BALDEV SINGH & ORS.

v.

STATE OF PUNJAB

(Criminal Appeal No. 749 of 2007)

FEBRUARY 22, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Penal Code, 1860 – ss. 376(2)(g), proviso and 342 – Punishment for rape and wrongful confinement – Prosecutrix raped and beaten by three accused – Conviction u/ss. 376(2)(g) and 342 – Imposition of 10 years rigorous imprisonment with fine of Rs. 1,000/- – Upheld by High Court – On appeal, held: Accused have already undergone about 3 ½ years imprisonment each – Section 376 is a non-compoundable offence – However, considering the fact that the incident is 14 years old and that the parties have themselves entered into a compromise, while upholding conviction of the accused-appellants, the sentence is reduced to the period of sentence already undergone in view of the proviso to s. 376(2)(g) which for adequate and special reasons permits imposition of a lesser sentence – However, fine enhanced to Rs. 50,000/- – Sentence/Sentencing.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 749 of 2007.

From the Judgment & Order dated 27.4.2005 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 242-SB of 1999.

Rakesh Tiwari, Rajat Sharma and A.P. Mohanty for the Appellants.

Kuldip Singh for the Respondent.

The following Order of the Court was delivered

O R D E R

This appeal has been filed against the impugned judgment dated 27.04.2005 IN CRLA No. 242 of 1999 of the High Court of Punjab & Haryana at Chandigarh.

The facts of the case have been set out in the judgment of the High Court and hence we are not repeating the same here, except where necessary.

The prosecution case is that on 03.03.1997 at about 6.30 A.M. the prosecutrix was coming to her house after answering the call of nature. The three appellants caught her and took her into a house and raped her and beat her. After police investigation the appellants were charge sheeted, and after a trial were convicted under Section 376 (2) (g) and Section 342 I.P.C. and sentenced to 10 years R.I. and to pay a fine of Rs. 1,000/- each. The sentence was upheld by the High Court, and hence this appeal.

Admittedly the appellants have already undergone, about 3 and = years imprisonment each. The incident is 14 years old. The appellants and the prosecutrix are married (not to each other). The prosecutrix has also two children. An application and affidavit has been filed before us stating that the parties want to finish the dispute, have entered into a compromise on 01.09.2007, and that the accused may be acquitted and now there is no misunderstanding between them.

Section 376 is a non compoundable offence, However, the fact that the incident is an old one, is a circumstance for invoking the proviso to Section 376 (2) (g) and awarding a sentence less than 10 years, which is ordinarily the minimum sentence under that provision, as we think that there are adequate and special reasons for doing so.

On the facts of the case, considering that the incident happened in the year 1997 and that the parties have themselves entered into a compromise, we uphold the conviction of the appellant but we reduce the sentence to the period of sentence already undergone in view of the proviso to Section 376 (2) (g)

which for adequate and special reasons permits imposition of a lesser sentence. However, we direct that each of the appellant will pay a sum of Rupees 50,000/- by way of enhancement of fine to the victim envisaged under Section 376 of the IPC itself. The fine shall be paid within three months from today. In the event of failure to pay the enhanced amount of fine it will be recovered as arrears of land revenue and will be given to the victim.

The appeal is disposed off.

N.J. Appeal disposed of.

GLODYNE TECHNOSERVE LTD.
v.
STATE OF M.P. & ORS.
(Civil Appeal No. 2907 of 2011)

APRIL 04, 2011

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Tender – Technical Bid – Appointment of vendor for District Mechanism for Public Distribution System – Issuance of Request for Proposal (RFP) – Pre qualification (Eligibility Criteria) provided in the RFP – Subsequently, tender documents and bidder's check list amended – Issuance of corrigendum – Quality Certificate in the form of an active ISO 9001:2000 certification to be submitted alongwith bid papers and other documents – Appellant submitted copy of the ISO 90001:2000 certificate of the previous year instead of the current year documents for the bid even though it had the active ISO 90001:2000 certification at the time of making of the bid – Disqualification of the appellant from consideration – On appeal held: Appellant had a valid and active ISO 9001:2000 certification which it did not submit along with the Bid documents, may be due to inadvertence – However, whether such an explanation was to be accepted or not lay within the discretionary powers of the authority inviting the bids – Rejection of the Technical Bid of the appellant cannot be said to be perverse or arbitrary.

In the year 2009, the Government of Madhya Pradesh in the Department of Food, Civil Supplies and Consumer Protection issued a Request for Proposal (RFP) for the appointment of a vendor for District Mechanism for Public Distribution System. The-pre qualification (Eligibility Criteria) was provided in RFP. Subsequently, the provisions of Section 3 of the Tender documents and Section 7 of the Bidder's Check List were amended. The Quality Certificate in the form of an active ISO 9001:2000

certification was to be submitted alongwith the other documents with the bid papers. The appellant, a Public Limited Company was disqualified from consideration since through inadvertence or otherwise, along with the Tender documents it had filed a copy of the ISO 9001:2000 certificate of the previous year, instead of the current year, although, it did have the said valid ISO 9001:2000 certificate at the time of making of the bid. Therefore, the appellant filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1. The introduction of the Corrigendum completely changed the provision in the Bidder's Response Form relating to submission of the Quality Certificate in the form of an active ISO 9001:2000certification. In any event, the appellant's contention based on clause 9 of Section 7.1.1 of the RFP as it stood prior to corrigendum is misconceived. The said clause 9 obliges a tenderer to produce along with the bid document a copy of the Quality certificate which is valid and active on the date of submission of the bid and it does not enable a bidder to withhold the copy of such Quality Certificate. Where the Quality certificate will be expiring shortly and is due for renewal, the bidder is also obliged to produce the renewed certificate at the time of signing of the contract. The appellant claimed to have a valid and active ISO 9001:2000 certificate at the time of submission of the bid, but did not produce a copy of the said certificate along with the bid document. [Para 32] [945-H; 946-A-B, D-E]

1.2. The submissions made on behalf of the appellant proceeds on the basis that it was entitled, almost as a matter of right, not to submit the documents required to be submitted along with the bid documents on the supposition that, even if such documents were valid and active, they could be submitted at the time of signing of the Memorandum of Understanding. The appellant had a

valid and active ISO 9001:2000 certification which it did not submit along with the Bid documents, may be due to inadvertence, but whether such explanation was to be accepted or not lay within the discretionary powers of the authority inviting the bids. The decision taken to reject the Technical Bid of the appellant cannot be said to be perverse or arbitrary. [Para 33] [946-F-H]

1.3. Even the question as to whether 'NP' the consultant agency had obtained information that the appellant had a valid and active ISO 9001:2000 certification and had passed on such information to 'K' - Commissioner-cum-Director, Food, Civil supplies and Consumer Protection does not make any difference, since the same was never asked for or placed before the Tender Advisory Committee constituted for the purpose of scrutinizing the Bids despite the presence of 'NP'- Consultant for the selection of suitable candidates, at the meeting of the Advisory Committee at 2.15 p.m. on the same day. [Para 34] [947-B-C]

Tata Cellular vs. Union of India **(1994) 6 SCC 651;** *New Horizons Limited and Anr. vs. Union of India and Ors*. **(1995) 1 SCC 478;** *Reliance Energy Ltd. and Anr. vs. Maharashtra State Road Development Corpn. Ltd. and Ors.* **(2007) 8 SCC 1;** *Siemens Public Communication Network Pvt. Ltd. vs. Union of India and Ors.* **(2008) 16 SCC 215;** *Ram Gajadhar Nishad vs. State ofU.P.* **(1990) 2 SCC 486;** *Sorath Builders vs. Shreejikrupa Buildcon Ltd. and Anr.* **(2009) 11 SCC 9 – referred to.**

Case Law Reference:

(1994) 6 SCC 651	**Referred to.**	**Para 15**
(1995) 1 SCC 478	**Referred to.**	**Para 17**
(2007) 8 SCC 1	**Referred to.**	**Para 17**
(2008) 16 SCC 215	**Referred to.**	**Para 24**
(1990) 2 SCC 486	**Referred to.**	**Para 25**
(2009) 11 SCC 9	**Referred to.**	**Para 26**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2907 of 2011.

From the Judgment & Order dated 29.7.2010 of the High Court of Madhya Pradesh at Jabalpur in Writ Petition No. 7348 of 2010.

Harish Salve, Dr. A.M. Singhvi, Shyam Divan, Vikram Mehta, Rohit Bhat, Nar Hari Singh, Vikas Mehta for the Appellant.

G.E. Vahanvati, A.G. Ravindra Shrivastava, B.S. Banthia, Vikas Upadhyay, Anup Jain, Pars Kuhad, Pancham Surana, Biju Mattam, Indu Sharma, Vibha Datta Makhija, Rishi Kesh for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. The Appellant is a Public Limited Company which claims to have an annual turnover of almost Rs.750 crores and has been carrying out large scale infrastructure projects for various State Governments in India, including Maharashtra and Bihar, where bio-metrics of millions of people are required to be collected to ensure identification of the population which is targeted as beneficiaries of various Government Welfare Schemes, such as the National Rural Employment Guarantee Scheme. The Appellant Company has been holding ISO 9001:2000 Certificate for the highest quality standards in respect of the services rendered by it. The Appellant Company claims to have carried out a pilot project in respect of 10 shops in the State Government Public Distribution System in Bhopal.

3. On 12th December, 2009, the Government of Madhya Pradesh in the Department of Food, Civil Supplies and Consumer Protection, hereinafter referred to as "FCS", issued a Request for Proposal, hereinafter referred to as "RFP", for the appointment of a vendor for District Mechanism for Public Distribution System, hereinafter referred to as "PDS". The last date for submission of bids was 7th January, 2010, which was subsequently extended till 17th February, 2010.

4. The RFP, as it stood at the time when the bids were invited, included Section 3.1 which, inter alia, provides that the bidder/one partner in the consortium must possess a valid certification in the Capability Maturity Model (CMM level 3 or above). In addition, the bidder/all partners of consortium (in case of consortium) should have an active (valid at least till June, 2010) ISO 9001:2000 certificate which had to be submitted as qualifying documents.

5. Subsequently, on 18th January, 2010, the pre-qualification (Eligibility Criteria) provided in the RFP was changed and the corrigendum, as far as it relates to Section 3.1, was amended so that the bidder/one partner in the consortium had to possess a valid certification in the Capability Maturity Model (CMM level 3 or above). In case of consortium, the partner developing the software application should have CMM level 3 certification and the bidder/lead partners of the consortium (in case of consortium, should have an active (valid at least till June, 2010) ISO 9001:2000 certification at the time of submission of the bid. The documents to be submitted along with the bid remained the same. Vide the corrigendum dated 18th January, 2010, Section 7 which provided for the Bidder Check List, was also altered. Prior to its amendment, Section 7.1.1 provided that the Company/one partner in the consortium (in case of consortium) should have an active ISO 9001:2000 certification at the time of submission of the bid, and it was also provided that a copy of the Quality Certificate or documentation of the quality policy were required to be provided along with the bid document. It was also submitted that in case the certificate was issued for renewal, the bidder should ensure that the renewed certificate was made available at the time of signing of the contract. It was mentioned that in case the same was not provided, the Department may consider initiating the Award of the contract with the second lowest bidder. The criteria relating to the documents to be submitted as qualifying documents included a copy of the quality certificate/ documentation of quality policy. The corrigendum dated 18th January, 2010, amended the said provision to indicate that the

bidder/one partner in the consortium must possess a valid certification in the Capability Maturity Model (CMM level 3 or above), in case of consortium the partner developing the software application was required to have CMM level 3 certification. It was further stated that the bidder/lead partners of the consortium (in case of consortium) should have an active (valid at least till June, 2010) ISO 9001:2000 certification at the time of the submission of the bid. The documents to be submitted along with the bid remained unchanged.

6. The question for decision in this case is whether, on account of the corrigendum whereby the provisions of Section 3 of the Tender documents and Section 7 of the Bidder's Check List were amended, the appellant was, disqualified from consideration, in view of the fact that along with the Tender documents it had filed, through inadvertence or otherwise, a copy of the ISO 9001:2000 certificate of the previous year, instead of the current year, although, it did have the said valid ISO 9001:2000 certificate at the time of making of the bid.

7. The case of the Appellant depends almost entirely on the submission that on the date of submission of the Bid, it had a valid and active ISO 9001:2000 certification, but that through inadvertence the expired certification of the previous year had been filed along with the bid papers.

8. Mr. Harish N. Salve, learned Senior Advocate, appearing for the Appellant Company, submitted that even if no ISO 9001:2000 certification was filed along with the bid documents, it would have made no difference and the submission of the bid would have been fully valid in view of Section 7.1.1, which consists of the Bidder's Check List and indicates what were the requirements for a valid bid and what supporting documents were to be submitted along with the bid papers. Referring to Clause 9 of the aforesaid Section, which deals with Quality Certification, Mr. Salve pointed out that the requirement of the said Clause was that the Company/one of the partners of the consortium (in case of consortium) should have an active ISO 9001:2000 certification at the time of submission of the Bid. Mr. Salve submitted that the said condition was duly satisfied by the Appellant who had such a valid and active ISO 9001:2000 certification when the bid documents were filed.

9. Mr. Salve submitted that, although, one of the conditions of the Tender document required that the Quality Certification and the documentation of the quality policy were to be provided along with the bid documents as supporting documents, Clause 9 also provided that in case the certificate was due for renewal, the bidder should ensure that the renewal certificate was made available at the time of signing of the contract. In case the same was not provided, the department could consider negotiating the award of contract with the second lowest bidder. Mr. Salve submitted that it would be clear from the said condition that it was not absolutely necessary for the valid ISO 9001:2000 certification to be filed along with the bid documents and that they could be filed before the agreement was ultimately signed. Mr. Salve once again reiterated that despite having such a valid certificate, through inadvertence the previous year's certificate had been enclosed with the bid documents. It was urged by learned Counsel that this is not a case of a tenderer not having a valid certification, as required, but a case of not filing it with the bid documents, despite having the same. Mr. Salve urged that in view of Clause 9 of Section 7.1.1, the Appellant's bid documents had been wrongly rejected at the Technical Bid stage, without even considering the Financial Bid which had been submitted by it.

10. In addition to the above, Mr. Salve submitted that after the Financial Bids, except that of the Appellant, were opened, the Appellant came to learn that its offer was about Rs. 200 crores less than the second-lowest tenderer to whom the contract was ultimately given and that by awarding the contract to the second lowest tenderer, the State of Madhya Pradesh was incurring a loss of such a huge amount.

11. Mr. Salve urged that the aforesaid position would be further strengthened from Section 3 of the Request for Proposal which contained the pre-qualification (eligibility) criteria relating to technical, operational, functional and other requirements. Mr. Salve submitted that Clause 3 of Section 3.1 provides that the

bidder/one partner in the consortium must possess a valid certification in the Capability Maturity Model, which condition had been duly satisfied, and that all the partners of the consortium (in case of consortium) should have an active (valid at least till June, 2010) ISO 9001:2000 certification, at the time of submission of the bid. Mr. Salve submitted that all those documents to be submitted as qualifying documents, included the Quality Certificate and ISO 9001:2000 certificate, and if the said condition is read with the conditions contained in Clause 9 of Section 7.1.1 of the RFP, it would be seen that the requirement of a valid ISO 9001:2000 certification on the date of submission of the Bid documents was duly satisfied in the Appellant's case.

12. Mr. Salve also referred to the correspondence between Shri Naveen Prakash, the representative of the Wipro Consulting Services, which had been appointed a consultant for the selection of suitable candidates, and Shri Sandeep R. Chalke, who was the Chief Executive of QAL International Certification (India), which was the repository of information relating to such certificates. Mr. Salve pointed out that Shri Naveen Prakash had sent an E-mail to Shri Sandeep R. Chalke, requesting information as to whether Glodyne Technoserve Ltd., the Appellant herein, had a valid ISO 9001:2000 certificate at the relevant point of time. It was pointed out that in reply, Shri Chalke informed Shri Naveen Prakash on 10th April, 2010, that the certificate of the Appellant as on the current date was active and valid till 18th November, 2010, and would continue to be valid thereafter if the reassessment was conducted on or before 18th November, 2010. Mr. Salve submitted that Shri Naveen Prakash, as the representative of the consultant, was present at every meeting of the Committee which had been set up to oversee the Tender process and on the date when the Appellant's bid was rejected on account of non-compliance with Clause 9 of Section 7.1.1 of the RFP, he had knowledge of the fact that the Appellant had a valid and active ISO 9001:2000 certification which would expire only on 18th November, 2009, unless continued after reassessment.

13. Mr. Salve referred to the affidavit affirmed by Shri Ajit Kesari, the Commissioner-cum-Director, Food, Civil Supplies and Consumer Protection, Government of Madhya Pradesh, Bhopal, on 8th July, 2010, which clearly indicated that the Respondents concerned had due notice of the fact that the Appellant held an active ISO 9001:2000 certificate which was valid till 18th November, 2009. Mr. Salve submitted that the information received by Shri Naveen Prakash from Shri Sandeep R. Chalke was forwarded to Shri Ajit Kesari by E-mail on 4th December, 2010, although, in the affidavit affirmed by Shri Kesari it was sought to be stated that the same had not been sent to the official E-mail address of the Director, Food, Government of Madhya Pradesh, nor to each Committee Member and was sent to his personal E-mail address for information only. Mr. Salve urged that whether it was sent to the Director's official E-mail address or his personal E-mail address, the fact remains that Shri Ajit Kesari had knowledge that the Appellant was in possession of a valid and active ISO 9001:2000 certificate at the time of submission of the Bid documents.

14. Mr. Salve also referred to the reply of Wipro Ltd. to the writ petition filed by the Appellant and pointed out that the manner and circumstances in which Shri Naveen Prakash had obtained the information that the Appellant Company held a valid ISO 9001:2000 certificate had been spelt out in Paragraph 5 of the said reply, which duly corroborated the fact that the same information had been passed on to Shri Kesari.

15. In support of his aforesaid submissions, Mr. Salve firstly referred to the decision of a Three- Judge Bench of this Court in *Tata Cellular Vs. Union of India* [(1994) 6 SCC 651], which laid down certain tests in regard to the right of the Courts to intervene in a Tender process. This Court, inter alia, held that while the Court does not normally interfere with the Government's freedom of contract, invitation of Tender and refusal of any Tender which pertain to policy matters, when such a decision or action is vitiated by arbitrariness, unfairness, illegality or irrationality, then such decision can be looked into

by the Court since the test was as to whether the wrong was of such a nature as to require intervention. In this regard, the Court laid down the areas of scope of judicial review in paragraph 69 of the judgment. For the sake of convenience, paragraph 69 of the said judgment is extracted hereinbelow :

"69. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated, the following are the requisites of a valid tender :

1. It must be unconditional.
2. Must be made at the proper place.
3. Must conform to the terms of obligation.
4. Must be made at the proper time.
5. Must be made in the proper form.
6. The person by whom the tender is made must be able and willing to perform his obligations.
7. There must be reasonable opportunity for inspection.
8. Tender must be made to the proper person.
9. It must be of full amount."

16. Mr. Salve urged that the Bid documents submitted by the Appellant fully satisfy the aforesaid tests and the rejection of the Appellant's bid was unlawful and cannot be sustained.

17. In this regard Mr. Salve also referred to the decision of this Court in *New Horizons Limited & Anr. Vs. Union of India & Ors.* [(1995) 1 SCC 478], which set out the circumstances in which the Court could lift the veil to ascertain the true nature of a decision which had been taken in order to satisfy itself that the same was not unjust and was not opposed to the interest of revenue.

Reference was also made to the decision of this Court in *Reliance Energy Ltd. & Anr. Vs. Maharashtra State Road Development Corpn. Ltd. & Ors.* [(2007) 8 SCC 1], which was essentially a decision in regard to the right of every participant

to a level playing field in respect of Government contracts and the extent of judicial review by the Court under Articles 32, 226 and 136 of the Constitution, in cases of illegality, irrationality, procedural impropriety and Wednesbury unreasonableness.

18. Mr. Salve urged that the rejection of the Appellant's Technical Bid for the reasons mentioned above, was not supported by the terms and conditions of the RFP and even the amendments effect to the Bidder's Response Form containing Clause 7.1.1 that was changed by the Corrigendum issued on 18th January, 2010, did not alter the position. He urged that the judgment of the Division Bench of the High Court, impugned in this Appeal, was liable to be quashed.

19. Appearing for the State of Madhya Pradesh, the learned Attorney General submitted that primarily four issues fall for the determination in the present case, namely,

(i) What is the relevance of Section 7 of the Request For Proposal as far as this Court case is concerned?

(ii) Does this case involve a mere mistake and is such a mistake fatal as far as the Appellant's bid documents are concerned?

(iii) What is the significance of Shri Navin Prakash's attempts to obtain clarification about the Appellant having a valid ISO 9001 Certificate on the date of submission of bid documents? and

(iv) Even assuming that the Appellant possessed a valid ISO 9001 Certification, was the same produced before the Respondents?

Referring to Clause 3.1 of the RFP relating to Pre-qualification (Eligibility Criteria), the learned Attorney General submitted that both the CMM Certificate and the ISO 9001:2000 Certificate were listed as documents to be submitted as qualifying documents and that the criteria set out in the said form would have to be read accordingly. In any event, the Bidder's Check List was completely changed by the

Corrigendum which was subsequently issued.

20. The learned Attorney General submitted that the provisions of the RFP which had been initially provided were subsequently altered which had the effect of replacing the provisions relating to Pre- qualification (Criteria Eligibility) contained in Section 3 of the Request For Proposal and Section 7.1 containing the proforma of the Bidder's Response Form. The learned Attorney General submitted that the Appellant could not, therefore, rely any longer on the terms and conditions indicated in the un-amended RFP since the provisions of Sections 3 and 7 stood substituted by the subsequent Corrigendum. In this regard, the learned Attorney General referred to the unamended provisions of Section 7.1 comprising the Bidder's Response Form wherein in paragraph 9, it has been indicated as follows :-

> "9. Qualify Certification - The Company/one of the partners of Consortium (in case of Consortium) should have an active ISO 9001:2000 certification at the time of submission of the bid. A copy of the Quality Certificate or documentation of the Quality Policy needs to be provided along with the bid document. In case the certificate is due for renewal, the bidder should ensure that the renewed certificate is made available at the time of signing of contract. In case the same is not provided, the Department may consider negotiating the award of contract with the L2 bidder."

The aforesaid paragraph indicates that a copy of the Quality Certificate/document of quality policy would have to be submitted along with the bid documents, with the relaxation that in case the quality certificate was due for renewal, the bidder should ensure that the renewed certificate was made available at the time of signing of the contract. The learned Attorney General submitted that although a good deal of reliance had been placed by Mr. Salve on the said provisions, the same was altered by the first corrigendum, which in paragraph 8 of the Bidder Information Sheet indicates as follows :-

> "8. Bidder should have active ISO 9001:2000 Certification at the time of submission of Bids. Copies of the certificates or briefs on Quality policy & System being followed to be provided.
>
> In case the certificate is due for renewal, the bidder should ensure that the renewed certificate is made available at the time of signing the contract. In case the same is not provided, the Department may consider negotiating the award of contract with the L2 Bidder."

21. The learned Attorney General then contended that even the said provision was replaced by a fresh corrigendum, wherein in paragraph 3 of the provision relating to "Turnover" it was differently provided as follows:-

> "3. The Bidder/one partner in the consortium must possess a valid Certification in the Capability Maturity Model (CMM Level 3 or above). In case of consortium, the partner developing the Software Application should have CMM Level 3 Certification. The Bidder/Lead Partners of consortium (in case of Consortium) should have an active (valid at least till June 2010) ISO 9001:2000 certification at the time of submission of the bid."

22. The learned Attorney General urged that once the provisions relating to the Bidder's Response Form contained in Section 7.1 stood substituted by the Corrigendum and the provision relating to Quality Certification stood altered omitting the relaxation given regarding filing of documents with the tender papers, it was no longer open to the Appellants to rely on the unamended Form.

23. The learned Attorney General also submitted that Shri Navin Prakash had collected the information regarding the ISO 9001 Certification of the Appellant Company on his private initiative and not under the instructions of the Tender Advisory Committee. Furthermore, the said information was not divulged by him at the meeting which was held at 2.15 p.m. on the same day when the said information was received. Referring to the Disqualification Clause contained in paragraph 4.11.6 in the

Request For Proposal, the learned Attorney General pointed out that the proposal of the bidder was liable to be disqualified if, inter alia, the bid received from him was in incomplete form or not accompanied by the bid security amount or by all requisite documents. He also referred to paragraph 5.2 under Section 5 which deals with proposal evaluation and lays special emphasis on the provisions under technical evaluation which set out that the said bid would be rejected if it did not meet the pre-qualification criteria. The learned Attorney General submitted that there was no provision at the time of technical evaluation for relaxation of the pre-qualification criteria.

24. In support of his aforesaid submission, the learned Attorney General firstly referred to the decision of a Three-Judge bench of this Court in *Siemens Public Communication Network Pvt. Ltd. vs. Union of India & Ors.* [(2008) 16 SCC 215], wherein while considering the decision making process of the Government or its instrumentality in awarding contracts, it was held that such process should exclude the remotest possibility of discrimination, arbitrariness and favouritism and the same should be transparent, fair, bona fide and in public interest. It was also held that it is not possible to re-write entries in bid documents and read into the bid documents terms that did not exist therein.

25. Reference was also made to another decision of this Court in *Ram Gajadhar Nishad vs. State of U.P.* [(1990) 2 SCC 486], wherein it was held that the effect of non-compliance of a mandatory condition in a Tender notice was fatal and the fact that the Appellant's Tender was not opened, accordingly, did not call for interference under Article 136 of the Constitution.

26. The learned Attorney General lastly referred to the decision in *Sorath Builders vs. Shreejikrupa Buildcon Ltd. & Anr.* [(2009) 11 SCC 9], where similar views had been expressed in relation to the acceptance of the lowest bid by the Respondent No.2 University, despite the fact that such bidder had failed to furnish pre-qualification documents within the specified time. This Court held that the judgment of the High Court setting aside the decision of the University was improper

as the said tenderer was itself to blame as it was late in submitting the required documents by three days and the Respondent No.2 University was justified in not opening the tender submitted by it. This Court observed that the lowest tenderer could not make any grievance as the lapse was due to his own fault. This Court noticed that of the three bidders who had responded to the tender notice, one stood disqualified at the threshold and the lowest tenderer stood disqualified for having filed the requisite documents three days late. In effect, the Appellant in the said case ultimately turned out to be sole bidder and his bid was accepted, being the lowest among all the eligible bids.

27. Referring to the decision in the *Tata Cellular* case (supra), cited on behalf of the Appellant Company, the learned Attorney General pointed out that the said case was not a case of omission, but of breach of the mandatory condition of filing certain documents which were required to be filed.

28. The learned Attorney General submitted that the order of the High Court impugned in the present appeal did not suffer from any infirmity which required any interference by this Court.

29. The submissions made by the learned Attorney General were reiterated by Mr. Paras Kuhad, appearing for the Respondent No.4, HCL Construction Ltd, which was impleaded as a Respondent by this Court on 3rd August, 2010. Mr. Kuhad submitted that having regard to the fact that a Corrigendum had been issued by which the provisions of paragraphs 3.1 and 7.1 had been completely substituted, it was no longer open to the Appellant to place reliance on the same since the said provisions no longer existed. Mr. Kuhad contended that the submissions made on behalf of the Appellant Company with regard to the conditions in the Bidder's Response Form and the Bidder's Check List, as it stood prior to the Corrigendum having been issued, was devoid of substance and the same had been made only to be rejected.

30. Mr. Kuhad pointed out that once the work had been entrusted to the Respondent No.4, it had taken various steps

in establishing the District Mechanism for Public Distribution System in Madhya Pradesh. It was urged that in that regard steps had been taken for Data Digitization Application Development, Preparation of Pre-Enrolment Data, Training and Certification of Operators, Establishment of Enrolment Camps, Biometric Enrolment of Beneficiaries, Data Transfer to UID, Generation of Aadhaar/UID Number and Mapping of EID number to UID number. Mr. Kuhad urged that the steps which were yet to be completed related to the loading of the data to the server and for preparation of the Ration Cards and for issuance of the same and also Food Coupons printing and distribution and retrieval thereof. It was submitted that at this advanced stage, it would be highly inequitable if the public distribution supply project in Madhya Pradesh was interfered with.

31. Replying to the submissions made on behalf of the Respondents, Mr. Shyam Divan, learned Senior Advocate, urged that the Corrigendum which was issued by the Respondents was not a replacement, as had been contended both by the learned Attorney General as well as Mr. Kuhad, but an addition to what was already in existence. Mr. Shyam Divan reiterated the submissions made by Mr. Salve that the clause relating to filing of certificate of registration even at the stage of signing of the agreement was valid and capable of being acted upon. Mr. Divan contended that the only change which was effected by the Corrigendum in regard to the Bidder's response clearly indicated that the Corrigendum related only to the introduction of Lead Partners in case of Consortium and that in case of a Consortium, the partner developing the software application should have CMM Level 3 Certification. It was submitted that in any event, in the absence of clarity, the benefit should go to the Appellant and its bid ought not to have been rejected at the Technical bid stage.

32. Having considered the submissions made on behalf of the respective parties, we are inclined to accept the submissions made by the Attorney General that the introduction of the Corrigendum completely changed the provision in the

Bidder's Response Form relating to submission of the Quality Certificate in the form of an active ISO 9001:2000 certification. In any event, the appellant's contention based on clause 9 of Section 7.1.1 of the RFP as it stood prior to corrigendum is misconceived. The said clause 9 specifically provided:

> ".....A copy of the Quality certificate or documentation of the Quality policy needs to be provided along with the bid document. In case the certificate is due for renewal, the bidder should ensure that the renewed certificate is made available at the time of signing of contract. In case the same is not provided, the Department may consider negotiating the award of contract with the L2 bidder."

The above provision obliges a tenderer to produce along with the bid document a copy of the Quality certificate which is valid and active on the date of submission of the bid and it does not enable a bidder to withhold the copy of such Quality Certificate. Where the Quality certificate will be expiring shortly and is due for renewal, the bidder is also obliged to produce the renewed certificate at the time of signing of the contract. The appellant claimed to have a valid and active ISO 9001:2000 certificate at the time of submission of the bid, but did not produce a copy of the said certificate along with the bid document.

33. The submissions made on behalf of the Appellant proceeds on the basis that it was entitled, almost as a matter of right, not to submit the documents required to be submitted along with the bid documents on the supposition that, even if such documents were valid and active, they could be submitted at the time of signing of the Memorandum of Understanding. The Appellant had a valid and active ISO 9001:2000 certification which it did not submit along with the Bid documents, may be due to inadvertence, but whether such explanation was to be accepted or not lay within the discretionary powers of the authority inviting the bids. The decision taken to reject the Technical Bid of the Appellant cannot be said to be perverse or arbitrary. We need not refer to the decisions cited by the learned Attorney General or the

Appellant in this regard, as the principles enunciated therein are well-established.

34. Even the question as to whether Shri Naveen Prakash of the consultant agency had obtained information that the Appellant had a valid and active ISO 9001:2000 certification and had passed on such information to Shri Kesari, does not make any difference, since the same was never asked for or placed before the Tender Advisory Committee constituted for the purpose of scrutinizing the Bids despite the presence of Shri Naveen Prakash at the meeting of the Advisory Committee at 2.15 p.m. on the same day.

35. We are not, therefore, inclined to entertain the appeal, which is dismissed, but without any order as to costs.

N.J. Appeal dismissed.

HARJIT SINGH UPPAL

v.

ANUP BANSAL

(Civil Appeal No. 4416 of 2011)

MAY 13, 2011

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

East Punjab Urban Rent Restriction Act, 1949 – ss. 15(1)(b) and 13(2)(i) proviso – Eviction petition on the ground of default in payment of rent – Order by the Rent Controller determining the provisional rent u/s. 13(2)(i) proviso – Tenant not availing his remedy to challenge the same by filing an appeal u/s. 15(1)(b) within the time prescribed – Effect of – Held: It cannot be said that the order fixing provisional rent becomes final and cannot be challenged subsequently, particularly, in the appeal challenging the order of eviction – s. 15(1)(b) does not make it imperative upon the person aggrieved to appeal from an interlocutory order and, if he does not do so, his right gets forfeited when he challenges the final order – An order of eviction follows if there is non-compliance of the order determining the provisional rent – However, when the tenant challenges the order of eviction in appeal and therein also challenges the order determining the provisional rent, it is not open to the Appellate Authority to refuse to consider the legality and validity of the order determining the provisional rent on the ground that no appeal was filed from that order though an appeal lay therefrom – Thus, the appellate authority did not commit any error in calling upon the Rent Controller to determine the arrears of rent, interest and costs afresh as the tenant's statement of payments towards rent was not referred to and considered by the Rent Controller – Order passed by the High Court is set aside and that of the appellate court is restored.

The respondent-landlord filed a petition under Section 13 of the East Punjab Urban Rent Restriction Act,

1949 to evict the appellant-tenant on the ground of default in paying rent since April, 2007, before the Rent Controller. The Rent Controller by order dated 11.06.2009 determined the provisional rent and directed the tenant to make the payment of arrears of rent within a week. On 07.09.2009, the tenant filed an application before the Rent Controller for recalling the order dated 11.06.2009 since the particulars of payment of rent furnished by the tenant were not considered. The tenant filed more applications. On 07.04.2010, the Rent Controller rejected all the applications and passed an order of eviction against the tenant holding that there was no provision of law under which the order dated 11.06.2009 could be recalled/ reviewed. The tenant filed an appeal under Section 15(1)(b) of the 1949 Act before the appellate authority and challenged the orders dated 07.04.2010 and 11.06.2009 passed by the Rent Controller. The appellate authority holding that the provisional assessment order dated 11.06.2009 was patently illegal, remanded the matter to the Rent Controller with a direction to pass fresh order regarding the provisional assessment of the arrears of rent, interest and costs of the proceedings. The respondent-landlord filed a revision petition challenging the order passed by the Appellate Authority. The Single Judge of the High Court allowed the revision petition holding that since the tenant did not avail his remedy to challenge the order fixing provisional rent, during the period between the date of the order and date fixed for payment, the Rent Controller had no choice but to pass an order of eviction. The order of the appellate authority was set aside and that of the Rent Controller was restored. Therefore, the appellants filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1. The order passed by the Rent Controller determining the provisional rent in an eviction petition based on the ground of default in a situation where the

tenant fails to comply with that order may be a foundational order for an order of eviction that follows but nevertheless such order is an interlocutory order as that order does not determine the principal matter finally; it is only the order on subordinate matter with which it deals. [Para 30] [964-F-G]

1.2. Section 15(1)(b) of the East Punjab Urban Rent Restriction Act, 1949 provides that a person aggrieved by an order passed by the Rent Controller may prefer appeal to the Appellate Authority within the time prescribed therein. The provision, for maintaining the appeal, does not make any difference between the final order and interlocutory order passed by the Rent Controller in the proceedings under the 1949 Rent Act. It does not say that if any aggrieved person by an interlocutory order passed by the Rent Controller from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness. There is no provision in Section 15(1)(b), a provision like Section 105 (2) and Section 97 of the Code of Civil Procedure. There is no impediment for an aggrieved person, on reading Section 15(1)(b) of the 1949 Rent Act, that an interlocutory order which had not been appealed though an appeal lay, could not be challenged in an appeal from the final order. Section 15(1)(b) does not make it imperative upon the person aggrieved to appeal from an interlocutory order and, if he does not do so, his right gets forfeited when he challenges the final order. [Paras 25, 31 and 32] [960-F-H; 964-G-H; 965-A-C]

1.3. An order of eviction follows as a matter of course if there is non-compliance of the order determining the provisional rent but when tenant challenges the order of eviction and therein also challenges the order of fixation of provisional rent-the order of eviction, in its nature, being dependant on the correctness of the order fixing the provisional rent and there being no indication to the contrary in Section 15(1)(b), it must be open to the

Appellate Authority to go into correctness of such provisional order when put in issue. [Para 33] [965-C-D]

2.1. The High Court erred in holding that as tenant did not avail of his remedy to challenge the order fixing provisional rent during the period between the date of the order and date fixed for payment, the Appellate Authority could not have gone into the merits of such determination and, set aside the order of the Appellate Authority. The legal position is where a tenant does not challenge the order of the fixation of provisional rent passed under Section 13(2)(i) proviso, in appeal under Section 15(1)(b) and also fails to comply with that order, the order of eviction must follow as per the provisions contained in the 1949 Rent Act but when the tenant challenges the order of eviction in appeal and therein also challenges the order determining the provisional rent, it is not open to the Appellate Authority to refuse to consider the legality and validity of the order determining the provisional rent on the ground that the correctness of such order cannot be examined as no appeal was filed from that order though an appeal lay therefrom. [Para 40] [970-E-H]

2.2. On the facts of the instant case, the appellate authority did not commit any error in calling upon the Rent Controller to determine the arrears of rent, interest and costs afresh as the tenant's statement of payments towards rent from April, 2007 was not at all referred to and considered by the Rent Controller. If the order of the High Court is allowed to stand, it would occasion in manifest injustice and result in miscarriage of justice inasmuch as the tenant would be thrown out of the leased premises although he may not have been in arrears of rent. In the circumstances, re-determination of arrears of rent, interest and costs by the Rent Controller, as directed by the appellate authority, would subserve the ends of justice. If on re-determination, the tenant is found in arrears of rent and does not deposit/pay the amount as determined by the Rent Controller in time, as may be

directed, obviously he would suffer the order of eviction. Thus, the order passed by the High Court is set aside and the order passed by the appellate court is restored. [Paras 41, 42] [971-A-D]

Rakesh Wadhawan and others v Jagdamba Industrial Corporation and others **(2002) 5 SCC 440;** *Vinod Kumar* v. *Prem Lata* **(2003) 11 SC 397;** *Maharajah Moheshur Sing v. The Bengal Government* **(1859) 7 Moore's Indian Appeals 283;** *Nanibala Dasi and Another v. Ichhamoyee Dasi and Ors.* **AIR 1925 Cal 218;** *Baikunta Nath Dey v. Nawab Salimulla Bahadur* **(1907) 6 C.L.J. 647;** *Mackenzie v. Narsingh Sahai* **(1909) 36 Cal 762;** *Khirodamoyi Dasi v. Adhar Chandra Ghose* **(1912) 18 C.L.J. 321;** *Sadhu Charan Dutta v. Haranath Dutta* **(1914) 20 C.W.N. 231;** *Kuloda v. Ramanand* **A.I.R. 1921 Cal.109;** *Syed Ishak Syed Farid and Anr. v. Kunjbihari Singh Sirdhujasingh Kshatriya* **A.I.R. 1940 Nagpur 104 – referred to.**

Case Law Reference:

(2003) 11 SC 397	**Referred to.**	**Para 19**
(1859) 7 MIA 283	**Referred to.**	**Para 26**
AIR 1925 Cal 218	**Referred to.**	**Para 28**
(1907) 6 C.L.J. 647	**Referred to.**	**Para 28**
(1909) 36 Cal 762	**Referred to.**	**Para 28**
(1912) 18 C.L.J. 321	**Referred to.**	**Para 28**
(1914) 20 C.W.N. 231	**Referred to.**	**Para 28**
AIR 1921 Cal.109	**Referred to.**	**Para 28**
AIR 1940 Nagpur 104	**Referred to.**	**Para 29**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4416 of 2011.

From the Judgment & Order dated 23.9.2010 of the High Court of Punjab & Haryana at Chandigarh in C.R. No. 4144 of 2010 (O&M).

Rishi Malhotra, Mrinmayee Sahu, Prem Malhotra for the Appellant.

Dr. Rajeev Dhawan, Naresh Kumar for the Respondent.

The Judgment of the Court was delivered by

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

2. The main question for determination in this appeal, by special leave, is: If a tenant does not avail his remedy to challenge the order of the provisional rent fixed under Section 13(2)(i) proviso to the East Punjab Urban Rent Restriction Act, 1949 (for short, '1949 Rent Act') by filing an appeal under Section 15(1)(b) within 15 days from date of such order, whether the order fixing provisional rent becomes final and cannot be challenged subsequently, particularly, in the appeal challenging the order of eviction.

3. The facts are these. The petition under Section 13 of the 1949 Rent Act was filed by the Respondent ('landlord') to evict the appellant ('tenant') from Komfort Banquet Hall, Zirakpur-Panchkula Road, Zirakpur, Tehsil Dera Bassi, District S.A.S. Nagar (Mohali) (for short, 'the premises') before the Court of Rent Controller, Dera Bassi on December 6, 2008. The landlord averred that the premises were leased out to the tenant for a term of five years commencing from August 11, 2003 at the rent of Rs. 1,50,000/- per month. As per the terms of lease, rent would increase at the rate of 5 per cent every year on the last prevailing rent and it was also agreed that the tenant shall pay the rent for every month in advance by the 7th of month. It is the case of the landlord that tenant stopped paying the rent since April, 2007 regularly. Ultimately, after the expiry of the first lease period, the tenant requested for reduction in rent and he agreed to pay the rent of the premises at the rate of Rs. 1,50,000/- per month with effect from August 11, 2008 for the period of 31 months. The tenant also agreed to pay the Service Tax at the rate of 12.5 per cent and also increase the rent at the rate of 5 per cent every year on the last prevailing rent.

4. The claim of eviction, inter alia, was founded on the

ground of default. It was averred that the tenant failed to make the payment of rent regularly and has fallen in arrears to the extent of Rs. 27,84,875.04 along with Service Tax at the rate of 12.5 per cent.

5. The tenant filed written statement and traversed the case set up by the landlord in the petition for eviction. He averred that the premises were incomplete at the time of lease and he invested huge amount for its completion by taking loan from the banks amounting to Rs. 58,98,370/-. The tenant claimed adjustment of that amount. He also stated in the written statement that he has been paying rent to the landlord regularly – mostly by cheques- and from 2007 he has paid Rs. 37,00,950/- to the landlord. He raised counter claim and claimed refund of the excess amount paid to the landlord.

6. On June 6, 2009, the tenant filed an affidavit before the Rent Controller setting out in detail the statement of the payment of rent made by him from April, 2007 amounting to Rs. 37,00,950/-.

7. The Rent Controller determined the provisional rent on June 11, 2009 assessing the arrears of rent provisionally at Rs. 27,84,875.04. The Rent Controller directed the tenant to make the payment of arrears of rent as determined with interest at the rate of 6 per cent per annum and costs of Rs. 1,000/- on July 18, 2009.

8. On September 7, 2009, the tenant made an application before the Rent Controller for recalling the order dated June 11, 2009, amongst other grounds, on the ground that his affidavit as well as the written statement that he has also paid Rs. 37,00,950/- to the landlord by way of cheques has not at all been considered.

9. The tenant made another application on February 9, 2010 before the Rent Controller for calling upon the landlord to provide list of his employees along with attendance register. This, the tenant said, was required to prove the factum of payment made by him to the landlord.

10. By yet another application, the tenant annexed copies of cheques which were duly encashed by the Manager of the landlord. He claimed adjustment of those payments while assessing provisional rent.

11. The landlord submitted reply to each of these applications, denied their correctness and submitted that the applications were not maintainable and have been made to delay the eviction proceedings.

12. The Rent Controller considered all these applications together and by her order dated April 7, 2010 rejected each one of these applications. The Rent Controller held that there was no provision of law under which the order dated June 11, 2009 could be recalled/reviewed. It was held, relying upon a decision of this Court in *Rakesh Wadhawan and others* v. *Jagdamba Industrial Corporation and others*[1], that on the failure of the tenant to comply with the order of the provisional assessment of arrears of rent, nothing remains to be done and order of eviction has to follow. Accordingly, the Rent Controller passed the order of eviction against the tenant on April 7, 2010.

13. The tenant preferred an appeal under Section 15(1)(b) of the 1949 Rent Act before the Appellate Authority assailing the orders dated April 7, 2010 and June 11, 2009 passed by the Rent Controller.

14. The Appellate Authority heard the parties and held that the provisional assessment order dated June 11, 2009 was patently illegal. The Appellate Authority, accordingly, allowed the appeal by its order dated June 10, 2010, set aside the orders dated April 7, 2010 and June 11, 2009 passed by the Rent Controller and remanded the matter to the Rent Controller with a direction to pass fresh order regarding the provisional assessment of the arrears of rent, interest and costs of the proceedings. The Appellate Authority also directed the Rent Controller to give to the parties an opportunity to produce the documents/affidavits in support of their rival stand in respect of the rent.

1. (2002) 5 SCC 440

15. The landlord challenged the order passed by the Appellate Authority in the revision petition before the High Court of Punjab and Haryana. The Single Judge of that Court held that since the tenant did not avail his remedy to challenge the order fixing provisional rent, during the period between the date of the order and date fixed for payment, the Rent Controller had no choice but to pass an order of eviction. The High Court, accordingly, by its order dated September 23, 2010 allowed the revision petition and set aside the order of the Appellate Authority and restored the order of the Rent Controller.

16. Section 13(2)(i) and the proviso appended thereto of the 1949 Rent Act reads as follows :

"S. 13. Eviction of tenants.—(1) …….

(2) A landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the applicant, is satisfied-

(i) that the tenant has not paid or tendered the rent due by him in respect of the building or rented land within fifteen days after the expiry of the time fixed in the agreement of tenancy with his landlord or in the absence of any such agreement, by the last day of the month next following that for which the rent is payable :

Provided that if the tenant on the first hearing of the application for ejectment after due service pays or tenders the arrears of rent and interest at six per cent per annum on such arrears together with the cost of application assessed by the Controller, the tenant shall be deemed to have duly paid or tendered the rent within the time aforesaid;

(ii) . . . . . .

(iii) . . . . . .

(iv) . . . . . .

(v) . . . . . ."

17. The provision of appeal from an order passed by the Rent Controller is made in Section 15 of the 1949 Rent Act. To the extent it is relevant, it reads as under :

> "S. 15. *Vesting of appellate authority on officers by State Government.—*
>
> (1)(a) ……
>
> (1) (b) Any person aggrieved by an order passed by the Controller may, within fifteen days from the date of such order or such longer period as the appellate authority may allow for reasons to be recorded in writing, prefer an appeal in writing to the appellate authority having jurisdiction. In computing the period of fifteen days the time taken to obtain a certified copy of the order appealed against shall be excluded.
>
> 2. . . . . .
> 3. . . . . .
> 4. . . . . .
> 5. . . . . ."

18. This Court had an occasion to consider Section 13(2)(i) and the proviso appended thereto in the case of *Rakesh Wadhawan*[1]. The Court summed up the conclusions as follows

> **"**30. *1*. In Section 13(2)(*i*) proviso, the words "assessed by the Controller" qualify not merely the words "the cost of application" but the entire preceding part of the sentence i.e. "the arrears of rent and interest at six per cent per annum on such arrears together with the cost of application".
>
> *2*. The proviso to Section 13(2)(*i*) of the East Punjab Urban Rent Restriction Act, 1949 casts an obligation on the Controller to make an assessment of (*i*) arrears of rent, (*ii*) the interest on such arrears, and (*iii*) the cost of application and then quantify by way of an interim or provisional order the amount which the tenant must pay or tender on the "first date of hearing" after the passing of such order of

> "assessment" by the Controller so as to satisfy the requirement of the proviso.
>
> *3*. Of necessity, "the date of first hearing of the application" would mean the date falling after the date of such order by the Controller.
>
> *4*. On the failure of the tenant to comply, nothing remains to be done and an order for eviction shall follow. If the tenant makes compliance, the inquiry shall continue for finally adjudicating upon the dispute as to the arrears of rent in the light of the contending pleas raised by the landlord and the tenant before the Controller.
>
> *5*. If the final adjudication by the Controller be at variance with his interim or provisional order passed under the proviso, one of the following two orders may be made depending on the facts situation of a given case. If the amount deposited by the tenant is found to be in excess, the Controller may direct a refund. If, on the other hand, the amount deposited by the tenant is found to be short or deficient, the Controller may pass a conditional order directing the tenant to place the landlord in possession of the premises by giving a reasonable time to the tenant for paying or tendering the deficit amount, failing which alone he shall be liable to be evicted. Compliance shall save him from eviction.
>
> *6*. While exercising discretion for affording the tenant an opportunity of making good the deficit, one of the relevant factors to be taken into consideration by the Controller would be, whether the tenant has paid or tendered with substantial regularity the rent falling due month by month during the pendency of the proceedings."

19. The decision in *Rakesh Wadhawan*[1] has been affirmed by a 3-Judge Bench decision of this Court in the case of *Vinod Kumar* v. *Prem Lata*[2].

20. Mr. Rishi Malhotra, learned counsel for the tenant

2. (2003) 11 SCC 397.

argued that the High Court was in error in setting aside the order of the Appellate Authority whereby matter was remanded to the Rent Controller for re-fixation of the provisional rent. He would submit that the Appellate Authority after considering the bank statements submitted by the tenant held that the landlord had concealed various payments which were tendered by the tenant. He referred to the finding of the Appellate Authority that the Rent Controller did not apply her mind while fixing the provisional rent and accepted the figures submitted by the landlord in a mechanical manner without considering the particulars of payment of rent furnished by the tenant. He argued that since the order dated June 11, 2009 determining the provisional rent was patently illegal, the Appellate Authority did not commit any error in upsetting that order in the appeal preferred by the tenant.

21. Dr. Rajeev Dhawan, learned senior counsel for the landlord, on the other hand, in support of the High Court's order, made the following submissions : (i) the order determining provisional rent is a foundational order and not an interlocutory order; such order could have been challenged in appeal under Section 15(1)(b) of the 1949 Rent Act within 15 days from the date of passing that order and in no other way; (ii) in the appeal challenging the eviction order dated April 7, 2010, the order determining the provisional rent could not have been challenged and such challenge was not maintainable; (iii) the only contention that was raised by the tenant before the Rent Controller was that he had invested huge amount of Rs. 58,98,370/- by raising loan from a bank and the said amount was liable to be adjusted in the arrears of rent; there was no contention raised about the payment of Rs. 37,00,950/- having been made towards rent from April, 2007 to the landlord; and (iv) the whole conduct of the tenant had been to prolong the litigation and it was to achieve this objective that the tenant continued to make applications one after the other before the Rent Controller which could not be legally maintained and were frivolous and without merit.

22. One thing needs to be noticed immediately that

besides the specific averment made by the tenant in the written statement that he has paid Rs. 37,00,950/- to the landlord towards rent from April 2007 and no rent was due and payable by him, in his affidavit dated June 6, 2009, the tenant gave the details of the payment of Rs. 37,00,950/- having been made to the landlord from April, 2007. The affidavit contains the cheque numbers, the dates on which such cheques were issued and the amount of cheques. Dr. Rajeev Dhawan, learned senior counsel for the landlord did not dispute the receipt of the copy of the affidavit dated June 6, 2009 by the landlord on June 11, 2009 before the matter was heard and considered by the Rent Controller for determination of the provisional rent.

23. Curiously, the order dated June 11, 2009, whereby the provisional rent was determined by the Rent Controller, does not show any consideration of the affidavit dated June 6, 2009 filed by the tenant.

24. The tenant was not satisfied with the order dated June 11, 2009 since the Rent Controller failed to consider the amount of Rs. 37,00,950/- which he claimed to have paid to the landlord towards rent for the period from April, 2007 and, therefore, he made an application on September 7, 2009 for recalling the order dated June 11, 2009. This application was decided on April 7, 2010 and by the same order, the eviction order was passed against the tenant.

25. Section 15(1)(b) of the 1949 Rent Act provides, to a person aggrieved by an order passed by the Rent Controller, a remedy of appeal. The Section provides for limitation for filing an appeal from that order and also the forum to which such appeal would lie. The provision, for maintaining the appeal, does not make any difference between the final order and interlocutory order passed by the Rent Controller in the proceedings under the 1949 Rent Act. There is no specific provision in the Section that if a party aggrieved by an interlocutory order passed by the Rent Controller does not challenge that order in appeal immediately, though provided, and waits for the final outcome, whether in the appeal

challenging the final order of the Rent Controller, the correctness of the interlocutory order from which an appeal lay could or could not be challenged in the appeal from the final order.

26. The observations made by the Privy Council more than a century and five decades back in *Maharajah Moheshur Sing v. The Bengal Government*[3] deserve to be recapitulated. The Privy Council stated:

> ".....We are not aware of any law or Regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory Order by which he may conceive himself aggrieved, under the penalty, if he does not so do, of forfeiting for ever the benefit of the consideration of the appellate Court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that anything would be more detrimental to the expeditious administration of Justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing; whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon his opponent similar calamities. We believe there have been very many cases before this Tribunal in which their Lordships have deemed it to be their duty to correct erroneous interlocutory Orders, though not brought under their consideration until the whole cause had been decided, and brought hither by appeal for adjudication."

27. It is appropriate that some of the provisions of the Code of Civil Procedure, 1908 (for short 'Code') are noticed for consideration of the question raised before us. Sections 97, 104 and 105 of the Code read as under :

> *"97. Appeal from final decree where no appeal from preliminary decree.* – Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.
>
> *104. Orders from which appeal lies.* – (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders:-
>
> (ff) an order under section 35A;
>
> (ffa) an order under section 91 or section 92 refusing leave to institute a suit of the nature referred to in section 91 or section 92, as the case may be;
>
> (g) an order under section 95;
>
> (h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree;
>
> (i) any order made under rules from which an appeal is expressly allowed by rules;
>
> Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.
>
> (2) No appeal shall lie from any order passed in appeal under this section.
>
> *105. Other orders.* – (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.
>
> (2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness."

3. (1859) 7 Moore's Indian Appeals 283.

28. The Calcutta High Court in *Nanibala Dasi and Another v. Ichhamoyee Dasi and others*[4] was concerned with a question as to whether the challenge to preliminary decree in a suit for partition could be made in a case where the final decree in the suit had already been made by the Subordinate Judge and no appeal against the final decree was then or has at any time been filed. The High Court referred to some of its earlier decisions, namely, *Baikunta Nath Dey v. Nawab Salimulla Bahadur*[5], *Mackenzie v. Narsingh Sahai*[6], *Khirodamoyi Dasi v. Adhar Chandra Ghose*[7], *Sadhu Charan Dutta v. Haranath Dutta*[8], *Kuloda v. Ramanand*[9] and held that the right of appeal from interlocutory order ceases after disposal of the suit and that rule is equally applicable to suits in which there is first a preliminary decree and ultimately a final decree.

29. On the other hand, in *Syed Ishak Syed Farid and another* v. *Kunjbihari Singh Sirdhujasingh Kshatriya*[10], the Division Bench of Nagpur High Court held as under :

> "The contention on the other side is that the Legislature has conferred a right of appeal against, an order refusing to extend time, and that an aggrieved party must be afforded an opportunity of exercising the right so conferred, especially as there is danger of it being held hereafter that as the orders in question were appealable, matters decided in them will be final in the absence of an appeal, and that they cannot be re-agitated hereafter in an appeal against the final decree. The learned Counsel urging this contention relied on the analogies of preliminary decrees and of orders of remand against a decision of a

4. AIR 1925 Cal 218.
5. (1907) 6 C.L.J. 647.
6. (1909) 36 Cal 762.
7. (1912) 18 C.L.J. 321.
8. (1914) 20 C.W.N. 231.
9. A.I.R. 1921 Cal. 109.
10. A.I.R. 1940 Nagpur 104.

trial Court on a preliminary point. S. 105(1), Civil P.C., is in these terms:

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A right of appeal is a valuable right, and we do not think that the Legislature after conferring it in such express terms in Section 104 would take it away by implication in a large class of cases in the next Section. An enabling Section which confers additional rights in certain cases cannot, we think, be read as taking away rights which have already been expressly conferred, especially when they are such valuable and cherished rights as those of appeal. *We also feel that if a right of appeal is once conferred, then in the absence of anything curtailing it, full opportunity must be afforded to an aggrieved party to exercise it. If he does exercise it and succeed, then any subsequent proceedings which militate against any rights he obtains in the appeal fall to the ground.*

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when the law gives a person two remedies he is entitled to avail himself of either of them unless they are inconsistent."

