. Having obtained the award from Lok Adalat, the party is not permitted to resile from the same. It attains finality to the dispute between the parties finally and binds all. Therefore, the order in this regard needs no interference.
>
> 17. Once the parties entered into compromise before the Lok Adalat, & at that time no question of any pecuniary jurisdiction raised and or required to be considered by the Lok Adalat. Therefore, once the award is passed, it is executable under C.P.C….."

11. In *M/s Valarmathi Oil Industries & Anr.* vs. *M/s Saradhi Ginning Factory,* AIR 2009 Madras 180, the admitted facts were that C.C. No. 308 of 2006 was taken on file by the learned Judicial Magistrate No. I, Salem on the complaint given by the respondent therein that the cheque was issued by the second petitioner therein on behalf of the first petitioner as partner of the firm, however, the same was dishonoured by the bank due to insufficient funds. According to the respondent, after issuance of the legal notice to the petitioner, the complaint was given under Section 138 of the N. I. Act against the petitioners.

During the pendency of the criminal case, at the request of both the parties, the matter was referred to Lok Adalat for settlement. Both the parties were present before the Lok Adalat and as per the award, they agreed for the settlement and accordingly, the petitioner/accused agreed to pay Rs. 3,75,000/- to the respondent on or before 03.09.2007. It was signed by the respondent/complainant, petitioners/accused and their respective counsel. In view of the compromise arrived at between both the parties, the amount payable was fixed at Rs. 3,75,000/- towards full quit of the claim and that the petitioners therein agreed to pay the above-said amount on or before 03.09.2007 and accordingly, the award was passed and placed before the Judicial Magistrate Court for further orders. When the said award was placed before the learned Judicial Magistrate, by judgment dated 17.10.2007, based on the award held that the petitioners therein guilty and convicted under Section 138 of N.I. Act, accordingly, imposed sentence of one year simple imprisonment and directed the petitioners therein to pay a sum of Rs. 3,75,000/- as compensation to the respondent. Aggrieved by which, the petitioners/accused preferred appeal in C.S.No.167 of 2007 before the Sessions Judge, Salem. Learned Sessions Judge, while suspending the sentence of imprisonment till 16.12.2007, directed the petitioners/accused to deposit the sum of Rs. 3,75,000/- before the trial court and clarified that in case of failure of depositing the amount, the order of suspension of sentence would stand cancelled automatically and the petitioners were also directed to execute a bond for Rs. 10,000/- with two sureties each for the like sum to the satisfaction of the trial court. Aggrieved by the same, the accused preferred criminal revision case before the High Court. It was contended on behalf of the petitioners before the High Court that as per Section 21 of the Act, every award of the Lok Adalat shall be deemed to be a decree of a civil court and, therefore, after the award passed by the Lok Adalat, the respondent/complainant was entitled to execute the award like a decree of the civil court, however, in the instant case, the learned Magistrate, by his Judgment has found the

petitioners guilty under Section 138 of N.I. Act and also convicted and sentenced them to undergo simple imprisonment for one year and to pay the compensation of Rs. 3,75,000/-. The question formulated by the High Court is whether the Magistrate can convict the petitioners/accused under Section 138 of N.I. Act after the award was passed in the Lok Adalat. Learned single Judge, after adverting to Section 21(1) of the Act and the order of the learned Magistrate has concluded as under:-

> "13. Had there been no settlement in the Lok Adalat, the learned Magistrate could have proceeded with the trial and deliver his Judgment, for which, there is no bar. In the instant case, as admitted by both the learned Counsel, there was an award passed in the Lok Adalat, based on the consensus arrived at between the parties. As per the award, the petitioners/accused had to pay Rs. 3,75,000/- to the respondent/complainant on or before 03.09.2007. As it is an award made by Lok Adalat, it is final and binding on the parties to the criminal revision and as contemplated under Section 21(2) of the Act, no appeal shall lie to any court against the award.
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> 14. In such circumstances, the petitioners could have filed the Execution Petition before the appropriate court, seeking the award amount to be paid with interest and costs. In such circumstances, it is clear that the learned Judicial Magistrate became functus officio, to decide the case after the award passed by Lok Adalat, to convict the accused under Section 138 of Negotiable Instruments Act, hence, the impugned order passed by the learned Sessions Judge is also not sustainable in law, however, it is clear that the petitioners/accused herein after having given consent for Lok Adalat award being passed and also the award amount agreed to pay Rs. 3,75,000/- on or before 03.09.2007 to the respondent, have not complied with their undertaking made before the Lok Adalat, which

> cannot be justified. However, the order passed by the learned Judicial Magistrate under Section 138 of Negotiable Instruments Act has to be set aside, in view of the Lok Adalat award passed under Section 20(1)(i)(b), 20(1)(ii) of Legal Services Authorities Act (Act, 39/1987), as the Judicial Magistrate became functus officio and the award is an executable decree in the eye of law, as per Section 21 of the Act."

After arriving at such conclusion, learned single Judge made it clear that as per the award passed by the Lok Adalat, the respondent/complainant is at liberty to file Execution Petition before the appropriate court to get the award amount of Rs. 3,75,000/- reimbursed with subsequent interest and costs, as per procedure known to law.

12. In *Bhavnagar University* vs. *Palitana Sugar Mill* (P) Ltd. and Others, (2003) 2 SCC 111, it was held that the purpose and object of creating a legal fiction in the statute is well known and when a legal fiction is created, it must be given its full effect.

13. In *Ittianam and Others* vs. *Cherichi @ Padmini* (2010) 8 SCC 612, it was held that when the Legislature uses a deeming provision to create a legal fiction, it is always used to achieve a purpose.

14. A statutory support as evidenced in the statement of Objects and reasons of the Act would not only reduce the burden of arrears of work in regular courts, but would also take justice to the door steps of the poor and the needy and make justice quicker and less expensive. In the case on hand, the Courts below erred in holding that only if the matter was one which was referred by a civil court it could be a decree and if the matter was referred by a criminal court it will only be an order of the criminal court and not a decree under Section 21 of the Act. The Act does not make out any such distinction between the reference made by a civil court and criminal court. There is no restriction on the power of Lok Adalat to pass an award

based on the compromise arrived at between the parties in a case referred by a criminal court under Section 138 of the N.I. Act, and by virtue of the deeming provision it has to be treated as a decree capable of execution by a civil court. In this regard, the view taken in *Subhash Narasappa Mangrule (supra)* and *M/s Valarmathi Oil Industries (supra)* supports this contention and we fully accept the same.

15. It is useful to refer the judgment of this Court in *State of Punjab & Anr.* vs. *Jalour Singh and Ors*. (2008) 2 SCC 660. The ratio that decision was that the "award" of the Lok Adalat does not mean any independent verdict or opinion arrived at by any decision making process. The making of the award is merely an administrative act of incorporating the terms of settlement or compromise agreed by the parties in the presence of the Lok Adalat, in the form of an executable order under the signature and seal of the Lok Adalat. This judgment was followed in *B.P. Moideen Sevamandir and Anr*. vs. *A.M. Kutty Hassan* (2009) 2 SCC 198.

16. In *P.T. Thomas* vs. *Thomas Job,* (2005) 6 SCC 478, Lok Adalat, its benefits, Award and its finality has been extensively discussed.

17. From the above discussion, the following propositions emerge:

(1) In view of the unambiguous language of Section 21 of the Act, every award of the Lok Adalat shall be deemed to be a decree of a civil court and as such it is executable by that Court.

(2) The Act does not make out any such distinction between the reference made by a civil court and criminal court.

(3) There is no restriction on the power of the Lok Adalat to pass an award based on the compromise

arrived at between the parties in respect of cases referred to by various Courts (both civil and criminal), Tribunals, Family court, Rent Control Court, Consumer Redressal Forum, Motor Accidents Claims Tribunal and other Forums of similar nature.

(4) Even if a matter is referred by a criminal court under Section 138 of the Negotiable Instruments Act, 1881 and by virtue of the deeming provisions, the award passed by the Lok Adalat based on a compromise has to be treated as a decree capable of execution by a civil court.

18. In view of the above discussion and ultimate conclusion, we set aside the order dated 23.09.2009 passed by the Principal Munsiff Judge in an unnumbered execution petition of 2009 in CC No. 1216 of 2007 and the order of the High Court dated 24.11.2009 in Writ Petition (C) No. 33013 of 2009. Consequently, we direct the execution court to restore the execution petition and to proceed further in accordance with law.

19. Before parting with this case, we would like to record our deep appreciation for the valuable assistance rendered by the learned *amicus curiae*.

20. The civil appeal is allowed. There shall be no order as to costs.

B.B.B. Appeal Allowed.

IQBAL SINGH NARANG & ORS.
v.
VEERAN NARANG
(CRIMINAL APPEAL NO. 2225 OF 2011)

NOVEMBER 30, 2011

[ALTAMAS KABIR AND SURINDER SINGH NIJJAR, JJ.]

Penal Code, 1860 – ss. 193, 420, 120-B – Criminal complaint by respondent against appellants u/ss. 193, 420, 120-B for allegedly making false statements in judicial proceedings before the Rent Controller – Application containing the aforesaid allegation also filed before the Rent Controller in Rent Application filed by appellant No.1 – Rent Controller disposed of the application holding that the complaint filed u/ss. 193, 420, 425 was yet to be decided and there was, therefore, no question of initiation of any action against the appellant on the basis of the said complaint – Issuance of summons against appellants by Judicial Magistrate to face trial u/ss. 193/120-B – Subsequently, the appellants filed application u/s. 482 Cr.P.C. for quashing of the complaint filed by the respondent u/ss. 193/120-B IPC pending before the Judicial Magistrate as also the Summoning Order – Dismissal of, by the High Court on the ground that the Rent Controller is not a Court within the meaning of s. 195(1) Cr.P.C. and that a private complaint would be maintainable in case of false evidence being adduced or recorded before the Rent Controller – Held: Rent Controller, being a creature of Statute, has to act within the four corners of the Statute and could exercise only such powers as had been vested in him by the Statute – Though the Rent Controller discharges quasi-judicial functions, he is not a Court, as understood in the conventional sense and he cannot, therefore, make a complaint u/s. 340 Cr.P.C. – Thus, a complaint could be made by a private party in the

proceedings – There is no reason to quash the proceedings in which the appellants were summoned – East Punjab Urban Rent Restriction Act, 1949 – s. 13.

Prakash H. Jain Vs. Marie Fernandes **(2003) 8 SCC 431;** *Om Prakash Vs. Ashwani Kumar Bassi* **(2010) 9 SCC 183 – relied on.**

Ram Krishan Vs. Santra Devi **1986 (1) P&H (DB) PLR 567;** *Ishwar Chand Gupta Vs. Chander Shekhar & Anr.* **(2001) 1 RCR Criminal 171 – referred to.**

Case Law Reference:

1986 (1) P&H (DB) PLR 567	**Referred to**	**Para 7**
(2001) 1 RCR Criminal 171	**Approved**	**Para 10**
(2003) 8 SCC 431	**Relied on**	**Para 12**
(2010) 9 SCC 183	**Relied on**	**Para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2225 of 2011.

From the Judgment & Order dated 23.7.2007 of the Hig Court of Punjab & Haryana at Chandigarh in Criminal Misc. No. 32515 of 2006.

Vikas Mehta for the Appellants.

Ujjal Singh, J.P. Singh, Parvinder Singh, R.C. Kaushik for the Respondent.

The Order of the Court was delivered by

O R D E R

ALTAMAS KABIR, J. 1. Leave granted.

2. On 3rd August, 1998, the Appellant No.1 filed an Ejectment Application under Section 13 of the East Punjab Urban Rent Restriction Act, 1949, for eviction of the Respondent from the premises in question.

3. The said Respondent filed Crl. RBT Complaint No.283/19.8.2003/2.8.2005 against the Appellants before the Illaqa Magistrate, under Sections 193, 420, 120-B IPC, for allegedly making false statements in judicial proceedings before the Rent Controller, Amritsar. The statement of the Complainant/ Respondent was recorded before the Chief Judicial Magistrate. The Complainant/ Respondent also filed an application under Sections 193/420/425 IPC before the Rent Controller-cum-J.M. First Class, Amritsar, in Rent Application No.111 of 1998, which had been filed by the Appellant No.1, in which allegations had been made that the Appellant No.1 had made false statements therein. By order dated 14th March, 2005, the Rent Controller disposed of the application filed by the Complainant/ Respondent in the rent proceedings upon holding that the complaint filed under Sections 193, 420, 425 IPC was yet to be decided and there was, therefore, no question of initiation of any action against the Appellant on the basis of the complaint filed by the Complainant/Respondent. According to the Appellant, since the Respondent had not challenged the order of the Rent Controller on the Application dated 14th March, 2005, the same had attained finality.

4. Appearing in support of the Appeal, Ms. Indu Malhotra, learned Senior Advocate, contended that it was obvious from the number of applications moved by the Respondent before the Rent Controller that the same was merely a ploy to delay the proceedings and cause prejudice to the Appellant No.1. The facts reveal that the Respondent had delayed the rent proceedings, which are pending since 1998, by filing vexatious and frivolous applications.

5. On 20th April, 2006, the Judicial Magistrate, First Class, Amritsar, after observing that no offence under Section 420 IPC had been made out against the accused, issued summons against them to face trial under Section 193 read with Section 120-B IPC.

6. Ms. Malhotra submitted that the Appellant Nos.1 and 2 appeared before the Judicial Magistrate, First Class, Amritsar,

and were released on bail vide order dated 16th May, 2006. Subsequently, the Appellants filed Crl. Misc. No.32515 of 2006 before the Punjab & Haryana High Court under Section 482 of the Code of Criminal Procedure, 1973, for quashing of the complaint filed by the Respondent under Sections 193/120-B IPC pending before the Judicial Magistrate, First Class, Amritsar, as also the Summoning Order dated 24th April, 2006. By its impugned judgment and order, the High Court dismissed Crl. Misc. No.32515 of 2006 filed by the Appellants on the ground that the Rent Controller is not a Court within the meaning of Section 195(1) Cr.P.C. and held that a private complaint would be maintainable in case of false evidence being adduced or recorded before the Rent Controller. Ms. Malhotra submitted that the High Court had failed to consider the fact that the ejectment proceedings initiated by the Appellant No.1 were still pending before the Rent Controller and a similar application had been dismissed on the ground that the proceedings were still going on and that the Court had not formed any opinion in the matter.

7. Having held that the Rent Controller is not a Court within the meaning of Section 195(1) Cr.P.C., the learned Single Judge also held that private complaints would be maintainable in case of allegations of false evidence before the Rent Controller. The learned Judge observed that the concept of the Rent Controller being a Court was erroneous and hence the decision of the Division Bench of the High Court in *Ram Krishan Vs. Santra Devi* [1986 (1) P&H (DB) PLR 567] was *per incuriam.*

8. On the basis of the aforesaid findings, the High Court chose not to interfere with the order passed by the learned Magistrate taking cognizance of the offence alleged to have been committed by the Appellants under Section 193/120-B IPC and dismissed the Misc. Case No.32515-M of 2006 filed by the Appellants herein.

9. On behalf of the Respondent it was urged that the order of the learned Single Judge, impugned in this appeal, was

based on a judgment of this Court and hence it did not suffer from any irregularity or illegality. It was also urged that since the Rent Controller was not a Court, a complaint under Section 195 Cr.P.C. in respect of false statements made before it, would be maintainable at the instance of a private party, notwithstanding the bar to filing of such complaint, except on a complaint in writing of that Court, by such officer of the Court, as that Court may authorize in writing in such regard. Learned counsel submitted that no interference was called for with the order of the High Court and the appeal was liable to be dismissed.

10. The question which, therefore, arises for consideration in this appeal is that even if the Rent Controller is held not to be a "Court", whether any private complaint would be maintainable in respect of statements alleged to have been falsely made before it. While disposing of the Revisional Application filed by the Appellants, the learned Single Judge of the Punjab & Haryana High Court took note of a judgment of the said Court in *Ishwar Chand Gupta Vs. Chander Shekhar & Anr.* [(2001) 1 RCR Criminal 171], in which it had been held that the Rent Controller was not a Court and that a complaint would lie under Section 195 Cr.P.C. in respect of statement made before the Rent Controller at the instance of a private party.

11. The aforesaid question has fallen for consideration in several cases before this Court and the consistent view which has been taken is that the Rent Controller, being a creature of Statute, has to act within the four corners of the Statute and could exercise only such powers as had been vested in him by the Statute.

12. In the decision rendered by this Court in *Prakash H. Jain Vs. Marie Fernandes* [(2003) 8 SCC 431], this Court held that the Competent Authority under the Maharashtra Rent Control Act, 1999, is at best a statutory authority created for a definite purpose and to exercise powers in a quasi-judicial manner, but its powers were strictly circumscribed by the very

statutory provisions which conferred upon it those powers and the same could be exercised in the manner provided therefor and subject to such conditions and limitations stipulated by the very provisions of law under which the Competent Authority itself was created. The aforesaid observations were made by this Court in the context of the powers conferred on the Competent Authority appointed under the Maharashtra Rent Control Act, 1999, which included powers to condone the delay in the filing of the proceedings. It is in such circumstances that it was observed by this Court that the High Court had rejected the submissions made on behalf of the Appellant therein that since it had all the trappings of a Court, the Competent Authority was a Court in the eye of law and consequently possessed inherent powers to condone the delay. The High Court also rejected the said prayer upon observing that statutory authorities have to act within the powers conferred on them by Statute.

13. The same views were also expressed by this Court in *Om Prakash Vs. Ashwani Kumar Bassi* [(2010) 9 SCC 183], wherein it was held that in the absence of a specific power being vested in the Rent Controller, it being a creature of statute, it could only act in terms of the powers vested in it by the Statute and could not, therefore, entertain an application under Section 5 of the Limitation Act for condonation of delay, since the Statute did not vest him with such power.

14. The aforesaid decisions of this Court establish that though the Rent Controller discharges quasi-judicial functions, he is not a Court, as understood in the conventional sense and he cannot, therefore, make a complaint under Section 340 Cr.P.C. Consequently, as held by the High Court, a complaint could be made by a private party in the proceedings.

15. In addition to the above, we also see no reason to quash the proceedings in which the Appellants herein had been summoned under Section 193/420/120-B IPC. The Appeal is, accordingly, dismissed. The interim orders passed earlier are vacated.

N.J. Appeal dismissed.

STATE OF MADHYA PRADESH & ORS.
v.
SATYAVRATA TARAN
(Civil Appeal No. 10554 of 2011)

DECEMBER 01, 2011

[H.L. DATTU AND CHANDRAMAULI KR. PRASAD, JJ.]

Service Law – Madhya Pradesh Educational Service (Collegiate Branch) Recruitment Rules, 1967 – r.13(5) – Pay scale – Senior scale/selection grade – Grant of – Whether Assistant Professors appointed through different means, modes and sources including emergency appointees in terms of r.13(5), were entitled to claim benefit of the services rendered prior to their regularization for grant of senior/ selection grade pay scales – Held: Voluminous materials produced by both the parties in support of their submissions in the form of schemes, Govt. orders and circulars were not by way of affidavit and the opposite party had no knowledge thereof – Matter therefore remanded to High Court for consideration afresh with liberty to both the parties to place on record all the documents on which they intend to rely in support of their case including the manner, mode and the source of appointment of each of the Assistant Professors – Chief Justice of the High Court to assign all the matters to the Principal Bench itself so that the matters could be finally settled by one Bench, instead of two or three Benches taking different views on the same set of facts and on the questions of law.

The respondent was appointed on the post of Assistant Professor on emergency basis under Rule 13(5) of the Madhya Pradesh Educational Service (Collegiate Branch) Recruitment Rules, 1967 with an express condition of immediate termination of his emergency appointment, without notice, on the

availability of Public Service Commission's panel of selected candidates. Subsequently, the respondent cleared Public Service Commission Examination and consequently, as per the condition of his appointment order, his services were regularized under M.P. Educational Service (Collegiate branch) Recruitment Rules, 1990. In the meantime, the State Government issued a Circular dated 12.02.1992 for addition of period of service rendered by teachers, prior to their service in the present College or University as Assistant Professor for conferring the benefit of senior/ selection grade pay scale but subject to certain conditions. The respondent, being aggrieved by non counting of his period of service rendered as an emergency appointee on the post of Assistant Professor by the State Government for the purpose of granting higher pay scale, filed a Writ Petition before the High Court. The same was allowed. Aggrieved by the same, the State Government preferred Writ Appeal before the High Court. The High Court dismissed the Writ Appeal and directed the State Government to count the period of service rendered by the respondent on emergency appointment for granting the benefit of the senior/selection grade pay scales.

In the instant appeal filed by the State Government, the question which arose for consideration was: Whether the Assistant Professors appointed through different means, modes and sources including emergency appointees in terms of Rule 13(5) of the Madhya Pradesh Educational Service (Collegiate Branch) Recruitment Rules, 1967 were entitled to claim the benefit of the services rendered by them prior to their regularization for grant of senior/selection grade pay scales.

Allowing the appeals, the Court

HELD: 1.1. Voluminous materials were produced in the form of schemes, Govt. orders and circulars produced

by both the counsel appearing for the parties. The documents were not even produced by way of affidavit and since the counsel on the opposite side had no knowledge of those documents, it is fit to remand these matters back to the High Court for fresh disposal in accordance with law. [Para 11] [483-D-E]

1.2. The orders passed by the High Court in all these matters are set aside and the matter is remanded back to the High Court for its fresh consideration in accordance with law. Liberty is given to both the parties to place on record all the documents on which they intend to rely in support of their case including the manner, mode and the source of appointment of each of the Assistant Professors. [Para 13] [483-H; 484-A-B]

1.3. The Chief Justice of the Madhya Pradesh High Court is requested to assign all these matters to the Principal Bench itself so that the matters could be finally settled by one Bench, instead of two or three Benches taking different views on the same set of facts and on the questions of law. [Para 14] [484-C]

Union of India v. K.B. Rajoria **(2000) 3 SCC 562: 2000 (2) SCR 613;** *Union of India v. Mathivanan* **(2006) 6 SCC 57: 2006 (3) Suppl. SCR 30;** *Dwijen Chandra Sarkar and Anr. v. Union of India* **(1999) 2 SCC 119: 1998 (3) Suppl. SCR 576;** *S. Sumnyan and Ors. v. Limi Niri and Ors.* **(2010) 6 SCC 791: 2010 (4) SCR 829 – cited.**

Case Law Reference:

2000 (2) SCR 613	**Cited**	**Para 8**
2006 (3) Suppl. SCR 30	**Cited**	**Para 8**
1998 (3) Suppl. SCR 576	**Cited**	**Para 8**
2010 (4) SCR 829	**Cited**	**Para 8**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10554 of 2011.

From the Judgment and Order dated 11.2.2010 of the High Court of M.P. at Jabalpur in W.A. No.995 of 2009.

WITH

Civil Appeal Nos. 10555, 10556, 10557, 10558, 10559 10560, 10561 , 10562, 10563, 10564, 10565, 10566, 10567, 10568, 10569, 10570, 10571, 10572, 10573, 10574, 10575, 10576, 10577, 10578, 10579, 10580, 10581, 10582, 10583, 10584, 10585, 10586, 10587, 10588, 10589, 10590, 10591, 10592, 10593, 10594, 10595, 10596, 10597, 10600, 10601, 10602, 10603, 10604, 10605, 10606, 10607, 10608, 10609, 10610, 10611, 10613, 10614, 16515, 10616, 10617, 10618, 10621, 10622, 10623, 10624, 10625, 10626, 10627, 10629, 10630, 10631, 10632, 10633, 10634, 10635, 10636, 10637, 10638, 10639, 10640, 10641, 10642, 10643, 10644, 10645, 10646, 10647, 10648, 10649, 10650, 10651, 10652, 10653, 10654, 10655, 10656, 10657, 10658, 10659, 10660 10661, 10662, 10663, 10664 of 2011.

Vivek. K. Tankha, ASG, P.S. Patwalia, B.S. Banthia, Anil Pandey, Vibha Datta Makhija, K. Vijay Kumar, K.K. Tyagi, P. Narasimhan, Romy Chacko, Arpit Gupta, L.C. Patney, Anupam Lal Das, Bharat Sangal, Vernika Tomar, Srijana Lama, Amit Sharma, Shahid Anwar, Dr. Kailash Chand, Rajendra Mishra, Raza Syed Khadim, Rajesh Singh, Ravindra S. Garia for the appearing parties.

The Judgment of the Court was delivered by

H.L. DATTU, J.

Delay condoned. Leave granted.

1. The present batch of appeals, by way of special leave,

arises out of a common Order dated 11.02.2010 passed by the Madhya Pradesh High Court and raises an identical question of law and facts for our consideration and decision. They are, therefore, being heard together and disposed of by this common Judgment and Order.

2. The common issue before us, in these appeals, can be summarized thus: Whether the Assistant Professors appointed through different means, modes and sources including emergency appointees in terms of Rule 13(5) of the Madhya Pradesh Educational Service (Collegiate Branch) Recruitment Rules, 1967 are entitled to claim the benefit of the services rendered by them prior to their regularization for grant of senior/ selection grade pay scales.

3. All these appeals are directed against the common Order dated 11.02.2010 of the High Court of Madhya Pradesh in Writ Appeal No. 599 of 2008 and other connected matters, whereby the writ appeals, filed by the appellants challenging the grant of senior scale/selection grade benefit to the respondents, by counting their period of service rendered as emergency appointees, were dismissed.

4. All the matters pertain to grant of senior/selection grade pay scales and for the sake of convenience, we may note such facts as emerging from record of the Special Leave Petition **(C)** No.16906 of 2010.

The respondent was appointed on the post of Assistant Professor on emergency basis vide Appointment Order dated 14.12.1987 under Rule 13(5) of Recruitment Rules, 1967 with an express condition of immediate termination of his emergency appointment, without notice, on the availability of Public Service Commission's panel of selected candidates. Subsequently, the respondent had cleared Public Service Commission Examination and consequently, as per the condition of his appointment order, his services were regularized vide Order dated 02.09.1993 under M.P.

Educational Service (Collegiate branch) Recruitment Rules, 1990 (hereinafter referred to as "Recruitment Rules, 1990"). In the meantime, the State Government had issued a Circular dated 12.02.1992 for addition of period of service rendered by teachers, prior to their service in the present College or University as Assistant Professor for conferring the benefit of senior/selection grade pay scale but subject to certain conditions. The respondent had made several representations to the State Government for counting his period of service as emergency appointee for determination of benefit of the senior/ selection grade pay scale, but the same were not replied. Subsequently, the State Government issued another Circular dated 11.10.1999 for revision of the pay scale which provides for the grant of benefit of senior grade pay scale after rendering minimum 6 years of service period and further 5 years of service period in senior grade as essential requirement for placement in selection grade pay scale as per clause 8 (a) of the said Circular. The respondent, being aggrieved by not counting of his period of service rendered as an emergency appointee on the post of Assistant Professor by the State Government for the purpose of granting higher pay scale, had filed a Writ Petition before the High Court of Madhya Pradesh, inter-alia seeking an appropriate Writ and other consequential reliefs. The same came to be allowed *vide* Judgment and Order dated 15.01.2009. Aggrieved by the same, the State Government preferred a Writ Appeal before the High Court. The High Court, *vide* its impugned common Order dated 11.02.2010, dismissed the Writ Appeal and directed the State Government to count the period of service rendered by the respondent on emergency appointment for granting the benefit of the senior/selection grade pay scales. Being aggrieved, the State Government is before us in this appeal.

5. The learned single Judge of the High Court, vide its Order dated 15.01.2009, observed that in view of series of decisions of the High Court, the service rendered by the Assistant Professor, appointed on the emergency basis,

requires to be counted for the purpose of granting benefit of higher pay scale. The High Court has specifically followed the Order dated 13.07.2007 of Single Judge in *Smt. Sandhya Prasad v. State of M.P.* in W.P. No. 807/2007(S) which, in turn, has followed the Division Bench decision in *State of M.P. & another v. Dr.(Smt.) Seema Raizada & another* in W.A. No. 4863/2001 decided on 10.08.2005. The learned Single Judge also clarified that the period of such service will only be counted for the purpose of granting the benefit of senior pay scale and selection grade and not for seniority in the cadre of Assistant Professor.

6. The Division Bench of the High Court in Writ Appeal No. 599/2008 and other connected matters, vide its impugned common Order, has discussed its earlier decision in State of M.P. & another v. Dr.(Smt.) Seema Raizada & another (Supra). That was the Writ Petition, filed by the State Government against the Order of the State Administrative Tribunal challenging the direction issued to take into consideration the period of service of the emergency appointee for determining the benefit of higher pay scale, which had been dismissed by the High Court. The High Court further observed that this decision was consistently followed by it in several other Division Bench and Single Bench decisions. The State Government, being aggrieved by these decisions in Dr. (Smt.)Seema Raizada (Supra) and other connected matters, preferred a Special Leave Petition before this Court. This Court, *vide* its Order dated 03.12.2007, dismissed Special Leave Petition on the ground of delay and hence, left the question of law open. The State Government also preferred a Review Petition, which was dismissed by this Court vide its Order dated 12.03.2008. Thereafter, the State Government, in identical matters, preferred a Writ Appeal before the Division Bench of the High Court in view of the dismissal of the SLP on the ground of delay but question of law was left open. The High Court, in its impugned judgment, has also discussed the judgment and order dated 07.05.2009 in Writ Appeal No. 528/2008 in State of M.P. v. Dr.

Brijesh Kumar. That Writ Appeal was filed by the State Government against the Single Judge Order wherein the benefit of higher pay scale was conferred on account of period of service rendered as emergency appointee. In that Writ Appeal, the High Court, after placing reliance on various earlier decisions, observed that there is a conceptual difference between the conferral of seniority and counting of the services for the purpose of grant of senior pay scale and the selection grade. The benefit of higher pay scale has to be given by counting the service from the date of initial appointment as the appointment was, as per the rules and has been, later regularized. The High Court, in the impugned judgment, has also observed that the High Court has consistently taken a view that emergency appointees, under Rule 13(5) of the Recruitment Rules, 1967, are entitled for the benefit of higher pay scale by counting the services rendered as emergency appointees. The High Court has also observed that the State Government has failed to grant the benefit of higher pay scale to the emergency appointees vide its Circular dated 11.12.1999. It further held that the emergency appointments were made after following due process of advertisement and selection in the pay scale and such appointees continued, till their regularization, without any break. Hence, such appointments were not on purely ad hoc basis. The High Court further observed that the emergency appointees satisfy all the five essential conditions envisaged in the Circular dated 12.02.1992 issued by the State Government in order to take into account the period of prior service rendered for determining the grant of higher pay scale and selection grade. The relevant portion of the impugned Order of the High Court is extracted below:

> "7. It is not in dispute that advertisement was issued, selection committee was formed which has considered the cases of the employees, they were duly qualified for being appointed, their appointments have continued till their regularisation and they were holding the similar pay scale in which they were regularised. Appointment was made in

the pay scale not on fixed pay and there was no brake, they were not appointed as against any leave vacancy, the appointment was not on purely ad hoc basis without following the procedure, the appointment was made under the aforesaid rule 12(5).

