STATE OF UTTARAKHAND & ANR.
v.
ARCHANAN SHUKLA & ORS.
(CIVIL APPEAL NO. 5130 OF 2009)

JULY 20, 2011

[MARKANDEY KATJU AND CHANDRAMAULI KR. PRASAD, JJ.]

SERVICE LAW:

Seniority – Employees appointed on ad hoc basis in 1988 – Their services regularised in 2004 – Claim for benefit of service from 1988 to 2004 for the purpose of seniority – Held: Admittedly, the employees were appointed after – selection under the Regularization Rules in the year 2004 – Therefore, they can get seniority only from the year 2004 and not from 1988 – The rule is clear – When there is a conflict between law and equity, it is the law which has to prevail in accordance with the maxim, 'dura lex sed lex', which means , 'the law is hard but is the law' – Equity can only supplement the law, but it cannot supplant or override it – Uttaranchal Regularization of Ad hoc Appointments (Posts under the Purview of Public Service Commission) Rules, 2002 – r. 7 – Equity – Maxim 'Dura lex sed lex'.

Raghunath Rai Bareja and Anr. Vs. Punjab National Bank and Ors. **2006 (10) Suppl. SCR 287 = (2007) 2 SCC 230;** *B. Premanand and Ors. Vs. Mohan Koikal and Ors.* **(2011) 3 SCR 932 – relied on.**

Case Law Reference:

2006 (10) Suppl. SCR 287	**relied on**	**para 7**
(2011) 3 SCR 932	**relied on**	**para 7**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5130 of 2009.

From the Judgment & Order dated 6.3.2006 of the High Court of Uttaranchal, at Nainital in Writ Petition No. 140 (S/B) of 2005.

WITH

C.A. No. 1474 of 2007.

L. Nageswara Rao, Rachana Srivastava for the Appellants.

Jayant Bhushan, Anurag Dubey, Meenesh Dubey (for S.R. Setia), Ajay Kr. Singh (for Shrish Kumar Misra) for the Respondents.

The following Order of the Court was delivered

ORDER

Civil Appeal No. 5130 of 2009

Heard learned counsel for the parties.

This Appeal has been filed against the impugned judgment and order dated 6th March, 2006 passed by the High Court of Uttarakhand at Nainital in Writ Petition No. 140/2005.

The facts have been set out in the impugned judgment and hence we are not repeating the same here except wherever necessary.

The respondents herein were appointed on adhoc officiating post in the year 1988 for a fixed term which was continued They were regularised in the year 2004 under the Uttaranchal Regularization of Ad Hoc Appointments (Posts under the purview of Public Service Commission) Rules, 2002 (for short 'the Rules'). The respondents claimed benefit of their service from 1988 to 2004 for the purpose of seniority and this has been granted by the High Court. Hence, this appeal.

We are afraid, we cannot agree with the view taken by the High Court.

Rule 7 (1) of the Rules states as under:

"A person appointed under these rules shall be entitled to seniority only from the date of order of appointment after selection in accordance with these rules and shall, in all cases, be placed below the persons appointed in accordance with the relevant service rules or as the case may be, the regular prescribed procedure, prior in the appointment of such person under these rules."

Admittedly, the respondents were appointed after a selection under the Regularization Rules in the year 2004. Hence, in our view, they can get seniority only from the year 2004 and not from 1988. The rule is clear and hence we cannot debar from the clear meaning of the rule.

It has been held in *Raghunath Rai Bareja & Another vs. Punjab National Bank & Others* (2007) 2 SCC 230 that when there is a conflict between law and equity, it is the law which has to prevail in accordance with the latin maxim 'dura lex sed lex' which means 'the law is hard but it is the law'. Equity can only supplement the law, but it cannot supplant or override it. This view was followed in Civil Appeal No. 2684 of 2007 titled *B. Premanand & Others vs. Mohan Koikal & Others* decided on 16th March, 2011.

In the present case, Rules 7 is very clear and hence the respondents are not entitled to the benefit of their service from 1988 to 2004 for the purpose of their seniority.

Accordingly, this appeal is allowed and the impugned judgment of the High Court is set aside,Nop costs.

Civil Appeal No. 1474 of 2007.

In view of our order passed today in Civil Appeal, No. 5130 of 2009, this appeal is also allowed and the impugned judgment of the High Court is set aside. No costs

R.P. Appeal allowed.

UTTAR PRADESH STATE ROAD TRANSPORT CORPORATION

v.

KULSUM & ORS.

(CIVIL APPEAL NO. 5901 of 2011)

JULY 25, 2011

[DALVEER BHANDARI AND DEEPAK VERMA, JJ.]

MOTOR VEHICLES ACT, 1988:

ss. 146 and 149 r/w ss.2(30) and 103(1-A) – Insurance policy – Third party risk – Insured vehicle of a private owner plying under an agreement with State Road Transport Corporation – Accident – Liability to pay compensation to victims – HELD: Is of the Insurance Company – The liability to pay compensation is based on a statutory provision – Compulsory Insurance of the vehicle is meant for the benefit of the 'Third Parties' – The purpose of compulsory insurance in the Act has been enacted with an object to advance social justice – The vehicle was given on hire by its owner – It would be deemed that the vehicle was transferred with its insurance policy – Thus, the Insurance Company cannot escape its liability to pay the compensation - Insurance – Vicarious liability – Social justice.

In the instant appeals filed by the Uttar Pradesh State Road Transport Corporation (the Corporation) and the Insurance Company, the question of law for consideration before the Court was: "If insured vehicle (in this case a mini bus) is plying under an Agreement of Contract with the Corporation, on the route as per permit granted in favour of the Corporation, in case of an accident, whether the Insurance Company would be liable to pay compensation or would it be the responsibility of the Corporation or the owner?"

Allowing the appeals of the Corporation and dismissing the appeal of the Insurance Company, the Court

HELD: 1.1. By virtue of sub-s. (1A) of s. 103 of the Motor Vehicles Act, 1988 the Corporation became entitled to hire any vehicle which could be plied on any route for which permit had been issued by the Transport Authority in its favour. [para 15] [627-D]

1.2. A critical examination of both the definitions of the 'owner', u/s 2(19) of the Motor Vehicles Act, 1939 and s.2(30) of the Motor Vehicles Act, 1988 would show that it underwent a drastic change in the Act of 1988. In the light of the distinct changes incorporated in the definition of 'owner' in the old Act and the existing Act, *Kailash Nath Kothari's* **case* shall have no application to the facts of the instant case. [paras 26 & 27] [632-D-E]**

Rajasthan State Road Transport Corporation vs. Kailash Nath Kothari and others* **1997 (3) Suppl. SCR 724 = (1997) 7 SCC 481 – held inapplicable.

1.3. The Corporation and the owner had specifically agreed that the vehicle will be insured and a driver would be provided by owner of the vehicle but overall control, not only on the vehicle but also on the driver, would be that of the Corporation. Thus, the vehicle was given on hire by its owner together with the existing and running insurance policy. In view of the terms and conditions, the Insurance Company cannot escape its liability to pay the compensation. [para 29] [633-G-H; 634-A-B]

1.4. There is no denial of the fact by the Insurance Company that at the relevant point of time the vehicle in question was insured with it and the policy was very much in force and in existence. It has also not been its

case that there has been violation of the terms and conditions of the policy or that the driver was not entitled to drive the said vehicle. The Tribunal has also held that the driver had a valid driving licence at the time of accident. [para 29] [634-A-C]

1.5. It has been admitted on behalf of the insurance company that in normal circumstances, if the said vehicle would not have been attached with the Corporation for being plied by it on the route of permit granted to it, the Insurance Company would have no option but to make the payment; that there is no difference in the tariff of premium for the vehicle insured at the instance of owner or for the vehicle which is being attached with the Corporation for being plied by it and it is same for both; that if an intimation would have been given to the Insurance Company that the vehicle is being attached with the Corporation, the Insurance Company would have met the liability of compensation, in case of an accident; that there is neither any statutory duty cast on the owner under the Act or under any Rules to seek permission from the Insurance Company to attach the vehicle with the Corporation nor is it under any of the orders issued by the Insurance Company. Thus, it is clear that Insurance Company is trying to evade its liability on flimsy grounds or under misconception of law. [paras 30 & 31] [634-D-H; 635-A-D]

1.6. In view of the definition of "Vicarious Liability", it can be inferred that the person supervising the driver through the principle of Respondeat Superior should pay for the damages of the victim. In the instant case, the driver was employed by the owner of the bus but evidently through Clause 4.4 of the Agreement, the driver was supposed to drive the bus under the instructions of conductor who was appointed by the Corporation. The said driver was also bound by all orders of the

Corporation. Thus, it can safely be inferred that effective control and command of the vehicle was that of the Coproration. [paras 33-35] [635-E-H; 636-A]

Black's Law Dictionary's "Vicarious Liability" **– referred to.**

1.7. Thus, for all practical purposes, for the relevant period, the Corporation had become the owner of the vehicle for the specific period; and the vehicle having been insured at the instance of original owner, it will be deemed that the vehicle was transferred along with the insurance policy in existence to the Corporation and, therefore, the Insurance Company would not be able to escape its liability to pay the amount of compensation. [para 36] [636-B-C]

1.8. The liability to pay compensation is based on a statutory provision. Compulsory Insurance of the vehicle is meant for the benefit of the Third Parties. The liability of the owner to have compulsory insurance is only in regard to Third Party and not to the property. Once the vehicle is insured, the owner as well as any other person can use the vehicle with the consent of the owner. Section 146 of the Act does not provide that any person who uses the vehicle independently, a separate Insurance Policy should be taken. The purpose of compulsory insurance in the Act has been enacted with an object to advance social justice. [para 37] [636-D-E]

Guru Govekar v. Filomena F. Lobo and Ors. **1988 (1) Suppl. SCR 170 = (1988 ACJ 585), 1988 AIR 1332 – relied on.**

1.9. Section 146 of the Act gives complete protection to Third Party in respect of death or bodily injury or damage to the property while using the vehicle in public place. For that purpose, insurance of the vehicle has been

made compulsory to the vehicles or to the owners. This would further reflect that compulsory insurance is obviously for the benefit of Third Parties. [para 41] [638-G-H; 639-A]

United India Insurance Company Limited v. Santro Devi and Ors. **2008 (16) SCR 944 = (2009) 1 SCC 558 – relied on**

1.10. Certificate of Insurance, between the owner and the Insurance Company contemplates, under what circumstances Insurance Company would be liable to pay the amount of compensation. A perusal of the relevant rules would show that there has not been any violation of the terms and conditions of the policy. Respondent-Insurance Company has also failed to point out violation of any Act, Rules or conditions of the Insurance. Insurance Company has no legal justification to deny the payment of compensation to the claimants. [para 42-43] [639-B, G-H; 640-A]

1.11. The liability of the Insurance Company is exclusive and absolute and it cannot escape its liability of payment of compensation to Third Parties or claimants. Admittedly, owner of the vehicle has not violated any of the terms and conditions of the policy or provisions of the Act. The owner had taken the insurance so as to meet such type of liability which may arise on account of use of the vehicle. Thus, legally or otherwise liability has to be fastened on the Insurance Company only. [para 44-46] [640-B-E]

1.12. The impugned judgment and order passed by High Court qua the Corporation is set aside and quashed and it is held that the Insurance Company would be liable to pay the amount of compensation to the claimants. [para 47] [640-F]

Case Law Reference

1997 (3) Suppl. SCR 724	**held inapplicable**	**para 9 and 21**
1988 (1) Suppl. SCR 170	**relied on**	**para 39**
2008 (16) SCR 944	**relied on**	**para 40**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5901 of 2011.

From the Judgment & Order dated 12.4.2007 of the High Court of Judicature at Allahabad, Lucknow Bench, at Allahabad in FAFO No. 65 of 2001.

WITH

C.A. Nos. 5902, 5903, 5904, 5905, 5906, 5907 of 2011.

Garima Prashad, Laxmibai Leitanthem, Pradeep Kumar, Shadab Khan, Kishore Rawat, M.K. Dua, Rajeev Mishra, Sanand Ramakrishnan (for Parmanand Pandey, J.P. Dhanda, Shrish Kumar Misra, for the appearing parties.

The Judgment of the Court was delivered by

DEEPAK VERMA, J. 1. Leave granted.

2. Since common questions of law and facts are involved in this batch of appeals, six of which have been filed by Uttar Pradesh State Road Transport Corporation, (hereinafter referred to as 'Corporation'), and one has been preferred by Insurance Company, against the identical judgments and orders passed by High Court of Allahabad, it is proposed to dispose of the same by this common judgment. For the sake of brevity and convenience, facts of appeal arising out of S.L.P.(C)No.1969 of 2008 have been taken into consideration.

3. The Appellant herein (UPSRTC) had challenged the award passed by Motor Accident Claims Tribunal (hereinafter

referred to as the 'MACT'), Barabanki in claim case therein, holding the Appellant - Corporation along with Ajai Vishen and Narottam, owner and driver of the mini bus, respectively, liable to pay compensation to the claimants.

4. In appeal before the High Court of Allahabad, it awarded compensation to the claimants vide impugned judgment and order dated 12.04.2007, recording the findings against the Appellant. The question of law that arises for consideration in the instant and connected appeals is formulated as under:

If insured vehicle (in this case a mini bus) is plying under an Agreement of Contract with the Corporation, on the route as per permit granted in favour of the Corporation, in case of an accident, whether the Insurance Company would be liable to pay compensation or would it be the responsibility of the Corporation or the owner?

5. Since it is a vexed question, with no unanimity in the judgments of various High Courts and as it has not been considered directly so far by this Court, we deem it fit and appropriate to do so.

6. Thumbnail sketch of the facts is mentioned hereinbelow:-

Ajai Vishen, the owner of mini bus, bearing Registration No. UP 32T/7344 entered into an Agreement of Contract with the Corporation on 07.08.1997 for allowing it to ply mini bus, as per the permit issued in favour of Corporation, by the concerned Road Transport Office (R.T.O.). On account of State amendment incorporated in Section 103 of the Motor Vehicles Act, 1988 (hereinafter called 'the Act') vide Uttar Pradesh Amendment Act 5 of 1993; the Corporation is vested with right to take the vehicles on hire as per the contract and to ply the same on the routes as per the permit granted to it. According to the terms and conditions of the Agreement, the mini bus was to be plied by the Corporation, on the routes as per the permit

issued by R.T.O. in its favour. Except for the services of the driver, which were to be provided by the owner, all other rights of owner were to be exercised by the Corporation only. The conductor was to be an employee of the Corporation, and he was authorised and entitled to collect money after issuing tickets to the passengers and had the duty to perform all the incidental and connected activities as a conductor on behalf of the Corporation. The collection so made was to be deposited with the Corporation.

7. While the mini bus was running on the specified route on 13.06.1998, at about 9.00 a.m., Vijay Pal Singh (deceased), along with his minor children namely, Km. Rupa (deceased), Rohit (deceased) and Km. Laxmi (deceased), was present near Gumti shop of a Barber at the side of National Highway, near Swastic Biscuit Factory, Police Chauki Mohammadpur, Post Safedabad, District Barabanki.

8. The Mini Bus, plying under the contract of the Corporation, driven by Narottam, suddenly rammed into the Gumti causing injuries to Vijay Pal, his children and also to the Barber- Majeed, owner of the Gumti shop. On account of severe bodily injuries suffered by them, they died.

9. Smt. Lallan Devi, w/o deceased Vijay Pal Singh and mother of the three deceased children filed four claim petitions claiming compensation. Smt. Kulsum w/o deceased Majeed, filed a separate claim petition for awarding compensation for death of Majeed in the said accident before the aforesaid M.A.C.T.

10. Although, all the above five claim petitions were allowed and different amounts of compensation were awarded by the Tribunal alongwith interest @ 12% per annum but, relying on a judgment of this Court in the case of *Rajasthan State Road Transport Corporation* Versus *Kailash Nath Kothari and others* reported in (1997) 7 SCC 481, the liability of payment has been fastened on the Corporation as, at the time of

accident, the offending vehicle, i.e., the mini bus was being run by it under the contract.

11. Feeling aggrieved by the awards of the Tribunal, Corporation preferred appeals and the owner of the bus, Ajai Vishan, filed cross objection against the finding on issue No. 4 recorded by the Tribunal, holding therein that Insurance Company was not liable to make payment and fastening the liability on the owner also, on account of alleged breach of Insurance Policy. However, it had a caveat that liability of the owner would arise only in case the Corporation fails to make the payment. The National Insurance Company Ltd., with which admittedly the said bus was insured for the relevant period, has been exonerated from payment of any compensation. Hence, the appeals.

12. We have accordingly heard Ms. Garima Prashad, Mr. Laxmibai Leitanthem, Mr. Pradeep Kumar, and Mr. Shadab Khan, learned counsel for Appellant, Mr. Kishore Rawat, learned counsel for the Respondent Insurance Company and Mr. J.P. Dhanda, Mr. Rajeev Mishra for Ajai Vishen, owner of the Mini Bus and perused the records.

13. However, before we proceed to decide the question formulated hereinabove, it is necessary to look into some of the provisions of the Act. Section 2 (30) of the Act defines the 'owner':

> "Owner" means a person in whose name a motor vehicle stands registered, and where such person is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase agreement, or an agreement of lease or an agreement of hypothecation, the person in possession of the vehicle under that agreement."

14. Section 103 of the Act deals with the provision of issue of permits to State Transport Undertakings. However, vide Uttar

Pradesh Amendment Act 5 of 1993, following sub-Section (1A) was inserted after sub-section (1) thereof, w.e.f. 16.1.1993 reproduced hereinbelow:

> "(1A) It shall be lawful for a State transport undertaking to operate on any route as stage carriage, under any permit issued therefor to such undertaking under sub-section (1), any vehicle placed at the disposal and under the control of such undertaking by the owner of such vehicle under any arrangement entered into between such owner and the undertaking for the use of the said vehicle by the undertaking."

15. By virtue of the aforesaid incorporated sub-section (1A) to Section 103 of the Act, the Corporation became entitled to hire any vehicle which could be plied on any route for which permit had been issued by the Transport Authority in its favour.

16. Chapter XI of the Act deals with the provisions of insurance of Motor Vehicles against third party risks. Relevant Portions of sections 146 and 147 thereof are reproduced hereinbelow:

> "146. Necessity for insurance against third party risk.-(1) No person shall use, except as a passenger, or cause or allow any other person to use, a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements of this Chapter :
>
> ... ..."
>
> 147. Requirement of policies and limits of liability. –(1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which -
>
> (a) is issued by a person who is an authorised insurer; and

> (b) insures the person or classes of persons specified in the policy to the extent specified in sub – section (2) –
>
> (i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person, including owner of the goods or his authorised representative carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;
>
> (ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place;
>
> Provided that a policy shall not be required –
>
> (i).....
>
> (ii) to cover any contractual liability.
>
> *Explanation.* – For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place.
>
> (2) Subject to the proviso to sub-section (1), a policy of insurance referred to in sub-section (1), shall cover any liability incurred in respect of any accident, up to the following limits, namely :-
>
> (a) save as provided in clause (b), the amount of liability incurred.
>
> (b) in respect of damage to any property of a third party, a limit of rupees six thousand :

... ..."

17. Section 149 of the Act casts a duty on the insurer to satisfy the judgment and award against persons insured in respect of third party risks. Section 157 of the Act deals with Transfer of Certificate of Insurance, reproduced hereinbelow:

"157. Transfer of certificate of insurance.– (1) Where a person in whose favour the certificate of insurance has been issued in accordance with the provisions of this Chapter transfers to another person the ownership of the motor vehicle in respect of which such insurance was taken together with the policy of insurance relating thereto, the certificate of insurance and the policy described in the certificate shall be deemed to have been transferred in favour of the person to whom the motor vehicle is transferred with effect from the date of its transfer.

[*Explanation.* – For the removal of doubts, it is hereby declared that such deemed transfer shall include transfer of rights and liabilities of the said certificate of insurance and policy of insurance.]

(2) The transferee shall apply within fourteen days from the date of transfer in the prescribed form to the insurer for making necessary changes in regard to the fact of transfer in the certificate of insurance and the policy described in the certificate in his favour and the insurer shall make the necessary changes in the certificate and the policy of insurance in regard to the transfer of insurance."

18. It is relevant to mention here that under Section 196 of the Act, Insurance of vehicle is mandatory and compulsory, otherwise it exposes the driver and owner to criminal liability.

19. In the light of the aforesaid provisions of the Act, we shall now consider various judgments of this Court and High Courts to reach our conclusion.

20. Even though several judgments have been cited by both sides, but the question which arises in the instant case is unique in nature and we would answer the same taking cue and help of the various judgments of this Court and High Courts.

21. In the matter of *Kailash Nath Kothari and others* (supra), a question had arisen with regard to the liability of Insurance Company, where the bus plied as per the contract with Rajasthan State Road Transport Corporation. However, the said case was dealing with earlier Motor Vehicle Act of 1939. Taking into consideration the definition of 'owner' as it existed then in Section 2 (19) of the old Act, it has been held in para 17 as under:

"17. The definition of *owner* under Section 2(19) of the Act is not exhaustive. It has, therefore to be construed, in a wider sense, in the facts and circumstances of a given case. The expression *owner* must include, in a given case, the person who has the actual possession and control of the vehicle and under whose directions and commands the driver is obliged to operate the bus. To confine the meaning of "owner" to the registered owner only would in a case where the vehicle is in the actual possession and control of the hirer not be proper for the purpose of fastening of liability in case of an accident. The liability of the "owner" is vicarious for the tort committed by its employee during the course of his employment and it would be a question of fact in each case as to on whom can vicarious liability be fastened in the case of an accident. In this case, Shri Sanjay Kumar, the owner of the bus could not ply the bus on the particular route for which he had no permit and he in fact was not plying the bus on that route. The services of the driver were transferred along with complete "control" to RSRTC, under whose directions, instructions and command the driver was to ply or not to ply the ill-fated bus on the fateful day. The passengers were being carried by RSRTC on receiving fare from them. Shri

Sanjay Kumar was therefore not concerned with the passengers travelling in that bus on the particular route on payment of fare to RSRTC. Driver of the bus, even though an employee of the owner, was at the relevant time performing his duties under the order and command of the conductor of RSRTC for operation of the bus. So far as the passengers of the ill-fated bus are concerned, their privity of contract was only with the RSRTC to whom they had paid the fare for travelling in that bus and their safety therefore became the responsibility of the RSRTC while travelling in the bus. They had no privity of contract with Shri Sanjay Kumar, the owner of the bus at all. Had it been a case only of transfer of services of the driver and not of transfer of control of the driver from the owner to RSRTC, the matter may have been somewhat different. But on facts in this case and in view of Conditions 4 to 7 of agreement, (*supra*), the RSRTC must be held to be vicariously liable for the tort committed by the driver while plying the bus under contract of the RSRTC. The general proposition of law and the presumption arising therefrom that an *employer*, that is the person who has the right to hire and fire the employee, is generally responsible vicariously for the tort committed by the employee concerned during the course of his employment an within the scope of his authority, is a rebuttable presumption."

22. In the light of the aforesaid judgment, learned counsel for Respondent Insurance Company, Mr. Kishore Rawat, strenuously contended before us that the question has already been answered against the Appellant – Corporation, thus, nothing survives in this and the connected appeals filed by the Corporation.

23. In our considered opinion, in the light of drastic and distinct changes incorporated in the definition of 'owner' in the old Act and the present Act, *Kailash Nath's* case (supra) has no application to the facts of this case.

24. However, we were unable to persuade ourselves with the specific question which arose in this and connected appeals as the question projected in these appeals was neither directly nor substantially in issue, in Kailash Nath's case (*supra*). Thus, reference to the same may not be of much help to us. Admittedly, in the said case, this Court was dealing with regard to earlier definition of owner as found in Section 2 (19) of the old Act.

25. Section 2 (19) of Motor Vehicles Act, 1939 is reproduced hereinbelow:

"2(19) 'owner' means, where the person in possession of a motor vehicle is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase agreement, the person in possession of the vehicle under that Agreement."

26. Critical examination of both the definitions of the 'owner', would show that it underwent a drastic change in the Act of 1988, already reproduced hereinabove.

27. In our considered opinion, in the light of the distinct changes incorporated in the definition of 'owner' in the old Act and present Act, Kailash Nath Kothari's case shall have no application to the facts of this case.

28. Before we proceed further to decide the aforesaid question of law, it is necessary to refer to some of the relevant clauses in the Agreement entered into between the Appellant and the owner of the vehicle on 07.08.1997. In the said Agreement, the Appellant has been referred to as the 'First Party' and owner Ajay Vishen has been referred to as 'Second Party'.

Relevant clauses 2.1, 3.2, 4.2, 4.3 and 4.4 of Annexure P-2 are reproduced hereinbelow:

"2.1 The Second Party shall be liable and responsible to

discharge all the legal liabilities under the Motor Vehicle Act, 1988 or any other Acts, Registration, payment of taxes of the vehicle, Comprehensive Insurance and all such liabilities as may be fixed from time to time by any law on the owner of vehicle and the First Party shall be deemed to have no liability whatsoever.

3.2. The driver shall remain and shall be deemed to be the employee of Second Party. That driver shall not under any circumstances be treated as employee of First Party. The Second Party shall be fully liable to procure driving licence, etc. and to meet all other legal requirements under Motor Vehicle Act 1988 or any other Act.

4.2. The driver of the bus under contract will drive the bus carefully. He shall stop the bus at every designated spot to enable passenger to board/get down from the bus and shall get in-out entries of the bus recorded wherever required. Driver of Bus shall ensure that tickets are issued to all the passengers and only after that would drive the bus at its next destination.

4.3. Bus driver shall not himself sell the tickets but this restriction shall not be applicable in the circumstances mentioned in clause-31 of the agreement.

4.4. The conductor appointed and deputed by the First Party shall have total responsibility for issuing tickets to the passengers, receiving fare and completing various papers/ records in this regard. The First Party shall appoint/depute the conductors."

29. Critical examination thereof would show that the Appellant and the owner had specifically agreed that the vehicle will be insured and a driver would be provided by owner of the vehicle but overall control, not only on the vehicle but also on the driver, would be that of the Corporation. Thus, the vehicle was given on hire by the owner of the vehicle together with its

existing and running insurance policy. In view of the aforesaid terms and conditions, the Insurance Company cannot escape its liability to pay the amount of compensation. There is no denial of the fact by the insurance company that at the relevant point of time the vehicle in question was insured with it and the policy was very much in force and in existence. It is also not the case of the insurance company that the driver of the vehicle was not holding a valid driving licence to drive the vehicle. The Tribunal has also held that the driver had a valid driving licence at the time of accident. It has also not been contended by it that there has been violation of the terms and conditions of the policy or that the driver was not entitled to drive the said vehicle.

30. During the course of hearing, we had asked the following pertinent questions to Mr. Kishore Rawat, learned counsel for the Insurance Company:

(i) Since the Insurance Company had admittedly received the amount of premium for the period when the mini bus had met with the accident then why should it not be made liable to make the payment of compensation? According to him, in normal circumstances, if the said vehicle would not have been attached with the Corporation for being plied by it on the route of permit granted to it, then of course, the Insurance Company would have no option but to make the payment.

(ii) We had also enquired if there exists different tariffs of premium for the vehicle insured at the instance of owner or for the vehicle which is being attached with the Corporation for being plied by it. He categorically admitted that there is no such difference in the tariff in either of the aforesaid situation and it is same for both.

(iii) We further enquired from him that if an intimation would have been given to the Insurance Company that the vehicle is being attached with the Corporation then what would have been the position? He again informed us that in that case, the

Insurance Company would have met the liability of compensation, in case of an accident.

(iv) Lastly, we enquired from him as to under which provision of the Act or the Rule, any statutory duty or otherwise is cast on the owner to seek permission or give an intimation to the Insurance Company in case the vehicle is attached with the Corporation for being plied by it? He candidly conceded that there is neither any statutory duty cast on the owner under the Act or under any Rules to seek permission from the Insurance Company nor it is under any of the orders issued by the Company. According to him, it would have been desirable for the insured to have informed about such a contract.

31. Thus, in the light of the aforesaid, it is clear that Insurance Company is trying to evade its liability on flimsy grounds or under misconception of law.

32. On account of the aforesaid discussions, it is crystal clear that actual possession of the vehicle was with the Corporation. The vehicle, driver and the conductor were under the direct control and supervision of the Corporation.

33. Black's Law Dictionary defines "Vicarious Liability" as follows:

> "Liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) because of the relationship between the two parties". (Page 927, Black's Law Dictionary, 7th Edition)."

34. So, through the above definition, it can be inferred that the person supervising the driver through the principle of *Respondeat Superior* should pay for the damages of the victim.

35. In the instant case, the driver was employed by Ajay Vishen, the owner of the bus but evidently through Clause 4.4. of the Agreement, reproduced hereinabove, driver was

supposed to drive the bus under the instructions of conductor who was appointed by the Corporation. The said driver was also bound by all orders of the Corporation. Thus, it can safely be inferred that effective control and command of the bus was that of the Appellant.

36. Thus, for all practical purposes, for the relevant period, the Corporation had become the owner of the vehicle for the specific period. If the Corporation had become the owner even for the specific period and the vehicle having been insured at the instance of original owner, it will be deemed that the vehicle was transferred along with the Insurance Policy in existence to the Corporation and thus Insurance Company would not be able to escape its liability to pay the amount of compensation.

37. The liability to pay compensation is based on a statutory provision. Compulsory Insurance of the vehicle is meant for the benefit of the Third Parties. The liability of the owner to have compulsory insurance is only in regard to Third Party and not to the property. Once the vehicle is insured, the owner as well as any other person can use the vehicle with the consent of the owner. Section 146 of the Act does not provide that any person who uses the vehicle independently, a separate Insurance Policy should be taken. The purpose of compulsory insurance in the Act has been enacted with an object to advance social justice.

38. Third Party rights have been considered by this Court in several judgments and the law on the said point is now fairly well settled.

39. The Apex Court in the case of *Guru Govekar v. Filomena F. Lobo and Ors. (1988 ACJ 585), 1988 AIR 1332* has held that:

> "8. ...Thus, if a policy is taken in respect of a motor vehicle from an insurer in compliance with the requirements of Chapter VIII of the Act, the insurer is under an obligation

to pay the compensation payable to a third party on account of any injury to his/her person or property or payable to the legal representatives of the third party in case of death of the third party caused by or arising out of the use of the vehicle at a public place. The liability to pay compensation in respect of death of or injury caused to the person or property of a third party undoubtedly arises when such injury is caused when the insured is using the vehicle in a public place. It also arises when the insured has caused or allowed any other person (including an independent contractor) to use his vehicle in a public place and the death of or injury to the person or property of a third party is caused on account of the use of the said vehicle during such period, unless such other person has himself taken out a policy of insurance to cover the liability arising out of such an accident.

13. ...This meant that once the insurer had issued a certificate of insurance in accordance with sub-section (4) of Section 95 of the Act the insurer had to satisfy any decree which a person receiving injuries from the use of the vehicle insured had obtained against any person insured by the policy. He was liable to satisfy the decree when he had been served with a notice under sub-section (2) of Section 96 of the Act about the proceedings in which the judgment was delivered.

14. ...Any other view will expose innocent third parties to go without compensation when they suffer injury on account of such motor accidents and will defeat the very object of introducing the necessity for taking out insurance policy under the Act."

40. In a recent judgment of this Court, in the case of *United India Insurance Company Limited v. Santro Devi and Ors. (2009) 1 SCC 558* it has been held as under :-

"16.The provisions of compulsory insurance have been

framed to advance a social object. It is in a way part of the social justice doctrine. When a certificate of insurance is issued, in law, the insurance company is bound to reimburse the owner. There cannot be any doubt whatsoever that a contract of insurance must fulfil the statutory requirements of formation of a valid contract but in case of a third-party risk, the question has to be considered from a different angle.

17. Section 146 provides for statutory insurance. An insurance is mandatorily required to be obtained by the person in charge of or in possession of the vehicle. There is no provision in the Motor Vehicles Act that unless the name(s) of the heirs of the owner of a vehicle is/are substituted on the certificate of insurance or in the certificate of registration in place of the original owner (since deceased), the motor vehicle cannot be allowed to be used in a public place. Thus, in a case where the owner of a motor vehicle has expired, although there does not exist any statutory interdict for the person in possession of the vehicle to ply the same on road; but there being a statutory injunction that the same cannot be plied unless a policy of insurance is obtained, we are of the opinion that the contract of insurance would be enforceable. It would be so in a case of this nature as for the purpose of renewal of insurance policy only the premium is to be paid. It is not in dispute that quantum of premium paid for renewal of the policy is in terms of the provisions of the Insurance Act, 1938."

41. Perusal of the ratio of aforesaid judgments of this Court, shows that Section 146 of the Act gives complete protection to Third Party in respect of death or bodily injury or damage to the property while using the vehicle in public place. For that purpose, insurance of the vehicle has been made compulsory to the vehicles or to the owners. This would further

reflect that compulsory insurance is obviously for the benefit of Third Parties.

42. Certificate of Insurance, between the owner and the Insurance Company contemplates, under what circumstances Insurance Company would be liable to pay the amount of compensation. The relevant conditions are reproduced hereinbelow :

"Rules with respect to use of the Vehicle

Use only for carriage of passengers in accordance with permit (contract carriage or stage carriage) issued within the meaning of the Motor Vehicles Act, 1988. This policy does not cover:

1. Use for organised racing pace making reliability trial speed testing.

2. Use whilst drawing a trailer except the towing (other than to reward) of any one disabled mechanically propellor vehicle.

Persons who are qualified to use the Vehicle:

Any person including the insured provided that person driving holds an effective driving licence at the time of the accident and is not disqualified from holding or obtaining such licence. Provided also that a person holding an effective learner's licence may also drive the vehicle when non used for transport of passenger at the time of the accident and such a person satisfies the requirement of rule No. 3 of this Central Motor Vehicle Rule, 1989."

43. Perusal thereof would show that there has not been any violation of the aforesaid terms and conditions of the policy. Respondent-Insurance Company has also failed to point out violation of any Act, Rules or conditions of the Insurance.

Insurance Company has no legal justification to deny the payment of compensation to the claimants.

44. In the light of the foregoing discussions, the Appeal filed by Insurance Company fails, wherein it has been directed that the amount would first be paid by the Company, with right to it to recover the same from owner of the vehicle. This we hold so, as the liability of the Insurance Company is exclusive and absolute.

45. Thus, looking to the matter from every angle, we are of the considered opinion that Insurance Company cannot escape its liability of payment of compensation to Third Parties or claimants. Admittedly, owner of the vehicle has not violated any of the terms and conditions of the policy or provisions of the Act. The owner had taken the insurance so as to meet such type of liability which may arise on account of use of the vehicle.

46. Apart from the above, learned counsel for Insurance Company could not point out any legal embargo which may give right to it to deny the payment of compensation. Thus, legally or otherwise liability has to be fastened on the Insurance Company only.

47. In the light of the aforesaid discussion, the Appeals of the Corporation are allowed. The impugned judgment and order passed by High Court qua the Corporation are hereby set aside and quashed and we hold that the Insurance Company would be liable to pay the amount of compensation to the claimants.

48. Appeals filed by the Corporation thus stand allowed and the Appeal filed by the Insurance Company stands dismissed with costs. Counsel's fee quantified at Rs. 10,000/- in each Appeal.

R.P. Appeals disposed of.

DEVENDER KUMAR TYAGI AND ORS.
v.
STATE OF U.P. AND ORS.
(Writ Petition (C) No. 66 of 2007)

AUGUST 23, 2011

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

Land Acquisition Act, 1894:

ss.4 and 6 – Publication of Notification in two Hindi newspapers having circulation in the locality where the land is situated and where people are well conversant with Hindi amounts to ample compliance with the requirement of the publication u/s.4(1) of the LA Act – In view of that, the subsequent publication of English translation of the said Notification u/s.4 of the LA Act in two newspapers would be unnecessary and would not extend the period of limitation envisaged in the proviso to s.6(1) of the LA Act – Therefore, the last date of publication for the purpose of s.4(1) of the LA Act, which can be treated as date of publication, is the date on which, the Notification u/s.4 of the LA Act was published in the Hindi newspaper – In the instant case, notification u/s.4(1) of the LA Act was made on 4.7.2006 – The declaration u/s.6 was issued on 18.12.2007 which was clearly beyond the period of limitation of one year as mandated by the proviso to s.6(1) of the LA Act.

ss.5-A, 17(1) and 17(4) – Construction of the Leather City Project – Elimination of enquiry u/s.5-A – Held: Acquisition of land for public purpose by itself shall not justify the exercise of power of eliminating enquiry u/s.5-A in terms of s.17(1) and s.17(4) of the LA Act – Court should take judicial notice of the fact that certain schemes or projects, such as the construction of the Leather City Project for public purpose, which contemplate the development of residential, commercial,

industrial or institutional areas, by their intrinsic nature and character require the investment of time of a few years in their planning, execution and implementation – Therefore, the land acquisition for said public purpose does not justify the elimination of enquiry u/s.5-A of the LA Act.

s.17(1) and 17(4) – Justification of invoking the urgency provision u/s.17(1) and excluding the application of s.5-A in terms of s.17(4) of the LA Act for acquisition of the land for the development of the Leather City Project – In terms of directions of the Supreme Court to the respondents to identify the area for relocation of bone mills and allied industries causing environment pollution and health hazards as per the recommendations of the CPCB, the respondents specified the construction of the Leather City Project at Hapur in Ghaziabad – Subsequently, it was only after the lapse of two years, the State Government published Notification u/s. 4 on 04.07.2006 – Thereafter, the State Government took more than 17 months in order to make a declaration of the Notification u/s.6 – This showed that the government functionary had proceeded at very slow pace at two levels, that is, prior to the issuance of the Notification u/s.4 and post the issuance of the Notification u/s.4, for acquisition of the land for construction of the Leather City Project, which undoubtedly is a public purpose – In the light of these circumstances, the respondents were not justified in invoking the urgency provisions u/s.17 of the LA Act, thereby, depriving the landowners of their valuable right to raise objections and opportunity of hearing before the authorities in order to persuade them that their property may not be acquired.

Judgment/Order: Directions or orders issued by the Supreme Court – Held: Must be abided by within the four corners of the legal framework and statutory provisions – The State Government is not allowed to transgress the express legal provisions and procedure thereunder in the garb or guise of implementing the Court's guidelines or directions – The

directions of the Supreme Court are issued with a purpose and the said purpose is supposed to be followed in the realm of legal structure and principles.

National Capital Region Planning Board Act, 1985:

Object of the Act – Discussed.

s.19 – Absence of grant of approval of Sub-Regional plan by NCRPB – Held: Would vitiate the acquisition proceedings – In the instant case, the respondents had authorized the NCRPB to prepare Sub-regional plan of construction of the Leather City Project at Hapur in the district of Ghaziabad – Subsequently, the NCRPB issued a draft Sub-regional plan, wherein the Leather City Project was not mentioned – The respondents had made several requests to NCRPB to include Leather City Project but no reply granting approval has come in terms of s.19(2) of the NCRPB Act – Therefore, the acquisition of land in the absence of express approval in terms of s.19 and operation of s.27 of the LA Act renders the entire acquisition proceedings illegal and hence vitiated – Land Acquisition Act, 1894 – s.27.

In 1994, public interest proceedings were initiated for relocation of the bone mills and allied industries in various parts of the State of Uttar Pradesh including the District of Ghaziabad. The Supreme Court has been monitoring the relocation. From time to time, the Supreme Court has issued various orders and directions including inspection of polluting bone industries in Ghaziabad. The Supreme Court by its order dated 17.8.2004 in a pending matter directed the respondents to relocate the bone mills and allied industries as per the recommendations of the Central Pollution Control Board and further directed the respondents to identify the definite area suitable for relocation of the said industries. Pursuant to this order, the respondents had filed an affidavit before the Supreme Court in the month of

December, 2004 proposing the Leather City Project for relocation of the said bone industries.

The respondents issued a notification dated 3.7.2006 under Section 4 r/w Section 17(4) of the Land Acquisition Act for acquisition of 28.804 hectares of land for the public purpose of planned development of the Leather City Project by invoking the urgency provision under the LA Act, thereby, dispensing with inquiry under Section 5A of the LA Act. The same was published in two daily Hindi Newspaper on 4.7.2006. Subsequently, the English version of the said notification was also published in two daily newspapers dated 24.1.2007. Thereafter, the respondent issued a Notification dated 18.12.2007 under Section 6 read with Section 17 (1) of the LA Act, whereby, it directed the Collector of Ghaziabad to take possession of the said land on the expiry of 15 days from the date of publication of the Notice under Section 9(1) even though no award was made under Section 11. The same was published in two newspapers on 05.01.2008.

The petitioners-land owners filed the instant writ petitions under Article 32 of the Constitution of India seeking quashing of the Notifications issued under Sections 4 and 6 of the LA Act. The issues involved in the writ petitions were whether the Notification dated 18.12.2007 issued by the respondents under Section 6 read with Section 17 (1) of the LA Act was within the period of limitation as contemplated by proviso (ii) to Section 6 (1) of the LA Act and whether the respondent was justified in invoking the urgency provision under Section 17(1) and excluding the application of Section 5-A in terms of Section 17(4) of the LA Act for acquisition of the land for the development of the Leather City Project.

Allowing the writ petitions, the Court

HELD: 1. The Notification under Section 4 of the Land Acquisition Act has to be published in the manner laid down therein. As against this, under Section 6, a declaration has to be first made and that declaration is then to be published in the manner provided in Section 6(2) of the LA Act. Also, the proviso (ii) to Section 6(1) lays down a time-limit within which declaration has to be made. The said proviso (ii) significantly only provides a time-limit for a declaration and not for publication as it has been incorporated in sub-section (1) of Section 6 of the LA Act. It is not in dispute that the declaration of the Notification under Section 6 was issued on 18.12.2007. It is also not in dispute that the Notification under Section 4 was issued on 03.07.2006 and the same was published in two daily newspapers in Hindi language on 04.07.2006 having circulation in the locality where the land is situated. Also, the people at Pargana Hapur in the Ghaziabad district are well conversant with the Hindi language. The publication of the Notification in two newspapers having circulation in the locality where the land is situated and where people are well conversant with Hindi amounts to ample compliance with the requirement of the publication under Section 4(1) of the LA Act. In view of that, the subsequent publication of English translation of the said Notification under Section 4 in two newspapers on 05.01.2007 was unnecessary and would not extend the period of limitation envisaged in the proviso to Section 6(1) of the LA Act. Hence, the last date of publication for the purpose of Section 4(1) of the LA Act, which can be treated as date of publication, is the date on which, the Notification under Section 4 was published in the newspaper, that is, 04.07.2006. Therefore, the period of limitation commences from 04.07.2006, which is the date of publication of the Notification under Section 4(1) of the LA Act. If the declaration under Section 6 of the LA Act is made before the expiry of the period of one year starting from

04.07.2006, then, only such declaration will be considered as valid for the purpose of the acquisition of land. However, in the instant case, the declaration under Section 6 was issued on 18.12.2007 which was clearly beyond the period of limitation of one year as mandated by the proviso to Section 6(1) of the LA Act. Therefore, the declaration of Notification under Section 6 and its subsequent publications are clearly beyond the period of limitation of one year starting from the date of publication of Notification under Section 4 of the LA Act. Act. [Paras 10, 11] [658-E-H; 659-A-F]

S.H. Rangappa v. State of Karnataka & Anr., **(2002) 1 SCC 538: 2001(3) Suppl. SCR 545;** *Sriniwas Ramnath Khatod v. State ofMaharashtra & Ors*. **(2002) 1 SCC 689: 2001 (5) Suppl. SCR 255 –referred to.**

2. It is well settled that acquisition of land for public purpose by itself shall not justify the exercise of power of eliminating enquiry under Section 5-A in terms of Section 17(1) and Section 17(4) of the LA Act. The Court should take judicial notice of the fact that certain schemes or projects, such as the construction of the Leather City Project for public purpose, which contemplate the development of residential, commercial, industrial or institutional areas, by their intrinsic nature and character require the investment of time of a few years in their planning, execution and implementation. Therefore, the land acquisition for said public purpose does not justify the invoking of urgency provisions under the LA Act. [para 15] [666-A-C]

Jai Narain and Ors. v. Union of India **(1996) 1 SCC 9: 1995 (5) Suppl. SCR 769;** *Radhey Shyam v. State of U.P.* **(2011) 5 SCC 553 – referred to.**

3. In the facts and circumstances of the instant case, it is clear that this Court by its Order dated 17.08.2004,

has issued a direction to the respondents to relocate the bone mills and allied industries causing environment pollution and health hazards as per the recommendations of the CPCB and, *inter alia*, respondents were also directed to identify the area for relocation. Pursuant to this, respondents have filed an affidavit in the month of December, 2004 specifying the construction of the Leather City Project at Hapur in Ghaziabad. Subsequently, it was only after the lapse of two years, the State Government had issued a Notification under Section 4 on 03.07.2006 and the same was published on 04.7.2006. Thereafter, the State Government took more than 17 months in order to make a declaration of the Notification under Section 6 from the date of publication of the Notification under Section 4 of the LA Act. In view of that, it is crystal clear that the government functionary has proceeded at very slow pace at two levels, that is, prior to the issuance of the Notification under Section 4 and post the issuance of the Notification under Section 4, for acquisition of the land for construction of the Leather City Project, which undoubtedly is a public purpose. Therefore, the series of the events amply exhibited the lethargical and lackadaisical attitude of the State Government. In the light of these circumstances, the respondents were not justified in invoking the urgency provisions under Section 17 of the LA Act, thereby, depriving the appellants of their valuable right to raise objections and opportunity of hearing before the authorities in order to persuade them that their property may not be acquired. [para 17] [668-D-H; 669-A]

Dev Sharan & Others v. State of U.P. **(2011) 4 SCC 7695 – referred to.**

4. The directions or orders issued by this Court must be abided by within the four corners of the legal framework and statutory provisions. The State

Government is not allowed to transgress the express legal provisions and procedure thereunder in the garb or guise of implementing the guidelines or directions issued by this Court. The directions of this Court were issued with a purpose and the said purpose is supposed to be followed in the realm of legal structure and principles. Therefore, the respondents were not justified in invoking the urgency provisions of the LA Act in an arbitrary manner by referring to the earlier directions as a defense for their illegal and arbitrary act of acquiring land without giving an opportunity of raising objections and hearing to the petitioners in terms of Section 5-A of the LA Act. Admittedly, the respondents had not obtained the approval of the National Capital Region Planning Board (NCRPB) for construction of the Leather City Project as Sub-regional plan in terms of Section 19(2) of the National Capital Region Planning Board Act (NCRPB Act). The purpose or aim of the NCRPB Act is to provide for co-ordinated, harmonized and common plan development of the National Capital Region at the central level in order to avoid haphazard development of infrastructure and land uses in the said region, which includes the district of Ghaziabad in the Uttar Pradesh. Under this Act, the NCRPB has been constituted with the Union Minister for Urban Development as the Chairperson and the Chief Ministers of Haryana, Rajasthan and Uttar Pradesh and Lt. Governor of Delhi as its members in order to undertake the task of development of the National Capital Region. The object of the NCRPB is to prepare, modify, revise and review a regional and functional plan for the development of said region and, further, to co-ordinate and monitor its implementation. Section 19(1) mandates the State government or Union Territory to submit their sub-regional plan to the NCRPB for examination in order to ensure that it is in conformity with the regional plan. Once the NCRPB affirms the conformity of the said plan with regional plan, only then the State government can finalize

it. Thereafter, the State Government is entitled to implement the Sub-regional plan by virtue of Section 20 of the NCRPB Act. [Paras 19, 20] [669-E-H; 670-A-E]

M.C. Mehta v. Union of India, **(2004) 6 SCC 588: 2004 (2) Suppl. SCR 504:** *Ghaziabad Development Authority v. Delhi Auto & General Finance (P) Ltd.* **(1994) 4 SCC 42;** *Sheikhar Hotels Gulmohar Enclave v. State of Uttar Pradesh* **(2008) 14 SCC 716: 2008 (8) SCR 273 – relied on.**

5. In the facts and circumstances of the instant case, the respondents by its resolution dated 19.04.2005, had authorized the NCRPB to prepare Sub-regional plan of construction of the Leather City Project at Hapur in the district of Ghaziabad for the HPDA. Subsequently, the NCRPB issued a draft Sub-regional plan, wherein the Leather City Project was not mentioned. The respondents had made several requests to NCRPB to include Leather City Project but no reply granting approval had come in terms of Section 19(2) of the NCRPB Act. Section 19 of the NCRPB Act contemplates the grant of approval by the NRCPB, and finalization by the State Government, of the Sub-Regional Plan if it is in consonance and consistent with the Regional Plan for the National Capital Region. Furthermore, Section 29 of the NCRPB Act contemplates that the State Government shall not undertake any development activity, which is inconsistent with the Regional Plan for the National Capital Regional. Also, Section 27 of the NCRPB Act has overriding effect on any other inconsistent law or instrument. The overall scheme of the NCRPB Act contemplates common plan, coordination and harmony in the formulation of policy of land uses and development of infrastructure in the National Capital Region. Therefore, the acquisition of land in the absence of express approval in terms of Section 19 and operation of Section 27 of the LA Act renders the entire acquisition proceedings illegal and hence vitiated.

Thus, the declaration of Notification dated 18.12.2006 under Section 6 of the LA Act is beyond the period of limitation as envisaged by proviso to Section 6(1) of the LA Act. The State Government was not justified, in the facts and circumstances of this case, to invoke the urgency provision of Section 17(4) of the LA Act. Therefore, the appellants cannot be denied of their valuable right under Section 5-A of the LA Act. [paras 23-24] [673-G-H; 674-A-F]

Case Law Reference:

2001 (3) Suppl. SCR 545	**referred to**	**Para 11**
2001 (5) Suppl. SCR 255	**referred to**	**Para 11**
1995 (5) Suppl. SCR 769	**referred to**	**Para 13**
(2011) 5 SCC 553	**referred to**	**Para 14, 15**
(2011) 4 SCC 7695	**referred to**	**Para 16**
2004 (2) Suppl. SCR 504	**relied on**	**Para 20**
(1994) 4 SCC 42	**relied on**	**Para 21**
2008 (8) SCR 273	**relied on**	**Para 22**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 66 of 2007.

Under Article 32 of the Constitution of India.

WITH

W.P. (C) No. 67 of 2007.

Pradeep Misra, Dr. Sushil Balwada, Ashok Kumar Sharma for the Petitioner.

Pallav Sisodia, R.K. Dash, Shail K. Dwivedi, R.K. Gupta, Rajiv Dubey, Kamlendra Mishra, Reena Singh, Devesh Kumar,

Nandini Gore, Ashok Kumar Sharma, Lakshmi Raman Singh, P.K. Manohar, Anil Kumar Jha, Chander Shekhar, Ashri, Anu Mohla, Varinder Kumar Sharma, Sunil Kumar Jain, J.S. Wad & Co., Dr. Vipin Gupta for the Respondent.

The Judgment of the Court was delivered by

H.L. DATTU, J.1. The petitioners have filed this writ petition under Article 32 of the Constitution of India, *inter alia,* challenging the Notification dated 03.7.2006 issued under Section 4 and the Notification dated 18.12.2007 issued under Section 6 of the Land Acquisition Act, 1894 (hereinafter referred to as "the LA Act") for acquiring their lands for a planned development of the Leather City Project in order to relocate bone mills and allied industries by invoking the urgency provisions under Section 17(1) and 17(4) of the LA Act.

2. This Court is monitoring the re-location of the bone mills and allied industries in the various parts of State of Uttar Pradesh including the district of Ghaziabad in the public interest proceedings, which were initiated in the year 1994. Since then, this Court has time and again issued various orders and directions including inspection of polluting bone industries in Ghaziabad by the U.P. Pollution Control Board (hereinafter referred to as "the UPPCB") and Central Pollution Control Board (hereinafter referred to as "the CPCB"). This Court, *vide* its Order dated 17.08.2004 in the Civil Appeal No. 3633-3634 of 1999 (*U.P. Pollution Control Board v. Anil K. Karnwal & Ors*.), which is still pending before us, had directed the respondents to relocate the bone mills and allied industries as per the recommendations of the CPCB and further directed the respondents to identify the definite area suitable for relocation of the said industries. Pursuant to this Order, the respondents had filed an affidavit before this Court in the month of December, 2004, *inter alia,* proposing the Leather City Project for relocation of the said bone industries.

3. In this backdrop, the respondents had issued a Notification dated 03.7.2006 under Section 4 read with Section 17 (4) of the LA Act for acquisition of 28.804 hectares of the land at village Imtori, Chitoli, Sabli of Hapur-Pargana in the district of Ghaziabad for the public purpose of planned development of the Leather City Project by invoking the urgency provision under the LA Act, thereby, dispensing with inquiry under Section 5-A of the LA Act. The same was published in two daily Hindi newspapers on 04.07.2006. Subsequently, the English version of the said Notification was also published in two daily newspapers dated 24.01.2007. The relevant part of the Notification is extracted below:

> "The Governor is pleased to order the publication of the following English translation of Notification No. 1588/VIII-3-2006-183 LA-2005, dated July 03, 2006:
>
> No. 1588/VIII-3-2006-183 LA-2005
>
> Dated Lucknow, July 3, 2006
>
> Under subsection (1) of section 4 of the Land Acquisition Act, 1894 (Act No. 1 of 1894), the Governor is pleased to notify for general information that the land mentioned in the schedule below is needed for the public purpose namely, for construction of Leather City Scheme at Villages-Chitoli, Sabli and Imtori, Pargana-Hapur, district-Ghaziabad by the Hapur-Pilkhuwa Development Authority, Hapur.
>
> The Governor being of the opinion that provisions of subsection (1) of section 17 of the said Act are applicable to the said land in as much as the said land is urgently required for construction of Leather City Scheme at Villages-Chitoli, Sabli and Imtori, Pargana-Hapur, district-Ghaziabad by the Hapur-Pilkhuwa Development Authority, Hapur under planned development Scheme, it is as well necessary to eliminate to delay likely to be caused by an enquiry under section 5-A of the said Act the Governor is

further pleased to direct, under subsection (4) of section 17 of said Act, that the provisions of section 5-A shall not apply."

4. Thereafter, the respondent had issued a Notification dated 18.12.2007 under Section 6 read with Section 17 (1) of the LA Act, whereby, it directed the Collector of Ghaziabad to take possession of the said land on the expiry of 15 days from the date of publication of the Notice under Section 9(1) even though no award has been made under Section 11. The same was published in two newspapers on 05.01.2008. The relevant portion of the Notification is extracted below:

"The Governor is pleased to order the publication of the following English translation of notification No. 2647/VIII-3-2006-136L.A.-2006, dated September 18, 2006:

No. 2647/VIII-3-2006-136L.A.-2006

Dated Lucknow, September 18, 2006

Under, sub-section (1) section 4 of the Land Acquisition Act, 1894 (Act No. 1 of 1894) the Governot is pleased to notify for general information that the land mentioned in the schedule below, is needed for a public purpose namely for construction of planned Leather City scheme at village Rampur, Paragana Hapur, District Ghaziabad by the Hapur Pilkhuwa Development Authority, Hapur.

2. The Governor, being of the opinion that the proivision of sub-section (1) of section 17 of the said Act are applicable to the said land in as much as the said land is urgently required, for the construction of planned Leather City scheme at village Rampur, Paragna Hapur, District Ghaziabad by the Hapur Pilkhuwa Development Authority, Hapur under planned development scheme, it is as well necessary to eliminate the delay likely to be caused by an inquiry under section 5A of the said Act. The Governor is

further pleased to direct under sub-section (4) of section 17 of the said Act that the provisions of section 5A of the said Act shall not apply."

5. Since the Petitioners' land situated at Hapur is included in these Notifications, the petitioners have filed present Writ Petition under Article 32 of the Constitution praying for issuance of appropriate writ or directions to quash these Notifications issued under Section 4 and Section 6 of the LA Act.

6. In this Writ Petition, the issues before us are :

I. Whether the Notification dated 18.12.2007 issued by the respondents under Section 6 read with Section 17 (1) of the LA Act is within the period of limitation as contemplated by proviso (ii) to Section 6 (1) of the LA Act.

II. Whether the respondent is justified in invoking the urgency provision under Section 17(1) and excluding the application of Section 5-A in terms of Section 17(4) of the LA Act for acquisition of the land for the development of the Leather City Project.

7. Mrs. Pinky Anand, the learned senior counsel for the petitioners, submits that declaration of Notification dated 18.12.2007 under Section 6 is beyond the period of limitation of one year from the date of the publication of Notification under Section 4, as mandated by proviso (ii) to Section 6(1) of the LA Act. In other words, she submits that respondents had failed to make the declaration of Notification under Section 6 within a period of one year starting from the last date of publication of Notification under Section 4 in two newspapers as contemplated by Section 4(1) of the LA Act. The learned senior counsel would argue that the publication of Notification under Section 4 in two newspapers in the Hindi language on 04.07.2006 was sufficient compliance of Section 4(1) of the LA

Act in order to commence the period of limitation for the purpose of proviso (ii) to Section 6(1) of the LA Act from the said date. In other words, she contends that since the people residing at Hapur, Ghaziabad are well conversant and acquainted with the Hindi language, the publication of the Notification under Section 4 in two newspapers in the Hindi language on 04.07.2006 duly fulfils the requirement of the publication of the Notification as contemplated by Section 4(1) of the LA Act. Therefore, the period of limitation for declaration of Notification under Section 6 would commence from 04.07.2006 and not from the date of subsequent publication of the said Notification under Section 4 on 24.1.2007. She submits that the declaration of Notification dated 18.12.2007 under Section 6 by the respondents is made after the expiry of one year and is beyond the period of limitation in terms of the proviso to Section 6 (1) of the LA Act. In other words, the period of limitation commences from date of completion of the necessary requirement of publication as contemplated by Section 4(1) of the LA Act. She further submits that in view of this, the acquisition proceedings are vitiated and should be set aside.

8. *Per Contra*, Shri. Pallav Sisodia, learned senior counsel for the respondents, submits that the declaration of Notification under Section 6 of the LA Act is well within the period of limitation of one year starting from the date of the last publication of the Notification under Section 4 of the LA Act, as mandated by proviso to Section 6(1) of the LA Act. He further submits that it is amply clear that the last date of publication of the Notification under Section 4 would be treated as the date of publication of the said Notification for all purposes in terms of Section 4(1) of the LA Act. He states that the respondents, after publishing the Notification under Section 4 on 4.07.2006 in the regional language, that is, Hindi, had also published the said Notification in English language on 05.01.2007. In this regard, the learned senior counsel argues that the period of limitation of one year in terms of proviso to Section 6(1) of the

LA Act would commence only from 05.01.2007, that is, the date of the last publication of the Notification under Section 4 of the Act. He further submits that the proviso to Section 6(1) refers only to the declaration of the Notification under Section 6 within the period of one year from the date of publication of the Notification under Section 4 of the LA Act and not the publication of the declaration under Section 6 (2). In other words, the proviso to Section 6(1) whilst prescribing the period of limitation, only refers to the declaration under Section 6, which is in the nature of order and excludes the publication of the declaration from its ambit. Therefore, the subsequent publication of declaration of Notification under Section 6 will not be taken into consideration in order to calculate the period of limitation in terms of proviso to Section 6(1) of the LA Act. The learned senior counsel, in support of his contention, has placed reliance on the decisions of this Court in *S.H. Rangappa v. State of Karnataka & Anr.*, (2002) 1 SCC 538 and *Sriniwas Ramnath Khatod v. State of Maharashtra & Ors.,* (2002) 1 SCC 689.

9. To appreciate the point in issue, it would be appropriate to set out relevant portion of Sections 4(1) and 6 of the LA Act.

> "4. Publication of preliminary notification and powers of officers thereupon.—(1) Whenever it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose or for a company, a notification to that effect shall be published in the Official Gazette and in two daily newspapers circulating in that locality of which at least one shall be in the regional language and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality (the last of the dates of such publication and the giving of such public notice, being hereinafter referred to as the date of the publication of the notification).
>
> * * *

6. Declaration that land is required for a public purpose.—(1) Subject to the provisions of Part VII of this Act, when the appropriate Government is satisfied, after considering the report, if any, made under Section 5-A sub-section (2), that any particular land is needed for a public purpose, or for a company, a declaration shall be made to that effect under the signature of a Secretary to such Government or of some officer duly authorised to certify its orders and different declarations may be made from time to time in respect of different parcels of any land covered by the same notification under Section 4 sub-section (1), irrespective of whether one report or different reports has or have been made (wherever required) under Section 5-A sub-section (2):

Provided that no declaration in respect of any particular land covered by a notification under Section 4 sub-section (1),—

(i) published after the commencement of the Land Acquisition (Amendment and Validation) Ordinance, 1967, but before the commencement of the Land Acquisition (Amendment) Act, 1984, shall be made after the expiry of three years from the date of the publication of the notification; or

(ii) published after the commencement of the Land Acquisition (Amendment) Act, 1984, shall be made after the expiry of one year from the date of the publication of the notification:

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

2) Every declaration shall be published in the Official

Gazette, and in two daily newspapers circulating in the locality in which the land is situate of which at least one shall be in the regional language, and the Collector shall cause public notice of the substance of such declaration to be given at convenient places in the said locality (the last of the dates of such publication and the giving of such public notice, being hereinafter referred to as the date of the publication of the declaration), and such declaration shall state the district or other territorial division in which the land is situate, the purpose for which it is needed, its approximate area, and, where a plan shall have been made of the land, the place where such plan may be inspected.

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

10. The Notification under Section 4 has to be published in the manner laid down therein. As against this, under Section 6, a declaration has to be first made and that declaration is then to be published in the manner provided in Section 6(2) of the LA Act. Also, the proviso (ii) to Section 6(1) lays down a time-limit within which declaration has to be made. The said proviso (ii) significantly only provides a time-limit for a declaration and not for publication as it has been incorporated in sub-section (1) of Section 6 of the LA Act.

11. It is not in dispute that the declaration of the Notification under Section 6 was issued on 18.12.2007. It is also not in dispute that the Notification under Section 4 was issued on 03.07.2006 and the same was published in two daily newspapers in Hindi language on 04.07.2006 having circulation in the locality where the land is situated. Also, the people at Pargana Hapur in the Ghaziabad district are well conversant with the Hindi language. In our considered view, the publication

of the Notification in two newspapers having circulation in the locality where the land is situated and where people are well conversant with Hindi amounts to ample compliance with the requirement of the publication under Section 4(1) of the LA Act. In view of this, the subsequent publication of English translation of the said Notification under Section 4 in two newspapers on 05.01.2007 is unnecessary and will not assist the respondents to extend the period of limitation envisaged in the proviso to Section 6(1) of the LA Act. Hence, the last date of publica ion for the purpose Section 4(1) of the LA Act, which can be treated as date of publication, is the date on which, the s cond Notification under Section 4 was published in the news aper, that is, 04.07.2006. Therefore, the period of lim tation commences from 04.07.2006, which is the date of publicati n of the Notification under Section 4(1) of the LA Act. If the declaration under Section 6 of the LA Act is made before the expiry of the period of one year starting from 04.07.2006, then, only such declaration will be considered as valid for the purpose of the acquisition of land. However, in the present case, the declaration under Section 6 was issued on 18.12.2007 which is clearly beyond the period of limitation of one year as mandated by the proviso to Section 6(1) of the LA Act. Therefore, the declaration of Notification under Section 6 and its subsequent publications are clearly beyond the period of limitation of one year starting from the date of publication of Notification under Section 4 of the LA Act. In our opinion, due to the aforesaid reasons, the reliance placed by Shri. Pallav Sisodia, learned senior counsel for respondents, on the decisions of this Court in *S.H. Rangappa v. State of Karnataka & Anr*., (2002) 1 SCC 538 and *Sriniwas Ramnath Khatod v. State of Maharashtra & Ors*., (2002) 1 SCC 689 in support of his contention that the proviso to Section 6(1) whilst prescribing time-limit, contemplates and refers only to the date of declaration and not publication under Section 6 of the LA Act will not come to the rescue of the respondents.

12. The second point in issue before us is the invocation

of the urgency clause by the respondents to acquire the lands in dispute. Mrs. Pinky Anand, learned senior counsel, submits that this Court has issued direction to relocate the bone industries in Ghaziabad vide its Order dated 17.08.2004, since then, the State Government had not shown any kind of urgency and was only considering the proposal of the Leather City Project in order to relocate the said industries for public purpose as they were located in the dense human habitation and causing environmental pollution and health hazards. It was only in July, 2006 that the State Government had issued the Notification under Section 4 on 3.7.2006, in continuation with this, after the lapse of more than a year, the State Government has issued Notification under Section 6 on 18.12.2007 by invoking urgency provision as contemplated by Section 17(1) and 17(4) of the LA Act. In other words, the lackadaisical attitude of the State Government since the direction of this Court in 2004 nearly 2 years ago and in making the declaration under Section 6 after the lapse of more than one year, form the issuance of the Notification under Section 4 of the LA Act does not exhibit or depict any kind of urgency but only lethargy on their part in acquiring the lands. Therefore, the urgency contemplated in the LA Act cannot be equated with dereliction of responsibility on the part of the State Government. The learned senior counsel contends that the respondents had unnecessarily invoked the urgency provisions under Section 17 (1) read with 17 (4) for the acquisition of the land for construction of the Leather City Project in order to relocate the said industries in view of the delay of two years in the issuance of the Notification under Section 4 and delay of more than seventeen months in making declaration under Section 6 from the date of publication of the Notification under Section 4. The learned senior counsel argues that the invoking of the urgency provision under Section 17(4), which excludes the application of the Section 5-A, by the respondents in the absence of any real urgency as contemplated by Section 17 amounts to illegal deprivation of the right to file objection and hearing of the appellants and inquiry under Section 5-A of the LA Act. She

submits that an expropriatory legislation like the LA Act must be given strict construction. She further submits that Section 5-A is a substantial right and akin to fundamental right which embodies a principle of giving of proper and reasonable opportunity to the land loser to persuade the authorities against the acquisition of their lands which can be dispensed with only in exceptional cases of real urgency and not by side-wind. The learned senior counsel also submits that the entire acquisition proceedings are vitiated as the respondents have failed to obtain the approval of development of the Leather City Project as a sub-regional plan under Section 19 of the National Capital Region Planning Board Act, 1985 (hereinafter referred to as "NCRPB Act"). She further submits that such approval is mandatory in view of Section 27 of the NCRPB Act, which has overriding effect on any other inconsistent law or instrument.

13. *Per contra*, Shri. Pallav Sisodia, learned senior counsel for respondents, submits that the bone mills and allied industries were causing environmental pollution and health hazards to the public at large in the district of Ghaziabad. This Court has issued directions to relocate the said industries in accordance with the recommendation of the CPCB. The State Government, in strict compliance of the Order of this Court dated 17.08.2004, acquired the lands for construction of the Leather City Project by invoking the urgency provisions under Section 17 of the LA Act. He further submits that in view of the said urgency, the State Government had issued a Notification dated 3.4.2006 under Section 4 of the LA Act for the acquisition of the said land for public purpose of urgent construction of the Leather City Project by invoking Section 17(4) of the LA Act in order to eliminate delay likely to be caused by enquiry under Section 5-A of the LA Act. The same was published in Hindi and English in two daily newspapers on 4.03.2006 and 24.01.2007, respectively. Subsequently, the State Government had issued the Notification dated 18.12.2007 under Section 6 read with Section 17(1) of the LA Act and published it in the newspapers dated 5.01.2008. The learned senior counsel submits that there

is no lethargy or negligence on the part of the State Government to acquire the said land. He contends that the construction of the Leather City Project, in view of the pollution of environment caused by these industries as observed by this Court, is an urgent matter requiring acquisition of the land by invoking the urgency provisions under Section 17(1) and Section 17(4), thereby, dispensing with the enquiry under Section 5-A of the LA Act. The learned senior counsel, by placing reliance on the decision of this Court in *Jai Narain and Ors. v. Union of India*, (1996) 1 SCC 9, would argue that the invoking of the urgency provisions is justified in a situation where the entire acquisition proceedings are initiated in compliance with the series of directions of this Court, which itself indicates the existence of urgency in acquiring the land for relocating the polluting industries. He further contends that the right of the land owner for filing of objections and opportunity of hearing under Section 5-A are subject to the provisions of Section 17 and the same can be legally curtailed in the event of any pressing need and urgency for the acquisition of land in order to eliminate delay likely to be caused by an enquiry under Section 5-A of the LA Act. The learned senior counsel further submits that the Hapur Pilkhuwa Development Authority (hereinafter referred to as "the HPDA") *vide* its resolution dated 19.04.2005, has authorized the National Capital Region Planning Board (hereinafter referred to as "the NCRPB") to prepare master plan for Hapur containing the Leather City Project termed as Sub-regional plan. Subsequently, the NCRPB in June, 2009, issued draft Sub-regional plan but without indicating the Leather City Project. Thereafter, the HPDA has made series of requests dated 27.08.2009, 18.08.2010 and 22.04.2011 to the NCRPB to include the Leather City Project in its Sub-regional plan. The respondents are keenly awaiting reply to these requests and hence, the grant of approval is still pending. *Arguendo*, the learned senior counsel submits that the Leather City Project pending approval of the NCRPB will not adversely affect the acquisition of the Land in any manner in view of the presence of the Chief Coordinator Planner of the NCR Cell, Ghaziabad

in almost all the meetings wherein the Leather City Project has been discussed and deliberated upon as he is a nominated member of the HPDA Board *vide* the Government Order and the Office Memo dated 08.06.2004 and 26.05.2011, respectively, amounts to implied consent or approval of the NCRPB.

