MUNICIPAL CORPORATION OF DELHI, DELHI

v.

ASSOCIATION, VICTIMS OF UPHAAR TRAGEDY & ORS.

(Civil Appeal Nos. 7114–7115 of 2003)

OCTOBER 13, 2011

[R.V. RAVEENDRAN AND K.S. RADHAKRISHNAN, JJ.]

Cinematograph Act, 1952 – ss.10 and 11 – The Delhi Cinematograph Rules – r.3 – Cinema theatre – Fire tragedy – Liability to pay compensation – Apportionment of liability – During matinee show of a newly released film, transformer of Delhi Vidyut Board (DVB) installed in ground floor parking area of Uphaar Cinema Theatre in Green Park, South Delhi caught fire which resulted in death of 59 persons and injury to 103 persons – Writ petition before the High Court – Claim for compensation for the victims of the tragedy – High Court held the theatre owner (licencee), DVB, Municipal Corporation of Delhi (MCD) and the Licensing Authority (Commissioner of Police) responsible for the incident and thus jointly and severally liable to compensate the victims – High Court apportioned the liability inter se among the four in the ratio of 55% payable by the theatre owner and 15% each payable by the DVB, MCD and the Licensing Authority – Whether MCD and the Licensing Authority could be made liable to pay compensation to the victims and what should be apportionment of liability – Held: It is not proper to award damages against public authorities merely because there has been some inaction in the performance of their statutory duties or because the action taken by them is ultimately found to be without authority of law – In regard to performance of statutory functions and duties, the courts will not award damages unless there is malice or conscious abuse – In the instant case, the cause of the fire was not attributable to the licensing authority and MCD or anything done by them – Their actions/ omissions were not the proximate cause for the deaths and injuries – The Licensing Authority and MCD were merely

discharging their statutory functions (that is granting licence in the case of licensing authority and submitting an inspection report or issuing a NOC by the MCD) – In such circumstances, merely on the ground that the Licensing Authority and MCD could have performed their duties better or more efficiently, they cannot be made liable to pay compensation to the victims of the tragedy – However, insofar as the licensee and DVB are concerned, there was close and direct proximity between their acts and the fire accident and resultant deaths/injuries of victims – Direct negligence on the part of DVB was established – The deaths were also on account of the negligence and greed on the part of the licensee in regard to installation of additional seats, in regard to closing of an exit door, parking of cars in front of transformer room by increasing parking from 15 to 35 and other acts – The licensee and DVB were thus jointly and severally liable to compensate the victims of the Uphaar fire tragedy – 85% on the part of the licensee and 15% on the part of DVB – Public law liability – Tortious liability of the State and its instrumentalities.

Cinematograph Act, 1952 – ss.10 and 11 – The Delhi Cinematograph Rules – r.3 – Cinema theatre – Fire tragedy – Compensation for victims – Determination of – Fire tragedy at Uphaar Cinema Theatre in Green Park, South Delhi resulted in death of 59 persons and injury to 103 persons – Writ petition before the High Court – Claim for compensation for the victims of the tragedy – High Court determined a uniform compensation of Rs.18 lakhs payable in the case of deceased aged more than 20 years, and 15 lakhs each in the case of those deceased less than 20 years and also awarded a compensation of Rs.1 lakh to each of the 103 injured – The High Court further awarded interest @ 9% p.a. on compensation from the date of filing of writ petition to the date of payment – Whether the compensation awarded was excessive – Held: While awarding compensation to a large group of persons, by way of public law remedy, it is unsafe to use high income as the determinative factor – To make a

sweeping assumption (as done by the High Court) that every person who purchased a balcony class ticket in 1997 (the year the incident occurred) should have had a monthly income of Rs.15,000/- and on that basis apply high multiplier of 15 to determine the compensation at a uniform rate of Rs.18 lakhs in the case of persons above the age of 20 years and Rs.15 lakhs for persons below that age, as a public law remedy, may not be proper – Taking note of the facts and circumstances, the amount of compensation awarded in public law remedy cases, and the need to provide a deterrent, award of Rs.10 lakhs in the case of persons aged above 20 years and Rs.7.5 lakhs in regard to those who were 20 years or below as on the date of the incident, would be appropriate – The award of Rs.1 lakh each in the case of injured is affirmed – The compensation amount will carry interest at the rate of 9% p.a. from the date of writ petition as ordered by the High Court – In the special facts and circumstances of the case, the Registrar General of Delhi High Court directed to receive applications in regard to death cases, from the claimants (legal heirs of the deceased) who want compensation in excess of what has been awarded i.e. Rs.10 lakhs/Rs.7.5 lakhs – Any amount awarded in excess of what is hereby awarded as compensation shall be borne exclusively by the theatre owner – As far as the injured are concerned, if they are not satisfied with the sum of Rs.1 lakh which has been awarded it is open to them to approach the civil court for claiming higher compensation – Public law liability – Tortious liability of the State and its instrumentalities.

Cinematograph Act, 1952 – ss.10 and 11 – The Delhi Cinematograph Rules – r.3 – Fire tragedy at Uphaar Cinema Theatre in Green Park, South Delhi resulted in death of 59 persons and injury to 103 persons – Writ petition before the High Court – Claim for punitive damages – High Court held that the theatre owner (licensee) had installed additional seats illegally which contributed to the cause for the death and injuries, as they slowed down the exit and accordingly directed the Licensee to pay Rs.2.5 crores as punitive damages –

Justification – Held: There was an apparent mistake on the part of the High Court in arriving at the sum of Rs.2.5 crores – The said sum was apparently assessed by the High Court as the income earned by the theatre owner (licencee) by selling tickets for additional seats between 1979 and 1996 – The High Court apparently calculated the ticket revenue at the rate of Rs.50/- per ticket for 52 additional seats for three shows a day to arrive at a sum of Rs.7,800/- per day –For 17 years, this works out to Rs. Rs.4,83,99,000/- – Presumably, the High Court deducted Rs.2,33,99,000/- towards entertainment tax etc., to arrive at Rs.2.5 crores as profit from these additional seats – However, on facts, all the 52 seats cannot be held to be illegal – If at all the licensee is to be made liable to reimburse the profits earned from illegal seats, it should be only in regard to 15 seats and 8 other seats in the owner's Box which was the cause for closing one of the exits – The High Court also wrongly assumed the ticket value to be Rs.50/- from 1979 to 1996, because it was Rs.50/- in the year 1997 for a balcony seat – Another erroneous assumption made was that for all shows on all the days, all the additional seats were fully occupied – On a realistic assessment, (at a net average income of Rs.12/- per seat with average 50% occupancy for 23 seats) the profits earned from these seats for 17 years would at best be Rs.25 lakhs – Punitive damages ordered to be paid by the Licensee accordingly reduced from Rs.2.5 crores to Rs.25 lakhs – Constitutional torts – Measure of damages.

Public law liability – Fire or other hazards in cinema theatres – Prevention of – Disaster Management – Safety arrangements – Inspection and enforcement of statutory norms – While affirming the suggestions given by the High Court, the Supreme Court gave further suggestions to the government for consideration and implementation – Cinematograph Act, 1952 – ss.10 and 11 – The Delhi Cinematograph Rules – r.3 – Disaster Management Act, 2005.

On 13.6.1997, during the matinee show of a newly

released film, a transformer of Delhi Vidyut Board ('DVB') installed in the ground floor parking area of Uphaar Cinema Theatre in Green Park, South Delhi caught fire which resulted in death of 59 persons in the balcony and stairwell of the Cinema theatre due to asphyxiation by inhaling noxious fumes/smoke and 103 persons were also injured in trying to get out.

First Respondent is an association of the victims of Uphaar Tragedy. The Association filed a writ petition before the High Court highlighting the inadequate safety arrangements made by the theatre owner (the licencee) and describing the several violations of the statutory obligations placed on it under law, for prevention of fire hazards in public places. It was further alleged that the public authorities concerned namely DVB, MCD, the Delhi Fire Force and the Licensing Authority not only failed in the discharge of their statutory obligations, but acted in a manner which was prejudicial to public interest by failing to observe the standards set under the statute and the rules framed for the purpose of preventing fire hazards; and that they issued licenses and permits in complete disregard of the mandatory conditions of inspection which were required to ensure that the minimum safeguards were provided in the cinema theatre. Adequate compensation for the victims of the tragedy and punitive damages against the theatre owner, DVB, MCD, the Delhi Fire Force and the Licensing Authority was therefore sought.

The High Court exonerated the Delhi Fire Force but held the theatre owner (Licencee), DVB, MCD and Licensing Authority responsible for the incident and thus jointly and severally liable to compensate the victims. The High Court directed payment of compensation to the legal heirs of 59 patrons who died, and also to the 103 persons who were injured. It determined a uniform compensation of Rs.18 lakhs payable in the case of deceased who were aged more than 20 years, and 15 lakhs each in the case

of those deceased who were less than 20 years and also awarded a compensation of Rs.1,00,000/- to each of the 103 injured. The High Court further awarded interest at 9% per annum on the compensation from the date of filing of writ petition to the date of payment. The High Court apportioned the liability *inter se* among the four in the ratio of 55% payable by the theatre owner and 15% each payable by the DVB, MCD and the Licensing Authority. The High Court further directed that the Licensee shall pay Rs.2.5 crores as punitive damages.

The DVB accepted the judgment of the High Court and deposited 15% of the total compensation. The theatre owner, Delhi Police and MCD, however, did not accept the judgment and filed the instant appeals wherein the following questions arose for consideration:

(i) Whether MCD and the Licensing Authority could be made liable to pay compensation to the victims

(ii) What should be apportionment of liability

(iii) Whether compensation awarded was excessive

(iv) Whether award of punitive damages of Rs.2.5 crores against the Licensee was justified

Disposing of the appeals, the Court

HELD:

PER R.V. RAVEENDRAN, J.

Re: Questions (i) and (ii)

1.1. It is not proper to award damages against public authorities merely because there has been some inaction in the performance of their statutory duties or because the action taken by them is ultimately found to be without authority of law. In regard to performance of statutory functions and duties, the courts will not award damages unless there is malice or conscious abuse. The cases

where damages have been awarded for direct negligence on the part of the statutory authority or cases involving doctrine of strict liability cannot be relied upon in this case to fasten liability against MCD or the Licensing Authority. The position of DVB is different, as direct negligence on its part was established and it was a proximate cause for the injuries to and death of victims. It can be said that in so far as the licensee and DVB are concerned, there was contributory negligence. The position of licensing authority and MCD is different. They were not the owners of the cinema theatre. The cause of the fire was not attributable to them or anything done by them. Their actions/omissions were not the proximate cause for the deaths and injuries. The Licensing Authority and MCD were merely discharging their statutory functions (that is granting licence in the case of licensing authority and submitting an inspection report or issuing a NOC by the MCD). In such circumstances, merely on the ground that the Licensing Authority and MCD could have performed their duties better or more efficiently, they cannot be made liable to pay compensation to the victims of the tragedy. There is no close or direct proximity to the acts of the Licensing Authority and MCD on the one hand and the fire accident and the death/injuries of the victims. But there was close and direct proximity between the acts of the Licensee and DVB on the one hand and the fire accident resultant deaths/injuries of victims. In view of the well settled principles in regard to public law liability, in regard to discharge of statutory duties by public authorities, which do not involve malafides or abuse, the High Court committed a serious error in making the licensing authority and the MCD liable to pay compensation to the victims jointly and severally with the Licensee and DVB. [Para 32] [56-H; 57-A-G]

1.2. This Court does not disagree with the observations of the High Court that the performance of duties by the licensing authority and by MCD (in its limited

sphere) was mechanical, casual and lackadaisical. There is a tendency on the part of these authorities to deal with the files coming before them as requiring mere paper work to dispose it. They fail to recognize the object of the law or rules, the reason why they are required to do certain acts and the consequences of non-application of mind or mechanical disposal of the application/requests which come to them. The compliance with the procedure and rules is mechanical. The observations of the High Court in regard to the shortcoming in the performance of their functions and duties by the licensing authority and to a limited extent by MCD are affirmed. But that does not lead to monetary liability. [Para 33] [57-H; 58-A-C]

Rabindra Nath Ghosal v. University of Calcutta and Ors. **(2002) 7 SCC 478: 2002 (2) Suppl. SCR 698;** *Rajkot Municipal Corporation v. M.J. Nakum* **(1997) 9 SCC 552: 1997 (1) SCR 304 and *Union of India v. United India Insurance Co.Ltd*. (1997) 8 SCC 683: 1997 (4) Suppl. SCR 643 – relied on.**

Geddis v. Proprietors of Bonn Reservoir **(1878) 3 Appeal Cases 430;** *X (Minors) v. Bedfordshire County Council* **(1995) 3 All ER 353;** ***R*** *v. Dy Governor of Parkhurst Prison* **(Ex.P.Hague) (1991) 3 All ER 733;** *John Just v. Her Majesty The Queen* **(1989) 2 SCR 1228 [Canadian Supreme Court] and** *Roger Holland v. Government of Saskatchewan & Ors*. **(2008) 2 SCR 551[Canadian Supreme Court] – referred to.**

Re: Questions (iii) and (iv)

2.1. None in the main hall (ground floor of the theatre) died. Those on the second floor also escaped. It is only those in the balcony caught in noxious fumes, who died of asphyxiation. The deaths were on account of the negligence and greed on the part of the licensee in regard to installation of additional seats, in regard to closing of an exit door, parking of cars in front of transformer room by increasing parking from 15 to 35 and other acts. Therefore the contention that DVB should be made

exclusively liable to pay the compensation is rejected. Inasmuch as the Licensing Authority and MCD have been already held to be not liable, the liability will be 85% (Licensee) and 15% (DVB). [Para 34] [58-D-G]

2.2. What can be awarded as compensation by way of public law remedy need not only be a nominal palliative amount, but something more. It can be by way of making monetary amounts for the wrong done or by way of exemplary damages, exclusive of any amount recoverable in a civil action based on tortuous liability. However, to make a sweeping assumption (as done by the High Court) that every person who purchased a balcony class ticket in 1997 should have had a monthly income of Rs.15,000 and on that basis apply high multiplier of 15 to determine the compensation at a uniform rate of Rs.18 lakhs in the case of persons above the age of 20 years and Rs.15 lakhs for persons below that age, as a public law remedy, may not be proper. It was improper to assume admittedly without any basis, that every person who visits a cinema theatre and purchases a balcony ticket should be of a high income group person. In the year 1997, Rs.15,000 per month was rather a high income. The movie was a new movie with patriotic undertones. It is known that zealous movie goers, even from low income groups, would not mind purchasing a balcony ticket to enjoy the film on the first day itself. While awarding compensation to a large group of persons, by way of public law remedy, it will be unsafe to use a high income as the determinative factor. The proper course would be to award a uniform amount keeping in view the principles relating to award of compensation in public law remedy cases reserving liberty to the legal heirs of deceased victims to claim additional amount wherever they were not satisfied with the amount awarded. Taking note of the facts and circumstances, the amount of compensation awarded in public law remedy cases, and the need to provide a deterrent, award of Rs.10 lakhs in the case of persons

aged above 20 years and Rs.7.5 lakhs in regard to those who were 20 years or below as on the date of the incident, would be appropriate. This Court does not propose to disturb the award of Rs.1 lakh each in the case of injured. The amount awarded as compensation will carry interest at the rate of 9% per annum from the date of writ petition as ordered by the High Court, however, the victims or the LRs. of the victims, as the case may be, are at liberty to seek higher remedy wherever they are not satisfied with the compensation. Any increase shall be borne by the Licensee (theatre owner) exclusively. [Para 38] [61-H; 62-A-H; 63-A]

2.3. However, in the special facts and circumstances of the case, the victims' association has been fighting the cause of victims for more than 14 years and if the victims are required to individually approach the civil court and claim compensation, it will cause hardship, apart from involving huge delay, as the matter will be fought in a hierarchy of courts. The incident is not disputed. The names and identity of the 59 persons who died and 103 persons who were injured are available and is not disputed. If three factors are available the compensation can be determined. The first is the age of the deceased, the second is the income of the deceased and the third is number of dependants (to determine the percentage of deduction for personal expenses). For convenience the third factor can also be excluded by adopting a standard deduction of one third towards personal expenses. Therefore just two factors are required to be ascertained to determine the compensation in 59 individual cases. First is the annual income of the deceased, two third of which becomes the annual loss of dependency and the age of the deceased which will furnish the multiplier. The annual loss of dependency multiplied by the multiplier will give the compensation. [Para 39] [63-B-F]

2.4. As this is a comparatively simple exercise, the Registrar General of Delhi High Court is directed to receive applications in regard to death cases, from the

claimants (legal heirs of the deceased) who want a compensation in excess of what has been awarded that is Rs.10 lakhs/Rs.7.5 lakhs. Such applications should be filed within three months. He shall hold a summary inquiry and determine the compensation. Any amount awarded in excess of what is hereby awarded as compensation shall be borne exclusively by the theatre owner. To expedite the process the concerned claimants and the Licensee with their respective counsel shall appear before the Registrar without further notice. The hearing and determination of compensation may be assigned to any Registrar or other Senior Judge nominated by the Chief Justice/Acting Chief Justice of the Delhi High Court. As far as the injured are concerned if they are not satisfied with the sum of Rs.1 lakh which has been awarded it is open to them to approach the civil court for claiming higher compensation and if they do so within 3 months, the same shall be entertained and disposed of in accordance with law. It is not possible to refer the injury cases for summary determination like death cases, as the principles are different and determination may require a more detailed enquiry. [Para 40] [63-G-H; 64-A-D]

Sarla Verma v. Delhi Transport Corporation **(2009) 6 SCC 121: 2009 (5) SCR 1098 – relied on.**

Rudul Sah vs. State of Bihar **1983 (4) SCC 141: 1983 (3) SCR 508;** *Nilabati Behera alias Lalita Behera vs. State of Orissa* **1993 (2) SCC 746: 1993 (2) SCR 581 and** *Sube Singh vs. State of Haryana* **2006 (3) SCC 178: 2006 (2) SCR 67 – referred to.**

Re: Punitive damages

3.1. There was an apparent mistake on the part of the High Court in arriving at the sum of Rs.2.5 crores. The High Court has stated that the licensee should be made liable to pay punitive damages to the extent of profit which it would have earned by selling tickets in regard to extra seats unauthorisedly and illegally sanctioned by

the authorities and installed by the Licensee. The High Court has not stated the arithmetical calculation of arriving at Rs.2,50,00,000/- but it has indicated that the said sum has been assessed as the income earned by them by selling tickets for additional 250 seats between 1979 and 1996. The High Court has apparently calculated the ticket revenue at the rate of Rs.50/- per ticket for 52 additional seats for three shows a day to arrive at a sum of Rs.7,800/- per day. For 17 years, this works out to Rs. Rs.4,83,99,000/-. Presumably, the High Court deducted Rs. Rs.2,33,99,000/- towards entertainment tax etc., to arrive at Rs.2.5 crores as profit from these additional seats. Initially the seats were 250. Forty three additional seats were sanctioned on 30.9.1976. Subsequently, the additional seats were cancelled. However, the Delhi High Court permitted the continuance of such number of seats which were permissible as per Rules. Therefore, all the 52 seats cannot be held to be illegal. What were illegal seats were the 15 seats that were added by securing an order dated 4.10.1980. The remaining 37 seats were found to be valid by the authorities. Therefore, if at all the licensee is to be made liable to reimburse the profits earned from illegal seats, it should be only in regard to these 15 seats and the eight seats in the Box which was the cause for closing one of the exits. In so far as the eight seats in the owner's box, though it is alleged that they were intended to be used only as complimentary seats, for the purpose of award of punitive damages, they are treated at par with other balcony seats. The High Court also wrongly assumed that the ticket value to be Rs.50/- from 1979 to 1996, because it was Rs.50/- in the year 1997 for a balcony seat. Another erroneous assumption made is that for all shows on all the days, all these additional seats would be fully occupied. On a realistic assessment, (at a net average income of Rs.12/- per seat with average 50% occupancy for 23 seats) the profits earned from these seats for 17 years would at best Rs.25,00,000/-. [Para 41] [64-E-H; 65-A-E]

3.2. What has been awarded is not exactly punitive damages with reference to the magnitude or capacity of the enterprise. All that the High Court pointed out was that the Licensee has installed additional seats illegally. That illegality contributed to the cause for the death and injuries, as they slowed down the exiting of the occupant's balcony. If people could have got out faster (which they could have if the gangway was wider as before, and if there had been two exits as before, instead of only one) many would not have died of asphyxiation. Therefore the Licensee is not only liable to pay compensation for the death and injuries, but should, in the least be denied the profits/benefits out of their illegal acts. In that sense it is not really punitive, but a kind of negative restitution. This Court therefore upholds in principle the liability of the Licensee to return and reimburse the profits from the illegally installed seats, but reduces it from Rs.2.5 crores to Rs.25 lakhs. The award of the said sum, as additional punitive damages, covers two aspects. The first is because the wrongdoing is outrageous in utter disregard of the safety of the patrons of the theatre. The second is the gravity of the breach requiring a deterrent to prevent similar further breaches. [Para 43] [68-C-F]

M C Mehta vs. Union of India **1987 (1) SCC 395: 1987 (1) SCR 819 – referred to.**

General observations and suggestions (In re: prevention of fire or other hazards in cinema theatres – Disaster Management)

4.While affirming the several suggestions by the High Court, the following further suggestions are being given to the government for consideration and implementation:

(i) Every licensee (cinema theatre) shall be required to draw up an emergency evacuation plan and get it approved by the licensing authority.

(ii) Every cinema theatre shall be required to screen a short documentary during every show showing the exits, emergency escape routes and instructions as to what to do and what not to do in the case of fire or other hazards.

(iii) The staff/ushers in every cinema theatre should be trained in fire drills and evacuation procedures to provide support to the patrons in case of fire or other calamity.

(iv) While the theatres are entitled to regulate the exit through doors other than the entry door, under no circumstances, the entry door (which can act as an emergency exit) in the event of fire or other emergency) should be bolted from outside. At the end of the show, the ushers may request the patrons to use the exit doors by placing a temporary barrier across the entry gate which should be easily movable.

(v) There should be mandatory half yearly inspections of cinema theatres by a senior officer from the Delhi Fire Services, Electrical Inspectorate and the Licensing Authority to verify whether the electrical installations and safety measures are properly functioning and take action wherever necessary.

(vi) As the cinema theatres have undergone a change in the last decade with more and more multiplexes coming up, separate rules should be made for Multiplex Cinemas whose requirements and concerns are different from stand-alone cinema theatres.

(vii) An endeavour should be made to have a single point nodal agency/licensing authority consisting of experts in structural Engineering/ building, fire prevention, electrical systems etc.

The existing system of police granting licences should be abolished.

(viii) Each cinema theatre, whether it is a multiplex or stand-alone theatre should be given a fire safety rating by the Fire Services which can be in green (fully compliant), yellow (satisfactorily compliant), red (poor compliance). The rating should be prominently displayed in each theatre so that there is awareness among the patrons and the building owners.

(ix) The Delhi Disaster Management Authority, established by the Government of NCT of Delhi may expeditiously evolve standards to manage the disasters relating to cinema theatres and the guidelines in regard to ex gratia assistance. It should be directed to conduct mock drills in each cinema theatre at least once in a year. [Para 45] [69-G-H; 70-A-H; 71-A-C]

Conclusions

(i) CA Nos.7114-15 of 2003 filed by the Municipal Corporation of Delhi is allowed and that part of the order dated 24.4.2003 of the Delhi High Court holding MCD jointly and severally liable to pay compensation to the victims of the Uphaar Fire tragedy, is set aside.

(ii) CA No.7116 of 2003 filed by the Licensing Authority is allowed and that part of the order dated 24.4.2003 of the Delhi High Court holding the Licensing Authority jointly and severally liable to pay compensation to the victims of the Uphaar Fire tragedy, is set aside.

(iii) The writ petition filed by the Victims Association on behalf of the victims, to the extent it seeks compensation from MCD and Licensing Authority is rejected.

(iv) The licensee (appellant in CA No.6748 of 2004) and Delhi Vidyut Board are held jointly and severally liable to compensate the victims of the Uphaar fire tragedy. Though their liability is joint and several, as between them, the liability shall be 85% on the part the licensee and 15% on the part of DVB.

(v) CA No.6748 of 2004 is allowed in part and the judgment of the High Court is modified as under :

(a) The compensation awarded by the High Court in the case of death is reduced from Rs.18 lacs to Rs.10 lacs (in the case of those aged more than 20 years) and Rs.15 lacs to Rs. 7.5 lacs (in the case of those aged 20 years and less). The said sum is payable to legal representatives of the deceased to be determined by a brief and summary enquiry by the Registrar General (or nominee of learned Chief Justice/Acting Chief Justice of the Delhi High Court).

(b) The compensation of Rs.One lakh awarded by the High Court in the case of each of the 103 injured persons is affirmed.

(c) The interest awarded from the date of the writ petition on the aforesaid sums at the rate of 9% per annum is affirmed.

(d) If the legal representatives of any deceased victim are not satisfied with the compensation awarded, they are permitted to file an application for compensation with supporting documentary proof (to show the age and the income), before the Registrar General, Delhi High Court. If such an application is filed within three months, it shall not be rejected on the ground of delay. The Registrar General or such other Member of Higher Judiciary nominated by the learned Chief Justice/Acting

Chief Justice of the High Court shall decide those applications in accordance with paras above and place the matter before the Division Bench of the Delhi High Court for consequential formal orders determining the final compensation payable to them.

(e) The injured victims who are not satisfied with the award of Rs.One lakh as compensation, may approach the civil court in three months, in which event the claims shall not be dismissed on the ground of delay.

(f) While disbursing the compensation amount, any ex gratia payment by the Central Government/Delhi Government shall not be taken into account. But other payments on account shall be taken note of.

(g) As a consequence, if DVB has deposited any amount in excess it shall be entitled to receive back the same from any amount in deposit or to be deposited.

(h) The punitive damages ordered to be paid by the Licensee, to the Union of India, (for being used for setting up a Central Accident Trauma Centre) is reduced from Rs.2.5 crores to Rs.25 lakhs.

(i) The decisions of the High Court and this Court having been rendered in a public law jurisdiction, they will not come in the way of any pending criminal proceedings being decided with reference to the evidence placed in such proceedings. [Para 46] [71-D-H; 72-A-H; 73-D-E]

PER K. S. RADHAKRISHNAN J. [Concurring and also supplementing on certain issues]

HELD: 1.1. Private law causes of action, generally enforced by the claimants against public bodies and

individuals, are negligence, breach of statutory duty, misfeasance in public office etc. Negligence as a tort is a breach of legal duty to take care which results in damage or injury to another. Breach of statutory duty is conceptually separate and independent from other related torts such as negligence though an action for negligence can also arise as a result of cursory and malafide exercise of statutory powers. [Para 2] [73-F-H]

1.2. In situations where monetary claims are raised by the victims against the violation of statutory provisions by licensing authorities, licensees, and others affecting the fundamental rights guaranteed to them under the Constitution, the Constitutional Courts are expected to vindicate the parties constitutionally, compensate them for the resulting harm and also to deter future misconduct. Constitutional Courts seldom exercise their constitutional powers to examine a claim for compensation, merely due to violation of some statutory provisions resulting in monetary loss to the claimants. Most of the cases in which Courts have exercised their constitutional powers are when there is intense serious violation of personal liberty, right to life or violation of human rights. When the issues are looked at from the point of violation of fundamental rights, such as personal liberty, deprivation of life etc., there is unanimity in approach by the Courts in India, U.K. and U.S.A. and various other countries, that the Constitutional Courts have a duty to protect those rights and mitigate the damage caused. [Paras 3, 10] [74-B-E; 78-C-D]

1.3. Due to the action or inaction of the State or its offices, if the fundamental rights of a citizen are infringed then the liability of the State, its officials and instrumentalities is strict. Claim raised for compensation in such a case is not a private law claim for damages, under which the damages recoverable are large. Claim made for compensation in public law is for compensating the claimants for deprivation of life and personal liberty

which has nothing to do with a claim in a private law claim in tort in an ordinary civil court. [Para 12] [80-B-C]

1.4. A strict liability in torts, private or constitutional do not call for a finding of intent or negligence. When activities are hazardous and if they are inherently dangerous the statute expects highest degree of care and if someone is injured because of such activities, the State and its officials are liable even if they could establish that there was no negligence and that it was not intentional. Public safety legislations generally falls in that category of breach of statutory duty by a public authority. To decide whether the breach is actionable, the Court must generally look at the statute and its provisions and determine whether legislature in its wisdom intended to give rise to a cause of action in damages and whether the claimant is intended to be protected. [Para 13] [80-E-H; 81-A]

1.5. But, in a case, where life and personal liberty have been violated the absence of any statutory provision for compensation in the Statute is of no consequence. Right to life guaranteed under Article 21 of the Constitution of India is the most sacred right preserved and protected under the Constitution, violation of which is always actionable and there is no necessity of statutory provision as such for preserving that right. Article 21 of the Constitution of India has to be read into all public safety statutes, since the prime object of public safety legislation is to protect the individual and to compensate him for the loss suffered. Duty of care expected from State or its officials functioning under the public safety legislation is, therefore, very high, compared to the statutory powers and supervision expected from officers functioning under the statutes like Companies Act, Cooperative Societies Act and such similar legislations. When one looks at the various provisions of the Cinematographic Act, 1952 and the Rules made thereunder, the Delhi Building Regulations and the

Electricity Laws the duty of care on officials was high and liabilities strict. [Para 14] [81-B-E]

State of Rajasthan v. Vidyawati **AIR 1962 SC 933: 1962 Suppl. SCR 989;** *Kasturi Lal v. State of U.P.* **AIR 1965 SC 1039: 1965 SCR 375;**

N. Nagendra Rao v. State of A.P. **AIR 1994 SC 2663: 1994 (3) Suppl. SCR 144;** *Devaki Nandan Prasad v. State of Bihar* **1983 (4) SCC 20: 1983 (2) SCR 921;** *Khatri & Others v. State of Bihar & Others* **(1981) 1 SCC 627: 1981(2) SCR 408;** *Rudal Shah v. State of Bihar* **(1983) 4 SCC 141: 1983 (3) SCR 508;** *Sebastian M. Hongray v. Union of India* **AIR 1984 SC 1026: 1984 (3) SCR 544;** *Bhim Singh v. State of J. & K.* **AIR 1986 SC 494;** *Saheli v. Commissioner of Police, Delhi* **AIR 1990 SC 513: 1989 (0) Suppl. SCR 488;** *Inder Singh v. State of Punjab* **AIR 1995 SC 1949: 1995 (1) Suppl. SCR 309;** *Radha Bai v. Union Territory of Pondicherry* **AIR 1995 SC 1476: 1995 (3) SCR 561;** *Lucknow Development Authority v. M.K. Gupta* **AIR 1994 SC 787: 1993 (3) Suppl. SCR 615;** *Delhi Domestic Working Women's Forum v. Union of India* **(1995) 1 SCC 14: 1994 (4) Suppl. SCR 528;** *Gudalure M.J. Cherian v. Union of India* **1995 Supp (3) SCC 387;** *Sube Singh v. State of Haryana* **2006 (3) SCC 178: 2006 (2) SCR 67;** *Nilabati Behera v. State of Orissa* **AIR 1993 SC 1960: 1993 (2) SCR 581 and** *Union of India v. Prabhakaran* **(2008) (9) SCC 527: 2008 (7) SCR 673 – referred to.**

Rylands v. *Fletcher* **(1868) LR 3 HL 330;** *Donoghue* v. *Stevenson* **1932 AC 562;** *Lloyde v. Westminster* **(1972) All E.R.1240;** *Henderson v. eHenry Jenkins & Sons* **(1969) 2 All E.R. 756;** *Anns v. Merton London Borough Council* **(1978) AC 728;** *Murphy v. Brentwood Dsitrict Council* **(1990) 3 WLR 414;** *Caparo Industries plc v. Dickman* **(1990) 2 AC 605 = 1990 All E.R. 568;** *X (Minors) v. Bedfordshire County Council* **(1995) 2 A.C. 633 and** *Barrett v. Enfield London Borough Council* **(2001) 2 AC 550 – referred to.**

CONSTITUTIONAL TORTS – MEASURE OF DAMAGES

2.1. Law is well settled that a Constitutional Court can award monetary compensation against State and its officials for its failure to safeguard fundamental rights of citizens but there is no system or method to measure the damages caused in such situations. Quite often the courts have a difficult task in determining damages in various fact situations. The yardsticks normally adopted for determining the compensation payable in a private tort claims are not as such applicable when a constitutional court determines the compensation in cases where there is violation of fundamental rights guaranteed to its citizens. Courts have not adopted a uniform criteria since no statutory formula has been laid down. [Para 15] [81-F-H; 82-A-C]

2.2. Constitutional Courts all over the world have to overcome these hurdles. Failure to precisely articulate and carefully evaluate a uniform policy as against State and its officials would at times tend the court to adopt rules which are applicable in private law remedy for which courts and statutes have evolved various methods, such as loss earnings, impairment of future earning capacity, medical expenses, mental and physical suffering, property damage etc. Adoption of those methods as such in computing the damages for violation of constitutional torts may not be proper. [Para 16] [82-B-E]

2.3. Legal liability in damages exist solely as a remedy out of private law action in tort which is generally time consuming and expensive and hence when fundamental rights are violated claimants prefer to approach constitutional courts for speedy remedy. Constitutional courts, of course, shall invoke its jurisdiction only in extraordinary circumstances when serious injury has been caused due to violation of fundamental rights especially under Article 21 of the Constitution of India. In such circumstances the Court can invoke its own methods depending upon the facts

and circumstances of each case. [Para 17] [83-B-C]

D.K. Basu vs. *Union of India* **(1997) 1 SCC 416: 1996 (10) Suppl. SCR 284;** *Rudal Shah v. State of Bihar* **(1983) 4 SCC 141: 1983 (3) SCR 508;** *Sebastian M. Hongray v. Union of India* **AIR 1984 SC 1026: 1984 (3) SCR 544;** *Bhim Singh v. State of J. & K.* **AIR 1986 SC 494 and** *Delhi Domestic Working Women's Forum v. Union of India* **(1995) 1 SCC 14: 1994 (4) Suppl. SCR 528– referred to.**

Constitutional Torts and Punitive Damages

3. Constitutional Courts' actions not only strive to compensate the victims and vindicate the constitutional rights, but also to deter future constitutional misconduct without proper excuse or with some collateral or improper motive. Constitutional courts can in appropriate cases of serious violation of life and liberty of the individuals award punitive damages. However, the same generally requires the presence of malicious intent on the side of the wrong doer, i.e. an intentional doing of some wrongful act. Compensatory damages are intended to provide the claimant with a monetary amount necessary to recoup/replace what was lost, since damages in tort are generally awarded to place the claimants in the position he would have been in, had the tort not taken place which are generally quantified under the heads of general damages and special damages. Punitive damages are intended to reform or to deter the wrong doer from indulging in conduct similar to that which formed the basis for the claim. Punitive damages are not intended to compensate the claimant which he can claim in an ordinary private law claim in tort. Punitive damages are awarded by the constitutional court when the wrong doer's conduct was egregiously deceitful. [Para 18] [83-D-H]

Rookes v. Barnard **(1964) All E.R. 367;** *BMW of North America Inc. v. Gore* **517 U.S. 559 (1996) and** *Philip Morris USA v. Williams* **549 U.S. 346 (2007) – referred to.**

Need for legislation

4. Need for a comprehensive legislation dealing with tortious liability of State, its instrumentalities has been highlighted by this Court and the academic world on various occasions and it is high time that a sophisticated jurisprudence of Public Law Liability is developed. [Para 19] [85-B-C]

Kasturi Lal v. State of U.P. **AIR 1965 SC 1039: 1965 SCR 375 – referred to.**

Anufijeva Vs. London Borough Southwork **2004 (2) WLR 603 – referred to.**

Per R.V. Raveendran, J.

Case Law Reference:

2002 (2) Suppl. SCR 698	**relied on**	**Para 31**
1997 (1) SCR 304	**relied on**	**Para 31**
(1878) 3 Appeal Cases 430	**referred to**	**Para 31**
(1995) 3 All ER 353	**referred to**	**Para 31**
(1991) 3 All ER 733	**referred to**	**Para 31**
(1989) 2 SCR 1228 [Canada]	**referred to**	**Para 31**
(2008) 2 SCR 551[Canada]	**referred to**	**Para 31**
1997 (4) Suppl. SCR 643	**relied on**	**Para 31**
1983 (3) SCR 508	**referred to**	**Para37.1**
1993 (2) SCR 581	**referred to**	**Para 37.2**
2006 (2) SCR 67	**referred to**	**Para 37.3**
2009 (5) SCR 1098	**relied on**	**Para 39**
1987 (1) SCR 819	**referred to**	**Para 42**

Per K. S. Radhakrishnan J.

Case Law Reference:

1962 Suppl. SCR 989	**referred to**	**Para 4**
1965 SCR 375	**referred to**	**Para 4**
1994 (3) Suppl. SCR 144	**referred to**	**Para 4**

(1868) LR 3 HL 330	**referred to**	**Para 6**
1932 AC 562	**referred to**	**Para 6**
(1972) All E.R. 1240	**referred to**	**Para 6**
(1969) 2 All E.R. 756	**referred to**	**Para 6**
(1978) AC 728	**referred to**	**Para 6**
(1990) 3 WLR 414	**referred to**	**Para 6**
(1990)2 AC 605	**referred to**	**Para 6**
(1995)2 A.C. 633	**referred to**	**Para 6**
(2001)2 AC 550	**referred to**	**Para 6**
1983 (2) SCR 921	**referred to**	**Para 11**
1981(2) SCR 408	**referred to**	**Para 11**
1983 (3) SCR 508	**referred to**	**Para 11**
1984 (3) SCR 544	**referred to**	**Para 11**
AIR 1986 SC 494	**referred to**	**Para 11**
1989 (0) Suppl. SCR 488	**referred to**	**Para 11**
1995 (1) Suppl. SCR 309	**referred to**	**Para 11**
1995 (3) SCR 561	**referred to**	**Para 11**
1993 (3) Suppl. SCR 615	**referred to**	**Para 11**
1994 (4) Suppl. SCR 528	**referred to**	**Para 11**
1995 Supp (3) SCC 387	**referred to**	**Para 11**
2006 (2) SCR 67	**referred to**	**Para 11**
1993 (2) SCR 581	**referred to**	**Para 11**
2008 (7) SCR 673	**referred to**	**Para 13**
1996 (10) Suppl. SCR 284	**referred to**	**Para 15**
(1964) All E.R. 367	**referred to**	**Para 18**
517 U.S. 559 (1996)	**referred to**	**Para 18**
549 U.S. 346 (2007)	**referred to**	**Para 18**
2004 (2) WLR 603	**referred to**	**Para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7114-7115 of 2003.

From the Judgment & Order dated 24.4.2003 of the High Court of Delhi 7116 of 2003 at New Delhi in Civil Writ Petition No. 4567 of 1999 and 3335 of 1997.

WITH

C.A. No. 6748 of 2004.

C.A. No. 7116 of 2003.

P.P. Malhotra, Indra Jaising, ASG, A.K. Ganguli, K.T.S. Tulsi, Brijender Chahar and R.S. Suri, Sanjiv Sen, Praveen Swarup, Anuja Chopra, Rajan Narain, Jayant K. Mehta, Ravinder Singh, Maheen Pradhan, Sandeep Phogat, Prem Malhotra, Mukul Gupta, Vishnu B. Saharya (for Saharya & Co.), Vinay Garg, Shailendra Sharma, Asha G. Nair, Anil Katiyar, S.N. Terdal, Jyoti Chahar, Rekha Pandey, Sushma Suri, D.S. Mahra, Apoorve Karal, Chaitanya, Manu Sharma, Debesh Panda, C.K. Ganguli, K.S. Prasad, Sanjeev Kr. Dubey, Jamal Akhtar, Chetan Chawla, Gaurav Sharma, Vanshdeep Dalmia for the appearing parties.

The Judgment of the Court was delivered by

R.V. RAVEENDRAN, J. 1. These appeals are filed against the judgment dated 24.4.2003 of a division bench of the Delhi High Court in the Uphaar Cinema tragedy. CA No.7114-15/2003 is by the Municipal Corporation of Delhi (for short 'MCD'). CA No.7116/2003 is by the Licensing Authority (Commissioner of Police). CA No. 6748/2004 is by M/s.Ansal Theatre and Clubotels Pvt. Ltd., the owners of the Uphaar Cinema Theatre (for short the 'theatre owner' or 'Licensee).

2. These appeals relate to the fire at Uphaar Cinema Theatre in Green Park, South Delhi on 13.6.1997, resulting in the death of 59 patrons and injury to 103 patrons. During the matinee show of a newly released film on 13.6.1997, the patrons of the cinema hall which was full were engrossed in the film. Shortly after the interval, a transformer of Delhi Vidyut Board installed in the ground floor parking area of Uphaar Cinema, caught fire. The oil from the transformer leaked and found its way to the passage outside where many cars were

parked. Two cars were parked immediately adjoining the entrance of the transformer room. The burning oil spread the fire to nearby cars and from then to the other parked cars. The burning of (i) the transformer oil (ii) the diesel and petrol from the parked vehicles (iii) the upholstery material, paint and other chemicals of the vehicles and (iv) foam and other articles stored in the said parking area generated huge quantity of fumes and smoke which consisted of carbon monoxide and several poisonous gases. As the ground floor parking was covered all round by walls, and the air was blowing in from the entry and exit points, the smoke and noxious fumes/smoke could not find its way out into open atmosphere and was blown towards the staircase leading to the balcony exit. On account of the chimney effect, the smoke travelled up. Smoke also travelled to the air-conditioner ducts and was sucked in and released into the auditorium. The smoke and the noxious fumes stagnated in the upper reaches of the auditorium, particularly in the balcony area. By then the electricity went off and the exit signs were also not operating or visible. The patrons in the balcony who were affected by the fumes, were groping in the dark to get out. The central gangway in the balcony that led to the Entrance foyer could have been an effective and easy exit, but it was closed and bolted from outside, as that door was used only for entry into the balcony from the foyer. The patrons therefore groped through towards the only exit situated on the left side top corner of the balcony. The staircase outside the balcony exit which was the only way out was also full of noxious fumes and smoke. They could not get out of the staircase into the foyer as the door was closed and locked. This resulted in death of 59 persons in the balcony and stairwell due to asphyxiation by inhaling the noxious fumes/smoke. 103 patrons were also injured in trying to get out.

3. First Respondent is an association of the victims of Uphaar Tragedy (for short the 'Victims Association' or 'Association'). The members of the Association are either those who were injured in the fire or are relatives/legal heirs of those who were killed in the fire. The Association filed a writ petition before the Delhi High Court. They highlighted the shocking state of affairs existing in the cinema building at the

time of the incident and the inadequate safety arrangements made by the owners. They described the several violations by the owners of the statutory obligations placed on theatre owners under law, for prevention of fire hazards in public places. They highlighted the acts of omission and commission by the public authorities concerned namely Delhi Vidyut Board ('DVB' for short), MCD Fire Force and the Licensing Authority. They alleged that these authorities not only failed in the discharge of their statutory obligations, but acted in a manner which was prejudicial to public interest by failing to observe the standards set under the statute and the rules framed for the purpose of preventing fire hazards; that they issued licenses and permits in complete disregard of the mandatory conditions of inspection which were required to ensure that the minimum safeguards were provided in the cinema theatre. They pointed out that most of the cinema theatres were and are being permitted to run without any proper inspection and many a time without the required licenses, permissions and clearances. They therefore, sought adequate compensation for the victims of the tragedy and punitive damages against the theatre owner, DVB, MCD, Fire Force and the Licensing Authority for showing callous disregard to their statutory obligations and to the fundamental and indefeasible rights guaranteed under Article 21 of the Constitution of India, of the theatre going public, in failing to provide safe premises, free from reasonably foreseeable hazards. They claimed compensation and other reliefs as under:-

(a) award damages of Rs.11.8 crores against the respondents, jointly and severally, to the legal heirs of the victims who lost their lives (listed in Annexure B of the writ petition) through the Association with the direction to equally distribute the same to the first degree heirs of all the victims;

(b) award damages of Rs.10.3 crores against the respondents, jointly and severally, to the injured (listed in Annexure C to the writ petition) to be distributed evenly or in such manner as may be considered just and proper;

(c) award punitive damages of Rs.100 crores to the association for setting up and running a Centralized Accident and Trauma Services and other allied services in the city of Delhi; and to direct Union of India to create a fund for that purpose;

(d) to monitor the investigation from time to time, to ensure that no person guilty of any of the offences is able to escape the clutches of law and that the investigation is carried out as expeditiously as possible in a free and fair manner; and

(e) direct the Union of India to ensure that no cinema hall in the country is allowed to run without license granted after strictly observing all the mandatory conditions prescribed under the laws and to further direct them to stop the operation of all cinema halls and to permit the operation only after verification of the existence of a valid license/ permit by the licensing authority, under the Cinematograph Act.

Relevant Legal Provisions

4. The Cinematograph Act, 1952 provides for regularization of exhibition of Cinemas. Section 10 provides that a cinema theatre cannot be run without obtaining license from the Licensing Authority. Section 11 provides that the Licensing Authority shall be the District Magistrate. After the coming into force of the Commissioner of Police system in Delhi in 1978, the Commissioner of Police was notified as the licensing authority under the proviso to section 11 of the Act. Licenses to be granted to a cinema theatre under section 10 could be either annual or temporary. All cinema theatres in Delhi were required to get their licenses renewed annually by moving an application in writing to the licensing authority. While granting renewal, the licensing authority was required to satisfy itself that the licensee had complied with the provisions of the Cinematograph Act and the Delhi Cinematograph Rules framed thereunder.

5. When the cinema theatre was constructed in the year 1973, the Delhi Cinematograph Rules, 1953 were regulating the procedure of granting licences, inspection and conditions of licences. After the coming into force of the Commissioner of Police system, the Delhi Cinematograph Rules 1983 came into force. Rule 3 provides that license shall be granted in respect of a building which is permanently equipped for Cinematograph exhibition and in respect of which the requirements set forth in first schedule of the Rules were fulfilled. The first schedule to the Rules laid down the specifications with which compliance must be made before any annual license was granted in respect of any building. Besides other things, the schedule lays down specifications regarding number of persons accommodated in the cinema hall and the manner in which the seats can be provided therein. The 1953 Rules insofar as they are relevant for accommodation, sitting, the width of gangways, stairways, exits, are extracted below:

(1) <u>Accommodation</u> - The total number of spectators accommodated in the building shall not exceed twenty per hundred square feet of the area available for sitting and standing or twenty per 133.5 square feet of over all area of the floor space in the auditorium. *. x x x*

(2) <u>Seating</u> - (1) *The seating in the building shall be arranged so that there is free excess to exits.*

(3) <u>Gangway</u> - (1) Gangway not less than forty-four inches wide shall be provided in the building as follows :-

(a) Down each side of the auditorium.

(b) Down the centre of the seating accommodation at intervals of not more than twenty-five feet.

(c) Parallel to the line of the seating so as to provide direct access to exits, provided that not more than one gangway for every ten rows shall be required.

(2) All gangways, exits and the treads of steps and stairways shall be maintained with non-slippery surfaces. *x x x*

(4) The exits and the gangways and passages leading to exits shall be kept clear of any obstruction other than rope barriers provided in accordance with sub-rule (6). On no account shall extra seats be placed in the gangways or spectators be allowed to stand in the gangways at the time of performances in such a way as to block or effectively reduce their width. x x x

(4) <u>Stairways</u> - (1) There shall be at least two stairways each not less than four feet wide to provide access to any gallery or upper floor in the building which is intended for use by the public.

x x x x

(5) No stairways shall discharge into a passage or corridor against or across the direction of exit.

(5) <u>Exits</u> : - (1) Every public portion of the building shall be provided with an *adequate number of clearly indicated exits placed in such positions and so maintained as to afford the audience ample means of safe and speedy egress.*

(2) In the auditorium there shall be atleast one exit from every tier, floor, or gallery for every hundred persons accommodated or part thereof :

Provided further that an exit on or by way of stage or platform shall not be reckoned as one of exits required by this rule.

(3) Every exit from the auditorium shall provide a clear opening space of not less than seven feet high and five feet wide.

(4) Exits from the auditorium shall be suitably spaced along both sides and along the back thereof and shall deliver into two or more different thorough fares or open space from which there are at all times free means of rapid dispersal.

(5) Every passage or corridor leading from an exit in the auditorium to a final place or exit from the building shall

be of such width as will in the opinion of the licensing authority enable the persons who are likely to use it in an emergency to leave the building without danger of crowding or congestion. At no point shall any such passage or corridor be less than five feet wide and it shall not diminish in width in the direction of the final place of exit.

(6) The combined width of the final place of exit from the building shall be such that there are at least five feet of exit width for every hundred persons that can be accommodated in the building.

(7) All exit doors shall open outwards and shall be so fitted that when opened they do not obstruct any gangway, passage, corridor, stairway or landing.

(8) All exit doors and doors through which the public have to pass on the way to the open air shall be available for exit during the whole time that the public are in the building and during such time shall not be locked or bolted.

(9) All exits from the auditorium and all doors or openings (other than the main entrance) intended for egress from the building shall be clearly indicated by the word "EXIT" in block letters, which shall not be less than seven inches high and shall be so displayed as to be clearly visible in the light as well as in the dark.

(10) All other doors of openings shall be so constructed as to be clearly distinguishable from exits. They may be indicated by the words "NO THOROUGHFARE" arranged as in the figure below, but no notice bearing the words "NO EXIT" shall be used in any part of the building.

(6) Parking Arrangements – (1) Such arrangements shall be made for the parking of motor cars and other vehicles in the vicinity of the buildings as the licensing authority may require.

(2) No vehicle shall be parked or allowed to stand in such a way as to obstruct exits or impede the rapid dispersal of persons accommodated, in the event of fire or panic.

(7) Fire Precautions - (1) Fire extinguishing appliances suitable to the character of the building and of a patron, class and capacity approved by the licensing authority shall be provided as prescribed by him; these appliances shall be disposed to his satisfaction so as to be readily available for use in case of fire in any part of the building.

(2) There shall always be sufficient means of dealing with the fire readily available within the enclosure and these shall include a damp blanket, a portals Chemical fire extinguisher and two buckets of dry sand.

(3) All fire extinguishing appliances shall at all times be maintained in proper working order and available for instant use, and all Chemical fire extinguishers shall be capable of withstanding a pressure of not less than 250 lbs. square inch.

(4) During an exhibition all fire extinguishing appliances shall be in charge of some person or persons specially appointed for this purpose. Such persons need not be employed exclusively in looking after the fire appliances but they must not be given any other work during an exhibition which would take them away from the building or otherwise prevent them from being immediately available in case of danger or alarm of fire.

(emphasis supplied)

INQUIRY REPORTS

6. Immediately after the incident, the Lt.Governor constituted an enquiry committee under Mr.Naresh Kumar (DC, South) to investigate into the incident. He secured several reports and in turn submitted an exhaustive report on the calamity. When the investigation was transferred to CBI on 26.7.1997, they also secured several reports. The court appointed Commissioners also gave a report. These reports, enumerated below, were considered by the High Court:

(i) Report dated 16.6.1997 issued by Delhi Fire Service.

(ii) Report dated 25.6.1997 of Mr.K.L Grover, Electrical Inspector (Labour Department) submitted to Mr.Naresh Kumar.

(iii) Report dated 25.6.1997 submitted by Mr.R.K. Bhattacharya, Executive Engineer (Building) South Zone, MCD to Mr.Naresh Kumar.

(iv) Report dated 26.6.1997 submitted by the Fire Research Laboratory, Central Building Research Institute to Mr. Naresh Kumar.

(v) Report dated 27.6.1997 and 11.8.1997 of Central Forensic Science Laboratory to Station House Officer.

(vi) Report dated 29.6.1997 by Mr.K.V. Singh, Executive Engineer (Electrical) PWD, to Mr. Naresh Kumar.

(vii) Report dated 2.7.1997 by Mr. M.L.Kothari, Electrical Deptt., IIT affirming the observations of Mr.K.V. Singh.

(viii) Panchnama dated 2.8.1997 prepared by Sr. Engineer, PWD.

(ix) Inspection-cum-Scrutiny Report dated 11.8.1997 by Eng.Deptt. of MCD.

(x) Toxicology Report dated 18.9.1997 by AIIMS.