8. In the light of the aforesaid undisputed facts when we consider circular dated 12.2.93 issued by the State Government which has been relied upon by the Tribunal while rendering decision in case of Seema Raizada and Padma Shrivastava, a close reading of the circular dated 12.2.92 indicates that prior service rendered has to be countered for the purpose of grant of higher pay scale and selection grade pay scale on following conditions:

(i) that the post held must be equivalent and carrying the same pay scale;

(ii) the qualifications of the post held should not be less than then prescribed qualification by the UGC for the post of lecturer;

(iii) at the time of appointment on the earlier post of which service is to be counted an incumbent must possess the minimum qualification prescribed by the UGC;

(iv) appointment on the post must have been made by the prescribed selection procedure by the State Government; and

(v) the appointment should not be purely ad hoc or as against leave vacancy for less than one year.

When we apply the aforesaid five conditions in the instant case, one by one, it is not disputed that appointment of the employees was on the same post and in the same pay scale. Thus, the first condition stands satisfied. When we come to the second condition as to the qualifications prescribed for the post, the post held was the same post

and the qualifications possessed by incumbents were not less than that prescribed by the UGC, it is not the case of State that qualifications prescribed in advertisement were less. Thus, second condition also stands fulfilled. When we come to IIIrd condition, the incumbent was holding the minimum qualification prescribed by UGC at the time of appointment on emergency basis, they were holding the qualifications has also not been disputed. When we come to fourth condition it is admitted that selection was made as prescribed under Rule 12(5) (sic.) of the Rules of 1967, since the appointment was made under Rule 12(5), the aforesaid IVth condition also stands satisfied. When we examine fifth and last condition it is apparent that appointment was made on emergency basis not on purely ad hoc basis, it was not against any leave vacancy. For the purpose of appointment, prescribed procedure under Rule 12(5) (sic.) was followed, appointment was made under the rule. Rules provide for emergency appointment and prescribed the procedure for that which was followed and ultimately the services were regularised. The State Government has taken the decision vide circular dated 12.2.92 for counting of such services for the purpose of higher pay scale and for selection pay scale, the benefit of which could not have been denied to the employees, thus relief has to be given on then basis of the aforesaid circular dated 12.2.92. Though it is not necessary to go into the DO of the MP PSC in view of circular dated 12.2.92, but MP PSC has clearly mentioned in its DO dated 25.12.98 thus:-

"The Commission after seeking legal opinion on clause 1(e) has declined to include service rendered in ad hoc capacity for counting of past service for placement in senior scale/selection grade, provided that the following three condition are fulfilled:-

"(a) The ad hoc service was of more than one year durataion;

(b) the incumbent was appointed on the recommendation of duly constituted Selection Committee, and

(c) The incumbent was selected to the permanent post in continuation to the ad hoc service, without any brake."

The Commission has taken the above decision.

The aforesaid three requirements also stand satisfied in the instant case. The instant case stand on better footing as the service rendered was not purely ad hoc, but it was under the rules as an emergency appointee, even ad hoc appointee in case ahs continued for more than one year duration and was selected by duly constituted selection committee and was later on selected to the permanent post in continuation to the ad hoc service without any brake, his services has to be counted fro placement in Senior Scale/Selection Grade as per aforesaid decision of PSC. In the instant case, the case of employees is much better. Thus, they could not have been denied the benefits of counting of their services rendered as emergency appointee and their past services ought to have been counted for the placement in Senior Scale/ Selection Grade, we find that decision rendred by the Single Bench to be in accordance with law and we do not find any ground to differ from the view taken by different Divison Benches of this Court in several matters dismissing the writ appeals assailing the order passed by the single Bench or the writ petition preferred against the order passed by State Administrative Tribunal."

The High Court further observed the respondents' stand on the better footing in terms of both the Circulars dated 12.02.1992 as well as Order dated 25.12.1998 of the M.P. Public Service Commission as their services are not purely ad hoc but, under the rules, as an emergency employee. The High Court, while dismissing the Writ Appeals, concluded that the respondents are bound to count the services rendered by the

appellants as emergency appointees for their placement in senior scale/selection grade.

7. Shri. B.S. Banthia, learned counsel for the appellant, submits that the Recruitment Rules, 1967 provides two modes of recruitment viz. by direct recruitment made by the PSC under Rule 7(1), and emergency appointments under Rule 13(5), when the PSC list is not available, on a temporary basis. The service of such emergency appointees, the learned counsel would contend, could be terminated as soon as PSC list, in accordance with Rule 7(1), was available. He would then state that only those appointees, who were appointed by the method of direct recruitment, as provided under Rule 7(1), were eligible to get the senior and selection grade pay scales and not those who were appointed in accordance with Rule 13(5). Though, not backdoor appointments, the learned counsel would contend that these were not conforming to the rigors of the selection procedure followed by the PSC and hence, could not be equated to those appointments made by the PSC. He would further submit that his argument is strengthened by the fact that the respondents could be terminated without notice in case of availability of the PSC list and that it was essential for the respondents to clear the requirements of PSC to get their appointments regularized. The learned counsel also relies upon voluminous other documents such as various schemes issued by UGC from time to time and adopted by the State of Madhya Pradesh either in toto or partially, and also the Government Orders and Circulars issued from time to time indicating the entitlement or otherwise of the emergency appointee for Senior Scale/Selection Grade and submits that these voluminous documents could not be produced before the High Court, since the appeals were disposed of at the stage of admission itself.

8. Shri. P.S. Patwalia, learned senior counsel, led the arguments for the respondents in the batch of appeals. He submits that the respondents are entitled for higher pay scale by counting their service rendered as emergency appointees

in view of the Circular dated 11.10.1999 read with the Circular dated 12.02.1992 issued by the State Government. He would contend that the appointment of the respondents were made after following a due selection procedure and hence, such appointments are not in the nature of temporary or ad hoc appointments but emergency appointments in accordance with the Rules. Therefore, the respondents are entitled to receive higher pay scale from the date of their initial appointment as emergency employees. He would then argue that not only the appointments were made as per the mode prescribed under the Recruitment Rules of 1967, but also their characteristics were not akin to those of ad hoc or fortuitous appointments as nation-wide advertisements were published and selections were made on the basis of merit. It is further submitted that the respondents were qualified for appointment to the post and they are also getting annual increments for continuous service from the date of initial appointment. He would argue that it was an admitted position that the appointments were not ad hoc appointments in view of the affidavit filed by the appellants before this Court. He further submits that the Govt. Order dated 25.08.1998, issued by Madhya Pradesh Public Service Commission, which has also been relied upon by the High Court in its impugned Judgment, contemplates the grant of higher pay scale on the basis of ad hoc service rendered for more than one year. He submits, by placing reliance on the said Govt. Order, that the case of respondents stands on the better footing as their services are not purely ad hoc. Shri. Patwalia would defend the reasoning of the High Court in the impugned judgment and submit that the respondents, as emergency appointees, fulfill all the five conditions envisaged in the Circular dated 12.02.1992. The learned senior counsel submits that the respondents were regularly working without any artificial breaks and that they are paid UGC pay scale with regular annual increments and are also eligible for pensionary benefits. He would contend that there are three characteristics of an ad hoc appointment, viz., they are made de hors the rules, they are employed for a specified duration and they are in a fixed pay

scale. He further submits that the grant of senior/selection grade pay scale, by taking into account the past period of service rendered, is a 'stagnation removal device' and there is no reason for the denial of the same to the respondents in the present cases. He argues that though the emergency appointments were made in view of non-availability of selected panel candidates of Public Service Commission, but it is a matter of fact that the respondents continued in the service till their regularization. He further submits that Circular dated 11.10.1999, while conferring benefit of higher pay scale on the Assistant Professors, uses the word "service" instead of "regular service" for computing the past services rendered. He contends that the 1999 Circular confers benefit to all kinds of services without any distinction whether regular, ad hoc, temporary or emergency service. He submits that the respondents have satisfied all the conditions referred to in Clause 8(a) of the 1999 Circular to qualify for higher pay scale. He argues that Rule 7(4) also contemplates a method of appointment other than through Public Service Commission, which when read with Rule 13(5), would give the respondents a status of being appointed to service under the Recruitment Rules, 1967. He would then submit that emergency appointments are prescribed under the rules and cannot be termed as ad hoc. He further argues that the ad hoc appointments are always de hors the service rules and in some cases, rules provided for the temporary appointment, for a limited period, cannot be considered as ad hoc. He submits that the State Government had granted the benefit of higher pay scale under the said Circulars only to the five emergency appointees but the same has been denied to those emergency appointees, who were appointed and regularized between the years 1987 and 2003 and thus, this amounts to discrimination and denial of equal treatment to similarly placed emergency appointees. In support of his submissions, Shri. Patwalia has referred to several precedents of this Court in the case of *Union of India v. K.B. Rajoria, (2000) 3 SCC 562, Union of India v. Mathivanan,* (2006) 6 SCC 57, *Dwijen Chandra Sarkar and*

Another v. Union of India, (1999) 2 SCC 119 and *S. Sumnyan and Ors. v. Limi Niri and Ors.,* (2010) 6 SCC 791. The learned senior counsel does not dispute the fact that the appeals were disposed of at the stage of admission itself.

9. Shri. Romy Chacko, learned counsel appearing for some of the respondents, adopted the submissions as made by Shri. Patwalia, and would state that there is a distinction drawn between ad hoc appointees and emergency appointees by the State itself.

10. All other learned counsel, appearing for respondents in connected civil appeals, would adopt the submissions as made by learned senior counsel Shri. Patwalia.

11. We tried to wade through voluminous materials in the form of schemes, Govt. orders and circulars produced by both the learned counsel appearing for the parties. More we tried to dwelve into the matter, more and more murkier facts, which we call normally 'Pandoras Box', started emerging. Going through these documents could have been done by us, but since those documents were not even produced by way of affidavit and since the learned counsel on the opposite side had no knowledge of those documents, we have thought it fit to remand these matters back to the High Court for fresh disposal in accordance with law, by granting liberty to both the parties to produce all thse documents which they tried to rely upon before us.

12. We are also informed by both the learned counsel that it would be in the interest of all the parties that these petitions be heard before one Bench so that possibility of divergent opinion/s from the High Court could be possibly avoided. The expression of desire appears to be reasonable and, therefore, we accept the same.

13. In that view of the matter, we allow the appeals, set aside the orders passed by the High Court in all these matters

and remand the matter back to the High Court for its fresh consideration in accordance with law. We also give liberty to both the parties to place on record all the documents on which they intend to rely in support of their case including the manner, mode and the source of appointment of each of the Assistant Professors.

14. We also request the learned Chief Justice of the Madhya Pradesh High Court to assign all these matters to the Principal Bench itself so that the matters could be finally settled by one Bench, instead of two or three Benches taking different views on the same set of facts and on the questions of law.

15. Since the matters were pending for some time, we request the learned Chief Justice to either take up the matters by himself or assign it to an appropriate Bench and request that Bench to dispose of the appeals at the earliest. We clarify that we have not expressed any opinion on the merits of the case. Ordered accordingly.

B.B.B. Appeals allowed.

STATE OF RAJASTHAN
v.
SHERA RAM @ VISHNU DUTTA
(Criminal Appeal No. 1502 of 2005)

DECEMBER 1, 2011

[SWATANTER KUMAR AND RANJANA PRAKASH DESAI, JJ.]

Penal Code, 1860 – ss.84, 302, 295 and 449 – Murder – Plea of insanity – Maintainability of – Respondent caused death of deceased by hurling a stone on his head – Conviction by Trial Court – Acquittal by High Court primarily on the ground that at the time of incident, accused was a person of unsound mind within meaning of s.84 – Appeal against the acquittal – Held: Oral and documentary evidence clearly showed that respondent was suffering from epileptic attacks just prior to the incident – Immediately prior to the occurrence, he had behaved violently and had caused injuries to his own family members – After committing the crime, he was arrested by the Police and even thereafter, he was treated for insanity, while in jail – There was evidence to show continuous mental sickness of the respondent – High Court on the basis of documentary and oral evidence had a taken a view which was a possible view and could not be termed as perverse or being supported by no evidence – The finding of High Court, being in consonance with the well settled principles of criminal jurisprudence, did not call for any interference, particularly when the appellant-State did not bring to the fore any evidence- documentary or otherwise, to persuade the Supreme Court to take a contrary view.

Appeal – Appeal against acquittal – Distinction between appeal against acquittal and appeal against conviction – Limitation upon the powers of the appellate court to interfere

with the judgment of acquittal and reverse the same – Discussed.

Criminal Trial – Exemption from criminal liability – Accused taking plea of insanity – Held: A person alleged to be suffering from any mental disorder cannot be exempted from criminal liability ipso facto – The onus would be on the accused to prove by expert evidence that he is suffering from such a mental disorder or mental condition that he could not be expected to be aware of the consequences of his act – Once, a person is found to be suffering from mental disorder or mental deficiency, which takes within its ambit hallucinations, dementia, loss of memory and self-control, at all relevant times by way of appropriate documentary and oral evidence, the person concerned would be entitled to seek resort to the general exceptions from criminal liability – Penal Code, 1860 – s.84.

Respondent abruptly hurled a stone on the head of a person resulting into his instantaneous death. The trial court convicted the respondent under Sections 302, 295 and 449 IPC and sentenced him to undergo imprisonment for life. However, the High Court acquitted him primarily on the ground that at the time of incident, he was a person of unsound mind within the meaning of Section 84 IPC. Aggrieved by the said judgment, the State filed the present appeal.

Dismissing the appeal, the Court

HELD: 1.1. As evident, this is an appeal against a judgment of acquittal. A judgment of acquittal has the obvious consequence of granting freedom to the accused. This Court has taken a consistent view that unless the judgment in appeal is contrary to evidence, palpably erroneous or a view which could not have been taken by the court of competent jurisdiction keeping in

view the settled canons of criminal jurisprudence, this Court shall be reluctant to interfere with such judgment of acquittal. [Paras 8,9] [494-H; 495-A-B]

1.2. The penal laws in India are primarily based upon certain fundamental procedural values, which are right to fair trial and presumption of innocence. A person is presumed to be innocent till proven guilty and once held to be not guilty of a criminal charge, he enjoys the benefit of such presumption which could be interfered with only for valid and proper reasons. An appeal against acquittal has always been differentiated from a normal appeal against conviction. Wherever there is perversity of facts and/or law appearing in the judgment, the appellate court would be within its jurisdiction to interfere with the judgment of acquittal, but otherwise such interference is not called for. [Para 10] [495-C-D]

1.3. There is a very thin but a fine distinction between an appeal against conviction on the one hand and acquittal on the other. The preponderance of judicial opinion of this Court is that there is no substantial difference between an appeal against conviction and an appeal against acquittal except that while dealing with an appeal against acquittal the Court keeps in view the position that the presumption of innocence in favour of the accused has been fortified by his acquittal and if the view adopted by the High Court is a reasonable one and the conclusion reached by it had its grounds well set out on the materials on record, the acquittal may not be interfered with. Thus, this fine distinction has to be kept in mind by the Court while exercising its appellate jurisdiction. The golden rule is that the Court is obliged and it will not abjure its duty to prevent miscarriage of justice, where interference is imperative and the ends of justice so require and it is essential to appease the judicial conscience. [Para 12] [500-C-F]

1.4. There is no absolute restriction in law to review and re-look the entire evidence on which the order of acquittal is founded. If, upon scrutiny, the appellate court finds that the lower court's decision is based on erroneous views and against the settled position of law then the said order of acquittal should be set aside. [Para 13] [500-G-H]

1.5. In the present case, the impugned judgment of acquittal recorded by the High Court does not suffer from any legal infirmity and, therefore, does not call for any interference. In the normal course of events, this Court is required not to interfere with a judgment of acquittal. [Para 15] [501-C]

State of Rajasthan, Through Secretary, Home Department v. Abdul Mannan **(2011) 8 SCC 65;** *State (Delhi Administration) v. Laxman Kumar & Ors.* **(1985) 4 SCC 476: 1985 (2) Suppl. SCR 898;** *Raj Kishore Jha v. State of Bihar & Ors.* **AIR 2003 SC 4664: 2003 (4) Suppl. SCR 208;** *Inspector of Police, Tamil Nadu v. John David* **JT 2011 (5) SC 1 – relied on.**

2.1. Section 84 IPC states that nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that what he is doing is either wrong or contrary to law. It is obvious from a bare reading of this provision that what may be generally an offence would not be so if the ingredients of Section 84 IPC are satisfied. It is an exception to the general rule. Thus, a person who is proved to have committed an offence, would not be deemed guilty, if he falls in any of the general exceptions stated under this Chapter. [Paras 17, 18] [501-F-H; 502-A]

2.2. To commit a criminal offence, *mens rea* is generally taken to be an essential element of crime. It is said *furiosus nulla voluntus est.* In other words, a person

who is suffering from a mental disorder cannot be said to have committed a crime as he does not know what he is doing. For committing a crime, the intention and act both are taken to be the constituents of the crime, *actus non facit reum nisi mens sit rea.* Every normal and sane human being is expected to possess some degree of reason to be responsible for his/her conduct and acts unless contrary is proved. But a person of unsound mind or a person suffering from mental disorder cannot be said to possess this basic norm of human behavior. [Para 19] [502-B-D]

2.3. A person alleged to be suffering from any mental disorder cannot be exempted from criminal liability *ipso facto*. The onus would be on the accused to prove by expert evidence that he is suffering from such a mental disorder or mental condition that he could not be expected to be aware of the consequences of his act. [Para 20] [503-B]

2.4. Once, a person is found to be suffering from mental disorder or mental deficiency, which takes within its ambit hallucinations, dementia, loss of memory and self-control, at all relevant times by way of appropriate documentary and oral evidence, the person concerned would be entitled to seek resort to the general exceptions from criminal liability. [Para 21] [503-C-D]

Surendra Mishra v. State of Jharkhand ***(2011) 3 SCC(Cri.) 232*** **– relied on.**

Medical Jurisprudence and Toxicology by Modi and HWV COX Medical Jurisprudence and Toxicology (7th Edn) by PC Dikshit **– referred to.**

3.1. In the present case, the oral and documentary evidence clearly shows that the respondent was suffering from epileptic attacks just prior to the incident.

Immediately prior to the occurrence, he had behaved violently and had caused injuries to his own family members. After committing the crime, he was arrested by the Police and even thereafter, he was treated for insanity, while in jail. [Para 27] [505-H; 506-A]

3.2. There is evidence to show continuous mental sickness of the respondent. He not only caused death of the deceased but also on the very same day injured and caused hurt to his family members including DW-1. His statement made under Section 313 Cr.PC is fully corroborated by oral and documentary evidence of DW-2, the Doctor who had treated the respondent, and the medical prescription slips, Ext. D-3 and D-4. Though, the High Court has not discussed this evidence in great detail, but this being an admissible piece of evidence, can always be relied upon to substantiate the conclusion and findings recorded by the High Court. [Para 28] [506-B-C]

3.3. The High Court on the basis of the documentary and oral evidence has a taken a view which was possible and cannot be termed as perverse or being supported by no evidence. The finding of the High Court, being in consonance with the well settled principles of criminal jurisprudence, does not call for any interference. More so, the State has not brought to the notice of this Court any evidence, documentary or otherwise, which could persuade this Court to take a contrary view i.e. other than the view taken by the High Court. [Para 29] [506-E-F]

4.1. Another aspect of this case which requires consideration by this Court is that the case of the prosecution suffers from legal infirmity. In fact, the prosecution has failed to prove beyond reasonable doubt that the injury inflicted by the respondent upon the deceased was sufficient in the ordinary course of nature to cause death. It is the case of the prosecution that the respondent had hurled a stone which had caused injury

(lacerated wound on the left side of the forehead) whereupon the deceased fell on the ground and subsequently collapsed. The injury is said to be 2'' x ½" x upto bone, transversely Lt. side of forehead and another lacerated wound 2" x ½" x ¼" near injury No.1 towards the forehead. These are the injuries which the deceased is stated to have suffered. In addition, abrasion of 1 cm x 1 cm on the left eyebrow was also present. According to the doctor, all these injuries were *ante mortem* in nature and the cause of death was shock and haemorrhage due to head injury. [Para 30] [506-G-H; 507-A-B]

4.2. In the statement of PW-20, the Doctor who prepared the post-mortem report, it is nowhere stated that the injuries caused by the respondent were sufficient in the ordinary course of nature to cause death. It is also not recorded in the post-mortem report, Ext. 37. This was a material piece of evidence which the prosecution was expected to prove in order to bring home the guilt of the respondent. This is a serious deficiency in the case of the prosecution. Absence of this material piece of evidence caused a dent in the case of the prosecution. The High Court has not taken note of this important aspect of the case. [Para 31] [507-C-D]

4.3. *Ex-facie,* the injuries do not appear to be so vital that they could have resulted in the death of the deceased, but this fact was required to be proved by expert evidence. However, the question whether the particular injury was sufficient in the ordinary course of nature to cause death or not is a question of fact which will have to be determined in light of the facts, circumstances and evidence produced in a given case. There could be cases where injuries caused upon the body of the deceased *per se* can irresistibly lead to the conclusion that the injuries were sufficient to cause death

in the ordinary course of nature, while there may be other cases where it is required to be proved by documentary and oral evidence. Resultantly, it will always depend on the facts of each case. [Paras 33, 35] [507-G; 511-D-F]

State of Rajasthan v. Kalu **(1998) SCC (Cri.) 898 – relied on.**

Ram Jattan and Others v. State of U.P. **(1995) SCC (Cri) 169 – referred to.**

Halsbury's Laws of India 5(2) Criminal Law-II **– referred to.**

Case Law Reference:

(2011) 8 SCC 65	**relied on**	**Para 10**
1985 (2) Suppl. SCR 898	**relied on**	**Para 13**
2003 (4) Suppl. SCR 208	**relied on**	**Para 13**
JT 2011 (5) SC 1	**relied on**	**Para 13**
(2011) 3 SCC (Cri.) 232	**relied on**	**Para 19**
(1995) SCC (Cri) 169	**referred to**	**Para 33**
(1998) SCC (Cri.) 898	**relied on**	**Para 34**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1502 of 2005.

From the Judgment & Order dated 21.2.2004 of the High Court of Judicature for Rajasthan at D.B. Criminal Appeal No. 375 of 2000.

Kamran Malik, Imtiaz Ahmad and Milind Kumar for the appellant.

Doongar Singh, V.J. Francies and Anupam Mishra for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Respondent Shera Ram @ Vishnu Dutta was charged for committing an offence under Sections 302, 295 and 449 of the Indian Penal Code, 1860 (for short 'IPC') and was sentenced to undergo imprisonment for life by the Additional Sessions Judge-1, Jodhpur vide judgment dated 7th June, 2000. However, upon appeal, he came to be acquitted of all the offences by a Division Bench of the High Court of Rajasthan vide order dated 21st February, 2004 primarily on the ground that at the time of incident, he was a person of unsound mind within the meaning of Section 84 IPC and was directed to be detained in safe custody in an appropriate hospital or a place of custody of non-criminal lunatics as would be provided to him by the State Government under the direct supervision of the Jail Authorities till the time he was cured of his mental illness and infirmity.

2. Aggrieved from the said judgment, the State of Rajasthan has presented this appeal by way of a special leave petition.

3. Before we proceed to dwell upon the merits of the case and the legal issues involved in the present appeal, a reference to the case of the prosecution would be necessary. According to the prosecution, on 10th March, 1999 at about 7.15 a.m., while Pujari Tulsi Das (now deceased) was in the Raghunathji's temple, the respondent abruptly hurled a stone on his head resulting into his instantaneous death. The respondent also damaged the idol and other properties of the temple. This all was unprovoked. The incident was witnessed by the villagers including PW-6 Santosh, PW-11 Narsingh Ram and PW-16, Smt. Tiku Devi.

4. PW-2, Ghan Shyam Das Daga reported the matter to the police immediately. Upon receipt of the information, the police registered a case under Section 302 IPC and proceeded with the investigation. Besides recording statements

of number of witnesses, the Investigating Officer also prepared the site plan and the inquest memo. The body of the deceased was sent for post-mortem which was performed by PW-20, Dr. C.P. Bhati, who prepared the post-mortem report Ext. P-37.

5. After investigation, the police filed the challan upon which, the respondent was committed to the appropriate Court of Sessions for trial. The charge-sheet was filed under Sections 302, 295 and 449 IPC, as already noticed. The respondent denied the charges leveled against him and claimed trial.

6. The prosecution examined as many as 23 witnesses to prove its case. The material piece of evidence appearing in the case of the prosecution against the respondent were put to him and his statement was recorded by the learned Trial Court under Section 313 of the Code of Criminal Procedure, 1973 (for short 'Cr.PC'). According to the respondent, his mental condition right from the year 1992-1993 was not good and occasionally he suffered from fits of insanity. He had undergone treatment for the same. He has stated that in the jail also, he was receiving the treatment. To put it simply, he claimed the defence of insanity under Section 84 IPC. The defence also examined DW-2, Dr. Vimal Kumar Razdan and DW-1, Bhanwar Lal, brother of the respondent who had produced records to show that the respondent was a person suffering from insanity of mind. The learned Trial Court rejected the plea of defence of insanity and convicted the respondent.

7. The respondent preferred an appeal against the judgment and order of conviction by the Trial Court which resulted in his acquittal vide order dated 21st February, 2004 with the afore-noticed directions to the State Government. Dissatisfied from the said judgment, the State has preferred the present appeal.

8. As is evident from the above-noted facts, it is an appeal against the judgment of acquittal. The plea of insanity raised by the respondent has been accepted by the High Court resulting in his acquittal.

9. A judgment of acquittal has the obvious consequence of granting freedom to the accused. This Court has taken a consistent view that unless the judgment in appeal is contrary to evidence, palpably erroneous or a view which could not have been taken by the court of competent jurisdiction keeping in view the settled canons of criminal jurisprudence, this Court shall be reluctant to interfere with such judgment of acquittal.

10. The penal laws in India are primarily based upon certain fundamental procedural values, which are right to fair trial and presumption of innocence. A person is presumed to be innocent till proven guilty and once held to be not guilty of a criminal charge, he enjoys the benefit of such presumption which could be interfered with only for valid and proper reasons. An appeal against acquittal has always been differentiated from a normal appeal against conviction. Wherever there is perversity of facts and/or law appearing in the judgment, the appellate court would be within its jurisdiction to interfere with the judgment of acquittal, but otherwise such interference is not called for. We may refer to a recent judgment of this Court in the case of *State of Rajasthan, Through Secretary, Home Department v. Abdul Mannan* [(2011) 8 SCC 65], wherein this Court discussed the limitation upon the powers of the appellate court to interfere with the judgment of acquittal and reverse the same.

11. This Court referred to its various judgments and held as under:-

> "12. As is evident from the above recorded findings, the judgment of conviction was converted to a judgment of acquittal by the High Court. Thus, the first and foremost question that we need to consider is, in what circumstances this Court should interfere with the judgment of acquittal. Against an order of acquittal, an appeal by the State is maintainable to this Court only with the leave of the Court. On the contrary, if the judgment of acquittal passed by the trial court is set aside by the High Court, and the accused

> is sentenced to death, or life imprisonment or imprisonment for more than 10 years, then the right of appeal of the accused is treated as an absolute right subject to the provisions of Articles 134(1)(a) and 134(1)(b) of the Constitution of India and Section 379 of the Code of Criminal Procedure, 1973. In light of this, it is obvious that an appeal against acquittal is considered on slightly different parameters compared to an ordinary appeal preferred to this Court.
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> 13. When an accused is acquitted of a criminal charge, a right vests in him to be a free citizen and this Court is very cautious in taking away that right. The presumption of innocence of the accused is further strengthened by the fact of acquittal of the accused under our criminal jurisprudence. The courts have held that if two views are possible on the evidence adduced in the case, then the one favourable to the accused, may be adopted by the court. However, this principle must be applied keeping in view the facts and circumstances of a case and the thumb rule is that whether the prosecution has proved its case beyond reasonable doubt. If the prosecution has succeeded in discharging its onus, and the error in appreciation of evidence is apparent on the face of the record then the court can interfere in the judgment of acquittal to ensure that the ends of justice are met. This is the linchpin around which the administration of criminal justice revolves.
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> 14. It is a settled principle of criminal jurisprudence that the burden of proof lies on the prosecution and it has to prove a charge beyond reasonable doubt. The presumption of innocence and the right to fair trial are twin safeguards available to the accused under our criminal justice system but once the prosecution has proved its case and the evidence led by the prosecution, in conjunction with the chain of events as are stated to have

occurred, if, points irresistibly to the conclusion that the accused is guilty then the court can interfere even with the judgment of acquittal. The judgment of acquittal might be based upon misappreciation of evidence or apparent violation of settled canons of criminal jurisprudence.

15. We may now refer to some judgments of this Court on this issue. In *State of M.P. v. Bacchudas,* the Court was concerned with a case where the accused had been found guilty of an offence punishable under Section 304 Part II read with Section 34 IPC by the trial court; but had been acquitted by the High Court of Madhya Pradesh. The appeal was dismissed by this Court, stating that the Supreme Court's interference was called for only when there were substantial and compelling reasons for doing so. After referring to earlier judgments, this Court held as under: (SCC pp. 138-39, paras 9-10)

> "9. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence where the accused has been acquitted, for the

> purpose of ascertaining as to whether any of the accused really committed any offence or not. (See Bhagwan Singh v. State of M.P.) The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference. These aspects were highlighted by this Court in Shivaji *Sahabrao Bobade v. State of Maharashtra, Ramesh Babulal Doshi v. State of Gujarat, Jaswant Singh v. State of Haryana, Raj Kishore Jha v. State of Bihar, State of Punjab v. Karnail Singh, State of Punjab v. Phola Singh, Suchand Pal v. Phani Pal* and *Sachchey Lal Tiwari v. State of U.P.*
>
> 10. When the conclusions of the High Court in the background of the evidence on record are tested on the touchstone of the principles set out above, the inevitable conclusion is that the High Court's judgment does not suffer from any infirmity to warrant interference."

16. In a very recent judgment, a Bench of this Court in *State of Kerala v. C.P. Rao* decided on 16-5-2011, discussed the scope of interference by this Court in an order of acquittal and while reiterating the view of a three-Judge Bench of this Court in *Sanwat Singh v. State of Rajasthan,* the Court held as under:

> "13. In coming to this conclusion, we are reminded of the well-settled principle that when the court has to exercise its discretion in an appeal arising against an order of acquittal, the court must remember that the innocence of the accused is

further re-established by the judgment of acquittal rendered by the High Court. Against such decision of the High Court, the scope of interference by this Court in an order of acquittal has been very succinctly laid down by a three-Judge Bench of this Court in Sanwat Singh v. State of Rajasthan 212. At SCR p. 129, Subba Rao, J. (as His Lordship then was) culled out the principles as follows:

'9. The foregoing discussion yields the following results: (1) an appellate court has full power to review the evidence upon which the order of acquittal is founded; (2) the principles laid down in Sheo Swarup case afford a correct guide for the appellate court's approach to a case in disposing of such an appeal; and (3) the different phraseology used in the judgments of this Court, such as (i) "substantial and compelling reasons", (ii) "good and sufficiently cogent reasons", and (iii) "strong reasons", are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified'."

17. Reference can also be usefully made to the judgment of this Court in *Suman Sood v. State of Rajasthan,* where this Court reiterated with approval the principles stated by the Court in earlier cases, particularly, *Chandrappa v. State of Karnataka.* Emphasising that expressions like "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances",

"distorted conclusions", "glaring mistakes", etc. are not intended to curtail the extensive powers of an appellate court in an appeal against acquittal, the Court stated that such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with the acquittal. Thus, where it is possible to take only one view i.e. the prosecution evidence points to the guilt of the accused and the judgment is on the face of it perverse, then the Court may interfere with an order of acquittal."