14. We have heard the learned counsel for the parties before us. The second point in issue before us is no more res integra as it has already been decided by this Court in *Radhy Shyam v. State of U.P.* (2011) 5 SCC 553, to which one of us was the party (G.S. Singhvi, J.), wherein this Court has considered the development of the jurisprudence and law, with respect to invoking of the urgency provisions under Section 17 vis-à-vis right of the landowner to file objections and opportunity of hearing and enquiry under Section 5-A, by reference to a plethora of earlier decisions of this Court. This Court had culled out the various principles governing the acquisition of the land for public purpose by invoking urgency thus:

"77. From the analysis of the relevant statutory provisions and interpretation thereof by this Court in different cases, the following principles can be culled out:

(i) Eminent domain is a right inherent in every sovereign to take and appropriate property belonging to citizens for public use. To put it differently, the sovereign is entitled to reassert its dominion over any portion of the soil of the State including private property without its owner's consent provided that such assertion is on account of public exigency and for public good — Dwarkadas Shrinivas v. Sholapur Spg. and Wvg. Co. Ltd., Charanjit Lal Chowdhury v. Union of India and Jilubhai Nanbhai Khachar v. State of Gujarat.

(ii) The legislations which provide for compulsory acquisition of private property by the State fall in the

category of expropriatory legislation and such legislation must be construed strictly — *DLF Qutab Enclave Complex Educational Charitable Trust v. State of Haryana, State of Maharashtra v. B.E. Billimoria and Dev Sharan v. State of U.P.*

(iii) Though, in exercise of the power of eminent domain, the Government can acquire the private property for public purpose, it must be remembered that compulsory taking of one's property is a serious matter. If the property belongs to economically disadvantaged segment of the society or people suffering from other handicaps, then the court is not only entitled but is duty-bound to scrutinise the LA Action/decision of the State with greater vigilance, care and circumspection keeping in view the fact that the landowner is likely to become landless and deprived of the only source of his livelihood and/or shelter.

(iv) The property of a citizen cannot be acquired by the State and/or its agencies/instrumentalities without complying with the mandate of Sections 4, 5-A and 6 of the LA Act. A public purpose, however, laudable it may be does not entitle the State to invoke the urgency provisions because the same have the effect of depriving the owner of his right to property without being heard. Only in a case of real urgency, the State can invoke the urgency provisions and dispense with the requirement of hearing the landowner or other interested persons.

(v) Section 17(1) read with Section 17(4) confers extraordinary power upon the State to acquire private property without complying with the mandate of Section 5-A. These provisions can be invoked only when the purpose of acquisition cannot brook the delay of even a few weeks or months. Therefore, before excluding the application of Section 5-A, the authority concerned must be fully satisfied that time of few weeks or months likely to be taken in conducting inquiry under Section 5-A will, in all probability,

frustrate the public purpose for which land is proposed to be acquired.

(vi) The satisfaction of the Government on the issue of urgency is subjective but is a condition precedent to the exercise of power under Section 17(1) and the same can be challenged on the ground that the purpose for which the private property is sought to be acquired is not a public purpose at all or that the exercise of power is vitiated due to mala fides or that the authorities concerned did not apply their mind to the relevant factors and the records.

(vii) The exercise of power by the Government under Section 17(1) does not necessarily result in exclusion of Section 5-A of the LA Act in terms of which any person interested in land can file objection and is entitled to be heard in support of his objection. The use of word "may" in sub-section (4) of Section 17 makes it clear that it merely enables the Government to direct that the provisions of Section 5-A would not apply to the cases covered under sub-section (1) or (2) of Section 17. In other words, invoking of Section 17(4) is not a necessary concomitant of the exercise of power under Section 17(1).

(viii) The acquisition of land for residential, commercial, industrial or institutional purposes can be treated as an acquisition for public purposes within the meaning of Section 4 but that, by itself, does not justify the exercise of power by the Government under Sections 17(1) and/or 17(4). The court can take judicial notice of the fact that planning, execution and implementation of the schemes relating to development of residential, commercial, industrial or institutional areas usually take few years. Therefore, the private property cannot be acquired for such purpose by invoking the urgency provision contained in Section 17(1). In any case, exclusion of the rule of audi alteram partem embodied in Sections 5-A(1) and (2) is not at all warranted in such matters."

15. In view of the above it is well settled that acquisition of land for public purpose by itself shall not justify the exercise of power of eliminating enquiry under Section 5-A in terms of Section 17 (1) and Section 17 (4) of the LA Act. The Court should take judicial notice of the fact that certain schemes or projects, such as the construction of the Leather City Project for public purpose, which contemplate the development of residential, commercial, industrial or institutional areas, by their intrinsic nature and character require the investment of time of a few years in their planning, execution and implementation. Therefore, the land acquisition for said public purpose does not justify the invoking of urgency provisions under the LA Act. In *Radhy Shyam* (*Supra*), this Court, whilst considering the conduct or attitude of the State Government vis-à-vis urgency for acquisition of the land for the public purpose of planned industrial development in District Gautam Budh Nagar, has observed:

> "82. In this case, the Development Authority sent the proposal sometime in 2006. The authorities up to the level of the Commissioner completed the exercise of survey and preparation of documents by the end of December 2006 but it took one year and almost three months for the State Government to issue notification under Section 4 read with Sections 17(1) and 17(4). If this much time was consumed between the receipt of proposal for the acquisition of land and issue of notification, it is not possible to accept the argument that four to five weeks within which the objections could be filed under sub-section (1) of Section 5-A and the time spent by the Collector in making enquiry under sub-section (2) of Section 5-A would have defeated the object of the acquisition."

16. Moreover, in Dev *Sharan & Others v. State of U.P.* (2011) 4 SCC 769, the acquisition of land for the construction of a new district Jail by invoking urgency provision under Section 17 was quashed on the ground that the government

machinery had functioned at very slow pace after issuance of the Notification under Section 4 in processing the acquisition proceedings which clearly evinces that there was no urgency to exclude the application of Section 5-A of the LA Act. This Court observed:

> "35. From the various facts disclosed in the said affidavit it appears that the matter was initiated by the Government's Letter dated 4-6-2008 for issuance of Section 4(1) and Section 17 notifications. A meeting for selection of a suitable site for construction was held on 27-6-2008, and the proposal for such acquisition and construction was sent to the Director, Land Acquisition on 2-7-2008. This was in turn forwarded to the State Government by the Director on 22-7-2008. After due consideration of the forwarded proposal and documents, the State Government issued Section 4 notification, along with Section 17 notification on 21-8-2008. These notifications were published in local newspapers on 24-9-2008.
>
> 36. Thereafter, over a period of 9 months, the State Government deposited 10% of compensation payable to the landowners, along with 10% of acquisition expenses and 70% of cost of acquisition was deposited, and the proposal for issuance of Section 6 declaration was sent to the Director, Land Acquisition on 19-6-2009. The Director in turn forwarded all these to the State Government on 17-7-2009, and the State Government finally issued the Section 6 declaration on 10-8-2009. This declaration was published in the local dailies on 17-8-2009.
>
> 37. Thus the time which elapsed between publication of Section 4(1) and Section 17 notifications, and Section 6 declaration in the local newspapers is 11 months and 23 days i.e. almost one year. This slow pace at which the government machinery had functioned in processing the acquisition, clearly evinces that there was no urgency for

> acquiring the land so as to warrant invoking Section 17(4) of the LA Act.
>
> 38. In Para 15 of the writ petition, it has been clearly stated that there was a time gap of more than 11 months between Section 4 and Section 6 notifications, which demonstrates that there was no urgency in the State action which could deny the petitioners their right under Section 5-A. In the counter which was filed in this case by the State before the High Court, it was not disputed that the time gap between Section 4 notification read with Section 17, and Section 6 notification was about 11 months.

17. In the facts and circumstances of the present case, it is clear that this Court, vide its Order dated 17.08.2004, has issued a direction to the respondents to relocate the bone mills and allied industries causing environment pollution and health hazards as per the recommendations of the CPCB and, *inter alia*, respondents were also directed to identify the area for relocation. Pursuant to this, respondents have filed an affidavit in the month of December, 2004 specifying the construction of the Leather City Project at Hapur in Ghaziabad. Subsequently, it was only after the lapse of two years, the State Government had issued a Notification under Section 4 on 03.07.2006 and the same was published on 04.7.2006. Thereafter, the State Government took more than 17 months in order to make a declaration of the Notification under Section 6 from the date of publication of the Notification under Section 4 of the LA Act. In view of the above circumstances, it is crystal clear that the government functionary has proceeded at very slow pace at two levels, that is, prior to the issuance of the Notification under Section 4 and post the issuance of the Notification under Section 4, for acquisition of the land for construction of the Leather City Project, which undoubtedly is a public purpose. Therefore, the above series of the events amply exhibit the lethargical and lackadaisical attitude of the State Government. In the light of the above circumstances, the respondents are not justified in invoking the urgency provisions under Section 17 of

the LA Act, thereby, depriving the appellants of their valuable right to raise objections and opportunity of hearing before the authorities in order to persuade them that their property may not be acquired.

18. Shri. Pallav Sisodia, learned senior counsel for respondents, heavily relied on *Jai Narain and Ors. v. Union of India* (Supra) in support of his contention that the acquisition proceedings were initiated under the directions of this Court which itself recognized the existence of urgent situation to relocate polluting industries. We are afraid that this decision will not come to the rescue of the respondents. In that case, this Court had monitored the setting up of sewage treatment plant and also directed the Delhi Administration to acquire land on war footing mentioning urgent situation of supply of pure water and avoiding any health hazards. The said urgency pointed out by this Court was duly reciprocated by the Delhi Administration by issuing a Notification under Section 4 and subsequently, a Notification under Section 6 of the LA Act within a time period of 2 months.

19. The directions or orders issued by this Court must be abided by within the four corners of the legal framework and statutory provisions. The State Government is not allowed to transgress the express legal provisions and procedure thereunder in the garb or guise of implementing our guidelines or directions. The directions of this Court are issued with a purpose and the said purpose is supposed to be followed in the realm of legal structure and principles. Therefore, the respondents are not justified in invoking the urgency provisions of the LA Act in an arbitrary manner by referring to our earlier directions as a defense for their illegal and arbitrary act of acquiring land without giving an opportunity of raising objections and hearing to the petitioners in terms of Section 5-A of the LA Act.

20. Admittedly, the respondents had not obtained the approval of the NCRPB for construction of the Leather City Project as Sub-regional plan in terms of Section 19 (2) of the

NCRPB Act. The purpose or aim of the NCRPB Act is to provide for co-ordinated, harmonized and common plan development of the National Capital Region at the central level in order to avoid haphazard development of infrastructure and land uses in the said region, which includes the district of Ghaziabad in the Uttar Pradesh. Under this Act, the NCRPB has been constituted with the Union Minister for Urban Development as the Chairperson and the Chief Ministers of Haryana, Rajasthan and Uttar Pradesh and Lt. Governor of Delhi as its members in order to undertake the task of development of the National Capital Region. The object of the NCRPB is to prepare, modify, revise and review a regional and functional plan for the development of said region and, further, to co-ordinate and monitor its implementation. Section 19(1) mandates the State government or Union Territory to submit their sub-regional plan to the NCRPB for examination in order to ensure that it is in conformity with the regional plan. Once the NCRPB affirms the conformity of the said plan with regional plan, only then the State government can finalize it. Thereafter, the State Government is entitled to implement the Sub-regional plan by virtue of Section 20 of the NCRPB Act. In *M.C. Mehta v. Union of India*, (2004) 6 SCC 588, this Court has discussed the purpose and overriding effect of the NRCPB Act thus:

> "**27.** The National Capital Region Planning Board Act, 1985 (for short "the NCR Act") was enacted to provide for the constitution of a Planning Board for the preparation of a plan for the development of the National Capital Region and for coordinating and monitoring the implementation of such plan and for evolving harmonised policies for the control of land uses and development of infrastructure in the National Capital Region so as to avoid any haphazard development of that region and for matters connected therewith or incidental thereto. The areas within the National Capital Region are specified in the Schedule to the NCR Act. The National Capital Region comprises the area of entire Delhi, certain districts of Haryana, Uttar

Pradesh and Rajasthan as provided in the Schedule. "Regional plan" as provided in Section 2(j) means the plan prepared under the NCR Act for development of the National Capital Region and for the control of land uses and the development of infrastructure in the National Capital Region. What the regional plan shall contain is provided in Section 10. Section 10(2) provides that the regional plan shall indicate the manner in which the land in the National Capital Region shall be used, whether by carrying out development thereon or by conservation or otherwise, and such other matters as are likely to have any important influence on the development of the National Capital Region…"

28. Section 27 provides that the provisions of the NCR Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than the NCR Act; or in any decree or order of any court, tribunal or other authority."

21. In *Ghaziabad Development Authority v. Delhi Auto & General Finance (P) Ltd.,* (1994) 4 SCC 42, this Court has considered the overriding effect of the NCRPB Act over the UP Urban Planning and Development Act, 1973, in relation to the conversion of land user by State of UP which was not in consonance with the Regional Plan approved by the NCRPB for the National Capital Region, by virtue of Section 27 read with Section 29 of the NCRPB Act. This Court, after referring to various provisions and analysing the scheme of the NCRPB Act, has observed thus:

"16. The four villages in question in which the lands of Delhi Auto and Maha Maya are situate form part of the U.P. Sub-Region of the National Capital Region. In the master plan of 1986 operative till 2001 A.D. (Annexure I) the lands of Delhi Auto and Maha Maya are included in the area set apart for 'recreational' use only. On this basis the Regional Plan was prepared and approved under the NCR Act on

3-11-1988 and finally published thereunder on 23-1-1989 according to which the area in question was set apart for 'recreational' use only. Admittedly no change in this Regional Plan to alter the land use of that area to 'residential' purpose was made any time thereafter in accordance with the provisions of NCR Act. The overriding effect of the NCR Act by virtue of Section 27 therein and the prohibition against violation of Regional Plan contained in Section 29 of the Act, totally excludes the land use of that area for any purpose inconsistent with that shown in the published Regional Plan. Obviously, the permissible land use according to the published Regional Plan in operation throughout, of the area in question, was only 'recreational' and not residential since no change was ever made in the published Regional Plan of the original land use shown therein as 'recreational'. This being the situation by virtue of the overriding effect of the provisions of NCR Act, the amendment of land use in the master plan under U.P. Act from 'recreational' to 'residential' at an intermediate stage, which is the main foundation of the respondents' claim, cannot confer any enforceable right in them. However, if the first amendment in the master plan under the U.P. Act altering the land use for the area from 'recreational' to 'residential' be valid, so also is the next amendment reverting to the original land use, i.e., 'recreational'. Intervening facts relating to the private colonisers described as planning commitments, investments, and legitimate expectations do not have the effect of inhibiting the exercise of statutory power under the U.P. Act which is in consonance with the provisions of the NCR Act, which also has overriding effect and lays down the obligation of each participating State to prepare a Sub-Regional Plan to elaborate the Regional Plan at the Sub-Regional level and holds the concerned State responsible for the implementation of the Sub-Regional Plan. The original land use of the area shown as 'recreational' at the time of approval and publication of the Regional Plan under

the NCR Act having remained unaltered thereafter, that alone is sufficient to negative the claim of Delhi Auto and Maha Maya for permission to make an inconsistent land user within that area."

22. In *Sheikhar Hotels Gulmohar Enclave v. State of Uttar Pradesh,* (2008) 14 SCC 716, this Court has allowed the invocation of the urgency clause by the State Government for the widening of the National Highway in the National Capital Region in the light of completion of the procedural requirement of approval of the master plan of the U.P. Government by the NCRPB. This Court observed thus:

> **"9.** Traffic congestion is a common experience of one and all and it is very difficult to negotiate the traffic congestion in Delhi and National Capital Region. Therefore, in the present situation, it cannot be said that the invocation of Section 5-A was for ulterior purpose or was arbitrary exercise of the power. *Since the master plan has already been prepared and it has been approved by the Planning Board and they have sanctioned a sum of Rs 20.65 crores for the development of this Transport Nagar and widening of National Highway 91 into four lanes. Therefore, the proposal was approved by the Board and it got the sanction from the National Capital Regional Planning Board and ultimately the Government invoked the power under Section 17(4) read with Section 5-A of the LA Act dispensing with the objections.* In the light of these facts it cannot be said that invoking of power was in any way an improper exercise. There is need for decongestion of traffic and it is really the dire need of the hour and earlier it is implemented, the better for the people at large."

23. In the facts and circumstances of the present case, the respondents, *vide* its resolution dated 19.04.2005, had authorized the NCRPB to prepare Sub-regional plan of construction of the Leather City Project at Hapur in the district of Ghaziabad for the HPDA. Subsequently, the NCRPB issued

a draft Sub-regional plan, wherein the Leather City Project was not mentioned. The respondents had made several requests to NCRPB to include Leather City Project but no reply granting approval has come in terms of Section 19(2) of the NCRPB Act. Section 19 of the NCRPB Act contemplates the grant of approval by the NRCPB, and finalization by the State Government, of the Sub-Regional Plan if it is in consonance and consistent with the Regional Plan for the National Capital Region. Furthermore, Section 29 of the NCRPB Act contemplates that the State Government shall not undertake any development activity, which is inconsistent with the Regional Plan for the National Capital Regional. Also, Section 27 of the NCRPB Act has overriding effect on any other inconsistent law or instrument. The overall scheme of the NCRPB Act contemplates common plan, coordination and harmony in the formulation of policy of land uses and development of infrastructure in the National Capital Region. Therefore, in our opinion, the acquisition of land in the absence of express approval in terms of Section 19 and operation of Section 27 of the LA Act renders the entire acquisition proceedings illegal and hence vitiated.

24. In view of above discussion, we hold that the declaration of Notification dated 18.12.2006 under Section 6 of the LA Act is beyond the period of limitation as envisaged by proviso to Section 6(1) of the LA Act. We also hold that the State Government was not justified, in the facts and circumstances of this case, to invoke the urgency provision of Section 17(4) of the LA Act. Therefore, the appellants cannot be denied of their valuable right under Section 5-A of the LA Act.

25. In the result, the Writ Petitions are allowed. The impugned Notification dated 03.7.2006 under Section 4 and Notification dated 18.12.2006 under Section 6 of the LA Act are hereby quashed. Costs are made easy.

D.G. Writ Petitions allowed.

PEPSICO INDIA HOLDING PVT. LTD.
v.
STATE OF MAHARASHTRA & ORS.
(CIVIL APPEAL NO. 7780 OF 2011)

SEPTEMBER 12, 2011

[DR. MUKUNDAKAM SHARMA AND ANIL R. DAVE, JJ.]

Water charges – Levy of increased water charges – Challenged, on ground that it could not be given retrospective effect – Held: In the instant case, decision was taken by the Corporation to increase the water charges based on the decision of the State Government to increase such rates of water charges – The Corporation had no other alternative but to revise the same and follow the increased rates as demanded by the State Government itself – The State Government had increased the water charges and the said rates were circulated by the Government to the Corporation in 2001 itself – However, demand for payment of water charges at the aforesaid increased rates was for some time kept in abeyance in view of the several representations pending at the level of the Government from appellant and others – But the Government did not change its position – The appellant is receiving the facility of water supply from the Corporation and is obliged to pay at such rates which are demanded by the Corporation as the same rate is being charged by the Government – The Corporation cannot be asked to suffer a loss for extensive user of water by the appellant – Although in 2003 a policy decision was taken to charge half the rate of the increased rate, but later on it was found that half the rate was not feasible and Corporation's financial loss was continuously increasing – That policy decision of 2003 was also a stop gap arrangement and the said decrease finally came to be amended in the notification of 2005 – The stand of the appellant that the increased rate

of water charges is being demanded from them on a retrospective basis is erroneous and fallacious and not proper because it is established from the record that the appellant had the knowledge about the aforesaid increase in 2001 itself when the Government issued the notification intimating such increase which fact is an admitted position – There was no violation of the water supply agreement between the appellant and respondent-corporation nor was there any question of giving any retrospective effect to the aforesaid increase.

Constitution of India, 1950 – Article 14 – Levy of water charges – Classification of consumers on basis of user – Three categories of consumers – Higher rates for industrial consumers using water as a raw material – Held: Requirement and use of water by such industrial consumers is huge and therefore they are placed as one distinct category or class of their own – These industries stand apart from other industries and are also differently situated from residential houses – There is an intelligible differentia between these three categories so there is no discrimination.

Appellant-company manufactures non-alcoholic beverages using water as one of the raw materials. There was a water supply agreement between the appellant and the respondent-corporation in terms of which the respondents could fix charges for water from time to time and increase or decrease the water charges in its discretion after giving notice to the consumer.

In the year 2001, water cess was increased by issuance of a Government Resolution. The revision was made after drawing a classification differentiating three categories of consumers of water, namely:- a) water used for purpose of drinking; b) water for industrial use and c) Industries where water was being used as a raw material as drinking water, for such industries (that is, cold drinks, mineral water etc.). Subsequently, respondent-corporation issued Circular deciding to

increase its water charges from November 1, 2001 onwards. The demand for payment of water charges at increased rates was, however, kept in abeyance in view of the several representations pending at the level of the Government from the appellant and others. The Government did not change its position and ultimately in the year 2005, water rates for industrial consumers using water as a raw material was notified by the respondent-corporation to have been revised w.e.f. 01.11.2001.

Appellant filed writ petition before the High Court questioning the levy of increased water charges on ground that it could not be given retrospective effect by the respondent. The High Court dismissed the writ petition. Hence the present appeal.

Dismissing the appeal, the Court

HELD:1. It is established from all the policy decisions of the Government for increasing the rates of water supply charges and also from the resolution of the Corporation taking a policy decision and also from the circulars issued for raising the water charges to 10 times that the decision was taken by the Corporation to increase the water charges based on the decision of the State Government to increase such rates of water charges. The Corporation supplies water to all needy persons be it residential houses, industrial units or to those industries where water is used as raw material on "no profit no loss basis". Consequent upon revision of the rates by the Government at which rate the Corporation is to make payment to the Government, the Corporation has no other alternative but to revise the same and follow the increased rates as demanded by the State Government itself. The State Government has increased the water charges so far those industries where water is used as raw material to 10 times and the said rates were circulated by the Government to the

Corporation in 2001 itself. The fact of such increase was intimated to all the persons to whom water was supplied by the Corporation including the appellant who was fully aware about the aforesaid increase of water charges from 2001. [Para 37] [700-C-F]

2. There cannot be any dispute to the fact that in the industries like that of the appellant, consumption of water is much more than all other types of industries as they use water as raw materials. Requirement and use of water in these industries is huge and therefore they are placed as one distinct category or class of their own. These industries stand apart from other industries and also differently situated from residential houses. Therefore, there is an intelligible differentia between these three categories so there is no discrimination. [Para 38] [700-G-H; 701-A]

3. However, demand for payment of water charges at the aforesaid increased rates was for some time kept in abeyance in view of the several representations pending at the level of the Government from the aggrieved and affected persons including that of the appellant. But since the Government did not change its position and informed the Corporation to make payment at the revised rate which was increased in 2001 itself, the Corporation has no other alternative but to release the payment of water tax/bill at the increased rate demanded by the State Government. Although in 2003 a policy decision was taken to charge half the rate of the increased rate i.e. five times instead of ten times, at par with the industrial uses, but later on it was found that half the rate is not feasible and that what is being charged at the earlier point of time is required to be paid as Corporation's financial loss was continuously increasing. That policy decision of 2003 was also a stop gap arrangement and the said decrease finally came to be

amended in the notification of 2005. [Para 39] [701-B-E]

4. The appellant is receiving the facility of water supply from the Corporation and is obliged to pay at such rates which are demanded by the Corporation as the same rate is being charged by the Government. The Corporation cannot be asked to suffer a loss for extensive user of water by the appellant using water as raw material for its business as it is discharging its public and welfare duty for supplying water to help and assist industries like the appellant. The stand of the appellant that the increased rate of water charges is being demanded from them on a retrospective basis is erroneous and fallacious and not proper because it is established from the record that the appellant had the knowledge about the aforesaid increase in 2001 itself when the Government issued the notification intimating such increase which fact is an admitted position. Therefore, there is no violation of clause 27 of the water supply agreement between the appellant and respondent-corporation nor is there any question of giving any retrospective effect to the aforesaid increase. [Para 40] [701-F-H; 702-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7780 of 2011.

From the Judgment & Order dated 4.11.2009 of High Court of Judicature at Bombay in Writ Petition No. 5834 of 2005.

L. Nageshwara Rao, Divyam Agarwal, Dheeraj Nair, Santosh for the Appellant.

Shyam Divan, G. Pal Swati Sinha, Taruna A. Prasad (for Fox Mandal & Co.), Sanjay V. Kharde, Dushyant Parashar, Asha Gopalan Nair for the Respondent.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. Leave granted.

2. The appeal is directed against the judgment and order dated 04.11.2009 passed by the High Court of Judicature at Bombay in Writ Petition No. 5834 of 2005. The said Writ Petition was filed by the appellant herein questioning the levy of increased water charges on ground that it cannot be given retrospective effect by the respondent herein.

3. The facts leading to the filing of the present appeal are that the appellant - PepsiCo India Holdings Pvt. Ltd. is incorporated in India under the Companies Act, 1956 for manufacturing and distributing carbonated soft drinks, bottled drinking water and other food products. Appellant stated that it is one of the leading manufacturers of Carbonated Soft Drinks and bottled drinking water in the entire State of Maharashtra and a significant portion of the entire national demand for the appellant's product is met from the production made within the State of Maharashtra itself.

4. The State of Maharashtra, represented by Secretary, Deptt. of Industries, Mantralaya is respondent no. 1, the Maharashtra Industrial Development Corporation ["MIDC"] is respondent no. 2 which is responsible for infrastructure required for any industry, i.e. land, water and electricity. All the Industrial Estates of State Government in Maharashtra come under the purview of respondent no. 2. MIDC at Roha Div. Alibag is respondent no. 3 and is the branch of respondent no. 2 and shares the same objective. Department of Irrigation is respondent no. 4 and is responsible for the supply of water to all industrial estates under respondent no. 2 in Maharashtra.

5. The appellant stated that respondent no. 2, acting through respondent no. 3 invited business undertakings to set up industrial units in the industrial areas to add impetus to industrial development in the State of Maharashtra. Accordingly, the appellant decided to set up its manufacturing plant in the State of Maharashtra at Paithan, Distt. Aurangabad and Roha,

Dist. Raigad. In this case, however, we are concerned with the manufacturing plant of the appellant located at Roha.

6. The primary business of the appellant is to manufacture non-alcoholic beverages in its plant and for the manufacturing of the same, water is used as one of the raw materials.

7. The plant from where the appellant operates its unit at Roha, Maharashtra was earlier owned by another company by the name Voltas India Limited. The said company had entered into a Water Supply Agreement with respondent no. 3 for its facilities at Dhatav, Roha under the Water Supply Regulation Act, 1973.

8. There are regulations in respect of supply of water, namely, 'Maharashtra Industrial Development Corporation Water Supply Regulations'. Regulation 2(2) defines "Consumer", which means any person or persons who has applied for supply of water from any works of the Corporation and to whom MIDC has agreed to supply water or any person or persons otherwise liable for payment of water charges to the Corporation. Clause 27 of the Water Supply Agreement provides that the Respondents shall fix charges for water from time to time and increase or decrease the water charges in its discretion after giving notice of one month to the consumer. Clause 36 of the Water Supply Agreement provides for penalty in case of failure on part of the consumer to pay the water bill. Clause 27 of the Water Supply Regulations, 1973 are as under:

> *"Clause 27: Water Rate:* The charges for water shall be fixed by the Corporation from time to time. The Corporation shall increase or decrease the water charges in its discretion after giving notice of one month to the consumer. The rates of water charges so fixed or altered shall be conclusive and be binding on the consumers."

Regulation 28 provides for recovery of arrears on account of

water charges or any other expenses incurred by the Corporation in connection with water supply to the consumer, which shall be recoverable as arrears of land revenue. The Corporation also has the right to disconnect the water supply in the event of contingencies provided under the regulations.

Regulation 35 is in respect of Water Rate, which reads as under:

> *"Regulation 35: Water Rate:* The consumer shall pay the charges for water supply which shall be fixed by the Corporation from time to time. The Corporation shall increase the water charges in its discretion after giving notice of one month to the consumer. The rates so fixed or altered by the Corporation shall be final and binding on the consumer."

Regulation 36 provides for recovery of arrears as land revenue. Clause 42 of the agreement provides for a forum of Chief Engineer, MIDC, for resolution of the disputes arising out of interpretation or otherwise of the regulations and that the decision of the dispute resolution authority shall be final and binding on the consumer. Regulation 51 provides that for disputes arising out of the interpretation or otherwise of the provisions of the Agreement, the decision of the Chief Engineer, MIDC shall be final and binding on the consumer.

9. Appellant purchased its plant at 100/1, A-Road, MIDC, Dhatav, Roha, Distt. Raigad from Voltas Limited, the original owners of the property. Voltas issued its no objection to transfer water connection in the name of the appellant. Since then, the respondent no. 3 has been issuing all the water bills in the name of the appellant.

10. Respondent no. 4 while acting upon a recommendation of the Finance Commission issued Government Resolution No. WSR 1001/(5/2001)/IM (P) dated September 12, 2001 increasing the water cess. The revision was made after drawing

a classification differentiating three categories of consumers of water, namely:-

> "Category 1 – Water used for purpose of drinking – present rates of water cess **doubled**.
>
> Category 2 – Water for industrial use – present rates of water increased **three times**.
>
> Category 3 – Industries where water is being used as a raw material as drinking water, for such industries (that is, cold drinks, mineral water etc.) – present rates of water increase **ten times".**
>
> For category 3 this is what was provided:-
>
> xxxxxxxxxxxxxxxxxxxx
>
> xxxxxxxxxxxxxxxxxxxx
>
> A5 "Drinking water industries where water is being used as raw material means cold drinks, breweries, mineral water and similarly based industries."

Above increase in rates was made effective from 1st September, 2001 as per clause A4.

11. The old rate of water was Rs. 3.65 per cubic meter which was increased to Rs. 36.50 pcm from September 1, 2001 for industries where water is being used as a raw material as drinking water. It was also specified that the revised rates would increase by 15% in the month of July of every following year.

12. Consequently, the appellant was placed in the third category i.e. industry using water as raw material. On that basis, the appellant was directed to pay water cess, on increased rates. Subsequently, some industrial associations/ organisations/ industrialists made representations to the State Government requesting it not to increase the water cess.

13. On October 24, 2001 the respondent no. 4 issued another Govt. Resolution Errata No. WSR 10001/ (5/2001)/IM (P). The corrigendum changed the increased water cess from the new rates of Rs. 36.50 pcm to Rs. 40 pcm and made the same effective from September 1, 2001 with a clarification that while deciding/fixing water rates vide Government Resolution No. WSR 1001/(5/2001)/IM (P) dated September 12, 2001, some deficiencies were left out and the same are being removed by Errata dt. 24.10.2001 with the following resolution:

> "A(3) In the industries where water is being used as raw material as drinking water, for such industries (i.e. Cold Drinks, Mineral Water etc.) present rates, (which have been made effective from 01/07/2000) are being made 10 times.
>
> A (4) Above increase in rates shall be effective from 1st September, 2001"

14. On 31.10.2001, respondent no. 2 issued a Circular No. G/30/2001 deciding to increase its water charges levied on the consumers and thereby implementing the revised rates of water charges from November 1, 2001 onwards. Relevant portion of the Circular is reproduced hereunder:

> "Pursuant to the policy decision taken during 246th meeting of Board of Directors of MIDC held on 3.10.1997 and as approved by the Sub-Committee of the Corporation appointed for that purpose, the Corporation has issued revised rates of water supply from 1.4.2001 vide the Circular under reference No. 1. Thereafter the Irrigation Department of Government of Maharashtra have issued revised rates of water supply for drinking and for industrial use vide the aforesaid reference No.2. The prevailing charges for drinking water have been doubled (from 1.7.2000) and water charges for industrial use have been increased three times (from 1.7.2000). It has been mentioned that the said increase in rate is effective from

the date 1st September, 2001.

Due to this increase in water charges, the amount to be paid by the Corporation to the Irrigation Department would be increased and therefore, it is inevitable for the Corporation to increase its water charges. Pursuant thereto the Corporation has decided to implement the revised rates of water charges from the date 1.11.2001.

Revised rates to be implemented from 1.11.2001 have been mentioned in the accompanying schedule No A-1 to A-5.

While determining the revised rate of water supply the prevailing water charges for domestic use have been increased by Rs.0.25 per c.m. while for industrial usage it has been increased by Rs. 6.50 p.c.m. and accordingly the revised rates have been made applicable to all the concerned consumers from the date 1.11.2001.

As stated above, all the Executive Engineers are requested to issue a separate circular regarding increase of water charges and to supply it immediately to all the consumers as per the accompanying form.

Water consumed by the consumers from the date 1.11.2001 should be charged at the revised rates."

15. On 06.12.2001, respondent no. 2 issued a Circular No. G-32/2001 informing the industrial organisations that the proposed increase in rates is due to the increase in water charges effected by respondent no. 4 and till the time respondent no. 4 does not withdraw the increase in water charges, the respondent no. 2 cannot reduce the water rates. It was further stated that representations received have been forwarded to the Government and therefore during the pendency of the said representations, the industrialists can pay the water bills at previous rates. On 13.08.2002, respondent no. 2 issued another Circular informing the pendency of

representations before the Government, in which it was also stated that industrialists are allowed to pay the bills at the old rates and the same should be accepted and the balance amount should be shown as arrears.

16. On 28.11.2002, respondent no. 4 issued a fresh Govt. Resolution No. SANKIRN 2002/(148/2002)/IM (P), whereby the water cess for different categories was amended as follows:-

"Category 1 – Water used for purpose of drinking – present rates of water cess **doubled**.

Category 2 – Water for industrial use – present rates of water increased **doubled.**

Category 3 – Industries where water is being used as a raw material as drinking water, for such industries (that is, cold drinks, mineral water etc.) – present rates of water increase **ten times."**

17. By the above amendment, the only change was made in category 2 and no change was made for the use of water by the Industry where water is being used as a raw material.

18. On 27.05.2003, a Circular No. G/06/2003 was issued by Chief Engineer (Head Office) MIDC, Mumbai 93 stating about the water tariff increase and thereby confirming the rates set out vide Govt. Resolution dated 28.11.2002. The said Circular provided for the amended policy of water supply of industrial and residential use, which was required to take effect from June 1, 2003. On the same day respondent no. 2 issued another Circular No. G/7/2003 wherein the rate of water supply of the consumers under the industrial area using water as raw material was fixed at same as of the rates in industrial area. Relevant portion of the Circular is reproduced hereunder:

"1. As per the Circular dated 24.10.2001 of the Irrigation Department, water rate is increased for industrial use – water rate 200 percent for residential use – water rate 100

percent for use water as raw material – water rate at 1000 percent. For recovering the increasing rate in water charges, by amending the rate of water supply of Corporation, were made applicable by Circular No. G/30 dated 31.10.2001 and the rate for use water as raw material, the rates were made applicable as per Circular No. G/17 dated 30.7.2002, with effect from 01.11.2001. The Corporation had raised the issue/representation against this price revision with the State Government. The said case/representation seeking reduction in water rate was under consideration of Government. Therefore, approval was given to accept the bills of water supply at old rate from the Industrialists under the industrial area as per Circular No. G/31 dt. 6.12.2001 and Circular No. G/18 dt. 13.8.2002 of this Office. Similarly, it was informed by Circular No. G/433 dt. 26.11.2001 not to increase rate of water supply at the placed where water charges are not payable to the Irrigation Department for industrial area.

2. Now as per the circular dated 28.11.2002 of the Irrigation Department, the water rate for industrial use has been decreased from 200 percent to 100 percent. *The increase in residential use and use water as raw materials is confirmed. The amended rates are made applicable from 1.9.2001.* As per circular dt. 28.11.2002, the Irrigation Department has increased 15 percent increase from 1.7.2002 and 15 percent increase from 1.7.2003.

5. *The rate of water supply of the consumers under the Industrial area using water as raw material will be the same as of the rates in Industrial area.* However, the rate of water of such consumers outside industrial area be charged by including difference of rates of water tax.

6. The representations seeking reductions of water charges are under the consideration of Government. Therefore, though the bills are sent to the consumers at increased rate, the concession was given to pay the same

at the earlier rate (of prior to 01.11.2001). For this reason, the arrears to that extent and late charges thereon have been shown in the bills of consumers, however, the rates during the period from 01.11.2001 to 31.05.2003 and the bills may not be revised presently. The decision in that regard will be issued separately. All consumers will be bound to pay the bills of water at the rate of water supply in this circular is made applicable from 01.06.2003."

In this view of the matter, no final decision was taken for the bills relating to the period from 01.11.2001 to 31.05.2003. The Maharashtra Industrial Development Corporation an undertaking of the Maharashtra Government issued a Policy of water supply and made it effective from 1st June, 2003.

19. On 11.06.2003, the respondent no. 2 issued Circular No. G/08/2003 revising rates of water supply for the period from November 1, 2001 till May 31, 2003. It was specified that for the period November 1, 2001 to November 30, 2002, the different amount as per the revised rates should be shown as arrears in the water bills. It was mentioned that if an undertaking is given by the consumer to pay the arrears, then the arrears would not be shown. Further, for the period from December 1, 2002 to May 31, 2003, the arrears calculated as per the revised rates were to be retrospectively recovered from the consumer in three equal monthly instalments.

20. On 18.05.2005, respondent no. 2 vide its Circular No. G/01/2005 revised the rates in respect of water supply to the customers in industrial area using water as raw material. Respondent no. 2 specifically observed that Circulars dated 27.05.2003 and 11.06.2003 provided for amended policy, which implemented equal rates for all types of industries. By Circulars dated 27.05.2003 and 11.06.2003 equal rates were fixed for the water supply to all industries including the industries using water as raw material in industrial area. Relevant part of the Circular is reproduced hereunder: -

"B. In accordance with Government Resolution dated 28.11.2002 of the Irrigation Department, the rates of using residential water use and industrial water use under the Industrial area and outside the area by Circular No. G/7/ 2003 and by Circular No. G-8 dated 11.6.2003, the orders are issued regarding as to how the said rates should be implemented.

C. By these circulars, equal rates are fixed for the water supply to all industries including the industries using water as raw material in industrial area. However, while implementing this policy it is found that in some industrial area, the use of water by industries which are using water as raw material, is in huge extent. Since the rates of water use as raw material, are more than five time of the water tax rate of general industrial use, the financial burden of amount of difference is falling on Corporation. With a view not to put financial burden of such type on Corporation, the decision of amending the rates of water supply of the customers using water as raw material under the Industrial area, has been taken. The rates of water supply of such customers be amended as follows: -

1) Revised rates: -

By extending the rates by Rs. 34.60 per c.m. of water supply of respective industrial area issued by issued under Circular No. G/7 dated 27/05/2003, the rates of water supply be amended from 1/11/2001.

2) Recovery of Bills of water supply: -

(i) <u>For the period from 01/11/2001 to 30/11/2002</u> – The water-tax be levied at revised rates for the aforesaid period. The amount of difference drawn by amended rates of water be shown as arrears. On the amount comes due to difference in rate of water during this period, late fee may not be

charged. The amount of arrears may not be shown in the monthly bill of water and for recovery of this amount, undertaking be taken from the customers on court-stamp paper of Rs. 20/-. In respect of the said arrears, separate orders will be issued as per the decision of Irrigation Department.

(ii) <u>For the period from 01/12/2002 to 30/04/2005</u> – For the aforesaid period, the amount of difference of amended bill be recovered in six equal instalments. First instalment be recovered with the bill of May, 2005 and last instalment be recovered with the bill of October, 2005. On the arrears of amount of its difference, no late fees be charged till 30.11.2005.

(iii) <u>Recovery of bills of water supply from 1/5/2005</u> – The recovery of further bills from 1/5/2005 be made regularly by amended rates of water supply as above."

21. On 06.06.2005, the Deputy Engineer of respondent no. 2 issued a letter to the appellant regarding revision of water rates for the consumers within the Industrial Area using water as raw material. By the said letter respondent no. 2 informed the appellant that respondent no. 4 had increased the rate of royalty by five times w.e.f. 01.09.2001 for consumers within the Industrial Area using water as raw material and appellant was further informed that its rate has been revised to Rs. 48.10 pcm w.e.f. 01.09.2001. The Deputy Engineer proposed recovery of water charges in the following manner:

(1) The water bills at revised rate will be paid regularly by the appellant from 01/05/2005 onwards. Accordingly, May 2005 bill is prepared & issued at the rate of Rs. 48.10 pcm.

(2) The water bills for the period 01/11/2001 to 30/11/2005 revised as per revised rate. Differential amount given in

separate page in tabular form amount to Rs. 69,97,385/-. However, the recovery of the differential payment will be kept in abeyance till the issue of royalty payment for this period is resolved by the Irrigation Department. For arrears of this period appellant will have to give an undertaking on the stamp paper of Rs. 20/- regarding payment of water charges to this office.

(3) For making differential payment of water bills as per revised rates for the period from 01/12/2002 to 30/04/2005 amounting to Rs. 1,57,62,618/- appellant will be allowed six monthly equal instalment of Rs. 26,27,103/- each.

The appellant was directed to pay the instalments failing which the amount would be charged along with interest to be calculated after six months.

22. On 24.06.2005, respondent no. 3 issued another letter to the appellant reiterating the observations made by the Deputy Engineer, MIDC, and reminding the appellant about the increased water rates for consumers using water as a raw material with effect from 01.11.2001. Through this letter appellant was directed to submit bank guarantee of Rs. 69,97,385/- towards differential amount due to revision of water rates and to pay Rs. 1,57,62,618/- being differential amount from December 1, 2002 to April 30, 2004 in six equal installments of Rs. 26,27,103/- each from May 2005 to October, 2005.

23. Thereafter, M/s. Waluj Industrial Association Paithan, Aurangabad, who was facing the similar situation as the appellant herein, filed Writ Petition No. 4263 of 2005 before the High Court of Judicature at Bombay, Aurangabad Bench, challenging the circulars and notices issued by respondents. In the said case similar agreement and the same regulation were applicable to the writ petitioner as the present appellant. Relevant part of the Judgment delivered by the High Court and having relevance to the present case is reproduced hereunder:

13. In view of the clauses referred to above, contained in Water Supply Regulations and Water Supply Agreement, conclusion can be drawn that the Corporation is within its right to revise water rates. It is a common grievance made by the petitioners, firstly that prescribing exorbitant water rates is unreasonable for which there is no basis. It is also contended that levy of water charges with retrospective effect is not permissible.

14. Respondents have placed on record Government Resolution dated 24.10.2001 whereby it has been directed by the State Government that royalty for lifting water by MIDC from the Irrigation Department shall be at the rates prescribed in the said Resolution. The aforesaid Resolution prescribed different rates in respect of use of water for normal industrial use as well as for user of water for manufacturing activity where water is used as a raw material. The Corporation issued notices to different industrial establishments in respect of revision of water rates and made demand in respect of payment of water charges at revised rates. Although petitioners have made a grievance that levy of water charges is with retrospective effect and respective industrial establishments were not informed about the revision of water charges on previous occasions, however, Respondent-Corporation has contended in its affidavit-in-reply that in fact different industrial establishments, operating within the area of Industrial Development Corporation, have been specifically informed in respect of revision of water rates and their liability to pay water charges at revised rates.

15. During the course of hearing, learned Counsel for Respondent-Corporation has made available record in respect of communications made by petitioners in Writ Petition No. 4263/2005 i.e. Waluj Industries Association. On perusal of an application tendered by Waluj Industries Association on 23.11.2001, it appears that said

communication is in response to a Circular dated 05.11.2001 relating to revision of water rates issued by MIDC. It is urged in the application that the whole industry is passing through a phase of recession and cannot bear the hectic increase. The Association has protested against the hike in water charges and requested the Corporation to take up the issue with Irrigation Ministry. A further application appears to have been tendered by the Chamber of Marathwada Industries and Agriculture on 16th August 2003 in respect of revision of water rates and communications made by the Corporation in that behalf to respective industrial units. Similar communications find place in the record dated 14th July 2003 by Industries Association of Young Entrepreneurs, Aurangabad and dated 24th July 2003 by the Chamber of Marathwada Industries and Agriculture. Many industrial units operating within the industrial area have tendered undertakings in the prescribed form in compliance with the directives issued by MIDC. It is, therefore, unacceptable that petitioners were not aware of the decision rendered in respect of revision of water rates by the Corporation and were also not communicated about such decision. Respondent-Corporation has also stated on oath that each industrial establishment has been communicated in the year 2001 and thereafter every time in respect of revision of water rates by the Corporation.

16. The argument advanced by petitioners regarding impermissibility of revision of water rates by the Corporation with retrospective effect is not acceptable. On perusal of the decisions rendered by the State Government in respect of levy of royalty for supply of water to MIDC at higher rates, contained in various Government Resolutions, it is difficult to accept the argument advanced by the petitioners that there is no nexus for upward revision of water charges by the MIDC. Petitioners have contended that no distinction can be made in respect of levy of water

charges on account of user of water for normal industrial use or for use as a raw material for finished products. The distinction made for charging different rates in respect of user of water for normal industrial use as well as in respect of user as a raw material for manufacturing activity is based on intelligible differentia and is based on sound reasoning."

Consequently, High Court declined to quash the notices and disposed of the petition with following directions: -

"(i) Respondent – Maharashtra Industrial Development Corporation shall be at liberty to levy water charges at revised rates. However, so far as portion of water supplied, which is being used for manufacture of liquor, beverages, etc., wherein water is used as a raw material, Respondent-Corporation would be within their right to recover water charges at higher rates, whereas the portion of water utilized for the purposes other than the manufacturing activity as raw materials, Respondent-Corporation shall have to recover water charges at normal rates.

(ii) Respondent-Corporation may tender revised bills taking into consideration the distinction made above.

(iii) Respective petitioners may make suitable representations to the Respondents in respect of revision of water rates effective from 2002 onwards and on receipt of the representations, Respondents shall take appropriate decision on considering grievances raised by respective petitioners."

24. Appellant in the year 2005 filed a writ petition before the High Court of Bombay which was registered as WP No. 5834 of 2005 challenging the Govt. Resolutions passed by Respondent no. 4 dated 12.09.2001, 24.10.2001 and 28.11.2002 along with letters issued by Respondent Nos. 2 & 3 dated 6.6.2005 and 24.6.2005 and prayed for quashing the

same by issuance of writ of certiorari or such other writ and to direct the respondents to refrain from severing any water connections with respect to industrial units of the appellant. The High Court vide its order dated 6.9.2005 stayed the operation of the notices dated 6.6.2005 and 24.6.2005 and allowed the appellant to continue to pay the bills at the pre-revised/earlier rates and charges. Consequently, however, vide order dated 4.09.2009 High Court dismissed the Writ Petition of the appellant in terms of the decision of the coordinate bench of the said High Court in Writ Petition No. 4263/2005. The High Court held in the following manner: -

> "(i) It will be open to the petitioners to submit documentary evidence before the respondents showing the water which they were using as a raw-material and the water which they were using for allied activities. The respondents thereafter to complete the entire exercise within 16 weeks from today.
>
> (ii) On the petitioners providing such information supported by documentary evidence, the respondents to charge the petitioners in terms of the directions issued by this court in writ petition no. 4263 of 2005.
>
> (iii) Considering direction no. 3 in paragraph 19 of the Judgment in Waluj Industries Association, it will be open to the petitioners to make suitable representation in respect of revision of water rates effected from 2002 onwards and on receipt of the representation, the respondents shall take appropriate decision after considering the grievances raised by the respective petitioners."

25. Against the said decision of the High Court, appellant has filed the present appeal, on which, we heard the learned counsel appearing for the parties. Counsel appearing for the parties have taken us meticulously through the entire relevant materials on record.

26. Learned counsel appearing for the appellant contended that the High Court erred in ignoring that inter se classification of industrial users on the basis of their usage without any reasonable differentia is discriminatory and that respondents are not allowed to categorize industrial users into consumers of "water as raw materials" and consumers for other purposes without any reasonable classification. It was submitted by him that the notification dated 18.05.2005 being prospective in operation and that there being no specific stipulation that it would be retrospective in operation, the respondent could not demand tax at the revised rate from a retrospective date. It was also submitted by him that in view of clause 27 of the agreement there could not have been any demand from a retrospective date. Counsel also relied upon clause 5 of Circular dt. 27.5.2003 and submitted that the rate of water supply to the consumers under the industrial area using water as raw material should be the same as that of the rates in industrial area.

27. Counsel appearing for the respondents, however, not only refuted the contentions put forth by the counsel appearing for the appellant but also submitted that the demand for payment of water tax with arrear, payable by the appellant is just and proper, as there was a continuing liability to pay at increased rate from the year 2001 itself on the part of the appellant but not paid pursuant to the representations filed by him. He also submitted that the irrigation department vide its circular dated 25th October, 2001 initially increased the rate of royalty by 10 times and the same was not altered even upon representations submitted by the aggrieved persons including the appellant and therefore the demand made, which is a subject matter of the appeal, cannot be said to be a retrospective demand made by the respondent. It was also submitted that industries using water as raw material stands clearly on an independent footing than the other industries not using water as raw material and, therefore, there is an

intelligible criteria in making a clear distinction between two categories of industries.

28. In the light of the aforesaid submissions and the materials on record, we proceed to dispose of this appeal by recording our reasons.

29. The specific stand of the respondents in respect of their liability to supply water in lieu of water charges emanates from their responsibility of making water available to the residential houses, industries, factories and entrepreneurs and also to those industries where water is used as raw material and the corporation does not by itself generates water and instead of it procure water from the respondent nos. 1 [State of Maharashtra] and 4 [Department of Irrigation] and provides the same to the residential houses, industries, factories and entrepreneurs etc.

30. It is also a specific stand of the respondent that water is made available by corporation to its allottees at no profit no loss basis. The corporation obtains water from the Irrigation Department for which it is obliged to pay royalty and the charges as fixed by the State Government. The Corporation also has to revise water charges to cover the expenditure of water, particularly, taking into consideration the increase in royalty and water charges by the State Government as well as other factors like increase in price of water purification, chemicals, energy charges, laying down pipelines, overhead tanks and other factors.

31. There is no dispute with regard to the fact that the State Government with effect from 1st September, 2001 upon consideration of the recommendation of the Finance Commission, Irrigation Commission and National Water Policy as well as the deficit arising due to the then prevalent low rates of water supply revised the water rates. Consequent upon the said revision, the Corporation also had to revise water rates to put in parity with the charges towards water supply by the

State Government. Consequent, there upon in the year 2001 itself the appellant was intimated the revision of water rates by the circular issued by the Corporation on 31.10.2001. A number of representations came to be filed from various aggrieved persons due to which a Circular dated 6.12.2001 was issued permitting the industries to pay at the pre revised/earlier rates in order to reconsider old rates in view of the fact that several representations were pending and were being considered by the State Government. The appellant himself submitted such a representation intimating that they are not paying at the increased rate in view of the pendency of the issue before the State Government. The appellant also in the present proceedings has admitted that they had knowledge about the increase of water charges in the year 2001 itself.

32. Another communication dated 28.11.2002 was issued by the State Government and in the said communication it was stated that there is recession world over in the field of industry and taking sympathetic view on the representation submitted by the industrialists with the Government, a decision has been taken to make some revisions in the rates of water cess of industrial use of water. It was, however, made clear in the said communication that no change has been made for the use of water by the industry producing drinking water and cold drinks/ breweries where water is being used as raw material. The Government resolution communicated by the said resolution stated that rates of the industrial use are being doubled but so far industries where water is being used as raw material, for such industries the rates are being made 10 times.

33. A communication, however, came to be issued on 27.05.2003 by the Maharashtra Industrial Development Corporation referring to circular dated 24.10.2001 and 28.11.2002 issued by the Irrigation Department. By referring to Circular dated 28.11.2002, it was stated that water rate for industrial use has been decreased from 200 percent to 100 percent but the increase in residential use of water as raw material is confirmed.

34. Consequent upon issuance of the Circulars by the Government regarding increase in the rate of water charges the matter of taking a policy decision in respect of water supply was put up before the Board of Directors of the Maharashtra Industrial Development Corporation, who had taken a decision that the rate of water supply of the consumers under the industrial area using water as raw material, will be same as of the rates in industrial area. It was also intimated therein that the representation seeking reduction of water charges is under the consideration of the Government and therefore though the bills are sent to the consumers at increased rate, a concession was given to pay the same at the earlier rate.

35. The Corporation issued yet another circular on 18.05.2005 and in this Circular reference was made to the Government resolution dated 28.11.2002 stating further that pursuant to the State Government resolution a circular dated 11.06.2003 was issued stating therein as to how the rates fixed by the Government resolution should be implemented. It was also stated that by the aforesaid circular dated 11.06.2003 equal rates are fixed for the water supply to all industries including the industries using water as raw material in industrial area but while implementing the said policy it was found that in some industrial areas, the use of water by industries which are using water as raw material is in huge extent and that as the rates of water use as raw material are more than five time of the water tax rate of general industrial use, the financial burden of amount of difference is falling on the corporation. It was also intimated that with a view not to put financial burden on the corporation, decision of amending the rates of water supply under industrial area has been taken. The rates of water supply of such consumers who use water a raw material was revised by extending the rates by Rs. 34.60 per cm of water supply of respective industrial area issued vide circular no. G/7 dated 27.05.12003, the rates of water supply was amended from 01.11.2001. As to how water bills relating to the period

from 01.11.2001 to 30.11.2002 should be recovered was also spelt out in the said notification.

36. Consequent thereto a letter was written to the appellant herein by Deputy Engineer, Maharashtra Industrial Development Corporation, on 06.06.2005 intimating him that he is required to pay water bills for the period from 01.11.2001 to 30.11.2005 as per revised rates.

37. It is, therefore, established from all the aforesaid policy decisions of the Government for increasing the rates of water supply charges and also from the resolution of the Corporation taking a policy decision and also from the circulars issued for raising the water charges to 10 times that the decision was taken by the Corporation to increase the water charges based on the decision of the State Government to increase such rat s of water charges. The Corporation supplies water to all ne dy persons be it residential houses, industrial units or to those industries where water is used as raw material on “no profit no loss basis”. Consequent upon revision of the rates by the Govern ment at which rate the Corporation is to make payment to the Government, the Corporation has no other alternative but to revise the same and follow the increase rates as demanded by the State Government itself. The State Government has increased the water charges so far those industries where water is used as raw material to 10 times and the said rates were circulated by the Government to the Corporation in 2001 itself. The fact of such increase was intimated to all the persons to whom water was supplied by the Corporation including the appellant who was fully aware about the aforesaid increase of water charges from 2001.

38. There cannot be any dispute to the fact that in the industries like that of the appellant, consumption of water is much more than all other types of industries as they use water as raw materials. Requirement and use of water in these industries is huge and therefore they are placed as one distinct category or class of their own. These industries stand apart

from other industries and also differently situated from residential houses. Therefore, there is an intelligible differentia between these three categories so there is no discrimination.

39. However, a demand for payment of water charges at the aforesaid increased rates was for some time kept in abeyance in view of the several representations pending at the level of the Government from the aggrieved and affected persons including that of the appellant. But since the Government did not change its position and informed the Corporation to make payment at the revised rate which was increased in 2001 itself, the Corporation has no other alternative but to release the payment of water tax/bill at the increased rate demanded by the State Government. Although in 2003 a policy decision was taken to charge half the rate of the increased rate i.e. five times instead of ten times, at par with the industrial uses, but later on it was found that half the rate is not feasible and that what is being charged at the earlier point of time is required to be paid as Corporation's financial loss was continuously increasing. That policy decision of 2003 was also a stop gap arrangement which is indicated from paragraph 6 thereof and the said decrease finally came to be amended in the notification of 2005.

40. The appellant is receiving the facility of water supply from the Corporation and is obliged to pay at such rates which are demanded by the Corporation as the same rate is being charged by the Government. The Corporation cannot be asked to suffer a loss for extensive user of water by the appellant using water as raw material for its business as it is discharging its public and welfare duty for supplying water to help and assist industries like the appellant. The stand of the appellant that the increased rate of water charges is being demanded from them on a retrospective basis is erroneous and fallacious and not proper because it is established from the record that the appellant had the knowledge about the aforesaid increase in 2001 itself when the Government issued the notification intimating such increase which fact is an admitted position.

Therefore, there is no violation of clause 27 nor is there any question of giving any retrospective effect to the aforesaid increase. It was also submitted that appellant was not paying increased water charges as the matter was pending for final consideration in view of several pending representations. In the pleadings before us, the said fact is clearly proved by the statement of the appellant in the affidavit filed.

41. We have gone through the judgment and order passed by the High Court in the coordinate Bench which was followed by the High Court in the present case. From the judgment it is distinctly indicated that while rejecting the contentions of the counsel appearing for the appellant the High Court has recorded cogent reasons for rejecting such contentions. We find no infirmity in the said reasons. We however make it clear that a representation of the nature as suggested by the High Court could still be made by the appellant on all the grounds specifically mentioned therein and any other valid ground, which when filed would be disposed of expeditiously.

42. Consequently, we find no merit in this appeal and the same is dismissed with the aforesaid liberty and leaving the parties to bear their own costs.

B.B.B. Appeal dismissed.

ANUP BHUSHAN VOHRA

v.

THE REGISTRAR GENERAL, HIGH COURT OF JUDICATURE AT CALCUTTA

(CRIMINAL APPEAL NO. 339 OF 2007)

SEPTEMBER 16, 2011

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

Contempt of Courts Act, 1971 – s.2(c) r/w s.12 – Criminal contempt – Committee constituted by some local persons active in public life, along with lawyers at Jalpaiguri – The Committee passed resolution for formation of a High Court Circuit Bench at Jalpaiguri – Members of the Committee put their resolution into action by starting agitation outside the main gate of the District Court premises – Issuance of Suo Motu Rules of Contempt, one, against the 16 persons actively associated with the aforesaid Committee to show cause as to why they were creating impediments in functioning of the judiciary in the District Court by obstructing Judicial Officers from entering into the Court premises and the other upon the Director General of Police, Government of West Bengal, the District Magistrate, Jalpaiguri, the Superintendent of Police, Jalpaiguri and the Inspector-in-charge, Kotwali Police Station, Jalpaiguri to show cause as to why they remained silent spectators in spite of repeated directions – Appellants/ contemnors filed affidavits – High Court found the appellants/ contemnors guilty of criminal contempt and sentenced them to undergo simple imprisonment for six months – Justification – Held: In the facts and materials placed and demonstrated, the conclusion of the High Court that the appellants, more particularly, government officials were responsible for "aiding and abetting the agitators by non-action" cannot be accepted – No acceptable material to hold that the officials committed criminal contempt of the Judges in the District of Jalpaiguri

by deliberately taking no action against the agitators resulting in interference with the due administration of justice – In the absence of any order either on the judicial side by the Chief Justice of the High Court or any communication and direction through the Registrar General and in view of the assertion of appellant-DGP in the form of an affidavit about the conversation made by the then Chief Justice and himself, the contrary conclusion arrived at by the High Court holding that the appellant-DGP disobeyed the order of the Chief Justice to take immediate step for restoration of functioning of the judiciary in the District cannot be accepted – There was no wrongful restraint on the Judges and Judicial Officers of the District Court as is evident from the GD entries wherein it was recorded that the Judges and Judicial Officers had acceded to the request of the agitators and restrained themselves from entering the court premises though police force was present at the spot to facilitate their entry as and when directed – Inasmuch as the matter pertains to criminal contempt, the issue is to be proved beyond reasonable doubt – In the instant case, it is clear that charge against the criminal contempt was not made out in the manner known to law – No case was made out to punish the appellants under "criminal contempt" in terms of s.2(c) r/w s. 12 of the Act – Also, all the appellants had filed separate affidavits explaining their stand and tendered unconditional apology at the earliest point of time – The High Court ought to have accepted the affidavits tendering apology – Calcutta High Court Contempt of Courts Rules, 1975.

A Committee was constituted by some local persons, who were active in public life, along with lawyers at Jalpaiguri. The Committee passed a resolution for the formation of a High Court Circuit Bench at Jalpaiguri and in order to achieve the said purpose to stage Satyagrah in front of the District Court at Jalpaiguri. The Members of the Committee put their resolution into action on 15.12.2006 and started agitation outside the main gate of

the District Court premises and put up a rostrum there on which a number of persons started sitting in Satyagrah.

The Acting Chief Justice of the High Court sitting in a Bench issued two Suo Motu Rules of Contempt, one, against the 16 persons actively associated with the aforesaid Committee to show cause as to why they are creating impediments in functioning of the judiciary in the District Court by obstructing Judicial Officers from entering into the Court premises and the other upon the Director General of Police, Government of West Bengal, the District Magistrate, Jalpaiguri, the Superintendent of Police, Jalpaiguri and the Inspector-in-charge, Kotwali Police Station, Jalpaiguri to show cause as to why they remained silent spectators in spite of repeated directions. In response to the Rules, the appellants/contemnors filed their affidavits before the High Court.

The High Court found all the appellants guilty of criminal contempt and sentenced them to undergo simple imprisonment for a term of six months. Hence the present appeals under Section 19 of the Contempt of Courts Act, 1971.

Allowing the appeals, the Court

HELD:1.1. In the facts and materials placed and demonstrated, the conclusion of the High Court that the appellants, more particularly, government officials were responsible for "aiding and abetting the agitators by non-action" cannot be accepted. [Para 22] [729-E-F]

1.2. It is clear from the materials placed that the police force was present at the gate of the District Court on all days except Sundays and holidays to supervise law and order situation and to assist the Judges and Judicial Officers, and that the District Judge and the Judicial Officers never asked for any police help for their

entry into the court premises on all days starting from 15.12.2006 ending with 15.01.2007 and all of them acceded to the humble request made by the agitators and returned home. There was no wrongful restraint on the Judges and Judicial Officers of the District Court as is evident from the GD entries wherein it was recorded that the Judges and Judicial Officers had acceded to the request of the agitators and restrained themselves from entering the court premises though police force was present at the spot to facilitate their entry as and when directed. [Paras 23, 26] [729-G-H; 730-A-G-H]

1.3. Though the High Court recorded a finding in the impugned judgment that because of the obstruction, the administration of justice in the District Court, Jalpaiguri was obstructed for a month in spite of specific request of District Judge, it was brought to the notice of this Court that the District Judge for the first time on 10.01.2007 had communicated to the District Magistrate with a request to make endeavour to resolve the crisis and even in that communication there was no mention of using police force to remove the agitators by force. It is also evident that Judges of the District Court wanted a peaceful solution and without use of force although in the fax messages sent by the District Magistrate to the Registrar General, it was complained that the Judges in the District Court were not allowed to enter into the court premises. [Para 27] [731-A-C]

1.4. There is no acceptable material to hold that the officials committed criminal contempt of the Judges in the District of Jalpaiguri by deliberately taking no action against the agitators resulting in interference with the due administration of justice. On analysis of the entire materials including their statements, affidavits, GD entries, fax messages, correspondence between District Judge and Registrar General and District Magistrate, it cannot be concluded that the officials deliberately

abstained from taking any action against the agitators. [Para 28] [731-D-E]

1.5. In the absence of any order either on the judicial side by the then Chief Justice or any communication and direction through the Registrar General and in view of the assertion of appellant-DGP in the form of an affidavit about the conversation made by the then Chief Justice and himself, the contrary conclusion arrived at by the High Court holding that the appellant-DGP has disobeyed the order of the then Chief Justice to take immediate step for restoration of functioning of the judiciary in the District cannot be accepted. [Para 29] [731-F-G]

1.6. In a matter of this nature, when the agitation started on 15.12.2006 by way of a Committee comprising persons from different walks of life including members of the bar, media, business community, NGOs, elected representatives etc, it is but proper for the High Court to intervene at the earliest point of time by sending Administrative/Port-folio Judge or the Registrar General to the spot. Such recourse was admittedly not resorted to. Till 05.01.2007, no communication or any effort was made by the Registrar General to the District administration, particularly, officers concerned and to the District Magistrate. Even the District Judge did not make any request or issued directions for removal of the agitators who were conducting Satyagrah in a peaceful manner. Every day on their request, all the Judicial Officers returned home to avoid any confrontation with the members of the bar and the Committee comprising persons from different walks of life. [Para 30] [731-H; 732-A-D]

1.7. Inasmuch as the matter pertains to criminal contempt, the issue is to be proved beyond reasonable doubt. In the instant case, it is clear that charge against the criminal contempt was not made out in the manner

known to law. No case was made out to punish all the appellants under "criminal contempt" in terms of Section 2 (c) read with Section 12 of the Contempt of Courts Act, 1971. [Paras 31, 36] [732-E-G; 734-H; 735-A]

Muthu Karuppan v. Parithi Ilamvazhuthi & Anr. **(2011) 5 SCC 496 – relied on.**

2. Also, all the appellants had filed separate affidavits explaining their stand and tendered unconditional apology at the earliest point of time. Considering the nature of the demand which, according to them, the High Court itself has passed a resolution acceding for the formation of the High Court Circuit Bench at Jalpaiguri and other relevant materials, the High Court ought to have accepted the affidavits tendering apology. In fact, the explanation to sub-section (1) of Section 12 of the Act enables the court to accept the apology if the same is bona fide and discharge the accused accordingly. Even such recourse was not followed by the High Court. Expressing unconditional apology and regret with an undertaking that they would maintain good behaviour in future and if the same is at the earliest point of time and bona fide, the Courts have to accept the same. In the instant case, there was nothing wrong in accepting the unconditional apology and request of the appellants which was made at the earliest point of time. [Paras 32, 35] [732-H; 733-A-D; 734-F]

O.P. Sharma & Ors. vs. High Court of Punjab & Haryana **(2011) 6 SCC 86 and** *Vishram Singh Raghubanshi vs. State of Uttar Pradesh* **(2011) 7 SCC 776 – relied on.**

Mohandas Karamchand Gandhi and Anr. **AIR 1920 Bombay 175 – referred to.**

Case Law Referemce:

(2011) 5 SCC 496	**relied on**	**Para 6**

(2011) 6 SCC 86	**relied on**	**Paras 32, 33**
(2011) 7 SCC 776	**relied on**	**Para 33**
AIR 1920 Bombay 175	**referred to**	**Para 33**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 339 of 2007.

From the Judgment & Order dated 2.3.2007 of High Court of Judicature at Calcutta in Crl. C.P. No. 1 of 2007 and CRR No. 187 of 2007.

WITH

Crl. A. Nos. 340, 345, 346, 358, 362, 388, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399 and 400 of 2007.

Mukul Rohtagi, Kalyan Bandopadhyay, R. Venkataramani, Pradip Kr. Ghosh, Jaideep Gupta, Abijit Sen Gupta, B.P. Yadav, Abhijit Bhattacharya, P.C. Sen, Aanchal Yadav, Binu Tamta, Joydeep Mazumdar, Rohit Dutta, Alto K. Joseph, Ranjan Kumar, Chiraranjan, Addey, Tara Chandra Sharma, Neelam Sharma, Rupesh Kumar, Raja Chatterjee, Sachin Das, G.S. Chatterjee for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. These appeals, under Section 19 of the Contempt of Courts Act, 1971 (hereinafter referred to as "the Act"), are filed against the common judgment and order dated 02.03.2007 passed by the Division Bench of the High Court of Judicature at Calcutta in Suo Moto Contempt Motion being Crl.C.P.No.1 of 2007 with C.R.R. No. 187 of 2007 whereby the High Court found all the appellants guilty of criminal contempt and sentenced them to undergo simple imprisonment for a term of six months with a fine of Rs.2,000/- each and, in default of payment of fine within a period of one month, to further undergo simple imprisonment for one month.