(xi) Joint Inspection Report dated 7.10.1997 by Representative of Licensing Authority, MCD, Delhi Fire Service, Electrical Inspector, and General Manger of Uphaaar Cinema.

(xii) Naresh Kumar Report.

(xiii) Court Commissioner's Report dated 30.11.2000.

Decision of High Court

7. The High Court after exhaustive consideration of the material including the aforesaid reports, recorded statements and other material, allowed the writ petition by order dated 24.4.2003. In the said order, the High Court identified the

causes that led to the calamity and persons responsible therefor. It held the theatre owner, DVB, MCD and the Licensing Authority responsible for the fire tragedy. It exonerated the Delhi Fire Force. We summarise below the acts/omissions attributed to each of them by the High Court.

Acts/omissions by DVB

8. DVB violated several provisions of the Electricity Act and the Rules. It had not obtained the approval of the Electrical Inspector for installation of the transformer as required under the Rules. The Rules required that the floor of the transformer room should be at a higher level than the surrounding areas and there should be a channel for draining of oil with a pit so that any leaking oil would not spread outside, increasing the fire hazard, and also to ensure that water did not enter the transformer. The transformer had to be checked periodically and subjected to regular maintenance and should have appropriate covers. The connecting of wires should be by crimping and not by hammering. The negligence on the part of DVB in maintaining the transformers and repairs led to the root cause of the incident, namely the starting of the fire.

Acts/Omissions of owner

9. Though the starting of the fire in the transformer happened due to the negligence of DVB, but if the owner had taken the necessary usual precautions and security measures expected of a theatre owner, even if the transformer had caught fire, it would not have spread to nearby cars or other stored articles nor would the balcony and staircases become a death trap on account of the fumes. The following acts/omissions were attributed to the theatre owner :

(i) *Parapet wall*: The owner had violated the municipal bye-laws by making several unauthorised alterations in the structure which all contributed to the incident. In particular, the violation by the owner in raising a parapet wall which was shown to be of three feet height in the sanctioned plan till the roof level had disastrous effect when the fire broke out. The stilt floor plan (sanctioned in 1972) showed that

what was sanctioned was a three feet high parapet wall along the ramp which was situated to the rear of the transformer room. If the said parapet wall had been constructed only to a height of three feet as shown in the sanctioned plan, the entire space above it would have been open and in the event of any fire in the transformer room or anywhere in the stilt floor, the fumes/smoke could have dispersed into the atmosphere. But at some point of time in or around 1973, the Licensee had raised the said three feet wall upto the ceiling height of twelve feet with the result the stilt floor (parking area) stood converted into a totally enclosed area. But for the construction of the parapet wall to ceiling height, the fumes/smoke from the transformer room and from the parking area where the cars were burning, would have gone out of the stilt floor into the open atmosphere. The unauthorized raising of this wall prevented the smoke from getting dispersed and forced it to seek a way up through the stairwell causing the chimney effect and also entered the balcony through the air conditioning system resulting in the concentration of the smoke in the balcony area of the theatre and the stairwell itself, thereby playing a major role in spreading the fire/ smoke to balcony area and stairwell. The Court found that the apparent intention of raising the height of the wall from three to twelve feet was to use the area between the wall and the transformer room for commercial purposes.

(ii) *Closing one exit in balcony and reducing the width of gangways*: Making alterations in the balcony, contrary to the Cinematograph Rules by closing the gangway/aisle on one side and closing/blocking one of the exits by construction of an owner's box in front of the right side exit (The details of these alterations are given in paras 11 to 14 below). The said acts impeded the free and quick exit of the occupants of balcony as everyone had to use the exit on the left side. The delay made them victims of asphyxiation due to the poisonous/noxious gases.

(iii) *Illegal parking in stilt floor*: The stilt floor where the

three electrical rooms (generator room, HT room and LT room) were situated, had an earmarked parking space for 15 cars. The sanctioned plan clearly contemplated a passage way for movement of cars of a width of about 16 ft. The sanctioned plan required that the area in front of the three electrical rooms should be left free as a part of that passage way and no parking was contemplated in front of the said three rooms. However the Licensee was permitting the patrons to park their cars in a haphazard manner, particularly in the central passage. Instead of restricting the cars to be parked in that floor to 15 and leaving the central passage, in particular the passage in front of the three electrical rooms free for maneuvering the cars, the owner permitted the entire passage to be used for parking the vehicles, thereby increasing the parking capacity from 15 to 35. This made exiting of vehicles difficult and until and unless the vehicles in the passage were removed, other parked vehicles could not get out. It also made it difficult for any patrons to use the said area as an exit in an emergency. Parking of vehicles in front of the three electrical rooms increased the fire hazard. If the passageway between two parked row of cars in the stilt floor had been kept free of parking as per the sanctioned plan and consequently if no cars had been parked in front of the transformer room, the fire in the transformer room would not have spread to the cars and the entire calamity could have been avoided. On that day, a contessa car parked next to the transformer room in the passageway first caught fire. (Though the sanctioned parking plan showed that the stilt floor was to be used for parking only fifteen cars with a middle passageway of fifteen feet width left free for movement of cars), the parking area was used for parking as many as 35 cars. As the parking area was overcrowded with haphazardly parked cars, the entire passageway meant for movement of cars was blocked. Not following the provisions of Electricity Act and Electricity Rules in regard to the construction of the transformer room with required safeguard and permitting haphazard parking

of large number of vehicles, particularly near the transformer room started the fire and spread it.

(iv) If the owners had not unjustly and by misrepresenting the facts, obtained an interim stay in the year 1983 which continued up to the date of the incident and as a consequence though the irregularities and violations of safety measures had been noticed and brought to its notice, they had not rectified them and the continued violations resulted in the incident.

Acts/omissions of MCD

10. The sanctioned plan issued in 1972 to the Licensee was for construction of a three feet high parapet wall. Though the Licensee raised the said wall up to ceiling height of 12 feet in violation of the Rules, the MCD failed to point out this violation between 1994 to 1997 and take action against the theatre owners.

MCD was required to give a NOC after inspecting the building, certifying that there was no violation of the building bye-laws or unauthorized construction, every year, from the year 1994 so that licence should be renewed. MCD failed to make such inspections. On the other hand it gave a NOC for grant of licence in the year 1996.

Acts/omissions of the Licensing Authority

11. The licensing authority owed a duty to ensure that the cinema theatre complied with all the requirements of the Cinematograph Act and Rules and to obtain the necessary NOCs from MCD, Fire Force and Electrical Inspector. If there was any violation, it ought not to have renewed the licence. The Licensing Authority failed to note the violations/deviations and take remedial action. Even though a stay order had been issued by the High Court on 28.6.1983, in a writ petition challenging the suspension of licences, the said stay order did not come in the way of the Licensing Authority making appropriate inspections and if necessary to take action to suspend the licence or seek modification of the interim order. The Licensing

Authority did not discharge its statutory functions and went on issuing temporary permits for periods of two months each, for a period of more than 13 years when the Rules clearly contemplated that the temporary permits could not be renewed for a period of more than six months.

Conclusion of High Court

Closing of one Balcony Exit and narrowing of gangway

12. We may only refer to the unauthorized closure of an exit from balcony and reduction of width of gangways by addition of seats in greater detail to have a complete picture. Uphaar Cinema was inaugurated on 27.4.1973. In the year 1975, there was a general cut of 10% value of the cinema ticket rates fixed by the Delhi Administration. The licensees made a representation to the Delhi Administration alleging that the expenses had gradually gone up during the course of years after the rates were fixed and that even the existing rates were inadequate to meet the operating costs. The representation of the Association of Motion Pictures Exhibitors was considered and the Delhi Administration agreed to relax the Rules and allowed the licensees to have additional seats (in addition to the existing seats) in their cinema halls to make good the loss caused to the licensees by the reduction in the rates by 10%. Uphaar Cinema was permitted to add 43 seats in balcony and 57 seats in the main hall, as per a notification dated 30.9.1976 issued by the licensing authority. As a consequence, 43 seats were added in the balcony and 57 seats were added in the main hall of Uphaar Theatre. The Chief Fire Officer inspected the theatre and submitted a report that the addition of seats was a fire hazard. The Lt. Governor therefore issued a notification dated 27.7.1979 cancelling with immediate effect the earlier notifications by which relaxation had been granted to the licensees (including Uphaar Cinema) by allowing them to increase the number of seats. The said notification dated 27.7.1979 was challenged by the Licensees by filing a writ petition in the Delhi High Court. The said writ petition was disposed of by a Division Bench of the High Court by its

judgment dated 29.11.1979 (reported in *Isher Das Sahni & Bros. v. The Delhi Administration* – AIR 1980 Delhi 147) holding that the Delhi Administration could not have granted such relaxations if such relaxations would have contravened the Rules to an extent as to increase the risk of fire hazard or to expose the spectators to unhealthy conditions. The High Court further held that the opinion and advice of the fire and health authorities had to be taken before grant of any relaxation. The High Court noted the following view of Chief Fire Officer showing reluctance to advise relaxation in the rules as the safety of the visitors to the theatres would be affected thereby:

> "Even under the normal circumstances the exit facilities are seriously hampered by people rushing and *it is felt that in case of panicky situation of a minor nature, the people will be put to great difficulty which may even result in stampede*. In the circumstances, I feel that it would not be advisable to allow extra seats required by the Managements. In a few theaters, however, the difficulty may not be so acute. If at all any relaxation has to be considered under unavoidable circumstances, our reaction to the proposals but forward by the management of a few cinema houses may kindly be seen in the enclosure".

The High Court also noted that Chief Fire Officer later modified and toned down his report when he was informed by the Delhi Administration that additional seats were permitted to compensate the loss on account of reduction in cinema fares. The High Court noted that ultimately the Delhi Administration, Chief Fire Officer and Municipal Corporation agreed to some relaxation and disposed of the petitions directing the Delhi Administration to apply their mind and decide how many of the additional seats were in accordance with the Rules and could be permitted to be retained. The effect of the order was that only those additional seats which contravened the Rules had to be removed and cancellation of the Notification dated 30.9.1976 did not result in automatic removal of all additional seats.

13. In the meanwhile by order dated 6.10.1978, the

Entertainment Tax Officer permitted Uphaar Cinema to install a box with eight seats for use without tickets (for complimentaries). This was not however specifically brought to the notice of the Licensing Authority nor his permission sought. These additional seats were not sanctioned by the Licensing Authority. In pursuance of such permission the Licensee closed the exit on the right side of the balcony for installing the box with eight seats. The central access was used exclusively for entry. As a result the only exit from the balcony was the one at the extreme left top corner of the balcony.

14. After the decision dated 29.11.1979, a show cause notice was issued to reconsider the addition of 100 seats and by order dated 22.12.1979, the DCP (Licensing) held that six additional seats in the balcony (seat No.8 in rows 'A' to 'F') and 56 additional seats in the main hall were blocking the gangway and causing obstruction to egress of patrons and directed their removal so that the original vertical gangway could be restored. However on a subsequent application dated 29.7.1980 by the Licensee by order dated 4.10.1980, the Licensing Authority permitted installation of 15 additional seats in the balcony, that is two additional rows of 3 seats each in front of the exit in balcony, addition of one seat against back wall next to seat no.38 and eight additional seats by adding one seat in each of rows 'A' to 'H'. As a result (i) the seating capacity which was 287 plus Box of 14 went up to 302 plus two Boxes (14+8), (ii) the right side exit was closed and a box of 8 seats added; (iii) the right side vertical gangway was closed and a new gangway created between seat Numbers (8) and (9); (iv) the width of the gangways leading to exit from balcony was reduced.

15. What is significant is while obtaining permission of Licensing Authority for increasing the capacity from 287 to 302, he was not informed about addition of one box of 8 seats and closing of one exit. As per the 1953 Rules, there should be one exit for every 100 seats. Under the 1981 Rules, this became minimum of one exit for every 150 persons. Originally there was one central entry/exit point between foyer to balcony and two exits at the two top corners of the balcony. After the

modifications and increase in seats, the central door became an exclusive entry from the foyer; the right side corner of the balcony was permanently closed by installation of the special box of eight seats and there was only one exit for the entire balcony with a capacity of 302 persons, situated at the left side top corner of the balcony. This was the major cause for the tragedy, as when lights went off and fumes surrounded, the balcony became a death trap. The left (West) exit from the balcony led to the staircase leading to the parking area. Patrons from the balcony who entered the entire stairwell also died, as it was full of noxious fumes entering from the stilt parking area on account of the chimney effect. The patrons were denied access to the right (East) exit because of the installation of the private box and the closing of right (East) exit, which would have otherwise provided an access to the other staircase with lift well which led to the ticket foyer outside the parking area and therefore free from noxious fumes/smoke. The report shows that the exit light, ground light, side light, emergency lights and public address system were all non-functional, adding to the delay, confusion and chaos, making it very difficult to get out of the balcony which was dark and full of smoke/fumes.

16. The High Court held that the theatre owner (Licencee), DVB, MCD and Licensing Authority being responsible for the incident were jointly and severally liable to compensate the victims. The High Court directed payment of compensation to the legal heirs of 59 patrons who died, and also to the 103 persons who were injured. The High Court determined a uniform compensation of Rs.18 lakhs payable in the case of deceased who were aged more than 20 years, and 15 lakhs each in the case of those deceased who were less than 20 years of age. It also awarded a compensation of Rs.1,00,000 to each of the 103 injured. It also awarded interest at 9% per annum on the compensation from the date of filing of writ petition to date of payment. The High Court apportioned the liability inter se among the four in the ratio of 55% payable by the theatre owners and 15% each payable by the Delhi Vidyut Board, MCD and the Licensing Authority. The High Court

directed that while paying compensation the ex-gratia amount wherever paid (Rs.1,00,000 in the case of death, Rs.50,000 in case of grievous injuries and Rs.25000 for simple injuries) should be deducted. The High Court directed that the Licensee shall pay Rs.2,50,00,000/- (Rupees two and half crores) as punitive damages (being the income earned from installing extra 52 seats unauthorizedly during the period 1979 to 1996. The said amount was ordered to be paid to Union of India for setting up a Central Accident Trauma Centre.

17. The High Court approved the recommendations of Naresh Kumar Committee which were extracted in detail in the judgment of the High Court. The High Court also made the following recommendations:

(A) Several requests by the fire authorities for adequate maintenance and timely upgradation of the equipment have floundered in the bureaucratic quagmire. When lives of citizens are involved the requirement of those dealing in public safety should be urgently processed and no such administration process of clearance in matters of public safety should take more than 90 days. The entertainment tax generates sufficient revenue for the administration to easily meet the financial requirements of bodies which are required to safeguard public health.

(B) Considering the number of theatres and auditoria functioning in the city, sufficient staff to inspect and enforce statutory norms should be provided by the Delhi Administration.

(C) The Delhi police should only be concerned with law and order and entrusting of responsibility of licensing of cinema theatres on the police force is an additional burden upon the already over burdened city police force.

(D) The inspection and enforcement of the statutory norms should be in the hands of one specialized multi disciplinary body which should deal with all aspects of the licensing of public places. It should contain experts in the field of (a) fire prevention (b) electric supply (c) law and order (d)

municipal sanctions (e) urban planning (f) public health and (g) licensing. Such a single multidisciplinary body would ensure that the responsibility of public safety is in the hands of a body which could be then held squarely responsible for any lapse and these would lead to a situation which would avoid the passing of the buck. The existing position of different bodies looking after various components of public safety cannot be continued. A single body would also ensure speedier processing of applications for licenses reducing red tape and avoidable complications and inevitable delay.

(E) All necessary equipment should be provided to ambulances and the fire brigade including gas masks, search lights, map of water tanks located in the area including the existence of the location of the underground water tanks. Such water tank locations should be available to the firemen working in the area. The workshop for the fire tenders service and maintenance should also be fully equipped with all spares and other equipment and requisition made by the fire brigade should receive prompt and immediate attention. There should also be adequate training imparted to the policemen to control the crowd in the event of a disaster as it is found that onlookers are a hindrance to rescue operations. Similarly all ambulances dealing with disaster management should be fully equipped.

18. The Vidyut Board has accepted the judgment and has deposited 15% of the total compensation. The theatre owner, Delhi Police and MCD have not accepted the judgment and have filed these appeals. CAs. 7114-7115/2003 has been filed by the MCD denying any liability. The Licensing Authority has filed CA No.7116/2003 contending that the theatre owners should be made liable for payment of the entire compensation. The theatre owner has filed CA NO.6748/2004 urging two contentions, namely, their share of liability should have been far less than 55% and the rates of compensation fixed were excessive.

19. At the outset it should be noted that the causes for the calamity have been very exhaustively considered by the High Court and it has recorded a categorical finding about the negligence and the liability on the part of the licensee and the DVB. On the examination of the records, we agree with the High Court that such a catastrophic incident would not have happened if the parapet wall had not been raised to the roof level. If the said wall had not been raised, the fumes would have dispersed in the atmospheric air. Secondly if one of the exits in the balcony had not been blocked by construction of an owner's box and if the right side gangway had not been closed by fixing seats, the visitors in the balcony could have easily dispersed through the other gangway and exit into the unaffected staircase. Thirdly if the cars had not been parked in the immediate vicinity of the transformer room and appropriate pit had been made for draining of transformer oil, the oil would not have leaked into the passage nor would the burning oil lighted the cars, as the fire would have been restricted only to the transformer room. Even if one of the three causes for which the theatre owner was responsible, was absent, the calamity would not have occurred. The Licensee could not point out any error in those findings. Ultimately therefore the contention of the licensee before us was not to deny liability but only to reduce the quantum of liability fastened by the High Court and to increase the share of the liability of the three statutory authorities. DVB, as noticed above, has not challenged the decision of the High Court. Therefore, we do not propose to reconsider and re-examine or re-assess the material considered and the finding recorded with reference to the Licensee and DVB. Therefore the incident is not disputed. The deaths and injuries are not in dispute. The identity of persons who died and who were injured is not in dispute. The fact that the Licensee and DVB are responsible is not in dispute. The limited questions that arise are whether the MCD and the Licensing Authority could have been made liable to pay compensation and whether the percentage of liability of the Licensee should be reduced from 55%.

20. On the contentions urged the following questions arise for consideration:

(i) Whether MCD and Licensing Authority could be made liable to pay compensation to the victims?

(ii) What should be apportionment of liability?

(iii) Whether compensation awarded is excessive?

(iv) Whether award of punitive damages of Rs.2.5 crores against the Licensee was justified?

We will deal with questions (i) and (ii) together and questions (iii) and (iv) together as they are interconnected.

Contentions of MCD

21. MCD submitted that the writ petition focuses on the violations by the licensee, the negligence on the part of the DVB, Fire Force and the licencing authority; no specific role assigned to the MCD in regard to the incident; that the writ petition deals with the responsibilities of the owners (licensees) (paras 2 to 6 and 15); Delhi Vidyut Board (para 7); licencing authority - Delhi Police (paras 8 to 14) and seeks to make them liable. The role of Delhi Fire Services (para 16) is referred. Role of Licensing Authority, Delhi Police (para 17), role of medical facilities managed by health authorities (paras 18 to 20) and the cover-up operations by the owners and the role of the licensing authority; that except a general averment that various instrumentalities of State including MCD are liable to pay damages, no specific averment of allegation has been made against MCD. It is also submitted that Mr. Naresh Kumar, Deputy Commissioner (South) NCT who was appointed by the Lt. Governor immediately after the incident to conduct an enquiry, had submitted a report which also primarily deals with the omissions and commissions of the Licensee, the Licencing Authority, Delhi Fire Force, Delhi Vidyut Board and does not fix any specific responsibility on MCD. Similarly the report of the Commissioners appointed by the Delhi High Court (consisting of an Advocate and Professors from engineering institutions) submitted its report dated 30.11.2000 which also does not fix any liability on MCD.

22. MCD next pointed out that even the impugned judgment of Delhi High Court while exhaustively covering the roles of the Licensee, Vidyut Board, the licensing authority, Delhi Fire Force, makes only a passing reference to MCD. The High Court holds MCD liable only on the ground that it did not take any action in regard to the unauthorised raising of parapet wall adjoining the transformer from three feet height to roof level. According to Delhi High Court on account of the raising of the height of the parapet wall in the year 1973, the noxious fumes/ smoke from the burning of the transformer oil, diesel and the fuel in the tanks of the cars and the burning of cars themselves could not escape into open atmosphere, and as a consequence, the noxious fumes and smoke funneled into the stairwell to reach the air-conditioning ducts providing air-conditioning to the balcony and the landing near the balcony exit, resulting in asphyxiation of 57 patrons. It is submitted that except the reference to the parapet wall there is absolutely no reference to the role of the MCD. It is contended that in 1973 it had no role to play to check the construction as at that time, it was the responsibility of the Executive Engineer, PWD. And by the time it came into the picture in 1994 replacing the Executive Engineer, PWD, the structure was in existence for more than two decades and therefore there was no question of MCD objecting to the said wall.

23. MCD submitted that it could easily demonstrate from the relevant enactment and Rules that it had no role to play in regard to the raising the height of the parapet wall by the theatre owner, nor any liability for such action by the theatre owner and as a consequence they should have been exonerated. It was pointed out that under the Cinematograph Act the Licensing Authority grants a cinematograph licence enabling a theatre owner to run cinema shows in the theatre. The Cinematographic Rules, 1953 contemplated the licensing authority obtaining clearances/consents from the Executive Engineer PWD and Electrical Inspector. Even the Delhi Cinematographic Rules of 1983 contemplated certificates/consents being obtained by the Licensing Authority from the Public Works Department,

Electrical Inspector and Chief Fire Officer every year before renewing the licence. Even in regard to the design and construction of the cinema theatre, the rules under the Cinematographic Act applied and prevailed and the municipal bye-laws did not contain any provision as to the construction of cinema theatre but on the other hand, clearly provided that the matter will be governed by the Cinematograph Rules. Thus, the MCD had no role to play either in construction of the cinema theatre or in the grant of licence or periodical renewal thereof. It was only on 3.5.1994 by virtue of amendment of the Delhi Cinematography Rules, 1981, substituted in place of the Executive Engineer of PWD, that MCD was required to give a report in regard to the structure/building which was one of the requirements for the licensing authority to grant or renew any cinema licence. From 1994, the limited role of MCD was to furnish a report regarding the structures and whether there were any deviations. But in fact its reports could not even be acted upon by the licensing authority, in view of the order of stay obtained by the Licensee against the licensing authority on 28.6.1983, made absolute on 25.3.1986. In view of such stay, the licensing authority was not issuing any licences but was only granting temporary bi-monthly permits for running of the theatre. Even the report given by the MCD pointing out the various defects/violations was not of any assistance to the Licensing Authority. This was because in the year 1993 itself, the licensing authority had made an application for vacating the interim stay but on account of the time taken by the Licensees for filing objections thereto and thereafter for hearing, the application was not heard even on the date of the incident and thereafter the entire matter became infructuous. In the circumstances it is submitted that the MCD had no role to play even in the matter of inspection and giving of reports regarding condition of the premises.

24. As far as the parapet wall is concerned it is contended that it had not sanctioned any plan for increasing the height of the parapet wall from 3 ft. to roof level. It was contended even if it granted any licence for construction or given any report or no objection certificate, in exercise of its statutory functions, it

could not be made liable for any compensation on the ground of grant of such licence or NOC or report in regard to the parapet wall, as no knowledge can be attributed to the Corporation about the possible consequences of raising the height of parapet wall.

25. Lastly it was contended by MCD that when in exercise of its statutory powers of regulating the constructions of buildings within its jurisdictional area or in complying with the request of the Licensing Authority for any report as per Cinematograph Rules, it acts bona fide and in accordance with the relevant rules and bye-laws, in the absence of malafides, it can not be made liable even if there were any errors or irregularities or violations. It was submitted that it cannot also be made liable for any violation by the theatre owner in putting up the construction in accordance with the plan sanctioned by the MCD or any violation of the rules or licence terms or negligence in running the cinema theatre.

26. It was contended by the victims Association that the liability of the Municipal Corporation arises from the fact that it was one of the authorities which was required to give Reports/ No Objection Certificates (NOCs) to the licensing authority every year, for construction and grant of renewal of licence. As admitted by the MCD itself the responsibility of granting a certificate in regard to the condition of the structure of the building and the violations in construction thereof was entrusted to the MCD on 3.5.1994. It was contended that if the Municipal Corporation had discharged its functions as was expected of them by thorough inspection of the theatre building and pointed out to the licensing authority any violations or deviations or unauthorised constructions, the temporary permit for running the theatre which was being issued by the licensing authority, could have been stopped and the calamity could have been averted. It was pointed out that on the other hand, when the Licensing Authority sought its report/NOC, by its communication dated 11.3.1996, seeking inspection and report, MCD represented by its Administrative Officer sent a report dated 25.9.1996 to the Deputy Commissioner of Police, (Licensing Authority)

stating that it had no objection for the renewal of annual Cinematograph licence of the Uphaar Theatre. It was submitted that the purpose of seeking a No Objection Certificate from the Municipal Corporation was not an empty formality; and that if statutory authorities like MCD, ignore the relevance and importance of such no objection certificate and routinely grant such certificates, as if it is a formality to be complied with mechanically, the licensing process would become a mockery. It was contended that statutory authorities like MCD should function diligently relating to public safety and if they fail to do so, they should be liable for the consequences.

27. We agree with the MCD that it had no role to play in regard to increasing the height of the parapet wall. The sanction for licence to construction granted in 1972 was in regard to a three feet high parapet wall. The height of the said wall was increased by the Theatre owners in or about 1973. The MCD was not the inspecting authority till 1994. There was no structural change, modification or deviation after 1994. When MCD inspected the theatre, it would have seen a theatre which was running for more than 20 years and that there was no recent change. In the circumstances, MCD cannot be found fault with for not complaining about the wall.

28. The Delhi Cinematographic Rules, 1981 as originally framed had no role for MCD in the grant of licences by the licensing authority. Rule 14 provided that before granting or renewing an annual licence the Licensing Authority shall call upon: (i) the Executive Engineer, PWD, to examine the structural features of the building and report whether the rules thereto had duly been complied with; (ii) the Electrical Inspector to examine the electrical equipments used in the building and report whether they complied with the requirements of the Electricity Act and the Rules thereunder and whether all precautions had been taken to protect the spectators and employees from electric shock and to prevent the introduction of fire in the building through the use of electrical equipments; and (iii) the Chief Fire Officer to ensure that proper means of escape and safety against fire and to report whether proper fire

extinguishers appliances have been provided. All defects revealed by such inspections were required to be brought to the notice of the licensee and the licensing authority who may refuse to grant or renew the licences unless and until they are remedied to its satisfaction. In fact even for granting a temporary licence, Rule 15 required the licensing authority to call upon the Executive Engineer, PWD, to inspect the building and report whether it is structurally safe for cinematographic exhibition. The said rules were amended by Cinematograph Amendment Rules, 1994 by notification dated 3.5.1994. By virtue of the said amendment wherever the term 'Executive Engineer' appeared it was to be substituted by the words 'concerned local body'. The term concerned local body was also defined as referring to MCD, DDA, NDMC, Cantonment Board, as the case may be in whose jurisdiction the place of cinematographic exhibition was situated. Therefore on and after 3.5.1994, the report/certificate of the MCD about the structural features of the building and whether the Rules in that behalf had been duly complied with, was a condition precedent for renewing the annual license or even granting a temporary lease by the licensing authority. This showed that as far as the structural features and deviations and defects, the Licensing Authority relied upon the MCD, for expert opinion after 3.5.1994. The question is whether MCD can be made liable to compensate the victims of the fire tragedy, on the ground that it was required to give an inspection report or on the ground that it gave a no objection certificate on 25.9.1996 for renewal of licence for 1996-97.

Contentions of the Licensing Authority

29. The Licensing Authority contended that the High Court committed an error in holding it responsible for having contributed to the spreading of fire and smoke by its acts of omission and commission and consequently making it liable to pay compensation. The licence was granted initially in the year 1973. At that time the District Magistrate was the licensing authority. The power to grant licence and renew it yearly was transferred from the District Magistrate to the Deputy

Commissioner of Police (Licensing) on 25.3.1986. The licensing authority was not an expert on Cinema Theatres nor technically qualified to assess whether a licence of a cinema theatre should be renewed or not. He was required to obtain the reports/NOCs from the PWD (from MCD from the year 1994), Fire Force and Electrical Inspector. On the basis of such reports and on personal inspections, the licensing authority was required to consider and decide whether a theatre owner was entitled to a licence or renewal of licence to exhibit cinematograph films in the theatre. The Licensing Authority was empowered to cancel the licence or refuse to renew it (if he was considering an application for renewal) if the applicant for licence did not fulfill the requirements. The theatre owners had filed a writ petition and obtained an interim order of stay in the year 1983 against the cancellation/suspension of their cinematographic licence. While making the interim order absolute on 25.3.1986, the High Court had made it clear that if there were any violations by the theatre owner, the licensing authority was at liberty to take such steps as were necessary to ensure that the violations or deviations were set right. The said interim order made it clear that if there were any violations, he can also move the High Court for vacating the interim order. The Licensing Authority moved an application on 19.4.1993 citing several serious violations committed by the licensee. But the High Court did not vacate the stay. Therefore the Licensing Authority had to issue temporary licences inspite of any irregularities. Therefore the Licensing Authority could not be held responsible.

30. While sparking in the Delhi Vidyut Board transformer due to negligence in maintenance, started the fire, the impact of this fire would not have been so tragic, (i) if the cars not been parked in front of and very close to the transformer in a haphazard manner; (ii) if adequate exits had been provided on both sides of the balcony; (iii) if the owners of the theatre had not closed top right exit of the balcony to provide a private box for the owners resulting in an exit only on one side of the balcony; (iv) if the owners had not constructed an illegal wall

the poisonous fumes would not have been funneled towards the balcony; and as every second's delay in exiting to safer environment was vital, if the exits been located on both sides of the balcony, precious minutes would have been saved in getting out and loss of several innocent lives avoided. It should be remembered that none of the patrons from the main hall (ground floor) of the cinema died or were injured. Even those who were on the second floor escaped. It was only the occupants of the balcony who were affected and the deaths were due to asphyxiation on account of the noxious fumes/ smoke. The theatre owner and DVB have been held liable. The question is whether the Licensing Authority and MCD can be held liable for improper discharge of statutory functions.

The Legal position :

31. In *Rabindra Nath Ghosal Vs. University of Calcutta and Ors*. - (2002) 7 SCC 478 this Court held:

> "The Courts having the obligation to satisfy the social aspiration of the citizens have to apply the tool and grant compensation as damages in a public law proceedings. Consequently when the Court moulds the relief in proceedings under Articles 32 and 226 of the Constitution seeking enforcement or protection of fundamental rights and grants compensation, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizens. ***But it would not be correct to assume that every minor infraction of public duty by every public officer would commend the Court to grant compensation in a petition under Articles 226 and 32 by applying the principle of public law proceeding. The Court in exercise of extraordinary power under Articles 226 and 32 of the Constitution, therefore, would not award damages against public authorities merely because they have made some order which turns out to be ultra vires, or there has been some inaction in the performance of the duties unless there***

is malice or conscious abuse. Before exemplary damages can be awarded it must be shown that some fundamental right under Article 21 has been infringed by arbitrary or capricious action on the part of the public functionaries and that the sufferer was a helpless victim of that act."

(emphasis supplied)

This Court in *Rajkot Municipal Corporation v. M.J. Nakum* (1997) 9 SCC 552 dealing with a case seeking damages under law of torts for negligence by municipality, held as follows:

"The conditions in India have not developed to such an extent that a Corporation can keep constant vigil by testing the healthy condition of the trees in the public places, road-side, highway frequented by passers-by. There is no duty to maintain regular supervision thereof, though the local authority/other authority/owner of a property is under a duty to plant and maintain the- tree. The causation for accident is too remote. Consequently, there would be no Common Law right to file suit for tort of negligence. It would not be just and proper to fasten duty of care and liability for omission thereof. It would be difficult for the local authority etc. to foresee such an occurrence. Under these circumstances, it would be difficult to conclude that the appellant has been negligent in the maintenance of the trees planted by it on the road-sides."

In *Geddis v. Proprietors of Bonn Reservoir* (1878) 3 Appeal Cases 430, the House of Lords held:

"For I take it, without citing cases, that is now thoroughly well established that ***no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to anyone;*** but an action does lie for doing that which the legislature has authorized, if it be done 'negligently."

In *X (Minors) v. Bedfordshire County Council* [(1995) 3

All ER 353] the House of Lords held that in cases involving enactments providing a framework for promotion of social welfare of the community, it would require exceptionally clear language to show a parliamentary intention that those responsible for carrying out the duties under such enactment should be liable in damages if they fail to discharge their statutory obligations. It was held:

"….a common law duty of care cannot be imposed on a statutory duty if the observance of such a common law duty of care would be inconsistent with or have a tendency to discourage the due performance of the statutory duties by the local authority."

In *R v. Dy Governor of Parkhurst Prison* (Ex.P.Hague) – [(1991) 3 All ER 733], the House of Lords held that the legislature had intended that the Prisons Act, 1952 should deal with the administration and management of prisons, but had not intended to confer on prisoners a cause of action in damages. The Prison Rules 1964 were regulatory in nature to govern prison regime, but not to protect prisoners against loss, injury, or damage nor to give them any right of action.

In *John Just v. Her Majesty The Queen* — (1989) 2 SCR 1228, the Canadian Supreme Court considered the question whether the department of Highways is liable for payment of damages to a person who was hit by a boulder on a highway on the ground it was duty of the department to maintain the highway in a safe and secure manner. The Canadian Supreme Court held:

"Prior to the accident the practice had been for the Department of Highways to make visual inspections of the rock cuts on Highway. These were carried out from the highway unless here was evidence or history of instability in an area in which case the rock engineer would climb the slope. In addition there were numerous informal inspections carried out by highway personnel as they drove along the road when they would look for signs of change in the rock cut and for rocks in the ditch…....In order for a

private duty to arise in this case, the plaintiff would have to establish that the Rockwork Section, having exercised its discretion as to the manner or frequency of inspection, carried out the inspection without reasonable care or at all. There is no evidence or indeed allegation in this regard……I would therefore dismiss the appeal."

(emphasis supplied)

In *Roger Holland v. Government of Saskatchewan & Ors*. (2008) 2 SCR 551 the Canadian Supreme Court held:

"The law to date has not recognized an action for negligent breach of statutory duty. It is well established that mere breach of a statutory duty does not constitute negligence: The Queen in *right of Canada* v. *Saskatchewan Wheat Pool* (1983) 1 SCR 205. The proper remedy for breach of statutory duty by a public authority, traditionally viewed, is judicial review for invalidity."

In *Union of India v. United India Insurance Co.Ltd*. – (1997) 8 SCC 683 this Court held:

"…….But in East Suffolk Rivers Catchment Board v. Kent 1941 AC 74, Lord Romer had stated:

Where a statutory authority is entrusted with a mere power it cannot be made liable for any damage sustained by a member of the public by reason of its failure to exercise that power.

In *Anns v.Merton London Borough* [1977 (2) All ER 492] this principle was somewhat deviated from. As stated earlier the plaintiff in *Anns* had sued for losses to flats in a new block which had been damaged by subsidence caused by inadequate foundations. The contention that the Council was negligent in the exercise of statutory powers to inspect foundations of new buildings giving rise to a claim for economic damage suffered was upheld. This principle was however not accepted in Murphy to the extent

economic looses were concerned. According to Lord Hoffman, Anns was not overruled in *Murphy Brentwood District Council* [1990 (2) All ER 908] so far as physical injury resulting from omission to exercise statutory powers was concerned (p. 410). A duty of care at common law can be derived from the authority's duty in public law to give proper consideration to the question" whether to exercise power or not (p.411). ***This public law duty cannot by itself give rise to a duty of care. A public body almost always has a duty in public law to consider whether it should exercise its powers but that did not mean that it necessarily owed a duty of care which might require that the power should be actually exercised. A mandamus could require future consideration of the exercise of a power. But an action for negligence looked back at what the authority ought to have done***. Question is as to when a public law duty to consider exercise of power vested by statute would create a private law duty to act, giving rise to a claim for compensation against public funds '(p. 412). One simply cannot derive a common law "ought" from a statutory "may". The distinction made by Lord Wilberforce in *Anns* between 'policy' and 'operations' is an inadequate tool with which to discover whether it was appropriate to impose a duty of care or not. But leaving that distinction, it does not always follow that the law should superimpose a common law duty of care upon a discretionary statutory power (p.413). *Apart from exceptions relating to individual or societal reliance on exercise of statutory power, - it is not reasonable to expect a service to be provided at public expense and also a duty to pay compensation for loss occasion by failure to provide the service. An absolute rule to provide compensation would increase the burden on public funds.*

(emphasis supplied)

32. It is evident from the decision of this Court as also the decisions of the English and Canadian Courts that it is not proper to award damages against public authorities merely

because there has been some inaction in the performance of their statutory duties or because the action taken by them is ultimately found to be without authority of law. In regard to performance of statutory functions and duties, the courts will not award damages unless there is malice or conscious abuse. The cases where damages have been awarded for direct negligence on the part of the statutory authority or cases involving doctrine of strict liability cannot be relied upon in this case to fasten liability against MCD or the Licensing Authority. The position of DVB is different, as direct negligence on its part was established and it was a proximate cause for the injuries to and death of victims. It can be said that in so far as the licensee and DVB are concerned, there was contributory negligence. The position of licensing authority and MCD is different. They were not the owners of the cinema theatre. The cause of the fire was not attributable to them or anything done by them. Their actions/omissions were not the proximate cause for the deaths and injuries. The Licensing Authority and MCD were merely discharging their statutory functions (that is granting licence in the case of licensing authority and submitting an inspection report or issuing a NOC by the MCD). In such circumstances, merely on the ground that the Licensing Authority and MCD could have performed their duties better or more efficiently, they cannot be made liable to pay compensation to the victims of the tragedy. There is no close or direct proximity to the acts of the Licensing Authority and MCD on the one hand and the fire accident and the death/injuries of the victims. But there was close and direct proximity between the acts of the Licensee and DVB on the one hand and the fire accident resultant deaths/injuries of victims. In view of the well settled principles in regard to public law liability, in regard to discharge of statutory duties by public authorities, which do not involve malafides or abuse, the High Court committed a serious error in making the licensing authority and the MCD liable to pay compensation to the victims jointly and severally with the Licensee and DVB.

33. We make it clear that the exoneration is only in regard to monetary liability to the victims. We do not disagree with the

observations of the High Court that the performance of duties by the licensing authority and by MCD (in its limited sphere) was mechanical, casual and lackadaisical. There is a tendency on the part of these authorities to deal with the files coming before them as requiring mere paper work to dispose it. They fail to recognize the object of the law or rules, the reason why they are required to do certain acts and the consequences of non-application of mind or mechanical disposal of the application/requests which come to them. As rightly observed by Naresh Kumar's report, there is a lack of safety culture and lack of the will to improve performance. The compliance with the procedure and rules is mechanical. We affirm the observations of the High Court in regard to the shortcoming in the performance of their functions and duties by the licensing authority and to a limited extent by MCD. But that does not lead to monetary liability.

Re: Questions (iii) and (iv)

34. The licensee argued that the entire liability should be placed upon the DVB. It was contended that DVB have installed a transformer of a capacity of 1000 KV without obtaining the statutory sanction/approval and without providing all the safety measures which it was duty bound to provide under the relevant Electricity Rules, and therefore, DVB alone should be responsible for the tragedy. This contention has no merit. In fact none in the main hall (ground floor of the theatre) died. Those on the second floor also escaped. It is only those in the balcony caught in noxious fumes, who died of asphyxiation. The deaths were on account of the negligence and greed on the part of the licensee in regard to installation of additional seats, in regard to closing of an exit door, parking of cars in front of transformer room by increasing parking from 15 to 35 and other acts. We therefore reject the contention that DVB should be made exclusively liable to pay the compensation. We have already held that the Licensing Authority and MCD are not liable. Therefore, the liability will be 85% (Licensee) and 15% (DVB).

35. We may next consider whether the compensation

awarded in this case is proper and in accordance with the principles of public law remedy. As noticed above, the High Court has awarded compensation to the legal heirs of 57 deceased victims at the rate of Rs.18 lakhs where the deceased was aged more than 20 years and Rs.15 lakhs where the deceased was aged 20 years or less. It awarded Rs.1 lakh for each of the 103 injured. In regard to the death cases, the High Court adopted the following rationale : Each person who was sitting in the balcony class where the rate of admission was Rs.50 per ticket, can be assumed to belong to a strata of society where the monthly income could not be less than Rs.15,000. Deducting one-third for personal expenses, the loss of dependency to the family would be Rs.10,000 p.m. or Rs.120,000/- per annum. Applying a common multiplier of 15 in all cases where the deceased was more than 20 years, the compensation payable would be Rs.18 lakhs. The High Court deducted Rs.3 lakhs and awarded compensation at a flat rate of Rs.15,00,000/- where the deceased was 20 years or less. The High Court also awarded interest at 9% per annum on the compensation amount from the date of filing of the writ petition (14.7.1997) to the date of payment.

36. Having awarded the said amounts the High Court proceeded to hold as follows :

> "97. We have arrived at the compensation on the basis of our estimation of the income of the victims of the unfortunate incident as we had no means to know their exact income. We, therefore, leave it open to the injured as well as relatives of the deceased to claim compensation based on the exact income of the victims by filing a suit or any other proceeding as may be permissible in law and if a suit or any other proceedings claiming such compensation are initiated within one year of this judgment, the same shall not be dismissed only on the ground of limitation. The amount directed by us to be payable under this judgment shall be **adjusted** against the amount which may ultimately be granted in favor of such persons in the proceedings mentioned above."

37. The contention of the Licensee is what could be awarded as a public law remedy is only a nominal interim or palliative compensation and if any claimants (legal heirs of the deceased or any injured) wanted a higher compensation, they should file a suit for recovery thereof. It was contended that as what was awarded was an interim or palliative compensation, the High Court could not have assumed the monthly income of each adult who died as being not less than Rs.15,000 and then determining the compensation by applying the multiplier of 15 was improper. This gives rise to the following question : Whether the income and multiplier method adopted to finally determine compensation can be arrived while awarding tentative or palliative compensation by way of a public law remedy under Article 226 or 32 of the Constitution?

(37.1) *Rudul Sah vs. State of Bihar* [1983 (4) SCC 141] was one of the earliest decisions where interim compensation was awarded by way of public law remedy in the case of an illegal detention. This Court explained the rationale for awarding such interim compensation thus:

> "This order will not preclude the petitioner from bringing a suit to recover appropriate damages from the state and its erring officials. The order of compensation passed by us is, as we said above, in the nature of a palliative. We cannot leave the petitioner penniless until the end of his suit, the many appeals and the execution proceedings. A full-dressed debate on the nice points of fact and law which takes place leisurely in compensation suits will have to await the filing of such a suit by the poor Rudul Sah."

(37.2) In *Nilabati Behera alias Lalita Behera vs. State of Orissa* [1993 (2) SCC 746] this court observed :

> "Therefore, when the court moulds the relief by granting "compensation" in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty

to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrong doer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law."

(37.3) In *Sube Singh vs. State of Haryana* [2006 (3) SCC 178] this court held:

"It is now well-settled that award of compensation against the State is an appropriate and effective remedy for redressal of an established infringement of a fundamental right under Article 21, by a public servant. The quantum of compensation will, however, depend upon the facts and circumstances of each case. Award of such compensation (by way of public law remedy) will not come in the way of the aggrieved person claiming additional compensation in a civil court, in the enforcement of the private law remedy in tort, nor come in the way of the criminal court ordering compensation under Section 357 of Cr. PC. Award of compensation as a public law remedy for violation of the fundamental rights enshrined in Article 21 of the Constitution, in addition to the private law remedy under the law of torts, was evolved in the last two-and-a-half decades."

38. Therefore what can be awarded as compensation by way of public law remedy need not only be a nominal palliative amount, but something more. It can be by way of making monetary amounts for the wrong done or by way of exemplary

damages, exclusive of any amount recoverable in a civil action based on tortuous liability. But in such a case it is improper to assume admittedly without any basis, that every person who visits a cinema theatre and purchases a balcony ticket should be of a high income group person. In the year 1997, Rs.15,000 per month was rather a high income. The movie was a new movie with patriotic undertones. It is known that zealous movie goers, even from low income groups, would not mind purchasing a balcony ticket to enjoy the film on the first day itself. To make a sweeping assumption that every person who purchased a balcony class ticket in 1997 should have had a monthly income of Rs.15,000 and on that basis apply high multiplier of 15 to determine the compensation at a uniform rate of Rs.18 lakhs in the case of persons above the age of 20 years and Rs.15 lakhs for persons below that age, as a public law remedy, may not be proper. While awarding compensation to a large group of persons, by way of public law remedy, it will be unsafe to use a high income as the determinative factor. The reliance upon *Neelabati Behera* in this behalf is of no assistance as that case related to a single individual and there was specific evidence available in regard to the income. Therefore the proper course would be to award a uniform amount keeping in view the principles relating to award of compensation in public law remedy cases reserving liberty to the legal heirs of deceased victims to claim additional amount wherever they were not satisfied with the amount awarded. Taking note of the facts and circumstances, the amount of compensation awarded in public law remedy cases, and the need to provide a deterrent, we are of the view that award of Rs.10 lakhs in the case of persons aged above 20 years and Rs.7.5 lakhs in regard to those who were 20 years or below as on the date of the incident, would be appropriate. We do not propose to disturb the award of Rs.1 lakh each in the case of injured. The amount awarded as compensation will carry interest at the rate of 9% per annum from the date of writ petition as ordered by the High Court, reserve liberty to the victims or the LRs. of the victims as the case may be to seek higher remedy wherever they are not satisfied with the compensation.

Any increase shall be borne by the Licensee (theatre owner) exclusively.

39. Normally we would have let the matter rest there. But having regard to the special facts and circumstances of the case we propose to proceed a step further to do complete justice. The calamity resulted in the death of 59 persons and injury to 103 persons. The matter related to a ghastly fire incident of 1997. The victims association has been fighting the cause of victims for more than 14 years. If at this stage, we require the victims to individually approach the civil court and claim compensation, it will cause hardship, apart from involving huge delay, as the matter will be fought in a hierarchy of courts. The incident is not disputed. The names and identity of the 59 persons who died and 103 persons who were injured are available and is not disputed. Insofar as death cases are concerned the principle of determining compensation is streamlined by several decisions of this court. (See for example *Sarla Verma v. Delhi Transport Corporation* (2009) 6 SCC 121. If three factors are available the compensation can be determined. The first is the age of the deceased, the second is the income of the deceased and the third is number of dependants (to determine the percentage of deduction for personal expenses). For convenience the third factor can also be excluded by adopting a standard deduction of one third towards personal expenses. Therefore just two factors are required to be ascertained to determine the compensation in 59 individual cases. First is the annual income of the deceased, two third of which becomes the annual loss of dependency the age of the deceased which will furnish the multiplier in terms of *Sarla Verma*. The annual loss of dependency multiplied by the multiplier will give the compensation.

40. As this is a comparatively simple exercise, we direct the Registrar General of Delhi High Court to receive applications in regard to death cases, from the claimants (legal heirs of the deceased) who want a compensation in excess of what has been awarded that is Rs.10 lakhs/Rs.7.5 lakhs. Such applications should be filed within three months from today. He

shall hold a summary inquiry and determine the compensation. Any amount awarded in excess of what is hereby awarded as compensation shall be borne exclusively by the theatre owner. To expedite the process the concerned claimants and the Licensee with their respective counsel shall appear before the Registrar without further notice. For this purpose the claimants and the theatre owner may appear before the Registrar on 10.1.2012 and take further orders in the matter. The hearing and determination of compensation may be assigned to any Registrar or other Senior Judge nominated by the Learned Chief Justice/Acting Chief Justice of the Delhi High Court. As far as the injured are concerned if they are not satisfied with the sum of Rs.1 lakh which has been awarded it is open to them to approach the civil court for claiming higher compensation and if they do so within 3 months from today, the same shall be entertained and disposed of in accordance with law. It is not possible to refer the injury cases for summary determination like death cases, as the principles are different and determination may require a more detailed enquiry.

Re: Punitive damages

41. We may next deal with the question of award of punitive damages of Rs.2,50,00,000/- against the licensee. Before examining whether such punitive damages could be awarded at all, we have to notice the apparent mistake in arriving at the sum of Rs.2.5 crores. The High Court has stated that the licensee should be made liable to pay punitive damages to the extent of profit which it would have earned by selling tickets in regard to extra seats unauthorisedly and illegally sanctioned by the authorities and installed by the Licensee. The High Court has not stated the arithmetical calculation of arriving at Rs.2,50,00,000/- but it has indicated that the said sum has been assessed as the income earned by them by selling tickets for additional 250 seats between 1979 and 1996. The High Court has apparently calculated the ticket revenue at the rate of Rs.50/- per ticket for 52 additional seats for three shows a day to arrive at a sum of Rs.7,800/- per day. For 17 years, this works out to Rs. Rs.4,83,99,000/-. Presumably, the High Court

deducted Rs. Rs.2,33,99,000/- towards entertainment tax etc., to arrive at Rs.2.5 crores as profit from these additional seats. Initially the seats were 250. Forty three additional seats were sanctioned on 30.9.1976. Subsequently, the additional seats were cancelled. However, the Delhi High Court permitted the continuance of such number of seats which were permissible as per Rules. Therefore, all the 52 seats cannot be held to be illegal. What were illegal seats were the 15 seats that were added by securing an order dated 4.10.1980. The remaining 37 seats were found to be valid by the authorities. Therefore, if at all the licensee is to be made liable to reimburse the profits earned from illegal seats, it should be only in regard to these 15 seats and the eight seats in the Box which was the cause for closing one of the exits. In so far as the eight seats in the owner's box, though it is alleged that they were intended to be used only as complimentary seats, for the purpose of award of punitive damages, they are treated at par with other balcony seats. The High Court also wrongly assumed that the ticket value to be Rs.50/- from 1979 to 1996, because it was Rs.50/- in the year 1997 for a balcony seat. Another erroneous assumption made is that for all shows on all the days, all these additional seats would be fully occupied. On a realistic assessment, (at a net average income of Rs.12/- per seat with average 50% occupancy for 23 seats) the profits earned from these seats for 17 years would at best Rs.25,00,000/-. Be that as it may.

42. We may next consider the appropriateness and legality of award of punitive damages. In this context, we may refer to the decision in *M C Mehta vs. Union of India* – 1987 (1) SCC 395 wherein this Court considered the question as to what should be the measure of liability of an enterprise which is engaged in a hazardous or inherently dangerous industry, if by reason of an accident occurring in such industry, persons die or are injured. This Court held:

> "…In a modem industrial society with highly developed scientific knowledge and technology where hazardous or inherently dangerous industries are necessary to carry out

> part of the developmental programme. This rule evolved in the 19th Century at a time when all these developments of science and technology had not taken place cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the needs of the present day economy and social structure. We need not feel inhibited by this rule which was evolved in this context of a totally different kind of economy. Law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic developments taking place in the country. As new situations arise the law has to be evolved in order to meet the challenge of such new situations. Law cannot afford to remain static. We have to evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialized economy. We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that in any other foreign country. We no longer need the crutches of a foreign legal order. We are certainly prepared to receive light from whatever source it comes but we have to build up our own jurisprudence and we cannot countenance an argument that merely because the new law does not recognise the rule of strict and absolute liability in cases of hazardous or dangerous liability or the rule as laid down in *Rylands v. Fletcher* as is developed in England recognises certain limitations and responsibilities. We in India cannot hold our hands back and I venture to evolve a new principle of liability which English courts have not done. We have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future on account of hazardous or inherently dangerous industries which are concomitant to an industrial economy, there is no reason why we should hesitate to evolve such principle of liability merely because it has not been so done in England. We are of the view that an enterprise which is engaged in a hazardous or

inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part……

….Such hazardous or inherently dangerous activity for private profit can be tolerated only on condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not. This principle is also sustainable on the ground that the enterprise alone has the resource to discover and guard against hazards or dangers and to provide warning against potential hazards. We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in *Rylands v. Fletcher* (supra).

We would also like to point out that the measure of compensation in the kind of cases referred to in the

preceding paragraph must be correlated to the magnitude and capacity *of the enterprise because such compensation must have deterrent effect.* The larger and more prosperous the enterprise the greater must be the amount of compensation payable by it, for the harm caused on account of an accident in carrying on all the hazardous or inherently activity by the enterprise."