[Emphasis supplied by us]

30. The order passed by the Rent Controller determining the provisional rent in an eviction petition based on the ground of default in a situation where the tenant fails to comply with that order may be a foundational order for an order of eviction that follows but nevertheless such order is an interlocutory order as that order does not determine the principal matter finally; it is only the order on subordinate matter with which it deals.

31. Section 15(1)(b) of 1949 Rent Act provides that a person aggrieved by an order passed by the Rent Controller may prefer appeal to the Appellate Authority within the time prescribed therein; it does not say that if any aggrieved person by an interlocutory order passed by the Rent Controller from which an appeal lies does not appeal therefrom, he shall

thereafter be precluded from disputing its correctness. There is no provision in Section 15(1)(b), a provision like Section 105 (2) and Section 97 of the Code.

32. We find no impediment for an aggrieved person, on reading Section 15(1)(b) of the 1949 Rent Act, that an interlocutory order which had not been appealed though an appeal lay, could not be challenged in an appeal from the final order. In our opinion, Section 15(1)(b) does not make it imperative upon the person aggrieved to appeal from an interlocutory order and, if he does not do so, his right gets forfeited when he challenges the final order.

33. It is true that an order of eviction follows as a matter of course if there is non-compliance of the order determining the provisional rent but when tenant challenges the order of eviction and therein also challenges the order of fixation of provisional rent – the order of eviction, in its nature, being dependant on the correctness of the order fixing the provisional rent and there being no indication to the contrary in Section 15(1)(b) – it must be open to the Appellate Authority to go into correctness of such provisional order when put in issue.

34. In view of the above legal position, we shall now advert to the facts of the present case. The tenant at the first available opportunity i.e., in his written statement filed on April 24, 2009 averred that he has been paying the rent to the landlord by cheques and from April 1, 2007, he has paid rent of Rs. 37,00,950/- to the landlord. As a matter of fact, the tenant by his counter claim prayed for refund of the excess payment made to the landlord. Then he filed his affidavit dated June 6, 2009 setting out the details of the payments made towards rent from April, 2007.

35. The landlord relied upon his ledger account to show that the tenant was in arrears of rent. According to the landlord, he received the payment as under:-

Date	Debit	Credit
9.4.2007	173643.75p	-
26.4.2007	-	163250
26.4.2007	-	10000
9.5.2007	173643.75p	-
9.6.2007	173643.75p	-
9.7.2007	173643.75p	-
18.7.2007	-	163250
18.7.2007	-	10000
9.8.2007	182325.94p	-
9.9.2007	182325.94p	-
27.9.2007	-	10000
28.9.2007	-	163250
9.10.2007	182325.94p	-
27.10.2007	-	10000
8.11.2007	-	171900
8.11.2007	-	10000
9.11.2007	182325.94	-
1.12.2007	-	163250
3.12.2007	-	10000
9.12.2007	182325.94	-
10.12.2007	-	10000
11.12.2007	-	171900
9.1.2008	182325.94p	-
9.2.2008	182325.94p	-
9.3.2008	182325.94p	-
9.3.2008	182325.94p	-
1.4.2008	-	Opening Balance 450000 (security amt.)
15.4.2008	-	528400

15.4.2008	450000 (amt. given through Cheque)	-
9.5.2008	182325.94p	-
13.5.2008	-	181900
9.6.2008	182325.94p	-
12.6.2008	202900 (amount given through Cheque)	-
12.6.2008	350000 (amo-unt given through Cheque	-
12.6.2008	450000 (am-ount given through Cheque)	-
9.7.2008	182325.94p	-
9.8.2008	150000	-
9.9.2008	150000	-
9.10.2008	150000	
21.8.2008	-	40000
22.8.2008	-	60000
9.11.2008	150000	-
Total	49,35,386-28	24,99,000/-

36. On the other hand, the tenant in his affidavit dated June 6, 2009 gave the details of the payments made to the landlord towards rent from the month of April, 2007 as under :

	Cheque No.	"Dated	for Rs.
i)	011862	30.3.2007	1,63,250.00
ii)	011861	30.3.2007	10,000.00
iii)	011863	25.4.2007	1,63,250.00
iv)	011864	25.4.2007	10,000.00

v)	011868	16.7.2007	1,63,250.00
vi)	011867	16.7.2007	10,000.00
vii)	011885	24.9.2007	10,000.00
viii)	011886	24.9.2007	1,63,250.00
ix)	011887	25.10.2007	1,71,900.00
x)	011888	25.10.2007	10,000.00
xi)	011889	6.11.2007	1,71,900.00
xii)	011890	6.11.2007	10,000.00
xiii)	011892	30.11.2007	1,63,250.00
xiv)	011893	3.11.2007	10,000.00
xv)	011894	5.12.2007	10,000.00
xvi)	011895	5.12.2007	1,71,900.00
xvii)	4789	11.4.2008	5,28,400.00
xviii)	4790	18.4.2008	5,45,700.00
xix)	4791	10.5.2008	1,81,900.00
xx)	4794	12.6.2008	2,75,000.00
xxi)	4795	12.6.2008	3,25,000.00
xxii)	4796	13.6.2008	4,00,000.00
xxiii)	4797	13.6.2008	1,80,000.00
xxiv)	116150	20.8.2008	60,000.00
xxv)	116151	20.8.2008	40,000.00
xxvi)	116152	20.8.2008	50,000.00
		Total Rs.	37,00,950.00

37. The Rent Controller, apparently, did not consider the statement given by the tenant at all and relied upon the ledger account submitted by the landlord and in his order dated June 11, 2009 held that an amount of Rs. 27,84,875.04 was due and payable by the tenant towards the arrears of rent. Since the Rent Controller failed to even consider the statement of payment tendered by the tenant, the tenant made an application for recall of the order dated June 11, 2009. The Rent Controller dismissed the application for recall and two other applications

made by the tenant by a common order and also passed an order for eviction of the tenant on April 7, 2010 as the tenant failed to comply with the order dated June 11, 2009 determining the provisional rent.

38. The tenant challenged the order dated April 7, 2010 and also the order dated June 11, 2009 in appeal. The Appellate Authority considered the material that was available before the Rent Controller for determination of rent, particularly, the two statements, one filed by the landlord and the other by the tenant, and on comparison thereof found that the entire payments made by the tenant have not been reflected in the ledger account submitted by the landlord. This is what the Appellate Authority observed :

> "Thus, it is apparent that the entire payments made by the respondent/tenant are not reflected in the account books of the respondent/landlord. The appellant/tenant has also raised a plea that he had made the payment of Rs. 2,75,000/- to the respondent, vide cheque No. 4794 dated 12.6.2008, Rs. 3,25,000/- vide cheque No. 4795 dated 12.6.2008, Rs. 4,00,000/- vide cheque No. 4796 dated 12.6.2008 and Rs. 1,80,000/- vide cheque No. 4797 dated 12.6.2008. The said cheques were the bearer cheques and were allegedly got encashed by the Manager of the respondent. However, this Court need not enter into the controversy as to if the payment of the bearer cheques, was received by the respondent/landlord or not as it would be for the Ld. Rent Controller to consider this question. However, the assessment order dated 11.6.2009 passed by the Ld. Rent Controller is patently illegal and erroneous. From the perusal of the said order, it is made out that Ld. Rent Controller did not apply his mind and accepted the figures mentioned by the respondent/landlord in the rejoinder in the mechanical manner. The Ld. Rent Controller has not mentioned anything that as to how the amount of about Rs. 14,52,900/- paid by the respondent/landlord to the tenant was being treated as arrears of rent. The Ld. counsel for the respondent could be claimed as

> arrears of rent [sic]. He tried to wriggle out of the situation by submitting that the tenant had agreed to repay the said amount with the rent. However, even on this the said amount could not be treated as arrears of rent. Moreover, the amount of Rs. 5,45,700/- which was received by the respondent/landlord from the tenant even as per the statement of account pertaining to the bank account of the respondent was not adjusted. The Ld. Rent Controller did not consider these aspects of the case at all."

39. The Appellate Authority held that the order dated June 11, 2009 was patently illegal; the tenant was called upon to tender much more amount than was actually due as arrears of rent and, accordingly, by its order dated June 10, 2010 set aside the orders dated April 7, 2010 and June 11, 2009 and remanded the matter to the Rent Controller with a direction to pass fresh order of provisional assessment of arrears of rent, interest and costs of the proceedings as contemplated by Section 13(2)(i) proviso of the 1949 Rent Act.

40. The High Court, however, held that as tenant did not avail of his remedy to challenge the order fixing provisional rent during the period between the date of the order and date fixed for payment, the Appellate Authority could not have gone into the merits of such determination and, accordingly, set aside the order of the Appellate Authority. In our view, the High Court fell into grave error in what it held. The legal position, in our opinion, is this: Where a tenant does not challenge the order of the fixation of provisional rent passed under Section 13(2)(i) proviso in appeal under Section 15(1)(b) and also fails to comply with that order, the order of eviction must follow as per the provisions contained in the 1949 Rent Act but when the tenant challenges the order of eviction in appeal and therein also challenges the order determining the provisional rent, it is not open to the Appellate Authority to refuse to consider the legality and validity of the order determining the provisional rent on the ground that the correctness of such order cannot be examined as no appeal was filed from that order though an appeal lay therefrom.

41. On the facts of the present case, the Appellate Authority did not commit any error in calling upon the Rent Controller to determine the arrears of rent, interest and costs afresh as the tenant's statement of payments towards rent from April, 2007 was not at all referred to and considered by the Rent Controller. If the order of the High Court is allowed to stand, it would occasion in manifest injustice and result in miscarriage of justice inasmuch as the tenant would be thrown out of the leased premises although he may not have been in arrears of rent. In the circumstances, re-determination of arrears of rent, interest and costs by the Rent Controller, as directed by the Appellate Authority, would subserve the ends of justice. If on re-determination, the tenant is found in arrears of rent and does not deposit/pay the amount as determined by the Rent Controller in time, as may be directed, obviously he would suffer the order of eviction.

42. In the result, the appeal is allowed. The order dated September 23, 2010 passed by the High Court is set aside and the order dated June 10, 2010 passed by the Appellate Court, S.A.S Nagar (Mohali) is restored. The parties shall bear their own costs.

N.J. Appeal allowed.

KANWAR SINGH SAINI
v.
HIGH COURT OF DELHI
(Criminal Appeal No. 1798 of 2009)

SEPTEMBER 23, 2011

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

Code of Civil Procedure, 1908 – Order XXXIX Rule 2A and Order XXI Rule 32 – Exercise of powers under Order XXXIX Rule 2A – Scope – Decree passed in a civil suit for injunction on basis of admission/undertaking made by the defendant-appellant and the pleadings taken by him in his written statement – Alleged breach of the undertaking given to the Court – Application by decree holder under Order XXXIX Rule 2A CPC r/w ss.10, 11 and 12 of the 1971 Act – Trial court held that a prima facie case of contempt was made out and referred the matter to the High Court – High Court held the appellant guilty of criminal contempt and awarded him simple imprisonment for four months – Whether application under Order XXXIX Rule 2A CPC or under the 1971 Act could be entertained by the Civil Court and whether the matter could be referred to the High Court at all – Held: The proceedings under Order XXXIX Rule 2A are available only during the pendency of the suit and not after conclusion of the trial of the suit – In the instant case, the undertaking given to the court during the pendency of the suit, on the basis of which the suit itself was disposed of, became a part of the decree and breach of such undertaking was to be dealt with in execution proceedings under Order XXI Rule 32 CPC and not by means of contempt proceedings – Even otherwise, it was not desirable for the High Court to initiate criminal contempt proceedings for disobedience of the order of the injunction passed by the subordinate court, for the reason that where a decree is for an injunction, and the party against whom it has been passed has wilfully disobeyed it, the same

may be executed by attachment of his property or by detention in civil prison or both – The application under Order XXXIX Rule 2A CPC itself was not maintainable, hence, all subsequent proceedings remained inconsequential – Contempt of Courts Act, 1971 – s.2(b) and ss.10,11 and 12 – Maxims – Maxim "sublato fundamento cadit opus".

Code of Civil Procedure, 1908 – Order X Rule 1, Order XIV, Rule 1(5) and Order XV, Rule 1 – "First hearing of the suit" – Meaning of – Held: The date of "first hearing of a suit" under CPC is ordinarily understood to be the date on which the Court proposes to apply its mind to the contentions raised by the parties in their respective pleadings and also to the documents filed by them for the purpose of framing the issues which are to be decided in the suit – The words the "first day of hearing" does not mean the day for the return of the summons or the returnable date, but the day on which the court applies its mind to the case which ordinarily would be at the time when either the issues are determined or evidence is taken.

Contempt of Court – Contempt proceedings – Purpose of – Held: The purpose of initiation of contempt proceedings is two-fold: to ensure the compliance of the order passed by the court; and to punish the contemnor as he has the audacity to challenge the majesty of law.

Contempt of Court – Contempt proceedings – Nature of – Standard of proof required – Held: The contempt proceedings being quasi-criminal in nature, the standard of proof requires in the same manner as in other criminal cases – The alleged contemnor is entitled to the protection of all safeguards/rights which are provided in the Criminal Jurisprudence, including the benefit of doubt –The case should not rest only on surmises and conjectures.

Contempt of Court – Civil contempt – Held: A mere disobedience by a party to a civil action of a specific order made by the court in the suit is civil contempt for the reason that it is for the sole benefit of the other party to the civil suit.

Jurisdiction – Conferment of – Held: Conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior court, and if the court passes order/decree having no jurisdiction over the matter, it would amount to a nullity as the matter goes to the roots of the cause – Such an issue can be raised at any belated stage of the proceedings including in appeal or execution – The court cannot derive jurisdiction apart from the statute.

The appellant had purportedly executed a sale deed in favour of one 'MY' in respect of a plot of land. 'MY' filed civil suit for permanent injunction alleging that the appellant tried to dispossess him from the said premises. The Civil Court while taking the written statement of the appellant on record, also recorded his statement in person that he had neither threatened to dispossess nor he would dispossess 'MY', and accordingly disposed of the suit directing the appellant/defendant not to breach the undertaking given by him. The same culminated into a decree dated 12.5.2003.

Subsequently, the undertaking given by the appellant to the civil court was allegedly violated. 'MY' filed application under Order XXXIX Rule 2A of CPC read with Sections 10, 11 and 12 of the Contempt of Courts Act, 1971 against the appellant, his wife and two sons. The trial court held that a *prima facie* case of contempt was made out and referred the matter to the High Court. The High Court held the appellant guilty of criminal contempt and imposed upon him simple imprisonment for four months. Hence the present appeal.

Allowing the appeal, the Court

HELD:1. The instant case is an example where all proceedings in the suit as well as under the Contempt of Courts Act, 1971 were taken without adverting to the procedure known in law. [Para 1] [986-E]

2.1. Order X Rule 1 CPC provides for recording the

statement of the parties to the suit at the "first hearing of the suit" which comes after the framing of the issues and then the suit is posted for trial, i.e. for production of evidence. Such an interpretation emerges from the conjoint reading of the provisions of Order X, Rule 1, Order XIV, Rule 1(5), and Order XV, Rule 1, CPC. The cumulative effect of the above referred provisions of CPC comes to that the "first hearing of the suit" can never be earlier than the date fixed for the preliminary examination of the parties and the settlement of issues. On the date of appearance of the defendant, the court does not take up the case for hearing or apply its mind to the facts of the case, and it is only after filing of the written statement and framing of issues, the hearing of the case commences. The hearing presupposes the existence of an occasion which enables the parties to be heard by the Court in respect of the cause. Hearing, therefore, should be first in point of time after the issues have been framed. The date of "first hearing of a suit" under CPC is ordinarily understood to be the date on which the Court proposes to apply its mind to the contentions raised by the parties in their respective pleadings and also to the documents filed by them for the purpose of framing the issues which are to be decided in the suit. Thus, the question of having the "first hearing of the suit" prior to determining the points in controversy between the parties i.e. framing of issues does not arise. The words the "first day of hearing" does not mean the day for the return of the summons or the returnable date, but the day on which the court applies its mind to the case which ordinarily would be at the time when either the issues are determined or evidence is taken. [Para 6] [989-E-H; 990-A-B]

2.2. From the fact situation, it is evident that the suit was filed by 'MY' on 26.4.2003 and in response to the notice issued in that case, the appellant/defendant appeared on 29.4.2003 in person and filed his written

statement. It was on the same day that his statement had been recorded by the court. This Court fails to understand as to what statutory provision enabled the civil court to record the statement of the appellant/ defendant on the date of filing the written statement. [Paras 7] [990-D-E]

Ved Prakash Wadhwa v. Vishwa Mohan **AIR 1982 SC 816;** *Sham Lal (dead) by Lrs. v. Atma Nand Jain Sabha (Regd.) Dal Bazar* **AIR 1987 SC 197;** *Siraj Ahmad Siddiqui v. Shri Prem Nath Kapoor* **AIR 1993 SC 2525 and** *M/s Mangat Singh Trilochan Singh thr. Mangat Singh (dead) by Lrs. & Ors. v. Satpal* **AIR 2003 SC 4300 – relied on.**

Whether the application under Order XXXIX Rule 2A CPC or under the 1971 Act could be entertained by the Civil Court and whether the matter could be referred to the High Court at all.

3.1. Application under Order XXXIX Rule 2A CPC lies only where disobedience/breach of an injunction granted or order complained of was one, that is granted by the court under Order XXXIX Rules 1 & 2 CPC, which is naturally to enure during the pendency of the suit. However, once a suit is decreed, the interim order, if any, merges into the final order. No litigant can derive any benefit from mere pendency of case in a Court of Law, as the interim order always merges in the final order to be passed in the case and if the case is ultimately dismissed, the interim order stands nullified automatically. [Para 9] [992-H; 993-A-B]

3.2. In case there is a grievance of non-compliance of the terms of the decree passed in the civil suit, the remedy available to the aggrieved person is to approach the execution court under Order XXI Rule 32 CPC which provides for elaborate proceedings in which the parties can adduce their evidence and can examine and cross-examine the witnesses as opposed to the proceedings in contempt which are summary in nature. Application

under Order XXXIX Rule 2A CPC is not maintainable once the suit stood decreed. Law does not permit to skip the remedies available under Order XXI Rule 32 CPC and resort to the contempt proceedings for the reason that the court has to exercise its discretion under the 1971 Act when an effective and alternative remedy is not available to the person concerned. Thus, when the matter relates to the infringement of a decree or decretal order embodies rights, as between the parties, it is not expedient to invoke and exercise contempt jurisdiction, in essence, as a mode of executing the decree or merely because other remedies may take time or are more circumlocutory in character. Thus, the violation of permanent injunction can be set right in executing the proceedings and not the contempt proceedings. There is a complete fallacy in the argument that the provisions of Order XXXIX Rule 2A CPC would also include the case of violation or breach of permanent injunction granted at the time of passing of the decree. [Para 10] [993-D-H; 994-A]

3.3. The power exercised by a court under Order XXXIX Rule 2A is punitive in nature, akin to the power to punish for civil contempt under the 1971 Act. Therefore, such powers should be exercised with great caution and responsibility. Unless there has been an order under Order XXXIX Rule 1 or 2 CPC in a case, the question of entertaining an application under Order XXXIX Rule 2A does not arise. In case there is a final order, the remedy lies in execution and not in an action for contempt or disobedience or breach under Order XXXIX Rule 2A. The contempt jurisdiction cannot be used for enforcement of decree passed in a civil suit. [Para 11] [994-B-C]

3.4. The proceedings under Order XXXIX Rule 2A are available only during the pendency of the suit and not after conclusion of the trial of the suit. Therefore, any undertaking given to the court during the pendency of the suit on the basis of which the suit itself has been

disposed of becomes a part of the decree and breach of such undertaking is to be dealt with in execution proceedings under Order XXI Rule 32 CPC and not by means of contempt proceedings. Even otherwise, it is not desirable for the High Court to initiate criminal contempt proceedings for disobedience of the order of the injunction passed by the subordinate court, for the reason that where a decree is for an injunction, and the party against whom it has been passed has wilfully disobeyed it, the same may be executed by attachment of his property or by detention in civil prison or both. The provision of Order XXI Rule 32 CPC applies to prohibitory as well as mandatory injunctions. In other words, it applies to cases where the party is directed to do some act and also to the cases where he is abstained from doing an act. Still to put it differently, a person disobeys an order of injunction not only when he fails to perform an act which he is directed to do but also when he does an act which he is prohibited from doing. Execution of an injunction decree is to be made in pursuance of the Order XXI Rule 32 CPC as the CPC provides a particular manner and mode of execution and therefore, no other mode is permissible. [Para 12] [994-D-H; 995-A]

3.5. Conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior court, and if the court passes order/decree having no jurisdiction over the matter, it would amount to a nullity as the matter goes to the roots of the cause. Such an issue can be raised at any belated stage of the proceedings including in appeal or execution. The finding of a court or tribunal becomes irrelevant and unenforceable/inexecutable once the forum is found to have no jurisdiction. Acquiescence of a party equally should not be permitted to defeat the legislative animation. The court cannot derive jurisdiction apart from the statute. [Para 13] [995-B-D]

3.6. When a statute gives a right and provides a

forum for adjudication of rights, remedy has to be sought only under the provisions of that Act. When an Act creates a right or obligation and enforces the performance thereof in a specified manner, "that performance cannot be enforced in any other manner". Thus for enforcement of a right/obligation under a statute, the only remedy available to the person aggrieved is to get adjudication of rights under the said Act. [Para 13] [995-G-H; 996-A]

3.7. The proceedings under Order XXXIX, Rule 2A CPC is a mode to compel the opposite party to obey the order of injunction by attaching the property and detaining the disobedient party in civil prison as a mode of punishment for being guilty of such disobedience. Breach of undertaking given to the court amounts to contempt in the same way as a breach of injunction and is liable to be awarded the same punishment for it. [Para 14] [996-D]

3.8. It is a settled legal proposition that the executing court does not have the power to go behind the decree. Thus, in absence of any challenge to the decree, no objection can be raised in execution. [Para 15] [986-E-F]

3.9. In the case at hand, the decree dated 12.5.2003 was passed by the civil court on the basis of admission/ undertaking made by the appellant and the pleadings taken by him in his written statement. Therefore, in a case where there was any disobedience of the said judgment and decree, the application under Order XXXIX Rule 2A CPC should not have been entertained. Such an application is maintainable in a case where there is violation of interim injunction passed during the pendency of the suit. In the instant case, no interim order had ever been passed. Thus, the appropriate remedy available to the decree holder-'MY' had been to file application for execution under Order XXI Rule 32 CPC. The procedure in execution of an injunction decree is same as prescribed under Order XXXIX Rule 2A i.e. attachment of property and detention of the disobedient

to get the execution of the order. In view thereof, all subsequent proceedings were unwarranted. [Para 16] [996-G-H; 997-A-B]

3.10. The application of the decree holder had been for violation of the undertaking which at the most could be civil contempt as defined under Section 2(b) of the Act 1971 as it includes the wilful breach of an undertaking given to a court. Therefore, the Trial Court failed to make a distinction between civil contempt and criminal contempt. A mere disobedience by a party to a civil action of a specific order made by the court in the suit is civil contempt for the reason that it is for the sole benefit of the other party to the civil suit. This case remains to the extent that, in such a fact situation, the administration of justice could be undermined if the order of a competent court of law is permitted to be disregarded with such impunity, but it does not involve sufficient public interest to the extent that it may be treated as a criminal contempt. It was a clear cut case involving private rights of the parties for which adequate and sufficient remedy had been provided under CPC itself, like attachment of the property and detention in civil prison, but it was not a case wherein the facts and circumstances warranted the reference to the High Court for initiating the proceedings for criminal contempt. [Para 17] [997-C-F]

3.11. The High Court failed to appreciate the nature/ status of proceedings in which the alleged false affidavit had been filed. In the instant case, proceedings under Order XXXIX Rule 2A CPC were not maintainable at all. Had the complainant 'MY' filed the execution proceedings under Order XXI Rule 32 CPC, the court could have proceeded in accordance with law without going into the averments raised therein by the appellant. [Para 18] [997-H; 998-A-B]

3.12. In an appropriate case where exceptional circumstances exist, the court may also resort to the provisions applicable in case of civil contempt, in case

of violation/breach of undertaking/judgment/order or decree. However, before passing any final order on such application, the court must satisfy itself that there is violation of such judgment, decree, direction or order and such disobedience is wilful and intentional. Though in a case of execution of a decree, the executing court may not be bothered whether the disobedience of the decree is wilful or not and the court is bound to execute a decree whatever may be the consequence thereof. In a contempt proceeding, the alleged contemnor may satisfy the court that disobedience has been under some compelling circumstances, and in that situation, no punishment can be awarded to him. Thus, for violation of a judgment or decree provisions of the criminal contempt are not attracted. [Para 19] [998-D-H]

3.13. The appellant had been subjected to unfair procedure from the institution of the suit itself. The suit had been "disposed of" in great haste without following the procedure prescribed in CPC. Once the suit has been decreed, the court could not entertain the application under Order XXXIX Rule 2A CPC as the suit had already been decreed and such an application is maintainable only during the pendency of the suit in case the interim order passed by the court or undertaking given by the party is violated. In the instant case, no interim order had ever been passed and the undertaking given by the appellant/defendant not to dispossess the plaintiff 'MY' culminated into a final decree and thus, if any further action was required, it could be taken only in execution proceedings. There has been manifest injustice in the case and the doctrine of *ex debito justitiae* has to be applied in order to redress the grievances of the appellant/defendant. The judgment and order impugned cannot be sustained under any circumstance. [Para 21] [1000-D-G]

3.14. The courts below proceeded with criminal contempt proceedings not for disobeying any judgment

or order but for taking inconsistent pleas in the reply filed by the appellant to the application under Order XXXIX Rule 2A CPC, accepting it to be a false affidavit. Purposes of initiation of contempt proceedings are two-fold: to ensure the compliance of the order passed by the court; and to punish the contemnor as he has the audacity to challenge the majesty of law. In the instant case, admittedly, the grievance of the complaint had been disobedience of decree/order of the civil court dated 12.5.2003. The High Court convicted the appellant and sent him to jail but did not grant any relief so far as the enforcement of the order dated 12.5.2003 is concerned. On fails to understand as under what circumstances, the High Court did not even consider it appropriate to enforce the judgment/order/decree if it had been disobeyed by the appellant. The instant case is a glaring example of non-application of mind and non-observance of procedure prescribed by law for dealing with such matters. Entire proceedings have been conducted in most casual and cavalier manner. The contempt proceedings being quasi-criminal in nature, the standard of proof requires in the same manner as in other criminal cases. The alleged contemnor is entitled to the protection of all safeguards/rights which are provided in the Criminal Jurisprudence, including the benefit of doubt. There must be a clear-cut case of obstruction of administration of justice by a party intentionally to bring the matter within the ambit of the said provision. The case should not rest only on surmises and conjectures. [Paras 22, 25] [1000-H; 1001-A-D; 1002-F-G]

3.15. As the application under Order XXXIX Rule 2A CPC itself was not maintainable all subsequent proceedings remained inconsequential. Legal maxim "*sublato fundamento cadit opus*" which means foundation being removed structure falls is attracted. [Para 26] [1003-D]

Dhananjay Sharma v. State of Haryana & Ors. **(1995) 3**

SCC 757: 1995 (3) SCR 964; *Rita Markandey v. Surjit Singh Arora* **(1996) 6 SCC 14: 1996 (7) Suppl. SCR 56;** *Murray & Co. v. Ashok Kr. Newatia & Anr.* **(2000) 2 SCC 367: 2000 (1) SCR 367 – distinguished.**

Dr. A.R. Sircar v. State of U.P. & Ors. **1993 Suppl. (2) SCC 734;** *Shiv Shanker & Ors. v. Board of Directors UPSRTC & Anr.* **1995 Suppl (2) SCC 726;** *Committee of Management, Arya Nagar Inter College, Arya Nagar, Kanpur, through its Manager & Anr. v. Sree Kumar Tiwary & Anr.* **AIR 1997 SC 3071;** *M/s. GTC Industries Ltd. v. Union of India & Ors*. **AIR 1998 SC 1566 and** *Jaipur Municipal Corpn. v. C.L. Mishra* **(2005) 8 SCC 423;** *Food Corporation of India v. Sukha Deo Prasad* **AIR 2009 SC 2330;** *Hungerford Investment Trust Ltd. (In voluntary Liquidation) v. Haridas Mundhra & Ors.* **AIR 1972 SC 1826;** *The United Commercial Bank Ltd. v. Their Workmen* **AIR 1951 SC 230;** *Smt. Nai Bahu v. Lal Ramnarayan & Ors.* **AIR 1978 SC 22;** *Natraj Studios Pvt. Ltd. v. Navrang Studio & Anr.* **AIR 1981 SC 537;** *A.R. Antulay v. R.S. Nayak & Anr.* **AIR 1988 SC 1531;** *Union of India & Anr. v. Deoki Nandan Aggarwal* **AIR 1992 SC 96;** *Karnal Improvement Trust, Karnal v. Prakash Wanti (Smt.) (Dead) & Anr.* **(1995) 5 SCC 159: 1995 (1) Suppl. SCR 136;** *U.P. Rajkiya Nirman Nigam Ltd. v. Indure Pvt. Ltd. & Ors.* **AIR 1996 SC 1373;** *State of Gujarat v. Rajesh Kumar Chimanlal Barot & Anr.* **AIR 1996 SC 2664;** *Kesar Singh & Ors. v. Sadhu* **(1996) 7 SCC 711: 1996 (1) SCR 1017;** *Kondiba Dagadu Kadam v. Savitribai Sopan Gujar & Ors.* **AIR 1999 SC 2213;** *Collector of Central Excise, Kanpur v. Flock (India) (P) Ltd., Kanpur* **AIR 2000 SC 2484;** *The Premier Automobiles Ltd. v. K.S.Wadke & Ors*. **AIR 1975 SC 2238;** *Sushil Kumar Mehta v. Gobind Ram Bohra (Dead) thr. L.Rs.* **(1990) 1 SCC 193: 1989 (2) Suppl. SCR 149;** *Samee Khan v. Bindu Khan* **AIR 1998 SC 2765;** *State of Punjab & Ors. v. Mohinder Singh Randhawa & Anr.* **AIR 1992 SC 473;** *Niaz Mohammad & Ors. v. State of Haryana & Ors*. **(1994) 6 SCC 332: 1994 (3) Suppl. SCR 720;** *Bank of Baroda v. Sadruddin Hasan Daya & Anr.* **AIR 2004 SC 942;** *Rama Narang v. Ramesh Narang & Anr.* **AIR 2006 SC 1883 and** *Debabrata Bandopadhyay & Ors. v. The State of West Bengal & Anr.* **AIR 1969 SC 189 – relied on.**

Sardar Hasan Siddiqui & Ors. v. State Transport Appellate Tribunal, U.P., Lucknow & Ors. **AIR 1986 All. 132 – approved.**

*Sakharan Ganesh Aaravandekar & Anr. v. Mahadeo Vinayak Mathkar & Ors***. (2008) 10 SCC 186;** *Mahender Kumar Gandhi v. Mohammad Tajer Ali & Ors.* **(2008) 10 SCC 795;** *Palitana Sugar Mills Private Limited & Anr. v. Vilasiniben Ramachandran & Ors.* **(2007) 15 SCC 218: 2007 (4) SCR 221;** *C. Elumalai & Ors. v. A.G.L. Irudayaraj & Anr.* **AIR 2009 SC 2214;** *Daroga Singh & Ors. v. B.K. Pandey* **(2004) 5 SCC 26: 2004 (1) Suppl. SCR 113;** *Bathina Ramakrishna Reddy v. State of Madras* **AIR 1952 SC 149;** *Brahma Prakash Sharma & Ors. v. The State of U.P.* **AIR 1954 SC 10 and** *State of Madhya Pradesh v. Revashankar* **AIR 1959 SC 102 – referred to.**

Doe d. Rochester (BP) v. Bridges **109 ER 1001**; *Barraclough v. Brown* **1897 AC 615 – referred to.**

Case Law Reference:

AIR 1982 SC 816	**relied on**	**Para 6**
AIR 1987 SC 197	**relied on**	**Para 6**
AIR 1993 SC 2525	**relied on**	**Para 6**
AIR 2003 SC 4300	**relied on**	**Para 6**
1993 Suppl. (2) SCC 734	**relied on**	**Para 9**
1995 Suppl (2) SCC 726	**relied on**	**Para 9**
AIR 1997 SC 3071	**relied on**	**Para 9**
AIR 1998 SC 1566	**relied on**	**Para 9**
(2005) 8 SCC 423	**relied on**	**Para 9**
AIR 2009 SC 2330	**relied on**	**Para 11**
AIR 1972 SC 1826	**relied on**	**Para 12**
AIR 1951 SC 230	**relied on**	**Para 13**

AIR 1978 SC 22	**relied on**	**Para 13**
AIR 1981 SC 537	**relied on**	**Para 13**
AIR 1986 All. 132	**approved**	**Para 13**
AIR 1988 SC 1531	**relied on**	**Para 13**
AIR 1992 SC 96	**relied on**	**Para 13**
1995 (1) Suppl. SCR 136	**relied on**	**Para 13**
AIR 1996 SC 1373	**relied on**	**Para 13**
AIR 1996 SC 2664	**relied on**	**Para 13**
1996 (1) SCR 1017	**relied on**	**Para 13**
AIR 1999 SC 2213	**relied on**	**Para 13**
AIR 2000 SC 2484	**relied on**	**Para 13**
109 ER 1001	**referred to**	**Para 13**
1897 AC 615	**referred to**	**Para 13**
AIR 1975 SC 2238	**relied on**	**Para 13**
1989 (2) Suppl. SCR 149	**relied on**	**Para 13**
AIR 1998 SC 2765	**relied on**	**Para 14**
AIR 1992 SC 473	**relied on**	**Para 15**
1995 (3) SCR 964	**distinguished**	**Para 18**
1996 (7) Suppl. SCR 56	**distinguished**	**Para 18**
2000 (1) SCR 367	**distinguished**	**Para 18**
(2008) 10 SCC 186	**referred to**	**Para 19**
(2008) 10 SCC 795	**referred to**	**Para 19**
1994 (3) Suppl. SCR 720	**relied on**	**Para 19**
AIR 2004 SC 942	**relied on**	**Para 19**
AIR 2006 SC 1883	**relied on**	**Para 19**
2007 (4) SCR 221	**referred to**	**Para 23**
AIR 2009 SC 2214	**referred to**	**Para 23**
2004 (1) Suppl. SCR 113	**referred to**	**Para 24**
AIR 1952 SC 149	**referred to**	**Para 24**
AIR 1954 SC 10	**referred to**	**Para 24**
AIR 1959 SC 102	**referred to**	**Para 24**
AIR 1969 SC 189	**relied on**	**Para 25**

CRIMINAL APPELATE JURISDICTION : Criminal Appeal No. 1798 of 2009.

From the Judgment & Order dated 20.7.2009 of the High Court of Delhi at New Delhi in Contempt Case (Criminal) No. 9 of 2004.

Tanmaya Mohta (for Purnima Bhat) for the Appellant.

Shree Prakash Sinha, Vijay Kumar and Shekhar Kumar for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. **'**Liberty' - the most cherished fundamental right, a basic human right, a "transcendental", inalienable, and `primordial' right, should not be put in peril without following the procedure prescribed by law and in a casual and cavalier manner. Instant case is an example where all proceedings in the suit as well as under the Contempt of Courts Act, 1971, (hereinafter called as 'Act 1971'), have been taken without adverting to the procedure known in law.

2. This Criminal Appeal has been preferred under Section 19 (1)(b) of the Act 1971 against the impugned judgment and order dated 20.7.2009 passed by the High Court of Delhi at New Delhi in Contempt Case (Crl.) No.9 of 2004, whereby the appellant has been convicted for committing contempt of court by violating the undertaking given by him to the Court at the time of disposal of the suit and awarded him simple imprisonment for four months.

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

A. The appellant executed a sale deed in favour of one Mohd. Yusuf on 5.9.2002 in respect of the premises bearing No. 148, village Khirki, Malviya Nagar, New Delhi for a sum of Rs.2,10,000/- and got the said deed registered.

B. Mohd. Yusuf filed suit No. 106/2003 in the Civil Court, Delhi, on 26.4.2003 for permanent injunction alleging that the appellant tried to dispossess him on 24.4.2003 from the said suit premises. His application for interim relief was rejected. The Civil Court issued summons and notice to the appellant/ defendant.

C. In response to the said summons and notice, the appellant filed a written statement on 29.4.2003 admitting the execution of sale deed in respect of the suit premises for a sum of Rs.2.10 lacs and handing over its possession to the plaintiff but denied the allegation that he had made any attempt to dispossess the plaintiff. However, the appellant raised the grievance that the entire consideration of sale has not been paid to him as a sum of Rs.25,000/- still remained outstanding.

D. The Civil Court while taking his written statement on record also recorded the statement of the appellant/defendant in person that he had neither threatened to dispossess nor he would dispossess the plaintiff. The plaintiff's counsel accepted the statements made by the appellant/defendant in the court and the case was adjourned for 12.5.2003. On 12.5.2003, plaintiff asked the court to dispose of the suit in view of the statement made by the appellant/defendant. The court disposed of the suit directing the appellant/defendant not to breach the undertaking given by him.

E. Appellant's son filed a suit on 11.8.2003 for partition in respect of two plot Nos. i.e. 147A and 148 claiming that he had a share in the said properties.

F. Mohd. Yusuf-plaintiff in the Suit No. 106/2003 filed an application before the High Court under the provisions of Act 1971 alleging the violation of the undertaking given by the appellant to the civil court. The application came up for hearing on 11.9.2003 but none appeared to press the same. The High Court disposed of the application vide order dated 11.3.2003 giving liberty to the said applicant to approach the civil court. The said order was passed without issuing notice to the appellant or anyone else.

G. Mohd. Yusuf filed an application dated 15.9.2003 under Order XXXIX Rule 2A of Code of Civil Procedure, 1908 (hereinafter called 'CPC') read with Sections 10, 11 and 12 of the Act 1971 against the appellant, his wife and two sons alleging that when he visited the suit premises on 4.8.2003, he found that the locks of the main door had been broken by them. The appellant filed reply to the said application on 22.10.2003 alleging that the execution of the sale deed dated 5.9.2002 and his written statement and the statement made before the court on 29.4.2003 had been obtained by fraud.

H. While hearing the said application, the Court vide order dated 16.2.2004 recorded that as the appellant had taken inconsistent pleas to his written statement filed earlier and violated the undertaking while making his oral statement, a prima facie case of contempt was made out and referred the matter to the High Court to be dealt with under the provisions of Act 1971.

I. The appellant filed a suit on 23.2.2005 for cancellation of the sale deed dated 5.9.2002.

J. The High Court while accepting the reference as Criminal Contempt, issued show cause notice to the appellant on 2.2.2005 directing him to appear in person on 16.2.2005. The Court vide impugned judgment and order dated 20.7.2009 held the appellant guilty of criminal contempt on the basis of inconsistent pleas taken by him and also for the breach of undertaking and imposed simple imprisonment for four months. The appellant was granted bail by this Court on 29.9.2009.

Hence, this appeal.

4. Mr. Tanmaya Mehta, learned counsel appearing for the appellant has raised the grievance mainly, that it was a case of civil contempt which could have been dealt with by the Trial Court itself and by no means could be treated as a criminal contempt case. The High Court erred in treating the same as criminal contempt and awarded the punishment to the appellant which was not warranted under the facts and circumstances of

the case and therefore, the judgment and order of the High Court convicting the appellant is liable to be set aside.

5. Mr. Shree Prakash Sinha, learned counsel appearing for the plaintiff - Mohd.Yusuf, intervener, has opposed the appeal contending that the appellant and his family members had made false and misleading statements to scuttle the interest of justice. The appellant has not only committed criminal contempt but also abused the process of the court. Thus, no interference is called for.

6. The suit was filed on 26.4.2003 and notice was issued returnable just after three days, i.e. 29.4.2003 and on that date the written statement was filed and the appellant appeared in person and his statement was recorded. Order X Rule 1 CPC provides for recording the statement of the parties to the suit at the "first hearing of the suit" which comes after the framing of the issues and then the suit is posted for trial, i.e. for production of evidence. Such an interpretation emerges from the conjoint reading of the provisions of Order X Rule 1; Order XIV Rule 1(5); and Order XV Rule 1, CPC. The cumulative effect of the above referred provisions of CPC comes to that the "first hearing of the suit" can never be earlier than the date fixed for the preliminary examination of the parties and the settlement of issues. On the date of appearance of the defendant, the court does not take up the case for hearing or apply its mind to the facts of the case, and it is only after filing of the written statement and framing of issues, the hearing of the case commences. The hearing presupposes the existence of an occasion which enables the parties to be heard by the Court in respect of the cause. Hearing, therefore, should be first in point of time after the issues have been framed. The date of "first hearing of a suit" under CPC is ordinarily understood to be the date on which the Court proposes to apply its mind to the contentions raised by the parties in their respective pleadings and also to the documents filed by them for the purpose of framing the issues which are to be decided in the suit. Thus, the question of having the "first hearing of the suit" prior to determining the points in controversy between the

parties i.e. framing of issues does not arise. The words the "first day of hearing" does not mean the day for the return of the summons or the returnable date, but the day on which the court applies its mind to the case which ordinarily would be at the time when either the issues are determined or evidence is taken. [Vide: *Ved Prakash Wadhwa v. Vishwa Mohan,* AIR 1982 SC 816; *Sham Lal (dead) by Lrs. v. Atma Nand Jain Sabha (Regd.) Dal Bazar,* AIR 1987 SC 197; *Siraj Ahmad Siddiqui v. Shri Prem Nath Kapoor,* AIR 1993 SC 2525; and *M/s Mangat Singh Trilochan Singh thr. Mangat Singh (dead) by Lrs. & Ors. v. Satpal,* AIR 2003 SC 4300]

7. From the above fact situation, it is evident that the suit was filed on 26.4.2003 and in response to the notice issued in that case, the appellant/defendant appeared on 29.4.2003 in person and filed his written statement. It was on the same day that his statement had been recorded by the court. We failed to understand as to what statutory provision enabled the civil court to record the statement of the appellant/defendant on the date of filing the written statement. The suit itself has been disposed of on the basis of his statement within three weeks of the institution of the suit. The order sheets of the suit read as under:

26.4.2003:

"Present: Ld. counsel for the plaintiff.

Arguments on injunction application heard. No ground for granting ex-parte stay order at this stage, request in this regard is declined. Issue summons of the suit and notice of the interim application to the defendants on PF and RC, courier, UPC and dasti also for 29-04-2003.

Sd/-
CJ/Delhi
26-04-2003"

29.4.2003:

"Counsel for the plaintiff.

Defendant in person.

He states that he is not likely to dispossess the plaintiff from the suit premises as he has already sold the same. However, he has stated that he has to take certain amount from the plaintiff towards expenses which has not been paid by the plaintiff. There is counter claim of the defendant affixing the court fee and in any case, he has legal remedy to exercise it. The defendant is ready to make the statement. Let it be recorded.

CJ/Delhi

"Statement of Shri Kanwar Singh Saini, Defendant on S.A.

Neither I have threatened the plaintiff nor I will dispossess him as I have already sold the suit property vide sale deed. The suit of the plaintiff may kindly be dismissed as there is no merit in the same.

R.O. &A.C.

Sd/

(Kanwar Singh Saini)

Sd/-
CJ/DELHI
29.4.2003"

"Statement of Ld. Counsel for plaintiff Shri Iqbal Ahmed without oath:

I have heard the statement of defendant and I have instruction from the plaintiff to accept the same. The suit of the plaintiff may kindly be disposed of.

R.O.&A.C.
Sd/-

(Iqbal Ahmed)

Sd/-
CJ/DELHI
29.4.2003

12.5.2003:

"I have heard the statement of defendant and I accept the

same. My suit be disposed of in terms of statement of defendant.

RO&AC

Sd/-

(Mohd. Yusuf)

Sd/-
CJ/DELHI
12.5.2003"

Thereafter the learned Judge passed the following order:-

"12.5.2003

Present: Plaintiff in person.

Ld. Counsel for the defendant.

Statement of plaintiff is recorded on a separate sheet. Statement of defendant is already recorded. Keeping in view of the statements of parties, the suit of the plaintiff is disposed of. Parties are bound by their statements as given in the court. No orders as to costs. File be consigned to Record Room.

Sd/-
CJ/DELHI
12.5.2003"

8. Be that as it may, the so-called statement/undertaking given by the appellant/defendant culminated into the decree of the Civil Court dated 12.5.2003. Thus, the question does arise as to whether the application under Order XXXIX Rule 2A CPC or under the Act 1971 could be entertained by the Civil Court and whether the matter could be referred to the High Court at all.

9. Application under Order XXXIX Rule 2A CPC lies only where disobedience/breach of an injunction granted or order complained of was one, that is granted by the court under Order XXXIX Rules 1 & 2 CPC, which is naturally to enure during the

pendency of the suit. However, once a suit is decreed, the interim order, if any, merges into the final order.

No litigant can derive any benefit from mere pendency of case in a Court of Law, as the interim order always merges in the final order to be passed in the case and if the case is ultimately dismissed, the interim order stands nullified automatically. (Vide: *Dr. A.R. Sircar v. State of U.P. & Ors.,* 1993 Suppl. (2) SCC 734; *Shiv Shanker & Ors. v. Board of Directors, UPSRTC & Anr.,* 1995 Suppl (2) SCC 726; *Committee of Management, Arya Nagar Inter College, Arya Nagar, Kanpur, through its Manager & Anr. v. Sree Kumar Tiwary & Anr.,* AIR 1997 SC 3071; *M/s. GTC Industries Ltd. v. Union of India & Ors.,* AIR 1998 SC 1566; and *Jaipur Municipal Corpn. v. C.L. Mishra,* (2005) 8 SCC 423).

10. In case there is a grievance of non-compliance of the terms of the decree passed in the civil suit, the remedy available to the aggrieved person is to approach the execution court under Order XXI Rule 32 CPC which provides for elaborate proceedings in which the parties can adduce their evidence and can examine and cross-examine the witnesses as opposed to the proceedings in contempt which are summary in nature. Application under Order XXXIX Rule 2A CPC is not maintainable once the suit stood decreed. Law does not permit to skip the remedies available under Order XXI Rule 32 CPC and resort to the contempt proceedings for the reason that the court has to exercise its discretion under the Act 1971 when an effective and alternative remedy is not available to the person concerned. Thus, when the matter relates to the infringement of a decree or decretal order embodies rights, as between the parties, it is not expedient to invoke and exercise contempt jurisdiction, in essence, as a mode of executing the decree or merely because other remedies may take time or are more circumlocutory in character. Thus, the violation of permanent injunction can be set right in executing the proceedings and not the contempt proceedings. There is a complete fallacy in the argument that the provisions of Order XXXIX Rule 2A CPC would also include the case of violation

or breach of permanent injunction granted at the time of passing of the decree.

11. In *Food Corporation of India v. Sukha Deo Prasad,* AIR 2009 SC 2330, this Court held that the power exercised by a court under Order XXXIX Rule 2A is punitive in nature, akin to the power to punish for civil contempt under the Act 1971. Therefore, such powers should be exercised with great caution and responsibility. Unless there has been an order under Order XXXIX Rule 1 or 2 CPC in a case, the question of entertaining an application under Order XXXIX Rule 2A does not arise. In case there is a final order, the remedy lies in execution and not in an action for contempt or disobedience or breach under Order XXXIX Rule 2A. The contempt jurisdiction cannot be used for enforcement of decree passed in a civil suit.

12. The proceedings under Order XXXIX Rule 2A are available only during the pendency of the suit and not after conclusion of the trial of the suit. Therefore, any undertaking given to the court during the pendency of the suit on the basis of which the suit itself has been disposed of becomes a part of the decree and breach of such undertaking is to be dealt with in execution proceedings under Order XXI Rule 32 CPC and not by means of contempt proceedings. Even otherwise, it is not desirable for the High Court to initiate criminal contempt proceedings for disobedience of the order of the injunction passed by the subordinate court, for the reason that where a decree is for an injunction, and the party against whom it has been passed has wilfully disobeyed it, the same may be executed by attachment of his property or by detention in civil prison or both. The provision of Order XXI Rule 32 CPC applies to prohibitory as well as mandatory injunctions. In other words, it applies to cases where the party is directed to do some act and also to the cases where he is abstained from doing an act. Still to put it differently, a person disobeys an order of injunction not only when he fails to perform an act which he is directed to do but also when he does an act which he is prohibited from doing. Execution of an injunction decree is to be made in pursuance of the Order XXI Rule 32 CPC as the

CPC provides a particular manner and mode of execution and therefore, no other mode is permissible. (See: *Hungerford Investment Trust Ltd. (In voluntary Liquidation) v. Haridas Mundhra & Ors.,* AIR 1972 SC 1826).

13. There can be no dispute regarding the settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior court, and if the court passes order/decree having no jurisdiction over the matter, it would amount to a nullity as the matter goes to the roots of the cause. Such an issue can be raised at any belated stage of the proceedings including in appeal or execution. The finding of a court or tribunal becomes irrelevant and unenforceable/inexecutable once the forum is found to have no jurisdiction. Acquiescence of a party equally should not be permitted to defeat the legislative animation. The court cannot derive jurisdiction apart from the statute. (Vide: *The United Commercial Bank Ltd. v. Their Workmen* AIR 1951 SC 230; *Smt. Nai Bahu v. Lal Ramnarayan & Ors.,* AIR 1978 SC 22; *Natraj Studios Pvt. Ltd. v. Navrang Studio & Anr.,* AIR 1981 SC 537; *Sardar Hasan Siddiqui & Ors. v. State Transport Appellate Tribunal, U.P., Lucknow & Ors.* AIR 1986 All. 132**;** *A.R. Antulay v. R.S. Nayak & Anr.,* AIR 1988 SC 1531; *Union of India & Anr. v. Deoki Nandan Aggarwal,* AIR 1992 SC 96; *Karnal Improvement Trust, Karnal v. Prakash Wanti (Smt.) (Dead) & Anr.,* (1995) 5 SCC 159; *U.P. Rajkiya Nirman Nigam Ltd. v. Indure Pvt. Ltd. & Ors.,* AIR 1996 SC 1373; *State of Gujarat v. Rajesh Kumar Chimanlal Barot & Anr.,* AIR 1996 SC 2664; *Kesar Singh & Ors. v. Sadhu,* **(**1996) 7 SCC 711; *Kondiba Dagadu Kadam v. Savitribai Sopan Gujar & Ors.,* AIR 1999 SC 2213; and *Collector of Central Excise, Kanpur v. Flock (India) (P) Ltd., Kanpur,* AIR 2000 SC 2484**).**

When a statute gives a right and provides a forum for adjudication of rights, remedy has to be sought only under the provisions of that Act. When an Act creates a right or obligation and enforces the performance thereof in a specified manner, "that performance cannot be enforced in any other manner".

Thus for enforcement of a right/obligation under a statute, the only remedy available to the person aggrieved is to get adjudication of rights under the said Act. (See: *Doe d. Rochester (BP) v. Bridges,* 109 ER 1001; *Barraclough v. Brown,* 1897 AC 615; *The Premier Automobiles Ltd. v. K.S.Wadke & Ors.,* AIR 1975 SC 2238; and *Sushil Kumar Mehta v. Gobind Ram Bohra (Dead) thr. L.Rs.,* (1990) 1 SCC 193).

14. In *Samee Khan v. Bindu Khan,* AIR 1998 SC 2765, this Court explained the distinction between a civil and criminal contempt observing that enforcement of the order in civil contempt is for the benefit of one party against another, while object of criminal contempt is to uphold the majesty of law and the dignity of the court. The scope of the proceedings under Order XXXIX Rule 2A CPC is entirely different. It is a mode to compel the opposite party to obey the order of injunction by attaching the property and detaining the disobedient party in civil prison as a mode of punishment for being guilty of such disobedience. Breach of undertaking given to the court amounts to contempt in the same way as a breach of injunction and is liable to be awarded the same punishment for it.

15. It is a settled legal proposition that the executing court does not have the power to go behind the decree. Thus, in absence of any challenge to the decree, no objection can be raised in execution. (Vide: *State of Punjab & Ors. v. Mohinder Singh Randhawa & Anr.,* AIR 1992 SC 473).

16. The case requires to be considered in the light of the aforesaid settled legal proposition.

Whatever may be the circumstances, the court decreed the suit vide judgment and decree dated 12.5.2003. The said decree was passed on the basis of admission/undertaking made by the appellant on 29.4.2003 and the pleadings taken by him in his written statement. Therefore, in a case where there was any disobedience of the said judgment and decree, the application under Order XXXIX Rule 2A CPC should not have been entertained. Such an application is maintainable in a case

where there is violation of interim injunction passed during the pendency of the suit. In the instant case, no interim order had ever been passed. Thus, the appropriate remedy available to the decree holder-Mohd. Yusuf had been to file application for execution under Order XXI Rule 32 CPC. The procedure in execution of an injunction decree is same as prescribed under Order XXXIX Rule 2A i.e. attachment of property and detention of the disobedient to get the execution of the order. In view thereof, all subsequent proceedings were unwarranted.

17. Application of the decree holder had been for violation of the undertaking which at the most could be civil contempt as defined under Section 2(b) of the Act 1971 as it includes the wilful breach of an undertaking given to a court. Therefore, the Trial Court failed to make a distinction between civil contempt and criminal contempt. A mere disobedience by a party to a civil action of a specific order made by the court in the suit is civil contempt for the reason that it is for the sole benefit of the other party to the civil suit. This case remains to the extent that, in such a fact situation, the administration of justice could be undermined if the order of a competent court of law is permitted to be disregarded with such impunity, but it does not involve sufficient public interest to the extent that it may be treated as a criminal contempt. It was a clear cut case involving private rights of the parties for which adequate and sufficient remedy had been provided under CPC itself, like attachment of the property and detention in civil prison, but it was not a case wherein the facts and circumstances warranted the reference to the High Court for initiating the proceedings for criminal contempt.

18. The High Court in para 29 of the impugned judgment has taken note of various judgments of this Court including *Dhananjay Sharma v. State of Haryana & Ors.,* (1995) 3 SCC 757; *Rita Markandey v. Surjit Singh Arora,* (1996) 6 SCC 14; and *Murray & Co. v. Ashok Kr. Newatia & Anr.,* (2000) 2 SCC 367, wherein it has been held that filing of a false affidavit or taking false pleadings in the court amounts to criminal contempt. The High Court failed to appreciate the nature/status

of proceedings in which the alleged false affidavit had been filed. The instant case is quite distinguishable on facts from those cases. In the instant case, proceedings under Order XXXIX Rule 2A CPC were not maintainable at all. Had the complainant Mohd. Yusuf filed the execution proceedings under Order XXI Rule 32 CPC, the court could have proceeded in accordance with law without going into the averments raised therein by the appellant.

19. In a given case if the court grants time to a tenant to vacate the tenanted premises and the tenant files an undertaking to vacate the same after expiry of the said time, but does not vacate the same, the situation would be altogether different. (See: *Sakharan Ganesh Aaravandekar & Anr. v. Mahadeo Vinayak Mathkar & Ors.,* (2008) 10 SCC 186; and *Mahender Kumar Gandhi v. Mohammad Tajer Ali & Ors.,* (2008) 10 SCC 795).

In an appropriate case where exceptional circumstances exist, the court may also resort to the provisions applicable in case of civil contempt, in case of violation/breach of undertaking/judgment/order or decree. However, before passing any final order on such application, the court must satisfy itself that there is violation of such judgment, decree, direction or order and such disobedience is wilful and intentional. Though in a case of execution of a decree, the executing court may not be bothered whether the disobedience of the decree is wilful or not and the court is bound to execute a decree whatever may be the consequence thereof. In a contempt proceeding, the alleged contemnor may satisfy the court that disobedience has been under some compelling circumstances, and in that situation, no punishment can be awarded to him. (See: *Niaz Mohammad & Ors. v. State of Haryana & Ors,* (1994) 6 SCC 332; *Bank of Baroda v. Sadruddin Hasan Daya & Anr.,* AIR 2004 SC 942; and *Rama Narang v. Ramesh Narang & Anr.,* AIR 2006 SC 1883)

Thus, for violation of a judgment or decree provisions of the criminal contempt are not attracted.