2. **Brief facts**:

(a) A Committee was constituted by some local persons, who were active in public life, along with lawyers at Jalpaiguri named "Circuit Bench 'O' Sarbik Unnayan Dabi Adyay Samannya Committee, Jalpaiguri" (hereinafter referred to as "the Committee"). The Committee had passed a resolution for the formation of a High Court Circuit Bench at Jalpaiguri and in order to achieve the said purpose to stage Satyagrah in front of the District Court at Jalpaiguri. The Members of the Committee put their resolution into action on 15.12.2006 and started agitation outside the main gate of the District Court premises and put up a rostrum there on which a number of persons started sitting in Satyagrah. They prevented the Judicial Officers including the District Judge, Jalpaiguri to enter into the Court premises from that day. In order to overcome the said situation, the District Judge drew attention of such fact to the Inspector-in-Charge, Kotwali Police Station, Jalpaiguri for extending police help, but no action was taken. Subsequently, the District Judge brought the matter to the notice of the Registrar General of the High Court of Calcutta for taking necessary steps.

(b) After taking note of the situation, Hon'ble Mr. Justice V. S. Sirpurkar, the then Chief Justice of the High Court, instructed the District Judge through the Registrar General to seek necessary help and protection from the Superintendent of Police, Jalpaiguri to take immediate steps so that the Judicial Officers could enter the Court premises and attend the judicial work. The District Judge conveyed the said decision of the High Court to the Superintendent of Police, Jalpaiguri but failed to get any response from him. Subsequently, he approached the District Magistrate but no action was taken from his end also. Failing to get any response either from the Superintendent of Police or the District Magistrate, Jalpaiguri, the District Judge sent a note to the then Chief Justice of the Calcutta High Court who gave direction over phone to the Director General of Police

to take effective steps without any further delay. The Director General of Police gave assurance that he would take up the matter with the Home Secretary, Government of West Bengal and also suggested the Registrar General to inform the District Judge to write to the District Magistrate, Jalpaiguri to take steps for ensuring proper functioning of the Court with a copy to the Superintendent of Police, Jalpaiguri. On 12.01.2007, the District Judge again wrote to the District Magistrate. In spite of that, no effective development had taken place and the Judicial Officers and the District Judge were unable to enter the court building.

(c) In view of the above situation, the District Judge sent a Fax message to the Registrar General of the High Court requesting him to take appropriate instructions and directions. On the basis of the said information, on 15.01.2007, the then Acting Chief Justice of the High Court sitting in a Bench issued two Suo Motu Rules of Contempt, one, against the 16 persons actively associated with the aforesaid Committee to show cause as to why they are creating impediments in functioning of the judiciary in the District Court by obstructing Judicial Officers from entering into the Court premises and the other upon the Director General of Police, Government of West Bengal, the District Magistrate, Jalpaiguri, the Superintendent of Police, Jalpaiguri and the Inspector-in-charge, Kotwali Police Station, Jalpaiguri to show cause as to why they remained silent spectators in spite of repeated directions.

(d) On the same day, the Committee withdrew the Satyagrah and removed the rostrum and cleared the entry gate. In response to the Rules, the appellants herein filed their affidavits before the High Court. After examining the appellants herein, the High Court, by impugned judgment dated 02.03.2007, imposed simple imprisonment for a term of six months with a fine of Rs.2,000/- each and in default of payment of fine within a period of one month, to further undergo imprisonment for one month. Aggrieved by the order of the

High Court, the appellants/contemnors have filed these appeals under Section 19 of the Act.

3. Heard M/s Mukul Rohtagi, Kalyan Bandopadhyay, R. Venkataramani, learned senior counsel, P.C. Sen, Tara Chandra Sharma, learned counsel for the appellants and Mr. Pradip Kr. Ghosh and Mr. Jaideep Gupta, learned senior counsel for the respondent-High Court.

4. Since we are going to dispose of all the 18 appeals by this judgment, the following details pertaining to these appeals are relevant:

S. No.	Name	Age	Profession	Case Number (Crl.Appeal)
1.	Sri Mukulesh Sanyal (Dead)	84	Editor of a local weekly	No. 395/2007
2.	Sri Chitta Dey	84	Trade Unionist	No. 390/2007
3.	Sri Benoy Kanta Bhowmic	83	Advocate	No. 394/2007
4.	Sri Samarendra Prosad Biswas	78	Business	No. 396/2007
5.	Smt. Pratima Bagchi (Dead)	74	Teacher (Retd.)	No. 399/2007
6.	Sri Jiten Das	73	Ex.M.P. (Retd. Professor)	No. 362/2007
7.	Sri Sadhan Bose	73	Business	No. 398/2007
8.	Sri Amal Roy	64	Political Worker	No. 392/2007
9.	Sri Debaprasad Roy	63	M.L.A.	No. 358/2007
10.	Sri Anup Bhushan Vohra (D.G.)	63	DGP, W.B. (Retd.)	No. 339/2007
11.	Sri Prasanta Chandra (Inspector-in-Charge)	58	Dy. S.P., Murshidabad	No. 346/2007
12.	Sri Subhas Kumar Dutta	57	Teacher	No. 393/2007
13.	Sri Rabindra Narayan Chowdhury	57	Business	No. 400/2007
14.	Sri Somnath Pal	46	Business	No. 388/2007

15.	Sri Sanjoy Chakraborty	44	Secretary of an NGO	No. 397/2007
16.	Sri Prabal Raha	40	Social worker	No. 391/2007
17.	Sri Tripurari (S.P.)	39	D.C. Central	No. 345/2007
18.	Sri R. Ranjit	38	D.M., Jalpaiguri, W.B.	No. 340/2007

5. Since all the appellants were proceeded for criminal contempt under the Act, it is useful to refer the relevant provisions applicable for disposal of these appeals. Section 2 (c) of the Act defines "criminal contempt" which reads as under:

> "2.(c) "criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which-
>
> (i) scandalizes or tends to scandalize, or lowers or tends to lower the authority of, any court; or
>
> (ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or
>
> (iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner;"

Section 12 of the Act provides punishment for contempt of court. The procedure to be followed has been dealt with in the Calcutta High Court Contempt of Courts Rules, 1975. It is settled law that the law of contempt must be strictly interpreted and complied with before any person can be committed for contempt.

6. In *Muthu Karuppan vs. Parithi Ilamvazhuthi & Anr.,* AIR 2011 SC 1645 = (2011) 5 SCC 496, this Court, while considering the criminal contempt held that the court should be satisfied that there is a reasonable foundation for the charge and further held that the punishment cannot be imposed on

mere probabilities and the court can not punish the alleged contemnor without any foundation merely on conjectures and surmises. How the criminal contempt has to be proceeded with has been explained in para 9, which reads as follows:

> **"9.** The contempt proceedings being quasi-criminal in nature, burden and standard of proof is the same as required in criminal cases. The charges have to be framed as per the statutory rules framed for the purpose and proved beyond reasonable doubt keeping in mind that the alleged contemnor is entitled to the benefit of doubt. Law does not permit imposing any punishment in contempt proceedings on mere probabilities, equally, the court cannot punish the alleged contemnor without any foundation merely on conjectures and surmises. As observed above, the contempt proceeding being quasi-criminal in nature require strict adherence to the procedure prescribed under the rules applicable in such proceedings."

In para 23, it was further held that any deviation from the prescribed Rules should not be accepted or condoned lightly and must be deemed to be fatal to the proceedings taken to initiate action for contempt.

7. With this background, let us analyse whether the appellants have committed criminal contempt in terms of Section 2(c) of the Act and whether the High Court is justified in imposing simple imprisonment for a term of six months with a fine of Rs. 2,000/- each and, in default, to further undergo simple imprisonment for one month.

8. The impugned order of the Division Bench shows that these appellants were punished for criminal contempt not only on the ground that they prevented the Judicial Officers including the District Judge and other staff members from entering into the District Court at Jalpaiguri, but also on the ground of alleged serious lapses/inaction on their part. It is useful to refer the findings recorded by the Division Bench regarding the role and

part played by the appellants which are as under:-

> "We, therefore, unhesitantly come to the conclusion that the Director-General of the Police, the District Magistrate of the District, the District Superintendent of the Police and the Inspector-in-charge of the local Police Station have committed not only the Criminal Contempt of the Judges Court in the District of Jalpaiguri by deliberately taking no action against the agitators resulting in interference with due Administration of Justice in the said District and at the same time the Director-General of Police has in addition to that also committed further contempt of this Court by disobeying the order of the then Chief Justice to take immediate step for restoration of the function of Judiciary in the said District.
>
> We disbelieve the statements of the three Officers of the District Administration that the learned District Judge never sought for Police assistance and on the other hand, supported the agitators. In his affidavit, the District Magistrate was constrained to admit that at least on January 10, 2007 the learned District Judge-in-Charge in writing asked for his assistance but in spite of such fact, he did not find any time to take appropriate step till January 15, 2007, the day on which we issued the Rules and directed the Chief Secretary to take appropriate step for restoration of the functions of Judiciary in the District. Moreover, the fact that a G.D. was lodged complaining obstruction to the entry of the employees of the Court was sufficient for taking action to see the Judiciary could function in the District in accordance with the Constitution of India and further request for Police help at the instance of the learned District Judge was unnecessary. The justification sought to be given that the agitation was peaceful was insignificant in the fact of the present case in view of the fact that the question of "breach of peace" arises if there is a resistance at the instance of an opposition group. The Judges are not expected to wrestle with those agitators by taking the law in their own hands of the purpose of entering the Court premises. They complied with the law of the land by drawing attention of the local Police by lodging a G.D. through an employee of the Court and at the same time, it has been well established from the materials on record that the local administration was quite alive to the situation that due to the purported "Satyagraha" by staging agitation and raising a rostrum at the main entrance gate of the Court premises, there was interference with due Administration of Justice and in such circumstances, it was the duty of the local administration to take step of their own once they found commission of a cognizable offence."

9. As stated in the earlier paras, a Committee constituted of some local persons, who were active in public life, along with the lawyers at Jalpaiguri, had passed certain resolutions to stage Satyagrah for the formation of High Court Circuit Bench in front of the District Court at Jalpaiguri. As a follow-up action, the Members of the Committee put their resolution into action on 15.12.2006 outside one of the two gates of the District Court premises that is the main gate and put up a rostrum there on which a number of persons started sitting in Satyagrah.

10. It is the stand of the police that on being aware of the said resolution of the Committee, on 15.12.2006, a police picket consisting of three officers and four constables was deployed under Sub-inspector Dilip Kumar Sen at the place of Satyagrah to watch and monitor the law and order situation. It was pointed out that the Sub-inspector Dilip Kumar Sen noted the above details in the General Diary (GD) of Kotwali P.S., under GDE No. 899 dated 15.12.2006 recording that the Judicial Officers and the staff of the District Court had arrived at the court premises, but they were persuaded by the members of the Committee not to enter into the Court. The officer has also recorded that the Judicial Officers did not ask

the police for help to enter into the court. Mr. Rohtagi, learned senior counsel appearing for the appellant- Anup Bhushan Vohra, former Director General of Police in Criminal Appeal No. 339 of 2007 has brought to our notice a true extract of GD entry made on 15.12.2006 under GDE No. 899 which reads as under:-

> "It is important to add here that each of the Judges and Magistrates (total of 11) of the said District Court are provided with one armed policemen and two other security guards as normal security to enable them to fulfill the duties of their office: i.e. the Judges and Magistrates of the District Court always had 27 security guards including 9 armed guards."

The further information relates to GD entry made on 19.12.2006 under GDE No. 1152, in which the S.I. detailed for duty at the District Court recorded that with force he was present at the main gate of the court premises and at 1050 hrs. when some of the Judicial Officers had arrived at the main gate of the District Court, they were requested "with folded hands" by the agitating Members of the Committee not to enter into the court. The Judicial Officers, thereafter, returned back. The S.I. and his force were standing at the spot, but there was no order/request by the Judicial Officers for help to enter into the court. It is also pointed out that in all those days, there was no pushing or cajoling, no threatening gestures made, no law and order problem and no circumstance was created for the police to interfere using force.

11. Apart from the GD entries made in those dates, similar effect GD entries were made at the local police station by the concerned police officials who were detailed with force for duty at the District Court on 22.12.2006, 26.12.2006, 27.12.2006, 31.12.2006, 02.01.2007 and 05.01.2007 under GDE Nos. 1338, 1620, 1690, 1916, 91 and 275 respectively. All those GD entries are placed before us in the form of annexures. By pointing out these details, learned senior counsel appearing for

the appellants pointed out that there was no intimation by the High Court till 05.01.2007. They also highlighted that at no point of time, there was any law and order problem and there was no coercion exercised by any of those conducting Satyagrah. On every single day from 15.12.2006 to 05.01.2007, whenever Judicial Officers of the District Court, Jalpaiguri attempted to enter into the Court premises, they were requested by the persons sitting in Satyagrah not to enter the court premises and thereupon the Judges and the officials and the staff voluntarily complied with and went back.

12. From the materials placed on record, it is seen that only on 05.01.2007, the Registrar General of the Calcutta High Court, for the first time, spoke over phone to Shri Anup Bhushan Vohra, DGP to enquire whether he knew about the problem which was "deteriorating" as no work was taking place in the Court at Jalpaiguri. In the affidavit filed by Mr. Vohra, it is stated that the Registrar General then handed over the phone to the then Chief Justice of the High Court - Hon'ble Mr. Justice V.S. Sirpurkar, who directed him to "keep the situation under watch". The affidavit further shows that the appellant Vohra assured the then Hon'ble Chief Justice that he would speak to the Superintendent of Police, Jalpaiguri and the Home Secretary of the State. According to him, as assured to the then Chief Justice, he informed both the officers. He also mentioned that this was not done in writing, but orally over phone to Mr. Prasad Ray, Home Secretary and Mr. Tripurari, Superintendent of Police, Jalpaiguri. The assertion of the DGP in the form of an affidavit shows that there was no order by the then Hon'ble Chief Justice either on the administrative side or on the judicial side but only over phone he was asked to watch the situation and, in turn, he also assured him as well as intimated the same to the Home Secretary and Superintendent of Police, Jalpaiguri. In those circumstances and in view of the the materials placed by the DGP, the conclusion of the Division Bench that there was an "order" by the then Chief Justice is factually incorrect.

13. It is brought to our notice that for the first time, that is, on 09.01.2007, the District Judge communicated to the Registrar General of the High Court regarding cessation of work by the Members of the Local Bar Association, Jalpaiguri and the Committee for Circuit Bench of the High Court at Calcutta. The contents of the said letter are also relevant, which reads as under:

"To
The Registrar General,
High Court, Appellate Side,
Calcutta.

Dated : the 9th January, 2007.

Sub: Cease work by the members of the Local Bar Association, Jalpaiguri and Samannyay Committee for Circuit Bench of the Hon'ble Court at Calcutta.

Sir,

With due respect, I am to inform that today i.e., on 9.1.07 I, along with all Judicial Officers, had been to the Court but at the entrance gate of the Court premises we were obstructed to enter into the premises.

I held discussion with the agitating members and insisted that we should be allowed to enter into the premises for smooth functioning of the judicial administration but it was impressed by the agitating members of the Samannyay Committee, mainly, along with member of local bar that when the door for discussion is open we should communicate the Hon'ble Court that the impasse can only be resolved by discussion from and on behalf of the Hon'ble Court. The agitating members did not agree to my proposal to allow us to enter into the premises

The recent resolution, enclosed herewith, will show that they have taken up different agitation programs till

15.1.07 copy of which is enclosed herewith. When persuasion failed, we have come to the chamber and office of the District Judge at his bungalow where all the members of the office staff have also came.

This is for your information and we are soliciting necessary instruction from your honour's end.

Yours faithfully,
(S. Bhattacharjee)

Add District Judge, 1st Court and District Judge-in-Charge, Jalpaiguri.

Memo No. 17/G Dated: 9.1.07.

Copy forwarded to the Superintendent of Police, Jalpaiguri, for information and necessary action.

Sd/-(S. Bhattacharjee)

Add District Judge, 1st Court and District Judge-in-Charge, Jalpaiguri."

It was highlighted that no immediate response was received by the District Judge from the Registrar General, particularly, as to the contents of his letter.

14. However, on 10.01.2007, it was pointed out that for the first time the Addl. District Judge/District Judge-in-Charge Mr. S. Bhattacharjee, wrote directly to the District Magistrate Mr. R. Ranjit (appellant in Criminal Appeal No. 340 of 2007) requesting him to look into the matter and make endeavour to resolve the crisis so that the Judges could enter into the court premises to discharge their functions. The GD entry made on 10.01.2007 under No. 614 recorded that police force was present at the main gate of the District Court from 1000 hrs. to 1300 hrs. and the Judicial Officers had come in some vehicles and after talking to the Members of the Committee, who with

folded hands requested them not to enter into the court, they left the place. It was emphasised that even on this day, there was no request from the Judicial Officers to the police to help them enter into the court.

15. The GD entry made on 13.01.2007 under No. 795 was pressed into service which shows that a strong police arrangement was made at the District Court where Shri T.K. Das Addl. Superintendent of Police (HQ), Shri Swapan Kumar Das, Dy. Superintendent of Police (HQ) and Shri David Ivan Lepcha had supervised the duty and Shri Ashok Das, Executive Magistrate, was also present. It was pointed out that in the afternoon of 13.01.2007, the District Magistrate, the Superintendent of Police and other officers convened a meeting at the Circuit House with the Members of the Committee and had told them in no uncertain terms that administration will not wait for any "amicable settlement" any further and would resort to applying force on 15.01.2007 to ensure proper functioning of the court. This was conveyed over phone to the District Judge and it was also informed to him that heavy police arrangement would again be made on 15.01.2007 onwards to ensure that Judges and Magistrates may enter into the court without any hindrance. This was also stated in the GD Entry No. 961 dated 15.01.2007. When the Addl. District Judge/District Judge-in-Charge arrived at the court gate at 1030 hrs., he was requested by the Addl. SP to enter into the court premises, but after seeing a large gathering of the Members of the Committee and their sympathisers, the District Judge decided not to enter the court and returned back. It was recorded in the said GD entry that the Members of the Committee and their sympathisers were successfully persuaded to remove the rostrum from the gate of the court premises, which they themselves removed. The court gate was opened by 1530 hrs., and the District Judge was also intimated about the same. Apart from the above information, it was also pointed out that between 15.12.2006, the day from which the Committee started agitation to15.01.2007 when they called off the agitation, all bail/custody matters were dealt with

by the Judges/Magistrates at their official residences in Jalpaiguri, arrested accused persons were produced by the police before them and in total 192 such cases were dealt with by the Magistrates at their residences during the said period, namely, 15.12.2006 to 15.01.2007.

16. Apart from the above details, Mr. Vohra has also highlighted that he was informed of the importance of the situation only on 05.01.2007 and no specific information/report was received before this date from any State or Central Government Agency or officer about the same. He asserted that he acted promptly on or after 05.01.2007, briefing the Home Secretary of the State, Superintendent of Police, Jalpaiguri.

17. In the meantime, it was pointed out that the then Chief Justice of the High Court, Hon'ble Mr. Justice V.S. Sirpurkar was elevated to the Supreme Court and he took oath on 12.01.2007 and on 15.01.2007, the then Acting Chief Justice - Mr. Justice Bhaskar Bhattacharya, sitting in a Bench Suo Motu issued two Rules to the following effect.

> "The learned Registrar General of this Court has drawn attention of this Court to the fact that due to agitation started by the "Circuit Bench 'O' Sarbik Unnyayan Dabi Adyay Samannaya Committee, Jalpaiguri," the Judicial Officers in the District of Jalpaiguri including the learned District Judge, Jalpaiguri, are unable to enter into the Court premises from December 15, 2006.
>
> Office of the learned District Judge immediately drew attention of such fact to the Inspector-in-charge, Kotwali Police Station, Jalpaiguri Sadar, but no action was taken. Subsequently, the learned District Judge brought the matter to the notice of the learned Registrar General of this Court, who in terms of the order by the then Hon'ble Chief Justice of this Court, instructed the learned District Judge to ask the Superintendent of Police, Jalpaiguri to take immediate action, so that the Judicial Officers can enter

into the Court premises for doing their duties.

Although the learned District Judge, Jalpaiguri conveyed the decision of this Court to the Superintendent of Police, Jalpaiguri, so that the Judicial Officers can enter into the Court building and function, the Superintendent of Police, Jalpaiguri paid deaf ears to the request of the learned District Judge. Subsequently, the learned District Judge was directed to approach the District Magistrate of the District, so that the judiciary in the District can function. In spite of such communication, no action was taken from the end of the District Magistrate, Jalpaiguri.

It appears from the note given by the learned Registrar General of this Court, that on January 5, 2007, the then Hon'ble Chief Justice of this Court directed the Director General of Police, West Bengal over phone to ensure proper functioning of the Jalpaiguri Court by taking effective steps without further delay and as a follow up action, the learned Registrar General also talked to the Director General of Police, West Bengal and enquired as to what effective steps had been taken for bringing back the normal situation, so that the learned District Judge's Court could function properly.

The Director General of Police, however, informed the learned Registrar General of this Court that he would take up the matter with the Home Secretary, Government of West Bengal and in the meantime, the learned District Judge, Jalpaiguri should be asked to write to the District Magistrate, Jalpaiguri requesting him to take steps for ensuring proper functioning of the Courts in Jalpaiguri with a copy to the Superintendent of Police, Jalpaiguri.

As pointed out earlier, in spite of written communication given by the learned District Judge to the District Magistrate, Jalpaiguri, till today the Judges in the District Judge's Court at Jalpaiguri are unable to enter into

the Court building.

It appears from the various papers submitted by the learned District Judge through fax message to the learned Registrar General of this Court that the "Circuit Bench 'O' Sarbik Unnayayan Dabi Adyay Samannaya Committee, Jalpaiguri" took a resolution of obstructing the ingress and egress to the Court building by various resolutions taken from time to time. From the resolution allegedly taken on December 23, 2006 which has been sent to the learned Registrar General of this Court by the learned District Judge concerned, it appears that in a meeting held at Nababbari premises the following persons participated and unanimously took a resolution to continue with the agitation:

(1) Sri Mukulesh Sanyal, President;

(2) Sri Sri Jiten Das, Ex. M.P. (C.P.M.);

(3) Sri Sri Debaprasad Roy, M.L.A. (Congress);

(4) Smt. Pratima Bagchi (R.S.P.):

(5) Sri Prabal Saha (Forward Block);

(6) Sri Pabitra Bhattacharyya (C.P.I.);

(7) Sri Somenath Pal (T.M.C.);

(8) Sri Amal Roy (C.P.I.M.L.);

(9) Sri Subhas Kumar Dutta, C.P.I.M.L. (Liberation);

(10) Sri Rabindra Lal Chakraborty (B.J.P.);

(11) Sri Chittaq De (Convenor, Co-ordination Committee of Plantation Works);

(12) Sri Sadhan Bose (Merchant Association);

(13) Sri Sarnarendra Prasad Biswas (North Bengal Chamber of Commerce);

(14) Sri Biswajit Das (Federation of Chamber of Commerce, Siliguri);

(15) Sri Sanjoy Chakraborty (Jalpaiguri Welfare Organisation).

It further appears from the resolution of the meeting dated December 18, 2006 of the said "Jalpaiguri 'O' Sarbik Unnyayan Dabi Adyay Samannaya Committee" that one Sri Benoy Kanta Bhowmick, presided over as President, supported the said illegal act of the Committee.

In our view, the aforesaid act on the part of those persons abovenamed, acting on behalf of the said Committee, has resulted in constitutional breakdown in the District of Jalpaiguri, as a result, the citizens of Jalpaiguri District are immensely prejudiced and such act interferes with and obstructs administration of justice in the said District.

We are also prima facie convinced that inaction on the part of the Director General of Police, West Bengal, District Magistrate, Jalpaiguri, the Superintendent of Police, Jalpaiguri and I.C., Kotwali Police Station, Jalpaiguri Sadar amounts to aiding and abetting the members of the said Committee, as a result of which, the judiciary is unable to function in that District for the last one month and all those persons are prima facie guilty of criminal contempt of a serious nature.

Accordingly, let a **Rule of contempt** be issued calling upon all those 15 persons and Sri Benoy Kanta Bhowrnick, abovenamed, to show cause why they should not be penalised or otherwise dealt with for committing criminal contempt as defined in Section 2(c) of the Contempt of Courts Act, 1971 by creating impediment in

functioning the judiciary in the District of Jalpaiguri for the last one month by restraining the Judicial Officers from entering into the Court building.

Similarly, **a Rule be also issued** upon the Director General of Police, West Bengal, District Magistrate, Jalpaiguri, Superintendent of Police, Jalpaiguri, Inspector-in-charge, Kotwali Police Station, Jalpaiguri Sadar to show cause why they should not be penalised or otherwise dealt with for aiding and abetting the aforesaid criminal contempt by remaining as silent spectators in spite of repeated directions not only given by the learned District Judge of the District, but also by the learned Registrar General and the former Hon'ble Chief Justice of this Court.

Let these Rules be immediately served upon all the concerns through the Chief Secretary, Government of West Bengal by tomorrow.

The Chief Secretary, Government of West Bengal, is directed to communicate to this Court what action the District Administration or the State Administration has taken for removing the impediments creating by those persons.

Having regard to the serious nature of a criminal contempt prima facie found by this Court, we direct the Chief Secretary, Government of West Bengal to see that in course of this day proper step is taken, so that the learned District Judge and all the Judicial Officers including the staff of the District Court may enter into the building and function normally.

The Chief Secretary will further ensure that no obstruction takes place in the matter of proper functioning of the Court in any part of the said District.

Office is directed to see that this order is

communicated to the Chief Secretary, Government of West Bengal by 2 p.m. of this day.

Let Rules be also issued by the office in course of this day.

The Rules are returnable on January 19, 2007 at 10.30 a.m.

On the returnable date, the alleged contemnors above named are directed to be present in Court at 10.30 a.m."

18. Pursuant to the issuance of the above Rules, the DGP-Mr. Vohra and other three officials of the State Government i.e., the District Magistrate, Superintendent of Police and Inspector in-Charge, Kotwali P.S. Jalpaiguri also filed separate affidavits highlighting their stand. Apart from the affidavit filed by the Inspector in-Charge of Kotwali P.S., copies of the entries made in the GD (which we referred in the earlier paras) maintained at the said P.S. were annexed to the affidavit.

19. It is further seen that all the officials including the DGP were examined by the High Court while hearing the contempt petition and their depositions were recorded. We were also taken through their depositions and these were mostly in the nature of cross-examination. Learned senior counsel appearing for the DGP has highlighted even the copies of fax messages sent by the District Judge to the Registrar General of the High Court on various dates which were supplied to him after cross examination by the court. Even otherwise, as rightly pointed out that in none of the fax messages, the Judges/Magistrates had requested the police for help to neither enter into the court nor do the fax messages record that they went back to their residences voluntarily on being requested by the agitators. The impugned order of the High Court also shows that apart from the official witnesses, the other parties were also heard on

16.02.2007 by the Bench and ultimately the impugned order was passed on 02.03.2007 convicting the appellants for criminal contempt of court and sentencing them to simple imprisonment for a term of six months with a fine of Rs. 2,000/- each.

20. Though the High Court has concluded that the above-mentioned government officials had "aided and abetted" the perpetrators to agitation, as rightly pointed out by the learned senior counsel for the appellants, there is no material/basis for such conclusion. We have already pointed out that from the GD entries on various dates, i.e., from 15.12.2006 till 15.01.2007, on all working days, whenever the Judicial Officers reach the main gate of the District Court, the organisers made a request with folded hands not to enter into the court premises and by their persuasion, the Judicial Officers returned to their homes. We have also noted that on any day neither the District Judge nor any other Judicial Officers directed the District Magistrate or the police officers present in the premises to remove all those persons. On the other hand, till the agitation was called off on 15.01.2007, the agitation was entirely peaceful and there was no law and order problem, sufficient police force was stationed and that the Members of the Committee and their sympathisers kept requesting the District Judge/Magistrates and the officials and staff with folded hands not to enter the courts in view of their demand for establishment of the High Court Circuit Bench and the District Judge/Judicial Officers and the staff voluntarily returned home and did not ask the police to help them get into the court premises. We have already pointed out the assertion made in the form of an affidavit by the DGP - Mr. Vohra that when the then Chief Justice (Hon'ble Mr. Justice V.S. Sirpurkar) talked to him over phone, he did not order or direct him to remove the agitators by force but only directed him "to monitor the situation". There is no contra assertion or statement from the side of the High Court through Registrar General, who was supposed to be present when the then Hon'ble Chief Justice discussed with the DGP over phone.

21. We are conscious of the fact that it is the responsibility of the State Administration to see that courts function on all working days without any hindrance. The administration of justice should never be stalled at the instance of anyone including the members of the bar even for any cause. However, we have already noted that though the said Committee started Satyagrah in front of the District Court as early as on 15.12.2006 till 05.01.2007, no request from the District Judge or from the Registrar General for removal of rostrum put up in front of the gate and clearing the agitators/satyagrahis who comprises not only members of the bar, legislature, NGOs, persons from media and representatives from different walks of life was made. We have already observed that there is no reason to disbelieve the assertion of the DGP Mr. Vohra about the conversation made by the then Hon'ble Chief Justice and it is the definite case of the DGP that he was asked "to monitor the situation" and "keep a watch over the development". He asserted that there was no direction either from the then Chief Justice or from the Registrar General for taking appropriate action against the agitators.

22. We are also satisfied that in none of the fax messages sent by the District Judge to the Registrar General, there was even a whisper that the Judges at the District Court had asked for any police help and there was no grievance that police help was not made available to the Judges. In the facts and materials placed and demonstrated, we are of the view that the conclusion of the High Court that the appellants, more particularly, government officials were responsible for "aiding and abetting the agitators by non-action" cannot be accepted.

23. We are also satisfied from the materials placed that the police force was present at the gate of the District Court on all days except Sundays and holidays to supervise law and order situation and to assist the Judges and Judicial Officers, the fact remains that the District Judge and the Judicial Officers never asked for any police help for their entry into the court

premises on all days starting from 15.12.2006 ending with 15.01.2007 and all of them acceded to the humble request made by the agitators and returned home. It is true that on 10.01.2007, the District Judge and the Judicial Officers requested the District Magistrate to take sincere efforts to resolve the crisis so that they may enter into the court premises and discharge judicial functions.

24. Another aspect with which we are unable to accept the conclusion of the Division Bench relates to the fact that fax messages were sent from the office of the District Magistrate. On this assumption, the Division Bench concluded that the District Magistrate himself had knowledge about the content of the fax messages. It was explained that fax messages we e sent from one of the nine fax machines installed at differen rooms at the premises of the Office of the District Magistrate and, as rightly pointed out, this does not necessarily mean that the District Magistrate had knowledge about the matter of the contents. Merely because the fax machines available at the office of the District Magistrate were utilised, it cannot be presumed that the District Magistrate could have noted the contents. The said assumption cannot be accepted without any further material.

25. It is true that several litigants might have suffered due to the non-functioning of the courts, however, it is brought to our notice that the concerned Magistrates were holding court at their residences and chambers to deal with all urgent matters and 192 cases were dealt with by different Magistrates during the period 15.12.2006 to 15.01.2007.

26. We are also satisfied that there was no wrongful restraint on the Judges and Judicial Officers of the District Court as is evident from the GD entries wherein it was recorded that the Judges and Judicial Officers had acceded to the request of the agitators and restrained themselves from entering the court premises though police force was present at the spot to facilitate their entry as and when directed.

27. Though the Division Bench recorded a finding in the impugned judgment that because of the obstruction, the administration of justice in the District Court, Jalpaiguri was obstructed for a month in spite of specific request of District Judge, it was brought to our notice (which we have already noted in the earlier paras) that the District Judge for the first time on 10.01.2007 had communicated to the District Magistrate with a request to make endeavour to resolve the crisis and even in that communication there was no mention of using police force to remove the agitators by force. It is also evident that Judges of the District Court wanted a peaceful solution and without use of force although in the fax messages sent by the District Magistrate to the Registrar General, it was complained that the Judges in the District Court were not allowed to enter into the court premises.

28. We are also satisfied that there is no acceptable material in holding that the officials committed criminal contempt of the Judges in the District of Jalpaiguri by deliberately taking no action against the agitators resulting in interference with the due administration of justice. If we analyse the entire materials including their statements, affidavits, GD entries, fax messages, correspondence between District Judge and Registrar General and District Magistrate, it cannot be concluded that the officials deliberately abstained from taking any action against the agitators.

29. As mentioned above, in the absence of any order either on the judicial side by the then Chief Justice or any communication and direction through the Registrar General and in view of the assertion of DGP in the form of an affidavit about the conversation made by the then Chief Justice and himself, the contrary conclusion arrived at by the Division Bench holding that the DGP has disobeyed the order of the then Chief Justice to take immediate step for restoration of functioning of the judiciary in the District cannot be accepted.

30. In a matter of this nature, when the agitation started

on 15.12.2006 by way of a Committee comprising persons from different walks of life including members of the bar, media, business community, NGOs, elected representatives etc, it is but proper for the High Court to intervene at the earliest point of time by sending Administrative/Port-folio Judge or the Registrar General to the spot. Such recourse was admittedly not resorted to. Till 05.01.2007, no communication or any effort was made by the Registrar General to the District administration, particularly, officers concerned and to the District Magistrate. Even the District Judge did not make any request or issued directions for removal of the agitators who were conducting Satyagrah in a peaceful manner. We have already pointed out that every day on their request, all the Judicial Officers returned home to avoid any confrontation with the members of the bar and the Committee comprising persons from different walks of life.

31. In the earlier part of our order, we have highlighted that the allegations against all the appellants relate to criminal contempt. Though the High Court has heard certain officials, it is the grievance of the appellants that proper procedure was not followed in all their cases. In other words, "fair procedure" provided for "criminal contempt" had not been adhered to by the High Court. It is also their grievance that even no formal charge was framed. Inasmuch as the matter pertains to criminal contempt, the issue is to be proved beyond reasonable doubt. Admittedly, the District Judge did not file any affidavit highlighting his stand and steps taken, if any, even after knowing the claim of the appellants, particularly, with reference to the various GD entries and their specific stand. We are also satisfied that that charge against the criminal contempt has not been made out in the manner known to law.

32. It is also brought to our notice that all the appellants filed separate affidavits explaining their stand and tendered unconditional apology at the earliest point of time. Considering the nature of the demand which, according to them, the High Court itself has passed a resolution acceding for the formation

of the High Court Circuit Bench at Jalpaiguri and other relevant materials, the Division Bench ought to have accepted the affidavits tendering apology. In fact, the explanation to sub-section (1) of Section 12 of the Act enables the court to accept the apology if the same is bona fide and discharge the accused accordingly. Unfortunately, even such recourse was not followed by the High Court. In appropriate case, the acceptability of unconditional apology and regret has been explained by this Court in O.P. Sharma & Ors. vs. High Court of Punjab & Haryana, 2011 (5) Scale 518 = (2011) 6 SCC 86. Considering the fact that the members of the bar who misbehaved with the court by raising slogans and realizing their mistake, dignity of the court and conduct of the legal profession tendered unconditional apology first before the Judge before whom the unfortunate incident had occurred, before the High Court where suo motu contempt was initiated and before this Court by filing affidavits. Expressing unconditional apology and regret with an undertaking that they would maintain good behaviour in future and if the same is at the earliest point of time and bona fide, the Courts have to accept the same. In view of the language used in "proviso" and "explanation" appended to Section 12(1) of the Act, this Court accepted the affidavits filed by all the appellants in *O.P. Sharma* (supra) and discharged all of them from the charges leveled against them.

33. In *Vishram Singh Raghubanshi vs. State of Uttar Pradesh,* (2011) 7 SCC 776, this Court reiterated the principles laid down in O.P. Sharma (supra) with regard to tendering unconditional apology and acceptance of the same.

34. Finally, it is worthwhile to refer to a Full Bench decision of the Bombay High Court in *Mohandas Karamchand Gandhi and Anr.,* AIR 1920 Bombay 175. It was an appeal filed against Mohandas Karamchand Gandhi and Mahadev Haribhai Desai, who were the Editor and Publisher respectively of a newspaper called 'Young India'. They were charged with contempt of Court for publishing in that newspaper, on 6th August, 1919, a letter

dated 22nd April, 1919 written by the District Judge of Ahmedabad to the Registrar of the High Court and also with publishing comments on that letter. The gist of the charge was that the letter in question was a private official letter forming part of certain proceedings then pending in this Court and that the comments which both of them made in their newspaper were comments on that pending case. Ultimately, this Court, after stating that the same ought not to have been published, reprimanded them. Though we are not concerned about the factual details and the ultimate decision, the following observation relating to power of the Court in contempt proceedings and how the same to be applied had been reiterated at page 180 which reads as under:

> "……We have large powers and, in appropriate cases, can commit offenders to prison for such period as we think fit and can impose fines of such amount as we may judge right. But just as our powers are large, so ought we, I think, to use them with discretion and with moderation remembering that the only object we have in view is to enforce the due administration of justice for the public benefit."

35. It is not in dispute that all the appellants have filed separate affidavits tendering unconditional apology at the earliest point of time before the High Court. We are satisfied that no case has been made out for criminal contempt against the appellants and there is nothing wrong in accepting their unconditional apology and request which was made at the earliest point of time.

36. Keeping the above principles and factual details as mentioned in earlier paras in mind, we pass the following order:

In view of the above discussion and abundant materials, we are satisfied that in this suo motu proceeding, the High Court has not made out a case to punish all the appellants under

"criminal contempt" in terms of Section 2 (c) read with Section 12 of the Act. We were informed that the appellant-Mukulesh Sanyal in Criminal Appeal No. 395 0f 2007 and appellant-Smt. Pratima Bagchi in Criminal Appeal No. 399 of 2007 have been reported dead. Thus these two appeals filed by them stand abated. The conviction and sentence on the other appellants are set aside and all of them are discharged from the charges leveled against them. All the appeals are allowed.

B.B.B. Appeals allowed.

SUPREME COURT BAR ASSOCIATION AND OTHERS
v.
B.D. KAUSHIK
(CIVIL APPEAL NO. 3401 OF 2003)

SEPTEMBER 26, 2011

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

Code of Civil Procedure, 1908 – Order 39 Rules 1 and 2 r/w s.151 – Rules and Regulations of Supreme Court Bar Association (SCBA) – Eligibility of the members to contest and vote at the SCBA elections –Amended rule – Validity of – In the General Body Meeting of SCBA, convened on February 18, 2003, resolution proposing amendment in Rule 18 of the Rules and Regulations of the SCBA projecting the principle of "One Bar One Vote" was put to vote and was passed by majority – Respondents, two members of the SCBA, filed civil suits challenging the validity of the resolution – They also filed applications u/Order 39 Rules 1 and 2 r/w s.151 of CPC to restrain the defendants-appellants from implementing the said Resolution till final disposal of the suits – Civil Judge allowed the applications by an interim order – Interim order challenged – Held: The concept of voting introduced by amendment of Rule 18 of the Rules and Regulations of the SCBA cannot be regarded as illegal or unconstitutional – The right to vote is not an absolute right – Right to vote or to contest election is neither a Fundamental Right nor a common law right, but it is purely a statutory right governed by statute/ rules/regulations – The right to contest an election and to vote can always be restricted or abridged, if statute/ rules or regulations prescribe so – In the case on hand, it cannot be said that limitations/ restrictions on the exercise of right to vote and contest the elections amounted to altering and/or amending and/ or changing Aims and Objects of the SCBA – The impugned Rule only prescribed the eligibility or made a person ineligible in the circumstances

stated therein which was in the nature of a reasonable restriction – The restriction on the right to vote of a member was provided with an avowed object of better welfare and convenience of those advocates, who are regularly practicing in Supreme Court and who are directly concerned with its day-to-day affairs – Such restriction in fact subserves Article 145 of the Constitution and other statutory provisions relating to advocates – The provision in the SCBA Rules for prescribing eligibility to vote at only one of the associations, i.e., "One Bar One Vote" was a prescription which was in furtherance of the right to form association and be able to manage the affairs of the association by those who regularly practice in the courts of which the association is formed and of which the members are regular practitioners – The amended Rule 18 did not take away right to vote completely but put restrictions to promote and protect the privileges, interest and prestige of the SCBA – Rule 18 was also amended to promote and maintain high standards of profession amongst Members of the Bar – Having regard to the objects of amendment of Rule 18, it is clear that the Civil Judge should not have granted the injunction as claimed by the plaintiffs/respondents for mere asking – The amendment made in Rule 18 was legal and valid and no right of the advocates, who filed the suits, was infringed or was violated – Guidelines/directions given by Supreme Court for effective implementation of the amended rule – Societies Registration Act, 1860 – s.12 – Constitution of India, 1950 – Arts. 136, 142 and 145.

Advocates/Legal Profession – Bar Association – Purpose of – Held: A Bar Association in a court is formed for the purpose of seeing that all lawyers practicing normally and regularly in that court work under one umbrella and be in a position to interact with the Judges or officials of that court for any grievance through their elected body because individual lawyers are not supposed nor it is proper for them to interact with the Judges so as to preserve and secure the independence of judiciary.

Interim order – Held: Interim relief, which has tendency to allow the final relief claimed in the proceedings, should not be granted lightly.

Appellant no.1-Supreme Court Bar Association (SCBA) is a Society registered under the Societies Registration Act, 1860 having its Registered Office in the Supreme Court premises at New Delhi. In exercise of powers under the provisions of the Societies Registration Act, 1860, the SCBA had framed its Memorandum of Association and Rules and Regulations.

A requisition signed by 343 Members of the SCBA was received in the Office of the SCBA whereby an amendment was sought in Rule 18 of the Rules and Regulations of SCBA regarding the eligibility of the members to contest and vote at the SCBA elections. It was proposed that a member, who exercises his right to vote in any High Court or District Court, Advocates'/Bar Association, shall not be eligible to contest for any post of the SCBA or to cast his vote at the elections. It was further proposed that every member before casting his vote shall in a prescribed form give a declaration that he is not voting in any other election of advocates in the High Court/District Court Bar Association and also that if such a declaration is found to be false, it shall entail automatic suspension of the member giving such false declaration from membership of SCBA for a period of three years. The requisition was considered in the Executive Committee meeting and it was decided to hold a special General Body Meeting to consider the requisition. On February 18, 2003 the General Body Meeting was convened wherein the resolution proposing amendment in Rule 18 of the Rules was put to vote. It was passed by majority of 85% of the members present and voting. Thus the resolution "One Bar One Vote", was adopted in the General Body Meeting dated February 18, 2003.

Respondents, who were members of the SCBA, filed civil suits challenging the validity of resolution dated February 18, 2003 and *inter alia* also prayed for a decree of perpetual injunction restraining the SCBA and its Office Bearers from implementing the said Resolution in the elections of SCBA, which were proposed to be held on April 25, 2003. The respondents also filed applications under Order 39 Rules 1 and 2 read with Section 151 of the CPC to restrain the defendants-appellants, from implementing the Resolution dated February 18, 2003 till the final disposal of the suits. By an interim order, the Civil Judge allowed the said applications. The said interim order passed by the Civil Judge was challenged in the present appeals.

Disposing of the appeals, the Court

HELD:1. No person can be enrolled as an advocate on the roll of more than one State Bar Council. A citizen of India is entitled to cast his vote at an election of Legislative Assembly or an election of M.P. only in the constituency where his name appears as a voter in the voting list and he cannot claim right to vote at another place where he may be residing because of his occupation, service, etc. Thus "one person one vote" is recognized statutorily since long. Viewed in the light of these facts, the concept of voting introduced by amendment of Rule 18 of the Rules and Regulations of the SCBA cannot be regarded as illegal or unconstitutional. The right to vote is not an absolute right. Right to vote or to contest election is neither a Fundamental Right nor a common law right, but it is purely a statutory right governed by statute/ rules/ regulations. The right to contest an election and to vote can always be restricted or abridged, if statute/ rules or regulations prescribe so. Voting right restrictions also existed in Rule 18 and 18A before Rule 18 was amended. By amendment a further restriction is imposed by the

Resolution adopted in the General Body Meeting. [Para 15] [764-F-H; 765-A-B]

2. The argument that by the said amendment of Rule 18, the Aims and Objects of the SCBA are amended without prior approval of the Registrar of Societies and, therefore, the same is illegal, cannot be accepted. The substance and purpose of the amendment made in Rule 18 of the Rules and Regulations of the SCBA cannot be lost sight of. It does not affect any of the aims and objectives of the SCBA. On the contrary, it promotes and protects privileges, interest and prestige of the SCBA. There is no manner of doubt that the amended Rule 18 promotes union and cooperation among the advocates practicing in this Court and this is one of the prime aims and objectives of forming the SCBA. The SCBA exists for the purpose of promoting the interest of the Supreme Court of India as well as that of advocates regularly practicing in the Court and not of the advocates, who are not regularly practicing in the Court. [Para 16] [765-C-F]

3. The restrictions placed on right of voting can hardly be regarded as altering or amending Aims and Objects of SCBA. The basic principle underlying the amendment of Rule 18 is that those advocates who are not practicing regularly in this Court cannot be permitted to take over the affairs of the SCBA nor on ransom. One of the Aims and Objects of the SCBA is to promote and protect the privileges, interest and prestige of the Association whereas another objective is to promote and maintain high standards of profession among members of the Bar. To achieve these objectives Rule 18 is amended. It is wrong to hold that limitations/restrictions on the exercise of right to vote and contest the elections amount to altering and/or amending and/ or changing Aims and Objects of the SCBA and this could not have been done without the consent of Registrar as provided in Societies Registration Act, 1860. [Para 17] [765-G-H; 766-A-B]

4. The Civil Judge decreed the suit partially by granting injunction without adjudicating rival claims of the parties. Interim relief, which has tendency to allow the final relief claimed in the proceedings, should not be granted lightly. The relief granted by the Judge at the interim stage was not warranted by the facts of the case at all. [Para 20] [768-A-C]

5. In any Body governed by democratic principles, no member has a right to claim an injunction so as to stall the formation of the Governing Body of the Association. No such right exists in election matters since exercise of a right conferred by a rule is always subject to the qualifications prescribed and limitations imposed thereunder. The contention of the respondents that the amendment to Rule whereunder the right to be eligible to contest for any post for the Association or the eligibility to cast the vote at the election, takes away the right completely, is misconceived since by the amendment the right is not taken away but is preserved subject to certain restrictions on its exercise and this could always be done. [Para 22] [769-C-E]

6. What the impugned Rule does is that it only declares the eligibility of a member to contest and vote and does not take away ipso facto the right to vote. The impugned Rule only prescribes the eligibility or makes a person ineligible in the circumstances stated therein which is the nature of a reasonable restriction as the right to vote is neither a common law right nor Fundamental Right but a statutory right prescribed by the statute. The impugned clause in the Rule is not the only clause prescribing ineligibility to vote as there are other eligibility conditions or ineligibility restrictions within Rule 18, which may also make a person ineligible to vote. The challenge, therefore, to this ineligibility of filing a declaration not to vote at the elections to any other Bar

Association is erroneous in law. If a person is the member of several associations of advocates and wants to participate in the affairs of different associations of which he/she is a member, he/she may not be in a position to be really involved in the affairs of all associations of which he/she is the member. A person who is a member of more than one association would form a different class than the person who is a member of only one association of lawyers, particularly, the association of the Court in which he/she regularly practices. Though an advocate can be member of several associations, the right to form an association or be a member of an association does not necessarily include the right to vote at every such association's General Body Meeting or election meetings and the rules of the association can circumscribe the voting rights of members of such association by prescribing eligibility and ineligibility. It is an admitted position that SCBA today has temporary members who do not have a right to vote. Similarly, non-active members and associate members do not have a right to vote. Thus, these are all reasonable restrictions which have been prescribed and are not open to challenge as there is no Fundamental Right to vote. After all a Bar Association in a court is formed for the purpose of seeing that all lawyers practicing normally and regularly in that court work under one umbrella and be in a position to interact with the Judges or officials of that court for any grievance through their elected body because individual lawyers are not supposed nor it is proper for them to interact with the Judges so as to preserve and secure the independence of judiciary. [Para 23] [769-F-H; 770-A-F]

7. The restriction on the right to vote of a member is provided with an avowed object of better welfare and convenience of those advocates, who are regularly practicing in this Court and who are directly concerned

with day-to-day affairs of the Supreme Court. Such restriction in fact subserves Article 145 of the Constitution and other statutory provisions relating to advocates. As right to vote is not an absolute right recognized in common law and is always subject to the statute/Rules creating such rights, it is equally well settled that the exercise of such right could always be subject to the provisions of the Statute/Rules creating it. Under the circumstances, the contention advanced by the respondents that their right to vote was either curtailed or abridged should not have been lightly accepted by the Judge. [Para 24] [770-G-H; 771-A-D]

8. The right to form an association is recognized as a Fundamental Right under Article 19(1)(c) of the Constitution. The provision in the SCBA Rules for prescribing eligibility to vote at only one of the associations, i.e., "One Bar One Vote" is a prescription which is in furtherance of the right to form association and be able to manage the affairs of the association by those who regularly practice in the courts of which the association is formed and of which the members are regular practitioners. It will not be out of place to mention that a person having become ineligible to vote because of having voted at another association election does not (a) lose the membership of the association nor (b) is in any way hampered or restricted in the use of other facilities, which the association provides to its members such as library, canteen, telecommunication, car parking, etc. Having regard to the aims and objects as set out in the Memorandum of Association, it is evident that one of the primary objectives of formation of the association was to have a Body of Advocates who are attached to and practicing in the Supreme Court of India. [Para 25] [771-E-H; 772-A-B]

Smt. Damyanti Naranga v. The Union of India and others

(1971) 1 SCC 678; *Zoroastrian Cooperative Housing Society Ltd. and others v. District Registrar, Cooperative Societies (Urban) and others* **(2005) 5 SCC 632 – referred to.**

9. In matters of internal management of an association, the courts normally do not interfere, leaving it open to the association and its members to frame a particular bye-law, rule or regulation which may provide for eligibility and or qualification for the membership and/or providing for limitations/restrictions on the exercise of any right by and as a member of the said association. It is well settled legal proposition that once a person becomes a member of the association, such a person looses his individuality qua the association and he has no individual rights except those given to him by the rules and regulations and/or bye-laws of the association. [Para 26] [773-D-F]

10. The amended Rule 18 has not taken away right to vote completely but has put restrictions to promote and protect the privileges, interest and prestige of the SCBA. Rule 18 was also amended to promote and maintain high standards of profession amongst Members of the Bar. Having regard to the objects of amendment of Rule 18, it is clear that the Civil Judge should not have granted the injunction as claimed by the plaintiffs/respondents for mere asking. [Para 27] [773-G-H; 774-A]

11. The power to amend Rules is specifically conferred under Rule 39 whereunder it is provided that the Rules and the bye-laws of the Association shall be subject to such conditions and/or modifications, as may from time to time, by resolution passed by at least 2/3rd of the Members present and voting at the General Body Meeting. Therefore, any part of the Rules could always be amended. SCBA being a Society registered under the Societies Registration Act, is governed by its Memorandum of Association. The said Association is

entitled to have its own Rules and Regulations. In fact, it is contemplated in the Act that a Committee of management can be constituted to manage the affairs of the Society as specified in the Rules and Regulations. The Memorandum of Association is a contract amongst the members of the Society, which though required to be registered under the Statute, does not acquire any statutory character. These are rules which govern internal control and management of the Society. The authority to frame, amend, vary and rescind such rules, undoubtedly, vests in the General Body of the Members of the Society. The power to amend the rules is implicit in the power to frame rules. [Para 29] [774-E-H; 775-A]

12.1. The record produced by the SCBA before this Court indicates that the meeting in which the amendment was carried out in Rule 18 was held in accordance with Rule 22 because it was a Special General Meeting. The holding of meetings including Special General Meeting is governed by Rules 21, 22 and 23. In terms of these Rules, notice by post has to go to non-resident members and to resident members only if request in writing is made to the Secretary that notices should be sent to him by post at his registered address, otherwise, notice by affixation on notice board and by circulating the notice, normally done with cause list is sufficient notice. The record does not indicate at all that any of the plaintiffs/respondents had given any notice to the Secretary of SCBA that he should be informed individually by a notice in writing of holding of any meeting by sending it at his registered address. There is weighty reason as to why notice by affixation on the notice board and by circulating the notice with cause list should be regarded as sufficient notice. This is obviously so because advocate members normally practicing in this Court would be made aware by these methods of notice. Thus the ground of improper holding of the meeting or lack of service of notice upon

the plaintiffs/respondents are devoid of merits and could not have been taken into consideration while granting injunction claimed by them. [Para 30] [775-B-C; 777-B-F]

12.2. The plaintiffs/respondents who were seeking to challenge the impugned Rule which prescribed an eligibility clause to enable them to vote, have candidly admitted that they are not regular practitioners of the Supreme Court nor do they attend the Supreme Court on regular basis nor are aware of the circulars circulated by the SCBA or pasted on the information board of the SCBA. This is something which has been totally overlooked by the trial court in arriving at a conclusion in favour of the plaintiffs/respondents without examining the true and correct import of Rule 23 of the Rules, which prescribes the method of giving notice of the meeting. There is no manner of doubt that the trial court has committed an error in coming to the conclusion that in any case individual notice was required to be given when the rule does not warrant giving of any such individual notice. [Para 31] [778-C-F]

13. Since 1952 this Court has authoritatively laid down that once election process has started the courts should not ordinarily interfere with the said process by way of granting injunction. The injunction granted by the Judge has propensity to intervene and interfere with election process which had already started. If the injunction granted by the Judge had not been stayed by this Court, the office bearers of the SCBA would have been required to prepare a new voters list as if unamended Rule 18 was in operation and the exercise undertaken by them for preparing voters list in the light of the amended Rule 18 would have been of no consequence. Thus the injunction claimed by the plaintiffs/respondents which had very wide repercussions on the elections, which were to be held in the year 2003, should not have been granted by the

Judge. [Para 33] [778-H; 779-A-D]

14. The impugned order is also liable to be set aside on yet another ground. Though the suits were not filed in a representative capacity, the injunction was granted by the court restraining the appellants from implementing the resolution dated February 18, 2003 in respect of all advocates and not in respect of two advocates only who have filed the Civil Suits. In the plaint, individual rights to vote at the election of the Executive Committee of SCBA was claimed. Even if extremely good case was made out by the plaintiffs/respondents of the two suits, the relief could have been confined only to the two plaintiffs/ respondents and a relief granting blanket injunction restraining the appellants from implementing the Resolution dated February 18, 2003 amending Rule 18 of the Rules and Regulations of SCBA till the final disposal of the suits could not have been granted. [Para 34] [779-E-H; 780-A]

15.1. Having regard to the over all conditions prevailing in SCBA, this Court proposes to give appropriate directions for implementation of the amended rule which projects the principle of "One Bar One Vote". [Para 37] [790-B]

15.2. Enrolment of advocates not practicing regularly in the Supreme Court is inconsistent with the main aim and object of the SCBA, no court can provide chambers or other facilities for such outside advocates, who are not regular practitioners. Neither the SCBA nor the court can deal with them effectively if they commit any wrong. The power of this Court to make certain rules, regulations and give directions to fill up the vacuum till such time appropriate steps in order to cover the gap are taken, is recognized and upheld in several reported decisions of this Court. Moreover, this Court, has framed Supreme Court Rules, 1966 in exercise of powers under Article

145(1)(a) of the Constitution regulating amongst other things advocates who are entitled to practice in this Court. Further, necessary directions/guidelines can always be issued when facilities and privileges are conferred on the members of the SCBA. Thus not only power to give necessary guidelines/directions is available under Articles 136, 142, 145(1)(a) of the Constitution but such power can also be exercised as "Grantor" of the benefits and privileges which are enjoyed by the members of the SCBA to restore its dignity. [Para 37] [788-E-G; 789-G-H; 780-A-B]

15.3. Under the circumstances this Court directs under Article 136 of the Constitution read with Article 142 of the Constitution that criteria adopted by this Court for allotment of chambers, as mentioned in Allotment of Lawyers' Chambers Rules, and as explained in *Vinay Balchandra Joshi* shall be adopted by the SCBA and its office bearers to identify regular practitioners in this Court. To identify regular practitioners in this Court, it would be open to the office bearers of SCBA or a small committee, which may be appointed by the SCBA consisting of three senior advocates, to collect information about those members who had contested election in any of the Court annexed Bar Association, viz., High Court Bar Association, District Court Bar Association, Taluka Bar Association, Tribunal Bar Association and Quasi-judicial Bar Associations like BIFR, AIFR, CAT, etc. from 2005 to 2010. If such an information is sought by the office bearers of SCBA or the Committee appointed by it, the same shall be supplied invariably and without fail by the Court annexed Bar Associations mentioned earlier. The committee of SCBA to be appointed is hereby directed to prepare a list of regular members practicing in this Court and another separate list of members not regularly practicing in this Court and third list of temporary members of the SCBA.

These lists are directed to be put up on the SCBA website and also on the SCBA notice board. A letter is directed to be sent by the SCBA to each member of SCBA informing him about his status of membership on or before February 28, 2012. The aggrieved member would be entitled to make a representation within 15 days from the date of receipt of letter from the S.C.B.A. to the Committee, which is to be appointed by the SCBA to identify regular practitioners stating in writing, whether personal hearing before the Committee is required or not. If such a request is made the concerned member shall be heard by the Committee. The representation/s shall be considered and the decision would be rendered thereon by the aforesaid Committee on or before April 30, 2012. The decision of that Committee shall be communicated to the member concerned but the decision shall be final, conclusive and binding on the member of the SCBA. Thereafter, final list of regular practitioners of this Court shall be displayed by S.C.B.A. [Para 38] [710-E-H; 711-A-E]

15.4. After preparation of the final list of the regular practitioners, each member shall give a written intimation to the S.C.B.A. whether he is a member of another Court annexed Bar. It shall be mandatory for a member, whose name is included in the said list, to give a permanent declaration that he would vote only in the SCBA and would not vote in any of the elections of any High Court Bar Association or District Bar Association or Taluka Bar Association or Tribunal Bar Association or Quasi-judicial Bar Associations like BIFR, AIFR, CAT, etc. A copy of this declaration shall be put up/displayed on the website of the SCBA as well as on the notice board of the SCBA. The information about having filed such a declaration shall be sent to all the Bar Associations where the said advocate is a member. Once such a declaration has been given, it will be valid till it is revoked and once it is

revoked a member shall forfeit his right to vote or contest any election to any post to be conducted by the SCBA, for a period of three years from the date of revocation. [Para 38] [791-F-H; 792-A-B]

15.5. The members of the SCBA, whose names do not figure in the final list of regular practitioners, shall not be entitled to either vote at an election of the office bearers of the SCBA or to contest any of the posts for which elections would be held by the S.C.B.A. [Para 39] [792-C]

15.6. This Court suggests that to ensure strict compliance with the directions issued by this judgment, an Implementation Committee consisting of three senior advocates may be constituted. The SCBA has suggested names of three senior advocates practicing in this Court be appointed as members of the said Implementation Committee. This Court recommends that the said three senior counsel be considered by the SCBA for being appointed as members of the said Committee subject to their consent and convenience. [Para 40] [792-D-E]

Vinay Balchandra Joshi v. Registrar General of Supreme Court of India **(1998) 7 SCC 461 and *Vineet Narain v. Union of India* (1998) 1 SCC 226 – referred to.**

16. In view of the findings that the amendment made in Rule 18 is legal and valid and that no right of the advocates, who have filed the suits, is infringed or is violated, this Court directs the trial court to take up the two suits immediately for hearing and to dismiss/ dispose of the two suits pending on its file in the light of the observations made by this Court in this judgment. [Para 41] [792-F-H]

Case Law Reference:

(1971) 1 SCC 678	referred to	Para 25

(2005) 5 SCC 632	**referred to**	**Para 25**
(1998) 7 SCC 461	**referred to**	**Para 36**
(1998) 1 SCC 226	**referred to**	**Para 37**
(1998) 7 SCC 461	**referred to**	**Para 38**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3401 of 2003.

From the Judgment & Order dated 5.4.2003 of the Court of Civil Judge, Delhi in Civil Suit No. 101 of 2003.

WITH

C.A. No. 3402 of 2003.

Harin P. Raval, ASG, Ranjit Kr. P.P. Rao and P.H. Parekh, Anil Katiyar, Anando Mukherjee, Harsh N. Parekh, Sushil Kr. Jain, K.C. Kaushik, V.K. Biju, Rajesh Aggarwal, Gaurav, Vibhu Misra, Vishal Prasad, Ritika Sethi, Mridul Aggarwal for the Appellant.

Dinesh Kumar Garg, B.S. Billowria, Ritu Puri, Sanjeev Tayal, Abhishek Garg, Dhananjay Garg and Caveator-in-person for the Respondent.

The Judgment of the Court was delivered by

J.M. PANCHAL, J. 1. Since common issues for determination are involved in Civil Appeal No. 3401 of 2003 and Civil Appeal No. 3402 of 2003, this Court proposes to dispose them of by this common judgment.

2. Civil Appeal No. 3401 of 2003 is filed by three appellants, i.e., (1) Supreme Court Bar Association (Registered), through its Honorary Secretary Mr. Ashok Arora, (2) Shri Ashok Arora, Honorary Secretary of Supreme Court Bar Association and (3) Ms. Sunita B. Rao, Coordinator, Implementation Committee, Supreme Court Bar Association (for short "SCBA"), Tilak Marg, New Delhi. It is directed against

interim order dated April 5, 2003, passed by learned Civil Judge, Delhi below application filed under Order 39 Rules 1 and 2 read with Section 151 of Civil Procedure Code (CPC) filed in Civil Suit No. 101 of 2003. Civil Appeal No. 3402 of 2003 is filed by Supreme Court Bar Association through its Honorary Secretary against interim order dated April 5, 2003, passed by the learned Civil Judge below application filed under Order 39 Rules 1 and 2 read with Section 151, CPC, filed in Civil Suit No. 101 of 2003. By the common order, the appellants are restrained from implementing the resolution dated February 18, 2003 amending Rule 18 of the Rules and Regulations of SCBA till the final disposal of both the suits.

3. The respondent in Civil Appeal No. 3401 of 2003 is Shri B.D. Kaushik whereas the respondent in Civil Appeal No. 3402 of 2003 is Shri A.K. Manchanda. Both the respondents are the advocates practicing in Delhi. They are members of SCBA, Delhi High Court Bar Association, Delhi Bar Association, Tis Hazari Courts, Delhi, etc. The appellant No. 1, i.e., Supreme Court Bar Association is a Society registered on August 25, 1999 under the Societies Registration Act, 1860 and its Registration No. is 35478 of 1999. The Registered Office of the Association is in Supreme Court premises at New Delhi. The provisions of the Societies Registration Act, 1860 empower a society to frame Memorandum of Association and Rules and Regulations. In exercise of those powers the Association has framed Memorandum of Association of the SCBA as also the Rules and Regulations. The aims and objectives of the Association are specified in Clause 3 of the Memorandum of Association, which are as under: -

> "3.AIMS AND OBJECTIVES: The Aims and Objectives of the association are:
>
> (i) To promote upholding of rule of law;
>
> (ii) To encourage profession of law in India;

(iii) To promote and protect the privileges, interest and prestige of the association and to promote union and cooperation among the advocates practicing in the court and other associations and advocates;

(iv) To promote and maintain high standards of profession among members of the Bar;

(v) To establish and maintain an adequate library for the use of the members and to provide other facilities and convenience to the members;

(vi) To watch the state of law, progress of legislation and administration of justice and to take such steps as may be necessary for their progress and reform;

(vii) To express opinion on proposed legislation and other matters of interest and to make representation in respect thereof;

(viii) To take necessary steps to prevent and remedy any abuse of law or mal-administration of justice;

(ix) To make representation from time to time to the authorities on matters affecting the Bar;

(x) To acquire and safeguard the rights and privileges necessary or convenient for the purpose of the association;

(xi) To arrange for raising funds for legal aid and to do everything including applying of funds that may be necessary to that end;

(xii) To promote and participate in All India Lawyers' Association and activities connected therewith;

(xiii) To adopt all such matters as might be necessary or incidental to the carrying out of the aforesaid objects;

(xiv) To take measures including founding and applying of funds for aid to deserving members of the association and its employees;

(xv) To conduct and hold seminars, symposia, conference on issues and topics of interest to the legal profession and to disseminate information in this behalf; and

(xvi) To promote the welfare of the members of the association."

The Rules and Regulations framed by the Association are known as Rules and Regulations of Supreme Court Bar Association. Rule 3 of the Rules and Regulations defines certain phrases. Rule 3(i) defines 'Association' to mean the Supreme Court Bar Association. There are four classes of Members as specified in Rule 4. They are (i) Resident Members, (ii) Non-resident Members, (iii) Associate Members, and (iv) Non-Active Members. As per Rule 3(ii) 'Associate Member' means an association of advocates practicing in a High Court or Judicial Commissioner's Court and enrolled as such a Member. Rule 3(iv) defines the term 'Committee' to mean Executive Committee of the Bar Association whereas Rule 3(v) defines the word 'Court' to mean the Supreme Court of India. The term 'Member' is defined in Rule 3(vi) to mean a member of Association. Sub-rule (vi)(a) of Rule 3, which was inserted by resolution of Special General Body Meeting dated September 9, 2010 retrospectively with effect from September 14, 2009, defines 'Temporary Member' to mean a member other than a member within the meaning of Rule 3(vi). 'Non-Active Member' is defined in Rule 3(viii) to mean a Member whose name is kept on the list of Members notwithstanding he has accepted an office of profit disentitling him to practice. The phrase 'Resident Member' is defined in Rule 3(ix) to mean a member residing and practicing as an advocate in Delhi or its suburbs. Rule 5 of the Rules and Regulations deals with fees, admission and subscription.

Rule 5(v)(a) provides that in terms of Rule 5 an applicant found to be suitable to be made a member of the Association, will be made a member, initially on temporary basis for a period of two years. It further provides that a person so made a member on temporary basis will be identified as temporary member and such temporary member will be entitled to avail the facilities of the Association such as library and canteen etc., but he will not have a right to participate in general meetings as prescribed in Rule 21 or to contest and vote at the elections as provided in Rule 18 and to be issued a Library Card. Explanation appended to Rule 5(v)(b) makes it clear that 'suitable' means a person applying must fulfill all the criteria listed in the Rules and Regulations of the Association, viz., Rule 5(v) and also satisfy the requirements prescribed in the prescribed form. As per Rule 5(v)(c) at the end of two years period from the date of approval of temporary membership by the Executive Committee, if such temporary member pays SCBA dues without any default during such period and produces the proof of either of the following of requirements before the Executive Committee, his name would be considered for being made a regular Member of the Association – (i) appearance in Supreme Court as lead counsel in at least five matters in each year of the two years period, or (ii) appearance in Supreme Court as a junior advocate appearing with any senior advocate/advocate-on record in at least twenty matters in each year of the two years period, (iii) only such of the temporary members on satisfying the above requirements at the end of two years period would be made a member of the Association with an entitlement to all the privileges of the Association including the right to contest and vote and Library Card etc., else, he/she shall continue to remain a temporary member till such time he/she fulfills these conditions.