12. There is a very thin but a fine distinction between an appeal against conviction on the one hand and acquittal on the other**.** The preponderance of judicial opinion of this Court is that there is no substantial difference between an appeal against conviction and an appeal against acquittal except that while dealing with an appeal against acquittal the Court keeps in view the position that the presumption of innocence in favour of the accused has been fortified by his acquittal and if the view adopted by the High Court is a reasonable one and the conclusion reached by it had its grounds well set out on the materials on record, the acquittal may not be interfered with. Thus, this fine distinction has to be kept in mind by the Court while exercising its appellate jurisdiction. The golden rule is that the Court is obliged and it will not abjure its duty to prevent miscarriage of justice, where interference is imperative and the ends of justice so require and it is essential to appease the judicial conscience.

13. Also, this Court had the occasion to state the principles which may be taken into consideration by the appellate court while dealing with an appeal against acquittal. There is no absolute restriction in law to review and re-look the entire evidence on which the order of acquittal is founded. If, upon scrutiny, the appellate court finds that the lower court's decision is based on erroneous views and against the settled position of law then the said order of acquittal should be set aside. {*See*

State (Delhi Administration) v. Laxman Kumar & Ors. [(1985) 4 SCC 476], *Raj Kishore Jha v. State of Bihar & Ors.* [AIR 2003 SC 4664], *Inspector of Police, Tamil Nadu v. John David* [JT 2011 (5) SC 1] }

14. To put it appropriately, we have to examine, with reference to the present case whether the impugned judgment of acquittal recorded by the High Court suffers from any legal infirmity or is based upon erroneous appreciation of evidence.

15. In our considered view, the impugned judgment does not suffer from any legal infirmity and, therefore, does not call for any interference. In the normal course of events, we are required not to interfere with a judgment of acquittal.

16. Having deliberated upon the above question of law, we may now proceed to discuss the merits of the case in hand. The High Court after consideration of the entire evidence produced by the prosecution, affirmed the finding that the incident as alleged by the prosecution had occurred and the respondent had hurled a stone on the head of Pujari Tulsi Das which resulted in his death. This being a finding of fact based upon proper appreciation of evidence, does not call for any interference by us.

17. The corollary that follows from the above is whether having committed the charged offence, the respondent is entitled to the benefit of the general exception contained in Section 84, Chapter IV of the IPC? Section 84 states that nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that what he is doing is either wrong or contrary to law.

18. It is obvious from a bare reading of this provision that what may be generally an offence would not be so if the ingredients of Section 84 IPC are satisfied. It is an exception to the general rule. Thus, a person who is proved to have

committed an offence, would not be deemed guilty, if he falls in any of the general exceptions stated under this Chapter.

19. To commit a criminal offence, *mens rea* is generally taken to be an essential element of crime. It is said *furiosus nulla voluntus est.* In other words, a person who is suffering from a mental disorder cannot be said to have committed a crime as he does not know what he is doing. For committing a crime, the intention and act both are taken to be the constituents of the crime, *actus non facit reum nisi mens sit rea.* Every normal and sane human being is expected to possess some degree of reason to be responsible for his/her conduct and acts unless contrary is proved. But a person of unsound mind or a person suffering from mental disorder cannot be said to possess this basic norm of human behavior. In the case of *Surendra Mishra v. State of Jharkhand* [(2011) 3 SCC(Cri.) 232], the Court was dealing with a case where the accused was charged for an offence under Section 302 IPC and Section 27 of the Arms Act. While denying the protection of Section 84 of the IPC to the accused, the Court held as under:-

> "9. In our opinion, an accused who seeks exoneration from liability of an act under Section 84 of the Indian Penal Code is to prove legal insanity and not medical insanity. Expression "unsoundness of mind" has not been defined in the Indian Penal Code and it has mainly been treated as equivalent to insanity. But the term insanity carries different meaning in different contexts and describes varying degrees of mental disorder. Every person who is suffering from mental disease is not ipso facto exempted from criminal liability. The mere fact that the accused is conceited, odd, irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and affected his emotions or indulges in certain unusual acts, or had fits of insanity at short intervals or that he was subject to epileptic fits and there was abnormal behavior or the behavior is

queer are not sufficient to attract the application of Section 84 of the Indian Penal Code."

20. From the above-stated principles, it is clear that a person alleged to be suffering from any mental disorder cannot be exempted from criminal liability *ipso facto*. The onus would be on the accused to prove by expert evidence that he is suffering from such a mental disorder or mental condition that he could not be expected to be aware of the consequences of his act.

21. Once, a person is found to be suffering from mental disorder or mental deficiency, which takes within its ambit hallucinations, dementia, loss of memory and self-control, at all relevant times by way of appropriate documentary and oral evidence, the person concerned would be entitled to seek resort to the general exceptions from criminal liability.

22. Epileptic Psychosis is a progressing disease and its effects have appropriately been described in the text book of *Medical Jurisprudence and Toxicology by Modi, 24th Ed. 2011* where it states as follows:-

"Epileptic Psychosis. – Epilepsy usually occurs from early infancy, though it may occur at any period of life. Individuals, who have had epileptic fits for years, do not necessarily show any mental aberration, but quite a few of them suffer from mental deterioration. Religiousity is a marked feature in the commencement, but the feeling is only superficial. Such patients are peevish, impulsive and suspicious, and are easily provoked to anger on the slightest cause.

The disease is generally characterized by short transitory fits of uncontrollable mania followed by complete recovery. The attacks, however, become more frequent. There is a general impairment of the mental faculties, with loss of memory and self-control. At the same time, hallucinations

of sight and hearing occur and are followed by delusions of a persecuting nature. They are deprived of all moral sensibility, are given to the lowest forms of vice and sexual excesses, and are sometimes dangerous to themselves as well as to others. In many long-standing cases, there is a progressive dementia or mental deficiency.

True epileptic psychosis is that which is associated with epileptic fits. This may occur before or after the fits, or may replace them, and is known as pre-epileptic, post-epileptic and masked or psychic phases (psychomotor epilepsy)

Post-Epileptic Mental Ill-health – In this condition, stupor following the epileptic fits is replaced by automatic acts of which the patient has no recollections. The patient is confused, fails to recognize his own relatives, and wanders aimlessly. He is terrified by visual and auditory hallucinations of a religious character and delusions of persecution, and consequently, may commit crimes of a horrible nature, such as thefts, incendiarism, sexual assaults and brutal murders. The patient never attempts to conceal them at the time of perpetration but on regaining consciousness may try to conceal them out of fear."

23. Similar features of Epilepsy have been recorded in the *HWV COX Medical Jurisprudence and Toxicology (7th Edn) by PC Dikshit.*

24. Reverting to the facts of the present case, it may be noted that no witness of the prosecution including the Investigating Officer stated anything with regard to the mental condition of the respondent. However, the respondent not only in his statement under Section 313 Cr.P.C. took up the defence of mental disorder seeking benefit of Section 84 IPC but even led evidence, both documentary as well as oral, in support of his claim. He examined Dr. Vimal Kumar Razdan, DW-2, who deposed that he had examined the respondent and

had given him treatment. He, also, produced the examination report in regard to the treatment of the respondent, Ext.D-5, which was prepared in his clinic.

25. According to the statement of this doctor and the prescription, the respondent was suffering from Epilepsy and while describing post epileptic insanity, this witness stated that after the epileptic attack, a patient behaves like an insane person and he is unable to recognise even the known persons and relatives. During this time, there is a memory loss and the patient can commit any offence. In the prescription, Ext. D-3, issued by Dr. Ashok Pangadiya, it was stated that the patient was suffering from the fits disease and symptoms of behavioral abnormality. Two types of medication on the basis of diagnosis of epileptic disease and other one for insanity were prescribed to the respondent who continued to take these medicines, post epileptic insanity.

26. Another witness who was produced by the defence was DW-1, Bhanwar Lal, the brother of the respondent. According to this witness, the respondent was suffering from mental disorder since 1993. He stated that when he gets the fits of insanity, he can fight with anybody, hit anybody and even throw articles lying around him. At the initial stage, Dr. Devraj Purohit had treated him. Then Dr. V.K. Razdan treated him and thereafter, in Jaipur, Dr. Ashok Pagadiya/Pandharia also treated him. Even when he was in jail, he was under treatment. He produced the prescription slips i.e. Exts. D3 and D4. This witness has also stated that on the date of occurrence at about 6.00 – 6.30 a.m., Shera Ram/respondent was not feeling well and, in fact, his condition was not good. Even at home he had broken the electricity meter and the bulbs. When the people at home including the witness tried to stop him, he had beaten DW-1 on his arm and after hitting him on the face he had run away.

27. This oral and documentary evidence clearly shows that the respondent was suffering from epileptic attacks just prior

to the incident. Immediately prior to the occurrence, he had behaved violently and had caused injuries to his own family members. After committing the crime, he was arrested by the Police and even thereafter, he was treated for insanity, while in jail.

28. Thus, there is evidence to show continuous mental sickness of the respondent. He not only caused death of the deceased but also on the very same day injured and caused hurt to his family members including DW-1. His statement made under Section 313 Cr.PC is fully corroborated by oral and documentary evidence of DW-2 and Ext. D-3 and D-4. Though, the High Court has not discussed this evidence in great detail, but this being an admissible piece of evidence, can always be relied upon to substantiate the conclusion and findings recorded by the High Court.

29. In other words, the High Court on the basis of the documentary and oral evidence has a taken a view which was a possible and cannot be termed as perverse or being supported by no evidence. The finding of the High Court, being in consonance with the well settled principles of criminal jurisprudence, does not call for any interference. More so, the learned counsel appearing for the State has not brought to our notice any evidence, documentary or otherwise, which could persuade us to take a contrary view i.e. other than the view taken by the High Court.

30. Another aspect of this case which requires consideration by this Court is that the case of the prosecution suffers from legal infirmity. In fact, the prosecution has failed to prove beyond reasonable doubt that the injury inflicted by the respondent upon the deceased was sufficient in the ordinary course of nature to cause death. It is the case of the prosecution that the respondent had hurled a stone which had caused injury (lacerated wound on the left side of the forehead) whereupon the deceased fell on the ground and subsequently collapsed. The injury is said to be 2'' x ½" x upto bone,

transversely Lt. side of forehead and another lacerated wound 2" x ½" x ¼" near injury No.1 towards the forehead. These are the injuries which the deceased is stated to have suffered. In addition, abrasion of 1 cm x 1 cm on the left eyebrow was also present. According to the doctor, all these injuries were *ante mortem* in nature and the cause of death was shock and haemorrhage due to head injury.

31. In the statement of PW-20, Dr. C.P. Bhati, it is nowhere stated that the injuries caused by the respondent were sufficient in the ordinary course of nature to cause death. It is also not recorded in the post-mortem report, Ext. 37. This was a material piece of evidence which the prosecution was expected to prove in order to bring home the guilt of the respondent. This is a serious deficiency in the case of the prosecution. Absence of this material piece of evidence caused a dent in the case of the prosecution. The High Court has not taken note of this important aspect of the case.

32. The learned counsel appearing for the respondent placed reliance upon this evidence and strenuously contended that the respondent was entitled to acquittal on this basis alone. We should not be understood to have stated any absolute proposition of law, but in the facts and circumstances of the present case, it was expected of PW-20 to state before the Court as well as record the same in the post-mortem report prepared by him i.e. Ext. 37, that the injuries were sufficient in the ordinary course of nature to cause death of the deceased.

33. *Ex-facie,* injuries do not appear to be so vital that they could have resulted in the death of the deceased, but this fact was required to be proved by expert evidence. The counsel for the respondent relied upon a judgment of this Court in the case of *Ram Jattan and Others v. State of U.P.* [(1995) SCC (Cri) 169] where this Court held that it is not appropriate to interfere with the conclusion that the injuries are not sufficient to cause death unless they are so patent. The Court held as under:-

"4. The learned counsel, however, further submitted that in any event the offence committed by the members of unlawful assembly cannot be held to be one of murder and therefore the common object of unlawful assembly was not one which attracts the provision of Section 302 read with Section 149 IPC. We find considerable force in this submission. Though, in general, right from the first report onwards the prosecution case is that all the 12 accused armed with sharp-edged weapons and lathis surrounded the three persons and inflicted the injuries but from the doctor's report we find that no injury was caused on the vital organs. So far as Patroo is concerned, who got the report written by PW 7 and gave it in the police station, we find 13 injuries but all of them were abrasions and lacerated injuries on the legs and hands. The doctor opined that all the injuries were simple. On Balli, PW 8, the doctor found 12 injuries and they were also on arms and legs. There was only one punctured wound, injury No. 8 and it was not a serious injury and it was also a simple injury. Now, coming to the injuries on the deceased, the doctor who first examined him, when he was alive, found 11 injuries. Out of them, injuries Nos. 1 and 2 were punctured wounds. Injury No. 5 was an incised wound and injury No. 6 was a penetrating wound. All these injuries were on the upper part of the right forearm and outer and lower part of right upper arm. The remaining injuries were abrasions and contusions. The doctor opined that except injuries Nos. 7 and 9 all other injuries were simple. He did not say whether injuries Nos. 7 and 9 were grievous but simply stated that they were to be kept under observation. The deceased, however, died the next day i.e. 9-4-1974 and the post-mortem was conducted on the same day. In the post-mortem examination 11 external injuries were noted but on the internal examination the doctor did not find any injury to the vital organs. He, however, noted that 8th and 9th ribs were fractured. Now, coming to the cause of death, he opined that death was due to shock and

haemorrhage. It is not noted that any of the injuries was sufficient to cause death in the ordinary course of nature. It could thus be seen that neither clause 1stly nor clause 3rdly of Section 300 are attracted to the facts of this case. This contention was also put forward before the High Court but the learned Judges rejected this contention observing that the fracture of 8th and 9th ribs must have resulted in causing death and therefore these injuries must be held to be sufficient in the ordinary course of nature to cause death. We are unable to agree with this reasoning. In the absence of proof by the prosecution in an objective manner that the injuries caused were sufficient in the ordinary course of nature to cause death, the same cannot be interfered with unless the injuries are so patent. As we have noted above except fracture of ribs there was no other injury to any of the vital organs. As a matter of fact internally the doctor did not notice any damage either to the heart or lungs. Even in respect of these two injuries resulting in fracture of the ribs, there were no corresponding external injuries. Again as already noted all the injuries were on the non-vital parts of the body. The learned counsel for the State, however, submitted that a forceful blow dealt on the arm might have in turn caused the fracture of the two ribs. Even assuming for a moment it to be so, it is difficult to hold that from that circumstance alone the common object of the unlawful assembly of 12 persons to cause the death of the deceased is established.

5. The common object has to be gathered or inferred from the various circumstances like nature of the weapons, the force used and the injuries that are caused. After carefully going through the medical evidence we find that it is difficult to conclude that the common object was to cause the death. The injuries on Patroo, PW 8 as well as on the deceased were more or less of the same nature except that in the case of deceased, there were few punctured wounds which were not serious but only simple.

He died due to shock and haemorrhage the next day. In any event there is no indication anywhere in the evidence of the doctor or in the post-mortem certificate that any of the injuries was sufficient in the ordinary course of nature to cause death. No doubt in his deposition the doctor, PW 4 has stated in the general way that these injuries were sufficient to cause death in the ordinary course of nature. We have already held that there was no external injury which resulted in the fracture of the ribs. In such an event clause 3rdly of Section 300 IPC is not attracted. Likewise clause 1stly of Section 300 IPC is also not attracted i.e. intentionally causing death. If their intention was to cause death, they would have used the lethal weapons in a different way and would not have merely inflicted simple injuries on the non-vital parts like legs and hands.

6. In the result we set aside the convictions of these eight appellants under Section 302 read with Section 149 IPC and the sentence for imprisonment for life. Instead we convict them under Section 304 Part II read with Section 149 IPC and sentence each of them to undergo rigorous imprisonment for five years. The sentences and convictions imposed on other counts are confirmed. The four other accused who were convicted by the trial court as well as by the High Court are not before us. However, we are of the view that they must also get the same benefit. They are Ram Chander (A-2), Dal Singhar (A-7), Barai (A-8) and Birju (A-11). Accordingly their convictions under Section 302 read with Section 149 IPC for imprisonment for life are set aside and instead they are also convicted under Section 304 Part II read with Section 149 IPC and are sentenced to undergo rigorous imprisonment for five years. The other convictions and sentences imposed on other counts are, however, confirmed.

34. Reliance was also placed upon the judgment of this Court in the case of *State of Rajasthan v. Kalu* [(1998) SCC

(Cri.) 898], where in the post mortem examination of the deceased, the cause of death was noticed as "acute peritonitis" as a result of abdominal injuries. However, during the cross-examination, Dr. Prem Narayna admitted that "peritonitis" could have set in due to surgical complications also. The Court took the view that the medical evidence, therefore, when analysed in its correct perspective shows that the evidence recorded by the High Court is correct to the effect that prosecution had not proved that the injuries were sufficient in the ordinary course of nature to cause death of the lady and had acquitted the respondent. The Supreme Court declined to interfere with the finding recorded by the High Court.

35. In the present case also, there is no documentary or oral evidence to prove the fact that the injuries caused by the respondent to the deceased were sufficient in the ordinary course of nature to cause death. This, however, cannot be stated as an absolute proposition of law and the question whether the particular injury was sufficient in the ordinary course of nature to cause death or not is a question of fact which will have to be determined in light of the facts, circumstances and evidence produced in a given case. *(Ref. Halsbury's Laws of India 5(2) Criminal Law-II).*

There could be cases where injuries caused upon the body of the deceased *per se* can irresistibly lead to the conclusion that the injuries were sufficient to cause death in the ordinary course of nature, while there may be other cases where it is required to be proved by documentary and oral evidence. Resultantly, it will always depend on the facts of each case. Thus, in such cases, it may neither be permissible nor possible to state any absolute principle of law universally applicable to all such cases.

36. In view of our discussion above, we find no error in the judgment under appeal. Thus, we have no hesitation in dismissing the appeal and the same is hereby dismissed.

B.B.B. Appeal dismissed.

SURESH DHANUKA

v.

SUNITA MOHAPATRA

(CIVIL APPEAL NO.10434-10435 OF 2011)

DECEMBER 02, 2011

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

Arbitration and Conciliation Act, 1996:

s. 9 – Object and intention of – Pending arbitration proceedings, passing of an order suspending the rights of the parties – Justification of – Joint venture agreement between parties to carry on business – Execution of deed of assignment by respondent in favour of appellant assigning 50% of right, title and interest in trade mark 'NH' along with proportional goodwill – Condition therein that on the termination of the Joint Venture, neither assignor nor the assignee would be entitled to use or register the Mark in its own name or jointly with some other party – Subsequently appellant and his son floated a company by the name of 'NHP' – Suit by the respondent wherein District Judge passing an interim order restraining the appellant and the company from selling, distributing, manufacturing and marketing any of the products in the name of 'NH' or 'NHP' which was later made absolute – Arbitration application u/s. 9 also filed by the respondent – Subsequently, the appellant came to know that in breach of the agreement, the respondent approached the dealers and distributors of the appellant to take direct supply from the respondent on a higher discount – Respondent canceling the Agreement and also revoked the Deed of Assignment – Thereafter, in an application filed by the appellant u/s. 9, the District Judge passing an ad-interim order whereby the respondent was restrained from selling her products by herself or by any other person, save and except

through the appellant which was later made absolute – Appeal thereagainst, allowed by the High Court– On appeal, held: Terms of the Deed of Assignment clearly indicate that the respondent had of her own volition parted with 50% of her right, title and interest in the Trade Mark 'NH' with proportional goodwill of the business concerning the goods in respect of which the Mark was used, absolutely and forever, from the date of the Deed – Order passed by the District Judge restraining the respondent from marketing her products through any person, other than the appellant, was more apposite, as the rights of both the parties stood protected till such time as a final decision could be taken in arbitral proceedings, which was the object and intention of s. 9 – High Court overlooked the provisions relating to the use of the trade mark contained in the deed of assignment – Money cannot be an adequate compensation since the appellant apparently acquired 50% interest in the trade mark together with the goodwill of the business – Thus, order passed by the High Court set aside and that of the District Judge restored.

s. 9 – Application u/s. 9 filed by appellant – Interim order passed and made absolute – Appeal thereagainst, by the respondent – High Court reserved the judgment – Thereafter, the High Court allowed the respondent to file an affidavit to bring on record subsequent events which did not form part of the records, without giving the appellant an opportunity of dealing with the same – Held: However innocuous the additional affidavit may have been, once the hearing was concluded and judgment was reserved, it would have been prudent on the part of the High Court to have given an opportunity to the appellant to deal with the same before allowing it to be taken on record – It was a record of the official proceedings and the appellant could not have been prejudiced since he himself had knowledge of the same.

Specific Relief Act, 1963 – s. 42 – Deed of Assignment of trade mark – Condition therein that all goods manufactured by the respondent under the said Trade mark would be marketed solely by the appellant; and that on the termination of the Joint Venture, neither assignor nor the assignee would be entitled to use or register the Mark in its own name or jointly with some other party – Invocation of s. 42 to enforce the negative covenant contained in the Deed of Assignment of trade mark, if contrary to s. 27 of the Contract Act and thus, void – Held: Section 27 of the Contract Act is not attracted – Appellant did not ask for any injunction against the respondent from carrying on any trade or business, but he objected to the use by the respondent of the Trade Mark, in which he had acquired 50% interest, while selling her products – Interim order passed by the District Judge, restraining the respondent from selling her products by herself or by any other person, save and except through the appellant, was apposite to the circumstances – Contract Act, 1872 – s. 27.

The respondent, manufacturer of herbal products entered into an agreement with the appellant resulting in the formation of a Joint Venture Company under the name and style of 'A' for a period of five years which was further extended for five years. Thereafter, the respondent executed a deed of assignment in favour of the appellant assigning 50% of the right, title and interest in the Trade Mark 'Naturoma Herbal' which was registered in the name of the respondent, with proportional goodwill of the business concerned in the goods with a stipulation that all goods manufactured by the respondent under the said Trade mark would be marketed solely by the appellant; and that on the termination of the Joint Venture, neither assignor nor the assignee would be entitled to use or register the Mark in its own name or jointly with some other party. Subsequently, an application was filed with the Trade Mark authorities for bringing on record the name of the appellant as the Joint Proprietor of the Trade Mark. Five years later, the appellant and his son floated a company by the name of 'Naturoma Herbals (P) Ltd.' and also

applied for registration of the Trade Mark in the name of that Company. Thereafter, the appellant resigned from the company despite the fact that the company had not started manufacturing the activities until then. The respondent then filed a suit under Sections 134 and 135 of the Trade Marks Act, 1999. An *ex-parte* interim order was passed restraining the appellant and the Company from selling, distributing, manufacturing and marketing any of the products in the name of "Naturoma" or "Naturoma Herbal" which was made absolute a year later, till the disposal of the suit. The respondent filed an application under Section 9 of the 1996 Act before the District Judge. Thereafter, the appellant came to know that in breach of the agreements entered into by the parties, the respondent was approaching the dealers and distributors of the appellant to take direct supply from the respondent on a higher discount. The appellant also filed an application under Section 9 of the 1996 Act before the District Judge. Thereafter, the respondent cancelled the Agreement and also revoked the Deed of Assignment. The appellant's application was dismissed and he filed a fresh application under Section 9 of the 1996 Act. An ad-interim order was passed restraining the respondent from selling her products by herself or by any other person, save and except through the appellant which was later made absolute. Thereafter, a corrigendum was made by the Trade Mark Registrar in the Trade Mark Journal, showing the appellant as the Joint Proprietor of the Trade Mark "Naturoma Herbal" which was cancelled without notice to the appellant. Meanwhile the respondent filed an appeal before the High Court against the interim order passed on the application filed by the appellant under Section 9 of the 1996 Act. The High Court reserved the judgment. The respondent then filed an affidavit to bring on record the said cancellation of the corrigendum and the same was relied on by the High

Court though the appellant was not given an opportunity to deal with the same. The High Court allowed the appeal. Aggrieved, the appellant filed a review application and the same was dismissed. Therefore, the appellant filed the instant appeal.

The questions which, therefore, arose for determination were:

i) Whether the High Court was justified in interfering with the order passed by the District Judge in the arbitration application, on account whereof pending arbitration, the respondent was restrained from marketing the products manufactured by her under the Trade Mark "Naturoma Herbal" or "Naturoma" by herself or through anyone, except through the appellant?

ii) Whether, pending arbitration proceedings, an order could have been passed by which the right acquired by the appellant under the Deed of Assignment of 50% of the right, title and interest in the Trade Mark "Naturoma Herbal", could have been suspended and he could have been restrained from objecting to the use of the said Mark by the respondent?

iii) Whether the High Court was justified in relying upon an affidavit filed on behalf of the respondent after hearing had been concluded and judgment had been reserved in the appeal, without giving the appellant an opportunity of dealing with the same?

iv) Whether the invocation of Section 42 of the Specific Relief Act, 1963, to enforce the negative covenant contained in the Deed of Assignment, was contrary to the provisions of Section 27 of the Contract Act, 1872 and was, therefore, void.

Allowing the appeals, the Court

HELD: 1.1 The terms of the Deed of Assignment clearly indicate that the respondent had of her own volition parted with 50% of her right, title and interest in the Trade Mark "Naturoma Herbal" with proportional goodwill of the business concerning the goods in respect of which the Mark was used, absolutely and forever, from the date of the Deed. On behalf of the respondent it was claimed that the Deed of Assignment had never been acted upon and that, in any event, the same had been revoked, when the Agreement, was cancelled. However, in view of the provisions of the Deed of Assignment, it is yet to be adjudicated upon and decided as to whether by virtue of the revocation of the Deed of Assignment by the respondent, the appellant was no longer entitled to the benefits of the Trade Mark which had been transferred to him to the extent of 50% absolutely and forever. In such circumstances, the order passed by the District Judge, restraining the respondent from marketing her products through any person, other than the appellant, was more apposite in the facts of the case, as the rights of both the parties stood protected till such time as a final decision could be taken in arbitral proceedings, which, in effect, is the object and intention of Section 9 of the Arbitration and Conciliation Act, 1996. [Para 31] [535-B-F]

1.2 It was inappropriate on the part of the High Court to allow the respondent to file an affidavit, on which reliance was placed, after the hearing had been concluded and judgment had been reserved, without giving the appellant an opportunity of dealing with the same. However innocuous the additional affidavit may have been, once the hearing was concluded and judgment was reserved, it would have been prudent on the part of the High Court to have given an opportunity to the appellant to deal with the same before allowing it to be taken on record. It has been submitted that the additional affidavit which was filed on behalf of the

respondent after the judgment had been reserved by the Appeal Court, only sought to bring on record the proceedings whereby the corrigendum which had been issued by the Trade Mark Registrar, showing the appellant as the Joint Proprietor of the Trade Mark "Naturoma Herbal", had been subsequently cancelled. Since what was produced was a record of the official proceedings, the appellant could not have been prejudiced since he himself had knowledge of the same. [Para 32] [535-G-H; 536-A-C]

1.3 As regards the invocation of Section 42 of the Specific Relief Act, 1963, to enforce the negative covenant contained in the Deed of Assignment, was contrary to the provisions of Section 27 of the Contract Act, 1872, the provisions of Section 27 would not be attracted to the facts of the instant case. What is declared to be void by virtue of Section 27 is any Agreement to restrain any person from exercising his right to carry on a profession or trade or business and any restraint thereupon by an Agreement would be void. It is seen from the materials on record that the appellant did not ask for any injunction against the respondent from carrying on any trade or business, but he objected to the use by the respondent of the Trade Mark, in which he had acquired a 50% interest, while selling her products. [Paras 33, 34] [536-D-F; 537-C]

1.4 The conditions in the Deed of Assignment clearly stipulate that all the goods manufactured by the respondent under the Trade Mark "Naturoma" would be marketed solely by the appellant. It was also submitted that the said Trade Mark would be used only in relation to goods connected in the course of trade with both the parties. One of the other conditions of the Deed of Assignment was that both the parties would be entitled to assign their respective shares in the Trade Mark

subject to prior written consent of the other party, which presupposes that the parties were the absolute owners of their respective shares in the Trade Mark and even on termination of the joint venture, as has been done in the instant case, neither of the parties would be entitled to use or register the Mark in their own names or jointly with some other party. [Para 35] [537-D-F]

1.5 Having regard to the arbitration clause-terms and conditions of the Deed of Assignment, the interim order passed on the application under Section 9 of the Arbitration and Conciliation Act, 1996, filed by the appellant in keeping with the terms and conditions agreed upon between the parties, was justified and within the jurisdiction of the District Judge. The interim order passed by the District Judge, restraining the respondent from selling her products by herself or by any other person, save and except through the appellant, was apposite to the circumstances. The said order took into consideration the interests of both the parties flowing from the Agreement and the Deed of Assignment, pending decision by an Arbitral Tribunal. The cause of action for the suit filed by the respondent before the District Judge was the incorporation of a Company by the appellant with his son under the name and style of "Naturoma Herbals (P) Ltd." and the subsequent application made before the Registrar of Trade Marks to register "Naturoma Herbal" in the name of the said Company. It is in that context that the interim order was passed restraining the appellant from distributing, manufacturing or marketing any of the products in the name of "Naturoma" or Trade Mark "Naturoma Herbal". The said order of injunction did not permit the respondent to manufacture and market the goods under the said Trade Mark in violation of the provisions of the Deed of Assignment. [Para 36] [537-G-H; 538-A-E]

1.6 The Single Judge of the High Court, while referring to some of the provisions of the Agreement between the parties, apparently overlooked the provisions relating to the use of the Trade Mark contained in the Deed of Assignment. Although, reference was made to the clause of the Agreement, the High Court failed to notice that the same was not contained in the Deed of Assignment, whereby 50% of the right, title and interest of the respondent in the Trade Mark "Naturoma Herbal" was assigned in favour of the appellant absolutely and forever. Even upon termination of the joint venture under the Agreement between the parties, neither the appellant nor the respondent would be entitled to use or register the Mark in their own names or jointly with some other party. In fact, the relevant terms and conditions of the Deed of Assignment had been extracted by the Single Judge in the impugned judgment, but the same appear to have been lost sight of while considering the terms and conditions of the Agreement executed between the parties. [Para 37] [538-F-H; 539-A]

1.7 This is not a case where money can be an adequate compensation, since the appellant has apparently acquired a 50% interest in the Trade Mark in question, together with the goodwill of the business in relation to the products in which the Trade Mark is used. Therefore, the High Court erred in reversing the order passed by the District Judge in the application filed by the appellant, under which the status-quo would have been maintained till the dispute was settled in arbitration. The impugned judgment and order of the Single Judge of the High Court impugned in the appeals is set aside and that of the District Judge is restored. [Paras 38, 39, 40] [539-B-D]

1.8 The order passed whereby the respondent had been allowed to continue with the running of the

business, but she was directed to maintain a separate account in respect of the transaction and to place the same before this Court at the time of hearing of the matter, such account does not appear to have been filed, but since the matter is disposed of by restoring the order of the District Judge in the application filed by the appellant, the respondent is directed, as and when arbitral proceedings may be taken, to furnish such account upto this day before the Arbitrator so that the claims of the parties could be fully decided by the Arbitrator. [Para 41] [539-E-G]

Gujarat Bottling Co. Ltd. vs. Coca Cola Company **(1995) 5 SCC 545;** *Percept D'Mark (India) (P) Ltd. vs. Zaheer Khan* **(2006) 4 SCC 227;** *K.T. Plantation Ltd. vs. State of Karnataka* **(2007) 7 SCC 125 – referred to.**

Case Law Reference:

(1995) 5 SCC 545	**Referred to**	**Para 24**
(2006) 4 SCC 227	**Referred to**	**Para 24**
(2007) 7 SCC 125	**Referred to**	**Para 24**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10434-10435 of 2011.