20. The application filed under Order XXXIX Rule 2A CPC bearing Misc. No.89/2003 by the decree holder contains the following pleadings and prayer was made to punish the said contemnors:

> "To his utter amazement, the petitioner-applicant on 4th of August 2003 on visiting the site (148, Village Khirki, New Delhi) learnt that the respondents in league and collusion with one another in deliberate and wilful breach of the aforementioned statement, assurance and/or undertaking had broken open locks and doors of the premises in reference 148, Village Khirki, New Delhi and taken possession thereof, thereby committing grave contempt of the Hon'ble Court (by breach of the aforementioned statement, assurance and/or undertaking furnished on 29th of April 2003 as accepted by the learned Civil Judge on 12th May 2003)."

The Civil Court considered the said application; took notice of the facts and in its order dated 16.2.2004 held:

> "It also shows that plaintiff was in possession of the suit property on the date of making the statement. As on today, the respondents are in possession of the suit property. Even the respondent had not denied this fact rather their contention is that plaintiff was never in possession of the suit property. Further, a local commissioner was appointed and has also corroborated the fact that respondents are in possession. Therefore, prima facie, it appears that plaintiff has been dispossessed from the suit property by the respondents. The contention of the respondent no.1 that plaintiff was never in possession runs counter to the written statement of defendant filed in the original suit. Moreover, this fact needs evidence and evidence will be led only before Hon'ble High Court. Therefore, prima facie case for reference of the contempt petition has been made out."

The Court reached the following conclusion :

> "As to the contention of learned counsel for respondent no.1 that evidence is required before making a reference, the provision of section 11 of the Contempt of Courts Act, 1971 are to be noted. Section 11 says that it is the Hon'ble High Court which has jurisdiction to inquire into or try the contempt petition. Therefore, the contention has no force. This Court has only to see that prima facie case exist for referring the contempt."

The Court made the reference as under:

> "However, against other respondents there is no material for making the reference. In view of the above, a reference is made to the Hon'ble High Court with humble prayer to try the contempt petition against respondent no.1 and to punish the guilty accordingly. Application is disposed of accordingly."

21. In view of the above discussion, as such proceedings were not maintainable, the order of reference itself was not warranted. It also becomes crystal clear that the appellant had been subjected to unfair procedure from the institution of the suit itself. The suit had been "disposed of" in great haste without following the procedure prescribed in CPC. Once the suit has been decreed, the court could not entertain the application under Order XXXIX Rule 2A CPC as the suit had already been decreed and such an application is maintainable only during the pendency of the suit in case the interim order passed by the court or undertaking given by the party is violated. In the instant case, no interim order had ever been passed and the undertaking given by the appellant/defendant not to dispossess the said plaintiff culminated into a final decree and thus, if any further action was required, it could be taken only in execution proceedings. There has been manifest injustice in the case and the doctrine of *ex debito justitiae* has to be applied in order to redress the grievances of the appellant/defendant. Judgment and order impugned cannot be sustained under any circumstance.

22. The courts below have proceeded with criminal contempt proceedings not for disobeying any judgment or order

but for taking inconsistent pleas in the reply filed by the appellant to the application under Order XXXIX Rule 2A CPC, accepting it to be a false affidavit. Purposes of initiation of contempt proceedings are two-fold: to ensure the compliance of the order passed by the court; and to punish the contemnor as he has the audacity to challenge the majesty of law. In the instant case, admittedly, the grievance of the complaint had been disobedience of decree/order of the civil court dated 12.5.2003. The High Court convicted the appellant and sent him to jail but did not grant any relief so far as the enforcement of the order dated 12.5.2003 is concerned. We failed to understand as under what circumstances, the High Court did not even consider it appropriate to enforce the judgment/order/decree if it had been disobeyed by the appellant. The instant case is a glaring example of non-application of mind and non-observance of procedure prescribed by law for dealing with such matters. Entire proceedings have been conducted in most casual and cavalier manner.

23. Learned counsel for the contesting respondent has placed a very heavy reliance on the judgments of this Court in *Palitana Sugar Mills Private Limited & Anr. v. Vilasiniben Ramachandran & Ors.,* (2007) 15 SCC 218; and *C. Elumalai & Ors. v. A.G.L. Irudayaraj & Anr.,* AIR 2009 SC 2214, wherein this court held that wherever there is a wilful disobedience/contumacious conduct – deliberate flouting of the order of the court, it amounts to contempt and it becomes the duty of the court to exercise its inherent power to set the wrong right as a party cannot be permitted to perpetuate the wrong by disobeying the order further.

In the case at hands, the court initiated criminal contempt proceedings but ultimately after convicting the appellant did not enforce the order passed by the Civil Court dated 12.5.2003.

24. In *Daroga Singh & Ors. v. B.K. Pandey,* (2004) 5 SCC 26, this Court rejected the plea of the contemnors that the High Court could not initiate the contempt proceedings in respect of the Contempt of the Courts subordinate to it placing reliance

upon earlier judgments in *Bathina Ramakrishna Reddy v. State of Madras,* AIR 1952 SC 149; *Brahma Prakash Sharma & Ors. v. The State of U.P.,* AIR 1954 SC 10; and *State of Madhya Pradesh v. Revashankar,* AIR 1959 SC 102. The Court further explained the scope of contempt proceedings observing:

> "..... For the survival of the rule of law the orders of the courts have to be obeyed and continue to be obeyed unless overturned, modified or stayed by the appellate or revisional courts. The court does not have any agency of its own to enforce its orders. The executive authority of the State has to come to the aid of the party seeking implementation of the court orders. The might of the State must stand behind the court orders for the survival of the rule of the court in the country. Incidents which undermine the dignity of the courts should be condemned and dealt with swiftly..... ..... If the judiciary has to perform its duties and functions in a fair and free manner, the dignity and the authority of the courts has to be respected and maintained at all stages and by all concerned failing which the very constitutional scheme and public faith in the judiciary runs the risk of being lost."

25. The contempt proceedings being quasi-criminal in nature, the standard of proof requires in the same manner as in other criminal cases. The alleged contemnor is entitled to the protection of all safeguards/rights which are provided in the Criminal Jurisprudence, including the benefit of doubt. There must be a clear-cut case of obstruction of administration of justice by a party intentionally to bring the matter within the ambit of the said provision. The case should not rest only on surmises and conjectures.

In *Debabrata Bandopadhyay & Ors. v. The State of West Bengal & Anr.,* AIR 1969 SC 189, this Court observed as under:

> "A question whether there is contempt of court or not is a serious one. The court is both the accuser as well as the

judge of the accusation. It behoves the court to act with as great circumspection as possible making all allowances for errors of judgment and difficulties arising from inveterate practices in courts and tribunals. It is only when a clear case of contumacious conduct not explainable otherwise, arises that the contemnor must be punished……. Punishment under the law of Contempt is called for when the lapse is deliberate and in disregard of one's duty and in defiance of authority. To take action in an unclear case is to make the law of contempt do duty for other measures and is not to be encouraged."

(Emphasis added)

26. In view of the above, as the application under Order XXXIX Rule 2A CPC itself was not maintainable all subsequent proceedings remained inconsequential. Legal maxim "*sublato fundamento cadit opus*" which means foundation being removed structure falls is attracted.

27. Thus, taking into consideration, the fact situation involved in the case, the appeal is allowed. The impugned judgment and order dated 20.7.2009 passed by the High Court of Delhi at New Delhi in Contempt Case (Crl.) No. 9 of 2004 is hereby set aside. His bail bonds stand discharged.

28. However, we clarify that any observation made in this judgment shall not affect, in any manner, merit of other cases pending between the parties in regard to the Suit property.

B.B.B. Appeal allowed.

LALIT KUMAR MODI

v.

BOARD OF CONTROL FOR CRICKET IN INDIA AND ORS.

(Special Leave Petition (C) No. 27157 of 2010)

SEPTEMBER 26, 2011

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

Tamil Nadu Societies Registration Act, 1975 – Disciplinary action by society – Constitution of Disciplinary Committee – Challenge to – First respondent-society (BCCI) organized a cricket competition (IPL) – Petitioner, a member of first respondent, appointed as the incharge Chairman thereof – Rights for telecasting of the cricket games auctioned by first respondent – Complaint from a bidder alleging breach of confidentiality against the petitioner – Petitioner suspended from his position and served with show cause notices – Disciplinary Committee of respondent no.1 entrusted with the function of examining the allegations – Plea of Petitioner that the Disciplinary Committee was not validly constituted and that since the President of BCCI had recused himself from the Committee, the Disciplinary Committee was required to either wait until the next President was elected so that the committee was reconstituted after including the new President therein, or if the Committee was to consist of three persons other than the President, it should consist of persons who were unbiased and acceptable to the petitioner – Held: The petitioner himself had objected to the President being the member of the Committee – That being the position, the President recused himself from the Committee – When a situation thus arises, in view of the objection of the petitioner, the society cannot be left without a remedy – Also, a member of the society having accepted the rules, agrees to the disciplinary authority of the three member Committee to be constituted under the rules – He cannot claim a right to dictate

as to who should be the members of the Committee – Normally the President shall be a member of three Member Committee, but if for any reason his presence on the Committee is objected to, on grounds of unfairness, and he recuses himself therefrom, respondent no.1 certainly has the power to substitute him by some other person – The Committee in question was validly constituted under Rule 1(q) in view of the necessity arising due to the recusal of the President of BCCI from the Committee – Board of Control for Cricket in India Rules – Rule 1(q).

Tamil Nadu Societies Registration Act, 1975 – Disciplinary action by society – Allegation of institutional bias – First respondent-society (BCCI) organized a cricket competition (IPL) – Petitioner appointed as the incharge Chairman thereof – Rights for telecasting of the cricket games auctioned by first respondent – Complaint from a bidder alleging breach of confidentiality against the petitioner – Petitioner suspended from his position and served with show cause notices – Disciplinary Committee of respondent no.1 entrusted with the function of examining the allegations – Plea of Petitioner that the members of the Committee suffered from an institutional bias and that the petitioner could not expect fairplay from the members who were already party to the decision to initiate the disciplinary action against the petitioner – Held: Merely because all the members of a society participated in the discussion concerning the allegations, the Society can't be expected to appoint an outsider to hold the disciplinary proceeding – Again, merely because a member has participated in such a meeting he cannot be accused of bias to disentitle him from being appointed on the Disciplinary Committee – The petitioner may have an apprehension of bias, but it is not possible to say from the material on record that he was facing a real danger of bias – One cannot presume that the three member committee will not afford the petitioner a fair hearing, or that it will not render unbiased findings – Taking a view as canvassed by the petitioner will lead to a demand for interference in the enquiries conducted by all other societies in such situations, and that cannot be approved.

Doctrines – Doctrine of necessity – Held: The doctrine of necessity is a common law doctrine, and is applied to tide over the situations where there are difficulties – Law does not contemplate a vacuum, and a solution has to be found out rather than allowing the problem to boil over.

The first respondent-society (BCCI) organized a cricket competition (IPL), and the petitioner, a member of first respondent, was appointed as the incharge Chairman thereof. The rights for telecasting of the cricket games were auctioned by the first respondent. The first respondent received a complaint from a bidder alleging breach of confidentiality against the petitioner. The petitioner was suspended from his position and was served with show cause notices. The petitioner denied the allegations and also wrote to 'M', the Honorary President of the first respondent requesting him to recuse himself from the decision making process in the interest of fairness. Consequently, 'M' recused himself from the Disciplinary Committee of respondent no.1, which was to decide upon the show cause notices and one 'J' was appointed in his place.

The petitioner thereafter filed a Writ Petition raised two objections. The first ground of objection was that the Disciplinary Committee was not validly constituted and that since the President of BCCI had recused himself from the Committee, the Disciplinary Committee was required to either wait until the next President was elected so that the committee was reconstituted after including the new President therein, or if the Committee was to consist of three persons other than the President, it should consist of persons who were unbiased and acceptable to the petitioner. The second objection was that the members of the Committee suffered from an institutional bias and that the petitioner could not expect fairplay from the members who were already party to the decision to initiate the disciplinary action against the

petitioner. This Writ Petition was dismissed. The High Court held that the substitution of the President by 'J' was acceptable on the basis of the doctrine of necessity and also repelled the argument with respect to bias. It further held that in case the petitioner had any grievance against the functioning of any of the members of the Committee, he may apply to the Committee that such a member may recuse himself from the Committee.

Subsequently, the petitioner applied to the Committee members that they should all recuse themselves from functioning as members of the Disciplinary Committee. The Committee rejected the application. It led to the filing of a second Writ Petition by the petitioner before another bench of the High Court. That petition also came to be dismissed.

Meanwhile, the first respondent extended the term of the Disciplinary Committee for continuing with the enquiry against the petitioner. The Petitioner challenged the extension granted to the Committee, but the challenge was negated by a different bench of the High Court.

All the said three orders passed by the different benches of the High Court were challenged in the instant petitions.

Dismissing the petitions, the Court

HELD: 1.1. The objection of the petitioner to the forming of the Disciplinary Committee was on the basis of Rule 1(q) of the Board of Control for Cricket in India. This rule states that the Board shall at every Annual General Meeting appoint a Committee consisting of three persons. The President shall be one of them and the function of the Committee is to inquire into and deal with the matters relating to any acts of misconduct etc. In view of the wording of this rule, there is no difficulty in accepting that normally the President has to be one of the members of this Committee. The question is with respect to the necessity arising on account of the

President being unavailable in a situation like the present one. [Para 27] [1024-H; 1025-A-B]

1.2. In the instant case the petitioner himself had objected to the President being the member of the Committee. That being the position, the President recused himself from the Committee. When a situation thus arises, in view of the objection of the petitioner, the society cannot be left without a remedy. The rule does not say that if the President cannot be a member of the Committee no substitution shall take place, nor does it say that the substituting member should be one not objected by the delinquent against whom the enquiry is proposed. A member of the society having accepted the rules, agrees to the disciplinary authority of the three member Committee which is to be constituted under these rules. He cannot claim a right to dictate as to who should be the members of the Committee. Any such interpretation will lead to a situation that the delinquent will decide as to who should be the members of the Disciplinary Committee. Such a submission cannot be accepted. The rule is elastic enough, and in an appropriate situation the word 'shall' can be read as 'may'. It is very clear that, normally the President shall be a member of three Member Committee, but if for any reason his presence on the Committee is objected to on grounds of unfairness, and he recuses himself therefrom, the respondent no.1 certainly has the power to substitute him by some other person. The action of the respondents is sought to be defended on the basis of necessity. The doctrine of necessity is a common law doctrine, and is applied to tide over the situations where there are difficulties. Law does not contemplate a vacuum, and a solution has to be found out rather than allowing the problem to boil over. Otherwise, one will have to wait for one more year for a new President to be elected, which submission cannot be accepted. [Para 30] [1026-G-H; 1027-A-F]

1.3. As far as the disciplinary actions by societies and associations are concerned, many of the societies under the Tamil Nadu Societies Registration Act and similar State Acts, are smaller societies. It is another matter that the first respondent society is a large body having large resources. If the members or the Managing Committee of a Society receive a complaint of any misconduct on the part of any of its office bearers, surely the subject is expected to be taken up in the General Body Meeting of the Society. These societies are expected to sort out the future course of action with respect to such allegations on their own on the basis of their internal disciplinary mechanism. Merely because all the members of a society have participated in the discussion concerning such allegation, the Society can't be expected to appoint an outsider to hold the disciplinary proceeding. It may not be financially possible as well for such small societies. That apart, only a prima facie opinion is formed in such meetings. Merely because a member has participated in such a meeting he cannot be accused of bias to disentitle him from being appointed on the Disciplinary Committee. [Para 31] [1027-G-H; 1028-A-C]

1.4. A mere apprehension of bias cannot be a ground for interference. There must exist a real danger of bias. Though such domestic inquiries have undoubtedly to be fair, a member of a society cannot stretch the principle of fairness to the extent of demanding a tribunal consisting of outsiders, on the basis that the society members are biased against him. In the instant case, the petitioner has, in clear terms stated that he was not making any personal allegations against two members of the Disciplinary Committee, viz. 'J' and 'S'. Even the grievance against the third member 'A' cannot be said to be well founded. The petitioner was alleging institutional bias against the members of the Committee, which was only on the basis of their participation in the meetings of

the first respondent society. In this way, institutional bias can be alleged against every member of the Governing Council of IPL and the General Body of the first respondent which cannot be accepted. The petitioner may have an apprehension, but it is not possible to say from the material on record that he was facing a real danger of bias. One cannot presume that the three member committee will not afford the petitioner a fair hearing, or that it will not render unbiased findings. Taking a view as canvassed by the petitioner will lead to a demand for interference in the enquiries conducted by all other societies in such situations, and that cannot be approved. This is apart from the view taken by this Court, that the Committee was validly constituted under Rule 1(q) in view of the necessity arising due to the recusal of the President of BCCI from the Committee. Similarly, there was no error in the order of the Disciplinary Committee declining to recuse, or the decision of the Annual General Meeting of the first respondent to extend the term of this Disciplinary Committee for the inquiry against the petitioner. [Paras 32, 33] [1028-E-H; 1029-A-E]

M.P. Special Police Establishment v. State of M.P.; **2004 (8) SCC 788: 2004 (5) Suppl. SCR 1020 – followed.**

State of U.P. v. Manbodhan Lal **AIR 1957 SC 912: 1958 SCR 533 and** *State of A.P. and another v. Dr. Rahimuddin Kamal* **AIR 1997 SC 947: 1997 (3) SCC 505 – relied on.**

Manak Lal v. Prem Chand Singhvi **AIR 1957 SC 425: 1957 SCR 575;** *S. Parthasarthi v. State of Andhra Pradesh* **1974 (3) SCC 459: 1974 (1) SCR 697;** *T.P. Daver v. Lodge Victoria* **AIR 1963 SC 1144: 1964 SCR 1;** *Kumaon Mandal Vikas Nigam Ltd. v. Girija Shankar Pant* **2001 (1) SCC 182: 2000 (4) Suppl. SCR 248;** *Election Commission of India v. Dr. Subramaniam Swamy* **1996 (4) SCC 104: 1996 (1) Suppl. SCR 637;** *Justice P.D. Dinakaran v. Hon'ble Judges Inquiry Committee and ors* **2011 (6) SCALE 97 – referred to.**

R v. Sussex, JJ, ex. p. McCarthy **(1924) 1 KB 256;** *R. v. Gough* **(1993) 2 All ER 724;** *Porter v. Magill* **(2002) 1 ALL ER 465;** *McInnes v. Onslow Fane* **(1978) 3 All ER 211 – referred to.**

Case Law Reference:

1957 SCR 575	**referred to**	**Para 21**
1974 (1) SCR 697	**referred to**	**Para 21**
(1924) 1 KB 256	**referred to**	**Para 21**
(1993) 2 All ER 724	**referred to**	**Para 21**
(2002) 1 ALL ER 465	**referred to**	**Para 21**
(1978) 3 All ER 211	**referred to**	**Para 22**
1964 SCR 1	**referred to**	**Para 23, 32**
2004 (5) Suppl. SCR 1020	**followed**	**Para 24, 32**
2000 (4) Suppl. SCR 248	**referred to**	**Para 24**
1996 (1) Suppl. SCR 637	**referred to**	**Para 25**
2011 (6) SCALE 97	**referred to**	**Para 26**
1958 SCR 533	**relied on**	**Para 28**
1997 (3) SCC 505	**relied on**	**Para 29**

CIVIL APPELLATE JURISDICTION : Petition for Special Leave (Civil) No. 27157 of 2010.

From the Judgment & Order dated 15.7.2010 of the High Court of Bombay in WP No. 1370 of 2010.

Ram Jethmalani, Vinod Bobde and Pravin, H. Parekh, Abhishek Singh, Jayant Mohan, Sarvesh Singh Baghel, Meenakshi Chatterjee, Rajat Nair, Anukur Chawala and Parekh & Co. for the Petitioner.

C.A. Sundaram, Mukul Rohatgi, Ranjit Kumar Amit Sibal, Akhila Kaushik, Raghu Raman, Ruchira Gupta, Deepti Sarin, Ishan Gaur, Rohini Musa, A Chattopadhyay, Zafar Inayat, Yogesh Karanjawala & Co., Radha Rangaswamy, Ranjeeta Rohatgi and Hari Shankar for the Respondents.

The Judgment for the Court was delivered by

H.L. GOKHALE J. 1. These three Special Leave Petitions seek to challenge three orders passed by three different benches of Bombay High Court, on the proceedings initiated by the appellant against the first respondent Board of Control for Cricket in India (hereinafter referred to either as 'first respondent' or the 'BCCI').

2. The first respondent is a society registered under the Tamil Nadu Societies Registration Act, 1975. The petitioner, herein, is a member of the first respondent representing one of its constituent associations. As a part of its activities, the first respondent had organized a cricket competition under the banner 'Indian Premier League' shortly known as (IPL), and the petitioner was appointed as the incharge Chairman thereof. Considering the popularity of the game of cricket, these games were to be televised. Telecasting of these games was expected to fetch a good income to BCCI and the firm entrusted with the telecasting of these games, and therefore, the rights for telecasting were auctioned by first respondent through a bidding process for an appropriate price.

3. In April 2010, the first respondent received a complaint from a bidder alleging breach of confidentiality against the petitioner. The petitioner was therefore, suspended from his position on 25.4.2010.

(a) He was served with a show cause notice dated 25.4.2010 inter-alia alleging/accusing him of (i) accepting multi-million dollar kickback while assigning the telecasting rights for IPL matches; (ii) attempting to rig the bids for the two new IPL teams-that were auctioned the previous month; (iii) having proxy stakes in IPL teams; (iv) entering into transactions with rank strangers against the mandate of the Governing Council of the IPL; (v) helping family members in benefiting from the IPL contracts.

(b) Thereafter another show cause notice was issued to him on 6.5.2010 which alleged inter-alia that he was seeking to create a parallel cricket body at international level (particularly in England) and thereby subvert the present International Cricket

structure. The petitioner sought certain information and documents from the first respondent in this behalf, but the same were not furnished.

4. The petitioner sent his reply to the first show cause notice on 15.5.2010 denying the allegations therein. Thereafter, he wrote to Shri Shashank Manohar, the Honorary President of the first respondent on 25.5.2010 requesting him that he should recuse himself from the decision making process in the interest of fairness. The petitioner then sent his reply to the second show cause notice on 31.5.2010. The first respondent served him the third show cause notice on the same day i.e. 31.5.2010 wherein they alleged amongst other things that the petitioner had committed irregularities and illegalities in the award of the IPL tenders for the Theatrical Rights. The petitioner replied to this notice on 15.6.2010.

5. Consequent upon the objection raised by the petitioner, Shri Shanshank Manohar recused himself from the Disciplinary Committee, which was to decide upon the show cause notices. The first respondent has a disciplinary committee to deal with the misconducts of its members. It is constituted under rule 1 (q) of the rules governing the first respondent society. This rule reads as follows:-

> (q) Disciplinary Committee: The Board shall at every Annual General Meeting appoint a Committee consisting of three persons of whom the President shall be one of them to inquire into and deal with the matter relating to any act of indiscipline or misconduct or violation of any of the Rules and Regulations by any player, Umpire, Team, Official, Administrator, Selector or any person appointed or employed by BCCI. The Committee shall have full power and authority to summon any person(s) and call for any evidence it may deem fit and necessary and make and publish its decision including imposing penalties if so required, as provided in the Memorandum and rules and Regulations."

6. On Shri Manohar recusing himself from the Committee,

Shri Jyotiraditya Scindia was appointed in his place. The other two members of the Committee were Shri Chirayu Amin and Shri Arun Jaitely as nominated earlier. The petitioner filed a Writ Petition bearing No. 1370/2010 in the Bombay High Court, and prayed that the order of suspension be recalled and he be reinstated, the three show cause notices be directed to be withdrawn, and the decision to refer the matter to the Disciplinary Committee be also directed to be recalled. Alternatively he prayed that the first respondent be directed to appoint a mutually acceptable and an independent person or panel to consider the replies of the Petitioner to the show cause notices, and to decide whether the allegations are required to be referred to the Disciplinary Committee or the matter should be closed.

7. The petitioner raised two issues in this petition.

(i) The first ground of objection was that the Committee was not validly constituted. This was on the footing that the rules and regulations of the first respondent society are a matter of contract amongst its members, and the Committee should be constituted strictly in accordance with the particular rule. The above referred rule 1 (q) provides for a Disciplinary Committee consisting of the President and two other persons. Since the President had recused himself from the Committee, the Disciplinary Committee will have to either wait until the next President is elected so that the committee is reconstituted after including the new President therein, or if the Committee is to consist of three persons other than the President, it should consist of persons who are unbiased and acceptable to the petitioner.

(ii) The second objection was that the members of the Committee suffered from an institutional bias. The petitioner could not expect fairplay from the members who have already been party to the decision to initiate the disciplinary action against the petitioner.

8. This Writ Petition was dismissed by a Division Bench of Bombay High Court by its judgment and order dated

15.7.2010. The Division Bench rejected the submission about the defect in the Committee. It held that the substitution of the President by Shri Jyotiraditya Scindia was acceptable on the basis of the doctrine of necessity. It repelled the argument with respect to bias, and held that whatever decision is rendered by the Committee could be challenged by the petitioner after the decision became available. The Court further held that in case the petitioner had any grievance against the functioning of any of the members of the Committee, he may apply to the Committee that such a member may recuse himself from the Committee. This order has been challenged in the first SLP (C) No. 27157/2010.

9. Subsequent to the order passed by the Division Bench, the petitioner applied to the Committee members that they should all recuse themselves from functioning as members of the Disciplinary Committee. The Committee rejected that application. It led to the filing of second Writ Petition by the petitioner in Bombay High Court bearing Petition No. 1909 of 2010. That petition also came to be dismissed by another Division Bench of Bombay High Court by its judgment and order dated 15.9.2010. This order is challenged in the second CC No. 15249/2010.

10. During the course of the calendar year 2010, the first respondent constituted a regular Disciplinary Committee for 2010-2011, and extended the special Committee consisting of Sarvashri Arun Jaitley, Chirayu Amin and Jyotiraditya Scindia for continuing with the enquiry against the petitioner. The extension granted to this Committee was challenged by the petitioner by filing Suit No. 195/2011 on the original side of the Bombay High Court. The notice of motion moved therein for injunction against the Committee came to be rejected first by a Single Judge and then in appeal by a Division Bench of the High Court by its order dated 5.4.2011. This order is challenged in the third CC No. 11545/2011. Since all these petitions are basically arising out of the same controversy, they have been heard and are being decided together.

11. Shri Ram Jethmalani, learned Senior Counsel and Shri Vinod Bobde, learned Senior Advocate have appeared for the petitioner. Shri Aryama Sundaram, learned Senior Advocate has appeared for the first Respondent. Shri Ranjit Kumar, Senior Advocate has appeared for Shri N. Srinivasan, Secretary of first respondent.

12. As stated above, the objections of the petitioner to the constitution of the Committee are two fold. Firstly, the Committee was not validly constituted and secondly, it suffers from institutional bias. As far as the first objection is concerned, Shri Jethmalani submitted that under the above rule 1 (q), the Disciplinary Committee can consist only of the President and two other persons. A society is constituted as a matter of contract amongst the members who form the society. It is expected to function as per the rules and regulations of the society which constitute the terms of contract amongst its members. In the present case, the rule concerning the Disciplinary Committee required the Committee to consist of the President and two other persons. If the President recuses himself, from being a member of the disciplinary Committee, either the society should wait until a new President is elected to constitute the new Disciplinary Committee, or since it is a matter of contract, the Committee be reconstituted with such persons to whom the petitioner has no objection. Shri Jethmalani submitted that he has no objection to a Committee of three former Judges or even a decision by a former Judge of this Hon'ble Court. In his submission the petitioner had a reasonable apprehension of bias against the members of the Committee, and therefore a reconstitution of the Committee as suggested by the petitioner was desirable from the point of view of fair-play.

13. In view of these suggestions, we asked Shri Sundaram, learned senior counsel for the first respondent, whether the first respondent was agreeable to accept this suggestion. In deference thereto, Shri Sundaram did take instructions, but pointed out that the Disciplinary Committee of the first respondent is required to conduct numerous inquiries.

If the first respondent agrees to a Disciplinary Committee consisting of outsiders in this matter, it may have to agree to similar request in many such matters, and that would not be desirable.

14. Shri Sundaram submitted that it is only because of the objection of the petitioner that Shri Manohar had recused himself from the Committee in all fairness. In a situation like this, the first respondent had to reconstitute the Committee by substituting another person in place of the President, and in view of the serious allegations against the petitioner, the inquiry could not wait for one more year for the next President to be elected. Since, the substitution had become necessary in view of petitioner's objection, it was not fair on his part to make any grievances against the reconstituted Committee. This submission of the first respondent based on the doctrine of necessity has been accepted by the Bombay High Court in its judgment rendered in the first Writ Petition bearing No. 1370 of 2010.

15. As far as the allegation of bias against the members of the Committee is concerned, the petitioner had in his letter dated 25.5.2010 objected to Shri Shashank Manohar remaining on the Committee. At that time he did not raise any objection to the other members of the Committee, namely Shri Arun Jaitely and Shri Chirayu Amin. In paragraph 3 (C) of this letter he stated as follows:-

> "C. It is submitted that it is not my endeavor to create any technical hurdle in the process and no hurdle shall be caused if an independent body constituting of other members of the Board is formed. It is submitted that there are only 14 members of the Governing Council and hence BCCI can choose and appoint independent persons to investigate into these allegations……."

16. In his Writ Petition No.1370 of 2010, the petitioner joined S/Shri Chirayu Amin and Arun Jaitely and Jyotiraditya Scindia as respondent no.4, 5 and 6. In para 4 of this Writ Petition, he stated as follows:-

> "4. Respondent Nos.3 (sic), 4 and 5 and 6 are members of the Disciplinary Committee of Respondent No.1 ("the Disciplinary Committee"). This Disciplinary Committee has been entrusted with the function of examining the allegations made against the Petitioner, in the three Show Cause Notices, issued to the Petitioner. The Petitioner is challenging the constitution, composition and continuation of the Disciplinary Committee. The Petitioner is also alleging institutional bias against the Disciplinary Committee. The Petitioner is however making no personal allegation of personal bias or malice against Respondent Nos. 5 and 6."

Thus, it is clear that as far as Shri Jaitely and Shri Scindia are concerned, the petitioner stated that he was not making any personal allegation of personal bias or malice against them. He was alleging institutional bias against the members of the Disciplinary Committee.

17. As far as Shri Chirayu Amin is concerned, all that was additionally stated against him was that Shri Amin had a 10% share in a party which gave the bid on behalf of an applicant from Pune. Shri Sundaram pointed out that the bid of that party was rejected. The only other blame against Shri Amin was that he succeeded the petitioner as the Chairman of IPL and, therefore, he would be biased against him.

18. The petitioner denies that he has played any deceit in the matter of entering into any of the disputed agreements, or that he has received any kickbacks. The submission of Shri Jethmalani concerning bias was on the footing that the disputed agreements under which the petitioner is alleged to have made some 80 million dollars by way of kickbacks, were approved by the Governing Council of IPL on 11.8.2009. Thus, this was known to all concerned and there was no deceit on the part of the petitioner, and therefore, there was no substance in the allegation. Respondents point out that these three members of the Disciplinary Committee were not present in that meeting, though, they were present in the subsequent meeting held on

2.9.2009 when these minutes were approved. Petitioner's allegation of bias is also on the footing that the three members of the Committee were present in the meeting of the Governing Council of IPL held on 25.6.2010, when it decided to charge the petitioner with fraud. They were also present in the Special General Meeting of the first respondent held on 3.7.2010 where the President of first respondent was authorized to take appropriate civil and criminal action against the petitioner. An FIR was lodged in pursuance thereto on 13.10.2010. It is therefore contended that the petitioner has a reasonable apprehension of bias against these three members that he may not get a fair hearing and an unbiased finding on the allegations from them.

19. As far as this aspect is concerned, the respondents maintain that they were kept in dark about the agreement/ arrangement that the petitioner entered into with the concerned parties from whom he is alleged to have received kickbacks. In any case, the three members of the Committee were not present in the meeting of Governing Council of IPL held on 11.8.2009 when the disputed agreements were allegedly approved. And to take the argument at its best, they were present in the three subsequent meetings referred by the petitioner. These agreements were approved by the General Body on 2.9.2009. The further action was also approved in the Governing Council meeting of 25.6.2010 and Special General Meeting of 3.7.2010. The question is whether the participation by these members in these three meetings would disqualify them from being the members of the Disciplinary Committee.

20. In view of these objections to these three members of the committee, we asked Shri Jethmalani, whether he was objecting to these members because they were members of the Governing Council in which case some other members from the General Body could be asked to be members of the Committee. Shri Jethmalani, however stated that the appellant was objecting only to these three members of the Governing Council, and not even to the other members of the Governing Council. Now, there is no logic as to why only these three

persons can be said to be suffering from institutional bias, and not the other members of the Governing Council. And, if the other members of the Governing Council could be members of the Disciplinary Committee, there is no reason as to why these three members could not be.

21. Shri Jethmalani submitted that we are concerned with reasonable apprehension of bias. This principle has been accepted by this Court in *Manak Lal Vs. Prem Chand Singhvi* reported in [AIR 1957 SC 425], in the context of an inquiry under the Bar Council Act, 1926. At the end of paragraph 6 this Court had observed that '*actual proof of prejudice in such cases may make the appellant's case stronger but such proof is not necessary in order that the appellant should effectively raise the argument that the tribunal was not properly constituted*''. He pointed out that in *S. Parthasarthi Vs. State of Andhra Pradesh* reported in [1974 (3) SCC 459], the view taken by the Court was similar. This Court held that the test of likelihood of bias was based on reasonable apprehension of a reasonable man fully cognizant of the facts, and relied upon the leading English judgment in the case of *R Vs. Sussex, JJ, ex. p. McCarthy* reported in (1924) 1 KB 256. In paragraph 16 of *S. Parthasarthi* this Court has observed as follows:-

> "The tests of "real likelihood" and "reasonable suspicion" are really inconsistent with each other. We think that the reviewing authority must make a determination on the basis of the whole evidence before it, whether a reasonable man would in the circumstances infer that there is real likelihood of bias. The Court must look at the impression which other people have. This follows from the principle that justice must not only be done but seen to be done. If right minded persons would think that there is real likelihood of bias on the part of an inquiring officer, he must not conduct the enquiry; nevertheless, there must be a real likelihood of bias. Surmise or conjecture would not be enough. There must exist circumstances from which reasonable men would think it probable or likely that the inquiring officer will be prejudiced against the delinquent.

The Court will not inquire whether he was really prejudiced. If a reasonable man would think on the basis of the existing circumstances that he is likely to be prejudiced, that is sufficient to quash the decision [see per Lord Denning, H.R. in Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon]. 1 1. (1968) 3 WLR 694 at 707

We may mention that Shri Jethmalani drew our attention to the recent development in English Law in this behalf, where 'real danger of bias' is no longer considered to be the test, but the relevant consideration is as to whether there was real possibility that the tribunal was biased. He referred to the judgments in the cases of *R. Vs. Gough* reported in (1993) 2 All ER 724, and *Porter Versus Magill* reported in (2002) 1 ALL ER 465.

22. Shri Jethmalani and Shri Bobde drew our attention to a judgment of House of Lords in *Mclnnes Vs. Onslow Fane* reported in (1978) 3 All ER 211 wherein three types of cases are discussed, viz. (i) application cases; (ii) inspection cases; and (iii) forfeiture cases. It was submitted that principles of natural justice have to be followed in any case in the category of forfeiture cases. In the present case the reputation of the petitioner was at stake and, therefore, the principle that no man should be judge in his own case, had to be followed. According to the petitioner, the members of the Disciplinary Committee could not be said to be unbiased. They were part of the institution, and therefore suffered from institutional bias.

23. In reply, Shri Sundaram, learned counsel for BCCI submitted that the members of a Society have to abide by the Rules and Regulations thereof and submit themselves to the jurisdiction of the domestic tribunal, though some of the members of the tribunal may even appear to him to be acting like prosecutors. A member cannot place himself above the Institution. He is bound by the rules, and cannot complain unless the inquiry disclosed malafides or unfair treatment. A society is comparable to a club or a Masonic Lodge. A judgment in the case of *T.P. Daver Vs. Lodge Victoria* reported in [AIR

1963 SC 1144] is relevant in this behalf wherein this Court has held in paragraph 7 thereof as follows:-

"7. Another aspect which may also be noticed is how far and to what extent the doctrine of bias may be invoked in the case of domestic tribunals like those of clubs. The observations of Maugham J. in Maclean's case (1929) 1 Ch. 602 in this context may be noticed. The learned Judge observed in that case thus :

"A person who joins in association governed by rules under which he may be expelled,..... has in my judgment no legal right of redress if he be expelled according to the rules, however unfair and unjust the rules or the action of the expelling tribunal may be provided that it acts in good faith..... The phrase, "the principles of natural justice," can only mean in this connection the principles of fair play so deeply rooted in the minds of modern Englishmen that a provision for an inquiry necessarily imports that the accused should be given his chance of defence and explanation. On that point there is no difficulty. Nor do I doubt that in most cases it is a reasonable inference from the rules that if there is anything of the nature of a lis between two persons, neither of them should sit on the tribunal."

Another difficulty that one is confronted with in proceedings held by committees constituted by clubs is to demarcate precisely the line between the prosecutor and the Judge. Maugham, J. noticed this difficulty and observed in Maclean's case1 (1929) 1 Ch. 602 thus :

"In many cases the tribunal is necessarily entrusted with the duty of appearing to act as prosecutors as well as that of judges; for there is no one else to prosecute. For example, in a case where a council is charged with the duty of considering the conduct of any member whose conduct is disgraceful and of expelling him if found guilty of such an offence, it constantly occurs that the matter is brought to the attention of the council by a report of legal

proceedings in the press. The member is summoned to appear before the council. The council's duty is to cause him to appear and to explain his conduct. It may be that in so acting the council are the prosecutors. In one sense they are; but if the regulations show that the council is bound to act as I have mentioned and to that extent to act as prosecutors, it seems to be clear that the council is not disqualified from taking the further steps which the rules require."

Though it is advisable for a club to frame rules to avoid conflict of duties, if the rules sanction such a procedure, the party, who has bound himself by those rules, cannot complain, unless the enquiry held pursuant to such rules discloses malafides or unfair treatment."

1. LR (1929) 1 Ch D 602, 623

24. On the issue of bias however, Shri Sundaram pointed out that as far as the law in India is concerned, a Constitution Bench of this Court has already clarified the legal position, and held that the test of 'real danger' of bias is the valid test and not the one of reasonable apprehension. In *M.P. Special Police Establishment Vs. State of M.P.* reported in [2004 (8) SCC 788], the Constitution Bench was concerned with the question of bias in the context of sanction to prosecute the ministers. In paragraph 14, the Court observed as follows:-

"…..The question in such cases would not be whether they would be biased. The question would be whether there is reasonable ground for believing that there is likelihood of apparent bias. Actual bias only would lead to automatic disqualification where the decision-maker is shown to have an interest in the outcome of the case. The principle of real likelihood of bias has now taken a tilt to "real danger of bias" and "suspicion of bias……"

The Constitution Bench referred with approval an earlier judgment in the case of *Kumaon Mandal Vikas Nigam Ltd. Vs. Girija Shankar Pant* reported in [2001 (1) SCC 182]. In that

case the question was whether the Managing Director had a bias against the respondent therein. This Court had held that mere apprehension of bias was not sufficient but that there must be real danger of bias.

25. With respect to the doctrine of necessity, Shri Sundaram referred to the judgment of this Court in the case of *Election Commission of India Vs. Dr. Subramaniam Swamy* reported in [1996 (4) SCC 104] where in the context of the disagreement amongst the Election Commissioners, this Court had applied this doctrine of necessity. He pointed out that this Court had even observed that *'if the choice is between allowing a biased person to act or to stifle the action altogether, the choice must fall in favour of the former as it is the only way to promote decision making'.* Shri Jethmalani on the other hand submitted that the doctrine of necessity could be applied in cases of constitutional or statutory requirements, and cannot be brought into in matters of contract. He submitted that this judgment should be read as such, and assailed the application of doctrine of necessity in the present case.

26. Shri Jethmalani drew out attention to a recent judgment of this Court in *Justice P.D. Dinakaran Vs. Hon'ble Judges Inquiry Committee and ors* reported in [2011 (6) SCALE 97], where this Court accepted the grievance of apparent bias against a Jurist Member of the Inquiry Committee and requested the Chairman of Rajya Sabha to nominate another jurist in his place in the inquiry against the petitioner. Shri Sundaram however, pointed out that the committee was constituted as a matter of Constitutional requirement where the benchmark required with respect to fairness will be quite high. In the present matter we are concerned with the question of likely unfairness on the part of members of a domestic tribunal of a society, and that context has to be kept in mind.

27. We have noted the submissions of the rival parties. The objection of Shri Jethmalani to the forming of the Disciplinary Committee was on the basis of rule 1 (q). When we read this rule we find that the rule states that the Board shall at every Annual General Meeting appoint a Committee consisting of

three persons. The President shall be one of them and the function of the Committee is to inquire into and deal with the matters relating to any acts of misconduct etc. In view of the wording of this rule, there is no difficulty in accepting that normally the President has to be one of the members of this Committee. The question is with respect to the necessity arising on account of the President being unavailable in a situation like the present one.

28. In this connection, we must note that the word 'shall' has been interpreted as 'may' in a number of judgments while interpreting such provisions on different occasions. In *State of U.P. Vs. Manbodhan Lal* reported in [AIR 1957 SC 912] a Constitution Bench of this Court was concerned with the order of Compulsory Retirement of the respondent who had challenged it on the ground that the Union Public Service Commission had not been consulted. This was in the context of Article 320 (3) (c) of the Constitution which reads as follows:-

> *"320 (3)* "*The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted.*
>
> (a)……..
>
> (b)…….
>
> (c) on all disciplinary matters affecting a person serving under the Government of India, or the Government of a State in a civil capacity, including memorials or petitions relating to such matters."

The Constitution Bench held that the consultation was not mandatory. The Court observed in paragraph 11 of the judgment as follows:-

> "……..the use of the word "shall" in a statute, though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, that unless the words of the statute are punctiliously followed, the proceeding, or the outcome of the proceeding, would be invalid.

On the other hand, it is not always correct to say that where the word "may" has been used, the statute is only permissive or directory in the sense that non-compliance with those provisions will not render the proceeding invalid. In that connection, the following quotation from Crawford on 'Statutory Construction' - Art. 261 at p. 516, is pertinent :

> "The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other....."

29. We may as well profitably refer to a judgment of this Court in the case of *State of A.P. and another Vs. Dr. Rahimuddin Kamal* reported in [AIR 1997 SC 947]. In that matter this Court was concerned with Rule 4(2) of the Andhra Pradesh Civil Services (Disciplinary Proceedings Tribunal) Rules, 1961, where the expression 'shall' had been used in the Rules, making it obligatory upon the part of the Government, to examine the records, consult the Head of the Department and Vigilance Commission and then pass an appropriate order. In that case the order of removal from service was passed in accordance with law and after conducting appropriate inquiry but without consulting the Commission. The Court took the view that the expression 'shall' had to be construed as 'may' and non consultation with the Commission would not render the order illegal or ineffective.

30. In the instant case the petitioner himself had objected to the President being the member of the Committee. That being the position, the President recused himself from the Committee. When a situation thus arises, in view of the objection of the petitioner, the society cannot be left without a remedy. The submission of Shri Jethmalani is that the alternate disciplinary committee has to be one which is not objected by

the petitioner. The rules lay down the terms of the contract amongst the members of the society, and the terms can be altered only with the consent of the concerned members. As far as this submission is concerned, we must note that firstly, the rule does not say that if the President cannot be a member of the Committee no substitution shall take place, nor does it say that the substituting member should be one not objected by the delinquent against whom the enquiry is proposed. This rule is being canvassed as a term of the contract of membership. A member of the society having accepted the rules, agrees to the disciplinary authority of the three member Committee which is to be constituted under these rules. He cannot claim a right to dictate as to who should be the members of the Committee. Any such interpretation will lead to a situation that the delinquent will decide as to who should be the members of the Disciplinary Committee. Such a submission cannot be accepted. In our understanding the rule is elastic enough, and in an appropriate situation the word 'shall' can be read as 'may'. It is very clear that, normally the President shall be a member of three Member Committee, but if for any reason his presence on the Committee is objected to on grounds of unfairness, and he recuses himself therefrom, the respondent no.1 certainly has the power to substitute him by some other person. The action of the respondents is sought to be defended on the basis of necessity. The doctrine of necessity is a common law doctrine, and is applied to tide over the situations where there are difficulties. Law does not contemplate a vacuum, and a solution has to be found out rather than allowing the problem to boil over. Otherwise, as proposed by Shri Jethmalani one will have to wait for one more year for a new President to be elected, which submission cannot be accepted.

31. As far as the disciplinary actions by societies and associations are concerned, many of the societies under the Tamil Nadu Societies Registration Act and similar State Acts, are smaller societies. It is another matter that the first respondent society is a large body having large resources. If the members or the Managing Committee of a Society receive

a complaint of any misconduct on the part of any of its office bearers, surely the subject is expected to be taken up in the General Body Meeting of the Society. These societies are expected to sort out the future course of action with respect to such allegations on their own on the basis of their internal disciplinary mechanism. Merely because all the members of a society have participated in the discussion concerning such allegation, the Society can't be expected to appoint an outsider to hold the disciplinary proceeding. It may not be financially possible as well for such small societies. That apart, only a prima facie opinion is formed in such meetings. Merely because a member has participated in such a meeting he cannot be accused of bias to disentitle him from being appointed on the Disciplinary Committee.

32. We have noted the submissions of the petitioner with respect to his apprehensions. However, as far as the propositions of law are concerned, we cannot take a different view in the present case from the law laid down in the judgment of the Constitution Bench of this Court in *M.P. Special Police Establishment* (supra), and the judgment of four Judges in *T.P. Daver Vs. Lodge Victoria* (supra). As held in *M.P. Special Police Establishment,* a mere apprehension of bias cannot be a ground for interference. There must exist a real danger of bias. And, following *T.P. Daver Vs. Lodge Victoria,* though such domestic inquiries have undoubtedly to be fair, a member of a society cannot stretch the principle of fairness to the extent of demanding a tribunal consisting of outsiders, on the basis that the society members are biased against him. As we have noted, the petitioner has, in clear terms stated that he was not making any personal allegations against two members of the Disciplinary Committee, viz. Shri Jaitely and Shri Scindia. Even the grievance against the third member Shri Amin cannot be said to be well founded. The petitioner was alleging institutional bias against the members of the Committee, which was only on the basis of their participation in the meetings of the first respondent society. In this way, institutional bias can be alleged against every member of the Governing Council of IPL and the General Body of the first respondent which cannot be

accepted. The petitioner may have an apprehension, but it is not possible to say from the material on record that he was facing a real danger of bias. We cannot presume that the three member committee will not afford the petitioner a fair hearing, or that it will not render unbiased findings. Taking a view as canvassed by the petitioner will lead to a demand for interference in the enquiries conducted by all other societies in such situations, and that cannot be approved in view of the law already laid down by this Court. This is apart from the view that we have taken, that the Committee is validly constituted under Rule 1(q) in view of the necessity arising due to the recusal of the President of BCCI from the Committee.

33. This being the position, we find no error in the judgment and order dated 15.7.2010 passed by the Division Bench of the Bombay High Court in Writ Petition No.1370 of 2010. Similarly, we do not find any error in the order of the Disciplinary Committee declining to recuse, or the decision of the Annual General Meeting of the first respondent to extend the term of this Disciplinary Committee for the inquiry against the petitioner. Consequently, there was no error in the two judgments of the High Court upholding those two decisions as well.

34. For the reasons stated above, all the three petitions are dismissed, though parties can certainly bear their cost of the litigation.

B.B.B. Special Leave Petitions dismissed.

MOHD. IMRAN KHAN

v.

STATE (GOVT. OF NCT OF DELHI)

(Criminal Appeal No. 1516 of 2010)

OCTOBER 10, 2011

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

Penal Code, 1860 – s.376 – Rape – Age of prosecutrix –Margin of error in age ascertained by radiological examination – Held: The medical report and the deposition of the Radiologist cannot predict the exact date of birth, rather it gives an idea with a long margin of 1 to 2 years on either side.

Penal Code, 1860 – s.376 – Rape – Testimony of prosecutrix – Appreciation of – Held: The statement of prosecutrix, if found to be worthy of credence and reliable, requires no corroboration – The court may convict the accused on the sole testimony of the prosecutrix – On facts, the trial court found no reason to disbelieve the prosecutrix – The evidence of rape stood fully corroborated by the medical evidence – Conviction of accused-appellants accordingly upheld – Evidence Act, 1872 – s.114(b) and s.118.

Penal Code, 1860 – s.376 r/w s.34 – Conviction under, for rape of minor – Issue of sentencing – Trial Court had sentenced the accused-appellants to RI for 7 years – High Court after taking into consideration all the circumstances including that the incident took place in 1989; the appeal before it was pending for more than 10 years; the prosecutrix had willingly accompanied the appellants to another city and stayed with them in the hotel; and she was more than 15 years of age when she eloped with the appellants and the appellants were young boys, reduced the sentence to 5 years which was less than the minimum prescribed sentence for the offence – Held: As the High Court itself awarded the sentence

less than the minimum sentence prescribed for the offence recording special reasons, it is not a fit case to reduce the sentence further – Sentence/Sentencing.

Criminal Trial – Investigation – Role of the Investigating Officer – Held: The investigation into a criminal offence must be free from all objectionable features or infirmities which may legitimately lead to a grievance to either of the parties that the investigation was unfair or had been carried out with an ulterior motive which had an adverse impact on the case of either of the parties – The Investigating Officer is supposed to investigate an offence avoiding any kind of mischief or harassment to either of the party – He has to be fair and conscious so as to rule out any possibility of bias or impartial conduct so that any kind of suspicion to his conduct may be dispelled and ethical conduct is absolutely essential for investigative professionalism.

The prosecution case was that the prosecutrix, a fifteen year old girl, was raped by the two appellants. The trial court convicted the appellants under Section 366 IPC r/w Section 34 IPC and sentenced them to undergo RI for 4 years. Both the appellants were further sentenced under Section 376 IPC to RI for 7 years. On appeal, the High Court affirmed the conviction of the appellants under Section 376 IPC, however, set aside their conviction under Sections 366/34 IPC and further reduced the sentence from 7 years RI to 5 years RI.

In the instant appeals, the appellants challenged their conviction under Section 376 IPC *inter alia* on grounds that the prosecutrix was over 16 years of age on the date of incident and that she was a willing partner in the entire episode.

Dismissing the appeals, the Court

HELD:1. The incident statedly occurred on or about 25-11-1989. Both the courts below had laboured hard to find out the age of the prosecutrix for the reason that defence produced certificate from Safdarjung Hospital,

New Delhi to create confusion and the I.O. in order to help the accused-appellants had made a statement that the certificate on record did not belong to the prosecutrix. The Birth Certificate issued under Section 17 of the Registration of Birth & Death Act, 1969 reveals that a female child was born on 2.9.1974 by the wedlock of Prabhu Dass and Devki, the parents of the prosecutrix. This certificate has been duly proved by the Medical Record Officer, Safdarjung Hospital, New Delhi (PW.9). Similar evidence had been given by the C.M.O., N.D.M.C., Delhi (PW.7). These documents have thoroughly been examined by the courts below and there is no cogent reason to examine the issue further. [Para 14] [1042-C-H; 1043-A-B]

1.2. The medical report of the Radiologist issued by Ram Manohar Lohia Hospital, New Delhi revealed that age of the prosecutrix was between 16 and 17 years. However, the medical report and the deposition of the Radiologist cannot predict the exact date of birth, rather it gives an idea with a long margin of 1 to 2 years on either side. [Para 14] [1043-C]

1.3. From the original records, it is clear that the prosecutrix was less than 16 years of age on the date of incident. [Para 14] [1043-E]

Jaya Mala v. Home Secretary, Government of J & K & Ors. **AIR 1982 SC 1297;** *Ram Suresh Singh v. Prabhat Singh @ Chhotu Singh & Anr.* **(2009) 6 SCC 681: 2009 (7) SCR 451 and** *State of Uttar Pradesh v. Chhotey Lal* **(2011) 2 SCC 550: 2011 (1) SCR 406 – relied on.**

Mussauddin Ahmed v. State of Assam **(2009) 14 SCC 541 and** *Alamelu & Anr. v. State* **(2011) 2 SCC 385 – cited.**

EVIDENCE OF PROSECUTRIX:

2.1. It is a trite law that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust. The prosecutrix stands

at a higher pedestal than an injured witness as she suffers from emotional injury. Therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. The Indian Evidence Act, 1872 nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 of Evidence Act and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence. The court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations. Rape is not merely a physical assault, rather it often distracts the whole personality of the victim. The rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the background of the entire case and in such cases, non-examination even of other witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offence. Thus, the law that emerges on the issue is to the effect that statement of prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The

court may convict the accused on the sole testimony of the prosecutrix. [Para 15] [1043-F-H; 1044-A-G]

2.2. The Trial Court came to the conclusion that there was no reason to disbelieve the prosecutrix, as no self-respecting girl would level a false charge of rape against anyone by staking her own honour. The evidence of rape stood fully corroborated by the medical evidence. The MLC of the prosecutrix Ext.PW2/A was duly supported by the Dr. (PW.2). [Para 16] [1044-G-H]

State of Maharashtra v. Chandraprakash Kewalchand Jain **AIR 1990 SC 658;** *State of U.P. v. Pappu @Yunus & Anr.* **AIR 2005 SC 1248;** *Vijay @ Chinee v. State of M.P.* **(2010) 8 SCC 191: 2010 (8) SCR 1150;** *State of Punjab v. Gurmit Singh & Ors.* **AIR 1996 SC 1393 and** *Wahid Khan v. State of Madhya Pradesh* **(2010) 2 SCC 9: 2009 (15) SCR 1207 – relied on.**

3.1. In the instant case, the I.O. (PW.15) unfortunately made an attempt to help the accused/appellants, though in the examination-in-chief the witness has deposed that the Birth Certificate providing the date of birth as 2.9.1974 was genuine. [Para 19] [1046-A-B]

3.2. The investigation into a criminal offence must be free from all objectionable features or infirmities which may legitimately lead to a grievance to either of the parties that the investigation was unfair or had been carried out with an ulterior motive which had an adverse impact on the case of either of the parties. The Investigating Officer is supposed to investigate an offence avoiding any kind of mischief or harassment to either of the party. He has to be fair and conscious so as to rule out any possibility of bias or impartial conduct so that any kind of suspicion to his conduct may be dispelled and the ethical conduct is absolutely essential for investigative professionalism. [Para 21] [1046-F-H; 1047-A]

State of Karnataka v. K. Yarappa Reddy **AIR 2000 SC**

185; *Jamuna Chaudhary & Ors. v. State of Bihar* **AIR 1974 SC 1822;** *State of Bihar & Anr. etc. etc. v. P.P. Sharma & Anr.* **AIR 1991 SC 1260;** *Babubhai v. State of Gujarat & Ors.* **(2010) 12 SCC 254: 2010 (10) SCR 651 – relied on.**

Javed Masood & Anr. v. State of Rajasthan **(2010) 3 SCC 538: 2010 (3) SCR 236 – referred to.**

4. In the instant case, the High Court after taking into consideration all the circumstances including that the incident took place in 1989; the appeal before it was pending for more than 10 years; the prosecutrix had willingly accompanied the appellants to Meerut and stayed with them in the hotel; and she was more than 15 years of age when she eloped with the appellants and the appellants were young boys, reduced the sentence to 5 years which was less than the minimum prescribed sentence for the offence. As the High Court itself has awarded the sentence less than the minimum sentence prescribed for the offence recording special reasons, it is not a fit case to reduce the sentence further in a proved case of rape of a minor. [Para 23] [1047-E-F]

Baldev Singh & Ors. v. State of Punjab **AIR 2011 SC 1231 – referred to.**

Case Law Reference:

(2009) 14 SCC 541	**cited**	**Para 13**
(2011) 2 SCC 385	**cited**	**Para 13**
AIR 1982 SC 1297	**relied on**	**Para 14**
2009 (7) SCR 451	**relied on**	**Para 14**
2011 (1) SCR 406	**relied on**	**Para 14**
AIR 1990 SC 658	**relied on**	**Para 15**
AIR 2005 SC 1248	**relied on**	**Para 15**
2010 (8) SCR 1150	**relied on**	**Para 15**
AIR 1996 SC 1393	**relied on**	**Para 17**
2009 (15) SCR 1207	**relied on**	**Para 17**

2010 (3) SCR 236	**referred to**	**Para 18**
AIR 2000 SC 185	**relied on**	**Para 20**
AIR 1974 SC 1822	**relied on**	**Para 21**
AIR 1991 SC 1260	**relied on**	**Para 21**
2010 (10) SCR 651	**relied on**	**Para 21**
AIR 2011 SC 1231	**referred to**	**Para 22**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1516 of 2010.