4.A requisition dated January 10, 2003 signed by 343 Members was received in the Office of the SCBA on January 23, 2003. By the said requisition an amendment was sought

in Rule 18 regarding the eligibility of the members to contest and vote at an election. It was proposed that the member, who exercises his right to vote in any High Court or District Court, Advocates'/Bar Association, shall not be eligible to contest for any post of the SCBA or to cast his vote at the elections. It was further proposed that every member before casting his vote shall in a prescribed form give a declaration that he is not voting in any other election of advocates in the High Court/District Court Bar Association. It was also proposed that if such a declaration is found to be false, it shall entail automatic suspension of the member giving such false declaration from membership of SCBA for a period of three years. The requisition dated January 10, 2003 was considered in the Executive Committee meeting held on February 1, 2003 and it was decided to hold a special General Body Meeting on February 18, 2003 to consider the requisition. Rule 22 of the Rules and Regulations of SCBA provides that the Executive Committee may call a General Body Meeting on seven days' notice to the members whereas Rule 23 stipulates the manner in which notice of meeting has to be given to a member. Accordingly notices for the aforesaid General Body Meeting were issued by the SCBA on February 6, 2003. The notices were sent to the members along with the cause list. The notice was also displayed on the notice board of the Office of the SCBA situated at Supreme Court premises. The notices were also sent to different Bar Associations at Delhi including the Delhi Bar Association. On February 18, 2003 the General Body Meeting was convened wherein more than 278 Members had participated. Mr. Ved Sharma and Mr. Rajiv Khosla, Office Bearers/Members of the District/Delhi Bar Association had participated and had spoken against the resolution in the General Body Meeting. After due deliberations and discussion, the resolution proposing amendment in Rule 18 of the Rules was put to vote. It was passed by majority of 85% of the members present and voting. Thereafter, a meeting of the Executive Committee was convened on March 3, 2003. In the said meeting it was resolved to hold election of the Office

Bearers/Executive Members for the next session and for the constitution of Election Committee. It was further resolved to hold election on April 25, 2003. An election Committee of three members of the SCBA was constituted for the purposes of conducting election. Further in the said meeting a requisition signed by 237 Members of SCBA to recall resolution dated February 18, 2003 was considered and dealt with. It was decided to defer the consideration of the said resolution in view of the fact that elections were declared. Moreover, in the meeting of the Executive Committee held on March 10, 2003 it was resolved to constitute an Implementation Committee to implement the resolution "One Bar One Vote", which was adopted in the General Body Meeting dated February 18, 2003. The notices of the election and about formation of the Implementation Committee were sent to the Members of the Bar Association on March 11, 2003 again along with the cause list and conveyed also by displaying the same on the notice board of the SCBA. On March 13, 2003, meeting of the Implementation Committee was held and the declaration form was finalized and programme for implementation was also decided. The notices regarding declaration form were again issued on March 25, 2003. Meanwhile, Mr. B.D. Kaushik, who is one of the members of the SCBA as well as a member of the High Court Bar Association, Delhi Bar Association, Tis Hazari Courts, filed Suit No. 100 of 2003 in the Court of Shri Sanjeev Jain, Commercial Civil Judge, Delhi, challenging validity of resolution dated February 18, 2003. He has sought a decree declaring that Resolution dated February 18, 2003, passed by the General Body Meeting of SCBA inserting Rule 18-III, is illegal and ineffective. He had also prayed for a decree of perpetual injunction restraining the SCBA and its Office Bearers from implementing the Resolution dated February 18, 2003 in the elections of SCBA, which were proposed to be held on April 25, 2003. Further, the prayer to restrain the SCBA and its election officers from debarring any of the members of the SCBA, who had already paid their subscription from casting their votes in the ensuing elections was also sought. Mr. A.K.

Manchanda, another member of the SCBA, filed suit No. 101 of 2003 in the Court of Shri Sanjeev Jain, Commercial Civil Judge, Delhi, seeking the reliefs which were sought by Mr. B.D. Kaushik in his suit No. 100 of 2003.

5. Mr. B.D. Kaushik and Mr. A.K. Manchanda, the plaintiffs in Suit Nos. 100 of 2003 and 101 of 2003 respectively, filed applications under Order 39 Rules 1 and 2 read with Section 151 of the Code of Civil Procedure to restrain the defendants, who are appellants herein, from implementing the Resolution dated February 18, 2003 till the final disposal of the suits. Both the applications were taken up together for hearing by the learned Judge. The learned Judge disposed of those applications seeking temporary injunction by common order dated April 5, 2003. By the said common order the applications filed by the plaintiffs under Order 39 Rules 1 and 2 were allowed and the appellants were restrained from implementing the Resolution dated February 18, 2003 amending Rule 18 of the Rules and Regulations of the SCBA till the final disposal of the suits. As the injunction granted by the learned Judge had far reaching repercussions, the appellants straightway approached this Court by filing Special Leave Petition No. D-7644 of 2003 against order dated April 5, 2003 in Suit No. 100 of 2003, passed by the learned Civil Judge, Delhi. The SCBA also filed Special leave Petition No. D-7645 of 2003 against order dated April 5, 2003 in Suit No. 101 of 2003. The matters were placed before this Court in mentioning list on April 10, 2003. This Court had heard the then learned Attorney General and other learned senior advocates practicing in this Court. The matters were taken on Board and straightway leave was granted. Pending proceedings, stay of the common order passed by the trial court was also granted. It was made clear that if any elections were held, the same shall be subject to the result of these appeals. It was also clarified that the order shall be effective notwithstanding any other order made by any court or authority in any other proceedings filed or yet to be filed. On leave being granted Special Leave Petition No. D-7644 of 2003 is

numbered as Civil Appeal No. 3401 of 2003 whereas Special Leave Petition No. D-7645 of 2003 is numbered as Civil Appeal No. 3402 of 2003.

6. This Court had appointed Mr. Ranjit Kumar, learned senior counsel practicing in this Court, as Amicus Curie to assist the Court in the matters. This Court has also requested learned Attorney General Mr. Goolam Vahanvati to express his views in the matters and to assist the Court. Accordingly, this Court has heard learned Attorney General as well as learned senior counsel Mr. Ranjit Kumar. The Court has also heard Mr. Rajesh Aggarwal, who has appeared on behalf of the appellants as well as Mr. Dinesh Kumar Garg, learned advocate who appeared on behalf of the original plaintiffs. This being a matter, which affects the learned advocates practicing in this Court, the Court has also heard learned senior counsel Mr. P.P. Rao, former President of SCBA, Mr. Pravin Parekh, present President of SCBA and Mr. Sushil Kumar Jain, President of Association of Advocates-on-Record. The Court has considered the Memorandum of Association of SCBA as well as Rules and Regulations of SCBA.

7. It is not disputed by any of the learned advocates appearing in the matters that after stay of common order dated April 5, 2003, passed in Civil Suit No. 100 of 2003 and Civil Suit No. 101 of 2003 was granted by this Court on April 10, 2003, elections of the office bearers of the SCBA have taken place and Rule 18 of the Rules and Regulations, as was amended by the Resolution dated February 18, 2003, has been implemented.

8. Article 145 (1)(a) of the Constitution empowers the Supreme Court to make Rules for regulating generally the practice and procedure of the Court including Rules as to the persons practicing before the Court. In exercise of this constitutional power, the Supreme Court has framed Rules called Supreme Court Rules, 1966. Rule 2(1)(b) provides that an advocate-on-record to be the only person to "act" as well

as to "plead" before this Court. The other two categories of persons, namely, "senior advocate" and "non-advocate-on-record" can only plead, but cannot act on behalf of the client. Their appearances/pleadings in a case before this Court cannot be without an advocate-on-record and without his instructions. Order IV of the Supreme Court Rules, 1966 deals with "advocates". Rule 1 states that subject to the provisions of the Rules only those advocates whose names are entered on the roll of any State Bar Council, maintained under the Advocates Act, 1961, shall be entitled to appear and plead before the Court. As per Rule 2(b) certain restrictions have been placed on senior advocate who is recognized as such under Rule 2(a), mentioning inter-alia that he cannot file a vakalatnama or act in any court or tribunal in India or accept instructions to draw pleadings or affidavits, etc. Explanation (iii) appended to the Order IV defines "junior" to mean an advocate other than a senior advocate. Rule 6(a) provides that an advocate-on-record shall, on his filing a memorandum of appearance on behalf of a party accompanied by a vakalatnama duly executed by the party, is entitled to act as well as to plead for the party in the matter and to conduct and to prosecute before the Court all proceedings that may be taken in respect of the said matter. Clause (b) of Rule 6 mentions that no advocate other than an advocate-on-record shall be entitled to file an appearance or act for a party in the court. Rule 10 of the Rules provides that no advocate other than an advocate-on-record shall appear and plead in any matter unless he is instructed by an advocate-on-record, whereas Rule 12 enables an advocate-on-record or a firm of advocates to employ one or more clerks to attend the registry for presenting or receiving any papers on behalf of the said advocate or firm of advocates. Rule 12(2) mandates that notice of every application for the registration of a clerk shall be given to the Secretary, SCBA, who shall be entitled to bring to the notice of the Registrar within seven days of the receipt of the notice any facts, which, in his opinion, may have a bearing on the suitability of the clerk to be registered. Rule 13(1) requires the Registrar to publish list

of persons proved to his satisfaction by evidence of general repute or otherwise, habitually to act as touts to be known as list of touts. Explanation (b) appended to Rule 13(1) mentions that the passing of a resolution by the SCBA or by High Court Bar Association declaring any person to be tout shall be evidence of general repute of such person for the purpose of this Rule.

9. The Advocates Act, 1961 provides for the creation of different State Bar Councils, whose one or the main function is to admit advocates on its rolls and to promote the growth of Bar Associations for the purpose of effective implementation of the welfare schemes. It further enables the Bar Councils to make their own rules. Section 17 of the Advocates Act provides that every Sate Bar Council shall prepare and maintain roll of advocates. Section 17(4) further states that no person shall be enrolled as an advocate on the roll of more than one State Bar Council. Section 49 of the Advocates Act, 1961 empowers the Bar Council of India to make rules. In exercise of the said power Bar Council of India has framed Rules. Chapter III of Bar Council Rules provides that every advocate shall be under an obligation to ensure that his name appears on the roll of the State Bar Council in whose jurisdiction he ordinarily practices and if that advocate does not apply for transfer of his name to the roll of State Bar Council within whose jurisdiction he ordinarily practices within six months of the start of such practice, it shall be deemed that he is guilty of professional misconduct. Section 34 of the Advocates Act, 1961 also empowers the High Courts to make Rules regarding the advocate practicing in the High Court and courts subordinate thereto.

10. The learned counsel, appearing in the matters, pointed out to the Court that problem of bogus voting in the election of office bearers of SCBA started since the year 1978. According to the learned counsel, in the year 1978, 101 Members contested election for the post of Members of Executive Committee. The grievance made by the learned counsel was that those advocates, who were not regularly practicing in this

Court, were enrolled as Members of the SCBA only to vote at the election of office bearers of the SCBA. According to the learned counsel, the advocates, who have been enrolled as Members of the SCBA are practicing either at Kanpur or at Gurgaon and other courts situated in India, but they never practice in this Court regularly nor are even able to recognize the Hon'ble Judges of this Court. The learned counsel emphasized that those advocates, who are not practicing in this Court and are enrolled as members of the SCBA, have outnumbered the actual practitioners in this Court and do not permit the actual practitioners to be office bearers of the SCBA. Thus the learned advocates appearing in the matters have called upon this Court to consider the problem posed in the appeals in the light of facts mentioned by them.

11. The Supreme Court Bar Association, as the name suggests, is a society primarily meant to promote the welfare of the advocates generally practicing in the Supreme Court. The name, i.e., the Supreme Court Bar Association was formally registered under the Societies Registration Act, 1860 only on August 25, 1999. One of the prime objectives of the SCBA is to establish and maintain adequate library for the use of the members and to provide other facilities and convenience of the members. Thus, the formation of the SCBA is in the nature of aid to the Advocates Act, 1961 and other relevant statutes including Article 145 of the Constitution.

12. There is no manner of doubt that court annexed Bar Associations constitute a separate class different from other lawyers associations such as Lawyers' Forum, All India Advocates' Association, etc. as they are always recognized by the concerned court. Court annexed Bar Associations function as part of the machinery for administration of justice. As is said often, the Bench and Bar are like two wheels of a chariot and one cannot function without the other. The court annexed Bar Associations start with the name of the court as part of the name of the Bar Association concerned. That is why we have Supreme Court Bar Association, Tis Hazari District Court Bar

Association, etc. The very nature of such a Bar Association necessarily means and implies that it is an association representing members regularly practicing in the court and responsible for proper conduct of its members in the court and for ensuring proper assistance to the court. In consideration thereof, the court provides space for office of the association, library and all necessary facilities like chambers at concessional rates for members regularly practicing in the court, parking place, canteen besides several other amenities. In the functions organized by the court annexed Bar Associations the Judges participate and exchange views and ascertain the problems, if any, to solve them and vice-versa. There is thus regular interaction between the members of the Bar Association and the Judges. The regular practitioners are treated as officers of the court and are shown due consideration.

13. Enrolment of advocates not practicing regularly in the court is inconsistent with the main aim and object of the Association. No court can provide chambers or other facilities for such outside advocates, who are not regular practitioners. Neither the Association nor the court can deal with them effectively if they commit any wrong. There are sufficient indications in the Memorandum of Association and the Rules and Regulations of SCBA, which indicate that the Association mainly tries to promote and protect the privileges, interest and prestige of the Association and to promote union and cooperation among the advocates practicing in the court and other associations of advocates. This is quite evident if one refers to sub-clause (iii) of clause (3) of the Aims and Objectives of the Association. It is significant to note that the signatories of the Memorandum of Association, namely, Members of the Executive Committee, whose names are mentioned, are all regular practitioners, who got the Association registered under the Societies Registration Act, 1860. Mr. P.P. Rao, learned senior counsel has given all credit for registration of Association to Shri K.K. Venugopal, one of the senior-most counsel of this Court.

14. Rule 6 of the Rules and Regulations of the SCBA mentions the duties of Members. It inter alia provides that (i) a member shall endeavour to provide full assistance to the court and competent representation to a client, (iii) a member shall not knowingly (a) make a false statement of material fact or of law to the court, (b) shall not seek to influence the court or Judges or officers of the court in any matter by means prohibited by law or by false representation on behalf of his client nor shall such member communicate with such persons ex-parte or engage in conduct intending to bring disrepute to the functioning of the court. Rule 6(iii)(c) provides that a member of the Association shall participate in serving those persons/ groups of persons who are unable to pay all or portion of reasonable fees or who are unable to obtain representation by counsel. Clause (c) of Rule 6(iii) inter alia states that a member may discharge his duty to serve those persons who are unable to pay all or portions of reasonable fees by providing professional services at no fees or at a substantially reduced fee. A member of the Association has to charge reasonable fees from his client which has to be determined on the basis of the time and labour spent over the matter and is not entitled to charge a contingent fee. Thus duties of members contemplate that the members should be regular practitioners in the Supreme Court.

15. As noticed earlier, no person can be enrolled as an advocate on the roll of more than one State Bar Council. A citizen of India is entitled to cast his vote at an election of Legislative Assembly or an election of M.P. only in the constituency where his name appears as a voter in the voting list and he cannot claim right to vote at another place where he may be residing because of his occupation, service, etc. Thus “one person one vote” is recognized statutorily since long. Viewed in the light of these facts, the concept of voting introduced by amendment of Rule 18 of the Rules and Regulations of the SCBA cannot be regarded as illegal or

unconstitutional. It is well settled by catena of reported decisions of this Court that the right to vote is not an absolute right. Right to vote or to contest election is neither a Fundamental Right nor a common law right, but it is purely a statutory right governed by statute/ rules/regulations. The right to contest an election and to vote can always be restricted or abridged, if statute/ rules or regulations prescribe so. Voting right restrictions also existed in Rule 18 and 18A before Rule 18 was amended. By amendment a further restriction is imposed by the Resolution adopted in the General Body Meeting.

16. The argument that by the said amendment of Rule 18 the Aims and Objects of the SCBA are amended without prior approval of the Registrar of Societies and, therefore, the same is illegal, cannot be accepted. The impugned order makes it more than clear that this ground has heavily weighed with the learned Judge in granting the injunction. The substance and purpose of the amendment made in Rule 18 of the Rules and Regulations of the SCBA cannot be lost site of. It does not affect any of the aims and objectives of the SCBA. On the contrary, it promotes and protects privileges, interest and prestige of the SCBA. There is no manner of doubt that the amended Rule 18 promotes union and cooperation among the advocates practicing in this Court and this is one of the prime aims and objectives of forming the SCBA. The SCBA exists for the purpose of promoting the interest of the Supreme Court of India as well as that of advocates regularly practicing in the Court and not of the advocates, who are not regularly practicing in the Court.

17. It has been rightly pointed out by the learned counsel for the appellant that restrictions placed on right of voting can hardly be regarded as altering or amending Aims and Objects of SCBA. The Aims and Objects of SCBA have been enumerated in earlier part of this judgment. The basic principle underlying the amendment of Rule 18 is that those advocates who are not practicing regularly in this Court cannot be permitted to take over the affairs of the SCBA nor on ransom.

One of the Aims and Objects of the SCBA is to promote and protect the privileges, interest and prestige of the Association whereas another objective is to promote and maintain high standards of profession among members of the Bar. To achieve these objectives Rule 18 is amended. It is wrong to hold that limitations/restrictions on the exercise of right to vote and contest the elections amount to altering and/or amending and/ or changing Aims and Objects of the SCBA and this could not have been done without the consent of Registrar as provided in Societies Registration Act, 1860.

18. Section 12 of the Societies Registration Act, 1860 invests a society with the power to frame rules/ regulations to govern the body of any society under the Act, which has been established for any particular purpose or purposes. In built in it is the authority to alter or abridge such power. If such a wide power is conferred including power to alter, amend or abridge the purpose itself, it could never be successfully contended that the power to amend, vary or rescind the rules does not exist in such society.

19. As noticed earlier 'Associate Member' means an association of advocates practicing in a High Court or Judicial Commissioners' Court and enrolled as such a member. As an association of advocates cannot practice in a High Court or Judicial Commissioners' Court, it is obvious that an associate member is a member of association of advocates practicing in a High Court and enrolled as such a Member. The intention, therefore, is obvious that it is only an advocate, who is practicing in a High Court or in a court of Judicial Commissioner and enrolled as a member, who is entitled to the status of an 'Associate Member' for the purpose of the Rules and Regulations of the SCBA. When it comes to the question of voting or contesting for an election, Rule 18(1)(iv) declares that non-active members and associate members shall not have right to vote. It is, therefore, clear that the SCBA is constituted primarily for those advocates who are regularly

practicing in the Supreme Court. Other advocates can become non-resident senior members, non-resident members, associate members and non-active members, but they will not be eligible to vote much less to contest the election. Thus, the amendment in Rule 18 is wholly consistent with the aims and objectives of the SCBA.

20. This Court further finds that in the application filed by the respondents/plaintiffs in each suit under Order 39 Rules 1 and 2 read with Section 151 CPC, injunction against the appellants to restrain them from implementing resolution dated February 18, 2003 amending Rule 18 of the Rules and Regulations of SCBA till the final disposal of the suits, was claimed. A bare perusal of the plaint of Civil Suit No. 100 of 2003 indicates that the respondent has claimed following reliefs in the plaint: -

> "a. A decree of declaration declaring that the resolution dated 18.2.2003 passed by the alleged General Body Meeting of Supreme Court Bar Association amending Rule 18-III is illegal and ineffective;
>
> b. pass a decree of perpetual injunction restraining the defendant No. 1 Association and its office bearers from implementing the resolution dated 18.2.2003 in the ensuing elections of Supreme Court Bar Association proposed to be held on 25.4.2003;
>
> c. This Hon'ble Court may also be pleased to restrain the defendant No. 1 association, its election officer(s) from debarring any of the members of Supreme Court Bar Association who have already paid their subscription from casting their vote in the ensuing elections.
>
> d. Any other proper and further order which this Hon'ble Court deems fit may kindly be passed in favour of the plaintiff and against the defendants."

Thus, the learned Judge has decreed the suit partially by granting injunction without adjudicating rival claims of the parties. This Court in catena of reported decisions has laid down the principle that interim relief, which has tendency to allow the final relief claimed in the proceedings, should not be granted lightly. No special circumstances have been mentioned in the two impugned orders which would justify decreeing the suits at interim stage. The relief granted by the learned Judge at the interim stage was not warranted by the facts of the case at all. Therefore, the impugned orders are also liable to be set aside on this ground.

21. Further, Order 39 Rule 1 deals with cases in which temporary injunction may be granted and inter alia provides that where in any suit it is proved by affidavit or otherwise – (a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, (b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors, (c) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, the Court may, by order, grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale removal or disposition of the property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit as the Court thinks fit until the disposal of the suit or until further orders.

Order 39 Rule 2 deals with injunction to restrain repetition or continuance of breach and inter alia provides that in any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit and either before or after judgment, apply to the court for a temporary injunction to restrain the

defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

As is well-known Section 151 deals with saving of inherent powers of the Court and provides that nothing in Civil Procedure Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

22. It hardly needs to be emphasized that in any Body governed by democratic principles, no member has a right to claim an injunction so as to stall the formation of the Governing Body of the Association. No such right exists in election matters since exercise of a right conferred by a rule is always subject to the qualifications prescribed and limitations imposed thereunder. The contention of the respondents that the amendment to Rule whereunder the right to be eligible to contest for any post for the Association or the eligibility to cast the vote at the election, takes away the right completely, is misconceived since by the amendment the right is not taken away but is preserved subject to certain restrictions on its exercise and this could always be done.

23. It is important to notice that what the impugned Rule does is that it only declares the eligibility of a member to contest and vote and does not take away ipso facto the right to vote. The impugned Rule only prescribes the eligibility or makes a person ineligible in the circumstances stated therein which is the nature of a reasonable restriction as the right to vote is neither a common law right nor Fundamental Right but a statutory right prescribed by the statute as has been held in several reported decisions of this Court. What is necessary to be noticed here is that the impugned clause in the Rule is not the only clause prescribing ineligibility to vote as there are other eligibility conditions or ineligibility restrictions within Rule 18,

which may also make a person ineligible to vote. The challenge, therefore, to this ineligibility of filing a declaration not to vote at the elections to any other Bar Association is erroneous in law. If a person is the member of several associations of advocates and wants to participate in the affairs of different associations of which he/she is a member, he/she may not be in a position to be really involved in the affairs of all associations of which he/she is the member. A person who is a member of more than one association would form a different class than the person who is a member of only one association of lawyers, particularly, the association of the Court in which he/she regularly practices. Though an advocate can be member of several associations, the right to form an association or be a member of an association does not necessarily include the right to vote at every such association's General Body Meeting or election meetings and the rules of the association can circumscribe the voting rights of members of such association by prescribing eligibility and ineligibility. It is an admitted position that SCBA today has temporary members who do not have a right to vote. Similarly, non-active members and associate members do not have a right to vote. Thus, these are all reasonable restrictions which have been prescribed and are not open to challenge as there is no Fundamental Right to vote. After all a Bar Association in a court is formed for the purpose of seeing that all lawyers practicing normally and regularly in that court work under one umbrella and be in a position to interact with the Judges or officials of that court for any grievance through their elected body because individual lawyers are not supposed nor it is proper for them to interact with the Judges so as to preserve and secure the independence of judiciary.

24. The argument of the respondents was that the right to vote available to a member has been infringed or curtailed but this argument does not appear to be correct for the simple reason that though the Rule is couched in a negative language, it preserves the right of a Member to either contest or to cast his vote in the election subject to his exercising an option to

vote only in the SCBA and not in any High Court/District Court Bar Association.

This is amply clear from the amended provision whereunder every member before casting his vote, is required, in the prescribed form, to give a declaration that he has not voted in any other election of any advocates in the High Court/ District Court Bar Association. The restriction on the right to vote of a member is provided with an avowed object of better welfare and convenience of those advocates, who are regularly practicing in this Court and who are directly concerned with day-to-day affairs of the Supreme Court. Such restriction in fact subserves Article 145 of the Constitution and other statutory provisions relating to advocates. As right to vote is not an absolute right recognized in common law and is always subject to the statute/Rules creating such rights, it is equally well settled that the exercise of such right could always be subject to the provisions of the Statute/Rules creating it. Under the circumstances, the contention advanced by the respondents that their right to vote was either curtailed or abridged should not have been lightly accepted by the learned Judge.

25. The right to form an association is recognized as a Fundamental Right under Article 19(1)(c) of the Constitution. The provision in the SCBA Rules for prescribing eligibility to vote at only one of the associations, i.e., "One Bar One Vote" is a prescription which is in furtherance of the right to form association and be able to manage the affairs of the association by those who regularly practice in the courts of which the association is formed and of which the members are regular practitioners. It will not be out of place to mention that a person having become ineligible to vote because of having voted at another association election does not (a) lose the membership of the association nor (b) is in any way hampered or restricted in the use of other facilities, which the association provides to its members such as library, canteen, telecommunication, car parking, etc. Having regard to the aims

and objects as set out in the Memorandum of Association, it is evident that one of the primary objectives of formation of the association was to have a Body of Advocates who are attached to and practicing in the Supreme Court of India. In Smt. Damyanti Naranga vs. The Union of India and others (1971) 1 SCC 678, this Court has authoritatively laid down that the right to form an association necessarily implies that persons forming the association have also the right to continue to be associated with only those whom they voluntarily admit in the association. In *Zoroastrian Cooperative Housing Society Ltd. and others vs. District Registrar, Cooperative Societies (Urban) and others* (2005) 5 SCC 632, in the context of Fundamental Right to form an association excluding others and the right of the Members of the association to keep others out, it has been held in para 17 at page 651 as under: -

> "Section 24 of the Act, no doubt, speaks of open membership, but Section 24(1) makes it clear that open membership is the membership of a person duly qualified therefore under the provisions of the Act, the Rules and the bye-laws of the Society. In other words, Section 24(1) does not contemplate an open membership dehorns the bye-laws of the society. Nor do we find anything in the Act which precludes a society from prescribing a qualification for membership based on a belief, a persuasion or a religion for that matter. Section 30(2) of the Act even places restrictions on the right of a member to transfer his right. In fact, the individual right of the member, Respondent 2, has got submerged in the collective right of the Society. In *State of U.P. v. C.O.D. Chheoki Employees' Coop. Society Ltd.* (1997) 3 SCC 681, this Court after referring to *Daman Singh vs. State of Punjab* (1985) 2 SCC 670, held in para 16 that: (SCC p. 691)
>
> "16. Thus, it is settled law that no citizen has a fundamental right under Article 19(1)(c) to become a member of a cooperative society. His right is governed by the provisions

of the statute. So, the right to become or to continue being a member of the society is a statutory right. On fulfillment of the qualifications prescribed to become a member and for being a member of the society and on admission, he becomes a member. His being a member of the society is subject to the operation of the Act, rules and bye-laws applicable from time to time. A member of the society has no independent right qua the society and it is the society that is entitled to represent as the corporate aggregate. No individual member is entitled to assail the constitutionality of the provisions of the Act, rules and the bye-laws as he has his right under the Act, rules and the bye-laws and is subject to its operation. The stream cannot rise higher than the source."

26. In matters of internal management of an association, the courts normally do not interfere, leaving it open to the association and its members to frame a particular bye-law, rule or regulation which may provide for eligibility and or qualification for the membership and/or providing for limitations/restrictions on the exercise of any right by and as a member of the said association.

It is well settled legal proposition that once a person becomes a member of the association, such a person looses his individuality qua the association and he has no individual rights except those given to him by the rules and regulations and/or bye-laws of the association.

27. It should have been noticed by the learned Judge that the plaintiffs/respondents claimed injunction on the basis that the right to contest and vote in the election of the SCBA had been adversely affected and, therefore, they invoked the provisions of Order 39 Rules 1 and 2 read with Section 151 CPC. The amended Rule 18 has not taken away right to vote completely but has put restrictions to promote and protect the privileges, interest and prestige of the SCBA. Rule 18 was also amended to promote and maintain high standards of

profession amongst Members of the Bar. Having regard to the objects of amendment of Rule 18, this Court is of the opinion that the learned Judge should not have granted the injunction as claimed by the plaintiffs/respondents for mere asking.

28. Originally enacted Rule 18 provided for eligibility of members to contest and vote at/in the elections. An important provision is contained in Rule 18(II)(4) to the effect that non-active members and associate members shall not have the right to vote. In light of the above provisions of the Rules, more particularly, Rule 5(1)(v), the eligibility of every advocate entitled to practice law for being a member of the Supreme Court Bar Association is subject to the provisions of the said Rules. In other words, an absolute right as is sought to be asserted by the plaintiffs/respondents is controlled by conditions, qualifications, disqualifications and restrictions imposed by the said Rules.

29. The power to amend Rules is specifically conferred under Rule 39 whereunder it is provided that the Rules and the bye-laws of the Association shall be subject to such conditions and/or modifications, as may from time to time, by resolution passed by at least 2/3rd of the Members present and voting at the General Body Meeting. Therefore, any part of the Rules could always be amended. As noticed earlier, SCBA being a Society registered under the Societies Registration Act, is governed by its Memorandum of Association. The said Association is entitled to have its own Rules and Regulations. In fact, it is contemplated in the Act that a Committee of management can be constituted to manage the affairs of the Society as specified in the Rules and Regulations. The Memorandum of Association is a contract amongst the members of the Society, which though required to be registered under the Statute, does not acquire any statutory character. These are rules which govern internal control and management of the Society. The authority to frame, amend, vary and rescind such rules, undoubtedly, vests in the General Body of the

Members of the Society. The power to amend the rules is implicit in the power to frame rules.

30. Yet, another ground of attack in the suits filed by the respondents is with reference to notice of meetings and the manner of holding of meetings including Special General Meeting. The record produced by the SCBA before this Court indicates that the meeting in which the amendment was carried out in Rule 18 was held in accordance with Rule 22 because it was a Special General Meeting. The holding of meetings including Special General Meeting is governed by Rules 21, 22 and 23, which read as under: -

"21. MEETINGS

The Annual General Meeting of the Association shall ordinarily be held not later than 15th day of May every year. Not less than 15 days notice shall be given to the members of the Annual General Meeting. The following shall along with other business that may be required to be transacted, be included in the agenda of the Annual General Meeting.

(a) Auditor's Report on the Account and Balance Sheet of Budget estimate;

(b) Report of the Secretary on the activities of the terms which will include report of the work of committee other than the Executive Committee;

(c) The election of the officers of the Association and Members of Executive Committee or other committees and appointment of Auditors;

(d) The approval of the revenue account and the balance sheet of the affairs of the Association as on 31st March of the previous year duly passed.

22. SPECIAL GENERAL MEETING

The Committee may call a General Meeting on 7 days notice to the Members provided that a Special General

Meeting may be called on a shorter notice.

Provided that the Secretary may call an emergent General Meeting on any day by affixing a notice to that effect on the notice board of the Association and circulating the same to the Members as can be conveniently informed.

The Committee shall call a General Meeting or a Special General Meeting upon the requisition given in writing by at least 150 Members of the Association in respect of any matter. The requisition specified the matter or question to be laid before the meeting and shall be addressed to the Secretary. The meeting shall be called not later than 2 weeks after the receipt of such requisition. The quorum at the Annual General Meeting or a General Meeting or a Special General Meeting shall be 50 Members. In absence of such quorum the meeting shall stand adjourned to such a date and time as the Chairman may appoint and for such adjourn meeting no quorum will be necessary.

23. NOTICE OF MEETING

1. The notice of the Annual General Meeting or any of the Special Meeting shall be given by: -

(a) Circulating the notice, to such members as can conveniently be informed in that way;

(b) Sending out such notices by post addressed to every non-resident and associate member and to every resident member who may have required the Secretary to send the notice in this way and has registered his address in the office of the Association;

The notice of the meeting other than the Annual General Meeting shall be given by:

(a) Affixing the notice on the notice board of the Association;

(b) Circulating the notice to such members as may be conveniently informed in that way."

As can be seen from the bare reading of these Rules, notice by post has to go to non-resident members and to resident members only if request in writing is made to the Secretary that notices should be sent to him by post at his registered address, otherwise, notice by affixation on notice board and by circulating the notice, normally done with cause list is sufficient notice. The record does not indicate at all that any of the plaintiffs/respondents had given any notice to the Secretary of SCBA that he should be informed individually by a notice in writing of holding of any meeting by sending it at his registered address. There is weighty reason as to why notice by affixation on the notice board and by circulating the notice with cause list should be regarded as sufficient notice. This is obviously so because advocate members normally practicing in this Court would be made aware by these methods of notice. Thus the ground of improper holding of the meeting or lack of service of notice upon the plaintiffs/respondents are devoid of merits and could not have been taken into consideration while granting injunction claimed by them.

31. On page 2 of the paper book the learned trial judge has mentioned details of the plaint and has categorically stated as under: -

"It is disclosed in the plaint that members of defendant No. 1 are scattered in various parts of the country including Delhi and majority of them do not visit the SCBA office on regular basis."

In para 3 of the plaint it is averred as under: -

"Since all the members including the plaintiff do not visit the Supreme Court and office of the defendant No. 1

Association on regular basis, they do not have an occasion to acquaint themselves about all the notices and circulars put up by the defendant No. 1 Association on its notice boards in the Supreme Court building."

Further, at page 19 of the paper book a finding has been arrived at by the trial court as under: -

"Most of the members do not ordinarily practice in the Supreme Court of India and are members of other association."

In the light of above pleadings, it is quite clear that the plaintiffs/respondents who were seeking to challenge the impugned Rule which prescribed an eligibility clause to enable them to vote, have candidly admitted that they are not regular practitioners of the Supreme Court nor do they attend the Supreme Court on regular basis nor are aware of the circulars circulated by the SCBA or pasted on the information board of the SCBA. This is something which has been totally overlooked by the trial court in arriving at a conclusion in favour of the plaintiffs/respondents without examining the true and correct import of Rule 23 of the Rules, which prescribes the method of giving notice of the meeting. There is no manner of doubt that the trial court has committed an error in coming to the conclusion that in any case individual notice was required to be given when the rule does not warrant giving of any such individual notice.

32. The three reasons indicated by the learned Judge in the impugned orders for grant of injunction are not sustainable at all and, therefore, the impugned orders will have to be set aside.

33. Further, the appellants had rightly pointed out to the learned Judge that election process had already started and, therefore, injunction, as claimed, should not be granted. Since 1952 this Court has authoritatively laid down that once election

process has started the courts should not ordinarily interfere with the said process by way of granting injunction. The argument advanced by the appellants that election process having started, the injunction should not be granted is dealt with by the learned Judge by holding that in the present case the plaintiffs have not prayed for injunction against the election process. This Court has no doubt at all that the injunction granted by the learned Judge has propensity to intervene and interfere with election process which had already started. Apart from the prayers claimed in the applications filed under Order 39 Rules 1 and 2 read with Section 151 CPC the Court could not have ignored the effect of granting an injunction. If the injunction granted by the learned Judge had not been stayed by this Court, the office bearers of the SCBA would have been required to prepare a new voters list as if unamended Rule 18 was in operation and the exercise undertaken by them for preparing voters list in the light of the amended Rule 18 would have been of no consequence. Thus the injunction claimed by the plaintiffs/respondents which had very wide repercussions on the elections, which were to be held in the year 2003, should not have been granted by the learned Judge.

34. The impugned order is also liable to be set aside on yet another ground. Though the suits were not filed in a representative capacity, the injunction is granted by the court restraining the appellants from implementing the resolution dated February 18, 2003 in respect of all advocates and not in respect of two advocates only who have filed Civil Suit Nos. 100 of 2003 and 101 of 2003 respectively. A perusal of the plaint in the two suits makes it more than clear that suits are not filed in a representative capacity. In the plaint, individual rights to vote at the election of the Executive Committee of SCBA is claimed. Even if extremely good case was made out by the plaintiffs/respondents of the two suits, the relief could have been confined only to the two plaintiffs/respondents and a relief granting blanket injunction restraining the appellants from implementing the Resolution dated February 18, 2003

amending Rule 18 of the Rules and Regulations of SCBA till the final disposal of the suits could not have been granted.

35. For all these reasons impugned common order is liable to be set aside and is hereby set aside.

36. Mr. K.K.Venugopal, an august and well-known senior lawyer, who is regularly practicing in this Court since years and was also former President of SCBA at least for three years and who was also Chairman, Interim Board of Management in 2010 when the Executive Committee of the SCBA had dissolved itself and appointed the Interim Board of Management, submitted that the statements of aims and objectives of the SCBA, among others, includes the objective, viz., "to promote and protect the privileges, interest and prestige of the association and to promote union and cooperation among the advocates practicing in the court and other association and advocates". According to the learned counsel, the phrase "to promote union and cooperation among the advocates practicing in the court and other association and advocate" is to promote union and cooperation among the advocates practicing in the Supreme Court, on the one hand, and other advocates or associations of advocates, on the other, which itself indicates that SCBA exists for the advocates practicing "in the court", i.e., Supreme Court of India. The learned counsel explained that SCBA exists for the benefit of the advocates in the Supreme Court of India and SCBA owes a fiduciary duty to such advocates and members of the SCBA for protecting their privileges, interests and prestige. The learned counsel asserted that the SCBA is, therefore, entitled to seek the protection of the Court by invoking Article 142 of the Constitution to ensure that the members practicing in the Supreme Court are not rendered incapable of enjoying, to the full, the privileges and benefits in the Supreme Court of India, which has provided infrastructure and facilities in the nature of libraries, car parking, chambers, canteens, lounges, etc. The learned counsel pointed out that the factual situation, which has been placed before the Court, would

establish that today the membership of the SCBA has risen to an mind-boggling figure of around 10,000, of which only around 2,000 members are regularly practicing in this Court. Informing the Court the learned counsel mentioned that historically, with the advocates regularly practicing in the Supreme Court being inducted as members of the SCBA, the facilities made available by this Court to the members were sufficient for their use, but certain unhealthy practices and vices started creeping in to the system of elections to the various posts/offices of the SCBA by reason of the fact that the office of the President of SCBA carried a vast prestige and status, not merely among lawyers but also among Governments and the political class. It was also stated by the learned counsel that being an office bearer of a member of the Executive Committee of the SCBA also carried great importance and prestige. According to the learned counsel, the main vice that crept into the system, for the last decade or so was that aspiring office bearers started buying the application forms for membership, in bulk, and paying the membership fee for lawyers from the various places like Meerut, Rohtak, Saharanpur, Ghaziabad and even as far away a place as Chandigarh. The learned counsel Shri Venugopal claimed as Chairman of the Interim Board of Management that one came across as many as 100 subscription forms, paid with consecutive bank draft numbers, as disclosed by the bank statements obtained by the Interim Board of Management, which showed that a single sponsor had paid vast sums of money for each of these forms and memberships, the membership fee being Rs.5,150/- for advocates with ten years standing and Rs.3,650/- for advocates with less than ten years standing. It was emphasized by the learned counsel that practices like these have resulted in the present strength of the SCBA being around 10,000 and it is a well known fact among the members of the Bar regularly practicing in the Supreme Court of India that persons inducted into the SCBA through such means, numbering about 8,000, are seen in the Supreme Court premises only on the day of SCBA elections for casting their votes, otherwise, these

persons have no interest whatsoever either in the functioning of the SCBA or the well being of its members or the functioning of the Supreme Court of India, as a Court. The learned counsel has produced minutes of the meeting of the Interim Board of Management dated March 22, 2010 along with his written submissions for perusal of the Court. The learned senior counsel lamented that all these would disclose the disgraceful condition to which SCBA has been reduced on account of machinations and malpractices of certain members of the SCBA, who are aspiring for offices in the Executive Committee of the SCBA. The learned counsel has also appended copies of Allotment of Lawyers' Chambers Rules as amended up to November 30, 2007 as well as letter dated August 10, 2004 inter alia prescribing eligibility to apply for allotment of chambers along with his written submissions. The learned counsel has pointed out that the SCBA is facing a crises today, because of the induction of the vast number of members who do not practice regularly in the Supreme Court of India and, therefore, have no interest whatsoever in the function of the Apex Court or in the reputation, prestige and well being of the SCBA whereas, on the other hand, the sole objective of such persons is to ensure that their respective sponsor(s), who paid their subscription and entrance fee, would be elected to one of the posts of the SCBA, including the post of SCBA President. The learned counsel has expressed apprehension that the day may not be far of when the entire set of office bearers of the SCBA may be persons with no regular practice in the Supreme Court of India and who may have their regular practice in other courts in Delhi or even in the adjoining towns or even in a city as far away from Delhi as Chandigarh. The learned counsel argued that the SCBA has to shoulder great responsibility in regard to the effective functioning of the Supreme Court itself, the dispensation of justice and to represent the regular practicing members of the Bar from time to time. According to the learned counsel the present situation, which virtually renders the regularly practicing members strangers in their own court can only be remedied if this Court

were to step in, to exercise its vast powers under Article 142 of the Constitution, to ensure that the functioning of the Court itself is not affected by reason of the huge influx, into the SCBA, of advocates who have no interest in the functioning of the Supreme Court, its Bar or its association. The learned counsel asserted that the circumstances prevailing are such that it is imperative for the well being of the institution, as well as Apex Court of the country itself, and its regularly practicing members to ensure that it is only the regularly practicing members who will be eligible to cast votes at the SCBA elections. For this purpose the learned counsel has suggested that it is essential that the right to vote in the SCBA elections is restricted to the categories of persons enumerated in the Interim Board of Management circular dated March 22, 2010, the relevant portion whereof has been extracted in the written submissions.

Mr. P.P.Rao, learned celebrated senior counsel regularly practicing in this Court since long and who is also former President of SCBA, has emphasized that the very name of Bar Association, viz., SCBA necessarily means and implies that it is an association representing members regularly practicing in the court and responsible for proper conduct of its members in the court and for ensuring proper assistance to the court. The learned counsel has, in his written submissions, mentioned that SCBA needs to be salvaged from the deluge of overwhelming numbers of outside advocates practicing not only in the NCTR but even all other States in North India who had been enrolled by short-sighted candidates with an eye on their election to the SCBA. The learned counsel has asserted that unless this Court comes to the rescue of SCBA, the association will cease to be a court annexed Bar Association and words "Supreme Court" will have to be dropped and substituted by the words "North India". Emphasizing that the character of the SCBA should not be allowed to be diluted in any circumstances, the learned counsel has asserted that this is a fit case for exercise of powers under Article 142 of the Constitution. The learned counsel Mr. P.P. Rao has suggested that to identify regular

practitioners the criteria adopted by this Court for allotment of chambers in Vinay Balchandra Joshi vs. Registrar General of Supreme Court of India (1998) 7 SCC 461 at pages 465-467 para 7, may be adopted or in the alternative criteria mentioned in the circular dated March 22, 2010 issued by the Interim Board of Management of the SCBA consisting of M/s. K.K. Venugopal, Chairman, Mr. P.P. Rao, Vice Chairman and Mr. P.H. Parekh, Member – Executive and Convener may be considered for acceptance mutatis mutandis.

Mr. Ranjit Kumar, a distinguished attorney of this Court, who is appointed as amicus curie in this matter to assist the Court, Mr. Sushil Kumar Jain, learned President, Supreme Court Advocates-on-Record Association, Mr. D.K.Garg, learned Counsel for the respondent and who was also in past President of Supreme Court Advocates-on-Record Association, pointed out to this Court the difficulties being faced by regular members of the SCBA because of enlistment of large number non-regular advocates as members of SCBA, who according to them, now constitute a majority as a result of which the SCBA has not been able to take any decision which would be in the interest of the Bar. The learned Counsel have stated in their written submissions filed, to supplement their oral arguments, that there are more than ten thousand members of SCBA out of which only two thousand advocates are regular members who actually practice in this Court and eight thousand non-regular members have taken over the affairs of the SCBA in such a manner that it is almost impossible for the regular members to transact any business in the general or special meetings of SCBA. The learned Counsel emphasized that yearly subscription for members of SCBA for many decades remained fixed at a paltry amount of Rs. 500/- and every time when a proposal was made to increase the subscription the same was rejected by the General Body dominated by these non-regular members and that only recently with great difficulty the subscription has been revised to Rs. 1500/- by secret ballot held within high security area of Supreme Court namely Library

1, but now there is a demand to reduce it again to Rs. 500/-. The learned Counsel pointed out that if the subscription for members of SCBA is again revised and reduced to Rs.500/-, it will be a boon not only for such non-regular members but also a boon for the candidates contesting elections who will have to shell out less, for enrolling those advocates who are not practicing regularly in this Court, to secure their votes and get elected. It was emphasized that the enhanced subscription is in the interest of association as it would not only improve financial position of SCBA but also help to keep at bay those members who are not regularly practicing in this Court. The learned Counsel argued that this Court provides to the members of SCBA, who are regularly practicing in this Court, several facilities/benefits such as bar rooms, libraries, canteens, parking place, clinics, rest rooms etc., and as SCBA is intrinsically and inextricably connected with the working of the Supreme Court, this Court should give appropriate directions for effective implementation of "One Bar One Vote" concept introduced by the amended rule in exercise of its powers under Articles 136, 142 and 145(1) (a) of the Constitution to relieve the SCBA of the number of maladies which have now come to be associated with it and to improve the working of the institution as a whole. What was stressed by all the learned Counsel was that it is not in the interest of SCBA that advocates who do not practice in this Court regularly, vote for or get elected to the Executive Committee of SCBA, but in past, several members who were themselves not regularly practicing in the Supreme Court had contested elections for different posts of Executive Committee of SCBA though they were already members of the Executive Committees of other Court annexed Bar Associations and had come out successful on the strength of votes of such non-regular members who are to be seen in the Court compound only on the date of elections. The learned Counsel mentioned that persons so elected do not participate in the functioning of SCBA since they are not affected by the working or non-working of the SCBA which has affected the functioning of SCBA as a facilitator in the

administration of justice and therefore in order to maintain purity and dignity of the profession this Court has not only power but duty to give directions under Article 136 and Article 142 particularly when request is made by the learned amicus curie, SCBA represented by its Honorary Secretary, President of Supreme Court Advocates–on-Record Association and other high-ranking lawyers like Shri K.K.Venugopal, Shri P.P.Rao etc., who are regularly practicing only in this Court. Mr. D.K.Garg, the learned Counsel who represents respondent Mr. B.D.Kaushik in C.A. No. 3401 of 2003, frankly pointed out to this Court as an officer of the Court that in spite of other effective alternative remedies available to the appellant SCBA against the interim order dated April 5,2003 passed by the learned Civil Judge, Delhi, this Court had not only entertained Special Leave Petition filed by SCBA, but also granted stay because this Court wanted to regulate, reform and improve the functioning of SCBA and to prevent the misuse of various facilities provided by this Court to the regular members of SCBA so that the members of the SCBA render best assistance to this Court in dispensation of justice. It was also submitted that SLP was entertained and operation of the impugned interim order was stayed by this Court to prevent the interference of the outside members in day-to-day functioning of SCBA and therefore this Court should give directions/frame guidelines to regulate, reform and improve the functioning of SCBA. The learned Counsel pointed out that it is no secret that yearly membership subscription fee of almost all these non-regular members is paid by candidates contesting election for the various posts of the Executive Committee of SCBA and the records of SCBA show that hundreds of bank drafts were issued by the same branch of the same bank in favour of SCBA for the same amount towards subscription of SCBA for such non-regular members and that some interested persons who seek votes of these non-regular members in the elections had paid the subscription. This last argument of Mr. D.K.Garg was endorsed by one and all learned advocates who are appearing in the matter. Thus, the learned advocates have urged this

Court to give guidelines/directions for effective implementation of amended rule which projects the principle of "One Bar One Vote".

37. This Court has considered the request made by the learned Counsel appearing in the matter to give appropriate directions/guidelines for effective implementation of "One Bar One Vote" principle enunciated by the amended rule. It is a matter of common knowledge that this Court has provided four huge libraries, three canteens, two lounges, several rooms to be used as consultation rooms where learned advocates regularly practicing in this Court can consult with their clients, arbitration rooms, advocate's chambers, huge parking places, free use of electricity supply etc., to the members of the SCBA. It is not in dispute that there are about ten thousand members of SCBA at present though the actual number of advocates/ practitioners, who are regularly practicing in this Court is not more than two thousand five hundred out of which there are about nine hundred Advocates-on-Record. It is an accepted fact that on the eve of annual elections of the Executive Committee of SCBA, nearly more than three thousand voters turn up from all over India to come to the premises of this Court, who are made to vote by the advocates seeking elections for various posts. Further, enlistment of large number of non-regular members as members of the SCBA have created problems in allotment of chambers for this Court and it has been found that large number of non-regular members of SCBA eats up the quota of regular members who genuinely need the chambers. It was pointed by Shri Sushil Kumar Jain, the learned President of Supreme Court Advocates-on-Record Association that many of the non-regular members who are allotted chambers are not even residing in or around Delhi. The Supreme Court Advocates-on-Record are advocates primarily practicing in the Supreme Court and are directly affected by the functioning of SCBA primary object of which is to look after the interest of advocates actually practicing in the Supreme Court. There is no manner of doubt that Advocates-on-Record

form an important constituent of the SCBA. All members of the Supreme Court Advocates-on-Record Association are also members of the SCBA and because of malpractices committed by the candidates who contest the elections a large number of advocates who are not regular practitioners in the Supreme Court have become members of SCBA and claim a right, not only to vote and elect the office bearers of the Association but also seek to be elected as office bearers themselves on the strength and support of such non-regular members. Because such non-regular members have become members of SCBA, they claim facilities which are being extended to members of SCBA, who are regularly practicing in this Court. Because of such claims, clashes, had taken place in the past. It has been pointed out by Mr. Sushil Kumar Jain, learned President of Supreme Court Advocates-on-Record Association that by merely becoming members of the SCBA some advocates deem themselves to be advocates of the Supreme Court and fleece litigants on that basis. According to Shri Sushil Kumar Jain such advocates call themselves as Supreme Court Advocates and write/mention such a status on their letter heads, visiting cards, name plates, etc. misleading the litigants. As rightly pointed out by the learned counsel Mr. P.P. Rao, enrolment of advocates not practicing regularly in the Supreme Court is inconsistent with the main aim and object of the SCBA, no court can provide chambers or other facilities for such outside advocates, who are not regular practitioners. Neither the SCBA nor the court can deal with them effectively if they commit any wrong. The power of this Court to make certain rules, regulations and give directions to fill up the vacuum till such time appropriate steps in order to cover the gap are taken, is recognized and upheld in several reported decisions of this Court. In *Vineet Narain Vs. Union of India* (1998) 1 SCC 226 this Court has observed as under in Paragraph 51 of the reported decision:-

> "In exercise of the powers of this Court under Article 32 read with Article 142, guidelines and directions have been

issued in a large number of cases and a brief reference to a few of them is sufficient. In Erach Sam Kanga Etc. Vs, Union of India, (Writ Petition No. 2632 of 1978 decided on 20th March, 1979) the Constitution Bench laid down certain guidelines relating to Emigration Act. In *Lakshmi Kant Pandey Vs. Union of India* (1984) 2 SCC 244, (in re: Foreign Adoption), guidelines for adoption of minor children by foreigners were laid down. Similarly in *State of West Bengal and Ors. Etc. Vs. Sampat Lal and Ors. Etc.,* (1985) 1 SCC 317, *K. Veeraswami Vs. Union of India and Others,* (1991) 3 SCC 655, *Union Carbide Corporation and Others Vs. Union of India and others,* (1991) 4 SCC 584, *Delhi Judicial Service Association Etc. Vs. State of Gujarat and others Etc. (Nadiad Case),* (1991) 4 SCC 406, *Delhi Development Authority Vs. Skipper Construction Co. (P) Ltd. and Another,* (1996) 4 SCC 622 and *Dinesh Trivedi, M.P. and Others Vs. Union of India and others* [1997] 4 SCC 306, guidelines were laid down having the effect of law, requiring rigid compliance. In *Supreme Court Advocates-on-Record Association and Others Vs. Union of India (IInd Judges case),* (1993) 4 SCC 441, a Nine-Judge Bench laid down guidelines and norms for the appointment and transfer of Judges which are being rigidly followed in the matter of appointments of High Court and Supreme Court Judges and transfer of High Court Judges. More recently in Vishakha and Others Vs. State of Rajasthan and others, (1997) 6 SCC 241, elaborate guidelines have been laid down for observance in work places relating to sexual harassment of working women."

Moreover, this Court, has framed Supreme Court Rules, 1966 in exercise of powers under Article 145(1)(a) of the Constitution regulating amongst other things advocates who are entitled to practice in this Court. Further, necessary directions/ guidelines can always be issued when facilities and privileges are conferred on the members of the SCBA. Thus not only

power to give necessary guidelines/directions is available under Articles 136, 142, 145(1)(a) of the Constitution but such power can also be exercised as "Grantor" of the benefits and privileges which are enjoyed by the members of the SCBA to restore its dignity. Having regard to the over all conditions prevailing in SCBA, this Court proposes to give appropriate directions for implementation of the amended rule which projects the principle of "One Bar One Vote".

38. Having given thoughtful consideration to the suggestions made by the learned counsel appearing in the matter, this Court is of the opinion that to identify regular practitioners the criteria adopted by this Court for allotment of chambers, as explained in *Vinay Balchandra Joshi Vs. Registrar General of Supreme Court of India* (1998) 7 SCC 461 at pages 465-467 para 7, should be directed to be adopted by SCBA from time to time. Shri K.K. Venugopal, the learned senior counsel has annexed a copy of Allotment of Lawyers' Chambers Rules, as amended up to November 30, 2007, with his written submissions, wherein detailed procedure for allotment of chambers and conditions precedent to be satisfied before a chamber is allotted, are laid down. Under the circumstances this Court directs under Article 136 of the Constitution read with Article 142 of the Constitution that criteria adopted by this Court for allotment of chambers, as mentioned in Allotment of Lawyers' Chambers Rules, and as explained in Vinay Balchandra Joshi (supra) shall be adopted by the SCBA and its office bearers to identify regular practitioners in this Court. To identify regular practitioners in this Court, it would be open to the office bearers of SCBA or a small committee, which may be appointed by the SCBA consisting of three senior advocates, to collect information about those members who had contested election in any of the Court annexed Bar Association, viz., High Court Bar Association, District Court Bar Association, Taluka Bar Association, Tribunal Bar Association and Quasi-judicial Bar Associations like BIFR, AIFR, CAT, etc. from 2005 to 2010. If such an information is

sought by the office bearers of SCBA or the Committee appointed by it, the same shall be supplied invariably and without fail by the Court annexed Bar Associations mentioned earlier. The committee of SCBA to be appointed is hereby directed to prepare a list of regular members practicing in this Court and another separate list of members not regularly practicing in this Court and third list of temporary members of the SCBA. These lists are directed to be put up on the SCBA website and also on the SCBA notice board. A letter is directed to be sent by the SCBA to each member of SCBA informing him about his status of membership on or before February 28, 2012. The aggrieved member would be entitled to make a representation within 15 days from the date of receipt of letter from the S.C.B.A. to the Committee, which is to be appointed by the SCBA to identify regular practitioners stating in writing, whether personal hearing before the Committee is required or not. If such a request is made the concerned member shall be heard by the Committee. The representation/s shall be considered and the decision would be rendered thereon by the aforesaid Committee on or before April 30, 2012. The decision of that Committee shall be communicated to the member concerned but the decision shall be final, conclusive and binding on the member of the SCBA. Thereafter, final list of regular practitioners of this Court shall be displayed by S.C.B.A.

After preparation of the final list of the regular practitioners, each member shall give a written intimation to the S.C.B.A. whether he is a member of another Court annexed Bar. It shall be mandatory for a member, whose name is included in the said list, to give a permanent declaration that he would vote only in the SCBA and would not vote in any of the elections of any High Court Bar Association or District Bar Association or Taluka Bar Association or Tribunal Bar Association or Quasi-judicial Bar Associations like BIFR, AIFR, CAT, etc. A copy of this declaration shall be put up/displayed on the website of the SCBA as well as on the notice board of the SCBA. The

information about having filed such a declaration shall be sent to all the Bar Associations where the said advocate is a member. Once such a declaration has been given, it will be valid till it is revoked and once it is revoked a member shall forfeit his right to vote or contest any election to any post to be conducted by the SCBA, for a period of three years from the date of revocation.

39. The members of the SCBA, whose names do not figure in the final list of regular practitioners, shall not be entitled to either vote at an election of the office bearers of the SCBA or to contest any of the posts for which elections would be held by the S.C.B.A.

40. This Court suggests that to ensure strict compliance with the directions issued by this judgment, an Implementation Committee consisting of three learned senior advocates may be constituted. The SCBA has suggested that Mr. K.K. Venugopal, learned senior advocate, Mr. P.P. Rao, learned senior advocate and Mr. Ranjit Kumar, learned senior advocate, practicing in this Court be appointed as members of the said Implementation Committee. This Court recommends that the names of three learned senior counsel mentioned above be considered by the SCBA for being appointed as members of the said Committee subject to their consent and convenience.

41. In view of the findings that the amendment made in Rule 18 is legal and valid and that no right of the advocates, who have filed the suits, is infringed or is violated, this Court directs the trial court to take up the two suits immediately for hearing and to dismiss/ dispose of the two suits pending on its file in the light of the observations made by this Court in this judgment.

42. Subject to above mentioned directions, the two appeals stand disposed of.

B.B.B. Appeals disposed of.

UNION OF INDIA THROUGH ITS SECRETARY MINISTRY OF DEFENCE

v.

RABINDER SINGH

(Civil Appeal No. 7241 of 2002)

SEPTEMBER 29, 2011

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

Army Act, 1950 – s.52(f) – Respondent was a Commanding Officer of the 6 Armoured Regiment in the Indian Army – Allegation that he proceeded to order modification of some vehicles and countersigned bills, and claimed and received amounts by preferring different claims, though not a single vehicle came to be modified and no items necessary for modification were purchased – General Court Martial found him guilty and awarded punishment of R.I. for one year and cashiering – Respondent filed writ petition which was dismissed by a Single Judge of the High Court but appeal therefrom was allowed by the Division Bench – On appeal, held: The Division Bench ignored the fact that the countersigning led to withdrawal of an amount of Rs.77,692/- by the respondent for certain purchases which were neither authorized nor effected – There was economic loss suffered by Army – There was a complete non-utilisation of amount for the purpose for which it was claimed to have been sought – There was deceit and injury –s.52 (f) of the Act was clearly attracted since respondent had acted with intent to defraud – Any Army officer indulging into such acts could no longer be retained in the services of the Army, and the order passed by the General Court Martial could not be faulted – The Single Judge rightly declined to interfere with the decision rendered by the General Court Martial – The Division Bench clearly erred in exercising its appellate power when there was no occasion or reason to exercise the same – Army Rules, 1954 – rr.30(4) and 42(b).

Army Act, 1950 – s.52(f) – Two parts of – Interpretation of – Held: The two parts of s.52 (f) are disjunctive, which can also be seen from the fact that there is a comma and the conjunction 'or' between the two parts of this sub-section, viz (i) does any other thing with intend to defraud and (ii) to cause wrongful gain to one person or wrongful loss to another person – If the legislature wanted both these parts to be read together, it would have used the conjunction 'and'.

The first respondent was deployed as the Commanding Officer of the 6 Armoured Regiment in the Indian Army. The unit was authorized for one signal special vehicle. In case such a vehicle was not held by the unit it was authorized to modify one vehicle with ad-hoc special finances for which it was authorized to claim amount.

It is the case of the appellant that the respondent proceeded to order modification of some 65 vehicles in two lots, first 43 and thereafter 22 and he countersigned bills, and claimed and received an amount of Rs.77,692/- by preferring four different claims, though not a single vehicle came to be modified; that no such items necessary for modification were purchased, but fictitious documents and pre-receipted bills were procured; and that though, the counter-foils of the cheques showed the names of some vendors, the amount was withdrawn by the respondent himself.

This led to the conducting of the Court of Inquiry to collect evidence and to make a report. On conclusion of the inquiry, disciplinary action was directed against the respondent. Thereafter, the case against the respondent was remanded for trial by a General Court Martial. General Court Martial found him guilty and awarded punishment of R.I. for one year and cashiering. The respondent filed writ petition which was dismissed by a

Single Judge of the High Court but appeal therefrom was allowed by the Division Bench leading to the present appeal.

Allowing the appeal, the Court

HELD:1.1. The Division Bench of the High Court held that the only allegation leveled against the first respondent was that he had countersigned the contingent bills for claiming the cost of modifications of the vehicles, but there was no charge of wrongful gain against him. The Division Bench ignored the fact that this countersigning led to withdrawal of an amount of Rs.77,692/- by the respondent for certain purchases which were neither authorized nor effected. The fact that the respondent had countersigned the contingent bills was never in dispute. The appellant placed on record the necessary documentary and oral evidence in support of the charges during the course of the enquiry which was conducted as per the provisions of the Army Act. The enquiry records showed that these amounts were supposed to have been paid to some shops but, in fact, no such purchases were effected. The respondent could not give any explanation which could be accepted. The Division Bench clearly erred in ignoring this material evidence on record which clearly shows that the Army did suffer wrongful loss. [Para 14] [804-F-H; 805-A-B]

1.2. The text of the charges clearly mention that the respondent claimed advance for 43 vehicles initially and then 22 vehicles subsequently by countersigning the contingent bills knowing fully well that his Regiment was not authorized to claim such grants. Thus, the charges are very clear, and the respondent cannot take advantage of Rule 30(4) and Rule 42(b), in any manner whatsoever. The Army had led additional evidence to prove that the amount was supposed to have been passed on to

certain shops but the necessary purchases were in fact not made. There was economic loss suffered by Army, since an amount was allegedly expended for certain purchases when the said purchases were not authorized. Besides, the expenditure which was supposed to have been incurred for purchasing the necessary items was, in fact found to have been not incurred for that purpose. There was a complete non-utilisation of amount for the purpose for which it was claimed to have been sought. The evidence brought on record is sufficient enough to come to the conclusion that there was deceit and injury. Therefore, it was clear that Section 52 (f) of the Act would get attracted since the respondent had acted with intent to defraud. [Paras 16, 17] [806-C-E; 807-B-D]

1.3. The two parts of Section 52 (f) are disjunctive, which can also be seen from the fact that there is a comma and the conjunction 'or' between the two parts of this sub-section, viz (i) does any other thing with intend to defraud and (ii) to cause wrongful gain to one person or wrongful loss to another person. If the legislature wanted both these parts to be read together, it would have used the conjunction 'and'. The appellants had charged the respondents for acting with 'intent to defraud', and therefore it was not necessary for the appellants to refer to the second part of Section 52 (f) in the charge. [Para 17] [807-E-H]

1.4. The respondent had full opportunity to defend. All the procedures and steps at various levels, as required by the Army Act were followed and it is, thereafter only that the respondent was cashiered and sentenced to R.I. for one year. There was no allegation of malafide intention. Assuming that the charge of wrongful gain to the respondent was not specifically averred in the charges, the accused clearly understood the charge of 'intent to defraud' and he defended the

same. He fully participated in the proceedings and there was no violation of any procedural provision causing him prejudice. The Courts are not expected to interfere in such situations. The armed forces are known for their integrity and reputation. The senior officers of the Armed Forces are expected to be men of integrity and character. When any such charge is proved against a senior officer, the reputation of the Army also gets affected. Therefore, any officer indulging into such acts could no longer be retained in the services of the Army, and the order passed by the General Court Martial could not be faulted. [Para 18] [808-A-D]

1.5. The Single Judge was right in passing the order whereby he declined to interfere into the decision rendered by the General Court Martial. There was no reason for the Division Bench to interfere in that order in an intra-Court appeal. The order of the Single Judge in no way could be said to be contrary to law or perverse. On the other hand, the Division Bench clearly erred in exercising its appellate power when there was no occasion or reason to exercise the same. In the circumstances, the order passed by the Division Bench is set aside, and the one passed by the Single Judge is confirmed. Consequently, the Writ Petition filed by the respondent stands dismissed. [Paras 19, 20] [808-E-G]

Dr. Vimla vs. Delhi Administration **AIR 1963 SC 1572: 1963 Suppl. SCR 585 and** *Major G.S. Sodhi vs. Union of India* **1991 (2) SCC 382 – relied on .**

S. Harnam Singh vs. State (Delhi Administration) **AIR 1976 SC 2140 – referred to.**

Case Law Reference:

AIR 1976 SC 2140	**Referred to**	**Paras 15, 17**
1963 Suppl. SCR 585	**Relied on**	**Para 16**
1991 (2) SCC 382	**Relied on**	**Para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7241 of 2002.

From the Judgment & Order dated 2.7.2001 of the High Court of Punjab & Haryana at Chandigarh in Letters Patent Appeal No. 996 of 1991 in Civil Writ Petition No. 955-A of 1989.

Parag P. Tripathi, ASG, R. Balasubramanium, Amey Nargolkar, Mahima Gupta, B.V. Balaram Das for the Appellants.

Seeraj Bagga (for Sureshta Bagga) for the Respondent.

The Judgment of the Court was delivered by

H.L. GOKHALE J. 1. This appeal by Union of India through the Secretary to Government, Ministry of Defence seeks to challenge the judgment and order passed by a Division Bench of the Punjab and Haryana High Court in L.P.A. No.996 of 1991 dated 2.7.2001 whereby the Division Bench has allowed the appeal filed by the first respondent from the judgment and order rendered by a Single Judge of that Court dated 31.5.1991 in C.W.P. No.995-A of 1989 which had dismissed the said Writ Petition filed by the first respondent.

2. The Division Bench has allowed the said petition by its impugned order and set aside the proceedings, findings and sentence of the General Court Martial held during 24.6.1987 to 1.10.1987 against the first respondent by which he was awarded the punishment of Rigorous Imprisonment (R.I.) for one year and cashiering.

The facts leading to this appeal are as follows:-

3. The first respondent was deployed between 1.2.1984 and 3.10.1986 as the Commanding Officer of the 6 Armoured Regiment which was a new raising at the relevant time in the

Indian Army. The unit was authorized for one signal special vehicle. In case such a vehicle was not held by the unit it was authorized to modify one vehicle with ad-hoc special finances for which it was authorized to claim 75% of Rs.950/- initially and claim the balance amount on completion of modification work.

4. It is the case of the appellant that the unit had sent a claim for 75% of the amount (i.e. Rs.450/- as per the old rates) for modification of one vehicle, but the same was returned for want of justifying documents by the audit authorities. Yet the respondent proceeded to order modification of some 65 vehicles in two lots, first 43 and thereafter 22. There is no dispute that he countersigned those bills, and claimed and received an amount of Rs.77,692/- by preferring four different claims. The case of the appellant is that not a single vehicle came to be modified, the money was kept separately and the expenditure was personally controlled by the respondent. No such items necessary for modification were purchased, but fictitious documents and pre-receipted bills were procured. Though, the counter-foils of the cheques showed the names of some vendors, the amount was withdrawn by the respondent himself. When the annual stock-taking was done, the non-receipt of stores and false documentation having taken place was found entered in the records.

5. (i) This led to the conducting of the Court of Inquiry on 13.10.1986 to collect evidence and to make a report under Rule 177 of the Army Rules, 1954 framed under Section 191 of the Army Act, 1950. On conclusion of the inquiry a disciplinary action was directed against the respondent.

(ii) Thereafter, the summary of evidence was recorded under Rule 23 of the Army Rules, wherein the respondent duly participated. Some 15 witnesses were examined in support of the prosecution, and the respondent cross-examined them. He was given the opportunity to make a statement in defence, but he declined to make it.

6. Thereafter, the case against the respondent was remanded for trial by a General Court Martial which was convened in accordance with the provisions under Chapter X of the Army Act. The respondent was tried for four charges. They were as follows:-

"The accused, IC16714K Major Deol Rabinder Singh, SM, 6 Armoured Regiment, attached Headquarters 6(1) Armoured Brigade, an officer holding a permanent commission in the Regular Army is charged with:-

(1) such an offence as is mentioned in Clause (f) of Section 52 of the Army Act

(2) with intent to defraud, in that he, at field on 25 June 84, while commanding 6 Armoured Regiment, when authorized to claim modification grant in respect of only one truck one tonne 4 x 4 GS FFR, for Rs. 950/-, with intent to defraud, countersigned a contingent bill No.1096/LP/6/TS dated 25 June 84 for Rs.31692/- for claiming an advance of 75% entitlement of cost of modification of 43 vehicles, which was passed for Rs.31650/-, well knowing that the Regiment was not authorized to claim such grant in respect of all types of vehicles.

Such an offence as is mentioned in clause (f) of Section 52 of the Army Act with intent to defraud, in that he, had filed on 5 March 85, while commanding 6 Armoured Regiment, with intent to defraud, countersigned a contingent bill no.1965/ULPG/85/TS dated 5 March 85 for Rs.20962.50 for claiming an advance of 75% entitlement of cost of modification of 22 vehicles, well knowing that the Regiment was not authorized to claim such grant in respect of all types of vehicles.

Such an offence as is mentioned in Clause (f) of

Section 52 of the Army Act with intent to defraud, in that he, had filed on 9 Feb 85, while commanding 6 Armoured Regiment, with intent to defraud, countersigned a final contingent bill No.1965/LP/02/TS dated 9 Feb 85 for Rs.18150/- for claiming the balance of the cost of modification of vehicles, which was passed for Rs.18149.98 well knowing that the Regiment was not authorized to claim such grant in respect of all types of vehicles.

Such an offence as is mentioned in Clause (f) of Section 52 of the Army Act with intent to defraud, in that he, had filed on 9 Sep 85, while commanding 6 Armoured Regiment, with intent to defraud, countersigned a final contingent bill No.1965/LP/04/TS dated 9 Sep 85 for Rs.6987.50/- for claiming the balance of the cost of modification of vehicles, well knowing that the Regiment was not authorized to claim such grant in respect of all types of vehicles."

7. The General Court Martial found him guilty of all those four charges, and awarded punishment of R.I. for one year and cashiering. The proceedings were thoroughly reviewed by the Deputy Judge-Advocate General, Headquarter, Western Command who made the statutory report thereon. These proceedings were confirmed by the confirming authority on 20.6.1988 in terms of Sections 153 and 154 of the Army Act. The respondent preferred a Post Confirmation Petition under Section 164 of the Army Act which was rejected by the Chief of the Army. This led the respondent to file the Writ Petition as stated above which was dismissed but the Appeal therefrom was allowed leading to the present Civil Appeal by special leave.