43. What has been awarded is not exactly punitive damages with reference to the magnitude or capacity of the enterprise. All that the High Court pointed out was that the Licensee has installed additional seats illegally. That illegality contributed to the cause for the death and injuries, as they slowed down the exiting of the occupant's balcony. If people could have got out faster (which they could have if the gangway was wider as before, and if there had been two exits as before, instead of only one) many would not have died of asphyxiation. Therefore the Licensee is not only liable to pay compensation for the death and injuries, but should, in the least be denied the profits/benefits out of their illegal acts. In that sense it is not really punitive, but a kind of negative restitution. We therefore uphold in principle the liability of the Licensee to return and reimburse the profits from the illegally installed seats, but reduce it from Rs.2.5 crores to Rs.25 lakhs for the reasons stated in the earlier para. The award of the said sum, as additional punitive damages, covers two aspects. The first is because the wrongdoing is outrageous in utter disregard of the safety of the patrons of the theatre. The second is the gravity of the breach requiring a deterrent to prevent similar further breaches.

General observations and suggestions

44. The Parliament has enacted the Disaster Management Act, 2005. Section 1(3) thereof provides that it shall come into force on such dates as the Central Government may by notification in the Official Gazette appoint; and different dates may be appointed for different provisions of the Act for different States, and any reference to commencement in any provisions of the Act in relation to any State shall be construed as a

reference to the commencement of that provision in that State. All the provisions of the Act have not been brought into effect in all the States. Having regard to the object of the Act, bringing the Act into force promptly would be in public interest. In so far as Delhi is concerned, by notification dated 19.3.2008, the Government of NCT of Delhi has established the Delhi Disaster Management Authority for the national capital territory of Delhi. A disaster management helpline number has been made operational. Emergency operating centre and relief centres have been established, A State Disaster Response Force has been established. Several volunteers have been given training in disaster management. Attempts are being made to hold regular mockdrills in regard to various types of disasters (like earthquakes, flood, fire, road accidents, industrial and chemical disasters, terrorists attacks, gas leaks etc.). Steps are taken to contact the public in regard to several natural and man-made disasters. The key to successfully meeting the consequences of disasters is preparedness. There can be no complacency. Human tendency is to be awake and aware in the immediate aftermath of a disaster. But as the days pass, slowly the disaster management equipment and disaster management personnel allowed to slip away from their readiness. Only when the next disaster takes place, there is sudden awakening. In regard to preparedness to meet disasters there could be no let up in the vigil. The expenditure required for maintaining a high state of alert and readiness to meet disasters may appear to be high and wasteful regarding 'non-disaster periods' but the expenditure and readiness is absolutely must. Be that as it may.

45. While affirming the several suggestions by the High Court, we add the following suggestions to the government for consideration and implementation:

(i) Every licensee (cinema theatre) shall be required to draw up an emergency evacuation plan and get it approved by the licensing authority.

(ii) Every cinema theatre shall be required to screen a short documentary during every show showing the exits, emergency escape routes and instructions as

to what to do and what not to do in the case of fire or other hazards.

(iii) The staff/ushers in every cinema theatre should be trained in fire drills and evacuation procedures to provide support to the patrons in case of fire or other calamity.

(iv) While the theatres are entitled to regulate the exit through doors other than the entry door, under no circumstances, the entry door (which can act as an emergency exit) in the event of fire or other emergency) should be bolted from outside. At the end of the show, the ushers may request the patrons to use the exit doors by placing a temporary barrier across the entry gate which should be easily movable.

(v) There should be mandatory half yearly inspections of cinema theatres by a senior officer from the Delhi Fire Services, Electrical Inspectorate and the Licensing Authority to verify whether the electrical installations and safety measures are properly functioning and take action wherever necessary.

(vi) As the cinema theatres have undergone a change in the last decade with more and more multiplexes coming up, separate rules should be made for Multiplex Cinemas whose requirements and concerns are different from stand-alone cinema theatres.

(vii) An endeavour should be made to have a single point nodal agency/licensing authority consisting of experts in structural Engineering/building, fire prevention, electrical systems etc. The existing system of police granting licences should be abolished.

(viii) Each cinema theatre, whether it is a multiplex or stand-alone theatre should be given a fire safety rating by the Fire Services which can be in green

(fully compliant), yellow (satisfactorily compliant), red (poor compliance). The rating should be prominently displayed in each theatre so that there is awareness among the patrons and the building owners.

(ix) The Delhi Disaster Management Authority, established by the Government of NCT of Delhi may expeditiously evolve standards to manage the disasters relating to cinema theatres and the guidelines in regard to ex gratia assistance. It should be directed to conduct mock drills in each cinema theatre at least once in a year.

Conclusions

46. In view of the foregoing, we dispose of the appeals as follows:

(i) CA Nos.7114-15 of 2003 filed by the Municipal Corporation of Delhi is allowed and that part of the order dated 24.4.2003 of the Delhi High Court holding MCD jointly and severally liable to pay compensation to the victims of the Uphaar Fire tragedy, is set aside.

(ii) CA No.7116 of 2003 filed by the Licensing Authority is allowed and that part of the order dated 24.4.2003 of the Delhi High Court holding the Licensing Authority jointly and severally liable to pay compensation to the victims of the Uphaar Fire tragedy, is set aside.

(iii) The writ petition filed by the Victims Association on behalf of the victims, to the extent it seeks compensation from MCD and Licensing Authority is rejected.

(iv) The licensee (appellant in CA No.6748 of 2004) and Delhi Vidyut Board are held jointly and severally liable to compensate the victims of the Uphaar fire tragedy. Though their liability is joint and several, as between them, the liability shall be 85% on the part the licensee and 15% on the part of DVB.

(v) CA No.6748 of 2004 is allowed in part and the judgment of the High Court is modified as under :

(a) The compensation awarded by the High Court in the case of death is reduced from Rs.18 lacs to Rs.10 lacs (in the case of those aged more than 20 years) and Rs.15 lacs to Rs. 7.5 lacs (in the case of those aged 20 years and less). The said sum is payable to legal representatives of the deceased to be determined by a brief and summary enquiry by the Registrar General (or nominee of learned Chief Justice/Acting Chief Justice of the Delhi High Court).

(b) The compensation of Rs.One lakh awarded by the High Court in the case of each of the 103 injured persons is affirmed.

(c) The interest awarded from the date of the writ petition on the aforesaid sums at the rate of 9% per annum is affirmed.

(d) If the legal representatives of any deceased victim are not satisfied with the compensation awarded, they are permitted to file an application for compensation with supporting documentary proof (to show the age and the income), before the Registrar General, Delhi High Court. If such an application if filed within three months, it shall not be rejected on the ground of delay. The Registrar General or such other Member of Higher Judiciary nominated by the learned Chief Justice/Acting Chief Justice of the High Court shall decide those applications in accordance with paras above and place the matter before the Division Bench of the Delhi High Court for consequential formal orders determining the final compensation payable to them.

(e) The injured victims who are not satisfied with the award of Rs.One lakh as compensation, may

approach the civil court in three months, in which event the claims shall not be dismissed on the ground of delay.

(f) While disbursing the compensation amount, any ex gratia payment by the Central Government/Delhi Government shall not be taken into account. But other payments on account shall be taken note of.

(g) As a consequence, if DVB has deposited any amount in excess it shall be entitled to receive back the same from any amount in deposit or to be deposited.

(h) The punitive damages ordered to be paid by the Licensee, to the Union of India, (for being used for setting up a Central Accident Trauma Centre) is reduced from Rs.2.5 crores to Rs.25 lakhs.

(i) The decisions of the High Court and this Court having been rendered in a public law jurisdiction, they will not come in the way of any pending criminal proceedings being decided with reference to the evidence placed in such proceedings.

K. S. Radhakrishnan J.

1. I fully endorse the reasoning as well as the conclusions reached by my esteemed brother. All the same, I would like to add a few thoughts which occurred to my mind on certain issues which arose for consideration in these matters.

2. Private law causes of action, generally enforced by the claimants against public bodies and individuals, are negligence, breach of statutory duty, misfeasance in public office etc. Negligence as a tort is a breach of legal duty to take care which results in damage or injury to another. Breach of statutory duty is conceptually separate and independent from other related torts such as negligence though an action for negligence can also arise as a result of cursory and malafide exercise of statutory powers. Right of an aggrieved person to sue in ordinary civil courts against the State and its officials and private persons through an action in tort and the principles to

be followed in considering such claims are well settled and require no further elucidation. We are in these appeals concerned with the claims resulting in the death of 59 patrons and injury to 103 patrons in a fire erupted at Uphaar Cinema Theater, South Delhi on 13.6.1997.

3. We are primarily concerned with the powers of the Constitutional Courts in entertaining such monetary claims raised by the victims against the violation of statutory provisions by licensing authorities, licensees, and others affecting the fundamental rights guaranteed to them under the Constitution. Constitutional Courts in such situations are expected to vindicate the parties constitutionally, compensate them for the resulting harm and also to deter future misconduct. Constitutional Courts seldom exercise their constitutional powers to examine a claim for compensation, merely due to violation of some statutory provisions resulting in monetary loss to the claimants. Most of the cases in which Courts have exercised their constitutional powers are when there is intense serious violation of personal liberty, right to life or violation of human rights. But, even in private law remedy against the State and its instruments they claim immunity on the plea that they are discharging sovereign functions, even in cases where there is violation of personal liberty.

4. This Court in *State of Rajasthan v. Vidyawati* AIR 1962 SC 933, rejected claim of the State sovereign immunity and upheld the award of compensation in tort for the death of a pedestrian due to the rash and negligent driving of a Government jeep. In *Kasturi Lal v. State of U.P.* AIR 1965 SC 1039, drawing distinction between sovereign and non-sovereign functions, the apex Court rejected the plea of arrest in violation of the U.P. Police Regulation on the ground that the arrest was made as a part of the sovereign powers of the State. Kasturi Lal was a Constitution Bench judgment. However, in *N. Nagendra Rao v. State of A.P.*, AIR 1994 SC 2663, a three Judge Bench of this Court drew a distinction between the sovereign and non sovereign functions of the State and held as follows:-

"No legal or political system today can place the State above "Law" as it is unjust and unfair for a citizen to be deprived of his property illegally when negligent act by the officers of the State without any remedy. From sincerity, efficiency and dignity of the State as a juristic person, propounded in the nineteenth century as sound sociological basis for State immunity, the circle has gone round and the emphasis is now more on liberty, equality and the rule of law. The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government on a par with any other juristic legal entity. Any watertight compartmentalization of the functions of the State as "sovereign and non-sovereign" or "governmental and non-governmental" is not sound. It is contrary to modern jurisprudential thinking. The need of the State to have extraordinary powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for the sake of the society and the people, the claim of a common man or ordinary citizen cannot be thrown out, merely because it was done by an Officer of the State even though it was against law and negligent. Needs of the State; duty of its officials and right of the citizens are required to be reconciled, so that the rule of law in a Welfare State is not shaken".

The Court further held:

"The determination of vicarious liability of the State being linked with the negligence of his officers, if they can be sued personally for which there is no dearth of authority and law of misfeasance in discharge of public duty having marched ahead, there is no rationale for the proposition that even if the officer is liable, the State cannot be sued."

5. The Court further opined that the ratio of *Kasturi Lal* is available to those rare and limited cases where the statutory authority acts as a delegate of such functions for which it cannot be sued in a court of law. The court opined that the same principle would not be available in large number of other

activities carried on by the State by enacting a law in its legislative competence.

6. The general principle of law enunciated in *Rylands* v. *Fletcher, (*1868) LR 3 HL 330, *Donoghue* v. *Stevenson*, [1932] AC 562, however, still guides us. In several situations, where officials are dealing with hazardous or explosive substance, the maxim *re ipsa* loquitor applies. Reference may be made to the decision in *Lloyde v. Westminster*, [1972] All E.R. 1240, *Henderson v. eHenry Jenkins & Sons*, [1969] 2 All E.R. 756. Principles laid down in *Donoghue v. Stevenson*, which highlighted the neighbour principle as a test to determine whether a potential duty of care exists, however is held to be not applicable to all fact situations. Lord Weilberfoce enunciated a dual test in *Anns v. Merton London Borough Council* [1978] AC 728, of existence of proximity and reasonable foreseeability and a failure to take care that causes harm to the claimant. The House of Lords, however, in *Murphy v. Brentwood Dsitrict Council [*1990] 3 WLR 414, however, overruled *Anns* on the ground that there was no duty to take care on the legal authority to prevent power economic loss occurring. House of Lords, however, in *Caparo Industries plc v. Dickman* [1990] 2 AC 605 = 1990 All E.R. 568 laid down three tests i.e. the claimants must show that harm was reasonably foreseeable, the relationship between the parties was proximate and that the imposition of liability would be just, fair and reasonable. Later in *X (Minors) v. Bedfordshire County Council*, [1995] 2 A.C. 633, Lord Browne-Wilkinson stated that an administrative act carried out in the exercise of a statutory discretion can only be actionable in negligence if the act is so unreasonable that it falls outside the proper ambit of that discretion. In effect, this would require that the act to be unlawful in the public law sense under the Wednesbury principle. House of Lords further held in *Barrett v. Enfield London Borough Council* [2001] 2 AC 550 that where a plaintiff claims damages for personal injuries which he alleges have been caused by decisions negligently taken in the exercise of a statutory discretion, and provided that the decisions do not involve issues of policy which the courts are

ill-equipped to adjudicate upon, it is preferable for the courts to decide the validity of the plaintiff's claim by applying directly the common law concept of negligence than by applying as a preliminary test the public law concept of Wednesbury unreasonableness to determine if the decision fell outside the ambit of the statutory discretion.

7. Later, House of Lords speaking through Lord Slynn stated as follows: "the House decided in *Barrett v Enfield London Borough Council (supra)* that the fact that acts which are claimed to be negligent are carried out within the ambit of a statutory discretion is not in itself a reason why it should be held that no claim for negligence can be brought in respect of them. It is only where what is done has involved the weighing of competing public interests or has been dictated by considerations on which Parliament could not have intended that the courts would substitute their views for the views of Ministers or officials that the courts will hold the issue is non-justiciable on the ground that the decision was made in the exercise of a statutory discretion." Both *Barrett* and *Phelps*, it may be noted, have highlighted the fact that a public body may be liable for acts done which fell within its ambit of discretion without the claimant also having to show that the act done was unlawful in the public law sense, so long as the decision taken or act done was justiciable.

8. Above decisions would indicate that in England also there is a lot of uncertainty when claims are raised against public bodies for negligence or violation of statutory duties. It is worth noticing that the Law Commission, U.K. in its consultation paper on "Administrative Redress" proposed that Judges should apply a 'principle of modified corrective justice' when deciding negligence claims against public bodies. (Law Commission Consultation Paper No.187 (2008). The Law Commission consequently proposed the introduction of a new touchstone of liability: 'serious fault'. The Law Commission's most far-reaching reform proposals relate to "court based redress" which suggests 'the creation of a specific regime for public bodies' based around a number of common elements

such as Judges would apply a standard of 'serious fault' in both judicial review and negligence proceedings.

9. Richard Mullender in an essay on Negligence, Public Bodies and Ruthlessness which appeared in "The Modern Law Review" (2009) 72 (6) MLR 961-98, argues for a reform of negligence law (as it applies to public bodies) that is different from that proposed by the Law Commission, such as application of the proportionality principle at the third stage of the duty of care test applied in *Caparo Industries* case.

10. Development taking place in U.K. has been highlighted only to show the uncertainty that one faces while deciding claims against public bodies and its officials. But when we look at the issues from the point of violation of fundamental rights, such as personal liberty, deprivation of life etc., there is unanimity in approach by the Courts in India, U.K. and U.S.A. and various other countries, that the Constitutional Courts have a duty to protect those rights and mitigate the damage caused. Violation of such rights often described as constitutional torts.

11. The concept of Constitutional Tort and Compensatory jurisprudence found its expression in *Devaki Nandan Prasad v. State of Bihar 1983 (4) SCC 20* where the petitioner's claim for pension was delayed for over twelve years. This Court awarded Rs.25,000/- as against authorities after having found that the harassment was intentional, deliberate and motivated. Liability to compensate for infringement of fundamental rights guaranteed under Article 21 was successfully raised in *Khatri & Others v. State of Bihar & Others* (1981) 1 SCC 627 (Bhagalpur Blinded prisoners case). In *Rudal Shah v. State of Bihar*, (1983) 4 SCC 141, this Court found that the petitioner's prolonged detention in the prison after his acquittal was wholly unjustified and illegal and held that Article 21 will be denuded of its significant content if the power of the Supreme Court was limited to passing orders of release from illegal detention. Court ordered that to prevent violation of that right and secure due compliance with the mandate of Article 21, it has to mulct its violators in the payment of monetary compensation. Court held

that right to compensation is thus some palliative for the unlawful acts of instrumentalities of the State which act in the name of public interest and which present for their protection the powers of the State as shield. Reference may also be made to the judgments of this Court in *Sebastian M. Hongray v. Union of India*, AIR 1984 SC 1026, *Bhim Singh v. State of J. & K.* (AIR 1986 SC 494), *Saheli v. Commissioner of Police, Delhi,* (AIR 1990 SC 513), *Inder Singh v. State of Punjab* (AIR 1995 SC 1949), *Radha Bai v. Union Territory of Pondicherry* AIR 1995 SC 1476, *Lucknow Development Authority v. M.K. Gupta* (AIR 1994 SC 787), *Delhi Domestic Working Women's Forum v. Union of India*, (1995) 1 SCC 14, *Gudalure M.J. Cherian v. Union of India* 1995 Supp (3) SCC 387, Sube Singh v. State of Haryana 2006 (3) SCC 178 etc. Specific reference may be made to the decision of this Court in *Nilabati Behera v. State of Orissa* (AIR 1993 SC 1960), wherein this Court held that the concept of sovereign immunity is not applicable to the cases of violation of fundamental rights and summarized as follows:

> "A claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is distinct from, and in addition to, the remedy in private law for damages for the tort resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right

> is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution."

12. Courts have held that due to the action or inaction of the State or its offices, if the fundamental rights of a citizen are infringed then the liability of the State, its officials and instrumentaities is strict. Claim raised for compensation in such a case is not a private law claim for damages, under which the damages recoverable are large. Claim made for compensation in public law is for compensating the claimants for deprivation of life and personal liberty which has nothing to do with a claim in a private law claim in tort in an ordinary civil court.

13.This Court in *Union of India v. Prabhakaran (2008) (9) SCC 527*, extended the principle to cover public utilities like the railways, electricity distribution companies, public corporations and local bodies which may be social utility undertakings not working for private profit. In Prabhakaran (supra) a woman fell on a railway track and was fatally run over and her husband demanded compensation. Railways argued that she was negligent as she tried to board a moving train. Rejecting the plea of the Railways, this Court held that her "contributory negligence" should not be considered in such untoward incidents – the railways has "strict liability". A strict liability in torts, private or constitutional do not call for a finding of intent or negligence. In such a case highest degree of care is expected from private and public bodies especially when the conduct causes physical injury or harm to persons. The question as to whether the law imposes a strict liability on the state and its officials primarily depends upon the purpose and object of the legislation as well. When activities are hazardous and if they are inherently dangerous the statute expects highest degree of care and if someone is injured because of such activities, the State and its officials are liable even if they could establish that there was no negligence and that it was not intentional. Public safety legislations generally falls in that category of breach of statutory duty by a public authority. To decide whether the breach is actionable, the Court must generally look at the statute

and its provisions and determine whether legislature in its wisdom intended to give rise to a cause of action in damages and whether the claimant is intended to be protected.

14. But, in a case, where life and personal liberty have been violated the absence of any statutory provision for compensation in the Statute is of no consequence. Right to life guaranteed under Article 21 of the Constitution of India is the most sacred right preserved and protected under the Constitution, violation of which is always actionable and there is no necessity of statutory provision as such for preserving that right. Article 21 of the Constitution of India has to be read into all public safety statutes, since the prime object of public safety legislation is to protect the individual and to compensate him for the loss suffered. Duty of care expected from State or its officials functioning under the public safety legislation is, therefore, very high, compared to the statutory powers and supervision expected from officers functioning under the statutes like Companies Act, Cooperative Societies Act and such similar legislations. When we look at the various provisions of the Cinematographic Act, 1952 and the Rules made thereunder, the Delhi Building Regulations and the Electricity Laws the duty of care on officials was high and liabilities strict.

CONSTITUTIONAL TORTS – MEASURE OF DAMAGES

15. Law is well settled that a Constitutional Court can award monetary compensation against State and its officials for its failure to safeguard fundamental rights of citizens but there is no system or method to measure the damages caused in such situations. Quite often the courts have a difficult task in determining damages in various fact situations. The yardsticks normally adopted for determining the compensation payable in a private tort claims are not as such applicable when a constitutional court determines the compensation in cases where there is violation of fundamental rights guaranteed to its citizens. In *D.K. Basu* vs. *Union of India* (1997) 1 SCC 416, a Constitution Bench of this Court held that there is no strait jacket formula for computation of damages and we find that

there is no uniformity or yardstick followed in awarding damages for violation of fundamental rights. In *Rudal Shah's case* (supra) this Court used the terminology "Palliative" for measuring the damages and The formula of "Ad hoc" was applied in *Sebastian Hongary*'s case (supra) the expression used by this Court for determining the monetary compensation was "Exemplary" cost and the formula adopted was "Punitive" . In *Bhim Singh's case*, the expression used by the Court was "Compensation" and method adopted was "Tortious formula". In *D.K. Basu* v*. Union of India (supra)* the expression used by this Court for determining the compensation was "Monetary Compensation". The formula adopted was "Cost to Cost" method. Courts have not, therefore, adopted a uniform criteria since no statutory formula has been laid down.

16. Constitutional Courts all over the world have to overcome these hurdles. Failure to precisely articulate and carefully evaluate a uniform policy as against State and its officials would at times tend the court to adopt rules which are applicable in private law remedy for which courts and statutes have evolved various methods, such as loss earnings, impairment of future earning capacity, medical expenses, mental and physical suffering, property damage etc. Adoption of those methods as such in computing the damages for violation of constitutional torts may not be proper. In Delhi *Domestic Working Women's Forum v. Union of India* (supra) the apex Court laid down parameters in assisting the victims of rape including the liability of the State to provide compensation to the victims and held as follows :-

> "It is necessary, having regard to the directive principles contained under Article 38(1) of the Constitution of India to set up Criminal Injuries Compensation Board. Rape victims frequently incurred substantial financial loss. Some, for example were too traumatized to continue in employment. Compensation for victims shall be awarded by the Court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board will take into

account the pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of the child but if it is occurred as a result of rape."

17. Legal liability in damages exist solely as a remedy out of private law action in tort which is generally time consuming and expensive and hence when fundamental rights are violated claimants prefer to approach constitutional courts for speedy remedy. Constitutional courts, of course, shall invoke its jurisdiction only in extraordinary circumstances when serious injury has been caused due to violation of fundamental rights especially under Article 21 of the Constitution of India. In such circumstances the Court can invoke its own methods depending upon the facts and circumstances of each case.

Constitutional Torts and Punitive Damages

18. Constitutional Courts' actions not only strive to compensate the victims and vindicate the constitutional rights, but also to deter future constitutional misconduct without proper excuse or with some collateral or improper motive. Constitutional courts can in appropriate cases of serious violation of life and liberty of the individuals award punitive damages. However, the same generally requires the presence of malicious intent on the side of the wrong doer, i.e. an intentional doing of some wrongful act. Compensatory damages are intended to provide the claimant with a monetary amount necessary to recoup/replace what was lost, since damages in tort are generally awarded to place the claimants in the position he would have been in, had the tort not taken place which are generally quantified under the heads of general damages and special damages. Punitive damages are intended to reform or to deter the wrong doer from indulging in conduct similar to that which formed the basis for the claim. Punitive damages are not intended to compensate the claimant which he can claim in an ordinary private law claim in tort. Punitive damages are awarded by the constitutional court when the wrong doer's conduct was egregiously deceitful. Lord Patrick Devlin in leading case on the point *Rookes v. Barnard*

[1964] All E.R. 367 delineated certain circumstances which satisfy the test for awarding punitive damages such as the conduct must have been oppressive, arbitrary, or unconstitutional, the conduct was calculated to make profit for the wrong doer and that the statute expressly authorizes awarding of punitive damages. Above principles are, however, not uniformly followed by English Courts though the House of Lords in a decision in *Attorney-General Vs. Blake* [2001] 1 AC 268, awarded punitive damages when it was found the defendant had profited from publishing a book and was asked to give an account of his profits gained from writing the book. In this case where the wrong doer was made to give up the profits made, through restitution for wrongs, certainly the claimant gained damages. In United States, in a few States, punitive damages are determined based on statutes. But often criticisms are raised because of the high imposition of punitive damages by courts. The Supreme Court of United States has rendered several decisions limiting the awards of punitive damages through the due process of law clauses of the Fifth and Fourteenth Amendments. In *BMW of North America Inc. v. Gore* 517 U.S. 559 (1996) the Court ruled that the punitive damages must be reasonable, as determined based on the degree of reprehensibility of the conduct, the ratio of punitive damages to compensatory damages and any criminal or civil penalties applicable to the conduct. In *Philip Morris USA v. Williams* 549 U.S. 346 (2007), the Court ruled that the award of punitive damages cannot be imposed for the direct harm that the misconduct caused to others, but may consider harm to others as a function of determining how reprehensible it was. There is no hard and fast rule to measure the punitive damages to determine such a claim. In United States in number of cases the Court has indicated that the ratio 10:1 or higher between punitive and compensatory damages is held to be unconstitutional. Several factors may gauge on constitutional court in determining the punitive damages such as contumacious conduct of the wrong doer, the nature of the statute, gravity of the fault committed, the circumstances etc. Punitive damages can be awarded when the wrongdoers'

conduct 'shocks the conscience' or is 'outrageous' or there is a willful and 'wanton disregard' for safety requirements. Normally, there must be a direct connection between the wrongdoer's conduct and the victim's injury.

Need for legislation

19. Need for a comprehensive legislation dealing with tortious liability of State, its instrumentalities has been highlighted by this Court and the academic world on various occasions and it is high time that we develop a sophisticated jurisprudence of Public Law Liability.

20. Due to lack of legislation, the Courts dealing with the cases of tortious claims against State and his officials are not following a uniform pattern while deciding those claims and this at times leads to undesirable consequences and arbitrary fixation of compensation amount.

21. Government of India on the recommendations of the first Law Commission introduced two bills on the Government liability in torts in the years 1965-67 in the Lok Sabha but those bills lapsed. In *Kasturi Lal's* case (supra), this Court has highlighted the need for a comprehensive legislation which was reiterated by this Court in various subsequent decisions as well.

22. Public Authorities are now made liable in damages in U.K. under the Human Rights Act, 1998. Section 6 of the Human Rights Act, 1998 makes a Public Authority liable for damages if it is found to have committed breach of human rights. The Court of Appeal in England in *Anufijeva Vs. London Borough Southwork* 2004 (2) WLR 603, attempted to answer certain important questions as to how the damages should be awarded for breach of human rights and how should damages be assessed. Further, such claims are also dealt by Ombudsmen created by various Statutes, they are independent and impartial officials, who investigate complaints of the citizens in cases mal-administration. The experience shows that majority of the Ombudsman's recommendations are complied in practice, though they are not enforceable in Courts.

23. The European Court of Justice has developed a sophisticated jurisprudence concerning liability in damages regarding liability of public bodies for the loss caused by administrative Acts. We have highlighted all these facts only to indicate that rapid changes are taking place all over the world to uphold the rights of the citizens against the wrong committed by Statutory Authorities and local bodies.

24. Despite the concern shown by this Court, it is unfortunate that no legislation has been enacted to deal with such situations. We hope and trust that utmost attention would be given by the legislature for bringing in appropriate legislation to deal with claims in Public Law for violation of fundamental rights, guaranteed to the citizens at the hands of the State and its officials.

B.B.B. Appeals disposed of.

P.R. SHAH, SHARES & STOCK BROKER (P) LTD.

v.

M/S. B.H.H. SECURITIES (P) LTD. & ORS.

(Civil Appeal No. 9238 of 2003)

OCTOBER 14, 2011

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

Arbitration – Institutional arbitration under the Bye Laws of the Mumbai Stock Exchange – Common arbitration – Permissibility – Whether there could be a single arbitration in regard to a claim of a member of the Exchange against a non-member and another member – Held: Though arbitration in respect of a non-member was under Bye-law 248 and arbitration in respect of the member was under Bye Law 282, as the Exchange had permitted a single arbitration against both, there could be no impediment for a single arbitration – As first respondent (member) had a single claim against second respondent (non-member) and appellant (another member) and as there was provision for arbitration in regard to both of them, and as the Exchange had permitted a common arbitration, it is not possible to accept the contention of the appellant that there could not be a common arbitration against appellant and second respondent – Bye-Laws of the Mumbai Stock Exchange – Bye Laws 248 and 282.

Arbitration and Conciliation Act, 1996 – s.34 – Institutional arbitration under the Bye Laws of the Mumbai Stock Exchange – Claim of first respondent, a member of the Exchange against appellant, another Member – Arbitral award passed by Arbitral Tribunal of the Exchange – Challenge to, on the ground that the Arbitral Tribunal ought to have held that there was no contract between first respondent and the appellant and that the claim of the first respondent against the appellant was based on fabricated documents – Held: A court does not sit in appeal over the

award of an arbitral tribunal by re-assessing or re-appreciating the evidence – An award can be challenged only under the grounds mentioned in s.34(2) of the Act – On facts, in absence of any ground under s.34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at – Bye-Laws of the Mumbai Stock Exchange – Bye Law 282.

Arbitration and Conciliation Act, 1996 – s.34 – Institutional arbitration under the Bye Laws of the Mumbai Stock Exchange – Claim of first respondent, a member of the Exchange against appellant, another Member – Arbitral award passed by Arbitral Tribunal of the Exchange – Challenge to, on ground that the Arbitrators had passed the award by making use of their personal knowledge in regard to the transactions and not on the material on record before them and therefore the award was vitiated – Held: Arbitrators cannot make use of their personal knowledge of the facts of the dispute, which is not a part of the record, to decide the dispute – But arbitrators can certainly use their expert or technical knowledge or the general knowledge about the particular trade, in deciding a matter – In fact, that is why in many arbitrations, persons with technical knowledge, are appointed as they will be well-versed with the practices and customs in the respective fields – In the instant case, all that the arbitrators had referred was the market practice – That cannot be considered as using some personal knowledge of facts of a transaction, to decide a dispute – Bye-Laws of the Mumbai Stock Exchange – Bye Law 282.

The constitution, management and dealings of the Mumbai Stock Exchange were governed by its' Rules, Bye-laws and Regulations. The appellant and the first respondent were members of the Exchange, while the second respondent was a non-member. The first respondent raised and referred a dispute against the second respondent and the appellant for arbitration under the Bye-Laws of the Exchange. The three-member Arbitral Tribunal of the Exchange passed an unanimous

award against the second respondent. In regard to the appellant, the tribunal per majority held that the appellant was liable to pay if the second respondent did not pay the awarded amount, whereas the third arbitrator held that the Arbitral tribunal could not arbitrate the dispute with reference to the appellant.

The second respondent did not contest the award nor pay the amount. The appellant filed application under section 34 of the Arbitration and Conciliation Act, 1996 challenging the award. A Single Judge of the High Court dismissed the said application. The intra-court appeal filed by the appellant was dismissed by a Division Bench of the High Court by the impugned judgment.

In the instant appeal, the following three contentions were urged by the appellant:

(i) Under Bye Law 248 of the Exchange, there can be arbitration only in regard to a dispute between a member and a non-member. A dispute between two members will have to be decided under Bye Law 282. The constitution of the Arbitral Tribunal, the procedure followed and remedies available were completely different in regard to a claim of a member against a non-member and claim of a member against another member. Therefore, there could not be a single arbitration in regard to a claim of a member against a non-member and another member.

(ii) The Arbitral Tribunal ought to have held that there was no contract between first respondent and the appellant and that the claim of the first respondent against the appellant was based on fabricated documents; and

(iii) The Arbitral Tribunal had passed the award by making use of their personal knowledge in regard to the transactions and not on the material on record before them and therefore the award was vitiated.

Dismissing the appeal, the Court

HELD:

Re : Contention (i)

1.1. The arbitration in this case was not an ad hoc arbitration under an arbitration agreement executed between the parties, but was an institutional arbitration under the Bye Laws of the Exchange. All claims, differences, complaints and disputes between two members in relation to any bargain, dealing, transaction or contract is arbitrable by virtue of the parties being members of the Exchange and there is no need for a separate arbitration agreement. In fact, the question whether there was any such bargain, dealing, transaction or contract between members is itself a question that was arbitrable, if there was a dispute. Bye-law 248 provides for reference to arbitration of any dispute between a member and non-member. Arbitration between members of the Exchange is provided for in Bye Law 282. [Para 10] [98-E-H; 99-D-E]

1.2. If A had a claim against B and C, and there was an arbitration agreement between A and B but there was no arbitration agreement between A and C, it might not be possible to have a joint arbitration against B and C. A cannot make a claim against C in an arbitration against B, on the ground that the claim was being made jointly against B and C, as C was not a party to the arbitration agreement. But if A had a claim against B and C and if A had an arbitration agreement with B and A also had a separate arbitration agreement with C, there is no reason why A cannot have a joint arbitration against B & C. Obviously, having an arbitration between A and B and another arbitration between A and C in regard to the same claim would lead to conflicting decisions. In such a case, to deny the benefit of a single arbitration against B and C on the ground that the arbitration agreements against B and C are different, would lead to multiplicity of proceedings, conflicting decisions and cause injustice. It would be proper and just to say that when A

has a claim jointly against B and C, and when there are provisions for arbitration in respect of both B and C, there can be a single arbitration. In this case though the arbitration in respect of a non-member is under Bye-law 248 and arbitration in respect of the member is under Bye Law 282, as the Exchange has permitted a single arbitration against both, there could be no impediment for a single arbitration. As first respondent had a single claim against second respondent and appellant and as there was provision for arbitration in regard to both of them, and as the Exchange had permitted a common arbitration, it is not possible to accept the contention of the appellant that there could not be a common arbitration against appellant and second respondent. [Para 14] [101-C-H; 102-A]

Sukanya Holdings (P) Ltd. vs. Jayesh H. Pandya & Anr. **2003 (5) SCC 531: 2003 (3) SCR 558 – held inapplicable.**

Re : Contention (ii)

2. A court does not sit in appeal over the award of an arbitral tribunal by re-assessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in section 34(2) of the Arbitration and Conciliation Act, 1996. The arbitral tribunal has examined the facts and held that both second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye Law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under section 34(2) of the Act, it is not possible to re-examine the facts

to find out whether a different decision can be arrived at. [Para 15] [102-B-E]

Re : Contention (iii)

3. An arbitral tribunal cannot of course make use of their personal knowledge of the facts of the dispute, which is not a part of the record, to decide the dispute. But an arbitral tribunal can certainly use their expert or technical knowledge or the general knowledge about the particular trade, in deciding a matter. In fact, that is why in many arbitrations, persons with technical knowledge, are appointed as they will be well-versed with the practices and customs in the respective fields. In the instant case, all that the arbitrators have referred is the market practice. That cannot be considered as using some personal knowledge of facts of a transaction, to decide a dispute. [Para 16] [102-H; 103-A-B]

Case Law Reference:

2003 (3) SCR 558 held inapplicable Para 12

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9238 of 2003.

From the Judgment & Order dated 16.9.2002 of the High Court of Bombay in Appeal No. 748 of 2002 in Arbitration Petition No. 99 of 2000.

Indu Malhotra, Nisha Bagchi, Vrushali Kakkar, Abhinav Agnihotri, Kush Chaturvedi, Vivek Jain, Prerna Priyadarshini and Vikas Mehta for the Appellant.

Shyam Divan, Santosh Paul, Arvind Gupta, Meera Mathew, M.J. Paul, Pratap Venugopal, Surekha Raman and Dileep Poolakkot (for K.J. John & Co.) for the Respondents.

The Judgment of the Court was delivered by

R.V. RAVEENDRAN, J. 1. The appellant and the first respondent are members of the Mumbai Stock Exchange, the third respondent herein ('Exchange' for short). The constitution, management and dealings of the Exchange are governed by

the Rules, Bye-laws and Regulations of the Exchange. The Rules relate to the constitution and management of the Exchange. The Bye-laws regulate and control the dealings, transactions, bargains and contracts of its members with other members and non-members. The Regulations contain the detailed procedure regarding the various aspects covered by the Bye-laws. Though the Rules, Bye-laws and Regulations of the Exchange were not made under any statutory provision, they have a statutory flavour. Bye-laws 248 to 281D provide for and govern the arbitration between members and non-members and Bye-laws 282 to 315L provide for and govern the arbitration between members of the Exchange.

2. The first respondent raised and referred a dispute against the second respondent and the appellant under the Rules, Bye-Laws and Regulations of the Mumbai Stock Exchange on 29.8.1998 (Arbitration Reference No.242/1998) seeking an award for a sum of Rs. 36,98,384.73 with interest at 24% per annum on Rs. 35,42,197.50. In the said Arbitration Reference, the first respondent alleged that appellant and second respondent are sister concerns with Ms. Kanan C. Sheth as a common Director; that Ms. Kanan C. Sheth approached the first respondent to get the carry forward sauda in respect of 50,000 shares of BPL and 15,000 shares of Sterlite Industries Ltd. transferred with the first respondent on behalf of the second respondent which was outstanding with the appellant; that in pursuance of it, on 4.6.1998, the first respondent got the sauda of 15,000 shares of BPL and 15,000 shares of Sterlite transferred to its account through a negotiated deal which is commonly known as 'all or none'; that in respect of the said transactions, the first respondent prepared, issued and delivered the contract and bill in favour of second respondent [Contract No. F.11/4/002 dated 4.6.1998 and Bill No.A/11/0236 dated 11.6.1998 for Rs. 1,07,30,400/- and Bill No.A.11/0236 dated 11.6.1998 for Rs. 15,50,670/-]; that as the said amount remained due, the first respondent approached the appellant and second respondent for clearing the said dues; that after several demands, the appellant issued a credit kapli

(Credit Slip No.49147 dated 11.6.1998) for payment of Rs.13 lakhs to first respondent along with a copy of the balance-sheet (Form No.31) for settlement (A11/98-99 for Rs. 13 lakhs); that the said kapli was rejected by the Exchange; that the first respondent, therefore, immediately approached the appellant and second respondent and demanded a cheque for the said amount of Rs. 15,50,670/-; that in that behalf, the appellant issued cheque (No.992090 dated 11.6.1998) for Rs. 13 lakhs leaving a balance of Rs. 250,670/-; that thereafter prices of the said scripts were falling down and the first respondent requested the appellant and second respondent to get the said souda re-transferred to their account; that they failed to do so, but kept on assuring that there was nothing to worry; that ultimately, at the request of the appellant and second respondent, the souda of 15000 shares of Sterlite was squared by selling the said shares and in respect of the squaring up of the said souda, a bill dated 19.6.1998 for Rs. 23,89,610.50 was raised by the first respondent for the amount due by appellant and second respondent; that when the first respondent demanded from appellant and second respondent the amounts due; they paid to the first respondent a sum of Rs. 4.5 lakhs in cash on 18/19.6.1998; that as the souda for the 15,000 shares of BPL still remained outstanding despite requests of the first respondent to square up the same, the first respondent carried forward the said 15,000 shares of BPL to Settlement No.13 and raised a bill dated 26.6.1998 showing Rs. 8,09,850/- as due to the first respondent; and that the said carry forward purchase of 15,000 shares of BPL was again brought forward to Settlement No.14 on 22.6.1998 and at the request of appellant and second respondent, the said outstanding purchase was sold on 24.6.1998 and 25.6.1998 and in that behalf, a sum of Rs. 5,42,065/- became due vide bill dated 1.7.1998. According to first respondent, all the bills were drawn on second respondent, as required by the appellant, as the contract dated 4.6.1998 was in the name of second respondent; that Ms. Kanan C. Sheth Director of appellant and first respondent accepted the said bills assuring payment and both were jointly and severally liable to pay the amounts due.

3. The first respondent also alleged in the arbitration reference claim that in view of the non-payment of the amounts due, it wrote a letter dated 2.7.1998 to the Executive Director of the Exchange to prevail upon and direct the appellant and second respondent to pay the amount due, but in spite of the Exchange forwarding a copy of the said letter to appellant and second respondent, the amount remained due; that therefore, the Executive Director of the Exchange through its Investors Service Cell permitted the first respondent to file an arbitration claim against appellant and second respondent. As a sum of Rs. 35,42,197.50 remained due in spite of demands by adding interest, the total sum due as on 29.8.1998 was Rs. 36,98,384.73.

4. Both the second respondent and the appellant filed their objections dated 3.3.1999 urging several common grounds with identical wording which, according to the first respondent, showed that the appellant and the second respondent were colluding with each other, apart from the fact that they had two common Directors. In its statement of objections, the appellant contended that the Arbitral Tribunal of the Exchange had no jurisdiction to enter upon the reference for want of a contract and want of arbitration agreement between the first respondent and the appellant. The appellant also denied that the transaction between the first respondent and second respondent was carried out by the first respondent, for and on behalf of the appellant and under instructions from the Director of the appellant. The appellant contended that the first respondent had made a claim based on fabricated documents. It was also contended that the arbitration reference was bad in law on account of misjoinder of parties and misjoinder of causes of action. It was submitted that the appellant was a member of the Exchange and the second respondent was not a member of the Exchange and the Exchange had a different set of Arbitration Rules governing arbitration in regard to disputes between members and arbitration in regard to disputes between member and a non-member. The appellant also contended that the sum of Rs. 13 lakhs paid by it to the first

respondent by cheque dated 11.6.1998, was not an amount paid in connection with the aforesaid transaction, but was a loan advanced by the appellant to the first respondent.

5. The disputes were heard by a three-member Arbitral Tribunal consisting of Justice D.B. Deshpande, Mr. Hemant V.Shah and Mr. Sharad Dalal as members. The arbitral tribunal called upon the appellant to produce its souda sheets of the dates on which the transactions took place as alleged by the first respondent but the appellant stated that they could not produce those sheets as their computers were not in a working condition. When the Arbitral Tribunal enquired whether there were any documents to show that Rs. 13 lakhs was advanced as a loan to first respondent (as contended by the appellant), the appellant informed the Arbitral Tribunal that there were no documents to show that it was a loan.

6. The Arbitral Tribunal made an award dated 12.10.1999. The majority (Mr. Hemant V.Shah and Mr. Sharad Dalal) held that the transaction had taken place as alleged by the first respondent and therefore the appellant and second respondent were liable for the amounts claimed. The third arbitrator, in his minority view, while agreeing with the other two arbitrators that the claim against second respondent as claimed deserved to be allowed, held that the claim against the appellant ought to be rejected as the Arbitral Tribunal appointed by the Exchange had no jurisdiction to hear and decide the first respondent's claim against the appellant and the first respondent should approach the proper forum seeking relief against the appellant. Therefore, the Arbitral Tribunal made an award as per the decision of the majority holding that the first respondent was entitled to recover Rs. 36,98,384.73 from second respondent along with interest at 18% per annum, as demanded, from 4.6.1998 till realization with a further direction that if the second respondent failed to pay the said amount along with interest, then the entire amount or the shortfall amount, if any, shall be made good by the appellant. In effect, there was an unanimous award for the sum of Rs. 36,98,354.73 with interest at 18% from 4.6.1998 to the date of payment against the second respondent;

and in regard to the appellant, the majority held the appellant was liable to pay if second respondent did not pay the amount, whereas the third arbitrator held that the Arbitral Tribunal could not arbitrate the dispute with reference to appellant.

8. The second respondent did not contest the award nor pay the amount. The appellant filed an application under section 34 of the Arbitration and Conciliation Act, 1996 ('Act' for short) challenging the award dated 17.10.1999. A learned Single Judge of the Bombay High Court after exhaustive consideration, dismissed the said application. Dealing with the contention that in an arbitration under Bye Law No.248 in regard to a dispute between a member (first respondent) and a non-member (second respondent), there cannot be an award against a member (appellant), on the ground that Bye Law 248 did not apply to a dispute between two members, the learned Single Judge held as under :

> "If, in a dispute between a member and non-member an incidental or connected claim against another claim cannot be referred for arbitration under Bye-law 248 and the Claimant is compelled to resort to two proceedings before different fora, then the possibility of multiplicity of findings at variance with each other by different fora cannot be ruled out. In my view it would be most undesirable to adopt a construction which would bring about the possibility of two fora reaching different conclusions where the cause of action is based on same set of facts. As noted above, the two fora are differently constituted and such a possibility cannot be ruled out. In the circumstances, I am of the view that a claim against the member can be entertained under Bye-law 248 where the said claim is incidental to or connected to a claim against a non-member. I am of the view that the claim made by the BHH in the present case is such a claim."

The intra-court appeal filed by the appellant was dismissed by a Division Bench of the Bombay High Court by the impugned judgment dated 16.9.2002. The said decision is under challenge in this appeal by special leave.

9. The following three contentions were urged by the appellant :

(i) Under Bye Law 248, there can be arbitration only in regard to a dispute between a member and a non-member. A dispute between two members will have to be decided under Bye Law 282. The constitution of the Arbitral Tribunal, the procedure followed and remedies available were completely different in regard to a claim of a member against a non-member and claim of a member against another member. Therefore, there could not be a single arbitration in regard to a claim of a member against a non-member and another member.

(ii) The Arbitral Tribunal ought to have held that there was no contract between first respondent and that the appellant and the claim of the first respondent against the appellant was based on fabricated documents.

(iii) The Arbitral Tribunal had passed the award by making use of their personal knowledge in regard to the transactions and not on the material on record before them and therefore the award was vitiated.

Re : Contention (i)

10. At the outset, it should be noticed that the arbitration in this case is not an ad hoc arbitration under an arbitration agreement executed between the parties, but was an institutional arbitration under the Bye Laws of the Exchange. All claims, differences, complaints and disputes between two members in relation to any bargain, dealing, transaction or contract is arbitrable by virtue of the parties being members of the Exchange and there is no need for a separate arbitration agreement. In fact, the question whether there was any such bargain, dealing, transaction or contract between members is itself a question that was arbitrable, if there was a dispute. We may in this behalf refer to the relevant Bye-Laws. Bye-law 248 provides for reference to arbitration of any dispute between a member and non-member. Clause (a) thereof relevant for our purpose is extracted below :

"All claims (whether admitted or not) difference and disputes between a member and a non-member or non-members (the terms 'non-member' and 'non-members' shall include a remisier, authorized clerk, a sub-broker who is registered with SEBI as affiliated with that member or employee or any other person with whom the member shares brokerage) arising out of or in relation to dealings, transactions and contracts made subject to the Rules, Bye-laws and Regulations of the Exchange or with reference to anything incidental thereto or in pursuance thereof or relating to their construction, fulfillment or validity or in relation to the rights, obligations and liabilities or remisiers, authorized clerks, sub-brokers, constituents, employees or any other persons with whom the member shares brokerage in relation to such dealings, transactions and contracts shall be referred to and decided by arbitration as provided in the Rules, Bye-laws and Regulations of the Exchange."

Arbitration between members of the Exchange is provided for in Bye Law 282 which is extracted below :

"All claims, complaints, differences and disputes between members arising out of or in relation to any bargains, dealings, transactions or contracts made subject to the Rules, Bye-laws and Regulations of the Exchange or with reference to anything incidental thereto (including claims, complaints, differences and disputes relating to errors or alleged errors in inputting any data or command in the Exchange's computerized trading system or in execution of any trades on or by such trading system) or anything to be done in pursuance thereof and any question or dispute whether such bargains, dealings, transactions or contracts have been entered into or not shall be subject to arbitration and referred to the Arbitration Committee as provided in these Bye-laws and Regulations."

11. The appellant contends that as the provisions for arbitration are different in regard to a dispute between a member and a non-member and in regard to a dispute

between two members, there cannot be a common arbitration in regard to a claim or dispute by a member against another member and a non-member. It is pointed out that in regard to the arbitration in the case of a non-member, the reference is to three arbitrators, each party appointing one arbitrator and the Executive Director of the Exchange appointing the third arbitrator, one of the three arbitrators being a non-member (vide Bye Law 249). On the other hand, in the case of a dispute between a member with another member, the matter is referred to the Arbitration Committee of the Exchange and the said Committee will appoint a three member Tribunal, known as the lower Bench (vide Bye Law 285); and in regard to such arbitration between a member and another member, an appeal is available from the lower bench of Arbitration Committee to the Arbitration Committee constituted by the governing Board. In the case of a dispute between a member and a non-member, no such institutional appeal is available. The appellant contends that the valuable right of appeal was denied by holding a joint arbitration against appellant and second respondent.

12. Reliance is placed on the decision of this Court in *Sukanya Holdings (P) Ltd. vs. Jayesh H. Pandya & Anr*. [2003 (5) SCC 531] wherein this Court held that where a suit is commenced in respect of a matter which falls partly within the arbitration agreement and partly outside and which involves the parties, some of whom are parties to the agreement while some are not, Section 8 of the Act was not attracted and the subject-matter of the suit could not be referred to arbitration, either wholly or by splitting up the causes of action and the parties. The decision in *Sukanya Holdings* will not apply as we are not concerned with a suit or a situation where there is no provision for arbitration in regard to some of the parties.

13. In this case, the first respondent had a claim for Rs. 36,98,354.73 jointly against second respondent and the appellant. According to the first respondent, it entered into the transaction with second respondent on the instructions of the appellant and on the understanding that the appellant will also

be liable and in fact, the appellant accepting its liability, had also paid Rs. 13 lakhs as part-payment. It is not disputed that appellant and second respondent were closely held family companies managed by the same person (Ms. Kanan C. Sheth). According to appellant the share holdings in appellant was Kanan C. Seth : 105,000 shares, Chetan M. Sheth : 45000 shares and Jasumati P.Shah: 150,000 shares and the shareholdings in second respondent company was Kanan C.Sheth: 100 shares and Chetan M. Sheth: 100 shares.

14. If A had a claim against B and C, and there was an arbitration agreement between A and B but there was no arbitration agreement between A and C, it might not be possible to have a joint arbitration against B and C. A cannot make a claim against C in an arbitration against B, on the ground that the claim was being made jointly against B and C, as C was not a party to the arbitration agreement. But if A had a claim against B and C and if A had an arbitration agreement with B and A also had a separate arbitration agreement with C, there is no reason why A cannot have a joint arbitration against B & C. Obviously, having an arbitration between A and B and another arbitration between A and C in regard to the same claim would lead to conflicting decisions. In such a case, to deny the benefit of a single arbitration against B and C on the ground that the arbitration agreements against B and C are different, would lead to multiplicity of proceedings, conflicting decisions and cause injustice. It would be proper and just to say that when A has a claim jointly against B and C, and when there are provisions for arbitration in respect of both B and C, there can be a single arbitration. In this case though the arbitration in respect of a non-member is under Bye-law 248 and arbitration in respect of the member is under Bye Law 282, as the Exchange has permitted a single arbitration against both, there could be no impediment for a single arbitration It is this principle that has been applied by the learned Single Judge, and affirmed by the division bench. As first respondent had a single claim against second respondent and appellant and as there was provision for arbitration in regard to both of them, and as the Exchange had permitted a common arbitration, it

is not possible to accept the contention of the appellant that there could not be a common arbitration against appellant and second respondent.

Re : Contention (ii)

15. A court does not sit in appeal over the award of an arbitral tribunal by re-assessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in section 34(2) of the Act. The arbitral tribunal has examined the facts and held that both second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye Law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.

Re : Contention (iii)

16. The appellant contends that the arbitration had used personal knowledge to decide the matter. Attention was drawn to the following observation in the award by the majority :

> "Also, it is known fact which is known to the arbitrators that as per the market practice such kind of transactions of one Broker takes place with another Broker either in their own name or in their firm's name or in the name of different entity which is also owned by the member." Same way these transactions are done by respondent no.2 (appellant herein) in the name of respondent no.1 (second respondent herein)."