From the Judgment & Order dated 27.10.2008 of the High Couret of Orissa, Cuttack in ARBA No. 17 of 2008 and order dated 28.9.2010 on Review Application No. 21 of 2009 in ARBA No. 17 of 2008.

P.K. Ghosh, Srenik Singhvi, SaurabhTrivedi for the Appellant.

A.K. Ganguli, Shambhu Prasad Singh, Shantwanu Singh Punam Kumari for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. These appeals arising out of SLP(C)Nos.3391-3392 of 2011, are directed against the judgment and order dated 27th October, 2008, passed by the Orissa High Court in ARBA No.17 of 2008 and the order dated 28th September, 2010, passed on the Review Application No.21 of 2008.

3. The Appellant herein, Suresh Dhanuka, filed an application before the learned District Judge, Khurda, being ARB (P) No.576 of 2007, under Section 9 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as the "1996 Act".

4. The facts leading to the filing of the said application reveal that on 1st April, 1999, Suresh Dhanuka, the Appellant herein, and Sunita Mahapatra, the Respondent herein, entered into an Agreement, whereby they agreed to jointly carry on business in the name and style of "Abhilasha". Sunita Mahapatra was carrying on business in the name and style of "M/s. Nature Probiocare Inc.", as the sole proprietress thereof. The said Agreement was for a period of five years from 1st April, 1999 to 31st March, 2004, which was subsequently extended till 31st March, 2009. On 4th October, 1999, the Respondent herein applied to the Registrar of Trade Marks, Kolkata, in Form No.TM-1 under the Trade and Merchandise Marks Act, 1958, for registration of the Trade Mark "Naturoma Herbal", under Application No.879695.

5. During the first five-year period of the original Agreement dated 1st April, 1999, the Respondent, Sunita Mahapatra, executed a Deed of Assignment on 1st October, 2000, assigning 50% of her right, title and interest in the said Trade Mark "Naturoma Herbal", with proportional goodwill of the business concerned in the goods in respect of which the Mark was permanently used, *interalia*, on the following terms and conditions, namely,

(a) All goods manufactured by the Respondent under the

said Trade Mark would be marketed solely by the Appellant herein;

(b) On the termination of the Joint Venture, neither the assignor nor the assignee would be entitled to use or register the Mark in its own name or jointly with some other party;

(C) The existing goodwill and further goodwill would vest in the owner and the assignee.

Soon thereafter, on 28th February, 2001, M/s. S. Majumdar & Co., the authorized Trade Mark agent of the Respondent, filed an application in Form No.TM-16, along with the Deed of Assignment, with the Trade Mark authorities, together with the fee of Rs.20/- for recording the name of the Appellant as the Joint Proprietor of the Trade Mark. The application for registration of the Trade Mark was advertised in the Trade Mark Journal on 13th November, 2003. While the same was pending, the Agreement dated 1st April, 1999, was extended by mutual consent till 31st March, 2009. It appears that during the period 2003-2007, the sale of the product increased from Rs.19,99,808/- to Rs.1,88,70,143/-. Meanwhile, the Agreement dated 1st April, 1999, was extended by mutual consent till 31st March, 2009, as indicated hereinbefore.

6. It appears that on 19th July, 2004, one Food Ingredients Specialties S.A. filed an opposition No.KOL-167256 to the Trade Mark application of the Respondent wherein a joint reply was filed, which was affirmed by both the parties. It is alleged that, thereafter, in 2006, the Appellant and his son floated a company by the name of "Naturoma Herbal (P) Ltd.". It is the case of the Appellant that the Appellant and his son floated the company with the name of "Naturoma Herbal (P) Ltd.". According to the Appellant, his son floated the company with the consent of the Respondent, who, subsequently, declined to participate in the management thereof. On 31st August, 2006, the Appellant resigned from the company despite the fact that

the company had not started manufacturing activities until then, as was certified by the Chartered Accountant. On 21st August, 2007, the Respondent herein filed a Suit, being CS No.26 of 2007, before the District Judge at Khurda, under Sections 134 and 135 of the Trade Marks Act, 1999. The learned District Judge, by an *ex-parte* order dated 29th August, 2007, restrained the Appellant and the company from selling, distributing, manufacturing and marketing any of the products in the name of "Naturoma" or "Naturoma Herbal". At this stage, on 4th September, 2007, the Respondent filed an application under Section 9 of the 1996 Act, also before the District Judge at Khurda.

7. On 12th September, 2007, the Appellant came to learn from the market that in breach of the Agreements entered into by the parties, the Respondent was approaching the Dealers and Distributors of the Appellant to take direct supplies from the Respondent on a higher discount. This led to the filing of the application under Section 9 of the 1996 Act by the Appellant before the District Judge, Alipore, Kolkata. Thereafter, on 25th September, 2007, the Respondent cancelled the Agreement dated 1st April, 1999 and also revoked the Deed of Assignment dated 1st October, 2000. The Appellant's application under Section 9 of the 1996 Act was dismissed on 26th November, 2007, on account of the earlier application filed under Section 9 of the above Act, by the Respondent before the District Judge at Khurda. Thereafter, on 19th December, 2007, the Appellant filed a fresh application under Section 9 of the 1996 Act, before the learned District Judge, Khurda. On 27th December, 2007, the learned District Judge passed an interim order restraining the Respondent from selling the products in question by herself or by any other person, save and except through the Appellant. The said interim order was made absolute on 22nd May, 2008.

8. On 1st July, 2008, a corrigendum was made by the Trade Mark Registrar in the Trade Mark Journal, showing the

Appellant as the joint proprietor of the Trade Mark "Naturoma Herbal".

9. The Respondent herein preferred an appeal before the Orissa High Court on 8th July, 2008, which was heard on 18th September, 2008 and judgment was reserved. While the matter was pending, the Respondent filed a letter with the Trade Mark Authority at Mumbai on 25th September, 2008, praying for cancellation of the order allowing the request of the Appellant in January, 2001, resulting in issuance of the Corrigendum in the Trade Mark Journal on 16th September, 2008. As would appear from the materials on record, the Assistant Registrar of Trade Marks, Mumbai, cancelled the Corrigendum dated 1st July, 2008 on 26th September, 2008, without notice to the Appellant and such cancellation was published in the Trade Mark Journal on 29th September, 2008. On 30th September, 2008, the Respondent filed an affidavit to bring on record the said cancellation of the Corrigendum and, though, the same was relied upon by the High Court in its judgment dated 27th October, 2008, the Appellant was not given an opportunity to deal with the same. The High Court, by its aforesaid judgment, allowed the appeal filed by the Respondent. The Review Application filed by the Appellant on 28th January, 2009, against the judgment and order dated 27th October, 2008, was ultimately rejected by the High Court on 28th September, 2010, resulting in the filing of the Special Leave Petitions on 7th January, 2011, in which notice was issued and a limited interim order was made.

10. Appearing for the Appellant, Mr. P.K. Ghosh, learned Senior Advocate, submitted that since the Respondent's establishment was basically a production unit and did not possess any experience and/or expertise in the field of marketing, promotion, distribution and management of its manufactured goods, she entered into an Agreement with the Appellant to market and distribute her products for a period of 5 years from 1st April, 1999, as indicated hereinbefore. The

same was extended for a further period of 5 years on 1st April, 2004 by mutual consent. Mr. Ghosh submitted that the Appellant incurred huge promotional expenses between 1999 and 2007 assessed at about Rs.72 lakhs and it was only after such promotional schemes that there was a substantial increase in the sale of the product with the Trade Mark "Naturoma Herbal". Mr. Ghosh submitted that the sales figures from the accounting year 2003-04 to the accounting year 2006-07 showed an increase of almost 1 crore 60 lakhs rupees.

11. Mr. Ghosh submitted that the Respondent even went so far as to sell its goods by using the Trade Mark "Naturoma Herbal" and deleting the name "Abhilasha" from the packaging of the products. Mr. Ghosh contended that suppressing all the above facts, the opposite party filed a suit, being C.S. No.26 of 2007, under Sections 134 and 135 of the Trade Marks Act, 1999, before the District Judge, Khurda, *inter alia*, praying for an order of injunction to restrain the Appellant from using the Mark "Naturoma Herbal" and obtained an *ex-parte* order of injunction to the above effect.

12. Having obtained an interim order in the aforesaid suit, the Respondent terminated the Agreement dated 1st April, 1999, and also revoked the Deed of Assignment dated 1st October, 2000, unilaterally. The Appellant thereupon moved the learned District Judge, Alipore, by way of an application under Section 9 of the 1996 Act, but the same had to be dropped on account of lack of jurisdiction. The Appellant, thereafter, filed another application under Section 9 of the above Act, being ARBP No.576 of 2007, before the Court of District Judge, Khurda, in which initially on 22nd December, 2007, an interim protection was given directing the Respondent not to sell, market, distribute, advertise its products under the Trade Mark "Naturoma Herbal", by herself or through any other person save and except the Appellant herein. The said order was subsequently confirmed on 22nd May, 2008.

13. Mr. Ghosh submitted that the Respondent had no

authority to terminate the Agreement dated 1st April, 1999, on the ground that the same had been misused by the Appellant. Learned counsel submitted that even if it be accepted that the Appellant was a Director of the Naturoma Herbals Pvt. Ltd., between June, 2005, to August, 2006, then there was no substance in the applications made against the Appellant as the said Company had not conducted any business within that period and, in any event, its product was sold under different designs containing the word "SAFFIRE" in bold and prominent fonts.

14. Mr. Ghosh submitted that the Respondent did not also have any right to revoke the Deed of Assignment whereby 50% of the right, title and interest in the Trade Mark "Natural Herbal" had been assigned to the Appellant to be held by him absolutely and forever. Mr. Ghosh urged that the Deed of Assignment did not contain any clause for revocation of the right and ownership of the Trade Mark to the extent of 50% and such revocation was made with the intention to defraud the Appellant and to grab the market created by him.

15. Mr. Ghosh reiterated the conditions contained in the Deed of Assignment dated 1st October, 2000, whereby 50% of the right, title and interest in the Trade Mark "Naturoma Herbal" with proportional goodwill of the business concerned in the said goods in respect of which the Mark was used, stood assigned to the Appellant absolutely and forever. Mr. Ghosh submitted that it was not within the powers of the Respondent to terminate the Deed of Assignment, even if the joint venture for marketing of the goods manufactured by the Respondent under the name of "Abhilasha", was discontinued. Mr. Ghosh reiterated that all goods manufactured by the Respondent under the aforesaid Trade Mark would have to be marketed solely by the Appellant and on termination of the joint venture, neither the assignor nor the assignee would be entitled to **use or register** (emphasis added) the Mark on its own name or jointly with some other party. Mr. Ghosh contended that the said condition

amounted to a negative covenant which could be enforced under Section 42 of the Specific Relief Act, 1963. Learned counsel urged that while Section 41 of the aforesaid Act indicates the circumstances in which an injunction cannot be granted to prevent the breach of a contract, the performance of which could not specifically be enforced, Section 42, on the other hand, specifically provides that notwithstanding anything contained in Clause (e) of Section 41, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the Court while not being in a position to compel specific performance of the affirmative agreement, would not be precluded from granting an injunction to perform the negative covenant, if the plaintiff had not failed to perform the contract so far as it was binding on him. Mr. Ghosh urged that in the instant case, the conditions in the Deed of Assignment made it very clear that except for the Appellant, no other person would be entitled to market, sell, distribute and advertise the goods manufactured by the manufacturer under the Trade Mark "Naturoma Herbal". It was further stipulated that if the joint venture agreement was to be terminated at any point of time, neither the assignor nor the assignee would be entitled to use or register the Mark in its own name or in the name of some other party.

16. It was submitted by Mr. Ghosh that the corrigendum which had been published by the Registrar of Trade Marks in the Trade Mark Journal on 1st July, 2008, showing the Appellant as the joint proprietor of the Trade Mark "Naturoma Herbal" was cancelled on 25th September, 2008, on the basis of a letter written by the Respondent to the Trade Mark Authority at Mumbai, seeking cancellation of the order, without any opportunity being given to the Appellant who had been shown as the joint proprietor of the Trade Mark in question. Mr. Ghosh submitted that what is more interesting is the fact that such letter seeking cancellation of the order by which the name of the Appellant was shown as the Joint Proprietor of the Trade

Mark was written at a time when the Respondent's appeal against the order of the Registrar of the Trade Marks was pending before the Orissa High Court. In fact, after the hearing of the appeal was concluded and judgment was reserved, the Respondent filed an affidavit before the High Court to bring on record the cancellation of the corrigendum published on 1st July, 2008 and, although, the same was relied upon by the High Court, no opportunity was given to the Appellant to deal with the said document or to make any submissions in respect thereof. Mr. Ghosh submitted that the appeal was ultimately allowed by the High Court on the basis of documents submitted on behalf of the Respondent after the judgment had been reserved in the appeal.

17. Mr. Ghosh also submitted that the review application filed by the Appellant on the ground that the affidavit filed by the Respondent was taken on record without any opportunity to the Appellant to meet the same, was also rejected on 20th September, 2010, on the basis of an order of the Registrar of Trade Marks which was not on record at the time when the hearing of the appeal was concluded and judgment was reserved. Mr. Ghosh submitted that the manner in which the entire proceedings had been conducted clearly indicates that the High Court had not applied its judicial mind in allowing the appeal filed by the Respondent against the orders passed on the Appellant's application under Section 9 of the Arbitration and Conciliation Act, 1996, before the District Judge at Khurda.

18. Mr. Ghosh lastly contended that on the application made by the Respondent to the Registrar of Trade Marks for registration of the Trade Mark "Naturoma", certain objections had been filed in her counter statement. In such objection, it had been clearly indicated that with a view to effectively market the products under the Trade Mark "Naturoma", the Respondent joined hands with the Appellant by a Deed of Assignment dated 1st October, 2000, whereby she had transferred 50% of her right, title and interest in favour of the Appellant and pursuant to such assignment, the Trade Mark application was now jointly

held by Nature Pro Biocare Inc. and Abhilasha. Mr. Ghosh submitted that the Respondent had at all times in no uncertain terms reiterated the assignment effected in favour of the Appellant with regard to the Trade Mark and the goodwill of the Company. Learned counsel submitted that having done so, there was no reason for the Registrar of Trade Marks to cancel the corrigendum by which the name of the Appellant had been brought on the Trade Mark Journal as joint owner of the Trade Mark "Naturoma Herbal" and that too not by any order of cancellation, but merely by a notification which was issued without any foundation, since the judgment in the appeal preferred by the Respondent had not yet been delivered. Mr. Ghosh submitted that the order of the High Court and that of the Registrar of Trade Marks canceling the corrigendum issued by the Registrar of Trade Marks in favour of the Appellant, were liable to be set aside.

19. On behalf of the Respondent, Mr. Shambhu Prasad Singh, learned Senior Advocate, submitted that since the arbitral proceeding was at its last stages and the Appellant could be adequately compensated in terms of money, the prayer for injunction made on behalf of the Appellant was liable to be rejected.

20. Apart from the above, Mr. Singh submitted that although a Deed of Assignment had been executed on 1st October, 2010, the same had never been acted upon, but the Appellant sought to take shelter under Clause 19 of the said Deed after having acted contrary thereto by forming a Company in the name of "Naturoma Herbals Private Limited" and applying for registration of the Respondent's Trade Mark "Naturoma" in his newly-formed Company's name. Referring to the Certificate of Incorporation and Memorandum of Association of the said Company, Mr. Singh pointed out that the name of the Appellant was shown in the Subscribers' List at Serial No.1 holding 5000 shares, while his son, Rahul Dhanuka, was shown to be holding the remaining 5000 shares.

21. On the question of grant of injunction to implement a negative covenant, as envisaged in Section 42 of the Specific Relief Act, 1963, Mr. Singh urged that the covenant contained in the Deed of Assignment, which had not been acted upon, was contrary to the provisions of Section 27 of the Indian Contract Act, 1872, and was, therefore, void.

22. Mr. Singh submitted that prior to the Agreement entered into between the parties on 1st April, 1999, regarding marketing and distribution of the goods manufactured by the Respondent, the Respondent had obtained Drug Licence on 2nd May, 1997, and Sales Tax Licence on 13th September, 1997, for marketing and selling "Naturoma Herbals". Mr. Singh urged that even eight years after the Assignment Deed was signed by the parties, the Respondent's name continued to be shown in the Trade Mark Journal as the proprietor of the aforesaid Trade Mark. Learned counsel submitted that as per the prayer of the Respondent in the application before the District Judge, Khurda, under Section 9 of the Arbitration and Conciliation Act, 1996, the Court had initially passed an interim order dated 29th August, 2007, whereby the Appellant and others were restrained from selling, distributing, manufacturing and marketing any product in the name of "Naturoma Herbals" or "Naturoma" or in any other name similar or identical to the said name. The said ad-interim order was made absolute on 25th January, 2008, till the disposal of the suit. The appeal preferred from the said order was dismissed by the High Court. The review petition filed thereafter was also dismissed.

23. Mr. Singh then submitted that in addition to the aforesaid proceeding before the District Judge, Khurda, the Appellant had also filed an application before the learned Arbitrator under Section 17 of the Arbitration and Conciliation Act, 1996, for the self-same reliefs.

24. On the question of enforcement of a negative covenant, Mr. Singh submitted that even in such a case, the balance of convenience and inconvenience would have to be taken into

consideration. In this regard, reference was made to the decision of this Court in (i) *Gujarat Bottling Co. Ltd. vs. Coca Cola Company* [(1995) 5 SCC 545], (ii) *Percept D'Mark (India) (P) Ltd. vs. Zaheer Khan* [(2006) 4 SCC 227] and (iii)*K.T. Plantation Ltd. vs. State of Karnataka* [(2007) 7 SCC 125].

25. Mr. Singh urged that the impugned decision of the High Court was without any illegality or irregularity and no interference was called for therewith.

26. In a short reply, Mr. Pradip Ghosh submitted that in the instant case there was no violation of Section 27 of the Indian Contract Act, 1872, as the injunction sought for was not on trade or business but in respect of use of the Trade Mark.

27. From the submissions made on behalf of the respective parties and the materials on record, it is clear that the Respondent who was a manufacturer of herbal products entered into an Agreement with the Appellant resulting in the formation of a Joint Venture Company under the name and style of "Abhilasha". The said Agreement was initially for a period of 5 years from 1st April, 1999, and, thereafter, extended till 31st March, 2009. There is also no dispute that a Deed of Assignment was executed by the Respondent in favour of the Appellant on 1st October, 2010, assigning 50% of the right, title and interest in the Trade Mark "Naturoma Herbal" registered in the name of the Respondent, with proportional goodwill of the business concerned in the goods in respect of which the Mark is permanently used, on certain conditions which have been extracted hereinbefore. It is also on record that an application was filed with the Trade Mark authorities for bringing on record the name of the Appellant as the Joint Proprietor of the Trade Mark and objections filed thereto were jointly resisted by the Appellant and the Respondent, accepting the fact that the Appellant was the owner of 50% of the Trade Mark and all rights, title and interest accrued therefrom. However, in 2006, it came to light that the Appellant had floated a Company by the name of "Naturoma Herbals (P) Ltd." and it had also applied

for registration of the Trade Mark in the name of that Company. It is at that stage that the Respondent filed a Suit on 21st August, 2007, under Sections 134 and 135 of the Trade Marks Act, 1999, being C.S. No.26 of 2007, in which an ex-parte interim order was passed on 29th August, 2007, restraining the Appellant and the Company from selling, distributing, manufacturing and marketing any of the products in the name of "Naturoma" or "Naturoma Herbal". The said ad-interim order was made absolute on 25th January, 2008, till the disposal of the suit.

28. Thereafter, on 25th September, 2007, the Respondent cancelled the Agreement dated 1st April, 1999 and also revoked the Deed of Assignment dated 1st October, 2000. Immediately thereafter, on 19th December, 2007, the Appellant filed a fresh application under Section 9 of the Arbitration and Conciliation Act, 1996, before the District Judge, Khurda, who on 27th December, 2007, passed an ad-interim order restraining the Respondent from selling her products by herself or by any other person, save and except through the Appellant. The said interim order was made absolute on 22nd May, 2008.

29. At this point of time, there were two apparently conflicting orders in existence; one by the District Judge, Khurda, in the Suit filed by the Respondent restraining the Appellant from selling, distributing, manufacturing or marketing any of the products in the name of "Naturoma" or "Naturoma Herbal", and on the other the District Judge passed an order under Section 9 of the Arbitration and Conciliation Act, 1996, restraining the Respondent from selling her products by herself or by any other person, save and except through the Appellant.

30. The corrigendum by which the Trade Mark Registrar had on 1st July, 2008, altered the entries in the Trade Mark Journal, showing the Appellant as the Joint Proprietor of the Trade Mark "Naturoma Herbal", was cancelled on 26th September, 2008, without notice to the Appellant. After the interim order passed on 27th December, 2007, on the

application filed by the Appellant under Section 9 of the Arbitration and Conciliation Act, 1996, and the same was made absolute on 22nd May, 2008, the Respondent preferred an appeal before the Orissa High Court on 8th July, 2008, being Arb. A. No.17 of 2008. The same was heard on 18th September, 2008, and judgment was reserved. After reserving judgment, the High Court allowed the Respondent to file an affidavit to bring on record subsequent events which did not form part of the records, without giving the Appellant an opportunity of dealing with the same. What is also relevant is the fact that the said affidavit was relied upon by the High Court while allowing the Appeal filed by the Respondent herein. The questions which, therefore, arise for determination are :

(i) Whether the High Court was justified in interfering with the order passed by the District Judge, Khurda in Arb.(P) No.576 of 2007, on account whereof pending arbitration, the Respondent was restrained from marketing the products manufactured by her under the Trade Mark "Naturoma Herbal" or "Naturoma" by herself or through anyone, except through the Appellant?

(ii) Whether, pending arbitration proceedings, an order could have been passed by which the right acquired by the Appellant under the Deed of Assignment of 50% of the right, title and interest in the Trade Mark "Naturoma Herbal", could have been suspended and he could have been restrained from objecting to the use of the said Mark by the Respondent?

(iii) Whether the High Court was justified in relying upon an affidavit filed on behalf of the Respondent after hearing had been concluded and judgment had been reserved in the appeal, without giving the Appellant an opportunity of dealing with the same?

(iv) Whether the invocation of Section 42 of the Specific Relief Act, 1963, to enforce the negative covenant contained in the Deed of Assignment, was contrary to the provisions of Section 27 of the Indian Contract Act, 1872 and was, therefore, void?

31. As far as the first two questions are concerned, the terms of the Deed of Assignment clearly indicate that the Respondent had of her own volition parted with 50% of her right, title and interest in the Trade Mark "Naturoma Herbal" with proportional goodwill of the business concerning the goods in respect of which the Mark was used, absolutely and forever, from the date of the Deed, namely, 1st October, 2000. It is no doubt true that on behalf of the Respondent it has been claimed that the Deed of Assignment had never been acted upon and that, in any event, the same had been revoked on 25th September, 2007, when the Agreement dated 1st April, 1999, was cancelled. However, in view of the provisions of the Deed of Assignment, it is yet to be adjudicated upon and decided as to whether by virtue of the revocation of the Deed of Assignment by the Respondent, the Appellant was no longer entitled to the benefits of the Trade Mark which had been transferred to him to the extent of 50% absolutely and forever. In such circumstances, the order passed by the District Judge, Khurda, in ARBP No.576 of 2007, restraining the Respondent from marketing her products through any person, other than the Appellant, was more apposite in the facts of the case, as the rights of both the parties stood protected till such time as a final decision could be taken in arbitral proceedings, which, in effect, is the object and intention of Section 9 of the Arbitration and Conciliation Act, 1996.

32. As far as the third question is concerned, it was inappropriate on the part of the High Court to allow the Respondent to file an affidavit, on which reliance was placed, after the hearing had been concluded and judgment had been reserved, without giving the Appellant an opportunity of dealing

with the same. However innocuous the additional affidavit may have been, once the hearing was concluded and judgment was reserved, it would have been prudent on the part of the High Court to have given an opportunity to the Appellant to deal with the same before allowing it to be taken on record. It has been submitted that the additional affidavit which was filed on behalf of the Respondent after the judgment had been reserved by the Appeal Court, only sought to bring on record the proceedings whereby the corrigendum which had been issued by the Trade Mark Registrar on 1st July, 2008, showing the Appellant as the Joint Proprietor of the Trade Mark "Naturoma Herbal", had been subsequently cancelled on 26th September, 2008. Since what was produced was a record of the official proceedings, the Appellant could not have been prejudiced since he himself had knowledge of the same.

33. Coming to the last question, as to whether the invocation of Section 42 of the Specific Relief Act, 1963, to enforce the negative covenant contained in the Deed of Assignment, was contrary to the provisions of Section 27 of the Indian Contract Act, 1872, or not, we are inclined to accept Mr. Ghosh's submissions that the injunction sought for by the Appellant was not to restrain the Respondent from carrying on trade or business, but from using the Trade Mark which was the subject matter of dispute. Accordingly, the provisions of Section 27 of the Indian Contract Act, 1872, would not be attracted to the facts in this case. For the sake of reference, Section 27 of the above Act is reproduced hereinbelow :-

> *27. Agreement in restraint of trade, void.-* Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.
>
> *Exception 1.- Saving of agreement not to carry on business of which goodwill is sold.-* One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local

limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business."

It is obvious that what is declared to be void by virtue of Section 27 is any Agreement to restrain any person from exercising his right to carry on a profession or trade or business and any restraint thereupon by an Agreement would be void.

34. As will be seen from the materials on record, the Appellant did not ask for any injunction against the Respondent from carrying on any trade or business, but he objected to the use by the Respondent of the Trade Mark, in which he had acquired a 50% interest, while selling her products.

35. The conditions in the Deed of Assignment clearly stipulate that all the goods manufactured by the Respondent under the Trade Mark "Naturoma" would be marketed solely by the Appellant. It was also submitted that the said Trade Mark would be used only in relation to goods connected in the course of trade with both the parties. One of the other conditions of the Deed of Assignment was that both the parties would be entitled to assign their respective shares in the Trade Mark subject to prior written consent of the other party, which presupposes that the parties were the absolute owners of their respective shares in the Trade Mark and even on termination of the joint venture, as has been done in the instant case, neither of the parties would be entitled to use or register the Mark in their own names or jointly with some other party.

36. Accordingly, having regard to the arbitration clause, which is Condition No.10 of the terms and conditions of the Deed of Assignment, the interim order passed on the application under Section 9 of the Arbitration and Conciliation Act, 1996, filed by the Appellant in keeping with the terms and conditions agreed upon between the parties, was justified and

within the jurisdiction of the District Judge, Khurda. As we have mentioned hereinbefore, the interim order passed by the learned District Judge, Khurda, restraining the Respondent from selling her products by herself or by any other person, save and except through the Appellant, was apposite to the circumstances. The said order took into consideration the interests of both the parties flowing from the Agreement and the Deed of Assignment, pending decision by an Arbitral Tribunal. The cause of action for the suit filed by the Respondent before the District Judge, Khurda was the incorporation of a Company by the Appellant with his son under the name and style of "Naturoma Herbals (P) Ltd." and the subsequent application made before the Registrar of Trade Marks to register "Naturoma Herbal" in the name of the said Company. It is in that context that the interim order was passed restraining the Appellant from distributing, manufacturing or marketing any of the products in the name of "Naturoma" or Trade Mark "Naturoma Herbal". The said order of injunction did not permit the Respondent to manufacture and market the goods under the said Trade Mark in violation of the provisions of the Deed of Assignment referred to hereinabove.

37. The learned Single Judge of the High Court, while referring to some of the provisions of the Agreement between the parties, apparently overlooked the provisions relating to the use of the Trade Mark contained in the Deed of Assignment. Although, reference was made to Clause 19 of the Agreement, the High Court failed to notice that the same was not contained in the Deed of Assignment, whereby 50% of the right, title and interest of the Respondent in the Trade Mark "Naturoma Herbal" was assigned in favour of the Appellant absolutely and forever. As has been emphasized hereinbefore, even upon termination of the joint venture under the Agreement between the parties, neither the Appellant nor the Respondent would be entitled to use or register the Mark in their own names or jointly with some other party. In fact, the relevant terms and conditions of the Deed of Assignment had been extracted by the learned Single

Judge in the impugned judgment, but the same appear to have been lost sight of while considering the terms and conditions of the Agreement executed between the parties.

38. In our view, this is not a case where money can be an adequate compensation, since the Appellant has apparently acquired a 50% interest in the Trade Mark in question, together with the goodwill of the business in relation to the products in which the Trade Mark is used.

39. We are, therefore, of the view that the High Court erred in reversing the order passed by the District Judge in ARBP No.576 of 2007 filed by the Appellant, under which the status-quo would have been maintained till the dispute was settled in arbitration.

40. We, accordingly, allow the Appeals, set aside the impugned judgment and order of the learned Single Judge of the High Court impugned in the Appeals and restore that of the District Judge, Khurda in ARBP No.576 of 2007.

41. However, before parting with the matter, we have to refer to the order passed by us on 28th January, 2011, whereby the Respondent had been allowed to continue with the running of the business, but she was directed to maintain a separate account in respect of the transaction and to place the same before us at the time of hearing of the matter. Such account does not appear to have been filed, but since we are disposing of the matter by restoring the order of the District Judge, Khurda, in ARBP No.576 of 2007, we further direct the Respondent, as and when arbitral proceedings may be taken, to furnish such account upto this day before the learned Arbitrator so that the claims of the parties can be fully decided by the learned Arbitrator.

42. Having regard to the facts of the case, the parties will bear their own costs in these appeals all throughout.

N.J. Appeals allowed.

STATE OF PUNJAB
v.
DAVINDER PAL SINGH BHULLAR & ORS. ETC
(Criminal Appeal Nos.753-55 of 2009)

DECEMBER 7, 2011

[DR. B.S. CHAUHAN AND A.K. PATNAIK, JJ.]

Code of Criminal Procedure, 1973:

s.362 – Alteration/Modification of judgment – Permissibility of – Held: There is no power of review with the Criminal Court after judgment has been rendered – High Court can alter or review its judgment before it is signed – When judgment/order is passed, it cannot be reviewed – s.362 is based on an acknowledged principle of law that once a matter is finally disposed of by a Court, the said Court in the absence of a specific statutory provision becomes functus officio and is disentitled to entertain a fresh prayer for any relief unless the former order of final disposal is set aside by a Court of competent jurisdiction in a manner prescribed by law – Court becomes functus officio the moment the order for disposing of a case is signed – Such an order cannot be ***altered*** *except to the extent of correcting a clerical or arithmetical error – There is also no provision for modification of the judgment.*

s.482 – Inherent powers under – Scope of exercise – Applications filed u/s.482 in a disposed of appeal – High Court entertained the applications, directed investigation by CBI and consequently CBI registered FIR – Held: Prohibition contained in s.362 is absolute; after the judgment is signed, even the High Court in exercise of its inherent power u/s.482 has no authority or jurisdiction to alter/review the same.

Constitution of India, 1950: Article 137 – Power to review

any judgment – Held: Supreme Court by virtue of Article 137 has been invested with an express power to review any judgment in Criminal Law.