8. We have heard Shri Parag P. Tripathi, learned Additional Solicitor General appearing on behalf of the appellant and Shri Seeraj Bagga, learned counsel appearing on behalf of the respondent.

9. Before we deal with the submissions by the rival counsel, we may note that the respondent was charged under Section 52 (f) of the Army Act, 1950 and the Section was specifically referred in the charges leveled against him. Section 52 reads as follows:-

"52. Offences in respect of property – Any person subject to this Act who commits any of the following offences, that is to say,-

(a) commits theft of any property belonging to the Government, or to any military, naval or air force mess, band or institution, or to any person subject to military, naval or air force law, or

(b) dishonestly misappropriates or converts to his own use any such property; or

(c) commits criminal breach of trust in respect of any such property; or

(d) dishonestly receives or retains any such property in respect of which any of the offences under clauses (a), (b) and (c) has been committed, knowing or having reason to believe the commission of such offence; or

(e) willfully destroys or injures any property of the Government entrusted to him; or

(f) does any other thing with intent to defraud, or to cause wrongful gain to one person or wrongful loss to another person,

shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to ten years or such less punishment as is in this Act mentioned."

10. Shri Tripathi learned ASG appearing for the appellant submitted that the Division Bench erred in holding that the particulars of the charges did not include the wrongful gain to the respondent and corresponding loss to the army, nor was it

proved, and therefore the charge of doing something with intent to defraud had not been conclusively proved. In his submission, sub-section (f) is in two parts. In fact, the Division Bench of the High Court also accepted that there are two parts of this Section**.** The respondent was charged with the first part which is 'doing something with intent to defraud'. Therefore, it was not necessary to mention in the charge the second part of the sub-section which covers 'wrongful gain to one person or wrongful loss to another'.

11. The offence with which the respondent was charged was doing something with intent to defraud. According to the respondent, the act attributed to him was only to countersign the contingent bills. The fact is that the Army got defrauded by this countersigning of the contingent bills by the respondent, inasmuch as no such purchases were authorized and in fact no modification of the vehicles was done. That being so, the charge had been established. The respondent cannot escape from his responsibility. It was pointed out on behalf of the appellant that assuming that the latter part of section 52 (f) was not specifically mentioned in the charge, no prejudice was caused to the respondent thereby. He fully understood the charges and participated in the proceedings.

12. Shri Seeraj Bagga, learned counsel for the respondent on the other hand, submitted that Rule 30 (4) and Rule 42 (b) of the Army Rules mandatorily require the appellant to make the charges specifically. His submission was that the charges were not specific and the respondent did not get an idea with respect to them and, therefore, he suffered in the proceedings. We may quote these rules. They read as follows:-

> "Rule 30(4). The particulars shall state such circumstances respecting the alleged offence as will enable the accused to know what act, neglect or omission is intended to be proved against him as constituting the offence."

> "Rule 42 (b). That such charge disclose an offence under the Act and is framed in accordance with the rules, and is so explicit as to enable the accused readily to understand what he has to answer."

Shri Bagga submitted that no evidence was produced with respect to wrongful gain by the respondent and, therefore, the Division Bench was right in interfering with the judgment rendered by the Single Judge as well as in the General Court-Martial.

Consideration of rival submissions -

13. We have noted the submissions of both the counsels. When we see the judgment rendered by the Single Judge of the High Court we find that he has held in paragraph 19 of his judgment that the findings of the General Court Martial were duly supported by the evidence on record, and the punishment had been awarded considering the gravity of the offence. In paragraph 18, he has also held that the respondent was afforded opportunity to defend his case, and there was neither any illegality in the conduct of the trial nor any injustice caused to him.

14. The Division Bench, however, held that the only allegation leveled against the first respondent was that he had countersigned the contingent bills for claiming the cost of modifications of the vehicles, but there was no charge of wrongful gain against him. The Division Bench, however, ignored the fact that this countersigning led to withdrawal of an amount of Rs.77,692/- by the respondent for certain purchases which were neither authorized nor effected. The fact that the respondent had countersigned the contingent bills was never in dispute. The appellant placed on record the necessary documentary and oral evidence in support of the charges during the course of the enquiry which was conducted as per the provisions of the Army Act. We have also been taken through the record of the enquiry. It showed that these amounts were

supposed to have been paid to some shops but, in fact, no such purchases were effected. The respondent could not give any explanation which could be accepted. The Division Bench has clearly erred in ignoring this material evidence on record which clearly shows that the Army did suffer wrongful loss.

15. The Division Bench also took the view that the allegation against the respondent did not come within the purview of intent to defraud. This is because to establish the intent to defraud, there must be a corresponding injury, actual or possible, resulting from such conduct. The Army Act lays down in Section 3 (xxv) that the expressions which are not defined under this Act but are defined under the Indian Penal Code, 1860 (Code for short) shall be deemed to have the same meaning as in the code. The Division Bench, therefore, looked to the definition of 'dishonestly' in Section 24 and of 'Falsification of accounts' in section 477A of the code. In that context, it has referred to a judgment of this Court in *S. Harnam Singh Vs. State (Delhi Administration)* reported in [AIR 1976 SC 2140]. In that matter, the appellant was working as a loading clerk in Northern Railways, New Delhi and he was tried under Section 477A and Section 120B of the Code read with Section 5(2) of the Prevention of Corruption Act. While dealing with Section 477A, this Court held in paragraph 13 of the judgment that in order to bring home an offence under this Section, one of the necessary ingredients was that the accused had willfully and with intent to defraud acted in a particular manner. The Code, however, does not contain a definition of the words 'intent to defraud'. This Court, therefore, observed in paragraph 18 as follows:-

> "18……..The Code does not contain any precise and specific definition of the words "intent to defraud". However, it has been settled by a catena of authorities that "intent to defraud" contains two elements viz. deceit and injury. A person is said to deceive another when by practising "suggestio falsi" or "suppressio veri" or both he intentionally induces another to believe a thing to be true,

> which he knows to be false or does not believe to be true. "Injury" has been defined in Section 44 of the Code as denoting "any harm whatever illegally caused to any person, in body, mind, reputation or property"."

It was submitted on behalf of the respondent that in the instant case, it was not shown that there was any wrongful gain on the part of the respondent and, therefore, the Division Bench rightly interfered in the order passed by the learned Single Judge as well as by the General Court Martial.

16. If we see the text of the charges, they clearly mention that the respondent claimed advance for 43 vehicles initially and then 22 vehicles subsequently by countersigning the contingent bills knowing fully well that his Regiment was not authorized to claim such grants. Thus, the charges are very clear, and the respondent cannot take advantage of Rule 30(4) and Rule 42(b), in any manner whatsoever. The Army had led additional evidence to prove that the amount was supposed to have been passed on to certain shops but the necessary purchases were in fact not made. In *Dr. Vimla Vs. Delhi Administration* reported in [AIR 1963 SC 1572], a bench of four judges of this Court was concerned with the offence of making a false document as defined in Section 464 of the Code. In paragraph 5 of its judgment the Court noted that Section 464 uses two adverbs 'dishonestly' and 'fraudulently', and they have to be given their different meanings. It further noted that while the term 'dishonestly' as defined under Section 24 of IPC, talks about wrongful pecuniary/economic gain to one and wrongful loss to another, the expression fraudulent is wider and includes any kind of injury/harm to body, mind, reputation inter-alia. The term injury would include non-economic/non-pecuniary loss also. This explanation shows that the term 'fraudulent' is wider as against the term 'dishonesty'. The Court summarized the propositions in paragraph 14 of the judgment in the following words:-

> "14. To summarize: the expression "defraud" involves two elements, namely, deceit and injury to the person deceived.

> Injury is something other than economic loss that is, deprivation of property, whether movable or immovable, or of money, and it will include any harm whatever caused to any person in body, mind, reputation or such others In short, it is a non-economic or non-pecuniary loss……."

17. In the instant case, there was an economic loss suffered by Army, since an amount was allegedly expended for certain purchases when the said purchases were not authorized. Besides, the expenditure which was supposed to have been incurred for purchasing the necessary items was, in fact found to have been not incurred for that purpose. There was a complete non-utilisation of amount for the purpose for which it was claimed to have been sought. The evidence brought on record is sufficient enough to come to the conclusion that there was deceit and injury. Therefore, it was clear that Section 52 (f) of the Act would get attracted since the respondent had acted with intent to defraud within the explanation of the concept as rendered by this Court in *S. Harnam Singh* (supra) which had specifically referred to and followed the law laid down earlier in *Dr. Vimla* (supra). We accept the submission of Shri Tripathi that the two parts of Section 52 (f) are disjunctive, which can also be seen from the fact that there is a comma and the conjunction 'or' between the two parts of this sub-section, viz (i) does any other thing with intend to defraud and (ii) to cause wrongful gain to one person or wrongful loss to another person. If the legislature wanted both these parts to be read together, it would have used the conjunction 'and'. As we have noted earlier in *Dr. Vimla* (supra) it was held that the term 'fraudulently' is wider than the term 'dishonestly' which however, requires a wrongful gain and a wrongful loss. The appellants had charged the respondents for acting with 'intent to defraud', and therefore it was not necessary for the appellants to refer to the second part of Section 52 (f) in the charge. The reliance by the Division Bench on the judgment in *S.Harnam Singh* (supra) to justify the conclusions drawn by it was clearly erroneous.

18. The respondent had full opportunity to defend. All the procedures and steps at various levels, as required by the Army Act were followed and it is, thereafter only that the respondent was cashiered and sentenced to R.I. for one year. There was no allegation of malafide intention. Assuming that the charge of wrongful gain to the respondent was not specifically averred in the charges, the accused clearly understood the charge of 'intent to defraud' and he defended the same. He fully participated in the proceedings and there was no violation of any procedural provision causing him prejudice. The Courts are not expected to interfere in such situations (see *Major G.S. Sodhi Vs. Union of India* reported in 1991 (2) SCC 382). The armed forces are known for their integrity and reputation. The senior officers of the Armed Forces are expected to be men of integrity and character. When any such charge is proved against a senior officer, the reputation of the Army also gets affected. Therefore, any officer indulging into such acts could no longer be retained in the services of the Army, and the order passed by the General Court Martial could not be faulted.

19. In our view, the learned Single Judge was right in passing the order whereby he declined to interfere into the decision rendered by the General Court Martial. There was no reason for the Division Bench to interfere in that order in an intra-Court appeal. The order of the learned Single Judge in no way could be said to be contrary to law or perverse. On the other hand, we would say that the Division Bench has clearly erred in exercising its appellate power when there was no occasion or reason to exercise the same.

20. In the circumstances, we allow this appeal and set-aside the order passed by the Division Bench, and confirm the one passed by the learned Single Judge. Consequently, the Writ Petition filed by the respondent stands dismissed, though we do not order any cost against the respondent.

B.B.B. Appeal allowed.

NATIONAL FERTILIZERS LTD.

v.

JAGGA SINGH (DECEASED) THROUGH L.RS.& ANR.

(CIVIL APPEAL No. 3033 OF 2008)

NOVEMBER 15, 2011

[CYRIAC JOSEPH AND A.K. PATNAIK, JJ.]

Land Acquisition Act, 1894 – Acquisition of land – Determination of market value – In the year 1983, State Government acquired 29.68 acres of land in village Bhatinda to meet the requirement of dwelling houses for the employees of NFL – Award passed by Land Acquisition Collector – Not satisfied, respondents-landowners made reference to civil court – Additional District Judge determined compensation at the rate of Rs.32.50 per square yard considering inter alia the order of the High Court in SS's case – Order of Additional District Judge upheld by Single Judge of High Court – Letters Patent Appeals – Division Bench of High Court held that for assessment of market value of the land acquired in the present case, the order passed by the High Court in the case of SS could not be preferred over the order of the High Court passed in the case of KS, and determined Rs.120/- per square yard as just and reasonable market value for the land acquired in the present case after adopting the reasoning given in the order of the High Court in the case of KS – Justification – Held: The reliance on order of the High Court passed in SS's case by the Additional District Judge and the Single Judge was not correct because the land in SS's case which was acquired for military cantonment was far away from the land acquired in the present case which was located adjacent to the colony of NFL and other colonies – Also, compared to the land acquired in SS's case, the land acquired in KS's case was much more nearer to the land acquired in the present case – In KS's case, the market value

of land was worked out at Rs.176/- per sq. yard – The Division Bench of the High Court applied a cut to this rate of Rs.176/- per sq. yard and determined the rate of Rs.120/- per sq. yard as just and reasonable value of the land acquired in the present case considering the location and potentiality of the acquired land – The Division Bench took into consideration the fact that the land in KS's case was located in the heart of the Bhatinda town, whereas the land acquired in the present case was slightly away from the heart of the town and was located adjacent to the existing colony of the NFL – No merit in the submission of the appellant that a cut of 60% should have been applied to the rate as determined in KS's case considering the larger size and lower quality of the land acquired in the present case – The cut applied by the Division Bench of the High Court in the impugned judgment so as to reduce the value from Rs.176/- per sq. yard to Rs.120/- per sq. yard was just and reasonable in the facts of the present case.

The National Fertilizers Limited (NFL) is a Government of India Undertaking engaged in the business of manufacturing fertilizers and has a plant in Bhatinda in the State of Punjab. To meet the requirement of dwelling houses for the employees of NFL, the State of Punjab acquired 29.68 acres of land in village Bhatinda by notification dated 24-01-1983 issued under Section 4 of the Land Acquisition Act, 1894. The Land Acquisition Collector determined the compensation. Not satisfied with the award, the respondents-landowners made reference under Section 18 of the Act to the civil court. The Additional District Judge determined the compensation at a rate of Rs.32.50 per square yard after considering two unregistered sale agreements (Exhibits A-X and A-Y) and the order of the High Court in *Sadhu Singh's* case determining the compensation for land acquired for extension of the military cantonment in the year 1976. On appeal, the Single Judge of the High Court

sustained the determination of compensation made by the Additional District Judge.

The Division Bench of the High Court, however, held that as Exhibits A-X and A-Y were unregistered and did not bear any date, these documents could not be considered for determination of compensation. The Division Bench also found from the site plan that the military cantonment for which *Sadhu Singh's* land was acquired was far away from the land acquired in the present case; and further that the land of *Karam Singh* which had been acquired for a municipal park in the year 1983 was much nearer to the land acquired in the present case. The Division Bench, therefore, took the view that the order passed by the High Court in the case of *Sadhu Singh* could not be preferred over the order of the High Court passed in the case of *Karam Singh* for making the assessment of market value of the land acquired in the present case and determined Rs.120/- per square yard as just and reasonable market value for the land acquired in the present case after adopting the reasoning given in the order dated 08.11.1989 of the High Court in the case of *Karam Singh*.

In the instant appeals, the question that arose for consideration was whether compensation for the lands acquired as determined by the Additional District Judge and as upheld by the order of the Single Judge was a correct assessment of the market value of the acquired land or the compensation as determined by the Division Bench of the High Court in the impugned judgment was a more accurate assessment of the market value of the land acquired in present case.

Dismissing the appeals, the Court

HELD:1.1. The Additional District Judge took into consideration two sale agreements (Exts. A-X and A-Y).

Exhibit A-X was executed by one Satish Gupta agreeing to transfer his plot of land measuring 400 sq. yards for Rs.17,300/- to one Sham Singh and Exhibit A-Y was executed by one Balram Shukla agreeing to transfer his plot of 400 sq. yards for Rs.17,000/- to Satnam Singh. It is seen that the sale agreement between Balram Shukla and Satnam Singh does not mention the date on which the agreement has been entered into. In the absence of any date of the sale agreement, the sale agreement could not have constituted the basis for determination of the market value of land in 1983 when the land was acquired in the present case. The Division Bench of the High Court, therefore, was right in taking the view that Exhibits A-X and A-Y cannot constitute the basis for determination of the market value of the acquired land in the present case. [Para 11] [822-F; 823-B-C]

1.2. The reliance on order of the High Court passed in *Sadhu Singh's* case by the Additional District Judge and the Single Judge was not correct because from the site plan it appears that the land in *Sadhu Singh's* case which was acquired for military cantonment was far away from the land acquired in the present case which was located adjacent to the colony of NFL and other colonies. From the site plan, it is also found that compared to the land acquired in *Sadhu Singh's* case, the land acquired in *Karam Singh's* case was much more nearer to the land acquired in the present case. [Para 12] [823-H; 824-A-B]

1.3. The land in the case of *Karam Singh* was acquired for a municipal park by notification issued under Section 4 of the Land Acquisition Act on 30.08.1983 and is located within the municipal limits. In *Karam Singh's* case there was evidence of three transactions of sale of the same date i.e., 29.06.1973, showing that some land in the area had been sold at the rate of Rs.100/- per sq. yard, some land in the area had been sold at Rs.70.30

paise per sq. yard and some land in the area had been sold at the rate of Rs.62.50 per sq. yard and the Court took the average rate of the three sale transactions which worked out to Rs.80/- per sq. yard. The Court then added an increase of 12% per annum for ten years to arrive at the value of the land in the year 1983 when the land was acquired and the figure worked out at Rs.176/- per sq. yard. For finding out the market value of the land acquired in the present case, the Division Bench of the High Court applied a cut to this rate of Rs.176/- per sq. yard and determined the rate of Rs.120/- per sq. yard as just and reasonable value of the land acquired in the present case considering the location and potentiality of the acquired land. The Division Bench has, therefore, taken into consideration the fact that the land in *Karam Singh's* case was located in the heart of the Bhatinda town, whereas the land acquired in the present case was slightly away from the heart of the town and was located adjacent to the existing colony of the NFL and other colonies, namely, the residential colonies of the thermal plant, and reduced the market value of the land acquired in the present case. [Para 13] [824-C-H; 825-A]

1.4. In the case of *Karam Singh*, it is seen that the High Court has not mentioned the size of the lands which were sold under the three sale deeds. In the absence of the size of the plots of land which were sold under the sale deeds, which were taken into consideration by the High Court while determining the market rate of the land in *Karam Singh's* case, it is difficult to accept the contention of the appellant that the determination of market value of the land in *Karam Singh's* case was in respect of land which was sold was much smaller in size as compared to the land which was acquired in the present case. Regarding quality of the land acquired in the present case, the appellant submitted that the land in *Karam Singh's* case was developed urban land meant for

residential and commercial purpose, whereas the land acquired in the present case was low, water-logged agricultural land. However, it is found from the evidence of Patwari, Land Acquisition, Industries Department Punjab, Chandigarh, examined as RW-1, that the level of the land, which was acquired in the present case, was that of the existing land of the township of NFL. The Additional District Judge in fact held, after considering all the oral and documentary evidence adduced by the parties, that the market value of the land acquired in the present case has to be determined on the basis of its potentiality for urban development and not on the basis of the revenue or agricultural classification of the land as done by the Collector because the land acquired in the present case had a great potential value for urban purposes, i.e. commercial, industrial and residential. There is therefore no merit in the submission of the appellant that a cut of 60% should have been applied to the rate as determined in *Karam Singh's* case considering the larger size and lower quality of the land acquired in the present case. The cut applied by the Division Bench of the High Court in the impugned judgment so as to reduce the value from Rs.176/- per sq. yard to Rs.120/- per sq. yard was just and reasonable in the facts of the present case. [Para 14] [825-E-H; 826-A-D]

Chimanlal Hargovinddas v. *Special Land Acquisition Officer, Poona and Another* **(1988) 3 SCC 751 : 1988 (1) Suppl. SCR 531;** *Hasanali Khanbhai & Sons and Others* v. *State of Gujarat* **(1995) 5 SCC 422 : 1995 (2) Suppl. SCR 363;** *K. Vasundara Devi* v. *Revenue Divisional Officer (LAO)* **(1995) 5 SCC 426 : 1995 (2) Suppl. SCR 376;** *Kanta Devi and Others* v. *State of Haryana and Another* **(2008) 15 SCC 201 : 2008 (10) SCR 367;** *Thakarsibhai Devjibhai and Others* v. *Executive Engineer, Gujarat and Another* **(2001) 9 SCC 584;** *General Manager, Oil and Natural Gas Corporation Limited* v. *Rameshbhai Jivanbhai Patel and Another* **(2008)**

14 SCC 745 : 2008 (11) SCR 927; *Pal Singh and Others* v. *Union Territory of Chandigarh* **[(1992) 4 SCC 400 : 1992 (1) Suppl. SCR 452 – Cited.**

Case Law Reference:

1988 (1) Suppl. SCR 531	**Cited**	**Para 6**
1995 (2) Suppl. SCR 363	**Cited**	**Para 6**
1995 (2) Suppl. SCR 376	**Cited**	**Para 6**
2008 (10) SCR 367	**Cited**	**Para 6**
(2001) 9 SCC 584	**Cited**	**Para 8**
2008 (11) SCR 927	**Cited**	**Para 9**
1992 (1) Suppl. SCR 452	**Cited**	**Para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3033 of 2008.

From the Judgment & Order dated 13.7.2005 of the High Court of Punjab & Haryana at Chandigarh in Letters Patent Appeal No. 430 of 1995.

WITH

C.A. Nos. 3095, 3114, 3105, 3102, 3101, 3099, 3112, 3097, 3100, 3109, 3094, 3093, 3110, 3098, 3103, 3096, 3111, 3107, 3115, 3113, 3117, 3108, 3104 , 3116 of 2008.

Pallav Shishodia, Diksha Rai Goswami, Sanjiv Kumar Saxena, Ghanshyam Joshi for the Appellant.

Manoj Swarup, Shivendra Swaroop, Ankit Swarup, Ashok Anand, Rohit Kumar Singh, Ajay Choudhary, Jagjit Singh Chhabra, Dr. Kailash Chand for the Respondents.

The Judgment of the Court was delivered by

A. K. PATNAIK, J. 1. These are the appeals by way of special leave against the judgment and order dated 13.07.2005 of the Division Bench of the Punjab and Haryana High Court, Chandigarh, in Letters Patent Appeals determining the market value of acquired land @ Rs.120/- per square yard (for short 'the impugned judgment').

2. The facts relevant for deciding these appeals briefly are that the National Fertilizers Limited (for short 'the NFL') is a Government of India Undertaking engaged in the business of manufacturing fertilizers and has a plant in Bhatinda in the State of Punjab. To meet the requirement of dwelling houses for the employees of NFL, the State of Punjab acquired 29.68 acres of land in village Bhatinda by notification dated 24.01.1983 issued under Section 4 of the Land Acquisition Act, 1894 (for short 'the Act'). The District Collector sent the market rates to the Land Acquisition Collector for different classes of agricultural or revenue land and these were for Nehri – Rs.56,000/- per acre, for Barani – Rs. 23,000/- per acre and for Gair Mumkin – Rs.23,000/- per acre. The Land Acquisition Collector determined the compensation at 50% above the rates sent by the District Collector for each of the aforesaid classes of land in his award dated 19.03.1986. Not satisfied with the award, the landowners made a reference under Section 18 of the Act to the civil court. Besides the State, NFL was impleaded as a defendant in the reference. By order dated 29.04.1991, the learned Additional District Judge determined the compensation for all the three classes of land at a uniform rate of Rs.32.50 per square yard after considering two unregistered sale agreements (Exhibits A-X and A-Y) and the order of the High Court in *Sadhu Singh's* case determining the compensation for land acquired for extension of the military cantonment in the year 1976. The land owners challenged the order of the Additional District Judge before the High Court in Regular First Appeals. The State of Punjab and NFL also challenged the order of the learned Additional District Judge before the High Court in Regular First Appeals. The learned

Single Judge of the High Court, who heard the appeals, sustained the determination of compensation made by the learned Additional District Judge and dismissed the appeals by a common order dated 09.09.1994.

3. Aggrieved, the land owners as well as NFL challenged the order dated 09.09.1994 of the learned Single Judge before the Division Bench of the High Court in Letters Patent Appeals. In the impugned judgment, the Division Bench of the High Court held that as Exhibits A-X and A-Y were unregistered and did not bear any date, these documents could not be considered for determination of compensation. The Division Bench also found from the site plan that the military cantonment for which Sadhu Singh's land was acquired was far away from the land acquired in the present case. The Division Bench also found that the land of Sadhu Singh was acquired for the military cantonment in the year 1976 whereas the lands acquired in the present case were included in the municipal limits of Bhatinda city in 1977 and around the land acquired in the present case, various colonies had come up in the municipal limits of Bhatinda. The Division Bench further found from the site plan that the land of Karam Singh which had been acquired for a municipal park was much nearer to the land of the land owners acquired in the present case. The Division Bench, therefore, took the view in the impugned judgment that the order passed by the High Court in the case of Sadhu Singh for the land acquired for military cantonment could not be preferred over the order of the High Court passed in the case of Karam Singh for land acquired for municipal park in the year 1983 for making the assessment of market value of the land acquired in the present case and determined Rs.120/- per square yard as just and reasonable market value for the land acquired in the present case and adopted the reasoning given in the order dated 08.11.1989 of the High Court (Exhibit A-15) in the case of Karam Singh (RFA No.906 of 1988).

4. Learned counsel appearing for the appellant submitted

that the Division Bench of the High Court was not correct in coming to the conclusion that the assessment of compensation in Karam Singh's case was more comparable and relevant for making assessment of market value of the land acquired in the present case. He submitted that in Karam Singh's case a very small area of land measuring 1058 sq. yards was acquired whereas in the present case a much bigger area of acre 29.68 was acquired. He submitted that in Karam Singh's case the land was a developed land located in the heart of the Bhatinda town, but in the present case the acquired land was water-logged and used for agricultural purpose and was away from the city. He referred to the order of the High Court passed in Karam Singh's case to show that the land acquired in that case had a great potential value for being used for commercial and residential purposes. He submitted that the land acquired in Karam Singh's case was at a distance of about 200 karmas from the scheme of Improvement Trust on the Amrik Singh Road. He submitted that at a short distance from the land acquired in Karam Singh's case, towards the city, there were shops of jewellers, iron furniture factory, cinema hall as well as Sepal Hotel. He argued that these facts made a big difference to the value of the land that was acquired in Karam Singh's case and that the assessment of compensation in Karam Singh's case was not at all relevant to the assessment of compensation for the land acquired in the present case.

5. Learned counsel for the appellant submitted that the learned Additional District Judge and the learned Single Judge have therefore rightly taken the view that the value of the land acquired in the case of Karam Singh could not be the basis for determining the compensation for the land acquired in the present case. He submitted that the learned Additional District Judge and the learned Single Judge of the High Court have in the present case taken the average price of two sale transactions in Exhibits A-X and A-Y as well as the market value of the land acquired in the year 1976 in the case of Sadhu Singh and after adding an increase of 12% per annum arrived

at the value of the land acquired in the present case in 1983 at Rs.32.50 per sq. yard, which was just and reasonable.

6. Learned counsel for the appellant cited *Chimanlal Hargovinddas v. Special Land Acquisition Officer, Poona and Another* [(1988) 3 SCC 751] in which this Court has listed the plus factors and minus factors which have to be taken into consideration for determining the market value of land in land acquisition cases. He submitted that in this decision this Court has mentioned largeness of area of land in the list of minus factors for determination of the market value of the land. He also relied on *Hasanali Khanbhai & Sons and Others v. State of Gujarat* [(1995) 5 SCC 422] in which deduction to the extent of 60% of the value of land on account of the large size of the land adopted by the High Court was found to be justified. He also relied on *K. Vasundara Devi v. Revenue Divisional Officer (LAO)* [(1995) 5 SCC 426] in which it was held that sufficient deduction should be made to arrive at the just and fair market value of large tracts of land, which were not developed. He also relied on *Kanta Devi and Others v. State of Haryana and Another* [(2008) 15 SCC 201] in which this Court made deduction of 60% for meeting the expenditure towards development charges.

7. Learned counsel for the respondent-land owners, on the other hand, submitted that all the witnesses produced by the land owners before the Additional District Judge have testified to the fact that the acquired land is situated on the National Highway leading from Bhatinda to Ferozepur *via* Goniana and was within the municipal limits of Bhatinda and was situated by the side of a metal road. He submitted that the witnesses have also testified that the acquired land was surrounded by many industrial concerns and residential colonies, such as thermal plant, the plant of NFL as well as colony of the employees of the two plants and Sucha Singh Colony, Amar Singh Colony, Kheta Singh Colony, Mandir Colony etc. He submitted that the witnesses have also stated that the *abadi*

of Bhatinda town has extended towards the land acquired in the present case and three sides of the acquired land are already occupied and on the fourth side is the metal road. He submitted that the learned Additional District Judge has taken note of all such evidence or the witnesses and has held that the land acquired in the present case has the potentiality of urban land and not of agricultural land.

8. Learned counsel for the respondent-landowners submitted that the land acquired in the present case may be at some distance from the land acquired in Karam Singh's case but this cannot be a ground for not treating the acquired land in the present case as comparable with the land acquired in Karam Singh's case for the purpose of determination of compensation. In support of his submission he relied on *Thakarsibhai Devjibhai and Others v. Executive Engineer, Gujarat and Another* [(2001) 9 SCC 584] in which this Court has held that if the quality, including potentiality, of two areas of land is similar then distance between the two would not by itself lead to a change in their respective market values. He submitted that it is not correct as has been submitted on behalf of the appellant that the acquired land was a low waterlogged agricultural land and as per the evidence of RW-1, the Patwari, Land Acquisition, Industries Department, Government of Punjab, the level of the acquired land was the same as that of the existing land of township of the NFL. He submitted that the quality of the acquired land and the quality of the land acquired in the case of Karam Singh were therefore one and the same and the Division Bench of the High Court has rightly held that the compensation determined for the land acquired in the case of Karam Singh should be the basis for determination of compensation of the acquired land in the present case. He submitted that in any case the value of the acquired land in Karam Singh's case was determined by the High Court under Ext.A-15 at Rs.176/- per square yard and the Division Bench in the impugned order has applied a cut and determined the compensation for the land acquired in the present case at a

reduced rate of Rs.120/- per square yard and this was a just and reasonable compensation awarded for the land acquired in the present case.

9. Learned counsel for the respondent-landowners next submitted that the determination of compensation by the learned Single Judge of the High Court in the present case on the basis of land acquired in *Sadhu Singh's* case was not at all correct because the land acquired in the case of Sadhu Singh was located in the cantonment area and the acquisition was in 1976, whereas the Municipal Council of Bhatinda was constituted only in 1977 and the land in the present case was acquired in 1983 when the land was within the municipal limits. He submitted that the acquisition in Sadhu Singh's case was made in 1976 more than seven years before the acquisition in the present case and therefore the value of land as determined in Sadhu Singh's case cannot be the basis for determination of compensation in the present case. He cited *General Manager, Oil and Natural Gas Corporation Limited v. Rameshbhai Jivanbhai Patel and Another* [(2008) 14 SCC 745] in which this Court has held that sale transactions which precede the subject acquisition by only a few years, i.e. upto four to five years, can be relied upon but relying on sale transactions beyond that would be unsafe, even if it relates to a neighbouring land. He submitted that in the absence of any appropriate sale transaction of the year 1983 in respect of land in an around the acquired land in the present case, the Division Bench rightly relied on the judicial precedent in the case of Karam Singh and determined the compensation at the rate of Rs.120/- per square yard. He relied on *Pal Singh and Others v. Union Territory of Chandigarh* [(1992) 4 SCC 400] wherein this Court has observed that a judgment of a court in a land acquisition case determining the market value of a land in the vicinity of the acquired lands, even though not inter partes, is admissible in evidence either as an instance or one from which the market value of the acquired land could be deduced or inferred. He submitted that Ext.A-15 which was the order of the

High Court in the case of Karam Singh has therefore been rightly relied upon by the Division Bench of the High Court in determining the compensation of Rs.120/- per square yard for the land acquired in the present case.

10. We have considered the submissions of the learned counsel for the parties and we find that while the case of the appellant is that the learned Additional District Judge and the learned Single Judge correctly determined the compensation payable to the landowners for the land acquired in the present case at the rate of Rs.32.50 per sq. yard, the case of the respondent-landowners is that the Division Bench of the High Court has correctly determined the compensation in the impugned judgment at the rate of Rs.120/- per sq. yard. Therefore, the question that we have to decide in these appeals is whether the compensation for the lands acquired as determined by the Additional District Judge and as upheld by the order of the learned Single Judge is a correct assessment of the market value of the acquired land or the compensation as determined by the Division Bench of the High Court in the impugned judgment is a more accurate assessment of the market value of the land acquired in present case.

11. We may first deal with the determination of the compensation by the Additional District Judge as affirmed by the learned Single Judge of the High Court in the Regular First Appeals. The Additional District Judge has taken into consideration two sale agreements (Exts. A-X and A-Y). Exhibit A-X is executed by one Satish Gupta agreeing to transfer his plot of land measuring 400 sq. yards for Rs.17,300/- to one Sham Singh and Exhibit A-Y is executed by one Balram Shukla agreeing to transfer his plot of 400 sq. yards for Rs.17,000/- to Satnam Singh. The average sale price in these two sale agreements comes to Rs.42.87 per sq. yard. The sale agreements are between the employees of NFL, who were members of the NFL Employees Co-operative Society. The Division Bench of the High Court has held in the impugned

judgment that these sale agreements, which have no details with regard to the date of execution and were not really sale deeds, could not have been taken into consideration for determining the market value of the acquired land. We have perused a copy of the sale agreement between Balram Shukla and Satnam Singh, which has been annexed in Civil Appeal No.3033 of 2008 as Annexure P-13 and we find that the sale agreement does not mention the date on which the agreement has been entered into. In the absence of any date of the sale agreement, the sale agreement could not have constituted the basis for determination of the market value of land in 1983 when the land was acquired in the present case. The Division Bench of the High Court, therefore, was right in taking the view that Exhibits A-X and A-Y cannot constitute the basis for determination of the market value of the acquired land in the present case.

12. The learned Additional District Judge has also relied on the order of the High Court determining compensation of land acquired in the case of Sadhu Singh (RFA No.1207 of 1984). The land in the case of Sadhu Singh was acquired within the revenue village of Bhatinda for extension of the military cantonment by notification dated 29.10.1976 and the High Court determined a rate of compensation of Rs.17/- per sq. yard. The Additional District Judge has given an increase of 12% per annum on this rate of Rs.17/- per sq. yard from 29.10.1976 to 24.01.1983 to arrive at the market value of the land as on 24.01.1983, i.e. the date of notification under Section 4 of the Act in the present case. The learned Single Judge of the High Court while sustaining the order of the learned Additional Judge, has held that although the exact location of the land is not given in Sadhu Singh's case, yet the same can be made the basis for determining the market value of the acquired land in the present case as the land acquired in the Sadhu Singh's case was within municipal limits of Bhatinda. In our considered opinion, the reliance on order of the High Court passed in Sadhu Singh's case by the learned Additional District Judge and the learned Single Judge was not

correct because from the site plan it appears that the land in Sadhu Singh's case which was acquired for military cantonment was far away from the land acquired in the present case which was located adjacent to the colony of NFL and other colonies. From the site plan, we also find that compared to the land acquired in Sadhu Singh's case, the land acquired in Karam Singh's case was much more nearer to the land acquired in the present case.

13. The Division Bench of the High Court has thus relied upon its order in the case of Karam Singh (RFA No.906 of 1988) passed on 08.11.1989 which was marked in the reference proceedings as Ext. A-15. The land in the case of Karam Singh was acquired for a municipal park by notification issued under Section 4 of the Land Acquisition Act on 30.08.1983 and is located within the municipal limits. In Karam Singh's case there was evidence of three transactions of sale of the same date i.e., 29.06.1973, showing that some land in the area had been sold at the rate of Rs.100/- per sq. yard, some land in the area had been sold at Rs.70.30 paise per sq. yard and some land in the area had been sold at the rate of Rs.62.50 per sq. yard and the Court took the average rate of the three sale transactions which worked out to Rs.80/- per sq. yard. The Court then added an increase of 12% per annum for ten years to arrive at the value of the land in the year 1983 when the land was acquired and the figure worked out at Rs.176/- per sq. yard. For finding out the market value of the land acquired in the present case, the Division Bench of the High Court applied a cut to this rate of Rs.176/- per sq. yard and determined the rate of Rs.120/- per sq. yard as just and reasonable value of the land acquired in the present case considering the location and potentiality of the acquired land. The Division Bench has, therefore, taken into consideration the fact that the land in Karam Singh's case was located in the heart of the Bhatinda town, whereas the land acquired in the present case was slightly away from the heart of the town and was located adjacent to the existing colony of the NFL and other

colonies, namely, the residential colonies of the thermal plant, Sucha Singh Colony, Amar Singh Colony, Kheta Singh Colony, Mandir Colony, etc. and reduced the market value of the land acquired in the present case.

14. We may now consider whether any further cut to the rate of Rs.120/- per sq. yard as determined by the Division Bench of the High Court in the impugned judgment was called for, considering the size and quality of the land acquired in the present case. Regarding the size of the land, the argument of learned counsel for the appellant is that the size of the land acquired in the case of Karam Singh was .04 acres (1058 sq. yards), whereas the size of the land acquired in the present case is acre 29.68 (143651 sq. yards). But on a reading of the order dated 08.11.1989 of the High Court in the case of Karam Singh (RFA No.906 of 1988) marked as Annexure Ext.A-15, we find that the High Court has taken into consideration three sale deeds of the same date to work out the average rate of the land at Rs.80/- per sq. yard in 1973 and applied an increase of 12% per annum to arrive at the figure of Rs.176/- per sq. yard, but has not mentioned the size of the lands which were sold under the three sale deeds. In the absence of the size of the plots of land which were sold under the sale deeds, which were taken into consideration by the High Court while determining the market rate of the land in Karam Singh's case, it is difficult to accept the contention of the learned counsel for the appellant that the determination of market value of the land in Karam Singh's case was in respect of land which was sold was much smaller in size as compared to the land which was acquired in the present case. Regarding quality of the land acquired in the present case, learned counsel for the appellant submitted that the land in Karam Singh's case was developed urban land meant for residential and commercial purpose, whereas the land acquired in the present case was low, water-logged agricultural land. We, however, find from the evidence of Basant Singh Patwari, Land Acquisition, Industries

Department Punjab, Chandigarh, examined as RW-1, that the level of the land, which was acquired in the present case, was that of the existing land of the township of NFL. The learned Additional District Judge in his order dated 29.04.1991 has in fact held, after considering all the oral and documentary evidence adduced by the parties, that the market value of the land acquired in the present case has to be determined on the basis of its potentiality for urban development and not on the basis of the revenue or agricultural classification of the land as done by the Collector because the land acquired in the present case had a great potential value for urban purposes, i.e. commercial, industrial and residential. We, therefore, do not find any merit in the submission of learned counsel for the appellant that a cut of 60% should have been applied to the rate as determined in Karam Singh's case considering the larger size and lower quality of the land acquired in the present case. In our opinion, the cut applied by the Division Bench of the High Court in the impugned judgment so as to reduce the value from Rs.176/- per sq. yard to Rs.120/- per sq. yard was just and reasonable in the facts of the present case.

15. In the result, we do not find any merit in these appeals and we dismiss the same and award a cost of Rs.10,000/- in favour of the respondents in each of the appeals.

B.B.B. Appeals dismissed.

PRATAP SINGH

v.

STATE OF U.P. & ANR.

(CIVIL APPEAL NO. 2307 OF 2011)

NOVEMBER 15, 2011

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

Judicial Service – Uttar Pradesh Higher Judicial Service Rules, 1975 – Rule 22 – Appellant, a judicial officer not promoted in the substantive vacancy to Uttar Pradesh Higher Judicial Service (UPHJS) and, reverted as Civil Judge (Senior Division) – On basis of remarks given by the District Judge in the ACR of appellant that he was most irresponsible and indisciplined officer – Legality of – Held: Documentary evidence on record made it clear that the remarks of the District Judge that the appellant was, 'irresponsible and indisciplined officer who has no regard for superiors or truth' had been expunged/substituted by the Inspecting Judge – The effect of such expunction/substitution was that the appellant could not be considered an irresponsible or indisciplined officer on the basis of remarks recorded by the District Judge – Due to consideration of the remarks recorded by the District Judge and not taking into consideration that such remarks were expunged/substituted as communicated to the appellant, the very consideration of the appellant's case for promotion in the substantive vacancy in UPHJS under the 1975 Rules by the selection committee and by the full court got seriously and vitally affected – The matter for appellant's promotion in the substantive vacancy in UPHJS thus needed re-consideration in accordance with law.

The appellant, a judicial officer, was not promoted in the substantive vacancy to Uttar Pradesh Higher Judicial Service (UPHJS) and, as a result, was reverted as Civil Judge (Senior Division).

The Selection committee did not recommend the appellant's name for promotion under Rule 22(1) of the Uttar Pradesh Higher Judicial Service Rules, 1975 in view of the remarks given by the District Judge in the ACR of the appellant. The committee referred to the remarks of the District Judge that the appellant was most irresponsible and indisciplined officer. The report of the committee was considered by the full court in its meeting and the name of the appellant was accordingly not approved for appointment in UPHJS under Rule 22 (1) of the 1975 Rules.

The question which arose for consideration in the instant appeal was whether non-approval of the appellant for promotion in the substantive vacancy in UPHJS under Rule 22(1) of the 1975 Rules suffered from any illegality.

Allowing the appeal, the Court

HELD: 1. It is not in dispute that the remarks recorded by the District Judge, Lalitpur in the ACR for 1996-97 (June 12, 1996 to March 31, 1997) formed the basis of non-approval of the appellant's name for promotion in the substantive vacancy in the UPHJS. That the District Judge, Lalitpur rated the appellant in the ACR recorded for the above period as an 'irresponsible and indisciplined officer' is borne out from the record. Against the remarks made by the District Judge, the appellant made a comprehensive representation to the Registrar on June 28, 1997. The representation made by the appellant was considered by the Inspecting Judge of Lalitpur District. Vide communication dated October 21, 1997, the appellant was informed that the adverse remarks recorded by the District Judge in column No. 1 (e)(iii) – 'disposal of old cases : not satisfactory" and the adverse remarks in column no. 1 (e)(iv) –"progress and disposal of execution cases: there were three execution cases of

1996 but no case was disposed of" had been expunged. In the above communication, the appellant was also informed that column no. 2—"overall assessment of the merit of the officer – outstanding, very good, good, fair, poor : Poor. Irresponsible and indisciplined officer who has no regard for his superiors or truth. Details mentioned in column no. 3 below" has been substituted by "overall assessment – just average". A careful reading of the communication dated October 21, 1997 leaves no manner of doubt that the adverse remarks given by the District Judge, Lalitpur in column no. 2 that appellant was irresponsible and indisciplined officer for the facts stated in column no. 3 no longer remained as it is and were substituted by "just average". The consideration of the remarks recorded by the District Judge, Lalitpur by the selection committee as well as by the full court in its meeting held on July 11, 1998 was, thus, not proper. [Paras 14, 15] [838-G-H; 829-A-G]

2. A judicial officer has to be disciplined and must behave as a responsible officer. Indiscipline in the judiciary cannot be tolerated. However, the remarks of the District Judge that the appellant was, 'irresponsible and indisciplined officer who has no regard for superiors or truth' have been expunged/substituted by the Inspecting Judge. The effect of such expunction/substitution is that the appellant cannot be considered an irresponsible or indisciplined officer on the basis of remarks recorded by the District Judge. The gravity of what has been recorded is, thus, lost. Moreover, the root of the problem between the two senior judicial officers appears to be clash of ego. The observation noted in column (3), 'He never came to me in the chamber or at the residence to discuss any problem relating to Nazarat' indicates that the District Judge was not happy with the appellant for having not given due importance to him. [Para 17] [841-D-G]

3. Due to consideration of the remarks recorded by the District Judge and not taking into consideration that such remarks were expunged/substituted as communicated to the appellant vide communication dated October 21, 1997, the very consideration of the appellant's case for promotion in the substantive vacancy in UPHJS under the 1975 Rules by the selection committee in its meeting dated May 18, 1998 and by the full court in its meeting held on July 11, 1998 gets seriously and vitally affected. [Para 18] [841-H; 842-A-B]

4. The matter for the appellant's promotion in the substantive vacancy in UPHJS which was considered by the selection committee on May 18, 1998 and by the full court on July 11, 1998 needs to be reconsidered in accordance with law. Since the appellant is likely to superannuate shortly, the High Court on its administrative side is expected to complete this exercise as early as possible and preferably within one month from the date of the communication of this order. [Para 21] [842-F-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2307 of 2011.

From the Judgment & dated 21.12.2009 of the High Court of Judicature at Allahabad, Lucknow Bench at Lucknow in Civil Misc. Writ No. 8 [S/B] Now D.B. of 1999.

Dinesh Dwivedi, P.N. Gupta, Manish Shankar Srivastava, Varun Chaudhary, Prateek Dwivedi for the Appellant.

Ravi Prakash Mehrotra, Vibhu Tiwari for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. The appellant – a judicial officer – having not been promoted in the substantive vacancy to Uttar Pradesh Higher Judicial Service (for short, 'UPHJS') and, as

a result of which, was reverted as Civil Judge (Senior Division) is in appeal, by special leave.

2. The appellant, after due selection, joined judicial service in Uttar Pradesh as Munsiff on May 16, 1977 and was confirmed as such on August 30, 1982. He became Additional Civil Judge on January 4, 1986 and got selection grade of Rs. 3700 – 5000 with effect from April 1, 1990. He then became Civil Judge (Senior Division).

3. The Allahabad High Court, on the administrative side, in its full court meeting held on November 18, 1995, approved promotion of the appellant in officiating capacity under Rule 22(3) of Uttar Pradesh Higher Judicial Service Rules, 1975 (for short, '1975 Rules'). Pursuant to the above decision taken by the full court, a notification was issued on June 7, 1996 promoting and posting the appellant as Additional District and Sessions Judge, Lalitpur.

4. While the appellant was posted as Additional District and Sessions Judge, Lalitpur, Shri Mukteshwar Prasad happened to be District Judge, Lalitpur. The appellant was made Officer in-charge, Nazarat by the District Judge with effect from September 10, 1996. The appellant continued as such until March, 1997 or so. It so happened that in the intervening night of January 30/31, 1997, some thieves entered the residence of the appellant and tried to break open the doors. The appellant suspected the involvement of class-IV employees of Lalitpur Judgeship. On that day, the District Judge was on leave and the appellant handed over an application to the Senior Administrative Officer wherein he alleged the support of the District Judge to class IV employees suspected to have entered the house of the appellant for theft. The application made by the appellant to the Senior Administrative Officer was kept in an open envelope. The District Judge, Lalitpur sought explanation from the appellant with regard to the allegations made by him in his application and also gave information of the incident to the Registrar of the High Court as well as the

inspecting Judge of Lalitpur Judgeship on February 19, 1997.

5. In the appellant's annual confidential report (ACR) of the year 1996-97 (June 12, 1996 to March 31, 1997), the District Judge (Shri Mukteshwar Prasad) made the following remarks:

"(a) Integrity of the officer whether beyond doubt, doubtful or positively lacking.	Beyond doubt. No complaint received.
(b) If he is fair and impartial in dealing with the public and bar.	No specific complaint was made to me.
(c) If he is cool-mind and does not lose temper in court.	Yes
(d) His private character, if such as to lower him in the estimation of the public and adversely affects the discharge of his official duties.	No complaint received against his private character.
(e) Control over the file in the matter of-	
(i) Proper fixation of cause list.	Not proper. On an Average, he fixed 22-23 cases.
(ii) Avoidance of unnecessary adjournments	Satisfactory
(iii) Disposal of old cases.	Not satisfactory. Disposed of one S.T. of 1991, 2 of 1992 and 6 of 1993

		out of 7 of 1991, 32 of 1992 and 36 of 1993.
(iv)	Progress and disposal of execution cases.	There were 3 execution cases of 1996 but no case was disposed of. One case is stayed by the Hon'ble High Court.
	(v) Interim orders, injunctions Being granted, refused to retained for sufficient reasons.	Yes.
	(vi) Are cases remanded on substantial grounds?	No appeal was remanded.
(f)	Whether judgments on facts and law are on the whole sound, well reasoned and expressed in good language.	Judgments of average quality.
(g)	Whether disposal of work is adequate (give percentage & reasons for short disposal).	Out-turn being 132% is above the standard. As per statement received as against 133 working days, he gave work for 175.88.
(h)	Control over the office and administrative capacity and tact.	Proper.
(i)	Relation with members of the bar [mention incidents, if any]	Normal
(j)	Behaviour in relation to brother Officers [mention incidents, if any]	Normal
(k)	Whether the officer has made Regular inspections of his court and Offices in his charge during the year and whether such inspections were full and effective.	YES
(l)	His punctuality in sitting in the court	Punctual.
(m)	Whether amenable to advice of District Judge and other superior Officers.	He is not amenable at all to the advice of the District Judge. Reasons given below in column no. 3.
2.	Overall assessment of the merit of the officer-out-standing, very good, good, fair, poor.	Poor. Irresponsible and indisciplined officer who has no regard for his super-iors or truth. Details mentioned in column no. 3 below.

3. <u>Other Remarks, if any.</u>

After taking over charge by me in this district, the officer was appointed Officer-in-Charge, Nazarat w.e.f. 10.9.1996. He being the next senior most officer in the Judgeship and only Addl. District Judge at that time, was expected to extend his full cooperation and assistance in the affairs of the Judgeship. Since very beginning, I found that his attitude was not cooperative and in fact he took no interest at all for improvement in working of Nazarat. He never came to me in the chamber or at the residence to discuss any problem relating to Nazarat. In the month of November, 1996, he made a request in writing for

relieving him from the post of Officer-in-charge, Nazarat. I summoned him and persuaded to continue as Officer-in-charge, Nazarat. With reluctance, he agreed to continue. Again he sent an application on 22.1.97 for removing him from the post of Officer-in-charge, Nazarat on the ground that Sri Shanker Lal, a Class IV employee was not transferred by me on his oral and written request. It is noteworthy that Sri Shanker Lal was transferred and in his place Sri Manik Chand was posted in his court vide order dated 30.1.97. Sri Singh was highly interested in a Class IV employee [Sri Swand Singh] and wanted his posting in his court but he was not transferred there for some administrative reasons. He joined the service in August, 1996.

He always complained of non-cooperation of Central Nazir and other officials working in the Nazarat and passed an order also on 23.12.96 to the effect that the Central Nazir never took round of the courts and never checked Chowkidars. In pursuance of this order, Central Nazir Sri Shamsher Bahadur Srivastava took a surprise round of the Civil Court building on 12.1.97 at about 3.35 a.m. and checked both Chowkidars at 3.50 a.m. Both Chowkidars, namely, Sarvasri Swank Singh and Gulab Chand Saroj were found sleeping. He submitted his report to the Officer-in-charge, Nazarat to call explanation of the Chowkidars. Sri Singh took no action against the Chowkidars and warned them to be vigilant in future.

Sri Singh always found shirking from work and never rendered any assistance to me in dealing with various problems of the Judgeship. Before posting of Sri Jai Singh, a newly promoted Addl. District Judge in the district in the month of March, 1997, he was senior most Addl. District Judge in the Judgeship. He, however, did not play his role properly for the simple reason that a Class IV employee of his choice was not posted by me in his court.

2. Sri Singh levelled totally false and baseless allegation against me in writing on 31.1.1997 when I was out of station and had gone to Gwalior. In my absence he handed over an application to Senior Administrative Officer and did not even keep the application in an envelope. Consequently, the contents of the letter were well-known to all the officials and officers working under me before my arrival at the headquarters. He levelled accusation against me that some thieves tried to break open the doors of his residence in the night intervening 30/31.1.1997. He suspected the involvement of some Class IV employees of the judgeship. According to him the thieves were Class IV employees of the judgeship and I was supporting them. After having gone through the contents of the letter, I was stunned. I sent a letter to Sri Singh and sought his reply on a few questions. In his reply dated 6.2.97, he tried to twist his letter dated 31.1.97. Thus the officer tried to tarnish my image in the eyes of other officers and officials of the Judgeship and committed an act of gross indiscipline.

I have already communicated these facts to the Registrar of the Hon'ble High Court of Judicature at Allahabad as well as Hon'ble the Inspecting Judge of Lalitpur through my D.O. letters No. 4 and 5/P.A./1997 dated 19.2.1997.

For all the above reasons, I have rated the officer to be most irresponsible and indisciplined."

6. The above adverse remarks recorded by the District Judge, Lalitpur were communicated to the appellant on May 30, 1997. On receipt of the communication, the appellant made representation to the Registrar on June 28, 1997 and prayed that the adverse remarks recorded by the District Judge be expunged.

7. On October 21, 1997, the appellant was communicated by the Joint Registrar that after consideration of his

representation, the remarks recorded by the District Judge in Column No. 1(e)(iii), 1(e)(iv) for the year 1996-97 have been expunged and Column No. 2 has been substituted by the court as – 'overall assessment – just average'.

8. It is the appellant's case that on July 11, 1998, he came to know that the full court in its meeting held on that day did not approve the appellant's name for his appointment in the substantive vacancy in UPHJS. The appellant submitted a representation to the High Court on administrative side on August 19, 1998 to reconsider the decision taken on July 11, 1998. The representation of the appellant was not favourably considered and on December 5, 1998 a notification was issued on the basis of the decision taken by the full court on July 11, 1998 reverting the appellant to the judicial service, i.e. Civil Judge (Senior Division).

9. The appellant challenged the notification dated December 5, 1998 in a writ petition before the Allahabad High Court at Lucknow Bench and prayed for quashing the same. He prayed that report of the selection committee dated May 18, 1998 and record of the decision of the full court taken on July 11, 1998 insofar as appellant was concerned be called for and a writ of mandamus be issued commanding the respondents to treat the appellant having been promoted to the UPHJS and ignore the remarks made by the District Judge in the ACR for the year 1996-97.

10. The above writ petition was contested by the respondents.

11. The Division Bench of the High Court, after hearing the parties, by its order dated December 21, 2009 dismissed the writ petition.

12. We heard Mr. Dinesh Dwivedi, learned senior counsel for the appellant and Mr. Ravi Prakash Mehrotra, learned counsel for the respondent no. 2.

13. From the counter affidavit filed before this Court on behalf of respondent No. 2 – High Court of Judicature at Allahabad – it transpires that the matter for promotion of the appellant in UPHJS under Rule 22 (3) of the 1975 Rules was considered by the HJS Selection Committee of three-Judges in its meeting held on November 10, 1995 and the name of the appellant was recommended for promotion to UPHJS in ad-hoc capacity. The report of the selection committee was considered by the full court in its meeting held on November 18, 1995 and the appellant's name was approved for promotion to UPHJS in ad-hoc capacity. The appellant was accordingly promoted to UPHJS and given posting at Lalitpur as Additional District and Sessions Judge. Thereafter appellant's matter for promotion in the substantive vacancy in UPHJS was considered by the selection committee comprising of three-Judges on May 18, 1998. The committee, however, did not recommend the appellant's name for promotion under Rule 22(1) of the 1975 Rules in view of the remarks given by the District Judge in the ACR for the year 1996-97. The committee referred to the remarks of the District Judge made in column 3 that he was most irresponsible and indisciplined officer. The report of the above committee was considered by the full court in its meeting held on July 11, 1998 and his name was not approved for appointment in UPHJS under Rule 22 (1) of the 1975 Rules. The question before us is : whether non-approval of the appellant for promotion in the substantive vacancy in UPHJS under Rule 22(1) of the 1975 Rules suffers from any illegality.

14. It is not in dispute that the remarks recorded by the District Judge, Lalitpur in the ACR for 1996-97 (June 12, 1996 to March 31, 1997) formed the basis of non-approval of the appellant's name for promotion in the substantive vacancy in the UPHJS. That the District Judge, Lalitpur rated the appellant in the ACR recorded for the above period as an 'irresponsible and indisciplined officer' is borne out from the record. Against the remarks made by the District Judge, the appellant made a

comprehensive representation to the Registrar on June 28, 1997. It is not necessary to refer to the representation made by the appellant in detail. Suffice it to say that the appellant did highlight that his integrity has been found to be beyond doubt and that in about 20 years of his judicial service, he has been posted with 24 District Judges and except the adverse remarks made by Shri Mukteshwar Prasad, District Judge, Lalitpur for the above period at no point of time any District Judge recorded any adverse remark about his conduct, integrity or performance. The appellant emphatically denied the observations of the District Judge, Lalitpur, recorded in the ACR and explained the entire episode.

15. The representation made by the appellant was considered by the Inspecting Judge of Lalitpur District. Vide communication dated October 21, 1997, the appellant was informed that the adverse remarks recorded by the District Judge in column No. 1 (e)(iii) – 'disposal of old cases : not satisfactory" and the adverse remarks in column no. 1 (e)(iv) – "progress and disposal of execution cases: there were three execution cases of 1996 but no case was disposed of" had been expunged. In the above communication, the appellant was also informed that column no. 2—"overall assessment of the merit of the officer – outstanding, very good, good, fair, poor : Poor. Irresponsible and indisciplined officer who has no regard for his superiors or truth. Details mentioned in column no. 3 below" has been substituted by "overall assessment – just average". A careful reading of the communication dated October 21, 1997 leaves no manner of doubt that the adverse remarks given by the District Judge, Lalitpur in column no. 2 that appellant was irresponsible and indisciplined officer for the facts stated in column no. 3 no longer remained as it is and were substituted by "just average". The consideration of the remarks recorded by the District Judge, Lalitpur by the selection committee as well as by the full court in its meeting held on July 11, 1998 was, thus, not proper.

16. However, in the counter affidavit filed on behalf of

respondent No. 2 before this Court, in paragraph 'C', the complete text of the order passed by the Inspecting Judge on August 6, 1997 on the representation of the appellant has been re-produced which reads as follows :

> "I have gone through the adverse remarks given by the District Judge, Sri Mukteshwar Prasad in para – 1 (e)(i), 1(e)(iii), 1(e)(iv), 1(f) and 1(m) as well as in column no. 2 relating to "over all assessment" and column no. 3 relating to "other remarks, if any", I have also gone through the representation preferred by the officer concerned. Looking to the representation made by the officer concerned, I feel that the conclusions arrived at by the District Judge in para 1(e)(i) and 1(f) do not deserve to be expunged while the conclusions arrived at under column 1(e)(iii) and 1(e)(iv) deserve to be expunged.
>
> The details given by the District Judge in remarks column no. 3 do go to indicate that Sri Pratap Singh—II is not amenable to the advice of the former, i.e. District Judge. As far as the over-all assessment taken to be 'poor' by the District Judge is concerned, I do not agree with the conclusions arrived at by him. Instead, looking to the reasons given by the Judicial Officer, Sri Pratap Singh-II in this regard, I find logic in them; since his integrity has been described by the District Judge to be beyond doubt and his work out-turn has been described to be above standard then, obviously, the over all assessment could not be 'poor'. Thus, it deserves to be expunged, and, instead, keeping in mind the complete A.C.R. and the remarks given by the District Judge, overall assessment can be rated as "just average".
>
> Further, since remarks given by the District Judge, Sri Mukteshwar Prasad are based on factual aspects which had also been communicated to the Registrar of the High Court as well as to me, the Inspecting Judge, at the opportune time, hence, they do not deserve to be

expunged, and the representation made by the Judicial Officer, Sri Pratap Singh-II in this regard deserves to be rejected."

17. On October 11, 2011, in course of hearing, Mr. Ravi Prakash Mehrotra, learned counsel for respondent No. 2 made a request for adjournment to enable him to seek instructions as to whether or not along with the communication dated October 21, 1997, copy of the decision of the Inspecting Judge, as reproduced above, was sent to the appellant. We acceded to the request of the counsel and kept the matter for October 18, 2011. On October 18, 2011, Mr. Ravi Prakash Mehrotra, fairly stated that the copy of the decision of the Inspecting Judge was not sent to the appellant and he was informed of what was contained in the communication dated October 21, 1997 only. In our view, in the above circumstances the text of the decision of the Inspecting Judge dated August 6, 1997 cannot be used against the appellant. It needs no emphasis that a judicial officer has to be disciplined and must behave as a responsible officer. Indiscipline in the judiciary cannot be tolerated. However, as noted above, the remarks of the District Judge that the appellant was, 'irresponsible and indisciplined officer who has no regard for superiors or truth' have been expunged/substituted by the Inspecting Judge. The effect of such expunction/ substitution is that the appellant cannot be considered an irresponsible or indisciplined officer on the basis of remarks recorded by the District Judge. The gravity of what has been recorded in column (3) is, thus, lost. Moreover, the root of the problem between the two senior judicial officers appears to be clash of ego. In the words of Samuel Johnson, every man is of importance to himself. The observation noted in column (3), 'He never came to me in the chamber or at the residence to discuss any problem relating to Nazarat' indicates that the District Judge was not happy with the appellant for having not given due importance to him.

18. Be that as it may, due to consideration of the remarks recorded by the District Judge and not taking into consideration

that such remarks were expunged/substituted as communicated to the appellant vide communication dated October 21, 1997, the very consideration of the appellant's case for promotion in the substantive vacancy in UPHJS under the 1975 Rules by the selection committee in its meeting dated May 18, 1998 and by the full court in its meeting held on July 11, 1998 gets seriously and vitally affected.

19. It is important to notice that in the counter affidavit filed on behalf of respondent no. 2, it has been stated that appellant's matter for promotion in the substantive vacancy in UPHJS was again considered by the selection committee on November 24, 2004 but in view of the matter being *sub judice*, it was resolved that appellant's name could not be considered for regular appointment under Rule 22(1) of the 1975 Rules and the above report of the selection committee was accepted by the full court in its meeting held on February 5, 2005.

20. In what we have discussed above, it is not necessary to consider the submissions of the learned senior counsel for the appellant that under Chapter III, Rule 4(B)(3) and Rule 4(C)(16) of the Allahabad High Court Rules (Rules of the Court), 1952 framed under Article 225 of the Constitution of India, the District Judge had no competence to make any remark with regard to the appellant.

21. In our view, the matter for the appellant's promotion in the substantive vacancy in UPHJS which was considered by the selection committee on May 18, 1998 and by the full court on July 11, 1998 needs to be reconsidered in light of the discussion made above and in accordance with law. Since the appellant is likely to superannuate shortly, we expect the High Court on its administrative side to complete this exercise as early as possible and preferably within one month from the date of the communication of this order.

22. The appeal is allowed, as indicated above, with no order as to costs.

B.B.B. Appeal allowed.

AIR INDIA CABIN CREW ASSN. & ORS.
v.
UNION OF INDIA & ORS.
(CIVIL APPEAL NOS. 9857-9861 OF 2011)

NOVEMBER 17, 2011

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Service Law – Conditions of Service – Alteration of, permissibility – Air India Cabin crew – Whether the management of Air India was entitled to alter the service conditions of Flight Pursers and Air Hostesses, despite several bilateral agreements arrived at between Air India and its workmen represented by the Air India Cabin Crew Association, and the Executive cadre of In-Flight Pursers and Air Hostesses – Held: It is, in fact, the prerogative of the Management to place an employee in a position where he would be able to contribute the most to the Company – Hence, the Air India was at liberty to adopt the revised promotion policy which was intended to benefit all the employees – The Management of Air India was always entitled to alter its policies with regard to their workmen, subject to the consensus arrived at between the parties in supersession of all previous agreements – Air Corporation (Transfer of Undertakings and Repeal) Act, 1994 – Labour Law.

Labour Law – Promotion of workman to executive cadre – Effect of – Held: Once an employee is placed in the Executive cadre, he ceases to be a workman and also ceases to be governed by Settlements arrived at between the Management and the workmen through the concerned Trade Union – Such Settlements by operation of law, cease to have any binding force on the employee so promoted by the Management – Service Law.

Precedents – Ratio decidendi – Held: A decision is an

authority for what it decides and not what can logically be deduced therefrom – Further, the ratio of a case must be understood having regard to the fact situation obtaining therein.

The questions that arose for consideration in the instant appeals were: 1) Whether the promotional avenues and other terms of service of the pre-1997 cadre of Assistant Flight Pursers could be changed to their prejudice despite the provisions of the Air Corporation (Transfer of Undertakings and Repeal) Act, 1994 and, in particular, Section 8 thereof and also in view of the judgments of this Court in the cases of Nergesh Meerza and Yeshaswinee Merchant, along with the various agreements and settlement arrived at between the parties and 2) Whether in the circumstances indicated, a policy decision of gender neutralization, which was prospective in nature, could be applied retrospectively to the pre-1997 cadre of Pursers and whether such application would be arbitrary and contrary to the provisions of Articles 14, 19 and 21 of the Constitution, as it upsets certain rights relating to promotion which had vested in Assistant Flight Pursers belonging to the pre-1997 cadre.

Dismissing the appeals, the Court

HELD:1. From the submissions made on behalf of the respective parties, what ultimately emerges for decision is whether the management of Air India was entitled to alter the service conditions of Flight Pursers and Air Hostesses, despite several bilateral agreements arrived at between Air India and its workmen represented by the Air India Cabin Crew Association, and the Executive cadre of In-Flight Pursers and Air Hostesses promoted to the Executive rank and given Grade 29, which was the starting point of the Executive cadre. The other connected question involved is whether those Flight Pursers who had been promoted in terms of the

revised promotion policy, would still be governed by the Settlements arrived at between the Management and the Unions, since they were covered by the same prior to their promotion to the Executive cadre. Another question which calls for attention is with regard to the merger of Cabin Crew effected in 1996, giving rise to the other disputed questions relating to interchangeability of duties between Flight Pursers and Air Hostesses. During the course of the hearing, it was urged that the Appellant Association was mainly concerned with the status of In-Flight Supervisors prior to the merger of cadres in 1996. In deciding the aforesaid questions, this Court will have to take into consideration the decisions rendered in Nergesh Meerza's case and Yeshaswinee Merchant's case, although, strictly speaking, this Court is more concerned with the decision taken in terms of Section 9 of the Air Corporation (Transfer of Undertakings and Repeal) Act, 1994, to bring about a parity in the service conditions of both Flight Pursers and Air Hostesses, both at the level of workmen and also the Executive cadre. While the Agreements are not altered or vary to any large extent, what has been done is to iron out the differences on account of the revised promotion policy, which exempted some of the workmen, who had been transformed to the category of Executive from the ambit of the said Settlements. [Paras 47, 48] [874-C-H; 875-A-B]

1.2. It is apparent from a reading of both the judgments delivered in Nergesh Meerza's case and Yeshaswinee Merchant's case that the same were rendered in the context of bringing parity between the cadre of In-Flight Supervisors and the cadre of Air Hostesses. It is, in fact, the prerogative of the Management to place an employee in a position where he would be able to contribute the most to the Company. Hence, notwithstanding the decision in Nergesh Meerza's

case and in Yeshaswinee Merchant's case, the Air India was at liberty to adopt the revised promotion policy which was intended to benefit all the employees. [Para 48] [875-B-D]

1.3. It was contended on behalf of the Appellant Association that the appellants were not concerned with the post-revised promotion policy, but with the separate cadre of In-Flight Pursers, as distinct from the cadre of Air Hostesses, with regard to their channel of promotion. This Court is inclined to agree with submissions on behalf of the appellant-association that prior to 1997, there was a category of Cabin Crew referred to as In-Flight Supervisors, which was confined to In-Flight Pursers alone and did not concern the Air Hostesses. However, this Court is unable to agree with the submissions on behalf of the appellant-association with regard to treating the duties discharged by In-Flight Supervisors to indicate that "In-Flight Supervisor" was a separate post. This Court is inclined to accept the submissions made on behalf of Air India that the duties discharged by persons designated as In-Flight Supervisors did not create any separate post and the post remained that of In-Flight Pursers. [Para 49] [875-D-G]

1.4. Accordingly, this Court is unable to accept the further submissions made on behalf of the appellants that they had been discriminated against in any way on account of the decision in Nergesh Meerza's case and Yeshaswinee Merchant's case. It is well-settled that a decision is an authority for what it decides and not what can logically be deduced therefrom. Further, it is also well-settled that the ratio of a case must be understood having regard to the fact situation obtaining therein. The position since the decisions rendered in Nergesh Meerza's case and in Yeshaswinee Merchant's case, underwent a change with the adoption of the revised

promotion policy agreed to between the parties and which replaced all the earlier agreements. The Management of Air India was always entitled to alter its policies with regard to their workmen, subject to the consensus arrived at between the parties in supersession of all previous agreements. This Court is also unable to accept the further submission made on behalf of the appellants that those workmen who had been promoted to the Executive category would continue to be governed by the Settlements arrived at when they were workmen and were represented by the Association. Once an employee is placed in the Executive cadre, he ceases to be a workman and also ceases to be governed by Settlements arrived at between the Management and the workmen through the concerned Trade Union. Such Settlements by operation of law, cease to have any binding force on the employee so promoted by the Management. [Para 50] [875-H; 876-A-F]

Air India v. Nergesh Meerza & Ors. **(1981) 4 SCC 335: 1982 (1) SCR 438 and** *Air India Cabin Crew Association.Vs. Yeshawinee Merchant & Ors.* **(2003) 6 SCC 277: 2003 (1) Suppl. SCR 455 – referred to.**

Karnataka State Road Transport Corporation v. KSRTC Staff & Workers' Federation & Anr. **(1999) 2 SCC 687: 1999 (1) SCR 733 – cited.**

Inderpreet Singh Kahlon & Ors. v. State of Punjab & Ors. **(2006) 11 SCC 356 : 2006 (1) Suppl. SCR 772 – relied on.**

Case Law Reference:

1982 (1) SCR 438	**referred to**	**Para 3**
2003 (1) Suppl. SCR 455	**referred to**	**Para 3**
1999 (1) SCR 733	**cited**	**Para 33**
2006 (1) Suppl. SCR 772	**relied on**	**Para 50**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9857-9861 of 2011.