An arbitral tribunal cannot of course make use of their

personal knowledge of the facts of the dispute, which is not a part of the record, to decide the dispute. But an arbitral tribunal can certainly use their expert or technical knowledge or the general knowledge about the particular trade, in deciding a matter. In fact, that is why in many arbitrations, persons with technical knowledge, are appointed as they will be well-versed with the practices and customs in the respective fields. All that the arbitrators have referred is the market practice. That cannot be considered as using some personal knowledge of facts of a transaction, to decide a dispute.

Conclusion

17. In view of the above, we find no reason to interfere with the judgment of the High Court and the appeal is accordingly dismissed.

B.B.B. Appeal dismissed.

U.P. AVAS EVAM VIKAS PARISHAD
v.
U.P. POWER CORPN. LTD.
(Civil Appeal No. 4209 of 2007)

OCTOBER 18, 2011

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

Electricity Supply Code, 2002 – Clauses 4.3, 4.45 and 4.5 – Levy of supervision charges – Validity of – Erection of transmission lines, associated distribution sub-stations and L.T. distribution mains, throughout the State of U.P was originally exclusively being carried out by the U.P. State Electricity Board (UP, SEB), and thereafter by the U.P. Power Corporation – State of U.P. issued a Government order dated 2.6.1982 authorizing the appellant to carry on by itself, in the colonies/multistoried buildings raised by it, the work of erection of transmission lines, associated distribution sub-stations and L.T. distribution mains up – Vide office memorandum dated 17.1.1984, UP, SEB levied supervision charges at the rate of 5% of total estimated cost of the work – On 24.4.1998, however, the UP, SEB issued another office memorandum, whereby the supervision charges were revised upwards from 5% to 15% – Higher supervision charges challenged by the appellant –U.P. Electricity Regulatory Commission allowed the appellant to pay supervision charges @ 5%, however, held that payment of supervision charges @ 5% was permissible only upto 6.6.2002 and that supervision charges with effect from 7.6.2002 i.e. the date of the enforcement of the Electricity Supply Code, 2002, would be governed by the said Code – Plea of appellant that it could not be required to pay supervision charges stipulated under the Electricity Supply Code, 2002 – Held: Since the provisions of the Electricity Supply Code, 2002, has statutory trappings, the same would override and supersede the stipulations contained in the office memorandum dated 17.1.1984, which has the force of merely an administrative order – The subject

matter under consideration is erection of transmission lines, associated distribution sub-stations and L.T. distribution mains – The aforesaid activity though indispensable, has dangerous connotations – If appropriate standards are not maintained and if adequate safety measures are not adopted, disastrous consequences are possible – Delegation of such activity has necessarily to be regulated by supervision, so as to avoid any lapses – Supervision needs inputs which have to be paid for – The Electricity Supply Code, 2002, stipulates 15% of the total estimated cost of electrification works as supervision charges – No case of the appellant, that the aforesaid charges are disproportionate to the work involved or have been fixed arbitrarily –Supervision charges have been levied, so that the agencies, such as the appellant, who decide to carry out the activities of erection of transmission lines, associated distribution sub-stations and L.T. distribution mains, on their own, abide by the minimum prescribed norms – Even otherwise, the appellant has unilaterally accepted to pay supervision charges under the Electricity Supply Code, 2005 which became enforceable w.e.f. 18.2.2005 – For exactly the same reasons, for which the appellant has accepted the Electricity Supply Code, 2005, it is liable to accept the levy of supervision charges under the Electricity Supply Code, 2002 – Indian Electricity Rules, 1956 – Rule 133 (1) read with the proviso to sub-rule (1) of rule 45 – U.P. Electricity Reforms Act, 1999 – s.10 – Electricity Supply Code, 2005.

The responsibility of erection of transmission lines, associated distribution sub-stations and L.T. distribution mains, throughout the State of U.P., was originally exclusively being carried out by the U.P. State Electricity Board (UP, SEB), and thereafter by the U.P. Power Corporation.

The State of U.P., in exercise of power vested in it under rule 133 (1) read with the proviso to sub-rule (1) of rule 45 of the Indian Electricity Rules, 1956, had issued a Government order dated 2.6.1982 authorizing the U.P. Avas Evam Vikas Parishad (i.e., the appellant) to carry on

by itself, in the colonies/multistoried buildings raised by it, the work of erection of transmission lines, associated distribution sub-stations and L.T. distribution mains up. The delegated work was liable to be carried out in terms of the prescribed standards.

Vide office memorandum dated 17.1.1984, the U.P. State Electricity Board (UP, SEB) levied supervision charges at the rate of 5% of total estimated cost of the electrification work on housing boards, local development authorities and NOIDA who opted to carry out on their own, the work of erection of transmission lines, associated distribution sub-stations, and L.T. distribution mains in the colonies/multistoried buildings promoted/raised by them. Consequently, the appellant commenced to deposit supervision charges at the rate of 5% of the total estimated cost of electrification work.

On 24.4.1998, however, the UP, SEB (presently, the U.P. Power Corporation) issued another office memorandum, whereby the supervision charges were revised upwards from 5% to 15%. Higher supervision charges were accordingly demanded from the appellant. The appellant made representations asserting that the memorandum dated 24.4.1998 was not applicable to it and claiming that supervision charges were recoverable from it, as per the earlier office memorandum dated 17.1.1984. The representations made by the appellant came to be rejected by the U.P. Power Corporation. The appellant filed appeal before the Uttar Pradesh Electricity Regulatory Commission, which allowed the same and accordingly, inspite of the office memorandum dated 24.4.1998, the appellant was allowed to pay supervision charges at the rate of 5%, as were prescribed by the office memorandum dated 17.1.1984.

The Uttar Pradesh Electricity Regulatory Commission, however, held that the payment of supervision charges at the rate of 5% (under the office memorandum dated 17.1.1984) was permissible only upto

6.6.2002 and that supervision charges with effect from 7.6.2002 i.e. the date of the enforcement of the Electricity Supply Code, 2002, would be governed by the said Code. The appellant preferred appeal assailing the determination of Uttar Pradesh Electricity Regulatory Commission to the effect, that supervision charges as prescribed by the office memorandum dated 17.1.1984, would be applicable only upto 6.6.2002. The appellant contended that it could not be required to pay supervision charges stipulated under the Electricity Supply Code, 2002. The appeal was dismissed by the Appellate Tribunal for Electricity. Hence the present appeal.

Dismissing the appeal, the Court

HELD:1. There is no doubt that the Government order/notification dated 2.6.1982 has statutory trappings, inasmuch as, it was issued by the State Government in exercise of power vested in it under rule 133 (1) read with the proviso to sub-rule (1) of rule 45 of the Indian Electricity Rules, 1956. However, insofar as the present controversy is concerned, the aforesaid notification dated 2.6.1982 is of no relevance. The subject matter of consideration in the instant appeal, pertains to supervision charges claimed by the UP, SEB (and thereafter, by the respondent U.P. Power Corporation). The Government order/notification dated 2.6.1982, did not stipulate any supervision charges. It merely allowed the U.P. Avas Evam Vikas Parishad, by way of relaxation, the liberty to carry out electrification works which were exclusively vested with the "designated licensees" (the UP, SEB and thereafter, the U.P. Power Corporation). The fact that the aforesaid relaxation granted by the Government order/notification dated 2.6.1982, had neither been rescinded nor been withdrawn is, therefore, inconsequential to the present controversy. It is, therefore, not factually/legally correct for the appellant to contend that the Electricity Supply Code, 2002, by varying the supervision charges, had amended/modified

the Government order/notification dated 2.6.1982. Since the Government order/notification dated 2.6.1982 does not make any reference to supervision charges, it is not possible to accept that the Electricity Supply Code, 2002 in any manner altered the Government order/notification dated 2.6.1982. [Para 9] [117-E-H; 118-A-C]

2. The office memorandum dated 17.1.1984 had no statutory force. It was issued as an administrative order passed by the UP, SEB. The Electricity Supply Code, 2002, on the other hand, has statutory bearings, and was formulated to carry out functions earlier assigned to the U.P. Electricity Regulatory Commission under Section 10 of the U.P. Electricity Reforms Act, 1999. Since the provisions of the Electricity Supply Code, 2002, has statutory trappings, the same would override and supersede the stipulations contained in the office memorandum dated 17.1.1984, which has the force of merely an administrative order. [Para 10] [118-G-H; 121-C-F]

3. The Appellate Tribunal for Electricity, while adjudicating upon the controversy in question, was fully justified in relying upon clauses 4.3, 4.5 and 4.45 of the Electricity Supply Code, 2002. The cumulative effect of the statutory provisions leave no room for any doubt, that the responsibility of erection of transmission lines, associated distribution sub-stations and L.T. distribution mains, throughout the State of U.P., was originally exclusively being carried out by the UP, SEB, and thereafter by the U.P. Power Corporation, as "designated licensees". The aforesaid activity was also being carried out exclusively in colonies/multistoried buildings by the aforesaid, again as "designated licensees". Subsequently, through the Government order/notification dated 2.6.1982, by relaxing the provisions of the Indian Electricity Rules, 1956, the U.P. Avas Evam Vikas Parishad was permitted, subject to its complying with certain conditions, the liberty to carry out the aforesaid

electrification works. The delegated work was liable to be carried out in terms of the prescribed standards. To ensure that works were being executed as per norms, clause 4.45 of the Electricity Supply Code, 2002, provided for supervision of the works by the U.P. Power Corporation. The aforesaid supervision work was liable to be carried out by charging 15% of the estimated cost of the work. No fault can be found, for having done so. [Para 11] [121-G; 123-B-E]

4. The subject matter under consideration is erection of transmission lines, associated distribution sub-stations and L.T. distribution mains. The aforesaid activity though indispensable, has dangerous connotations. If appropriate standards are not maintained and if adequate safety measures are not adopted, disastrous consequences are possible. Delegation of such activity has necessarily to be regulated by supervision, so as to avoid any lapses. Supervision needs inputs which have to be paid for. The Electricity Supply Code, 2002, stipulates 15% of the total estimated cost of electrification works as supervision charges. It is not the case of the appellant, that the aforesaid charges are disproportionate to the work involved or have been fixed arbitrarily. It is not as if the appellant has any compulsion of carrying on these works by itself. It has chosen to do so, by taking the responsibility on itself. If the supervision charges are unacceptable, the appellant can require the U.P. Power Corporation to undertake the electrification work by depositing the estimated cost with the respondent. Supervision charges have been levied, so that the agencies, such as the appellant, who decide to carry out the activities of erection of transmission lines, associated distribution sub-stations and L.T. distribution mains, on their own, abide by the minimum prescribed norms. Higher public cost ensuring prescribed safety measures, would certainly override the cost consideration projected on behalf of the appellant. [Para 11] [123-G-H; 124-A-F]

5. Even otherwise, the contention raised on behalf of the appellant, that it was not liable to reimburse supervision charges stipulated under the Electricity Supply Code, 2002, does not lie in the appellant's mouth. This is so, because the appellant has unilaterally accepted to pay supervision charges under the Electricity Supply Code, 2005. The aforesaid Electricity Supply Code, 2005 became enforceable w.e.f. 18.2.2005. If the appellant has accepted the enforceability of the Electricity Supply Code, 2005 over and above the office memorandum dated 17.1.1984, it is not understandable why the appellant has failed to accede to abide by supervision charges levied under the Electricity Supply Code, 2002. For exactly the same reasons, for which the appellant has accepted the Electricity Supply Code, 2005, it is liable to accept the levy of supervision charges under the Electricity Supply Code, 2002. [Para 12] [124-F-H; 125-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4209 of 2007.

From the Judgment & Order dated 7.3.2007 of the Appellate Tribunal for Eletricity, New Delhi in Appeal No. 204 of 2006.

Abhindra Maheshwari, Vishwajit Singh for the Appellant.

Saugata Nath Mitra (for Meenakshi Arora) for the Respondent.

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. The appellant herein, the Uttar Pradesh Avas Evam Vikas Parishad (hereinafter referred to as, the U.P. Avas Evam Vikas Parishad), is a statutory body constituted under the U.P. Awas Evam Vikas Parishad Adhiniyam, 1965. The U.P. Avas Evam Vikas Parishad has been engaged in development of colonies, residential plots, residential houses, as well as, commercial plots and complexes throughout the State of Uttar Pradesh (U.P.).

2. The U.P. Power Corporation Ltd. (hereinafter referred to as, U.P. Power Corporation) is the successor of the U.P. State Electricity Board (hereinafter referred to as, UP, SEB). It has been the statutory duty of the UP, SEB (and thereafter, the U.P. Power Corporation) to erect transmission lines, associated distribution sub-stations and L.T. distribution mains, throughout the State of U.P. The aforesaid activity has also been carried out by the UP, SEB (and thereafter by the U.P. Power Corporation) in colonies/multistoried buildings, developed/raised in the State of U.P. The aforesaid statutory duty is cast on account of the fact, that the said authorities are "designated licensees", for supply and distribution of electricity, under section 26 of the Electricity (Supply) Act, 1948. The aforesaid provision has been re-enacted as a part of section 86 of the Electricity Act, 2003.

3. The UP, SEB (and thereafter, the U.P. Power Corporation) used to exclusively carry out its legal obligations, of erection of transmission lines, associated distribution sub-stations and L.T. distribution mains, throughout the State of U.P., as a "designated licensee". The aforesaid activity was also carried out in colonies/multistoried buildings by the aforesaid, again as a "designated licensee". For carrying out the said activities in colonies/multistoried buildings, the concerned depleting agency was required to deposit with the "designated licensee", the estimated cost of the transmission lines, associated distribution sub-stations and L.T. distribution mains. The said work was entrusted to the UP, SEB (and thereafter, the U.P. Power Corporation) as "deposit work".

4. The State of U.P., in exercise of power vested in it under rule 133 (1) read with the proviso to sub-rule (1) of rule 45 of the Indian Electricity Rules, 1956, had issued a Government order dated 2.6.1982 authorizing the U.P. Avas Evam Vikas Parishad (i.e., the appellant herein) to carry on by itself, in the colonies/multistoried buildings raised by it, the work of erection of transmission lines, associated distribution sub-stations and L.T. distribution mains up to 11 K.V., subject to the conditions envisaged in the said Government order. A

relevant extract of the Government order dated 2.6.1982, which was duly notified, is being reproduced hereunder:-

> "The Governor is hereby pleased to provide relaxation under the provisions of Rule 45(1) of Indian Electricity Rules, 1956 with respect to the works of installations upto 11 K.V. in the land etc. of complex of Avas Evam Vikas Parishad in pursuance of the provision of 133(1) of Indian Electricity Rules, 1956 read with provision of rule 45(1).
>
> 1. All the installation of electrification works shall be done under the supervision of recognized engineer/ Junior Engineer (Electrical), who has got the certificate of Electrical Supervisor from Electrical Inspector Office.
>
> 2. The work of wiring and installation of overhead line shall be got done by the persons and linemen having the permit of wireman obtained from Electrical Inspector Office. Only those persons shall come under the category of lineman, who have passed the lineman trade test from I.T.I. or who have worked on the post of linemen minimum upto 10 six months in any institution.
>
> 3. There must be one Electrical Supervisor, two Wiremen and two linesmen separately for the execution of electrification work in every area.
>
> 4. Before commencement of construction of overhead lines and cable laying etc., an approval of drawing regarding method of construction shall have to be obtained from Electrical Inspector Office."

A perusal of the aforesaid Government order reveals, that no supervision charges were prescribed as payable by the U.P. Avas Evam Vikas Parishad to the UP, SEB.

5. Supervision charges were levied by the UP, SEB for the first time through an office memorandum dated 17.1.1984. At the aforesaid juncture, the UP, SEB was pleased to levy 5% of total estimated cost of the electrification work as supervision

charges. The memorandum dated 17.1.1984 prescribing 5% as supervision charges, was applicable for housing boards, local development authorities and NOIDA who opted to carry out on their own, the work of erection of transmission lines, associated distribution sub-stations, and L.T. distribution mains in the colonies/multistoried buildings promoted/raised by them. The office memorandum dated 17.1.1984 laid down the following pre-conditions to be fulfilled by the housing boards/ local development authorities/NOIDA who were desirous to take up the aforesaid electrification activity on their own:-

"1. Specifications of materials to be used in such constructions will be approved by the Superintending Engineer concerned of the U.P. State Electricity Board.

2. The materials to be used in such constructions will be inspected and approved by an officer of the U.P. State Electricity Board to be authorized by the Superintending Engineer concerned of the Board. In case, however, the UPSEB is satisfied that promoters of a colony have engaged qualified and experienced Engineers for this job, this condition may be waived by express written orders of the Superintending Engineer concerned of the UPSEB.

3. The quality of the work to be executed will be supervised by the UPSEB's officer so that there is no difficulty in taking over of the works of UPSEB.

4. 5% (five percent) of the total estimated cost of electrification work has been deposited with the UPSEB towards supervision charges, with provisions for its adjustment as per final cost when works are completed. For this purpose, the Housing Board/Local Development Authority/ NOIDA etc. shall first submit detailed estimate of work proposed to be undertaken by them to enable UPSEB work out above 5% amount for initial deposit. On completion of work, they will submit 'as executed'. On detailed account of work to the

concerned authority of the UPSEB."

It is not a matter of dispute, that the appellant herein commenced to deposit the aforesaid supervision charges at the rate of 5% of the total estimated cost of electrification work, consequent upon the issuance of the office memorandum dated 17.1.1984. It would also be relevant to mention, that the memorandum dated 17.1.1984 provided, that maintenance of such installations, after the transfer of the electrification works by such promoters to the UP, SEB (now, the U.P. Power Corporation), would be carried out by the UP, SEB. It also provided, that service connections to individual occupants of colonies/multistoried buildings, would be provide by the UP, SEB in accordance with its rules and regulations, issued from time to time.

6. On 24.4.1998, the UP, SEB (presently, the U.P. Power Corporation) issued another office memorandum, whereby the supervision charges were revised upwards from 5% to 15%. As per the office memorandum dated 24.4.1998, the aforesaid supervision charges were payable in respect of residential/non-residential, single/multi-storied building complexes and colonies; developed by public enterprises, private builders and promoters. Based on the memorandum dated 24.4.1998, higher supervision charges were demanded from the appellant. Disputing the applicability of the memorandum dated 24.4.1998, the U.P. Avas Evam Vikas Parishad (i.e., the appellant herein), addressed representations to the "designated licensee" asserting, that the memorandum dated 24.4.1998 was not applicable to it. The appellant herein claimed, that supervision charges were recoverable from it, as per the earlier office memorandum dated 17.1.1984. The various representations made by the appellant (i.e., the U.P. Avas Evam Vikas Parishad) came to be rejected by the U.P. Power Corporation on 10.10.2001.

7. The appellant herein assailed the order dated 10.10.2001 by preferring an appeal before the Uttar Pradesh Electricity Regulatory Commission, Lucknow. On 30.7.2002, the Uttar Pradesh Electricity Regulatory Commission held, that

the appeal preferred by the appellant herein was maintainable. Accordingly, notices were issued to the U.P. Power Corporation. Thereafter the matter came to be finally adjudicated on merits, vide an order dated 3.2.2006. The appeal preferred by the U.P. Avas Evam Vikas Parishad was allowed. The operative part of the order dated 3.2.2006 is being reproduced hereunder:-

> "It is concluded on the basis of said findings that Office Memorandum No. 209-K/XIV-A/SEB/84 dated 17.1.1984 has never been superseded, so far as it concerns levy of supervision charge on the petitioner, in any manner by other said Office Memorandums on which the respondent has relied upon. This Office Memorandum has effect till 6th June, 02, the date prior to 'The Electricity Supply Code, 2002' came into force.
>
> Therefore, the respondent is directed to levy supervision charges @ of 5% as per Office Memorandum No. 209-K/XIV-A/SEB/84 dated 17.1.1984 up to 6.6.02 and make adjustments for the amount recovered in excess from the petitioner."

Accordingly, inspite of the office memorandum dated 24.4.1998, the U.P. Avas Evam Vikas Parishad was allowed to pay supervision charges at the rate of 5%, as were prescribed by the office memorandum dated 17.1.1984.

8. It, however, emerges from the operative part of the appellate order dated 3.2.2006, that it had been held that the payment of supervision charges at the rate of 5% (under the office memorandum dated 17.1.1984) was permissible only upto 6.6.2002 i.e., upto the date preceding the date from which the Electricity Supply Code, 2002, came into force. It would be pertinent to mention that the Electricity Supply Code, 2002 became enforceable with effect from 7.6.2002. The inference emerging from the appellate order dated 3.2.2006 was, that supervision charges with effect from the date of the enforcement of the Electricity Supply Code, 2002, would be governed by the said Code. This determination at the hands of the Uttar

Pradesh Electricity Regulatory Commission was not acceptable to the U.P. Avas Evam Vikas Parishad (i.e., the appellant herein). It is, therefore, that the U.P. Avas Evam Vikas Parishad preferred an appeal before the Appellate Tribunal for Electricity, assailing the determination of Uttar Pradesh Electricity Regulatory Commission to the effect, that supervision charges as prescribed by the office memorandum dated 17.1.1984, would be applicable only upto 6.6.2002. The challenge raised was that the appellant herein could not be required to pay supervision charges stipulated under the Electricity Supply Code, 2002. The appeal preferred by the U.P. Avas Evam Vikas Parishad was dismissed by the Appellate Tribunal for Electricity on 7.3.2007. Dissatisfied with the order dated 7.3.2007, the U.P. Avas Evam Vikas Parishad has preferred the instant Civil Appeal.

It was the vehement contention of the learned counsel for the appellant, that the Uttar Pradesh Electricity Regulatory Commission's order dated 3.2.2006, as also, the order dated 7.3.2007 passed by the Appellate Tribunal for Electricity, were liable to be set aside. It was submitted, that the aforesaid adjudicating authorities had failed to take into consideration, that the electrification work carried out by the appellant, i.e., the U.P. Avas Evam Vikas Parishad, in colonies, as well as, complexes raised by it, were governed by the office memorandum dated 17.1.1984. It was submitted, that the aforesaid memorandum had never been rescinded or superseded. It was, therefore, the contention of the learned counsel for the appellant, that supervision charges could have been demanded from the appellant, only at the rate stipulated in the office memorandum dated 17.1.1984. In conjunction with the aforesaid contention, it was also the contention of the learned counsel for the appellant that the U.P. Avas Evam Vikas Parishad (i.e., the appellant herein) was expressly permitted by the State Government vide Government order dated 2.6.1982, to execute on its own, electrification work in colonies/complexes developed by it. It was submitted, that the aforesaid order dated 2.6.1982 had been issued under rule

133 (1) read with the proviso to sub-rule (1) of rule 45 of the Indian Electricity Rules, 1956 and as such, had statutory force. It was, therefore, the contention of the learned counsel for the appellant, that without the supersession of the order dated 2.6.1982, there was no justification for the respondent to claim from the appellant, supervision charges at the rate of 15%. Additionally, it was the submission of the learned counsel for the appellant, that the adjudicatory authorities had failed to consider the responsibility vested in the appellant, namely, that the appellant was engaged in raising colonies/buildings/houses for the general welfare of the citizens of this country, on a no profit no loss basis; and in case, supervision charges were raised from 5% to 15%, the eventual effect would have to be suffered by those who are provided with the buildings constructed by the appellant i.e., the general public. It was accordingly submitted by the learned counsel for the appellant, that if the rate of supervision charges is increased, the eventual cost of construction would also naturally enhance. It is, therefore, the submission of the learned counsel for the appellant, that the determination by the adjudicatory authorities was devoid of genuine and valid consideration.

9. To start with, we shall deal with the Government order/notification dated 2.6.1982. There is no doubt that the aforesaid Government order/notification has statutory trappings, inasmuch as, it was issued by the State Government in exercise of power vested in it under rule 133 (1) read with the proviso to sub-rule (1) of rule 45 of the Indian Electricity Rules, 1956. However, insofar as the present controversy is concerned, in our considered view, the aforesaid notification dated 2.6.1982 is of no relevance. The subject matter of consideration in the instant appeal, pertains to supervision charges claimed by the UP, SEB (and thereafter, by the respondent U.P. Power Corporation). The Government order/notification dated 2.6.1982, did not stipulate any supervision charges. It merely allowed the U.P. Avas Evam Vikas Parishad, by way of relaxation, the liberty to carry out electrification works which were exclusively vested with the "designated licensees" (the UP,

SEB and thereafter, the U.P. Power Corporation). The fact that the aforesaid relaxation granted by the Government order/notification dated 2.6.1982, had neither been rescinded nor been withdrawn is, therefore, inconsequential to the present controversy. It is, therefore, not factually/legally correct for the appellant to contend that the Electricity Supply Code, 2002, by varying the supervision charges, had amended/modified the Government order/notification dated 2.6.1982. Since the Government order/notification dated 2.6.1982 does not make any reference to supervision charges, it is not possible for us to accept that the Electricity Supply Code, 2002 in any manner altered the Government order/notification dated 2.6.1982. Accordingly, the contention advanced at the hands of the learned counsel for the appellant based on the Government order/notification dated 2.6.1982 is devoid of any merit.

10. The office memorandum dated 17.1.1984, as already noticed above, was the primary basis for the appellant to assail the determination rendered by the two adjudicatory authorities, on the issue of levy of supervision charges. According to the adjudicatory authorities, the supervision charges depicted in the office memorandum dated 17.1.1984 would be applicable upto 6.6.2002. The aforesaid determination was based on the fact, that the Electricity Supply Code, 2002 would be applicable with effect from 7.6.2002. As per the determination rendered in the impugned orders (passed by the adjudicatory authorities referred to hereinabove), the supervision charges depicted in the office memorandum dated 17.1.1984, would be applicable till 6.6.2002, whereafter, the same would be recoverable in terms of the provisions of the Electricity Supply Code, 2002. We find merit in the determination at the hands of the adjudicatory authorities. Firstly, the office memorandum dated 17.1.1984 had no statutory force. It was issued as an administrative order passed by the UP, SEB. The Electricity Supply Code, 2002, on the other hand, has statutory bearings. It is relevant to notice, that the Electricity Supply Code, 2002 had been drawn to carry out the responsibilities vested with the Uttar Pradesh Electricity Regulatory Commission under section

10 of the U.P. Electricity Reforms Act, 1999. Section 10 of the Uttar Pradesh Electricity Reforms Act, 1999 is being reproduced hereunder:-

"S.10. Functions of the Commission

The Commission shall have the following functions; namely,-

(a) to determine the tariff for electricity, wholesale, bulk, grid or retail, as the case may be;

(b) to determine the tariff payable for the use of the transmission facilities;

(c) to regulate power purchase and procurement process of the transmission utilities and distribution utilities including the price at which the power shall be procured from the generating companies, generating stations or from other sources for transmission, sale, distribution or supply in the State;

(d) to promote competition, efficiency and economy in the activities of the electricity industry to achieve the objects and purposes of this Act;

(e) to regulate investment approval for transmission, distribution or supply of electricity to the entities operating within the State;

(f) to aid and advise the State Government in matters concerning electricity generation, transmission, distribution and supply in the State;

(g) to issue license for transmission, distribution or supply of electricity and determine the conditions of the license;

(h) to regulate the working of licensees and

other persons authorized or permitted to engage in the electricity industry in the State and to make their working efficient, economical and equitable;

(i) to require licensees to formulate plans and schemes for the promotion of generation, transmission, distribution, supply or utilization of electricity and quality of service and to device proper power purchase and procurement process;

(j) to set standards for the electricity industry in the State including standards relating to quality, continuity and reliability of service;

(k) to promote competitiveness and make avenues for participation of private sector in the electricity industry in the State, and also to ensure a fair deal to the consumers;

(l) to lay down and enforce safety standards;

(m) to aid and advise the State Government in formulating power policy for the State;

(n) to collect and record information relating to generation, transmission, distribution or utilization of electricity;

(o) to collect and publish data and forecasts on the demand for, and use of electricity in the State and to require the licensees to collect and publish such data;

(p) to regulate the assets, properties and interest in properties relating to the electricity industry in the State in such manner as to safeguard the public interest;

(q) to adjudicate upon the dispute and differences between a licensee and utility or to refer the same for arbitration;

(r) to co-ordinate with environmental regulatory

agencies for evolving policies and procedures for appropriate environmental regulation of Electricity Sector in the State; and

(s) to aid and advise the State Government on any other matter referred by the State Government."

The Electricity Supply Code, 2002 which has statutory trappings was formulated to carry out functions earlier assigned to the U.P. Electricity Regulatory Commission under Section 10 of the U.P. Electricity Reforms Act, 1999 (already extracted above). This is apparent from the order of the U.P. Electricity Regulatory Commission, reproduced hereunder:-

"Electricity Supply Consumers Regulation, 1984, formulated by the erstwhile U.P. State Electricity Board covers the conditions of supply of electricity to retail consumers. After the enactment of U.P. Electricity Reforms Act, 1999, the U.P. Electricity Regulatory Commission has been assigned functions under Section 10 of the Act to regulate the distribution, supply, utilization of electricity, issue licenses to regulate the working of the licensees and to set the standards of services for the consumers as well as standards for the electricity industry in the State."

Since the provisions of the Electricity Supply Code, 2002, has statutory trappings, the same would override and supersede the stipulations contained in the office memorandum dated 17.1.1984, which has the force of merely an administrative order.

11. We are also satisfied, that the Appellate Tribunal for Electricity, while adjudicating upon the controversy in question, was fully justified in relying upon clauses 4.3, 4.5 and 4.45 of the Electricity Supply Code, 2002. The aforesaid clauses are being reproduced hereunder:-

"4.3 The Licensee is responsible for ensuring that its distribution system is upgraded, extended and

strengthened to meet the demand for electricity in its area of supply.

4.5 The cost of extension and upgradation of the system for meeting demand of new consumers shall be recovered from the new consumers through system loading charges as approved by the Commission. In areas where distribution mains do not exist, the costs for installation of new distribution mains shall normally be covered by grant from the State Government or local body or any collective body of consumers or a consumer. The Licensee may also install new Distribution Mains from the surplus available with the Licensee after meeting all expenditure. The Licensee shall submit a policy regarding the utilization of surplus funds and the installation of Distribution Mains to the Commission for approval. The…..

(a) responsibility of construction of the required distribution network in case of a new residential, commercial or an industrial complex with load exceeding 25 KW shall be that of the body or the agency (public or private) that constructs such complex, and

(b) responsibility for laying the distribution network for street lights on any new road/ street shall be that of the local authority concerned.

4.45 The estimate shall be prepared as per the provisions of the Indian Electricity Act, 1910 and on the basis of charges approved by the Commission. The Licensee shall submit once in two years a proposal to the Commission for approval of various charges to be charged by the Licensee from the consumer in the estimate. The estimate shall be valid for two months. If the work is to be done by the applicant, Licensee shall charge 15% of the estimate as supervision charges that shall need to

be deposited before work begins. In other cases, Licensee shall commence the work after the applicant has deposited the full amount of the estimate."

The cumulative effect of the aforesaid statutory provisions leave no room for any doubt, that the responsibility of erection of transmission lines, associated distribution sub-stations and L.T. distribution mains, throughout the State of U.P., was originally exclusively being carried out by the UP, SEB, and thereafter by the U.P. Power Corporation, as "designated licensees". The aforesaid activity was also being carried out exclusively in colonies/multistoried buildings by the aforesaid, again as "designated licensees". Subsequently, through the Government order/notification dated 2.6.1982, by relaxing the provisions of the Indian Electricity Rules, 1956, the U.P. Avas Evam Vikas Parishad was permitted, subject to its complying with certain conditions, the liberty to carry out the aforesaid electrification works. The delegated work was liable to be carried out in terms of the prescribed standards. To ensure that works were being executed as per norms, clause 4.45 of the Electricity Supply Code, 2002, provided for supervision of the works by the U.P. Power Corporation. The aforesaid supervision work was liable to be carried out by charging 15% of the estimated cost of the work. No fault can be found, for having done so.

12. According to the learned counsel for the appellant, the rate of supervision charges was hiked from 5% to 15% unauthorizedly, and without application of mind. The submission was, that the supersession of the office memorandum dated 17.1.1984 would have an adverse effect on the public at large, inasmuch as, the eventual cost of construction of houses offered by the U.P. Avas Evam Vikas Parishad to the general public would be costlier. The subject matter under consideration is erection of transmission lines, associated distribution sub-stations and L.T. distribution mains. The aforesaid activity though indispensable, has dangerous connotations. If appropriate standards are not maintained and if adequate

safety measures are not adopted, disastrous consequences are possible. Delegation of such activity has necessarily to be regulated by supervision, so as to avoid any lapses. Supervision needs inputs which have to be paid for. The Electricity Supply Code, 2002, stipulates 15% of the total estimated cost of electrification works as supervision charges. It is not the case of the appellant, that the aforesaid charges are disproportionate to the work involved or have been fixed arbitrarily. It is not as if the appellant has any compulsion of carrying on these works by itself. It has chosen to do so, by taking the responsibility on itself. If the supervision charges are unacceptable, the appellant can require the U.P. Power Corporation to undertake the electrification work by depositing the estimated cost with the respondent. In our considered view, the fact, that the public at large would have to bear the brunt of the hike in supervision charges, is totally unacceptable, especially in the background of the position noticed above. The instant contention is even otherwise irrelevant to the subject matter under consideration. Supervision charges have been levied, so that the agencies, such as the appellant herein, who decide to carry out the activities of erection of transmission lines, associated distribution sub-stations and L.T. distribution mains, on their own, abide by the minimum prescribed norms. Higher public cost ensuring prescribed safety measures, would certainly override the cost consideration projected by the learned counsel for the appellant. We find no merit in the instant contention as well.

Even otherwise, the contention raised at the hands of the learned counsel for the appellant, that the appellant was not liable to reimburse supervision charges stipulated under the Electricity Supply Code, 2002, does not lie in the appellant's mouth. This is so, because the appellant has unilaterally accepted to pay supervision charges under the Electricity Supply Code, 2005. The aforesaid Electricity Supply Code, 2005 became enforceable w.e.f. 18.2.2005. All the pleas raised by the appellant, to avoid payment of supervision charges under the Electricity Supply Code, 2002, are also available to the appellant to avoid payment of such charges under the

Electricity Supply Code, 2005. If the appellant has accepted the enforceability of the Electricity Supply Code, 2005 over and above the office memorandum dated 17.1.1984, it is not possible for us to understand why the appellant has failed to accede to abide by supervision charges levied under the Electricity Supply Code, 2002. For exactly the same reasons, for which the appellant has accepted the Electricity Supply Code, 2005, it is liable to accept the levy of supervision charges under the Electricity Supply Code, 2002.

13. For the reasons recorded hereinabove, we find no merit in the instant Civil Appeal and the same is accordingly dismissed.

B.B.B. Appeal dismissed.

UNION OF INDIA & ORS.

v.

RAMESH GANDHI

(Criminal Appeal No. 1356 of 2004)

NOVEMBER 14, 2011

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

Code of Criminal Procedure, 1973 – s.482 – Scope of jurisdiction to quash FIR – Allegation made in FIR that the accused-private company had committed breach of contractual obligations arising under the two contracts entered into by it with Coal India Ltd. (CIL) and when the accused-private company approached the High court and Supreme Court seeking the enforcement of the directions of Coal Controller, all the accused deliberately suppressed the fact that accused-private company had committed a breach of its contractual obligations, thereby enabling the accused-private company to obtain favourable order from the said Courts in regard to supply of coal and secure illegal monetary gain by manipulating the judicial process – Accused no.7-respondent, a member of accused-private company, filed writ petition challenging the said FIR – High Court quashed the FIR on the ground that the supply of coal had been obtained in terms of a decision given by the High Court and approved by the Supreme Court and for the said reason no magistrate can, therefore, decide whether any unjust pecuniary advantage was made available to the accused-private company – Justification – Held: For coming to its conclusion, the High Court made an 'elaborate examination' of the Indian legal system – But, the entire enquiry proceeded on a wrong premise that no examination, as to how a judgment of a superior Court came into existence, is permissible – Non-disclosure of all the necessary facts tantamounts to playing fraud on the Courts – Fraud vitiates everything including judicial acts – If a judgment obtained by playing fraud on the Court is a nullity and is to be treated as non est by every Court

superior or inferior, it would be strange logic to hear that an enquiry into the question whether a judgment was secured by playing fraud on the Court by not disclosing the necessary facts relevant for the adjudication of the controversy before the Court is impermissible – In fact, it is clear that such an examination is permissible – Tested from the point of view of the law laid down in R.P. Kapur and Ch. Bhajan Lal cases, the impugned FIR does not merit interference, as it is not a case of even the respondent that the FIR is required to be quashed on any one of the grounds legally recognised by Supreme Court to be sufficient ground for quashing an FIR – Penal Code, 1860 – s.120B r/w s.420 – Prevention of Corruption Act, 1988 – s.13(2) r/w s.13(1)(d) – Constitution of India, 1950 – Article 226 – Fraud.

Advertisements were issued by Coal India Limited (CIL) inviting offers for purchase of various grades of coal. A private company entered into two contracts with CIL. Subsequently however, it sought variation of the original terms of the contracts. The same was directed to be given by Coal Controller. Complaining that the CIL and its officers were not honouring the directions given by the Coal Controller, the said private company approached the High Court by filing two writ petitions. The writ petitions were allowed. Aggrieved, CIL approached this Court by filing Civil Appeal Nos. 2004-2005 of 1997. The appeals were dismissed.

Subsequently, the private company filed contempt petitions complaining that CIL and its officers had failed to comply with the judgment of this Court dated 18th March, 1997 in the above-mentioned Civil Appeal Nos. 2004-2005 of 1997. The said contempt petitions were disposed of by this Court in favour of the said private company by order dated 14th July, 1997.

In the above-mentioned background, an FIR came to be registered under Section 120B read with Section 420 IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. The crux of the FIR

was that though the supplies by CIL were pursuant to the directions issued by the High Court confirmed and reinforced by the judgment dated 18th March, 1997 and order dated 14th July, 1997 of this Court, the accused obtained such directions from the courts by "intentionally and dishonestly" suppressing certain relevant and crucial facts, which resulted in orders being passed both by this Court as well as by the High Court favourable to the said private company (accused no.9) and caused huge wrongful loss of approximately rupees ninety lakhs to Central Coalfields Ltd. (CCL), a subsidiary of CIL and a corresponding wrongful gain to accused no.9-private company.

Accused no.7-respondent, a member of accused no.9-private company, filed writ petition before the High Court praying that the FIR be quashed. The High Court quashed the FIR on the ground that inasmuch as the supply of coal to the accused-private company had been made in terms of a decision given by the High Court as approved by this Court at a price fixed by this Court, no Magistrate can examine the allegation that such a supply of coal resulted in an unjust pecuniary advantage to the accused-private company.

In the instant appeal, the appellant contended that the only issue considered and decided by the High Court and confirmed by this Court was whether the Coal Controller had the necessary legal authority to direct (by his two letters dated 12.4.1994) the variation of the terms of the two contracts entered into by the accused-private company and this Court did find that the Coal Controller had the requisite legal authority to direct such variation; that the mere existence of authority in the Coal Controller to order variation in the terms of the contracts did not by itself mean that the authority had been exercised legally and validly; that the accused-private company had already committed a breach of its contractual obligations to CIL and having regard thereto, the Coal Controller

should not have exercised his authority in favour of such a defaulting purchaser; that the Coal Controller did not take all the relevant factors before exercising his authority to grant variation in the terms of the contracts between the accused-private company and the Coal India Ltd.; that even in the legal proceedings before the High Court and this Court, these factors were not brought to the notice of the Courts by any one of the accused and that if only the fact that the accused-private company had already defaulted in its obligations arising out of the two contracts entered into by it with the CIL had been brought to the notice of the Courts, they would not have intervened in favour of the accused-private company.

Allowing the appeal, the Court

HELD:1. From the tenor of the impugned FIR, it is clear that the charge against the accused is as follows:(a)The accused-private company committed breach of contractual obligations arising under the two contracts entered into by it with CIL. (b) The officers of the CIL and CCL(shown accused in the FIR) are obliged in law (as per the terms of the contract) to take penal action against the accused-private company for such breach of the contractual obligations. (c) The above-mentioned officers/accused failed to take any such penal action. (d) On the other hand, when the accused-private company approached the courts seeking the enforcement of the directions of Coal Controller, all the accused deliberately suppressed the fact that accused-private company had committed a breach of its contractual obligations,thereby enabling the accused-private company to obtain favourable order. (e) The suppression of the crucial fact that the accused-private company committed breach of its contractual obligations was deliberate and intentional on the part of all the accused and (f) Such suppression is a consequence of a criminal conspiracy between all the accused to enable the accused-private company to secure an illegal

monetary gain by manipulating the judicial process. [Para 17] [156-F-H; 157-A-C]

2.1. The entire controversy in the judgment dated 18-3-1997 of this Court revolved only around the authority of the Coal Controller to issue the various directions such as were given by him on 12.04.1994. On an examination of the relevant provisions of law, this Court no doubt held that the Coal Controller was legally competent to issue the said directions. That the accused-private company had already committed breach of contractual obligations arising under the two contracts was not at issue in the said judgment. [Para 18] [157-D-E]

2.2. The fact that the supplies of coal were made to the accused-private company pursuant to the orders of the High Court and confirmed by this Court by itself does not rule out the possibility of a crime having been committed. It is well known that decisions are rendered by courts on the basis of the facts pleaded before them and the issues arising out of those pleaded facts. The only issue projected on the basis of the facts placed before High Court and this Court was the competence of the Coal Controller to give directions which in substance amounted to variation of the terms of the contracts to which the accused-private company and Coal India Ltd. are parties. This court in Civil Appeal Nos.2004-2005 of 1997 declared that the Coal Controller had the requisite legal authority to give such directions but did not examine any other issue. [Para 19] [157-G-H; 158-A-C]

3. The High Court quashed the FIR only on the ground that the supply of coal had been obtained in terms of a decision given by the High Court and approved by this Court and for the said reason no magistrate can, therefore, decide whether any unjust pecuniary advantage was made available to the accused-private company. For coming to such a conclusion, the Judge made an 'elaborate examination' of the Indian legal system. But, the entire enquiry proceeded on a wrong

premise that no examination, as to how a judgment of a superior Court came into existence, is permissible in the system of law which we follow. [Para 21] [158-F-H]

4.1. Fraud vitiates everything including judicial acts. If a judgment obtained by playing fraud on the Court is a nullity and is to be treated as non est by every Court superior or inferior, it would be strange logic to hear that an enquiry into the question whether a judgment was secured by playing fraud on the Court by not disclosing the necessary facts relevant for the adjudication of the controversy before the Court is impermissible. In fact, it is clear that such an examination is permissible. Such a principle is required to be applied with greater emphasis in the realm of public law jurisdiction as the mischief resulting from such fraud has larger dimension affecting the larger public interest. Therefore, the conclusion reached by the judgment under appeal that no Court can examine the correctness of the contents of the impugned FIR, is unsustainable and without any basis in law. The very complaint in the FIR is that the judgment of the High Court, as affirmed by this Court, is a consequence of a deliberate and dishonest suppression of the relevant facts necessary for adjudicating the rights and obligations of the parties to the said litigation. [Paras 22, 23] [159-A; 160-C-F]

4.2. Non- disclosure of all the necessary facts tantamounts to playing fraud on the Courts. The allegation in the FIR is that the various accused deliberately withheld/suppressed the fact that the accused-private company, by the time it approached the High Court in writ petition, had already committed breach of its obligations arising of the contracts from out of which the entire litigation arose, which is a fact which is greatly relevant in deciding the entitlement of the accused-private company to seek various reliefs such as the ones sought by it before the High Court. It was further specific allegation in the FIR such a non-disclosure/

suppression of the crucial fact was wilful and deliberate pursuant to a conspiracy between all the accused to secure an illegal and wrongful monetary gain to the accused-private company. Therefore, the Judgment under appeal cannot be sustained. [Paras 24, 25] [160-G-H; 161-A-C]

S.P. Chengal Varaya Naidu (Dead) By Lrs. v. *Jagannath (Dead) By Lrs. & Ors.*, **(1994) 1 SCC 1: 1993 (3) Suppl. SCR 422 and** *A.V. Papayya Sastry and Ors. v. Government of A.P. and Ors.* **AIR 2007 SC 1546 : 2007 (3) SCR 603 – relied on.**

5. Coming to the question of the scope of the jurisdiction to quash an FIR, either in the exercise of statutory jurisdiction under Section 482 of Cr.P.C. or under Article 226 of the Constitution of India, the law is well settled and this Court in a catena of decisions laid down clear principles and indicated parameters which justify the quashing of an FIR. Tested from the point of view of the law laid down in *R.P. Kapur* and *Ch. Bhajan Lal* cases, the impugned FIR does not merit interference, as it is not a case of even the respondent (writ petitioners) that the FIR is required to be quashed on any one of the grounds legally recognised by this Court to be sufficient ground for quashing an FIR. [Paras 26, 29] [161-D-E; 165-B-C]

R.P. Kapur v. State of Punjab, **AIR 1960 SC 866 : 1960 SCR 388 and** *State of Haryana and others* v. *Ch. Bhajan Lal and others* **AIR 1992 SC 604 : 1990 (3) Suppl. SCR 259 – relied on.**

Case Law Reference:

1993 (3) Suppl. SCR 422	**relied on**	**Para 22**
2007 (3) SCR 603	**relied on**	**Para 23**
1960 SCR 388	**relied on**	**Para 27**
1990 (3) Suppl. SCR 259	**relied on**	**Para 28**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1356 of 2004.

From the Judgment & Order dated 23.11.2001 of the High Court of Calcutta in Writ Petition No. 352 of 2001.

P.P. Malhotra, ASG, Sunil Roy, P.K. Dey, Mukesh Verma, A.K. Sharma, P. Parmeswaran for the Appellants.

Gopal Subramanium, Vikas Singh, Yunus Malik, Amrita Narayan, Anand Varma, Ravi Kishore, Samir Malik, Prashant Chaudhary for the Respondent.

The Judgment of the Court was delivered by

CHELAMESWAR, J. 1. This appeal arises out of a judgment of the High Court of Calcutta dated 23rd November, 2001 in Writ Petition No. 352/2001. The appellants herein were the respondents in the above-mentioned Writ Petition.

2. An FIR came to be registered on 15th November, 2000 in the Delhi Special Police Establishment, Ranchi Branch in Crime No. RC 13(A)/2000 (R) under Section 120B read with Section 420 IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 against nine accused of whom the first accused was the Coal Controller at the relevant point of time. The next five accused were the officers of Central Coalfields Limited (hereinafter 'CCL'. for short), which is a subsidiary of Coal India Limited (hereinafter 'CIL', for short). Accused No.9 is a Private Limited Company (hereinafter 'private company', for short) and accused Nos. 7 and 8 are the members of the said private company.

3. The sole respondent, Mr. Ramesh Gandhi, is one of the members of the above-mentioned private company and shown to be the seventh accused in the above-mentioned FIR. He filed writ petition No. 352/2001 on the file of the Calcutta High Court praying that the above-mentioned FIR be quashed. By the judgment under appeal, the Calcutta High Court allowed the writ petition quashing the FIR.

4. The substance of the accusation in the FIR is that all the accused entered into a criminal conspiracy to confer an illegal and unjust benefit on the above-mentioned private company. In the process, the accused, "intentionally and dishonestly"

suppressed certain relevant and crucial facts (in the various cases filed before the Calcutta High Court and also this Court to which the accused were parties), which resulted in orders being passed both by this Court as well as by the High Court favourable to the private company.

5. FIR reads as follows:

"DELHI SPECIAL POLICE ESTABLISHMENT, RANCHI BRANCH

FIRST INFORMATION REPORT

Crime No.RC 13(A)/2000(R), Date and time of Report : 15.11.2000 at 1700 Hrs.

Place of occurrence with State : Calcutta (West Bengal), Ranchi (Jharkhand)

Date and time of occurrence : 1990-91 to 2000

Name of complainant or informant with address : Through Source

Offence : U/s. 120B r/w 420 IPC and Sec. 13(2) r/w 13(1)(d) of PC Act, 1988.

Name and address of the accused : (1) Shri P.N. Tiwary, the then Coal Controller, Calcutta (retd.)

(2) Shri R.P. Srivastava, the then G.M. Sales, CCL, Ranchi (retd.)

(3) Shri S.K. Srivastava, G.M. (Sales), CCL, Ranchi

(4) Shri B. Akla, CMD, CCL, Ranchi

(5) Shri K.M. Singh, the then G.M., Argada Area, CCL

(6) Shri Sudarshan Singh, the then Area Sales Officer Argada Area, CCL, presently Superintending Engineer (E&M), N.K. Area, CCL

(7) Shri Ramesh Gandhi, Prop. M/s. Continental Transport Constn. Corpn., (CTCC), Dhanbad (Pvt).

(8) Shri Mahesh Gandhi of M/s. CTCC, Dhanbad (Pvt.)

(9) M/s. Continental Transport Construction Corpn. (CTCC), Dhanbad (Pvt.)

Action taken : Regular case registered and investigation taken up.

Investigation Officer: Shri A. Prasad, DSP, CBI, SPE, Ranchi

INFORMATION

A reliable information has been received to the effect that Shri P.N. Tiwary, the then Coal Controller (since retd.), Calcutta, Shri R.P. Srivastava, the then G.M.(Sales), CCL, Ranchi (since retd.), Shri S.K. Srivastava, the then GM.(Sales), CCL, Ranchi, Shri B. Akla, the then Chief of Marketing, Coal India Limited, Calcutta, Director (Technical) and (Projects and Planning), CCL and presently Chairman-cum-Managing Director, Central Coalfields Ltd. (CCL), Ranchi, Shri K.M. Singh, the then G.M., Argada Area, CCL, Shri Sudarshan Singh, the then Area Sales Officer, Argada Area, CCL (presently Superintending Engineer (E&M), N.K. Area, CCL, Shri Ramesh Gandhi of M/s. Continental Transport Construction Corpn., Dhanbad and Shri Mahesh Gandhi of M/s. Continental Transport Construction Corpn., Dhanbad entered into a criminal conspiracy among themselves and in furtherance of the said conspiracy the accused public servants abused their respective official positions, in as much as that they helped the private firm namely M/s. CTCC by way of illegally and unauthorisedly transferring different grades of coal/slurry to the private firm (CTCC) and also by way of intentionally and dishonestly suppressing relevant facts before the Hon'ble Courts and thereby helped M/s.CTCC in getting favourable orders for release of steam coal which was meant to be supplied only to the actual users and not to the traders like M/s. CTCC. As a result of the aforesaid overt acts of the accused public servants as mentioned above, M/s. CTCC, illegally obtained the supply of the Steam Coal at a cheaper rate applicable to the actual

users, even after the lapse of the period stipulated by the Hon'ble Supreme Court, causing wrongful loss to the tune of Rs.90,00,000/- approximately to the CCL.

It has been alleged that Coal India Limited (CIL), Calcutta vide NIT (Notice Inviting Tender) dated 9/15-1-91 offered sale of existing stock of following categories of coal under "BULK SALE SCHEME" on as is where is basis.

(i) Slurry
(ii) Dirty Slurry
(iii) Middlings
(iv) Rejects

It was also stipulated vide item no.23 of the terms and conditions of the NIT that in case of failure on the part of the buyer to lift 90% of the quantity within 90 days of allocation, security deposit and the Bank Guarantee would be liable to be forfeited by the Company.

In response to the aforesaid NIT, M/s. CTCC, offered to buy following quantity/quality of coal at the prescribed rate. M/s. CTCC was allotted the entire quantity w.e.f. 25.7.91 which was to be lifted within 90 days after depositing the cost in advance.

Name of Product	**Quantity offered by M/s. CTCC**	**Price**
Slurry Grade 'D'	179000 MT	Rs. 37756/- per MT
Dirty Slurry Grade 'F'	45000 MT	Rs. 238.50 per MT
Middlings Grade 'F'	90000 M T	Rs. 238.50 per MT
Rejects	50000 MT	Rs. 178.00 per MT

It is further alleged that M/s. CTCC deposited the cost only for 1500 MTs of Middlings Grade 'F' and 13276 MT of Slurry Grade 'D' against the offered quantity as mentioned in the foregoing para. M/s. CTCC had lifted this quantity of 1500 MT only and was thus to be penalised by way of forfeiture of security/invoking of Bank Guarantee as per terms and conditions of the NIT. However, the concerned accused public servants in pursuance to a criminal conspiracy, had shown favours to M/s. CTCC by not taking action subsequently as above.

In furtherance of the conspiracy, M/s. CTCC requested the CIL in April 1993 to transfer the remaining quantity of 88500 MT of Middlings Grade 'F' to Dirty Slurry Grade 'F' and the same was approved on 28.5.93 in complete violation of terms and conditions of the NIT.