Jurisdiction: Of the Bench – Held: A Judge or a Bench of Judges can assume jurisdiction in a case pending in the High Court only if the case is allotted to him or them by the Chief Justice – Strict adherence of this procedure is essential for maintaining judicial discipline and proper functioning of the Court – The Judge cannot choose which matter he should entertain and he cannot entertain a petition in respect of which jurisdiction has not been assigned to him by the Chief Justice.

Investigation/Inquiry: When CBI enquiry can be directed – Held: A constitutional court can direct the CBI to investigate into the case provided the court after examining the allegations in the complaint reaches a conclusion that the complainant could make out prima facie case against the accused – However, the person against whom the investigation is sought, is to be impleaded as a party and must be given a reasonable opportunity of being heard – CBI cannot be directed to have a roving inquiry as to whether a person was involved in the alleged unlawful activities – The court can direct CBI investigation only in exceptional circumstances where the court is of the view that the accusation is against a person who by virtue of his post could influence the investigation and it may prejudice the cause of the complainant, and it is necessary to do so in order to do complete justice and make the investigation credible.

Doctrine of waiver: Bar of waiver/acquiescence – Held: Issue of bias must be raised by party at the earliest if he is aware of it – If plea of bar is not taken at early stage, bar of waiver is created – Moreover, question of waiver/ acquiescence would arise in a case provided the person apprehending the bias/prejudice is a party to the case.

Judicial bias: Disability to act as an adjudicator – Held:

Suspicion or bias disables an official from acting as an adjudicator – Mere ground of appearance of bias and not actual bias is enough to vitiate judgment/order – Judgment which is result of bias or want of impartiality is a nullity.

Judgment/Order: Review/alteration of judgment – Permissibility – Held: There is no power with the criminal court to review after judgment is rendered.

Res judicata: Writ of habeas corpus petitions filed earlier and dealt with by the courts in accordance with law – Fresh petition in respect of the same subject matter filed after 10 years – Maintainability of – Held: A second petition for issuing a writ of habeas corpus is barred by principles of res judicata – The doctrine of res judicata may not apply in case a writ petition under Article 32 of the Constitution is filed before Supreme Court after disposal of a habeas corpus writ petition under Article 226 of the Constitution by the High Court – However, it is not possible to re-approach the High Court for the same relief by filing a fresh writ petition – In case, a petition by issuing writ of habeas corpus is dismissed by the High Court and Special Leave Petition against the same is also dismissed, a petition under Article 32 of the Constitution, seeking the same relief would not be maintainable – There may be certain exceptions to the rule that a person was not aware of the correct facts while filing the first petition or the events have arisen subsequent to making of the first application – The Court must bear in mind that doctrine of res judicata is confined generally to civil action but inapplicable to illegal action and fundamentally lawless order – A subsequent petition of habeas corpus on fresh grounds which were not taken in the earlier petition for the same relief may be permissible.

Appeal: Special leave petition (SLP)– Dismissal of, in limine – Held: Dismissal of the SLP in limine does not mean that the reasoning of the judgment of the High Court against

which the SLP had been filed before the Supreme Court stood affirmed or the judgment and order impugned merged with such order of Supreme Court on dismissal of the petition – It would simply mean that Supreme Court did not consider the case worth examining for a reason, which may be other than merit of the case – An order rejecting the SLP at the threshold without detailed reasons, therefore, would not constitute any declaration of law or a binding precedent – The doctrine of res judicata does not apply, if the case is entertained afresh at the behest of other parties – Precedent.

The question which arose for consideration in the instant appeals were whether the High Court can pass an order on an application entertained after final disposal of the criminal appeal or even suo motu particularly, in view of the provisions of Section 362 Cr.P.C. and as to whether in exercise of its inherent jurisdiction under Section 482 Cr.P.C. the High Court can ask a particular investigating agency to investigate a case following a particular procedure through an exceptionally unusual method which is not in consonance with the statutory provisions of Cr.P.C.

The prosecution case was that FIR No.334/91 under IPC and Explosive Substances Act, 1908 was registered. In connection with that FIR, one 'BSM' was arrested. On 19.12.1991, 'BSM' escaped from the custody of the police for which FIR No.112 under Sections 223 and 224 IPC was registered. The father of 'BSM' filed writ petition before the High Court for production of his son. The State Government explained that 'BSM' had escaped from police custody. The High Court dismissed the aforesaid writ petition. After completion of the investigation in respect of FIR No.112 of 1991 regarding the escape of 'BSM', a challan was filed before the competent court wherein he was declared a proclaimed offender. After completion of the investigation in FIR No.334 of 1991, the

Police chargesheeted eight persons. The chargesheet revealed that an attempt was made by terrorists on the life of 'SSS', the then SSP, Chandigarh, by using explosives. In a thunderous explosion that followed, the Ambassador Car of the SSP, Chandigarh, was blown high into the air whereafter it fell down ahead at some distance completely shattered. Two persons died and several persons got grievously injured. Three of the accused, namely, 'DPSB, 'PSM' and 'GKM' were subjected to trial. The other co-accused were not traceable and they were declared proclaimed offenders. The trial court acquitted the three accused giving them benefit of doubt. The High Court dismissed the appeal against the said acquittal.

After 20 days of the disposal of the appeal against acquittal, the High Court again took up the case *suo motu* on 30.5.2007 and directed the authorities to furnish full details of the proclaimed offenders in respect of the FIR No.334/91 dated 29.8.1991 and the Bench marked the matter "Part Heard". The SSP, Chandigarh submitted an affidavit dated 4.8.2007, giving information regarding all the proclaimed offenders in that case. One of them was 'DPSB' who was initially declared as a proclaimed offender. However, he was subsequently arrested and was sentenced to death in a case in which an assassination attempt was made on the life of 'MSB', the then President, All India Youth Congress, in which several persons were killed and the legs of 'MSB' were amputated. It was also mentioned in the affidavit that 'BSM' had escaped from police custody and his whereabouts were not known. Another proclaimed offender was killed in a police encounter. After considering the said affidavit filed by the SSP, the High Court directed the Chandigarh Administration to constitute a Special Investigation Team to enquire into all aspects of the proclaimed offenders and submit a status

report. The High Court also issued notice to the CBI. It was during the pendency of these proceedings that the father of 'BSM' whose *habeas corpus* writ petition had already been dismissed by the High Court in the year 1991, approached the Court by filing a miscellaneous application on 16.9.2007, for issuance of directions to find out the whereabout of his son. The High Court directed the CBI to investigate the allegations of father of 'BSM' regarding his missing son and further directed the CBI not to disclose the identity of any of the witnesses to anyone except the High Court and to code the names of witnesses as witness A, B and C and further to submit periodical status reports. In the same matter, the Bench entertained another Criminal Miscellaneous Application on 30.10.2007 filed by 'DPSB' (a convict in another case and lodged in Tihar Jail) regarding allegations that his father and maternal uncle had been abducted in the year 1991. The High Court directed the CBI to investigate the allegations made in the complaint filed by 'DPSB'. The CBI after making a preliminary investigation/enquiry on the application, registered an FIR on 2.7.2008 under Sections 120-B, 364, 343, 330, 167 and 193 IPC against 'SSS,' the then SSP and other police officers.

The instant appeals were filed on various grounds, including: the judicial bias of the Judge presiding over the Bench by making specific allegations that the officer named in the order had conducted an enquiry against the Presiding Judge (Mr. Justice X) on the direction of the Chief Justice of Punjab & Haryana High Court and, thus, the said Judge ought not to have proceeded with the matter, rather should have recused himself from the case; and that as the judgment in appeal against acquittal was passed by the Court on 11.5.2007 upholding the judgment of acquittal, the Court became *functus officio* and it had no competence to reopen the case by order dated 30.5.2007.

Allowing the appeals, the Court

HELD: I. <u>JUDICIAL BIAS:</u> There may be a case where allegations may be made against a Judge of having bias/ prejudice at any stage of the proceedings or after the proceedings are over. There may be some substance in it or it may be made for ulterior purpose or in a pending case to avoid the Bench if a party apprehends that judgment may be delivered against him. Suspicion or bias disables an official from acting as an adjudicator. Further, if such allegation is made without any substance, it would be disastrous to the system as a whole, for the reason, that it casts doubt upon a Judge who has no personal interest in the outcome of the controversy. This principle is derived from the legal maxim – *nemo debet esse judex in causa propria sua.* **It applies only when the interest attributed is such as to render the case his own cause. This principle is required to be observed by all judicial and quasi-judicial authorities as non-observance thereof, is treated as a violation of the principles of natural justice. The failure to adhere to this principle creates an apprehension of bias on the part of the Judge. The question is not whether the Judge is actually biased or, in fact, has really not decided the matter impartially, but whether the circumstances are such as to create a reasonable apprehension in the mind of others that there is a likelihood of bias affecting the decision. The test of real likelihood of bias is whether a reasonable person, in possession of relevant information, would have thought that bias was likely and whether the adjudicator was likely to be disposed to decide the matter only in a particular way. Public policy requires that there should be no doubt about the purity of the adjudication process/ administration of justice. The Court has to proceed observing the minimal requirements of natural justice, i.e., the Judge has to act fairly and without bias and in good faith. A judgment which is the result of bias or want of**

impartiality, is a nullity and the trial *"coram non judice".* Therefore, the consequential order, if any, is liable to be quashed. It is evident that the allegations of judicial bias are required to be scrutinised taking into consideration the factual matrix of the case in hand. The court must bear in mind that a mere ground of appearance of bias and not actual bias is enough to vitiate the judgment/order. Actual proof of prejudice in such a case may make the case of the party concerned stronger, but such a proof is not required. In fact, what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. However, once such an apprehension exists, the trial/judgment/order etc. stands vitiated for want of impartiality. Such judgment/order is a nullity and the trial "*coram non-judice"*. [Paras 10, 14, 16, 20] [579-E-F; 581-C-D-F; 582-B-C; 584-H; 585-A-C]

State of West Bengal & Ors. v. Shivananda Pathak & Ors. **AIR 1998SC 2050;** *Bhajan Lal, Chief Minister, Haryana v. M/s. Jindal Strips Ltd. & Ors.* **(1994) 6 SCC 19;** *Rameshwar Bhartia v. The State of Assam* **AIR 1952 SC 405;** *Mineral Development Ltd. v. The State of Bihar & Anr.* **AIR 1960 SC 468;** *Meenglas Tea Estate v. The Workmen* **AIR 1963 SC 1719;** *The Secretary to the Government, Transport Department, Madras v. Munuswamy Mudaliar & Ors.* **AIR 1988 SC 2232;** *A.U. Kureshi v. High Court of Gujarat & Anr.* **(2009) 11 SCC 84;** *Mohd. Yunus Khan v. State of U.P. & Ors.* **(2010) 10 SCC 539)** *Manak Lal, Advocate v. Dr. Prem Chand Singhvi & Ors.* **AIR 1957 SC 425;** *Vassiliades v. Vassiliades* **AIR 1945 PC 38;** *S. Parthasarathi v. State of Andhra Pradesh* **AIR 1973 SC 2701;** *Ranjit Thakur v. Union of India & Ors.* **AIR 1987 SC 2386;** *Rupa Ashok Hurra v. Ashok Hurra & Anr.* **(2002) 4 SCC 388;** *Justice P.D. Dinakaran v. Hon'ble Judges Inquiry Committee* **(2011) 8 SCC 380 – relied on.**

***In re: Linahan,* 138 F. 2nd 650 (1943);** *Public Utilities Commission ofthe District of Columbia v. Franklin S. Pollak*

343 US 451 (1952) 466; *Ex Parte Pinochet Ugarte (No.2)* **1999 All ER, 577;** *Locabail (UK) Ltd. v. Bayfield Properties Ltd. & Anr.* **(2000) 1 All ER 65 – referred to.**

II. <u>DOCTRINE OF WAIVER:</u>

In a given case if a party knows the material facts and is conscious of his legal rights in that matter, but fails to take the plea of bias at the earlier stage of the proceedings, it creates an effective bar of waiver against him. In such facts and circumstances, it would be clear that the party wanted to take a chance to secure a favourable order from the official/court and when he found that he was confronted with an unfavourable order, he adopted the device of raising the issue of bias. The issue of bias must be raised by the party at the earliest. Inaction in every case does not lead to an inference of implied consent or acquiescence. Waiver is an intentional relinquishment of a right. It involves conscious abandonment of an existing legal right, advantage, benefit, claim or privilege, which except for such a waiver, a party could have enjoyed. In fact, it is an agreement not to assert a right. There can be no waiver unless the person who is said to have waived, is fully informed as to his rights and with full knowledge about the same, he intentionally abandons them. It is apparent that the issue of bias should be raised by the party at the earliest, if it is aware of it and knows its right to raise the issue at the earliest, otherwise it would be deemed to have been waived. However, it is to be kept in mind that acquiescence, being a principle of equity must be made applicable where a party knowing all the facts of bias etc., surrenders to the authority of the Court/Tribunal without raising any objection. Acquiescence, in fact, is sitting by, when another is invading the rights. The acquiescence must be such as to lead to the inference of a licence sufficient to create rights in other party. Needless to say

that question of waiver/acquiescence would arise in a case provided the person apprehending the bias/ prejudice is a party to the case. The question of waiver would not arise against a person who is not a party to the case as such person has no opportunity to raise the issue of bias. [paras 21-23, 25] [585-F-G; 586-D-G; 587-E-G]

M/s. Pannalal Binjraj & Ors. v. Union of India & Ors., **AIR 1957 SC397;** *Justice P.D. Dinakaran* **(2011) 8 SCC 380;** *M/s. Power Control Appliances & Ors. v. Sumeet Machines Pvt. Ltd.* **(1994) 2 SCC 448;** *P. ohn Chandy & Co. (P) Ltd. v. John P. Thomas* **AIR 2002 SC 2057;** *Dawsons Bank Ltd. v. Nippon Menkwa Kabushihi Kaish* **AIR 1935 PC 79;** *Basheshar Nath v. Commissioner of Income-tax, Delhi and Rajasthan & Anr.* **AIR 1959 SC 149;** *Mademsetty Satyanarayana v. G. Yelloji Rao & Ors.*, **AIR 1965 SC 1405;** *Associated Hotels of India Ltd. v. S. B. Sardar Ranjit Singh* **AIR 1968 SC 933;** *Jaswantsingh Mathurasingh & Anr. v. Ahmedabad Municipal Corporation & Ors.* **(1992) Suppl 1 SCC 5;** *M/s. Sikkim Subba Associates v. State of Sikkim* **AIR 2001 SC 2062;** *Krishna Bahadur v. M/s. Purna Theatre &Ors.* **AIR 2004 SC 4282;** *Municipal Corporation of Greater Bombay v. Dr. Hakimwadi Tenants' Association & Ors.* **AIR 1988 SC 233 – relied on.**

III. <u>BAR TO REVIEW/ALTER- JUDGMENT</u>

There is no power of review with the Criminal Court after judgment has been rendered. The High Court can alter or review its judgment before it is signed. When an order is passed, it cannot be reviewed. Section 362 Cr.P.C. is based on an acknowledged principle of law that once a matter is finally disposed of by a Court, the said Court in the absence of a specific statutory provision becomes *functus officio* and is disentitled to entertain a fresh prayer for any relief unless the former order of final

disposal is set aside by a Court of competent jurisdiction in a manner prescribed by law. The Court becomes *functus officio* the moment the order for disposing of a case is signed. Such an order cannot be altered **except to the extent of correcting a clerical or arithmetical error. There is also no provision for modification of the judgment. Moreover, the prohibition contained in Section 362 Cr.P.C. is absolute; after the judgment is signed, even the High Court in exercise of its inherent power under Section 482 Cr.P.C. has no authority or jurisdiction to alter/review the same. If a judgment has been pronounced without jurisdiction or in violation of principles of natural justice or where the order has been pronounced without giving an opportunity of being heard to a party affected by it or where an order was obtained by abuse of the process of court which would really amount to its being without jurisdiction, inherent powers can be exercised to recall such order for the reason that in such an eventuality the order becomes a nullity and the provisions of Section 362 Cr.P.C. would not operate. In such eventuality, the judgment is manifestly contrary to the *audi alteram partem* rule of natural justice. The power of recall is different from the power of altering/ reviewing the judgment. However, the party seeking recall/alteration has to establish that it was not at fault. This Court by virtue of Article 137 of the Constitution has been invested with an express power to review any judgment in Criminal Law and while no such power has been conferred on the High Court, inherent power of the court cannot be exercised for doing that which is specifically prohibited by the Code itself. [paras 26, 27, 28] [588-A-H; 589-A-B-D]**

Hari Singh Mann v. Harbhajan Singh Bajwa & Ors. **AIR 2001 SC 43;***Chhanni v. State of U.P.* **AIR 2006 SC 3051;** *Moti Lal v. State of M.P.***AIR 1994 SC 1544;** *State of Kerala v. M.M. Manikantan Nair* **AIR 2001 SC 2145;** *Chitawan &*

Ors. v. Mahboob Ilahi **1970 Crl.L.J. 378;** *Deepak Thanwardas Balwani v. State of Maharashtra & Anr.* **1985 Crl.L.J. 23;** *Habu v. State of Rajasthan* **AIR 1987 Raj. 83 (F.B.);***Swarth Mahto & Anr. v. Dharmdeo Narain Singh* **AIR 1972 SC 1300;** *Makkapati Nagaswara Sastri v. S.S. Satyanarayan* **AIR 1981 SC 1156;** *Asit Kumar Kar v. State of West Bengal & Ors.* **(2009) 2 SCC 703;***Vishnu Agarwal v. State of U.P. & Anr.* **AIR 2011 SC 1232;** *State Represented by D.S.P., S.B.C.I.D., Chennai v. K.V. Rajendran & Ors.* **AIR 2009 SC 46;** *Smt. Sooraj Devi v. Pyare Lal & Anr.* **AIR 1981 SC 736 – relied on.**

IV. INHERENT POWERS UNDER SECTION 482 Cr.P.C.

4.1. The inherent power under Section 482 Cr.P.C. is intended to prevent the abuse of the process of the Court and to secure the ends of justice. Such power cannot be exercised to do something which is expressly barred under the Cr.P.C. If any consideration of the facts by way of review is not permissible under the Cr.P.C. and is expressly barred, it is not for the Court to exercise its inherent power to reconsider the matter and record a conflicting decision. If there had been change in the circumstances of the case, **it would be in order for the High Court to exercise its inherent powers in the prevailing circumstances and pass appropriate orders to secure the ends of justice or to prevent the abuse of the process of the Court. Where there are no such changed circumstances and the decision has to be arrived at on the facts that existed as on the date of the earlier order, the exercise of the power to reconsider the same materials to arrive at different conclusion is in effect a review, which is expressly barred under Section 362 Cr.P.C. [para 31] [590-B-E]**

Simrikhia v. Dolley Mukherjee and Chhabi Mukherjee & Anr, **(1990) 2 SCC 437;** *Kurukshetra University & Anr. v. State of Haryana & Anr*. **AIR 1977 SC 2229;** *State of W.B. & Ors.*

v. Sujit Kumar Rana **(2004) 4 SCC 129 – relied on.**

4.2. The power under Section 482 Cr.P.C. cannot be resorted to if there is a specific provision in the Cr.P.C. for the redressal of the grievance of the aggrieved party or where alternative remedy is available. Such powers can be exercised *ex debito justitiae* to do real and substantial justice as the courts have been conferred such inherent jurisdiction, in absence of any express provision, as inherent in their constitution, or such powers as are necessary to do the right and to undo a wrong in course of administration of justice as provided in the legal maxim "*quando lex aliquid alique, concedit, conceditur et id sine quo res ipsa esse non potest*". However, the High Court has not been given nor does it possess any inherent power to make any order**, which in the opinion of the court, could be in the interest of justice as the statutory provision is not intended to by-pass the procedure prescribed. [para 33] [591-B-F]**

Lalit Mohan Mondal & Ors. v. Benoyendra Nath Chatterjee **AIR 1982 SC 785;** *Rameshchandra Nandlal Parikh v. State of Gujarat & Anr.* **AIR 2006 SC 915;** *Central Bureau of Investigation v. Ravi Shankar Srivastava, IAS & Anr.* **AIR 2006 SC 2872;** *Inder Mohan Goswami & Anr. v. State of Uttaranchal & Ors.* **AIR 2008 SC 251;** *Pankaj Kumar v. State of Maharashtra & Ors.* **AIR 2008 SC 3077 – relied on.**

4.3. The High Court can always issue appropriate direction in exercise of its power under Article 226 of the Constitution at the behest of an aggrieved person, if the court is convinced that the power of investigation has been exercised by an Investigating Officer malafide or the matter is not investigated at all. Even in such a case, the High Court cannot direct the police as to how the investigation is to be conducted but can insist only for

the observance of process as provided for in the Cr.P.C. Another remedy available to such an aggrieved person may be to file a complaint under Section 200 Cr.P.C. and the court concerned will proceed as provided in Chapter XV of the Cr.P.C. The provisions of Section 482 Cr.P.C. closely resemble Section 151, CPC and, therefore, the restrictions which are there to use the inherent powers under Section 151 CPC are applicable in exercise of powers under Section 482 Cr.P.C. and one such restriction is that there exists no other provision of law by which the party aggrieved could have sought relief. [Paras 34-35] [591-H; 592-A-D]

Gangadhar Janardan Mhatre v. State of Maharashtra & Ors., **(2004) 7 SCC 768;** *Divine Retreat Centre v. State of Kerala & Ors.* **AIR 2008 SC 1614;** *The Janata Dal v. H.S. Chowdhary & Ors.* **AIR 1993 SC 892;** *Divisional Forest Officer & Anr. v. G.V. Sudhakar Rao & Ors.* **AIR 1986 SC 328;** *Popular Muthiah v. State represented by Inspector of Police* **(2006) 7 SCC 296;** *Rajan Kumar Machananda v. State of Karnataka* **1990 (supp.) SCC 132;** *Joseph Peter v. State of Goa, Daman and Diu* **AIR 1977 SC 1812– relied on.**

4.4. The rule of inherent powers has its source in the maxim *"Quadolex aliquid alicui concedit, concedere videtur id sine quo ipsa, ess uon potest"* which means that when the law gives anything to anyone, it gives also all those things without which the thing itself could not exist. The order cannot be passed by-passing the procedure prescribed by law. The court in exercise of its power under Section 482 Cr.P.C. cannot direct a particular agency to investigate the matter or to investigate a case from a particular angle or by a procedure not prescribed in Cr.P.C. Such powers should be exercised very sparingly to prevent abuse of process of any court. Courts must be careful to see that its decision in exercise of this power is based on sound principles. To inhere means that it

forms a necessary part and belongs as an attribute in the nature of things. The High Court under Section 482 Cr.P.C. is crowned with a statutory power to exercise control over the administration of justice in criminal proceedings within its territorial jurisdiction. This is to ensure that proceedings undertaken under the Cr.P.C. are executed to secure the ends of justice. For this, the Legislature has empowered the High Court with an inherent authority which is repository under the Statute. The Legislature therefore clearly intended the existence of such power in the High Court to control proceedings initiated under the Cr.P.C. Conferment of such inherent power might be necessary to prevent the miscarriage of justice and to prevent any form of injustice. However, it is to be understood that it is neither divine nor limitless. It is not to generate unnecessary indulgence. The power is to protect the system of justice from being polluted during the administration of justice under the Code. The High Court can intervene where it finds the abuse of the process of any court which means, that wherever an attempt to secure something by abusing the process is located, the same can be rectified by invoking such power. There has to be a nexus and a direct co-relation to any existing proceeding, not foreclosed by any other form under the Code, to the subject matter for which such power is to be exercised. [Para 40] [593-G-H; 594-A-G]

4.5. Application under Section 482 Cr.P.C. lies before the High Court against an order passed by the court subordinate to it in a pending case/proceedings. Generally, such powers are used for quashing criminal proceedings in appropriate cases. Such an application does not lie to initiate criminal proceedings or set the criminal law in motion. Inherent jurisdiction can be exercised if the order of the Subordinate Court results in the abuse of the "process" of the court and/or calls for

interference to secure the ends of justice. The use of word 'process' implies that the proceedings are pending before the Subordinate Court. When reference is made to the phrase "to secure the ends of justice", it is in fact in relation to the order passed by the Subordinate Court and it cannot be understood in a general connotation of the phrase. More so, while entertaining such application the proceedings should be pending in the Subordinate Court. In case it attained finality, the inherent powers cannot be exercised. Party aggrieved may approach the appellate/revisional forum. Inherent jurisdiction can be exercised if injustice done to a party, e.g., a clear mandatory provision of law is overlooked or where different accused in the same case are being treated differently by the Subordinate Court. An inherent power is not an omnibus for opening a pandorabox, that too for issues that are foreign to the main context. The invoking of the power has to be for a purpose that is connected to a proceeding and not for sprouting an altogether new issue. A power cannot exceed its own authority beyond its own creation. It is not that a person is remediless. On the contrary, the constitutional remedy of writs are available. Here, the High Court enjoys wide powers of prerogative writs as compared to that under Section 482 Cr.P.C. To secure the corpus of an individual, remedy by way of *habeas corpus* is available. For that the High Court should not resort to inherent powers under Section 482 Cr.P.C. as the Legislature has conferred separate powers for the same. Needless to mention that Section 97 Cr.P.C. empowers Magistrates to order the search of a person wrongfully confined. It is something different that the same court exercising authority can, in relation to the same subject matter, invoke its writ jurisdiction as well. Nevertheless, the inherent powers are not to provide universal remedies. The power cannot be and should not be used to belittle its own existence. One cannot concede anarchy to an inherent power for that was never

the wisdom of the Legislature. To confer un-briddled inherent power would itself be trenching upon the authority of the Legislature. [Para 40] [594-H; 595-A-H; 596-A-B]

V. <u>JURISDICTION OF THE BENCH :</u>

5. The Chief Justice is the master of roster. The Chief Justice enjoys a special status and he alone can assign work to a Judge sitting alone and to the Judges sitting in Division Bench or Full Bench. The Bench gets jurisdiction from the assignment made by the Chief Justice and the Judge cannot choose as which matter he should entertain and he cannot entertain a petition in respect of which jurisdiction has not been assigned to him by the Chief Justice as the order passed by the court may be without jurisdiction and made the Judge *coram non-judice.* [Paras 42-43] [587-C-D; 598-D-E]

State of Rajasthan v. Prakash Chand & Ors. **AIR 1998 SC 1344;** *State of U.P. & Ors. v. Neeraj Chaubey & Ors.* **(2010) 10 SCC 320;** *State of Maharashtra v. Narayan Shamrao Puranik* **AIR 1982 SC 1198;** *Inder Mani v. Matheshwari Prasad* **(1996) 6 SCC 587;** *R. Rathinam v. State* **(2002) 2 SCC 391;** *Jasbir Singh v. State of Punjab* **(2006) 8 SCC 294 – relied on.**

Sanjay Kumar Srivastava v. Acting Chief Justice, **1996 AWC 644 – approved.**

VI. <u>WHEN CBI ENQUIRY CAN BE DIRECTED:</u>

A constitutional court can direct the CBI to investigate into the case provided the court after examining the allegations in the complaint reaches a conclusion that the complainant could make out prima facie, a case against the accused. However, the person against whom the investigation is sought, is to be

impleaded as a party and must be given a reasonable opportunity of being heard. CBI cannot be directed to have a roving inquiry as to whether a person was involved in the alleged unlawful activities. The court can direct CBI investigation only in exceptional circumstances where the court is of the view that the accusation is against a person who by virtue of his post could influence the investigation and it may prejudice the cause of the complainant, and it is necessary so to do in order to do complete justice and make the investigation credible. [para 48] [600-B-D]

Secretary, Minor Irrigation and Rural Engineering Services, *U.P. & Ors. v. Sahngoo Ram Arya & Anr.* **AIR 2002 SC 2225;** *Common Cause, A Registered Society v. Union of India & Ors.* **(1999) 6 SCC 667;** *D. Venkatasubramaniam & Ors. v. M.K.Mohan Krishnamachari & Anr.* **(2009) 10 SCC 488;** *Disha v. State of Gujarat & Ors.* **AIR 2011 SC 3168;** *Vineet Narain & Ors. v. Union of India & Anr.* **AIR 1996 SC 3386;** *Union of India v. Sushil Kumar Modi* **(1998) 8 SCC 661;** *Rajiv Ranjan Singh 'Lalan' (VIII) v. Union of India* **(2006) 6 SCC 613;** *Rubabbuddin Sheikh v. State of Gujarat & Ors.* **AIR 2010 SC 3175;** *Ashok Kumar Todi v. Kishwar Jahan & Ors,* **(2011) 3 SCC 758 – relied on.**

7.1. The instant appeals are decided in the light of the said settled legal propositions. It is evident from the judgment and order dated 11.5.2007 that the criminal appeal stood dismissed. The order sheet dated 30.5.2007 revealed that in spite of the disposal of the said criminal appeal it had been marked therein as "put up for further hearing" and directions were given to the trial court to furnish a detailed report as to the measures taken by it to bring the proclaimed offenders before the Court. The order dated 5.9.2007 showed that the Bench headed by Mr. Justice X was furnished with full information regarding proclaimed offenders by the authorities. The

order dated 19.9.2007 revealed that the Bench expressed its anguish that nothing could be done since the year 1993 by the Chandigarh Police to procure the presence of the proclaimed offenders. The record revealed that 'DPSB' was involved in assassination attempt of 'MSB'. He was convicted and given the death sentence. Ever since 2003, 'DPSB' remained silent regarding the investigation of the alleged disappearances of his father and uncle and suddenly woke up in the year 2007 when the Bench presided by Mr. Justice X started *suo motu* hearing various other matters after the disposal of the criminal appeal against acquittal. The Court was fully aware that another relative of 'DPSB' had filed a case before the High Court in the year 1997, for production of 'BSB', the father of 'DPSB' and not for his uncle. The High Court had rejected the said petition and the matter was not agitated further attained finality. [paras 50-52] [600-F-G; 601-D-E; 602-E-H; 603-A]

7.2. It is evident that the court was very much anxious to know about the proclaimed offenders, however, after getting certain information, the Court stopped monitoring the progress in procuring the presence of any of those proclaimed offenders. By this time, the Court also came to know that son of 'DSM' had also been killed. Therefore, the chapter regarding the proclaimed offenders was closed. There was no occasion for the Court to proceed further with the matter and entertain the applications under Section 482 Cr.P.C., filed by 'DSM' and 'DPSB'. The Bench was not competent to entertain the said applications and even if the same had been filed in the disposed of appeal, the court could have directed to place the said applications before the Bench dealing with similar petitions. It is evident from the order dated 30.5.2007 that in spite of the fact that the appeal stood disposed of on 11.5.2007, there appeared an order in the file: "put up for further hearing". That

meant the matter was to be heard by the same Bench consisting of Judges 'X' and 'A'. However, the matter was listed before another Bench on 2.7.2007 and the said Bench directed to list the matter before DB-IV after taking the appropriate order from the Chief Justice. In absence of the Chief Justice, the senior most Judge passed the order on 5.7.2007 to list the matter before the DB-IV. The matter remained with the Presiding Judge, though the other Judge changed most of the time, as is evident from the subsequent order sheets. Order sheet dated 30.5.2007 revealed that it was directed to put up the case for further hearing. Thus, it should have been heard by the Bench as it was on 30.5.2007. [paras 54-55] [603-H; 604-A-G]