From the Judgment & Order dated 8.10.2007 of the High Court of Delhi in WP (C) No. 983-987 of 2006.

WITH

C.A. Nos. 9862-9865 & 9866-9871 of 2011.

Gaurab Banerjee, H.P. Rawal, ASG, C.U. Singh, Pramod B. Agarwala, Praveena Gautam, Rajan Bharti, Sanjoy Ghose, Anitha Shenoy, Siddharth Aggarwal, Manali Sunghal, Stuti Gujral, Abhijat P. Medh, Praveen Jain, T.S. Sidhu, Mukesh Kumar, Sahil Tagotra, Vyom Shah, S.A. Haseeb, Ravi Kini, Vikas Soni (for M.V. Kini & Associates), Jawahar Raja, Mayur Suresh P. Ramesh Kumar, Dhawal Mehtortra, Rajat Kumar, Pukhrambam Ramesh Kumar, S. Wasim A. Quadri, Saima Bakshi, Zadi Ali, M.P. Jha for the appearing parties.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. Special Leave Petitions (Civil) Nos.20668-20672 of 2007, Special Leave Petitions (Civil) Nos.20679- 20682 of 2007 and Special Leave Petitions (Civil) Nos.20773-20778 of 2007, have been taken up together for hearing and final disposal, inasmuch as, the facts in the several matters are the same, and the law involved is also the same. For the sake of convenience, we shall narrate the facts from Special Leave Petitions (Civil) Nos.20668-20672 of 2007, which have been filed by the Air India Cabin Crew Association and two others.

3. The common issue in all these matters is whether the promotional avenues and other terms of service of the pre-1997 cadre of Assistant Flight Pursers could be changed to their prejudice despite the provisions of the Air Corporation (Transfer of Undertakings and Repeal) Act, 1994 and, in particular,

Section 8 thereof and also in view of the judgments of this Court in *Air India Vs. Nergesh Meerza & Ors.* [(1981) 4 SCC 335], and *Air India Cabin Crew Assn. Vs. Yeshaswinee Merchant & Ors.* [(2003) 6 SCC 277], along with the various agreements and settlement arrived at between the parties. The further question that arises is whether in the circumstances indicated, a policy decision of gender neutralization, which was prospective in nature, could be applied retrospectively to the pre-1997 cadre of Pursers and whether such application would be arbitrary and contrary to the provisions of Articles 14, 19 and 21 of the Constitution, as it upsets certain rights relating to promotion which had vested in Assistant Flight Pursers belonging to the pre-1997 cadre.

4. In order to appreciate the case made out by the appellants in these appeals, it is necessary to set out briefly some of the facts leading to the filing of the several writ petitions before the Delhi High Court.

5. According to the appellants, for several decades two distinct cadres have been existing in Air India Corporation, comprising male Air Flight Pursers and female Air Hostesses, each with their own terms and conditions of service, including promotional avenues. In 1980, one Nergesh Meerza and four other Air Hostesses filed Writ Petition No.1186 of 1980 in the Bombay High Court, questioning the constitutional validity of Regulation 46(i)(c) of the Air India Employees' Service Regulations and raising certain other questions of law. Air India, being the Respondent No.1 therein, moved a transfer petition, being Transfer Case No.3 of 1981, for transfer of the writ petitions from the Bombay High Court to this Court on the ground that several writ petitions filed by Air India were pending before this Court and also on account of the fact that other writ petitions had also been filed by the Air Hostesses employed by the Indian Airlines Corporation, hereinafter referred to as "IAC", which were also pending in this Court involving almost identical reliefs. Even in the said case, which was transferred

to this Court, it was observed that from a comparison of the method of recruitment and the promotional avenues available, Air Hostesses formed an absolutely separate category from that of Assistant Flight Pursers in many respects, having different grades, different promotional avenues and different service conditions.

6. At this stage, it may be necessary to give a little further background regarding Indian Airlines Corporation and Air India Limited established under Section 6 of the Air Corporations Act, 1953. Subsequently, Indian Airlines Limited and Air India Limited were formed and registered under the Companies Act, 1956. In 1994, the Air Corporations (Transfer of Undertakings and Repeal) Act, 1994, hereinafter referred to as "1994 Act", was enacted to provide for the transfer and vesting of the undertakings of Indian Airlines and Air India respectively to and in the companies formed and registered as Indian Airlines Limited and Air India Limited and also to repeal the Air Corporations Act, 1953. Section 3 of the 1994 Act provided for the vesting and transfer of the undertaking of Indian Airlines in Indian Airlines Limited and the undertaking of Air India in Air India Limited. Section 8 of the 1994 Act also specified that every officer or other employee of the Corporations, except the Director of the Board, Chairman, Managing Director or any other person entitled to manage the whole or a substantial part of the business and affairs of the Corporation serving in its employment immediately before the appointed day (1st April, 1994) would, in so far as such officer or other employee were concerned, become as from the appointed day, an officer or other employee, as the case may be, of the company in which the undertaking had vested and would hold his office or service therein for the same tenure, at the same remuneration and upon the same terms and conditions of service. He would be entitled to the same obligations, rights and privileges as to leave, passage, insurance, superannuation scheme, provident fund, other funds of retirement, pension, gratuity and other benefits as he would have held under the Corporation if its undertaking

had not vested in the Company, with the option of not becoming an officer or other employee of the Company.

7. The dispute regarding the distinction between Assistant Flight Pursers and Air Hostesses resulted in a Record Note signed on 30th May, 1977, by the Air India Cabin Crew Association and Air India Limited, which noticed differences between the functional designation of In-Flight Crew and actual designation and also permitted female Executive Air Hostesses to fly. After the decision in *Nergesh Meerza's* case, on 17th November, 1983, a further Record Note was entered into between the aforesaid Association and Air India Limited, which introduced avenues of promotion for Air Hostesses. It was provided that the avenues of promotion for Air Hostesses would be through the categories of Senior Check Air Hostess, Deputy Check Air Hostess and Additional Chief Air Hostess to Chief Air Hostess. It was also indicated that as far as male Assistant Flight Pursers, comprising Flight Pursers and In-Flight Supervisors were concerned, they would continue to be unaffected and the hierarchy on board the aircraft for various categories would remain as was then existing and there would be no change in the job functions of any category of cabin crew on account of the said agreement. What is evident from the said Record Note is that the separate and distinct cadres of male and female Cabin Crew were continued in respect of promotional avenues, hierarchy and job functions on board an aircraft.

8. Subsequently, on 5th June, 1997, a settlement was arrived at between the appellants and Air India that all earlier settlements, awards, past practices, record notes and understandings arrived at between the erstwhile Corporation and the appellant Association, would continue. Immediately after the signing of the said Memorandum of Settlement, on the very same day Air India Limited issued a promotion policy for all the Cabin Crew members, but treated the pre-1997 and post-1997 crew separately. By a specific clause, the said

promotion policy amended the existing promotional avenues for the male Cabin Crew to that of In-Flight Supervisors and female Cabin Crew to the post of Senior Check Air Hostesses recruited prior to the settlement. The said promotion policy kept the promotional avenues in the two streams of male Cabin Crew and female Cabin Crew, recruited prior to 1997, separate.

9. It may be of interest to note that there was a distinct division among the Air Hostesses, the majority of whom belonging to "workmen" category, numbering about 684 at the relevant time, were members of the Air India Cabin Crew Association. When the revised promotion policy for Cabin crew was brought into effect from 7th June, 1997, a small number of about 53 Air Hostesses, who were about 50 years of age, including those promoted to executive cadres for ground duties or who were at the verge of retirement from flying duties, formed an association in the name of Air India Air Hostesses' Association. The Association unsuccessfully challenged the binding effects of the Settlement of 5th June, 1997, in the Bombay High Court, but got itself impleaded as a party in a pending Reference before the National Industrial Tribunal and raised the issues of merger and interchangeability of job functions between the male and female Cabin Crew members. Despite opposition from the appellant Association, which represented 684 out of 1138 Air Hostesses of Air India, the High Court accepted the conditional proposal of merger of cadres of male and female members of Cabin Crew and held that Air Hostesses were also entitled to retire at the age of 58 years from flying duties on par with Flight Pursers and other members of the cabin crew. The High Court held that the age of retirement from flying duties of Air Hostesses at and up to the age of 50 years with option to them to accept ground duties after 50 and up to the age of 58 years amounted to discrimination against them based on sex, which was violative of Articles 14, 15 and 16 of the Constitution, as also Section 5 of the Equal Remuneration Act, 1976. It was further held that

the two cadres of male and female Cabin Crew members came to be merged only after 1997 and such merger applied to fresh recruits and the conditions of service and distinction between the two cadres would continue with regard to the existing Cabin Staff up to the year 1997.

10. The aforesaid promotion policy separated the promotional avenues for male Cabin Crew and female Cabin Crew recruited prior to 1997 as a separate and distinct class, as was also observed in Yeshaswinee Merchant's case (supra). According to the appellants, the Union of India, by its directive dated 21st November, 2003, attempted to over-reach the judgment of this Court in Yeshaswinee Merchant's case (supra), wherein, the directives dated 16th October, 1989 and 29th December, 1989, were to become inoperative after the Repeal Act of 1994. Thereafter, on 18th December, 2003, in terms of the directive of 21st November, 2003, the Respondent No.2 came out with an Office Order of even date, wherein, it was, inter alia, indicated that with the flying age of female Cabin Crew having been brought at par with the male Cabin Crew, the issue of seniority and promotion would have to be addressed by the Department so that there was no resentment among the categories of employees. Liberty was given to the In-Flight Service Department to assign flight duties to such Air Hostesses, who may have been grounded at the age of 50 years. On 30th December 2003, the Respondent No.2 addressed a letter to the Air Hostesses informing them that in keeping with the directions received from the Respondent No.1, it had been decided by the management to allow them to fly up to the age of 58 years, though, of course, such decision would be without prejudice to the proceedings pending before the National Industrial Tribunal at Mumbai. Thereafter, by subsequent letters, the Respondent No.2 wrote to the appellant Association that on the issue of service conditions, the management was aware of the various Agreements, Awards and Judgments and it was re-emphasized that the two cadres were not being merged and the service conditions of the male

and female Cabin crew continued to be separate and distinct in terms of the Agreements and judgments passed in respect thereof.

11. However, in contrast to the correspondence on 27th December, 2005, the Respondent No.2, in total disregard of the Record Notes, Memorandum of Settlement and the judgments of this Court in Nergesh Meerza's case and in Yeshaswinee Merchant's case (supra), issued an administrative order bringing female Cabin crew and the male Cabin Crew at par in respect of age of retirement. Accordingly, Air Hostesses were also permitted to fly up to the age of 58 years. In the said order it was also indicated that after the promulgation of the order, the Executive Female Cabin Crew would be eligible to be considered for the position of In-Flight Supervisor along with the Executive Male Cabin Crew. It was, however, clarified that the number of Executive Cabin Crew to be designated as In-Flight Supervisors would be based on operational requirements of the company.

12. On the promulgation of the said order, the appellant Association made a representation to the Chairman and Managing Director of the Respondent No.2 on 28th December, 2005, pointing out that the same was contrary to the judgments of this Court. Since the appellant Association did not receive any response to its representation, it filed Writ Petition (C) Nos.983-987 of 2006, before the Delhi High Court on 21st January, 2006, complaining that the orders passed were arbitrary, illegal and contrary to the various decisions of this Court. The said writ petitions, along with various connected matters, came up for consideration before the Division Bench of the High Court on 30th January, 2006. After impleading Air India Air Hostesses Association and the Air India Executive Air Hostesses Association as respondents in the writ petition on the ground that they were likely to be affected by any order which may be passed in the pending proceedings, the appellant Association filed its Rejoinder Affidavit to the Counter

Affidavits filed by the Respondent Nos.1, 2 and 3 and denied the claim of the respondents that the posts of Flight Supervisors had been abolished by the promotion policy of 1997 and that the male and female cadres of the Cabin Crew recruited prior to 1997, had been merged. Before the Division Bench of the High Court, both the parties appeared to have clarified their stand that the merger of Indian Airlines with Air India did not in any manner affect the existing settlements and agreements. Ultimately, on 8th October, 2007, the Division Bench of the High Court dismissed the writ petitions filed by the appellant Association. By the said judgment, the Division Bench of the High Court rejected the challenge of the appellant Association to the constitutional validity of Section 9 of the Air Corporation (Transfer of Undertakings) Act, 1994, though, on the ground of laches. The other challenge to the impugned directive issued by the management on 21st November, 2003, was also not accepted. More importantly, for our purpose in these cases, the Division Bench of the High Court held that the expression "In-Flight Supervisor" is, in fact, a description of a job function and is not a post exclusively reserved for the male Cabin crew.

13. As mentioned hereinabove, these appeals are directed against the said decision of the Division Bench of the High Court of Delhi.

14. Appearing for the appellant Association and the other appellants in SLP(C)Nos.20668-20672 of 2007 (Now appeals), Mr. Pramod B. Agarwala, learned Advocate for the appellants in SLP(C)Nos. 20679-20682 of 2007, contended that the Appellant No.1, Association, is a registered trade union under the Trade Unions Act and represents the largest number of Cabin Crew in the country, both prior to and after 1997 of both Air India and the former Indian Airlines. Learned counsel contended that the said Association is the sole recognized union for collective bargaining in respect of the Cabin Crew, such as Air Hostess and Flight Purser cadres. He submitted that the said Association represented more than 1480 Cabin

Crew in Air India and more than 350 of their members were pre-1997 Air Hostesses and, approximately, 360 were pre-1997 Flight Pursers. The Executive Cabin Crew members are represented by the Air India Officers Association, as also the Air India Executive Cabin Crew Association. It was contended by Mr. Agarwala that none of the other trade unions are recognized or registered trade unions.

15. Mr. Agarwala submitted that the challenge to the directive issued by the Central Government on 21st November, 2003, had been wrongly interpreted by the management of Air India as facilitating the breach of binding Settlements, Agreements and Record Notes. The management of Air India also appears to have taken the position that the directive issued by the Central Government on 21st November, 2003, freed it from the directions contained in the decision of this Court in *Yeshaswinee Merchant's* case (supra). Mr. Agarwala submitted that the decision in these appeals would depend on the answers to the following questions :

(a) Whether the decision of this Court in *Nergesh Meerza's* case and *Yeshaswinee Merchant's* case (supra), could be nullified by an order of the Civil Aviation Ministry issued under Section 9 of the Air Corporation (Repeal and Transfer of Undertakings) Act, 1994, and also whether the same could set aside the various Record Notes, Settlements and Agreements entered into by Air India with the appellant Association?; and

(b) Did the post of In-Flight Supervisor stand abolished by the promulgation of the promotion policy of 5th June, 1997?

16. Referring to the judgment of the High Court, Mr. Agarwala submitted that three issues were framed for adjudication, namely,

(i) What is the effect of the judgments of the Supreme Court in *Nargesh Meerza's* case (supra) and in the case of *Yeshaswinee Merchant* (supra) on the validity of the impugned orders and directives?;

(ii) Is the position of an In-Flight Supervisor a job function or a post and how does the same affect the claim of male Cabin Crew in the Flight Purser cadre to an exclusive right to be appointed to such a position?

(iii) Are the impugned circulars and orders rendered invalid either on account of procedural violations and/or on the grounds of discrimination, arbitrariness or irrationality and do they violate any previous settlements and agreements?

17. Mr. Agarwala submitted that the High Court had misunderstood the decisions rendered by this Court and had proceeded on an erroneous assumption that Flight Pursers were claiming benefits only for the male Cabin Crew.

18. Mr. Agarwala submitted that in the two cases referred to hereinabove, the relevant findings are that on a comparison of the mode of recruitment, the classification, the promotional avenues and other matters which had been discussed, it was clear that Air Hostesses formed a separate category from that of Air Flight Pursers, having different grades, different promotional avenues and different service conditions, but no discrimination had been made between Flight Pursers and Air Hostesses, although their service conditions may have been different. It was also held that the post of In-Flight Supervisor belongs to the Flight Purser cadre. While considering the fact that the retirement age of Air Hostesses was 58 years, Air Hostesses were prohibited from flying beyond the age of 50 years. What was also established was that there could be no interchangeability of functions between the two cadres, unless the same was introduced by way of settlement between the

appellant Association and the management of Air India. Mr. Agarwala submitted that all these issues had been considered by this Court in the light of the various Agreements, Settlements and Awards entered into by Air India with the appellant Association in *Yeshaswinee Merchant's* case and once such an exercise had been undertaken by this Court, it was no longer open to the High Court to undertake a fresh exercise on the decided issues.

19. Mr. Agarwala further contended that the findings of this Court could not be negated by a mere directive issued by the Government under Section 9 of the 1994 Act. The said directive of 21st November, 2003, merely directs Air India to allow the female Cabin crew to perform flying duties up to the age of 58 years in the interest of operations and in view of the exigencies of circumstances. Mr. Agarwala submitted that by issuing such an administrative order, on 27th December, 2005, Air India was not only seeking to nullify the judgments of this Court, but also the binding settlements which had been arrived at between the parties.

20. On the question as to whether the abolition of a post could be implied or whether it has to be an explicit arrangement through a bilateral settlement or a Court order, learned counsel submitted that, although, it had been Air India's stand that the post of In-Flight Supervisor stood abolished under the 1997 promotion policy, the same is not reflected either in the said policy or the settlement. In fact, except for placing on record a seniority list as on 1994 and 1998, no other material had been disclosed to establish the fact that the posts of In-Flight Supervisors had been abolished. Mr. Agarwala repeated his submission that it had been admitted by Air India that the post of In-Flight Supervisor was meant exclusively for the Flight Purser cadre, since their promotional avenue and/or any change in their service conditions could only be brought about through a bilateral settlement with the appellant Association. Mr. Agarwala pointed out that in *Nergesh Meerza's* case this Court

had observed that it was unable to understand how the management could phase out the posts available to the Air Hostesses exclusively at the instance of Pursers when they had no concern with the said post nor did they have any right to persuade the management to abolish a post which had been meant for them. This Court went on to observe that since the decision had been taken as far back as in 1977 and no grievance had been made by the Air Hostesses in that regard, no relief could be given to them, but in view of the limited promotional channels available to Air Hostesses, Air India should seriously consider the desirability of restoring the posts of Deputy Chief Air Hostess in order to remove the injustice which had been done to the Air Hostesses, in violation of the principles of natural justice.

21. Consequent upon the decision in *Nergesh Meerza's* case, a settlement was reached on 17th November, 1983, whereby the Executive Post of Deputy Chief Air Hostess was reintroduced with a separate standard force and job profile and also defining separate promotional avenues for the cadre of Flight Pursers and Air Hostesses. The subsequent settlement of 25th December, 1988, went further and increased the standard force of Deputy Chief Air Hostesses, while maintaining the separate avenues of promotion of the two cadres.

22. The third Agreement contained in the Record Note of Understanding dated 17th March, 1995, did not contain anything of relevance to the facts of this case, except for paragraph 6 of the Note which provided for interchangeability of job functions. It was indicated that in respect of new entrants there would be interchangeability in the job functions between male and female members of the Cabin Crew to ensure optimum utilization of the existing work force and the standard force to be maintained, without affecting the promotional avenues of the work force then in existence and that the uniform conditions of service were to be maintained. Paragraph 7 dealt with the upgradation of In-Flight service, which, it was agreed, would be carried out as

per the Agreement dated 6th October, 1992, with immediate effect. The said Agreement did not change anything as far as the two separate cadres were concerned, which continued to remain in existence.

23. The aforesaid Agreement was followed by a policy adopted by Air India for redesignation, scales of pay and changes in promotion policy for Executive Cabin Crew of In-Flight Services Department. The same was contained in a letter dated 24th May, 1996, written by the Director, H.R.D., to the Director of Finance of Air India. By virtue of the said policy, the posts of the Executive Cabin Crew of the In-Flight Services Department were redesignated. The Executive Cabin Crew began from Grade No.27, which consisted of In-Flight Supervisors and Deputy Chief Air Hostesses. Their designation was revised to that of Deputy Manager-IFS. Grade No.29 consisting of Deputy Manager and Additional Chief Air Hostesses were redesignated as Manager-IFS. Grade No.31, which comprised of Managers and Chief Air Hostesses, were redesignated as Senior Managers-IFS. Lastly Senior Managers in Grade No.34 were redesignated as Assistant General Managers-IFS. It was made clear that such redesignation was for Administrative/ Executive ground assignments and, that the existing functional designations of In-Flight Supervisor and Air Hostess would continue, whilst on flight duties, in accordance with the prevailing practices. The scales of pay were also revised and a fitment method was introduced in respect thereof. The effect of the said policy was that all Cabin Crew could be required to discharge dual functions, in the air and also on the ground, in addition to duties to be performed by In-Flight Supervisors.

24. Inasmuch as, all members of the appellant Association, which was a Trade Union registered under the Trade Unions Act, 1926, belong to the workmen category of the Cabin Crew, as was then existing, such as Assistant Flight Purser, Flight Purser, Check Flight Purser, Additional Senior Check Flight

Purser, Senior Check Flight Purser, Air Hostess, Senior Air Hostess, Check Air Hostess, Additional Senior Check Air Hostess, Senior Check Air Hostess and those recruited from March, 1995 onwards till the date of Settlement, they intimated to the Management of Air India on 1st July, 1990, that the Settlement entered into between the Management for the period 1st October, 1985 to August 31, 1990, stood terminated on the expiry of the period specified in the Settlement. A fresh Charter of Demands for the period commencing from 1st September, 1990, was also submitted. On 26th May, 1993, the Management of Air India and the appellant Association signed a Memorandum of Settlement providing for payment of interim relief during the period of wage settlement for the period commencing from 1st September, 1990. It was indicated that the settlement was in supersession of all previous Agreements, Record Notes, Understandings, Awards and past practices in respect of matters specifically dealt with or amended or modified. It was stipulated that the Settlement would be implemented after the same was approved by the Board of Directors of Air India Limited. The result of the said Settlements and Agreements was that the designation of Air Hostesses and Flight Pursers were discontinued and all were designated as "Cabin Crew".

25. Then came the promotion policy for Cabin Crew on 5th June, 1997. It was stipulated therein that the revised promotion policy would cover all promotions of Crew from the induction level up to the level of Manager, which is the first Executive level post, with the object of providing planned growth to the Cabin Crew. From this date onwards, the two cadres of the Cabin Crew stood merged as far as the fresh recruits were concerned. Paragraph 7.4 of the promotion policy provided that the existing category of Cabin Crew on being promoted to the new grades would continue to perform their job functions prior to such promotion till the time of actual requirement in the higher grade. It was also provided in paragraph 7.5 that on promotion to the Executive cadre, i.e., to the level of Manager and above,

the male Cabin Crew would continue to carry out their respective job functions of Assistant Flight Pursers/Flight Pursers, as the case may be, until such time they started performing the functions of In-Flight Supervisors on a regular basis. Mr. Agarwala submitted that paragraph 7.4 created a cadre within a cadre after 5th June, 1997, and those recruited prior to 1995 and 1999 were to continue in their old cadre till the date of merger and the new service conditions would apply to new recruits after the said date.

26. Mr. Agarwala submitted that this Court had taken into account all the various Agreements, Settlements and Awards entered into by the Management of Air India with the appellant Association in *Yeshaswinee Merchant's* case and it was not open to the High Court to attempt to rewrite the law, as had been declared by this Court.

27. Mr. Agarwala contended that all the Agreements arrived at between the appellant Association and the Management of Air India in 1977, 1983, 1988 and 1995, dealt with Executive posts and also protected the separate and distinct promotional avenues of Flight Pursers and Air Hostesses, at least till 1997, when there was a merger of the Cabin Crew.

28. On the question as to whether by the directive of 21st November, 2003, issued by the Government under Section 9 of the 1994 Act, the law as declared by this Court in *Yeshaswinee Merchant's* case could be unsettled, Mr. Agarwala's response was to the contrary. It was submitted by him that the said directive only directed Air India to allow the female Cabin Crew to perform flying duties up to the age of 58 years, but it did not say anything more. On the other hand, by issuing the Administrative Order dated 27th December, 2003, Air India was seeking to nullify the judgments of this Court, as also the binding settlements, which it was not empowered to do under the law. It was submitted that a contrary view could not be canvassed by the Government

authorities barely four months after the judgment of this Court, concluding that the directives were no longer operative due to the repeal of the Air Corporations Act, 1994. Mr. Agarwala contended that the directive of 21st November, 2003, issued by the Government was nothing but a mechanism evolved by the management of Air India to circumvent the judgments of this Court, which it could not do.

29. As to the second proposition as to whether a post could be abolished by implication, Mr. Agarwala submitted that the same could only be effected through a bilateral settlement or a Court order. It was urged that, although, on behalf of Air India it had been submitted that the post of In-Flight Supervisor had been abolished under the said promotion policy, not a single clause of the settlement reflects such submission. Mr. Agarwala submitted that except for a seniority list of 1994 and 1998, no material had been placed on behalf of the Air India to show that in fact the post of In-Flight Supervisor had been abolished. In this regard, Mr. Agarwala also referred to the observation made by this Court in *Nergesh Meerza's* case, where it had been observed that the Court was unable to understand how the Management could phase out a post available to the Air Hostesses exclusively, at the instance of Pursers, when they had absolutely no concern with the said post.

30. Mr. Agarwala submitted that the case of the appellant Association, representing the In-Flight Pursers, was confined to the question of the benefits which were available to In-Flight Pursers prior to the promotion policy of 1997.

31. Mr. Sanjoy Ghose, learned Advocate appearing for the appellants in SLP(C)Nos.20679-20682 of 2007, supported the submissions made on behalf of the All India Cabin Crew Association and submitted that the Appellant No.1, Kanwarjeet Singh, was himself a party in *Yeshaswinee Merchant's* case (supra). Learned counsel submitted that the appellants were all Assistant Flight Pursers, who also sought the same relief as was being sought by the Air India Cabin Crew Association. Mr.

Ghose submitted that the appellants were aggrieved by the order passed by the Minister of Civil Aviation on 21st November, 2003, enhancing the age of flight duties of female Cabin Crew up to 58 years and also the subsequent order passed by Air India on 18th December, 2003, directing the In-Flight Services Department of Air India to assign flight duties to Air Hostesses who had been grounded at the age of 50 years. Mr. Ghose submitted that even the Office Order issued by Air India on 27th December, 2005, stating that Air India would be at liberty to consider Air Hostesses for the post of Air Flight Supervisor, was contrary to the decision of this Court in both *Nergesh Meerza's* case, as well as *Yeshaswinee Merchant's* case, indicating that there were three different categories of staff comprising the Cabin Crew. It was submitted that by issuing the said orders, Air India was trying to by-pass the decisions of this Court in the said two cases. It was submitted that the question has to be decided as to whether the functions discharged by In-Flight Pursers were "job functions" or whether the same were the adjuncts of the Flight Purser's duties on board the Aircraft. It was further contended that whatever be the answer to the said question, what was material is that in the absence of an express agreement with the majority union, the job functions, which were the subject matter of industrial agreements and settlements, could not be altered or abolished in any manner by Air India.

32. Mr. Ghose further submitted that the respondents' contention that the post of In-Flight Supervisor is an executive post and workmen have no locus standi to challenge the same, is contrary to the position adopted by the management of Air India regarding the legitimate interest of the appellants by which their avenues of promotion had been altered and their future job functions had been affected, without recourse to the lawful process of collective bargaining. It was pointed out that in *Yeshaswinee Merchant's* case (supra), this Court had held that executives, who as workmen had entered into and benefited from the various industrial settlements, could not attempt to

wriggle out of the same, merely on account of having received promotions to the executive cadre.

33. The other challenge with regard to the increase in the retirement age of Air Hostesses up to 58 years and also assigning them flying duties up to and beyond the age of 50 years, was the same as in the Air India Cabin Crew Association's case. In addition, it was also submitted that having protected the conditions of service of the employees under Section 8 of the 1994 Act, the legislature could not have intended to confer powers upon the Central Government in Section 9 thereof, to direct the Management of Air India to alter the conditions of service which had been settled on the basis of binding settlements and agreements. In support of his submissions, Mr. Ghose referred to the decision of this Court in *Karnataka State Road Transport Corporation Vs. KSRTC Staff & Workers' Federation & Anr.* [(1999) 2 SCC 687], wherein, it was held that the power of the Government to issue directives could not in its width over-ride industrial law or create service conditions. Mr. Ghose submitted that since the decision in *Yeshaswinee Merchant's* case continued to hold the field, any attempt to question the 1997 policy on the ground of ironing out the creases relating to accelerated promotions and eligibility criteria was misplaced and the 2003 directive to permit Air Hostesses to fly beyond the age of 50 years, which was exigency based, should not be allowed to continue for 8 years, since almost a thousand new Cabin Crew had been recruited after 2003.

34. In SLP(C)Nos.20773-20778 of 2007, Rajendra Grover and Ors. Vs. Air India Ltd. & Anr., the same challenges were advanced as in the other two SLPs. It was submitted by Mr. Siddharth Aggarwal, learned Advocate appearing for the appellants, that Air India is a Government Company within the meaning of Section 617 of the Companies Act, 1956, in which one of the departments is the "In-Flight Services Department", which includes the Cabin Crew Section, consisting of members

of two separate and distinct cadres – Air Hostess's Cadre and Flight Purser's Cadre. Mr. Aggarwal submitted that this Court had clearly recognized the said two cadres as separate and distinct in *Nergesh Meerza's* case (supra), and the same was upheld in *Yeshaswinee Merchant's* case (supra). Accordingly, the conditions of service with regard to the various posts had been the subject matter of negotiations and settlements and, as contended both by Mr. Siddharth Aggarwal and Mr. Ghose, the same could not be altered to the detriment of the workmen without due consultation with the concerned unions. Mr. Aggarwal urged that the post of In-Flight Supervisor is a post which was exclusive to the Flight Pursers Cadre and even if it is taken as a job function, the same would continue to be exclusive to the Flight Pursers cadre and could not, therefore, have been extended to Air Hostesses after 1997 when the Cabin Crew comprised of In-Flight Purser and Air Hostess were merged. Mr. Aggarwal, submitted that on account of judicial precedent and the principles of res judicata, the decisions in Nergesh Meerza's case and Yeshaswinee Merchant's case were binding and since the terms and conditions of service of the pre-1997 recruits had been fixed through negotiations and agreements made in course of industrial adjudication, the High Court ought not to have accepted the proposal of merger of the two cadres, without the consent of the employees. He also reiterated that a splinter group of Air Hostesses, who had consented to the merger as proposed by Air India, could not wriggle out of the binding agreements and settlements to which they were also parties through the Air India Cabin Crew Association, merely on the ground that they were no longer workmen as they had been promoted to executive posts. It was urged that the decision taken by the Management of Air India contained in the order of the Ministry of Civil Aviation dated 21st November, 2003, and the Office Order issued by Air India on 18th December, 2003, as well as the Office Order dated 27th December, 2005, were, illegal, arbitrary and in violation of the principles of res judicata and were, therefore, liable to be quashed.

35. Mr. L. Nageshwara Rao, learned Senior Advocate, who also appeared on behalf of the Appellant Association, submitted that the three issues framed for adjudication by the High Court related to (1) the effect of the judgments of the Supreme Court in *Nergesh Meerza's* case and in *Yeshaswinee Merchant's* case (supra) on the validity of the impugned orders and directives; (2) Whether the position of an In-Flight Supervisor was a job function or a post; and (3) Whether the impugned circulars and orders were rendered invalid on the ground of procedural violation or on the ground of discrimination, arbitrariness or irrationality. Mr. Rao submitted that all the three issues had been incorrectly answered by the High Court.

36. Mr. Rao submitted that since it had been categorically held in *Nergesh Meerza's* case and in *Yeshaswinee Merchant's* case that Air Hostesses and Flight Pursers constitute different cadres and that "In-Flight Supervisor" is a post belonging to and forming part of the Flight Purser cadre, the same could not be altered by mere Office Orders. It was also held that there could be no interchangeability of functions between the two cadres, unless such interchangeability was introduced by way of settlement between the Appellant Association and the Management of Air India. Mr. Rao submitted that the High Court also observed that there was no discrimination made out as regards the differential treatment between Flight Pursers and Air Hostesses and their service conditions could be different. Accordingly, the flying age of Air Hostesses from the Pre-1997 settlement period was fixed at 50 years, though the retirement age was 58 years. On the question whether the position of In-Flight Supervisor was a job function or a post, Mr. Rao submitted that the said question had been decided in *Nergesh Meerza's* case and it was held that the post belonged to the Flight Pursers cadre.

37. On the third issue regarding whether the impugned circulars and orders had been rendered invalid, Mr. Rao

submitted that there could not be any exercise of powers by the Central Government under Section 9 in respect of the dispute, having regard to the decisions rendered in *Nergesh Meerza's* case and in *Yeshaswinee Merchant's* case. Mr. Rao submitted that the High Court, while considering the matter, had arrived at a wrong conclusion and the impugned judgment was, therefore, liable to be set aside.

38. The submissions made on behalf of the appellants in all these appeals were strongly opposed on behalf of the Union of India by the Additional Solicitor General, Mr. Gaurav Banerji. He submitted that on the basis of a Record Note dated 30th May, 1977, between Air India and the Air India Cabin Crew Association, the post of Deputy Chief Air Hostess was abolished and the service conditions of Air Hostesses were altered on 12th April, 1980 vide Regulation 46. Subsequently, after the judgment in *Nergesh Meerza's* case, the post of Deputy Chief Air Hostess was reintroduced on 17th November, 1983, and the challenge thereto was rejected both by the learned Single Judge and the Division Bench of the Bombay High Court. On 16th October, 1989, the Government of India issued directions to Air India under Section 34 of the 1983 Act to increase the retirement age of Air Hostesses to 58 years and the same was followed by a Clarification dated 29th December, 1989, indicating that while the Air Hostesses would retire at the age of 58 years, they would be entitled to fly till the age of 45 years. Thereafter, on 12th January, 1983, a further Circular was issued by Air India extending the flying age of Air Hostesses from 45 years to 50 years. Soon thereafter, the Air Corporation Act was repealed by the Air Corporations (Transfer of Undertakings and Repeal) Act, 1994, resulting in the Record Note between Air India and the Association on 17th March, 1995, leading to the re-designation of scales of pay and changes in the promotion policy for the Executive Cabin Crew of In-Flight Services Department. Mr. Banerji submitted that on 5th June, 1997, a Memorandum of Settlement was entered into between Air India and the Association and on the same day, a

promotion policy for Cabin Crew was also promulgated. This was challenged in the Bombay High Court in *Yeshaswinee Merchant's* case (supra), in which the Bombay High Court held that the cadre of Flight Pursers was distinct and separate from that of Air Hostesses. Mr. Banerji submitted that while the decision in *Yeshaswinee Merchant's* case was rendered by the Division Bench on 11th July, 2003, by a Presidential Directive dated 21st November, 2003, issued under section 9 of the Air Corporations (Repeal) Act, 1994, Air Hostesses were allowed to undertake flying duties till the age of 58 years, which was followed by the Administrative Order dated 27th December, 2005, by which the Executive female Cabin Crew was made eligible to be considered to be in position along with male Cabin Crew.

39. Mr. Banerji submitted that the issues involved in these matters are purely administrative in nature relating to the management of Air India and did not, therefore, attract the provisions of Article 14 of the Constitution as the Company has the right to run and manage its affairs in accordance with law. Mr. Banerji submitted that in the revised Promotion Policy for the Cabin Crew dated 5th June, 1997, there was a shift from the policy of standard force promotion to a time bound policy. By virtue of Clause 4 of the Promotion Policy, there was a merger of the male and female Cabin Crew, both the existing crew and new recruits, to make them all eligible for the Career Advancement Scheme.

40. Referring to the Memorandum of Settlement arrived at between the management and the workmen represented by the Appellant Association, Mr. Banerji pointed out that the said Settlement covered only the workmen and not the members of the executive staff. He pointed out that in clause 7 of the Memorandum of Settlement it was categorically stated and agreed to by the parties that the Cabin Crew who are promoted to the grade of Manager (Grade 29 and above) would not be represented by the Appellant Association. Mr. Banerji submitted

that as per the earlier promotion policy, a decision had been taken to rationalize the designations of the Cabin Crew. In keeping with the said decision In-Flight Supervisors and Deputy Chief Air Hostesses, who were in Grade 27, were re-designated as Deputy Manager–IFS. Grade 28 was abolished and Grade 29 was comprised of Deputy Manager and Additional Chief Air Hostesses, who were re-designated as Manager-IFS. It was, however, clarified that the revised designations were for executive/administrative ground assignments. The existing functional designations of In-Flight Supervisors and Air Hostesses would continue while on flight duties, in accordance with prevailing practices. Once again referring to the revised Promotion Policy of 5th June, 1997, Mr. Banerji also referred to paragraph 7.4 onwards where it has been stated in no uncertain terms that the existing cadre of Cabin Crew on being promoted to the new/higher grades would continue to perform their job functions prior to such promotion till the time actual requirement arose in the higher grade or position. Paragraph 7.5.1 also stipulated that on promotion to the executive cadre i.e. to the level of Manager (Grade 29 and above) the male Cabin Crew would continue to carry out their respective job functions of AFP/FP till such time as they started to perform the functions of In-Flight Supervisors on a regular basis. Mr. Banerji also pointed out that in paragraph 7.5.3 it has been mentioned that the male Cabin Crew would be required to carry out executive/administrative office duties, as and when required, without disturbing their bids and on promotion to the level of Manager and above, they would be entitled to applicable allowances and benefits attached to the respective executive grades of Cabin Crew. Similarly, in the case of promotee female Cabin Crew recruited prior to March, 1995, to the executive grades, paragraph 7.5.4 provided that there would be no change in their existing terms and conditions of service and the female Cabin Crew would be entitled to be paid for their flights. They would also be entitled to applicable allowances and benefits attached to their respective grades of Cabin Crew. Mr. Banerji submitted that the aforesaid Settlement

and Promotion Policy superseded all the earlier Settlements and hence the claim of the Appellants regarding the right of In-Flight Pursers to pre-merger benefits was not tenable in law.

41. Referring to the decision in *Nargesh Meerza's* case (supra), Mr. Banerji contended that two cadres of In-Flight Pursers and Air Hostesses were being maintained separately, although, there was always a possibility of duties and job functions overlapping. By the revised Promotion Policy the two cadres were brought at par with each other. Mr. Banerji submitted that the basis of the decision in *Yeshaswinee Merchant's* case (supra) was that the majority of the Air Hostesses had wanted to retire from flight duties on international flights at the age of 50 yeas or opt for ground duties on 50 years of age up to the age of 58 years on a par with males, so that at least in some period of their service, they would not have to remain for long periods away from their homes and families.

42. Mr. Banerji submitted that, although, in the writ petitions before the High Court the vires of Section 9 of the Air Corporations (Transfer of Undertaking and Repeal) Act, 1994, had been challenged, the said provisions were exactly the same, as was contained in Section 34 of the Air Corporations Act, 1953, which empowered the Government to issue any directions in respect of any functions of the Corporations, which then existed, where the Corporations have power to regulate the matter in any manner including the terms and conditions of service of officers and employees of the Corporation. In fact, the provisions of Section 9 of the Repeal Act had not been diluted in any way by the judgments in the Nergesh Meerza and in Yeshaswinee Merchant's case. Mr. Banerji submitted that for a long time there had been complaints with regard to the discrimination in the service conditions of Air Hostesses in Air India and it was, therefore, decided to remove such discrimination in service conditions of the Air Hostesses to bring them at par with other male crew members. Mr. Banerji submitted that in individual cases, Air Hostesses could be

allowed to opt out of flying till the age of 58 years, but as a general Rule, by virtue of the Presidential Directive, all Air Hostesses were required to discharge the functions of Air Cabin Crew along with their male counter-parts. As far as Air Hostesses belonging to the Executive Cadre are concerned, even they were required to discharge such duties till they could be accommodated in a substantial vacancy.

43. Mr. Banerji submitted that the decision to increase the flying age of Air Hostesses to 58 years was to remove the discrimination allegedly practised against them and not to prejudice their service conditions.

44. Appearing for a group of Air Hostesses represented by the Air India Hostesses Association and the Air India Executive Hostesses Association, Respondent Nos.3 and 4 in the writ petition filed by Kanwarjeet Singh, Mr. C.U. Singh, learned Senior Advocate, submitted that the said Association (AICCA) had no right to question the claims of those who had already been promoted to the managerial cadre by virtue of the revised promotion policy. Mr. Singh submitted that the said Association could represent employees up to Grade 26 who were considered to be "workmen" for the purposes of collective bargaining. Mr. Singh pointed out that the settlement dated 5th June, 1997, was only with regard to the terms and conditions of service of workmen up to Grade 26.

45. Mr. Singh submitted that the claim of the Air Hostesses for parity of service conditions with their male counter-parts had been continuing for a considerable length of time. The said disputes were referred to the National Industrial Tribunal by the Central Government on 28th February, 1972. The Award was published on 25th March, 1972, wherein, it was ultimately observed that the nature of duties of In-Flight Supervisors, the Deputy Chief Flight Pursers and the Deputy Chief Air Hostesses were administrative and supervisory. Hence, they were not "workmen" within the meaning of the Industrial Disputes Act, 1947, and their case was beyond the jurisdiction

of the Tribunal. The Tribunal also took note of the evidence that the Deputy Chief Air Hostess and the In-Flight Supervisor performed supervisory functions, both on the ground as well as in flight and that Cabin Crew were to work as a team and interchangeability of duties could be insisted upon by the Management in emergencies, when a standby Crew of that class was not available. It was, however, clarified that the Management should not have blanket power to effect such interchangeability of duties between Air Hostesses and Assistant Flight Pursers and Flight Pursers. Mr. Singh reiterated that in 1977 the supervisory post of Deputy Chief Air Hostesses was phased out and on account of the anomalies which surfaced the Record Note of Agreement signed by the Management of Air India and the Association on 30th May, 1977 took note of the fact that female Executives, irrespective of rank or seniority, would be listed as Air Hostesses on board the Aircraft, and would be deprived of their rank and seniority. Consequently, all reports issued on the Aircraft would have to be signed by the Air Hostess, irrespective of her rank and were to be countersigned by the Flight Purser. This ultimately led to the new promotion policy for Cabin Crew on 5th June, 1997, which was, however, confined to employees in the workmen category alone. Ultimately, by Office Order dated 18th December, 2003, female Cabin Crew were permitted to undertake flying duties up to the age of 58 years with the object that opportunities for male and female Cabin Crew should be equal in Air India and that female Cabin Crew should be eligible for being considered for the post of In-Flight Supervisor along with the male Cabin Crew.

46. Mr. Singh submitted that ultimately the writ petitions, which were filed, inter alia, for a declaration that Section 9 of the Air Corporation (Transfer of Undertakings and Repeal) Act, 1994, was ultra vires and for other reliefs, was dismissed by the Delhi High Court, resulting in the Special Leave Petitions. Mr. Singh submitted that there was no substance in the appeals filed since the revised promotion rules had been approved and

accepted by all concerned. Mr. Singh urged that it was on account of the continued representations made for placing the cadre of Air Hostesses at par with the cadre of In-Flight Pursers, that the settlement was arrived at and there was no reason to interfere with the same. Mr. Singh submitted that the appeals were, therefore, liable to be dismissed.

47. From the submissions made on behalf of the respective parties, what ultimately emerges for decision is whether the management of Air India was entitled to alter the service conditions of Flight Pursers and Air Hostesses, despite several bilateral agreements arrived at between Air India and its workmen represented by the Air India Cabin Crew Association, and the Executive cadre of In-Flight Pursers and Air Hostesses promoted to the Executive rank and given Grade 29, which was the starting point of the Executive cadre. The other connected question involved is whether those Flight Pursers who had been promoted in terms of the revised promotion policy, would still be governed by the Settlements arrived at between the Management and the Unions, since they were covered by the same prior to their promotion to the Executive cadre.

48. Another question which calls for our attention is with regard to the merger of Cabin Crew effected in 1996, giving rise to the other disputed questions relating to interchangeability of duties between Flight Pursers and Air Hostesses. It may be indicated that during the course of the hearing, Mr. Pramod B. Agarwala urged that the Appellant Association was mainly concerned with the status of In-Flight Supervisors prior to the merger of cadres in 1996. In deciding the aforesaid questions, this Court will have to take into consideration the decisions rendered in *Nergesh Meerza's* case (supra) and *Yeshaswinee Merchant's* case (supra), although, strictly speaking, we are more concerned with the decision taken in terms of Section 9 of the 1994 Act, to bring about a parity in the service conditions of both Flight Pursers and Air Hostesses, both at the level of

workmen and also the Executive cadre. While the Agreements are not altered or vary to any large extent, what has been done is to iron out the differences on account of the revised promotion policy, which exempted some of the workmen, who had been transformed to the category of Executive from the ambit of the said Settlements. It is apparent from a reading of both the judgments delivered in *Nergesh Meerza's* case and *Yeshaswinee Merchant's* case that the same were rendered in the context of bringing parity between the cadre of In-Flight Supervisors and the cadre of Air Hostesses. It is, in fact, the prerogative of the Management to place an employee in a position where he would be able to contribute the most to the Company. Hence, notwithstanding the decision in *Nergesh Meerza's* case and in *Yeshaswinee Merchant's* case, the Air India was at liberty to adopt the revised promotion policy which was intended to benefit all the employees.

49. As indicated hereinbefore, Mr. Pramod B. Agarwala, representing the Appellant Association, submitted that the appellants were not concerned with the post-revised promotion policy, but with the separate cadre of In-Flight Pursers, as distinct from the cadre of Air Hostesses, with regard to their channel of promotion. We are inclined to agree with Mr. Agarwala's submissions that prior to 1997, there was a category of Cabin Crew referred to as In-Flight Supervisors, which was confined to In-Flight Pursers alone and did not concern the Air Hostesses. However, we are unable to agree with Mr. Agarwala's submissions with regard to treating the duties discharged by In-Flight Supervisors to indicate that "In-Flight Supervisor" was a separate post. We are inclined to accept the submissions made on behalf of Air India that the duties discharged by persons designated as In-Flight Supervisors did not create any separate post and the post remained that of In-Flight Pursers.

50. Accordingly, we are unable to accept the further submissions made on behalf of the appellants that they had been discriminated against in any way on account of the

decision in *Nergesh Meerza's* case and *Yeshaswinee Merchant's* case. As was observed by this Court in *Inderpreet Singh Kahlon & Ors. Vs. State of Punjab & Ors.* {(2006) 11 SCC 356], it is well-settled that a decision is an authority for what it decides and not what can logically be deduced therefrom. Further, it is also well-settled that the ratio of a case must be understood having regard to the fact situation obtaining therein. The position since the decisions rendered in *Nergesh Meerza's* case and in *Yeshaswinee Merchant's* case, underwent a change with the adoption of the revised promotion policy agreed to between the parties and which replaced all the earlier agreements. In our view, the Management of Air India was always entitled to alter its policies with regard to their workmen, subject to the consensus arrived at between the parties in supersession of all previous agreements. We are also unable to accept the further submission made on behalf of the appellants that those workmen who had been promoted to the Executive category would continue to be governed by the Settlements arrived at when they were workmen and were represented by the Association. In our view, once an employee is placed in the Executive cadre, he ceases to be a workman and also ceases to be governed by Settlements arrived at between the Management and the workmen through the concerned Trade Union. It is not a question of an attempt made by such employees to wriggle out of the Settlements which had been arrived at prior to their elevation to the Executive cadre, which, by operation of law, cease to have any binding force on the employee so promoted by the Management.

51. We are not, therefore, inclined to interfere with the orders passed in the several writ petitions, out of which the present appeals arise, and the same are, accordingly, dismissed. All connected applications, if any, will also stand disposed of by this order.

52. However, having regard to the facts of the case, the parties will bear their own expenses.

B.B.B. Appeals dismissed.

R.K. MITTAL & ORS.
v.
STATE OF UTTAR PRADESH & ORS.
(CIVIL APPEAL NO. 6962 OF 2005)

DECEMBER 05, 2011

[SWATANTER KUMAR AND RANJANA PRAKASH DESAI, JJ.]

Town Planning – Change of user of land – Permissibility – Power of New Okhla Industrial Development Authority to permit users, other than residential, in the sectors specifically earmarked for 'residential use' in the Master Plan of the New Okhla Industrial Development Area – Ambit and scope of – Held: A decision sought to be taken by the Development Authority in the garb of a policy decision matter, if not in conformity to the Master Plan, the Regulations and provisions of the Act in force, would be an action extra jus – The Development Authority or its officers, have no power to vary the user and spaces prescribed in the Master Plan, except by amending the relevant laws and that too, for a proper object and purpose – In the present case, the action of the Development Authority in permitting mixed user was in apparent violation of the statutory provisions in the Master Plan – Establishment of banks and nursing homes in the residential sectors meant for residential use alone was unequivocal violation of the statutory provisions in the Master Plan – No power was vested in the Development Authority to permit such user and ignore the misuse for such a long period – All the cases where banks, nursing homes or any commercial activity was being carried on, particularly like the appellants' case, where a bank and company were running their offices in the residential sectors amounted to change of user and was thus impermissible – The lessees, who changed the user contrary to law, are liable to be proceeded against as per the terms of the lease deed and the provisions of the

Act – U.P. Industrial Area Development Act, 1976 – New Okhla Industrial Development Area (Preparation and Finalization of Plan) Regulations, 1991 – The New Okhla Industrial Development Area Building Regulations and Directions, 2006.

The ambit and scope of the power of New Okhla Industrial Development Authority to permit users, other than residential, in the sectors specifically earmarked for 'residential use' in the Master Plan of the New Okhla Industrial Development Area was the basic issue in the instant appeals.

The question that arose for consideration of the Court was whether the residential premises can be, wholly or partly, used by the original allottee or even its transferee, for any purpose other than residential.

Disposing of the appeals, the Court

HELD: 1.1. The change of user, in the case in hand, has to be seen in light of the Master Plan, the New Okhla Industrial Development Area (Preparation and Finalization of Plan) Regulations, 1991and the provisions of the U.P. Industrial Area Development Act, 1976. The legislative purpose that emerges from the scheme of the Act and other relevant provisions is to keep a residential building separate from commercial and other buildings. This would necessarily imply that the jurisdiction of the Development Authority to permit different user in violation of this statute and the Regulations is not contemplated in law. In the present case, the change in user of the building was violative not only of the New Okhla Industrial Development Area (Preparation and Finalization of Plan) Regulations, 1991, byelaws and the provisions of the U.P. Industrial Area Development Act, 1976, but was also contrary to the law governing erection of the building.

[Paras 16 and 23] [903-C-E; 905-F-H]

Hari Rao v. N. Govindachari & Ors. **(2005) 7 SCC 643: 2005 (3) Suppl. SCR 217 and** *Dev Brat Sharma v. Jagjit Mehta* **(1990) Supp. SCC 724 – held inapplicable.**

2. The development Plan has to be prepared in accordance with the provisions of the Act and the Regulations framed thereunder. The notified development Plan has a legal sanction and provisions contained therein are mandatory in nature. They are incapable of being altered or varied without following the due process prescribed in law. [Para 25] [907-F-H; 908-A-B]

NOIDA Entrepreneurs Association v. NOIDA & Ors. **(2011) 6 SCC 527 and** *NDMC & Ors. v. Tanvi Trading and Credit Private Limited and Ors.* **(2008) 8 SCC 765 : 2008 (12) SCR 867 – relied on.**

3. The development Plan prepared in accordance with the Regulations take the statutory colour in terms of Section 6(2)(b) of the Act and, therefore, its alteration by an executive order would be impermissible. Even when a Master Plan is to be amended, the entire prescribed procedure must be followed. The power to amend should be exercised only in consonance with the settled norms without going beyond the original power of the Development Authority to make such Plan in accordance with the provisions of the Act. The power to amend cannot be used to frustrate the provisions of the statute. Regulations, being subordinate legislation must fall in line with the principal provisions of the Act and in no way should be detrimental to the provisions and the legislative scheme of the Act. [Para 26] [908-D-F]

4. The land cannot be permitted to be used contrary to the stipulated user except by amendment of Master Plan, after due consideration of the provisions of the Act

and the Rules. Inaction by the Government authorities means permitting the unauthorized use, contrary to law. The authorities while reconsidering such matters are expected to act reasonably and cautiously. They deal with larger public interest and, therefore, have a responsibility to act with greater degree of sensitivity and proper application of mind. If the Development Authority aids the violation of the statutory provisions, it will be a perversity in the discharge of statutory obligations on the part of the Development Authority. The public interest, as codified in the statutory regulations and the provisions of the Act, should control the conduct of the Development Authority and its decision making process, rather than popular public demand guiding the exercise of its discretion, that too, in a somewhat arbitrary manner. [Paras 27, 28] [908-H; 909-A-D]

5. The power given to the Authority has to be construed in strict terms and it cannot be exercised in a manner which will run contrary to the scheme of the Act and which would defeat the very object of the Act and the Regulations. The jurisdiction of the Development Authority has to be seen on the touchstone of proper exercise of power within its legal limitations while giving full effect to the statutory provisions. [Paras 29, 30] [910-F-H]

6. It is not merely at the discretion of the Development Authority concerned to designate user of a site and then alter the same without following due process of law. Even where such an exercise is required to be undertaken by the Development Authority, there also it is expected of the Development Authority to act for the betterment of the public and strictly in accordance with the Plans and the statutory provisions. It cannot take recourse to its powers and use its discretion contrary to such provisions and that too, to frustrate the very object of the Act. Exercise of power ought not to be destructive

of the provisions of the Act and the Plans, having the force of law. Even where the requisite prescribed procedure is followed, still the discretion should be exercised sparingly for achieving the object of the statute and not to completely vary or destruct the purpose for which the sector has been earmarked. [Para 33] [912-E-H]

M.C. Mehta v. Union of India & Ors. **(2004) 6 SCC 588: 2004 (2) Suppl. SCR 504;** *Bangalore Medical Trust v. B.S. Mudappa & Ors.* **(1991) 4 SCC 54 : 1991 (3) SCR 102;** *S.N. Chandrashekar & Anr. v. State of Karnataka & Ors.* **(2006) 3 SCC 208 : 2006 (1) SCR 1039;** *ITC Ltd. v. State of Uttar Pradesh & Ors.* **(2011) 7 SCC 493 and** *Dr. G.N. Khajuria & Ors. v. Delhi Development Authority & Ors.* **(1995) 5 SCC 762: 1995 (3) Suppl. SCR 212 – relied on.**

7. A decision which is sought to be taken by the Development Authority in the garb of a policy decision matter, if not in conformity to the Master Plan, the Regulations and provisions of the Act in force, would be an action *extra jus.* The Development Authority is to act in adherence to the provisions of the law regulating such user or construction. The Development Authority or its officers, have no power to vary the user and spaces prescribed in the Master Plan, except by amending the relevant laws and that too, for a proper object and purpose. Any decision, as a policy matter or otherwise, for any extent of public convenience, shall be vitiated, if it is not supported by the authority. The Courts would examine what is the sensible way to deal with this situation, so as to give effect to the presumed purpose of the legislation. The provisions in question should be construed on their plain reading, supporting the structure of the legislative intent and its purpose. The rule of schematic interpretation would come into play in such situations and the concerned Development Authority cannot be permitted to overreach the procedure

prescribed by law, with designs not acceptable in law. [Para 34] [913-A-D]

8. The Development Authority is *inter alia* performing regulatory functions. There has been imposition of statutory duties on the power of this regulatory authority exercising specified regulatory functions. Such duties and activities should be carried out in a way which is transparent, accountable, proportionate and consistent. It should target those cases in which action is called for and the same be exercised free of arbitrariness. The Development Authority is vested with drastic regulatory powers to investigate, make regulations, impute fault and even to impose penalties of a grave nature, to an extent of cancelling the lease. The principles of administrative justice squarely apply to such functioning and are subject to judicial review. The Development Authority, therefore, cannot transgress its powers as stipulated in law and act in a discriminatory manner. The Development Authority should always be reluctant to mould the statutory provisions for individual, or even public convenience as this would bring an inbuilt element of arbitrariness into the action of the authorities. Permitting mixed user, where the Master Plan does not so provide, would be glaring example of this kind. [Para 35] [913-E-H; 914-A]

9.1. In the present case, the action of the Development Authority in permitting mixed user was in apparent violation of the statutory provisions in the Master Plan. Establishment of banks and nursing homes in the residential sectors meant for residential use alone was unequivocal violation of the statutory provisions in the Master Plan. [Paras 38, 39] [914-G-H]

9.2. The lease deed executed in favour of the predecessor-in-interest of R.K. Mittal and the other appellants had contained specific stipulations that the

lessee will obey and submit to all directions issued, existing or thereafter to exist, as obeyed by the lessor. The erection of the structure was also to be in accordance with the approved plans. Clause (h) of the lease deed specifically provides that the constructed building shall be used only for the purpose of residential, residential-cum-medical or surgical clinic and for no other purpose, that too subject to such terms as are imposed by the lessor. [Para 40] [915-A-C]

9.3. The transfer deed which was executed in favour of the present appellants, with the approval of the Development Authority, also contained similar clauses and also provided that the terms and conditions imposed by Development Authority from time to time shall be binding on the transferee. Clause 15 of the transfer deed stipulated that the transferee shall put the property to use exclusively for residential purpose and shall not use it for any purpose other than residential. After raising the construction on the plot in question, admittedly, the appellants have put the property to a different use other than residential. The property was rented out to two different commercial undertakings, i.e., Andhra Bank and a company by the name 'Akariti Infotech'. It is not even the case of the appellants that the Development Authority had granted any specific permission to them to use the property for any purpose other than residential. [Para 41] [915-C-F]

9.4. The appellants, in fact, relied upon an agenda note where there was a proposal put forward by the Development Authority to grant permission for nursing home, guest house, lodging house, banks etc. on a 100 metres wide road on such terms and conditions as may be imposed by the Development Authority. This also provided for levying certain additional charges for granting such permission. Based on this proposal, it is

stated that a public notice was issued and objections were invited. The matter rested at that. This was not finalized. In other words, no final decision was taken by the Development Authority in consonance with the provisions of the Act to permit such user in the residential sector. It is a settled position of law that no authority can exercise the power vested in it, contrary to law. In the present case, there appears to be no proper data collected or study carried out by the Development Authority even for mooting such a proposal, much less amending the Plan or the Regulations. It is a matter of regret that the Development Authority is dealing with such serious matters in such a casual manner. Either way, this certainly affected the rights of the parties adversely. It is not only the rights of individuals which are to be examined by the authorities concerned, but also the effect of such amendment on the residential sector as a whole which is one of the relevant factors to be considered. [Paras 42, 43] [915-G-H; 916-A-D]

9.5. The running of a bank or a commercial business by a company in the residential sector is certainly not permissible. In fact, it is in patent violation of the Master Plan, Regulations and the provisions of the Act. No power is vested in the Development Authority to permit such user and ignore the misuse for such a long period. [Para 44] [916-E]

9.6. All the cases where banks, nursing homes or any commercial activity is being carried on, particularly like the appellants' case, where a bank and company are running their offices in the residential sectors would amount to change of user and thus be impermissible. The officers of the Development Authority should refrain from carving out exceptions to the implementation of the Master Plan and the Regulations in force, that too without the authority of law. For taking up any exercise for change of user or such similar conditions, amendment

to the relevant Regulations, Master Plan and if needed, the provisions of the Act, is a condition precedent. It should be ensured that such exercise would further the cause and object of the Act and would not be destructive to the scheme of the development. No such jurisdiction or authority vests in the officers of the Development Authority to permit change of user in its discretion and in violation of the law in force. [Para 47] [917-G-H; 918-A-B]

Shabi Construction Company v. City & Industrial Development Corporation & Anr. **(1995) 4 SCC 301 : 1995 (3) SCR 534 and** *K.K. Bhalla v. State of M.P. & Ors.* **(2006) 3 SCC 581 : 2006 (1) SCR 342 – relied on.**

10. The action of the Development Authority should be free of arbitrariness and must be applied uniformly. The doctrine of reasonable expectation has no applicability to the present case and there cannot be any waiver of statutory provisions as well. The user of a sector is provided under the Master Plan and in furtherance to Regulations and the provisions of the Act. It is incapable of being administratively or executively altered. The lessees, who have changed the user contrary to law, are liable to be proceeded against as per the terms of the lease deed and the provisions of the Act. [Para 52] [921-D-G]

11. The Master Plan and the Zonal plan specify the user as residential and therefore these plots cannot be used for any other purpose. The Plans have a binding effect in law. If the scheme/Master Plan is being nullified by arbitrary acts and in excess and derogation of the power of the Development Authority under law, the Court will intervene and would direct such authorities to take appropriate action and wherever necessary even quash the orders of the public authorities. [Para 53] [921-H; 922-A-B]

12. An ancillary question that came up for consideration was as to how much area can be permitted to be used by a doctor to run his clinic or by a lawyer or architect to run their offices in the residential sector. If other conditions are satisfied, then as the law stands today, according to the Development Authority, they can be permitted to use 30 per cent of the Floor Area Ratio (FAR) of the ground floor for their clinics/offices. It would be suffice if 30 per cent of the ground floor area is permitted to be used for office of an architect/lawyer and for clinic simplicitor by a doctor. [Para 54] [923-E-G]

K. Ramadas Shenoy v. Chief Officer, Town Municipal Council, Udipi and Others **(1976) 1 SCC 24;** *M.I. Builders v. Radhey Shyam Sahu* **[(1999) 6 SCC 464]: 1999 (3) SCR 1066;** *Virender Gaur & Ors. v. State of Haryana & Ors.* **[(1995) 2 SCC 577] : 1994 (6) Suppl. SCR 78 and** *Delhi Pradesh Citizen Council Vs. Union of India & Anr.* **(2006) 6 SCC 305 – relied on.**

13. The law imposes an obligation upon the Development Authority to strictly adhere to the plan, regulations and the provisions of the Act. Thus, it cannot ignore its fundamental duty by doing acts impermissible in law. The concept of public accountability and performance of public duties in accordance with law and for the larger public good are applicable to statutory bodies as well as to the authorities functioning therein. There is no justification, whatsoever, for the respondents to act arbitrarily. There is also no justification for the Development Authority to issue a public notice in the fashion in which it has done. A few officers of the Development Authority cannot collectively act in violation of the law and frustrate the very object and purpose of the Master Plan in force, Regulations and provisions of the Act. [Para 55] [924-A-E]

14. The appeals are accordingly disposed of in the following terms:-

a. That banking or nursing homes or any other commercial activity is not permitted in Sector 19 and for that matter, in any sector, in the Development Area earmarked for 'residential use'.

b. That the 21 banks and the nursing homes, which are operating in Sector 19 or any other residential sector, shall close their activity forthwith, stop misuse and put the premises to residential use alone, within two months.

c. That lessees of the plots shall ensure that the occupant banks, nursing homes, companies or persons carrying on any commercial activity in the residential sector should stop such activity and shift the same to the appropriate sectors i.e. commercial, commercial pockets in industrial/institutional area and specified pockets for commercial use within the residential sector, strictly earmarked for that activity in the development Plan, Regulations and provisions of the Act.

d. That the Development Authority shall consider the request for allotment of alternative spaces to the banks and the persons carrying on other commercial activities, with priority and expeditiousness.

e. That the Doctors, Lawyers and Architects can use 30 per cent of the area on the ground floor in their premises in residential sector for running their clinics/ offices.

f. That for such use, the lawyers, architects and doctors shall be liable to pay such charges as may be determined by the Development Authority in accordance with law and after granting an

opportunity of being heard. The affected parties would be at liberty to raise objections before the Development Authority that no charges are payable for such users as per the law in force.

g. In the event the lessee or the occupant fails to stop the offending activity and/or shift to alternate premises within the time granted in this judgment, the Development Authority shall seal the premises and proceed to cancel the lease deed without any further delay, where it has not already cancelled the lease deed.

h. Wherever the Development Authority has already passed the orders cancelling the lease deeds, such orders shall be kept in abeyance for a period of two months. In the event the misuse is not stopped within a period of two months in terms of this judgment, then besides sealing of the premises, these orders of cancellation shall stand automatically revived and would come into force without further reference to any Court. In the event the misuse is completely stopped in all respects, the orders passed by the authorities shall stand quashed and the property would stand restored to the lessees.

i. These orders shall apply to all cases, where the order of termination of lease has been passed by the Development Authority irrespective of whether the same has been quashed and/or writs of the lessees dismissed by any Court of competent jurisdiction and even if such judgment is in appeal before this Court.

j. The orders in terms of this judgment shall be passed by an officer not below the rank of Commissioner. This order shall be passed after giving an opportunity to the parties of being heard

by such officer. This direction shall relate only to the determination of charges, if any, payable by the lessee or occupant for the period when the commercial activity was being carried on in the premises in question. [Para 56] [924-E-H; 925-A-H; 926-A-F]

Case Law Reference:

2005 (3) Suppl. SCR 217	**held inapplicable**	**Para 19**
(1990) Supp. SCC 724	**held inapplicable**	**Para 19**
(2011) 6 SCC 527	**relied on**	**Para 25**
2008 (12) SCR 867	**relied on**	**Para 25**
2004 (2) Suppl. SCR 504	**relied on**	**Para 27**
1991 (3) SCR 102	**relied on**	**Para 28**
2006 (1) SCR 1039	**relied on**	**Para 30**
(2011) 7 SCC 493	**relied on**	**Para 31**
1995 (3) Suppl. SCR 212	**relied on**	**Para 32**
1995 (3) SCR 534	**relied on**	**Para 36**
2006 (1) SCR 342	**relied on**	**Para 37**
(1976) 1 SCC 24	**relied on**	**Para 53**
1999 (3) SCR 1066	**relied on**	**Para 53**
1994 (6) Suppl. SCR 78	**relied on**	**Para 53**
(2006) 6 SCC 305	**relied on**	**Para 54**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6962 of 2005.

From the Judgment & Order dated 9.1.2002 of the High Court of Judicature at Allahabad in Civil Miss. Writ Petition No. 36709 of 2010.

WITH

C.A. No. 6963 of 2005.

C.A. No. 10535 and 10536 of 2011.

Himanshu Munshi, Jitendra Mohan Sharma, Sandeep Singh, Vibhor, Ajit Sharma, Vivek Sharma and Neeraj Kr. Sharma for the Appellants.

Ravindra Kumar, Shrish Kumar Misra, Shiel Sethi, Rachana Joshi Issar, Nidhi Tewari, Ambreen Rasool, Alok Prakash, Vinay Kumar Garg, Himanshu Munshi, Pahlad Singh Sharma, Navin Chawla, Manoj Swarup & Co., C. Mukund, Bijoy Kumar Jain, A. Jain and Pankaj Jain for the Respondents.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Leave granted in both the Special Leave Petitions.

2. The ambit and scope of power of New Okhla Industrial Development Authority (for short, the 'Development Authority') to permit users, other than residential, in the sectors specifically earmarked for 'residential use' in the Master Plan of the New Okhla Industrial Development Area (for short, the 'Development Area') is the basic question that falls for consideration of this Court in this bunch of appeals. These appeals demonstrate some of the instances of widespread violation of statutory provisions and somewhat arbitrary exercise of power by the Development Authority. Lack of adoption of uniform application of law has resulted in large number of cases of violation of law all over the State of Uttar Pradesh going unnoticed. The time has come for the Development Authorities to change their style of functioning and act vigilantly and uniformly, that too, strictly in accordance with law, keeping in view the larger public interest.