Accused Ramesh Gandhi of M/s. CTCC in accordance with Shri P.N. Tiwary, the then Coal Controller, Calcutta and the accused officials of the CCL/CIL submitted a representation to accused Shri P.N. Tiwary requesting transfer of the left over quantity of 165724 MT of Slurry Grade 'D' to Dirty Slurry Grade 'F'. Shri P.N. Tiwari, in his capacity as Coal Controller, was supposed to allow the transfer of grade of coal after following due procedure, but he, in utter violation of the terms and condition of the NIT, approved the same and intimated to the CMD, CCL, Ranchi, accordingly.

It is further alleged that the Coal India Limited, Calcutta floated another NIT under "LIBERALISED SALES SCHEME II (LSS-II)", with same terms and conditions as of Bulk Sale Scheme, and M/s. CTCC offered to purchase, under this scheme, following quantities of coal from the collieries mentioned against each.

Grade of Coal	Quantity lifted	Colliery
(i) Steam Coal Grade 'B'	1.35 Lakhs MT	Urimari
(ii) Steam Coal Washery Grade 'D'	1.75 Lakhs MT	Jarangdih

It is further alleged that M/s. CTCC was allotted 32,000 MT of Steam Coal Grade 'B' from URIMARI Colliery and 5750 MT of Washery Grade 'D' Coal from Jarangdih Colliery vide letter dated 7.4.93 and 21.4.93 respectively of Coal India Limited, Calcutta. As against the aforesaid allotted quantity M/s.CTCC deposited the amount equal only to the value of 3000 MT each and lifted the same from the respective sources.

In pursuance of criminal conspiracy M/s. CTCC further requested the then General Manager, Argada Area, CCL, Shri K.M. Singh, vide letter dated 7.4.94 to allot Steam Coal from Sirka, Religara and Giddi 'C' Collieries (All high demand collieries), in lieu of left over quantity of Slurry Grade 'D' (165724 MT), Middlings Grade 'F' (88500 MT) and Dirty Slurry Grade'F' (45000 MT) of the previous scheme, i.e. Bulk Sale Scheme.

Steam Coal of the aforesaid three sources namely Sirka, Religara and Giddi 'C' was to be allotted, as per the policy of the CIL/CCL, exclusively to the industrial consumers (Actual users) and not to the traders like M/s. CTCC at all, during the relevant period. Also, the rate of Steam Coal applicable to the industrial Consumers (Actual users) was approximately Rs.200/- per MT less than the rate fixed for the traders and M/s. CTCC being the traders, was not authorised to get the Steam Coal at the rate which was applicable to the industrial consumers (actual users).

Following the receipt of letter dated 7.4.94 of M/s. CTCC, accused Shri K.M. Singh, the then General Manager, Argada Area, CCL, in pursuance to the criminal conspiracy falsely intimated the Sales and Marketing Divisions of CCL, Ranchi, on 8.4.94 to the effect that Argada Area was having a huge stock of Steam Coal and that he was ready to supply the same to M/s. CTCC.

It is further alleged that accused Shri K.M. Singh, the then General Manager, Argada Area, CCL also was not competent to entertain such a matter as it was the concern

of General Manager (Sales and Marketing), CCL, Ranchi.

Simultaneously, accused Ramesh Gandhi of M/s. CTCC approached accused P.N. Tiwary, the then Coal Controller, as well, on the same issue, who in turn, in criminal conspiracy with M/s. CTCC and accused public servants wrote a letter dated 12.4.94 to the CMD, CCL, Ranchi, inter alia, directing him to accede to the request of M/s. CTCC, without ascertaining from the CCL, Ranchi, the stock position and the past conduct of M/s. CTCC of not remitting the cost of entire offered quantity of coal in question against both the aforesaid schemes namely 'Bulk Sale' and 'LSS-II' within the stipulated period as prescribed and also the fact that M/s. CTCC was not authorised to get the Steam Coal which was meant for Industrial Units (Actual Users).

Even before the aforesaid letter dated 12.4.94 of accused P.N. Tiwary, was received in the office of the CMD, CCL, Ranchi, accused Ramesh Gandhi of M/s. CTCC moved to the Hon'ble High Court, Calcutta by suppressing the relevant facts of the matter and secured an order dated 18.4.94 vide which CMD, CCL, Ranchi was directed to comply with the directions of the Coal Controller issued vide letter dated 12.4.94. The accused public servants of CIL/CCL also did not place the correct facts before the Hon'ble High Court, Calcutta in the matter.

It is further alleged that it was obligatory on the part of accused R.P. Shrivastava, the then General Manager (Sales), CCL, Ranchi, and Shri Akla, the then Chief of Marketing, CIL, Calcutta to safeguard the interest of the company by way of approaching the Coal Controller to modify his order issued vide letter dated 12.4.94 according to the terms and conditions of the NITs in question and also to recommend to move the Division Bench of Hon'ble High Court Calcutta for modification of the order dated 18.4.94 on following points.

(i) M/s. CTCC did not fulfil the terms and conditions of NITs

in question and thus the penalty was to be imposed on them;

(ii) Steam Coal of the aforesaid collieries was not meant for traders like M/s. CTCC.

(iii) Traders, if allotted Steam Coal, were to pay @ Rs.200/- approximately (per MT) more than the rate allowed to the Industrial Consumers (Actual users).

However, they, in pursuance to the criminal conspiracy, simply recommended challenging the authority of the Coal Controller for issuing direction vide letter dated 12.4.94, in the Hon'ble High Court, Calcutta since the Coal Controller was authorised to issue such letters, the Hon'ble High Court, Calcutta vide order dated 6.4.95 dismissed the Revision Petition filed by the CIL with direction to implement the order dated 12.4.94 of the Coal Controller.

M/s. CTCC, however, did not deposit the value of the Coal to be lifted again, on some pretext or the other as they were not in a position to sale such a huge quantity of coal at monopolistic price, those days, since the buyers were getting coal directly from the Coal India Limited and other sources. Also neither the accused Shri B. Akla, the then Chief of Marketing CIL nor Shri R.P. Shrivastava, the then General Manager (Sales and Marketing), CCL, Ranchi asked M/s. CTCC to deposit the coal value and to lift the coal.

Two SLPs vide no. 2004 and 2005 of 1997 were, however, filed in the Hon'ble Supreme Court after a lapse of more than two years by the CIL./CCL challenging the order dated 6.4.95 of the Division Bench of the Hon'ble High Court, Calcutta.

At this stage also, the actual facts relating to the failure on the part of M/s. CTCC in lifting the coal after depositing the coal value in advance within the stipulated period as per terms and conditions of the NITs, were not brought to the notice of the Hon'ble Supreme Court and

simply the authority of the Coal Controller was challenged.

The Hon'ble Supreme Court after hearing both the accused parties, dismissed both the SLPs on 18.3.97 with an observation that the Coal Controller had got the jurisdiction to pass such orders.

On receipt of the orders of the Hon'ble Supreme Court, it was rightly commented upon by an officer of Sales and Marketing Department of the CCL, Ranchi on 5.4.97 to the effect that merely challenging authority of the Coal Controller had not served any purpose. He opined that all the relevant points regarding failure on the part of M/s. CTCC should be raised by preferring an appeal against the impugned order. Accused Shri B. Akla by that time had joined as Director (Projects and Planning) CCL, Ranchi and had perused the aforesaid noting on 5.4.97 itself, but he had returned the file on 16.4.97 without any comment with an advice to discuss the matter with the Panel Advocate of CCL/CIL.

On 22.4.98, a modification petition was filed in the Hon'ble Supreme Court on behalf of CCL/CIL, mentioning therein the difficulties in implementing the orders dated 12.4.94 fo the Coal Controller, Calcutta. In this petition also, there was no mention about the facts that M/s. CTCC had not deposited the value of the entire quantity of coal and had not lifted the same within the stipulated period. The fact that Steam Coal of the collieries in question was meant specially for the industrial units/Actual users and if sold to the traders was to be costlier by Rs.200/- per MT approximately was also not mentioned in the said modification petition.

M/s. CTCC also filed a contempt petition simultaneously in the Hon'ble Supreme Court against the then CMD, CCL, Ranchi and others in the matter. Hearing of both the petitions was fixed on 9.5.97 and the Hon'ble Supreme Court issued a show cause notice to the concerned officers of CCL. Hearing on the modification

petition as mentioned above could not be taken up.

As per the commitment of the CCL, the Hon'ble Supreme Court vide its order dated 14.7.97, directed the CCL to complete the supply of the entire quantity of coal allotted to M/s. CTCC within 20 months positively at the rate of 10,000 MT per month and at the modified price fixed by the CIL w.e.f. 1.4.97.

On receipt of the aforesaid order, the Dealing Officer of the Sales and Marketing Division of CCL, Ranchi, initiated a proposal suggesting that penalty as per terms and conditions of NIT of "Bulk Sale" and "LSS-II" Schemes should be decided in case M/s. CTCC to notify truck wise allotment on a weekly basis, to ensure timely placement of trucks by the party and to maintain a record to assess the quantity lifted by them within a particular period of time.

It was also decided/recommended during a meeting held jointly by the Director (Finance), CCL, Ranchi, C.G.M., Argada Area, CCL, Sales Officer, Argada Area, CCL, CGM (Sales and Marketing Division), CCL, Ranchi etc. to impose a penalty on M/s. CTCC in case failed to lift 10,000 MT of coal per month as per the orders of the Hon'ble Supreme Court. When this note, duly recommended by the Committee was put up to the accused Shri B. Akla, the then director (Technical) and (Projects and Planning), CCL, Ranchi, he observed in favour of the party to the effect that the party shall have to be made to forego the unlifted quantity after "the stipulated period, and it will in itself, be sufficient and recovery/ penalising for unlifted quantity may not be required".

This observation of accused Shri B. Akla, which was not in accordance with the recommendation of General Manager (Sales) and the Committee members, including the Director (Finance) shows that he was promoting the interests of M/s. CTCC rather than that of CCL, Ranchi.

Thereafter, on 20.9.97, a meeting was held which was attended to by Shri B. Akla, Director (Technical) and

(P&P), Shri A.K. Mitra, Director (Finance), R.R. Menon, G.M.(Sales and Marketing), CCL and Ramesh Gandhi of M/s. CTCC and it was mutually agreed upon that M/s. CTCC would submit a Bank Guarantee at the rate of Rs.30/- per MT for the unlifted quantity of coal, which could not be lifted due to the failure on the part of M/s. CTCC and to allow twenty months time for lifting the entire quantity as per the direction of the Hon'ble Supreme Court. This period was to be calculated from the actual date of commencement of lifting or 1st November, 1997, whichever was earlier. It was also specified that M/s. CTCC would pay @ Rs.896/- per MT for the Steam Coal Grade 'B' at the notified rate w.e.f. 1.4.97.

As per the aforesaid decision M/s. CTCC was to lift the entire quantity of coal by June 1999, but against 2.8 lakh MT of Steam Coal, M/s. CTCC lifted only about 30000 MT of coal from the aforesaid three collieries upto June 1999 and thus the remaininig quantity of 2.5 lakhs MT of coal was not to be allowed to be lifted by M/s. CTCC. However, in violation of the Supreme Court's order M/s. CTCC was allowed by Shri R.P. Shrivastava, the then General Manager (Sales), CCL, Ranchi to lift another 15000 MT of Steam Coal between June 1999 to October 1999. As per the direction of Hon'ble Supreme Court, the lifting of Coal was to commence from November 1997 but it was delayed by M/s. CTCC in connivance with the officers of CCL, on one pretext or the other upto March 1998, till the peak season started. This was obviously with a view to avoid the lean season.

It is also alleged that Shri Sudarshan Singh the then Area Sales Officer, Argada Area, CCL, was made the nodal officer responsible for regulating supplies of coal to M/s. CTCC and its reconciliation but he intentionally did not make any reconciliation and did not adhere to the norms of NIT/direction of the Hon'ble Supreme Cort. Shri Sudarshan Singh also went to the extent of issuing a letter/ certificate favouring the party mentioning therein that due

to the non-availability of Coal in the Area, the supplies could not be made to M/s. CTCC. This was done with a view to helping the party in the matter of lifting coal even after the expiry of the stipulated period of 20 months.

After the expiry of 20 months, accused Shri S.K. Shrivastava the then General Manager (Sales), CCL, Ranchi and Shri Mahesh Gandhi of M/s. CTCC entered into an unwarranted agreement (MOU) on 23.3.2000, vide which M./s. CTCC would be allowed to lift coal according to its own will as no time frame was fixed for lifting the same. M/s. CTCC was also given a chance for lifting coal from Bokaro, Barkakana, Sayal and Dhuri Area, in addition to the aforesaid areas was in high demand and was fetching the highest premium. In the MOU, no provision was kept for imposing any penalty for failure on the part of M/s. CTCC in lifting of Coal. This was done with a view of allow M/s. CTCC to lift coal during premium months.

The rate at which M/s. CTCC allowed to lift the coal was applicable to the industrial consumers/actual users and not to the traders like M/s. CTCC. The rate applicable to the trader was Rs.200/- (approximately per MT) more.

After the expiry of stipulated period of 20 months, M/ s. CTCC was allowed by the accused public servants of CCL to lift extra quantity of 45000 MT of steam coal, at the rate applicable to the actual users and thereby CCL Ranchi was put to a wrongful loss to the tune of Rs.90 lakhs (Rs. Ninty Lakhs) approximately.

The aforesaid acts of commissions and omissions on the part of S/Shri P.N. Tiwary, the then Coal Controller, Calcutta (retired), R.P. Shrivastava, the then General Manager (Sales), CCL, Ranchi (retd.), S.K. Srivastava, G.M. (Sales) CCL, Ranchi, B. Akla, CMD, CCL, Ranchi, K.M. Singh, the then G.M. Argada Area, CCL, Sudarshan Singh, the then Area Sales Officer, Argada Area, presently superintending engineer (E&M), NK Area, CCL, Ramesh Gandhi of M/s. Continental Transport Construction

Corporation (CTCC) Dhanbad (Pvt.) reveal that the public servants and the private persons alongwith their firm, as mentioned above, entered into a criminal conspiracy and in pursuance of the same violated the terms and conditions of the NITs issued in respect of sale of coal under "Bulk Sale" and "LSS-II" Schemes, wilfully suppressed relevant facts before the Hon'ble High Court, Calcutta and Hon'ble Supreme Court of India and subsequently in violation of Hon'ble Supreme Court's order allowed the private party namely M/s. CTCC to lift an additional quantity of 45000 MT of coal at the rate applicable to the industrial consumers/actual users and thereby caused huge wrongful loss to the tune of Rs.90 lakhs approximately to the CCL, Ranchi and corresponding wrongful gain to the private party and themselves. Shri P.N. Tiwary, the then Coal Controller, Calcutta also connived with the private party and accused public servants by fraudulently and dishonestly issuing directions to the CMD, CCL, Ranchi in favour of the private party.

This prima facie disclose the commission of offences u/s. 120(B) r/w 420 IPC and Sec. 13(2) r/w sec. 13(1)(d) of P.C. Act, 1988.

This R.C. is therefore registered and investigation is taken up.

Sd/- 15.11.2000
[A. PRASAD]
Dy. Supt. Of Police,
CBI/SPE/Ranchi,
Investigating Officer
Dated 15.11.2000"

6. According to the FIR, the various acts and omissions narrated therein of the accused caused a huge wrongful loss of approximately rupees ninety lakhs to the CCL and a corresponding wrongful gain to the private company.

7. This case has a long and chequered history. It all started with two advertisements issued by CIL in January, 1991 and

September, 1991 published in the 'Statesman' newspaper inviting offers for purchase of various grades of coal under two schemes propounded by it named as 'Bulk Sale Scheme' and 'Liberalised Sale Scheme-II'. [It is unfortunate that copies of the above advertisements are not placed on record]

8. What transpired subsequently is described in detail by this Court in judgment dated 18th March, 1997 in Civil Appeal Nos.2004-2005/1997 reported in (1997) 9 SCC 258. Both Coal India Ltd. and the private company were parties to the above-mentioned appeals. In paras 5 to 7, this Court recorded as follows:

"5. In Civil Appeal arising out of Special Leave Petition No. 25983 of 1995 we are concerned with the sale of coal under the Liberalised Sales Scheme-II (for short 'LSS-II) framed by CIL in August 1992 in pursuance of Notifications dated July 24, 1967 and June 4, 1992. In September 1992 CIL published an advertisement in the 'Statesmen' inviting offers for purchase in respect of coal offered for sale under LSS-II. In the said advertisement the quantity and quality of coal that was being offered in the various collieries belonging to the subsidiaries of CIL were specified. Among the collieries mentioned in the advertisement were Urimari and Jarangdih collieries of CCL. In respect of Urimari Colliery 1.35 lac tonnes of Grade-B Steam Coal was offered and in respect of Jarangdih Colliery 1.75 lac tonnes of Grade W-III Steam Coal was offered. In response to the said advertisement M/s. Continental Transport and Construction Corporation, respondent No. 1 in both the appeals (hereinafter referred to as 'the petitioners'), sent a letter dated September 16, 1992 to the General Manager (Sales), CCL, offering to purchase 1.35 lac tonnes of Grade-B Steam Coal from Urimari Colliery and 1.75 lac tonnes of Grade W-III Steam Coal from Jarangdih Colliery. By allotment letter dated April 7, 1993, CCL allotted to the petitioners 32,400 MT Grade-B Steam Coal from Urimari Colliery in Sayal area in response to the offer made by the petitioners on

September 16, 1992. By another allotment letter dated April 20/21, 1993, CCL allotted to the petitioners 50,750 MT Grade W-III Steam Coal from Jarangdih Colliery. The validity of the said allotments was up to March 31, 1994, but the period of the said allotments was extended. The case of the petitioners is that Steam Coal at Urimari and Jarangdih Collieries was not matching to the declared Grade-B and W-III respectively and was of lower grades. Sirka Colliery falling in Argada area also belongs to CCL. The petitioners, having come to know that sufficient stocks of Grade-B Steam Coal was available for disposal at Sirka Colliery, wrote a letter dated April 7, 1994 to the General Manager (Argada area) of CCL, wherein it was mentioned that 32,400 MT of Grade-B Steam Coal from Urimari Colliery and 50,750 MT of Grade W-III Steam Coal from Jarangdih Colliery was allotted to them vide allotment letters dated April 7, 1993 and April 20/21, 1993 respectively and that on account of non-availability of Grade-B Steam Coal at Urimari Colliery and Grade W-III grade steam coal at Jarangdih Colliery it would not be possible for them to lift the required quantity of coal. In the said letter it was also stated that the petitioners had learnt that Sirka Colliery had huge stocks of Grade-B Steam Coal to the tune of 4.16 lakh MT and that he (General Manger) was willing to accept the diversion of orders of other areas booked under LSS-II to the tune of 2.00 lakhs MT in addition to other pending commitments and orders/ proposed deliveries to others including the petitioners. By the said letter the petitioners expressed their willingness to accept equivalent quantities of Grade-B Steam Coal from Sirka Colliery in case the General Manager was willing to accept the transfer of allotment for Steam Coal of Urimari and Jarangdih Collieries. The General Manager was requested to accept the proposal of the petitioners at his level and intimate to the General Manager (Sales)/ CCL Headquarters for obtaining the formal approval in this regard. After receiving the said letter the General Manager (A), Sirka, sent a communication dated April 8, 1994 to

the General Manager (S&M), CCL, wherein he enclosed a copy of the aforementioned letter of the petitioners dated April 7, 1994 and, after referring to his wireless message dated April 1, 1994, he stated that in view of the stock position of 4.16 lakhs MT of coal at Sirka Colliery it has been confirmed that in order to liquidate stocks such orders of steam coal, if diverted from other areas, could be accepted. On April 9, 1994 the petitioners submitted a representation to the Coal Controller for transfer of allotments of steam coal from Urimari and Jarangdih Collieries allotted by CCL/Headquarters under LSS-II from these collieries to Sirka Colliery of Argada area. In the said representation the petitioners mentioned that quality of coal being produced at Urimari Colliery was equivalent to Grade-D coal and at Jarangdih Colliery also the quality of coal being produced was equivalent to Grade W-IV. It was stated that at Sirka Colliery of Argada area there were huge stocks of Grade-B Steam Coal to the tune of 4.10 lakhs MT and it was pointed out that the General Manager (Argada area) of CCL, in his letter dated April 8, 1994, had recommended the request of the petitioners for diversion of allotments to Sirka Colliery for favourable consideration and approval of the General Manager (Sales)/CCL. A copy of the said letter of the General Manager, Argada Area, Sirka dated April 8, 1994 was also submitted along with the representation. By the said representation the petitioners requested the Coal Controller to issue a direction to the coal company for transfer of allotments of Steam Coal from Urimari and Jarangdih Collieries to Sirka Colliery for release of equivalent quantity of Steam Coal from Sirka Colliery. On the said representation the Coal Controller, on April 12, 1994, sent a communication to the Chairman-cum-Managing Director, CCL, Ranchi referring to the letter dated April 7, 1994 submitted by the petitioners to the General Manager, Argada area as well as the letter dated April 8, 1994 from the General Manager, Argada addressed to the General Manager (Sales)/CCL wherein

he had recommended for acceptance of the transfer in order to liquidate huge stocks of coal at Sirka Colliery. In the said letter the Coal Controller has stated :

Having noted the entire circumstances and facts of the case and the availability of steam coal at Sirka you are advised to forthwith give effect to the transfer of these allotments of steam coal from Urimari/Jarangdih collieries to Sirka Colliery for delivery of equivalent quantity of steam coal Grade B to the party as requested for by them and recommended by the concerned area, at the earliest.

6. Civil Appeal arising out of S.L.P. (Civil) No. 26366 of 1995 relates to sale of washery products on the basis of the Notification dated July 24, 1967, before amendment introduced therein by Notification dated June 4, 1992. On January 17, 1991 and advertisement was published in the 'Statesman' inviting offers for bulk purchase of rejects, Middlings, Slurry and Dirty Slurry in various washeries of CCL including the Gidi Washery. In response to the said advertisement, the petitioners, on March 2, 1991, submitted offers for purchase of 1,79,000 MT Slurry, 90,000 MT Middlings and 90,000 MT Dirty Slurry. By letters dated May 11/14, 1991 CIL accepted the offer of the petitioners and agreed to supply to the petitioners 1,79,000 MT Slurry Grade-D, 90,000 MT Middlings Grade-F and 45,000 MT Dirty Slurry Grade-F from Gidi Washery. Subsequently by letter dated May 28, 1992 CCL approved the transfer of 88,500 MT of Grade-F Middlings allotted to the petitioners to equivalent quantity of Grade-F Dirty Slurry to be delivered from Gidi Washery. By letter dated September 18, 1993, the General Manager (Argada area) of CCL refused to accede to the request of the petitioners to allow delivery of Grade-D also with Grade-F Dirty Slurry and reiterated that in order to avoid possible malpractices of lifting of Slurry against orders of Dirty Slurry, lifting of both the products concurrently was not possible. On September 20, 1993, the petitioners submitted a representation to the Coal Controller requesting him to direct CCL to transfer

their allotment of 1,65,724 MT of Slurry Grade-D to equivalent quantity of Dirty slurry Grade-F which was abundantly available at the Gidi Washery. On January 31, 1994 the Coal Controller gave a direction to the Chairman-cum-Managing Director, CCL, Ranchi, to transfer 1,65,724 MT of Grade-D Slurry to equivalent quantity of Grade-F Slurry in Gidi Washery. Since the direction of the Coal Controller was not implemented by CCL, the petitioners moved the Calcutta High Court by filing a Writ Petition and the High Court, by order dated February 10, 1994, directed the appellants to act in terms of Coal Controller's letter dated January 31, 1994. Thereupon by letter dated February 28, 1994, CCL confirmed the transfer of 1,65,724 MT of Grade-D Slurry to Grade-F Slurry of Gidi Washery. The case of the petitioners is that with effect from April 1, 1994, CCL changed the grade of Dirty Slurry of Gidi Washery from Grade-F to Grade-E for the year 1994-95 and increased its price by about Rs. 85 per MT. The petitioners submitted a representation to the Coal Controller on April 2, 1994 in that regard. On April 7, 1994, the petitioners wrote a letter to the General Manager (Argada area) of CCL, wherein they stated that in view of the difficulties mentioned in the said letter, it would not be possible for them to lift the Dirty Slurry allotted to them from Gidi Washery and they sought transfer of their allotments of Dirty Slurry to Steam Coal from Sirka/Gidi-C/Religara collieries. By his letter dated April 8, 1994 addressed to the General Manager (S&M), CCL, the General Manager (Argada area), forwarded the said letter of the petitioners for favourable consideration. On April 9, 1994 the petitioners submitted a representation to the Coal Controller requesting him to transfer of then-allotted quantity of Dirty Slurry remaining to be booked and lifted against allotment and the entire quantity of recent allotment of 1,65,724 MT of Dirty Slurry for release of equivalent quantity of Steam Coal by road from Sirka/Gidi-C/Religara collieries. The Coal Controller, sent a communication dated April 12, 1994 to the Chairman-cum-Managing

Director, CCL, wherein, after taking note of the representation dated April 7, 1994 submitted by the petitioners to the General Manager (Argada area) and the letter from the General Manager, Argada area to the General Manager (Sales)/CCL dated April 8, 1994, he stated :

Having noted the entire circumstances and facts and the availability of the coal at Sirka/Religara/Gidi-C desired to be lifted by the party, you are advised to forthwith effect to the transfer of allotments of Dirty Slurry and in the party letter dated 2.4.94 and 9.4.94 for release of equivalent quantity of steam coal from Sirka/Religara/Gidi-C collieries as requested for by them and recommended by the concerned area, at the earliest.

7. Since the directions contained in both the communications of the Coal Controller dated April 12, 1994 addressed to the Chairman-cum-Managing Director of CCL were not being implemented by CCL, the petitioners on April 18, 1994, filed two Writ Petitions (Matters Nos. 940-941 of 1994) in the Calcutta High Court. Both the Writ Petitions were disposed of by a learned single Judge (Mitra J.) by order dated April 18, 1994 whereby the Chairman-cum-Managing Director of CCL was directed to act in terms of the communications dated April 12, 1994 sent by the Coal Controller within a fortnight from the date. This order was passed by the learned single Judge without issuing notice to the appellants and by directing that a copy of the Writ Petition be served upon Mrs. A. Quraishi, Advocate as she generally appears on behalf of the Chairman-cum-Managing Director of CCL and the Chairman-cum-Managing Director of CCL 'was directed to regularise her appointment in the matter. The said order of the learned single Judge was, however, set aside in appeal by the Division Bench of the High Court by order June 6, 1994 and the matter was remitted for reconsideration on merits. Thereafter, the matter was considered by Samaresh Banerjee J. who, after issuing

notice to the parties, by his judgment dated April 6, 1995, allowed both the Writ Petitions filed by the petitioners and directed the appellants herein, who were respondents in the Writ Petitions, to implement the orders of the Coal Controller dated April 12, 1994 forthwith. Letters Patent Appeals filed by the appellants against the said judgment of the learned single Judge have been dismissed by the Division Bench of the High Court (K.C. Agarwal CJ. and Tarun Chatterjee J.) by the impugned judgment dated October 31, 1995. Hence these appeals. "

It can be seen from the above-extract that the private company entered into two contracts with CIL pursuant to two Notice Inviting Tenders (NITs). Subsequently, the private company sought variation of the original terms of the contracts in so far as they relate to the quality of coal and also the collieries from which the coal could be secured. The same was directed to be given by the Coal Controller (one of the accused) by his communications dated 12.04.1994. Complaining that the CIL and its officers were not honouring the directions given by the Coal Controller, the private company approached the Calcutta High Court by filing two writ petitions, i.e. W.P. Nos. 940 and 941 of 1994. The brief history of the said writ petitions is taken note of by this Court in para 7 of the judgment dated 18th March, 1997, extracted above. Eventually, both the writ petitions were allowed by the judgment of the Calcutta High Court dated 6th April, 1995 and the same was confirmed by the Division Bench in Letters Patent Appeals by a judgment dated 31st October, 1995. Aggrieved by the same, CIL approached this Court by the above-mentioned Civil Appeal Nos. 2004-2005 of 1997. Both the appeals were dismissed.

9. The matter did not end there. Complaining that the Coal India Ltd. and its officers failed to comply with the judgment of this Court dated 18th March, 1997 in the above-mentioned Civil Appeal Nos. 2004-2005 of 1997, the private company filed contempt petitions Nos. 261-262 of 1997. The said contempt petitions were disposed of by an order dated 14th July, 1997

by this Court. The operative portion of the said order is as follows:-

> "We, however, find that in the contempt petitions the prayer of the applicants is that they may be supplied coal at the notified price fixed by the Coal India Ltd. and made effective for sale of coal with effect from April 1, 1997. Having regard to the said prayer made by the applicants themselves in the contempt petitions, we consider it just and appropriate in the interest of justice to direct that the supplies of the coal that are to be made by the respondents as per the directions of the Coal Controller during the period of next 20 months shall be made at Rs.896/- per metric tonne, the notified price fixed by the Coal India Ltd. with effect from April 1, 1977. It is made clear that the respondents are not restricted to supply coal at the rate of 10000 metric tonne per month and that if there is availability of larger quantity of coal the respondents can supply quantity in excess of 10000 metric tonne per month so as to reduce the period of 20 months for the supply but in no event the said period shall be extended. Since the supplies are to be made at the rate of 10000 metric tonne per month, it will be permissible for the applicants to furnish rotating bank guarantee for 10000 metric tonne of coal per month. It is also made clear that the price at which the supply of coal is to be made as directed above, shall be for the entire quantity of coal to be supplied by the respondents and there shall be no variation in the said price. The contempt petitions as well as the interlocutory applications Nos.5-6 are disposed of accordingly."

10. Subsequently, it appears that CIL did, in fact, supply coal to the private company allegedly not only in compliance with the directions of this Court in its order dated 14th March but also in excess of the legal obligations imposed by the orders of this Court.

11. It is in the above-mentioned background, the FIR, which

is the subject matter of the dispute in the instant appeal, came to be registered on 15th November 2000.

12. The crux of the FIR is that though the supplies by the Coal India Ltd. are pursuant to the directions issued by the Calcutta High Court confirmed and reinforced by the judgment dated 18.3.97 and order dated 14.7.97 of this Court referred to above, such directions from the courts are consequences of the failure on the part of the various accused (mentioned in the FIR) to bring the relevant and crucial facts which in law disentitle the private company from getting any relief either from this Court or from the Calcutta High Court. According to the FIR, the private company failed to comply with the twin obligations arising under the two contracts referred to earlier, i.e. lifting of the coal contracted to be purchased by it in accordance with the schedule agreed upon and making the payment of money towards the sale price of the coal in terms of the schedule of the payment agreed upon. The substance of the FIR is that the failure to bring the above mentioned crucial facts to the notice of the Courts (both the Calcutta High Court and this Court), is deliberate and due to a conspiracy between all the accused of which the respondent is one.

13. By the judgment under appeal, the said FIR was quashed. The only reason given is that the supply of coal to the private company had been made in terms of a decision given by the Calcutta High Court as approved by this Court at a price fixed by this Court. Therefore, no Magistrate can examine the allegation that such a supply of coal resulted in an unjust pecuniary advantage to the private company. The operative portion of the judgment reads as under:

> "It was contended that the object of the First Information Report and the investigation thereon was to unearth criminal misconduct conducted by the accused public servants to obtain for CTCC wrongful pecuniary advantage by corrupt or illegal means or by abusing their position as public servants or while holding office as public servants and accordingly offences said to have been

committed includes those mentioned in Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. The alleged wrongful pecuniary advantage is obtaining of supply of coal at a less price. As aforesaid supply of coal had been obtained in terms of a decision given by this Court and approved by the Supreme Court and at the price fixed by the Supreme Corut, no magistrate, therefore, in the circumstances can decide that any unjust pecuniary advantage was made available to CTCC by any of the accused public servants.

For the reasons aforesaid I quash the First Information Report impugned in this writ petition, all investigations made pursuant to the said First Information Report and restrain Central Bureau of Investigation from carrying on any further investigation on the basis of the said First Information Report."

14. Hence, this appeal.

15. Learned Additional Solicitor General, Shri P.P. Malhotra, appearing for the appellant very vehemently submitted that: the only issue considered and decided by the Calcutta High Court and confirmed by this Court was whether the Coal Controller had the necessary legal authority to direct (by his two letters dated 12.4.1994) the variation of the terms of the two contracts entered into by the private company and this Court did find that the Coal Controller had the requisite legal authority to direct such variation. The mere existence of authority in the Coal Controller to order variation in the terms of the contracts does not by itself mean that the authority had been exercised legally and validly. The Coal Controller failed to take note of the fact that the private company had already committed a breach of its contractual obligations to CIL. Having regard to the breach of the contract committed by the private company, the Coal Controller should not have exercised his authority in favour of such a defaulting purchaser. In other words, the Coal Controller did not take all the relevant factors before exercising his authority to grant variation in the terms of the contracts between the private company and the Coal India Ltd. Shri Malhotra further

submitted that even in the legal proceedings before the Calcutta High Court and this Court, these factors were not brought to the notice of the Courts by any one of the accused. It is argued that if only the fact that the private company had already defaulted in its obligations arising out of the two contracts entered into by it with the CIL had been brought to the notice of the Courts, Courts would not have intervened in favour of the private company. The gravamen of the charge in the FIR in issue is that the failure to bring such crucial facts, which were most crucial for adjudicating the rights and obligations of the private company and CIL, to the notice of the Courts is the consequence of a criminal conspiracy by all the accused to enable the private company to derive an unjust and illegal benefit at the cost of CIL. Shri Malhotra, therefore, submitted that the judgment under appeal clearly failed to consider this aspect and, therefore, unsustainable in law.

16. On the other hand, Shri Gopal Subramanium, learned senior counsel appearing for the respondent submitted that the judgment under appeal does not call for any interference as the conclusion arrived at by the judgment under appeal is a logical corollary to the earlier judgment in Civil Appeal Nos. 2004-2005 of 1997 and order in Contempt Petitions Nos. 261-262 of 1997 of this Court.

17. From the tenor of the impugned FIR, we understand the charge against the accused to be as follows:

(a) The private company committed breach of contractual obligations arising under the two contracts entered into by it with CIL.

(b) The officers of the CIL and CCL(shown accused in the FIR) are obliged in law (as per the terms of the contract) to take penal action against the private company for such breach of the contractual obligations.

(c) The above-mentioned officers/accused failed to take any such penal action.

(d) On the other hand, when the private company

approached the courts seeking the enforcement of the directions of Coal Controller, all the accused deliberately suppressed the fact that private company had committed a breach of its contractual obligations, thereby enabling the private company to obtain favourable order.

(e) The suppression of the crucial fact that the private company committed breach of its contractual obligations was deliberate and intentional on the part of all the accused.

(f) Such suppression is a consequence of a criminal conspiracy between all the accused to enable the private company to secure an illegal monetary gain by manipulating the judicial process.

18. We have meticulously examined the judgment of this Court dated 18.3.1997. The entire controversy in the said judgment revolved **only** around the authority of the Coal Controller to issue the various directions such as were given by him on 12.04.1994. On an examination of the relevant provisions of law, this Court no doubt held that the Coal Controller was legally competent to issue the said directions. That the private company had already committed breach of contractual obligations arising under the two contracts was not at issue. There is no discussion in that regard in the said judgment.

19. Whether the private company failed to comply with the legal obligations arising out of the contracts entered into by it with the Coal India or its subsidiaries, depends on the proof of the facts allegedly constituting the acts or omissions amounting to the breach of the contracts on the part of the private company. To arrive at any conclusion on the above question, it requires a detailed examination of the relevant material. The fact that the supplies of coal were made to the private company pursuant to the orders of the Calcutta High Court and confirmed by this Court by itself does not rule out the possibility of a crime having been committed. It is well known that decisions are rendered by courts on the basis of the facts pleaded before

them and the issues arising out of those pleaded facts. As we have already pointed out, the only issue projected on the basis of the facts placed before Calcutta High Court and this Court is the competence of the Coal Controller to give directions which in substance amounted to variation of the terms of the contracts to which the private company and Coal India Ltd. are parties. This court in Civil Appeal Nos.2004-2005 of 1997 declared that the Coal Controller had the requisite legal authority to give such directions but did not examine any other issue.

20. The exact terms and conditions subject to which the CIL accepted the offer of private company are not available on record in the instant case. But it appears from the FIR (which is the subject matter of dispute) that the private company is required to lift the entire quantity of coal it agreed to purchase within a period of 90 days from the date of allotment. It also appears from the FIR, that the private company is obliged to make the payments of the price in a specified manner and schedule and also make a security deposit, the exact nature of which is not mentioned either in FIR or in the petition or in the judgment under appeal. We are, therefore, to make a conjuncture that deposit of money is some kind of a guarantee for the performance of the contract on the part of the private company.

21. Coming to the judgment under appeal, as it is already noticed that the High Court quashed the FIR only on the ground that the supply of coal had been obtained in terms of a decision given by the Calcutta High Court and approved by this Court and for the said reason no magistrate can, therefore, decide whether any unjust pecuniary advantage was made available to the private company. For coming to such a conclusion, the learned Judge made an 'elaborate examination' of the Indian legal system. But, in our opinion, the entire enquiry proceeded on a wrong premise that no examination, as to how a judgment of a superior Court came into existence, is permissible in the system of law which we follow.

22. This Court on more than one occasion held that fraud vitiates everything including judicial acts. In *S.P. Chengal Varaya Naidu (Dead) By Lrs. Vs. Jagannath (Dead) By Lrs. & Ors.*, (1994) 1 SCC 1, this Court observed as follows in para 1:-

> 1. "Fraud-avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and honest in the eyes of law. Such a judgment/decree - by the first court or by the highest court - has to be treated as a nullity by every court, whether superior or inferior. *It can be challenged in any court even in collateral proceedings."*

23. Again in *A.V. Papayya Sastry and Ors. Vs. Government of A.P. and Ors.*, AIR 2007 SC 1546, this Court reviewed the law on this position and reiterated the principle. In paras 38 and 39 it was held as follows:

> 38. The matter can be looked at from a different angle as well. Suppose, a case is decided by a competent Court of Law after hearing the parties and an order is passed in favour of the applicant/plaintiff which is upheld by all the courts including the final Court. Let us also think of a case where this Court does not dismiss Special Leave Petition but after granting leave decides the appeal finally by recording reasons. Such order can truly be said to be a judgment to which Article 141 of the Constitution applies. Likewise, the doctrine of merger also gets attracted. *All orders passed by the courts/authorities below, therefore, merge in the judgment of this Court and after such judgment, it is not open to any party to the judgment to approach any court or authority to review, recall or reconsider the order.*
>
> 39. *The above principle, however, is subject to exception of fraud.* Once it is established that the order was obtained by a successful party by practising or playing

> fraud, it is vitiated. Such order cannot be held legal, valid or in consonance with law. It is non-existent and non est and cannot be allowed to stand. This is the fundamental principle of law and needs no further elaboration. Therefore, it has been said that a judgment, decree or order obtained by fraud has to be treated as nullity, whether by the court of first instance or by the final court. And it has to be treated as nonest by every Court, superior or inferior.
>
> [emphasis supplied]

If a judgment obtained by playing fraud on the Court is a nullity and is to be treated as non est by every Court superior or inferior, it would be strange logic to hear that an enquiry into the question whether a judgment was secured by playing fraud on the Court by not disclosing the necessary facts relevant for the adjudication of the controversy before the Court is impermissible. From the above judgments, it is clear that such an examination is permissible. Such a principle is required to be applied with greater emphasis in the realm of public law jurisdiction as the mischief resulting from such fraud has larger dimension affecting the larger public interest.

Therefore, the conclusion reached by the judgment under appeal that no Court can examine the correctness of the contents of the impugned FIR, is unsustainable and without any basis in law. The very complaint in the FIR is that the judgment of the Calcutta High Court, as affirmed by this Court, is a consequence of a deliberate and dishonest suppression of the relevant facts necessary for adjudicating the rights and obligations of the parties to the said litigation

24. Coming to the question as to what amounts for securing a judgment by playing fraud in the Court- In *Chengal Varaya Naidu* (supra), this Court categorically held that the non-disclosure of all the necessary facts tantamounts to playing fraud on the Courts. At para 6 of the said judgment, it was held as follows:

> "……..If he withholds a vital document in order to gain advantage on the other side then he would he guilty of

playing fraud on the court as well as on the opposite party."

25. The allegation in the FIR is that the various accused deliberately withheld/suppressed the fact that the private company, by the time it approached the Calcutta High Court in writ petition Nos.940 and 941 of 1994, had already committed breach of its obligations arising of the contracts from out of which the entire litigation arose. A fact which is greatly relevant in deciding the entitlement of the private company to seek various reliefs such as the ones sought by it before the Calcutta High Court. It is further specific allegation in the FIR such a non-disclosure/suppression of the crucial fact was wilful and deliberate pursuant to a conspiracy between all the accused to secure an illegal and wrongful monetary gain to the private company. Therefore, in our opinion the Judgment under appeal cannot be sustained.

26. Coming to the question of the scope of the jurisdiction to quash an FIR, either in the exercise of statutory jurisdiction under Section 482 of Cr.P.C. or under Article 226 of the Constitution of India, the law is well settled and this Court in a catena of decisions laid down clear principles and indicated parameters which justify the quashing of an FIR. We do not propose to catalogue all the cases where the issue was examined but notice only two of them and indicate the consistent principles laid down by this Court in this regard.

27. In *R.P.* Kapur *Vs. State of Punjab,* AIR 1960 SC 866, this Court at para 6 held:

> "……It is well-established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Ordinarily criminal proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this

inherent jurisdiction. However, we may indicate some categories of cases where the inherent jurisdiction can and should be exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice. If the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding the High Court would be justified in quashing the proceeding on that ground. Absence of the requisite sanction may, for instance, furnish cases under this category. Cases may also arise where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not. In such cases it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal court to be issued against the accused person. A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in

question. In exercising its jurisdiction under s. 561-A the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial magistrate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained. Broadly stated that is the nature and scope of the inherent jurisdiction of the High Court under s. 561-A in the matter of quashing criminal proceedings, ……."

28. In *State of Haryana and others Vs. Ch. Bhajan Lal and others* AIR 1992 SC 604, this Court after reviewing large number of cases on the question of the quashing the FIR held at paras 108 and 109 as follows:

"108. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extra-ordinary power under Article 226 or the inherent powers Under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima-facie constitute any offence or make out a case against the accused.

2. Where the allegations in the First Information Report

and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers Under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

3. Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

4. Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated Under Section 155(2) of the Code.

5. Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

6. Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

7. Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

109. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the Court will not be

justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the F.I.R. or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice."

29. Tested from the point of view of the law laid down in the above mentioned judgments, the impugned FIR does not merit interference, as it is not a case of even the respondent (writ petitioners) that the FIR is required to be quashed on any one of the grounds legally recognised by this Court to be sufficient ground for quashing an FIR.

30. For all the above reasons, we are of the opinion that the judgment under appeal cannot be sustained and the same is required to be set aside and we, accordingly, set aside the same. The appeal stands allowed.

B.B.B. Appeal allowed.

NATIONAL INSURANCE COMPANY LTD.

v.

SINITHA & ORS.

(Special Leave Petition (C) No. 6513 of 2007)

NOVEMBER 23, 2011

[ASOK KUMAR GANGULY AND JAGDISH SINGH KHEHAR, JJ.]

Motor Vehicles Act, 1988 – s.163A – Compensation claim – Whether a claim made u/s.163A is a claim under the "fault" liability principle, or under the "no-fault" liability principle – Held: S.163A of the Act has an overriding effect on all other provisions of the Motor Vehicles Act – There is no basis for inferring that s.163A of the Act is founded under the "no-fault" liability principle –On the conjoint reading of ss.140 and 163A, the legislative intent is clear, namely, that a claim for compensation raised under s.163A, need not be based on pleadings or proof at the hands of the claimants showing absence of "wrongful act", being "neglect" or "default" – But that, is not sufficient to determine that the provision falls under the "fault" liability principle – To decide whether a provision is governed by the "fault" liability principle the converse has also to be established, i.e., whether a claim raised thereunder can be defeated by the concerned party (owner or insurance company) by pleading and proving "wrongful act", "neglect" or "default" – It is open to the owner or insurance company, as the case may be, to defeat a claim under s.163A of the Act by pleading and establishing through cogent evidence a "fault" ground ("wrongful act" or "neglect" or "default") – It is, therefore, doubtless, that s.163A of the Act is founded under the "fault" liability principle.

Motor Vehicles Act, 1988 – s.163A – Compensation claim – Challenge to, on ground of "negligence" – While giving way to a bus coming from the opposite side, the motorcycle driven by 'S' hit a large laterite stone lying on the

tar road, whereupon the motorcycle overturned and 'S' suffered injuries and later died in the hospital – The motorcycle was insured with the petitioner-Insurance Company – Claim by wife, children and parents of 'S' under s.163A –Whether or not, on facts, the compensation awarded to the claimants/ respondents by the Tribunal, as also, by the High Court, was liable to be set aside on ground of "negligence" of 'S' – Held: Negligence is a factual issue and can only be established through cogent evidence – A person may be "responsible" for an act, yet he may not be "negligent" – In the instant case, the Tribunal in holding that the rider 'S' was responsible for the accident, had placed reliance on copies of the FIR, post mortem certificate, scene mahazar, report of inspection of vehicle, inquest report and final report – Neither of these can constitute proof of "negligence" at the hands of 'S' – It was imperative for the petitioner-Insurance Company to have pleaded negligence, and to have established the same through cogent evidence – Since no pleading or evidence was brought to notice at the hands of the petitioner, it is not possible to conclude, that the inverse onus placed on the shoulders of the petitioner under s.163A to establish negligence, was discharged by it.

Motor Vehicles Act, 1988 – s.163A – Compensation claim – Motorcycle driven by 'S' met with accident resulting in his death – The motorcycle was insured with the petitioner-Insurance Company – Claim by wife, children and parents of 'S' under s.163A – Whether the claim under s.163A can only be raised at the behest of a third party and that 'S' being the rider of the motorcycle, cannot be treated as a third party – Held: Despite queries, the petitioner could not point out the relationship between 'S' and the owner of the motorcycle involved in the accident – Since the relationship between 'S' and the owner was not established, nor the capacity in which he was riding the vehicle was brought out, it is not possible to conclude, that 'S' while riding the motorcycle on the fateful day, was an agent, employee or representative of the owner – It was open to the petitioner to defeat the claim for compensation raised by the respondents by establishing, that the rider 'S'

represented the owner, and as such, was not a third party, but the petitioner failed to discharge the said onus.

Motor Vehicles Act, 1988 – Compensation claim – Applicability of "fault" liability principle and "no-fault" liability principle – Held: If a claim for compensation under a provision, is not sustainable for reason of a "fault" on account of any one or more of the following i.e., "wrongful act", "neglect" or "default", the provision in question would be governed by the "fault" liability principle – Stated differently, where the claimant in order to establish his right to claim compensation (under a particular provision) has to establish, that the same does not arise out of "wrongful act" or "neglect" or "default", the said provision will be deemed to fall under the "fault" liability principle – So also, where a claim for compensation can be defeated on account of any of the aforesaid considerations on the basis of a "fault" ground, the same would also fall under the "fault" liability principle – On the contrary, if under a provision, a claimant does not have to establish, that his claim does not arise out of "wrongful act" or "neglect" or "default"; and conversely, the claim cannot be defeated on account of any of the aforesaid considerations; then most certainly, the provision in question will fall under the "no-fault" liability principle.

While giving way to a bus coming from the opposite side, the motorcycle driven by 'S' hit a large laterite stone lying on the tar road, whereupon the motorcycle overturned and 'S' suffered injuries and later died in the hospital. The motorcycle was insured with the petitioner-Insurance Company.

The wife, children and parents of 'S' filed a claim petition before the Motor Accident Claims Tribunal under Section 166 of the Motor Vehicles Act, 1988. The claim petition was subsequently amended, inasmuch as, the claim was sought under Section 163A of the Act. The Tribunal awarded compensation. The award was upheld to an extent by the High Court.

In the instant Special Leave Petition, the petitioner, while placing reliance upon the determination rendered by the Tribunal that 'S' was "responsible" for the accident, contended that the claimants were not entitled to raise any claim for compensation because the accident in question had occurred solely and exclusively on account of the negligence of the deceased 'S'.

Per contra, the respondents placed reliance on the decision rendered by this Court in Oriental Insurance Company Limited v. Hansrajbhai V. Kodala, and submitted that compensation is determined under Section 163A of the Act under the "no-fault" liability principle and thus the issues of "wrongful act", "neglect" or "fault", at the hands of the deceased 'S' were irrelevant for determination of claim made under Section 163A of the Act.

The petitioner, however, asserted that the judgment rendered by this Court in Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala, did not have any determinative effect on the controversy arising in this case. The petitioner raised three contentions – firstly that the decision in Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala pertained only to the issue whether a claimant was entitled to claim further compensation (under a separate provision governed by the "fault" liability principle) after the claimant had sought and obtained compensation under Section 163A of the Act, whereas the issue in hand in the present case, is separate and distinct, namely, whether a claim for compensation made under Section 163A of the Act, can be defeated either by the owner or by the insurance company, by pleading and establishing, that the accident in question was based on the "negligence" of the offending vehicle; secondly, that while adjudicating upon the controversy in Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala, the attention of this Court was not invited to sub-section (4) of Section 140, nor the effect

thereof, on the interpretation of Section 163A of the Act and that the interpretation of sub-section (4) of Section 140 was wholly irrelevant to the issues raised and decided, in Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala, whereas, it is of extreme significance in the present controversy and thirdly, that not only on account of the non obstante clause contained in Section 163A of the Act, but also on account of the overriding effect of the provision envisaged therein, nothing contained in any of the Sections referred to by this Court while deciding in Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala, can be deemed to have the effect of negating anything contained in Section 163A of the Act.

Dismissing the Special leave petition, the Court

HELD:1.1. This Court in *Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala* **had held, that compensation payable under Section 163A of the Motor Vehicles Act, 1988, was not as an interim measure, but was final. Therefore, compensation determined under Section 163A could not be in addition to a claim for further compensation under a separate provision governed by the "fault" liability principle. However, no categorical determination was given that section 163A of the Act has (or has not) been founded under the "no-fault" liability principle. [Paras 7, 8] [195-A-B; 197-B]**

1.2. The issues of law arising for consideration in the present controversy as against the matter adjudicated upon by this Court in *Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala ,* **are separate and distinct. In fact, there is hardly any grey area which may be considered as common between the issues involved. [Para 10] [198-F-G]**

1.3. The second contention advanced at the hands of the petitioner also cannot be brushed aside. Sub-section (4) of Section 140 of the Act was not referred to,

nor taken into consideration, while adjudicating upon the controversy arising in Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala. Absence of reference to sub-section (4) of Section 140 of the Act was because the same was wholly irrelevant for the purpose of the controversy settled in the aforesaid case. [Para 10] [198-H; 199-A-B]

1.4. Also, there is merit in the last contention advanced by the petitioner, namely, the overriding effect of Section 163A by the use of the words "Notwithstanding anything contained in this act or any other law for the time being in force or instrument having the force of law .....". Section 163A was introduced into the Motor Vehicles Act, 1988 by way of an amendment carried out with effect from 14.11.1994. As against the aforesaid, Section 144 of the Act was incorporated into the Motor Vehicles Act, 1988 from the very beginning. Section 144 is a part of Chapter X of the Motor Vehicles Act, 1988, which includes Section 140. Even though, Section 144 of the Act mandates, that the provisions of Chapter X (which includes Section 140) have effect notwithstanding anything to the contrary contained in any other provision of the Act or in any other law for the time being in force, Section 144 of the Act would not override the mandate contained in Section 163A, for the simple reason that Section 144 provided for such effect over provisions "for the time being in force", i.e., the provisions then existing, but Section 163A was not on the statute book at the time when Section 144 was incorporated therein. Therefore the provisions contained in Chapter X, would not have overriding effect, over Section 163A of the Act. As against the aforesaid, at the time of incorporation of Section 163A of the Act, Sections 140 and 144 of the Act, were already subsisting, as such, the provisions of Section 163A which also provided by way of a non-obstante clause, that it would have by a legal fiction overriding effect over all existing provisions under the Act, as also, any other law or instrument having the

force of law "for the time being in force", would have overriding effect, even over the then existing provisions in Chapter X of the Act because the same was already in existence when Section 163A was introduced into the Act. Section 163A of the Act has overriding effect over all the provisions/sections taken into consideration by this Court while deciding the controversy in Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala. It is therefore clear, that none of the provisions taken into consideration, in the said decision can override, the legal effect of the mandate contained in Section 163A of the Act. Therefore, it would be incorrect to hold, that the controversy raised in the instant case can be deemed to have been settled by this Court in Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala. [Para 10] [199-A-D; F-H; 200-A-D]

Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala, **(2001) 5 SCC 175 : 2001 (2) SCR 999 – referred to.**

Whether a claim made under Section 163A of the Act is a claim under the "fault" liability principle, or under the "no-fault" liability principle.