8. The chargesheet in the trial court itself revealed that two accused had died. The State counsel failed to bring these facts to the notice of the court. The order dated 5.10.2007 though gave an impression that the High Court was trying to procure the presence of the proclaimed offenders but, in fact, it was to target the police officers, who had conducted the inquiry against Mr. Justice X. The order read that particular persons were eliminated in a false encounter by the police and it was to be ascertained as to who were the police officers responsible for it, so that they could be brought to justice. There could be no justification for the Bench concerned to entertain applications filed under Section 482 Cr.P.C. as miscellaneous applications in a disposed of appeal. The law requires that the Bench could have passed an appropriate order to place those applications before the Bench hearing Section 482 Cr.P.C. petitions or place the matters before the Chief Justice for appropriate orders. As the High Court after rejecting the applications for leave to appeal had passed several orders to procure the presence of the proclaimed offenders so that they could be brought to justice, neither the State of Punjab nor 'SSS' could be held to be

the persons aggrieved by such orders and, therefore, there could be no question of raising any protest on their behalf for passing such orders even after disposal of the application for leave to appeal as such orders were rather in their favour. The appellants became aggrieved only and only when the High Court entertained the applications filed under Section 482 Cr.P.C. for tracing out the whereabouts of certain persons allegedly missing for the past 20 years. Such orders did not have any connection with the incident in respect of which the application for leave to appeal had been entertained and rejected. An application for leave to appeal that has been dismissed against an order of acquittal cannot provide a platform for an investigation in a subject matter that is alien and not directly concerned with the subject matter of appeal. If a person has an opportunity to raise objections and fails to do so, it would amount to waiver on his part. However, such person can raise objections only if he is impleaded as a party-respondent in the case and has an opportunity to raise an objection on the ground of bias. In the instant case, neither the State of Punjab nor 'SSS' have been impleaded as respondents. Thus, the question of waiver on the ground of bias by either of them does not arise. [Paras 57-60] [606-C-H; 607-A-F]

9. Undoubtedly, in respect of missing persons earlier *habeas corpus* petitions had been filed by the persons concerned in 1991 and 1997 which were dealt with by the courts in accordance with law. A fresh petition in respect of the same subject matter could not have been entertained after 10 years of dismissal of the said writ petition. A second writ petition for issuing a writ of *habeas corpus* is barred by principles of *res judicata*. The doctrine of *res judicata* may not apply in case a writ petition under Article 32 of the Constitution is filed before this Court after disposal of a *habeas corpus* writ petition under Article 226 of the Constitution by the High Court. However, it is not

possible to re-approach the High Court for the same relief by filing a fresh writ petition for the reason that it would be difficult for the High Court to set aside the order made by another Bench of the same court. In case, a petition by issuing Writ of *Habeas Corpus* is dismissed by the High Court and Special Leave Petition against the same is also dismissed, a petition under Article 32 of the Constitution, seeking the same relief would not be maintainable. There may be certain exceptions to the rule that a person was not aware of the correct facts while filing the first petition or the events have arisen subsequent to making of the first application. The Court must bear in mind that doctrine of *res judicata* is confined generally to civil action but inapplicable to illegal action and fundamentally lawless order. A subsequent petition of *habeas corpus* on fresh grounds which were not taken in the earlier petition for the same relief may be permissible. A case is to be decided on its facts taking into consideration whether really new issues have been agitated or the facts raised in subsequent writ petition could not be known to the writ petitioner while filing the earlier writ petition. [Paras 61-63, 65] [607-G-H; 608-A-C; F-G; 609-C-D]

Ghulam Sarwar v. Union of India & Ors. **AIR 1967 SC 1335;** *Nazul Ali Molla, etc. v. State of West Bengal* **1969 (3) SCC 698;** *Niranjan Singh v. State of Madhya Pradesh* **AIR 1972 SC 2215;** *Har Swarup v. The General Manager, Central Railway & Ors.* **AIR 1975 SC 202;** *T.P. Moideen Koya v. Government of Kerala & Ors.* **AIR 2004 SC 4733;** *K. Vidya Sagar v. State of Uttar Pradesh & Ors.* **AIR 2005 SC 2911;** *Lalubhai Jogibhai Patel v. Union of India & Ors.* **AIR 1981 SC 728;** *Ajit Kumar Kaviraj v. Distt. Magistrate, Birbhum & Anr.* **AIR 1974 SC 1917;** *Sunil Dutt v. Union of India & Ors.* **AIR 1982 SC 53;** *Srikant v. District Magistrate, Bijapur & Ors.* **(2007) 1 SCC 486 – relied on.**

10. The parties concerned had not filed fresh writ petitions, rather chosen, for reasons best known to them applications under Section 482 Cr.P.C., which could not have been entertained. A large number of documents were submitted to the court under sealed cover by the State of Punjab on the direction of this court. The said documents showed that 'SSS' had conducted the enquiry in 2002 against Mr. Justice X on the direction of the Chief Justice of the Punjab and Haryana High Court on the alleged appointment of certain judicial/executive officers in Punjab through the Chairman of the Public Service Commission. 'SSS' had filed reports against Mr. Justice X. The Chief Justice of Punjab and Haryana High Court confronted Mr. Justice X with the said reports. On the basis of the said reports, the Chief Justice of the High Court submitted his report to the Chief Justice of India, on the basis of which a Committee to investigate the matter further was appointed. This Committee even examined one Superintendent of Police of the intelligence wing who had worked directly under 'SSS' while conducting the enquiry. [Para 65-66] [609-D-H; 610-A]

11. The High Court has adopted an unusual and unwarranted procedure, not known in law, while issuing certain directions. The court not only entertained the applications filed by 'DPSB' and 'DSM' in a disposed of appeal but enlarged the scope of CBI investigation from proclaimed offenders to other missing persons. The court directed the CBI to treat affidavits handed over by 'DPSB' who admittedly had inimical relation with 'SSS' as statement of eye-witnesses. The court further directed the CBI to change the names of witnesses to witness (A), (B) or (C) and record their statements under Section 164 Cr.P.C. so that they could not resile at a later stage. The court was not justified in directing the CBI to adopt such an unwarranted course. When the matter came up for

hearing on 2.4.2008, in spite of the fact that the matter was heard throughout by a particular Division Bench, Mr. Justice X alone held the proceedings, and accepted the status report of the CBI sitting singly, as the proceedings reveal that the other Judge was not holding court on that day. [paras 67-69] [610-A-F]

12. The FIR unquestionably is an inseparable corollary to the impugned orders which are a nullity. Therefore, the very birth of the FIR which is a direct consequence of the impugned orders cannot have any lawful existence. The FIR itself is based on a preliminary enquiry which in turn is based on the affidavits submitted by the applicants who had filed the petitions under Section 482 Cr.P.C. The order impugned was rightly challenged to be a nullity at least on three grounds, namely, judicial bias; want of jurisdiction by virtue of application of the provisions of Section 362 Cr.P.C. coupled with the principles of constructive *res judicata*; and the Bench had not been assigned the roster to entertain petitions under Section 482 Cr.P.C. It is a settled legal proposition that if initial action is not in consonance with law, all subsequent and consequential proceedings would fall through for the reason that illegality strikes at the root of the order. In such a fact-situation, the legal maxim "*sublato fundamento cadit opus*" meaning thereby that foundation being removed, structure/work falls, comes into play and applies on all scores in the present case. The orders impugned being a nullity, cannot be sustained. As a consequence, subsequent proceedings/ orders/FIR/ investigation stand automatically vitiated and are liable to be declared *non est*. [paras 70-72, 76] [611-B-F; 612-D-E]

Badrinath v. State of Tamil Nadu & Ors. **AIR 2000 SC 3243;** *State of Kerala v. Puthenkavu N.S.S. Karayogam & Anr.* **(2001) 10 SCC 191;** *Mangal Prasad Tamoli (dead) by Lrs. v. Narvadeshwar Mishra (dead) by Lrs. & Ors.* **(2005) 3 SCC 422;** *In C. Albert Morris v. K. Chandrasekaran & Ors.* **(2006) 1 SCC 228;** *Upen Chandra Gogoi v. State of Assam & Ors*. **(1998) 3 SCC 381;** *Satchidananda Misra v. State of Orissa & Ors.* **(2004) 8 SCC 599;** *Regional Manager, SBI v. Rakesh Kumar Tewari* **(2006) 1 SCC 530;** *Ritesh Tewari & Anr. v. State of U.P. & Ors.* **AIR 2010 SC 3823 – relied on.**

13. The dismissal of the special leave petition *in limine* does not mean that the reasoning of the judgment of the High Court against which the Special Leave Petition had been filed before this Court stands affirmed or the judgment and order impugned merges with such order of this Court on dismissal of the petition. It simply means that this Court did not consider the case worth examining for a reason, which may be other than merit of the case. An order rejecting the Special Leave Petition at the threshold without detailed reasons, therefore, does not constitute any declaration of law or a binding precedent. The doctrine of *res judicata* does not apply, if the case is entertained afresh at the behest of other parties. No inference can be drawn that by necessary implication, the contentions raised in the special leave petition on the merits of the case have been rejected. So it has no precedential value. [para 77] [612-G-H; 613-A-D]

The Workmen of Cochin Port Trust v. The Board of Trustees of the Cochin Port Trust & Anr. **AIR 1978 SC 1283;** *Ahmedabad Manufacturing & Calico Printing Co. Ltd. v. The Workmen & Anr.* **AIR 1981 SC 960;** *Indian Oil Corporation Ltd. v. State of Bihar & Ors.* **AIR 1986 SC 1780;** *Yogendra Narayan Chowdhury & Ors. v. Union of India & Ors.* **AIR 1996 SC 751;** *Union of India & Anr. v. Sher Singh & Ors.* **AIR 1997 SC 1796;** *M/s Sun Export Corporation, Bombay v. Collector of Customs, Bombay & Anr.* **AIR 1997 SC 2658;** *Kunhayammed & Ors. v. State of Kerala & Anr.* **AIR 2000 SC 2587;** *Saurashtra Oil Mills Association, Gujarat v. State of*

Gujarat & Anr. **AIR 2002 SC 1130;** *Union of India & Ors. v. Jaipal Singh* **AIR 2004 SC 1005;** *Delhi Development Authority v. Bhola Nath Sharma (dead) by L.Rs. & Ors.* **AIR 2011 SC 428 – referred to.**

14. The error in the impugned orders of the High Court transgresses judicious discretion. The process adopted by the High Court led to greater injustice than securing the ends of justice. The path charted by the High Court inevitably reflects a biased approach. It was a misplaced sympathy for a cause that can be termed as being inconsistent to the legal framework. Law is an endless process of testing and retesting as said by Justice Cardozo in his conclusion of the Judicial Process, ending in a constant rejection of the dross and retention of whatever is pure and sound. The multi-dimensional defective legal process adopted by the court below cannot be justified on any rational legal principle. The High Court was swayed away by considerations that are legally impermissible and unsustainable. The impugned orders challenged are declared to be nullity and as a consequence, the FIR registered by the CBI is also quashed. However, it is open to the applicants who had filed the petitions under Section 482 Cr.P.C. to take recourse to fresh proceedings, if permissible in law. [Paras 78-80] [613-H; 614-A-E]

Case Law Reference:

1998 (1) SCR 811	**relied on**	**Para 12**
343 US 451 (1952) 466	**referred to**	**Para 12**
1994 (2) Suppl. SCR 445	**relied on**	**Para 13**
AIR 1952 SC 405	**relied on**	**Para 14**
1960 SCR 609	**relied on**	**Para 14**

1964 SCR 165	**relied on**	**Para 14**
1988 Suppl. SCR 673	**relied on**	**Para 14**
2009 (1) SCR 879	**relied on**	**Para 14**
2010 (12) SCR 448	**relied on**	**Para 14**
1957 SCR 575	**relied on**	**Para 15**
AIR 1945 PC 38	**relied on**	**Para 16**
1974 (1) SCR 697	**relied on**	**Para 16**
1988 (1) SCR 512	**relied on**	**Para 16**
2002 (2) SCR 1006	**relied on**	**Para 17**
1999 All ER, 577	**relied on**	**Para 17**
(2000) 1 All ER 65	**relied on**	**Para 18**
(2011) 8 SCC 380	**relied on**	**Para 19**
1999 All ER, 577	**referred to**	**Para 17**
(2000) 1 All ER 65	**referred to**	**Para 19**
1957 SCR 233	**relied on**	**Para 21**
(2011) 8 SCC 380	**relied on**	**Para 21**
1994 (1) SCR 708	**relied on**	**Para 22**
2002 (3) SCR 549	**relied on**	**Para 22**
AIR 1935 PC 79	**relied on**	**Para 23**
1959 Suppl. SCR 528	**relied on**	**Para 23**
1965 SCR 221	**relied on**	**Para 23**
1968 SCR 548	**relied on**	**Para 23**

1991 (1) Suppl. SCR226	**relied on**	**Para 23**
2001 (3) SCR 261	**relied on**	**Para 23**
2004 (3) Suppl. SCR 833	**relied on**	**Para 23**
1988 SCR 21	**relied on**	**Para 24**
2000 (4) Suppl. SCR 313	**relied on**	**Para 26**
2006 (3) Suppl. SCR 305	**relied on**	**Para 26**
AIR 1994 SC 1544	**relied on**	**Para 26**
2001 (3) SCR 203	**relied on**	**Para 26**
1970 Crl.L.J. 378	**relied on**	**Para 27**
1985 Crl.L.J. 23	**relied on**	**Para 27**
AIR 1987 Raj. 83 (F.B	**relied on**	**Para 27**
AIR 1972 SC 1300	**relied on**	**Para 27**
1981 (1) SCC 62	**relied on**	**Para 27**
(2009) 2 SCC 703	**relied on**	**Para 27**
2011 SCR 197	**relied on**	**Para 27**
2008 (12) SCR 1141	**relied on**	**Para 28**
1981 (2) SCR 485	**relied on**	**Para 29**
1990 (1) SCR 788	**relied on**	**Para 31**
1977 (4) SCC 451	**relied on**	**Para 32**
(2004) 4 SCC 129	**relied on**	**Para 32**
1982 (3) SCC 219	**relied on**	**Para 33**
2006 (1) SCC 732	**relied on**	**Para 33**
2006 (4) Suppl. SCR 450	**relied on**	**Para 33**
2007 (10) SCR 847	**relied on**	**Para 33**
2008 (16) SCC 117	**relied on**	**Para 33**
2004 (4) Suppl. SCR 772	**relied on**	**Para 34,45**
2008 (4) SCR 701	**relied on**	**Para 34**
1992 (1) Suppl. SCR 226	**relied on**	**Para 35**
1985 (3) Suppl. SCR 680	**relied on**	**Para 36**
2005 (5) Suppl. SCR 63	**relied on**	**Para 37**
1990 (supp.) SCC 132	**relied on**	**Para 38**
1977 (3) SCR 771	**relied on**	**Para 39**
1997 (6) Suppl. SCR 1	**relied on**	**Para 41**
2010 (11) SCR 542	**relied on**	**Para 42**
1982 (2) SCC 440	**relied on**	**Para 42**
1996 (7) Suppl. SCR 400	**relied on**	**Para 42**
(2002) 2 SCC 391	**relied on**	**Para 42**
2006 (7) Suppl. SCR 174	**relied on**	**Para 42**
1996 AWC 644	**approved**	**Para 42**
2002 (5) SCC 521	**relied on**	**Para 44**
1999 (3) SCR 1279	**relied on**	**Para 44**
2009 (14) SCR 441	**relied on**	**Para 46**
AIR 2011 SC 3168	**relied on**	**Para 47**
1996 (1) SCR 1053	**relied on**	**Para 47**

(1998) 8 SCC 661	**relied on**	**Para 47**
2006 (4) Suppl. SCR 742	**relied on**	**Para 47**
2010 (1) SCR 991	**relied on**	**Para 47**
2011 (3) SCR 597	**relied on**	**Para 47**
1967 SCR 271	**relied on**	**Para 62**
1969 (3) SCC 698	**relied on**	**Para 62**
1973 (1) SCR 691	**relied on**	**Para 62**
1975 (3) SCC 621	**relied on**	**Para 62**
2004 (4) Suppl. SCR 904	**relied on**	**Para 62**
2005 (5) SCC 581	**relied on**	**Para 62**
1981 (2) SCR 352	**relied on**	**Para 63**
1975 (2) SCR 21	**relied on**	**Para 63**
1982 (3) SCC 405	**relied on**	**Para 63**
2006 (9) Suppl. SCR 312	**relied on**	**Para 64**
2000 (8) SCC 395	**relied on**	**Para 73**
(2001) 10 SCC 191	**relied on**	**Para 73**
(2005) 3 SCC 422	**relied on**	**Para 74**
2005 (4) Suppl. SCR 779	**relied on**	**Para 75**
(1998) 3 SCC 381	**relied on**	**Para 75**
2004 (4) Suppl. SCR 505	**relied on**	**Para 75**
(2006) 1 SCC 530	**relied on**	**Para 75**
2010 (11) SCR 589	**relied on**	**Para 75**

1978 (3) SCR 971	**referred to**	**Para 77**
1981 (3) SCR 213	**referred to**	**Para 77**
1986 (3) SCR 553	**referred to**	**Para 77**
1995 (6) Suppl. SCR 17	**referred to**	**Para 77**
1997 (1) SCR 1048	**referred to**	**Para 77**
1997 (1) Suppl. SCR 259	**referred to**	**Para 77**
AIR 2000 SC 2587	**referred to**	**Para 77**
2002 (1) SCR 1099	**referred to**	**Para 77**
2003 (5) Suppl. SCR 115	**referred to**	**Para 77**
2011 (2) SCC 54	**referred to**	**Para 77**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 753-755 of 2009.

From the Judgment & Order dated 5.10.2007 in Criminal Misc. No. 152-MA of 2007; 06.11.2007 in Criminal Misc. No. 93535 of 2007 filed in Criminal Misc. No. 152-MA of 2007 and 4.7.2008 in Criminal Misc. No. 152-MA of 2007 of the High Court of Punjab and Haryana at Chandigarh.

WITH

Criminal Appeal No. 2258-2264 of 2011.

Ram Jethmalani, Ranjit Kumar, R.S. Khosla, AAG, K.K. Khanna, AAG, Aprajita Singh, Meenakshi Grover, Saurabh Ajay Gupta, Pranav Dish, Karan Kalia, A.S. Virk, Kuldip Singh, J.K. Sud, A.K. Mehtra, Manoj Prasad for the Appellant.

P.P. Malhotra, ASG, K.N. Balgopal ,Colin Gonsalves, G.K. Bharti, A.P. Mukundan, Nitya Nambiar, T. Koza, Rajesh Dhawan, Madhumita Bora, Balaji Srinivasan, Jayshree

Satpute, Jyoti Mendiratta, Navkiram Singh, P.K. Dey, Dr. Ch. Shamsudin Khan, A.K. Sharma, M.S. Daobia, S.S. Rawat, B. Krishna Prasad, Kamini Jaiswal, Sanjay Jain and Jaspreet Gogia for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. Leave granted in the Special Leave Petitions filed by Shri Sumedh Singh Saini.

2. These appeals have been preferred against the orders dated 30.5.2007, 22.8.2007, 5.10.2007 and 4.7.2008 in Crl. Misc. No. 152-MA of 2007; order dated 19.9.2007 in Crl. Misc. No. 86286 of 2007 in Crl. Misc. No. 152-MA of 2007; and orders dated 2.11.2007 and 6.11.2007 in Crl. Misc. No. 93535 of 2007 in Crl. Misc. No. 152-MA of 2007 passed by the High Court of Punjab and Haryana at Chandigarh. For the sake of convenience of disposal of the appeals, we would refer only to the criminal appeals filed by the State.

3. The Appeals herein raise peculiar substantial questions of law as to whether the High Court can pass an order on an application entertained after final disposal of the criminal appeal or even suo motu particularly, in view of the provisions of Section 362 of the Code of Criminal Procedure, 1973 (hereinafter called Cr.P.C.) and as to whether in exercise of its inherent jurisdiction under Section 482 Cr.P.C. the High Court can ask a particular investigating agency to investigate a case following a particular procedure through an exceptionally unusual method which is not in consonance with the statutory provisions of Cr.P.C.

4**.** FACTS:

(A) An FIR No.334/91 under Sections 302, 307, 323, 437 and 120-B of the Indian Penal Code, 1860 (hereinafter called the 'IPC') and Sections 3 & 4 of Explosive Substances Act, 1908 was registered at Police Station, Sector 17, Chandigarh. In connection with an FIR dated 13.12.1991, one Balwant Singh

Multani was arrested in a case in respect of the FIR No.440 registered under Sections 212 and 216 IPC, Sections 25/54/69 of Arms Act 1959, and Sections 3 & 5 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter called as 'TADA Act') at Police Station, Sector-17, Chandigarh. On 19.12.1991, the said accused Balwant Singh Multani escaped from the custody of the police from Police Station Qadian (Punjab) for which FIR No.112 dated 19.12.1991 under Sections 223 and 224 IPC was registered at Police Station Qadian (Punjab). Shri Darshan Singh Multani, father of Balwant Singh Multani filed Criminal Writ Petition No.1188 of 1991 before the High Court of Punjab & Haryana under Article 226 of the Constitution of India, 1950, (hereinafter called "Constitution"), for production of the said accused Balwant Singh Multani. The State Government filed a reply to the same, explaining that the said accused had escaped from police custody and after considering the case, the High Court dismissed the *Habeas Corpus* Petition. After completion of the investigation in respect of FIR No.112 of 1991 regarding the escape of Balwant Singh Multani, a challan was filed before the competent court wherein he was declared a proclaimed offender vide order dated 12.5.1993. After completion of the investigation in FIR No.334 of 1991 dated 29.8.1991, the Police chargesheeted eight persons. The chargesheet revealed that an attempt was made by terrorists on the life of the then SSP, Chandigarh, by using explosives. In a thunderous explosion that followed, the Ambassador Car of the SSP, Chandigarh, was blown high into the air whereafter it fell down ahead at some distance completely shattered. HC Amin Chand, the driver of the car and ASI Lalu Ram, PSO, died on the spot. ASI Ramesh Lal, PSO, and CRPF jawans in the Escort vehicle were grievously injured. The bomb explosion was carried out by the terrorists from a parked car in order to kill the SSP, UT, Chandigarh, and other police personnel and this explosion was conducted with explosives operated with a remote control, because of which, two police personnel died

on the spot and many others were grievously injured. Three of the accused, namely, Davinder Pal Singh Bhullar alias Master, Partap Singh Maan and Gursharan Kaur Maan were subjected to trial. The other co-accused namely, Navneet Singh, Manjit Singh, Manmohan Jit Singh, Gurjant Singh and Balwant Singh were not traceable. They were declared proclaimed offenders.

(B) On conclusion of the trial, the Court vide judgment and order dated 1.12.2006 acquitted the three accused giving them benefit of doubt.

(C) Aggrieved, the State (U.T., Chandigarh) preferred Criminal Miscellaneous No.152-MA of 2007 before the High Court challenging the said acquittal. However, the appeal was dismissed vide judgment and order dated 11.5.2007.

(D) After 20 days of the disposal of the said Crl. Misc. No.152-MA of 2007, i.e., appeal against acquittal, the High Court again took up the case *suo motu* on 30.5.2007 and directed the authorities to furnish full details of the proclaimed offenders in respect of the FIR No.334/91 dated 29.8.1991 and the Bench marked the matter "Part Heard".

(E) Shri Dinesh Bhatt, SSP, Chandigarh submitted an affidavit dated 4.8.2007, giving information regarding all the proclaimed offenders in that case. One of them was Davinder Pal Singh Bhullar, who had initially been declared as a proclaimed offender in the said case on 2.3.1993. However, he had subsequently been arrested in a case relating to FIR No.316 of 1993, Police Station, Parliament Street, Delhi and FIR No.150 of 1993, Police Station, Srinivas Puri, New Delhi and had been sentenced to death in a case in which an assassination attempt was made on the life of Shri M.S. Bitta, the then President, All India Youth Congress, in which several persons were killed and Shri Bitta's legs were amputated. It was also mentioned therein that Balwant Singh Multani escaped from police custody and his whereabouts were not known. One

proclaimed offender, Navneet Singh had been killed in a police encounter in Rajasthan on 26.2.1995.

(F) After considering the said affidavit filed by Shri Dinesh Bhatt, SSP, the High Court vide order dated 22.8.2007 directed the Chandigarh Administration to constitute a Special Investigation Team to enquire into all aspects of the proclaimed offenders and submit a status report. The High Court also issued notice to the Central Bureau of Investigation (hereinafter called the 'CBI').

(G) It was during the pendency of these proceedings that Shri Darshan Singh Multani, father of Balwant Singh Multani, whose *habeas corpus* writ petition had already been dismissed by the High Court in the year 1991, approached the Court by filing a miscellaneous application on 16.9.2007, for issuance of directions to find out the whereabout of his son Balwant Singh Multani.

(H) In response to the show cause notice dated 22.8.2007, the CBI submitted its reply on 3.10.2007 requesting the High Court not to handover the enquiry to the CBI, as it was already overburdened with the investigation of cases referred to it by various courts; suffered from a shortage of manpower and resources; and the case did not have any inter-state ramifications.

(I) The High Court vide order dated 19.9.2007 took note of the fact that Manmohan Jit Singh, an employee of IBM, was reported by the US Department of Justice, Federal Bureau of Investigation, to be one of the proclaimed offenders. In view thereof, an affidavit was filed by Chandigarh Administration dated 5.10.2007 submitting that the proclaimed offender Manmohan Jit Singh had left for abroad.

(J) However, the High Court vide order dated 5.10.2007, directed the CBI to investigate the allegations of Darshan Singh Multani regarding his missing son and further directed the CBI

not to disclose the identity of any of the witnesses to anyone except the High Court and to code the names of witnesses as witness A, B & C and further to submit periodical status reports. The order further reads:-

> "However, Shri Sumedh Singh Saini, Director, Vigilance Bureau, Punjab, who at that time, i.e., on 11.2.1991 was posted as Senior Supdt. of Police was at helm of affairs of Chandigarh Police and was serving as the Sr. Supdt. of Police, UT. As of date, he is holding a very important post and is in a position to influence the investigating officer if it is handed over to the Punjab Police or even for that matter to the Chandigarh Police."

(K) In the same matter, the Bench entertained another Criminal Miscellaneous Application on 30.10.2007 filed by Davinder Pal Singh Bhullar, (a convict in another case and lodged in Tihar Jail) regarding allegations that his father Shri Balwant Singh Bhullar and maternal uncle Shri Manjit Singh had been abducted in the year 1991. The High Court vide order dated 6.11.2007 directed the CBI to investigate the allegations made in the complaint filed by Davinder Pal Singh Bhullar and further to get his statement recorded under Section 164 Cr.P.C., so that the witness may not resile under duress or be won over by any kind of inducement. An order was passed rejecting the submission made on behalf of the CBI that the alleged kidnapping of Shri Balwant Singh Bhullar and Shri Manjit Singh had no connection with the said case arising out of FIR No.334 dated 29.8.1991.

(L) The CBI after making a preliminary investigation/ enquiry on the application, registered an FIR on 2.7.2008 under Sections 120-B, 364, 343, 330, 167 and 193 IPC against Shri S.S. Saini, the then SSP, UT, Chandigarh, Shri Baldev Singh Saini, the then DSP, UT, Chandigarh, Shri Harsahay Sharma, the then SI, P.S. Central, Chandigarh, Shri Jagir Singh, the then SI, P.S. Central, Chandigarh and other unknown police officials

of UT Police, Chandigarh, and P.S. Qadian. The CBI further submitted a status report on 4.7.2008 and after considering the same, the High Court issued further directions to complete the investigation within the stipulated period and submit a further report.

5. The State of Punjab, being aggrieved, approached this Court submitting that it has to espouse the cause of its officers who fought war against terrorism, putting themselves at risk during the troublesome period in the early 1990s. That Shri S.S. Saini, SSP, has been one of the most decorated officers of the State having outstanding entries in his Service Book. He is an honest and hardworking officer and has taken drastic steps to curb terrorism in the State in early 1990s. The terrorists had planned a diabolical act and an attempt was made on his life, wherein his three bodyguards were killed and three others were seriously injured. The officer himself suffered grievous injuries. The terrorists had also even chased him up to England when he went there for a social visit. They had planned to attack the said officer. They were arrested by the police and put to trial and also stood convicted. A sentence of four years had been imposed. These appeals have been filed on various grounds, including: the judicial bias of the Judge presiding over the Bench by making specific allegations that the officer named in the order i.e. Shri S.S. Saini had conducted an enquiry against the Presiding Judge (hereinafter called "Mr. Justice X") on the direction of the Chief Justice of Punjab & Haryana High Court and, thus, the said Judge ought not to have proceeded with the matter, rather should have recused himself from the case. More so, as the judgment in appeal against acquittal had been passed by the Court on 11.5.2007 upholding the judgment of acquittal, the Court has become *functus officio* and it had no competence to reopen the case vide order dated 30.5.2007.

6. This Court vide order dated 11.7.2008 stayed the investigation until further orders.

7. Shri Ram Jethmalani, Shri Ravi Shankar Prasad and Shri Ranjit Kumar, learned senior counsel appearing for the appellants, have submitted that once the judgment in appeal against acquittal has been rendered by the High Court on 11.5.2007, in view of the complete embargo of the provisions of Section 362 Cr.P.C., the Court having become *functus officio* was not competent to reopen the case and, thus, proceedings subsequent to 11.5.2007 are a nullity for want of competence/jurisdiction. More so, the proceedings that continued after the said judgment, by illegally reopening the case, were a result of judicial bias of Mr. Justice X, which was just to take revenge against Shri S.S. Saini, who had conducted an inquiry against Mr. Justice X and thus, all such proceedings are liable to be quashed. None of the parties had ever named Mr. S.S. Saini in connection with any of the cases. It was Mr. Justice X, who, on his personal knowledge, mentioned his name in court order dated 5.10.2007. Such a course is not permissible in law. More so, so far as Balwant Singh Multani's case is concerned, his father Darshan Singh Multani (at the relevant time an officer of Indian Administrative Service) had approached the High Court for the same relief and the case stood dismissed in the year 1991 and he had not taken up the matter any further. Thus, the proceedings attained finality. Application of Mr. Multani could not have been entertained after the expiry of 16 years. The same position existed in respect of the application filed by Davinder Pal Singh Bhullar (who had been convicted and awarded a death sentence in another case and the same stood confirmed by this Court) in respect of abduction of his father Balwant Singh Bhullar and uncle Manjit Singh in the year 1991 without furnishing any explanation for delay of 16 years. More so, Mrs. Jagir Kaur, sister of Balwant Singh Bhullar, had filed Crl. W.P. No. 1062 of 1997 for production of Balwant Singh Bhullar, which stood dismissed vide order dated 15.7.1997 only on the ground of delay. A second writ petition for *habeas corpus* is not maintainable and is barred by the principles of *res judicata*. The CBI submitted that investigation of the said alleged abduction be not tagged

with that of the involvement of the officer and disappearance of Balwant Singh Multani, as both the incidents were separate and independent and had no connection with each other. The High Court after taking note of the said submissions in its order dated 6.11.2007 illegally clubbed both the said applications. The applications filed by Davinder Pal Singh Bhullar and Darshan Singh Multani could not be filed/entertained in the disposed of criminal appeal. Had the said applications been filed independently, the same could be rejected as being filed at a much belated stage. Even otherwise, the said applications could have gone to a different Bench. Thus, by entertaining those applications in a disposed of criminal appeal, the Bench presided over by Mr. Justice X violated the roster fixed by the Chief Justice. Thus, the proceedings are liable to be quashed.