Introductory Facts

3. This judgment shall dispose of the above referred four civil appeals and the applications for intervention therein. Out of the four appeals, in Civil Appeal No. 6962 of 2005and Civil Appeal arising out of SLP(C) No. 24029 of 2005, the lease deed in favour of the parties had been cancelled by the Development Authority while in other two appeals, Civil Appeal No. 6963 of 2005 and Civil Appeal arising out of SLP (C) No.9150 of 2007, after giving notice, it had passed an order requiring the parties concerned to stop the misuse within the stipulated time, failing which appropriate action in accordance with law, including cancellation of the lease deed, would be taken. The facts and circumstances in all the appeals and even the intervention applications are somewhat similar. In any case, the common question of law arising in all the appeals and applications is whether the residential premises can be, wholly or partly, used by the original allottee or even its transferee, for any purpose other than residential? We do not consider it necessary to refer to the facts of each case in greater detail, except the facts of the lead case, i.e., Civil Appeal No.6962 of 2005, *R.K. Mittal* v. *State of U.P.* However, wherever reference to certain additional facts is called for, we would notice the same in the other cases as well.

4. The Development Authority executed a lease deed dated 2nd April, 1988 in favour of Shri Rajendra Kumar Srivastava in relation to Plot No.778, Block A, Sector XIV, New Okhla Industrial Development Area, District Ghaziabad, admeasuring about 274.37 square meters as per the boundaries described in the deed. Upon the plot, the lessee raised some construction which remained unfinished. The lessee thereupon actually transferred the plot in question along with unfinished superstructure vide Transfer Deed dated 20th August, 1999 in favour Shri R.K. Mittal, Shri Ashok Garg and Shri Sanjeev Gupta, the appellants herein. The original lease deed contained specific stipulations in regard to the lessee

being obliged to obey all the Rules, Regulations and Directions made by the lessor. The lessee was to raise construction as per approved plans and to use the premises only for the purpose for which it was committed in terms of the lease and as per law. These clauses of the lease deed read as under :

"(d) That the lessee will obey and submit to all Directions issued or Regulations made by the Lessor now existing or hereafter to exist so for as the same are incidental to the possession of immovable property or so far as they effect the health, safety or convenience of the other inhabitants of the place.

(e) That the Lessee will at his own cost erect on the demised premises in accordance with the plans, elevation and design and in a position to be approved by the lessor or any officer authorised by the lessor in that behalf in writing and in a substantial and workman like manner, a residential building only with all necessary, sewers, drains and other appurtenances according to the Directions issued or Regulations made in respect of buildings, drains, latrines and connection with sewer.

XXX XXX XXX

(h) That the lessee shall use the demised premises only for the purpose of constructing a building for residential purpose of customary home occupation or residential cum medical and surgical clinic or dispensary or professional office and for no other purpose without the consent of the Lessor and subject to such terms & conditions as Lessor may impose and will not do or suffer to be done on demised premises or any part thereof, any act or thing which may be or grow to be a nuisance, damage, annoyance, or inconvenience to the Lessor or the owners, occupiers of other premises in the neighbourhood."

5. The Transfer Deed executed by the original lessee in

favour of the appellants also contained similar conditions and in addition thereto provided that the conditions of the lease deed shall be binding upon the appellants. The relevant clauses of the Transfer Deed read as under :

> "10. That the Transferees shall complete the construction of plot and shall obtain Occupancy Certificate of Plot from Building Cell, Noida within balance construction period as per terms of lease deed of plot which is upto 23.2.2000. Extension of time for construction of plot and for obtaining occupancy certificate will be granted as per terms of lease deed of plot and as per then prevailing extension policy of NOIDA.
>
> 11. That the Transferee shall be bound by the terms and conditions of lease deed of plot executed on 2.4.88, subject to the amendments indicated in the Transfer Memorandum.
>
> XXX XXX XXX
>
> 15. That the Transferees shall put the property in the use exclusively for residential purpose and shall not use it for any purpose other than residential.
>
> XXX XXX XXX
>
> 17. That the terms and conditions amended by the NOIDA AUTHORITY from time to time shall be binding on the Transferees aforesaid."

6. After completing the construction, the appellants appear to have rented out the premises to Andhra Bank and Akariti Infotech. As such, both the bank and the company had been carrying on their business from the premises in question. The Development Authority, on 18th January, 2001 and 22nd February, 2001 issued notices to both Andhra Bank and Akariti Infotech to stop commercial use in the said premises within 30

days, failing which action would be taken as per the lease deed. In these notices, it was also stated that there was encroachment in violation of the prescribed building byelaws and the use of residential plot for commercial purpose was in violation of the provisions of the lease deed of the plot. Invoking the provisions of the U.P. Industrial Area Development Act, 1976 (for short, 'the Act'),the Development Authority gave them opportunity to file objections. To these notices, the appellants not only filed objections but also appeared before the Development Authority and contended that the Development Authority, in furtherance to the proposal to permit running of consulting clinics, banks and guest houses in the residential areas, had permitted such use on the main roads, on payment of 30 per cent of the existing residential rate on per square meter area of plot per annum and had invited suggestions from the general public. Reliance was also placed on certain press reports. Noticing these facts and obviously taking the view that there was no legal sanctity to the alleged change of user, the Development Authority rejected the objections and required the misuse to be stopped and the violation of the building byelaws to be removed within four months. A part of the said order reads as follows :

> "The terms and conditions of lease deed and transfer deed of plot clearly states that allotted plot shall be used exclusively for residential purposes. The petitioner changed the land use of plot without intimating to the Authority and did not bother to seek any clarification or obtain permission from the Authority for such change. It is a well known fact that this Authority does not permit commercial activity in the residential plots. This is a classic case of violation of law by the most educated enlightened class of the Country. This class in Noida has tried to change not only the character of Noida but have for self interest destroyed the peace of the Neighbours. It is also possible that the then Bank staff also colluded in the matter and did not bother to see the conditions contained in the

lease deed and did not even try to approach the Authority for clarification.

In view of the above stated facts and after listening to the petitioner, it is ordered that representation pleadings of the petitioner Allottee of Residential Plot No.A-778, Sector-19 stand rejected and the petitioner is also directed to ensure vacation of bank branch and infotec office from the residential premises and restore the building according to prescribed building bye-law within 4 months (Four Months) from the date of service of this order.

7. As the Petitioner has evaded compliance of terms of lease deed for nearly five months on one pretext or the other, he is also informed that in case of failure to restore the land use of plot within stipulated period, the Authority shall be free to take further action under law WITHOUT FURTHER NOTICE.

Orders regarding penalty for misuse of premises will be passed separately."

7. Aggrieved from the aforesaid order, the appellants filed a writ petition before the High Court of Judicature at Allahabad. The writ petition preferred by the appellants came to be dismissed vide order dated 19th January, 2002. It was noticed by the High Court and rightly so, that the Development Authority had invited some suggestions for change of user of residential plots to commercial or mixed user on certain terms and conditions, by bringing certain changes/amendments in its byelaws and policy decisions. This remained at an interim stage and no final decision was taken by any competent authority in accordance with the provisions of the Act. The Development Authority had not undertaken any exercise for the said amendment in accordance with law and had not even sought the approval of the State Government, as required under the law, for change of user or amendment of the byelaws, Master Plan, etc. In fact, the provisions directing forfeiture of

property under Section 14 of the Act and imposition of penalty for misuse in terms of Section 15 of the Act were in force. Relying upon judgment of this Court in *Munshi Ram* v. *Union of India*[(2000) 7 SCC 22], the High Court not only dismissed the writ petition but also directed the Development Authority to take immediate and strong action against those who have started using residential plots, wholly or partially, for other non-residential uses. The appellants, feeling dissatisfied by the judgment of the High Court, have preferred the present appeal before this Court. In order to complete the factual matrix of the case, we may notice that the appellants have placed on record Annexure P-7, a copy of the public notice dated 30th March, 2000 indicating that there was proposal to grant permission for mixed use consulting clinics, bank branch and guest houses on 18 A.M. wide roads on the conditions stated therein. These conditions also included the provision that fees payable on grant of permission for mixed use of land would be 30 per cent of existing residential rate, on per square meter area of plot, on yearly basis. To this proposal, public opinion was invited and it was stated that objections/suggestions in this regard may be filed in writing in the office of the Additional Chief Executive Officer of the Development Authority. Even hearing was to be granted. In the affidavit filed on behalf of the respondent-Development Authority on 8th October, 2002, it has been specifically averred that 21 banks were functioning in residential sector in the Development Area under private arrangements with the lessees of the concerned plots and these banks have not obtained any permission or authorization from the Development Authority. Two banks, namely, Oriental Bank of Commerce, Sector 27, Noida and Vijaya Bank, Sector 19, Noida had obtained such permission for a period of five years and three years respectively since 1995 and 1994. These banks had not obtained any permission or renewal thereafter. Show cause notices had been issued to all the banks to wind up their activities from these areas. In para 10 of the affidavit, it had been stated that the Development Authority 'has taken a firm decision to evict all the banks from the residential sectors and

notices have been issued to all these 21 banks without exception'. A definite averment has also been made in this affidavit that the functioning of the banks in the residential sectors caused inconvenience and disturbance to the public at large and the Development Authority has earmarked specific areas for making land available to the banks to carry on their commercial activities. They have allotted land to several banks in commercial-cum-institutional and commercial portion of industrial and institutional sectors. Option was given to the 21 banks to function in these areas and that if they would apply for the same, the Development Authority shall consider their cases sympathetically. The Development Authority, specifically and with emphasis, reiterated that banking activities cannot be allowed in residential plots of the residential sector. Another affidavit was filed on behalf of the Development Authority in March 2011, wherein a clear stand was taken that as per the Master Plan, Sector 19 of the Development Area is a residential sector, where the land use is residential alone, neither commercial nor mixed. List of 43 properties in Sector 19, Noida was filed as Annexure-1, where non-residential activities, including banking and medical clinics, were being carried on while Annexure-2 related to other 11 properties being used for other non-residential purposes in Sector 19 itself. There are institutional plots in Sector 19, which had been allotted by the Development Authority for running of nursing homes or commercial activity. An office order was issued on or about 14th May, 2009, in relation to Guest Houses, by the Chief Executive Officer of the Development Authority. However, the same is stated to have been withdrawn immediately thereafter. In other words, according to the respondents, there is no order or sanction operative and binding as of now, which permits any user other than residential in the residential sector.

8. Having stated the facts, we may now examine the relevant provisions of law. The State of Uttar Pradesh had enacted the law to provide for creation of an Authority for development of certain areas of the State into industrial and

urban townships and for matters connected therewith. 'Authority' had been defined under Section 2(b) of the Act to mean the Authority constituted under Section 3 of the Act. Section 3 required the State Government to constitute, for the purposes of the Act, an authority for any industrial Development Area in terms of that Section. Section 6 of the Act related to functions of the Authority while Section 7 mentions the powers of the Authority in respect of transfer of land. In terms of these statutory provisions, the object of the Authority was to secure the planned development of industrial Development Area and the Authority was required to perform certain functions in terms of Section 6(2), which reads as under:

> "2) Without prejudice to the generality of the objects of the Authority, the Authority shall perform the following functions—
>
> (a*)* to acquire land in the industrial development area, by agreement or through proceedings under the Land Acquisition Act, 1894 for the purposes, of this Act;
>
> (b) to prepare a plan *for the development of the industrial development area;*
>
> (c) to demarcate and develop sites for industrial, commercial and residential purposes according to the plan;
>
> (d) to provide infra-structure for industrial, commercial and residential purposes;
>
> (e) to provide amenities;
>
> (f) to allocate and transfer either by way of sale or lease or otherwise plots of land for industrial, commercial or residential purposes;
>
> (g) to regulate the erection of buildings and setting up

of industries; and

(h) to lay down the purpose for which a particular site or plot of land shall be used, namely for industrial or commercial or residential purpose or any other specified purpose in such area."

9. In terms of Section 8 of the Act, for the purposes of proper planning and development of the industrial development area, the Authority had the power to issue directions, as it consider necessary, regarding the factors stated therein, including restriction of use on any site for a purpose other than for which it has been allocated. Every transferee in whose favour the land was transferred was bound to comply with the directions issued as expeditiously as possible and was obliged to erect the building or to take such necessary steps to comply with the directions in accordance with Section 8(2) of the Act. No person could raise construction, erect or occupy the building in contravention of the building regulations. The Authority has been vested with the powers to make regulations with the previous approval of the State Government in terms of Section 19 of the Act, while the State Government may, by notification, frame Rules for the purposes of the Act as contemplated under Section 18 of the Act.

10. Section 2(d) of the Act defines 'Industrial Development Area' to be an area declared as such by the State Government by notification. Section 6(2)(b) requires the Authority to prepare a plan for the development of an industrial development area while Section 6(2)(h) enjoins the Authority to lay down the purpose for which a particular site or plot of land shall be used, namely for industrial or commercial or residential or any other specified purpose. The power to transfer lands is also given to the Authority. In terms of Section 19 read with Section 6 of the Act, the New Okhla Industrial Development Area was notified and the Authority framed the regulations for the purposes of proper planning and development of that area. These were called the New Okhla Industrial Development Area

(Preparation and Finalization of Plan) Regulations, 1991 [hereafter referred to as 'the Regulations']. Regulation 2 of the Regulations defines various kinds of uses including 'Land Use'. 'Land Use' under Regulation 2(g) means the use of any land or part thereof in the industrial development area for industrial, residential, institutional, commercial, public water bodies, organized recreational open spaces, public and semi-public buildings, agriculture and other like purposes. In contradistinction to the 'Commercial Use', 'Industrial Use' 'Institutional Use' and 'Public Use', the 'Residential Use' has been defined under Regulation 2(1)(k) which reads as under: -

"(k) *'Residential Use'* means the use of any land or building or part thereof for human habitation and such other uses incidental to residential uses."

11. The expression 'Sector' has also been defined in Regulation 2(l) to mean any one of the divisions in which the industrial development area or part thereof may be divided, for the purposes of development under the Act. Regulation 3 enjoins upon the Authority a duty to prepare a Draft Plan for industrial development areas in terms of Regulation 3(1) to 3(6). Under Regulation 4, the Plan has to include sector plans into which such industrial area has been divided. It should also depict the residential use by allocating the area of land for housing, for different and defined densities and plotted development for different categories of households in terms of Regulation 4(1)(b)(ii). Similarly, it should also state the commercial use, public use, agricultural use and other purposes as the Authority may deem fit. The procedure for finalization of the Draft Plan is also contemplated under Chapter III, Regulations 5 to 11 of the Regulations. The Regulations postulate that the Authority, after preparation of the Draft Plan, shall, by public notice, invite objections and suggestions to be filed before the date notified but not earlier than 30 days from the date of publication. A proper enquiry and hearing is contemplated whereafter the Draft Plan is to be finalized in terms of Regulation 9 and the date of commencement of the

Plan is to be specified in terms of Regulation 10. The Authority has the power to amend the Plans but this power to amend is restricted in its scope. Regulation 11 empowers the Authority to do so, but no such amendment can be made which would result in important alteration in the character of the Plan and which do not relate to the extent of land use or standards of population density. Even thereafter, it is required to follow the prescribed procedure. Regulation 11 reads as under: -

> *"11. Amendment of the Plan.* - (1) The Authority may make such amendments in the Plan which do not effect important alteration in the character of the Plan and which do not relate to the extent of land use or standards of population density.
>
> (2) Before making any amendment in the Plan under sub-section (1), the Authority shall publish a notice in at least one newspaper having circulation in the development are inviting objections and suggestions from any affected person with regard to the proposed amendment before such date as may be specified in the notice and shall consider all objections that may be received.
>
> (3) Every amendment made under this Regulation shall be published in any of the manner specified in Regulation 5 and the amendment shall come into operation either on the date of the first publication or on such other date as the Authority may fix.
>
> (4) The Authority shall not make during the specified period in which the Plan is to remain effective, such amendment(s) in the Plan which affects important alteration in the character of the Plan and which relates to the extent of the land sue or standards of population density."

12. It is not in dispute before us that the Development Authority had finalized the Master Plan in accordance with the provisions of the Act and the Regulations, which was titled as

'Master Plan, NOIDA, 2001'. This Plan is in force and is binding on all concerned.

13. Besides the above provisions of the Act and the Regulations framed thereunder by the Development Authority, the Development Authority has also framed building regulations and directions, which are termed as 'The New Okhla Industrial Development Area Building Regulations and Directions, 2006 (for short 'Regulations 2006)'. These have been primarily framed as byelaws in relation to the constructions, restrictions thereof and type of user. Under Regulation 3.12 (h), a residential building is explained as under: -

> "(h) '*Residential building'* refers to any building in which sleeping accommodation is provided for normal residential purpose with or without cooking or dining or both facilities and includes one or two or multi family dwelling, lodging or rooming houses, dormitories, apartment houses, flats and hostels."

14. In distinction to the 'residential building', an 'industrial building' is the building or part thereof, in which product or materials of all counts and properties are fabricated, assembled, manufactured etc. An 'institutional building' refers to a building or a part of a building which is used for purposes such as medical or other treatment or care of persons suffering from physical or mental illness, disease or infirmity and includes hospital, institutions and sanitaria etc. while a 'business building' refers to a building or part of a building which is used for transaction of business like Banks, Commercial office, etc. In other words, each building proposed to be used for a definite purpose has to meet different standards, FAR (Floor Area Ratio) and byelaws. These purposes are incapable of being confused with each other or even used interchangeably. Respective purposes have been defined in unambiguous terms in the byelaws, having distinct implications.

15. It does not appear to be the scheme of the provisions

of the Act, the Regulations and the bye laws, including the Regulations, 2006 that each of these purposes or buildings can be understood or used interchangeably. In fact, each has distinct features and it does not lie in the jurisdiction of the Development Authority to permit such conversion in users, beyond the scope of the Master Plan, the byelaws and the statutory provisions. Regulation 3.22 of the Regulations, 2006 explain the word 'conversion' to mean the change of an occupancy or change in building structure or part thereof, resulting into change of space or use requiring additional occupancy certificate.

16. The change in user of the building is, therefore, violative not only of the Regulations, byelaws and the provisions of the Act, but is also contrary to the law governing erection of the building. The legislative purpose that emerges from the scheme of the Act and other relevant provisions is to keep a residential building separate from commercial and other buildings. This would necessarily imply that the jurisdiction of the Development Authority to permit different user in violation of this statute and the Regulations is not contemplated in law.

Contentions

17. On behalf of the appellants/lessees/users, in the cases before us, it has been contended that the activity of banking or running of clinics is being carried on by them for a long period. Thus, this has been impliedly permitted by the Development Authority. It is also their contention that a public notice had been issued by the Development Authority, permitting mixed user and, thus, the appellants/lessees/users are bonafidely carrying on activities of running banks/nursing homes/other commercial activities in the residential sectors. Reliance has been placed upon Public Notice dated 30th March, 2000 and also that vide notification dated 4th December, 2010 plots allotted in the developed sector to farmers under a Rehabilitation Scheme had permitted establishment of guest houses, restaurants,

banks, professional offices, day care centres etc. vide notification dated 4th December, 2010.

18. It is also the contention of the appellants that neither the byelaws, rules and regulations nor the layout plan of the Development Authority, in any manner, impede or place any kind of bar on carrying out banking activity in the residential sectors.

19. While relying upon the judgments of this Court in the case of *Hari Rao Vs. N. Govindachari & Ors.* [(2005) 7 SCC 643]*, and Dev Brat Sharma Vs. Jagjit Mehta* [(1990) Supp. SCC 724]*,* it was contended that such use does not amount to change of user as it is permissible to carry out professional or clinical activity in the residential houses and, therefore, the notice of termination issued and/or cancellation of the lease deeds, being arbitrary and without application of mind, was vitiated in law.

20. Lastly, it was contended that as there is inadequacy of space for banks, clinics and other commercial offices in the Development Area, the present user is need-based and is in the larger public interest. According to the appellants, the number of plots for the banks is not sufficient to meet the needs of the public in the residential sectors and no alternative spaces are available for relocation of the banks. The lease rent and other charges payable to the Development Authority for both these categories have a considerable difference. Thus, it has the impact of creating heavy liability and inconvenience to the appellants, particularly if they are forced to shift to commercial or institutional sectors/pockets.

21. On the contra, the contention on behalf of the Development Authority is that banking activity is impermissible in the residential sectors. It causes inconvenience to public and disturbance to the residents. Referring to the Meeting dated 17th December, 2002 of the Committee of the Officers, the stand taken is that banking activity cannot be allowed in the

residential portions of the residential sectors and to this effect, a notice was also published.

22. Further, the contention is that the power of the Development Authority to demarcate and develop sites, to lay down the purpose for which a particular site or plot of land shall be used, is controlled by the specific provisions of the Act and the Regulations framed thereunder. Sections 6(2)(b) and 7 of the Act are stated to be the source of power in this regard. It is also the contention that in the Master Plan, 2001, subsequent Plans and the Zoning Regulations, all residential sectors are marked in yellow colour. Sector 19 of the Development Area, where the subject matter of this case is located, is a residential sector. Thus, it can only be used for the residential purpose.

23. The learned counsel appearing for the lessee/ transferees had relied upon the judgments of this Court in the cases of *Hari Rao* (supra) and *Dev Brat Sharma* (supra). Both these judgments have no application to the present case, on facts or in law. These were cases of eviction under the respective Rent Restriction Acts. In one case, this Court held that putting up of a clinic in a part of the house by a doctor was not change of user, while in the other, where the premises had been rented out for a commercial purpose of selling of leather goods, change of the industry to a garment and cloth business, was not considered as change of user. We are unable to understand as to how the lessees in the present case can derive any benefit from these judgments. In the present case, we have a clear law in force and that law is neither similar in purpose nor linguistically identical to the Rent Restriction Acts of the respective States. The change of user, in the case in hand, has to be seen in light of the Master Plan, the Regulations and the provisions of the Act. What may not be change of user under the Rent Restriction Act, as the rights of the parties therein are governed by the contract between the parties and the grounds of eviction taken by them, may be a change of user within the scope of development Plan and the Regulations.

24. In light of the contentions raised, first of all, it will be appropriate for this Court to examine the scheme of the Act and the Regulations in question. Under the provisions of the Act, the Development Authority is obliged to notify an industrial development area. The very object of the Development Authority is to secure the planned development of the industrial development area and the first and foremost step in this direction is to prepare a Plan for development of the industrial development area. This development Plan is to demarcate and develop sites for industrial, commercial and residential purposes. The land which falls within the jurisdiction of the Development Authority and is part of the development Plan can be transferred in terms of Section 7 of the Act by auction, allotment or otherwise, on such terms and conditions as the Development Authority may state and subject to any rules that may be made thereunder. No person can erect or occupy any building in an industrial development area in contravention to any building Regulation. Under Section 6(2) of the Act, the Development Authority is empowered to make Regulations to regulate the erection of the buildings and Section 6(2)(b) specifically authorizes the Development Authority to make regulation providing for the layout Plan of the building, whether industrial, commercial or residential. The transfer of the land has to be as per the terms and conditions contained in the lease deed executed by the Development Authority in favour of the transferee. But this all has to be subject to the provisions of the Act and the Regulations framed thereunder. It has to be clearly understood that the lease deed has to be in consonance with law and cannot be in conflict with the provisions of the law. Section 14 of the Act empowers the Development Authority to resume the site or building so transferred and further forfeit whole or any part of the money paid in respect thereof, if the lessee commits breach of the terms and conditions of the lease. No provision of the Act has been brought to our notice which provides for the manner and method to be adopted by the Development Authority for preparation of the development Plan in accordance with the provisions of the Act. This is where the

Regulations come into play. Under Regulations 3 and 4 of the Regulations, the Draft Plan has to be prepared by the Development Authority for development of an industrial area, which will include a sector plan. The meaning of 'residential use' under the Regulations is a restricted one and is incapable of being given a wide connotation. It means the use of any land or building or part thereof for human habitation and such other uses incidental to the residential use. The very language of Regulation 2(1)(k) of the Regulations clearly depicts the intent of the framers that the expression 'residential use' is not to be understood in its wider sense, in fact, it would require strict construction because all other uses have been separately defined. The different kinds of uses, therefore, have to be understood only in terms of the explanation or meaning given to them under the Regulations. If unduly wide meaning is given to the expression 'residential use', then it is bound to cause overlap between the other uses. It would cause unnecessary confusion. Thus, each use has to be understood as per its plain language and there is no need for the Development Authority or, for that matter, even for the courts, to expand the meaning given to such expressions. The expression 'such other use incidental to residential use' in Regulation 2(1)(k) has to take its colour from the use of the building for human habitation. In other words, the latter part of the Regulation has to be read *ejusdem generis* to the earlier part of that Regulation.

25. The development Plan has to be prepared in accordance with the provisions of the Act and the Regulations framed thereunder. As already noticed, the Development Authority has to prepare the Draft Plan, give public notice thereof, invite objections and thereupon conduct an inquiry and hearing as contemplated under the law, before preparing a final development Plan. This final development Plan is a statutory requirement which has to be prepared as ordained under the provisions of Section 6(2)(b) of the Act read with Regulations 5 to 11 of the Regulations. This Plan necessarily provides for a particular use or purpose of any area/site, namely industrial,

commercial institutional or residential. The notified development Plan has a legal sanction and provisions contained therein are mandatory in nature. They are incapable of being altered or varied without following the due process prescribed in law. Reference can be made to the judgment of this Court in the case of *NOIDA Entrepreneurs Association v. NOIDA & Ors.* [(2011) 6 SCC 527]. Further, this Court, in the case of *NDMC & Ors. v. Tanvi Trading and Credit Private Limited and Ors.* [(2008) 8 SCC 765], not only took the view that even the interim guidelines issued in relation to Luytens' Building Zone till finalization of the Master Plan for Delhi would have statutory force and be treated mandatory, but also that such guidelines, so far as consistent with the Master Plan, would continue to be binding even after coming into force of the Master Plan.

26. It has to be noticed at this stage that the development Plan prepared in accordance with the Regulations take the statutory colour in terms of Section 6(2)(b) of the Act and, therefore, its alteration by an executive order would be impermissible. Even when a Master Plan is to be amended, the entire prescribed procedure must be followed. The power to amend should be exercised only in consonance with the settled norms without going beyond the original power of the Development Authority to make such Plan in accordance with the provisions of the Act. The power to amend cannot be used to frustrate the provisions of the statute. Regulations, being subordinate legislation must fall in line with the principal provisions of the Act and in no way should be detrimental to the provisions and the legislative scheme of the Act.

27. In the case of *M.C. Mehta v. Union of India & Ors.* [(2004) 6 SCC 588] dealing with the question of unauthorized industrial activity in residential area in Delhi, the plea raised for *in situ* regularization of areas with 70 per cent industrial use was not accepted by this Court, holding that regularization would have adverse impact on the law abiders. This Court also held that the land cannot be permitted to be used contrary to the stipulated user except by amendment of Master Plan, after

due consideration of the provisions of the Act and the Rules. Inaction by the Government authorities means permitting the unauthorized use, contrary to law.

28. The authorities while reconsidering such matters are expected to act reasonably and cautiously. They deal with larger public interest and, therefore, have a responsibility to act with greater degree of sensitivity and proper application of mind. If the Development Authority aids the violation of the statutory provisions, it will be a perversity in the discharge of statutory obligations on the part of the Development Authority. The public interest, as codified in the statutory regulations and the provisions of the Act, should control the conduct of the Development Authority and its decision making process, rather than popular public demand guiding the exercise of its discretion, that too, in a somewhat arbitrary manner. To illustrate the dimensions of exercise of such powers, we may refer to the judgment of this Court in the case of *Bangalore Medical Trust v. B.S. Mudappa & Ors.* [(1991) 4 SCC 54], wherein this Court was concerned with the provisions of the Bangalore Development Authority Act, 1976 with particular reference to Sections 33, 38 and 38(A) of that Act. A site intended for a public park was sought to be converted into a hospital/nursing home, under the garb of the latter being a 'civic amenity'. This Court formed the view that such conversion of an open space reserved under the scheme for a public park into a civic amenity site by constructing hospital and allotment of the site to persons or body of persons, was opposed to the objects of the Act and would be *ultra vires* the same. This Court held as under:-

> "46. …….No one howsoever high can arrogate to himself or assume without any authorisation express or implied in law a discretion to ignore the rules and deviate from rationality by adopting a strained or distorted interpretation as it renders the action ultra vires and bad in law. Where the law requires an authority to act or decide, 'if it appears to it necessary' or if he is 'of opinion that a particular act

> should be done' then it is implicit that it should be done objectively, fairly and reasonably. Decisions affecting public interest or the necessity of doing it in the light of guidance provided by the Act and rules may not require intimation to person affected yet the exercise of discretion is vitiated if the action is bereft of rationality, lacks objective and purposive approach. The action or decision must not only be reached reasonably and intelligibly but it must be related to the purpose for which power is exercised. The purpose for which the Act was enacted is spelt out from the Preamble itself which provides for establishment of the Authority for development of the city of Bangalore and areas adjacent thereto. To carry out this purpose the development scheme framed by the Improvement Trust was adopted by the Development Authority. Any alteration in this scheme could have been made as provided in sub-section (4) of Section 19 only if it resulted in improvement in any part of the scheme. As stated earlier a private nursing home could neither be considered to be an amenity nor it could be considered improvement over necessity like a public park. The exercise of power, therefore, was contrary to the purpose for which it is conferred under the statute."

29. The above decision of the Court was given in light of the provisions of Section 19(4) of that Act which empowered the Authority to alter the scheme, where it appeared to the Authority that an improvement could be made in the scheme. In other words, the power given to the Authority has to be construed in strict terms and it cannot be exercised in a manner which will run contrary to the scheme of the Act and which would defeat the very object of the Act and the Regulations.

30. The jurisdiction of the Development Authority has to be seen on the touchstone of proper exercise of power within its legal limitations while giving full effect to the statutory provisions.

This Court in the case of *S.N. Chandrashekar & Anr. v. State of Karnataka & Ors.* [(2006) 3 SCC 208], referred with approval to judgments of the High Courts, applying the rule of strict construction to the terminology used and while interpreting the words 'commerce' and 'commercial' held that intra category changes could be permitted only in accordance with law and Section 14-A of that Act. Even if the change of user is consented to by the residents of the area, it would be no ground to permit such a change in violation of the Regulations. This Court stated the law as follows:-

> "27. The Planning Authority has no power to permit change in the land use from the Outline Development Plan and the Regulations. Sub-section (1) of Section 14, as it then existed, categorically stated, that every change in the land use, inter alia, must conform to the Outline Development Plan and the Regulations which would indisputably mean that it must conform to the Zoning Regulations.
>
> 28. The provisions of the Act are to be read with the Regulations, and so read, the construction of Sections 14 and 15 will lead to only one conclusion, namely, such changes in the land use must be within the Outline Development Plan and the Zoning Regulations. If running of a hotel or a restaurant was not permissible both under clauses (a) and (b) of the Zoning Regulations in a residential area, such change in the land use could not have been permitted under Section 14 read with Section 15 of the Act. It is precisely for that reason, Section 14-A was introduced."

31. Even in the case of *ITC Ltd. v. State of Uttar Pradesh & Ors.* [(2011) 7 SCC 493], this Court declined to accept the contention that where the State Government had treated the hotels as an 'industry' even in such cases, the same could not be treated as 'industry' under the Act because the byelaws continued to treat the hotels to be a commercial activity and that had alone covered such industry. This Court held as under:-

> "38. The learned counsel for the respondents submitted that the lease was terminated by the State Government, in exercise of revisional jurisdiction under Section 41 of the U.P. Urban Planning and Development Act, 1973 read with Section 12 of the Act on the ground that there were irregularities and violations of regulations and policies of Noida Authority in allotting the hotel plots to the appellants. It is submitted that the State Government has such power to cancel the allotment and as a consequence the lease."

32. Reference can also be made to the judgment of this Court in *Dr. G.N. Khajuria & Ors. v. Delhi Development Authority & Ors.* [(1995) 5 SCC 762]. In that case, the Plan had provided for a public park and the Delhi Development Authority had taken the decision to establish a nursery school for the benefit of the children of the colony. Rejecting the contention, this Court observed that within the framework of law and the provisions made in the Master Plan, the authorities could only establish a public park and nothing else, as such conversion would amount to misuse of power.

33. All the above judgments clearly show that it is not merely at the discretion of the Development Authority concerned to designate user of a site and then alter the same without following due process of law. Even where such an exercise is required to be undertaken by the Development Authority, there also it is expected of the Development Authority to act for the betterment of the public and strictly in accordance with the Plans and the statutory provisions. It cannot take recourse to its powers and use its discretion contrary to such provisions and that too, to frustrate the very object of the Act. Exercise of power ought not to be destructive of the provisions of the Act and the Plans, having the force of law. We would hasten to add that even where the requisite prescribed procedure is followed, still the discretion should be exercised sparingly for achieving the object of the statute and not to completely vary or destruct the purpose for which the sector has been earmarked.

34. A decision which is sought to be taken by the Development Authority in the garb of a policy decision matter, if not in conformity to the Master Plan, the Regulations and provisions of the Act in force, would be an action *extra jus.* The Development Authority is to act in adherence to the provisions of the law regulating such user or construction. The laconic result of a collective reading of the afore-referred statutory provisions is that the Development Authority or its officers, have no power to vary the user and spaces prescribed in the Master Plan, except by amending the relevant laws and that too, for a proper object and purpose. Any decision, as a policy matter or otherwise, for any extent of public convenience, shall be vitiated, if it is not supported by the authority. The Courts would examine what is the sensible way to deal with this situation, so as to give effect to the presumed purpose of the legislation. The provisions in question should be construed on their plain reading, supporting the structure of the legislative intent and its purpose. The rule of schematic interpretation would come into play in such situations and the concerned Development Authority cannot be permitted to overreach the procedure prescribed by law, with designs not acceptable in law.

35. The Development Authority is *inter alia* performing regulatory functions. There has been imposition of statutory duties on the power of this regulatory authority exercising specified regulatory functions. Such duties and activities should be carried out in a way which is transparent, accountable, proportionate and consistent. It should target those cases in which action is called for and the same be exercised free of arbitrariness. The Development Authority is vested with drastic regulatory powers to investigate, make regulations, impute fault and even to impose penalties of a grave nature, to an extent of cancelling the lease. The principles of administrative justice squarely apply to such functioning and are subject to judicial review. The Development Authority, therefore, cannot transgress its powers as stipulated in law and act in a discriminatory manner. The Development Authority should

always be reluctant to mould the statutory provisions for individual, or even public convenience as this would bring an inbuilt element of arbitrariness into the action of the authorities. Permitting mixed user, where the Master Plan does not so provide, would be glaring example of this kind.

36. In the case of *Shabi Construction Company v. City & Industrial Development Corporation & Anr.* [(1995) 4 SCC 301], this Court held that, prior sanction of the State Government being the *sine qua non* for a final development Plan, as also for minor modifications thereof, under Sections 31 and 37 of the Maharashtra Regional and Town Planning Act, 1966, the agreement entered into with the Planning Authority so far as it relates to increased Floor Space Index (FSI) did not and could not bestow any legal right upon the appellant. To put it conversely, only on sanction by the State Government, could the inchoate right under the agreement crystallize into a legally enforceable right in favour of the appellant.

37. Still, in another case of *K.K. Bhalla v. State of M.P. & Ors.* [(2006) 3 SCC 581], this Court did not approve and attach any validity to the action of the Chief Minister directing and calling for a proposal from the said Development Authority to make allotment for development of an industrial area on concessional terms and held that the purpose for which the allotments were made might be well-meaning, but the allotments, being contrary to the mandatory provisions of the Act and the Rules were void and of no effect, being illegal.

38. Similarly, in the present case, the action of the Development Authority in permitting mixed user was in apparent violation of the statutory provisions in the Master Plan.

39. Establishment of banks and nursing homes in the residential sectors meant for residential use alone is unequivocal violation of the statutory provisions in the Master Plan.

40. Reverting to the case in hand, we may notice that the lease deed executed in favour of the predecessor-in-interest of R.K. Mittal and the other appellants had contained specific stipulations that the lessee will obey and submit to all directions issued, existing or thereafter to exist, as obeyed by the lessor. The erection of the structure was also to be in accordance with the approved plans. Clause (h) of the lease deed specifically provides that the constructed building shall be used only for the purpose of residential, residential-cum-medical or surgical clinic and for no other purpose, that too subject to such terms as are imposed by the lessor.

41. The transfer deed which was executed in favour of the present appellants, with the approval of the Development Authority, also contained similar clauses and also provided that the terms and conditions imposed by Development Authority from time to time shall be binding on the transferee. Clause 15 of the transfer deed stipulated that the transferee shall put the property to use exclusively for residential purpose and shall not use it for any purpose other than residential. After raising the construction on the plot in question, admittedly, the appellants have put the property to a different use other than residential. The property was rented out to two different commercial undertakings, i.e., Andhra Bank and a company by the name 'Akariti Infotech'. It is not even the case of the appellants before us that the Development Authority had granted any specific permission to them to use the property for any purpose other than residential.

42. The appellants, in fact, have relied upon an agenda note where there was a proposal put forward by the Development Authority to grant permission for nursing home, guest house, lodging house, banks etc. on a 100 metres wide road on such terms and conditions as may be imposed by the Development Authority. This also provided for levying certain additional charges for granting such permission. Based on this proposal, it is stated that a public notice was issued and objections were invited.

43. The matter rested at that. This was not finalized. In other words, no final decision was taken by the Development Authority in consonance with the provisions of the Act to permit such user in the residential sector. We, in fact, are unable to understand why such action was initiated by the authorities concerned, in face of the statutory provisions of the Act, Regulations and the Master Plan in force. It is a settled position of law that no authority can exercise the power vested in it, contrary to law. In the present case, there appears to be no proper data collected or study carried out by the Development Authority even for mooting such a proposal, much less amending the Plan or the Regulations. It is a matter of regret that the Development Authority is dealing with such serious matters in such a casual manner. Either way, this certainly affected the rights of the parties adversely. It is not only the rights of individuals which are to be examined by the authorities concerned, but also the effect of such amendment on the residential sector as a whole which is one of the relevant factors to be considered.

44. The running of a bank or a commercial business by a company in the residential sector is certainly not permissible. In fact, it is in patent violation of the Master Plan, Regulations and the provisions of the Act. We see no power vested in the Development Authority to permit such user and ignore the misuse for such a long period.

45. We may notice that only in two cases i.e. Oriental Bank of Commerce (Sector 27, Noida) and Vijaya Bank (Sector-19, Noida), the permission for running a bank in the residential sector was granted for a period of five years and three years, respectively. This permission came to end few years back and was admittedly never renewed or extended. Even this initial grant of permission is a case of lack of legal authority and is contrary to the provisions of law. It is not the case of anyone before us that the Development Authority had granted permission for running a bank/commercial activity or nursing

home in the residential sector. A survey had been conducted under the orders of the Court dated 3rd March, 2011. As per this survey, a number of banks and nursing homes were being run in the residential sector, which was not permissible.

46. The conduct of the authorities, prior to institution of the writ petitions in the High Court, showed uncertainty and wavering of mind in its decision-making processes. In fact, it was expected of the Development Authority to take a firm and final decision and put at rest the unnecessary controversy raised by its proposal. However, once the writ petitions were filed, thereafter, the stand of the Development Authority has been consistent and unambiguous. In the counter affidavit filed in this Court, it has been stated that even in case of grant of permission to the above stated two banks, no extension was granted and in fact show cause notices have been issued to all the banks in the residential sector to wind up their activities and move out of the residential sector. It is the definite case of the Development Authority that banking activity is a commercial activity and therefore, cannot be carried on in the residential sector, more particularly on the plots in question. In regard to Sector 19, a specific averment has been made in the affidavit of the Development Authority that the land use is residential alone and is neither commercial nor mixed. As per the Master Plan, its primary use is 'residential' where plots are planned for residential purpose alone. It is, therefore, abundantly clear from the pleadings on record that commercial activity of any kind in the residential sector is impermissible. These pleadings are in conformity with the statutory provisions and the Master Plan.

47. All the cases where banks, nursing homes or any commercial activity is being carried on, particularly like the appellants' case, where a bank and company are running their offices in the residential sectors would amount to change of user and thus be impermissible. The officers of the Development Authority should refrain from carving out exceptions to the implementation of the Master Plan and the

Regulations in force, that too without the authority of law. For taking up any exercise for change of user or such similar conditions, amendment to the relevant Regulations, Master Plan and if needed, the provisions of the Act, is a condition precedent. It should be ensured that such exercise would further the cause and object of the Act and would not be destructive to the scheme of the development. We have no hesitation in our minds in holding that no such jurisdiction or authority vests in the officers of the Development Authority to permit change of user in its discretion and in violation of the law in force.

48. Another important aspect is that the Development Authority had taken a policy decision and had earmarked specific areas where land was made available to the banks to carry on their commercial activities in the commercial pockets of the industrial or institutional sectors. This land was being provided at a concessional rate and a number of banks had taken advantage of this scheme to get the lands allotted to them in the appropriate sectors. They have been given lands in the commercial and even in the commercial pockets of the industrial or institutional sector. However, the 21 banks functioning in the residential sectors have not even opted to apply under the said scheme. If they would apply, the Development Authority has taken onto itself to consider the same sympathetically. This Scheme was opened on 20th June, 2011 and closed on 11th July, 2011. 26 commercial plots were offered for allotment under this Scheme in different sectors and plots were even reserved to be used as banks. In other words, the Development Authority has provided due opportunity to these banks to shift their activities to the appropriate sectors, however, to no effect. Despite issuance of show cause notices and offer to allot alternative plots, the unauthorized use by the appellant - banks and nursing homes have persisted in the residential sectors.

49. Another case which is required to be noticed by us from amongst the number of cases listed, is the case of

Chairman and Chief Executive Officer, New Okhla Industrial Development Authority & Anr. v. Mange Ram Sharma & Anr., SLP (C) No. 24029/2005. In this case, according to the Development Authority, the lessee is running a 20 bedded hospital with all modern and diagnostic facilities, admitted by the lessee and his family members in a letter Annexure P-7 to the authorities. In this letter they had claimed that the hospital is being run from the premises in question and had all the modern facilities. However, these facts are not admitted by the lessee who have tried to explain that letter by stating that in a three-storeyed building of 400 square metres, they are carrying on professional activity of medical consultancy only in an area of 28.42 square metres on the ground floor and rest of the premises is being used entirely for residential purposes. It is also denied that any hospital is being run from the premises. According to them, the order dated 15th October, 1994 terminating the lease is contrary to law and they have also submitted an undertaking that the premises will not be used for any purpose other than residential. According to the applicant/ respondent in terms of the lease deed, such a user is permissible. The respondents being doctors, are carrying out their professional activity in a limited portion and as such, they have also placed on record a list of hospitals being operated from residential blocks which have even been empanelled by the appellant Development Authority. The Development Authority is acting arbitrarily and not taking any action against those persons, though they have executed the lease deed with the same terms and conditions as the appellant's. In this case, this Court had appointed a local Commissioner to visit the premises. As per report of the Commissioner dated 20thSeptember, 2003, the premises in question is a corner plot in front of 30 metres wide road and had two gates. There is a sign board displaying 'Sharma Clinic and Medical Surgical Centre'. Names of the doctors have also been displayed on the sign boards on the boundary wall. There is a reception counter which is attended to by a nurse. On ground floor, the basement was still under construction. Major part of the ground floor was

being used as medical clinic. There were four cabins used by different doctors of different specialties. The first floor is being used for residential purposes. The second floor is being partly used for residential purposes while there is also an office on that floor. None of the parties had filed objections to this report of the Local Commissioner and, therefore, there is no reason for us not to accept the same. Even as per the report of the Local Commissioner, the house is being used for medical-cum-surgical clinic and is not merely a consultant's clinic. Use of a major part of the ground floor for running the medical centre obviously is not permissible in accordance with the provisions of the Act and the Regulations. The Development Authority is expected to take proper action at the earliest. Even if we reject the case of the appellant Development Authority that a 20 bedded hospital is being run from the premise, still the fact stands established on record that practically the entire ground floor and part of the second floor is being used for activities other than residential.

50. According to the respondents, they had not been served with the show cause notice, though according to the appellant, show cause notice dated 29th August, 1992 was issued and thereafter, the order of termination/cancellation of lease had been passed against the respondents. This order had been set aside by the High Court and the Development Authority has come up in appeal before this Court.

51. In the light of what we have discussed above, even on facts of this case, running of a hospital or even a medical clinic of this dimension cannot be permitted in a residential area. It would be different if a doctor uses permissible part of the premises for clinical purposes i.e. to meet or examine his patients in any portion. For surgery or specific treatments, such patients would have been addressed to proper nursing homes or regular hospitals. Therefore, doctors cannot carry on, in the garb of a medical clinic, a regular medical and surgical activity on a commercial scale. Thus, we find that action of the

Development Authority was justifiable.

52. One of the allegations against the Development Authority is that they have acted arbitrarily and discriminatorily in issuance of notices, in passing of orders of cancellation of the lease deed and/or even in imposing other restrictions in relation to the properties in question. It is their contention that commercial activity, nursing homes and banks are operating in a large number of residential houses but the Development Authority has adopted a policy of pick and choose and has not acted uniformly even in that regard. Certain instances have been mentioned. Instances of banks have been mentioned in the case of *R.K. Mittal* (supra), while nursing homes have been mentioned in the case of *Mange Ram* (supra). We are unable to grant approval to this discriminatory policy of the Development Authority. They are expected to act fairly and judiciously in such matters. The action of the Development Authority should be free of arbitrariness and must be applied uniformly. The ground of legitimate expectation taken by the lessees on the premise that public notice had been issued by the Development Authority proposing to permit mixed user in the residential sector binds the Authority. Firstly, the action of the Development Authority in issuing the notices is not in accordance with law. Secondly, this argument is without any substance and is misconceived. The doctrine of reasonable expectation has no applicability to the present case and there cannot be any waiver of statutory provisions as well. The user of a sector is provided under the Master Plan and in furtherance to Regulations and the provisions of the Act. It is incapable of being administratively or executively altered. The lessees, who have changed the user contrary to law, are liable to be proceeded against as per the terms of the lease deed and the provisions of the Act.

53. The Master Plan and the Zonal plan specify the user as residential and therefore these plots cannot be used for any other purpose. The Plans have a binding effect in law. If the scheme/Master Plan is being nullified by arbitrary acts and in

excess and derogation of the power of the Development Authority under law, the Court will intervene and would direct such authorities to take appropriate action and wherever necessary even quash the orders of the public authorities. This Court in the case of *K. Ramadas Shenoy v. Chief Officer, Town Municipal Council, Udipi and Others* [(1976) 1 SCC 24] was concerned with the resolution of the Municipal Committee to construct a cinema theatre at place where earlier the permission was granted for construction of *Kalyan Mandap*–cum-Lecture Hall and the contention before the Court was that town planning scheme forbade any cinema building at the place asked for and therefore, the resolution of the committee was invalid. This Court accepted the contention and while setting aside the resolution observed that an illegal construction of a cinema building materially affected the right to enjoyment of the property of the persons residing in the residential area and there being unauthorized construction, the Court would intervene and quash the resolution of the Municipality. This view was followed in the case of *M.I. Builders v. Radhey Shyam Sahu* [(1999) 6 SCC 464], wherein this Court even directed demolition of unauthorized constructions. At this stage, we may also refer to the judgment of this Court in the case of *Virender Gaur & Ors. v. State of Haryana & Ors.* [(1995) 2 SCC 577], wherein this Court was concerned with the issue whether Dharmshala should be permitted to be constructed upon the land which was reserved as open space under the plan. This Court, while noticing the impact on environment, right to hygienic environment and protection of the residents, observed as under:-

> "11. It is seen that the open lands, vested in the Municipality, were meant for the public amenity to the residents of the locality to maintain ecology, sanitation, recreation, playground and ventilation purposes. The buildings directed to be constructed necessarily affect the health and the environment adversely, sanitation and other effects on the residents in the locality. Therefore, the order

passed by the Government and the action taken pursuant thereto by the Municipality would clearly defeat the purpose of the scheme. Shri D.V. Sehgal, learned Senior Counsel, again contended that two decades have passed by and that, therefore, the Municipality is entitled to use the land for any purpose. We are unable to accept the self-destructive argument to put a premium on inaction. The land having been taken from the citizens for a public purpose, the Municipality is required to use the land for the protection or preservation of hygienic conditions of the local residents in particular and the people in general and not for any other purpose. Equally acceptance of the argument of Shri V.C. Mahajan encourages pre-emptive action and conduct, deliberately chartered out to frustrate the proceedings and to make the result fait accompli. We are unable to accept the argument of fait accompli on the touchstone of prospective operation of our order."

54. An ancillary question that comes up for consideration is as to how much area can be permitted to be used by a doctor to run his clinic or by a lawyer or architect to run their offices in the residential sector. If other conditions are satisfied, then as the law stands today, according to the Development Authority, they can be permitted to use 30 per cent of the Floor Area Ratio (FAR) of the ground floor for their clinics/offices. Reference can also be made to the judgment of this Court in the case of *Delhi Pradesh Citizen Council Vs. Union of India & Anr.* [(2006) 6 SCC 305] wherein similar directions were issued. We are not only relying upon the precedents of this Court, but such an approach would also be permissible in face of the Regulations, terms and conditions of the lease deed executed by the parties and the Master Plan. It would, therefore, be suffice if 30 per cent of the ground floor area is permitted to be used for office of an architect/lawyer and for clinic simplicitor by a doctor.

55. From the above dictum of this Court, it is clear that

environmental impact, convenience of the residents and ecological impact are relevant considerations for the Courts while deciding such an issue. The law imposes an obligation upon the Development Authority to strictly adhere to the plan, regulations and the provisions of the Act. Thus, it cannot ignore its fundamental duty by doing acts impermissible in law. There is not even an iota of reason stated in the affidavits filed on behalf of the Development Authority as to why the public notice had been issued without amending the relevant provisions that too without following the procedure prescribed under law. The concept of public accountability and performance of public duties in accordance with law and for the larger public good are applicable to statutory bodies as well as to the authorities functioning therein. We find no justification, whatsoever, for the respondents to act arbitrarily in treating equals who are similarly placed as unequals. There is also no justification for the Development Authority to issue a public notice in the fashion in which it has done. A few officers of the Development Authority cannot collectively act in violation of the law and frustrate the very object and purpose of the Master Plan in force, Regulations and provisions of the Act.

56. For the reasons afore-recorded, we would dispose of the appeals of the Development Authority, the appellants/ occupiers/ lessees, interveners and occupants in the following terms:-

1. That banking or nursing homes or any other commercial activity is not permitted in Sector 19 and for that matter, in any sector, in the Development Area earmarked for 'residential use'.

2. That the 21 banks and the nursing homes, which are operating in Sector 19 or any other residential sector, shall close their activity forthwith, stop misuse and put the premises to residential use alone, within two months from the date of pronouncement of this judgment.

3. That lessees of the plots shall ensure that the occupant banks, nursing homes, companies or persons carrying on any commercial activity in the residential sector should stop such activity and shift the same to the appropriate sectors i.e. commercial, commercial pockets in industrial/ institutional area and specified pockets for commercial use within the residential sector, strictly earmarked for that activity in the development Plan, Regulations and provisions of the Act.

4. That the Development Authority shall consider the request for allotment of alternative spaces to the banks and the persons carrying on other commercial activities, with priority and expeditiousness.

5. That the Doctors, Lawyers and Architects can use 30 per cent of the area on the ground floor in their premises in residential sector for running their clinics/offices.

6. That for such use, the lawyers, architects and doctors shall be liable to pay such charges as may be determined by the Development Authority in accordance with law and after granting an opportunity of being heard. The affected parties would be at liberty to raise objections before the Development Authority that no charges are payable for such users as per the law in force.

7. In the event the lessee or the occupant fails to stop the offending activity and/or shift to alternate premises within the time granted in this judgment. The Development Authority shall seal the premises and proceed to cancel the lease deed without any further delay, where it has not already cancelled the lease deed.

8. Wherever the Development Authority has already passed the orders cancelling the lease deeds, such orders shall be kept in abeyance for a period of two months from today. In the event the misuse is not stopped within a period of two months in terms of this judgment, then besides sealing of the premises, these orders of cancellation shall stand automatically revived and would come into force without further reference to any Court. In the event the misuse is completely stopped in all respects, the orders passed by the authorities shall stand quashed and the property would stand restored to the lessees.

9. These orders shall apply to all cases, where the order of termination of lease has been passed by the Development Authority irrespective of whether the same has been quashed and/or writs of the lessees dismissed by any Court of competent jurisdiction and even if such judgment is in appeal before this Court.

10. The orders in terms of this judgment shall be passed by an officer not below the rank of Commissioner. This order shall be passed after giving an opportunity to the parties of being heard by such officer. This direction shall relate only to the determination of charges, if any, payable by the lessee or occupant for the period when the commercial activity was being carried on in the premises in question.

57. The appeals are disposed of in the above terms, with no order as to costs.

B.B.B. Appeals disposed of.

####NEXT FILE
HANUMANT MURLIDHAR GAVADE
v.
MUMBAI AGRICULTURAL PRODUCE MARKET & ORS.
(CIVIL APPEAL NOS.10701-10702 OF 2011)

DECEMBER 07, 2011

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

Agricultural Produce Market Committee – Newly constructed wholesale market – Allotment of galas/shops to traders – Writ Petitions before High Court – High Court appointed a former Judge of that Court - Justice Daud - as Court Commissioner – Norms fixed by Justice Daud Committee – Held: Claimant respondent fulfilled eligibility of one large gala only and that was already given to him, hence his claim for second large gala was without merit – The Market Committee could not have agreed for allotment of two large galas to the claimant respondent contrary to the norms fixed by the Justice Daud Committee – In regard to the claim of appellant, as per the intent indicator fixed by the Justice Daud Committee, he had indicated his intention for allotment of one small gala only, therefore, his claim for one large gala was devoid of any merit – Appellant only entitled to one small gala in the Market.

Maharashtra Agricultural Produce Marketing (Development and Regulation) Act, 1963 – ss. 31 and 34A – 'Cess'/'market fee' and 'supervision cost' – Difference between – Held: The cost of supervision is paid to the State Government by the person purchasing produce in the market or market area – It is the cost recovered by the State Government for the expenses incurred for the staff appointed by it to supervise the purchase of agricultural produce in the market or market area regulated by the Market Committee under the 1963 Act – Insofar as 'market fee' or, for that matter, 'cess' is concerned, it is levied by the Market Committee – S.31 of the 1963 Act empowers Market Committee to levy fees and rates of commission (adat) – The cess or market fees so levied goes to the coffers of Market Committee in return of the functions performed by it – 'Cess' and 'supervision cost' are thus distinct charges and 'supervision cost' is not part of 'cess' or 'market fee'.

In 1985, the Mumbai Agricultural Produce Market Committee decided to shift subsidiary wholesale markets of fruit and vegetable in the city of Mumbai at Vashi. The construction of the new wholesale market at Vashi was completed in 1995. Controversy arose in respect of allotment of galas*/shops to the traders and numerous Writ Petitions were filed before the High Court. The High Court appointed a former Judge of that Court - Justice Daud - as Court Commissioner to determine the norms of allotment of* galas*/ shops in the newly constructed wholesale market at Vashi. The Justice Daud Committee submitted three reports which were accepted by the High Court.*

The wholesale market in question had a total number of 1029 galas *– 732 large* galas *each measuring 450 sq. ft. and 297 small* galas *each measuring 300 sq. ft. In the instant appeals, the appellant and the common respondent nos. 5 and 2 (hereinafter referred to as 'claimant respondent') are rival claimants in respect of allotment of one large gala.*

Disposing of the appeals, the Court

HELD: 1.1. As per the norms fixed by the Justice Daud committee, the claimant who had paid cess during the relevant period upto Rs. 90,000/- was entitled to one large *gala* and those who paid cess from Rs. 90,001 to Rs. 3,00,000/- were entitled to two large *galas*. The claimant respondent was denied second *gala* by the

Market Committee as he had paid cess for the relevant period to the tune of Rs. 87,047.98 i.e. he paid cess less than Rs. 90,000/-. The plea of claimant respondent that if supervision fee of Rs. 5,380/- paid by him is considered in payment of cess, then he would be entitled to allotment of second large *gala* as he would be treated to have paid cess exceeding Rs. 90,000/- for the relevant period, cannot be accepted. 'Cess' or 'market fee' is different from 'supervision cost'. Section 34A of the Maharashtra Agricultural Produce Marketing (Development and Regulation) Act, 1963 provides for 'Cost of Supervision'. The cost of supervision is paid to the State Government by the person purchasing produce in the market or market area. It is the cost recovered by the State Government for the expenses incurred for the staff appointed by it to supervise the purchase of agricultural produce in the market or market area regulated by the Market Committee under the 1963 Act. [Paras 10, 11, 12, 13, 14]

1.2. Insofar as 'market fee' or, for that matter, 'cess' is concerned, it is levied by the Market Committee. Section 31 of the 1963 Act empowers Market Committee to levy fees and rates of commission (adat). The levy of market fee by the Market Committee and its calculation is done in the prescribed manner. The cess or market fees so levied goes to the coffers of Market Committee in return of the functions performed by it. Section 31(b) provides for payment of supervision cost under Section 34A and also the market fees. It is, thus, clear that 'cess' and 'supervision cost' are distinct charges and 'supervision cost' is not part of 'cess' or 'market fee'. In this view, the cess paid by the claimant respondent for the relevant period being less than Rs. 90,000/-, as per the norms fixed by the Justice Daud Committee and accepted by the High Court, he is entitled to one large *gala* only, which has already been allotted to him. [Para 15]

1.3. As regards the further submission of the claimant respondent that in the Writ Petition filed by it in the High Court, on consent of the Market Committee as per the signed minutes, the Market Committee agreed to give to him one large *gala* in the Fruit Market on priority basis and when available and, the High Court disposed of Writ Petition accordingly on August 25, 2000 and that application made by the Market Committee for recall of that order was rejected, it is clear that the order dated August 25, 2000 does not help the claimant respondent at all for more than one reason. In the first place, the above order of the High Court does not indicate that the claimant respondent is entitled to two large *galas* in the market. It only records the agreement of the Market Committee to give to the claimant respondent one large *gala* in the market. That one large *gala* has already been given to the claimant respondent is not in dispute. Secondly, and more importantly, if under the norms fixed by the Justice Daud Committee, which has been accepted by the High Court, the claimant respondent is not entitled to more than one *gala*, then he cannot claim entitlement to two large *galas* under the order dated August 25, 2000 passed by the High Court merely because the Market Committee agreed for such allotment. The Market Committee could not have agreed for allotment of two large *galas* to the claimant respondent contrary to the norms fixed by the Justice Daud Committee. The claimant respondent fulfils eligibility of one large *gala* only and that has been given to him. His claim for second large *gala* is without any merit. [Para 17]

2. Insofar as the appellant is concerned, even if it is assumed that he paid cess above Rs. 25,000/- for the relevant period, in view of the admitted fact that he had paid Rs. 34,000/- only at the time of booking, as per the intent indicator fixed by the Justice Daud Committee, he indicated his intention for allotment of one small *gala*. His

claim for one large *gala* is, thus, devoid of any merit. He could not have been allotted large *gala* by the Market Committee and the allotment of one large *gala* to him was wrong and has been rightly cancelled. Accordingly, it is held that the appellant is entitled to one small *gala* in the Fruit Market at Vashi. [Paras 18, 19]

3. The Market Committee-respondent No. 1, submitted that two small *galas* in Fruit Market were presently available. In view of that, the Market Committee (respondent No. 1) is directed to allot one small *gala* to the appellant immediately and in no case later than one month. Upon allotment of the said *gala*, the appellant shall occupy allotted small *gala* as early as may be possible and in no case later than one month from the date of allotment. On allotment of one small *gala,* the appellant shall hand over vacant possession of *Gala* No. F-158 to the Market Committee and in any case within one month therefrom. The impugned judgment of the High Court is accordingly modified. [Paras 20, 21]

CIVIL APPELATE JURISDICTION : Civil Appeal Nos. 10701-10702 of 2011.

From the Judgment & Order dated 26.2.2008 of the High Court of Bombay Civil Appellate Jurisdiction in Writ Petition No. 4101 of 2001 and 7077 of 2003.

Uday B. Dube, Kuldip Singh for the Appellant.

C.U. Singh, Shivaji M. Jadhav, Asha Gopalan Nair, Shantha Kr. Mahale, Rajesh Mahale, Harish Hebbar for the Respondent.

The Judgment of the Court was delivered by

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

2. The dispute in these Appeals concerns allotment of one large *gala* in the Wholesale Fruit and Vegetable Market, Vashi. The rival claimants are the appellant and common respondent Nos. 5 and 2 in these Appeals - Narayan Nivrutti Shinde (hereinafter referred to as 'claimant respondent').

3. In 1985, Mumbai Agricultural Produce Market Committee (for short, 'Market committee') decided to shift subsidiary wholesale markets of fruit and vegetable in city of Mumbai at Vashi. In 1995, the construction of the new wholesale market at Vashi was completed. The controversy arose in respect allotment of *galas*/shops to the traders and numerous Writ Petitions were filed before the Bombay High Court. On April 26, 1996, the High Court appointed a former Judge of that Court - Justice Daud - as Court Commissioner to determine the norms of allotment of *galas*/shops in the newly constructed wholesale market at Vashi.

4. The Justice Daud Committee submitted three reports which were accepted by the High Court. As regards the Fruit Market which had total number of 1029 *galas* – 732 being of the large *galas* each measuring 450 sq. ft. and 297 small *galas* each measuring 300 sq. ft. - in its report the Justice Daud Committee provided for eligibility for two time frames; time frame 1985-86 to 1994-95, and time frame 1991-92 to 1994-95. For time frame 1985-86 to 1994-95, the claimant was required to establish doing of five years business as reflected in payment of market fee irrespective of quantum thereof. The claimant was further required to show that he had held an APMC licence for at least two years in the above ten year period and also that he did business in one of the years 1995-96 or 1996-97. This was required to be established by proof of cess paid. The cess-space nexus provided in respect of time frame 1985-86 to 1994-95 is thus :-

Total Cess paid	Entitlement
1) Rs. 1500 to Rs. 5,000	. . . Half small gala

2) Rs. 5,001 to Rs. 10,000 ...1 Small Gala

3) Rs. 10,001 to Rs. 15,000 . . . Half Large Gala

4) Rs. 15,001 to Rs. 90,000 ...1 Large Gala

5) Rs. 90,001 to Rs, 3,00,000/- ...2 Large Galas

6) Above Rs. 3,00,000/- ...3 Large Galas

5. The norms fixed by The Justice Daud Committee further provided that no one would get more than three large *galas* and for retaining the third, the claimant would have to pay the market price within 90 days of the acceptance of the norm by the High Court. Those who had booked the *galas* upto December 31, 1993 and had come into the business from 1991-92 to 1994-95, the second time frame 1991-92 to 1994-95 was made applicable. It was provided that those eligible in this category must have held APMC licences for at least three years and done business for three years as reflected in the payment of market fee irrespective of quantum and show that they were doing business in 1995-96 or 1996-97 by proof of having paid market fee either in 1995-96 or 1996-97. The cess-space nexus for this category was thus :-

Total Cess paid Entitlement

1) Rs. 2500 to Rs. 7500 ...Half a Small Gala

2) Rs. 7501 to 25,000 ...1 Small Gala

3) Above Rs. 25,000 ...1 Large Gala

6. The other conditions need not be referred to insofar as time frame 1985-86 to 1994-95 is concerned.

7. As regards time frame 1991-92 to 1994-95, *inter alia*, space-cess nexus was provided thus :-

Total Cess Paid Entitlement

1) Rs. 10,000 to Rs. 20,000 ...Half a Small Gala

2) Above Rs. 20,000 ...1 Small Gala

8. By way of clarification in the norms fixed by the Justice Daud Committee, it was provided that those claimants who fall in the time frame 1985-86 to 1994-95 and had made bookings upto September 30, 1991 and those who fall in the time frame 1991-92 to 1994-95 and had made their bookings upto December 31, 1993, the amount paid and intent indicator would be as follows:-

Amount paid For

1) Rs. 10,000 to Rs. 34,000 ...1 Small Gala

2) More than Rs. 34,000 and

upto Rs. 68,000 ...1 Large Gala

3) More than Rs. 68,000 and

upto Rs. 1,02,000 ...2 Large Galas

4) More than Rs. 1,02,000 ...3 Large Galas

9. In light of the above norms, we have to see the claim of the appellant for one large *gala* and the claim of the claimant respondent for second large *gala* since he has been allotted one large gala already and the allotment of one large *gala* to him is not in issue.

10. First, we shall deal with the entitlement of the claimant

respondent to the second *gala*. He was denied second *gala* by the Market Committee as he had paid cess for the relevant period to the tune of Rs. 87,047.98. In other words, he paid cess less than Rs. 90,000/-. As per the norms fixed by the Justice Daud committee, the claimant who had paid cess during the relevant period upto Rs. 90,000/- was entitled to one large *gala* and those who paid cess from Rs. 90,001 to Rs. 3,00,000/- were entitled to two large *galas*.

11. Mr. C.U. Singh, learned senior counsel for the claimant respondent, submitted that if supervision fee of Rs. 5,380/- paid by the claimant respondent is considered in payment of cess, then he would be entitled to allotment of second large *gala* as he would be treated to have paid cess exceeding Rs. 90,000/- for the relevant period.

12. The submission of Mr. C.U. Singh, learned senior counsel, does not appeal us. 'Cess' or 'market fee' is different from 'supervision cost'.

13. Section 34A of the Maharashtra Agricultural Produce Marketing (Development and Regulation) Act, 1963 (for short, '1963 Act') provides for 'Cost of Supervision'. It reads as follows :-

> "34A. Supervision over purchase of agricultural produce in any market or market area and payment of cost of supervision by purchasers.
>
> (1) The State Government may, by general or special order, direct that the purchase of agricultural produce, the marketing of which is regulated in any market or market area under this Act, shall be under the supervision of such staff appointed by the State Government as it may deem to be necessary; and subject to the provisions of this Chapter, the cost of such supervision shall be paid to the State Government by the person purchasing such produce in such market or market area.
>
> (2) The cost to be paid by a purchaser shall be determined from time to time by the State Government and notified in the market or market area (in such manner as the State Government may deem fit), so however that the amount of the cost does not exceed five paise per hundred rupees of the purchase price of the agricultural produce which is purchased by such purchaser."

14. A look at the above provision would show that cost of supervision is paid to the State Government by the person purchasing produce in the market or market area. It is the cost recovered by the State Government for the expenses incurred for the staff appointed by it to supervise the purchase of agricultural produce in the market or market area regulated by the Market Committee under the 1963 Act. The determination of cost of supervision is notified by the State Government from time to time and does not exceed five paise per hundred rupees of the purchase price.

15. Insofar as 'market fee' or, for that matter, 'cess' is concerned, it is levied by the Market Committee. Section 31 of the 1963 Act empowers Market Committee to levy fees and rates of commission (adat). The levy of market fee by the Market Committee and its calculation is done in the prescribed manner. The cess or market fees so levied goes to the coffers of Market Committee in return of the functions performed by it. Section 31(b) provides for payment of supervision cost under Section 34A and also the market fees. It is, thus, clear that the 'cess' and 'supervision cost' are distinct charges and 'supervision cost' is not part of 'cess' or 'market fee'. In this view, the cess paid by the claimant respondent for the relevant period being less than Rs. 90,000/-, as per the norms fixed by the Justice Daud Committee and accepted by the High Court, he is entitled to one large *gala* only, which has already been

allotted to him.

16. Mr. C.U. Singh, learned senior counsel, then submitted that in the Writ Petition filed by the claimant respondent in the High Court, on consent of the Market Committee as per the signed minutes, the Market Committee agreed to give to him (petitioner therein) one large *gala* in the Fruit Market on priority basis and when available and, the High Court disposed of Writ Petition accordingly on August 25, 2000. He also submitted that an application was made by the Market Committee for recall of that order, but that application was rejected.

17. In our view, the order dated August 25, 2000 referred to by Mr. C.U. Singh, learned senior counsel, does not help the claimant respondent at all for more than one reason. In the first place, the above order of the High Court does not indicate that the claimant respondent is entitled to two large *galas* in the market. It only records the agreement of the Market Committee to give to the claimant respondent one large *gala* in the market. That one large *gala* has already been given to the claimant respondent is not in dispute. Secondly, and more importantly, if under the norms fixed by the Justice Daud Committee, which has been accepted by the High Court, the claimant respondent is not entitled to more than one *gala*, then he cannot claim entitlement to two large *galas* under the order dated August 25, 2000 passed by the High Court merely because the Market Committee agreed for such allotment. The Market Committee, in our view, could not have agreed for allotment of two large *galas* to the claimant respondent contrary to the norms fixed by the Justice Daud Committee. As noticed above, the claimant respondent fulfils eligibility of one large *gala* only and that has been given to him. His claim for second large *gala* is without any merit and it is held that he is not entitled to second large *gala*.