2.1. If a claim for compensation under a provision, is not sustainable for reason of a "fault" on account of any one or more of the following i.e., "wrongful act", "neglect" or "default", the provision in question would be governed by the "fault" liability principle. Stated differently, where the claimant in order to establish his right to claim compensation (under a particular provision) has to establish, that the same does not arise out of "wrongful act" or "neglect" or "default", the said provision will be deemed to fall under the "fault" liability principle. So also, where a claim for compensation can be defeated on account of any of the aforesaid considerations on the basis of a "fault" ground, the same would also fall under the "fault" liability principle. On the contrary, if under a provision, a claimant does not have to establish, that his

claim does not arise out of "wrongful act" or "neglect" or "default"; and conversely, the claim cannot be defeated on account of any of the aforesaid considerations; then most certainly, the provision in question will fall under the "no-fault" liability principle. [Para 11] [201-B-E]

2.2. For determination of the issue under consideration, namely, whether Section 163A of the Act is governed by the "fault" or the "no-fault" liability principle, it is first relevant to examine Section 140 of the Act, so as to determine whether it has any bearing on the interpretation of Section 163A of the Act. For the instant determination, only sub-sections (3) and (4) are relevant. A perusal of sub-section (3) reveals, that the burden of "pleading and establishing", whether or not "wrongful act", "neglect" or "default" was committed by the person (for or on whose behalf) compensation is claimed under Section 140, would not rest on the shoulders of the claimant. In other words the onus of proof of "wrongful act", "neglect" or "default" is not on the claimant. The matter however does not end with this. A perusal of sub-section (4) of Section 140 of the Act further reveals, that the claim of compensation under Section 140 of the Act cannot be defeated because of any of the "fault" grounds ("wrongful act", "neglect" or "default"). This additional negative bar, precluding the defence from defeating a claim for reasons of a "fault", is of extreme significance, for the consideration of the issue in hand. It is apparent, that both sides are precluded in a claim raised under Section 140 of the Act from entering into the arena of "fault" ("wrongful act" or "neglect" or "default"). There can be no doubt, therefore, that the compensation claimed under Section 140 is governed by the "no-fault" liability principle. [Para 12] [201-F; 202-H; 203-A-D]

2.3. A perusal of Section 163(A) reveals that sub-section (2) thereof is in pari materia with sub-section (3) of Section 140. In other words, just as in Section 140 of

the Act, so also under Section 163A of the Act, it is not essential for a claimant seeking compensation, to "plead or establish", that the accident out of which the claim arises suffers from "wrongful act" or "neglect" or "default" of the offending vehicle. But then, there is no equivalent of sub-section (4) of Section 140 in Section 163A of the Act. Whereas, under sub-section (4) of Section 140, there is a specific bar, whereby the concerned party (owner or insurance company) is precluded from defeating a claim raised under Section 140 of the Act, by "pleading and establishing", "wrongful act", "neglect" or "default", there is no such or similar prohibiting clause in Section 163A of the Act. The additional negative bar, precluding the defence from defeating a claim for reasons of a "fault" ("wrongful act", "neglect" or "default"), as has been expressly incorporated in Section 140 of the Act (through sub-section (4) thereof), having not been embodied in Section 163A of the Act, has to have a bearing on the interpretation of Section 163A of the Act. The legislature designedly included the negative clause through sub-section (4) in Section 140, yet consciously did not include the same in the scheme of Section 163A of the Act. The legislature must have refrained from providing such a negative clause in Section 163A intentionally and purposefully. In fact, the presence of sub-section (4) in Section 140, and the absence of a similar provision in Section 163A, leaves no room for any doubt, that the only object of the Legislature in doing so was, that the legislature desired to afford liberty to the defence to defeat a claim for compensation raised under Section 163A of the Act, by pleading and establishing "wrongful act", "neglect" or "default". Thus, it is open to a concerned party (owner or insurer) to defeat a claim raised under Section 163A of the Act, by pleading and establishing anyone of the three "faults", namely, "wrongful act", "neglect" or "default". But for the above reason, there is no plausible logic in the wisdom of the

legislature, for providing an additional negative bar precluding the defence from defeating a claim for compensation in Section 140 of the Act, and in avoiding to include a similar negative bar in Section 163A of the Act. The object for incorporating sub-section (2) in Section 163A of the Act is, that the burden of pleading and establishing proof of "wrongful act", "neglect" or "default" would not rest on the shoulders of the claimant. The absence of a provision similar to sub-section (4) of Section 140 of the Act from Section 163A of the Act, is for shifting the onus of proof on the grounds of "wrongful act", "neglect" or "default" onto the shoulders of the defence (owner or the insurance company). A claim which can be defeated on the basis of any of the aforesaid considerations, is regulated under the "fault" liability principle. Therefore Section 163A of the Act is founded on the "fault" liability principle. [Para 13] [204-C-H; 205-A-E]

2.4. There is also another reason, which supports the aforesaid conclusion. Section 140 of the Act falls in Chapter X of the Motor Vehicles Act, 1988. Chapter X of the Motor Vehicles Act, 1988 is titled as "Liability Without Fault in Certain Cases". The title of the chapter in which Section 140 falls, leaves no room for any doubt, that the provisions under the chapter have a reference to liability "… without fault …", i.e., are founded under the "no-fault" liability principle. However, Section 163A of the Act, does not find place in Chapter X of the Act. Section 163A falls in Chapter XI which has the title "Insurance of Motor Vehicles Against Third Party Risks". The Motor Vehicles Act, 1988 came into force with effect from 1.7.1989 (i.e., the date on which it was published in the Gazette of India Extraordinary Part II). Section 140 of the Act was included in the original enactment under chapter X. As against the aforesaid, Section 163A of the Act was inserted therein with effect from 14.11.1994 by way of an amendment. Had it been the intention of the legislature to provide for another provision (besides Section 140 of the Act), under

the "no-fault" liability principle, it would have rationally added the same under Chapter X of the Act. Only because it was not meant to fall within the ambit of the title of Chapter X of the Act "Liability Without Fault in Certain Cases", it was purposefully and designedly not included thereunder. [Para 14] [205-F-H; 206-A-C]

2.5. The heading of Section 163A also needs a special mention. It reads, "Special Provisions as to Payment of Compensation on Structured Formula Basis". It is abundantly clear that Section 163A, introduced a different scheme for expeditious determination of accident claims. Expeditious determination would have reference to a provision wherein litigation was hitherto before (before the insertion of Section 163A of the Act) being long drawn. The only such situation (before the insertion of Section 163A of the Act) wherein the litigation was long drawn was under Chapter XII of the Act. Since the provisions under Chapter XII are structured under the "fault" liability principle, its alternative would also inferentially be founded under the same principle. Section 163A of the Act, catered to shortening the length of litigation, by introducing a scheme regulated by a pre-structured formula to evaluate compensation. It provided for some short-cuts, as for instance, only proof of age and income, need to be established by the claimant to determine the compensation in case of death. There is also not much discretion in the determination of other damages, the limits whereof are also provided for. All in all, one cannot lose sight of the fact, that claims made under Section 163A can result in substantial compensation. When taken together the liability may be huge. It is difficult to accept, that the legislature would fasten such a prodigious liability under the "no-fault" liability principle, without reference to the "fault" grounds. When compensation is high, it is legitimate that the insurance company is not fastened with liability when the offending vehicle suffered a "fault" ("wrongful act", "neglect", or "defect") under a valid Act

only policy. Even the instant process of reasoning, leads to the inference, that Section 163A of the Act is founded under the "fault" liability principle. [Para 15] [206-D-H; 207-A]

2.6. Section 163A of the Act has an overriding effect on all other provisions of the Motor Vehicles Act, 1988. Stated in other words, none of the provisions of the Motor Vehicles Act which is in conflict with Section 163A of the Act will negate the mandate contained therein (in Section 163A of the Act). Therefore, no matter what, Section 163A of the Act shall stand on its own, without being diluted by any provision. Furthermore, there is no basis for inferring that Section 163A of the Act is founded under the "no-fault" liability principle. Additionally, on the conjoint reading of Sections 140 and 163A, the legislative intent is clear, namely, that a claim for compensation raised under Section 163A of the Act, need not be based on pleadings or proof at the hands of the claimants showing absence of "wrongful act", being "neglect" or "default". But that, is not sufficient to determine that the provision falls under the "fault" liability principle. To decide whether a provision is governed by the "fault" liability principle the converse has also to be established, i.e., whether a claim raised thereunder can be defeated by the concerned party (owner or insurance company) by pleading and proving "wrongful act", "neglect" or "default". It is open to the owner or insurance company, as the case may be, to defeat a claim under Section 163A of the Act by pleading and establishing through cogent evidence a "fault" ground ("wrongful act" or "neglect" or "default"). It is, therefore, doubtless, that Section 163A of the Act is founded under the "fault" liability principle. [Para 16] [207-B-H; 208-A]

Whether or not the compensation awarded to the claimants/respondents in the present controversy, by the Tribunal, as also, by the High Court, is liable to be set aside on the plea of "negligence" raised at the hands of the petitioner.

3. The award rendered by the Tribunal, as also, the decision of the High Court in favour of the claimants/respondents is liable to be reappraised. In case, the petitioner can establish having pleaded and proved negligence at the hands of the rider 'S', the petitioner would succeed. The Tribunal framed four issues for consideration, with the first issue being:"1) Who are responsible for the accident?". It is difficult to understand the true purport of the first issue framed by the Tribunal. A person may be "responsible" for an act, yet he may not be "negligent". Negligence is a factual issue and can only be established through cogent evidence. In the present case also, the negligence of 'S' shall have to be determined from the factual position emerging from the evidence on record. Issue no.(1) framed by the Tribunal therefore, may not provide an appropriate answer to the issue in hand. Besides there being no issue framed by the Tribunal for adjudicating "negligence" in the accident under reference, it is also clear that the petitioner-Insurance Company did not seek the courts intervention on such a plea. Also, no witness was produced by the petitioner-Insurance Company before the Tribunal. During the course of hearing, the petitioner only relied upon the conclusions drawn by the Tribunal on issue no.(1). The Tribunal in holding, that the rider 'S' was responsible for the accident, had placed reliance on copies of the first information report, post mortem certificate, scene mahazar, report of inspection of vehicle, inquest report and final report. Neither of these can constitute proof of "negligence" at the hands of 'S'. Even if he was responsible for the accident, because the motorcycle being ridden by 'S' had admittedly struck against a large laterite stone lying on the tar road, but then, it cannot be overlooked that the solitary witness who had appeared before the Tribunal had deposed, that this has happened because the rider of the motorcycle had given way to a bus coming from the opposite side. Had he not done so there may have been a head-on collusion. Or it may well

be, that the bus coming from the opposite side was being driven on the wrong side. This or such other similar considerations would fall in the realm of conjectural determination. In the absence of concrete evidence this factual jumble will remain an unresolved tangle. In a claim raised under Section 163A of the Act, the claimants have neither to plead nor to establish negligence. Negligence (as also, "wrongful act" and "default") can be established by the owner or the insurance company (as the case may be) to defeat a claim under Section 163A of the Act. It was therefore imperative for the petitioner-Insurance Company to have pleaded negligence, and to have established the same through cogent evidence. This procedure would have afforded an opportunity to the claimants to repudiate the same. Has the petitioner discharged this onus? In the present case, only one witness was produced before the Tribunal. The aforesaid witness appeared for the claimants. The witness asserted, that while giving way to a bus coming from opposite side, the motorcycle being ridden by 'S', hit a large laterite stone lying on the tar road, whereupon, the motorcycle overturned, and the rider and the pillion-rider suffered injuries. The petitioner insurance-company did not produce any witness before the Tribunal. In the absence of evidence to contradict the aforesaid factual position, it is not possible to conclude, that 'S' was "negligent" at the time when the accident occurred. Since no pleading or evidence has been brought to notice of this Court (at the hands of the petitioner), it is not possible to conclude, that the inverse onus which has been placed on the shoulders of the petitioner under Section 163A of the Act to establish negligence, has been discharged by it. [Para 17] [208-G-H; 209-A-F; G-H; 210-A-H; 211-A]

4. The further contention advanced at the hands of the petitioner was that the claim under Section 163A can only be raised at the behest of a third party and that 'S' being the rider of the motorcycle, cannot be treated as a

third party. According to the petitioner, since the rider of the vehicle involved in the accident was 'S' himself, he would stand in the shoes of the owner, and as such, no claim for compensation can be raised in an accident caused by him, under Section 163A of the Act. To substantiate his contention, it would be essential for the petitioner to establish, that 'S' having occupied the shoes of the owner, cannot be treated as the third party. Only factual details brought on record through reliable evidence, can discharge the aforesaid onus. During the course of hearing, despite queries, the petitioner could not point out the relationship between 'S' and the owner of the motorcycle involved in the accident. 'S' is not shown to be the employee of the owner. He was not even shown as the representative of the owner. In order to establish the relationship between 'S' and the owner, the petitioner-Insurance Company could have easily produced either the owner himself as a witness, or even the claimants themselves as witnesses. These, or other witnesses, who could have brought out the relationship between the owner and 'S', were not produced by the petitioner, before the Tribunal. The petitioner has, therefore, not discharged the onus which rested on its shoulders. Since the relationship between 'S' and the owner has not been established, nor the capacity in which he was riding the vehicle has been brought out, it is not possible to conclude, that 'S' while riding the motorcycle on the fateful day, was an agent, employee or representative of the owner. It was open to the petitioner to defeat the claim for compensation raised by the respondents by establishing, that the rider 'S' represented the owner, and as such, was not a third party. The petitioner failed to discharge the said onus. [Paras 18, 19] [211-B-C-F-G-H; 212-A-D]

Oriental Insurance Company Limited vs. Jhuma Saha, **(2007) 9 SCC 263: 2007 (1) SCR 979 – referred to.**

Case Law Reference:

2001 (2) SCR 999	**referred to**	**Para 6**
2007 (1) SCR 979	**referred to**	**Para 18**

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 6513 of 2007.

From the Judgment & Order dated 22.9.2006 of the High Court of Kerala at Ernakulam in MACA No. 1569 of 2006.

Joy Basu, Ruchi Bharda Jain, B.K. Satija, Sudhir Kumar Gupta, Rajvinder Singh, Manish Gupta, R.K. Gupta, Amrita Sharma, Darpan K.M., Naveen R. Nath, Jogy Scaria, M.P.Vinod, Ranjit, Bina Madhavan for the appearing parties.

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. Shijo, aged 27 years, was riding a motorcycle bearing registration no.KL-8J-6528, on 3.3.1999 on the Wadakkanchery-Kunnamkulam Road. George K., also aged 27 years, was pillion-riding with Shijo. While giving way to a bus coming from the opposite side at Kumaranelly, the motorcycle hit a big laterite stone lying on the tar road. On impact, the motorcycle overturned. Resultantly, the rider as also the pillion-rider suffered injuries. They were taken to Divine Medical Centre, Wadakkanchery, for treatment. Thereafter, the rider Shijo, was taken to West Fort Hospital, Thrissur. The pillion-rider George K. was taken to Medical College Hospital, Thrissur. Shijo succumbed to his injuries on the following day. George K., survived. The motorcycle was insured with the petitioner herein i.e. the National Insurance Company Limited. A valid act only policy, at the time of the occurrence, is admitted.

2. On 18.8.2000 the complainants, i.e. the wife, children and parents of Shijo, filed a claim petition before the Motor Accident Claims Tribunal, Thrissur, Kerala (hereinafter referred to as 'the Tribunal'), under Section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as 'the Act'). Through the aforesaid claim petition, the claimants prayed for compensation of Rs.8,20,500/-. The claim petition was subsequently

amended, inasmuch as, the claim was sought under Section 163A of the Act. A separate claim for compensation by George K., the pillion-rider, was also filed. The claim made by George K., is not relevant for the present controversy, inasmuch as, the instant petition pertains to compensation awardable to the claimants of deceased Shijo.

3. The Tribunal by its order dated 19.4.2005, allowed the claim petition filed by the wife, minor children and parents of Shijo. They were awarded compensation of Rs.4,26,650/-. The instant compensation included Rs.2000/- towards funeral expenses, Rs.5000/- for loss of consortium to the widow, Rs.2500/- as loss of estate, Rs.4150/- towards medical expenses and Rs.5000/- as compensation for pain and suffering. Additionally, interest at the rate of 6% per annum was awarded with effect from 18.8.2000 (i.e. the date of filing the claim petition), till realization. The claimants were also awarded costs quantified at Rs.8000/-.

4. Dissatisfied with the determination rendered by the Tribunal, the National Insurance Company Limited, i.e. the appellant herein, preferred MACA no.1569 of 2006 before the Kerala High Court. The High Court decided the said appeal on 22.9.2006. The High Court upheld one of the contentions of the appellant-Insurance Company by holding, that Rs.5000/- awarded for pain and suffering, was impermissible under Section 163A of the Act. Even without issuing notice to the claimants, the aforesaid amount was ordered to be deducted from the total compensation held as payable to claimants (by the Tribunal). Besides the aforesaid determination, all other components of compensation awarded by the Tribunal, were upheld by the High Court. Still dissatisfied, the National Insurance Company Limited has approached this Court by filing the instant petition, for special leave to appeal.

5. While assailing the order of the High Court, the first contention advanced at the hands of the learned counsel for the petitioner was, that the claimants are not entitled to raise any claim for compensation because the accident in question had occurred solely and exclusively on account of the negligence

of the deceased Shijo. Insofar as the instant contention is concerned, reliance was placed on the determination rendered by the Tribunal, wherein in paragraph 8, based on the first information report, post mortem certificate, scene mahazor, report of inspection of the vehicle, inquest report and the final report, the Tribunal had concluded that Shijo was "responsible" for the accident. It was, therefore, the submission of the learned counsel for the petitioner, that no compensation was payable to the claimants on account of the death of Shijo, who was himself, responsible for the accident. It was the contention of the learned counsel for the petitioner, that it was not just and appropriate to award compensation, wherein the claimants represented the person "responsible" for the accident. Such a determination, according to the learned counsel for the petitioner, would amount to rewarding the representatives of the wrong doer.

6. In order to repudiate the aforesaid submission, advanced at the hands of the learned counsel for the petitioner, learned counsel representing the respondents, was satisfied in placing reliance on the decision rendered by this Court in Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala, (2001) 5 SCC 175. The submissions advanced at the hands of the learned counsel for the respondents was, that compensation determined under Section 163A of the Act, was determined under the "no-fault" liability principle. It was pointed out, that under the "no-fault" liability principle, the fault of the party is not a relevant consideration. Accordingly, it was submitted, that the issue of "wrongful act", "neglect" or "fault", at the hands of the deceased Shijo were irrelevant for the determination of a claim made under Section 163A of the Act. Learned counsel for the respondents had placed reliance on paragraph 15 of the judgment. We are, however, extracting paragraphs 15 to 19 of the judgment hereunder, so as to examine holistically the inferences and conclusions recorded by this Court in *Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala* (supra):

"**15.** In this context if we refer to the Review Committee's

report, the reason for enacting Section 163-A is to give earliest relief to the victims of the motor vehicle accidents. The Committee observed that determination of cases takes a long time and, therefore, under a system of structural compensation, the compensation that is payable for different classes of cases depending upon the age of the deceased, the monthly income at the time of death, the earning potential in the case of a minor, loss of income on account of loss of limb etc. can be notified and the affected party can then have option of their accepting lump-sum compensation under the Scheme of structural compensation or of pursuing his claim through the normal channels. The report of the Review Committee was considered by the State Governments and comments were notified. Thereafter, the Transport Development Council made suggestions for providing adequate compensation to victims of road accidents without going into long-drawn procedure. As per the objects and reasons, it is a new predetermined formula for payment of compensation to road accident victims on the basis of age/income, which is more liberal and rational. On the basis of the said recommendation after considering the report of the Transport Development Council, the Bill was introduced with "a new predetermined formula for payment of compensation to road accident victims on the basis of age/income, which is more liberal and rational" i.e. Section 163-A. It is also apparent that compensation payable under Section 163-A is almost based on relevant criteria for determining the compensation such as annual income, age of the victim and multiplier to be applied. In addition to the figure which is arrived at on the basis of the said criteria, the Schedule also provides that amount of compensation shall not be less than Rs 50,000. It provides for fixed amount of general damage in case of death such as (*1*) Rs 2000 for funeral expenses, (*2*) Rs 5000 for loss of consortium, if beneficiary is the spouse, (*3*) Rs 2400 for loss of estate, (*4*) for medical expenses supported by the bills, voucher not exceeding Rs 15,000. Similarly, for

disability in a non- fatal accident para 5 of the Schedule provides for determination of compensation on the basis of permanent disability. Para 6 provides for notional income for those who had no income prior to an accident at Rs 15,000 per annum. There is also provision for reduction of 1/3rd amount of compensation on the assumption that the victim would have incurred the said amount towards maintaining himself had he been alive. The purpose of this section and the Second Schedule is to avoid long-drawn litigation and delay in payment of compensation to the victims or his heirs who are in dire need of relief. If such affected claimant opts for accepting the lump-sum compensation based on structured formula, he would get relief at the earliest. *It also gives vital advantage of not pleading or establishing any wrongful act or neglect or default of the owner of the offending vehicle or vehicles. This no-fault liability appears to have been introduced on the basis of the suggestion of the Law Commission to the effect that the expanding notions of social security and social justice envisage that liability to pay compensation must be "no-fault liability" and as observed by this Court in Ramanbhai case (1987) 3 SCC 234 "in order to meet to some extent the responsibility of the society to the deaths and injuries caused in road accidents". However, this benefit can be availed of by the claimant only by restricting his claim on the basis of income at a slab of Rs 40,000 which is the highest slab in the Second Schedule which indicates that the legislature wanted to give benefit of no- fault liability to a certain limit. This would clearly indicate that the Scheme is in alternative to the determination of compensation on fault basis under the Act*. The object underlining the said amendment is to pay compensation without there being any long-drawn litigation on a predetermined formula, which is known as structured-formula basis which itself is based on relevant criteria for determining compensation and the procedure of paying compensation after determining the fault is done away. Compensation amount is paid without

pleading or proof of fault, on the principle of social justice as a social security measure because of ever-increasing motor vehicle accidents in a fast-moving society. Further, the law before insertion of Section 163-A was giving limited benefit to the extent provided under Section 140 for no-fault liability and determination of compensation amount on fault liability was taking a long time. That mischief is sought to be remedied by introducing Section 163-A and the disease of delay is sought to be cured to a large extent by affording benefit to the victims on structured- formula basis. Further, if the question of determining compensation on fault liability is kept alive it would result in additional litigation and complications in case claimants fail to establish liability of the owner of the defaulting vehicles.

Use of specific words "also" and "in addition" in Sections 140 and 141

16. The aforesaid conclusion gets support from the language used in Sections 140, 141, 161 and 163-A. Sections 140 to 143 provide for liability of the owner of the vehicle in case of death or permanent disablement of any person resulting from an accident arising out of use of a motor vehicle or motor vehicles, *to pay compensation without any pleading or establishing that death or permanent disablement was due to any wrongful act, neglect or default of the owner or owners of the vehicle or vehicles.* By way of earliest relief, the victim is entitled to get the amount of compensation of Rs 50,000 in case of death and Rs 25,000 in case of permanent disablement. *It is further provided that such claim shall not be defeated by reason of any wrongful act, neglect or default of the person in respect of whose death or permanent disablement has occurred.* Sub-section (5) of Section 140 upon which much reliance is placed by learned counsel for the Insurance Companies as well as the claimants requires consideration and interpretation, which inter alia provides that owner of the vehicle is also liable to pay compensation

under any other law for the time being in force. *The word "also" indicates that the owner of the vehicle would be additionally liable to pay compensation under any other law for the time being in force. The proviso to sub-section (5) further clarifies that the amount of compensation payable under any other law for the time being in force is to be reduced from the amount of compensation payable under sub-section (2) or under Section 163-A.* This is further crystallised in Section 141 which provides that right to claim compensation under Section 140 is in addition to any other right to claim compensation on the principle of fault liability and specifically excludes the right to claim compensation under the Scheme referred to in Section 163-A. *Section 163-B also provides that where a person is entitled to claim compensation under Section 140 and Section 163-A, he can file the claim under either of the said sections, but not under both. Similarly, Section 141(1) also crystallises that right to claim compensation under Section 140 is in addition to the right to claim compensation in respect thereof under any other provision of the Act or any other law for the time being in force. Sub-section (2) further provides that if the claimant has filed an application for compensation under Section 140 and also in pursuance of any right on the principle of fault liability, the claim for compensation under Section 140 is to be disposed of in the first place and as provided in sub-section (3) the amount received under sub-section (2) of Section 140 is to be adjusted while paying the compensation on the principle of fault liability. On the basis of fault liability if additional amount is required to be paid then the claimant is entitled to get the same but there is no provision for refund of the amount received under Section 140(2), even if the Claims Tribunal arrives at the conclusion that the claimant was not entitled to get any compensation on the principle of fault liability. Further, Section 144 gives overriding effect to the provisions made under Chapter X by providing that the provisions of the Chapter shall have effect*

notwithstanding anything contained in any provision of the Act or of any other law for the time being in force. From the aforesaid sections, one aspect is abundantly clear that right to claim compensation on the basis of no-fault liability under Section 140 is in addition to the right to claim compensation on the principle of fault liability or right to get compensation under any other law. Such amount is required to be reduced from the amount payable under the fault liability or compensation which may be received under any other law. If nothing is payable under the Act then the claimant is not required to refund the amount received by him. As against this, there is specific departure in the Scheme envisaged for paying compensation under Section 163-A. Section 163-A nowhere provides that this payment of compensation on no-fault liability on the basis of structured formula is in addition to the liability to pay compensation in accordance with the right to get compensation on the principle of fault liability and unless otherwise provided for the same cause, compensation cannot be paid again.

Provisions for refund of compensation if compensation is received under any other law or under the Act

17. Further, as *the legislature has not provided for refund or adjustment of compensation received "under the Act" and compensation payable under Section 163-A, it would mean that the Scheme of payment of compensation under Section 163-A, is in alternative to determination of compensation under Section 168.* As stated above, Sections 140(5) and 141(3) make provisions for reduction of compensation paid under Section 140. Under proviso to sub-section (5) of Section 140, the amount of such compensation which the claimant is entitled to receive under any other law is required to be reduced from the amount of compensation payable under Section 140 or under Section 163-A. *Under Section 141(3), if a person gets the compensation on principle of fault liability, then also provision is made for adjustment of compensation*

received under Section 140. There is no such provision for adjustment of compensation received under Section 163-A from the compensation receivable "under the Act" on the principle of fault. Similarly, Section 161 provides for payment of compensation in case of "hit-and-run" motor accidents. Under Section 161(3), in cases in respect of the death of any person resulting from a "hit-and-run" motor accident, a fixed sum of Rs 25,000 is to be paid as compensation and in case of grievous hurt, the amount fixed is Rs 12,500. Thereafter, under Section 162, the legislature has provided for refund of compensation paid under Section 161 on the principle of "hit-and-run motor accident" by providing that the payment of compensation under Section 161 shall be subject to the condition that if any compensation is awarded "under any other provision of this Act" or "any other law" or "otherwise", so much amount as is equal to the compensation paid under Section 161 is required to be adjusted or refunded to the insurer. Under Section 162(2), duty is cast on the tribunal, court or other authority awarding such compensation to verify as to whether in respect of such death or bodily injury, compensation has already been paid under Section 161 and to make adjustment as required thereunder. Result is, the claimant is not entitled to have additional compensation but at the same time he can proceed by filing application under Section 165 or under the Workmen's Compensation Act, 1923 (i.e. other law) and if he gets compensation under either of the said provisions, the amount paid under Section 161 is to be refunded or adjusted.

18. *The contention of the learned counsel for the claimants that compensation payable under Section 163-A is in addition to the determination of compensation on the basis of fault liability and thereafter it could be adjusted on similar lines provided under Section 140 read with Section 141 or Section 162 cannot be accepted.* The legislature has specifically provided

Scheme of adjustment of compensation under Section 140 read with Section 141 and Section 162 if the claimants get compensation under the Act, while there are no such provisions under Section 163-A. Addition or introduction of such scheme in provisions would be impermissible.

Use of different words such as — "any other law, under this section", "any other law for the time being in force", "provisions of this Act" or "any other provision of this Act" in different sections

19. The learned counsel for the claimants submitted that the proviso to sub-section (5) of Section 140 would mean that even in case where compensation is determined under the structured-basis formula under Section 163-A, the claimant is entitled to claim compensation on the basis of fault liability and if he gets higher amount on the basis of fault liability then from that amount compensation which is paid under Section 163-A is to be reduced. At the first blush the argument of the learned counsel appears to be attractive as the proviso to sub-section (5) of Section 140 is to some extent ambiguous and vague. It may mean that amount of compensation given under any other law may include the amount payable on the basis of fault liability, therefore, in view of the said proviso compensation amount payable under any other law is to be reduced from the compensation payable under Section 140 or 163-A. *For appreciating this contention and for ascertaining appropriate meaning of the phrase "compensation under any other law for the time being in force", the proviso to sub-section (5) is required to be considered along with other provisions. The Scheme of other provision in Section 167 indicates that the aforesaid phrase is referable to compensation payable under the Workmen's Compensation Act, 1923 or any other law which may be in force but not to the determination of "compensation under the Act", and would not include the compensation which is determined "under the provision of the Act". Thus Section 167 in terms provides that where death of, or*

bodily injury to, any person gives rise to claim compensation under the Act and also under the Workmen's Compensation Act, 1923, such person cannot claim compensation under both the Acts. Further, in Section 140(5), the legislature has used the words "under any other law for the time being in force" and "under any other law". In Section 141(1), the legislature has used the phrase "under any other provision of this Act or of any other law for the time being in force". In sub-section (2), the legislature has specifically provided that a claim for compensation under Section 140 shall be disposed of as expeditiously as possible and where compensation is also claimed in pursuance of any right on principle of fault, the application under Section 140 is to be disposed of in first place. Whereas, there is no such reference for payment of compensation under Section 163-A. Further, in Section 161(2), the legislature has used the phrase "any other law for the time being in force" and "provisions of this Act". *Similarly, in Section 162, the legislature has used the words "under any other provisions of this Act" or "any other law or otherwise". As against this, in Section 163-A, the legislature has used the phrase "notwithstanding anything contained in this Act or in any other law for the time being in force"*. When the legislature has taken care of using different phrases in different sections, normally different meaning is required to be assigned to the language used by the legislature, unless context otherwise requires. However, in relation to the same subject-matter, if different words of different import are used in the same statute, there is a presumption that they are not used in the same sense (*Member, Board of Revenue* v. *Arthur Paul Benthall, AIR 1956 SC 35*. *In this light, particularly Section 141 which provides for right to claim compensation "under any other provision of this Act" or of "any other law for the time being in force", proviso to sub-section (5) of Section 140 would mean that it does not provide for deduction or adjustment of compensation payable under the Act, that is, on the*

principle of fault liability which is to be determined under Section 168.

Specific language of Section 163-A including its heading".

(emphasis is ours)

7. It is apparent from the observations extracted herein above, that this Court had drawn the following inferences and conclusions:

Firstly, that compensation was payable under Section 140 of the Act, without the necessity of pleading or establishing, that death or permanent disablement was due to any "wrongful act", "neglect" or "default" of the offending vehicle or vehicles. It was also concluded, that a claim under Section 140 of the Act cannot be defeated ".....by reason of any wrongful act, neglect or default of the offending vehicle/person responsible for death or permanent disablement.....". (from paragraph 15 extracted above)

Secondly, that the word "also" used in sub-section (5) of Section 140 of the Act, and the proviso to sub-section (5) of Section 140 clarifies, that the amount of compensation payable under "any other law" for the time being in force, was separate and distinct from the amount of compensation payable under sub-section (2) of Section 140 or Section 163A of the Act. It was however clarified, that the amount of compensation held as payable under any other law would have to be reduced from the amount of compensation payable under Sections 140(2) or 163A of the Act (from paragraph 16 extracted above)

Thirdly, sub-section (2) of Section 141 of the Act provides, that in cases where compensation is sought both under Section 140 of the Act, as also, under a provision governed by the "fault" liability principle under the Act, then the claim raised under Section 140 would be decided first. And the compensation so awarded under Section 140 aforementioned, would be adjusted while paying compensation determined under the "fault" liability

principle. (from paragraph 16 extracted above)

Fourthly, Section 141 of the Act provides, that the right to claim compensation on the basis of the "no-fault" liability principle under Section 140, was in addition to the right to claim compensation "under any other provision of this Act". There are some exceptions. Compensation under Section 140 would not be in addition to the compensation contemplated under the schemed Section 163 of the Act. Compensation determined under Section 140 of the Act, would be deducted from the compensation found payable, under any other provision under the Act governed by the "fault" liability principle. (from paragraph 16 extracted above)

Fifthly, Section 163A nowhere provides, that payment of compensation under the "fault" liability principle, would be in addition to the right to claim compensation thereunder (under Section 163A of the Act). Accordingly, the scheme of payment of compensation under Section 163A provides an alternative right, from the one provided under Section 168 of the Act. (from paragraph 16 extracted above)

Sixthly, while referring to the phrase "compensation under any other law for the time being in force" contained in the proviso to sub-section (5) of Section 140 of the Act (in its un-amended format), it was concluded, that the scheme of Section 167 indicated, that the aforesaid phrase was referable to compensation payable under the Workmen's Compensation Act, 1923 or any other law in force i.e., other than compensation contemplated under the Act. (from paragraph 17 extracted above)

Seventhly, the question whether compensation determined under Section 163A of the Act would be in addition to the compensation receivable under the "fault" liability principle was answered in the negative. Accordingly, the contention that the compensation determined under Section 163A of the Act would be adjustable from the compensation found payable under any other provision governed by the "fault"

liability principle, was also rejected. (from paragraph 18 extracted above)

Eighthly, on a conjunctive examination of the phrase "compensation under any other law for the time being in force" occurring in the proviso to sub-section (5) of Section 140 of the Act, with the scheme of Section 167 of the Act, it was concluded, that the aforesaid phrase was referable to compensation payable under the Workmen's Compensation Act, 1923. Therefore, it was concluded that a claim cannot be raised under both the Acts i.e., the Motor Vehicles Act, 1988, and the Workmen's Compensation Act, 1923. (from paragraph 19 extracted above).

Ninthly, from the use of the words "under any law for the time being in force" used in Section 140(5) of the Act ; the words "under any other provision of this Act or of any other law for the time being in force", used in Section 141(1) of the Act ; the stipulation contained in Section 141(2) of the Act, that a claim under Section 140 is to be disposed of "as expeditiously as possible" and before compensation is determined under the "fault" liability provisions (and noticing that there was no such provision in Section 163A of the Act) ; the phrase "any other law for the time being in force" and "provisions of this Act" used in Section 161(2) of the Act ; the use of the words "under any other provision of this Act" and "any other law or otherwise" used in Section 162 of the Act ; the words "notwithstanding anything contained in this Act or in any other law for the time being in force", used in Section 163A of the Act ; it was held that all these phrases were to be examined together. When examined together it was concluded, that the compensation payable under Section 140 of the Act was not liable to deduction or adjustment out of the compensation determinable under the "fault" liability principle i.e., under Section 168 of the Act. (from paragraph 19 extracted above).

On a collective analysis of the inferences and conclusions summarized above, this Court in *Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala* (supra) held, that compensation payable under Section 163A of the Act was not as an interim measure, but was final. Therefore, compensation determined under Section 163A could not be in addition to a claim for further compensation under a separate provision governed by the "fault" liability principle. It would be relevant to notice here, that we have intentionally and deliberately drawn inferences as have been extracted hereinabove, from the observations made by this Court in *Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala* (supra). This exercise has been ventured, so as to obviate the possibility of missing something which did not find place in paragraph 22 of the aforesaid judgment, wherein, reasons for having arrived at the eventual conclusion in the matter were recorded. This exercise was essential because the learned counsel for the respondents had primarily placed reliance only on paragraph 15 (extracted above) of the said judgment, during the course of hearing. At times it is seen, that conclusions may have been recorded keeping in mind, the pointed controversy dealt with.

8. A thorough analysis of the observations of the Bench in addition to the conclusions drawn by the Court in paragraph 22 of the judgment relied upon by the learned counsel for the respondents, we hope, would lead us to an appropriate conclusion on the matter in hand. In addition to having recorded the inferences and conclusions drawn in the judgment relied upon by the learned counsel for the respondents, it would also be necessary for us to extract hereunder the reasons recorded by this Court while rendering its judgment in *Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala* (supra). The aforesaid conclusions recorded in paragraph 22 of the judgment are being extracted herein :

"22. In the result, the contention of the claimants that right to get compensation under Section 163-A is

additional to claim compensation on no-fault liability is rejected for the following reasons:

(*1*) There is no specific provision in the Act to the effect that such compensation is in addition to the compensation payable under the Act. Wherever the legislature wanted to provide additional compensation, it has done so (Sections 140 and 141).

(*2*) In case where compensation is paid on no-fault liability under Sections 140 and 161 in case of "hit-and-run motor accidents", the legislature has provided adjustment or refund of the said compensation in case where compensation is determined and payable under the award on the basis of fault liability under Section 168 of the Act. There is no such procedure for refund or adjustment of compensation paid where the compensation is paid under Section 163-A.

(*3*) The words "under any other law for the time being in force" would certainly have different meaning from the words "under this Act" or "under any other provision of this Act".

(*4*) In view of the non obstante clause "notwithstanding anything contained in this Act" the provisions of Section 163-A would exclude determination of compensation on the principle of fault liability.

(*5*) The procedure of giving compensation under Section 163-A is inconsistent with the procedure prescribed for awarding compensation on fault liability. Under Section 163-A compensation is awarded without proof of any fault while for getting compensation on the basis of fault liability the claimant is required to prove wrongful act, neglect or default of the owner of the vehicle or the vehicle concerned.

(*6*) Award of compensation under Section 163-A is on a predetermined formula for payment of compensation to road accident victims and that formula itself is based

on criteria similar to determining the compensation under Section 168. The object was to avoid delay in determination of compensation."

Having collectively analysed all that has been noticed by us in the instant paragraph, and the reasons extracted from paragraph 22 hereinabove, we must conclude that no categorical determination emerges therefrom, that section 163A of the Act has (or has not) been founded under the "no-fault" liability principle.

9. In order to demonstrate, that the judgment relied upon by the learned counsel for the respondents was inapplicable to the controversy in hand, learned counsel for the petitioner contended, that the issue which arose for consideration before this Court in *Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala* (supra) was delineated in paragraph 2 thereof. Paragraph 2 aforesaid is being extracted herein :

"**2.** The common question involved in these appeals is whether the compensation payable under Section 163-A of the Motor Vehicles Act, 1988 (hereinafter referred to as "the Act") as per the structured-formula basis is in addition or in the alternative to the determination of the compensation on the principle of fault liability, after following the procedure prescribed under the Act."

It was also pointed out, that the reasons recording the answer posed in paragraph 2 (extracted above), contained in paragraph 22 (also extracted above) clearly demonstrate, that the answer and the reasons thereof clearly reveal, that the controversy adjudicating upon therein, pertained only to the issue whether a claimant was entitled to claim further compensation (under a separate provision governed by the "fault" liability principle) after the claimant has sought and obtained compensation under Section 163A of the Act. It was submitted, that the issue in hand in the present case, is separate and distinct, namely, whether a claim for compensation made under Section 163A of the Act, can be defeated either by the owner or by the insurance company, by pleading and

establishing, that the accident in question was based on the "negligence" of the offending vehicle. Secondly, it was the contention of the learned counsel for the appellant, that while adjudicating upon the controversy in Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala (supra), the attention of this Court was not invited to sub-section (4) of Section 140, nor the effect thereof, on the interpretation of Section 163A of the Act. In this behalf, it is sought to be contended, that the interpretation of sub-section (4) of Section 140 was wholly irrelevant to the issues raised and decided, in *Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala* (supra), whereas, it is of extreme significance in the present controversy. Thirdly, it was the contention of the learned counsel for the appellant, that the use of words "Notwithstanding anything contained in this act or any other law for the time being in force or instrument having the force of law…..", not only on account of the non obstinate clause contained in Section 163A of the Act, but also on account of the overriding effect of the provision envisaged therein, nothing contained in any of the Sections referred to by this Court while deciding in *Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala* (supra), can be deemed to have the effect of negating anything contained in Section 163A of the Act. As such, it is sought to be asserted that the judgment rendered by this Court in *Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala* (supra), cannot have any determinative effect on the controversy arising in this case.

10. We find merit in the aforesaid contention of the learned counsel for the appellant, insofar as the first aspect of this matter is concerned. There can be no dispute whatsoever, that the issues of law arising for consideration in the present controversy as against the matter adjudicated upon by this Court in Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala (supra), are separate and distinct. In fact, there is hardly any grey area which may be considered as common between the issues involved. We are also satisfied that the second contention advanced at the hands of the learned counsel for the

petitioner cannot be brushed aside. Sub-section (4) of Section 140 of the Act was not referred to, nor taken into consideration, while adjudicating upon the controversy arising in Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala (supra). Absence of reference to sub-section (4) of Section 140 of the Act was because the same was wholly irrelevant for the purpose of the controversy settled in the aforesaid case. We also find merit in the last contention advanced at the hands of the learned counsel for the petitioner, namely, the overriding effect of Section 163A by the use of the words "Notwithstanding anything contained in this act or any other law for the time being in force or instrument having the force of law …..". In this behalf, it would be pertinent to mention, that Section 163A was introduced into the Motor Vehicles Act, 1988 by way of an amendment carried out with effect from 14.11.1994. As against the aforesaid, it is necessary to mention that Section 144 of the Act was incorporated into the Motor Vehicles Act, 1988 from the very beginning. Section 144, it may be pointed out, is a part of Chapter X of the Motor Vehicles Act, 1988, which includes Section 140. Section 144 of the Act is being extracted herein:

> "**144. Overriding effect.** – The provisions of this Chapter shall have effect notwithstanding anything contained in any other provision of this act or of any other law for the time being in force."

Even though, Section 144 of the Act mandates, that the provisions of Chapter X (which includes Section 140) have effect notwithstanding anything to the contrary contained in any other provision of the Act or in any other law for the time being in force. Section 144 of the Act would not override the mandate contained in Section 163A, for the simple reason that Section 144 provided for such effect over provisions "for the time being in force", i.e., the provisions then existing, but Section 163A was not on the statute book at the time when Section 144 was incorporated therein. Therefore the provisions contained in Chapter X, would not have overriding effect, over Section 163A of the Act. As against the aforesaid, at the time of incorporation of Section 163A of the Act, Sections 140 and 144 of the Act,

were already subsisting, as such, the provisions of Section 163A which also provided by way of a non-obstante clause, that it would have by a legal fiction overriding effect over all existing provisions under the Act, as also, any other law or instrument having the force of law "for the time being in force", would have overriding effect, even over the then existing provisions in Chapter X of the Act because the same was already in existence when Section 163A was introduced into the Act. The importance of the instant aspect of the matter is, that Section 163A of the Act has overriding effect over all the provisions/ sections taken into consideration by this Court while deciding the controversy in *Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala* (supra). It is therefore clear, that none of the provisions taken into consideration, in the decision relied upon by the learned counsel for the respondents can override, the legal effect of the mandate contained in Section 163A of the Act. We are, therefore, satisfied that it would be incorrect to hold, that the controversy raised in the instant case can be deemed to have been settled by this Court in *Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala* (supra). We have delineated the inferences drawn by us from the observations recorded in *Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala* (supra), in extenso hereinabove. We have also reproduced, hereinabove, paragraph 22 of the judgment in *Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala* (supra), so as to determine with some sense of exactitude the conclusions drawn in the aforesaid judgment. It cannot be stated that the issue arising in the present controversy, has been dealt with or adjudicated upon in Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala (supra). Additionally, the contentions advanced at the hands of the learned counsel for appellant, more particularly reliance placed by him on sub-section (4) of Section 140 has certainly not been dealt with *Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala* (supra). Thus, viewed, it is not possible for us to conclude that the issue arising in this case can be stated to have been settled. The assertion made by the learned counsel for the respondents, that the issue raised

in the instant case, by the learned counsel of the petitioner, is no longer res integra, can therefore not be accepted.

11. Having arrived at the conclusion that the issue in hand has to be decided independently, we will now venture to determine whether a claim made under Section 163A of the Act is a claim under the "fault" liability principle, or under the "no-fault" liability principle. We are satisfied, that if a claim for compensation under a provision, is not sustainable for reason of a "fault" on account of any one or more of the following i.e., "wrongful act", "neglect" or "default", the provision in question would be governed by the "fault" liability principle. Stated differently, where the claimant in order to establish his right to claim compensation (under a particular provision) has to establish, that the same does not arise out of "wrongful act" or "neglect" or "default", the said provision will be deemed to fall under the "fault" liability principle. So also, where a claim for compensation can be defeated on account of any of the aforesaid considerations on the basis of a "fault" ground, the same would also fall under the "fault" liability principle. On the contrary, if under a provision, a claimant does not have to establish, that his claim does not arise out of "wrongful act" or "neglect" or "default"; and conversely, the claim cannot be defeated on account of any of the aforesaid considerations; then most certainly, the provision in question will fall under the "no-fault" liability principle.

12. For determination of the issue under consideration, namely, whether Section 163A of the Act is governed by the "fault" or the "no-fault" liability principle, it is first relevant for us to examine Section 140 of the Act, so as to determine whether it has any bearing on the interpretation of Section 163A of the Act. Section 140 aforesaid is being extracted hereunder :

> *"140. Liability to pay compensation in certain cases on the principle of no fault.* – (1) Where death or permanent disablement of any person has resulted from an accident arising out of the use of a motor vehicle or motor vehicles, the owner of the vehicle shall, or, as the case may be, the

> owners of the vehicles shall jointly and severally, be liable to pay compensation in respect of such death or disablement in accordance with the provisions of this section.
>
> (2) The amount of compensation which shall be payable under sub-section (1) in respect of the death of any person shall be a fixed sum of fifty thousand rupees and the amount of compensation payable under that sub-section in respect of the permanent disablement of any person shall be a fixed sum of twenty-five thousand rupees.
>
> (3) In any claim for compensation under sub-section (1), the claimant shall not be required to plead and establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act, neglect or default of the owner or owners of the vehicle or vehicles concerned or of any other person.
>
> (4) A claim for compensation under sub-section (1) shall not be defeated by reason of any wrongful act, neglect or default of the person in respect whose death or permanent disablement the claim has been made nor shall the quantum of compensation recoverable in respect of such death or permanent disablement be reduced on the basis of the share of such person in the responsibility for such death or permanent disablement.
>
> (5) Notwithstanding anything contained in sub-section (2) regarding death or bodily injury to any person, for which the owner of the vehicle is liable to give compensation for relief, he is also liable to pay compensation under any other law for the time being in force :
>
> Provided that the amount of such compensation to be given under any other law shall be reduced from the amount of compensation payable under this section or under section 163A.**"**

For the instant determination, only sub-sections (3) and (4)

are relevant. A perusal of sub-section (3) reveals, that the burden of "pleading and establishing", whether or not "wrongful act", "neglect" or "default" was committed by the person (for or on whose behalf) compensation is claimed under Section 140, would not rest on the shoulders of the claimant. In other words the onus of proof of "wrongful act", "neglect" or "default" is not on the claimant. The matter however does not end with this. A perusal of sub-section (4) of Section 140 of the Act further reveals, that the claim of compensation under Section 140 of the Act cannot be defeated because of any of the "fault" grounds ("wrongful act", "neglect" or "default"). This additional negative bar, precluding the defence from defeating a claim for reasons of a "fault", is of extreme significance, for the consideration of the issue in hand. It is apparent, that both sides are precluded in a claim raised under Section 140 of the Act from entering into the arena of "fault" ("wrongful act" or "neglect" or "default"). There can be no doubt, therefore, that the compensation claimed under Section 140 is governed by the "no-fault" liability principle.

13. In the second limb of the present consideration, it is necessary to carry out a comparison between Sections 140 and 163A of the Act. For this, Section 163A of the Act is being extracted hereunder:

> *"Section 163A. Special provisions as to payment of compensation on structured formula basis* – (1) Notwithstanding anything contained in this Act or in any other law for the time being in force or instrument having the force of law, the owner of the motor vehicle or the authorized insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be.
>
> *Explanation* – For the purposes of this sub-section, "permanent disability" shall have the same meaning and extent as in the Workmen's Compensation Act, 1923 (8 of 1923).

> (2) In any claim for compensation under sub-section (1), the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle or vehicles concerned or of any other person.
>
> (3) The Central Government may, keeping in view the cost of living by notification in the Official Gazette, from time to time amend the Second Schedule."

A perusal of Section 163(A) reveals that sub-section (2) thereof is in pari materia with sub-section (3) of Section 140. In other words, just as in Section 140 of the Act, so also under Section 163A of the Act, it is not essential for a claimant seeking compensation, to "plead or establish", that the accident out of which the claim arises suffers from "wrongful act" or "neglect" or "default" of the offending vehicle. But then, there is no equivalent of sub-section (4) of Section 140 in Section 163A of the Act. Whereas, under sub-section (4) of Section 140, there is a specific bar, whereby the concerned party (owner or insurance company) is precluded from defeating a claim raised under Section 140 of the Act, by "pleading and establishing", "wrongful act", "neglect" or "default", there is no such or similar prohibiting clause in Section 163A of the Act. The additional negative bar, precluding the defence from defeating a claim for reasons of a "fault" ("wrongful act", "neglect" or "default"), as has been expressly incorporated in Section 140 of the Act (through sub-section (4) thereof), having not been embodied in Section 163A of the Act, has to have a bearing on the interpretation of Section 163A of the Act. In our considered view the legislature designedly included the negative clause through sub-section (4) in Section 140, yet consciously did not include the same in the scheme of Section 163A of the Act. The legislature must have refrained from providing such a negative clause in Section 163A intentionally and purposefully. In fact, the presence of sub-section (4) in Section 140, and the absence of a similar provision in Section 163A, in our view, leaves no room for any doubt, that the only object of the Legislature in doing so was,

that the legislature desired to afford liberty to the defence to defeat a claim for compensation raised under Section 163A of the Act, by pleading and establishing "wrongful act", "neglect" or "default". Thus, in our view, it is open to a concerned party (owner or insurer) to defeat a claim raised under Section 163A of the Act, by pleading and establishing anyone of the three "faults", namely, "wrongful act", "neglect" or "default". But for the above reason, we find no plausible logic in the wisdom of the legislature, for providing an additional negative bar precluding the defence from defeating a claim for compensation in Section 140 of the Act, and in avoiding to include a similar negative bar in Section 163A of the Act. The object for incorporating sub-section (2) in Section 163A of the Act is, that the burden of pleading and establishing proof of "wrongful act", "neglect" or "default" would not rest on the shoulders of the claimant. The absence of a provision similar to sub-section (4) of Section 140 of the Act from Section 163A of the Act, is for shifting the onus of proof on the grounds of "wrongful act", "neglect" or "default" onto the shoulders of the defence (owner or the insurance company). A claim which can be defeated on the basis of any of the aforesaid considerations, regulated under the "fault" liability principle. We have no hesitation therefore to conclude, that Section 163A of the Act is founded on the "fault" liability principle.