8. On the other hand, S/Shri K.N. Balgopal and Colin Gonsalves, learned senior counsel appearing for respondents – private parties and Shri P.K. Dey, learned counsel appearing for the CBI, have submitted that in order to do complete justice in the case, the High Court has exercised its power under Section 482 Cr.P.C., no interference is required by this Court on such technical grounds. The provisions of Section 362 Cr.P.C. are not to be construed in a rigid and technical manner as it would defeat the ends of justice. The two-fold aim of criminal justice is that "guilt shall not escape nor innocence suffer." Allegations made against the Presiding Judge are scandalous and false and do not require any consideration whatsoever. The name of Mr. S.S. Saini, SSP stood mentioned in the record of the case before the Bench. The chargesheet filed after investigation of allegations in the FIR dated 19.8.1991 and in the judgment of the Trial Court dated 1.12.2006 speak that the attack was made on him. It is wrong that his name has been added by the Presiding Judge in the Bench for his personal revenge on his personal knowledge. So far as names of two proclaimed offenders, who had been killed in an encounter are concerned, it has been mentioned in the

chargesheet itself that Navneet Singh and Gurjant Singh, proclaimed offenders, had been killed in encounters. However, such fact could not be brought to the notice of the High Court by the public prosecutor. The State of Punjab filed an application for intervention but did not raise any issue of bias or prejudice against the Presiding Judge of the Bench. The Union Territory of Chandigarh has approached this Court against the same impugned judgment and order and special leave petition has been dismissed *in limine*. More so, after conducting a preliminary enquiry, the CBI has registered a First Information Report (hereinafter called the "FIR") on 2.7.2008 which should not be quashed. The CBI be permitted to investigate the cases. Thus, the appeals are liable to be dismissed.

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

LEGAL ISSUES :

I. JUDICIAL BIAS

10. There may be a case where allegations may be made against a Judge of having bias/prejudice at any stage of the proceedings or after the proceedings are over. There may be some substance in it or it may be made for ulterior purpose or in a pending case to avoid the Bench if a party apprehends that judgment may be delivered against him. Suspicion or bias disables an official from acting as an adjudicator. Further, if such allegation is made without any substance, it would be disastrous to the system as a whole, for the reason, that it casts doubt upon a Judge who has no personal interest in the outcome of the controversy.

11. In respect of judicial bias, the statement made by Frank J. of the United States is worth quoting:-

> "If, however, 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the Judge, then no one has ever had a fair trial and no one will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions ……. Much harm is done by the myth that, merely by……. taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine."
>
> [In re: Linahan, 138 F. 2nd 650 (1943)]
>
> (See also: *State of West Bengal & Ors. v. Shivananda Pathak & Ors.,* AIR 1998 SC 2050).

12. To recall the words of Mr. Justice Frankfurter in *Public Utilities Commission of the District of Columbia v. Franklin S. Pollak,* 343 US 451 (1952) 466: The Judicial process demands that a judge moves within the framework of relevant legal rules and the covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that, on the whole, judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted.

13. In *Bhajan Lal, Chief Minister, Haryana v. M/s. Jindal Strips Ltd. & Ors.,* (1994) 6 SCC 19, this Court observed that there may be some consternation and apprehension in the mind of a party and undoubtedly, he has a right to have fair trial, as guaranteed by the Constitution. The apprehension of bias must be reasonable, i.e. which a reasonable person can entertain. Even in that case, he has no right to ask for a change of Bench, for the reason that such an apprehension may be inadequate and he cannot be permitted to have the Bench of his choice. The Court held as under:-

"Bias is the second limb of natural justice. Prima facie no one should be a judge in what is to be regarded as 'sua causa', whether or not he is named as a party. The decision-maker should have no interest by way of gain or detriment in the outcome of a proceeding. Interest may take many forms. It may be direct, it may be indirect, it may arise from a personal relationship or from a relationship with the subject-matter, from a close relationship or from a tenuous one."

14. The principle in these cases is derived from the legal maxim – *nemo debet esse judex in causa propria sua.* It applies only when the interest attributed is such as to render the case his own cause. This principle is required to be observed by all judicial and quasi-judicial authorities as non-observance thereof, is treated as a violation of the principles of natural justice. (Vide: *Rameshwar Bhartia v. The State of Assam,* AIR 1952 SC 405; *Mineral Development Ltd. v. The State of Bihar & Anr.,* AIR 1960 SC 468**;** *Meenglas Tea Estate v. The Workmen*, AIR 1963 SC 1719; and *The Secretary to the Government, Transport Department, Madras v. Munuswamy Mudaliar & Ors.,* AIR 1988 SC 2232).

The failure to adhere to this principle creates an apprehension of bias on the part of the Judge. The question is not whether the Judge is actually biased or, in fact, has really not decided the matter impartially, but whether the circumstances are such as to create a reasonable apprehension in the mind of others that there is a likelihood of bias affecting the decision. (Vide: *A.U. Kureshi v. High Court of Gujarat & Anr.,* (2009) 11 SCC 84; and *Mohd. Yunus Khan v. State of U.P. & Ors.,* (2010) 10 SCC 539).

15. In *Manak Lal, Advocate v. Dr. Prem Chand Singhvi & Ors.,* AIR 1957 SC 425, this Court while dealing with the issue of bias held as under:

"Actual proof of prejudice in such cases may make the

appellant's case stronger but such proof is not necessary…. What is relevant is the reasonableness of the apprehension in that regard in the mind of the appellant."

16. The test of real likelihood of bias is whether a reasonable person, in possession of relevant information, would have thought that bias was likely and whether the adjudicator was likely to be disposed to decide the matter only in a particular way. Public policy requires that there should be no doubt about the purity of the adjudication process/administration of justice. The Court has to proceed observing the minimal requirements of natural justice, i.e., the Judge has to act fairly and without bias and in good faith. A judgment which is the result of bias or want of impartiality, is a nullity and the trial *"coram non judice".* Therefore, the consequential order, if any, is liable to be quashed. (Vide: *Vassiliades v. Vassiliades,* AIR 1945 PC 38; *S. Parthasarathi v. State of Andhra Pradesh,* AIR 1973 SC 2701; and *Ranjit Thakur v. Union of India & Ors.,* AIR 1987 SC 2386).

17. In *Rupa Ashok Hurra v. Ashok Hurra & Anr.,* (2002) 4 SCC 388, this Court observed that public confidence in the judiciary is said to be the basic criterion of judging the justice delivery system. If any act or action, even if it is a passive one, erodes or is even likely to erode the ethics of judiciary, the matter needs a further look. In the event, there is any affectation of such an administration of justice either by way of infraction of natural justice or an order being passed wholly without jurisdiction or affectation of public confidence as regards the doctrine of integrity in the justice delivery system, technicality ought not to outweigh the course of justice — the same being the true effect of the doctrine of *ex debito justitiae*. It is enough if there is a ground of an appearance of bias.

While deciding the said case, this Court placed reliance upon the judgment of the House of Lords in *Ex Parte Pinochet Ugarte* (No.2) 1999 All ER, 577, in which the House of Lords

on 25.11.1998, restored warrant of arrest of Senator Pinochet who was the Head of the State of Chile and was to stand trial in Spain for some alleged offences. It came to be known later that one of the Law Lords (Lord Hoffmann), who heard the case, had links with Amnesty International (AI) which had become a party to the case. This was not disclosed by him at the time of the hearing of the case by the House. Pinochet Ugarte, on coming to know of that fact, sought reconsideration of the said judgment of the House of Lords on the ground of appearance of bias and not actual bias. On the principle of disqualification of a Judge to hear a matter on the ground of appearance of bias, it was pointed out:

> "An appeal to the House of Lords will only be reopened where a party though no fault of its own, has been subjected to an unfair procedure. A decision of the House of Lords will not be varied or rescinded merely because it is subsequently thought to be wrong."

18. In *Locabail (UK) Ltd. v. Bayfield Properties Ltd. & Anr.,* (2000) 1 All ER 65, the House of Lords considered the issue of disqualification of a Judge on the ground of bias and held that in applying the real danger or possibility of bias test, it is often appropriate to inquire whether the Judge knew of the matter in question. To that end, a reviewing court may receive a written statement from the Judge. A Judge must recuse himself from a case before any objection is made or if the circumstances give rise to automatic disqualification or he feels personally embarrassed in hearing the case. If, in any other case, the Judge becomes aware of any matter which can arguably be said to give rise to a real danger of bias, it is generally desirable that disclosure should be made to the parties in advance of the hearing. Where objection is then made, it will be as wrong for the Judge to yield to a tenuous or frivolous objection as it will be to ignore an objection of substance. However, if there is real ground for doubt, that doubt must be resolved in favour of recusal. Where, following

appropriate disclosure by the Judge, a party raises no objection to the Judge hearing or continuing to hear a case, that party cannot subsequently complain that the matter disclosed gives rise to a real danger of bias.

19. In *Justice P.D. Dinakaran v. Hon'ble Judges Inquiry Committee,* (2011) 8 SCC 380, this Court has held that in India the courts have held that, to disqualify a person as a Judge, the test of real likelihood of bias, i.e., real danger is to be applied, considering whether a fair minded and informed person, apprised of all the facts, would have a serious apprehension of bias. In other words, the courts give effect to the maxim that *'justice must not only be done but be seen to be done'*, by examining not actual bias but real possibility of bias based on facts and materials.

The Court further held:

> "The first requirement of natural justice is that the Judge should be impartial and neutral and must be free from bias. He is supposed to be indifferent to the parties to the controversy. He cannot act as Judge of a cause in which he himself has some interest either pecuniary or otherwise as it affords the strongest proof against neutrality. He must be in a position to act judicially and to decide the matter objectively. A Judge must be of sterner stuff. His mental equipoise must always remain firm and undetected. He should not allow his personal prejudice to go into the decision-making. The object is not merely that the scales be held even; it is also that they may not appear to be inclined. If the Judge is subject to bias in favour of or against either party to the dispute or is in a position that a bias can be assumed, he is disqualified to act as a Judge, and the proceedings will be vitiated. This rule applies to the judicial and administrative authorities required to act judicially or quasi-judicially."

20. Thus, it is evident that the allegations of judicial bias are required to be scrutinised taking into consideration the

factual matrix of the case in hand. The court must bear in mind that a mere ground of appearance of bias and not actual bias is enough to vitiate the judgment/order. Actual proof of prejudice in such a case may make the case of the party concerned stronger, but such a proof is not required. In fact, what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. However, once such an apprehension exists, the trial/judgment/order etc. stands vitiated for want of impartiality. Such judgment/order is a nullity and the trial "*coram non-judice*".

II. DOCTRINE OF WAIVER:

21. In *Manak Lal* (Supra), this Court held that alleged bias of a Judge/official/Tribunal does not render the proceedings invalid if it is shown that the objection in that regard and particularly against the presence of the said official in question, had not been taken by the party even though the party knew about the circumstances giving rise to the allegations about the alleged bias and was aware of its right to challenge the presence of such official. The Court further observed that waiver cannot always and in every case be inferred merely from the failure of the party to take the objection. "Waiver can be inferred only if and after it is shown that the party knew about the relevant facts and was aware of his right to take the objection in question."

Thus, in a given case if a party knows the material facts and is conscious of his legal rights in that matter, but fails to take the plea of bias at the earlier stage of the proceedings, it creates an effective bar of waiver against him. In such facts and circumstances, it would be clear that the party wanted to take a chance to secure a favourable order from the official/court and when he found that he was confronted with an unfavourable order, he adopted the device of raising the issue of bias. The issue of bias must be raised by the party at the earliest.

(See: *M/s. Pannalal Binjraj & Ors. v. Union of India & Ors.,*

AIR 1957 SC 397; and Justice *P.D. Dinakaran* (Supra))

22. In *M/s. Power Control Appliances & Ors. v. Sumeet Machines Pvt. Ltd.,* (1994) 2 SCC 448 this Court held as under:–

> "Acquiescence is sitting by, when another is invading the rights…. It is a course of conduct inconsistent with the claim… It implies positive acts; not merely silence or inaction such as involved in laches. ..... The acquiescence must be such as to lead to the inference of a licence sufficient to create a new right in the defendant....."

Inaction in every case does not lead to an inference of implied consent or acquiescence as has been held by this Court in *P. John Chandy & Co. (P) Ltd. v. John P. Thomas,* AIR 2002 SC 2057. Thus, the Court has to examine the facts and circumstances in an individual case.

23. Waiver is an intentional relinquishment of a right. It involves conscious abandonment of an existing legal right, advantage, benefit, claim or privilege, which except for such a waiver, a party could have enjoyed. In fact, it is an agreement not to assert a right. There can be no waiver unless the person who is said to have waived, is fully informed as to his rights and with full knowledge about the same, he intentionally abandons them. (Vide: *Dawsons Bank Ltd. v. Nippon Menkwa Kabushihi Kaish,* AIR 1935 PC 79; *Basheshar Nath v. Commissioner of Income-tax, Delhi and Rajasthan & Anr.,* AIR 1959 SC 149; *Mademsetty Satyanarayana v. G. Yelloji Rao & Ors.,* AIR 1965 SC 1405; *Associated Hotels of India Ltd. v. S. B. Sardar Ranjit Singh,* AIR 1968 SC 933; *Jaswantsingh Mathurasingh & Anr. v. Ahmedabad Municipal Corporation & Ors.,* (1992) Suppl 1 SCC 5; *M/s. Sikkim Subba Associates v. State of Sikkim,* AIR 2001 SC 2062; and *Krishna Bahadur v. M/s. Purna Theatre & Ors.,* AIR 2004 SC 4282).

24. This Court in *Municipal Corporation of Greater*

Bombay v. Dr. Hakimwadi Tenants' Association & Ors., AIR 1988 SC 233 considered the issue of waiver/acquiescence by the non-parties to the proceedings and held:

> "In order to constitute waiver, there must be voluntary and intentional relinquishment of a right. The essence of a waiver is an estoppel and where there is no estoppel, there is no waiver. Estoppel and waiver are questions of conduct and must necessarily be determined on the facts of each case…….
>
> There is no question of estoppel, waiver or abandonment. There is no specific plea of waiver, acquiescence or estoppel, much less a plea of abandonment of right. That apart, the question of waiver really does not arise in the case. Admittedly, the tenants were not parties to the earlier proceedings. There is, therefore, no question of waiver of rights, by Respondents 4-7 nor would this disentitle the tenants from maintaining the writ petition."

25. Thus, from the above, it is apparent that the issue of bias should be raised by the party at the earliest, if it is aware of it and knows its right to raise the issue at the earliest, otherwise it would be deemed to have been waived. However, it is to be kept in mind that acquiescence, being a principle of equity must be made applicable where a party knowing all the facts of bias etc., surrenders to the authority of the Court/Tribunal without raising any objection. Acquiescence, in fact, is sitting by, when another is invading the rights. The acquiescence must be such as to lead to the inference of a licence sufficient to create rights in other party. Needless to say that question of waiver/acquiescence would arise in a case provided the person apprehending the bias/prejudice is a party to the case. The question of waiver would not arise against a person who is not a party to the case as such person has no opportunity to raise the issue of bias.

III. BAR TO REVIEW/ALTER- JUDGMENT

26. There is no power of review with the Criminal Court after judgment has been rendered. The High Court can alter or review its judgment before it is signed. When an order is passed, it cannot be reviewed. Section 362 Cr.P.C. is based on an acknowledged principle of law that once a matter is finally disposed of by a Court, the said Court in the absence of a specific statutory provision becomes *functus officio* and is disentitled to entertain a fresh prayer for any relief unless the former order of final disposal is set aside by a Court of competent jurisdiction in a manner prescribed by law. The Court becomes *functus officio* the moment the order for disposing of a case is signed. Such an order cannot be *altered* except to the extent of correcting a clerical or arithmetical error. There is also no provision for modification of the judgment. (See: *Hari Singh Mann v. Harbhajan Singh Bajwa & Ors.,* AIR 2001 SC 43; and *Chhanni v. State of U.P.,* AIR 2006 SC 3051).

Moreover, the prohibition contained in Section 362 Cr.P.C. is absolute; after the judgment is signed, even the High Court in exercise of its inherent power under Section 482 Cr.P.C. has no authority or jurisdiction to alter/review the same. (See: *Moti Lal v. State of M.P.,* AIR 1994 SC 1544; *Hari Singh Mann* (supra)**;** and *State of Kerala v. M.M. Manikantan Nair,* AIR 2001 SC 2145).

27. If a judgment has been pronounced without jurisdiction or in violation of principles of natural justice or where the order has been pronounced without giving an opportunity of being heard to a party affected by it or where an order was obtained by abuse of the process of court which would really amount to its being without jurisdiction, inherent powers can be exercised to recall such order for the reason that in such an eventuality the order becomes a nullity and the provisions of Section 362 Cr.P.C. would not operate. In such eventuality, the judgment is manifestly contrary to the *audi alteram partem* rule of natural

justice. The power of recall is different from the power of altering/reviewing the judgment. However, the party seeking recall/alteration has to establish that it was not at fault. (Vide: *Chitawan & Ors. v. Mahboob Ilahi,* 1970 Crl.L.J. 378; *Deepak Thanwardas Balwani v. State of Maharashtra & Anr.,* 1985 Crl.L.J. 23; *Habu v. State of Rajasthan,* AIR 1987 Raj. 83 (F.B.); *Swarth Mahto & Anr. v. Dharmdeo Narain Singh,* AIR 1972 SC 1300; *Makkapati Nagaswara Sastri v. S.S. Satyanarayan,* AIR 1981 SC 1156; *Asit Kumar Kar v. State of West Bengal & Ors.,* (2009) 2 SCC 703; and *Vishnu Agarwal v. State of U.P. & Anr.,* AIR 2011 SC 1232).

28. This Court by virtue of Article 137 of the Constitution has been invested with an express power to review any judgment in Criminal Law and while no such power has been conferred on the High Court, inherent power of the court cannot be exercised for doing that which is specifically prohibited by the Code itself. (Vide: *State Represented by D.S.P., S.B.C.I.D., Chennai v. K.V. Rajendran & Ors.,* AIR 2009 SC 46).

29. In *Smt. Sooraj Devi v. Pyare Lal & Anr.,* AIR 1981 SC 736, this Court held that the prohibition in Section 362 Cr.P.C. against the Court altering or reviewing its judgment, is subject to what is "otherwise provided by this Code or by any other law for the time being in force". Those words, however, refer to those provisions only where the Court has been expressly authorised by the Code or other law to alter or review its judgment. The inherent power of the Court is not contemplated by the saving provision contained in Section 362 Cr.P.C. and, therefore, the attempt to invoke that power can be of no avail.

30. Thus, the law on the issue can be summarised to the effect that the criminal justice delivery system does not clothe the court to add or delete any words, except to correct the clerical or arithmetical error as specifically been provided under the statute itself after pronouncement of the judgment as the Judge becomes *functus officio*. Any mistake or glaring

omission is left to be corrected only by the appropriate forum in accordance with law.

IV. INHERENT POWERS UNDER SECTION 482 Cr.P.C.

31. The inherent power under Section 482 Cr.P.C. is intended to prevent the abuse of the process of the Court and to secure the ends of justice. Such power cannot be exercised to do something which is expressly barred under the Cr.P.C. If any consideration of the facts by way of review is not permissible under the Cr.P.C. and is expressly barred, it is not for the Court to exercise its inherent power to reconsider the matter and record a conflicting decision. *If there had been change in the circumstances of the case,* it would be in order for the High Court to exercise its inherent powers in the prevailing circumstances and pass appropriate orders to secure the ends of justice or to prevent the abuse of the process of the Court. Where there are no such changed circumstances and the decision has to be arrived at on the facts that existed as on the date of the earlier order, the exercise of the power to reconsider the same materials to arrive at different conclusion is in effect a review, which is expressly barred under Section 362 Cr.P.C. (See: *Simrikhia v. Dolley Mukherjee and Chhabi Mukherjee & Anr,* (1990) 2 SCC 437).

32. The inherent power of the court under Section 482 Cr.P.C. is saved only where an order has been passed by the criminal court which is required to be set aside to secure the ends of justice or where the proceeding pending before a court, amounts to abuse of the process of court. Therefore, such powers can be exercised by the High Court in relation to a matter pending before a criminal court or where a power is exercised by the court under the Cr.P.C. Inherent powers cannot be exercised assuming that the statute conferred an unfettered and arbitrary jurisdiction, nor can the High Court act at its whim or caprice. The statutory power has to be exercised sparingly with circumspection and in the rarest of rare cases. (Vide: *Kurukshetra University & Anr. v. State of Haryana &*

Anr., AIR 1977 SC 2229; and *State of W.B. & Ors. v. Sujit Kumar Rana,* (2004) 4 SCC 129).

33. The power under Section 482 Cr.P.C. cannot be resorted to if there is a specific provision in the Cr.P.C. for the redressal of the grievance of the aggrieved party or where alternative remedy is available. Such powers cannot be exercised as against the express bar of the law and engrafted in any other provision of the Cr.P.C. Such powers can be exercised to secure the ends of justice and to prevent the abuse of the process of court. However, such expressions do not confer unlimited/unfettered jurisdiction on the High Court as the "ends of justice" and "abuse of the process of the court" have to be dealt with in accordance with law including the procedural law and not otherwise. Such powers can be exercised *ex debito justitiae* to do real and substantial justice as the courts have been conferred such inherent jurisdiction, in absence of any express provision, as inherent in their constitution, or such powers as are necessary to do the right and to undo a wrong in course of administration of justice as provided in the legal maxim "*quando lex aliquid alique, concedit, conceditur et id sine quo res ipsa esse non potest*". However, the High Court has not been given nor does it possess any inherent power to make *any order,* which in the opinion of the court, could be in the interest of justice as the statutory provision is not intended to by-pass the procedure prescribed. (Vide: *Lalit Mohan Mondal & Ors. v. Benoyendra Nath Chatterjee,* AIR 1982 SC 785; *Rameshchandra Nandlal Parikh v. State of Gujarat & Anr.,* AIR 2006 SC 915; *Central Bureau of Investigation v. Ravi Shankar Srivastava, IAS & Anr.,* AIR 2006 SC 2872; *Inder Mohan Goswami & Anr. v. State of Uttaranchal & Ors.,* AIR 2008 SC 251; and *Pankaj Kumar v. State of Maharashtra & Ors.,* AIR 2008 SC 3077).

34. The High Court can always issue appropriate direction in exercise of its power under Article 226 of the Constitution at the behest of an aggrieved person, if the court is convinced that

the power of investigation has been exercised by an Investigating Officer malafide or the matter is not investigated at all. Even in such a case, the High Court cannot direct the police as to how the investigation is to be conducted but can insist only for the observance of process as provided for in the Cr.P.C. Another remedy available to such an aggrieved person may be to file a complaint under Section 200 Cr.P.C. and the court concerned will proceed as provided in Chapter XV of the Cr.P.C. (See: *Gangadhar Janardan Mhatre v. State of Maharashtra & Ors.,* (2004) 7 SCC 768; and *Divine Retreat Centre v. State of Kerala & Ors.,* AIR 2008 SC 1614).

35. The provisions of Section 482 Cr.P.C. closely resemble Section 151 of Code of Civil Procedure, 1908, (hereinafter called the 'CPC'), and, therefore, the restrictions which are there to use the inherent powers under Section 151 CPC are applicable in exercise of powers under Section 482 Cr.P.C. and one such restriction is that there exists no other provision of law by which the party aggrieved could have sought relief. (Vide: *The Janata Dal v. H.S. Chowdhary & Ors.,* AIR 1993 SC 892).

36. In *Divisional Forest Officer & Anr. v. G.V. Sudhakar Rao & Ors.,* AIR 1986 SC 328, this Court held that High Court was not competent under Section 482 Cr.P.C. to stay the operation of an order of confiscation under Section 44(IIA) of the Andhra Pradesh Forest Act as it is distinct from a trial before a court for the commission of an offence.

37. In *Popular Muthiah v. State* represented by Inspector of Police, (2006) 7 SCC 296, explaining the scope of Section 482 Cr.P.C., this Court held :

> *"The High Court cannot issue directions to investigate the* ***case from a particular angle*** *or by a particular agency."* (Emphasis added)

Thus, in case, the High Court in exercise of its inherent

powers, issues directions contravening the statutory provisions laying down the procedure of investigation, it would be unwarranted in law.

38. In *Rajan Kumar Machananda v. State of Karnataka,* 1990 (supp.) SCC 132, this Court examined a case as to whether the bar under Section 397(3) Cr.P.C. can be circumvented by invoking inherent jurisdiction under Section 482 Cr.P.C. by the High Court. The Court came to the conclusion that if such a course was permissible it would be possible that every application facing the bar of Section 397(3) Cr.P.C. would be labelled as one under Section 482 Cr.P.C. Thus, the statutory bar cannot be circumvented.

39. This Court has consistently emphasised that judges must enforce laws whatever they may be and decide the cases strictly in accordance with the law. "The laws are not always just and the lights are not always luminous. Nor, again, are judicial methods always adequate to secure justice". But the courts "are bound by the Penal Code and Criminal Procedure Code" by the very 'oath' of the office. (See: *Joseph Peter v. State of Goa, Daman and Diu,* AIR 1977 SC 1812).

40. It is evident from the above that inherent powers can be exercised only to prevent the abuse of the process of the court and to secure the ends of justice. However, powers can be used provided there is no prohibition for passing such an order under the provisions of Cr.P.C. and there is no provision under which the party can seek redressal of its grievance. Under the garb of exercising inherent powers, the Criminal Court cannot review its judgment. Such powers are analogous to the provisions of Section 151 CPC and can be exercised only to do real and substantial justice. The rule of inherent powers has its source in the maxim *"Quadolex aliquid alicui concedit, concedere videtur id sine quo ipsa, ess uon potest"* which means that when the law gives anything to anyone, it gives also all those things without which the thing itself could not exist. The

order cannot be passed by-passing the procedure prescribed by law. The court in exercise of its power under Section 482 Cr.P.C. cannot direct a particular agency to investigate the matter or to investigate a case from a particular angle or by a procedure not prescribed in Cr.P.C. Such powers should be exercised very sparingly to prevent abuse of process of any court. Courts must be careful to see that its decision in exercise of this power is based on sound principles.

To inhere means that it forms a necessary part and belongs as an attribute in the nature of things. The High Court under Section 482 Cr.P.C. is crowned with a statutory power to exercise control over the administration of justice in criminal proceedings within its territorial jurisdiction. This is to ensure that proceedings undertaken under the Cr.P.C. are executed to secure the ends of justice. For this, the Legislature has empowered the High Court with an inherent authority which is repository under the Statute. The Legislature therefore clearly intended the existence of such power in the High Court to control proceedings initiated under the Cr.P.C. Conferment of such inherent power might be necessary to prevent the miscarriage of justice and to prevent any form of injustice. However, it is to be understood that it is neither divine nor limitless. It is not to generate unnecessary indulgence. The power is to protect the system of justice from being polluted during the administration of justice under the Code. The High Court can intervene where it finds the abuse of the process of any court which means, that wherever an attempt to secure something by abusing the process is located, the same can be rectified by invoking such power. There has to be a nexus and a direct co-relation to any existing proceeding, not foreclosed by any other form under the Code, to the subject matter for which such power is to be exercised.

Application under Section 482 Cr.P.C. lies before the High Court against an order passed by the court subordinate to it in a pending case/proceedings. Generally, such powers are used

for quashing criminal proceedings in appropriate cases. Such an application does not lie to initiate criminal proceedings or set the criminal law in motion. Inherent jurisdiction can be exercised if the order of the Subordinate Court results in the abuse of the "process" of the court and/or calls for interference to secure the ends of justice. The use of word 'process' implies that the proceedings are pending before the Subordinate Court. When reference is made to the phrase "to secure the ends of justice", it is in fact in relation to the order passed by the Subordinate Court and it cannot be understood in a general connotation of the phrase. More so, while entertaining such application the proceedings should be pending in the Subordinate Court. In case it attained finality, the inherent powers cannot be exercised. Party aggrieved may approach the appellate/revisional forum. Inherent jurisdiction can be exercised if injustice done to a party, e.g., a clear mandatory provision of law is overlooked or where different accused in the same case are being treated differently by the Subordinate Court.

An inherent power is not an omnibus for opening a pandorabox, that too for issues that are foreign to the main context. The invoking of the power has to be for a purpose that is connected to a proceeding and not for sprouting an altogether new issue. A power cannot exceed its own authority beyond its own creation. It is not that a person is remediless. On the contrary, the constitutional remedy of writs are available. Here, the High Court enjoys wide powers of prerogative writs as compared to that under Section 482 Cr.P.C. To secure the corpus of an individual, remedy by way of *habeas corpus* is available. For that the High Court should not resort to inherent powers under Section 482 Cr.P.C. as the Legislature has conferred separate powers for the same. Needless to mention that Section 97 Cr.P.C. empowers Magistrates to order the search of a person wrongfully confined. It is something different that the same court exercising authority can, in relation to the same subject matter, invoke its writ jurisdiction as well.

Nevertheless, the inherent powers are not to provide universal remedies. The power cannot be and should not be used to belittle its own existence. One cannot concede anarchy to an inherent power for that was never the wisdom of the Legislature. To confer un-briddled inherent power would itself be trenching upon the authority of the Legislature.

V. JURISDICTION OF THE BENCH :

41. The court is "not to yield to spasmodic sentiments to vague and unregulated benevolence". The court "is to exercise discretion informed by tradition, methodized by analogy, disciplined by system". This Court in *State of Rajasthan v. Prakash Chand & Ors.,* AIR 1998 SC 1344 observed as under:

> "Judicial authoritarianism is what the proceedings in the instant case smack of. It cannot be permitted under any guise. Judges must be circumspect and self-disciplined in the discharge of their judicial functions……It needs no emphasis to say that all actions of a Judge must be judicious in character. Erosion of credibility of the judiciary, in the public mind, for whatever reasons, is the greatest threat to the independence of the judiciary. Eternal vigilance by the Judges to guard against any such latent internal danger is, therefore, necessary, lest we "suffer from self-inflicted mortal wounds". We must remember that the Constitution does not give unlimited powers to anyone including the Judge of all levels. The societal perception of Judges as being detached and impartial referees is the greatest strength of the judiciary and every member of the judiciary must ensure that this perception does not receive a setback consciously or unconsciously. Authenticity of the judicial process rests on public confidence and public confidence rests on legitimacy of judicial process. Sources of legitimacy are in the impersonal application by the Judge of recognised objective principles which owe their existence to a system as distinguished from subjective

moods, predilections, emotions and prejudices. It is most unfortunate that the order under appeal founders on this touchstone and is wholly unsustainable".

42. This Court in *State of U.P. & Ors. v. Neeraj Chaubey & Ors.,* (2010) 10 SCC 320, had taken note of various judgments of this Court including *State of Maharashtra v. Narayan Shamrao Puranik,* AIR 1982 SC 1198; *Inder Mani v. Matheshwari Prasad,* (1996) 6 SCC 587; *Prakash Chand* (Supra); *R. Rathinam v. State,* (2002) 2 SCC 391; and *Jasbir Singh v. State of Punjab,* (2006) 8 SCC 294, and came to the conclusion that the Chief Justice is the master of roster. The Chief Justice has full power, authority and jurisdiction in the matter of allocation of business of the High Court which flows not only from the provisions contained in sub-section (3) of Section 51 of the States Reorganisation Act, 1956, but inheres in him in the very nature of things. The Chief Justice enjoys a special status and he alone can assign work to a Judge sitting alone and to the Judges sitting in Division Bench or Full Bench. He has jurisdiction to decide which case will be heard by which Bench. The Court held that a Judge or a Bench of Judges can assume jurisdiction in a case pending in the High Court only if the case is allotted to him or them by the Chief Justice. Strict adherence of this procedure is essential for maintaining judicial discipline and proper functioning of the Court. No departure from this procedure is permissible.