18. Insofar as the appellant is concerned, it is clear that his claim is covered by the second time frame fixed by the Justice Daud Committee. Even if it is assumed that he paid the cess above Rs. 25,000/- for the relevant period, in view of the admitted fact that he had paid Rs. 34,000/- only at the time of booking, as per the intent indicator fixed by the Justice Daud Committee, he indicated his intention for allotment of one small *gala*. His claim for one large *gala* is, thus, devoid of any merit. He could not have been allotted large *gala* by the Market Committee and the allotment of one large *gala* to him was wrong and has been rightly cancelled.

19. We, accordingly, hold that the appellant is entitled to one small *gala* in the Fruit Market at Vashi.

20. Mr. Shantha Kr. Mahale, learned counsel for the Market Committee-respondent No. 1, submitted that two small *galas* in Fruit Market were presently available. In view of that, we direct the Market Committee (respondent No. 1) to allot one small *gala* to the appellant immediately and in no case later than one month from today. Upon allotment of the said *gala*, the appellant shall occupy allotted small *gala* as early as may be possible and in no case later than one month from the date of allotment. On allotment of one small *gala,* the appellant shall hand over vacant possession of *Gala* No. F-158 to the Market Committee and in any case within one month therefrom.

21. The impugned judgment of the High Court is modified and the Appeals are allowed to the extent indicated above with no order as to costs.

B.B.B. Appeals disposed of.

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 – The oral and documentary evidence on record clearly establishes that original Form-A and Form-B signed in ink by authorised officer of the party concerned, were presented by the proposed candidate along with 1st set of nomination papers– The finding returned by the High Court in this regard cannot be said to be wrong or unjustified – Election Commission of India Notification dated 10-2-2009.

ELECTION LAW:

Scrutiny of nominations – Returning Officer – Role and nature of functions of – HELD: The Returning Officer plays an important role in the election management, and to ensure that there is no scope left for any complaint, the Commission has issued a handbook for Returning Officers – Scrutiny of nomination papers is an important quasi-judicial function and the Returning Officer has to discharge this duty with complete judicial detachment and in accordance with the highest judicial standards.

WORDS AND PHRASES :

Expression 'only' occurring in clause (e) of Para 13 of Election Symbol (Reservation and Allotment) Order 1968 – Connotation of.

General elections to the State Legislative Assembly were announced to be held on 16.4.2009 and 23.4.2009. The case of respondent No. 1 (proposed candidate) was that on 4.4.2009, the last date prescribed for filing of nominations, he filed before the Returning Officer, four sets of nomination papers as a candidate of BJD, a registered and recognized political party in the State; that the check list was issued by the Returning Officer with his signatures to him the same day; that on 6.4.2009, the date fixed for scrutiny of nominations, the Returning Officer rejected his nomination on the ground that Form A and Form B filed by him along with his first set of nomination papers were not duly signed in ink by authorized person of the political party. In the election, the appellant was elected. Two election petitions – one by the proposed candidate and the other by the proposer – were filed challenging the election of the returned candidate, on the ground of improper rejection of the nomination of the proposed candidate. The High Court, at the time of decision in the election petitions, framed additional Issue No. 6, namely, whether the election petitioner (proposed candidate) filed the original Form A and Form B duly signed in ink by the authorized person with the first set of his nomination papers. The High Court answered the said issue in affirmative and answering the other issues, held that the Returning Officer improperly rejected the nomination of the proposed candidate in violation of statutory provisions and rules and instructions issued by the Election Commission. It allowed both the election petitions and declared the election of the returned candidate as null and void.

In the instant appeals filed by the returned candidate, the questions for consideration before the Court were:

(i) "whether it is mandatory for a candidate set up by a recognized political party to file original ink signed Forms A and B appended to para 13 of the 1968 Order" and (ii) whether the High Court erred in framing issue no. 6 at the time of decision in the election petitions, i.e., whether the election petitioner filed the original Form A and Form B being duly signed in ink by the authorized person with the first set of his nomination; and whether the finding recorded by the High Court on that issue suffered from any illegality.

Dismissing the appeals, the Court

HELD: 1.1 In the case of *Jagan Nath, it has been held that the statutory requirements of election law must be strictly observed. Section 33 of the Representation of the People Act, 1951 enacts that a candidate shall file nomination paper on or before the appointed date in the prescribed form. The form in which nomination paper shall be presented and completed is provided in r.4 of the Conduct of Election Rules1961. In view of r. 4, a candidate set up by a recognised political party has to make a declaration in Para b(1) of Part-III of Form 2-B to the effect that he was set up at the election by the named party, which was recognised national party/State party in the State and that the symbol reserved for the said party be allotted to him. [para 29- 30]**

Jagan Nath vs. Jaswant Singh and Ors.* **1954 SCR 892 – followed.

Krishna Mohini (Ms) v. Mohinder Nath Sofat **1999 (4) Suppl. SCR 76 = (2000) 1 SCC 145 – referred to.**

1.2 Para 13 of the Election Symbol (Reservation and Allotment) Order, 1968 Order provides that for a candidate to be considered to have been set up by a political party in a parliamentary or assembly constituency, he has to comply with the conditions set out in clauses (a) to (e) thereof. Clause (e) of para 13 reads, "Forms A and B are signed, in ink only, by the said office-bearer or person authorised by the party". For a candidate, proposed by a single elector alone, to be treated as a candidate set up by a recognised political party, the filing of notice and communication in Forms A and B referable to clauses (b), (c) and (d) and in accord with clause (e) of para 13 is essential, and on its non-compliance, the nomination of such a candidate is liable to be rejected. The word "only" used in clause (e) of para 13 cannot be ignored; it emphasises that Forms A and B are to be signed in ink by the office bearer or person authorised by the recognised party and in no other way. Thus, it excludes any other mode of filing Forms A and B when a candidate is set up by a recognised political party. Therefore, the word 'only' used in clause (e) of para 13 is indicative of the mandatory character of that provision. [para 32, 33 and 36]

Henry R. Towne v. Mark Eisner **(245 US 418 at 425 – referred to.**

1.3 Where a candidate is set up by a recognised political party, clause (b)(i) of Part-III of Form 2-B becomes relevant as by making declaration therein the candidate makes a request that the symbol reserved for such party be allotted to him. It is for this reason that the requirements of para 13 of the 1968 Order become integral part of Form 2-B, Part-III under r. 4 of the 1961 Rules where a candidate is set up by a recognised political party. It cannot be said that para 13 of the 1968 Order cannot be read into r. 4. Non-compliance of requirements of para 13 of the 1968 Order is a defect of substantial character and the nomination paper of a candidate proposed by a single elector set up by a recognised political party having such defect is liable to

be rejected u/s 36(2)(b) as it tantamounts to non-compliance of the provisions of s. 33, namely, the nomination paper having not been completed in the prescribed form. [para 37]

1.4 In the instant case, the proposed candidate admittedly filed his nomination paper proposed by a single elector having been set up by BJD, a recognised political party in the State of Orissa, and, therefore, it was incumbent upon him that the requirements of para 13 of the 1968 Order were fully complied with. It was necessary for the proposed candidate that Forms A and B referable to clauses (b), (c) and (d) of para 13 of the 1968 Order were submitted to the Returning Officer duly signed in ink by the authorised person of BJD not later than 3.00 p.m. on April 4, 2009. [para 38]

2. The pleadings of the parties as well as the evidence let in by them clearly show that the parties were seriously in issue whether the original Form-A and Form-B duly signed in ink by the authorised person of BJD were filed by the proposed candidate with the first set of his nomination paper. This Court accordingly, holds that the High Court did not commit any error in framing Issue no. 6 which was quite vital and material for decision in the election petitions. This Court further holds that no prejudice has been caused to the returned candidate by framing such additional issue at the time of the decision in the election petitions. [para 40]

3.1 Where a check list certifies that Forms A and B (in the case of candidates set up by a recognised political parties), have been filed, such certificate leads to presumption that the procedural requirement of filing the documents as prescribed in para 13 of the 1968 Order has been complied with. The presumption is of course rebuttable but there must be sufficient evidence by the other side to displace such presumption. No doubt, the burden is on the candidate set up by a recognised political party to prove that he had filed Forms A and B duly signed in ink by the authorised person of that party but that burden gets discharged on production of evidence that raises presumption in his favour. In the instant case, the check list (Ext.11), Form 3A (Ext. 42/F, mentioning in Column 6 that the proposed candidate was a nominee of BJD) and the consolidated list of the nominated candidates (Ext. 44) give rise to presumption in favour of the proposed candidate that he had filed Form-A and Form-B duly signed in ink by the authorised person of BJD with the first set of his nomination papers. This presumption has not been rebutted by the returned candidate. The proposed candidate has been successful in discharging the burden placed upon him. [para 49]

3.2 The proposed candidate (PW-2) deposed that while giving the details of nomination papers and the documents presented personally by him on 4.4.2009 at 11.25 a.m., in the first set of nomination papers, PW-1 was the proposer and along with the first set of nomination papers, original Form-A and Form-B signed in ink by the President and authorised signatory of BJD were filed. He deposed that he had presented four sets of nominations as the nominee of BJD and all the four sets were complete in all respect. He also deposed that the Returning Officer examined the four sets of nominations presented by him and thereafter personally prepared the check list of documents, put his signature on that and asked him (proposed candidate) to sign on the said documents. The Returning Officer retained with him one of such check list ticked duplicate (Ext. 22) and handed over another to him (proposed candidate) ticked original (Ext. 11). Significantly, the Returning Officer (CW-1) in his deposition has not specifically denied that Form A and Form B in original duly signed in ink by the authorised

person of BJD were not filed by the proposed candidate. He admitted that no endorsement regarding the deficiency was made in the check list. [para 41and 43]

3.3 The evidence on record, i.e, the evidence of the Returning Officer (CW-1), the evidence of PW-2 and the documentary evidence, namely, the check list (Ext.11) Form 3A (Ext. 42/F) displayed on the notice board, the consolidated list of nominated candidates, clearly establish that original Form-A and Form-B signed in ink by authorised officer of the party (BJD) were presented by the proposed candidate along with 1st set of nomination papers on April 4, 2009. The finding returned by the High Court in this regard cannot be said to be wrong or unjustified. [para 50]

4.1 Section 83 of the Representation of the People Act, 1951 requires that an election petition shall contain a concise statement of the material facts on which the petitioner relies. It has been repeatedly held by this Court that s.83 is peremptory. Thus, in a case u/s 100(1)(c) of the 1951 Act, 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, thus, form the basis of adjudication in the election petition. [para 52 and 57]

Samant N. Balakrishna, etc. v. George Fernandez and others etc. **1969 (3) SCR 603 = AIR 1969 SC 1201;** *Azhar Hussain v. Rajiv Gandhi* **1986 SCR 782 =AIR 1986 SC 1253;** *Hari Shanker Jain v. Sonia Gandhi* **2001 (3) Suppl. SCR 38 =(2001) 8 SCC 233;** *Pothula Rama Rao v. Pendyala Venakata Krishna Rao and Others* **2007 (8) SCR 982 = (2007) 11 SCC 1;** *Nandiesha Reddy v. Kavitha Mahesh* **(2011) 7 SCC 721 – relied on.**

4.2 The election petitioner in ground 5(E) set up the case that the objection of non-filing of original Forms A and B signed in ink by the authorised officer of the party was not raised by any of the contesting candidates or any person on their behalf present at the time and place of scrutiny. It was the Returning Officer who raised the issue of non-filing of original Forms A and B but he refused minimum opportunity to the election petitioner to rebut the same. The Returning Officer ought to have acted in terms of proviso to s. 36(5) of the 1951 Act and afforded an opportunity to the election petitioner until next day to rebut the objection and show that the proposed candidate had filed Forms A and B duly singed in ink by the authorised person of BJD. PW-3, the authorised representative of the election petitioner did state in his evidence that he requested the Returning Officer, when he raised the objection that original Forms A and B were not filed, to enquire into the matter about the missing Forms A and B. It was not necessary to state in the election petition the evidence of PW-3 in support of ground 5(E). [para 63]

4.3 Therefore, 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 High Court, inter alia, considered the evidence of PW-2 and also the evidence of the Returning Officer (CW1), the documentary evidence, namely, the check list (original-ext. 11), Form 3-A (ext. 42/F) and consolidated list of nominated candidates (ext.-44) and finally concluded that the proposed candidate had filed the original Form-A and Form-B duly signed in ink by the authorised person of BJD with the first set of his nomination and, accordingly, decided Issue No. 6 in favour of election petitioners. There is no error in the consideration of the matter by the High Court. [para 58

and 60-62]

5.1 The proviso that follows sub-s. (5) of s. 36 of the 1951 Act, provides that in case an objection is raised by the Returning Officer or is made by any other person, the candidate concerned may be allowed time to rebut it not later than the next day but one following the date fixed for scrutiny, and the Returning Officer shall record his decision on the date to which the proceedings have been adjourned. [para 64]

Rakesh Kumar v. Sunil Kumar **1999 (1) SCR 470 = (1999) 2 SCC 489 – referred to.**

5.2 The Returning Officer plays an important role in the election management and to ensure that there is no scope left for any complaint, the Commission has issued a handbook for Returning Officers. The handbook, as it states, has been designed to give to the Returning Officers the information and guidance which they may need in performance of their functions. The handbook does not have statutory character and is in the nature of guidance to the Returning Officers. Para 2 of Chapter VI of the handbook emphasises that scrutiny of nomination papers is an important quasi-judicial function and the Returning Officer has to discharge this duty with complete judicial detachment and in accordance with the highest judicial standards. Para 6 provides that even if no objection has been raised to a nomination paper, the Returning Officer has to satisfy himself that the nomination paper is valid in law. If any objection is raised to any nomination paper, the Returning Officer has to hold a summary inquiry to decide the same and treat the nomination paper to be either valid or invalid. It states that brief reasons in support of the decision must be set out, particularly, where an objection has been raised or the nomination paper has been rejected. [para 15 and 24]

5.3 In the facts and circumstances of the case, the 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. The election petitioners have been successful in proving the improper rejection of the proposed candidate's nomination and, as such, they have been able to prove the ground for setting aside the appellant's election u/s 100(1)(c) of the 1951 Act. The consideration of the matter by the High Court does not suffer from any factual or legal infirmity. In this view of the matter and the factual and legal position, there is no ground to interfere with the impugned judgment. [para 66-67]

Case Law Reference:

1954,SCR 892	**followed**	**para 26**
1999 (4) Suppl. SCR 76	**referred to**	**para 31**
245 US 418 at 425	**referred to**	**para 36**
1969 (3) SCR 603	**relied on**	**para 52**
1986 SCR 782	**relied on**	**para 53**
2001 (3) Suppl. SCR 38	**relied on**	**para 54**
2007 (8) SCR 982	**relied on**	**para 55**
(2011) 7 SCC 721	**relied on**	**para 56**
1999 (1) SCR 470	**referred to**	**para 65**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4956 of 2010.

From the Judgment & Order dated 23.06.2010 of the High Court of Orissa, Cuttack in Election Petition No. 6 of 2009.

WITH

C.A. No. 4962 of 2010.

Subir Palit, Aditya Mohapatra, Devansh Mohan, D.S. Chauhan, Milind Kumar for the Appellant.

K.K. Venugopal, Bidyadhar Mishra, Pitambar Acharya, Shibashish Misra, Subash Acharya, Dileep Biswal, S.N. Bhat, S. Panigrahy, P. Bhardwaj, V. Shymohan for the Respondent.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. The returned candidate — Ramesh Rout – whose election to the 14th Orissa Legislative Assembly from 89-Athagarh Assembly Constituency has been set aside by the High Court of Orissa has preferred these two appeals under Section 116A read with Section 116C of the Representation of the People Act, 1951 (for short, 'the 1951 Act').

2. The Election Commission of India (for short, 'Commission') in order to constitute 14th Legislative Assembly announced general elections in the State of Orissa to be held in two phases on April 16, 2009 and April 23, 2009. Following this, the Governor of the State of Orissa in exercise of powers conferred under Section 5(2) of the 1951 Act issued a notification which was published in the official gazette on March 28, 2009. The 89 – Athagarh Assembly constituency is one of the 147 Assembly constituencies in the State of Orissa and is 'General' constituency. The Commission appointed the following schedule of election :

"28.3.2009

To

04.04.2009 = Period prescribed for filing of "NOMINATIONS"

06.04.2009 = date fixed for SCRUTINY OF NOMINATIONS.

08.04.2009 = last date for WITHDRAWAL OF NOMINATIONS

23.04.2009 = date of POLLING.

16.05.2009 = date of COUNTING OF VOTES.

28.05.2009 = date before which the Election shall be completed."

3. On April 4, 2009, at 11.25 A.M., the respondent in Civil Appeal No. 4962 of 2010 – Ranendra Pratap Swain (hereinafter referred to as 'proposed candidate') filed four sets of nomination papers for 89-Athagarh Assembly constituency as a candidate of Biju Janata Dal ('BJD') – a registered and recognized political party in the State of Orissa before the Returning Officer. Seven other candidates including the present appellant also filed their nomination papers at the said election. The check list (ticked original) was issued by the Returning Officer with his signature to the proposed candidate at 11.45 a.m. A copy of the check list (ticked duplicate) was retained by the Returning Officer.

4. On the appointed date (i.e. April 6, 2009) and time for scrutiny of nominations, the Returning Officer rejected the nomination papers of the proposed candidate on the ground that the Form A and Form B filed by the proposed candidate along with his first set of nomination paper were not duly signed in ink by the authorized officer of the political party (BJD).

5. Upset with the order of Returning Officer dated April 6,

2009, rejecting his nomination, the proposed candidate filed a writ petition before the Orissa High Court. However, the High Court did not entertain the writ petition and directed him to pursue his grievance before the Commission or seek appropriate relief after election process was over. The proposed candidate raised his grievance before the Commission but without any success.

6. The election to the 89-Athagarh Assembly constituency was held as per election schedule and the appellant who contested the election as an independent candidate was declared elected.

7. Two election petitions came to be filed before the Orissa High Court challenging the election of the appellant to 89-Athagarh Assembly Constituency. One by the proposed candidate being Election Petition no. 4 of 2009 and the other by the proposer – respondent in Civil Appeal No. 4956 of 2010 being Election Petition no. 6 of 2009. In both election petitions, the election of the appellant was challenged on the ground of improper rejection of nomination papers of the proposed candidate. It was averred therein that the proposed candidate had filed Form A and Form B signed in ink by the authorized person along with first set of nomination paper showing that he had been duly sponsored by the BJD to contest as a party nominee from 89-Athagarh Assembly constituency and with other three sets of nomination, he had filed xerox copies of original Forms A and B duly authenticated by a Notary Public. The election petitioners raised diverse grounds in challenging the order of the Returning Officer dated April 6, 2009 whereby the nomination papers of the proposed candidate were rejected.

8. The appellant — (respondent therein) – contested the election petitions by filing separate written statement. He raised objections about the maintainability of election petitions on facts and in law. Inter alia, it was denied that the proposed candidate filed original Form-A and Form-B signed in ink by the authorized person of BJD as at the time of scrutiny original Form A and Form B were not available and the Form A and Form B on record did not contain ink signature.

9. On the respective pleadings of the parties, the High Court initially framed four issues but later on framed additional issue no. 5. The relevant two issues, namely, issue no. 3 and issue no. 5 read as follows :

> "3. Whether the Returning Officer improperly rejected the nomination of the Election Petitioner in violation of the statutory provisions and rules?
>
> 5. Whether the Returning Officer improperly rejected the nomination of Sri Ranendra Pratap Swain, the official candidate of Biju Janata Dal in violation of the instructions issued by the Election Commission of India in exercise of its constitutional powers and the principles of natural justice or not?"

10. The election petitioners as well as the returned candidate tendered oral and documentary evidence. On behalf of the election petitioners, three witnesses, namely, proposer – Rabindra Nath Rout (PW-1); proposed candidate – Ranendra Pratap Swain (PW-2) and authorised agent – Tarani Kanta Biswal (PW-3) were examined. On the other hand, the returned candidate examined himself as RW-1 and one Magnicharan Rout as (RW-2). The Returning Officer was examined by the Court as its witness (CW-1). The documents tendered in evidence were marked separate exhibits.

11. The High Court also called for all the original documents pertaining to the scrutiny of nomination papers for 89-Athagarh Constituency and 87-Badamba Constituency. We shall refer to relevant documentary evidence appropriately wherever necessary.

12. The High Court on hearing the parties, at the time of decision in the election petitions, framed an additional issue no. 6 namely, whether the election petitioner (proposed candidate) filed the original Form A and Form B duly signed in ink by the authorized person with the first set of his nomination paper. The High Court answered issue nos. 3, 5 and 6 in the affirmative and allowed both election petitions on June 23, 2010 and declared the election of the appellant null and void. The High Court declared that a casual vacancy is created relating to 89-Athagarh Assembly Constituency and the Commission was directed to conduct fresh election in respect of the said constituency in accordance with law.

13. It is from this judgment that these two appeals have arisen.

14. We have heard Mr. Gopal Subramanian, learned senior counsel for the appellant and Mr. K.K. Venugopal, learned senior counsel for the proposed candidate.

15. The Returning Officer plays an important role in the election management and to ensure that there is no scope left for any complaint, the Commission has issued a handbook for Returning Officers (for short, 'the handbook') The handbook, as it states, has been designed to give to the Returning Officers the information and guidance which they may need in performance of their functions; to acquaint them with up-to-date rules and procedures prescribed for the conduct of elections and to ensure that there is no scope for complaint of partiality on the part of any official involved in the election management. We shall refer to the relevant provisions of the handbook a little later. The handbook does not have statutory character and is in the nature of guidance to the Returning Officers.

16. By virtue of a notification dated February 10, 2009 (Exhibit 10) issued by the Commission, for the first time, the issuance of check list to a candidate filing nomination paper has been introduced. Prior thereto, there was no such provision. It is provided that in respect of each candidate, the Returning Officer should maintain, in duplicate, the check list of the documents/requirements filed by the candidates. When a candidate files nomination paper, the Returning Officer shall indicate in the second column of the check list whether the concerned documents have been filed or other requirements fulfilled. If any of the documents has not been filed, it requires the Returning Officer to clearly state in the bottom of the check list, indicating the time limit by which such document/s can be submitted. The check list in two sets with all requirements indicated is needed to be signed by the Returning Officer as well as the candidate. The check list (marked original) is handed over to the candidate/proposer who files nomination paper, while check list (marked copy) is retained by the Returning Officer. The notification states that the copy of the check list will serve the dual purpose of acknowledging the receipt of the documents submitted as well as of notices as directed in the handbook. It is further provided that no separate notice is required to be given to the candidate in respect of the items mentioned in the check list. If and when a document is filed subsequent to filing of nomination, an acknowledgment to that effect is issued to the candidates, namely, mentioning the date and time at which it is filed and this is also indicated in the appropriate place in the check list retained by the Returning Officer. The proforma of the check list has also been notified with the notification dated February 10, 2009.

17. Section 33 of the 1951 Act makes provision for presentation of nomination paper and requirements for a valid nomination. To the extent it is relevant for the purposes of the present case, it is reproduced as follows :

> "S. 33. Presentation of nomination paper and requirements for a valid nomination.—(1) On or before the date appointed under clause (a) of section 30 each candidate shall, either in person or by his proposer, between the hours of eleven o' clock in the forenoon and three o' clock in the

afternoon deliver to the returning officer at the place specified in this behalf in the notice issued under section 31 a nomination paper completed in the prescribed form and signed by the candidate and by an elector of the constituency as proposer:

xxx xxx xxx

(4) On the presentation of a nomination paper, the returning officer shall satisfy himself that the names and electoral roll numbers of the candidate and his proposer as entered in the nomination paper are the same as those entered in the electoral rolls:

Provided that no misnomer or inaccurate description or clerical, technical or printing error in regard to the name of the candidate or his proposer or any other person, or in regard to any place, mentioned in the electoral roll or the nomination paper and no clerical, technical or printing error in regard to the electoral roll numbers of any such person in the electoral roll or the nomination paper, shall affect the full operation of the electoral roll or the nomination paper with respect to such person or place in any case where the description in regard to the name of the person or place is such as to be commonly understood; and the returning officer shall permit any such misnomer or inaccurate description or clerical, technical or printing error to be corrected and where necessary, direct that any such misnomer, inaccurate description, clerical, technical or printing error in the electoral roll or in the nomination paper shall be overlooked.

xxx xxx xxx"

18. Section 35 provides for notice of nominations and the time and place for their scrutiny.

19. The provision concerning scrutiny of nomination is made in Section 36 of the 1951 Act. To the extent it is relevant, it reads as follows :

"S. 36. Scrutiny of nomination.—(1) On the date fixed for the scrutiny of nominations under section 30, the candidates, their election agents, one proposer of each candidate, and one other person duly authorized in writing by each candidate but no other person, may attend at such time and place as the returning officer may appoint; and the returning officer shall give them all reasonable facilities for examining the nomination papers of all candidates which have been delivered within the time and in the manner laid down in section 33.

(2) The returning officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds:-

(a) xxx xxx xxx

(b) that there has been a failure to comply with any of the provisions of section 33 or section 34; or

(c) that the signature of the candidate or the proposer on the nomination paper is not genuine.

xxx xxx xxx

(4) The returning officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character.

(5) The returning officer shall hold the scrutiny on the date appointed in this behalf under clause (b) of section 30 and shall not allow any adjournment of the proceedings except when such proceedings are interrupted or

obstructed by riot or open violence or by causes beyond his control:

Provided that in case an objection is raised by the returning officer or is made by any other person the candidate concerned may be allowed time to rebut it not later than the next day but one following the date fixed for scrutiny, and the returning officer shall record his decision on the date to which the proceedings have been adjourned.

xxx xxx xxx"

20. The Conduct of Elections Rules, 1961 (for short, '1961 Rules') have been framed under the 1951 Act. Rule 4 provides that every nomination paper presented under sub-section (1) of Section 33 shall be completed in such one of the Forms 2A to 2E as may be appropriate. Proviso that follows Rule 4 makes a provision that a failure to complete or defect in completing, the declaration as to symbols in a nomination paper in Form 2A or Form 2B shall not be deemed to be a defect of substantial character within the meaning of sub-section (4) of Section 36.

21. Form 2B under Rule 4 is in three parts. Part-I is to be used by a candidate set up by a recognised political party. Part-II is required to be filled by a candidate for election to the legislative assembly not set up by a recognised political party and it provides that there should be ten electors of the constituency as proposers. Part-III of Form 2B is a declaration to be made by the candidate giving assent to his nomination. Clause (b)(i) is applicable to a candidate who has been set up by a recognised political party with a request that symbol reserved for such party be allotted to him. Clause (b)(ii), on the other hand is applicable to a candidate not set up by any registered recognised political party or a candidate who is contesting the election as an independent candidate. A recognised political party means a political party recognised by the Commission under the 1968 Order.

22. Rule 5 of the 1961 Rules makes a provision for symbols for elections in parliamentary and assembly constituencies. Rule 10 of 1961 Rules provides for preparation of list of contesting candidates.

23. In exercise of the powers conferred by Article 324 of the Constitution of India read with Section 29A of the 1951 Act and Rules 5 and 10 of the 1961 Rules, the Commission made Election Symbols (Reservation and Allotment) Order, 1968 (for short '1968 Order'). Unregistered political parties are out of its purview. The registered recognized and unrecognized political parties and independent candidates are dealt with by the 1968 Order. 1968 Order came to be amended by notification no. 56/2000/Judl. III dated 1st December, 2000. Para 13 of the 1968 Order is relevant for consideration of the present matter. It reads as follows :

"13. When a candidate shall be deemed to be set up by a political party.—For the purposes of an election form any Parliamentary or Assembly Constituency to which this Order applies, a candidate shall be deemed to be set up by a political party in any such Parliamentary or Assembly Constituency, if, and only if—

(a) the candidate has made the prescribed declaration to this effect in his nomination paper,

(aa) the candidate is a member of that political party and his name is borne on the rolls of members of the party;

(b) a notice by the political party in writing in Form B, to that effect has, not later than 3.p.m. on the last date for making nominations, been delivered to the Returning Officer of the constituency;

(c) the said notice in Form B is signed by the President, the Secretary or any other office-bearer of the party,

and the President, Secretary or such other office bearer sending the notice has been authorised by the party to send such notice;

(d) the name and specimen signature of such authorised person are communicated by the party, in Form A, to the Returning Officer of the constituency and to the Chief Election Officer of the State or Union Territory concerned, not later than 3 p.m. on the last date for making nominations; and

(e) Forms A and B are signed, in ink only, by the said office-bearer or person authorised by the party:

Provided that no fascimile signature or signature by means of rubber stamp, etc. of any such office bearer or authorised person shall be accepted and no form transmitted by fax shall be accepted."

24. Chapter VI of the handbook deals with the scrutiny of nominations by the Returning Officer. Para 2 emphasises that scrutiny of nomination papers is an important quasi-judicial function and the Returning Officer has to discharge this duty with complete judicial detachment and in accordance with the highest judicial standards. Para 6 provides that even if no objection has been raised to a nomination paper, the Returning Officer has to satisfy himself that the nomination paper is valid in law. If any objection is raised to any nomination paper, the Returning Officer has to hold a summary inquiry to decide the same and treat the nomination paper to be either valid or invalid. It states that brief reasons in support of the decision must be set out, particularly, where an objection has been raised or the nomination paper has been rejected. Para 7 provides for presumption of validity of every nomination paper unless the contrary is prima facie obvious or has been made out. In case of a reasonable doubt, as to the validity of a nomination paper, the benefit of such doubt must go to the candidate concerned and the nomination paper should be held to be valid. Para 7 seeks to remind the Returning Officer that whenever a candidate's nomination paper is improperly rejected and he is prevented from contesting the election, there is a legal presumption that the result of the election has been materially affected by such improper rejection and the election is liable to be set aside. Para 9.6 sets out some of the defects which may be treated by the Returning Officer as defects of substantial nature. It, inter alia, provides that failure to submit written authorisation form from the political party, within prescribed time and in prescribed form, where a candidate claims to have been set up by a national or state party, is a defect of substantial nature. Para 10.3 says that the nomination paper filed by a candidate claiming to have been set up by a recognised national/state party subscribed by only an elector as proposer is liable to be rejected, if a notice in writing to that effect has not been delivered to the Returning Officer of the Constituency by an authorised office-bearer of that political party by 3 p.m. on the last date for making nominations in Forms A and B devised by the Commission for the purpose under para 13 of the 1968 Order.

25. In light of the above provisions, particularly Sections 33(1) and 36(1) of the 1951 Act, Rule 4 of the 1961 Rules, Part-III of Form 2B, para 13(e) of the 1968 Order and Forms A and B appended to 1968 Order and the guidelines issued to the Returning Officers in the handbook, Mr. Gopal Subramanian, learned senior counsel for the appellant submitted that where a candidate for the election to Assembly has been set up by a recognised political party, the filing of original Forms A and B duly signed in ink by an authorised person of such political party is non-negotiable and non-filing of original Forms A and B signed in ink constitutes a defect of substantial nature. Learned senior counsel argued that proviso to Rule 4 carves out an exception in respect of declaration in relation to symbol by candidates of unrecognised political party and independent candidates as per clause (b)(ii) of Part-III of Form 2-B and has no application to the case of a candidate belonging to a

recognised political party who has to make a declaration as required by clause(b)(i) thereof. According to Mr. Gopal Subramanian, the proviso appended to Rule 4 and para 13 of the 1968 Order operate in completely different fields without any overlap or conflict. He vehemently contended that the present case squarely falls under Section 36(2)(b) of the 1951 Act for failure to comply with the requirement of nomination paper completed in prescribed form. He would argue that the nomination having been subscribed by one proposer, basing on the declaration given by the election petitioner, it is intrinsic mandatory requirement of the 1968 Order that ink signed Forms A and B were filed prior to 3 P.M. on the last date of making nomination so as to sustain the declaration of the candidate having been set up by a recognised political party.

26. On the other hand, Mr. K.K. Venugopal, learned senior counsel for the proposed candidate contended that Section 36(4) of the 1951 Act read with proviso to Rule 4 of the 1961 Rules and Form 2 B (Part III) would make the filing of xerox copy of Form A and Form B permissible (assuming that xerox copy of Form A and Form B were filed only) and cannot form the basis of the rejection of the nomination paper. He submitted that failure to file original Form A and Form B signed in ink was not defect of a substantial character within the meaning of Section 36(4) of the 1951 Act. According to him, para 13(e) of the 1968 Order that states "Forms A and B are signed, in ink only, by the said office bearer or person authorised by the party" is only an expression of hope and is not mandatory as it does not use the expression 'shall be signed'. He referred to a decision of this Court in the case of *Jagan Nath v. Jaswant Singh & Ors.*[1] in support of his submission that the election law is technical and unless express provision is found, one cannot read the word "are" as "shall". With reference to Section 33(1) of the 1951 Act, Mr. Venugopal would submit that the expression "a nomination paper completed in the prescribed form and signed by the candidate and by an elector of the constituency as proposer" did not require the nomination paper to be accompanied by specified documents. Rule 4 of the 1961 Rules deals with the nomination paper while para 13 of the 1968 Order deals with the political party's authorisation. The two are separate and distinct and para 13 of 1968 Order cannot be read into Rule 4 of the 1961 Rules.

27. Mr. K.K. Venugopal, learned senior counsel submitted that neither Section 33 nor Section 34 of the 1951 Act required that the nomination should be accompanied by the sponsorship or authorisation of a political party. Section 36(2) of the 1951 Act sets out the grounds on which nomination paper can be rejected. Neither clause (a) which deals with qualifications and disqualifications nor clause (b) that deals with failure to comply with Section 33 nor Section 34 or clause (c) which deals with signature of the candidate or his proposer is relevant to the present controversy.

28. On the above contentions, the question presented for our consideration is, whether it is mandatory for a candidate set up by a recognised political party to file original ink signed Forms A and B appended to para 13 of the 1968 Order.

29. Before we consider the above question, it is important to recapitulate the general rule relating to election law stated by the Constitution Bench of this Court in the case of Jagan Nath1. This Court (at page 895) stated :

> "The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the court possesses no common law power. It is also well settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law. None of these propositions, however, have any application if the special law itself

confers authority on a tribunal to proceed with a petition in accordance with certain procedure and when it does not state the consequences of non-compliance with certain procedural requirements laid down by it. It is always to be borne in mind that though the election of a successful candidate is not to be lightly interfered with, one of the essentials of that law is also to safeguard the purity of the election process and also to see that people do not get elected by flagrant breaches of that law or by corrupt practices. In cases where the election law does not prescribe the consequence or does not lay down penalty for non-compliance with certain procedural requirements of that law, the jurisdiction of the tribunal entrusted with the trial of the case is not affected."

30. Section 33 of the 1951 Act enacts that a candidate shall file nomination paper on or before the appointed date in the prescribed form. The form in which nomination paper shall be presented and completed is provided in Rule 4 of the 1961 Rules. According to Rule 4, every nomination paper presented under sub-section (1) of Section 33 shall be completed in such one of the forms 2-A to 2-E, as may be appropriate. Proviso that follows Rule 4 provides that a failure to complete or defect in completing, the declaration as to symbols in a nomination paper in Form 2-A or Form 2-B shall not be deemed to be a defect of substantial character within the meaning of Section 36(4) of 1951 Act. The controversy in the present case relates to a candidate set up by a recognised political party of the State and, therefore, the relevant form in this regard is Form 2-B. Form 2-B is in three parts. Part-II is not relevant and, therefore, it is not necessary to refer to that. Part-I and Part-III of Form 2-B are relevant. Part-I of Form 2-B is required to be completed by a candidate set up by a recognised political party. Part-III of Form 2-B is a declaration to be made by the candidate giving assent to his nomination. The candidate is required to declare, in case of a candidate set up by a recognised State party in terms of para b(i), "that I am set up at this election by the ……party, which is recognised national party/state party in this State and that the symbol reserved for the above party be allotted to me". Para b (ii) of Part-III is applicable to a candidate set up by any registered unrecognised political party or a candidate who is contesting the election as an independent candidate. A plain reading of proviso that follows Rule 4 leaves no manner of doubt that a failure to complete or defect in completing, the declaration as to symbols in a nomination paper in Form 2A or Form 2B by a candidate set up by a recognised political party or a candidate set up by registered unrecognised political party or a candidate who seeks to contest the election as an independent candidate is not a defect of substantial nature. It is not possible to catalogue defects contemplated by the proviso. However, to illustrate the few; wrong description of symbol, omission to fill blank space given in proforma in respect of choice of symbols, selecting a symbol which is reserved, etc., fall in the category of defects not of a substantial character. We are fortified in our view by a decision of this Court in *Krishna Mohini (Ms) v. Mohinder Nath Sofat*[2] wherein this Court said in para 32 (Pg. 159) :

"32. Though Rule 4 of the Conduct of Elections Rules requires every nomination paper presented under sub-section (1) of Section 33 to be complete in such one of the Forms 2-A to 2-E as may be appropriate and, therefore, the blank space meant for showing three symbols in order of preference as symbols of the candidate's choice, has to be filled in; however, non-filling of the space as to choice of symbol is not a defect of a substantial character. Such deficiency in the nomination paper is saved by the proviso to Rule 4 of the Conduct of Elections Rules, 1961 which provides that failure to complete or defect in completing the declaration as to symbols in a nomination paper shall not be deemed to be a defect of a substantial character within the meaning of sub-section (4) of Section 36. Choosing a wrong symbol, leaving blank the space meant for filling the choice of

symbols and an error in describing the symbol — are all defects not of a substantial character. An independent candidate may mention as his preference the symbol reserved for a recognised political party, but that again will not be a defect of a substantial character. Dealing with such cases, this Court has held in *K.S. Abdul Azeez v. Ramanathan Chettiar* (AIR 1967 SC 85) that the question of symbols should not play an important part because symbols can be assigned by political parties till the date for withdrawal and nomination paper should not be cancelled, on this ground, during the interval."

31. The applicability of proviso that follows Rule 4, however, is limited to defect in the declaration as to symbol made by a candidate in Form 2-A or 2-B appended to 1961 Rules. Its operation does not extend to the defects in forms required to be filled or completed by a candidate set up by a recognised political party under 1968 Order or non-fulfilment of requirements set out in clauses (a) to (e) of para 13 of the 1968 Order.

32. 1968 Order has been made by the Commission to provide for specification, reservation, choice and allotment of symbols of elections in Parliamentary and Assembly Constituencies for the registered political parties (recognised or unrecognised) and the independent candidates. Para 13 provides in unmistakable terms that for a candidate to be considered to have been set up by a political party in a parliamentary or assembly constituency, he has to comply with the conditions set out in clauses (a) to (e) thereof. In Krishna Mohini (Ms)2, this Court held that in order to be a candidate set up by a registered and recognised political party so as to take advantage of being proposed by a single elector, all the four requirements set out in clauses (a), (b), (c) and (d) of para 13 of 1968 Order must be satisfied. The Court went on to say that if any one or more of the requirements are not satisfied, the benefit of nomination being proposed by a single elector is not available to him. Clause (e) of para 13 of the 1968 Order is equally important. It reads, "Forms A and B are signed, in ink only, by the said office-bearer or person authorised by the party". Proviso appended to para 13 makes a provision that no facsimile signature or signature by means of rubber stamp, etc. of any such office-bearer or authorised person shall be accepted and no form transmitted by fax shall be accepted. In other words, for a candidate, proposed by a single elector alone, to be treated as a candidate set up by a recognised political party, the filing of notice and communication in Forms A and B referable to clauses (b), (c) and (d) and in accord with clause (e) of para 13 of the 1968 Order is essential and on its non-compliance, the nomination of such candidate is liable to be rejected.

33. That clause (e) of para 13, 1968 Order does not use the expression "shall be signed" is obvious from the bare reading of the provision but the significance of the word "only" therein cannot be ignored.

34. In Concise Oxford English Dictionary (Tenth Edition, Revised), the word 'only' is explained :

Only • adv. 1 and no one or nothing more besides.. . . . . • **adj.** alone of its or their kind; single or solitary. . . . . .

35. In Webster Comprehensive Dictionary, International Edition (Volume Two), the word 'only' is defined thus :

Only (?n'l?) adv. . . . . **2** In one manner or for one purpose alone. . . . . **4** Solely; merely; exclusively: limiting a statement to a single defined person, thing, or number. – adj. **1** Alone in its class; having no fellow or mate; sole; single; solitary:

36. The word 'only' is ordinarily used as an exclusionary term. In the American case of *Henry R. Towne v. Mark Eisner* (245 US 418 at 425), the court said, "A word is not a crystal,

transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used". In ascertaining the meaning of the word 'only', its placement is material and so also the context in which the word has been used. The use of the word 'only' in clause (e), para 13, 1968 Order emphasises that Forms A and B are to be signed in ink by the office bearer or person authorised by the recognised party and in no other way. Thus, it excludes any other mode of filing Forms A and B when a candidate is set up by a recognised political party. In our view, therefore, the word 'only' used in clause (e) of para 13 is indicative of the mandatory character of that provision.

37. Where a candidate is set up by a recognised political party, clause (b)(i), Part-III of Form 2-B becomes relevant as by making declaration therein the candidate makes a request that symbol reserved for such party be allotted to him. It is for this reason that the requirements of para 13 of the 1968 Order become integral part of Form 2-B, Part-III under Rule 4 of the 1961 Rules where a candidate is set up by a recognised political party. We are unable to accept the submission of Mr. K.K. Venugopal that para 13 of the 1968 Order cannot be read into Rule 4. Non-compliance of requirements of para 13 of the 1968 Order, in our view, is a defect of substantial character and the nomination paper of a candidate proposed by a single elector set up by a recognised political party having such defect is liable to be rejected under Section 36(2)(b) as it tantamounts to non-compliance of the provisions of Section 33, namely, the nomination paper having not been completed in the prescribed form.

38. The proposed candidate admittedly filed his nomination paper proposed by a single elector having been set up by BJD, a recognised political party in the State of Orissa, and, therefore, it was incumbent upon him that the requirements of para 13 of the 1968 Order were fully complied with. In other words, it was necessary for the proposed candidate that Forms A and B referable to clauses (b), (c) and (d) of para 13, 1968 Order were submitted to the Returning Officer duly signed in ink by the authorised person of BJD not later than 3.00 p.m. on April 4, 2009.

39. Having held so, the other questions that need to be considered by us in these appeals are, whether the High Court erred in framing issue no. 6 at the time of decision in the election petitions, i.e., whether the election petitioner Ranendra Pratap Swain filed the original Form-A and Form-B being duly signed in ink by the authorised person with the first set of his nomination and whether the finding recorded by the High Court on that issue suffers from any illegality.

40. The pleadings of the parties as well as the evidence let in by them clearly show that the parties were seriously in issue whether the original Form-A and Form-B duly signed in ink by the authorised person of BJD were filed by the proposed candidate with the first set of his nomination paper. The election petitioners (in both election petitions) asserted that the proposed candidate had filed original Forms A and B duly signed in ink by Shri Navin Patnaik (authorised person of BJD) before the Returning Officer on April 4, 2009 at the time of presentation of nomination paper and check list was issued acknowledging receipt of these forms. The returned candidate disputed the said assertion made in the election petitions. The evidence of the Returning Officer, who was examined as court witness no. 1, and his cross-examination on behalf of the proposed candidate as well as the returned candidate also indicate that the factual controversy in the election petitions centered around on the filing of the original Form-A and Form-B duly signed in ink by the authorised person of BJD with the first set of his nomination. It follows that by framing issue no. 6 at the time of final decision of the election petitions, no prejudice has been caused to the returned candidate. As a matter of fact, no ground of prejudice has been raised in the

appeals nor such argument was advanced before us by the learned senior counsel for the returned candidate. We, accordingly, hold that the High Court did not commit any error in framing issue no. 6 which was quite vital and material for decision in the election petitions. We further hold that no prejudice has been caused to the returned candidate by framing such additional issue at the time of the decision in the election petitions.

41. The proposed candidate PW-2 deposed that he had contested Orissa Assembly Elections held in 1990, 1995, 2000 and 2004 from 89-Athagarh Constituency and had won all these four elections. While giving the details of nomination papers and the documents presented personally by him on April 4, 2009 at 11.25 a.m., he stated that in the first set of nomination, Rabindra Nath Rout (PW-1) was the proposer and along with the first set of nomination paper, original Form-A and Form-B signed in ink by Shri Naveen Patanaik, President and the authorised signatory of BJD were filed. He deposed that he had presented four sets of nominations as the nominee of BJD for 89-Athagarh Assembly Constituency and all his four sets of nominations were complete in all respect. He also deposed that immediately after he presented four sets of nominations, as a nominee of BJD, the Returning Officer asked him to take oath before him and he, accordingly, took oath before the Returning Officer. From 11.25 a.m. to 11.45 a.m., the Returning Officer examined the four sets of nominations presented by him and thereafter the Returning Officer personally prepared the check list of documents; put his signature on that and asked him (proposed candidate) to sign on the said documents. The Returning Officer retained with him one of such check list ticked duplicate (Ex. 22) and handed over another to him (proposed candidate) ticked original (Ex. 11).

42. The deposition of the proposer—Rabindra Nath Rout (PW-1) is not of much help as he has stated that he was not present in the office room of the Returning Officer when the proposed candidate filed his nomination.

43. Significantly, the Returning Officer (CW-1) in his deposition has not specifically denied that Form-A and Form-B in original duly signed in ink by the authorised officer of BJD were not filed by the proposed candidate. Rather he stated that had it come to his notice that Form-A and Form-B duly signed in ink by the authorised signatory were not filed by the proposed candidate, he would have made an endorsement on the bottom of the check list to that effect and asked the proposed candidate to file the original ink signed forms within time. He admitted that no such endorsement was made in the check list. The Returning Officer also stated in his deposition that the nomination papers filed by the proposed candidate were examined by him only from technical stand point and it was not his duty to examine the correctness or validity of the documents at the time of filing of the same.

44. Although there is voluminous documentary evidence, in our view, the three documents viz; the check list (Ex. 11), Form 3-A (Ex. 42/F) and the consolidated list of nominated candidates (Ex. 44) are important. The check list marked 'original' (Ex. 11) given to the proposed candidate is as follows :

Sl. No.	Documents	Whether filed (write yes/no)
1.	Affidavit in Form-26	yes
2.	Affidavit as per the Commission's order dated 27.03.03	yes
3.	Certified extract of electoral roll (when candidate is an elector of a different constituency)	Not needed

4. Forms A and B (applicable in the case of candidates set up by political parties) yes

5. Copy of caste certificate (if the candidate claims to belong to SC/ST) Not needed

6. Security deposit (whether made) yes

7. Oath/affirmation (whether taken) yes

The following documents which have not been filed should be filed as indicated below :

(a) _____should be filed latest by _____.

(b) _____should be filed latest by _____.

Received.

……

(Signature of candidate)

Date & time : 04.04.2009 -- 11.45 a.m.

Place : ATHAGARH"

45. List of nominated candidates—Checks If (Ex.44) to the extent it is relevant is as follows :

Name of Parliamentary/Assembly Constituency -89 Athagarh

No. Name of the candidate Address of candidate Symbols chosen in Order of preference by the candidate. Name of political Party (National/State or registered) by which the candidate claims to have been set up/independent candidate Whether Forms 'A' and 'B' have been received by 3.00 p.m. on the last date for making nominations in respect of the candidate Whether main candidate or substitute candidate of the party (as per Party's intimation in Form B)

1 2 3 4 5 6 7

1 Ranendra Pratap Swain At - Radhago vindapur P.O.-Dhaipur, P.S. Athagarh Dist.-Cuttack Cunch Biju Janata Dal Yes Main Candidate

46. On April 4, 2009, the Returning Officer published a notice in Form 3A on the notice board of his office in respect of the nomination papers presented before him on that day. In that notice – Form 3A (Ex. 42/F), it was mentioned in column no. 6 that proposed candidate was nominee of BJD. Pertinently, April 4, 2009 was the last day of nominations. Form 3A was displayed on the notice board after 3 p.m. Had the proposed candidate not filed Forms A and B as required, i.e., duly signed in ink by an authorised person of BJD, he would not have been shown as a nominee of that party in Form 3A.

47. On behalf of the returned candidate it was contended before the High Court and reiterated before us that none of these documents indicate that Forms A and B were filed in original. It was submitted that these documents only indicate that Forms A and B were filed as endorsed in the check list and were received before 3.00 p.m. on the last date of making nominations but these documents do not prove that original Forms A and B signed in ink by the authorised signatory of the party were filed.

48. It is true that neither in the check list nor in the list of

nominated candidates, the word 'original' before Forms A and B is mentioned but it was not required to be mentioned as in the case of candidates set up by political parties; the requirement is that such candidates file Form A and Form B duly signed in ink by the authorised officer of the concerned political party. In the event of filing of Form A and Form B otherwise, an endorsement would obviously be made against that column in the check list and time would be given to make up the deficiency by 3.00 p.m. on the last day of nomination. In the circumstances, having regard to the significance of the check list, if Forms A and B were not filed in original by the proposed candidate, an endorsement would have been made by the Returning Officer that only xerox copies of Forms A and B were filed. No doubt under Section 33(4) of the 1951 Act, the Returning Officer is not expected to make a detailed scrutiny of the nomination paper presented before him but in the case of a candidate who has filed his nomination paper as a candidate set up by a recognised political party and in view of para 13 of the 1968 Order, the Returning Officer would surely check whether Form A and Form B suffer from any defect.

49. As a matter of fact, to obviate unnecessary dispute about presentation of nomination paper by a candidate, the Commission in the handbook has provided for guidelines pertaining to check list. Accordingly, a check list is required to be prepared duly certified by the Returning Officer that all documents have been received. Such check list is signed by the Returning Officer as well as by the candidate. Where a check list certifies that Forms A and B (in the case of candidates set up by a recognised political parties), have been filed, such certificate leads to presumption that the procedural requirement of filing the documents as prescribed in para 13 of the 1968 Order has been complied with. The presumption is of course rebuttable but there must be sufficient evidence by the other side to displace such presumption. In the present case, the check list (Ex.11), Form 3A (Ex. 42/F) and the list of the nominated candidates—checks IF (Ex. 44) give rise to presumption in favour of the proposed candidate that he had filed Form-A and Form-B duly signed in ink by the authorised person of BJD with the first set of his nomination paper. The question is whether this presumption has been rebutted by the returned candidate? We do not think so. The oral evidence of the returned candidate (RW-1) and his witness (RW-2) is not of much help insofar as this aspect is concerned. The Returning Officer has not stated firmly and with certainty in his evidence that the proposed candidate had not filed Form-A and Form-B signed in ink by the authorised person of the BJD. Rather he stated that had it come to his notice that the original Form-A and Form-B duly signed in ink were not filed along with the nomination paper by the proposed candidate, he would have made an endorsement to that effect in the check list. Moreover, between 11.46 a.m. when the check list was prepared by the Returning Officer and given to the candidate and 3.00 p.m. on April 4, 2009 (last date of nominations) no intimation was issued by the Returning Officer or received by the candidate with regard to non-filing of original Forms A and B. No doubt, the burden is on the candidate set up by a recognised political party to prove that he had filed Forms A and B duly signed in ink by the authorised person of that party but that burden gets discharged on production of evidence that raises presumption in his favour. In the present case the proposed candidate has been successful in discharging the burden placed upon him.

50. The evidence of the Returning Officer is the important part of the case. He admitted in his evidence that the xerox copies of the nomination papers and documents were got prepared through his officials for the purpose of displaying on the notice board. He also admitted that since proposed candidate had filed all documents required in the nomination form, no further endorsement was made in the check list that he (proposed candidate) was required to file any documents. Moreover, with regard to another candidate, Janaki Rout in respect of 89-Athagarh Assembly Constituency, the Returning Officer stated that he asked him to file the document which he

had not filed along with the nomination paper by 3.00 p.m. at the latest. In respect of yet another candidate Bijaya Kumar Biswal, in the check list, he had endorsed therein that the certified extract of the electoral roll was not filed and asked him to file the same at 11.00 a.m. on April 6, 2009 at the latest. It is, thus, seen that the Returning Officer was conscious of his duties as per the statutory provisions and the guidelines issued by the Commission by way of handbook. On presentation of nomination papers by respective candidates wherever deficiencies were found, he made endorsement in the check list and gave them time to make up the deficiency as per law. A careful consideration of the evidence of Returning Officer leaves no manner of doubt that he has not distorted the facts nor withheld anything from the court with regard to presentation of nomination papers by the candidates including the proposed candidate. The evidence on record, i.e, the evidence of the Returning Officer, the documentary evidence, namely, the check list, Form 3A displayed on the notice board, the consolidated list of nominated candidates and the evidence of PW-2 clearly establish that original Form-A and Form-B signed in ink by authorised officer of the party (BJD) were presented by the proposed candidate along with 1st set of nomination paper on April 4, 2009. The finding returned by the High Court in this regard cannot be said to be wrong or unjustified.

51. It is a fact that the original Forms A and B were not available on record before the Returning Officer on April 6, 2009 at the time of scrutiny. However, we are not persuaded by the submission made on behalf of the returned candidate that in the absence of original Forms A and B on record, the Returning Officer had to proceed on the basis of records available before him on that day and he had no option but to reject the nomination. The least expected of the Returning Officer, when he found that original forms A and B were not available on record, was to make brief enquiry about non-availability of the forms A and B. It was all the more necessary as the nomination papers along with accompanying documents were sent for xeroxing.

52. Section 83 of the 1951 Act requires that an election petition shall contain a concise statement of the material facts on which the petitioner relies. It has been repeatedly held by this Court that Section 83 is peremptory. In *Samant N. Balakrishna, etc. v. George Fernandez and others etc.*[3], this Court observed in para 29 (Pg. 1212) of the Report thus:

> ".....The section is mandatory and requires first a concise statement of material facts and then requires the fullest possible particulars. What is the difference between material facts and particulars? The word 'material' shows that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of particulars is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet. There may be some overlapping between material facts and particulars but the two are quite distinct....."

53. In *Azhar Hussain v. Rajiv Gandhi*[4], this Court held that an election petition must be dismissed if the mandatory requirements enjoined by Section 83 to incorporate the material facts and particulars relating to alleged corrupt practice in the election petition are not complied with.

54. In *Hari Shanker Jain v. Sonia Gandhi*[5], this Court reiterated the mandatory provision contained in Section 83(1)(a) of the 1951 Act and observed therein that the material facts required to be stated are those facts which can be considered as materials supporting the allegations made. In other words, this Court said that they must be such facts as would afford the basis for the allegations made in the petition and would constitute the cause of action as understood in the Code of Civil Procedure, 1908.

55. A 3-Judge Bench of this Court in *Pothula Rama Rao v. Pendyala Venakata Krishna Rao and Others*[6], stated in paragraph 8 (at Pg. 6) of the Report as follows :

> "If an election petitioner wants to put forth a plea that a nomination was improperly rejected, as a ground for declaring an election to be void, it is necessary to set out the averments necessary for making out the said ground. The reason given by the Returning Officer for rejection and the facts necessary to show that the rejection was improper, should be set out. If the nomination had been rejected for non-compliance with the first proviso to Sub-section (1) of Section 33, that is, the candidate's nomination not being subscribed by ten voters as proposers, the election petition should contain averments to the effect that the nomination was subscribed by ten proposers who were electors of the Constituency and therefore, the nomination was valid. Alternatively, the election petition should aver that the candidate was set up by a recognized political party by issue of a valid 'B' Form and that his nomination was signed by an elector of the Constituency as a proposer, and that the rejection was improper as there was no need for ten proposers. In the absence of such averments, it cannot be said that the election petition contains the material facts to make out a cause of action."

56. In a recent decision in *Nandiesha Reddy v. Kavitha Mahesh*[7], this Court observed that where election petitioner alleges improper rejection of his/her nomination paper by the Returning Officer, he/she must set out in election petition reasons given by the Returning Officer for refusal to accept nomination paper and facts necessary to show that refusal was improper. In paragraphs 36 and 37 of the Report (at Pg. 734), this Court held as under

> "36. Section 83 (1)(a) inter alia provides that an election petition shall contain a concise statement of the material facts. Further, Section 87 of the Act provides that subject to the provisions of the Act and the Rules framed thereunder every election petition shall be tried in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits. Order VI of the Code of Civil Procedure is devoted to the pleadings generally and Rule 2(i) thereof, inter alia, provides that every pleading shall contain a statement in a concise form of all the material facts on which the party pleading relies for claim. In an election petition, which does not contain material facts, no relief can be granted.
>
> 37. The phrase "material fact" as used in Section 83 (1)(a) of the Act or Order 6 Rule 2 of the Code of Civil Procedure has not been defined in the Act or the Code of Civil Procedure. In our opinion all specific and primary facts which are required to be proved by a party for the relief claimed are material facts. It is settled legal position that all material facts must be pleaded by the party on which the relief is founded. Its object and purpose is to enable the contesting party to know the case which it has to meet. An election petition can be summarily dismissed if it does not furnish the material facts to give rise to a cause of action. However, what are the material facts always depend upon the facts of each case and no rule of universal application is possible to be laid down in this regard."

57. In view of the above legal position, there is no doubt that in a case under Section 100(1)(c) of the 1951 Act, the only issue before the Court is improper rejection of nomination paper and the court is required to examine the correctness and propriety of the order by which the nomination paper 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.

58. The learned senior counsel for the appellant submitted 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. We do not find any merit in this contention.

59. In the Election Petition No. 4 of 2009 filed by the proposed candidate, the order of rejection of nomination has been assailed, inter alia, on the following grounds:

"5(C) That the reasonings given in the decision of the Retuning Officer, in his order of rejection dtd. 06.04.2009 is also not legally sustainable for the following reasons :-

(a) The Nominee of B.J.D. Nominee for 87-BARAMBA Assembly Constituency was submitted on 03.04.2009. The Returning Officer had the occasion to examine the same and grant the Check List on 03.04.2009 i.e. one day before the submission of the Nomination of the Election Petitioner, whereas the Election Petitioner submitted his Nomination on 04.04.2009. If according to the Returning Officer, "from comparison of two sets of Form A & B submitted in 87- BARAMBA, he came to conclusion that the set of Form A & B, submitted by the Election Petitioner along with his first set of Nomination was not original and not signed in ink but a xerox copy, then in ordinary course of human conduct and in view of instruction of the Election Commission", he would have recorded an endorsement to that effect in the CHECK LIST which he himself gave at 11.45 AM on 04.04.2009, and would have further called upon the Election Petitioner to produce the same by 3 PM on the same day.

(b) The Returning Officer instead of making a comparison with the Form A & B submitted along with the Nominations of 87-BARAMBA, should have referred to the Form A & B, which was communicated both to him & to the CEO under the provisions of Election Symbol (Reservation & Allotment) Order – 1968.

5(D) That a plain reading of four Orders of rejection recorded by the Returning Officer on four sets of Nominations submitted by the Election Petitioner spells out so much so discrepancy that the same itself is sufficient to conclude that the order suffers from inconsistency and is an outcome of non application of mind.

5(E) That on the date of scrutiny no objection was raised by any of the contesting candidates or any person on their behalf present at the time and place of scrutiny to the effect that the Form A & B, filed by the Election Petitioner with his first set of "NOMINATION" were not original not it contains the signature of the authorised person IN INK were Xerox copies.

The complaint was raised by the Returning Officer himself who had received all the four sets of Nominations, along with other affidavits, documents original money receipt and original Form A & B, duly signed in ink, by the authorised person, and had signed the CHECK LIST which is a document required to be signed & delivered to the candidate in exercise of his statutory powers on 04.04.2009. The partisan attitude and hostility of the Returning Officer towards the Election Petitioner emanates from his own conduct, when he refused minimum opportunity to the Election Petitioner to REBUT the

so called allegations regarding non-submission of original Form – A & B containing signature of authorised person in ink, which a candidate is entitled to as of right under the Rules of Election Law."

60. The High Court, inter alia, considered the evidence of PW-2 and also the evidence of the Returning Officer, the documentary evidence, namely, the check list (original-exhibit 11), Form 3-A (exhibit 42/F) and consolidated list of nominated candidates—checks IF (exhibit-44) and the contentions of the returned candidate and held as under :

"13. As found from the evidence of P.Ws 1 and 2, the latter filed four sets of Nomination along with other accompanying documents. In the 1st set of Nomination Papers, he filed original ink signed Form A and Form B. Accordingly, the Returning Officer issued the Check List to Sri Ranendra Pratap Swain. They further deposed that while handing over the Check List, the Returning Officer stated that "whatever original forms and documents that you have submitted and I have received from you have been clearly mentioned by me in the Check List. You preserve the Check List with you. If in fact the Returning Officer had stated so, it being a material fact, the same should have been averred in the election petition. In absence of pleading this part of evidence of P.Ws 1 and 2 cannot be relied upon. According to the evidence of Returning Officer, on examining the documents on technical stand point, he found the election Petitioner, Sri Ranendra Pratap Swain to have filed all required documents and accordingly he issued the Check List marked Ext. 22 to him. He fairly admitted in his evidence that he can distinguish a xerox copy from its original. He further deposed that had it come to his notice that Sri Ranendra Pratap Swain filed the xerox copies of the original ink signed Form A and Form B, he would have endorsed it in the bottom of the Check List and directed him to file the original ones. Again on 04.04.2009 after the time fixed for filing the Nomination Papers was over, he prepared copy of those documents in Form 3A to publish in the notice board. At that time also he could not detect the filing of Xerox Copies of the original ink signed Form A and Form B. Furthermore, when he prepared the consolidated "List of Nominated Candidates-Checks if". He could not detect the so called defect. He mentioned the symbol "Conch" in the appropriate column of the said form so also the name of political party, which set up the candidate, Sri Ranendra Pratap Swain. Since the signature of P.W. 1 the proposer of Ranendra Pratap Swain, partially got effected, the Returning Officer asked him to put another signature and accordingly he did it. When the Returning Officer was alive to find out an effaced signature in the Nomination, it appears some what fishy how he filed to detect the Xerox copies of the original ink signed Form A and Form B, if filed. The original ink signed Form A and Form B, if filed. The contention of learned counsel for the respondent that there was no pleading with regard to Form 3A and consolidated "List of Nominated Candidates-Checks If" in either of the election petitions and as such the same cannot be relied upon cannot be accepted. It is the fundamental rule of pleadings that pleading must contain a statement of the material facts, but not the evidence by which they are to be proved. In the present case, it has been averred in the election petitions that Shri Ranendra Pratap Swain filed the Nomination along with required documents including original Form A and Form B ink signed, before the Returning Officer. Moreover, Form 3A and consolidated "List of Nominated Candidates-Checks if" have been admitted as Exts. 42/f and 44 respectively without objection. So their validity cannot be questioned. As per the decision State of Orissa and others (supra) their probative value is also very high. Even if those documents

were not referred to in the election petitions, the evidence led in that respect can be accepted."

61. The High Court finally concluded that the proposed candidate had filed the original Form-A and Form-B duly signed in ink by the authorised person of BJD with the first set of his nomination and, accordingly, decided Issue No. 6 in favour of election petitioners. The consideration of the matter by the High Court in para 14 of the judgment may be reproduced as it is.

"14. No doubt at the time of filing of Nomination, the Returning Officer is not required to scrutinize the Nomination and the accompanying documents in minor details, but he is duty bound to examine the same on technical stand point. Now the pertinent question is whether he was expected to examine whether the original ink signed Form A and Form B were filed, while examining the Nomination Paper along with the accompanying documents, on technical stand point. In my considered opinion, he had to do so, particularly when he deposed that had it come to his notice that Sri Ranendra Pratap Swain filed the Xerox copies of the original ink signed Form-A and Form-B, he would have endorsed it in the bottom of the Check List and directed him to file the original ones. At this stage Mr. Palit, learned counsel for the respondent submitted that unless, an election petitioner fully established his case, it would not be proper to set aside the election. In support of his submission, he relied on the decision in the case of Ram Phal Kundu Vs. Kamal Sharma, AIR 2004 Supreme Court 1657, where the apex Court held as follows.

> "Therefore, unless the election petitioner fully established his case, it will not be legally correct to set aside the election of the appellant."

As found from the evidence of P.Ws. 1 and 2 the latter filed the original ink signed Form A and Form B in his 1st set of Nomination. This part of their evidence could not be shaken. Even no suggestion was given to P.W. 1 that P.W. 2 did not file original ink signed Form A and Form B in his 1st set of Nomination. So, the above decision is not applicable to the present case.

The Returning Officer has admitted in his evidence that the Nominations along with all the accompanying documents of all the eight candidates were Xeroxed outside in Anand Xerox of Athagarh. He has also admitted that on 04.04.2009 all the four sets of Nomination papers of Sri Ranendra Pratap Swain were Xeroxed to display the same in his Notice Board. The possibility that, in the process the original ink signed Form A and Form B were inadvertently exchanged for the Xerox copies thereof, cannot be ruled out. Under such premises, in my considered opinion, Sri Ranendra Pratap Swain had filed the original Form-A and Form-B duly signed in ink by the authorised person with the 1st set of his Nomination. Accordingly, issue no. 6 is answered in affirmative.

62. In what we have already discussed above, we do not find any error in the consideration of the matter by the High Court.

63. The election petitioner, as noticed above, in ground 5(E) set up the case that the objection of non-filing of original Forms A and B signed in ink by the authorised officer of the party was not raised by any of the contesting candidates or any person on their behalf present at the time and place of scrutiny. It was the Returning Officer who raised the issue of non-filing of original Forms A and B but he refused minimum opportunity to the election petitioner to rebut the same. In our view, the Returning Officer ought to have acted in terms of proviso to Section 36(5) of the 1951 Act and afforded an opportunity to the election petitioner until next day to rebut the objection and show to the Returning Officer that the proposed candidate had

filed Forms A and B duly singed in ink by the authorised person of BJD. PW-3, the authorised representative of the election petitioner did state in his evidence that he requested to the Returning Officer, when he raised the objection that original Forms A and B were not filed, to enquire into the matter about the missing Forms A and B. It was not necessary to state in the election petition the evidence of PW-3 in support of ground 5(E).

64. The proviso that follows sub-section (5) of Section 36 of the 1951 Act provides that in case an objection is raised by the returning officer or is made by any other person the candidate concerned may be allowed time to rebut it not later than the next day but one following the date fixed for scrutiny, and the returning officer shall record his decision on the date to which the proceedings have been adjourned.

65. In *Rakesh Kumar v. Sunil Kumar*[8], this Court held in para 21 (Pg. 500) as under:

> "21. ……The use of the expression "not later than the next day but one following the date fixed for scrutiny" under the proviso to Sub-section (5) of Section 36 of the Act unmistakably shows that the Returning Officer has been vested with the discretion to fix time to enable a candidate to rebut an objection to the validity of his nomination paper and such a discretion has to be fairly and judicially exercised. The refusal to grant an opportunity to the respondent and rejecting his nomination paper was clearly an arbitrary exercise of the discretion vested in the Returning Officer. The Returning Officer has also not given any cogent reasons for his refusal to grant an opportunity as prayed for by the respondent. The Returning Officer appears to have been labouring under some misconception when he recorded that the political party "cannot be given further time to change such authorisation after scrutiny". Under the proviso to Section 36(5) of the Act, the scrutiny itself would have been postponed to the adjourned time and, therefore, it was not a case of meeting the objection after scrutiny of the nomination papers. The failure to exercise his jurisdiction to postpone the decision as to the validity of the nomination paper of the respondent, even after the respondent had sought time to meet the objection, indeed rendered the rejection of the nomination paper of the respondent as both improper and illegal. The Returning Officer is not expected to reject a nomination paper, without giving an opportunity to the candidate or his representative present at the time of scrutiny to meet an objection, capable of being met, particularly where such an opportunity is sought for by the candidate or his representative and no one present on behalf of the other candidates had opposed the claim made by the respondent. Having raised the objection suo motu, the request of the respondent who was present and sought time in writing to seek clarification from the BJP as to who was its official candidate, the Returning Officer in all fairness was obliged to grant time to the respondent as prayed for by him and postponed the scrutiny to the next day but he ought not to have rejected his nomination paper in hot haste. The Returning Officer, obviously, failed to exercise his jurisdiction under Section 36(5) of the Act properly and thereby fell in a grave error in rejecting the nomination paper of the respondent……."

66. In the facts and circumstances of the present case, which have already been noticed above, the Returning Officer erred in acting in hot haste in rejecting the nomination paper 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. The election petitioners have been successful in proving the improper rejection of the proposed candidate's nomination paper. In other words, they have been able to prove the ground for setting aside appellant's election to 89-Athagarh Assembly Constituency under Section 100(1)(c) of the 1951 Act.