14. There is also another reason, which supports the aforesaid conclusion. Section 140 of the Act falls in Chapter X of the Motor Vehicles Act, 1988. Chapter X of the Motor Vehicles Act, 1988 is titled as "Liability Without Fault in Certain Cases". The title of the chapter in which Section 140 falls, leaves no room for any doubt, that the provisions under the chapter have a reference to liability "… without fault …", i.e., are founded under the "no-fault" liability principle. It would, however, be pertinent to mention, that Section 163A of the Act, does not find place in Chapter X of the Act. Section 163A falls in Chapter XI which has the title "Insurance of Motor Vehicles Against Third Party Risks". The Motor Vehicles Act, 1988 came into force with effect from 1.7.1989 (i.e., the date on which it

was published in the Gazette of India Extraordinary Part II). Section 140 of the Act was included in the original enactment under chapter X. As against the aforesaid, Section 163A of the Act was inserted therein with effect from 14.11.1994 by way of an amendment. Had it been the intention of the legislature to provide for another provision (besides Section 140 of the Act), under the "no-fault" liability principle, it would have rationally added the same under Chapter X of the Act. Only because it was not meant to fall within the ambit of the title of Chapter X of the Act "Liability Without Fault in Certain Cases", it was purposefully and designedly not included thereunder.

15. The heading of Section 163A also needs a special mention. It reads, "Special Provisions as to Payment of Compensation on Structured Formula Basis". It is abundantly clear that Section 163A, introduced a different scheme for expeditious determination of accident claims. Expeditious determination would have reference to a provision wherein litigation was hitherto before (before the insertion of Section 163A of the Act) being long drawn. The only such situation (before the insertion of Section 163A of the Act) wherein the litigation was long drawn was under Chapter XII of the Act. Since the provisions under Chapter XII are structured under the "fault" liability principle, its alternative would also inferentially be founded under the same principle. Section 163A of the Act, catered to shortening the length of litigation, by introducing a scheme regulated by a pre-structured formula to evaluate compensation. It provided for some short-cuts, as for instance, only proof of age and income, need to be established by the claimant to determine the compensation in case of death. There is also not much discretion in the determination of other damages, the limits whereof are also provided for. All in all, one cannot lose sight of the fact, that claims made under Section 163A can result in substantial compensation. When taken together the liability may be huge. It is difficult to accept, that the legislature would fasten such a prodigious liability under the "no-fault" liability principle, without reference to the "fault" grounds. When compensation is high, it is legitimate that the

insurance company is not fastened with liability when the offending vehicle suffered a "fault" ("wrongful act", "neglect", or "defect") under a valid Act only policy. Even the instant process of reasoning, leads to the inference, that Section 163A of the Act is founded under the "fault" liability principle.

16. At the instant juncture, it is also necessary to reiterate a conclusion already drawn above, namely, that Section 163A of the Act has an overriding effect on all other provisions of the Motor Vehicles Act, 1988. Stated in other words, none of the provisions of the Motor Vehicles Act which is in conflict with Section 163A of the Act will negate the mandate contained therein (in Section 163A of the Act). Therefore, no matter what, Section 163A of the Act shall stand on its own, without being diluted by any provision. Furthermore, in the course of our determination including the inferences and conclusions drawn by us from the judgment of this Court in *Oriental Insurance Company Limited vs. Hansrajbhai V. Kodala* (supra), as also, the statutory provisions dealt with by this Court in its aforesaid determination, we are of the view, that there is no basis for inferring that Section 163A of the Act is founded under the "no-fault" liability principle. Additionally, we have concluded herein above, that on the conjoint reading of Sections 140 and 163A, the legislative intent is clear, namely, that a claim for compensation raised under Section 163A of the Act, need not be based on pleadings or proof at the hands of the claimants showing absence of "wrongful act", being "neglect" or "default". But that, is not sufficient to determine that the provision falls under the "fault" liability principle. To decide whether a provision is governed by the "fault" liability principle the converse has also to be established, i.e., whether a claim raised thereunder can be defeated by the concerned party (owner or insurance company) by pleading and proving "wrongful act", "neglect" or "default". From the preceding paragraphs (commencing from paragraph 12), we have no hesitation in concluding, that it is open to the owner or insurance company, as the case may be, to defeat a claim under Section 163A of the Act by pleading and establishing through cogent evidence a "fault" ground

("wrongful act" or "neglect" or "default"). It is, therefore, doubtless, that Section 163A of the Act is founded under the "fault" liability principle. To this effect, we accept the contention advanced at the hands of the learned counsel for the petitioner.

17. Having recorded our conclusions herein above, it is essential for us to determine whether or not the compensation awarded to the claimants/respondents in the present controversy, by the Tribunal, as also, by the High Court, is liable to be set aside on the plea of "negligence" raised at the hands of the petitioner. The award rendered by the Tribunal, as also, the decision of the High Court in favour of the claimants/respondents is, therefore, liable to be reappraised keeping in mind the conclusions recorded by us. In case, the petitioner can establish having pleaded and proved negligence at the hands of the rider Shijo, the petitioner would succeed. The pleadings filed before the Tribunal at the hands of the petitioner, are not before us. What is before us, is the award of the Tribunal dated 19.4.2005. We shall endeavour to determine the plea of negligence advanced at the hands of the learned counsel for the petitioner from the award. The Tribunal framed the following issues for consideration :

> "(1) Who are responsible for the accident?
>
> (2) What, if any is the compensation due and who are liable?
>
> (3) What is the annual income of the deceased?
>
> (4) Whether the OP (2280/00) is maintainable under Section 168A of the N.V. Act?"

It is difficult to understand the true purport of the first issue framed by the Tribunal. A person may be "responsible" for an act, yet he may not be "negligent". Illustratively, a child who suddenly runs onto a road may be "responsible" for an accident. But was the child negligent? The answer to this question would emerge by unraveling the factual position. A child incapable of fending for himself would certainly not be negligent, even if he suddenly runs onto a road. The person in whose care the child

was, at the relevant juncture, would be negligent, in such an eventuality. The driver at the wheels at the time of the accident is responsible for the accident, just because he was driving the vehicle, which was involved in the accident. But considering the limited facts disclosed in the illustration can it be said that he was negligent? Applying the limited facts depicted in the illustration, it would emerge that he may not have been negligent. Negligence is a factual issue and can only be established through cogent evidence. Now the case in hand. In the present case also, the negligence of Shijo shall have to be determined from the factual position emerging from the evidence on record. Issue no.(1) framed by the Tribunal therefore, may not provide an appropriate answer to the issue in hand. Besides there being no issue framed by the Tribunal for adjudicating "negligence" in the accident under reference, it is also clear that the petitioner-Insurance Company did not seek the courts intervention on such a plea. It is also relevant to mention, that no witness was produced by the petitioner-Insurance Company before the Tribunal. During the course of hearing, learned counsel for the petitioner only relied upon the conclusions drawn by the Tribunal on issue no.(1). For this, our attention was drawn to paragraph 8 of the award rendered by the Tribunal which is being extracted hereunder :

> "**8.** Issue No.1 : This issue arises now only in O.P. 2281/2000. PW1 admitted that she has seen the accident. Exhibits A1 to A5 and Exhibit A10 are records from the connected criminal case charge sheeted under Sections 279, 337 and 304A, IPC as against the deceased Shijo. They are the copies of the FIR, post mortem certificate, scene mahazor, report of inspection of the vehicle, final report and the inquest report, respectively. In the absence of contra evidence I find that the deceased Shijo was responsible for the accident."

The Tribunal in holding, that the rider Shijo was responsible for the accident, had placed reliance on copies of the first information report, post mortem certificate, scene mahazor, report of inspection of vehicle, inquest report and final report.

Neither of these in our considered view, can constitute proof of "negligence" at the hands of Shijo. Even if he was responsible for the accident, because the motorcycle being ridden by Shijo had admittedly struck against a large laterite stone lying on the tar road. But then, it cannot be overlooked that the solitary witness who had appeared before the Tribunal had deposed, that this has happened because the rider of the motorcycle had given way to a bus coming from the opposite side. Had he not done so there may have been a head-on collusion. Or it may well be, that the bus coming from the opposite side was being driven on the wrong side. This or such other similar considerations would fall in the realm of conjectural determination. In the absence of concrete evidence this factual jumble will remain an unresolved tangle. It has already been concluded hereinabove, that in a claim raised under Section 163A of the Act, the claimants have neither to plead nor to establish negligence. We have also held, that negligence (as also, "wrongful act" and "default") can be established by the owner or the insurance company (as the case may be) to defeat a claim under Section 163A of the Act. It was therefore imperative for the petitioner-Insurance Company to have pleaded negligence, and to have established the same through cogent evidence. This procedure would have afforded an opportunity to the claimants to repudiate the same. Has the petitioner discharged this onus? In the present case, only one witness was produced before the Tribunal. The aforesaid witness appeared for the claimants. The witness asserted, that while giving way to a bus coming from opposite side, the motorcycle being ridden by Shijo, hit a large laterite stone lying on the tar road, whereupon, the motorcycle overturned, and the rider and the pillion-rider suffered injuries. The petitioner insurance-company herein did not produce any witness before the Tribunal. In the absence of evidence to contradict the aforesaid factual position, it is not possible for us to conclude, that Shijo was "negligent" at the time when the accident occurred. Since no pleading or evidence has been brought to our notice (at the hands of the learned counsel for the petitioner), it is not possible for us to conclude, that the inverse

onus which has been placed on the shoulders of the petitioner under Section 163A of the Act to establish negligence, has been discharged by it. We, therefore, find no merit in the first contention advanced at the hands of the learned counsel for the appellant.

18. The second contention advanced at the hands of the learned counsel for the petitioner was, that Shijo being the rider of the motorcycle, cannot be treated as a third party. It was pointed out, that the claim under Section 163A can only be raised at the behest of a third party. It seems, that the instant determination raised at the hands of the learned counsel for the petitioner, is based on the determination rendered by this Court in *Oriental Insurance Company Limited vs. Jhuma Saha,* (2007) 9 SCC 263, wherein, this Court held as under :

> "**10.** The deceased was the owner of the vehicle. For the reasons stated in the claim petition or otherwise, he himself was to be blamed for the accident. The accident did not involve motor vehicle other than the one which he was driving. The question which arises for consideration is that the deceased himself being negligent, the claim petition under Section 166 of the Motor Vehicles Act, 1988 would be maintainable."

According to the learned counsel for the petitioner, since the rider of the vehicle involved in the accident was Shijo himself, he would stand in the shoes of the owner, and as such, no claim for compensation can be raised in an accident caused by him, under Section 163A of the Act.

19. To substantiate his second contention, it would be essential for the petitioner to establish, that Shijo having occupied the shoes of the owner, cannot be treated as the third party. Only factual details brought on record through reliable evidence, can discharge the aforesaid onus. During the course of hearing, despite our queries, learned counsel for the petitioner could not point out the relationship between Shijo and the owner of the motorcycle involved in the accident. Shijo is not shown to be the employee of the owner. He was not even

shown as the representative of the owner. In order to establish the relationship between the Shijo and the owner, the petitioner-Insurance Company could have easily produced either the owner himself as a witness, or even the claimants themselves as witnesses. These, or other witnesses, who could have brought out the relationship between the owner and Shijo, were not produced by the petitioner herein, before the Tribunal. The petitioner has, therefore, not discharged the onus which rested on its shoulders. Since the relationship between the Shijo and the owner has not been established, nor the capacity in which he was riding the vehicle has been brought out, it is not possible for us to conclude, that Shijo while riding the motorcycle on the fateful day, was an agent, employee or representative of the owner. It was open to the petitioner to defeat the claim for compensation raised by the respondents by establishing, that the rider Shijo represented the owner, and as such, was not a third party, in terms of the judgment rendered by this Court in *Oriental Insurance Company Limited* case (supra). The petitioner failed to discharge the said onus. In view of the above, it is not possible for us to accede to the second contention advanced at the hands of the learned counsel for the petitioner.

20. For the reasons recorded herein above, we find no merit in the instant Special Leave Petition. The same is, accordingly, dismissed.

B.B.B. Special Leave Petition dismissed.

BHARATI BALKRISHNA DHONGADE

v.

STATE OF MAHARASHTRA & ORS.

(Civil Appeal No. 10465 of 2011)

DECEMBER 05, 2011

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

Reservation – Benefit of reservation – Claim of – Appellant's claim that she belongs to 'Namdeo Shimpi' which is one of the sub-caste included in Other Backward Classes (OBCs) of 'Shimpi' caste in Maharashtra, even though it is not specifically mentioned as such; but the same was recognized in the State of Karnataka – Rejected by the Scrutiny Committee and the Division Bench of the High Court – On appeal, held: When a caste or sub-caste is not so expressly or specifically included in the Government Resolution/order along with the main caste, in such case, even if it is synonymous to the one mentioned in the order, it is not permissible to avail such benefit of reservation – A caste may fall under the category of OBCs in one State, but the said caste may not be classified as OBC in other State – Thus, the findings of the Scrutiny Committee and the Division Bench of the High Court that the appellant does not belong to caste 'Shimpi' (OBC) and belongs to 'Namdeo Shimpi' caste which is not OBC in the State of Maharashtra, does not call for interference – More so, no specific evidence led by the appellant to discharge the burden of proof on her u/s. 8, to prove her OBC status – Maharashtra Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Other Backward Classes and Special Backward Category (Regulation of Issuance and Verification of) Caste Certificate Act, 2001 – s. 8.

The Appellant was issued a Caste Certificate by the Additional District Deputy Collector, certifying that she belongs to Hindu Shimpi Caste which is recognized as Other Backward Class (OBC) under Entry No. 153 of the

Government Resolution. The appellant contested and won elections of Municipal Corporation of Greater Mumbai from the Ward reserved for women candidate belonging to the other backward classes. The Caste Certificate of the appellant was scrutinized by the Scrutiny Committee. Respondent No. 6-defeated candidate filed a complaint to the Caste Scrutiny Committee alleging that the appellant's claim of belonging to caste "Hindu Shimpi" was not proper. The Committee certified that the Caste Certificate issued to the appellant was valid. Respondent No. 6 filed a writ petition. The High Court remanded back the matter to the Committee and the Committee declared the claim of the appellant as invalid and cancelled the Caste Certificate issued to her. Aggrieved, the appellant filed a writ petition. The Division Bench of the High Court holding that the appellant did not belong to OBC as "Namdeo Shimpi" was not recognised by the State of Maharashtra as OBC of 'Shimpi Caste', though some other sub-castes of caste 'Shimpi in (OBC) have been mentioned in Entry 153, 'Namdeo Shimpi' has not been included under the original caste 'Shimpi', dismissed the writ petition. Therefore, the appellant filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1. The Committee as well as the Division Bench of the High Court considered the entire material on record including the distinction between the list of OBCs in the State of Karnataka as against the list of OBCs in State of Maharashtra and recorded a finding that the appellant who belongs to 'Namdeo Shimpi' caste does not belong to OBC of 'Shimpi' caste in Maharashtra. Relying on the position prevailing in the State of Karnataka, namely, that caste 'Namdeo Shimpi' has been included in Other Backward Class (OBC), the appellant submitted that the same analogy may be applied to the State of Maharashtra which cannot be accepted. [Para 13] [226-D-F]

1.2. The counter affidavit filed by the Secretary to the Government of Maharashtra in this Court shows that pursuant to the recommendations made by the Maharashtra State Backward Class Commission, the list of castes falling under OBC 'Shimpi' was amended from time to time. However, even the Government Resolution dated 01.03.2006 does not include 'Namdeo Shimpi' under the heading 'Shimpi' as OBC. The said Committee considered the distinction between the list of OBCs in the State of Karnataka and in State of Maharashtra and took note of the fact that though the Karnataka State thought it fit to include 'Namdeo Shimpi' under the category of 'Shimpi' (OBC), the Government of Maharashtra has not done so. The Division Bench of the High Court rightly highlighted the same in the impugned order. [Paras 14 and 15] [226-G-H; 227-A-F]

Indra Sawhney vs. Union of India **1992 Supp (3) SCC 212 – referred to.**

1.3. When it is not so expressly or specifically included in the Government Resolution/order along with the main caste, in such case, even if it is synonymous to the one mentioned in the order, it is not permissible to avail such benefit of reservation. It is well known that a caste may fall under the category of OBCs in one State, but the said caste may not be classified as OBC in other State. At any rate, no specific evidence was led by the appellant to discharge the burden of proof on her under Section 8 of the Maharashtra Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Other Backward Classes and Special Backward Category (Regulation of Issuance and Verification of) Caste Certificate Act, 2001. Inasmuch as the burden of proof under Section 8 of the said Act being on the person who claims to belong to that caste, tribe, or class, in view of the factual conclusion by the Committee based on relevant acceptable material and the decision of the Division Bench, the claim of the appellant

cannot be accepted. On the other hand, it is satisfied that the Committee and the Division Bench of the High Court considered the entire material in the light of the decisions of this Court and came to a finding of fact that the appellant does not belong to caste 'Shimpi' (OBC) and belongs to 'Namdeo Shimpi' caste which is not OBC in the State of Maharashtra. Thus, there is no valid ground for interference with the impugned order of the High Court. [Para 16 and 17] [227-G-H; 228-A-D]

State of Maharashtra vs. Milind and Others **(2001) 1 SCC 4;** *B. Basavalingappa vs. D. Munichinappa* **AIR 1965 SC 1269: (1965) 1 SCR 316;** *Bhaiya Lal vs. Harikishan Singh* **AIR 1965 SC 1557: (1965) 2 SCR 877;** *Bhaiya Ram Munda vs. Anirudh Patar & Ors.* **(1970) 2 SCC 825;** *Kumari Madhuri Patil & Another vs. Additional Commissioner, Tribal Development & Ors.* **(1994) 6 SCC 241;** *Dayaram vs. Sudhir Batham & Ors.* **2011 (11) Scale 448 – referred to.**

Case Law Reference:

(2001) 1 SCC 4	**Referred to.**	**Para 7**
(1965) 1 SCR 316	**Referred to.**	**Para 7**
(1965) 2 SCR 877	**Referred to.**	**Para 7**
(1970) 2 SCC 825	**Referred to.**	**Para 10**
(1994) 6 SCC 241	**Referred to.**	**Para 12**
2011 (11) Scale 448	**Referred to.**	**Para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10465 of 2011.

From the Judgment & Order dated 21.10.2010 of the High Court of Judicature at Bombay in W.P. No. 5772 of 2009.

L.N. Rao, A.V. Savant, R.N. Govilkar, Nitin S. Tambwekar, B.S. Rai, Santosh Krishnan, K. Rajeev, Sunil Upadhyay, Sudhanshu S. Choudhari, Asha Gopalan Nair, S. Sukumaran, Anand Sukumar, Bhupesh Kumar Pathak, Meera Mathur for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. The principal question which arose for consideration in this appeal is whether "Namdeo Shimpi" caste is a sub-caste within the meaning of Entry 153 (Shimpi) in the Government Notification notifying list of Other Backward Classes (OBC) relating to the State of Maharashtra, even though it is not specifically mentioned as such?

3. This appeal is filed against the final judgment and order dated 21.10.2010 passed by the High Court of Judicature at Bombay in Writ Petition No. 5772 of 2009 whereby the Division Bench of the High Court dismissed the writ petition filed by the appellant herein.

4. **Brief Facts:**

(a) On 18.01.1997, the Additional District Deputy Collector, Mumbai Suburban District, Mumbai issued a Caste Certificate to the appellant herein certifying that she belongs to Hindu Shimpi Caste which is recognized as Other Backward Class (Sr. No. 153) under Government Resolution No. CBC 1467/M dated 13.10.1967, Education and Social Welfare Department and as amended from time to time. In the year 2007, the appellant herein along with Mrs Safia Parveen Abdul Munaf-Respondent No. 6 contested the elections of Municipal Corporation of Greater Mumbai from Ward No. 62 reserved for women candidate belonging to the other backward classes and the appellant won the election. As per the policy of the State Election Commission, the Caste Certificate of the appellant herein was sent to the Scrutiny Committee to scrutinize the caste claimed and issue of validity certificate.

(b) After the elections, Respondent No. 6 forwarded a complaint to the Caste Scrutiny Committee (in short 'the Committee') alleging that the appellant's claim of belonging to caste "Hindu Shimpi" was not proper. The appellant herein also submitted the documents in support of her claim. By order dated 20.04.2007, the Committee certified that the Caste Certificate

issued to the appellant was valid and accepted that she belongs to 'Shimpi' of Other Backward Class (OBC).

(c) Challenging the said order, Respondent No. 6 filed Writ Petition No. 5112 of 2007 before the High Court of Bombay. By order dated 15.09.2008, the High Court set aside the order dated 20.04.2007 passed by the Committee and remanded the matter back to it for de novo consideration and decision in accordance with law. By order dated 19.06.2009, the Committee declared the claim of the appellant herein as invalid and cancelled the Caste Certificate issued to her.

(d) Aggrieved by the order dated 19.06.2009, the appellant herein filed Writ Petition No. 5772 of 2009 before the High Court of Bombay. By order dated 21.10.2010, the Division Bench of the High Court dismissed the writ petition.

(e) Aggrieved by the said decision, the appellant herein has preferred this appeal by way of special leave petition before this Court.

5. Heard Mr. L. Nageswara Rao, learned senior counsel for the appellant and Ms. Asha Gopalan Nair, learned counsel for respondent Nos. 1 to 3, Mr. S. Sukumaran, learned counsel for respondent No.5 and Mr. A.V. Sawant, learned senior counsel for the contesting respondent No.6.

6. Mr. Rao, learned senior counsel for the appellant by drawing our attention to the Government Resolution dated 03.06.1996 issued by Social Welfare, Cultural Affairs and Sports Department, Government of Maharashtra, submitted that in view of illustration given in Clause 25, the Committee and the High Court ought to have accepted the claim of the appellant and declared that she belongs to 'Namdeo Shimpi', which is one of the castes included in Other Backward Classes (OBCs). In the above-mentioned Government Resolution, Clauses 25 and 31 have been pressed into service. They are as follows:

"**Clause 25**

If in the list of O.B.C.'s if there is a clear reference of the main caste, the competent authorities should issue caste

certificate to the sub-caste or the similar caste of the main caste i.e., in the list of list of O.B.Cs' caste Kunbi is included. If in the documents of any person the word used are Tillori Kunbi or Khaire Kunbi then since the caste Kunbi is in the list of the O.B.C's and since the said caste is a main caste, such person be granted certificate of the caste Kunbi. If only the word/names Tillori, Khaire are mentioned, the caste certificate cannot be issued to such person as on the bases of the name Tillori, Khaie the main caste does not get clarified.

Clause 31

In the list of O.B.C's, eligible for the benefits in the state of Maharashtra, main castes are included and the sub-castes of such caste are also held eligible for issuance of the caste certificate. Persons belonging to such sub-castes be issued caste certificate in the name of the main caste."

It is not in dispute that the reference mentioned in Clause 25, namely, caste 'Kunbi' is only an illustration. It is, no doubt, true that in terms of Clause 31 in the list of OBCs eligible for the benefits in the State of Maharashtra, if main castes are included, in that event, the sub-castes are also eligible for issuance of the caste certificate. According to the learned senior counsel for the appellant, based on Clause 31, persons belonging to such sub-castes can be issued caste certificate in the name of the main caste. Per contra, Mr. A.V. Sawant, learned senior counsel for the contesting respondent No.6 submitted that first of all, the reference made by the appellant is not a full extract and admittedly it is only a portion thereof and in the absence of full details about the Government Resolution, it is not safe to rely upon and, more particularly, in the light of Constitutional judgments of this Court clarifying the position regarding issuance of caste certificate.

7. On a complaint being made by Respondent No. 6, regarding the validity of the caste certificate produced by the appellant, the matter was referred to the Regional Caste Certificate Verification Committee (RCCVC). The Verification Committee, consisting of the President, Member and Research

Officer, on receipt of the complaint issued notice to both the parties, afforded opportunity to them and after relying on various materials including the Government Notifications, Regulations etc., by order dated 19.06.2009, declared the claim of the appellant invalid and cancelled the Caste Certificate issued by the Additional District Deputy Collector, Mumbai Suburban District dated 18.01.1997.

8. The said order of the Verification Committee was challenged before the Division Bench of the High Court and by order dated 21.10.2010, it concluded that the appellant belongs to 'Namdeo Shimpi' caste which does not fall under Entry 153 of the relevant Government Resolution dated 01.03.2006 issued by the Government of Maharashtra. It is relevant to point out that though some other sub-castes of caste 'Shimpi' in (OBC) have been mentioned in Entry 153, admittedly, 'Namdeo Shimpi' has not been included under the original caste 'Shimpi'. The relevant protion of the Entry 153 is as under:

S.No.	**Original caste and Serial no. In the category of Other Backward Class**	**Synonym caste/ sub-caste and Serial Number of its original caste included afresh**
6.	Shimpi — 153	Jain Shimpi, Shravak Shimpi, Shetaval, Shetawal, Saitaval, Saitawal — 153

In view of the fact that there is no reference to 'Namdeo Shimpi' in Entry 153, the appellant who belongs to the same caste cannot claim the benefit meant for 'Other Back-ward Classes' of 'Shimpi' caste.

9. The issue relating to caste certificate, scrutiny by the Committee, inclusion or deletion etc. have been considered by the Constitution Bench of this Court in *State of Maharashtra vs. Milind and Others,* (2001) 1 SCC 4. Relying upon two earlier Constitution Bench decisions in (i) *B. Basavalingappa*

vs. D. Munichinappa, AIR 1965 SC 1269 = (1965) 1 SCR 316 and (ii) *Bhaiya Lal vs. Harikishan Singh,* AIR 1965 SC 1557 = (1965) 2 SCR 877, the Constitution Bench in *Milind's* case (supra) has clearly held that an enquiry as to whether any other caste or sub-caste can be included in the caste or tribe specifically mentioned in the Presidential Order was wholly impermissible.

10. The factual position in the *Milind's* case (supra) is as follows:-

The respondent, on the basis of the School Leaving Certificate and other records of himself and his close relative obtained a caste certificate from the Executive Magistrate, Nagpur on 20.08.1981 as belonging to "Halba", Scheduled Tribe. On the basis of that certificate, he was selected in the Government Medical College for MBBS degree course for the year 1985-86 in the reserved category meant for Scheduled Tribes. The certificate was sent for verification to the Scrutiny Committee constituted under the Directorate of Social Welfare. After necessary inquiry, the Scrutiny Committee recorded a finding to the contrary and rejected the certificate. The Appellate Authority, after detailed examination of evidence dismissed the respondent's appeal and held that the respondent belonged to "Koshti" caste and not to "Halba/Halbi", Scheduled Tribe. However, the High Court allowed the respondent's writ petition and quashed the impugned orders inter alia holding that it was permissible to inquire whether any subdivision of a tribe was a part and parcel of the tribe mentioned therein and that "Halba-Koshti" was a subdivision of main tribe "Halba/Halbi" as per Entry 19 in the Constitution (Scheduled Tribes) Order, 1950 (for short "Scheduled Tribes Order") applicable to Maharashtra. Before the Constitution Bench, learned senior counsel for the appellant-State of Maharashtra contended that:

(a) it was not permissible to hold an inquiry whether a particular group was a part of the Scheduled Tribe as specified in the Scheduled Tribes Order;

(b) the decision in *Bhaiya Ram Munda vs. Anirudh Patar*

& Ors. (1970) 2 SCC 825, did not lay down the correct principle of law as to the scope of inquiry and the power to amend the Scheduled Castes/Scheduled Tribes Order; [this contention involved the specific question as to whether "Halba-Koshti" caste was a sub-tribe within the meaning of Entry 19 (Halba/Halbi) of the Scheduled Tribes Order relating to the State of Maharashtra, even though not specifically mentioned as such].

(c) the High Court misinterpreted the report of the Joint Committee of Parliament placed before it when representations for inclusion of "Halba-Koshti" in the Scheduled Tribes Order were rejected;

(d) the High Court also committed an error in invoking and applying the principle of stare decisis to the facts of the present case;

(e) & (f) the High Court erred in setting aside the orders of the Scrutiny Committee and the Appellate Authority which were made on proper and full consideration of evidence and authorities;

(g) the High Court gave undue importance to the resolutions/circulars issued by the State Government which were contrary to law;

(h) the High Court erred in treating the issue involved in the present case to have been closed in Abhay caste.

On the other hand learned senior counsel for the respondent contended that the old records relating to the period when there was no controversy, clearly supported the case of the respondent and the School Leaving Certificate issued to the respondent was valid. He also submitted that it was open to show that a particular caste was part of the Scheduled Tribes coming within the meaning and scope of tribal community even though it was not described as such in the Presidential Order.

11. Allowing the appeal but moulding the relief, the Constitution Bench held thus:

"11. By virtue of powers vested under Articles 341 and 342

of the Constitution of India, the President is empowered to issue public notification for the first time specifying the castes, races or tribes or part of or groups within castes, races, or tribes which shall, for the purposes of the Constitution be deemed to be Scheduled Castes or Scheduled Tribes in relation to a State or Union Territory, as the case may be. The language and terms of Articles 341 and 342 are identical. What is said in relation to Article 341 mutatis mutandis applies to Article 342. The laudable object of the said articles is to provide additional protection to the members of the Scheduled Castes and Scheduled Tribes having regard to social and educational backwardness from which they have been suffering since a considerable length of time. The words "castes" or "tribes" in the expression "Scheduled Castes" and "Scheduled Tribes" are not used in the ordinary sense of the terms but are used in the sense of the definitions contained in Articles 366(24) and 366(25). In this view, a caste is a Scheduled Caste or a tribe is a Scheduled Tribe only if they are included in the President's Orders issued under Articles 341 and 342 for the purpose of the Constitution. Exercising the powers vested in him, the President has issued the Constitution (Scheduled Castes) Order, 1950 and the Constitution (Scheduled Tribes) Order, 1950. Subsequently, some orders were issued under the said articles in relation to Union Territories and other States and there have been certain amendments in relation to Orders issued, by amendment Acts passed by Parliament.

15. Thus it is clear that States have no power to amend Presidential Orders. Consequently, a party in power or the Government of the day in a State is relieved from the pressure or burden of tinkering with the Presidential Orders either to gain popularity or secure votes. Number of persons in order to gain advantage in securing admissions in educational institutions and employment in State services have been claiming as belonging to either

Scheduled Castes or Scheduled Tribes depriving genuine and needy persons belonging to Scheduled Castes and Scheduled Tribes covered by the Presidential Orders, defeating and frustrating to a large extent the very object of protective discrimination given to such people based on their educational and social backwardness. Courts cannot and should not expand jurisdiction to deal with the question as to whether a particular caste, sub-caste; a group or part of tribe or sub-tribe is included in any one of the entries mentioned in the Presidential Orders issued under Articles 341 and 342 particularly so when in clause (2) of the said article, it is expressly stated that the said Orders cannot be amended or varied except by law made by Parliament. The power to include or exclude, amend or alter Presidential Order is expressly and exclusively conferred on and vested with Parliament and that too by making a law in that regard. The President had the benefit of consulting the States through Governors of States which had the means and machinery to find out and recommend as to whether a particular caste or tribe was to be included in the Presidential Order. If the said Orders are to be amended, it is Parliament that is in a better position to know having the means and machinery unlike courts as to why a particular caste or tribe is to be included or excluded by law to be made by Parliament. Allowing the State Governments or courts or other authorities or Tribunals to hold inquiry as to whether a particular caste or tribe should be considered as one included in the schedule of the Presidential Order, when it is not so specifically included, may lead to problems. In order to gain advantage of reservations for the purpose of Article 15(4) or 16(4) several persons have been coming forward claiming to be covered by Presidential Orders issued under Articles 341 and 342. This apart, when no other authority other than Parliament, that too by law alone can amend the Presidential Orders, neither the State Governments nor the courts nor Tribunals nor any authority can assume jurisdiction to hold inquiry and take evidence to declare

that a caste or a tribe or part of or a group within a caste or tribe is included in Presidential Orders in one entry or the other although they are not expressly and specifically included. A court cannot alter or amend the said Presidential Orders for the very good reason that it has no power to do so within the meaning, content and scope of Articles 341 and 342. It is not possible to hold that either any inquiry is permissible or any evidence can be let in, in relation to a particular caste or tribe to say whether it is included within Presidential Orders when it is not so expressly included.

36. Finally, the Constitution Bench has concluded that:

1. It is not at all permissible to hold any inquiry or let in any evidence to decide or declare that any tribe or tribal community or part of or group within any tribe or tribal community is included in the general name even though it is not specifically mentioned in the entry concerned in the Constitution (Scheduled Tribes) Order, 1950.

2. The Scheduled Tribes Order must be read as it is. It is not even permissible to say that a tribe, sub-tribe, part of or group of any tribe or tribal community is synonymous to the one mentioned in the Scheduled Tribes Order if they are not so specifically mentioned in it.

3. A notification issued under clause (1) of Article 342, specifying Scheduled Tribes, can be amended only by law to be made by Parliament. In other words, any tribe or tribal community or part of or group within any tribe can be included or excluded from the list of Scheduled Tribes issued under clause (1) of Article 342 only by Parliament by law and by no other authority.

4. It is not open to State Governments or courts or tribunals or any other authority to modify, amend or alter the list of Scheduled Tribes specified in the notification issued under clause (1) of Article 342.

5. *Decisions of the Division Benches of this Court in* Bhaiya Ram Munda *v.* Anirudh Patar *and* Dina *v.* Narain Singh *did not lay down law correctly in stating that the inquiry was permissible and the evidence was admissible within the limitations indicated for the purpose of showing what an entry in the Presidential Order was intended to be. As stated in Position (1) above no inquiry at all is permissible and no evidence can be let in, in the matter."*

12. In *Kumari Madhuri Patil & Another vs. Additional Commissioner, Tribal Development & Ors.* (1994) 6 SCC 241, this Court has given elaborate directions for deciding the claim of persons who belong to the Scheduled Castes, Scheduled Tribes or Other Backward Classes. These directions have been reiterated in a recent decision by a larger Bench of three Judges of this Court in *Dayaram vs. Sudhir Batham & Ors.* 2011 (11) Scale 448.

13. Mr. Rao, learned senior counsel, by relying on the position prevailing in the State of Karnataka, namely, that caste 'Namdeo Shimpi' has been included in OBC submitted that the same analogy may be applied to the State of Maharashtra. We have already noted the elaborate discussion and the ultimate order of the Committee as well as the Division Bench of the High Court. We are satisfied that before arriving at such conclusion they considered the entire material on record including the distinction between the list of OBCs in the State of Karnataka as against the list of OBCs in State of Maharashtra and recorded a finding that the appellant who belongs to 'Namdeo Shimpi' caste does not belong to OBC of 'Shimpi' caste in Maharashtra. In view of the same, we reject the contention of the learned senior counsel for the appellant.

14. Ms. Asha Gopalan Nair, learned counsel appearing for the State took us through various averments in the counter affidavit filed by the State of Maharashta. The counter affidavit filed by the Secretary to the Government of Maharashtra in this Court shows that pursuant to the recommendations made by the Maharashtra State Backward Class Commission, the list of castes falling under OBC 'Shimpi' has been amended from time to time. However, even the Government Resolution dated

01.03.2006 does not include 'Namdeo Shimpi' under the heading 'Shimpi' as OBC.

15. It is brought to our notice that the Maharashtra State Backward Class Commission has been constituted in terms of the judgment of this Court in *Indra Sawhney vs. Union of India,* 1992 Supp (3) SCC 212, which is headed by a retired Judge of the Bombay High Court and assisted by experts in the field. Further, the said Commission undertakes extensive studies and make recommendations from time to time or suggest additions and alterations in the list of OBCs and it is after such elaborate exercise the final list has emerged as per the Government Resolution dated 01.03.2006. The details furnished in the counter affidavit filed by the Secretary to the Government of Maharashtra show that the above referred Government Resolution is being updated from 1961 on several occasions. We have already explained that the extract of the Government Resolution dated 03.06.1996 relied on by Mr. Rao, learned senior counsel for the appellant dealing with caste 'Kunbi' (OBC), has no relevance to the facts of the present case. We are also satisfied that the said Committee has considered the distinction between the list of OBCs in the State of Karnataka and in State of Maharashtra and has taken note of the fact that though the Karnataka State has thought it fit to include 'Namdeo Shimpi' under the category of 'Shimpi' (OBC), the Government of Maharashtra has not done so. This has also been rightly highlighted in the impugned order by the Division Bench of the High Court.

16. When it is not so expressly or specifically included in the Government Resolution/order along with the main caste, in such case, even if it is synonymous to the one mentioned in the order, it is not permissible to avail such benefit of reservation. It is well known that a caste may fall under the category of OBCs in one State, but the said caste may not be classified as OBC in other State. At any rate, we are of the view that no specific evidence was led by the appellant to discharge the burden of proof on her under Section 8 of the Maharashtra Scheduled Castes, Scheduled Tribes, De-notified Tribes

(Vimukta Jatis), Nomadic Tribes, Other Backward Classes and Special Backward Category (Regulation of Issuance and Verification of) Caste Certificate Act, 2001. Inasmuch as the burden of proof under Section 8 of the said Act being on the person who claims to belong to that caste, tribe, or class, in view of the factual conclusion by the Committee based on relevant acceptable material and the decision of the Division Bench, we are unable to accept the claim of the appellant. On the other hand, we are satisfied that the Committee and the Division Bench of the High Court have considered the entire material in the light of the decisions of this Court and came to a finding of fact that the appellant does not belong to caste 'Shimpi' (OBC) and belongs to 'Namdeo Shimpi' caste which is not OBC in the State of Maharashtra.

17. Under these circumstances, we do not find any valid ground for interference with the impugned order of the High Court. Consequently, the appeal fails and the same is dismissed with no order as to costs.

N.J. Appeal dismissed.

HANUMANT MURLIDHAR GAVADE

v.

MUMBAI AGRICULTURAL PRODUCE MARKET & ORS.

(Civil Appeal Nos.10701-10702 of 2011)

DECEMBER 07, 2011

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

Agricultural Produce Market Committee – Newly constructed wholesale market – Allotment of galas/shops to traders – Writ Petitions before High Court – High Court appointed a former Judge of that Court - Justice Daud - as Court Commissioner – Norms fixed by Justice Daud Committee – Held: Claimant respondent fulfilled eligibility of one large gala only and that was already given to him, hence his claim for second large gala was without merit – The Market Committee could not have agreed for allotment of two large galas to the claimant respondent contrary to the norms fixed by the Justice Daud Committee – In regard to the claim of appellant, as per the intent indicator fixed by the Justice Daud Committee, he had indicated his intention for allotment of one small gala only, therefore, his claim for one large gala was devoid of any merit – Appellant only entitled to one small gala in the Market.

Maharashtra Agricultural Produce Marketing (Development and Regulation) Act, 1963 – ss. 31 and 34A – 'Cess'/'market fee' and 'supervision cost' – Difference between – Held: The cost of supervision is paid to the State Government by the person purchasing produce in the market or market area – It is the cost recovered by the State Government for the expenses incurred for the staff appointed by it to supervise the purchase of agricultural produce in the market or market area regulated by the Market Committee under the 1963 Act – Insofar as 'market fee' or, for that matter, 'cess' is concerned, it is levied by the Market Committee – S.31 of the 1963 Act empowers Market Committee to levy fees and rates of commission (adat) – The cess or market

fees so levied goes to the coffers of Market Committee in return of the functions performed by it – 'Cess' and 'supervision cost' are thus distinct charges and 'supervision cost' is not part of 'cess' or 'market fee'.

In 1985, the Mumbai Agricultural Produce Market Committee decided to shift subsidiary wholesale markets of fruit and vegetable in the city of Mumbai at Vashi. The construction of the new wholesale market at Vashi was completed in 1995. Controversy arose in respect of allotment of *galas*/shops to the traders and numerous Writ Petitions were filed before the High Court. The High Court appointed a former Judge of that Court - Justice Daud - as Court Commissioner to determine the norms of allotment of *galas*/shops in the newly constructed wholesale market at Vashi. The Justice Daud Committee submitted three reports which were accepted by the High Court.

The wholesale market in question had a total number of 1029 *galas* – 732 large *galas* each measuring 450 sq. ft. and 297 small *galas* each measuring 300 sq. ft. In the instant appeals, the appellant and the common respondent nos. 5 and 2 (hereinafter referred to as 'claimant respondent') are rival claimants in respect of allotment of one large gala.

Disposing of the appeals, the Court

HELD: 1.1. As per the norms fixed by the Justice Daud committee, the claimant who had paid cess during the relevant period upto Rs. 90,000/- was entitled to one large *gala* and those who paid cess from Rs. 90,001 to Rs. 3,00,000/- were entitled to two large *galas*. The claimant respondent was denied second *gala* by the Market Committee as he had paid cess for the relevant period to the tune of Rs. 87,047.98 i.e. he paid cess less than Rs. 90,000/-. The plea of claimant respondent that if supervision fee of Rs. 5,380/- paid by him is considered in payment of cess, then he would be entitled to allotment of second large *gala* as he would be treated to have paid

cess exceeding Rs. 90,000/- for the relevant period, cannot be accepted. 'Cess' or 'market fee' is different from 'supervision cost'. Section 34A of the Maharashtra Agricultural Produce Marketing (Development and Regulation) Act, 1963 provides for 'Cost of Supervision'. The cost of supervision is paid to the State Government by the person purchasing produce in the market or market area. It is the cost recovered by the State Government for the expenses incurred for the staff appointed by it to supervise the purchase of agricultural produce in the market or market area regulated by the Market Committee under the 1963 Act. [Paras 10, 11, 12, 13, 14] [236-C-H; 237-A-E]

1.2. Insofar as 'market fee' or, for that matter, 'cess' is concerned, it is levied by the Market Committee. Section 31 of the 1963 Act empowers Market Committee to levy fees and rates of commission (adat). The levy of market fee by the Market Committee and its calculation is done in the prescribed manner. The cess or market fees so levied goes to the coffers of Market Committee in return of the functions performed by it. Section 31(b) provides for payment of supervision cost under Section 34A and also the market fees. It is, thus, clear that 'cess' and 'supervision cost' are distinct charges and 'supervision cost' is not part of 'cess' or 'market fee'. In this view, the cess paid by the claimant respondent for the relevant period being less than Rs. 90,000/-, as per the norms fixed by the Justice Daud Committee and accepted by the High Court, he is entitled to one large *gala* only, which has already been allotted to him. [Para 15] [237-G-H; 238-A-B]

1.3. As regards the further submission of the claimant respondent that in the Writ Petition filed by it in the High Court, on consent of the Market Committee as per the signed minutes, the Market Committee agreed to give to him one large *gala* in the Fruit Market on priority basis and when available and, the High Court disposed of Writ

Petition accordingly on August 25, 2000 and that application made by the Market Committee for recall of that order was rejected, it is clear that the order dated August 25, 2000 does not help the claimant respondent at all for more than one reason. In the first place, the above order of the High Court does not indicate that the claimant respondent is entitled to two large *galas* in the market. It only records the agreement of the Market Committee to give to the claimant respondent one large *gala* in the market. That one large *gala* has already been given to the claimant respondent is not in dispute. Secondly, and more importantly, if under the norms fixed by the Justice Daud Committee, which has been accepted by the High Court, the claimant respondent is not entitled to more than one *gala*, then he cannot claim entitlement to two large *galas* under the order dated August 25, 2000 passed by the High Court merely because the Market Committee agreed for such allotment. The Market Committee could not have agreed for allotment of two large *galas* to the claimant respondent contrary to the norms fixed by the Justice Daud Committee. The claimant respondent fulfils eligibility of one large *gala* only and that has been given to him. His claim for second large *gala* is without any merit. [Para 17] [238-E-H; 239-A]

2. Insofar as the appellant is concerned, even if it is assumed that he paid cess above Rs. 25,000/- for the relevant period, in view of the admitted fact that he had paid Rs. 34,000/- only at the time of booking, as per the intent indicator fixed by the Justice Daud Committee, he indicated his intention for allotment of one small *gala*. His claim for one large *gala* is, thus, devoid of any merit. He could not have been allotted large *gala* by the Market Committee and the allotment of one large *gala* to him was wrong and has been rightly cancelled. Accordingly, it is held that the appellant is entitled to one small *gala* in the Fruit Market at Vashi. [Paras 18, 19] [239-B-D]

3. The Market Committee-respondent No. 1, submitted that two small *galas* in Fruit Market were presently available. In view of that, the Market Committee (respondent No. 1) is directed to allot one small *gala* to the appellant immediately and in no case later than one month. Upon allotment of the said *gala*, the appellant shall occupy allotted small *gala* as early as may be possible and in no case later than one month from the date of allotment. On allotment of one small *gala,* the appellant shall hand over vacant possession of *Gala* No. F-158 to the Market Committee and in any case within one month therefrom. The impugned judgment of the High Court is accordingly modified. [Paras 20, 21] [239-D-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 10701-10702 of 2011.

From the Judgment & Order dated 26.2.2008 of the High Court of Bombay Civil Appellate Jurisdiction in Writ Petition No. 4101 of 2001 and 7077 of 2003.

Uday B. Dube, Kuldip Singh for the Appellant.

C.U. Singh, Shivaji M. Jadhav, Asha Gopalan Nair, Shantha Kr. Mahale, Rajesh Mahale, Harish Hebbar for the Respondents.

The Judgment of the Court was delivered by

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

2. The dispute in these Appeals concerns allotment of one large *gala* in the Wholesale Fruit and Vegetable Market, Vashi. The rival claimants are the appellant and common respondent Nos. 5 and 2 in these Appeals - Narayan Nivrutti Shinde (hereinafter referred to as 'claimant respondent').

3. In 1985, Mumbai Agricultural Produce Market Committee (for short, 'Market committee') decided to shift subsidiary wholesale markets of fruit and vegetable in city of Mumbai at Vashi. In 1995, the construction of the new wholesale market at Vashi was completed. The controversy arose in

respect allotment of *galas*/shops to the traders and numerous Writ Petitions were filed before the Bombay High Court. On April 26, 1996, the High Court appointed a former Judge of that Court - Justice Daud - as Court Commissioner to determine the norms of allotment of *galas*/shops in the newly constructed wholesale market at Vashi.

4. The Justice Daud Committee submitted three reports which were accepted by the High Court. As regards the Fruit Market which had total number of 1029 *galas* – 732 being of the large *galas* each measuring 450 sq. ft. and 297 small *galas* each measuring 300 sq. ft. - in its report the Justice Daud Committee provided for eligibility for two time frames; time frame 1985-86 to 1994-95, and time frame 1991-92 to 1994-95. For time frame 1985-86 to 1994-95, the claimant was required to establish doing of five years business as reflected in payment of market fee irrespective of quantum thereof. The claimant was further required to show that he had held an APMC licence for at least two years in the above ten year period and also that he did business in one of the years 1995-96 or 1996-97. This was required to be established by proof of cess paid. The cess-space nexus provided in respect of time frame 1985-86 to 1994-95 is thus :-

Total Cess paid	**Entitlement**
1) Rs. 1500 to Rs. 5,000	...Half small gala
2) Rs. 5,001 to Rs. 10,000	...1 Small Gala
3) Rs. 10,001 to Rs. 15,000	...Half Large Gala
4) Rs. 15,001 to Rs. 90,000	**...1 Large Gala**
5) Rs. 90,001 to Rs, 3,00,000/-	...2 Large Galas
6) Above Rs. 3,00,000/-	...3 Large Galas

5. The norms fixed by The Justice Daud Committee further provided that no one would get more than three large *galas* and for retaining the third, the claimant would have to pay the market price within 90 days of the acceptance of the norm by the High Court. Those who had booked the *galas* upto December 31,

1993 and had come into the business from 1991-92 to 1994-95, the second time frame 1991-92 to 1994-95 was made applicable. It was provided that those eligible in this category must have held APMC licences for at least three years and done business for three years as reflected in the payment of market fee irrespective of quantum and show that they were doing business in 1995-96 or 1996-97 by proof of having paid market fee either in 1995-96 or 1996-97. The cess-space nexus for this category was thus :-

Total Cess paid	Entitlement
1) Rs. 2500 to Rs. 7500	...Half a Small Gala
2) Rs. 7501 to 25,000	...1 Small Gala
3) Above Rs. 25,000	...1 Large Gala

6. The other conditions need not be referred to insofar as time frame 1985-86 to 1994-95 is concerned.

7. As regards time frame 1991-92 to 1994-95, *inter alia*, space-cess nexus was provided thus :-

Total Cess Paid	Entitlement
1) Rs. 10,000 to Rs. 20,000	...Half a Small Gala
2) Above Rs. 20,000	...1 Small Gala

8. By way of clarification in the norms fixed by the Justice Daud Committee, it was provided that those claimants who fall in the time frame 1985-86 to 1994-95 and had made bookings upto September 30, 1991 and those who fall in the time frame 1991-92 to 1994-95 and had made their bookings upto December 31, 1993, the amount paid and intent indicator would be as follows:-

Amount paid	For
1) Rs. 10,000 to Rs. 34,000	...1 Small Gala
2) More than Rs. 34,000 and upto Rs. 68,000	...1 Large Gala

3) More than Rs. 68,000 and upto Rs. 1,02,000	...2 Large Galas
4) More than Rs. 1,02,000	...3 Large Galas

9. In light of the above norms, we have to see the claim of the appellant for one large *gala* and the claim of the claimant respondent for second large *gala* since he has been allotted one large gala already and the allotment of one large *gala* to him is not in issue.

10. First, we shall deal with the entitlement of the claimant respondent to the second *gala*. He was denied second *gala* by the Market Committee as he had paid cess for the relevant period to the tune of Rs. 87,047.98. In other words, he paid cess less than Rs. 90,000/-. As per the norms fixed by the Justice Daud committee, the claimant who had paid cess during the relevant period upto Rs. 90,000/- was entitled to one large *gala* and those who paid cess from Rs. 90,001 to Rs. 3,00,000/- were entitled to two large *galas*.

11. Mr. C.U. Singh, learned senior counsel for the claimant respondent, submitted that if supervision fee of Rs. 5,380/- paid by the claimant respondent is considered in payment of cess, then he would be entitled to allotment of second large *gala* as he would be treated to have paid cess exceeding Rs. 90,000/- for the relevant period.

12. The submission of Mr. C.U. Singh, learned senior counsel, does not appeal us. 'Cess' or 'market fee' is different from 'supervision cost'.

13. Section 34A of the Maharashtra Agricultural Produce Marketing (Development and Regulation) Act, 1963 (for short, '1963 Act') provides for 'Cost of Supervision'. It reads as follows :-

> "34A. Supervision over purchase of agricultural produce in any market or market area and payment of cost of supervision by purchasers.

(1) The State Government may, by general or special order, direct that the purchase of agricultural produce, the marketing of which is regulated in any market or market area under this Act, shall be under the supervision of such staff appointed by the State Government as it may deem to be necessary; and subject to the provisions of this Chapter, the cost of such supervision shall be paid to the State Government by the person purchasing such produce in such market or market area.

(2) The cost to be paid by a purchaser shall be determined from time to time by the State Government and notified in the market or market area (in such manner as the State Government may deem fit), so however that the amount of the cost does not exceed five paise per hundred rupees of the purchase price of the agricultural produce which is purchased by such purchaser."

14. A look at the above provision would show that cost of supervision is paid to the State Government by the person purchasing produce in the market or market area. It is the cost recovered by the State Government for the expenses incurred for the staff appointed by it to supervise the purchase of agricultural produce in the market or market area regulated by the Market Committee under the 1963 Act. The determination of cost of supervision is notified by the State Government from time to time and does not exceed five paise per hundred rupees of the purchase price.

15. Insofar as 'market fee' or, for that matter, 'cess' is concerned, it is levied by the Market Committee. Section 31 of the 1963 Act empowers Market Committee to levy fees and rates of commission (adat). The levy of market fee by the Market Committee and its calculation is done in the prescribed manner. The cess or market fees so levied goes to the coffers of Market Committee in return of the functions performed by it. Section 31(b) provides for payment of supervision cost under Section 34A and also the market fees. It is, thus, clear that the

'cess' and 'supervision cost' are distinct charges and 'supervision cost' is not part of 'cess' or 'market fee'. In this view, the cess paid by the claimant respondent for the relevant period being less than Rs. 90,000/-, as per the norms fixed by the Justice Daud Committee and accepted by the High Court, he is entitled to one large *gala* only, which has already been allotted to him.

16. Mr. C.U. Singh, learned senior counsel, then submitted that in the Writ Petition filed by the claimant respondent in the High Court, on consent of the Market Committee as per the signed minutes, the Market Committee agreed to give to him (petitioner therein) one large *gala* in the Fruit Market on priority basis and when available and, the High Court disposed of Writ Petition accordingly on August 25, 2000. He also submitted that an application was made by the Market Committee for recall of that order, but that application was rejected.