From the Judgment & Order dated 8.12.2009 of the High Court of Delhi in Criminal Appeal No. 311 of 1999.

WITH

Criminal Appeal No. 1517 of 2010.

P.P. Malhotra, ASG, Amrendra Sharan, Abhay Kumar, Sujeet Kr. Murty, Somesh Jha, S. Islam Anis Ahmed, Balraj Dewan, P.K. Dey, Rajaja Narayana, Anil Katiyar for the appearing parties.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. Both these criminal appeals have been preferred against the common impugned judgment and order dated 8.12.2009 of the High Court of Delhi passed in Criminal Appeal Nos.311 of 1999 and 312 of 1999, by which the High Court has affirmed the conviction of the appellants under Section 376 of the Indian Penal Code, 1860 (hereinafter called 'IPC'), however, set aside their conviction under Sections 366/34 IPC and further reduced the sentence from 7 years RI to 5 years RI with a fine of Rs.10,000/- each and in default to undergo further punishment for 3 months.

2. Facts and circumstances giving rise to these appeals are unfolded by the statement of Shri Prabhu Dass (father of prosecutrix Monika) dated 28.11.1989 made before the Police Station, Vinay Nagar, New Delhi to the effect that his daughter Monika, aged about 15 years, studying in standard 9th in Green

Field School, Safdarjung Enclave, New Delhi had left her house on 24.11.1989 for going to school. She informed through telephone that she would stay in the house of her friend Amita for the night. On 25.11.1989 at about 8.30 a.m. Monika telephoned her cousin Satish Anand that she was going to Pragati Maidan along with her school friends and asked him to reach there so that she would come back with him. Monika asked Satish Anand to meet her at Ahmed Food Restaurant, U.P. Pavilion, where Mohd. Imran Khan and Jamal Ahmed (appellants) used to work. Satish Anand went to Pragati Maidan at the pointed place, but he could neither meet Monika nor either of the appellants, but he came to know that Monika was roaming inside Pragati Maidan along with the appellants. As she did not come back till evening, the complainant Prabhu Dass went to Pragati Maidan on 26.11.1989 and on enquiry he came to know that Monika was seen roaming with the appellants. The appellants were known to Monika as Prabhu Dass, complainant was having a stall of readymade garments at shop no.11 in Anarkali Bazar, Pragati Maidan in front of the food stall where the appellants were working. Complainant's wife Devki and daughter Monika used to come to work there also. Complainant searched for his daughter at many places but could not find.

3. On the basis of his statement, a case under Section 363 IPC was registered and investigation ensued. It was during the investigation Monika, prosecutrix was recovered. The appellants-accused Mohd. Imran Khan and Jamal Ahmed were also arrested. Offences under Sections 366 and 376 IPC were added. Monika was examined under Section 164 of Code of Criminal Procedure, 1973 (hereinafter called 'Cr.P.C.') on the basis of which the appellants-accused were arrested. After having further investigation, offences punishable under Sections 342/506 IPC were also added.

4. Monika, prosecutrix was medically examined to determine her age and to find out the possibility of commission of rape. The appellants were also examined medically. After conclusion of the investigation, the matter was committed to

Sessions Court and trial commenced. Prosecution examined as many as 16 witnesses in support of its case. The defence examined 4 witnesses. Mohd. Imran Khan, first appellant also examined himself under Section 315 Cr.P.C. After conclusion of the trial, the Trial Court vide judgment and orders dated 29.5.1999 and 31.5.1999 convicted the appellants under Section 366 IPC read with Section 34 and sentenced them to undergo RI for 4 years and a fine of Rs.2,000/- each. In default of payment of fine, they would undergo SI for two months. Both the appellants were further sentenced under Section 376 IPC to RI for 7 years and a fine of Rs.3,000/- each. In default of payment of fine, they would undergo SI for 3 months. However, both the sentences were directed to run concurrently.

5. Being aggrieved, both the appellants preferred separate Criminal Appeal Nos.311 of 1999 and 312 of 1999 which have been disposed of by the common impugned judgment and order dated 8.12.2009, by which the High Court acquitted both the appellants of the charges under Sections 366/34 IPC, but maintained their conviction under Section 376 IPC. However, the sentence under Section 376 IPC was reduced from 7 years to 5 years each and to pay a fine of Rs.10,000/- each failing which to undergo SI for 3 months.

Hence, these appeals.

6. Shri Amrendra Sharan, learned Senior counsel for the appellant Jamal Ahmed in Criminal Appeal No.1517 of 2010 has submitted that the prosecutrix Monika was over and above 16 years of age. The Investigating Officer deposed in the court that the Birth Certificate produced in the court did not relate to her. The prosecution did not cross-examine him after declaring hostile. In such an eventuality the appellant is entitled for the benefit of his statement. The appellant Jamal Ahmed had no physical connection with the prosecutrix. She had an affair with Mohd. Imran Khan and had gone with him voluntarily. She had been taken from Delhi to Meerut by bus. She met with an Advocate for planning her marriage with Mohd. Imran Khan. She stayed in the hotel. Thus, she had ample opportunity to

raise hue and cry or inform some body at some place that she had been subjected to some threat or coercion. The courts below erred in placing reliance on her statement.

7. Shri Anis Ahmed, learned counsel appearing for another appellant in Criminal Appeal No.1516 of 2010 has also assailed the impugned judgment on similar grounds.

8. Per contra, Shri P.P. Malhotra, learned ASG appearing for the State of Delhi has opposed the appeals contending that Monika, prosecutrix was below 16 years of age on the date of incident. She remained under persistent threats from the appellants. Therefore, she could not raise hue and cry. The concurrent finding of facts regarding rape by both the appellants does not warrant any interference. The appeals lack merit and are liable to be dismissed.

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

10. The Trial Court has meticulously scrutinised and appreciated the evidence of the prosecution as well as of defence. Shri Prabhu Dass, father of the prosecutrix died on 10.11.1995 during trial before his statement could be recorded. Som Wati, Lady Constable (PW.1) deposed that she was in the team which recovered the prosecutrix on 29.11.1989 and taken her for medical examination. She has also recovered the underwear of the prosecutrix and was handed over to I.O. Dr. Reeta Rastogi (PW.2) proved the M.L.C., Ext.PW2/A of the prosecutrix and deposed that the same was prepared by her according to which there was no sign of external injury. The hymen of the prosecutrix was inflame and there was slight bleeding. Her vagina admitted two fingers tightly. Prosecutrix was not habitual of intercourse but there was evidence of intercourse. Its witness was not cross-examined by the defence as to whether the evidence of intercourse was recent one or not. Monika, the prosecutrix (PW.3) had given full version of the incident as to how she had been picked up by the appellants from Pragati Maidan. She knew both the accused as they had been working in the stall near the stall of her father. When

prosecutrix was waiting for her cousin, the accused persons showed her a knife and told her in case she tried to run away or raise noise, they would kill her. Both the accused persons forcibly took her to ISBT in a three wheeler and from there to Meerut by bus. The accused kept their respective knives on the back of the prosecutrix in such a manner that neither the passengers nor the bus conductor could notice of their activity. She was taken to Hotel Ajanta in Meerut where the appellant Jamal Ahmed made the entry in the Hotel register and took her to room no.101. At the time of making entry in the Hotel register by accused Jamal Ahmed, accused Mohd. Imran Khan stayed with the prosecutrix throughout. Both the accused persons committed rape upon her in that room. Next day in the morning she was taken by the accused persons to the house of the sister of one of them and from there she was brought to Delhi to the house of elder brother of appellant Jamal Ahmed. Both the accused persons committed rape upon her in that house. They had put their knives on her back in such a manner that other persons could not notice them. She could not raise hue and cry while coming from Meerut to Delhi as she was totally in a position of shock and the accused appellants threatened to kill her in case she raises voice or tries to run away. On 27.11.1989 she had been locked inside the house as the appellants had gone away and after coming back in the evening she was raped by both of them. On 28.11.1989 both the appellants left the house and returned in the evening along with elder brother and brother-in-law of accused Imran. These two persons had taken the prosecutrix to a flat behind G.B. Pant Hospital where she found both the appellants present. After sometime, police recovered her from that place and she was sent for medical examination. Her statement was recorded under Section 164 Cr.P.C. on 29.11.1989.

11. Shri Babu Lal (PW.11), the then Metropolitan Magistrate proved the statement of the prosecutrix recorded under Section 164 Cr.P.C. Other witnesses also supported the case of the prosecution. Both the appellants denied their involvement while their statements under Section 313 Cr.P.C.

were recorded. Some defence witnesses were examined, however, relevant witness had been appellant Imran Khan who has examined himself as DW.5 under Section 315 Cr.P.C. According to him Monika, prosecutrix met him on 25.11.1989 at 3 p.m. at his restaurant and told him that her mother had turned her out so she would not go to her house and if he refused to keep her she would die. It was on the insistence of the prosecutrix that he along with another appellant and prosecutrix went to Meerut to consult Shri Mustafa, Advocate who was known to other appellant, however, the lawyer told her to bring the Birth Certificate etc. as it was to be produced in the court for getting married and court would issue one month's notice.

12. All the prosecution witnesses have faced grilling cross-examination but nothing could be elicited to discredit any part of their evidence. This part of the prosecution has been accepted by both the courts and we do not see any cogent reason to interfere with the same.

13. Learned counsel for both the parties have emphasised on the question as to whether the conduct of the prosecutrix had been such that the appellants could not be held responsible as she had voluntarily gone with them to Meerut and, in spite of the fact, that she had ample opportunity to raise hue and cry or inform any person, she did not do so. It is submitted on behalf of the appellants that it was a case of consent as the prosecutrix had voluntarily accompanied the appellants to Meerut. In order to buttress his argument, Shri Amrendra Sharan, learned senior counsel, placed reliance upon the judgments of this Court in *Mussauddin Ahmed v. State of Assam,* (2009) 14 SCC 541; and *Alamelu & Anr. v. State* represented by Inspector of Police, (2011) 2 SCC 385, wherein after appreciating the evidence on record, the Court held that the prosecutrix had been a willing partner in the entire episode. The conviction accorded under Section 376 IPC by the courts below has been set aside by this Court in similar circumstances.

In our considered opinion, such arguments may be relevant in case we reach the conclusion that the findings of fact recorded by the courts below on the issue of age of the prosecutrix and commission of rape could not be factually correct and were liable to be set aside.

In view of the fact that the High Court has acquitted the appellants for the offences under Sections 366/34 IPC the issue of kidnapping is not required to be considered further.

AGE :

14. Both the courts below have laboured hard to find out the age of the prosecutrix for the reason that defence produced certificate from Safdarjung Hospital, New Delhi to create confusion and the I.O. in order to help the appellants had made a statement that the certificate on record did not belong to the prosecutrix. The medical report of the Radiologist issued by Ram Manohar Lohia Hospital, New Delhi revealed that age of the prosecutrix was between 16 and 17 years. The Birth Certificate issued under Section 17 of the Registration of Birth & Death Act, 1969 reveals that a female child was born on 2.9.1974 by the wedlock of Prabhu Dass and Devki, residents of Sector 12/69, R.K. Puram, New Delhi and its registration number had been 4840. It also reveals that number of live children including this child had been two. However, this certificate has been duly proved by Vijay Kumar Harnal, Medical Record Officer, Safdarjung Hospital, New Delhi (PW.9), who explained that one female child was born in Safdarjung Hospital at 7.15 a.m. on 2.9.1974. Her mother's name was Devki, wife of Prabhu Dass and her address was R.K. Puram, New Delhi. He also explained that the other Birth Certificate produced by the defence according to which a female child was born on 12.9.1971 was of a different female child who was born to one Devi Rani, wife of Prabhu Dayal, residents of Kotla Mubarakpur and thus, it did not belong to Monika, prosecutrix. Similar evidence had been given by Dr. R.K. Sharma, C.M.O., N.D.M.C., Delhi (PW.7). According to him, the female child was born with Registration No.4840 on 2.9.1974 and he further explained that the name of the parents

and address of another female child born on 27.9.1971 bearing different registration no.4502 had been totally different, i.e. Prabhu Dayal and Devi Rani, residents of Kotla Mubarakpur . The number of living children with that family is also different from that of the prosecutrix. These documents have thoroughly been examined by the courts below and we do not see any cogent reason to examine the issue further.

The medical report and the deposition of the Radiologist cannot predict the exact date of birth, rather it gives an idea with a long margin of 1 to 2 years on either side. In *Jaya Mala v. Home Secretary, Government of J & K & Ors.,* AIR 1982 SC 1297, this Court held:

> "However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side."

(See also: *Ram Suresh Singh v. Prabhat Singh @ Chhotu Singh & Anr.,* (2009) 6 SCC 681; and *State of Uttar Pradesh v. Chhotey Lal,* (2011) 2 SCC 550)

In view of the above as we have seen the original record produced before us, we are of the considered opinion that the prosecutrix was less than 16 years of age on the date of incident.

EVIDENCE OF PROSECUTRIX:

15. It is a trite law that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust. The prosecutrix stands at a higher pedestal than an injured witness as she suffers from emotional injury. Therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. The Indian Evidence Act, 1872 (hereinafter called 'Evidence Act'), nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 of Evidence Act and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence. The court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations. Rape is not merely a physical assault, rather it often distracts the whole personality of the victim. The rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the background of the entire case and in such cases, non-examination even of other witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offence. (Vide: *State of Maharashtra v. Chandraprakash Kewalchand Jain,* AIR 1990 SC 658; *State of U.P. v. Pappu @Yunus & Anr.* AIR 2005 SC 1248; and *Vijay @ Chinee v. State of M.P.,* (2010) 8 SCC 191).

Thus, the law that emerges on the issue is to the effect that statement of prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix.

16. The Trial Court came to the conclusion that there was no reason to disbelieve the prosecutrix, as no self-respecting girl would level a false charge of rape against anyone by staking her own honour. The evidence of rape stood fully corroborated by the medical evidence. The MLC of the prosecutrix Ext.PW2/A was duly supported by Dr. Reeta Rastogi (PW.2).

17. This view of the Trial Court stands fortified by the judgment of this Court in *State of Punjab v. Gurmit Singh & Ors.* AIR 1996 SC 1393, wherein this Court observed that "the courts must, while evaluating evidence remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her."

Similarly, in *Wahid Khan v. State of Madhya Pradesh,* (2010) 2 SCC 9, it has been observed as under:

> "It is also a matter of common law that in Indian society any girl or woman would not make such allegations against a person as she is fully aware of the repercussions flowing therefrom. If she is found to be false, she would be looked at by the society with contempt throughout her life. For an unmarried girl, it will be difficult to find a suitable groom. Therefore, unless an offence has really been committed, a girl or a woman would be extremely reluctant even to admit that any such incident had taken place which is likely to reflect on her chastity. She would also be conscious of the danger of being ostracised by the society. It would indeed be difficult for her to survive in Indian society which is, of course, not as forward-looking as the western countries are."

18. Much reliance has been placed by learned counsel for the appellants on the judgment of this Court in *Javed Masood & Anr. v. State of Rajasthan,* (2010) 3 SCC 538, wherein it had been held that in case the prosecution witness makes a statement and is not declared hostile, he is supposed to speak the truth and his statement is to be believed.

It is in view of this fact in the instant case that Puran Singh, I.O. (PW.15) has deposed in the court that the "birth certificate of the prosecutrix did not relate to the prosecutrix. I did not verify about the birth certificate from the NDMC. I do not remember if at the time of bail application I had submitted that the birth certificate is genuine but does not relate to prosecutrix."

19. Thus, the question does arise as to what extent the court is under an obligation to accept the statement of Puran Singh, I.O. (PW.15) particularly in view of the birth certificate available on the record. In view of our finding in respect of the date of birth we are of the view that Puran Singh, I.O. (PW.15) unfortunately made an attempt to help the accused/appellants, though in the examination-in-chief the witness has deposed that the Birth Certificate providing the date of birth as 2.9.1974 was genuine.

Be that as it may, by now Puran Singh (PW.15) might have retired as the incident itself occurred 22 years ago. Therefore, we do not want to say anything further in respect of his conduct.

20. In *State of Karnataka v. K. Yarappa Reddy,* AIR 2000 SC 185, this Court while dealing with a similar issue held:

> "It is well-nigh settled that even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinized independently of the impact of it. Otherwise the criminal trial will plummet to the level of the investigating officers ruling the roost. The court must have predominance and pre-eminence in criminal trials over the action taken by investigating officers. Criminal justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit the investigating officer's suspicious role in the case."

21. The investigation into a criminal offence must be free from all objectionable features or infirmities which may legitimately lead to a grievance to either of the parties that the investigation was unfair or had been carried out with an ulterior motive which had an adverse impact on the case of either of the parties. Investigating Officer is supposed to investigate an offence avoiding any kind of mischief or harassment to either of the party. He has to be fair and conscious so as to rule out any possibility of bias or impartial conduct so that any kind of suspicion to his conduct may be dispelled and the ethical

conduct is absolutely essential for investigative professionalism. The investigating officer "is not merely to bolster up a prosecution case with such evidence as may enable the court to record a conviction but to bring out the real unvarnished truth." (Vide: *Jamuna Chaudhary & Ors. v. State of Bihar,* AIR 1974 SC 1822; *State of Bihar & Anr. etc. etc. v. P.P. Sharma & Anr.,* AIR 1991 SC 1260; and *Babubhai v. State of Gujarat & Ors.,* (2010) 12 SCC 254)

22. Shri Amrendra Sharan, learned senior counsel has placed reliance on the judgment of this Court in *Baldev Singh & Ors. v. State of Punjab,* AIR 2011 SC 1231, wherein the convicts of gang rape had been sentenced to 10 years RI and a fine of Rs.1000/- each had been imposed and served about more than 3 years imprisonment and incident had been very old, this Court in the facts and circumstances of the case reduced the sentence as undergone, directing the appellants therein to pay a sum of Rs.50,000/- of fine to be paid to the victim and prayed for some relief.

23. The High Court after taking into consideration all the circumstances including that the incident took place in 1989; the appeal before it was pending for more than 10 years; the prosecutrix had willingly accompanied the appellants to Meerut and stayed with them in the hotel; and she was more than 15 years of age when she eloped with the appellants and the appellants were young boys, reduced the sentence to 5 years which was less than the minimum prescribed sentence for the offence. As the High Court itself has awarded the sentence less than the minimum sentence prescribed for the offence recording special reasons, we do not think it to be a fit case to reduce the sentence further in a proved case of rape of a minor.

The appeals lack merit and are, accordingly, dismissed.

B.B.B. Appeals dismissed.

D. ETHIRAJ

v.

SECRETARY TO GOVT. & ORS.

(CRIMINAL APPEAL NO. 1949 OF 2011)

OCTOBER 11, 2011

[ASOK KUMAR GANGULY AND GYAN SUDHA MISRA, JJ.]

REMISSION OF SENTENCE:

Claim for remission of sentence as per Government of Tamil Nadu, G.O. dated 23.2.1992 – Rejected by High Court on the ground that on the date of notification, the prisoner was on bail – Held: In the instant case, the prisoner is entitled to get his case of remission of sentence considered in accordance with the G.O. – A prisoner being on bail on a particular day is just a fortuitous circumstance – What the court has to consider is the actual period of sentence undergone by the prisoner and whether by reason of the period actually undergone, the prisoner qualifies for remission – Order of High Court is set aside – Prisoner directed to make a representation afresh – State Government directed to consider the case of the prisoner in the light of the observations made in the judgment – Constitution of India, 1950 – Article 161, Article 141 – Precedent – Tamil Nadu, Home (Prison C) Department GOMs No. 279 dated 23.2.1992.

The appellant was convicted and sentenced to undergo three years rigorous imprisonment u/s 366 read with s. 109 and s. 119 IPC by the trial court by judgment and order dated 14.1.1992. His appeal before the High Court and the special leave petition before the Supreme Court were dismissed and, consequently, he was readmitted to Central Prison on 7.9.2010. The High Court declined the appellant's prayer for having his case for remission of sentence considered in accordance with the

Tamil Nadu, Home (prison C) Department G.O.Ms. No. 279, dated 23.2.1992, on the ground that he was on bail on the date of issuance of the notification.

Allowing the appeal, the Court

HELD: 1.1. A prisoner being on bail on a particular day is just a fortuitous circumstance. What the court has to consider is the actual period of sentence undergone by the prisoner and whether by reason of the period actually undergone, the prisoner qualifies for remission. [Para 20] [1056-E-F]

Nalamolu Appala Swamy & Ors. Vs. State of Andhra Pradesh **(1989) Supp (2) SCC 192 – relied on.**

1.2. However, during the period the petitioner was on bail and had not at all suffered by imprisonment, he cannot get the benefit of remission in respect of that period. [para 18] [1056-B]

State of Haryana Vs. Nauratta Singh & Ors. **2000 (2) SCR 246 = (2000) 3 SCC 514; and** *Joginder Singh Vs. State of Punjab & Ors.* **(2001) 8 SCC 306 – relied on**

1.3. In the instant case, the appellant had undergone a total sentence of 1 year and 140 days as on 5.10.2010 and applied for consideration of remission of his sentence in accordance with the said notification. Admittedly, the G.O. No. 279, dated 23.2.1992, which was issued in exercise of the powers conferred by Article 161 of the Constitution of India, is still subsisting and the State is bound by the same. The G.O. does not speak that in order to get the benefit of remission, the prisoner must actually be in jail on the date when the G.O. was issued. The appellant is entitled to have his case of remission considered under the said G.O. since he admittedly suffered more than six months of imprisonment prior to the date of judgment rendered by the High Court on 25.3.2011. [para 4-5 and 9] [1051-C-E; 1053-C-E]

1.4. Despite the clear position settled by a three Judge Bench of this Court in *Nalamolu Appala Swamy's* **case and despite the fact that the said judgment was placed before the High Court, it unfortunately came to a decision which is contrary to the reason given by this Court. The judgment of the High Court is, therefore, set aside. The appellant is directed to make a representation afresh praying for remission attaching a copy of the instant judgment. The State Government is directed to consider the case of the appellant in the light of the observations made in the instant judgment. [Para 13, 14, 20 and 21] [1054-B-C; F-G; 1056-E-G]**

Case Law Reference:

(1989) Supp (2) SCC 192	**relied on**	**para 13**
2000 (2) SCR 246	**relied on**	**para 15**
(2001) 8 SCC 306	**relied on**	**para 16**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1949 of 2011.

From the Judgment & Order dated 25.3.2011 of the High Court of Judicature at Madras in H.C.P. No. 2323 of 2010.

A.L. Somayajee, V. Padmanabhan, Shailendra Kishore, Krishna Dev, Senthil Jagadeesan for the Appellant.

Gurukrishna Kumar, AAG, Akshat Hansaria, B. Balaji, M. Yogesh Kana (for Subramonium Prasad) for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. Leave granted.

2. Heard learned counsel for the parties.

3. When the matter was listed on 26th September, 2011, this Court directed learned counsel for the State to furnish an affidavit stating therein what is the actual period of sentence undergone by the appellant. However, the affidavit has not been filed, but learned counsel appearing for the State has filed a statement showing the period of sentence undergone by the

petitioner at different stages and the said statement has not been denied by the counsel appearing for the petitioner. We take that statement on record.

On a perusal of the same, the following position is clear:

S.No.	From	To	No. of days
1	16.05.1987	19.05.1987	04 days
2	14.01.1992	24.01.1992	11 days
3	22.11.2002	26.02.2003	96 days
4	07.09.2010	Till Date (05.10.2011)	1 year 29 days

4. It is clear from the above table that the appellant had undergone sentence of 1 year and 140 days as on 5.10.2011.

5. The subject matter of challenge in this case is an order passed by the Division Bench of the High Court dated 25th March, 2011 whereby the High Court has, while referring to various judgments, by a reasoned order declined the appellant's prayer for having his case for remission of sentence considered in the light of Government Orders (Gos) issued by the Government from time to time.

6. The crux of the ratio in High Court's judgment is that as the petitioner was on bail on the date of issuance of various notifications for remission of sentence, his case for remission cannot be considered.

7. We are unable to accept the aforesaid reasoning of the High Court for the reasons discussed below:

8. Various notifications have been issued in connection with remission of sentence by the Government. Learned counsel appearing for both the parties have relied in support of their case on a notification being G.O. Ms. No. 279, Dated 23rd February, 1992 issued by the Government. We set out the said notification since this Court is to interpret the same in the judgment.

GOVERNMENT OF TAMIL NADU

ABSTRACT

Prisoners - Remision of sentence - Special remission on occasion of newly elected Government assuming office in Tamil Nadu -ordered.

HOME (PRISON C) DEPARTMENT
G.O.Ms.NO. 279, Dated 23.2.92.

ORDER

On the occasion of the assumption of office of the newly elected Government in Tamil Nadu, the Government have decided to grant remission to certain classes of prisoners who have been convicted for various offences by the courts in this State and sentenced to various terms of imprisonment other than life imprisonment.

2. In exercise of the powers conferred by Article 161 of the Constitution of India, the Government of Tamil Nadu hereby remits;

a. In the case of women who have been sentenced to punishment for offences other than those relating to murder, robbery and smuggling activities, the whole of the unexpired portion of the punishment to which they have been sentenced, and

b. In the case of men who have been sentenced to punishment for various offences other than those relating to murder; robbery and smuggling activities, six months out of their imprisonment.

3. The special remission sanctioned above will not be admissible in the cases of civil prisoners and detenus under the law relating to detention and also in the cases of persons convicted for offences under Sections 3 to 10 of the Official Secrets Act, 1923, Sections 2 and 3 of the Criminal Law Amendment Act 1961, Sections 121 to 130 of the Indian Penal Code, Foreigners and Passport Acts and persons convicted by Courts of criminal jurisdiction of other States.

4. The remission ordered herein shall be made applicable to those prisoners also who have been convicted in this State but are undergoing their sentence in the jails of other States or Union Territories.

5. The remission ordered herein shall take effect from the 24th February, 1992 namely the birth day of the Honorable Chief Minister of Tamil Nadu.

(BY ORDER OF THE GOVERNOR)
K. MALAISAMY,
SECRETARY TO GOVERNMENT.

9. Admittedly the said notification is still subsisting and the State is bound by the same. The said notification, as it is clear from its text, was issued in exercise of the powers conferred by Article 161 of the Constitution of India. The petitioner applied his case for remission of sentence to be considered under the said notification. The appellant was convicted by learned District and Sessions Judge, Ooty by judgment dated 14th January, 1992 in Sessions Case No. 11 of 1989 and sentenced to undergo three years rigorous imprisonment for an offence under Section 366 read with Section 109, IPC and one year rigorous imprisonment for an offence under Section 119, IPC. The sentences were however to run concurrently.

10. On an appeal being filed by the appellant vide C.A. No. 64 of 1992, the High Court by its judgment dated 7th June, 2002 dismissed the same confirming the conviction and sentence of the appellant. The special leave petition preferred by the appellant in this Court against the said judgment of the High Court came to be dismissed on 20th July, 2010.

11. As a result of the above, the appellant was readmitted in Central Prison, Coimbatore on 7th September, 2010 and has been undergoing sentence even today.

12. In view of the aforesaid admitted facts, the appellant, in our judgment, is entitled to have his case of remission considered under the aforesaid notification since he admittedly suffered more than six months of imprisonment prior to the date of judgment rendered by the High Court on 25th March, 2011,

but the High Court, for the reasons discussed in the judgment, refused to consider the same on the ground that on the date of issuance of notification for remission of sentence, the petitioner was on bail.

13. Mr. A.L. Somayajee, learned senior counsel appearing for the appellant cited before us a decision of this Court in *Nalamolu Appala Swamy & Ors. Vs. State of Andhra Pradesh* (1989) Supp (2) SCC 192. The learned counsel has drawn our attention to para 3 of the said judgment and submitted that similar plea was taken by the State of Andhra Pradesh in that case. Para 3 of the said judgment would show that and is set out below:

"3 In a brief affidavit-in-reply filed by the State, it has been stated in para 4 as follows:

"It is respectfully submitted that the said GO is not applicable after November 1, 1984 and further the remission can only be granted to the prisoners who are actually in jail at the time of issuance of the said GO. The appellants herein were on bail by virtue of the order of this Hon'ble Court. Since they were not in jail at the time of issuance of the above GO they cannot claim to be released by applying this GO to them."

14. Here also, we find that the G.O. does not speak that in order to get the benefit of remission, the prisoner must actually be in jail on the date when the G.O. was issued. Despite the aforesaid clear position settled by this Court and despite the fact that the same judgment was placed before the High Court, the High Court, unfortunately, came to a decision which is contrary to the reason given by the aforesaid three Judge Bench decision of this Court in *Nalamolu Appala* (supra).

15. Learned counsel for the State has made a very strenuous effort to sustain the High Court's reasoning by referring to two decisions of this Court. First of all, he has drawn our attention to the decision rendered by this Court in the case of *State of Haryana Vs. Nauratta Singh & Ors.* (2000) 3 SCC

514. The facts of that case are succinctly narrated in the Head Note which is set out below:

> "The respondent was acquitted on 5-1-1978 by the trial Court, for the offence under Sections 302/34 IPC. The High Court, although allowed the respondent to remain on bail during the pendency of appeal, ultimately convicted him on 23-4-1980 under the said provisions. Consequently, the resopndent surrendered on 7-6-1980. During the pendency of his appeal before Supreme Court he was again released on bail on 2-8-1980. The Supreme Court, ultimately, upheld the conviction and, consequently, he was again taken to jail on 22-8-1994. In such circumstances, the Punjab and Haryana High Court, upholding the respondent's contention that his conviction related back to the date of the trial court's decision, I.e. 5-1-1978, allowed his claim that the period during which he was on bail (from 5-1-1978 to 7-6-1980 and from 2-8-1980 to 21-8-1994) should be included within the period of his entitlement for remission. The respondent's claim was based on the instructions issued by the Stae of Haryana postulating that remission would "be also granted to all the convicts who were on parole/furlough from the jail on 25-1-1988".

16. The Court found that an accused cannot claim the period during which he was on bail towards his remission. We are in respectful agreement with that interpretation by this Court in Nauratta Singh. Any other interpretation will render criminal justice system to a mockery. This Court clarified the same by giving illustration in para 18 of the report in Nauratta Singh, which we set out here:

> "18. The clear fallacy of the approach made by the High Court can be demonstrated thorugh an illustration. An accused was tried for an offence under Section 326 IPC. Durign trial period he was allowed to remain on bail and the trial prolonged up to, say, 3 years. Finally the court convicted him and sentenced him to imprisonment for three years. Should not the convicted person go to jail at all on the premise that he was on bail for three years and is hence entitled to remission of that period?"

17. Similar views have been expressed by this Court in the subsequent decision of *Joginder Singh Vs. State of Punjab & Ors.* (2001) 8 SCC 306. In Joginder Singh, the aforesaid para of Nauratta has been quoted.

18. We are in entire agreement with the aforesaid views taken by this Court that if it is clear from the facts of a given case that during the period the petitioner was on bail and had not at all suffered any imprisonment, he cannot get the benefit of remission in respect of that period.

19. The same is admittedly not the positon in this case. Here, the appellant had suffered substantial portion of the period in jail which is more than 17 months. On this, there is no dispute. In that view of the matter, the appellant's case is covered by the ratio of the three Judge Bench decision of this Court *in Nalamolu Appala Swamy* (supra).

20. We are unable to approve the reasoning given by the High Court that the appellant's case for remission cannot be considered in terms of the said notification as on the date of the notification, he was on bail. This is a wrong approach. A prisoner may be on bail on a particular day -- this is just a fortuitous circumstance. What the Court has to consider is the actual period of sentence undergone by the prisoner and whether by reason of the period actually undergone, the prisoner qualifies for remission. We are, therefore, constrained to set aside the judgment of the High Court.

21. We direct the appellant to make a representation afresh praying for remission attaching a copy of this judgment. In our view, the appellant is entitled to get his case of remission of sentence considered in accordance with the above mentioned G.O. We also direct the State to consider the case of the appellant in the light of the observations made in this judgment and pass an order within a period of six weeks from the date of receipt of the representation.

22. The appeal is accordingly allowed.

R.P. Appeal allowed.

SANCHIT BANSAL & ANR.
v.
THE JOINT ADMISSION BOARD (JAB) & ORS.
(CIVIL APPEAL NO. 8520 OF 2011)

OCTOBER 11, 2011

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

Education/Educational Institutions – Admissions to undergraduate Engineering courses – Joint Entrance Examination (IIT-JEE 2006) –Determination of cut-off marks – The first appellant appeared in IIT-JEE 2006, as a general category candidate – He secured 75 marks in Mathematics, 104 marks in Physics and 52 marks in Chemistry, aggregating to 231 – The Joint Admission Board (JAB) had fixed the cut off marks for admission as 37 for Maths, 48 for Physics and 55 for Chemistry and the aggregate cut off marks as 154 – As first appellant did not secure the minimum of 55 marks in Chemistry he was not qualified, even though his aggregate in the three subjects was very high – Feeling aggrieved by his non-selection, which according to the appellants was due to a defective, erroneous and malafide process adopted for cut-off determination, the appellants filed a writ petition – Writ petition dismissed by High Court – Whether the procedure adopted by JAB to arrive at the cut off marks for JEE 2006 was arbitrary and mala fide and whether the High Court ought to have interfered in the matter – Held: The JAB wanted to select candidates with consistent performance in all three subjects – To achieve this result, the traditional procedures would not have been of any assistance – The object of the procedure followed by JAB for arriving at the cut-off marks was to select candidates well equipped in all the three subjects, with reference to their merit, weighed against the average merit of all the candidates who appeared in the examination – The fact that the procedure was

complicated did not make it arbitrary or unreasonable or discriminatory – The appellants did not make out, even remotely, any malafide motive, in regard to the procedure for arriving at the cut-off marks – The claim that to deny admission to one student from among more than 2,87,000 students (i.e. the first appellant), the process of fixing cut-off marks was manipulated, is too far fetched and difficult to accept, apart from the fact that there was no iota of material to support such a claim – Where minimum performance in all the subjects is also relevant, a person who fails to get the minimum cut off marks in one subject, cannot contend that he had secured very high marks in other two subjects and therefore injustice has been done – By adopting mean and standard deviation methods, the JAB arrived at different minimum marks for different subjects, depending upon the overall performance of all candidates in a given subject, and enabled selection of those who did comparatively and uniformly well in all subjects – The procedure though complicated, sought to achieve a more balanced selection when compared to the traditional methods – It was neither arbitrary nor capricious – The procedure adopted in JEE 2006 may not be the best of procedures, nor as sound and effective as the present procedures – But no ground for Courts to interfere with the procedure, even if it was not accurate or efficient, in the absence of malafides or arbitrariness or violation of law – No ground to grant any relief to the first appellant.

Education / Educational Institutions – Specialized courses – Admissions – Scope for interference by Courts – Held: The process of evaluation, the process of ranking and selection of candidates for admission with reference to their performance, the process of achieving the objective of selecting candidates who will be better equipped to suit the specialized courses, are all technical matters in academic field and courts will not interfere in such processes – Courts will interfere only if they find all or any of the following : (i) violation

of any enactment, statutory Rules and Regulations; (ii) mala fides or ulterior motives to assist or enable private gain to someone or cause prejudice to anyone; or where the procedure adopted is arbitrary and capricious.

Administrative Law – Administrative action – When arbitrary and capricious – Held: An action is said to be arbitrary and capricious, where a person, in particular, a person in authority does any action based on individual discretion by ignoring prescribed rules, procedure or law and the action or decision is founded on prejudice or preference rather than reason or fact – To be termed as arbitrary and capricious, the action must be illogical and whimsical, something without any reasonable explanation – When an action or procedure seeks to achieve a specific objective in furtherance of education in a bona fide manner, by adopting a process which is uniform and non-discriminatory, it cannot be described as arbitrary or capricious or mala fide – Education/ Educational Institutions.

The first appellant is the son of second appellant who is a Professor in the Indian Institute of Technology (IIT), Kharagpur. Admission to undergraduate courses in fifteen IITs as also IT—BHU and ISM, Dhanbad is through the Common Entrance Examination known as the Joint Entrance Examination (IIT-JEE). IIT-JEE is supervised by the Joint Admission Board (JAB), the first respondent.

The first appellant appeared in the IIT-JEE 2006, as a general category candidate. He secured 75 marks in Mathematics, 104 marks in Physics and 52 marks in Chemistry, aggregating to 231. The Board had fixed the cut off marks for admission as 37 for Maths, 48 for Physics and 55 for Chemistry and the aggregate cut off marks as 154. As first appellant did not secure the minimum of 55 marks in Chemistry he was not qualified, even though his aggregate in the three subjects was very high.

Feeling aggrieved by his non-selection, which according to appellants was due to a defective, erroneous and malafide process adopted for cut-off determination, the appellants filed a writ petition claiming the following reliefs, apart from several consequential reliefs: (a)To quash the selection and merit list of admissions to IIT/ITBHU/ISM on the basis of JEE 2006 as it was prepared on the basis of imposition of illogical and cut off marks in three subjects without any rational basis; (b)to prepare and publish fresh chemistry marks for admissions to IITs in regard to JEE 2006 after making appropriate corrections in evaluation by adjusting the wrong evaluation and on that basis prepare and publish fresh merit list for admission to IITs/ITBHU/ISM in regard to JEE 2006.

A Single Judge of the High Court dismissed the said writ petition. Aggrieved, the appellants filed appeal before the division bench. The division bench declined to grant any relief to the first appellant.

In the instant appeal, the appellants contended that the minutes of the meeting of JAB 2006 which laid down the procedure for holding the JEE 2006, furnished by the respondents, did not contain the cut off procedure for JEE 2006; that the cut off procedure fixed before the examination was repeatedly changed after the examination and the two different versions given by the Board at different points of time demonstrated that none of the procedures showed 55% as the chemistry cut off marks; that the procedure adopted was full of errors and defects; and that if the iterative procedure explained by the Board was implemented correctly, the effect would be to increasing the Maths cut off marks from 37 to 42 and decreasing Physics cut off marks from 48 to 44 and Chemistry cut off marks from 55 to 51 and further that the Chemistry cut off marks were probably manipulated to exclude appellant No.1 from the JEE merit list as the

Chairman, Joint Admission Board 2006 (then Director, IIT, Karagpur) and the organizing Chairman, JEE 2006 had a personal grudge against the second appellant.

The question which therefore arose for consideration was whether the procedure adopted by the Board to arrive at the cut off marks for JEE 2006 was arbitrary and *mala fide* and whether the High Court ought to have interfered in the matter.

Dismissing the appeal, the Court

HELD:1. It is no doubt true that the simplest and most straight forward method of selecting the candidates to be called for counseling would be to take the candidates in the order of merit (with reference to actual marks) subject to their possessing a pre-declared minimum marks in each subject. For example the Board can decide beforehand that the aggregate cut off marks for eligibility would be 150, that is 50 in each of the three subjects and prepare a merit list of the candidates who fulfil the said criteria and then call the first 5500 students in the merit list, in the order of merit for counseling. This would be the traditional method. [Para 14] [1074-H; 1075-A-B]

2. But the Board wants to select candidates with consistent performance in all three subjects. To achieve this result and shortlist about 5500 candidates from out of 287564 candidates, the traditional procedures will not be of assistance. Therefore, a rather complicated but scientific procedure has been followed. For a layman, the above procedure may appear to be highly cumbersome and complicated. But the object of the aforesaid procedure for arriving at the cut-off marks is to select candidates well equipped in all the three subjects, with reference to their merit, weighed against the average merit of all the candidates who appeared in the examination. The fact that the procedure was complicated would not

make it arbitrary or unreasonable or discriminatory. [Paras 15,16] [1075-C-D; 1083-G-H; 1084-A]

3. The process of evaluation, the process of ranking and selection of candidates for admission with reference to their performance, the process of achieving the objective of selecting candidates who will be better equipped to suit the specialized courses, are all technical matters in academic field and courts will not interfere in such processes. Courts will interfere only if they find all or any of the following : (i) violation of any enactment, statutory Rules and Regulations; (ii) mala fides or ulterior motives to assist or enable private gain to someone or cause prejudice to anyone; or where the procedure adopted is arbitrary and capricious. An action is said to be arbitrary and capricious, where a person, in particular, a person in authority does any action based on individual discretion by ignoring prescribed rules, procedure or law and the action or decision is founded on prejudice or preference rather than reason or fact. To be termed as arbitrary and capricious, the action must be illogical and whimsical, something without any reasonable explanation. When an action or procedure seeks to achieve a specific objective in furtherance of education in a bona fide manner, by adopting a process which is uniform and non-discriminatory, it cannot be described as arbitrary or capricious or mala fide. [Para 19] [1085-F-H; 1086-A-C]

Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupeshkumar Sheth **1984 (4) SCC 27;** *All India Council for Technical Education v. Surinder Kumar Dhawan* **2009 (11) SCC 726: 2009 (3) SCR 859 and** *Directorate of Film Festivals v. Gaurav Ashwin Jain* **2007 (4) SCC 737: 2007 (5) SCR 7 – relied on.**

4. In the instant case, the appellants have not made out, even remotely, any malafide motive, in regard to the procedure for arriving at the cut-off marks. The claim that

to deny admission to one student from among more than 2,87,000 students, they manipulated the process of fixing cut-off marks is too far fetched and difficult to accept, apart from the fact that there is no iota of material to support such a claim. It is too much to assume that where nearly three lakhs candidates appeared, a particular procedure was adopted to ensure that a particular candidate failed. [Para 20] [1086-D-F]

5. The minimum aggregate cut off was 154. The minimum cut off for individual subjects was 37, 48 and 55 for Maths, Physics and Chemistry. If a candidate had secured the minimum in three subjects and had also secured the minimum of the aggregate which was only 154, he becomes eligible; whereas a candidate who got 231 in the aggregate but does not get the minimum cut off marks in one of the subjects (as for example the first appellant who got only 52 which is less than the cut off of 55), naturally cannot be qualified. Even in standard traditional examinations, if total maximum marks was 600 (in six subjects) and minimum marks in each of the six subjects was 35 out of 100, a candidate who may secure 482 marks (that 90% in five subjects, but secures only 32 marks in one subject, will be considered as failed, whereas a person who secures only 210 marks (that is 35 marks in all the six subjects) will be considered as passed. Where minimum performance in all the subjects is also relevant, a person who fails to get the minimum cut off marks in one subject, cannot contend that he had secured very high marks in other two subjects and therefore injustice has been done. All procedures when standardized, result in some kind of injustice to some or the others. That cannot be helped. [Para 21] [1087-B-F]

6. Where a huge number of candidates (more than 287,000) have participated in an examination, for filling about 5500 seats, and it becomes necessary to select candidates possessing comparatively better proficiency

in all three subjects, the traditional methods of short-listing may not be of assistance. The traditional methods would result in the candidates who have done extremely well in one subject or two subjects but have little or no proficiency in the third subject to steal a march over candidates who have done uniformly well in all the three subjects. For example, in the traditional method where 40% are the minimum marks required to be scored in each subject, a candidate who just gets 40% in Maths and 40% in Physics and 91% in Chemistry, would be eligible and as his total marks are 171, will get admitted in preference to a candidate who did uniformly well and secured 52 marks in Maths, 53 marks in Physics and 65 marks in Chemistry whose total is 170 marks. The result is that a candidate who is comparatively poor in Maths and Physics, secures a seat by virtue of his good performance in Chemistry, in preference to a candidate who has done uniformly well in all subjects. The traditional procedure may not therefore help in securing candidates who do well in all subjects. If one has to choose the candidates with good performances in all subjects, with the average of the performance of all the candidates who participated in a given examination as the benchmark, it is necessary to apply the more complicated mean and standard deviation methods. By adopting mean and standard deviation methods, the Board does not start with a set of uniform minimum passing marks but arrives at different minimum marks for different subjects, depending upon the overall performance of all candidates in a given subject, and enables selection of those who have done comparatively and uniformly well in all subjects. That is how, for example, JEE-2006, the cut-off marks were arrived at 37, 48 and 55 for Maths, Physics and Chemistry. This method ensured that those who have done reasonably well in Maths, when compared with the overall majority, got selected in spite of the fact that if the minimum marks had

been prescribed as 40%, they would have failed. It enabled candidates who got good marks in Physics and Chemistry (Say 80%) but got only 38% or 39% in Maths, to get selected, in preference to a candidate who secured a mere 40% in all three subjects. In the traditional method, the candidate with 39%, 80% and 90% would have been unsuccessful and person with 40%, 40% and 40% would have been successful. The cut-off marks in Maths being fixed at 37% (instead of the traditional minimum of 40%) enabled the students who have done better in other streams to have a reasonable chance of getting admitted. The procedure though complicated, sought to achieve a more balanced selection when compared to the traditional methods. It was neither arbitrary nor capricious. [Para 22] [1087-F-H; 1088-A-H; 1085-A-B]

7. As regards the next contention of the appellants that different versions of the procedure adopted for arriving at the cut-off marks was given at different stages, and this made the entire exercise doubtful, it is found that what were given were not different versions, but better or more detailed disclosure of the same process or procedure. Apparently the Board was not initially willing to disclose the entire process. The RTI Act had just come into force and the apparent tendency initially was to give the minimum information. Subsequently when pressed, the Board has come out with complete disclosure of the process adopted. [Para 23] [1089-C-E]

8. All aspects connected with the selection process are technical falling within the purview of the professional experts in charge and the role of the courts is very limited. The procedure adopted in JEE 2006 may not be the best of procedures, nor as sound and effective as the present procedures. In fact the action taken by the appellants in challenging the procedure for JEE 2006, their attempts to bring in transparency in the procedure by various RTI applications, and the debate generated by

the several views of experts during the course of the writ proceedings, have helped in making the merit ranking process more transparent and accurate. IITs and the candidates who now participate in the examinations must, to a certain extent, thank the appellants for their effort in bringing such transparency and accuracy in the ranking procedure. But there is no ground for that Courts to interfere with the procedure, even if it was not accurate or efficient, in the absence of malafides or arbitrariness or violation of law. It is true that if in JEE 2006, a different or better process had been adopted, or the process now in vogue had been adopted, the results would have been different and the first appellant might have obtained a seat. But on that ground it is not possible to impute malafides or arbitrariness, or grant any relief to the first appellant. Therefore, the appellant will have to be satisfied in being one of the many unsung heroes who helped in improving the system. [Paras 25, 26] [1091-A-F]

Case Law Reference:

1984 (4) SCC 27	**relied on**	**Para 18**
2009 (3) SCR 859	**relied on**	**Para 18**
2007 (5) SCR 7	**relied on**	**Para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8520 of 2011.

From the Judgment & Order dated 6.1.2010 of the Division Bench of High Court of West Bengal at Calcutta in F.M.A. No. 1424 of 2008.

Prashant Bhushan and Pranav Sachdeva for the Appellants.

Gopal Subramanium, SG, Anand Verma and Shekhar Kumar for the Respondents.

The Judgment of the Court was delivered by

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

2. The first appellant is the son of second appellant who is a Professor in the Indian Institute of Technology (IIT for short), Kharagpur. Admission to undergraduate courses in fifteen IITs as also IT--BHU and ISM, Dhanbad is through the Common Entrance Examination known as the Joint Entrance Examination (for short IIT-JEE). The said examination is considered to be the toughest entrance examination in India, with more than 50 candidates vying for each seat in the said examination. IIT-JEE is conducted every year by a different IIT on a rotation basis and is supervised by the Joint Admission Board (JAB or the 'Board'), the first respondent herein. The first appellant appeared in the IIT-JEE 2006, as a general category candidate. He secured 75 marks in Methamatics, 104 marks in Physics and 52 marks in Chemistry, aggregating to 231. The Board had fixed the cut off marks for admission as 37 for Maths, 48 for Physics and 55 for Chemistry and the aggregate cut off marks as 154. As first appellant did not secure the minimum of 55 marks in chemistry he was not qualified, even though his aggregate in the three subjects was very high.

3. The second appellant wrote a letter dated 5.9.2006 to all the IIT Chairmen/Directors alleging anomalies and inherent contradictions in the selection process. He alleged that the cut off marks were fixed arbitrarily and with malafides in a manner that a student such as the first appellant with 231 marks was found to be not qualified whereas a student who got aggregate marks of 154 was found to have qualified. The appellants also filed several applications under the Right to Information Act 2005 and collected considerable data. The appellants claim that when they sought information about the procedure for computation of cut off marks for JEE 2006 the organising Chairman, JEE 2006 gave two different versions at different points of time.

4. The first response given by the Organizing Chairman, JEE 2006 on 14.5.2007 read as follows :

"Procedure for computation of cut-off marks etc. for JEE 2006

1. "Consistent with announced criteria of "Ranking" and "Tie-breaking" given in Section 11.1 and 11.2 of the Information Brochure of JEE 2006 the different cut-offs were decided.

2. On the basis of overall performance of candidates who appeared in all the three subjects (Mathematics, Physics & Chemistry), mean marks of each of the three subjects along with standard deviation was determined. The cut-off in each subject was decided as mean marks minus one standard deviation. Further depending on the number of candidates required to be qualified on All India basis, the aggregate marks cut-off was obtained. The cut-off marks of individual subject and aggregate are given below for GE category candidates:-

Mathematics	37
Physics	48
Chemistry	55
Aggregate	154"

The second response given by the organizing Chairman, JEE 2006 on 12.7.2007 was as under:

"Procedure for cut-off determination in JEE-2006:

(i) For each subject, mean and standard deviation of the marks obtained are computed. For this computation only scores of those candidates who have secured minimum 1 (one) mark in each of the three subjects have been considered.

(ii) The cut-off marks of an individual subject is calculated as Cut-off mark of a subject = Mean of the marks for the subject

- Standard deviation of the marks for the subject

The result has been rounded to the nearest integer.

(iii) The mean and standard deviation of the aggregate marks are calculated for those candidates who score at least one mark in each subject

(iv) The aggregate cut-off mark is calculated as

Aggregate cut-off = (Mean of aggregate marks - Standard deviation of aggregate marks) rounded to nearest integer + a positive number

The number selected for counseling (i.e. qualified in JEE-2006 for counseling) is 1.3 X the number of seats available in all participating Institutions. Each time 1(one) mark is added to the mean-standard deviation of the aggregate marks and the number obtained is compared with the desired number. This process is continued until one arrives at the desired number to be called for counseling."

5. Feeling aggrieved by his non-selection, which according to appellants was due to a defective, erroneous and malafide process adopted for cut-off determination, the appellants filed a writ petition (WP 11434 (W) of 2007) claiming the following reliefs, apart from several consequential reliefs :

(a) To quash the selection and merit list of admissions to IIT/ITBHU/ISM on the basis of JEE 2006 as it was prepared on the basis of imposition of illogical and cut off marks in three subjects without any rational basis;

(b) to prepare and publish fresh chemistry marks for admissions to IITs in regard to JEE 2006 after making appropriate corrections in evaluation by adjusting the wrong evaluation and on that basis prepare and publish fresh merit list for admission to IITs/ITBHU/ISM in regard to JEE 2006.

6. A learned Single Judge dismissed the said writ petition holding as follows :

(a) The appellants could not challenge the procedure for determination of cut off in JEE 2006 as they had given a signed declaration that the decision of JAB regarding the admission to be final and they would abide by the said

decision.

(b) The respondents had justified as to the manner of arriving at the cut off marks for Chemistry in JEE 2006 and it was within the domain of the Joint Admission Board to decide upon the procedure for determining such cut off and there was no material to show that the procedure adopted was flawed or arbitrary.

7. Feeling aggrieved, the appellants filed an appeal. A division bench by an interim order dated 7.7.2009 directed the Chairman of the first respondent Board to cause any of the Directors of the IITs in India to prepare and submit a report regarding the working out of cut off marks of Chemistry based on formula and/or norms on the basis of information disclosed under the RTI Act and also disclosed in the affidavit in opposition. The division bench also permitted the appellants to procure any expert's report in regard to working out of cut off marks in regard to Chemistry by following the aforesaid two norms and submit the report.

8. In pursuance of it, the appellants secured the two reports both dated 17.7.2009 from T.A.Abinandanan, Professor, Department of Materials Engineering, Indian Institute of Science, Bangalore. The first report was on the calculation of the cut off marks in Chemistry. The concluding portion of the said opinion is extracted below:

"Therefore, the cut-off marks of Chemistry as per the formula provided in the affidavit-in-opposition comes out to be Six (6). This cannot be 55.

Conclusions : Cut-off marks in Chemistry were calculated in two different methods; in both the methods, the formula is the same: "Mean minus Standard Deviation"; however, the methods differ in the candidate populations used for computing the Mean and Standard Deviation. The calculated value of the Mean and Standard Deviation will depend on the candidate population used in arriving at these two quantities.

The cut-off marks in Chemistry, comes out, correctly and precisely, to be MINUS SIX and SIX, respectively, based on the formula and/or norms on the basis of information disclosed under the Right to Information Act, and disclosed in the affidavit in opposition.

The Chemistry cut-off marks cannot be 55 by any of the disclosed formulas."

The second report dated 17.7.2009 of Prof. T.A. Abinandanan was on the analysis of candidates' performance in JEE 2006. We extract below the conclusion in the said report:

"A comparison between my findings and the data provided by IIT-Kharagpur reveals the following:

1. Number of candidates in the two categories:

   Category A: I found 145,439 candidates in this category,in perfect agreement with the data provided by IIT-Kharagpur.

   Category B: I found 287,564 candidates in this category,in perfect agreement with the data provided by IIT-Kharagpur.

2. Cut-off marks in Mathematics, Physics, and Chemistry:

	Mathem-atics	Phy-sics	Che-mistry
IIT-Kharagpur data	37	48	55
Category A of this study	7	4	6
Category B of this study, provided for the sake of completeness	-3	8	-6

In terms of cut-off marks, my findings do not agree at all with the data provided by IIT-Kharagpur. Since the

procedure used by IIT-Kharagpur for the determination of the cut-off is the same as the computation I performed for candidates in Category A, a direct comparison is valid.

3. For the subject of Chemistry, following the formula provided by IIT-Kharagpur, the cut-off marks determined by my analysis is only 6, whereas it is 55 in the data provided by IIT-Kharagpur."

9. The JAB appointed a two member committee of IIT Directors (Mr. Gautam Barua, Director, IIT, Guwahati and Mr. Dewang Khakhar, Director, IIT, Bombay) to work out the cut-off marks for chemistry. They gave the following report dated 19.7.2009 :

"The committee first of all noted that the issue of cut-off marks in each of the subjects of the examination, namely, Physics, Chemistry and Mathematics has been present in the JEE system for a number of years. The principle behind having cut-off marks is to ensure that a candidate qualifying the JEE examination satisfies a minimum proficiency level in each of the subjects. As the difficulty level of the question papers vary from year to year, no absolute pass mark can be set as is normally done in examinations. Thus the pass mark has to be relative to the performance of the candidates of that particular year.

The committee examined the procedure for subject cut-off marks in JEE 2006 as submitted in an affidavit to the Calcutta High Court and the procedure given against an RTI application. The committee noted that the procedures given in these document did not contain sufficient details to calculate the cut offs.