In *Prakash Chand* (Supra), this Court dealt with a case wherein the Chief Justice of Rajasthan High Court had withdrawn a part-heard matter from one Bench and directed it to be listed before another Bench. However, the earlier Bench still made certain observations. While dealing with the issue, this Court held that it was the exclusive prerogative of the Chief Justice to withdraw even a part-heard matter from one Bench and to assign it to any other Bench. Therefore, the observations made by the Bench subsequent to withdrawal of the case from that Bench and disposal of the same by another Bench were

not only unjustified and unwarranted but also *without jurisdiction* and made the Judge coram *non-judice*.

It is a settled legal proposition that no Judge or a Bench of Judges assumes jurisdiction unless the case is allotted to him or them under the orders of the Chief Justice.

It has rightly been pointed out by the Full Bench of Allahabad High Court in *Sanjay Kumar Srivastava v. Acting Chief Justice,* 1996 AWC 644, that if the Judges were free to choose their jurisdiction or any choice was given to them to do whatever case they would like to hear and decide, the machinery of the court could have collapsed and judicial functioning of the court could have ceased by generation of internal strife on account of hankering for a particular jurisdiction or a particular case.

43. In view of the above, the legal regime, in this respect emerges to the effect that the Bench gets jurisdiction from the assignment made by the Chief Justice and the Judge cannot choose as which matter he should entertain and he cannot entertain a petition in respect of which jurisdiction has not been assigned to him by the Chief Justice as the order passed by the court may be without jurisdiction and made the Judge *coram non-judice.*

VI. <u>WHEN CBI ENQUIRY CAN BE DIRECTED:</u>

44. In *Secretary, Minor Irrigation and Rural Engineering Services, U.P. & Ors. v. Sahngoo Ram Arya & Anr.,* AIR 2002 SC 2225, this Court placed reliance on its earlier judgment in *Common Cause, A Registered Society v. Union of India & Ors,* (1999) 6 SCC 667 and held that before directing CBI to investigate, the court must reach a conclusion on the basis of pleadings and material on record that a prima facie case is made out against the accused. The court cannot direct CBI to investigate as to whether a person committed an offence as alleged or not. The court cannot merely proceed on the basis

of 'ifs' and 'buts' and think it appropriate that inquiry should be made by the CBI.

45. In *Divine Retreat Centre* (Supra), this Court held that the High Court could have passed a judicial order directing investigation against a person and his activities only after giving him an opportunity of being heard. It is not permissible for the court to set the criminal law in motion on the basis of allegations made against a person in violation of principles of natural justice. A person against whom an inquiry is directed must have a reasonable opportunity of being heard as he is likely to be adversely affected by such order and, particularly, when such an order results in drastic consequence of affecting his reputation.

46. In *D. Venkatasubramaniam & Ors. v. M.K.Mohan Krishnamachari & Anr.,* (2009) 10 SCC 488, this Court held that an order passed behind the back of a party is a nullity and liable to be set aside only on this score. Therefore, a person against whom an order is passed on the basis of a criminal petition filed against him, he should be impleaded as a respondent being a necessary party.

47. This Court in *Disha v. State of Gujarat & Ors.,* AIR 2011 SC 3168, after considering the various judgments of this Court, particularly, in *Vineet Narain & Ors. v. Union of India & Anr.,* AIR 1996 SC 3386; *Union of India v. Sushil Kumar Modi,* (1998) 8 SCC 661; *Rajiv Ranjan Singh 'Lalan' (VIII) v. Union of India,* (2006) 6 SCC 613; *Rubabbuddin Sheikh v. State of Gujarat & Ors.,* AIR 2010 SC 3175; and *Ashok Kumar Todi v. Kishwar Jahan & Ors.,* (2011) 3 SCC 758; held that the court can transfer the matter to the CBI or any other special agency only when it is satisfied that the accused is a very powerful and influential person or the State Authorities like high police officials are involved in the offence and the investigation has not been proceeded with in proper direction or the investigation had been conducted in a biased manner. In such a case, in order

to do complete justice and having belief that it would lend credibility to the final outcome of the investigation, such directions may be issued.

48. Thus, in view of the above, it is evident that a constitutional court can direct the CBI to investigate into the case provided the court after examining the allegations in the complaint reaches a conclusion that the complainant could make out prima facie, a case against the accused. However, the person against whom the investigation is sought, is to be impleaded as a party and must be given a reasonable opportunity of being heard. CBI cannot be directed to have a roving inquiry as to whether a person was involved in the alleged unlawful activities. The court can direct CBI investigation only in exceptional circumstances where the court is of the view that the accusation is against a person who by virtue of his post could influence the investigation and it may prejudice the cause of the complainant, and it is necessary so to do in order to do complete justice and make the investigation credible.

INSTANT CASES :

49. The present appeals are required to be decided in the light of the aforesaid settled legal propositions.

50. It is evident from the judgment and order dated 11.5.2007 that Criminal Misc. No.152-MA of 2007 stood dismissed. The order sheet dated 30.5.2007 reveals that in spite of the disposal of the said criminal appeal it had been marked therein as "put up for further hearing" and the order dated 30.5.2007 reveals the directions given to the Trial Court to furnish a detailed report as to the measures taken by it to bring the proclaimed offenders, namely Navneet Singh, Manjit Singh, Manmohan Singh, Gurjant Singh and Balwant Singh before the Court and the case was adjourned for 2nd July, 2007.

51. Two different orders are available on the record of this

case. The aforesaid marking "put up for further hearing" had been shown in the order sheet dated 11.5.2007, i.e., the date of disposal of criminal appeal against acquittal. While in another copy, it is not in the order sheet dated 11.5.2007 but on the order sheet dated 30.5.2007. In view of this confusion, this Court vide order dated 17.3.2011 has called for the original record. It appears from the original record that no such order had been passed on 11.5.2007. More so, there is nothing on record to show as under what circumstances the file was put up before the Court on 30.5.2007 as no order had ever been passed by the court in this regard.

The proceedings dated 10.7.2007, 25.7.2007, 31.7.2007, 6.8.2007 and 9.8.2007 show that the case has been adjourned for short dates. The order dated 5.9.2007 shows that the Bench headed by Mr. Justice X was furnished with full information regarding proclaimed offenders by the authorities. However, the case was adjourned for 19.9.2007. The order dated 19.9.2007 reveals that the Bench not only entertained the application filed by Darshan Singh Multani, IAS (Retd.), but also expressed its anguish that nothing could be done since the year 1993 by the Chandigarh Police to procure the presence of the proclaimed offenders. The Police by filing the replies had adopted the delaying tactics only to derail the process of the court without bringing the proclaimed offenders to justice. The application filed by the U.T., Chandigarh to file a reply to the application filed by Darshan Singh Multani was rejected. The CBI was further directed to investigate the case properly, as no worthwhile steps were being taken by the Chandigarh Police.

The order dated 5.10.2007 passed by the Bench shows that the CBI had been impleaded as respondent in the petition suo motu by the court. The CBI submitted its reply to the Crl.Misc. Application No. 86287 of 2007 opposing the said application and further submitted that the matter be not entrusted to the CBI and petition be dismissed being devoid of any merit.

The order dated 6.11.2007 reveals that the Court enlarged the scope of investigation by the CBI by including investigations qua Balwant Singh Bhullar and Manjit Singh.

Relevant part of the order dated 4.7.2008 reads as under:

> *"After going through the status report, it comes out that the encounter of Navneet Singh son of late Tirath Singh of Qadian was a genuine encounter with the Rajasthan police. We feel that there is no need to further investigate the matter in the case of Navneet Singh son of late Tirath Singh. In the case of Manjit Singh son of late Rattan Singh, no evidence is coming forth and the CBI is at liberty to drop the investigation of Manjit Singh son of late Rattan Singh, if it so desires."*

Thus, it is clear that the Bench was aware of the fact that two proclaimed offenders had been killed in encounters. Thus, the CBI was given liberty not to further investigate the matter in case of Navneet Singh and Manjit Singh, if it so desired.

52. The record reveals that Davinder Pal Singh Bhullar was involved in M.S. Bitta's assassination attempt and had absconded to Germany on a fake passport. He was arrested there and was extradited to India and arrested on 18.1.1995. He was tried for the said offence, convicted in the year 2001 and given the death sentence. It was confirmed by the High Court as well as by this Court and the review petition also stood rejected in January 2003. Ever since 2003, he remained silent regarding the investigation of the alleged disappearances of his father and uncle and suddenly woke up in the year 2007 when the Bench presided by Mr. Justice X started suo motu hearing various other matters after the disposal of the criminal appeal against acquittal. The Court was fully aware that another relative of Bhullar i.e. his father's sister had filed a case before the High Court in the year 1997, for production of Balwant Singh Bhullar, the father of Davinder Pal Singh Bhullar above and not for his uncle Manjit Singh. The High Court had rejected the said

petition vide order dated 15.7.1997 and the matter was not agitated further. Thus, it attained finality.

53. The application of the Punjab Government dated 19.5.2008 bearing Crl. Misc. No. 23084 of 2008 to get itself impleaded in the matter is still pending consideration, though order dated 23.5.2008 gives a different impression altogether.

54. Admittedly, the application for Leave to Appeal stood disposed of vide judgment and order dated 11.5.2007. The matter suddenly appeared before the Bench on 30.5.2007 and the Court directed the Police to furnish information regarding the proclaimed offenders and a detailed report as to the measures taken to procure the presence of the said proclaimed offenders, namely, Navneet Singh, Manjit Singh, Manmohan Singh, Gurjant Singh and Balwant Singh so that they may face trial. However, after hearing the matter on few dates, the Court vide order dated 5.10.2007 closed the chapter of proclaimed offenders observing as under:

> "Since the police of U.T. Chandigarh has now woken up, that the proclaimed offenders have to be brought to justice and are making efforts to procure their presence, we feel that there is no need for the Special Investigation Team (S.I.T.) The Inspector General of Police, Union Territory, Chandigarh had been directed by this Court vide order dated 5.9.2007 to set up a Special Investigation Team (S.I.T.) for this purpose. At this stage, now, there is no need for this Special Investigation Team. The Inspector General of Police, UT, Chandigarh is directed to disband the Special Investigation Team and proceed as per law in the normal course to procure the presence of the proclaimed offenders, who are allegedly in foreign countries." (Emphasis added)

Therefore, it is evident that the court was very much anxious to know about the proclaimed offenders, however, after getting certain information, the Court stopped monitoring the progress

in procuring the presence of any of those proclaimed offenders. By this time, the Court also came to know that applicant Darshan Singh Multani's son had also been killed. Therefore, the chapter regarding the proclaimed offenders was closed. There was no occasion for the Court to proceed further with the matter and entertain the applications under Section 482 Cr.P.C., filed by Darshan Singh Multani and Davinder Pal Singh Bhullar. At this stage, the Court started probing regarding *missing persons*. The question does arise as to whether applications under Section 482 Cr.P.C. could be entertained in a disposed of appeal or could be heard by a Bench to which the roster has not been assigned by Hon'ble the Chief Justice.

In view of the law referred to hereinabove, the Bench was not competent to entertain the said applications and even if the same had been filed in the disposed of appeal, the court could have directed to place the said applications before the Bench dealing with similar petitions.

55. It is evident from the order dated 30.5.2007 that in spite of the fact that the appeal stood disposed of vide judgment and order dated 11.5.2007, there appears an order in the file: "put up for further hearing". That means the matter is to be heard by the same Bench consisting of Judges 'X' and 'A'. However, the matter was listed before another Bench on 2.7.2007 and the said Bench directed to list the matter before DB-IV after taking the appropriate order from the Chief Justice. In absence of the Chief Justice, the senior most Judge passed the order on 5.7.2007 to list the matter before the DB-IV. The matter remained with the Presiding Judge, though the other Judge changed most of the time, as is evident from the subsequent order sheets. Order sheet dated 30.5.2007 reveals that it was directed to put up the case for further hearing. Thus, it should have been heard by the Bench as it was on 30.5.2007.

56. In the counter affidavit filed by Davinder Pal Singh Bhullar, respondent no.1 before this Court, it has been stated as under:

"W,X, Y&Z That in reply to these grounds, it is submitted that the answering respondent being behind the bars awaiting his death sentence moved an application through his counsel in the Hon'ble High Court, when he came to know from the news item published in the news paper regarding marking of CBI enquiry in the case of abduction of Balwant Singh Multani an Engineer, son of Mr. Darshan Singh Multani a retired IAS Officer, who was then a serving officer. *When the answering respondent found that Mr. Sumedh Singh Saini has now been taken to task by the Hon'ble Division Bench of Punjab and Haryana High Court, the answering respondent also moved the Hon'ble High Court for seeking enquiry regarding the abduction and murder of his father and his maternal uncle who were abducted by the lawless police officials headed by Mr. Sumedh Singh Saini the then SSP of Chandigarh and the Hon'ble Bench extended the scope of the enquiry vide order dated 6.11.2007.* So the delay is not worthy to be taken note of as the past record of the Mr. Sumedh Singh Saini which has been mentioned in preliminary submissions clearly shows that he was able to threaten and overawe an Hon'ble Punjab and Haryana High Court Judge in year 1995 and even though he has been charged by a court for abduction for murder of three individuals in year 1995, but the trial of the case is still pending in the year 2008. *So throughout this period the manner in which Mr. Sumedh Singh Saini has been able to subvert judicial processes did not allow the respondent to move a court of law and now when an Hon'ble Division Bench has shown courage to uphold the majesty of law, that the respondent also gathered his courage to move the Hon'ble High Court,* with the hope that at some time justice would prevail."

(Emphasis added)

57. So far as the issue in respect of the proclaimed complainants/offenders is concerned, the document was before the High Court to show that a letter had been sent by the U.S Department of Justice Federal Wing of Investigation to the CBI disclosing that Manmohan Jit Singh had died on December 2006. Thus, information in respect of one of the proclaimed offenders was with the court. The judgment of the Trial Court was before the High Court under challenge. Thus, the High Court could have taken note of the proclaimed offender and there was no new material that came before the High Court on the basis of which proceedings could be revived. The chargesheet in the Trial Court itself revealed that two persons had died. It appears that the State counsel also failed to bring these facts to the notice of the court.

58. The impugned order dated 5.10.2007 though gives an impression that the High Court was trying to procure the presence of the proclaimed offenders but, in fact, it was to target the police officers, who had conducted the inquiry against Mr. Justice X. The order reads that particular persons were eliminated in a false encounter by the police and it was to be ascertained as to who were the police officers responsible for it, so that they could be brought to justice.

59. There could be no justification for the Bench concerned to entertain applications filed under Section 482 Cr.P.C. as miscellaneous applications in a disposed of appeal. The law requires that the Bench could have passed an appropriate order to place those applications before the Bench hearing 482 Cr.P.C. petitions or place the matters before the Chief Justice for appropriate orders.

60. As the High Court after rejecting the applications for leave to appeal had passed several orders to procure the presence of the proclaimed offenders so that they could be brought to justice, neither the State of Punjab nor Mr. S.S. Saini could be held to be the persons aggrieved by such orders and

therefore, there could be no question of raising any protest on their behalf for passing such orders even after disposal of the application for leave to appeal as such orders were rather in their favour. The appellants became aggrieved only and only when the High Court entertained the applications filed under Section 482 Cr.P.C. for tracing out the whereabouts of certain persons allegedly missing for the past 20 years. Such orders did not have any connection with the incident in respect of which the application for leave to appeal had been entertained and rejected. An application for leave to appeal that has been dismissed against an order of acquittal cannot provide a platform for an investigation in a subject matter that is alien and not directly concerned with the subject matter of appeal.

Mr. K.N. Balgopal, learned Senior counsel appearing for the respondents has submitted that the issue of bias must be agitated by a party concerned at the earliest and it is not permissible to raise it at such a belated stage. The legal proposition in this regard is clear that if a person has an opportunity to raise objections and fails to do so, it would amount to waiver on his part. However, such person can raise objections only if he is impleaded as a party-respondent in the case and has an opportunity to raise an objection on the ground of bias. In the instant case, neither the State of Punjab nor Mr. S.S. Saini have been impleaded as respondents. Thus, the question of waiver on the ground of bias by either of them does not arise.

61. Undoubtedly, in respect of such missing persons earlier *habeas corpus* petitions had been filed by the persons concerned in 1991 and 1997 which had been dealt with by the courts in accordance with law. The writ petition for *habeas corpus* filed by Mrs. Jagir Kaur in respect of Balwant Singh Bhullar had been dismissed in 1997 only on the ground of delay. We fail to understand how a fresh petition in respect of the same subject matter could be entertained after 10 years of dismissal of the said writ petition.

62. A second writ petition for issuing a writ of *habeas corpus* is barred by principles of *res judicata*. The doctrine of *res judicata* may not apply in case a writ petition under Article 32 of the Constitution is filed before this Court after disposal of a *habeas corpus* writ petition under Article 226 of the Constitution by the High Court. However, it is not possible to re-approach the High Court for the same relief by filing a fresh writ petition for the reason that it would be difficult for the High Court to set aside the order made by another Bench of the same court. In case, a petition by issuing Writ of *Habeas Corpus* is dismissed by the High Court and Special Leave Petition against the same is also dismissed, a petition under Article 32 of the Constitution, seeking the same relief would not be maintainable.

(See: *Ghulam Sarwar v. Union of India & Ors.,* AIR 1967 SC 1335; *Nazul Ali Molla, etc. v. State of West Bengal,* 1969 (3) SCC 698; *Niranjan Singh v. State of Madhya Pradesh,* AIR 1972 SC 2215; *Har Swarup v. The General Manager, Central Railway & Ors.,* AIR 1975 SC 202; *T.P. Moideen Koya v. Government of Kerala & Ors.,* AIR 2004 SC 4733; and *K. Vidya Sagar v. State of Uttar Pradesh & Ors.,* AIR 2005 SC 2911).

63. There may be certain exceptions to the rule that a person was not aware of the correct facts while filing the first petition or the events have arisen subsequent to making of the first application. The Court must bear in mind that doctrine of *res judicata* is confined generally to civil action but inapplicable to illegal action and fundamentally lawless order. A subsequent petition of *habeas corpus* on fresh grounds which were not taken in the earlier petition for the same relief may be permissible. (Vide: *Lalubhai Jogibhai Patel v. Union of India & Ors.,* AIR 1981 SC 728; *Ajit Kumar Kaviraj v. Distt. Magistrate, Birbhum & Anr.,* AIR 1974 SC 1917; and *Sunil Dutt v. Union of India & Ors.,* AIR 1982 SC 53).

64. While dealing with a similar issue, this Court in *Srikant v. District Magistrate, Bijapur & Ors.,* (2007) 1 SCC 486 observed as under:

> "Whether any new ground has been taken, has to be decided by the court dealing with the application and no hard-and-fast rule can be laid down in that regard. But one thing is clear, it is the substance and not the form which is relevant. If some surgical changes are made with the context, substance and essence remaining the same, it cannot be said that challenge is on new or fresh grounds".

65. Thus, in view of the above, the law in the issue emerges that a case is to be decided on its facts taking into consideration whether really new issues have been agitated or the facts raised in subsequent writ petition could not be known to the writ petitioner while filing the earlier writ petition.

Be that as it may, the parties concerned had not filed fresh writ petitions, rather chosen, for reasons best known to them applications under Section 482 Cr.P.C., which could not have been entertained.

66. A large number of documents have been submitted to the court under sealed cover by the State of Punjab on the direction of this court. We have gone through the said documents and suffice is to mention here that Shri Sumedh Singh Saini, IPS had conducted the enquiry in 2002 against Mr. Justice X on the direction of the Chief Justice of the Punjab and Haryana High Court on the alleged appointment of certain judicial/executive officers in Punjab through Shri Ravi Sandhu, Chairman of the Public Service Commission. Shri S.S. Saini had filed reports against Mr. Justice X. The Chief Justice of Punjab and Haryana High Court confronted Mr. Justice X with the said reports. On the basis of the said reports, the Chief Justice of the High Court submitted his report to the Chief Justice of India, on the basis of which a Committee to investigate the matter further was appointed. This Committee

even examined one Superintendent of Police of the intelligence wing who had worked directly under Shri S.S. Saini while conducting the enquiry.

67. The High Court has adopted an unusual and unwarranted procedure, not known in law, while issuing certain directions. The court not only entertained the applications filed by Shri Davinder Pal Singh Bhullar and Darshan Singh Multani in a disposed of appeal but enlarged the scope of CBI investigation from proclaimed offenders to other missing persons. The court directed the CBI to treat affidavits handed over by the applicant Shri Bhullar who admittedly had inimical relation with Shri S.S. Saini, as statement of eye-witnesses. The court further directed the CBI to change the names of witnesses to witness (A), (B) or (C) and record their statements under Section 164 Cr.P.C. so that they could not resile at a later stage. We fail to understand how the court could direct the CBI to adopt such an unwarranted course.

68. The High Court accepted certain documents submitted by Shri R.S. Bains, advocate, as is evident from the order dated 22.8.2007 and it was made a part of the record though Shri Bains had not been a counsel engaged in the case nor he had been representing any of the parties in the case.

69. When the matter came up for hearing on 2.4.2008, in spite of the fact that the matter was heard throughout by a particular Division Bench, Mr. Justice X alone held the proceedings, and accepted the status report of the CBI sitting singly, as the proceedings reveal that the other Judge was not holding court on that day. The order sheet dated 2.4.2008 reads as under:

> "Status report, which has been presented by the CBI in Court in a sealed cover, is taken in custody.
>
> Hon'ble Mr. Justice Harbans Lal, who has to hear the case along with me, as it is a part-heard case, is not holding

court today.

To come up on 4.4.2008.

Sd/-
Judge"

70. The FIR unquestionably is an inseparable corollary to the impugned orders which are a nullity. Therefore, the very birth of the FIR, which is a direct consequence of the impugned orders cannot have any lawful existence. The FIR itself is based on a preliminary enquiry which in turn is based on the affidavits submitted by the applicants who had filed the petitions under Section 482 Cr.P.C.

71. The order impugned has rightly been challenged to be a nullity at least on three grounds, namely, judicial bias; want of jurisdiction by virtue of application of the provisions of Section 362 Cr.P.C. coupled with the principles of constructive *res judicata*; and the Bench had not been assigned the roster to entertain petitions under Section 482 Cr.P.C. The entire judicial process appears to have been drowned to achieve a motivated result which we are unable to approve of.

72. It is a settled legal proposition that if initial action is not in consonance with law, all subsequent and consequential proceedings would fall through for the reason that illegality strikes at the root of the order. In such a fact-situation, the legal maxim "*sublato fundamento cadit opus*" meaning thereby that foundation being removed, structure/work falls, comes into play and applies on all scores in the present case.

73. In *Badrinath v. State of Tamil Nadu & Ors.,* AIR 2000 SC 3243; and *State of Kerala v. Puthenkavu N.S.S. Karayogam & Anr.,* (2001) 10 SCC 191, this Court observed that once the basis of a proceeding is gone, all consequential acts, actions, orders would fall to the ground automatically and this principle is applicable to judicial, quasi-judicial and

administrative proceedings equally.

74. Similarly in *Mangal Prasad Tamoli (dead) by Lrs. v. Narvadeshwar Mishra (dead) by Lrs. & Ors.,* (2005) 3 SCC 422, this Court held that if an order at the initial stage is bad in law, then all further proceedings, consequent thereto, will be *non est* and have to be necessarily set aside.

75. In *C. Albert Morris v. K. Chandrasekaran & Ors.,* (2006) 1 SCC 228, this Court held that a right in law exists only and only when it has a lawful origin.

(See also: *Upen Chandra Gogoi v. State of Assam & Ors.,* (1998) 3 SCC 381; *Satchidananda Misra v. State of Orissa & Ors.,* (2004) 8 SCC 599; *Regional Manager, SBI v. Rakesh Kumar Tewari,* (2006) 1 SCC 530; and *Ritesh Tewari & Anr. v. State of U.P. & Ors.,* AIR 2010 SC 3823).

76. Thus, in view of the above, we are of the considered opinion that the orders impugned being a nullity, cannot be sustained. As a consequence, subsequent proceedings/orders/ FIR/ investigation stand automatically vitiated and are liable to be declared *non est*.

77. The submission advanced on behalf of the respondents that as the Special Leave Petition filed against the impugned judgment by some other party, stood dismissed by this Court, these matters also have to be dismissed at the threshold without entering into merit, is not worth acceptance.

The issue as to whether the dismissal of the special leave petition by this Court in limine, i.e., by a non-speaking order would amount to affirmation or confirmation or approval of the order impugned before this Court, has been considered time and again. Thus, the issue is no more *res integra*.

A large number of judicial pronouncements made by this Court leave no manner of doubt that the dismissal of the

Special Leave Petition *in limine* does not mean that the reasoning of the judgment of the High Court against which the Special Leave Petition had been filed before this Court stands affirmed or the judgment and order impugned merges with such order of this Court on dismissal of the petition. It simply means that this Court did not consider the case worth examining for a reason, which may be other than merit of the case. An order rejecting the Special Leave Petition at the threshold without detailed reasons, therefore, does not constitute any declaration of law or a binding precedent.

The doctrine of *res judicata* does not apply, if the case is entertained afresh at the behest of other parties. No inference can be drawn that by necessary implication, the contentions raised in the special leave petition on the merits of the case have been rejected. So it has no precedential value.

(See: *The Workmen of Cochin Port Trust v. The Board of Trustees of the Cochin Port Trust & Anr.,* AIR 1978 SC 1283; *Ahmedabad Manufacturing & Calico Printing Co. Ltd. v. The Workmen & Anr.,* AIR 1981 SC 960; *Indian Oil Corporation Ltd. v. State of Bihar & Ors.,* AIR 1986 SC 1780; *Yogendra Narayan Chowdhury & Ors. v. Union of India & Ors.,* AIR 1996 SC 751; *Union of India & Anr. v. Sher Singh & Ors.,* AIR 1997 SC 1796; *M/s Sun Export Corporation, Bombay v. Collector of Customs, Bombay & Anr.,* AIR 1997 SC 2658; *Kunhayammed & Ors. v. State of Kerala & Anr.,* AIR 2000 SC 2587; *Saurashtra Oil Mills Association, Gujarat v. State of Gujarat & Anr.,* AIR 2002 SC 1130; *Union of India & Ors. v. Jaipal Singh,* AIR 2004 SC 1005; and *Delhi Development Authority v. Bhola Nath Sharma (dead) by L.Rs. & Ors.,* AIR 2011 SC 428).

CONCLUSIONS :

78. The error in the impugned orders of the High Court transgresses judicious discretion. The process adopted by the High Court led to greater injustice than securing the ends of

justice. The path charted by the High Court inevitably reflects a biased approach. It was a misplaced sympathy for a cause that can be termed as being inconsistent to the legal framework. Law is an endless process of testing and retesting as said by Justice Cardozo in his conclusion of the Judicial Process, ending in a constant rejection of the dross and retention of whatever is pure and sound. The multi-dimensional defective legal process adopted by the court below cannot be justified on any rational legal principle. The High Court was swayed away by considerations that are legally impermissible and unsustainable.

79. In view of the above, the appeals succeed and are accordingly allowed. The impugned orders challenged herein are declared to be nullity and as a consequence, the FIR registered by the CBI is also quashed.

80. However, it is open to the applicants who had filed the petitions under Section 482 Cr.P.C. to take recourse to fresh proceedings, if permissible in law.

D.G. Appeals allowed.

##NEXT FILE
RAMESH ROUT
v.
RABINDRA NATH ROUT
(Civil Appeal No. 4956 of 2010)

DECEMBER 9, 2011

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

REPRESENTATION Of THE PEOPLE ACT, 1951:

s. 33 read with r. 4 of 1961 Rules and Para 13(a) to (e), of 1968 Order – Elections to State Legislative Assembly – Candidate set up by a recognized political party — Form A and Form B appended to Para 13 of 1968 Order to be signed "in ink only" by office-bearer or person authorized by the party – Connotation of – Held: Statutory requirements of election law must be strictly observed – For a candidate set up by a recognized political party, it is necessary that Forms A and B referable to clauses (b), (c) and (d) of para 13 of the 1968 Order are submitted to Returning Officer duly signed in ink by the authorized person of the political party concerned in

accord with clause (e) of the said para –Clause (e) of para 13 is indicative of the mandatory character of the provision and on its non-compliance, the nomination of such candidate is liable to be rejected as it tantamounts to non-compliance of provisions of s. 33, namely, the nomination paper having not been completed in the prescribed form – Conduct of Election Rules, 1961 – r. 4 – Election Symbol (Reservation and Allotment) Order, 1968 – Para 13 (a) to (e) – Interpretation of Statutes.

ss. 83 and 100(1) (c) – Election petition – Framing of additional issue – Rejection of nomination on the ground that Form A and Form B signed in ink by authorized person were not filed – Challenged in election petition – High Court framing an additional issue in this regard at the time of decision in the election petition – Held: The pleadings of the parties as well as the evidence let in by them clearly show that they were seriously in issue whether the original Form-A and Form-B duly signed in ink by the authorised person of the party concerned were filed by the proposed candidate with the first set of his nomination paper – The issue was quite vital and material for decision in the election petition – No prejudice has been caused to the returned candidate – High Court did not commit any error in framing the issue – Practice and Procedure – Framing of issues.

s.36(5), proviso – Rejection of nomination – Opportunity to be afforded to the proposed candidate to rebut the objection – HELD: Returning Officer erred in acting in hot haste in rejecting the nomination of the proposed candidate and not postponing the scrutiny to the next day, particularly, when a request was made by the authorised representative of the proposed candidate –Returning Officer ought to have acted in terms of proviso to s. 36(5) and afforded an opportunity to the proposed candidate until next day to rebut the objection and show that Form A and Form B had been filed duly signed in ink by the authorised person of the political party concerned.

ss. 83 (1) (a) and 100(1)(c) – Election petition – To contain concise statement of material facts – HELD: In a case u/s 100(1)(c), the only issue before the court is improper rejection of nomination and the court is required to examine the correctness and propriety of the order by which the nomination of a candidate is rejected – The grounds set out in the election petition challenging the order of rejection of nomination paper, thus, form the basis of adjudication in the election petition – It was not necessary to state in the election petition the evidence of the authorised representative of the election petitioner in support of ground – The oral and documentary evidence on record clearly establish that original Form-A and Form-B signed in ink by authorised office-bearer of the recognized political party were presented by the proposed candidate along with 1st set of nomination papers — It cannot be said that the material facts relating to the ground on which election of the returned candidate has been set aside have neither been pleaded in the election petition nor have been proved by leading cogent evidence – The Returning Officer erred in rejecting nomination of the proposed candidate – The election petitioners have been successful in proving the improper rejection of the proposed candidate's nomination and, as such, have been able to prove the ground for setting aside the election of the returned candidate –The judgment of the High Court in declaring the election of the returned candidate as null and void does not suffer from any legal infirmity.

ELECTION SYMBOL (RESERVATION AND ALLOTMENT) ORDER, 1968:

Para 13 – Presumption as regards filing of Forms A and B – Check list - Where a check list certifies that Forms A and B (in the case of candidates set up by a recognised political party), have been filed, such certificate leads to presumption that the procedural requirement of filing the documents as prescribed in para 13 has been complied with –This presumption has not been rebutted by the returned candidate