A presentation was made before the committee by officials of IIT Kharagpur, including the Chairman JEE 2006, to explain in detail the procedure used in determining the cut-off marks in JEE 2006. The procedure was also given in writing along with sample calculations based on the actual

data of JEE 2006 (attached as Annexures B-G). A demonstration of the computer program implementing the above procedure and using the actual JEE 2006 data, was made before the committee. The results obtained from this demonstration were found to be the same as reported in the Annexures. The committee also examined the computer program used in the demonstration and found that it was as per the procedures reported in the Annexures. The committee was satisfied that the procedures outlined in the Annexures are systematic and complete. The committee also verified that these procedures give the actual cut offs in JEE 2006 for all the subjects, including Chemistry, and also the aggregate cut offs, as reported in the RTI disclosure."

10. The division bench considered the said reports and the contentions of the parties and by impugned order dated 6.1.2010 held that it was unable to grant any relief to the first appellant as it was not inclined to sit over the wisdom of the body of experts and the appellants had not made out any malafides. It also noted that the procedure adopted in 2007 and 2008 was more transparent and simple than the selection process of 2006 and the JAB had made an effort after JEE 2006 to ensure that the candidates get a clearer picture, demonstrating that there were no possibilities of any unfair means in the process of selection. The said judgment is challenged in this appeal by special leave.

11. The question for consideration is whether the procedure adopted by the Board to arrive at the cut off marks for JEE 2006 is arbitrary and mala fide and whether the High Court ought to have interfered in the matter.

12. Learned counsel for the appellants submitted that the minutes of the meeting of JAB 2006 held on 17.9.2005 which laid down the procedure for holding the JEE 2006, furnished by the respondents, did not contain the cut off procedure for JEE 2006. It was submitted that the cut off procedure which was

fixed before the examination was repeatedly changed after the examination and that the two different versions given by the Board at different points of time demonstrated that none of the procedures showed 55% as the chemistry cut off marks; that the procedure adopted was full of errors and defects; and that if the iterative procedure explained by the Board was implemented correctly, the effect would be to increasing the Maths cut off marks from 37 to 42 and decreasing Physics cut off marks from 48 to 44 and Chemistry cut off marks from 55 to 51. It was also contended that the Chemistry cut off marks were probably manipulated to exclude appellant No.1 from the JEE merit list as Prof. S.K. Dube, Chairman, Joint Admission Board 2006 (then Director, IIT, Karagpur) and Prof. V.K.Tiwari, organizing Chairman, JEE 2006 had a personal grudge against the second appellant who was a Professor of Computer Science and Engineering at IIT, Kharagpur.

13. On the other hand the respondents submitted that the IIT-JEE examination is time tested and world renowned and has produced some of the brightest brains of India who have excelled in fields even apart from engineering and technology such as civil services, management etc; and entrance examination is held in high regard for its transparency and objectivity. It was submitted that the JAB and the organizing Institute had ensured that all steps were taken to maintain the confidentiality of the process as well as the identity of the candidates and for that purpose used a bar code on the left and right hand side of each OMR sheet and it was not possible to prejudice a particular candidate by any manual process. It was further submitted that the calculation of the cut off marks had been done on the basis of the procedure adopted by the Board in a completely transparent and objective manner; and there was no possibility of any manual intervention in either the calculation of cut off marks or in calculation of marks of any individual student.

14. It is no doubt true that the simplest and most straight forward method of selecting the candidates to be called for

counseling would be to take the candidates in the order of merit (with reference to actual marks) subject to their possessing a pre-declared minimum marks in each subject. For example the Board can decide beforehand that the aggregate cut off marks for eligibility would be 150, that is 50 in each of the three subjects and prepare a merit list of the candidates who fulfil the said criteria and then call the first 5500 students in the merit list, in the order of merit for counseling. This would be the traditional method.

15. But the Board wants to select candidates with consistent performance in all three subjects. To achieve this result and shortlist about 5500 candidates from out of 287564 candidates, the above mentioned traditional procedures will not be of assistance. Therefore, a rather complicated but scientific procedure has been followed. We may at this juncture set out the Evaluation procedure for JEE 2006 and the Procedure for cut-off determination in JEE 2006 done by iterative process, followed by the Board.

"Evaluation Procedure for JEE 2006

Joint Entrance Examination (JEE) conducted by the IITs for admission to the Under-graduate course in all the seven IITs, IT-BHU and ISM Dhanbad is considered to be the best and the toughest admission test in the world. This is primarily intended to attract the brightest of the young minds for education and research in engineering and technology in India.

Joint Entrance Examination (JEE)-2006 was conducted on 9th April 2006 was one stage of examination as approved by the Joint Admission Board (JAB). In this examination, there were three question papers namely Mathematics, Physics and Chemistry. Each question paper was objective type in nature to test the aptitude and comprehension ability of the candidates. Each question paper is a question-cum-answer book named as Question Paper Booklet (QPB). This question paper booklet has

questions with a space for rough work and the answer sheet which is a machine gradable bar coded OMR sheet attached to the question paper at the end.

This OMR has two parts i.e. Left Hand Side and Right Hand Side with codes on both the side.

After the examination, the question paper booklets are collected from the candidates and submitted to the respective Institutes by the representatives of that Institute. The evaluation procedure is as follows:

* This question paper booklet centre wise is given to different Professors who are named as Chief Coder/coders. For each subject one Chief coder along with 10-12 coders are involved. Depending upon the number of candidates the total numbers of coders vary from Institute to Institute.
* Under the strict supervision of all the Chief coders, the coders separate the OMR Sheet from each of the question paper booklets and arranged them in the prescribed manner.
* These sheets are then separated into two parts i.e. Right Hand Side and Left Hand Side and arranged in prescribed manner.
* Left Hand Side contains the personal data of the candidates including the Centre of Examination and his Registration No.
* Right Hand Side contains the response of the candidates which he has answered in response to each of the question. This response is given by bubbling the appropriate answer circle as specified.
* RHS and LHS of these OMR answer sheet are separately scanned for all the candidates. Accuracy and consistency in this process of scanning are verified with sufficient number of data points for each subject and at each IIT with the same machine

and its setting. While compiling these marks, full secrecy about the identity of the candidates is maintained by the Bar Code already present in the RHS and LHS."

It may be mentioned that in order to maintain quality of the candidates getting admission in IITs/IT-BHU and ISM Dhanbad, the consistent performance in all three subjects is required. The candidates having marks equal to zero or negative in any one of the subjects are notconsidered for determining subject cut-off and ranking. Candidates having marks equal to one (1) or more in all three subjects are considered for determining cut-off and ranking.

"PROCEDURE FOR CUT-OFF DETERMINATION IN JEE-2006:

(i) For each subject, mean and standard deviation of the marks obtained are computed. For this computation only scores of those candidates who have secured minimum of 1 (one) mark in each of the three subjects have been considered.

(ii) The cut-off marks of an individual subject is calculated as Cut-off mark of a subject =

Mean of the marks for the subject – Standard deviation of the marks for the subject.

The result has been rounded to the nearest integer.

(iii) The mean and standard deviation of the aggregate marks are calculated for those candidates who score at least one mark in each subject.

(iv) The aggregate cut-off mark is calculated as

Aggregate cut-off = (Mean of aggregate marks – Standard deviation of Aggregate marks)rounded to nearest integer
-- a positive number.

The number selected for counseling (i.e. qualified in JEE-2006 for counseling) is 1.3 x the number of seats available in all participating Institutions. Each time 1 (one) mark is added to the mean-standard deviation of the aggregate marks and the number obtained is compared with the desired number. This process is continued until one arrives at the desired number to be called for counseling.

PROCEDURE FOR RANKING:

Based on the cut-off marks in the individual subjects as well as aggregate marks in the Examination, a common merit list will be prepared without any relaxed criteria. In addition, separate merit lists of candidates belonging to SC, ST and PD categories will be prepared with different relaxed norms relevant to their categories. While preparing these merit lists, if a candidate belongs to more than one category of relaxed norms, he/she shall be considered only in the category in which he/she gets the maximum benefit. There will not be any separate list of wait listed candidates.

PROCEDURE FOR THE BREAKING:

Tie-breaking criterion adopted for awarding ranks to the candidates who have scored same aggregate marks is as follows :

For each subject, the mean mark will be calculated on the basis of marks obtained by those candidates who have appeared in all three subjects. A candidate will be ranked higher, if he/she has scored higher marks in the subject having the lowest mean marks. If two or more candidate scored the same marks in the above mentioned subject, then the marks of the subject with second lowest mean marks will be used for breaking the tie. Candidates scoring the same marks in all three subjects will be given the same rank."

"Flow Chart illustrating procedure for subject cut off determination of JEE 2006

By following the said procedure the respondents claim to have obtain the following successive subject cut off marks :

Chemistry cut off marks	Physics cut off marks	Mathe-matics cut of marks	GE calculated	GE required
1	1	1	134449	
5	3	6	105968	
9	6	9	83130	
13	9	12	64420	
17	12	15	49696	
22	16	18	37038	
27	21	21	27227	
33	26	24	19803	
39	32	27	14192	
45	39	31	9799	
52	46	35	6580	
59	53	39	4490	5500
53	47	36	6144	
54	48	37	5717	
55	49	38	5342	
55	49	37	5472	
55	48	37	5585	

Thereafter taking the data set of the 5585 candidates shortlisted as per the subject cut off process, the aggregate cut off is determined by the following iterative process :

"Initially the cut off mark is taken as 1 and on that basis calculate the number of candidates satisfying the cut off marks. As against the total of the candidates who had secured one mark each in each of the 3 subjects the candidates were found to be 134449. Thereafter the mean in regard to each subject is calculated by dividing total number of marks secured by each candidate in a particular paper and then dividing the number of candidates who appeared for the paper. This gives the mean. Then the standard deviation is arrived at by adopting the formula

Then the idea is to reduce the number from 134449 to around 5500. The cut off marks were recalculated for each subject by adopting the formula of cut off marks being mean marks less standard deviation of the marks and rounding it off to the lowest integer. Then if the number is still more, again calculate by applying the cut off marks procedure with reference to the reduced number. By this process the cut off marks have been arrived at in regard to each subject for 5585 which was nearest to 5500. Thereafter taking the data set of the said 5585 shortlisted the aggregate cut off was determined by following iterative process :

"Step 1 Total desired number of candidates to be called for counseling (including SC,ST and PD candidates) > 6307 (NTD).

This number is disclosed in the Counseling Brochure sent to all the qualified candidates

Step 2 Take dataset (N) obtained after arriving at the final subject cut-off marks.

Step 3 Calculate Mean and Standard Deviation of the aggregate marks for dataset N.

Step 4 Calculate aggregate cut-off of GE candidates by the formula:

Aggregate cut-off (171) = mean of aggregate marks (212.555) – standard deviation of aggregate marks (41.30975).

(Note : The value was rounded off to the nearest lower integer)

Step 5 Calculate cut-off marks of SC/ST, PD by the formula:

Subject cut-off of SC/ST = 0.3 x subject cut-off of GE candidates

Aggregate cut-off of SC/ST = 0.6 x aggregate cut-off of GE candidates

Subject cut-off of PD = 0.8 x subject cut-off of GE candidates

Aggregate cut-off of PD = 0.9 x aggregate cut-off GE candidates

Step 6 Use subject cut-off and aggregate cut-offs for all categories to obtain the total desired number, NTD.

Step 7 Calculate total numbers of candidates, NT.

Step 8 If NT < NTD, decrease GE aggregate cut-off by 1 mark and go to step 4.

Step 9 If NT > NTD, Print NT with all categories. The calculation is stopped."

16. For a layman, the above procedure may appear to be highly cumbersome and complicated. But the object of the aforesaid procedure for arriving at the cut-off marks is to select candidates well equipped in all the three subjects, with reference to their merit, weighed against the average merit of all the candidates who appeared in the examination. The fact that the procedure was complicated would not make it arbitrary

or unreasonable or discriminatory.

17. There are several statistical methods of preparing the ranking for purpose of selecting the best candidates for admission to a course, some simple and some complex. Each method or system has its merits and demerits and can be adopted only under certain conditions or by making certain assumptions. Any such statistical techniques should be under continuous review and evaluation to achieve improvement, in the light of experience gained over the years and new developments, if it is a reliable tool in the selection process.

18. In *Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupeshkumar Sheth* [1984 (4) SCC 27] it was observed thus :

> "...the Court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day-to-day working of educational institutions and the departments controlling them."

In *All India Council for Technical Education v. Surinder Kumar Dhawan* [2009 (11) SCC 726] this court held :

> "The courts are neither equipped nor have the academic or technical background to substitute themselves in place of statutory professional technical bodies and take decisions in academic matters involving standards and quality of technical education. If the courts start entertaining petitions from individual institutions or students to permit courses of their choice, either for their convenience or to alleviate hardship or to provide better opportunities, or because they think that one course is equal to another, without realizing the repercussions on the field of technical education in general, it will lead to chaos in education and deterioration in standards of education. …… The role of statutory expert bodies on education and role of courts are

well defined by a simple rule. If it is a question of educational policy or an issue involving academic matter, the courts keep their hands off. If any provision of law or principle of law has to be interpreted, applied or enforced, with reference to or connected with education, the courts will step in."

(emphasis supplied)

This Court also repeatedly held that courts are not concerned with the practicality or wisdom of the policies but only illegality. In *Directorate of Film Festivals v. Gaurav Ashwin Jain* [2007 (4) SCC 737] this court held :

"….Courts do not and cannot act as appellate authorities examining the correctness, suitability and appropriateness of a policy, nor are courts advisors to the executive on matters of policy which the executive is entitled to formulate. The scope of judicial review when examining a policy of the Government is to check whether it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution, or opposed to any statutory provision or manifestly arbitrary. Courts cannot interfere with policy either on the ground that it is erroneous or on the ground that a better, fairer or wiser alternative is available. Legality of the policy, and not the wisdom or soundness of the policy, is the subject of judicial review…"

(emphasis supplied)

19. Thus, the process of evaluation, the process of ranking and selection of candidates for admission with reference to their performance, the process of achieving the objective of selecting candidates who will be better equipped to suit the specialized courses, are all technical matters in academic field and courts will not interfere in such processes. Courts will interfere only if they find all or any of the following : (i) violation of any enactment, statutory Rules and Regulations; (ii) mala fides or ulterior motives to assist or enable private gain to someone or cause prejudice to anyone; or where the procedure

adopted is arbitrary and capricious. An action is said to be arbitrary and capricious, where a person, in particular, a person in authority does any action based on individual discretion by ignoring prescribed rules, procedure or law and the action or decision is founded on prejudice or preference rather than reason or fact. To be termed as arbitrary and capricious, the action must be illogical and whimsical, something without any reasonable explanation. When an action or procedure seeks to achieve a specific objective in furtherance of education in a bona fide manner, by adopting a process which is uniform and non-discriminatory, it cannot be described as arbitrary or capricious or mala fide.

20. The appellants in this case have alleged mala fides on the part of Chairman of the Board and Chairman of the Organising Committee. The allegation is that on account of personal enmity, rivalry and hostility harboured by them towards the second appellant, who happens to be a professor at IIT, Kharagpur, they manipulated the ranking and selection process and deliberately set cut-off marks to deny admission to second appellants' son, a seat in an IIT. The appellants have not made out, even remotely, any such motive, in regard to the procedure for arriving at the cut-off marks. The claim that to deny admission to one student from among more than 2,87,000 students, they manipulated the process of fixing cut-off marks is too far fetched and difficult to accept, apart from the fact that there is no iota of material to support such a claim. It is too much to assume that where nearly three lakhs candidates appeared, a particular procedure was adopted to ensure that a particular candidate failed. It would appear that somewhat similar procedure was adopted in the year 2000 and 2001. The iterative procedure involving mean and standard deviation of the scores, similar to JEE 2006 was followed in JEE 2001. The object of the entire exercise was to ensure a balanced selection among the candidates who participated in the examination. IIT-JEE is a renowned examination trusted by the entire student world. It is not only a difficult examination to pass, but a difficult examination to rank and select the best of candidates having

good knowledge in all three subjects.

21. The appellants next contended that the first appellant had obtained 231 marks and he had been found to be unsuitable whereas candidates who got 154 were found suitable, this was absurd and illogical. There is nothing illogical about the process. The minimum aggregate cut off was 154. The minimum cut off for individual subjects was 37, 48 and 55 for Maths, Physics and Chemistry. If a candidate had secured the minimum in three subjects and had also secured the minimum of the aggregate which was only 154, he becomes eligible; whereas a candidate who got 231 in the aggregate but does not get the minimum cut off marks in one of the subjects (as for example the first appellant who got only 52 which is less than the cut off of 55), naturally cannot be qualified. Even in standard traditional examinations, if total maximum marks was 600 (in six subjects) and minimum marks in each of the six subjects was 35 out of 100, a candidate who may secure 482 marks (that 90% in five subjects, but secures only 32 marks in one subject, will be considered as failed, whereas a person who secures only 210 marks (that is 35 marks in all the six subjects) will be considered as passed. Where minimum performance in all the subjects is also relevant, a person who fails to get the minimum cut off marks in one subject, cannot contend that he had secured very high marks in other two subjects and therefore injustice has been done. All procedures when standardized, result in some kind of injustice to some or the others. That cannot be helped.

22. The next complaint was about the procedure adopted based on variable cut-offs instead of pre-declared fixed cut-offs. Where a huge number of candidates (more than 287,000) have participated in an examination, for filling about 5500 seats, and it becomes necessary to select candidates possessing comparatively better proficiency in all three subjects, the traditional methods of short-listing may not be of assistance. The traditional methods would result in the candidates who have done extremely well in one subject or two subjects but have little or no proficiency in the third subject to steal a march over

candidates who have done uniformly well in all the three subjects. For example, in the traditional method where 40% are the minimum marks required to be scored in each subject, a candidate who just gets 40% in Maths and 40% in Physics and 91% in Chemistry, would be eligible and as his total marks are 171, will get admitted in preference to a candidate who did uniformly well and secured 52 marks in Maths, 53 marks in Physics and 65 marks in Chemistry whose total is 170 marks. The result is that a candidate who is comparatively poor in Maths and Physics, secures a seat by virtue of his good performance in Chemistry, in preference to a candidate who has done uniformly well in all subjects. The traditional procedure may not therefore help in securing candidates who do well in all subjects. If one has to choose the candidates with good performances in all subjects, with the average of the performance of all the candidates who participated in a given examination as the benchmark, it is necessary to apply the more complicated mean and standard deviation methods.

Let us take another illustration. Assume that Maths was a very tough subject and many would have failed if 40% was to be the minimum marks to pass in the examination. Candidates who secured 38% or 39% in Maths will fail, though their performance in Maths was reasonable and even if they had secured 70% in both Physics and Chemistry. By adopting mean and standard deviation methods, the Board does not start with a set of uniform minimum passing marks but arrives at different minimum marks for different subjects, depending upon the overall performance of all candidates in a given subject, and enables selection of those who have done comparatively and uniformly well in all subjects. That is how, for example, JEE-2006, the cut-off marks were arrived at 37, 48 and 55 for Maths, Physics and Chemistry. This method ensured that those who have done reasonably well in Maths, when compared with the overall majority, got selected in spite of the fact that if the minimum marks had been prescribed as 40%, they would have failed. It enabled candidates who got good marks in Physics and Chemistry (Say 80%) but got only 38%

or 39% in Maths, to get selected, in preference to a candidate who secured a mere 40% in all three subjects. In the traditional method, the candidate with 39%, 80% and 90% would have been unsuccessful and person with 40%, 40% and 40% would have been successful. The cut-off marks in Maths being fixed at 37% (instead of the traditional minimum of 40%) enabled the students who have done better in other streams to have a reasonable chance of getting admitted. The procedure though complicated, sought to achieve a more balanced selection when compared to the traditional methods. It was neither arbitrary nor capricious.

23. The appellants next contended that different versions of the procedure adopted for arriving at the cut-off marks was given at different stages, and this made the entire exercise doubtful. On a careful examination we find that what were given were not different versions, but better or more detailed disclosure of the same process or procedure. Apparently the Board was not initially willing to disclose the entire process. The RTI Act had just come into force and the apparent tendency initially was to give the minimum information. Subsequently when pressed, the Board has come out with complete disclosure of the process adopted.

24. It is true that the procedure for ranking by IIT-JEE has not been uniform. Some years, variable cut-off marks were adopted and some years fixed minimum marks were adopted. In JEE 2000 and JEE 2001, there was independent cut off for each subject and also for the aggregate, as in JEE 2006. In JEE 2004, the qualifying criteria and the ranks in the screening tests were based on the total marks scored and there were no individual subject cut off marks. A common merit list was prepared based on the performance in individual subjects as well as aggregate in the main examination. In JEE 2005, the qualifying criteria and the ranks in the screening tests were based on the total marks scored and there were no individual subject cut off marks. In JEE 2006 there were independent cut off marks for each subject and also for the aggregate, and the cut off procedure was not disclosed before the JEE

examination. However in JEE 2007 and JEE 2008 subject cut off procedure was made available to the public through the JEE website before the JEE examination. During JEE 2007, the subjects cut off were determined on the basis that top 80% candidates qualified in each subject (that is 1, 4 and 3 in Mathematics, Physics and Chemistry and aggregate cut off was 206). During JEE 2008, the subject cut off was 5, 0 and 3 in Mathematics, Physics and Chemistry and aggregate cut off for common merit list was 172. The subject cut off procedure ensured the number of candidates above each subject cut off were exactly the same. In the year 2009 the subject cut off for General category was 11, 8 and 11 for Mathematics, Physics and Chemistry (out of 160 each) and the aggregate cut off was 178. The cut off marks (that is the minimum qualifying marks for ranking (MQMR) is arrived at by computing the average of the marks secured by all the candidates for each of the three subjects. In the year 2010 also the subject cut off were based on the average of the marks secured by all candidates in each subject. This would show that there is a gradual evolution in the process of standardizing ranking, leading to improvement and stabilization of the procedure.

25. We may note that even now many feel that the current pattern of IIT-Joint Entrance Examination, has failed to ensure the selection of best among the aspirants. They feel that that coaching classes have given several candidates of limited ability an edge over others, by training them to answer the multiple choice questions and get through, thereby blocking the chances of better candidates with deeper understanding of concepts and analytical skills required for a course of study at IITs. They also suggest that weightage should be given to class XII marks, in selection to IITs, so that the coaching class culture is discouraged. On the other hand coaching centres contend that the improve the skills of the candidates and make them ready for the undergoing the tough course. There are those who are satisfied with the existing system and those who find several faults with it. All that can be said is that the selection process requires to be upgraded and fine tuned year after year with

periodic changes in the process, so that the selection process and examination remain relevant and meaningful. But all aspects connected with the process are technical falling within the purview of the professional experts in charge and the role of the courts is very limited.

26. The procedure adopted in JEE 2006 may not be the best of procedures, nor as sound and effective as the present procedures. In fact the action taken by the appellants in challenging the procedure for JEE 2006, their attempts to bring in transparency in the procedure by various RTI applications, and the debate generated by the several views of experts during the course of the writ proceedings, have helped in making the merit ranking process more transparent and accurate. IITs and the candidates who now participate in the examinations must, to a certain extent, thank the appellants for their effort in bringing such transparency and accuracy in the ranking procedure. But there is no ground for that Courts to interfere with the procedure, even if it was not accurate or efficient, in the absence of malafides or arbitrariness or violation of law. It is true that if in JEE 2006, a different or better process had been adopted, or the process now in vogue had been adopted, the results would have been different and the first appellant might have obtained a seat. But on that ground it is not possible to impute malafides or arbitrariness, or grant any relief to the first appellant. Therefore, the appellant will have to be satisfied in being one of the many unsung heroes who helped in improving the system.

27. We find no reason for interfering with the order of the High Court. The appeal is dismissed.

B.B.B. Appeal dismissed.

DAYARAM

v.

SUDHIR BATHAM & ORS.

(CIVIL APPEAL NO.3467 of 2005)

OCTOBER 11, 2011

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

Social Status certificate – Scheduled Caste certificate – Verification of – By State Level Screening Committee in accordance with the Supreme Court decision in Madhuri Patil – In Madhuri Patil, a two Judge Bench of Supreme Court issued fifteen directions to streamline the procedure for issuance of caste (social status) certificates, their scrutiny and approval – Whether directions 1 to 15 in Madhuri Patil were impermissible, being legislative in nature – Held: The Supreme Court has a constitutional duty to protect the fundamental rights of Indian citizens – The directions issued in Madhuri Patil are intrinsic to the fulfillment of fundamental rights of backward classes of citizens and are also intended to preclude denial of fundamental rights to such persons who are truly entitled to affirmative action benefits – In giving such directions, Supreme court neither re-wrote the Constitution nor resorted to 'judicial legislation' – The directions 1 to 15 issued in Madhuri Patil in exercise of power under Articles 142 and 32 of the Constitution, are valid and laudable, as they were made to fill the vacuum in the absence of any legislation, to ensure that only genuine scheduled caste and scheduled tribe candidates secured the benefits of reservation and the bogus candidates were kept out – By issuing such directions, Supreme Court was not taking over the functions of the legislature but merely filling up the vacuum till legislature chose to make an appropriate law – Constitution of India, 1950 – Article 142.

Social Status certificate – Scheduled Caste certificate –

Verification of – By State Level Screening Committee in accordance with the Supreme Court decision in Madhuri Patil – Whether directions 11 and 12 in Madhuri Patil, which exclude the jurisdiction of the civil court to entertain suits challenging the decisions of the Caste Scrutiny Committees, violate s.9 of CPC – Held: If a suit is to be filed in a civil court in regard to the decision of the scrutiny committee, the cause of action for such suit would not arise under any statute, but with reference to an order of a committee constituted in pursuance of a scheme formulated by Supreme Court, by way of a stop-gap quasi-legislative action – The principle underlying s.9 is that cognizance of any category of suits arising under a statute, can be barred (either expressly or impliedly) by that Statute – But in regard to cognizance of the category of suits arising from the scheme formulated by a decision of Supreme Court (and not under a statute), the scheme formulated by the decision of the court is the 'statute', and therefore the scheme can expressly or impliedly bar cognizance of such suits – As the scrutiny committee is a creature of the judgment in Madhuri Patil and the procedure for verification and passing of appropriate orders by the scrutiny committee is also provided for in the said judgment, there is nothing irregular or improper in Supreme court directing that orders of the scrutiny committee should be challenged only in a proceeding under Article 226 of the Constitution and not by way of any suit or other proceedings – Permitting civil suits with provisions for appeals and further appeals would defeat the very scheme and will encourage the very evils which Supreme Court wanted to eradicate – Madhuri Patil provides for verification only to avoid false and bogus claims – No reason why the procedure laid down in Madhuri Patil should not continue in the absence of any legislation governing the matter – Code of Civil Procedure, 1908 – s.9 – Jurisdiction of civil courts – Constitution of India, 1950 – Article 226 – Writ petition relating to caste certificates.

Social Status certificate – Scheduled Caste certificate – Verification of – By State Level Screening Committee in

accordance with the Supreme Court decision in Madhuri Patil – Claim of respondents 1 to 3 that they belonged to 'Dhobi' caste, a scheduled caste in Bhopal district of Madhya Pradesh – Whether direction 13 in Madhuri Patil barring intra-court appeals against decisions of Single Judges in writ petitions, when such appeals are specifically provided for in State enactments/Letters Patents, was valid and proper – Held: The 'Uchcha Nyayalaya (Khandpeeth Ko Appeal) Adhiniyam, 2005" enacted by the State of Madhya Pradesh confers a right of appeal before a division bench against the judgment of the single judge exercising jurisdiction under Article 226 of the Constitution – The right to file a writ appeal under the Adhiniyam (State Act) is a 'vested right', to any person filing a writ petition – That right can be taken away only by an express amendment to the Act or by repeal of that Act, or by necessary intendment, that is where a clear inference could be drawn from some legislation that the legislature intended to take away the said right – The right of appeal to a division bench, made available to a party to a writ petition, either under a statute or Letters Patent, cannot be taken away by a judicial order – The power under Article 142 is not intended to be exercised, when such exercise will directly conflict with the express provisions of a statute – The second sentence of clause 13 providing that where the writ petition is disposed of by a single judge, no further appeal would lie against the order of the division bench (even when there is a vested right to file such intra-court appeal) and will only be subject to a special leave under Article 136, is not legally proper and therefore, to that extent, is held to be not a good law – The second sentence of direction No.(13) stands overruled – As a consequence, wherever the writ petitions against the orders of the scrutiny committee are heard by a single judge and the state law or Letters Patent permits an intra-court appeal, the same will be available – Constitution of India, 1950 – Articles 142 and 226 – 'Uchcha Nyayalaya (Khandpeeth Ko Appeal) Adhiniyam, 2005 [as enacted by State of Madhya Pradesh] – Appeal – Right of appeal.

Respondents 1 to 3 claimed that they belonged to 'Dhobi' caste, a scheduled caste in Bhopal district of Madhya Pradesh, and secured appointment to posts reserved for Schedule Castes. The appellant, who was the President of the Schedule Caste Employees Association, made a complaint to the Sub-Divisional Magistrate that respondents 1 to 3 did not belong to any scheduled caste and had produced false caste certificates. The Collector enquired into the matter and gave a report holding that the caste certificates produced by respondents 1 to 3 were false. Consequently, the appointments of respondents 1 to 3 were cancelled. Respondents 1 to 3 challenged the report of the Collector and their consequential termination by filing a writ petition. The High Court directed that the caste certificates of respondents 1 to 3 be verified by the State Level Screening Committee in accordance with the decision of this court in *Madhuri Patil. The appellant, who had also approached the High Court, was permitted by the High Court to pursue his complaint against respondents 1 to 3 before the State Level Screening Committee.**

The State Level Screening Committee held an enquiry, and after hearing respondents 1 to 3 and the appellant, made an order holding that respondents 1 to 3 did not belong to 'Dhobi' caste and directed cancellation of the caste certificates issued to them. Aggrieved by the order, respondents 1 to 3 again approached the High Court, by filing a writ petition. A single Judge of the High Court allowed the writ petition, quashed the order of the scrutiny committee and declared that the respondents 1 to 3 belonged to a scheduled caste. Consequently he quashed the orders of termination of service with a direction to reinstate respondents 1 to 3 with all consequential benefits. The said order was challenged by the appellants by filing a Letters Patent Appeal. The LPA was dismissed by a division bench of the High Court, as not maintainable in view of direction (13) of the caste verification procedure

in *Madhuri Patil*, which directed that "in case the writ petition is disposed of by a single Judge, then no further appeal would lie against that order to the division bench, but subject to special leave under Article 136."

The present appeals were referred by a two Judge bench, by order of reference doubting the legality and validity of the directions issued in *Madhuri Patil*.

In *Madhuri Patil,* a two Judge Bench of this Court found that spurious tribes and persons not belonging to scheduled tribes were snatching away the reservation benefits given to genuine tribals, by claiming to belong to scheduled tribes and was therefore of the view that the caste certificates issued should be scrutinised with utmost expedition and promptitude. To streamline the procedure for the issuance of a caste (social status) certificates, their scrutiny and approval, this Court issued fifteen directions.

In view of the reference order, the following questions arose for consideration:

(i) Whether directions 1 to 15 in *Madhuri Patil* are impermissible, being legislative in nature?

(ii) Whether directions 11 and 12 in *Madhuri Patil,* which exclude the jurisdiction of the civil court to entertain suits challenging the decisions of the Caste Scrutiny Committees, violate section 9 of the Code of Civil Procedure?

(iii) Whether direction 13 in *Madhuri Patil* barring intra-court appeals against decisions of Single Judges in writ petitions, when such appeals are specifically provided for in State enactments/Letters Patents, is valid and proper?

Disposing the appeals, the Court

HELD:

Re: Question (i) directions (1) to (15) in Kumari Madhuri Patil in general

1. The Supreme Court has a constitutional duty to protect the fundamental rights of Indian citizens. Whenever this Court found that the socio-economic rights of citizens required to be enforced, but there was a vacuum on account of the absence of any law to protect and enforce such rights, this Court has invariably stepped in and evolved new mechanisms to protect and enforce such rights, to do complete justice. This has been done by re-fashioning remedies beyond those traditionally available under writ jurisdiction by issuing appropriate directions or guidelines to protect the fundamental rights and make them meaningful. [Para 6] [1111-F-G]

1.2. In a given situation when laws are found to be inadequate for the purpose of grant of relief, the court can exercise its jurisdiction under Article 142 of the Constitution. The directions issued by this court under Article 142 from the law of the land in the absence of any substantive law covering the field and such directions "fill the vacuum" until the legislature enacts substantive law. This court has issued guidelines and directions in several cases for safeguarding, implementing and promoting the fundamental rights, in the absence of legislative enactments. [Para 10] [1115-A-C]

1.3. The directions issued in *Madhuri Patil* were towards furtherance of the constitutional rights of scheduled castes/scheduled tribes. As the rights in favour of the scheduled castes and scheduled tribes are a part of legitimate and constitutionally accepted affirmative action, the directions given by this Court to ensure that only genuine members of the scheduled castes or scheduled tribes were afforded or extended the benefits, are necessarily inherent to the enforcement of fundamental rights. In giving such directions, this court neither re-wrote the Constitution nor resorted to 'judicial

legislation'. The Judicial Power was exercised to interpret the Constitution as a 'living document' and enforce fundamental rights in an area where the will of the elected legislatures have not expressed themselves. Directions issued in the exercise of Judicial Power can fashion modalities out of existing executive apparatus, to ensure that eligible citizens entitled to affirmative action alone derive benefits of such affirmative action. The directions issued in *Madhuri Patil* are intrinsic to the fulfillment of fundamental rights of backward classes of citizens and are also intended to preclude denial of fundamental rights to such persons who are truly entitled to affirmative action benefits. [Para 12] [1115-H; 1116-A-E]

1.4. The directions in *Madhuri Patil* are based on a principle. The principle is wherever the interests of weaker sections are adversely affected due to unscrupulous acts of persons attempting to usurp the benefits meant for such weaker sections, court can, and in fact should, step in, till a proper legislation is in place. [Para 13] [1117-B-D]

1.5. The directions 1 to 15 issued in *Madhuri Patil* in exercise of power under Articles 142 and 32 of the Constitution, are valid and laudable, as they were made to fill the vacuum in the absence of any legislation, to ensure that only genuine scheduled caste and scheduled tribe candidates secured the benefits of reservation and the bogus candidates were kept out. By issuing such directions, this court was not taking over the functions of the legislature but merely filling up the vacuum till legislature chose to make an appropriate law. [Para 14] [1117-E-F]

S. P. Gupta v. Union of India **(1981) Supp. SCC 87;** *Bandhua Mukti Morcha v. Union of India* **(1984) 3 SCC 161;** *Vishaka v. State of Rajasthan* **(1997) 6 SCC 241;** *Vineet Narain v. Union of India* **1998 (1) SCC 226;** *Kalyan Chandra Sarkar v. Rajesh Ranjan* **(2005) 3 SCC 284;** *Lakshmi Kant Pandey v. Union of India* **(1984) 2 SCC 244;** *Common Cause*

v. Union of India **(1996) 1 SCC 753;** *M.C. Mehta v. State of Tamilnadu* **(1996) 6 SCC 756;** *Supreme Court Bar Association v.Union of India* **(1998) 4 SCC 409 and** *Divisional Manager, Aravali Golf Club vs. Chander Haas* **2008 (1) SCC 683 – relied on.**

Kumari Madhuri Patil v. Additional Commissioner, Tribal Development **(1994) 6 SCC 241*; and** *Common Cause vs. Union of India* **2008 (5) SCC 511 – referred to.**

Nature of the Judicial ***process, page 124*** **– referred to.**

Re: Question (ii) : Whether civil courts jurisdiction could be barred?

2.1. The jurisdiction of the civil court to entertain any suit of a civil nature arising under a statute can be excluded only when cognizance is expressly or impliedly barred by the statute which gives rise to such suits. In this case, the creation of the scrutiny committee is by the judgment of this Court. The procedure and functioning of the scrutiny committee is also in accordance with the scheme formulated by the said judgment. Thus if a suit is to be filed in a civil court in regard to the decision of the scrutiny committee, the cause of action for such suit would not arise under any statute, but with reference to an order of a committee constituted in pursuance of a scheme formulated by this court, by way of a stop-gap quasi –legislative action. The principle underlying section 9 is that cognizance of any category of suits *arising under a statute*, can be barred (either expressly or impliedly) by that *Statute.* But in regard to cognizance of the category of suits arising from the scheme formulated by a decision of this Court (and not under a statute), the scheme formulated by the decision of the court is the 'statute', and therefore the scheme can expressly or impliedly bar cognizance of such suits. As the scrutiny committee is a creature of the judgment in *Madhuri Patil* and the procedure for verification and passing of appropriate orders by the scrutiny committee is also provided for in

the said judgment, there is nothing irregular or improper in this court directing that orders of the scrutiny committee should be challenged only in a proceeding under Article 226 of the Constitution and not by way of any suit or other proceedings. Section 9 of the Code and plethora of decisions which considered it, state that the civil court will have jurisdiction except where the cognizance of suits of civil nature is either expressly or impliedly barred. [Para 19] [1120-B-H; 1121-A]

2.2. The assumption that para 15 of *Madhuri Patil* curtails the power of judicial review under Article 226 is not correct. It is inconceivable to even think that this Court, by a judicial order would curtail or regulate the writ jurisdiction of the High Court under Article 226. All that para 15 of *Madhuri Patil* does is to draw attention to the settled parameters of judicial review and nothing more. It is made clear that nothing in para 15 of the decision in *Madhuri Patil* shall be construed as placing any fetters upon the High Court in dealing with writ petitions relating to caste certificates. [Para 21] [1122-E-F]

2.3. Each scrutiny committee has a vigilance cell which acts as the investigating wing of the committee. The core function of the scrutiny committee, in verification of caste certificates, is the investigation carried on by its vigilance cell. When an application for verification of the caste certificate is received by the scrutiny committee, its vigilance cell investigates into the claim, collects the facts, examines the records, examines the relations or friend and persons who have knowledge about the social status of the candidate and submits a report to the committee. If the report supports the claim for caste status, there is no hearing and the caste claim is confirmed. If the report of the vigilance cell discloses that the claim for the social status claimed by the candidate was doubtful or not genuine, a show-cause notice is issued by the committee to the candidate. After giving due opportunity to the candidate to place any

material in support of his claim, and after making such enquiry as it deems expedient, the scrutiny committee considers the claim for caste status and the vigilance cell report, as also any objections that may be raised by any opponent to the claim of the candidate for caste status, and passes appropriate orders. The scrutiny committee is not an adjudicating authority like a Court or Tribunal, but an administrative body which verifies the facts, investigates into a specific claim (of caste status) and ascertains whether the caste/tribal status claimed is correct or not. Like any other decisions of administrative authorities, the orders of the scrutiny committee are also open to challenge in proceedings under Article 226 of the Constitution. Permitting civil suits with provisions for appeals and further appeals would defeat the very scheme and will encourage the very evils which this court wanted to eradicate. As this Court found that a large number of seats or posts reserved for scheduled castes and scheduled tribes were being taken away by bogus candidates claiming to belong to scheduled castes and scheduled tribes, this Court directed constitution of such scrutiny committees, to provide an expeditious, effective and efficacious remedy, in the absence of any statute or a legal framework for proper verification of false claims regarding SCs/STs status. This entire scheme in *Madhuri Patil* will only continue till the concerned legislature makes appropriate legislation in regard to verification of claims for caste status as SC/ST and issue of caste certificates, or in regard to verification of caste certificates already obtained by candidates who seek the benefit of reservation, relying upon such caste certificates. [Para 22] [1122-E-H; 1123-A-G]

2.4. Having regard to the scheme for verification formulated by this Court in *Madhuri Patil,* **the scrutiny committees carry out verification of caste certificates issued without prior enquiry, as for example the caste certificates issued by Tehsildars or other officers of the departments of Revenue/Social Welfare/Tribal Welfare,**

without any enquiry or on the basis of self-affidavits about caste. If there were to be a legislation governing or regulating grant of caste certificates, and if caste certificates are issued after due and proper inquiry, such caste certificates will not call for verification by the scrutiny committees. *Madhuri Patil* **provides for verification only to avoid false and bogus claims. The said scheme and the directions therein have been satisfactorily functioning for the last one and a half decades. If there are any shortcomings, the Government can always come up with an appropriate legislation to substitute the said scheme. There is no reason why the procedure laid down in** *Madhuri Patil* **should not continue in the absence of any legislation governing the matter. [Para 23] [1123-H; 1124-A-C]**

Vankamamidi Venkata Subba Rao vs. Chatlapalli Seetharamaratna Ranganayakamma **(1997) 5 SCC 460;** *Rajasthan State Road Transport Corporation v. Bal Mukund Bairwa* **(2009) 4 SCC 299;** *Dhulabai v. State of MP* **(1968) 3 SCR 662 – referred to.**

<u>Re: Question (iii) : Whether a right of appeal can be taken away by way of judicial order?</u>

3.1. The State of Madhya Pradesh enacted the 'Uchcha Nyayalaya (Khandpeeth Ko Appeal) Adhiniyam, 2005" which is deemed to have come into force from 1.7.1981. The said Adhiniyam confers a right of appeal before a division bench against the judgment of the single judge exercising jurisdiction under Article 226 of the Constitution of India. [Para 25] [1124-E]

3.2. A remedy by way of appeal, provided expressly by a statute cannot be taken away by an executive fiat or a judicial order. [Para 26] [1124-H; 1125-A]

3.3. The right to file a writ appeal under the Adhiniyam (State Act) is a 'vested right', to any person filing a writ petition. That right can be taken away only by an express amendment to the Act or by repeal of that Act,

or by necessary intendment, that is where a clear inference could be drawn from some legislation that the legislature intended to take away the said right. The right of appeal to a division bench, made available to a party to a writ petition, either under a statute or Letters Patent, cannot be taken away by a judicial order. The power under Article 142 is not intended to be exercised, when such exercise will directly conflict with the express provisions of a statute. [Para 28] [1127-F-H]

Asia Industries (P) Ltd. v. S.B. Sarup Singh **(1965) 2 SCR 756;** *A.R. Antulay v. R.S. Nayak* **(1988) 2 SCC 602;** *Hoosein Kasam Dada (India) Ltd.vs. The State of Madhya Pradesh and Ors.* **1953 SCR 987 and** *Garikapatti Veeraya v.N.Subbiah Choudhury* **(1957) SCR 488 – relied on.**

Conclusion

4. In view of the above, it is held that the second sentence of clause 13 providing that where the writ petition is disposed of by a single judge, no further appeal would lie against the order of the division bench (even when there is a vested right to file such intra-court appeal) and will only be subject to a special leave under Article 136, is not legally proper and therefore, to that extent, is held to be not a good law. The second sentence of direction No.(13) stands overruled. As a consequence, wherever the writ petitions against the orders of the scrutiny committee are heard by a single judge and the state law or Letters Patent permits an intra-court appeal, the same will be available. [Para 29] [1128-A-C]

Case Law Reference:

(1994) 6 SCC 241	**referred to**	**Para 1**
(1981) Supp. SCC 87	**relied on**	**Para 7**
(1984) 3 SCC 161	**relied on**	**Para 7**
(1997) 6 SCC 241	**relied on**	**Para 8**
1998 (1) SCC 226	**relied on**	**Para 9**
(2005) 3 SCC 284	**relied on**	**Para 10**

(1984) 2 SCC 244	**relied on**	**Para 10**
(1996) 1 SCC 753	**relied on**	**Para 10**
(1996) 6 SCC 756	**relied on**	**Para 10**
(1998) 4 SCC 409	**relied on**	**Para 11**
2008 (1) SCC 683	**relied on**	**Para 13**
2008 (5) SCC 511	**referred to**	**Para 13**
(1997) 5 SCC 460	**referred to**	**Para 16**
(2009) 4 SCC 299	**referred to**	**Para 17**
(1968) 3 SCR 662	**referred to**	**Para 18**
(1965) 2 SCR 756	**relied on**	**Para 26**
(1988) 2 SCC 602	**relied on**	**Para 26**
1953 SCR 987	**relied on**	**Para 27**
(1957) SCR 488	**relied on**	**Para27**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3467 of 2005.

From the Judgment & Order dated 4.8.2003 of the High Court of Madhya Pradesh at Jabalpur in Letters Patent Appeal No. 409 of 2003.

WITH

C.A. No. 3468 of 2005

Gopal Subramanium, SG, Anand Verma, B.K. Satija, Akshat Srivastava, P.P. Singh, Inderjeet Yadav, Vikas Upadhyay, B.S. Banthia, Satyapal Khushal Chand Pasi for the appearing parties.

The Judgment of the Court was delivered by

R.V. RAVEENDRAN, J. 1. Respondents 1 to 3 claimed that they belonged to 'Dhobi' caste, a scheduled caste in Bhopal district of Madhya Pradesh, and secured appointment to posts reserved for Schedule Castes. The appellant, who was the President of the Schedule Caste Employees Association, made a complaint to the Sub-Divisional Magistrate that respondents 1 to 3 did not belong to any scheduled caste and had produced false caste certificates. The Collector enquired

into the matter and gave a report dated 20.1.2000 holding that the caste certificates produced by respondents 1 to 3 were false. Consequently, the appointments of respondents 1 to 3 were cancelled on 20.4.2000. Respondents 1 to 3 challenged the report of the Collector and their consequential termination in WP No. 2666/2000. The Madhya Pradesh High Court directed that the caste certificates of respondents 1 to 3 be verified by the State Level Screening Committee in accordance with the decision of this court in *Kumari Madhuri Patil v. Additional Commissioner, Tribal Development* (1994) 6 SCC 241. The appellant, who had also approached the High Court, was permitted by the High Court to pursue his complaint against respondents 1 to 3 before the State Level Screening Committee.

2. The State Level Screening Committee held an enquiry, and after hearing respondents 1 to 3 and the appellant, made an order dated 4.2.2002 holding that respondents 1 to 3 did not belong to 'Dhobi' caste and directed cancellation of the caste certificates issued to them. Aggrieved by the order dated 4.2.2002 of the Committee, respondents 1 to 3 again approached the High Court, in WP No.2074/2002. A learned single Judge of the High Court, by order dated 9.3.2003, allowed the writ petition, quashed the order of the scrutiny committee and declared that the respondents 1 to 3 belonged to a scheduled caste. Consequently he quashed the orders of termination of service with a direction to reinstate respondents 1 to 3 with all consequential benefits. The said order was challenged by the appellants by filing a Letters Patent Appeal (LPA No.409/2003). The LPA was dismissed by a division bench of the High Court, by order dated 4.8.2003 as not maintainable in view of direction (13) of the caste verification procedure in *Madhuri Patil*, which directed that "in case the writ petition is disposed of by a single Judge, then no further appeal would lie against that order to the division bench, but subject to special leave under Article 136." The said order of the division bench holding the appeal as not maintainable is challenged in Civil Appeal No.3467/2005. The appellant has also challenged the order of the learned Single Judge by filing

a separate appeal in CA No.3468/2005, to avoid difficulties in the event of being unsuccessful in CA No.3467/2005.

The Reference

3. These two appeals have been referred by a two Judge bench, to a larger bench by order of reference dated 31.3.2010 doubting the legality and validity of the directions issued in *Madhuri Patil*. We extract below the relevant portion of the order of reference:

> "In *Kumari Madhuri Patit's case*, as many as fifteen directions were given, which, in our opinion, are all legislative in nature. In our opinion, if a Court feels that some law should be made, then it can only make a recommendation to that effect to the legislature but it cannot itself legislate. It is upto the legislature to accept the recommendation or not.
>
> In *Kumari Madhuri Patil case*, the two Judge Bench of this Court in direction No.13 observed as follows:
>
> > "The High Court would dispose of these cases as expeditiously as possible within a period of three months. In case, as per its procedure, the writ petition/miscellaneous petition/matter is disposed of by a single Judge, then no further appeal would lie against that order to the Division Bench but subject to special leave under Article 136."
>
> In our opinion, the direction that no further appeal will lie against the decision of a Single Judge of the High Court to a division bench was clearly not valid. It is well settled that an appeal is a creature of the statute and if the statute or the Letters Patent of the High Court or rules provide for an appeal, then an appeal will lie. For instance, the Court cannot say that no second appeal under section 100 CPC will be entertained in future by the High Court. That will be really abolishing section 100 CPC and this can only be done by the legislature and not by the courts. *An appeal can be created by the legislature and abolished by the*

legislature. The court can neither creates an appeal nor abolish it.

Since the aforesaid direction in *Kumari Madhuri Patil* case (supra), are in our opinion not valid, we are of the opinion that they require reconsideration by a larger bench."

The directions in Madhuri Patil

4. In *Madhuri Patil,* a two Judge Bench of this Court found that spurious tribes and persons not belonging to scheduled tribes were snatching away the reservation benefits given to genuine tribals, by claiming to belong to scheduled tribes. This Court found that the admission wrongly gained or appointment wrongly obtained on the basis of false caste certificates had the effect of depriving the genuine scheduled castes or scheduled tribes of the benefits conferred on them by the Constitution. It also found that genuine candidates were denied admission to educational institutions or appointments to posts under the State, for want of social status certificate; and that ineligible or spurious candidates who falsely gained entry resorted to dilatory tactics and created hurdles in completion of the inquiries by the Scrutiny Committee, regarding their caste status. It noticed that admissions to educational institutions were generally made by the parents, as the students will be minors, and they (parents or the guardians) played fraud in claiming false status certificate. This Court was therefore of the view that the caste certificates issued should be scrutinised with utmost expedition and promptitude. To streamline the procedure for the issuance of a caste (social status) certificates, their scrutiny and approval, this Court issued the fifteen directions, relevant portions of which are extracted below:

1. The application for grant of social status certificate shall be made to the Revenue-Sub-Divisional Officer and Deputy Collector or Deputy Commissioner and the certificate shall be issued by such Officer rather than at the Officer, Taluk or Mandal level.

2. The parent, guardian or the candidate, as the case may

be, shall file an affidavit duly sworn and attested by a competent gazetted officer or non-gazetted officer with particulars of castes and sub-castes, tribe, tribal community, parts or groups of tribes or tribal communities, the place from which he originally hails from and other particulars as may be prescribed by the concerned Directorate.

3. Application for verification of the caste certificate by the Scrutiny Committee shall be filed at least six months in advance before seeking admission into educational institution or an appointment to a post.

4. All the State Governments shall constitute a Committee of three officers, namely, (I) an Additional or Joint Secretary or any officer higher in rank of the Director of the concerned department, (II) the Director, Social Welfare/ Tribal Welfare/Backward Class Welfare, as the case may, and (III) in the case of Scheduled Castes another officer who has intimate knowledge in the verification and issuance of the social status certificates. In the case of Scheduled Tribes, the Research Officer who has intimated knowledge in identifying the tribes, tribal communities, parts of or groups of tribes or tribal communities.

5. Each Directorate should constitute a vigilance cell consisting of Senior Deputy Superintendent of Police in over all charge and such number of Police Inspectors to investigate into the social status claims. ……..

6. The Director concerned, on receipt of the report from the vigilance officer if he found the claim for social status to be "not genuine" or "doubtful" or spurious or falsely or wrongly claimed, the Director concerned should issue show cause notice supplying a copy of the report of the vigilance officer to the candidate by a registered post with acknowledgement due or through the head of the concerned educational institution in which the candidate is studying or employed…….. After giving such opportunity either in person or through counsel, the

Committee may make such inquiry as it deems expedient and consider the claims vis-a-vis the objections raised by the candidate or opponent and pass an appropriate order with brief reasons in support thereof.

7. In case the report is in favour of the candidate and found to be genuine and true, no further action need be taken except where the report or the particulars given are procured or found to be false or fraudulently obtained and in the latter event the same procedure as is envisaged in para 6 be followed.

8. Notice contemplated in para 6 should be issued to the parents/ guardian also in case candidate is minor to appear before the Committee with all evidence in his or their support of the claim for the social status certificates.

9. The inquiry should be completed as expeditiously as possible preferably by day-to-day proceedings within such period not exceeding two months. If after inquiry, the caste Scrutiny Committee finds the claim to be false or spurious, they should pass an order cancelling the certificate issued and confiscate the same. It should communicate within one month from the date of the conclusion of the proceedings the result of enquiry to the parent/guardian and the applicant.

10. In case of any delay in finalizing the proceedings, and in the meanwhile the last date for admission into an educational institution or appointment to an officer post, is getting expired, the candidate be admitted by the Principal or such other authority competent in that behalf or appointed on the basis of the social status certificate already issued or an affidavit duly sworn by the parent/ guardian/candidate before the competent officer or non-official and such admission or appointment should be only provisional, subject to the result of the inquiry by the Scrutiny Committee.

11. The order passed by the Committee shall be final and conclusive only subject to the proceedings under

Article 226 of the Constitution.

12. No suit or other proceedings before any other authority should lie.

13. The High Court would dispose of these cases as expeditiously as possible within a period of three months. In case, as per its procedure, the writ petition/ Miscellaneous petition/matter is disposed of by a Single Judge, then no further appeal would lie against that order to the Division Bench but subject to special leave under Article 136.

14. In case, the certificate obtained or social status claimed is found to be false, the parent/guardian/the candidate should be prosecuted for making false claim. If the prosecution ends in a conviction and sentence of the accused, it could be regarded as an offence involving moral turpitude, disqualification for elective posts or offices under the State or the Union or elections to any local body, legislature or the Parliament.

15. As soon as the finding is recorded by the Scrutiny Committee holding that the certificate obtained was false, on its cancellation and confiscation simultaneously, it should be communicated to the concerned educational institution or the appointing authority by registered post with acknowledgement due with a request to cancel the admission or the appointment. The principal etc. of the educational institution responsible for making the admission or the appointing authority, should cancel the admission/appointment without any further notice to the candidate and debar the candidate for further study or continue in office in a post.

[emphasis supplied]

This Court also observed that as the aforesaid procedure by providing for a fair and just verification, could shorten the undue delay and also prevent avoidable expenditure for the State on the education of the candidate admitted/appointed on false

social status or further continuance therein, every State should endeavour to give effect to it and see that the constitutional objectives intended for the benefit and advancement of the genuine scheduled castes/scheduled tribes are not defeated by unscrupulous persons.

Questions for consideration

5. In view of the reference order, the following questions arise for consideration:

(i) Whether directions 1 to 15 in *Madhuri Patil* are impermissible, being legislative in nature?

(ii) Whether directions 11 and 12 in *Madhuri Patil,* which exclude the jurisdiction of the civil court to entertain suits challenging the decisions of the Caste Scrutiny Committees, violate section 9 of the Code of Civil Procedure?

(iii) Whether direction 13 in *Madhuri Patil* barring intra-court appeals against decisions of Single Judges in writ petitions, when such appeals are specifically provided for in State enactments/Letters Patents, is valid and proper?

Re: Question (i) directions (1) to (15) in *Kumari Madhuri Patil in general*

6. This Court has a constitutional duty to protect the fundamental rights of Indian citizens. Whenever this Court found that the socio-economic rights of citizens required to be enforced, but there was a vacuum on account of the absence of any law to protect and enforce such rights, this Court has invariably stepped in and evolved new mechanisms to protect and enforce such rights, to do complete justice. This has been done by re-fashioning remedies beyond those traditionally available under writ jurisdiction by issuing appropriate directions or guidelines to protect the fundamental rights and make them meaningful.

7. In *S. P. Gupta v. Union of India* (1981) Supp. SCC 87, this Court observed :

> "The judiciary has therefore a socio-economic destination and a creative function. It has, to use the words of Glanville Austin, to become an arm of the socio-economic revolution and perform an active role calculated to bring social justice within the reach of the common man. It cannot remain content to act merely as an umpire but it must be functionally involved in the goal of socio-economic justice."

Referring to the British concept of judging, that is, a Judge is only a neutral and passive umpire, who merely hears and determines issues of fact and law, this Court further observed thus :

> "Now this approach to the judicial function may be all right for a stable and static society but not for a society pulsating with urges of gender justice, worker justice, minorities justice, dalit justice and equal justice between chronic un-equals. Where the contest is between those who are socially or economically unequal, the judicial process may prove disastrous from the point of view of social justice, if the Judge adopts a merely passive or negative role and does not adopt a positive and creative approach. The judiciary cannot remain a mere bystander or spectator but it must become an active participant in the judicial process ready to use law in the service of social justice through a pro-active goal oriented approach."

> "What is necessary is to have Judges who are prepared to fashion new tools, forge new methods, innovate new strategies and evolve a new jurisprudence, who are judicial statesmen with a social vision and a creative faculty and who have, above all, a deep sense of commitment to the Constitution with an activist approach and obligation for accountability, not to any party in power nor to the opposition nor to the classes which are vociferous but to the half hungry millions of India who are continually denied their basic human rights. We need Judges who are alive to the socio-economic realities of Indian life, who are anxious to wipe every tear from every eye, who have faith in the constitutional values and who are ready to use law

as an instrument for achieving the constitutional objectives."

In *Bandhua Mukti Morcha v. Union of India* (1984) 3 SCC 161 expanded upon the role of this Court thus:

> "But the question then arises as to what is the power which may be exercised by the Supreme Court when it is moved by an "appropriate" proceeding for enforcement of a fundamental right. It is not only the high prerogative writs of mandamus, habeas corpus, prohibition, quo warranto and certiorari which can be issued by the Supreme Court but also writs in the nature of these high prerogative writs and therefore even if the conditions for issue of any of these high prerogative writs are not fulfilled, *the Supreme Court would not be constrained to fold its hands in despair and plead its inability to help the citizen who has come before it for judicial redress, but would have power to issue any direction, order or writ including a writ in the nature of any high prerogative writ. This provision conferring on the Supreme Court power to enforce the fundamental rights in the widest possible terms shows the anxiety of the Constitution makers not to allow any procedural technicalities to stand in the way of enforcement of fundamental rights.* The Constitution makers clearly intended that the Supreme Court should have the amplest power to issue whatever direction, order or writ may be appropriate in a given case for enforcement of a fundamental right."
>
> *(emphasis supplied)*

8. In *Vishaka v. State of Rajasthan* (1997) 6 SCC 241 this court recognized its obligation under Article 32 to provide for the enforcement of fundamental rights in areas with legislative vacuum. After detailed consideration, this Court held:

> "In view of the above, and the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual

> harassment at work places, we lay down the guidelines and norms specified hereinafter for due observance at all work places or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights and it is further emphasised that this would be treated as the law declared by this Court under Article 141 of the Constitution."

9. In *Vineet Narain v. Union of India* 1998 (1) SCC 226 this court took note of the fact that in exercise of the powers under Article 32 read with Article 142, guidelines and directions had been issued in a large number of cases; and that issue of such guidelines and directions is a well settled practice which has taken firm roots in our constitutional jurisprudence and that such exercise was essential to fill the void in the absence of suitable legislation to cover the field. Consequently this Court issued various directions with the following preamble:

> "As pointed out in Vishakha (supra), it is the duty of the executive to fill the vacuum by executive orders because its field is co-terminus with that the legislature, *and where there is inaction even by the executive for whatever reason, the judiciary must step in, in exercise of its constitutional obligations under the aforesaid provisions to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field*.
>
> 59. On this basis, we now proceed to give the directions enumerated hereafter for rigid compliance till such time as the legislature steps in to substitute them by proper legislation. These directions made under Article 32 read with Article 142 to implement the rule of law wherein the concept of equality enshrined in Article 14 is embedded, have the force of law under Article 141 and by virtue of Article 144 it is the duty of all authorities, civil and judicial, in the territory of India to act in aid of this Court."
>
> (emphasis supplied)

10. In *Kalyan Chandra Sarkar v. Rajesh Ranjan* (2005) 3 SCC 284 this Court held that Article 142 is an important constitutional power granted to this court to protect the citizens. In a given situation when laws are found to be inadequate for the purpose of grant of relief, the court can exercise its jurisdiction under Article 142 of the Constitution. This court reiterated that directions issued by this court under Article 142 from the law of the land in the absence of any substantive law covering the field and such directions "fill the vacuum" until the legislature enacts substantive law. This court has issued guidelines and directions in several cases for safeguarding, implementing and promoting the fundamental rights, in the absence of legislative enactments. By way of illustrations, we may refer to *Lakshmi Kant Pandey v. Union of India* (1984) 2 SCC 244 [regulating inter-country adoptions], *Common Cause v. Union of India* (1996) 1 SCC 753 [regulating collection, storage and supply of blood for blood transfusions], *M.C. Mehta v. State of Tamilnadu* (1996) 6 SCC 756 [enforcing prohibition on child labour].

11. In *Supreme Court Bar Association v.Union of India* (1998) 4 SCC 409 a Constitution Bench of this Court held:

> "Indeed this Court is not a court of restricted jurisdiction of only dispute-settling. It is well recognized *and established that this court has always been a law maker and its role travels beyond merely dispute settling*. It is a "problem solver in the nebulous provisions dealing with the subject matter of a given case cannot be altogether ignored by this Court, while making an order under Article 142. Indeed, these constitutional powers cannot, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in a statute dealing expressly with the subject."
>
> (emphasis supplied)

12. The directions issued in *Madhuri Patil* were towards

furtherance of the constitutional rights of scheduled castes/ scheduled tribes. As the rights in favour of the scheduled castes and scheduled tribes are a part of legitimate and constitutionally accepted affirmative action, the directions given by this Court to ensure that only genuine members of the scheduled castes or scheduled tribes were afforded or extended the benefits, are necessarily inherent to the enforcement of fundamental rights. In giving such directions, this court neither re-wrote the Constitution nor resorted to 'judicial legislation'. The Judicial Power was exercised to interpret the Constitution as a 'living document' and enforce fundamental rights in an area where the will of the elected legislatures have not expressed themselves. Benjamin Cardozo in his inimitable style said that the power, to declare the law carries with it the power and within limits the duty, to make law when none exists. (*Nature of the Judicial Process, page 124).* Directions issued in the exercise of Judicial Power can fashion modalities out of existing executive apparatus, to ensure that eligible citizens entitled to affirmative action alone derive benefits of such affirmative action. The directions issued in *Madhuri Patil* are intrinsic to the fulfillment of fundamental rights of backward classes of citizens and are also intended to preclude denial of fundamental rights to such persons who are truly entitled to affirmative action benefits.

13. We may now deal with the two decisions relied upon in the reference order. The first is the decision in *Divisional Manager, Aravali Golf Club vs. Chander Haas* [2008 (1) SCC 683]. In that case it was observed that Judges should not *unjustifiably try to perform* executive or legislative functions and in the name of judicial activism, cannot cross their limits and try to take-over the functions which belong to another organ of the State. The court also lamented upon the tendency of some Judges to interfere in matters of policy. These observations no doubt, deserve acceptance. These observations were made in the context of setting aside a direction of the High Court to create the posts of drivers and then regularize the services of respondents against such newly created posts. It was held that courts cannot direct creation of posts which is the prerogative of the executive or legislature. In fact in the very decision this

court further observed that its observations did not mean that Judges should never be activists *as many a time judicial activism is a useful adjunct to democracy and such activism should be resorted to only in exceptional circumstances where the situation forcefully demands it in the interest of the nation or the poorer or weaker sections of the society*, keeping in mind that ordinarily the task of legislation or administrative decisions is for the legislature and the executive and not for the judiciary. Thus the decision in *Aravali Golf Club* in effect supports the principle which is the basis for the directions in *Madhuri Patil*. The principle is wherever the interests of weaker sections are adversely affected due to unscrupulous acts of persons attempting to usurp the benefits meant for such weaker sections, court can, and in fact should, step in, till a proper legislation is in place. It is not necessary to refer to the second case mentioned in the reference order, that is *Common Cause vs. Union of India* - 2008 (5) SCC 511, for two reasons. First is, it reiterates *Aravali Golf Club*. Second is, on the relevant issue, the two learned Judges have differed and therefore the discussion is not of any assistance.

14. Therefore we are of the view that directions 1 to 15 issued in exercise of power under Articles 142 and 32 of the Constitution, are valid and laudable, as they were made to fill the vacuum in the absence of any legislation, to ensure that only genuine scheduled caste and scheduled tribe candidates secured the benefits of reservation and the bogus candidates were kept out. By issuing such directions, this court was not taking over the functions of the legislature but merely filling up the vacuum till legislature chose to make an appropriate law.

Re: Question (ii) : Whether civil courts jurisdiction could be barred?

15. Direction (11) in *Madhuri Patil* states that order passed by the scrutiny committee shall be final and conclusive, subject only to challenge under Article 226 of the Constitution. Direction (12) states that no suit (before a civil court) or other proceedings before any other authority should lie against the

orders of the scrutiny committee. The appellant contends that the right to file a civil suit cannot be taken away by a judicial order and that a suit could be barred only by a statute, either expressly or impliedly. Section 9 of the Code of Civil Procedure ('Code' for short) provides that courts have to try all civil suits unless barred. The relevant portion of the said section is extracted below :

> "The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."

16. In *Vankamamidi Venkata Subba Rao vs. Chatlapalli Seetharamaratna Ranganayakamma* (1997) 5 SCC 460 this Court explained the scope of section 9 thus :

> "When a legal right is infringed, a suit would lie unless there is a bar against entertainment of such civil suit and the civil Court would take cognizance of it. Therefore, the normal rule of law is that Civil Courts have jurisdiction to try all suits of civil nature except those of which cognizance is either expressly or by necessary implication excluded….. Courts generally construe the provisions strictly when jurisdiction of the civil courts is claimed to be excluded. *However, in the development of civil adjudication of civil disputes, due to pendency of adjudication and abnormal delay at hierarchical stages, statutes intervene and provide alternative mode of resolution of disputes with less expensive but expeditious disposal…….*It is also an equally settled legal position that where a statute gives finality to the orders of the special tribunal, the civil court's jurisdiction must be held to be excluded, if there is adequate remedy to do what the civil court would normally do in a suit. Where there is no express exclusion, the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case, it is necessary that the statute creates a special right or liability and provides procedure for the

determination of the right or liability and further lays down that all questions about the said right or liability shall be determined by the Tribunal so constituted and whether remedies is normally associated with the action in civil Courts or prescribed by the statutes or not. Therefore, each case requires examination whether the statute provides right and remedies and whether the scheme of the Act is that the procedure provided will be conclusive and thereby excludes the jurisdiction of the civil Court in respect thereof."

(emphasis supplied)

17. Scope of section 9 of the Code was again explained by this Court in *Rajasthan State Road Transport Corporation v. Bal Mukund Bairwa* (2009) 4 SCC 299 as under:

"Section 9 of the Code is in enforcement of the fundamental principles of law laid down in the maxim *Ubi jus ibi remedium.* A litigant, thus, having a grievance of a civil nature has a right to institute a civil suit in a competent civil court unless its cognizance is either expressly or impliedly barred by any statute. Ex facie, in terms of Section 9 of the Code, civil courts can try all suits*, unless barred by statute, either expressly or by necessary implication.*."

(emphasis supplied)

18. In *Dhulabai v. State of MP* (1968) 3 SCR 662 this Court enumerated the circumstances wherein civil court jurisdiction could be held to be excluded. They are:

"(1) Where the statute gives a finality to the orders of the special tribunals, the Civil Court's jurisdiction must be held to be excluded if there is adequate remedy to do what the Civil Courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court."

19. It is therefore clear that the jurisdiction of the civil court to entertain any suit of a civil nature arising under a statute can be excluded only when cognizance is expressly or impliedly barred by the statute which gives rise to such suits. In this case, the creation of the scrutiny committee is by the judgment of this Court. The procedure and functioning of the scrutiny committee is also in accordance with the scheme formulated by the said judgment. Thus if a suit is to be filed in a civil court in regard to the decision of the scrutiny committee, the cause of action for such suit would not arise under any statute, but with reference to an order of a committee constituted in pursuance of a scheme formulated by this court, by way of a stop-gap quasi – legislative action. The principle underlying section 9 is that cognizance of any category of suits *arising under a statute*, can be barred (either expressly or impliedly) by that *Statute.* But in regard to cognizance of the category of suits arising from the scheme formulated by a decision of this Court (and not under a statute), the scheme formulated by the decision of the court is the 'statute', and therefore the scheme can expressly or impliedly bar cognizance of such suits. This is because the 'statute' which gives rise to a cause of action referred to in the aforesaid decisions in *V. Venkata Subha Rao, Bal Mukund Bairwa* and *Dhulabai,* in this case is substituted by the 'quasi-legislative' stop-gap scheme created by the decision of this Court. As the scrutiny committee is a creature of the judgment in *Madhuri Patil* and the procedure for verification and passing of appropriate orders by the scrutiny committee is also provided for in the said judgment, there is nothing irregular or improper in this court directing that orders of the scrutiny committee should be challenged only in a proceeding under Article 226 of the Constitution and not by way of any suit or other proceedings. Section 9 of the Code and plethora of decisions which considered it, state that the civil court will have jurisdiction

except where the cognizance of suits of civil nature is either expressly or impliedly barred.

20. One incidental submission about the nature and constitution of the scrutiny committee requires to be dealt with. It is submitted that scrutiny committee, directed to be constituted by *Madhuri Patil,* is neither a court nor a tribunal, but a committee consisting of government officers, namely, (i) an officer of Additional or Joint Secretary level or other officer higher in rank than the Director of the department concerned; (ii) the Director, Social Welfare/Tribal Welfare/Backward Classes Welfare, as the case may be; and (iii) an officer, who has an intimate knowledge in the verification and issuance of social status certificates in the case of scheduled castes and a Research Officer who has intimate knowledge in identifying tribes, communities etc., in the case of scheduled tribes. The scrutiny committee does not have any judicial member. It is submitted that in the event of caste status being erroneously decided by the scrutiny committee, which does not have any 'judicial' mind, the only remedy available for the aggrieved person would be a writ petition under Article 226 of the Constitution. Such a remedy cannot act as a efficacious substitute to the right to file a civil suit since the High Court exercising writ jurisdiction will not re-appreciate evidence whereas a civil court could do so. It is contended that the High Court's writ jurisdiction, which is concerned only with decision making process, is further curtailed by paragraph 15 in *Madhuri Patil* which directs as under :

> "The question then is whether the approach adopted by the high court in not elaborately considering the case is vitiated by an error of law. High Court is not a court of appeal to appreciate the evidence. The Committee which is empowered to evaluate the evidence placed before it when records a finding of fact, it ought to prevail unless found vitiated by judicial review of any High Court subject to limitations of interference with findings of fact. The Committee when considers all the material facts and records a finding, though another view, as a court of appeal may be possible it is not a ground to reverse the findings. The court has to see whether the committee considered all the relevant material placed before it or has not applied its mind to relevant facts which have led the committee ultimately record the finding. Each case must be considered in the backdrop of its own facts."

It was submitted that not only the decision of the scrutiny committee is given finality on questions of fact, but even the power of judicial review is sought to be curtailed by the aforesaid observation in *Madhuri Patil.* It is pointed out that if the scrutiny committee wrongly holds a genuine caste certificate is to be a false certificate, and the certificate holder is prevented from approaching the civil court, such erroneous findings of fact by the committee which is a non-judicial body would attain finality, without any remedy to the certificate holder. It was therefore submitted that denial of the right to approach the civil court and restricting the remedy to only writ proceedings, in the anxiety to provide speedy remedy, has the potential of causing severe miscarriage of justice.

21. The assumption that para 15 of *Madhuri Patil* extracted above curtails the power of judicial review under Article 226 is not correct. It is inconceivable to even think that this Court, by a judicial order would curtail or regulate the writ jurisdiction of the High Court under Article 226. All that para 15 of *Madhuri Patil* does is to draw attention to the settled parameters of judicial review and nothing more. We make it clear that nothing in para 15 of the decision in *Madhuri Patil* shall be construed as placing any fetters upon the High Court in dealing with writ petitions relating to caste certificates.

22. Each scrutiny committee has a vigilance cell which acts as the investigating wing of the committee. The core function of the scrutiny committee, in verification of caste certificates, is the investigation carried on by its vigilance cell. When an application for verification of the caste certificate is received by the scrutiny committee, its vigilance cell investigates into the claim, collects the facts, examines the records, examines the relations or friend and persons who have knowledge about the

social status of the candidate and submits a report to the committee. If the report supports the claim for caste status, there is no hearing and the caste claim is confirmed. If the report of the vigilance cell discloses that the claim for the social status claimed by the candidate was doubtful or not genuine, a show-cause notice is issued by the committee to the candidate. After giving due opportunity to the candidate to place any material in support of his claim, and after making such enquiry as it deems expedient, the scrutiny committee considers the claim for caste status and the vigilance cell report, as also any objections that may be raised by any opponent to the claim of the candidate for caste status, and passes appropriate orders. The scrutiny committee is not an adjudicating authority like a Court or Tribunal, but an administrative body which verifies the facts, investigates into a specific claim (of caste status) and ascertains whether the caste/tribal status claimed is correct or not. Like any other decisions of administrative authorities, the orders of the scrutiny committee are also open to challenge in proceedings under Article 226 of the Constitution. Permitting civil suits with provisions for appeals and further appeals would defeat the very scheme and will encourage the very evils which this court wanted to eradicate. As this Court found that a large number of seats or posts reserved for scheduled castes and scheduled tribes were being taken away by bogus candidates claiming to belong to scheduled castes and scheduled tribes, this Court directed constitution of such scrutiny committees, to provide an expeditious, effective and efficacious remedy, in the absence of any statute or a legal framework for proper verification of false claims regarding SCs/STs status. This entire scheme in *Madhuri Patil* will only continue till the concerned legislature makes appropriate legislation in regard to verification of claims for caste status as SC/ST and issue of caste certificates, or in regard to verification of caste certificates already obtained by candidates who seek the benefit of reservation, relying upon such caste certificates.

23. Having regard to the scheme for verification formulated by this Court in *Madhuri Patil,* the scrutiny committees carry out verification of caste certificates issued without prior enquiry,

as for example the caste certificates issued by Tehsildars or other officers of the departments of Revenue/Social Welfare/ Tribal Welfare, without any enquiry or on the basis of self-affidavits about caste. If there were to be a legislation governing or regulating grant of caste certificates, and if caste certificates are issued after due and proper inquiry, such caste certificates will not call for verification by the scrutiny committees. *Madhuri Patil* provides for verification only to avoid false and bogus claims. The said scheme and the directions therein have been satisfactorily functioning for the last one and a half decades. If there are any shortcomings, the Government can always come up with an appropriate legislation to substitute the said scheme. We see no reason why the procedure laid down in *Madhuri Patil* should not continue in the absence of any legislation governing the matter.

Re: Question (iii) : Whether a right of appeal can be taken away by way of judicial order?

24. Direction (13) in *Madhuri Patil* directs that when a writ petition challenging the decision of the scrutiny committee is decided by a Single Judge of the High Court, no further appeal would lie against that order to the division bench and the decision of the learned Single Judge would only be subjected to special leave under Article 136 of the Constitution.

25. The State of Madhya Pradesh enacted the 'Uchcha Nyayalaya (Khandpeeth Ko Appeal) Adhiniyam, 2005" which is deemed to have come into force from 1.7.1981. The said Adhiniyam confers a right of appeal before a division bench against the judgment of the single judge exercising jurisdiction under Article 226 of the Constitution of India. The relevant provision is as follows:

> "An appeal shall lie from a judgment or order passed by one Judge of the High Court in exercise of original jurisdiction under Article 226 of the Constitution of India, to a division bench comprising of two judges of the same High Court."

26. A remedy by way of appeal, provided expressly by a

statute cannot be taken away by an executive fiat or a judicial order. In *Asia Industries (P) Ltd. v.S.B. Sarup Singh* (1965) 2 SCR 756 this Court held:

> "Under the rules made by the High Court in exercise of the powers conferred on it under section 108 of the Government of India Act, 1915, an appeal under section 39 of the Act will be heard by a single Judge. Any judgment made by the single Judge in the said appeal will, under Clause 10 of the Letters Patent, be subject to appeal to that Court. *If the order made by a single Judge is a judgment and if the appropriate Legislature has, expressly or by necessary implication, not taken away the right of appeal, the conclusion is inevitable that an appeal shall lie from the judgment of a single Judge under Clause 10 of the Letters Patent to the High Court."*
>
> (emphasis supplied)

In *A.R. Antulay v. R.S. Nayak* (1988) 2 SCC 602, an earlier bench had transferred the criminal trials pending before the Special Judge to the High Court of Bombay. A bench of seven judges while overruling the earlier decision held that section 7(1) of the Criminal Law Amendment Act, 1952 created a condition that notwithstanding anything contained in the Code of Criminal Procedure or any other law, the offences under section 6(1) of the said Act to be tried by special judges only; and therefore the order dated 16.2.1984 [reported in (1984) 2 SCC 183] transferring the cases to High Court was not authorized by law. It was also submitted that if the case was tried by a special judge, the accused had a right of appeal to the High Court and by transferring the trial to the High Court the said vested right of appeal was taken away which was impermissible in law. This court held that Parliament alone can take away vested right of appeal and no court whether inferior or superior can take away the said vested right. The following observations in that context are relevant:

> "The power to create or enlarge jurisdiction is legislative in character, so also the power to confer a right of appeal or to take away a right of appeal. Parliament alone can do it by law and no Court, whether superior or inferior or both combined can enlarge the jurisdiction of a Court or divest a person of his rights of revision and appeal."
>
> (emphasis supplied)

27. We may also refer to two other decisions dealing with the right of appeal vested in a litigant, on and from the date of commencement of the lis. Though in this case, we are not immediately concerned with interference with the vested right of appeal of a litigant, after the commencement of a lis, the principle underlying these two decisions are useful in understanding the right to appeal. A Constitution Bench of this Court in *Hoosein Kasam Dada (India) Ltd.vs. The State of Madhya Pradesh and Ors.* – 1953 SCR 987 held that right of appeal is a vested substantive right. This Court held:

> "The above decisions quite firmly establish and our decisions in *Janardan Reddy v. The State* [1950] S.C.R. 941 and in *Ganpat Rai v. Agarwal Chamber of Commerce Ltd.* (1952) S.C.J. 564, uphold the principle that a right of appeal is not merely a matter of procedure. It is matter of substantive right. This right of appeal from the decision of an inferior tribunal to a superior tribunal becomes vested in a party when proceedings are first initiated in, and before a decision is given by, the inferior court. In the language of Jenkins C.J. in *Nana bin Aba v. Shaikh bin Andu* (1908) ILR 32 Bom 337 to disturb an existing right of appeal is not a mere alteration in procedure. Such a vested right cannot be taken away except by express enactment or necessary intendment. An intention to interfere with or to impair or imperil such a vested right cannot be presumed unless such intention be clearly manifested by express words or necessary implication."

In *Garikapatti Veeraya v.N.Subbiah Choudhury* (1957) SCR 488, this Court held that the vested right of appeal can be taken

away only by a subsequent enactment. The following principles were enunciated:

(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties there to till the rest of the carrier of the suit.

(iv) The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit of proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.

(emphasis supplied)

28. The right to file a writ appeal under the Adhiniyam (State Act) is a 'vested right', to any person filing a writ petition. That right can be taken away only by an express amendment to the Act or by repeal of that Act, or by necessary intendment, that is where a clear inference could be drawn from some legislation that the legislature intended to take away the said right. The right of appeal to a division bench, made available to a party to a writ petition, either under a statute or Letters Patent, cannot be taken away by a judicial order. The power under Article 142 is not intended to be exercised, when such exercise will directly conflict with the express provisions of a statute.

Conclusion

29. In view of the above, we hold that the second sentence of clause 13 providing that where the writ petition is disposed of by a single judge, no further appeal would lie against the order of the division bench (even when there is a vested right to file such intra-court appeal) and will only be subject to a special leave under Article 136, is not legally proper and therefore, to that extent, is held to be not a good law. The second sentence of direction No.(13) stands overruled. As a consequence, wherever the writ petitions against the orders of the scrutiny committee are heard by a single judge and the state law or Letters Patent permits an intra-court appeal, the same will be available.

Civil Appeal No.3467/2005

30. In the light of the above, we allow this appeal (CA No.3467/2005) and set aside the judgment of the Division Bench of the High Court holding the writ appeal as not maintainable. Consequently, the writ appeal (earlier Letters Patent Appeal) will stand restored to the file of the High Court. We request the High Court to hear and dispose of the said appeal (against order dated 9.5.2003 in W.P.No.2074/2002) on merits, expeditiously.

Civil Appeal No.3468/2005 :

31. In view of our order in CA No.3467/2005 as above, CA No.3468/2005 challenging the order dated 9.5.2003 of the learned Single Judge is dismissed as infructuous.

We record our appreciation for the assistance rendered by Mr. Gopal Subramanian, as Amicus Curiae.

B.B.B. Appeals disposed of.

PHULCHAND EXPORTS LTD.
v.
OOO PATRIOT
(CIVIL APPEAL NO. 3343 OF 2005)

OCTOBER 12, 2011

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

Arbitration and Conciliation Act, 1996 – ss.47 and 48 – Enforcement of award – Test of principles of public policy – CIF Contract – The appellant-sellers shipped goods and the vessel freighted by the sellers left the port of loading viz. Kandla, India – The vessel carrying the goods, however, suffered engine failure and consequently the goods did not reach the port of destination (port of Novorossiysk, Russia) – The respondent-buyers lodged recovery claim against the sellers before the International Court of Commercial Arbitration at the Chamber of Commerce and Industry of the Russian Federation, Moscow – The said Arbitral Tribunal held that there were breaches by the sellers and that the clause for reimbursement could be invoked by the buyers – The Arbitral Tribunal, however, did not award the full price paid by the buyers to the sellers but instead awarded half of that amount as there was delay by the buyers in invoking the clause of reimbursement [clause 4 of the contract] and the buyers also did not pass the shipping documents and the insurance certificate to the sellers – Arbitration petition filed by respondent-buyers for enforcement of the award – Allowed by High Court – Whether enforcement of the award in favour of the respondent was contrary to public policy of India under s.48(2)(b) of the Act – Held: The appellant-sellers breached the terms of the contract at the very threshold by late shipment of goods and by loading on board the vessel which was no longer to reach the port of Novorossiysk as the first port of discharge – The sellers' failure to discharge the primary obligation under the contract regarding the shipment of goods

can be held to have resulted in postponement of transfer of title in goods to the buyers – Even if the property in the goods was deemed to have transferred to the buyers, since there was no delivery of the goods due to the fault of the sellers in shipment of the goods, the goods continued to be at the risk of the sellers – In that situation, first proviso to Section 26 of the 1930 Act was clearly attracted – No merit in the case set up by the sellers that their liability ceased to exist on shipment of the goods or in any case when the shipping documents were handed over through the banking channels on negotiations of Letter of Credit – Stipulation for reimbursement in the event stated in clause 4 of the contract was not in the nature of penalty; the clause was not in terrorem – It was neither punitive nor vindictive – No reason why the sellers should not be bound by it and the court should not enforce such term – The sellers and the buyers in the present case were business persons having no unequal bargaining powers – Having regard to the subject matter of the contract, the clause for reimbursement or repayment in the circumstances provided therein was neither unreasonable nor unjust; far from being extravagant or unconscionable – It was the precise sum which the sellers were required to reimburse to the buyers, which they had received for the goods, in case of the non-arrival of the goods within the prescribed time – More so, the fact of the matter was that goods never arrived at the port of discharge – The Arbitral Tribunal only awarded reimbursement of half the price paid by the buyers to the sellers and, therefore, the award cannot be held to be unjust, unreasonable or unconscionable or contrary to the public policy of India – Sale of Goods Act, 1930 – s.26 – Contract Act, 1872 – ss.23, 73 and 74.

Arbitration and Conciliation Act, 1996 – s.48(2)(b) – Expression 'public policy of India' used in s.48(2)(b) – Held: Has to be given wider meaning – Arbitral award can be set aside, 'if it is patently illegal'.

Contract – CIF contract – Obligations upon a seller under a C.I.F. contract – Held: In relation to goods, the seller must

ship goods of contract description on board a ship bound to the contract destination – If there is a late shipment or the seller has put goods on board a ship not bound to the contract destination as stipulated, the logical inference that must necessarily follow is that the seller has not put on board goods conforming to a contract destination.

Transaction relating to sale of 1000 Metric Tons of Indian long grain polished rice for a price fixed at INR 12,450 (Indian Rupees twelve thousand four hundred fifty only) per one metric ton net on CIF (liner out) Novorossiysk, Russia basis was concluded, vide a contract between the appellant-sellers and respondent-buyers. The appellant-sellers shipped goods – 16 days later of the stipulated time and the vessel freighted by the sellers left the port of loading viz., Kandla (India) – 38 days later than the time of departure stipulated in the contract. The goods, however, never reached the port of destination (port of Novorossiysk) inasmuch as the vessel carrying the goods suffered an engine failure and in salvage operation, the vessel was taken to the Turkish sea port of Eregli where the concerned Admiralty court took judgment to arrest vessel towards the cost of rescue and the entire cargo was sold out to compensate the cost of rescue of the vessel.

The respondent-buyers lodged claim against the sellers for recovery of amount in the International Court of Commercial Arbitration at the Chamber of Commerce and Industry of the Russian Federation (for short "the Arbitral Tribunal"). The buyers' claim was founded on the breach of contract by the sellers and particularly with reference to clause 4 of the contract that provided, "in case the goods do not arrive to the customs area of Russian Federation within 180 days from the date of payment the transferred amount is to be reimbursed to the buyers' account".

The Arbitral Tribunal held that there were breaches by the sellers and that the clause for reimbursement could be invoked by the buyers. The Arbitral Tribunal, however, did not award the full price paid by the buyers to the sellers but instead awarded half of that amount as there was delay by the buyers in invoking the clause of reimbursement and the buyers also did not pass the shipping documents and the insurance certificate to the sellers.

The buyers filed Arbitration Petition under Sections 47 and 48 of the Arbitration and Conciliation Act 1996 for enforcement of the above award. The sellers contested the petition on the ground that subject award was contrary to the principles of public policy and, therefore, the award was unenforceable. A Single Judge of the High Court over-ruled the objections raised by sellers and held that the award could be enforced as a decree of the Court. The Division Bench relying upon the decision of this Court in *Renusagar Power* held that award was purely based on findings of facts and no public policy was involved and upheld the order of the Single Judge.

The question which arose for consideration in the instant appeal was whether enforcement of the award given by the International Court of Commercial Arbitration at the Chamber of Commerce and Industry of Russian Federation, Moscow in favour of the respondent was contrary to public policy of India under Section 48(2)(b) of the Arbitration and Conciliation Act, 1996.

Dismissing the appeal, the Court

HELD:1. In *Renusagar Power case* (as relied upon by the Division Bench of the High Court), a narrower meaning had been given to the expression 'public policy of India' while this Court in a subsequent decision in the case of *Saw Pipes Ltd.* has given wider meaning to that expression. In view of the decision in *Saw Pipes Ltd.*, the expression 'public policy of India' used in Section 48(2)(b) has to be given wider meaning and the award could be set aside, 'if it is patently illegal'. [Paras 12, 13] [1145-A-B; 1146-A]

Renusagar Power Co. Ltd vs. General Electric Co. **AIR 1994 SC 860: 1993 (3) Suppl. SCR 22;** *Oil and Natural Gas Corporation Ltd. vs. Saw Pipes Ltd.* **(2003) 5 SCC 705: 2003 (3) SCR 691 – referred to.**

2.1. The title of Section 26 of the Sale of Goods Act, 1930 shows that the rule provided there-under is the prima facie rule subject to the agreement otherwise between the parties. This is clearly indicated by the expression "unless otherwise agreed" with which the section begins. The parties to the contract are, thus, free to by-pass the prima facie rule provided in Section 26 by making agreement otherwise. The prima facie rule in Section 26 is that the goods remain at the seller's risk until the property in the goods is transferred to the buyer. But when the property in the goods is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not. The above rule has some exceptions. The first proviso provides that where delivery of goods has been delayed due to the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault. The second proviso is further subject to the first proviso and provides that nothing in the section shall affect the duties or liabilities of either seller or buyer as bailee of the goods of the other party. [Para 20] [1148-H; 1149-A-D]

2.2. The obligations upon a seller under a C.I.F. contract are well known, some of which are in relation to goods and some of which are in relation to documents. In relation to goods, the seller must ship goods of contract description on board a ship bound to the contract destination. If there is a late shipment or the seller has put goods on board a ship not bound to the contract destination as stipulated, the logical inference that must necessarily follow is that the seller has not put on board goods conforming to a contract destination. [Para 21] [1149-E-F]

2.3. In the present case, there was late shipment of goods by 16 days. Besides delay in shipping the goods and the delayed departure of the vessel from the port of loading, the goods were shipped in a vessel having no firm commitment to reach the port of Novorossiysk as the first port of discharge. As a matter of fact, the sellers gave a line bill of lading giving a carrier right to determine the line of unloading and the consecutive order of destination of sea ports and as a result of that the goods were loaded on board the vessel that was no longer to reach the port of Novorossiysk as first port of discharge. The contract between the parties clearly provided in clause 4 that shipment should be done by a vessel that is on way to Novorossiysk as the first port of discharge. This term in the contract is not inconsequential or immaterial but seems to be fundamental having regard to the subject matter of the goods. The sellers breached the terms of the contract at the very threshold by late shipment of goods and by loading on board the vessel which was no longer to reach the port of Novorossiysk as the first port of discharge. The sellers having breached the terms of the C.I.F. contract at the threshold, it is very difficult to hold that property in the goods got transferred out and out to the buyers on shipment of the goods or when the shipping documents were handed over to the bank for negotiations of L/C. In a case such as this one, the sellers' failure to discharge the primary obligation under the contract regarding the shipment of goods can be held to have resulted in postponement of transfer of title in goods to the buyers. In any case the prima facie rule contemplated in Section 26 of the 1930 Act stands rebutted in the facts of the present case. [Para 22] [1149-G-H; 1150-A-D]

2.4. Even if the property in the goods is deemed to have transferred to the buyers, since there was no delivery of the goods due to the fault of the sellers in shipment of the goods, firstly belatedly and then by a

vessel that was not on way to Novorossiysk as the first port of discharge, the goods continued to be at the risk of the sellers as they were in fault. In that situation, first proviso to Section 26 of the 1930 Act is clearly attracted. [Para 23] [1150-E-F]

2.5. There is no merit in the case set up by the sellers that their liability ceased to exist on shipment of the goods or in any case when the shipping documents were handed over through the banking channels on negotiations of Letter of Credit. As in the present case, the sellers were in breach at the threshold, it is immaterial whether or not the buyers had a right of action against the insurers or carrier. [Para 24] [1150-G]

Johnson v. *Taylor Bros.* **[1920] A.C. 144 – referred to.**

Lord Elphinstone vs. The Monkland Iron and Coal Company Limited and Liquidators **1886 House of Lords VOL. XI page 332 and** *Dunlop Pneumatic Tyre Company Limited vs. New Garage and Motor Company Limited* **(1915) AC 79 [House of Lords] – cited.**

Kennedy's CIF contracts (Third edition) revised by Dennis C. Thompson and *CIF and FOB Contracts (Fourth edition) by David M. Sassoon* **– referred to.**

3.1. Section 73 of the Contract Act, 1872 provides for compensation for loss or damage caused by breach of contract and Section 74 makes a provision for compensation for breach of contract where penalty is stipulated for. Both these Sections provide for reasonable compensation in a case of breach of contract. None of these two Sections makes the award of liquidated damages illegal. The plain reading of Section 74 would show that it deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. [Paras 26, 27 and 28] [1151-E-F; 1153-A-D]

3.2. The stipulation for reimbursement in the event stated in clause 4 of the contract is not in the nature of penalty; the clause is not *in terrorem.* It is neither punitive nor vindictive. Moreover, what has been provided in the contract is the reimbursement of the price of the goods paid by the buyers to the sellers. The clause of reimbursement or repayment in the event of delayed delivery/arrival or non-delivery is not to be regarded as damages. Even in the absence of such clause, where the seller has breached his obligations at threshold, the buyer is entitled to the return of the price paid and for damages. There is no reason why the sellers should not be bound by it and the court should not enforce such term. No way the clause is in the nature of threat held over the sellers in terror. [Para 29] [1154-B-E]

3.3. The transactions covered by Section 23 of the 1872 Act are the transactions where the consideration or object of such transaction is forbidden by law or the transaction is of such a nature that if permitted would defeat the provisions of any law or the transaction is fraudulent or the transaction involves or implies injury to the person or property of another or where the court regards it immoral or opposed to public policy. Whether particular transaction is contrary to a public policy would ordinarily depend upon the nature of transaction. Where experienced businessmen are involved in a commercial contract and the parties are not of unequal bargaining power, the agreed terms must ordinarily be respected as the parties may be taken to have had regard to the matters known to them. The sellers and the buyers in the present case are business persons having no unequal bargaining powers. They agreed on all terms of the contract being in conformity with the international trade and commerce. Having regard to the subject matter of the contract, the clause for reimbursement or repayment in the circumstances provided therein is neither unreasonable nor unjust; far from being extravagant or

unconscionable. It is the precise sum which the sellers are required to reimburse to the buyers, which they had received for the goods, in case of the non-arrival of the goods within the prescribed time. More so, the fact of the matter is that goods never arrived at the port of discharge. The Arbitral Tribunal has only awarded reimbursement of half the price paid by the buyers to the sellers and, therefore, the award cannot be held to be unjust, unreasonable or unconscionable or contrary to the public policy of India. [Para 31] [1155-C-H]

Maula Bux vs. Union of India **1969 (2) SCC 554: 1970 (1) SCR 928;** *Fateh Chand* v. *Balkishan Dass* **(1964) 1 SCR 515– referred to.**

Case Law Reference:

1993 (3) Suppl. SCR 22	**referred to**	**Paras 10,11, 12,**
2003 (3) SCR 691	**referred to**	**Para 11**
1970 (1) SCR 928	**referred to**	**Para 14**
1886 House of Lords VOL. XI	**cited**	**Para 15**
(1915) AC 79	**cited**	**Para 15**
[1920] A.C. 144	**referred to**	**Para 18**
(1964) 1 SCR 515	**referred to**	**Para 27**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3343 of 2005.

From the Judgment & Order dated 3.5.2002 of the Bombay High Court in Appeal No. 4 of 2002 in Arbitration Petition No. 66 of 2001.

Krishnan Venugopal, Kamal Budhiraja and Manu Seshadri (for Dua Associates) for the Appellant.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. This appeal, by special leave, occupied judicial time of almost whole day, and the basic

question raised is this : whether enforcement of the award dated October 18, 1999 given by the International Court of Commercial Arbitration at the Chamber of Commerce and Industry of Russian Federation, Moscow in favour of the respondent is contrary to public policy of India under Section 48(2)(b) of the Arbitration and Conciliation Act, 1996.

2. By contract dated November 18, 1997, between — Phulchand Exports Limited, Mumbai, India ('the sellers') and OOO Patriot, Moscow, Russia ('the buyers'), a transaction relating to sale of 1000 Metric Tons of Indian long grain 1.5 time polished rice PR—106 of 9 per cent broken maximum (for short, 'the goods') for a price fixed at INR 12,450 (Indian Rupees twelve thousand four hundred fifty only) per one metric ton net on CIF (liner out) Novorossiysk, Russia basis was concluded. The price was fixed according to Incoterms-90 and included value of the goods, packing and marking, loading into hold, stowing of the cargo, fulfilling the customs formalities in the sellers' country, insurance, freight charges, berthing charges and unloading charges of the goods at the port of Novorossiysk. The total value of the contract was firm and fixed at INR 12,450,000,00 (Indian Rupees twelve million four hundred fifty thousand only). It is upon this contract, and on what was done under it, that the above question in this appeal turns. Some of the relevant terms, and, omitting clauses which do not appear important, are as follows :

"1. SUBJECT OF CONTRACT :

……the Goods on CIF Novorossiysk port, Russia basis,…….

2. PRICE OF THE CONTRACT

.....The price is fixed on the terms of CIF (liner out) Novorossiysk, Russia according to Incoterms—90……

3. TERMS OF PAYMENT

Payment for the Goods, delivered under the present contract is to be effected by irrevocable documentary

Letter of Credit opened in favour of the sellers for the total value of the contract for the period of 45 days…..

The L/C is governed by "ICC Uniform customs and practice for documentary L/C"……..

The L/C should be opened within 10 working days from the date of signing of the contract.

The L/C is executed by the beneficiary's bank against presentation by the sellers of the following documents:

x x x x x x x x

3. Insurance Policy for 11% of the value of the Goods, Covering all risks stipulated in the Institute Cargo Clauses (A), Institute War Clauses, Institute Strike Clauses till the completion of the unloading of the Goods at the port of Novorossiysk, issued in the name of the Buyers Bank – Joint Stock Commercial Bank AVTOBANK, Moscow, Russia.

x x x x x x x

4. TERMS OF DELIVERY

Shipment should be done on the basis of CIF (liner out) Novorossiysk, Russia in accordance with Incoterms – 90.

The Goods sold under the present contract should be shipped within 40 days from the date of opening the L/C.

The date of shipment is the date of loading of the Goods to the board of vessel……..

Shipment should be done by a vessel that is on the way to Novorossiysk as the first port of discharge. The Sellers shall take all possible measures that transit time of the Goods to Novorossiysk, Russia will not exceed 25 days.

x x x x x x x x x

The sellers shall take all possible measures for placing the Goods in such a way that it will be free for examination and will not be blocked up by any other cargo while unloading at the port of Novorossiysk…….

Insurance Policy for 110% of the value of the Goods, covering all risks, stipulated in the Institute Cargo Clauses (A), Institute War Clauses, Institute Strike Clauses till the completion of the unloading of the Goods at the port of Novorossiysk, issued in the name of the Buyers Bank – Joint Stock Commercial Bank AVTOBANK…….

x x x x x x x x

In case the Goods do not arrive to the customs area of Russian Federation within 180 days from the date of payment the transferred amount is to be reimbursed to the Buyers' account.

8. PENALTY

The Sellers are obliged within 5 working days from the date of receipt of the Buyers advice of the L/C to open in favour of the Buyers the Performance Bond issued by the Sellers Bank for 2% of the total value of the Contract in favour of the Buyers valid for 60 days from the date of opening of the L/C. The original of the said document should be dispatched to the Buyer's by courier mail. The copy of the AWB should be faxed to the Buyers immediately.

x x x x x x x x

When failing to deliver the goods in time stipulated in clause 4 of the present Contract, the Sellers are to pay penalty to the Buyers at the rate of 0.3% of the value of non-delivered Goods per each day of delay from the 5th day after expiry of the delivery date to the 15th day inclusive. Total amount of penalty should be paid to the Buyers within 10 days from the date of bill in the currency of the Contract.

9. TERMS OF CANCELLATION OF THE CONTRACT

The Buyers have the right to cancel the Contract under the following circumstances:

The quality of the delivered Goods does not correspond to the Appendices No. 1 and No. 2 to

the present Contract (according to the report of the State Board Inspection of Russian Federation for the testing of the Goods at the port of shipment Kandla (India).

The date of shipment of the Goods is postponed by the Sellers beyond the period of more than 15 days.

The Sellers have the right to cancel the Contract if the date of the opening of the L/C is postponed for the period of more than 15 days from the agreed date.

x x x x x x x x."

3. The buyers opened irrevocable letter of credit ('L/C') for the total value of the contract on December 3, 1997 with the last date of shipment – January 12, 1998. On presentation of documents by the sellers, the bank honoured L/C and paid the amount to the sellers. The sellers shipped goods on January 29, 1998 – 16 days later of the stipulated time and the vessel freighted by the sellers left the port of loading viz., Kandla (India) on February 20, 1998 — 38 days later than the time of departure stipulated in the contract. The goods never reached the port of destination (port of Novorossiysk). It so happened that the vessel carrying the goods suffered an engine failure as a result of which it was declared 'General Average' by the Master of the vessel. In salvage operation, the vessel was rescued and taken to the Turkish sea port of Eregli. The owner of the rescue vessel claimed to the Admiralty Court of Eregli to arrest the vessel with the cargo in an action for enforcement of the lien against the vessel. The concerned court took judgment to arrest vessel towards the cost of rescue and the entire cargo was sold out to compensate the cost of rescue of the vessel.

4. The buyers lodged their claim with the United India Insurance Company Limited (insurers) on August 24, 1998 due to non-delivery of the goods to Novorossiysk. However, insurers denied their liability under the insurance policy for the loss of goods on the ground that risk of detention was not covered.

Their stand was that the insured voyage having been frustrated due to detention of the cargo, there was no liability under the policy. The sellers also took up the matter with the insurers and they were informed by the insurers vide letters dated September 16, 1998 and December 29, 1998 that the liability of the insurers was not established and the parties (the sellers and the buyers) must act as the goods were uninsured.

5. On November 27, 1998 the buyers lodged claim against the sellers for recovery of amount of USD 285,569.53 in the International Court of Commercial Arbitration at the Chamber of Commerce and Industry of the Russian Federation (for short 'Arbitral Tribunal"). The buyers' claim was admitted for consideration by the Arbitral Tribunal on December 7, 1998. The sellers did not acknowledge the buyers' claim and set up the defences that they have honoured all commitments under the contract; the risk in the goods and the property in the goods passed to the buyers upon shipment of the goods i.e. the date on which the goods were loaded on board the vessel being January 29, 1998 and in any event the property in the goods passed over to the buyers when their shipping documents were handed over through the banking channels upon negotiations of the letter of credit, namely on February 19, 1998. According to the sellers, if for some reasons the goods were not received by the buyers then they had remedies under the policy of insurance against insurers or against the ship owners but in so far the sellers were concerned, they were not liable. The sellers also set up the defence that the delayed shipment was acquiesced to and accepted by the buyers as they were informed of the delay of shipment; the buyers had right to repudiate the contract on the ground of delay in shipment which they never did. The sellers thus submitted before the Arbitral Tribunal that the claim was misconceived and liable to be dismissed.

6. The Arbitral Tribunal held its sessions on various dates; heard the parties through their representatives and delivered its judgment (verdict) on October 18, 1999. The Arbitral Tribunal did not find any merit in the defences set up by the sellers. It

held that the sellers broke the terms of the Contract (Article 4) and shipped goods on January 29, 1998 – 16 days later of the stipulated time and the vessel freighted by the sellers left the port of Kandla (India) on February 20, 1998 – 38 days later than the time of departure stipulated in the contract. The sellers gave a line bill of lading giving a carrier right to determine the line of unloading and the consecutive order of destination of sea ports and, thus, at the moment of loading on board the vessel was no longer to reach the port of Novorossiysk as the first port of discharge in accordance with the terms of contract. The vessel with cargo had not arrived at the port of Novorossiysk on the date of lodging the claim (as a matter of fact the vessel never reached the port of destination). The Arbitral Tribunal held that there was clear term about the commitment of the sellers to reimburse the paid amount towards goods in case of non-arrival. The Arbitral Tribunal referred to the sellers' conduct in sending its representatives to Eregli (Turkey) to find out the situation of goods and observed that it was evident therefrom that the sellers did not consider themselves exempted from the commitment for fate and safety of the goods. It was held by the Arbitral Tribunal that the sellers did not prove the fact of force majeure which could discharge them from their liability. The Arbitral Tribunal, however, found that there was delay on the part of the buyers in acting in accord with clause 4 of the Contract; they (buyers) did not pass the insurance certificate and cargo documents to the sellers and the buyers did not demand from the sellers reimbursement of the transferred amount immediately after expiration of 180 days (i.e. 26-27/11/1998). The Arbitral Tribunal, therefore, split the amount of losses between the parties – buyers and sellers – in equal parts and ordered that the sellers shall pay the amount of USD 138,402.03 to the buyers. The Arbitral Tribunal awarded interest in the some of USD 2,562.71 payable by sellers to the buyers and also directed the sellers to pay the amount of USD 4,869.00 to recover claimant's expenses to pay registry and arbitrage fees.

7. The buyers filed Arbitration Petition on December 22,

2000 before the High Court of Judicature at Bombay under Sections 47 and 48 of the Arbitration and Conciliation Act 1996 (hereinafter referred to as 'the 1996 Act') for enforcement of the above award.

8. The sellers contested the petition on the ground that subject award was contrary to the principles of public policy and, therefore, the award was unenforceable.

9. The Single Judge of the Bombay High Court in his order dated July 16, 2001 did not find any merit in the objections raised by sellers; overruled the objections and held that the award dated October 18, 1999 could be enforced as a decree of the Court.

10. Against the order of the Single Judge, the sellers preferred appeal before the Division Bench. The Division Bench relying upon the decision of this Court in *Renusagar Power Co. Ltd vs. General Electric Co*[1]. held that award was purely based on findings of facts and no public policy was involved and the Single Judge rightly dismissed the petition. Consequently, the Division Bench by its order dated May 3, 2002 dismissed the appeal.

11. Mr. Krishnan Venugopal, learned Senior counsel for the appellant at the outset submitted that test concerning public policy applied by the Division Bench based on the decision of this Court in *Renusagar Power Co. Ltd*[1]. is flawed. He referred to a subsequent decision of this Court in *Oil and Natural Gas Corporation Ltd. vs. Saw Pipes Ltd*[2]. and submitted that this Court has given wider meaning to the expression "public policy of India" used in Section 34 of the 1996 Act in that case. He submitted that the wider meaning given to the expression "public policy of India" used in Section 34 by this Court has also been applied to the same expression occurring in Section 48 (2)(b) of the 1996 Act. He, thus, submitted that the matter needs to be sent back to the High Court for reconsideration on this ground alone.

1. AIR 1994 SC 860.
2. (2003) 5 SCC 705

12. It is true that in Renusagar1, relied upon by the Division Bench, a narrower meaning has been given to the expression 'public policy of India' while this Court in a subsequent decision in the case of Saw Pipes Ltd.2 has given wider meaning to that expression. This Court in the case of Saw Pipes Ltd.2 (para 31, page 727) stated as under:

> "31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case it is required to be held that the award could be set aside if it is patently illegal. The result would be — award could be set aside if it is contrary to:
>
> (a) fundamental policy of Indian law; or
>
> (b) the interest of India; or
>
> (c) justice or morality, or
>
> (d) in addition, if it is patently illegal.
>
> Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

13. There is merit in the submission of learned senior counsel that in view of the decision of this Court in Saw Pipes Ltd.2, the expression 'public policy of India' used in Section 48 (2)(b) has to be given wider meaning and the award could be

set aside, 'if it is patently illegal'. At the first blush we thought of remanding the matter to the High Court, but on a deeper thought, we decided to hear the objections relating to patent illegality in the award ourselves as the award by the Arbitral Tribunal was given as far back as on October 18, 1999 and about 12 years have elapsed since then. We thought that the issue relating to enforceability of the subject award must be brought to an end finally one way or the other.

14. Mr. Krishnan Venugopal, learned Senior counsel strenuously urged that the contract entered into between the sellers and the buyers was a CIF contract and the risk in the goods and the property passed over to the buyers upon the shipment of the goods on January 29, 1998 and in any case the property in the goods passed over to the buyers when the shipping documents were handed over to them through the Banking channels on negotiations of letter of credit on February 19, 1998. He would submit that from this day the sellers' liabilities ceased to exist. In this connection he relied upon a decision of this Court in *Maula Bux vs. Union of India*[3]. He also referred to Section 26 of the Sale of Goods Act, 1930 (for short '1930 Act').

15. Learned Senior counsel also submitted that the stipulation in clause 4, "in case the goods don't arrive the customs area of Russian Federation within 180 days from the date of payment the transferred amount is to be reimbursed to the Buyers' account" amounts to penalty within the meaning of Section 74 of the Contract Act, 1872 (for short, `1872 Act') and being unconscionable bargain is void under Section 23 of the 1872 Act and, therefore, enforcement of the subject award by the Indian Courts is contrary to 'public policy of India'. He relied upon two decisions of House of Lords; *(i) Lord Elphinstone vs. The Monkland Iron and Coal Company Limited, and Liquidators*[4]*; and (ii) Dunlop Pneumatic Tyre Company Limited vs. New Garage and Motor Company Limited*[5]*.*

3. 1969 (2) SCC 554.

4. 1886 House of Lords VOL. XI page 332.

5. (1915) AC 79.

16. C.I.F. (Cost, Insurance, Freight) contract is well-understood by the people in commerce and in law. In Kennedy's C.I.F. Contracts (Third Edition) revised by Dennis C. Thompson, a C.I.F. contract is explained (at page 1) thus :

> "…….It is a contract which contemplates the carriage of goods by sea, and is the most common form of shipping contract in use today. It is known as a c.i.f. contract, for the price which the buyer has to pay is the cost of the goods, together with the insurance of the goods during transit and the freight to the port of destination.
>
> Under this form of contract the seller performs his obligations by shipping, at the time specified in the contract or, in default of express provision in the contract, within a reasonable time, goods of the contractual description in a ship bound for the destination named in the contract, or by purchasing documents in respect of such goods already afloat, and by tendering to the buyer, as soon as possible after the goods have been destined to him, the shipping documents, i.e., a bill of lading for carriage of goods, a policy of insurance covering the reasonable value of the goods, together with an invoice showing the amount due from the buyer."

17. In C.I.F. and F.O.B. Contracts (Fourth Edition) by David M. Sassoon dealing with essence of C.I.F. contracts, it is stated that essential feature of a C.I.F. contract is that delivery is satisfied by delivery of documents and not by actual physical delivery of the goods. Shipping documents required under a C.I.F. contract are bill of lading, policy of insurance and an invoice.

18. In *Johnson v. Taylor Bros.*[6], Lord Atkinson in the House of Lords explained the meaning of C.I.F. contract as under :

> "……. when a vendor and purchaser of goods situated as they were in this case (Seller in Sweden and buyers in England) enter into a c.i.f. contract, such as that entered into in the present case, (Ordinary c.i.f. terms), the vendor in the absence of any special provision to the contrary is bound by his contract to do six things. First, to make out an invoice of the goods sold. Second, to ship at the port of shipment goods of the description contained in the contract. Third, to procure (There might be added the words "on shipment, see ante, § 7") a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract. Fourth, to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer. Fifthly, with all reasonable despatch to send forward and tender to the buyer these shipping documents, namely, the invoice, bill of lading and policy of assurance, delivery of which to the buyer is symbolical of delivery of the goods purchased, placing the same at the buyer's risk and entitling the seller to payment of their price……..".

6. [1920] A.C. 144 at p. 155.

19. Section 26 of the 1930 Act upon which reliance was placed by the learned senior counsel for the sellers reads as follows :

> "S. 26. Risk prima facie passes with property.— Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not:
>
> Provided that, where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault:
>
> Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as bailee of the goods of the other party."

20. The title of Section 26 shows that the rule provided

there-under is the prima facie rule subject to the agreement otherwise between the parties. This is clearly indicated by the expression "unless otherwise agreed" with which the section begins. The parties to the contract are, thus, free to by-pass the prima facie rule provided in Section 26 by making agreement otherwise. The prima facie rule in Section 26 is that the goods remain at the seller's risk until the property in the goods is transferred to the buyer. But when the property in the goods is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not. The above rule has some exceptions. The first proviso provides that where delivery of goods has been delayed due to the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault. The second proviso is further subject to the first proviso and provides that nothing in the section shall affect the duties or liabilities of either seller or buyer as bailee of the goods of the other party.

21. The obligations upon a seller under a C.I.F. contract are well known, some of which are in relation to goods and some of which are in relation to documents. In relation to goods, the seller must ship goods of contract description on board a ship bound to the contract destination. If there is a late shipment or the seller has put goods on board a ship not bound to the contract destination as stipulated, in our view, the logical inference that must necessarily follow is that the seller has not put on board goods conforming to a contract destination.

22. In the present case, as we see it, there is late shipment of goods by 16 days. Besides delay in shipping the goods and the delayed departure of the vessel from the port of loading, the goods were shipped in a vessel having no firm commitment to reach the port of Novorossiysk as the first port of discharge. As a matter of fact the sellers gave a line bill of lading giving a carrier right to determine the line of unloading and the consecutive order of destination of sea ports and as a result of that the goods were loaded on board the vessel that was no longer to reach the port of Novorossiysk as first port of

discharge. The contract clearly provides in clause 4 that shipment should be done by a vessel that is on way to Novorossiysk as the first port of discharge. This term in the contract is not inconsequential or immaterial but seems to be fundamental having regard to the subject matter of the goods. The sellers breached the terms of the contract at the very threshold by late shipment of goods and by loading on board the vessel which was no longer to reach the port of Novorossiysk as the first port of discharge. The sellers having breached the terms of the C.I.F. contract at the threshold, it is very difficult to hold that property in the goods got transferred out and out to the buyers on shipment of the goods or when the shipping documents were handed over to the bank for negotiations of L/C. In a case such as this one, the sellers' failure to discharge the primary obligation under the contract regarding the shipment of goods can be held to have resulted in postponement of transfer of title in goods to the buyers. In any case the prima facie rule contemplated in Section 26 of the 1930 Act stands rebutted in the facts of the present case.

23. Even if the property in the goods is deemed to have transferred to the buyers, since there was no delivery of the goods due to the fault of the sellers in shipment of the goods, firstly belatedly and then by a vessel that was not on way to Novorossiysk as the first port of discharge, the goods continued to be at the risk of the sellers as they were in fault. In that situation, first proviso to Section 26 of the 1930 Act is clearly attracted.

24. We do not find any merit in the case set up by the sellers that their liability ceased to exist on shipment of the goods on January 29, 1998 or in any case when the shipping documents were handed over through the banking channels on negotiations of Letter of Credit. As in the present case, the sellers were in breach at the threshold, it is immaterial whether or not the buyers had a right of action against the insurers or carrier.

25. The buyers' claim was founded on the breach of contract by the sellers and particularly with reference to the last

paragraph of clause 4 of the contract that provided, "in case the goods do not arrive to the customs area of Russian Federation within 180 days from the date of payment the transferred amount is to be reimbursed to the buyers' account". The goods not only did not arrive to the customs area of Russian Federation within 180 days from the date of payment but they never arrived at all in the customs area of Russian Federation/ the port of Novorossiysk (port of discharge). The Arbitral Tribunal held that there were breaches by the sellers and that the above clause for reimbursement could be invoked by the buyers. The Arbitral Tribunal, however, did not award the full price paid by the buyers to the sellers but instead awarded half of that amount as there was delay by the buyers in invoking the clause of reimbursement and the buyers also did not pass the shipping documents and the insurance certificate to the sellers. The contention of the learned senior counsel for the sellers in contesting the enforcement of the award is that the clause of reimbursement amounts to 'penalty' within the meaning of Section 74 of the 1872 Act and also unconscionable bargain and, therefore, void under Section 23 of that Act. He would, thus, submit that enforcement of such award would be contrary to public policy of India.

26. Section 73 of the 1872 Act provides for compensation for loss or damage caused by breach of contract and Section 74 makes a provision for compensation for breach of contract where penalty is stipulated for. These two Sections – 73 and 74 – of the 1872 Act read as under:

> "73. Compensation for loss or damage caused by breach of contract.— When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

> Compensation for failure to discharge obligation resembling those created by contract.—When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.
>
> Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.
>
> S. 74. Compensation for breach of contract where penalty stipulated for.—When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.
>
> Explanation.— A stipulation for increased interest from the date of default may be a stipulation by way of penalty.
>
> Exception.— When any person enters into any bail-bond, recognizance or other instrument of the same nature, or under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.
>
> Explanation.— A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested."

27. Both these Sections provide for reasonable compensation in a case of breach of contract. None of these two Sections makes the award of liquidated damages illegal. Section 74, as observed by this Court, in the case of *Fateh Chand v. Balkishan Dass*[7] is, "an attempt to eliminate the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty……The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty."

28. The plain reading of Section 74 would show that it deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. In Fateh Chand7, this Court held :

> "….The expression "if the contract contains any other stipulation by way of penalty" widens the operation of the section so as to make it applicable to all stipulations by way of penalty, whether the stipulation is to pay an amount of money, or is of another character, as, for example, providing for forfeiture of money already paid. There is nothing in the expression which implies that the stipulation must be one for rendering something after the contract is broken. There is no ground for holding that the expression "contract contains any other stipulation by way of penalty" is limited to cases of stipulation in the nature of an agreement to pay money or deliver property on breach and does not comprehend covenants under which amounts paid or property delivered under the contract, which by the terms of the contract expressly or by clear implication are liable to be forfeited."

29. In the case of *Maula Bux*[3] while dealing with Section

7. (1964) 1 SCR 515.

74 of the 1872 Act, this Court was concerned with the case of forfeiture of the amount of deposit. It was held, "forfeiture of reasonable amount paid as earnest money does not amount to imposing a penalty. But, if forfeiture is of the nature of penalty, Section 74 applies". It was further held, 'where under the terms of the contract, the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty'. We are afraid the decision of this Court in Maula Bux3 does not support the contention of the learned senior counsel that the stipulation of reimbursement contained in last para of clause 4 of the contract to transfer the payment of goods already received by sellers in the event of non-delivery of the goods within 180 days in the customs area of Russian Federation amounts to penalty. The stipulation for reimbursement in the event stated in last para of clause 4 of the contract is not in the nature of penalty; the clause is not in terrorem. It is neither punitive nor vindictive. Moreover, what has been provided in the contract is the reimbursement of the price of the goods paid by the buyers to the sellers. The clause of reimbursement or repayment in the event of delayed delivery/ arrival or non-delivery is not to be regarded as damages. Even in the absence of such clause, where the seller has breached his obligations at threshold, the buyer is entitled to the return of the price paid and for damages. We can see no reason why the sellers should not be bound by it and the court should not enforce such term. No way the clause is in the nature of threat held over the sellers in terror.

30. Section 23 of the 1872 Act reads as under :

> "S. 23. What considerations and objects are lawful, and what not.—The consideration or object of an agreement is lawful, unless—
>
> it is forbidden by law; or
>
> is of such a nature that, if permitted, it would defeat the provisions of any law; or
>
> is fraudulent; or

involves or implies injury to the person or property of another; or

the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

31. The transactions covered by Section 23 are the transactions where the consideration or object of such transaction is forbidden by law or the transaction is of such a nature that if permitted would defeat the provisions of any law or the transaction is fraudulent or the transaction involves or implies injury to the person or property of another or where the court regards it immoral or opposed to public policy. Whether particular transaction is contrary to a public policy would ordinarily depend upon the nature of transaction. Where experienced businessmen are involved in a commercial contract and the parties are not of unequal bargaining power, the agreed terms must ordinarily be respected as the parties may be taken to have had regard to the matters known to them. The sellers and the buyers in the present case are business persons having no unequal bargaining powers. They agreed on all terms of the contract being in conformity with the international trade and commerce. Having regard to the subject matter of the contract, the clause for reimbursement or repayment in the circumstances provided therein is neither unreasonable nor unjust; far from being extravagant or unconscionable. It is the precise sum which the sellers are required to reimburse to the buyers, which they had received for the goods, in case of the non-arrival of the goods within the prescribed time. More so, the fact of the matter is that goods never arrived at the port of discharge. The Arbitral Tribunal has only awarded reimbursement of half the price paid by the buyers to the sellers and, therefore, the award cannot be held to be unjust, unreasonable or unconscionable or contrary to the public policy of India.

32. Mr. Krishnan Venugopal, learned senior counsel would submit that the goods were insured and the buyers were made beneficiaries in the insurance policy and, therefore, they have right to claim loss for goods from the insurance company and not the sellers. Moreover, the right to claim under insurance policy is not subrogated in favour of the buyers. The argument is noted to be rejected having no merit at all for the reasons already indicated above.

33. In view of the above there is no merit in the appeal and it is dismissed accordingly. Since the buyers (respondent) have not chosen to appear, there shall be no order as to costs.

B.B.B. Appeal dismissed.

SIEMENS LTD. & ANOTHER
v.
SIEMENS EMPLOYEES UNION & ANOTHER
(CIVIL APPEAL NO.8607 OF 2011)

OCTOBER 12, 2011

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

Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 – ss.26, 27, 28 r/w s.30(2) and Schedule IV, item no. 9 – Unfair Labour Practice – Appellant-company issued notification dated 3rd May, 2007 for workmen employed in its factory, whereby applications were invited to appear for a selection process to undergo a two year long period as an 'Officer Trainee' – The notification stated that after successful completion of the said two years, the trainees were to be designated as 'Junior Executive Officers' – Grievance of respondent-trade union that though the designation of 'Junior Executive Officer' was that of an officer belonging to the management cadre, in fact the job description of a Junior Executive Officer was same as that of a workman, with little additional duties; that such a move was, in effect an alteration in the conditions of service of the workmen and resulted in reduction in the job opportunities for workers – Plea of respondent- trade union that the change sought to be brought about by the appellant-company by its said notification was in violation of clause 7 of the industrial agreement/settlement entered into between itself and the appellant-company in 1982 and that the appellant-company had resorted to unfair labour practice under item No.9 of Schedule IV of the Act – Labour Court held against the appellant-company – Order upheld by High Court – On appeal, held: While considering clause 7 of the said settlement the Courts below did not taken into consideration clause 12 – Clause 7 contained a prohibition against the employees or officers or members of the staff of the appellant-

company from doing normal production work – But that cannot be read in such a manner as to nullify the purport of clause 12 which reserved promotional employment potential of existing workmen – So in the instant case if by way of rearrangement of work, the management of appellant-company gave promotional opportunity to the existing workers that did not bring about any violation of clause 7 of the said settlement rather such a rearrangement of work was in terms of clause 12 – What was restricted under clause 7 was asking the officers to do the normal production work – There was no blanket ban in asking the officers from doing any production work – Both clause 7 and clause 12 of the said settlement must be reasonably and harmoniously construed to make it workable with the evolving work culture of the appellant-company in facing new challenges in the emerging economic order which had changed considerably from 1982 – Further, both Labour Court and the High court failed to take into consideration that the workers voluntarily applied for the promotion scheme pursuant to its introduction – Besides, legally also the management of the company was not prevented from rearranging its business in the manner it considered it best, if in the process it did not indulge in victimization – In the instant case no malafide was alleged against the appellant-company – No allegation of victimization was made by the respondent-union in its complaint – In the given situation, it cannot be said that by introducing the scheme of promotion, to which the workers overwhelmingly responded on their own, the management indulged in unfair labour practice – In fact if the order of the High Court is upheld, the same will go against the interest of erstwhile workmen of appellant-company who had responded to the scheme of promotion – Order of the High Court set aside – However, it is made clear that in implementing the scheme the management of appellant-company would not bring about any retrenchment of the workmen nor any workmen be rendered surplus in any way.

Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 – s.26 and

27 and Schedule II, III and IV – Unfair Labour Practice – Difference between provisions relating to unfair labour practices in the Maharashtra Act and those in Central Act i.e. Industrial Disputes Act – Held: The Industrial Disputes Act prohibits an employer or workmen or a trade union from committing any unfair labour practice while the Maharashtra Act prohibits an employer or union or an employee from engaging in any unfair labour practice – The prohibition under the Industrial Disputes Act is aimed at preventing the commission of an unfair labour practice while the Maharashtra Act mandates that the concerned parties cannot be engaged in any unfair labour practice – The word 'engage' is more comprehensive in nature as compared to the word 'commit' – Industrial Disputes Act, 1947 – s.2(ra) and Vth schedule.

Labour Laws – Unfair Labour Practice – Concept of – Held: Any unfair labour practice within its very concept must have some elements of arbitrariness and unreasonableness – If unfair labour practice is established the same would bring about a violation of guarantee under Article 14 of the Constitution – Therefore, anyone who alleges unfair labour practice must plead it specifically and such allegations must be established properly before any forum can pronounce on the same – Constitution of India, 1950 – Article 14.

Labour Laws – Unfair Labour Practice – Changed economic scenario – Effect of – Held: In the changed economic scenario, the concept of unfair labour practice is also required to be understood in the changed context – Today every State, which has to don the mantle of a welfare state, must keep in mind the twin objectives of industrial peace and economic justice and the courts and statutory bodies while deciding what unfair labour practice is must also be cognizant of the aforesaid twin objects.

Constitution of India, 1950 – Article 136 – Jurisdiction under – Held: There can be no hard and fast rule in the exercise of this jurisdiction – Just because the findings which are assailed in a special leave petition are concurrent cannot debar the Supreme Court from exercising its jurisdiction if the

demands of justice require its interference – In a case where the Supreme Court finds that the concurrent finding is based on patently erroneous appreciation of basic issues involved in an adjudication, the Supreme Court may interfere.

Precedent – Ratio decidendi – Held: The ratio of a decision has to be appreciated in its context.

Words and Phrases – 'commit and 'engage' – Meaning of.

Appellant no.1-company issued notification dated 3rd May, 2007 for workmen employed in its factory, whereby applications were invited to appear for a selection process to undergo a two year long period as an 'Officer Trainee'. The notification stated that after successful completion of the said two years, the trainees were to be designated as 'Junior Executive Officers'. Respondent-trade union filed complaint under Section 28 read with Section 30(2) of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 *inter alia* alleging that though the designation of 'Junior Executive Officer' was that of an officer belonging to the management cadre, in fact the job description of a Junior Executive Officer was same as that of a workman, with little additional duties and resultantly, the Junior Executive Officers of the factory were now to do the very same work that had always been done by the workmen; that such a move was, in effect an alteration in the conditions of service of the workmen and resulted in reduction in the job opportunities for workers. The trade union submitted that the change sought to be brought about by the appellant-company by its said notification was in violation of clause (7) of the agreement / settlement entered into between itself and the appellant-company in 1982 and that the appellant-company had resorted to unfair labour practice under item No.9 of Schedule IV of the Maharashtra Act of 1971 and had thereby violated the mandate of Section 27 of the said Act.

The Labour Court held that there was an attempt by the appellant-company not to implement clause 7 of the 1982 agreement / settlement and this amounted to an unfair labour practice. The appellant-company filed writ petition. A Single Judge of the High Court upheld the order of the Labour Court. The Division Bench of the High Court affirmed the finding of the Single Judge. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. Any unfair labour practice within its very concept must have some elements of arbitrariness and unreasonableness and if unfair labour practice is established the same would bring about a violation of guarantee under Article 14 of the Constitution. Therefore, it is axiomatic that anyone who alleges unfair labour practice must plead it specifically and such allegations must be established properly before any forum can pronounce on the same. It is also to be kept in mind that in the changed economic scenario, the concept of unfair labour practice is also required to be understood in the changed context. Today every State, which has to don the mantle of a welfare state, must keep in mind the twin objectives of industrial peace and economic justice and the courts and statutory bodies while deciding what unfair labour practice is must also be cognizant of the aforesaid twin objects. [Para 19] [1172-C-E]

2.1. Unfair labour practice, for the first time, was defined and codified in the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971. But insofar as the Industrial Disputes Act, Central Law, is concerned, unfair labour practice was codified and brought into force by the Amending Act, 46 of 1982 with effect from 21st August 1984. [Para 20] [1172-F-G]

2.2. Clause (ra) of Section 2 of Industrial Disputes Act defines unfair labour practice to mean the practices

specified in the fifth schedule and the fifth schedule was also inserted by the said Amending Act. The fifth schedule has two parts. The first part refers to unfair labour practices on the part of the employers and trade union of employers and the second part refers to unfair labour practices on the part of the workmen and trade union of workmen. However, there is some difference between the provisions relating to unfair labour practices in the Maharashtra Act and those in Central Act i.e. Industrial Disputes Act. The Industrial Disputes Act prohibits an employer or workmen or a trade union from committing any unfair labour practice while the Maharashtra Act prohibits an employer or union or an employee from engaging in any unfair labour practice. The prohibition under the Industrial Disputes Act is aimed at preventing the commission of an unfair labour practice while the Maharashtra Act mandates that the concerned parties cannot be engaged in any unfair labour practice. The word 'engage' is more comprehensive in nature as compared to the word 'commit'. [Para 21] [1172-H; 1173-A-D]

Hindustan Lever Ltd. v. Ashok Vishnu Kate & others **1995 (6) SCC 326: 1995 (3) Suppl. SCR 702 – relied on.**

3.1. It is true that this Court normally does not upset a concurrent finding but there is no such inflexible rule. The jurisdiction of this Court under Article 136 is a special jurisdiction. This is clear from the text of the Article itself which starts with a non-obstante clause. This is a jurisdiction conferring residual power on this Court to do justice and is to be exercised solely on discretion to be used by this Court to advance the cause of justice. This Article does not confer any right of appeal on any litigant. But it simply clothes this Court with discretion which is to be exercised in an appropriate case for ends of justice. Therefore, there can be no hard and fast rule in the exercise of this jurisdiction. Just because the findings which are assailed in a special leave petition are

concurrent cannot debar this Court from exercising its jurisdiction if the demands of justice require its interference. In a case where the Court finds that the concurrent finding is based on patently erroneous appreciation of basic issues involved in an adjudication, the Court may interfere. In the instant case the Court proposes to interfere with the concurrent finding for the reasons discussed hereinbelow. [Para 27] [1174-G-H; 1175-A-C]

3.2. It is well known that an industrial settlement is entered into between the management and labour for maintaining industrial peace and harmony. Therefore, any attempt by either the management or the workmen to violate such a settlement may lead to industrial unrest and amounts to an unfair labour practice. Here the charge of unfair labour practice against the appellant-company is that it has violated item 9 of Schedule IV of the Maharashtra Act. The purport of item 9 is that any failure to implement an award or settlement or agreement would be an unfair labour practice. In the instant case while considering clause 7 of the said settlement the Courts have not taken into consideration clause 12. If a harmonious reading is made of clauses 7 and 12 it will be clear that clause 7 cannot be given an interpretation which makes clause 12 totally redundant. Clause 7 contains a prohibition against the employees or officers or members of the staff of the appellant-company from doing normal production work. But that cannot be read in such a manner as to nullify the purport of clause 12 which reserves the promotional employment potential of existing workmen. So in the instant case if by way of rearrangement of work, the management of the appellant-company gives promotional opportunity to the existing worker that does not bring about any violation of clause 7 of the said settlement rather such a rearrangement of work will be in terms of clause 12. At the same time if some of job of executive officers are the same as is done by the existing worker that does not bring about such a

violation of clause 7 as to constitute unfair labour practice. [Para 28] [1175-D-H; 1176-A-B]

3.3. What is restricted under clause 7 is asking the officers to do the normal production work. There is no blanket ban in asking the officers from doing any production work. Therefore, both clause 7 and clause 12 of the said settlement must be reasonably and harmoniously construed to make it workable with the evolving work culture of the appellant-company in facing the new challenge in the emerging economic order which has changed considerably from 1982. Even if it is assumed that 1982 agreement still subsists even then when a challenge is made of unfair labour practice on the basis of violation of a clause of 1982 agreement on the basis of a complaint filed in 2007, the Labour Court and the High Court must consider the said agreement reasonably and harmoniously keeping in mind the vast changes in economic and industrial scenario and the new challenges which the appellant-company has to face in the matter of reorganizing work in order to keep pace with the changed work culture in the context of scientific and technological development. Also while adjudicating on the complaint of the union both the Labour Court and the High Court should have taken into consideration all subsequent settlements between the management of the said company and the union in 1985, 1988, 1992, 1997 and 2004. Both the Labour Court and the High Court failed to notice that in its complaint the union has accepted that they are not objecting to the promotion being granted to the workers. However, the said stand of the workers union is not consistent with the nature of the complaint filed before the Labour Court. [Para 29] [1176-C-G]

3.4. The admitted facts are, there are 89 vacancies in the category of officers and 154 workers have applied. Therefore, everybody who has applied cannot be promoted, only a certain percentage of the workers

applying can be promoted. Both the Labour Court and the High court failed to take into consideration that the workers voluntarily applied for the promotion scheme pursuant to its introduction. Nowhere has it been alleged by the workers that any force or pressure was brought upon them to apply. The union is supposed to represent the interests of the workers. When the workers themselves do not consider the scheme as unfair to them, can the union take upon them the burden of saying that the scheme is unfair? In the instant case the respondent-union is unfortunately seeking to do that. Both the Labour Court and the High Court have failed to appreciate this basic fundamental issue in their adjudication and have, therefore, come to an obviously erroneous finding. Apart from the aforesaid clear factual position legally also the management of the company is not prevented from rearranging its business in the manner it considers it best, if in the process it does not indulge in victimisation. [Para 30] [1176-H; 1177-A-E]

3.5. In the instant case no malafide has been alleged against the appellant-company. Nor it is anybody's case that as a result of reorganization of its working pattern by introducing the scheme of promotion any person is either retrenched or is rendered surplus. No allegation of victimization has been made by the respondent-union in its complaint. In the absence of any allegation of victimization it is rather difficult to find out a case of unfair labour practice against the management in the context of the allegations in the complaint. It is nobody's case that the management is punishing any workmen in any manner. Also no workmen of the appellant-company made any complaint either to the management or to the union that the management is indulging in any act of unfair labour practice. [Paras 22, 32] [1173-E-F; 1178-B]

3.6. In the given situation, this Court cannot appreciate how by introducing the scheme of promotion to which the workers overwhelmingly responded on their

own can it be said that the management has indulged in unfair labour practice. [Para 33] [1178-C]

3.7. It is not the case of the respondent-union that its recognition is in any way being withdrawn or tinkered with. Nor is it the case of the respondent-union that it is losing its power of collective bargaining. It may be that the number of workmen is reduced to some extent pursuant to a promotional scheme to which the workmen readily responded. But no union can insist that all the workmen must remain workmen perpetually otherwise it would be an unfair labour practice. Workmen have a right to get promotion and improve their lot if the management offers them with a bona fide chance to do so. In fact if the order of the High Court is upheld, the same will go against the interest of erstwhile workmen of the appellant-company who have responded to the scheme of promotion. [Para 39] [1180-C-E]

3.8. The High court failed to have a correct perspective of the questions involved in this case and came to an erroneous finding. The order of the High Court is set aside. However, it is made clear that in implementing the scheme the management of the appellant-company must not bring about any retrenchment of the workmen nor should the workmen be rendered surplus in any way. [Paras 40, 41] [1180-F-G]

Parry & Co. Ltd. v. P.C. Pal & ors., **AIR 1970 SC 1334: 1969 SCR 976 and** *Hindustan Lever Ltd. v. Ram Mohan Ray and others* **1973 (4) SCC 141: 1973 (3) SCR 924 – relied on.**

Arkal Govind Raj Rao v. Ciba Geigy of India Ltd., Bombay **1985 (3) SCC371: 1985 (1) Suppl. SCR 282 – distinguished.**

L.H. Sugar Factories and Oil Mills (P) Ltd., v. State of U.P. **(1961) 1 LLJ 686 (HC All) – referred to.**

Case Law Reference:

1995 (3) Suppl. SCR 702	**relied on**	**Paras 21,34**
1969 SCR 976	**relied on**	**Paras 31,34**
1973 (3) SCR 924	**relied on**	**Para 34**
1985 (1) Suppl. SCR 282	**distinguished**	**Para 35,36**
(1961) 1 LLJ 686 (HC All)	**referred to**	**Para 37**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8607 of 2011.

From the Judgment & Order dated 12.3.2010 of the High Court of Bombay in LPA No. 30 of 2010 in WP No. 1319 of 2009.

Ashok Desai, P.V. Anaokar, Arun R. Pednekar, V.N. Raghupathy for the Appellants.

K.K. Venugopal, Bennet D. Costa, Nitin S. Tambwekar, B.S. Sai, Rohit B, K. Rajeev, Mukti Choudhary for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. Leave granted.

2. This appeal has been preferred from the order dated 12th March, 2010 of the Division Bench of the Bombay High Court in Letters Patent Appeal No. 30/2010.

3. The appellant no. 1 is a public limited company having its registered office at 130, Pandurang Budhkar Marg, Dr. Annie Besant Road, Worli, Mumbai and is engaged in the business of manufacturing switchgears, switchboards, motors, etc., of its many factories, one is located at Thane-Belapur Road, Kalwe, Thane, and houses the plant that manufactures switchboards for the company. The appellant employs about 2200 employees. The appellant no. 2 is the Chief Manager (Personnel) of the said Company.

4. Respondent no. 1, the contesting respondent, is a registered trade union of the workers employed by the appellant no.1. It is recognized under the provisions of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour

Practices Act, 1971 (hereinafter, referred to as the Maharashtra Act). Respondent no. 2, the *pro forma* respondent, represents the Switchboard Unit of the company, and is responsible for the routine functioning of the plant at Kalwe.

5. In 2007 the trade union preferred a complaint under Section 28 of the Maharashtra Act for unfair labour practices, jointly and severally against the company, its Chief Manager for personnel (appellant no. 2) and its Works Manager (respondent no.2) before the learned Industrial Court, Thane, Maharashtra. The trade union impugned a notification dated 3rd May, 2007 issued by the company for its workmen employed in its factory located in Kalwe, whereby applications were invited to appear for a selection process to undergo a two year long period as an 'Officer Trainee'. This training was to be in the fields of manufacturing, quality inspection and testing, logistics and technical sales order execution. The notification stated that after the successful completion of the said two years, the trainees were to be designated as 'Junior Executive Officers'. The case of the respondent trade union is that though the designation of 'Junior Executive Officer' was that of an officer belonging to the management cadre, in fact it was merely a nomenclature, with negligible content of managerial work. It was urged that the job description of a Junior Executive Officer was same as that of a workman, with little additional duties. Resultantly, the Junior Executive Officers of the factory were now to do the very same work that had always been done by the workmen.

6. It was submitted that such a move was, in effect an alteration in the conditions of service of the workmen, as some vacancies available for workmen in the switch board unit were to be reserved for officers from the management cadre. Resultantly there would have been a reduction in the job opportunities for workers. According to the trade union, any such change could not have been affected without giving the workmen a prior notice to such effect in terms of Section 9A of the Industrial Disputes Act, 1947. In this regard, the trade union referred to an agreement entered into between itself and the company in 1982. The said agreement, titled

'Rationalization and Transport Settlement' has clause (7). The said clause is as follows:-

"7. That employees or officer or staff categories shall not be asked to do normal production work."

7. The union also referred to clause (12) of the agreement which is as follows:-

"12. That this settlement shall not be utilized for eliminating the further employment potential or promotional opportunities to the existing workmen."

8. Clause (16) is set out herein below:

"16. This agreement shall come into force with effect from 01.01.1981 except Clause No.14 which shall have effect from 16.11.1982 only and shall remain in operation until it is changed in accordance with the provisions of law.

9. Clause (7) ensures that the job opportunities for workers shall not be reduced by the company by making its managerial staff perform the workmen's job. Clause (16) ensured the perpetuity of this Settlement until expressly overruled by a subsequent Settlement. It was submitted by the trade union that the change sought to be brought about by the company by its notification dated 3rd May, 2007, was in violation of clause (7). The trade union thus complained that the company and its two officers resorted to unfair labour practices mentioned in items 9 and 10 of Schedule IV of the Maharashtra Act, and had thereby violated the mandate of Section 27 of the Maharashtra Act.

10. It was further submitted that even if the said Settlement was said to be non-binding, the impugned move was in violation of Section 9A of the Industrial Disputes Act insofar as the affected workmen had not been given any notice as contemplated by clause (a) of Section 9A read with Entry 11 of the Fourth Schedule of the Industrial Disputes Act.

11. The Maharashtra Act was the first enactment of its kind in the country to have been legislated by a State for the prevention of unfair labour practices and consequent

victimization. It was a comprehensive legislative device to weed out unfair labour practices, not only on the part of the employers, but also on the part of trade unions and the workmen. Chapter VI of the Act is titled 'Unfair Labour Practices'. Section 26, the first section of this chapter, defines an unfair labour practice for the purposes of the Act. It reads as under:

"26. Unfair labour practices: In this Act, unless the context requires otherwise, 'unfair labour practices' mean any of the practices listed in Schedules II, III and IV."

12. Section 27 prohibits 'unfair trade practices'. The said Section is as follows:-

"27. Prohibition on engaging in unfair labour practices: No employer or union and no employees shall engage in any unfair labour practice."

13. Section 28 deals with the procedure for preferring a complaint against an unfair labour practice. Clause (1) of this section reads as follows:

"28. Procedure for dealing with complaints relating to unfair labour practices: (1) Where any person has engaged in or is engaging in any unfair labour practice, then any union or any employee or any employer or any Investigating Officer may, within ninety days of the occurrence of such unfair labour practice, file a complaint before the Court competent to deal with such complaint either under section 5, or as the case may be, under section 7, of this Act:

Provided that, the Court may entertain a complaint after the period of ninety days from the date of the alleged occurrence, if good and sufficient reasons are shown by the complainant for the late filing of the complaint."

14. In the instant case the complaint has been filed under Section 28 read with Section 30(2) of the Maharashtra Act by the respondent-union and in the instant complaint the respondent-union alleged that the management is indulging in unfair labour practices under item Nos.9 and 10 of Schedule

IV of the Maharashtra Act (para 3(a) of the complaint). Schedule IV of the Maharashtra Act categorizes the general unfair labour practices on the part of the employers. Under Schedule IV, item Nos.9 and 10, in respect of which unfair labour practices have been alleged, provide as follows:

"9. Failure to implement award, settlement or agreement.

10. To indulge in act of force or violence."

15. In paragraph 3 (b) of the complaint it has been alleged that the respondent-union is anticipating that the management is likely to reduce the work of the workmen category and give it to the newly recruited officer trainees. It has also been alleged that by doing so the management is acting in violation of Section 9(A) of Industrial Disputes Act, 1947 by bringing about a change in service condition without giving any notice. In so far as this allegation in the complaint is concerned, the order of Industrial Court, Thane, shows that it did not find that the management was in any way trying to change the condition of the service or it was acting in violation of the provisions of Section 9(A).

16. The precise findings of the Labour Court, Thane while dealing with the complaint of the Union about change of condition of service under Section 9(A) of the Industrial Disputes Act are as under:

"……Considering the evidence that even earlier also, the company has reduced the strength of the employees in various departments, they were transferred from one section to other section, the promotions are given from the category of workmen to the category of officers and therefore, it cannot be said that there's any breach under S.9A of the Industrial Dispute Act, 1947."

17. Therefore, the complaint of the respondent-union, which ultimately found favour with Industrial Court as unfair labour practice, is the attempt made by the management in not implementing clause 7 of settlement.

18. In this aspect the exact finding of the Labour Court is as follow:

"……Considering the nature of work to be performed by these Officer's Trainee, certainly it shows that there's breach of clause 7 of the Settlement dated 16.11.1982. As such, the Complainant Union has succeeded to prove the unfair labour practice under Item 9 of Schedule IV of the Act."

19. Before proceeding further in this matter, this Court proposes to examine the concept of unfair labour practice and the way it has been dealt with under the Maharashtra Act and also under the ID Act. Any unfair labour practice within its very concept must have some elements of arbitrariness and unreasonableness and if unfair labour practice is established the same would bring about a violation of guarantee under Article 14 of the Constitution. Therefore, it is axiomatic that anyone who alleges unfair labour practice must plead it specifically and such allegations must be established properly before any forum can pronounce on the same. It is also to be kept in mind that in the changed economic scenario, the concept of unfair labour practice is also required to be understood in the changed context. Today every State, which has to don the mantle of a welfare state, must keep in mind that twin objectives of industrial peace and economic justice and the courts and statutory bodies while deciding what unfair labour practice is must also be cognizant of the aforesaid twin objects.

20. Unfair labour practice, for the first time, was defined and codified in the Maharashtra Act referred to hereinabove. But in so far as the Industrial Disputes Act, Central Law, is concerned, unfair labour practice was codified and brought into force by the Amending Act, 46 of 1982 with effect from 21st August 1984.

21. Clause (ra) of Section 2 of Industrial Disputes Act defines unfair labour practice to mean the practices specified in the fifth schedule and the fifth schedule was also inserted by the said Amending Act. The fifth schedule has two parts. The

first part refers to unfair labour practices on the part of the employers and trade union of employers and the second part refers to unfair labour practices on the part of the workmen and trade union of workmen. However, there is some difference between the provisions relating to unfair labour practices in the Maharashtra Act and those in Central Act i.e. Industrial Disputes Act. The Industrial Disputes Act prohibits an employer or workmen or a trade union from committing any unfair labour practice while the Maharashtra Act prohibits an employer or union or an employee from engaging in any unfair labour practice. The prohibition under the Industrial Disputes Act is aimed at preventing the commission of an unfair labour practice while the Maharashtra Act mandates that the concerned parties cannot be engaged in any unfair labour practice. The word 'engage' is more comprehensive in nature as compared to the word 'commit' [See *Hindustan Lever Ltd. v. Ashok Vishnu Kate & others* reported in 1995 (6) SCC 326 at para 37, page 345 of the report].

22. In the instant case no allegation of victimization has been made by the respondent-union in its complaint. In the absence of any allegation of victimization it is rather difficult to find out a case of unfair labour practice against the management in the context of the allegations in the complaint. It is nobody's case that the management is punishing any workmen in any manner. It may be also mentioned here that no workmen of the appellant-company has made any complaint either to the management or to the union that the management is indulging in any act of unfair labour practice.

23. Even then the Labour Court, Thane, has come to certain findings of unfair labour practice against the management and which have been referred to above.

24. The appellant-company challenged the finding of the Labour Court before the High Court by filing a writ petition. The learned Single Judge in his judgment noted that the main grievance of the respondent-union was that in the process of reorganizing its work pattern the management of the appellant-company was reducing the number of posts of workmen and

some of the work which were done by the workmen are to be done by the officers and the grievance of the respondent-union was that this was contrary to clause 7 of settlement dated 16th November, 1982 (hereinafter 'the said settlement'). Ultimately, the learned Single Judge came to a finding that though the post which is introduced by the management is named Junior Executive, the said post was different from the post of Junior Executive which was in existence and after saying so the learned Single Judge held, "the Tribunal has rightly held that this amounted to unfair labour practice under item 9 of Schedule IV of the said Act" (para 9). The learned Single Judge also noted that even though promoted as Junior Executive the present workers will be expected to do a part of the work of the workman along with some additional work. This, according to the learned Single Judge, was in breach of clause 7 of the said settlement.

25. The appellant-company also challenged the said order of the learned Single Judge before the Division Bench. The Division Bench came to a finding that whatever work is given to the officers/trainees in addition to the present work was the work of a workman. So even if the workmen are promoted they will be doing the job of a workman with some additional work and the Division Bench also came to the same finding that this will be in violation of clause 7 of the agreement and thus considered it unfair labour practice. With these findings, the Division Bench affirmed the finding of the learned Single Judge.

26. Mr. K.K. Venugopal, learned Senior Counsel appearing on behalf of the respondent-union urged that in exercise of its powers under Article 136 this Court normally does not interfere with concurrent finding and, therefore, should not interfere with the concurrent finding in the instant case.

27. It is true that this Court normally does not upset a concurrent finding but there is no such inflexible rule. The jurisdiction of this Court under Article 136 is a special jurisdiction. This is clear from the text of the Article itself which starts with a non-obstante clause. This is a jurisdiction conferring residual power on this Court to do justice and is to

be exercised solely on discretion to be used by this Court to advance the cause of justice. This Article does not confer any right of appeal on any litigant. But it simply clothes this Court with discretion which is to be exercised in an appropriate case for ends of justice. Therefore, there can be no hard and fast rule in the exercise of this jurisdiction. Just because the findings which are assailed in a special leave petition are concurrent cannot debar this Court from exercising its jurisdiction if the demands of justice require its interference. In a case where the Court finds that the concurrent finding is based on patently erroneous appreciation of basic issues involved in an adjudication, the Court may interfere. In the instant case the Court proposes to interfere with the concurrent finding for the reasons discussed hereinbelow.

28. Admittedly, the finding of unfair labour practice against the appellant-company by the High Court and the Labour Court is based on the premise that the appellant-company acted in breach of clause 7 of the agreement. It is well known that an industrial settlement is entered into between the management and labour for maintaining industrial peace and harmony. Therefore, any attempt by either the management or the workmen to violate such a settlement may lead to industrial unrest and amounts to an unfair labour practice. Here the charge of unfair labour practice against the appellant-company is that it has violated item 9 of Schedule IV of the Maharashtra Act. Item 9 has been set out hereinabove and the purport of item 9 is that any failure to implement an award or settlement or agreement would be an unfair labour practice. In the instant case while considering clause 7 of the said settlement the Courts have not taken into consideration clause 12. Both clauses 7 and 12 have been set out hereinabove. If a harmonious reading is made of clauses 7 and 12 it will be clear that clause 7 cannot be given an interpretation which makes clause 12 totally redundant. Clause 7 contains a prohibition against the employees or officers or members of the staff of the appellant-company from doing normal production work. But that cannot be read in such a manner as to nullify the purport of clause 12 which reserves the promotional employment

potential of existing workmen. So in the instant case if by way of rearrangement of work, the management of the appellant-company gives promotional opportunity to the existing worker that does not bring about any violation of clause 7 of the said settlement rather such a rearrangement of work will be in terms of clause 12. At the same time if some of job of executive officers are the same as is done by the existing worker that does not bring about such a violation of clause 7 as to constitute unfair labour practice.

29. What is restricted under clause 7 is asking the officers to do the normal production work. There is no blanket ban in asking the officers from doing any production work. Therefore, both clause 7 and clause 12 of the said settlement must be reasonably and harmoniously construed to make it workable with the evolving work culture of the appellant-company in facing the new challenge in the emerging economic order which has changed considerably from 1982. Even if we assume that 1982 agreement still subsists even then when a challenge is made of unfair labour practice on the basis of violation of a clause of 1982 agreement on the basis of a complaint filed in 2007, the Labour Court and the High Court must consider the said agreement reasonably and harmoniously keeping in mind the vast changes in economic and industrial scenario and the new challenges which the appellant-company has to face in the matter of reorganizing work in order to keep pace with the changed work culture in the context of scientific and technological development. This Court also finds that while adjudicating on the complaint of the union both the Labour Court and the High Court should have taken into consideration all subsequent settlements between the management of the said company and the union in 1985, 1988, 1992, 1997 and 2004. Both the Labour Court and the High Court failed to notice that in its complaint the union has accepted that they are not objecting to the promotion being granted to the workers. However, the said stand of the workers union is not consistent with the nature of the complaint filed before the Labour Court.

30. The admitted facts are, there are 89 vacancies in the

category of officers and 154 workers have applied. Therefore, everybody who has applied cannot be promoted, only a certain percentage of the workers applying can be promoted. Both the Labour Court and the High court failed to take into consideration that the workers voluntarily applied for the promotion scheme pursuant to its introduction. Nowhere has it been alleged by the workers that any force or pressure was brought upon them to apply. In the background of these facts the question is when the workers applied on their own to a scheme of promotion introduced by the management and they do not make any complaint either to the union or to the management in respect of the introduction of the scheme, can it be said that by introducing a promotional scheme the management is indulging in unfair labour practice? The union is supposed to represent the interests of the workers. When the workers themselves do not consider the scheme as unfair to them, can the union take upon them the burden of saying that the scheme is unfair? In the instant case the respondent-union is unfortunately seeking to do that. Both the Labour Court and the High Court have failed to appreciate this basic fundamental issue in their adjudication and have, therefore, come to an obviously erroneous finding. Apart from the aforesaid clear factual position legally also the management of the company is not prevented from rearranging its business in the manner it considers it best, if in the process it does not indulge in victimisation.

31. Reference in this connection may be made to a decision of this Court in *Parry & Co. Ltd. v. P.C. Pal & ors.,* reported in AIR 1970 SC 1334, a three-Judge Bench of this Court held as follows:-

> "It is well established that it is within the managerial discretion of an employer to organize and arrange his business in the manner he considers best. So long as that is done bona fide it is not competent of a tribunal to question its propriety. If a scheme for such reorganization results in surplusage of employees no employer is expected to carry the burden of such economic dead

> weight and retrenchment has to be accepted as inevitable, however unfortunate it is…"

(para 14, page 1341 of the report)

32. In the instant case no malafide has been alleged against the appellant-company. Nor it is anybody's case that as a result of reorganization of its working pattern by introducing the scheme of promotion any person is either retrenched or is rendered surplus.

33. In the given situation, this Court cannot appreciate how by introducing the scheme of promotion to which the workers overwhelmingly responded on their own can it be said that the management has indulged in unfair labour practice.

34. Similarly, in the case of *Hindustan Lever Ltd. v. Ram Mohan Ray and others* reported in 1973 (4) SCC 141, another three-Judge Bench of this Court held that nationalization and standardization of work by the management by itself would not fall under item 10 of Schedule IV of Industrial Disputes Act unless it is likely to lead to retrenchment of workers. Relying on the decision in *Parry* (supra) this Court held in *Hindustan Liver* (supra) that since the reorganization has not brought about any change adversely affecting the workers and there has been no retrenchment, similar principles are applicable here.

35. Mr. K.K. Venugopal, learned Senior Counsel appearing for the union in support of his submission relied on a decision of this Court in the case of *Arkal Govind Raj Rao v. Ciba Geigy of India Ltd., Bombay* reported in 1985 (3) SCC 371. In that case the question which was considered by this Court was where an employee was performing multifarious duties and the issue is whether he is a workman or not the test to be applied is what was the primary, basic or dominant nature of the duties for which the workman was employed. This Court came to the conclusion that when the primary and basic duties of an employee are clerical but certain stray assignments are given to him to create confusion, the Court may remove the gloss to find out the reality.

36.In *Arkal Govind Raj* (supra) the aforesaid question arose out of the termination of service of the appellant Govind Raj as his termination led to an industrial dispute. In that dispute numerous primary objections were raised by Ciba Geigy and one of them was that Govind Raj was not a workman within the meaning of Section 2(s) of the Industrial Disputes Act. In that context, this Court, after analyzing the evidence, came to a finding that Govind Raj was a workman within the meaning of the Act and held that neither the Labour Court nor the High Court came to a correct finding. With that finding this Court remanded the matter to the Labour Court for deciding the dispute in accordance with its judgment. The said decision has no bearing on the issues with which we are concerned in this case. It is well known that the ratio of a decision has to be appreciated in its context. Going by that principle, we do not find that the decision in *Arkal Govind Raj* (supra) is of any assistance to the respondents.

37. Mr. Venugopal also relied on the commentary of K.D. Srivastava on Law Relating to Trade Unions and Unfair Labour Practices in India (Fourth Edition). The learned counsel relied on a decision of the Allahabad High Court in the case of *L.H. Sugar Factories and Oil Mills (P) Ltd., v. State of U.P.,* (1961) 1 LLJ 686 (HC All). Some of the observations made in the said judgment which have been quoted in the commentary of K.D. Srivastava are as follows:-

> "…If an employer deliberately uses his power of promoting employees in a manner calculated to sow discord among his workmen, or to undermine the strength of their union, he is guilty of unfair labour practice."
>
> (page 402)

38. In the instant case no malafide has been alleged by the union against the appellant-company in the matter of reorganization of its work. It is also nobody's case that as a result of the reorganization of the work any attempt is made by the appellant-company to create discord amongst the workmen so as to undermine the strength of the union. Apart from that the facts in the case of *L.H. Sugar Factories* (supra) are totally

different. In *L.H. Sugar Factories* (supra) the company wrongfully deprived ten workers of their promotion to the post of driver-cum-assistant fitter while preferring eleven other workmen over them. This led to an industrial dispute. Therefore, those observations of Allahabad High Court in a totally different fact situation are not attracted in the present case to make out a case of unfair labour practice. We fail to appreciate the relevance of the aforesaid decision to the facts of the present case.

39. At the same time it is not the case of the respondent-union that its recognition is in any way being withdrawn or tinkered with. Nor is it the case of the respondent-union that it is losing its power of collective bargaining. It may be that the number of workmen is reduced to some extent pursuant to a promotional scheme to which the workmen readily responded. But no union can insist that all the workmen must remain workmen perpetually otherwise it would be an unfair labour practice. Workmen have a right to get promotion and improve their lot if the management offers them with a bona fide chance to do so. In fact if the order of the High Court is upheld, the same will go against the interest of erstwhile workmen of the appellant-company who have responded to the scheme of promotion.

40. For the reasons aforesaid, we are of the view that the High court failed to have a correct perspective of the questions involved in this case and obviously came to an erroneous finding.

41. We allow the appeal and set aside the order of the High Court in which has merged the order of the Labour Court. However, we make it clear that in implementing the scheme the management of the appellant-company must not bring about any retrenchment of the workmen nor should the workmen be rendered surplus in any way.

42. The appeal is, thus, allowed. There will be no order as to cost.

B.B.B. Appeal allowed.

SHAW WALLACE & CO. LTD. (NOW UNITED SPIRITS LTD.)

v.

NEPAL FOOD CORPORATION & OTHERS

(CIVIL APPEAL NO.7100 OF 2001)

OCTOBER 13, 2011

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

Carriage of Goods by Sea Act, 1925 – ss.2 and 4; and Article I, clause (b) and Article III, r.3 – Role of carrier's agent and its liability – Contract for sale of parboiled rice between NFC and NHH – Vessel 'Pichit Samut' chartered by NHH for carrying rice to be shipped by NFC to NHH, from Calcutta to Penang, Malaysia – NFC filed suit against the owner of the vessel and its agent Shaw Wallace for recovery of damages on ground of wrongful delivery by the ship-owner to NHH without production of the necessary documents (bills of lading) and wrongful failure on part of the ship-owner and Shaw Wallace to furnish the bills of lading within the validity period of letter of credit, thereby preventing NFC from negotiating and recovering the amount due – Suit decreed by the High Court – Held: As per the sale contract, the seller (NFC) was entitled to payment of the entire invoice value, at sight at the seller's bank, on presentation of the "on board Bills of Lading" supported by its commercial invoice – Mere fact that delivery was taken by the buyer (NHH) at Penang even without the bills of lading would not have caused any loss to the seller, if it had been issued the bills of lading to which it was entitled, without delay so that it could have realized the amount against the letter of credit which was valid and in force till 15.1.1979 – NFC lost the value of goods on account of Shaw Wallace not releasing the bills of lading before 15.1.1979, even though it was liable to issue the bills of lading on 17.12.1978 – The bills of lading were ultimately issued on 25.1.1979 – By deliberately delaying the issue of the bills of lading from 17.12.1978 to

25.1.1979, Shaw Wallace committed a breach of statutory duty cast under Article III (3) of the Schedule to the Act – It also acted negligently in performance of its legal duty in common law to issue the bills of lading on delivery of the mate's receipt, as the agent of the ship-owner – Thus it became liable to pay damages to make good the loss, namely the value of the goods covered by the bills of lading – If the issue of bill of lading is denied or delayed as a consequence of which the shipper suffers loss, the owner of the vessel and its agent will jointly and severally be liable to make good the loss by way of damages – Shaw Wallace alongwith the ship-owner was jointly and severally responsible for the loss caused to NFC – Judgment and decree of High Court affirmed.

Carriage of Goods by Sea Act, 1925 – ss.2 and 4; and Article I, clause (b) and Article III, r.3 – Role of carrier's agent and its liability – Contract for sale of rice between NFC and NHH – Vessel 'Eastern Grand' sub-chartered by NHH for carrying rice to be shipped by NFC to NHH, from Calcutta to Penang, Malaysia – Shaw Wallace was the agent of the owner of the vessel, at Calcutta – NFC filed suit against the disponent owner of the vessel (main charterer), the owner of the vessel, Shaw Wallace and Owner's Protective Agent, for recovery of damages on ground of wrongful delivery by the disponent owner to the buyers and wrongful failure to furnish the bills of lading thereby preventing NFC from negotiating and recovering the amount due – High Court decreed the suit against the disponent owner and Shaw Wallace – Held: In the instant case, the letter of credit expired on 15.1.1979 while the goods were cleared at Penang between 16.1.1979 to 19.1.1979 – It was only on 19.1.1979, after the expiry of letter of credit and after the goods were delivered to NHH, that NFC tendered the mate's receipts and requested for issue of bills of lading from Shaw Wallace – Even if Shaw Wallace had delivered the bills of lading on the day of demand namely on 19.1.1979 itself, NFC could not have realized the amount against the letter of credit – Shaw Wallace could be made liable only if it had committed breach of statutory duty or breach of any other legal duty amounting to negligence causing loss to NFC – Having

regard to the fact, that the letter of credit had expired on 15.1.1979 long prior to the tendering of mate's receipt and demand for bills of lading, the delay of nine days in issuing the bills of lading had no relevance – Evidently NFC and its agent had taken the matter in a casual manner presumably expecting a further extension of letter of credit – No finding that the mate's receipts were tendered or delivered with a demand for issue of bills of lading prior to 19.1.1979 – The High Court failed to consider this important aspect and wrongly assumed that breach, default, delay could be attributed to Shaw Wallace, in issuing the bills of lading, even before the mate's receipts were tendered on 19.1.1979 – Judgment and decree of the High Court insofar as it decreed the suit against Shaw Wallace set aside – Decree against the disponent owner not disturbed.

In the instant appeals viz. Civil Appeal No.7100/2001 and Civil Appeal No.7099/2011, the issue relating to the role played by the carrier's agent and its statutory duty and also its legal duty in common law arose for consideration.

Civil Appeal No.7100/2001

Nepal Food Corporation (NFC)-first respondent entered into a contract with Ngoh Hong Hang Pvt. Ltd., Singapore ('NHH'/'buyer') for sale of parboiled rice. UPT Imports Exports Ltd.-second respondent was the owner of the vessel – '*M.V. Pichit Samut*'. **Shaw Wallace-appellant represented itself to be the agent of the owner of the vessel. The said vessel** '*Pichit Samut*' **was chartered by NHH from the owner of the vessel under charterparty agreement for carrying rice to be shipped by NFC to NHH, from Calcutta to Penang, Malaysia. Shaw Wallace was appointed as the 'Owner's Protective Agent'. Shaw Wallace was also acting as the charterer's agent as per charterer's request. M/s Asian Agency was the agent of the seller (NFC) who was the shipper of the goods.**

NFC filed suit in the High Court against the owner of

the vessel and its agent Shaw Wallace for recovery of damages. The basis of the claim was two-fold. The first was wrongful delivery by the ship-owner to NHH without production of the necessary documents (bills of lading). The second was wrongful failure on the part of the ship-owner and Shaw Wallace to furnish the bills of lading within the validity period of letter of credit, thereby preventing the NFC from negotiating and recovering the amount due.

The owner of the vessel did not defend the suit claim. Shaw Wallace in its written statement claimed that it had merely acted as the agent of the ship-owner in regard to that particular voyage undertaken by M.V. *Pichit Samut*; and that it could issue the bills of lading only on the instructions of and under the authority of the second respondent and that as it merely acted on the instructions of the ship-owner, as its agent, it could not be held liable for the acts or omissions of the ship-owner. A Single Judge of the High Court decreed the suit with interest at 9% per annum from the date of suit. The Single Judge held that Shaw Wallace was liable to pay damages to NFC on three counts: (i) Breach of statutory duty: The act of withholding the bills of lading by Shaw Wallace was wrongful and in violation of the statutory duty imposed by Article III, Rule 3 of the Carriage of Goods by Sea Act, 1925. (ii) Breach of legal duty amounting to a wrongful act and negligence: The appellant wrongfully refused to make over to NFC, the bills of lading (which were documents of title to goods), though NFC was entitled to it on demand, in an attempt to assist the charterer (NHH) in realizing its purported claim and as a result of this wrongful act of Shaw Wallace, NFC suffered loss and damages to the extent of the value of the said goods. (iii) Conversion: Both ship-owner as well as Shaw Wallace acted inconsistently with the rights of NFC,in respect of the said bills of lading and such wrongful acts amounted to conversion of the said bills of lading which were documents of title to the goods, and thereby caused damages and injury to the plaintiff to the

extent of the value of the said goods.

Feeling aggrieved, Shaw Wallace filed an intra-court appeal which was dismissed by the Division Bench of the High Court. Aggrieved, Shaw Wallace came up before this Court.

Civil Appeal No.7099/2001

The first respondent-NFC entered into a contract with Ngoh Hong Hang Pvt. Ltd., Singapore ('NHH'/ 'buyer') for sale of certain quantities of Nepal parboiled rice. Thye Shipping Parma SA, the second respondent was the disponent owner (main charterer) of the vessel – '*M.V. Eastern Grand* under a charter arrangement with the owner of the vessel – M/s Eastern Steamship & Enterprises (S) Ltd.- third respondent. The said vessel '*Eastern Grand*' was sub-chartered by NHH (buyer of the rice) from Thye Shipping under a charterparty agreement for carrying rice supplied by NFC, from Calcutta to Penang, Malaysia. Khemka & Co. (Agencies) Pvt. Ltd., the fourth respondent was the Owner's Protective Agent. Shaw Wallace was the agent of the owner of the vessel, at Calcutta. M/s Asian Agency was the agent of the seller (NFC) who was the shipper of the goods.

NFC-the first respondent filed suit in the High Court against the disponent owner of the vessel (charterer), the owner of the vessel, Shaw Wallace and Owner's Protective Agent, for recovery of damages. The basis of the claim was two-fold. The first was wrongful delivery by the second respondent to the buyers. Second was wrongful failure to furnish the bills of lading thereby preventing the NFC from negotiating and recovering the amount due. While the first was the cause of action against the Thye Shipping; the second was a cause of action against both Thye Shipping and Shaw Wallace.

Respondent nos. 2, 3 and 4 did not contest the suit. Shaw Wallace-appellant in its written statement contended that (a) it did not issue the bills of lading to

NFC because it was bound by the instructions of its principal; (b) a suit against an agent of a disclosed principal was not maintainable; (c) it was in no way concerned with the delivery of the cargo since its role was limited to that of an agent with the responsibility of getting the goods loaded; (d) it had no knowledge of the opening of the letter of credit or the expiry date thereof; and (e) it was in no way concerned with the main contract of sale of rice between NFC and NHH. A Single Judge decreed the suit against Thye Shipping (second respondent) and Shaw Wallace (appellant) with interest at 9% per annum from the date of suit. Feeling aggrieved, Shaw Wallace filed an intra court appeal, which was dismissed. The said judgment was also challenged before this Court.

Disposing of the appeals, the Court

HELD:

Civil Appeal No.7100/2001

1.1. NFC did not engage the vessel *Pichit Samut*. It was chartered by the buyer NHH to carry the goods purchased by it from NFC. The contract of carriage was governed by the terms of the charterparty agreement dated 11.10.1978. As per the said charterparty agreement, if the ship was delayed, the Charterer (NHH) was responsible to pay the demurrage and the agreement provided that the demurrage should be settled at Singapore, twenty days after discharge of the cargo at Penang. Thus NFC did not have any obligation towards the owner of the vessel to pay either the freight or any demurrage charges. If there was any delay for which NFC was liable, that was a matter to be sorted out by NHH making a claim against NFC. As per the sale contract dated 7.12.1977 between NFC as seller/shipper and NHH as the buyer, the seller (NFC) was entitled to payment of the entire invoice value, at sight at the seller's bank, on presentation of the "on board Bills of Lading" supported by its commercial invoice. NFC had secured its interest by ensuring that the buyer opens an

irrevocable letter of credit and by making the supply during the currency of the letter of credit. The shipper (NFC) was certain of obtaining payment from the Bank under the buyer's letter of credit, by merely producing before the bank, the bills of lading and the invoice. The shipper was entitled to the bills of lading from the agent of the shipowner, immediately on production of the mate's receipt. Therefore, the mere fact that delivery was taken by the buyer (NHH) at Penang even without the bills of lading would not have caused any loss to the seller, if it had been issued the bills of lading to which it was entitled, without delay so that it could have realized the amount against the letter of credit which was valid and in force till 15.1.1979. NFC lost the value of goods on account of Shaw Wallace not releasing the bills of lading before 15.1.1979, even though it was liable to issue the bills of lading on 17.12.1978. [Para 16] [1205-B-G]

1.2. The delivery of the goods on board the ship was completed on 4.12.1978. On 17.12.1978, Asian Agency presented the mate's receipt along with the filled forms of bills of lading to Shaw Wallace and demanded the issue of signed bills of lading. Issue of mate's receipt on behalf of the master of the ship was the authority and instruction to the agent of the ship-owner to issue the bills of lading to the shipper. The likelihood of a dispute between the charterer/buyer and shipper/seller regarding demurrage for lay days was not sufficient to suspend the authorization given by issue of the mate's receipt. But Shaw Wallace did not issue the bills of lading inspite of Asian Agency furnishing the mate's receipts and duly filled forms of bills of lading. Thereafter, Asian Agency made a further demand by telex on 1.1.1979. Shaw Wallace replied that the ship-owner wanted a bank guarantee towards payment of demurrage before the release of bills of lading, without indicating the amount for which the bank guarantee was to be given. By this process, issue of the bills of lading which was legitimately due on 17.12.1978 was postponed beyond 15.1.1979, on which date the letter

of credit ceased to be operative. The bills of lading were ultimately issued on 25.1.1979. Having regard to Rule 3 of Article III of the Schedule to the Act, there was a statutory duty cast upon Shaw Wallace as agent of the carrier, to issue the bills of lading, without delay. Shaw Wallace was aware of the relevance and importance of bills of lading. By deliberately delaying the issue of the bills of lading from 17.12.1978 to 25.1.1979, Shaw Wallace committed a breach of statutory duty cast under Article III (3) of the Schedule to the Act. It also acted negligently in performance of its legal duty in common law to issue the bills of lading on delivery of the mate's receipt, as the agent of the ship-owner. Thus it became liable to pay damages to make good the loss, namely the value of the goods covered by the bills of lading. For this purpose it is immaterial whether Shaw Wallace was aware or unaware of the fact that the Letter of Credit was expiring on 15.1.1979. The contention of Shaw Wallace that it was acting merely on the instructions of the shipowner in refusing to issue the bills of lading till furnishing of a bank guarantee and therefore not liable, is rejected. [Para 17] [1205-H; 1206-A-G]

1.3. The appellant made a belated attempt to avoid liability by contending that it was not responsible or liable for the issue of bills of lading, that only the master of the ship who received the goods, had to issue the bills of lading, and that NFC having permitted the ship to leave the port without obtaining the bills of lading, could not require the agent to issue the bills of lading. The well recognized practice relating to carriage of goods by sea is that where a consignment is loaded/received on board on different dates, the person in charge of the vessel issues mate's receipts acknowledging the quantity received, as and when the goods are received. On completion of delivery of goods by the shipper, on production of the mate's receipts, the bills of lading would be issued to the shipper either by the master of the vessel or by the agent of the shipowner. In this case, at the

relevant time, Shaw Wallace represented to NFC and its agent (Asian Agency) that it was the agent of the carrier and did all acts expected to be carried out by the carrier's agents, that is informing the shipper's agents about the arrival of the ship by issuing notice of readiness and by calling upon the shipper's agent to load the cargo. It issued to the master of the vessel, the mate's receipt book, bearing printed caption of 'Shaw Wallace & Co. Ltd.,' thereby making it clear that it was acting as an agent of the carrier. The mate's receipt forms issued by Shaw Wallace for use by the master of the ship clearly contained a printed provision that the bills of lading could be obtained at the agent's office. Shaw Wallace corresponded and dealt with the shipper's agent in all matters with reference to the shipment and furnished the blank forms of bills of lading to the shipper's agent. Shaw Wallace also received the mate's receipt and duly filled forms of bills of lading from Asian Agency on 17.12.1978 without any protest. Ultimately, the Shaw Wallace did issue the bills of lading. Therefore, it is too late in the day for Shaw Wallace to contend that it was not liable to issue the bills of lading. It is also significant that Shaw Wallace never informed NFC or Asian Agency before the vessel left Calcutta on 4.12.1978 or even thereafter, that it did not have the authority to issue the bills of lading or that it would not issue bills of lading in view of any default on the part of NFC. On the other hand, it held out till the ship left the port that it was the carrier's agent and it will issue the bills of lading in lieu of the mate's receipt. It did not express any reservation or objection when it issued the blank forms of bills of lading to Asian Agency for being filled or even when the mate's receipts and filled forms of bills of lading were delivered to it on 17.12.1978. Even in the letter dated 28.12.1978 addressed to the Asian Agency, it merely stated that readiness of the ship to receive goods would commence from 9.11.1978 and not 26.12.1978. More than 15 days after receiving the mate's receipts and filled form of bills of lading, on 3.1.1979, for the first time, Shaw

Wallace raised the issue of furnishing a bank guarantee for payment of demurrage amount before releasing the bills of lading. Even in this letter, it did not mention the amount of demurrage for which the bank guarantee was to be issued. The demurrage amount was mentioned for the first time by letter dated 15.1.1979. Therefore, even if NFC wanted to give a bank guarantee, it could not have given a bank guarantee before 15.1.1979 as the amount for which bank guarantee was required, was not notified. On 15.1.1979, the letter of credit expired. Therefore, it is clear that the Shaw Wallace alongwith the ship-owner was jointly and severally responsible for the loss caused to the NFC. The liability of Shaw Wallace arises by reason of breach of a statutory duty and by reason of its negligence in performing its legal duty to release the bills of lading when demanded. Whether the delay on the part of the Shaw Wallace in issuing the bills of lading was on account of negligence or on account of mala fides, makes no difference, in so far as its liability is concerned. [Para 18] [1206-H; 1207-A-H; 1208-A-E]

1.4. Once a mate's receipt is issued to the shipper on delivery of the goods to the ship, issue of bill of lading in respect of such goods cannot be postponed on any ground except where the person claiming the bill of lading is not the shipper. Once the mate's receipt is issued to the shipper (or its agent) and the demand for issue of a bill of lading in terms of the mate's receipts is made by the shipper (or its agent), the owner of the vessel is bound to issue the bill of lading and cannot deny or delay the issue of the bill of lading. If the arrangement was that the agent of the owner of the vessel will issue the bill of lading, or if the owners' agent had held out that it will issue the bill of lading, the agent cannot withhold the bills of lading once the mate's receipt is issued, irrespective of any instructions to the contrary, issued by the owner of the vessel subsequent to the issue of mate's receipt and departure of the vessel with the goods from the port. If the issue of bill of lading is denied or delayed as a

consequence of which the shipper suffers loss, the owner of the vessel and its agent will jointly and severally be liable to make good the loss by way of damages. [Para 19] [1208-F-H; 1209-A]

1.5. The decision of the High Court that the appellant is jointly and severally liable along with the owner of the vessel does not call for any interference. [Para 21] [1210-B]

Halsbury's Laws of England **(4th Edition, Vol. 43(2) Shipping & Navigation : Pages 1042 and 1043);** *Scrutton on Charterparties and Bills of Lading* **(Twentyfirst (2008) Edition] and C*ARVER's Carriage by Sea* (Thirteenth Edition, vol. 1, Page 41 Para 54) – referred to.**

Civil Appeal No.7099/2001

2.1. In the instant case, the goods were loaded between 5.12.1978 and 29.12.1978. The vessels sailed on 30.12.1978. The letter of credit expired on 15.1.1979. The goods were cleared at Penang between 16.1.1979 to 19.1.1979.It was only on 19.1.1979, after the expiry of letter of credit and after the goods were delivered to NHH, that the NFC tendered the mate's receipts and requested for issue of bills of lading from Shaw Wallace. Even if Shaw Wallace had delivered the bills of lading on the day of demand namely on 19.1.1979 itself, NFC could not have realized the amount against the letter of credit. Shaw Wallace could be made liable only if it had committed breach of statutory duty or breach of any other legal duty amounting to negligence causing loss to the NFC. In this case, having regard to the fact, that the letter of credit had expired on 15.1.1979 long prior to the tendering of mate's receipt and demand for bills of lading, the delay of nine days in issuing the bills of lading had no relevance. Even if the bills of lading had been issued forthwith on 19.1.1979, it would not have been of any assistance. [Para 35] [1215-D-F]

2.2. The High Court inferred that it would be highly

improbable that the holder of the mate's receipts would delay the making of a demand for blank bills of lading forms. The Single Judge recorded a finding that Asian Agency was demanding the blank bills of lading forms from Shaw Wallace from 30.12.1978 and that Shaw Wallace did not supply the blank forms to Asian Agency until 17.1.1979. Consequently the single Judge reasoned that the demand for bills of lading was being prior to 15.1.1979 and therefore, Shaw Wallace was liable to pay damages equal to the value of the goods. The division bench affirmed the said findings. However, there is no reference in the plaint, to the demand for the blank forms of lading on and from 30.12.1978 by Asian Agency. Asian Agency did not send either any letter or telex to Shaw Wallace demanding the issue of bills of lading or the blank forms of bill of lading for purposes of filling up at any time prior to 17.1.1979. Asian Agency did not tender the mate's receipts prior to 17.1.1979. The first communication in writing from Asian Agency to Shaw Wallace after the ship left on 30.12.1978 was when it sent the mate's receipts and the filled forms of bill of lading to Shaw Wallace for issuing bills of lading, under cover of letter dated 19.1.1979. On the same day, that is on 19.1.1979, Asian Agency also sent a notice through counsel to Shaw Wallace demanding that immediate steps be taken for release of bills of lading and for extension of validity of the letters of credit from the buyers so as to enable NFC to negotiate the same and realise the proceeds. Significantly, the above notice refers to forwarding of the duly filled forms of bill of lading in regard to Eastern Grand on 18.1.1979 (the date should be 19.1.1979). It does not refer to any earlier demand by Asian Agency for issue of blank forms of bills of lading from 30.12.1978 or any other date. It does not refer to any earlier demand for issue of bills of lading. Similarly in the notice dated 10.12.1979 issued by NFC through counsel to Shaw Wallace, there is no reference to any demand earlier to 19.1.1979. If really NFC and Asian Agency were seriously pursuing the

matter, one fails to understand why no letter or telex was sent either by NFC or by Asian Agency making a demand for issue of blank bill of lading forms or insisting upon the issue of bills of lading by tendering the mate's receipts. [Paras 36, 37, 38, 39] [1215-G-H; 1216-A-D, F-G]

2.3. Even assuming that there was any oral demand for bill of lading forms on 30.12.1978 as found by the High Court, it was evident NFC and its agent had taken the matter in a casual manner presumably expecting a further extension of letter of credit. In the circumstances, it cannot be said that there was any default, negligence or delay on the part of Shaw Wallace in issuing the bills of lading prior to 17.1.1979.The Single Judge and division bench found that there was a demand for blank forms of bill of lading from 30.12.1978. Accepting the said finding will not help NFC as there is no finding that the mate's receipts were tendered or delivered with a demand for issue of bills of lading prior to 19.1.1979. The High Court failed to consider this important aspect and wrongly assumed that breach, default, delay could be attributed to Shaw Wallace, in issuing the bills of lading, even before the mate's receipts were tendered on 19.1.1979. The decisions of the Single Judge and division bench of the High Court cannot therefore be sustained. [Para 38] [1217-G-H; 1218-A-C]

Conclusion

3. CA No. 7099/2001 (Re: Eastern Grand) is allowed and the judgment and decree of the High Court in so far as it decrees the suit against the appellant is set aside. The decree against the second respondent is not disturbed. CA No. 7100/2001 (Re: *Pichit Samut*) is dismissed and the judgment and decree of the High Court is affirmed. [Para 39] [1218-D-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7100 of 2001.

From the Judgment & Order dated 14.9.2001 of the High Court at Calcutta in Appeal No. 322 of 1988.

WITH

C.A. No. 7099 of 2001.

Amar Dave, Radhika Gautam, Gaurav Goel, Mahesh Agarwal, Abhishek Gupta, Zafar Inayat, Anandh Kannan, E.C. Agrawala for the Appellant.

Jaideep Gupta, Rajshekhar Roa, P.C. Sharma, N.P. Agarwalla, Richa Maken, Debajyoti Basu for the Respondent.

The Judgment of the Court was delivered by

R.V. RAVEENDRAN, J.

Civil Appeal No.7100/2001

Shaw Wallace & Co. Ltd., the appellant herein, was the second defendant in suit No. 922/1979 filed by Nepal Food Corporation ('NFC' for short, plaintiff in the suit and first respondent herein) for recovery of Rs. 1,26,38,951/06. UPT Imports Exports Ltd., the second respondent herein, was the first defendant in the said suit. The appellant filed this appeal by special leave, aggrieved by the judgment dated 14.9.2001 of a division bench of the Calcutta High Court dismissing its appeal (Ap.No.323 of 1988) against judgment and decree dated 9.9.1987 passed by a learned single Judge of that court decreeing the suit filed by the first respondent in part. For convenience we will also refer to the parties by their ranks in the suit.

2. NFC entered into a contract dated 7.12.1977 with Ngoh Hong Hang Pvt. Ltd., Singapore (for short 'NHH' or the 'buyer') for sale of 10000 MT of parboiled rice-1978 crop, (as also other quantities of rice). As per the contract, the payment was to be made by the buyer by establishing an irrecoverable confirmed and transferable letter of credit confirmed by Rashtriya Banijya Bank, Kathmandu in US dollars in favour of the seller allowing part payment. The contract provided that the payment 100% invoice value shall be made at sight at the seller's bank on presentation of 'on board Bills of Lading' (or charterparty Bills of Lading) supported by seller's commercial invoice. In pursuance of it, Bangkok Bank Ltd., Hong Kong who were the

buyer's bankers, issued an irrecoverable letter of credit dated 25.4.1978 (amended/extended on 25.5.1978 and 31.8.1978) for US $ 21,60,000, in regard to the price of 10000 MT of Nepal paraboiled rice. The validity period of the said letter of credit was originally upto 30.6.1978, the last date for shipment being 20.6.1978. This was extended from time to time and the validity period of the letter of credit was extended from time to time, finally up to 15.1.1979, with the last date for shipment being extended to 31.12.1978.

3. UPT Imports Exports Ltd. was the owner of the vessel – '*M.V. Pichit Samut*'. Shaw Wallace represented itself to be the agent of the owner of the vessel. The said vessel '*Pichit Samut*' was chartered by NHH (buyer of rice from NFC) from the owner of the vessel under charterparty agreement dated 11.10.1978 for carrying 5000 MT of rice to be shipped by NFC to NHH, from Calcutta to Penang, Malaysia. M/s Grand Fortune Singapore Private Ltd., (for short 'Grand Fortune') was the general agent of the owner of the vessel. In accordance with Charterer's request to assign the said vessel under the agency of appellant for the said fixture, the said general agent acting on behalf of the owners, appointed Shaw Wallace (second defendant) as the 'Owner's Protective Agent' on 16.10.1978. Shaw Wallace was also acting as the charterer's agent as per charterer's request dated 3.1.1979. M/s Asian Agency was the agent of the seller (NFC) who was the shipper of the goods.

4. Shaw Wallace addressed a letter dated 6.11.1978 to Asian Agency (NFC's agent) informing that the vessel *Pichit Samut* was due to arrive at Sandheads, Calcutta on 8.11.1978, that there was insufficient cargo at the Port and that all expenses for delays, if any, would be to the shipper's (seller's) account. Shaw Wallace informed Asian Agency by letter dated 8.11.1978 that the vessel *Pichit Samut* had arrived at Sandheads, Calcutta and served a notice of readiness (that the vessel was ready to receive cargo). The said notice of readiness was accepted by Asian Agency on 28.11.1978 when the vessel arrived at berth (23 K P D) after it was certified to be fit for loading by the surveyor. The loading of rice in the ship was commenced on 29.11.1978

and completed on 4.12.1978. Several mate's receipts were issued between 29.11.1978 to 4.12.1978 to Asian Agency on behalf of the master of the ship acknowledging the receipt of goods as and when received. The ship sailed from the Port of Calcutta to Penang on 4.12.1978.

5. The general agent of the shipowner – Grand Fortune, advised Shaw Wallace by telex message dated 5.12.1978, not to issue Bills of Lading to NFC until advised, in view of the dispute between the charterer and the shipper in regard to the "lay days". At this juncture it is necessary to refer to the background facts relating to the said dispute. When the vessel arrived at Garden Reach Anchorage on 9.11.1978, the vessel was passed as fit for loading, by the surveyors. On 9.11.1978, NFC did not have sufficient goods to load and therefore the vessel was birthed at 28 KPD. The vessel was programmed to shift from 28 KPD to 23 KPD on 16.11.1978, but could not be shifted on account of Port Workers strike. After the strike was called off, the vessel moved from 28 KPD to 23 KPD on 28.11.1978. Asian Agency therefore accepted the notice of readiness dated 8.11.1978, only on 28.11.1978. According to Shaw Wallace, Asian Agency ought to have accepted the notice of readiness as soon as the ship berthed at the port on 9.11.1978. According to Asian Agency, the vessel could be said to be ready only when it berthed at 23 KPD which was on 28.11.1978 and therefore there was no delay on its part. The dispute was as to whether the shipper should bear the demurrage charges if any for the lay days between 9.11.1978 to 28.11.1978. It is in this background the said telex dated 5.12.1978 was issued by Grand Fortune. This was followed by another telex dated 12.12.1978 from Grand Fortune, forwarding a telex communication from NHH requiring the ship-owner to advise its agent Shaw Wallace to obtain a bank guarantee from NFC regarding demurrage before issuing the Bills of Lading, to avoid disputes over payment of demurrage and stating that if it was not done, it (NHH) will not be responsible for any demurrage incurred. In view of it, Grand Fortune instructed Shaw Wallace to require NFC to furnish a bank guarantee for issuing and releasing the bills of lading. On 13.12.1978, Shaw Wallace sent

a statement of facts pertaining to the arrival and loading of *Pichit Samut*. As per the standard practice, Shaw Wallace supplied the blank forms of bills of lading to NFC for being filled and returned. NFC's agent delivered the mate's receipts and the duly filled forms of bills of lading to Shaw Wallace on 17.12.1978 with a request to sign and issue the bills of ladings as the agent of the owner of the vessel. Shaw Wallace's statement of facts was returned by NFC's agents with remarks on 19.12.1978.

6. *Pichit Samut* arrived at Penang on 18.12.1978. NHH took delivery of the goods from the vessel at Penang on 22.12.1978 without possessing any document of title and apparently without the knowledge of the NFC. Asian Agency - NFC's agent, addressed a telex message dated 1.1.1979 to Shaw Wallace regretting that bills of lading had not been delivered to them, despite delivering the mate's receipts and that therefore, Shaw Wallace would be responsible for all delays and damages, as NFC was unable to negotiate the letter of credit in the absence of bills of lading. NHH sent the following telex dated 3.1.1979 to Shaw Wallace:

> "As you are aware, we wish to counter claim demurrage from shipper……Since the owner requires charterers/ shippers to provide first class international prime bank guarantee to pay freight, dead freight and demurrage before issuing bills of lading, it is proper for us to request shipper to submit first class international prime Bank Guarantee to pay the demurrage prior to releasing of bills of lading and subject to our telex confirmation before. Kindly act as an agent on our behalf to do the needful and possible and we will be responsible for all possible legal action."

It should be noted that by then NHH had taken delivery of the cargo from *Pichit Samut*. Shaw Wallace sent a telex message dated 3.1.1979 informing Asian Agency that the Carrier had advised not to issue the bills of lading until NFC furnished a bank guarantee towards demurrage and that the ship-owner would not be responsible for the delay in issuing bills of lading, in view of delay on the part of NFC in furnishing a bank guarantee

for the demurrage. The validity period of the letter of credit issued at the instance of NHH expired on 15.1.1979. Shaw Wallace by communication dated 15.1.1979 informed NFC's agent that the demurrage due in respect of *M.V. Pichit Samut* was US$ 30,000 and a bank guarantee for the said amount should be furnished by the NFC or its agents so that the bills of lading could be issued. On 19.1.1979, NFC issued a notice to Shaw Wallace calling upon them to issue bills of lading and take steps to see that NHH extends the validity of the letters of credit to enable NFC to negotiate the same and realize the value of goods failing which Shaw Wallace would be held liable for all consequences. On 25.1.1979, three signed bills of lading dated 4.12.1978 were delivered by Shaw Wallace to NFC's agent (Asian Agency) in regard to 1522.727 MT, 1022.860 MT and 1901.207 MT of rice entrusted to the master of the vessel 'Pichit Samut' for transshipment to Penang. NFC issued its final invoice in regard to the consignments on 1.2.1979 and 2.2.1979.

7. NHH issued a notice dated 3.2.1979 to NFC alleging that NFC was liable in damages in a sum of US$ 13,41,242.38 for several breaches, that is short-supply of 1521.52 MT of parboiled rice and non-supply 11573 MT of white rice and demurrage in regard to delaying three vessels. NFC issued a notice dated 25.9.1979 to NHH claiming US$ 59,12,191.07 towards the value of rice supplied. NFC also issued a legal notice dated 29.11.1979 to UPT Imports Exports and Shaw Wallace claiming the value of the goods as damages, by reason of the delay in issuing the bills of lading and the wrongful delivery of the cargo to NHH without the production of bills of lading. NFC filed Suit No.922/1979 in the Calcutta High Court against the owner of the vessel (first defendant) and its agent Shaw Wallace (second defendant) for recovery of ' 1,26,38,951/06 made up of the following amounts :

(a) Damages equivalent to the value of '

Rs. 1,05,32,459/22

4446.794 MT of rice covered by the three Bills of Lading (1522.727 MT + 1022.860 MT + 1901.207 MT) loaded on the

Vessel *Pichit Samut.*

(b) Interest thereon at the rate of 20% per annum R s . 21,06,491/84

from 4.12.1978 (date of Bills of Lading) to

3.12.1979 (date of suit).

8. During the pendency of the said suit, NFC also filed a suit against NHH in the High Court of Singapore for recovery of US$ 28,57,009.75 being the value of the goods supplied, (including the rice shipped through *M.V.Pichit Samut* and *M.V.Eastern Grand*). NHH raised a counter claim for US $13,41,242/38. The said suit (Suit No.5809/1983) was decreed (by the High Court of Singapore on 22.8.1984) on admission for US$ 11,54,575/37 for which there was no defence or dispute. NFC filed Civil Appeal No.56/1984 before the appellate court at Singapore regarding non-grant of decree on admission for the balance. However, NHH was wound up by the Singapore High Court in the year 1985, on an application by a Malaysian creditor and consequently, NFC could not recover any amount from its buyer NHH.

9. In the suit filed by NFC against the owner of the vessel and the agent (appellant), it was contended that as the bills of lading were not issued in time, the valuable security was not available for negotiation and, in the meanwhile, the validity period of the letter of credit having expired on 15.1.1979, loss was caused to NFC in respect of the value of the goods. The basis of the claim was two-fold. The first was wrongful delivery by the ship-owner (first defendant) to NHH without production of the necessary documents (bills of lading). The second was wrongful failure on the part of the ship-owner and Shaw Wallace to furnish the bills of lading within the validity period of letter of credit, thereby preventing the NFC from negotiating and recovering the amount due. While the first was a cause of action against the ship-owner, the second was a cause of action against both the ship-owner and Shaw Wallace.

10. The first defendant (owner of the vessel) did not defend the suit claim. The second defendant (Shaw Wallace) in its written statement claimed that it had merely acted as the agent of the ship-owner in regard to that particular voyage undertaken by M.V. *Pichit Samut*; and that it could issue the bills of lading only on the instructions of and under the authority of the first defendant. Shaw Wallace contended that as it merely acted on the instructions of the ship-owner (first defendant), as its agent, it could not be held liable for the acts or omissions of the ship-owner. On the said pleadings, the following issues were framed:

"1. Is the suit not maintainable as against the defendant No.2 on the grounds as stated in written statement?

2. Has there been any breach of contract on the part of defendant No.2?

3. Was there any negligence or breach of obligation on the part of defendant No.2, as alleged in paragraphs 15 and 16 of the plaint?

4. To what relief, if any, is the plaintiff entitled as against defendant No.2? "

Both parties (plaintiff and second defendant) led oral and documentary evidence.

11. After considering the evidence, a learned Single Judge, by order dated 9.9.1987, decreed the suit for Rs. 1,05,32,459.22 with interest at 9% per annum from the date of suit. He rejected the claim for interest from 4.12.1978 (date of bill of lading) to 3.12.1979 (date of suit). The learned Single Judge held that the suit was maintainable. He also held that Shaw Wallace was liable to pay damages to NFC on three counts:

(i) Breach of statutory duty : The act of withholding the bills of lading by Shaw Wallace was wrongful and in violation of the statutory duty imposed by Article III, Rule 3 of the Carriage of Goods by Sea Act, 1925.

(ii) Breach of legal duty amounting to a wrongful act and negligence : The second defendant wrongfully refused to make over to NFC, the bills of lading (which were

documents of title to goods), though NFC was entitled to it on demand, in an attempt to assist the charterer (NHH) in realizing its purported claim. As a result of this wrongful act of Shaw Wallace, NFC suffered loss and damages to the extent of the value of the said goods.

(iii) Conversion : Both ship-owner as well as Shaw Wallace acted inconsistently with the rights of NFC, in respect of the said bills of lading and such wrongful acts amounted to conversion of the said bills of lading which were documents of title to the goods, and thereby caused damages and injury to the plaintiff to the extent of the value of the said goods.

12. Feeling aggrieved, Shaw Wallace filed an intra-court appeal. A Division Bench of the Calcutta High Court by impugned judgment dated 14.9.2001 dismissed the said appeal. The division bench affirmed the finding that the appellant was guilty of breach of a statutory duty and breach of a legal duty which amounted to negligence. It however clarified that Shaw Wallace was guilty of conversion of bills of lading which constituted title to the goods and not conversion of goods. The division bench rejected the contention of the appellant that it was the duty of the master of the ship who took charge of the goods to issue the bill of lading and not that of the agent. It held that Shaw Wallace had an obligation to issue the bills of lading within the validity period of the letter of credit. It also held that by the appellant's failure to issue the bills of lading, NFC was unable to negotiate the letter of credit and consequently lost the value of the goods.

13. The said judgment and decree of the appellate bench of the High Court is challenged in this appeal. At the outset, it should be noticed that in this appeal, we are neither concerned with the liability of the buyer/charterer (NHH) nor with the liability of the owner of the vessel (UPT Imports Exports). The decree against the owner of the vessel who remained ex parte is not under challenge. We are only concerned with the role played by Shaw Wallace as the carrier's agent and the question whether it was liable for the suit claim. The High Court has not made

Shaw Wallace liable as an agent, for any acts of omission or commission by its principal (the ship owner). Nor has the High Court made the agent (Shaw Wallace) liable by binding it to any contract made by the principal (ship owner). The High Court has made Shaw Wallace liable in view of its breach of a statutory duty and negligence to perform its legal duty in common law. Therefore, the limited question that arises for our consideration in this appeal is whether there is any ground for interference, in regard to the concurrent finding of the learned Single Judge and the division bench holding that the appellant- Shaw Wallace committed breach of its statutory duty and also breach of its legal duty amounting to negligence and wrongful act and consequently liable to pay to NFC the value of the goods by way of damages.

14. Section 2 of the Indian Carriage of Goods by Sea Act, 1925 ('Act' for short) provides that subject to the provisions of the said Act, the rules set out in the schedule shall have effect in relation to and in connection with the carriage of goods by sea, in ships carrying goods from any port in India to any other port whether in or outside India. Section 4 provides that every bill of lading issued in India shall contain an express statement that it is to have effect subject to the provisions of the rules contained in the schedule to the Act. The schedule to the said Act contains the rules relating to bills of lading. Clause (a) of Article I of the Schedule defines the term 'carrier' as including the owner of charterer who enters into a contract of carriage with a shipper. "Contract of carriage" is defined in clause (b) of Article I thus :

"(b) "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far such document relates to the carriage of goods by sea including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same :"

Article III deals with the Responsibilities and Liabilities of Carriers by Sea. Rule 3 thereof which is relevant for our purpose, is extracted below :

> "3. After receiving the goods into his charge, the carrier or the master or agent of the carrier, shall, on demand of the shipper issue to the shipper a bill of lading showing among other things—
>
> (a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage;
>
> (b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper;
>
> (c) The apparent order and condition of the goods:
>
> Provided that no carrier, master or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking."

15. *Halsbury's Laws of England* (4th Edition, Vol. 43(2) Shipping & Navigation : Pages 1042 and 1043) deals with the 'Right to receive bill of lading' and 'effect of mate's receipt'. We extract below the relevant portion therefrom :

> *"1544. Right to receive bill of lading.* The person who at the time of shipment is the owner of the goods is entitled to receive a bill of lading and to have it made out in accordance with his instructions. If he is refused a bill of lading, or if the terms of the bill of lading offered differ from those which he is entitled to require, or if his instructions are not complied with, he may demand the redelivery of his

> goods, and a refusal to redeliver them, when so demanded, amounts to a conversion of them by the shipowner. The shipowner is not discharged from his responsibility to the owner of the goods merely on the ground that a bill of lading has already been signed and handed over to a third person who was believed in good faith to be the owner."
>
> *"1545. Effect of mate's receipt.* Possession of the mate's receipt prima facie entitles the holder to receive a bill of lading. Therefore, on its production, in the absence of notice that the holder is not the owner, the master or other agent of the shipowner is justified in signing a bill of lading and delivering it to the holder in exchange for the mate's receipt."

The following observations relating to mate's receipt in *Scrutton on Charterparties and Bills of Lading* (Twentyfirst (2008) Edition] are relevant:

> "On delivery of goods by a shipper to the shipowner or his agent, the shipper will, unless there is a custom of the port to the contrary, obtain a document known as a "mate's receipt"…. As a general rule, the person in possession of the mate's receipt, where one exists, is the person entitled to bills of lading, which should be given in exchange for that receipt and he an sue for wrongful dealing with the goods." [page 162]
>
> After the shipment of goods under a contract of affreightment, the bill of lading is signed by the carrier or his agent and delivered to the shipper, in exchange for the mate's receipt." [page 62]

The standard method of preparing bills of lading is stated in C*ARVER's Carriage by Sea* (Thirteenth Edition, vol. 1, Page 41 Para 54) thus :

> "The bills of lading are usually procured by the shipper, and filled by him with statements of the kinds and quantities of the goods, and the marks upon them. These are checked on behalf of the ship, and documents are signed on behalf of the master, by the ship's agent, and delivered to the

shipper."

16. NFC did not engage the vessel *Pichit Samut*. It was chartered by the buyer NHH to carry the goods purchased by it from NFC. The contract of carriage was governed by the terms of the charterparty agreement dated 11.10.1978. As per the said charterparty agreement, if the ship was delayed, the Charterer (NHH) was responsible to pay the demurrage and the agreement provided that the demurrage should be settled at Singapore, twenty days after discharge of the cargo at Penang. Thus NFC did not have any obligation towards the owner of the vessel to pay either the freight or any demurrage charges. If there was any delay for which NFC was liable, that was a matter to be sorted out by NHH making a claim against NFC. As per the sale contract dated 7.12.1977 between NFC as seller/shipper and NHH as the buyer, the seller (NFC) was entitled to payment of the entire invoice value, at sight at the seller's bank, on presentation of the "on board Bills of Lading" supported by its commercial invoice. NFC had secured its interest by ensuring that the buyer opens an irrevocable letter of credit and by making the supply during the currency of the letter of credit. The shipper (NFC) was certain of obtaining payment from the Bank under the buyer's letter of credit, by merely producing before the bank, the bills of lading and the invoice. The shipper was entitled to the bills of lading from the agent of the shipowner, immediately on production of the mate's receipt. Therefore, the mere fact that delivery was taken by the buyer (NHH) at Penang even without the bills of lading would not have caused any loss to the seller, if it had been issued the bills of lading to which it was entitled, without delay so that it could have realized the amount against the letter of credit which was valid and in force till 15.1.1979. NFC lost the value of goods on account of Shaw Wallace not releasing the bills of lading before 15.1.1979, even though it was liable to issue the bills of lading on 17.12.1978.

17. The delivery of the goods on board the ship was completed on 4.12.1978. On 17.12.1978, Asian Agency presented the mate's receipt along with the filled forms of bills of lading to Shaw Wallace and demanded the issue of signed

bills of lading. Issue of mate's receipt on behalf of the master of the ship was the authority and instruction to the agent of the ship-owner to issue the bills of lading to the shipper. The likelihood of a dispute between the charterer/buyer and shipper/seller regarding demurrage for lay days was not sufficient to suspend the authorization given by issue of the mate's receipt. But Shaw Wallace did not issue the bills of lading inspite of Asian Agency furnishing the mate's receipts and duly filled forms of bills of lading. Thereafter, Asian Agency made a further demand by telex on 1.1.1979. Shaw Wallace replied that the ship-owner wanted a bank guarantee towards payment of demurrage before the release of bills of lading, without indicating the amount for which the bank guarantee was to be given. By this process, issue of the bills of lading which was legitimately due on 17.12.1978 was postponed beyond 15.1.1979, on which date the letter of credit ceased to be operative. The bills of lading were ultimately issued on 25.1.1979. Having regard to Rule 3 of Article III of the Schedule to the Act, there was a statutory duty cast upon Shaw Wallace as agent of the carrier, to issue the bills of lading, without delay. Shaw Wallace was aware of the relevance and importance of bills of lading. By deliberately delaying the issue of the bills of lading from 17.12.1978 to 25.1.1979, Shaw Wallace committed a breach of statutory duty cast under Article III (3) of the Schedule to the Act. It also acted negligently in performance of its legal duty in common law to issue the bills of lading on delivery of the mate's receipt, as the agent of the ship-owner. Thus it became liable to pay damages to make good the loss, namely the value of the goods covered by the bills of lading. For this purpose it is immaterial whether Shaw Wallace was aware or unaware of the fact that the Letter of Credit was expiring on 15.1.1979. The contention of Shaw Wallace that it was acting merely on the instructions of the shipowner in refusing to issue the bills of lading till furnishing of a bank guarantee and therefore not liable, is rejected.

18. The appellant made a belated attempt to avoid liability by contending that it was not responsible or liable for the issue of bills of lading, that only the master of the ship who received the goods, had to issue the bills of lading, and that NFC having

permitted the ship to leave the port without obtaining the bills of lading, could not require the agent to issue the bills of lading. The well recognized practice relating to carriage of goods by sea is that where a consignment is loaded/received on board on different dates, the person in charge of the vessel issues mate's receipts acknowledging the quantity received, as and when the goods are received. On completion of delivery of goods by the shipper, on production of the mate's receipts, the bills of lading would be issued to the shipper either by the master of the vessel or by the agent of the shipowner. In this case, at the relevant time, Shaw Wallace represented to NFC and its agent (Asian Agency) that it was the agent of the carrier and did all acts expected to be carried out by the carrier's agents, that is informing the shipper's agents about the arrival of the ship by issuing notice of readiness and by calling upon the shipper's agent to load the cargo. It issued to the master of the vessel, the mate's receipt book, bearing printed caption of 'Shaw Wallace & Co. Ltd.,' thereby making it clear that it was acting as an agent of the carrier. The mate's receipt forms issued by Shaw Wallace for use by the master of the ship clearly contained a printed provision that the bills of lading could be obtained at the agent's office. Shaw Wallace corresponded and dealt with the shipper's agent in all matters with reference to the shipment and furnished the blank forms of bills of lading to the shipper's agent. Shaw Wallace also received the mate's receipt and duly filled forms of bills of lading from Asian Agency on 17.12.1978 without any protest. Ultimately, the Shaw Wallace did issue the bills of lading. Therefore, it is too late in the day for Shaw Wallace to contend that it was not liable to issue the bills of lading. It is also significant that Shaw Wallace never informed NFC or Asian Agency before the vessel left Calcutta on 4.12.1978 or even thereafter, that it did not have the authority to issue the bills of lading or that it would not issue bills of lading in view of any default on the part of NFC. On the other hand, it held out till the ship left the port that it was the carrier's agent and it will issue the bills of lading in lieu of the mate's receipt. It did not express any reservation or objection when it issued the blank forms of bills of lading to Asian Agency for being filled or even when the mate's receipts and

filled forms of bills of lading were delivered to it on 17.12.1978. Even in the letter dated 28.12.1978 addressed to the Asian Agency, it merely stated that readiness of the ship to receive goods would commence from 9.11.1978 and not 26.12.1978. More than 15 days after receiving the mate's receipts and filled form of bills of lading, on 3.1.1979, for the first time, Shaw Wallace raised the issue of furnishing a bank guarantee for payment of demurrage amount before releasing the bills of lading. Even in this letter, it did not mention the amount of demurrage for which the bank guarantee was to be issued. The demurrage amount was mentioned for the first time by letter dated 15.1.1979. Therefore, even if NFC wanted to give a bank guarantee, it could not have given a bank guarantee before 15.1.1979 as the amount for which bank guarantee was required, was not notified. On 15.1.1979, the letter of credit expired. Therefore, it is clear that the Shaw Wallace alongwith the ship-owner (first defendant) was jointly and severally responsible for the loss caused to the NFC. The liability of Shaw Wallace arises by reason of breach of a statutory duty and by reason of its negligence in performing its legal duty to release the bills of lading when demanded. Whether the delay on the part of the Shaw Wallace in issuing the bills of lading was on account of negligence or on account of mala fides, makes no difference, in so far as its liability is concerned.

19. Once a mate's receipt is issued to the shipper on delivery of the goods to the ship, issue of bill of lading in respect of such goods cannot be postponed on any ground except where the person claiming the bill of lading is not the shipper. Once the mate's receipt is issued to the shipper (or its agent) and the demand for issue of a bill of lading in terms of the mate's receipts is made by the shipper (or its agent), the owner of the vessel is bound to issue the bill of lading and cannot deny or delay the issue of the bill of lading. If the arrangement was that the agent of the owner of the vessel will issue the bill of lading, or if the owners' agent had held out that it will issue the bill of lading, the agent cannot withhold the bills of lading once the mate's receipt is issued, irrespective of any instructions to the contrary, issued by the owner of the vessel subsequent to the issue of mate's

receipt and departure of the vessel with the goods from the port. If the issue of bill of lading is denied or delayed as a consequence of which the shipper suffers loss, the owner of the vessel and its agent will jointly and severally be liable to make good the loss by way of damages.

20. The appellant next contended that even if it is held liable in damages, the amount claimed was erroneous. It is pointed that NFC has claimed in the plaint (Annexure D to the plaint) that the value of 4446.794 MT of parboiled rice was Rs. 1,05,32,459/22. The appellant further pointed out that as per the contract rate of US$ 216 per MT, the value of 4446.794 MT would be US$ 960,507. It is pointed out that in the plaint in its suit filed against NHH in the High Court of Singapore, NFC had shown the value of 4446.794 MT as US$ 960,507. According to the appellant, as per the prevailing exchange rate when the loss occurred, the rupee equivalent of US$ 960,507 was 'Rs. 77,80,110/- (at the rate of Rs. 8.10 per US Dollar) and therefore, the claim of Rs. 1,05,32,459/22 was excessive, erroneous and even if the plaintiff should succeed, the decree should be only for Rs. 77,80,110/-. We have carefully considered the said contention. It is seen that the appellant in its written statement did not raise the contention that the exchange rate was Rs. 8.10 per US Dollars at the relevant time and the Indian rupee equivalent of the value of the rice in US Dollar would be only Rs. 77,80,110/-. Significantly, even when the learned Single Judge decreed the suit for Rs. 1,05,32,459.22, the appellant did not raise this contention in the memorandum of appeal in the intra-court appeal. Again, when the appeal by the appellant was dismissed by a division bench of the High Court and the special leave petition was filed before this Court, the appellant did not raise this contention in the special leave petition. Apart from the absence of pleadings, there is no material on record to show the date with reference to which the exchange rate was calculated, (that is, whether it was 4.12.1978 or 15.1.1979 or 25.1.1979 or 3.12.1979) or to show the exchange rate on the relevant rate. In the absence of any plea in the written statement and in the absence of any ground in the memorandum of appeal

or special leave petition, and the absence of any material, the appellant cannot during arguments, raise this issue which involves examination of disputed questions of fact. The said contention is therefore liable to be rejected.

21. In the view we have taken, it is wholly unnecessary to consider the several decisions on unrelated issues relied upon by both sides. The decision of the High Court that the appellant is jointly and severally liable along with the owner of the vessel does not call for any interference. The appeal is therefore, liable to be dismissed.

Civil Appeal No.7099/2001

22. Shaw Wallace, the appellant was the third defendant in a suit (Suit No.1010 of 1979) filed by Nepal Food Corporation (plaintiff in the suit and first respondent herein) for recovery of Rs. 95,67,537/31. Thye Shipping Parma SA, the second respondent herein, was the first defendant in the said suit. Eastern Steamship & Enterprises (S) Ltd., and Khemka & Co. (Agencies) Pvt. Ltd., respondents 3 and 4 herein were the second and fourth defendants respectively in the suit. The appellant has filed this appeal aggrieved by the judgment dated 14.9.2001 of a division bench of the Calcutta High Court dismissing its appeal (Appeal No.322 of 1988) against judgment and decree dated 9.9.1987 passed by a learned single Judge of that court decreeing the suit filed by the first respondent.

23. The plaintiff entered into a contract dated 7.12.1977 with Ngoh Hong Hang Pvt. Ltd., Singapore (for short 'NHH' or the 'buyer') for sale of certain quantities of Nepal parboiled rice. As per the contract, the payment was to be made by the buyer by establishing an irrecoverable confirmed and transferable letter of credit confirmed by Rashtriya Banijya Bank, Kathmandu in US dollars in favour of the seller allowing part payment. The contract provided that the payment 100% invoice value shall be made at sight at the seller's bank on presentation of 'on board Bills of Lading' (or charter party Bills of Lading) supported by seller's commercial invoice. In pursuance of it, Bangkok Bank Ltd., Hong Kong who were the buyer's bankers, issued an

irrecoverable letter of credit dated 25.4.1978 for US $ 21,60,000, in regard to the price of 10000 MT of Nepal parboiled rice. The validity period of the said letter of credit was originally upto 30.6.1978, the date of shipment latest by 20.6.1978. This was extended from time to time and the validity of the letter of credit was extended up to 15.1.1979 and the date of shipment was extended to 31.12.1978. (vide communication dated 26.10.1978 of Rashtriya Banijya Bank).

24. Thye Shipping Parma SA, the first defendant was the disponent owner (main charterer) of the vessel – '*M.V. Eastern Grand* under a charter arrangement with the owner of the vessel — M/s Eastern Steamship & Enterprises (S) Ltd*.,* the second defendant. The said vessel '*Eastern Grand*' was sub-chartered by NHH (buyer of the rice) from Thye Shipping under a charterparty agreement dated 14.11.1978 for carrying 4500 MT of rice supplied by NFC, from Calcutta to Penang, Malaysia. Khemka & Co. (Agencies) Pvt. Ltd., the fourth defendant was the Owner's Protective Agent. Shaw Wallace was the agent of the owner of the vessel, at Calcutta. M/s Asian Agency was the agent of the seller (NFC) who was the shipper of the goods.

25. Shaw Wallace addressed a letter dated 18.11.1978 to Asian Agency (NFC's agent) informing that the vessel Eastern Grand was due to arrive at Calcutta on 22.11.1978, and NFC should be ready to load the rice on that date. Shaw Wallace informed NFC's agent by letter dated 22.11.1978 that the vessel Eastern Grand had arrived at the port at Calcutta on 21.11.1978 and served a notice of readiness. The said notice of readiness was accepted by NFC's Agent on 4.12.1978. The loading of goods was commenced on 5.12.1978 and continued upto 12.12.1978. As loading could not be completed for want of entire quantity of rice, the ship was shifted from its berth on 12.12.1978. The ship was again re-berthed on 27.12.1978 and loading was resumed and completed between 27.12.1978 to 29.12.1978. Several mate's receipts were issued between 5.12.1978 to 29.12.1978 to Asian Agency on behalf of the ship acknowledging the receipt of goods (in all 3434.291 MT) as and when received. The ship sailed from the Port of Calcutta to Penang on

30.12.1978.

26. The disponent owner of the vessel (Thye Shipping) advised Shaw Wallace by telex on 1.1.1979, not to issue bills of lading to NFC until a bank guarantee was furnished by NFC in regard to demurrage charges and dead freight charges (for the period of delay between 12.12.1978 and 27.12.1978). On 1.1.1979, Khemka & Co. sent a statement of facts-cum-lay time sheet relating to *Eastern Grand* to Asian Agency for signature and return. On 2.1.1979, Shaw Wallace informed Asian Agency that as per the instructions of its Principal (owner of the vessel), through the protective agents, the bills of lading could not be released until receipt of confirmation that charterer/shipper had provided a bank guarantee acceptable to the ship owner to pay the freight, dead freight and demurrage due to the ship owners.

27. *Eastern Grand* arrived at Penang on 16.1.1979 and NHH took delivery of the goods from the vessel at Penang between 16.1.1979 and 19.1.1979 without having the authority of the bills of lading. In the meanwhile, the validity period of the letter of credit issued by the buyer expired on 15.1.1979. Shaw Wallace by communication dated 15.1.1979 informed Asian Agency that the total demurrage and dead freight due in respect of *M.V. Eastern Grand* was US $77,000 and a bank guarantee for the said amount should be furnished by the NFC or its agents so that the bills of lading could be issued.

28. As per the standard practice, Shaw Wallace supplied the blank forms of bills of lading to Asian Agency for being filled and returned. Asian Agency delivered the mate's receipts and the duly filled bills of lading to Shaw Wallace on 18.1.1979 with a request to sign and issue the bills of ladings as owner's agent. Asian Agency sent a notice dated 19.1.1979 to Shaw Wallace demanding the immediate release of the bills of lading and requiring it to ensure extension of the letter of credit to enable NFC to negotiate the same, failing which Shaw Wallace would be held liable for all consequences. Shaw Wallace received a telex dated 24.1.1979 from the ship owner, giving clearance to

release the bills of lading. On 29.1.1979, Shaw Wallace delivered three signed bills of lading dated 28.12.1978 and 29.12.1978 to NFC's agent (Asian Agency) in regard to 3366.170 MT of rice entrusted to the master of the vessel 'Eastern Grand' for transshipment from Calcutta to Penang. NFC issued its final invoice in regard to the consignments on 2.2.1979.

29. NHH issued a notice dated 3.2.1979 to NFC alleging that NFC was liable in damages for short-supply of 1521.52 MT of parboiled rice and non-supply 11573 MT of white rice, apart from being liable to demurrage for three vessels, in all US$ 13,41,242.38. NFC issued a notice dated 24.9.1979 to NHH claiming US$ 59,12,191.07 in regard to the supplies made (including quantities shipped in *M. V. Eastern Grand* and *M. V. Pichit Samut*). As there was no response, NFC also issued a legal notice dated 10.12.1979 to Shaw Wallace and Khemka & Co. claiming Rs. 95,67,537/31 being the value of the goods covered by the three bills of lading as damages, for the wrongful delivery of the cargo to NHH.

30. NFC filed Suit No.1010/1979, in the Calcutta High Court against the disponent owner of the vessel (charterer), the owner of the vessel, Shaw Wallace and Owner's Protective Agent Khemka & Co. (Agencies) Pvt. Ltd., (fourth defendant) for recovery of Rs. 95,67,537/31 as damages for the loss and damage suffered by it. In the suit filed by NFC, it was contended that as the bills of lading were withheld, the valuable security was not available for negotiation and, in the meanwhile, the validity period of the Letter of Credit having expired on 15.1.1979, loss was caused in respect of the value of the goods. The basis of the claim was two-fold. The first was wrongful delivery by the first defendant to the buyers. Second was wrongful failure to furnish the bills of lading thereby preventing the NFC from negotiating and recovering the amount due. While the first was the cause of action against the Thye Shipping (first defendant) the second was a cause of action against both Thye Shipping and Shaw Wallace.

31. Defendants 1, 2 and 4 did not contest the suit. Shaw

Wallace (third defendant) in its written statement contended as follows : (a) it did not issue the bills of lading to NFC because it was bound by the instructions of its principal; (b) a suit against an agent of a disclosed principal was not maintainable; (c) it was in no way concerned with the delivery of the cargo since its role was limited to that of an agent with the responsibility of getting the goods loaded; (d) it had no knowledge of the opening of the letter of credit or the expiry date thereof; and (e) it was in no way concerned with the main contract of sale of rice between NFC and NHH. Issues were framed similar to those in the case of *Pichit Samut*. Both parties (plaintiffs and second defendant) led evidence – both oral and documentary.

32. As already mentioned (vide para 8 above),during the pendency of the said suit, NFC also filed a suit against NHH in the High Court of Singapore for the value of the goods supplied, but could not recover any amount as NHH was ordered to be wound up in the year 1985.

33. After considering the evidence, a learned Single Judge, by judgment dated 9.9.1987, decreed the suit for Rs. 95,67,537/31 against Thye Shipping (second respondent) and Shaw Wallace (appellant) with interest at 9% per annum from the date of suit (24.12.1979). The learned Single Judge held that the suit was maintainable. He also held that Shaw Wallace was liable to pay damages to NFC as claimed. Feeling aggrieved, Shaw Wallace filed an intra court appeal. The division bench of the Calcutta High Court, by impugned order dated 14.9.2001 dismissed the said appeal. The reasonings of the learned Single Judge and the Division Bench are broadly the same as the reasoning in the case of '*Pichit Samut*'. The said judgment and decree of the High Court is challenged in this appeal by special leave.

34. We have already noticed that the appeal is limited to the role of Shaw Wallace as the carrier's agent and its liability. The legal position has been discussed while dealing with the case of *Pichit Samut.* The decision of the High Court was upheld in the case of *Pichit Samut* solely on the ground that in view of the delay on the part of Shaw Wallace in releasing the bills of

lading, NFC could not present the bills of ladings and invoices and receive payment against the letter of credit before its expiry on 15.1.1979. In the case of *Pichit Samut'*, the mate's receipts were delivered and the demand for bills of lading was made on 17.12.1978, the cargo were delivered to the NHH on 22.12.1978 and bills of lading were issued on 25.1.1979, after the expiry of the letter of credit on 15.1.1979. We therefore held that if Shaw Wallace had delivered the bills of lading when demanded, NFC could have realized the value of the goods long prior to 15.1.1979 when the letter of credit expired and that on account of its failure to release the bills of lading before 15.1.1979, NFC was prevented from realizing the value of the rice supplied.

35. But the facts are completely different here. As noticed above, the goods were loaded between 5.12.1978 and 29.12.1978. The vessels sailed on 30.12.1978. The letter of credit expired on 15.1.1979. The goods were cleared at Penang between 16.1.1979 to 19.1.1979.It was only on 19.1.1979, after the expiry of letter of credit and after the goods were delivered to NHH, that the NFC tendered the mate's receipts and requested for issue of bills of lading from Shaw Wallace. Even if Shaw Wallace had delivered the bills of lading on the day of demand namely on 19.1.1979 itself, NFC could not have realized the amount against the letter of credit. Shaw Wallace could be made liable only if it had committed breach of statutory duty or breach of any other legal duty amounting to negligence causing loss to the NFC. In this case, having regard to the fact, that the letter of credit had expired on 15.1.1979 long prior to the tendering of mate's receipt and demand for bills of lading, the delay of nine days in issuing the bills of lading had no relevance. As noticed above, even if the bills of lading had been issued forthwith on 19.1.1979, it would not have been of any assistance.

36. After referring to the oral evidence, the High Court inferred that it would be highly improbable that the holder of the mate's receipts would delay the making of a demand for blank bills of lading forms. The learned Single Judge recorded a finding that Asian Agency was demanding the blank bills of lading forms from Shaw Wallace from 30.12.1978 and that Shaw Wallace

did not supply the blank forms to Asian Agency until 17.1.1979. Consequently the learned single Judge reasoned that the demand for bills of lading was being prior to 15.1.1979 and therefore, for the reasons stated in the case of *Pichit Samut*, Shaw Wallace was liable to pay damages equal to the value of the goods. The division bench affirmed the said findings.

37. There is no reference in the plaint, to the demand for the blank forms of lading on and from 30.12.1978 by Asian Agency. Asian Agency did not send either any letter or telex to Shaw Wallace demanding the issue of bills of lading or the blank forms of bill of lading for purposes of filling up at any time prior to 17.1.1979. Asian Agency did not tender the mate's receipts prior to 17.1.1979. The first communication in writing from Asian Agency to Shaw Wallace after the ship left on 30.12.1978 was when it sent the mate's receipts and the filled forms of bill of lading to Shaw Wallace for issuing bills of lading, under cover of letter dated 19.1.1979, which is extracted below:

> "We enclose under notes MR's & B/L's with 3 original copy for issuing B/L. M/R No.4, 5, 6, 7, 8, 9, 10, 11, 12, 13,14, 15, 16,17,18, 19, 20, 21, 22, 23, 24, 25, 26, 27,28, 29, 30,31,32,33,34,35, 37,38,39,40, 41,42,43,44,45, 46 for 26680 bags Nepal Parboiled medium rice for Malayasa. MR No. 38,47,48,49,50,51,52, 53,54,55,59 for 25 409 bags LPN Malayasia Nepal Parboiled Medium rice. M.R.No. 1,2,3,56,57,58 for 15,791 bags Nepal Parboiled Medium rice 1978 for Port Penanag."

38. On the same day, that is on 19.1.1979, Asian Agency also sent a notice through counsel to Shaw Wallace demanding that immediate steps be taken for release of bills of lading relating to *Pichit Samut* and *Eastern Grand* and for extension of validity of the letters of credit from the buyers so as to enable NFC to negotiate the same and realise the proceeds. We extract below the relevant portions of the said notice :

> "We have been instructed that the above *m.v. Pichit Samut* was loaded with 4539 gross tones Nepal Rice and the loading was completed on the 4th December, 1978. The other vessel m.v. Eastern Grand was also loaded by

our clients with 3434 gross tones of Nepal Ribel and such loading was completed on the 29th December, 1978. on completion of the loading the Mate Receipts were duly issued by the respective Steamers to our said clients.

Our clients in their turn forwarded to you the forms of the Bills of Lading duly filled in together with the Original Mate Receiepts and such documents were submitted for m.v. *Pichit Samut* on the 17th December, 1978 and for m.v. Eastern Grand on the 18th January 1979.

You are aware that as per the normal practice the bills of lading are exchangeable against the original Mate receipts which you as steamer agents were obliged to issue in favour of our clients.

It is regretted that although the formalities as aforesaid were duly complied with by our clients you did not release the necessary Bills of Lading to our clients and although you knew fully well that without such bills of lading and other documents our clients could not be negotiate the letter of credit in connection with the said shipments."

Significantly, the above notice refers to forwarding of the duly filled forms of bill of lading in regard to Eastern Grand on 18.1.1979 (the date should be 19.1.1979). It does not refer to any earlier demand by Asian Agency for issue of blank forms of bills of lading from 30.12.1978 or any other date. It does not refer to any earlier demand for issue of bills of lading. Similarly in the notice dated 10.12.1979 issued by NFC through counsel to Shaw Wallace, there is no reference to any demand earlier to 19.1.1979. If really NFC and Asian Agency were seriously pursuing the matter, we fail to understand why no letter or telex was sent either by NFC or by Asian Agency making a demand for issue of blank bill of lading forms or insisting upon the issue of bills of lading by tendering the mate's receipts. Even assuming that there was any oral demand for bill of lading forms on 30.12.1978 as found by the High Court, it was evident NFC and its agent had taken the matter in a casual manner presumably expecting a further extension of letter of credit. In the circumstances, it cannot be said that there was any default,

negligence or delay on the part of Shaw Wallace in issuing the bills of lading prior to 17.1.1979.The learned Single Judge and division bench have found that there was a demand for blank forms of bill of lading from 30.12.1978. Accepting the said finding will not help NFC as there is no finding that the mate's receipts were tendered or delivered with a demand for issue of bills of lading prior to 19.1.1979. The High Court has failed to consider this important aspect and wrongly assumed that breach, default, delay could be attributed to Shaw Wallace, in issuing the bills of lading, even before the mate's receipts were tendered on 19.1.1979. The decisions of the learned Single Judge and division bench of the High Court can not therefore be sustained.

Conclusion

39. In view the above, the appeals are disposed of as follows:

(i) CA No. 7099/2001 (Re: Eastern Grand) is allowed and the judgment and decree of the High Court in so far as it decrees the suit against the appellant is set aside. The decree against the second respondent herein (first defendant in the suit) is not disturbed.

(ii) CA No. 7100/2001 (Re: *Pichit Samut*) is dismissed and the judgment and decree of the High Court is affirmed.

(iii) Parties to bear their respective costs.

B.B.B. Appeals disposed of.