17. In our view, the order dated August 25, 2000 referred to by Mr. C.U. Singh, learned senior counsel, does not help the claimant respondent at all for more than one reason. In the first place, the above order of the High Court does not indicate that the claimant respondent is entitled to two large *galas* in the market. It only records the agreement of the Market Committee to give to the claimant respondent one large *gala* in the market. That one large *gala* has already been given to the claimant respondent is not in dispute. Secondly, and more importantly, if under the norms fixed by the Justice Daud Committee, which has been accepted by the High Court, the claimant respondent is not entitled to more than one *gala*, then he cannot claim entitlement to two large *galas* under the order dated August 25, 2000 passed by the High Court merely because the Market Committee agreed for such allotment. The Market Committee, in our view, could not have agreed for allotment of two large *galas* to the claimant respondent contrary to the norms fixed by the Justice Daud Committee. As noticed above, the claimant respondent fulfils eligibility of one large *gala* only and that has been given to him. His claim for second large *gala* is without

any merit and it is held that he is not entitled to second large *gala*.

18. Insofar as the appellant is concerned, it is clear that his claim is covered by the second time frame fixed by the Justice Daud Committee. Even if it is assumed that he paid the cess above Rs. 25,000/- for the relevant period, in view of the admitted fact that he had paid Rs. 34,000/- only at the time of booking, as per the intent indicator fixed by the Justice Daud Committee, he indicated his intention for allotment of one small *gala*. His claim for one large *gala* is, thus, devoid of any merit. He could not have been allotted large *gala* by the Market Committee and the allotment of one large *gala* to him was wrong and has been rightly cancelled.

19. We, accordingly, hold that the appellant is entitled to one small *gala* in the Fruit Market at Vashi.

20. Mr. Shantha Kr. Mahale, learned counsel for the Market Committee-respondent No. 1, submitted that two small *galas* in Fruit Market were presently available. In view of that, we direct the Market Committee (respondent No. 1) to allot one small *gala* to the appellant immediately and in no case later than one month from today. Upon allotment of the said *gala*, the appellant shall occupy allotted small *gala* as early as may be possible and in no case later than one month from the date of allotment. On allotment of one small *gala,* the appellant shall hand over vacant possession of *Gala* No. F-158 to the Market Committee and in any case within one month therefrom.

21. The impugned judgment of the High Court is modified and the Appeals are allowed to the extent indicated above with no order as to costs.

B.B.B. Appeals disposed of.

DHANRAJ SINGH CHOUDHARY

v.

NATHULAL VISHWAKARMA

(Civil Appeal No. 2293 of 2005)

DECEMBER 08, 2011

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

Ethics – Legal ethics – Held: Person practising law has to practise in the spirit of honesty and not in the spirit of mischief-making or money-getting – He has an obligation to maintain probity and high standard of professional ethics and morality – An advocate's attitude towards and dealings with his client has to be scrupulously honest and fair – Any compromise with the law's nobility as a profession is bound to affect the faith of the people in the rule of law and, therefore, unprofessional conduct by an advocate has to be viewed seriously – On facts, professional misconduct proved against appellant-advocate is quite grave and serious – It was not only undesirable but highly unethical on the part of the advocate to have created title or at least having attempted to create title in him in respect of the property for which litigation was pending in the court and he was representing one of the parties in that litigation –Settlement of the advocate with the complainant does not mitigate or wipe out professional misconduct and must not prevent adequate punishment to the advocate – Punishment for professional misconduct has twin objectives of deterrence and correction – In view of the facts and circumstances of the case, the punishment of suspension from practice for one year reduced to a period of three months – Advocates Act, 1961.

Advocates Act, 1961 – ss. 37 and 42 – Cross-appeal filed by advocate challenging the punishment of reprimand passed by the Disciplinary Committee of the State Bar Council – Maintainability of – Held: s. 37 does not contemplate cross-appeal – Submission that the advocate

preferred cross-objections (titled cross-appeal) within 30 days of the receipt of the notice of the appeal preferred by complainant and the same is permissible under Or. 41 r. 22 CPC which is applicable to the proceedings before the Disciplinary Committee of the Bar Council of India, cannot be accepted – Code is not made applicable as it is to the proceedings before the Disciplinary Committee – s. 42 makes applicable provisions of the Code in respect of matters contained therein which do not refer to appeals – Cross-objections titled 'cross-appeal' preferred by the advocate being wholly mis-conceived were rightly held to be not maintainable – Even if cross-appeal is treated as an appeal u/s. 37, it is hopelessly time barred – Code of Civil Procedure, 1908 – Or.41 r. 22.

Respondent filed a complaint against appellant-advocate to the Bar Council of M.P. alleging professional misconduct against the appellant. It was alleged that the appellant-advocate attested the sale deed containing the statement to the effect that shop on the western side of the saleable property in occupation of the complainant had already been transferred to the appellant-advocate by giving him ownership right, although the vendor's father had entered into an agreement to sell the suit property to the complainant and had received the consideration amount. The complainant alleged that he had already filed a suit for specific performance of the agreement which was pending and was within the knowledge of the advocate appellant whereas the appellant had instituted a suit on behalf of the vendor against the complainant for eviction of the said shop showing the complainant as a tenant of the vendor. The complaint was referred to the Disciplinary Committee of the State Bar Council. The appellant was given notice and he appeared before the Committee and expressed his ignorance about the statement made in the sale deed. The Disciplinary Committee held the advocate guilty of professional misconduct and awarded punishment of reprimand. Aggrieved, the complainant filed an appeal

under Section 37 of the Advocates Act, 1961 to the Bar Council of India. The Disciplinary Committee suspended the appellant from practice for a period of one year. After conclusion of the hearing, the appellant filed an application seeking permission to file cross-appeal and the same was rejected. Therefore, the appellant-advocate filed the instant appeals.

Dismissing the appeals, the Court

HELD: 1.1. The legal profession is a noble profession. It is not a business or a trade. A person practising law has to practise in the spirit of honesty and not in the spirit of mischief-making or money-getting. An advocate's attitude towards and dealings with his client has to be scrupulously honest and fair. Any compromise with the law's nobility as a profession is bound to affect the faith of the people in the rule of law and, therefore, unprofessional conduct by an advocate has to be viewed seriously. A person practising law has an obligation to maintain probity and high standard of professional ethics and morality. [Paras 17 and 19] [251-F; 253-A-B]

V.C. Rangadurai vs. D. Gopalan and Ors. **AIR 1979 SC 281: 1979 (1) SCR 1054 – referred to.**

1.2. If the conduct of the advocate appellant is seen, it becomes clear that he was privy to the false statement recorded in the sale deed. In his deposition before the Disciplinary Committee, State Bar Council, Madhya Pradesh, the advocate appellant stated that he came to know of the said fact when the complainant had lodged the complaint against him. His explanation does not merit acceptance. On a question put by the Disciplinary Committee to him that prior to signing the sale deed dated November 3, 1999 in the form of witness why did he not read the said document, his reply was that he did not consider it essential to read the contents of the sale deed. It cannot be believed it was not only undesirable but highly unethical on the part of the advocate appellant

to have created title or at least having attempted to create title in him in respect of the property for which litigation was pending in the court and he was representing one of the parties in that litigation. But for his connivance with the vendor, no such statement would have found place in the sale deed dated November 3, 1999. The professional misconduct proved against the advocate appellant is quite grave and serious. [Paras 20 and 21] [253-B-C]

2.1. In the cross-appeal preferred by the advocate appellant, it is stated that being aggrieved by the order dated April 22, 2002 passed by the Disciplinary Committee of the State Bar Council, Madhya Pradesh, the cross-appeal is being preferred by the advocate appellant. As a matter of law, Section 37 of the Advocates Act, 1961 does not contemplate cross-appeal. The submission of the appellant that he preferred cross-objections (titled cross-appeal) within 30 days of the receipt of the notice of the appeal preferred by the complainant and that is permissible under Order 41 Rule 22 CPC which is applicable to the proceedings before the Disciplinary Committee of the Bar Council of India cannot be accepted. The Code has not been made applicable as it is to the proceedings before the disciplinary committee. Section 42 of the 1961 Act makes applicable provisions of the Code in respect of matters contained therein while providing that the Disciplinary Committee of a Bar Council shall have the same powers as are vested in a civil court. The matters contained in Section 42 do not refer to the appeals. Thus, the provisions contained in Order 41 of the Code, including Rule 22 thereof, have no applicability to the proceedings before a Disciplinary Committee. [Paras 11 and 12] [249-C-H; 250-A]

2.2. Appeal is a creature of statute. The extent and scope of an appeal is governed by statutory provisions. Section 37 of the 1961 Act is the statutory provision for an appeal to the Bar Council of India from the order of

the Disciplinary Committee of the State Bar Council. Section 39 of the 1961 Act, however, makes Sections 5 and 12 of the Limitation Act, 1963 applicable to the appeals preferred under Section 37 and Section 38 of the 1961 Act. There is no provision like Order 41 Rule 22 of the Code in the 1961 Act. The cross-objections titled 'cross-appeal' preferred by the advocate appellant being wholly mis-conceived have rightly been held to be not maintainable by the Disciplinary Committee of the Bar Council of India. There may not be any difficulty in treating the 'cross-appeal' preferred by the advocate appellant as an appeal under Section 37 of the 1961 Act, but then such appeal is hopelessly time barred. The order was passed by the Disciplinary Committee of the State Bar Council on April 22, 2002. The advocate appellant presented his appeal (titled 'cross-appeal') before the Disciplinary Committee of the Bar Council of India on October 30, 2004, i.e., after more than two years. No application for condonation of delay was filed. [Paras 13 and 14] [250-B-F]

2.3. From the material on record the professional misconduct of the advocate appellant is clearly established and the Disciplinary Committee of the State Bar Council, Madhya Pradesh, cannot be said to have committed any error in holding him guilty of the professional misconduct. Having held that, the Disciplinary Committee of the State Bar Council awarded him punishment of reprimand. Against the inadequate punishment awarded to the advocate appellant for the proved professional misconduct, the complainant preferred appeal. In that appeal, notice was issued to the advocate appellant and in response thereto, he did appear before the Disciplinary Committee of the Bar Council of India on October 30, 2004 and was fully heard. The requirement of the proviso appended to Section 37(2) was thus, fully met. [Para 16] [251-C-E]

3.1. Interlocutory applications in the civil appeals,

have been made by the advocate appellant and the complainant jointly for disposal of the appeals in terms of the compromise between them. The settlement with the complainant does not mitigate or wipe out professional misconduct and must not prevent adequate punishment to the advocate appellant. Both these applications are, accordingly, rejected. [Para 24] [253-D-E]

3.2. The punishment for professional misconduct has twin objectives-deterrence and correction. Having regard to the over all facts and circumstances of the case, the advocate appellant is ordered to be suspended from practice for a period of three months which would meet the above objectives. [Para 25] [253-F]

Case Law Reference:

1979 (1) SCR 1054 Referred to. Para 18

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2293 of 2005.

From the Judgment & Order dated 31.10.2004 of the Disciplinary Committee of the Bar Council in D.C. Appeal No. 55 of 2002.

WITH

C.A. No. 4484 of 2005.

S.B. Sanyal, Akshat Shrivastava, P.P. Singh, Inderjeet Yadav for the Appellant.

Umesh Babu Chaurasia, Manjula Chaurasia, Jitendra Kumar Mahapatra, Rameshwar Prasad Goyal for the Respondent.

The Judgment of the Court was delivered by

R.M. LODHA, J.1. These two Appeals have been preferred by Advocate Dhanraj Singh Choudhary (for short, 'advocate appellant') being dissatisfied with the two orders dated October 31, 2004 passed by the Disciplinary Committee of the Bar Council of India. By the principal order, the advocate

appellant has been suspended from practice for a period of one year from the date of communication of the order.

2. On the complaint made by the respondent-Nathulal Vishwakarma against the advocate appellant to the Bar Council of Madhya Pradesh, Jabalpur, the matter was referred to the Disciplinary Committee of the State Bar Council. The allegation of professional mis-conduct against the advocate appellant is that in the sale deed dated November 3, 1999 executed by Jitender Singh Bakna in favour of Smt. Suchi Gupta concerning sale of property House No. 423 situate in Nursing Ward, Jabalpur, which was attested by the advocate appellant, it has been stated that on the Western side of the saleable property one shop adjacent to Sahara lounge presently in occupation of the complainant has already been transferred by the vendor to the advocate appellant by giving him the ownership right, although vendor's father Sardar Desh Singh Bakna had entered into an agreement to sell the suit property to the complainant on November 15, 1991 and the vendor's father has already received an amount of Rs. 2,00,000/- towards the sale consideration. The complainant alleged that he had already filed a suit for specific performance of the agreement dated November 15, 1991 which was pending and was within the knowledge of the advocate appellant. As a matter of fact, the advocate appellant had instituted a suit on behalf of Sardar

Desh Singh Bakna against the complainant for eviction of the said shop showing the complainant as a tenant of Sardar Desh Singh Bakna.

3. On notice, the advocate appellant filed reply to the complaint and denied the allegations made against him. In his reply, the advocate appellant explained the circumstances in which the sale deed dated November 3, 1999 was executed. He expressed his ignorance about the statement made in the sale deed dated November 3, 1999 regarding sale of shop in occupation of the complainant to the advocate appellant by the vendor.

4. On the pleadings of the parties, the Disciplinary

Committee of the State Bar Council framed the following issues:-

1. (a) Whether the Respondent-Advocate purchased the property from Jitendra Singh Bhakna as described at Page No. 5 in Sale Deed dated 3.11.99 of which the Respondent Advocate who was attesting witness?

(b) Whether the Respondent Advocate deliberately filed suit for eviction in the name of Jitendra Singh Bhakna against the complainant although the respondent was the owner thereof as mentioned in the sale deed dated 3.11.99?

(c) Whether the respondent advocate has been guilty of professional mis-conduct?

2. Result ?

5. The complainant and the advocate appellant examined themselves and also tendered documents in support of their respective case. The Disciplinary Committee of the State Bar Council, after hearing the parties and on consideration of the evidence tendered by them, recorded its finding against the advocate appellant on the above issues and held the advocate appellant guilty of professional mis-conduct. Having adjudged the advocate appellant guilty of professional mis-conduct, the Disciplinary Committee, State Bar Council, Madhya Pradesh, awarded punishment of reprimand to the advocate appellant vide its order dated April 22, 2002.

6. Not satisfied with the order dated April 22, 2002 passed by the Disciplinary Committee, State Bar Council, Madhya Pradesh, the complainant preferred appeal under Section 37 of the Advocates Act, 1961 (for short, '1961 Act') to the Bar Council of India. The Disciplinary Committee of the Bar Council of India issued notice to the advocate appellant on October 5, 2004 intimating him that the matter has been kept on October 30, 2004. On receipt of the notice, the advocate appellant appeared before the Disciplinary Committee of the Bar Council of India, which heard the appeal preferred by the complainant

for enhancement of the punishment on October 30, 2004. After the conclusion of the hearing of that appeal, an application was filed by the advocate appellant seeking permission to file cross-appeal and the cross-appeal was tendered.

7. The Disciplinary Committee of the Bar Council of India, vide its judgment dated October 31, 2004, allowed the appeal of the complainant; modified the punishment of reprimand awarded by the Disciplinary Committee of the State Bar Council and ordered his suspension from practice for a period of one year from the date of communication of the order. By a separate order passed on that day, i.e., October 31, 2004, the cross-appeal preferred by the advocate appellant was dismissed.

8. Civil Appeal No. 2293 of 2005 preferred by the advocate appellant arises from the order of the Disciplinary Committee of the Bar Council of India whereby complainant's appeal for enhancement of punishment has been allowed, while Civil Appeal No. 4484 of 2005 has been preferred by the advocate appellant aggrieved by the order dismissing his cross-appeal as not maintainable.

9. The order dated October 31, 2004, whereby the advocate appellant's cross-appeal has been dismissed by the Disciplinary Committee of the Bar Council of India, reads as follows :-

"After the conclusion of hearing of Disciplinary Appeal No. 55 of 2002, an application has been filed by the respondent-advocate seeking permission to file a cross-appeal in the above noted appeal. Under Section 37 of the Advocates Act an appeal should be filed within period of 60 days from the date of communication of the order passed by the Disciplinary Committee of the State Bar Council. There is however no provision for filing application seeking permission to file any appeal or cross-appeal. Therefore, the application filed by the respondent-advocate seeking permission to file cross appeal cannot be entertained and as such the same is liable to be rejected.

The application filed by the respondent-advocate is accordingly dismissed as not being maintainable."

10. We find no legal infirmity in the order passed by the Disciplinary Committee of the Bar Council of India in not entertaining the cross-appeal preferred by the advocate appellant.

11. Section 37(1) of the 1961 Act provides for a remedy of an appeal to any person aggrieved by an order of the disciplinary committee of a State Bar Council under Section 35 to prefer an appeal to the Bar Council of India within 60 days of the date of the communication of the order to him. Proviso that follows sub-section (2) of Section 37 provides that the disciplinary committee of the Bar Council of India shall not vary the order of the disciplinary committee of the State Bar Council affecting the person prejudicially without giving him reasonable opportunity of being heard. In the cross-appeal preferred by the advocate appellant, it is stated that being aggrieved by the order dated April 22, 2002 passed by the Disciplinary Committee of the State Bar Council, Madhya Pradesh, the cross-appeal is being preferred by the respondent therein (advocate appellant herein). As a matter of law, Section 37 of the 1961 Act does not contemplate cross-appeal. This position is not disputed by Mr. S.B. Sanyal, learned senior counsel for the advocate appellant. He would, however, submit that the advocate appellant preferred cross-objections (titled cross-appeal) within 30 days of the receipt of the notice of the appeal preferred by the complainant and that is permissible under Order 41 Rule 22 of the Code of Civil Procedure, 1908 (for short, 'the Code') which is applicable to the proceedings before the Disciplinary Committee of the Bar Council of India.

12. We do not agree with the submission of Mr. S.B. Sanyal, learned senior counsel for the advocate appellant. The Code has not been made applicable as it is to the proceedings before the disciplinary committee. Section 42 of the 1961 Act makes applicable provisions of the Code in respect of matters contained therein while providing that the disciplinary committee

of a Bar Council shall have the same powers as are vested in a civil court. The matters contained in Section 42 do not refer to the appeals. Thus, the provisions contained in Order 41 of the Code, including Rule 22 thereof, have no applicability to the proceedings before a Disciplinary Committee.

13. Appeal is a creature of statute. The extent and scope of an appeal is governed by statutory provisions. Section 37 of the 1961 Act is the statutory provision for an appeal to the Bar Council of India from the order of the disciplinary committee of the State Bar Council. Section 39 of the 1961 Act, however, makes Sections 5 and 12 of the Limitation Act, 1963 applicable to the appeals preferred under Section 37 and Section 38 of the 1961 Act. There is no provision like Order 41 Rule 22 of the Code in the 1961 Act. The cross-objections titled 'cross-appeal' preferred by the advocate appellant being wholly mis-conceived have rightly been held to be not maintainable by the Disciplinary Committee of the Bar Council of India.

14. There may not be any difficulty in treating the 'cross-appeal' preferred by the advocate appellant as an appeal under Section 37 of the 1961 Act, but then such appeal is hopelessly time barred. The order was passed by the Disciplinary Committee of the State Bar Council on April 22, 2002. The advocate appellant presented his appeal (titled 'cross-appeal') before the Disciplinary Committee of the Bar Council of India on October 30, 2004, i.e., after more than two years. No application for condonation of delay has been made. In this view of the matter also the cross-appeal preferred by the advocate appellant was liable to be dismissed and has rightly been dismissed.

15. The Disciplinary Committee of the State Bar Council has considered the entire material, including the evidence of the complainant and the advocate appellant and arrived at the finding that the advocate appellant was guilty of professional mis-conduct for having attested the sale deed dated November 3, 1999 containing a statement that the shop on the western side of the saleable property in occupation of the complainant has already been transferred to the advocate appellant by giving

him ownership right. The attestation of the sale deed containing the above statement, which was apparently false to the knowledge of advocate appellant, amounted to professional mis-conduct. The vendor-Jitender Singh Bakna and his father Sardar Desh Singh Bakna were the clients of the advocate appellant. As a matter of fact, the advocate appellant had filed a suit on behalf of the vendor against the complainant seeking his eviction from the premises for which the statement was made in the sale deed dated November 3, 1999 that the said premises in occupation of the complainant has been transferred by the vendor to the advocate appellant.

16. From the material on record the professional mis-conduct of the advocate appellant is clearly established and the Disciplinary Committee of the State Bar Council, Madhya Pradesh, cannot be said to have committed any error in holding him guilty of the professional mis-conduct. Having held that, the Disciplinary Committee of the State Bar Council awarded him punishment of reprimand. Against the inadequate punishment awarded to the advocate appellant for the proved professional mis-conduct, the complainant preferred appeal. In that appeal, notice was issued to the advocate appellant and in response thereto, he did appear before the Disciplinary Committee of the Bar Council of India on October 30, 2004 and was fully heard. The requirement of the proviso appended to Section 37(2) of the 1961 is, thus, fully met.

17. The legal profession is a noble profession. It is not a business or a trade. A person practising law has to practise in the spirit of honesty and not in the spirit of mischief-making or money-getting. An advocate's attitude towards and dealings with his client has to be scrupulously honest and fair.

18. In *V.C. Rangadurai Vs. D. Gopalan and others*[1] Krishna Iyer, J. stated :-

> "Law's nobility as a profession lasts only so long as the members maintain their commitment to integrity and service to the community."

1. AIR 1979 SC 281.

19. Any compromise with the law's nobility as a profession is bound to affect the faith of the people in the rule of law and, therefore, unprofessional conduct by an advocate has to be viewed seriously. A person practising law has an obligation to maintain probity and high standard of professional ethics and morality.

20. In the above backdrop, if the conduct of the advocate appellant is seen, it becomes clear that he was privy to the following false statement recorded in the sale deed dated November 3, 1999 :-

> "That on the Western side of the saleable property one shop adjacent to the Sahara lounge having 257 sq.ft. is there and in which at present Shri Nathu Lal Vishwakarma runs the hotel and the same has already been transferred by the Seller to Shri Dhan Raj Singh Choudhary by giving him the ownership right...."

21. In his deposition before the Disciplinary Committee, State Bar Council, Madhya Pradesh, the advocate appellant stated that he came to know of the said fact when the complainant had lodged the complaint against him. His explanation does not merit acceptance. On a question put by the Disciplinary Committee to him that prior to signing the sale deed dated November 3, 1999 in the form of witness why did he not read the said document, his reply was that he did not consider it essential to read the contents of the sale deed. Can it be believed? We think not. It was not only undesirable but highly unethical on the part of the advocate appellant to have created title or at least having attempted to create title in him in respect of the property for which litigation was pending in the court and he was representing one of the parties in that litigation. But for his connivance with the vendor, no such statement would have found place in the sale deed dated November 3, 1999. The professional misconduct proved against the advocate appellant is quite grave and serious. The question now is of the award of appropriate punishment to the advocate appellant.

22. Mr. S.B. Sanyal, learned senior counsel, submitted that

the incident was quite old; the advocate appellant did not get any benefit out of the said statement made in the sale deed and, subsequently the above statement in the sale deed has been expunged on the agreement of the vendor and vendee. In the light of these mitigating circumstances, the learned counsel submitted that suspension of practice for one year was harsh. He appealed for reduction of the suspension period.

23. By order dated November 30, 2011, we directed the advocate appellant to remain personally present on the next date of hearing. In view of that, the advocate appellant is present before us. In addition to the circumstances pointed out by Mr. S.B. Sanyal, learned senior counsel, the advocate appellant informed us that he has been suffering from glaucoma in his both eyes and was not keeping good health.

24. We find that the two applications, being Interlocutory Application No. 4 in Civil Appeal No. 4484 of 2005 and Interlocutor Application No. 8 in Civil Appeal No. 2293 of 2005, have been made by the advocate appellant and the complainant jointly for disposal of the Appeals in terms of the compromise between them. We are unable to accede to their request. In our view the settlement with the complainant does not mitigate or wipe out professional misconduct and must not prevent adequate punishment to the advocate appellant. Both these applications are, accordingly, rejected.

25. The punishment for professional misconduct has twin objectives – deterrence and correction. Having regard to the over all facts and circumstances of the case which have been noted above, we are of the view that if the advocate appellant is suspended from practice for a period of three months effective from today the above objectives would be met. We order accordingly.

26. Both Civil Appeals are dismissed with the modification in punishment as indicated above. No costs.

27. The Registry shall send copy of this Order to the Secretary, State Bar Council, Madhya Pradesh and the Secretary, Bar Council of India immediately.

N.J. Appeals dismissed.

RAMESH ROUT

v.

RABINDRA NATH ROUT

(Civil Appeal No. 4956 of 2010)

DECEMBER 9, 2011

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

REPRESENTATION Of THE PEOPLE ACT, 1951:

s. 33 read with r. 4 of 1961 Rules and Para 13(a) to (e), of 1968 Order – Elections to State Legislative Assembly – Candidate set up by a recognized political party — Form A and Form B appended to Para 13 of 1968 Order to be signed "in ink only" by office-bearer or person authorized by the party – Connotation of – Held: Statutory requirements of election law must be strictly observed – For a candidate set up by a recognized political party, it is necessary that Forms A and B referable to clauses (b), (c) and (d) of para 13 of the 1968 Order are submitted to Returning Officer duly signed in ink by the authorized person of the political party concerned in accord with clause (e) of the said para –Clause (e) of para 13 is indicative of the mandatory character of the provision and on its non-compliance, the nomination of such candidate is liable to be rejected as it tantamounts to non-compliance of provisions of s. 33, namely, the nomination paper having not been completed in the prescribed form – Conduct of Election Rules, 1961 – r. 4 – Election Symbols (Reservation and Allotment) Order, 1968 – Para 13 (a) to (e) – Interpretation of Statutes.

ss. 83 and 100(1) (c) – Election petition – Framing of additional issue – Rejection of nomination on the ground that Form A and Form B signed in ink by authorized person were not filed – Challenged in election petition – High Court framing an additional issue in this regard at the time of decision in the election petition – Held: The pleadings of the parties as well as the evidence let in by them clearly show that

they were seriously in issue whether the original Form-A and Form-B duly signed in ink by the authorised person of the party concerned were filed by the proposed candidate with the first set of his nomination paper – The issue was quite vital and material for decision in the election petition – No prejudice has been caused to the returned candidate – High Court did not commit any error in framing the issue – Practice and Procedure – Framing of issues.

s.36(5), proviso – Rejection of nomination – Opportunity to be afforded to the proposed candidate to rebut the objection – HELD: Returning Officer erred in acting in hot haste in rejecting the nomination of the proposed candidate and not postponing the scrutiny to the next day, particularly, when a request was made by the authorised representative of the proposed candidate –Returning Officer ought to have acted in terms of proviso to s. 36(5) and afforded an opportunity to the proposed candidate until next day to rebut the objection and show that Form A and Form B had been filed duly signed in ink by the authorised person of the political party concerned.

ss. 83 (1) (a) and 100(1)(c) – Election petition – To contain concise statement of material facts – HELD: In a case u/s 100(1)(c), the only issue before the court is improper rejection of nomination and the court is required to examine the correctness and propriety of the order by which the nomination of a candidate is rejected – The grounds set out in the election petition challenging the order of rejection of nomination paper, thus, form the basis of adjudication in the election petition – It was not necessary to state in the election petition the evidence of the authorised representative of the election petitioner in support of ground – The oral and documentary evidence on record clearly establish that original Form-A and Form-B signed in ink by authorised office-bearer of the recognized political party were presented by the proposed candidate along with 1st set of nomination papers — It cannot be said that the material facts relating to the ground on which election of the returned candidate has been set aside have neither been pleaded in the election petition nor have been

proved by leading cogent evidence – The Returning Officer erred in rejecting nomination of the proposed candidate – The election petitioners have been successful in proving the improper rejection of the proposed candidate's nomination and, as such, have been able to prove the ground for setting aside the election of the returned candidate –The judgment of the High Court in declaring the election of the returned candidate as null and void does not suffer from any legal infirmity.

ELECTION SYMBOLS (RESERVATION AND ALLOTMENT) ORDER, 1968:

Para 13 – Presumption as regards filing of Forms A and B – Check list - Held Where a check list certifies that Forms A and B (in the case of candidates set up by a recognised political party), have been filed, such certificate leads to presumption that the procedural requirement of filing the documents as prescribed in para 13 has been complied with –This presumption has not been rebutted by the returned candidate – The oral and documentary evidence on record clearly establishes that original Form-A and Form-B signed in ink by authorised officer of the party concerned, were presented by the proposed candidate along with 1st set of nomination papers – The finding returned by the High Court in this regard cannot be said to be wrong or unjustified – Election Commission of India Notification dated 10-2-2009.

ELECTION LAW:

Scrutiny of nominations – Returning Officer – Role and nature of functions of – HELD: The Returning Officer plays an important role in the election management, and to ensure that there is no scope left for any complaint, the Commission has issued a handbook for Returning Officers – Scrutiny of nomination papers is an important quasi-judicial function and the Returning Officer has to discharge this duty with complete judicial detachment and in accordance with the highest judicial standards.

WORDS AND PHRASES :

Expression 'only' occurring in clause (e) of Para 13 of Election Symbol (Reservation and Allotment) Order 1968 – Connotation of.

General elections to the State Legislative Assembly were announced to be held on 16.4.2009 and 23.4.2009. The case of respondent No. 1 (proposed candidate) was that on 4.4.2009, the last date prescribed for filing of nominations, he filed before the Returning Officer, four sets of nomination papers as a candidate of BJD, a registered and recognized political party in the State; that the check list was issued by the Returning Officer with his signatures to him the same day; that on 6.4.2009, the date fixed for scrutiny of nominations, the Returning Officer rejected his nomination on the ground that Form A and Form B filed by him along with his first set of nomination papers were not duly signed in ink by authorized person of the political party. In the election, the appellant was elected. Two election petitions – one by the proposed candidate and the other by the proposer – were filed challenging the election of the returned candidate, on the ground of improper rejection of the nomination of the proposed candidate. The High Court, at the time of decision in the election petitions, framed additional Issue No. 6, namely, whether the election petitioner (proposed candidate) filed the original Form A and Form B duly signed in ink by the authorized person with the first set of his nomination papers. The High Court answered the said issue in affirmative and answering the other issues, held that the Returning Officer improperly rejected the nomination of the proposed candidate in violation of statutory provisions and rules and instructions issued by the Election Commission. It allowed both the election petitions and declared the election of the returned candidate as null and void.

In the instant appeals filed by the returned candidate, the questions for consideration before the Court were: (i) "whether it is mandatory for a candidate set up by a

recognized political party to file original ink signed Forms A and B appended to para 13 of the 1968 Order" and (ii) whether the High Court erred in framing issue no. 6 at the time of decision in the election petitions, i.e., whether the election petitioner filed the original Form A and Form B being duly signed in ink by the authorized person with the first set of his nomination; and whether the finding recorded by the High Court on that issue suffered from any illegality.

Dismissing the appeals, the Court

HELD: 1.1. In the case of *Jagan Nath,** **it has been held that the statutory requirements of election law must be strictly observed. Section 33 of the Representation of the People Act, 1951 enacts that a candidate shall file nomination paper on or before the appointed date in the prescribed form. The form in which nomination paper shall be presented and completed is provided in r.4 of the Conduct of Election Rules1961. In view of r. 4, a candidate set up by a recognised political party has to make a declaration in Para b(1) of Part-III of Form 2-B to the effect that he was set up at the election by the named party, which was recognised national party/State party in the State and that the symbol reserved for the said party be allotted to him. [para 29- 30] [277-H; 278-A-B; 279-A-D]**

Jagan Nath vs. Jaswant Singh and Ors.* **1954 SCR 892 – followed.

Krishna Mohini (Ms) v. *Mohinder Nath Sofat* **1999 (4) Suppl. SCR 76 = (2000) 1 SCC 145 – referred to.**

1.2. Para 13 of the Election Symbols (Reservation and allotment) Order, 1968 Order provides that for a candidate to be considered to have been set up by a political party in a parliamentary or assembly constituency, he has to comply with the conditions set out in clauses (a) to (e) thereof. Clause (e) of para 13 reads, "Forms A and B are signed, in ink only, by the said office-bearer or person authorised by the party". For a candidate, proposed by

a single elector alone, to be treated as a candidate set up by a recognised political party, the filing of notice and communication in Forms A and B referable to clauses (b), (c) and (d) and in accord with clause (e) of para 13 is essential, and on its non-compliance, the nomination of such a candidate is liable to be rejected. The word "only" used in clause (e) of para 13 cannot be ignored; it emphasises that Forms A and B are to be signed in ink by the office bearer or person authorised by the recognised party and in no other way. Thus, it excludes any other mode of filing Forms A and B when a candidate is set up by a recognised political party. Therefore, the word 'only' used in clause (e) of para 13 is indicative of the mandatory character of that provision. [para 32, 33 and 36] [280-H; 281-A-E; 282-B-D]

Henry R. Towne v. *Mark Eisner* **(245 US 418 at 425 – referred to.**

1.3. Where a candidate is set up by a recognised political party, clause (b)(i) of Part-III of Form 2-B becomes relevant as by making declaration therein the candidate makes a request that the symbol reserved for such party be allotted to him. It is for this reason that the requirements of para 13 of the 1968 Order become integral part of Form 2-B, Part-III under r. 4 of the 1961 Rules where a candidate is set up by a recognised political party. It cannot be said that para 13 of the 1968 Order cannot be read into r. 4. Non-compliance of requirements of para 13 of the 1968 Order is a defect of substantial character and the nomination paper of a candidate proposed by a single elector set up by a recognised political party having such defect is liable to be rejected u/s 36(2)(b) as it tantamounts to non-compliance of the provisions of s. 33, namely, the nomination paper having not been completed in the prescribed form. [para 37] [282-E-G]

1.4. In the instant case, the proposed candidate admittedly filed his nomination paper proposed by a

single elector having been set up by BJD, a recognised political party in the State of Orissa, and, therefore, it was incumbent upon him that the requirements of para 13 of the 1968 Order were fully complied with. It was necessary for the proposed candidate that Forms A and B referable to clauses (b), (c) and (d) of para 13 of the 1968 Order were submitted to the Returning Officer duly signed in ink by the authorised person of BJD not later than 3.00 p.m. on April 4, 2009. [para 38] [282-H; 283-A-B]

2. The pleadings of the parties as well as the evidence let in by them clearly show that the parties were seriously in issue whether the original Form-A and Form-B duly signed in ink by the authorised person of BJD were filed by the proposed candidate with the first set of his nomination paper. This Court accordingly, holds that the High Court did not commit any error in framing Issue no. 6 which was quite vital and material for decision in the election petitions. This Court further holds that no prejudice has been caused to the returned candidate by framing such additional issue at the time of the decision in the election petitions. [para 40] [283-D-F]

3.1. Where a check list certifies that Forms A and B (in the case of candidates set up by a recognised political parties), have been filed, such certificate leads to presumption that the procedural requirement of filing the documents as prescribed in para 13 of the 1968 Order has been complied with. The presumption is of course rebuttable but there must be sufficient evidence by the other side to displace such presumption. No doubt, the burden is on the candidate set up by a recognised political party to prove that he had filed Forms A and B duly signed in ink by the authorised person of that party but that burden gets discharged on production of evidence that raises presumption in his favour. In the instant case, the check list (Ext.11), Form 3A (Ext. 42/F, mentioning in Column 6 that the proposed candidate was a nominee of BJD) and the consolidated list of the nominated candidates (Ext. 44) give rise to presumption

in favour of the proposed candidate that he had filed Form-A and Form-B duly signed in ink by the authorised person of BJD with the first set of his nomination papers. This presumption has not been rebutted by the returned candidate. The proposed candidate has been successful in discharging the burden placed upon him. [para 49] [288-D-H; 289-A-C]

3.2. The proposed candidate (PW-2) deposed that while giving the details of nomination papers and the documents presented personally by him on 4.4.2009 at 11.25 a.m., in the first set of nomination papers, PW-1 was the proposer and along with the first set of nomination papers, original Form-A and Form-B signed in ink by the President and authorised signatory of BJD were filed. He deposed that he had presented four sets of nomination as the nominee of BJD and all the four sets were complete in all respect. He also deposed that the Returning Officer examined the four sets of nominations presented by him and thereafter personally prepared the check list of documents, put his signature on that and asked him (proposed candidate) to sign on the said documents. The Returning Officer retained with him one of such check list ticked duplicate (Ext. 22) and handed over another to him (proposed candidate) ticked original (Ext. 11). Significantly, the Returning Officer (CW-1) in his deposition has not specifically denied that Form A and Form B in original duly signed in ink by the authorised person of BJD were not filed by the proposed candidate. He admitted that no endorsement regarding the deficiency was made in the check list. [para 41and 43] [284-C-G; 285-A-C]

3.3. The evidence on record, i.e, the evidence of the Returning Officer (CW-1), the evidence of PW-2 and the documentary evidence, namely, the check list (Ext.11) Form 3A (Ext. 42/F) displayed on the notice board, the consolidated list of nominated candidates, clearly establish that original Form-A and Form-B signed in ink

by authorised officer of the party (BJD) were presented by the proposed candidate along with 1st set of nomination papers on April 4, 2009. The finding returned by the High Court in this regard cannot be said to be wrong or unjustified. [para 50] [289-D-H; 290-A-B]

4.1. Section 83 of the Representation of the People Act, 1951 requires that an election petition shall contain a concise statement of the material facts on which the petitioner relies. It has been repeatedly held by this Court that s.83 is peremptory. Thus, in a case u/s 100(1)(c) of the 1951 Act, the only issue before the court is improper rejection of nomination and the court is required to examine the correctness and propriety of the order by which the nomination of a candidate is rejected. The grounds set out in the election petition challenging the order of rejection of nomination, thus, form the basis of adjudication in the election petition. [para 52 and 57] [290-F; 293-C-D]

Samant N. Balakrishna, etc. v. *George Fernandez and others etc.* **1969 (3) SCR 603 = AIR 1969 SC 1201;** *Azhar Hussain* v. *Rajiv Gandhi* **1986 SCR 782 =AIR 1986 SC 1253;** *Hari Shanker Jain* v. *Sonia Gandhi* **2001 (3) Suppl. SCR 38 =(2001) 8 SCC 233;** *Pothula Rama Rao* v. *Pendyala Venakata Krishna Rao and Others* **2007 (8) SCR 982 = (2007) 11 SCC 1;** *Nandiesha Reddy v. Kavitha Mahesh* **(2011) 7 SCC 721 – relied on.**

4.2. The election petitioner in ground 5(E) set up the case that the objection of non-filing of original Forms A and B signed in ink by the authorised officer of the party was not raised by any of the contesting candidates or any person on their behalf present at the time and place of scrutiny. It was the Returning Officer who raised the issue of non-filing of original Forms A and B but he refused minimum opportunity to the election petitioner to rebut the same. The Returning Officer ought to have acted in terms of proviso to s. 36(5) of the 1951 Act and afforded an opportunity to the election petitioner until next day to

rebut the objection and show that the proposed candidate had filed Forms A and B duly singed in ink by the authorised person of BJD. PW-3, the authorised representative of the election petitioner did state in his evidence that he requested the Returning Officer, when he raised the objection that original Forms A and B were not filed, to enquire into the matter about the missing Forms A and B. It was not necessary to state in the election petition the evidence of PW-3 in support of ground 5(E). [para 63] [298-F-H; 299-A]

4.3. Therefore, it cannot be said that the material facts relating to the ground on which election of the returned candidate has been set aside have neither been pleaded in the election petition nor have been proved by leading cogent evidence. The High Court, inter alia, considered the evidence of PW-2 and also the evidence of the Returning Officer (CW1), the documentary evidence, namely, the check list (original-ext. 11), Form 3-A (ext. 42/F) and consolidated list of nominated candidates (ext.-44) and finally concluded that the proposed candidate had filed the original Form-A and Form-B duly signed in ink by the authorised person of BJD with the first set of his nomination and, accordingly, decided Issue No. 6 in favour of election petitioners. There is no error in the consideration of the matter by the High Court. [para 58 and 60-62] [293-E; 295-D; 297-B-C; 298-E]

5.1. The proviso that follows sub-s. (5) of s. 36 of the 1951 Act, provides that in case an objection is raised by the Returning Officer or is made by any other person, the candidate concerned may be allowed time to rebut it not later than the next day but one following the date fixed for scrutiny, and the Returning Officer shall record his decision on the date to which the proceedings have been adjourned. [para 64] [299-B]

Rakesh Kumar v. *Sunil Kumar* **1999 (1) SCR 470 = (1999) 2 SCC 489 – referred to.**

5.2. The Returning Officer plays an important role in

the election management and to ensure that there is no scope left for any complaint, the Commission has issued a handbook for Returning Officers. The handbook, as it states, has been designed to give to the Returning Officers the information and guidance which they may need in performance of their functions. The handbook does not have statutory character and is in the nature of guidance to the Returning Officers. Para 2 of Chapter VI of the handbook emphasises that scrutiny of nomination papers is an important quasi-judicial function and the Returning Officer has to discharge this duty with complete judicial detachment and in accordance with the highest judicial standards. Para 6 provides that even if no objection has been raised to a nomination paper, the Returning Officer has to satisfy himself that the nomination paper is valid in law. If any objection is raised to any nomination paper, the Returning Officer has to hold a summary inquiry to decide the same and treat the nomination paper to be either valid or invalid. It states that brief reasons in support of the decision must be set out, particularly, where an objection has been raised or the nomination paper has been rejected. [para 15 and 24] [269-E-F; 274-H; 275-A-C]

5.3. In the facts and circumstances of the case, the Returning Officer erred in acting in hot haste in rejecting the nomination of the proposed candidate and not postponing the scrutiny to the next day, particularly, when a request was made by the authorised representative of the proposed candidate. The election petitioners have been successful in proving the improper rejection of the proposed candidate's nomination and, as such, they have been able to prove the ground for setting aside the appellant's election u/s 100(1)(c) of the 1951 Act. The consideration of the matter by the High Court does not suffer from any factual or legal infirmity. In this view of the matter and the factual and legal position, there is no ground to interfere with the impugned judgment. [para 66-67] [300-E-G]

Case Law Reference:

1954,SCR 892	**followed**	**para 29**
1999 (4) Suppl. SCR 76	**referred to**	**para 31**
245 US 418 at 425	**referred to**	**para 36**
1969 (3) SCR 603	**relied on**	**para 52**
1986 SCR 782	**relied on**	**para 53**
2001 (3) Suppl. SCR 38	**relied on**	**para 54**
2007 (8) SCR 982	**relied on**	**para 55**
(2011) 7 SCC 721	**relied on**	**para 56**
1999 (1) SCR 470	**referred to**	**para 65**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4956 of 2010.

From the Judgment & Order dated 23.6.2010 of the High Court of Orissa, Cuttack in Election Petition No. 6 of 2009.

WITH

C.A. No. 4962 of 2010

Subir Palit, Aditya Mohapatra, Devansh Mohan, D.S. Chauhan, Milind Kumar for the Appellant.

K.K. Venugopal, Bidyadhar Mishra, Pitambar Acharya, Shibashish Misra, Subash Acharya, Dileep Biswal, S.N. Bhat, S. Panigrahy, P. Bhardwaj, V. Shymohan for the Respondent.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. The returned candidate — Ramesh Rout – whose election to the 14th Orissa Legislative Assembly from 89-Athagarh Assembly Constituency has been set aside by the High Court of Orissa has preferred these two appeals under Section 116A read with Section 116C of the Representation of the People Act, 1951 (for short, 'the 1951 Act').

2. The Election Commission of India (for short, 'Commission') in order to constitute 14th Legislative Assembly announced general elections in the State of Orissa to be held

in two phases on April 16, 2009 and April 23, 2009. Following this, the Governor of the State of Orissa in exercise of powers conferred under Section 5(2) of the 1951 Act issued a notification which was published in the official gazette on March 28, 2009. The 89 – Athagarh Assembly constituency is one of the 147 Assembly constituencies in the State of Orissa and is 'General' constituency. The Commission appointed the following schedule of election :

"28.3.2009

To

04.04.2009	=	Period prescribed for filing of "NOMINATIONS"
06.04.2009	=	date fixed for SCRUTINY OF NOMINATIONS.
08.04.2009	=	last date for WITHDRAWAL OF NOMINATIONS
23.04.2009	=	date of POLLING.
16.05.2009	=	date of COUNTING OF VOTES.
28.05.2009	=	date before which the Election shall be completed."

3. On April 4, 2009, at 11.25 A.M., the respondent in Civil Appeal No. 4962 of 2010 – Ranendra Pratap Swain (hereinafter referred to as 'proposed candidate') filed four sets of nomination papers for 89-Athagarh Assembly constituency as a candidate of Biju Janata Dal ('BJD') – a registered and recognized political party in the State of Orissa before the Returning Officer. Seven other candidates including the present appellant also filed their nomination papers at the said election. The check list (ticked original) was issued by the Returning Officer with his signature to the proposed candidate at 11.45 a.m. A copy of the check list (ticked duplicate) was retained by the Returning Officer.

4. On the appointed date (i.e. April 6, 2009) and time for scrutiny of nominations, the Returning Officer rejected the

nomination papers of the proposed candidate on the ground that the Form A and Form B filed by the proposed candidate along with his first set of nomination paper were not duly signed in ink by the authorized officer of the political party (BJD).

5. Upset with the order of Returning Officer dated April 6, 2009, rejecting his nomination, the proposed candidate filed a writ petition before the Orissa High Court. However, the High Court did not entertain the writ petition and directed him to pursue his grievance before the Commission or seek appropriate relief after election process was over. The proposed candidate raised his grievance before the Commission but without any success.

6. The election to the 89-Athagarh Assembly constituency was held as per election schedule and the appellant who contested the election as an independent candidate was declared elected.

7. Two election petitions came to be filed before the Orissa High Court challenging the election of the appellant to 89-Athagarh Assembly Constituency. One by the proposed candidate being Election Petition no. 4 of 2009 and the other by the proposer – respondent in Civil Appeal No. 4956 of 2010 being Election Petition no. 6 of 2009. In both election petitions, the election of the appellant was challenged on the ground of improper rejection of nomination papers of the proposed candidate. It was averred therein that the proposed candidate had filed Form A and Form B signed in ink by the authorized person along with first set of nomination paper showing that he had been duly sponsored by the BJD to contest as a party nominee from 89-Athagarh Assembly constituency and with other three sets of nomination, he had filed xerox copies of original Forms A and B duly authenticated by a Notary Public. The election petitioners raised diverse grounds in challenging the order of the Returning Officer dated April 6, 2009 whereby the nomination papers of the proposed candidate were rejected.

8. The appellant — (respondent therein) – contested the

election petitions by filing separate written statement. He raised objections about the maintainability of election petitions on facts and in law. Inter alia, it was denied that the proposed candidate filed original Form-A and Form-B signed in ink by the authorized person of BJD as at the time of scrutiny original Form A and Form B were not available and the Form A and Form B on record did not contain ink signature.

9. On the respective pleadings of the parties, the High Court initially framed four issues but later on framed additional issue no. 5. The relevant two issues, namely, issue no. 3 and issue no. 5 read as follows :

> "3. Whether the Returning Officer improperly rejected the nomination of the Election Petitioner in violation of the statutory provisions and rules?
>
> 5. Whether the Returning Officer improperly rejected the nomination of Sri Ranendra Pratap Swain, the official candidate of Biju Janata Dal in violation of the instructions issued by the Election Commission of India in exercise of its constitutional powers and the principles of natural justice or not?"

10. The election petitioners as well as the returned candidate tendered oral and documentary evidence. On behalf of the election petitioners, three witnesses, namely, proposer – Rabindra Nath Rout (PW-1); proposed candidate – Ranendra Pratap Swain (PW-2) and authorised agent – Tarani Kanta Biswal (PW-3) were examined. On the other hand, the returned candidate examined himself as RW-1 and one Magnicharan Rout as (RW-2). The Returning Officer was examined by the Court as its witness (CW-1). The documents tendered in evidence were marked separate exhibits.

11. The High Court also called for all the original documents pertaining to the scrutiny of nomination papers for 89-Athagarh Constituency and 87-Badamba Constituency. We shall refer to relevant documentary evidence appropriately wherever necessary.

12. The High Court on hearing the parties, at the time of decision in the election petitions, framed an additional issue no. 6 namely, whether the election petitioner (proposed candidate) filed the original Form A and Form B duly signed in ink by the authorized person with the first set of his nomination paper. The High Court answered issue nos. 3, 5 and 6 in the affirmative and allowed both election petitions on June 23, 2010 and declared the election of the appellant null and void. The High Court declared that a casual vacancy is created relating to 89-Athagarh Assembly Constituency and the Commission was directed to conduct fresh election in respect of the said constituency in accordance with law.

13. It is from this judgment that these two appeals have arisen.

14. We have heard Mr. Gopal Subramanian, learned senior counsel for the appellant and Mr. K.K. Venugopal, learned senior counsel for the proposed candidate.

15. The Returning Officer plays an important role in the election management and to ensure that there is no scope left for any complaint, the Commission has issued a handbook for Returning Officers (for short, 'the handbook') The handbook, as it states, has been designed to give to the Returning Officers the information and guidance which they may need in performance of their functions; to acquaint them with up-to-date rules and procedures prescribed for the conduct of elections and to ensure that there is no scope for complaint of partiality on the part of any official involved in the election management. We shall refer to the relevant provisions of the handbook a little later. The handbook does not have statutory character and is in the nature of guidance to the Returning Officers.

16. By virtue of a notification dated February 10, 2009 (Exhibit 10) issued by the Commission, for the first time, the issuance of check list to a candidate filing nomination paper has been introduced. Prior thereto, there was no such provision. It is provided that in respect of each candidate, the Returning Officer should maintain, in duplicate, the check list of the

documents/requirements filed by the candidates. When a candidate files nomination paper, the Returning Officer shall indicate in the second column of the check list whether the concerned documents have been filed or other requirements fulfilled. If any of the documents has not been filed, it requires the Returning Officer to clearly state in the bottom of the check list, indicating the time limit by which such document/s can be submitted. The check list in two sets with all requirements indicated is needed to be signed by the Returning Officer as well as the candidate. The check list (marked original) is handed over to the candidate/proposer who files nomination paper, while check list (marked copy) is retained by the Returning Officer. The notification states that the copy of the check list will serve the dual purpose of acknowledging the receipt of the documents submitted as well as of notices as directed in the handbook. It is further provided that no separate notice is required to be given to the candidate in respect of the items mentioned in the check list. If and when a document is filed subsequent to filing of nomination, an acknowledgment to that effect is issued to the candidates, namely, mentioning the date and time at which it is filed and this is also indicated in the appropriate place in the check list retained by the Returning Officer. The proforma of the check list has also been notified with the notification dated February 10, 2009.

17. Section 33 of the 1951 Act makes provision for presentation of nomination paper and requirements for a valid nomination. To the extent it is relevant for the purposes of the present case, it is reproduced as follows :

> "S. 33. Presentation of nomination paper and requirements for a valid nomination.—(1) On or before the date appointed under clause (a) of section 30 each candidate shall, either in person or by his proposer, between the hours of eleven o' clock in the forenoon and three o' clock in the afternoon deliver to the returning officer at the place specified in this behalf in the notice issued under section 31 a nomination paper completed in the prescribed form and signed by the candidate and by an elector of the

constituency as proposer:

xxx xxx xxx

(4) On the presentation of a nomination paper, the returning officer shall satisfy himself that the names and electoral roll numbers of the candidate and his proposer as entered in the nomination paper are the same as those entered in the electoral rolls:

Provided that no misnomer or inaccurate description or clerical, technical or printing error in regard to the name of the candidate or his proposer or any other person, or in regard to any place, mentioned in the electoral roll or the nomination paper and no clerical, technical or printing error in regard to the electoral roll numbers of any such person in the electoral roll or the nomination paper, shall affect the full operation of the electoral roll or the nomination paper with respect to such person or place in any case where the description in regard to the name of the person or place is such as to be commonly understood; and the returning officer shall permit any such misnomer or inaccurate description or clerical, technical or printing error to be corrected and where necessary, direct that any such misnomer, inaccurate description, clerical, technical or printing error in the electoral roll or in the nomination paper shall be overlooked.

xxx xxx xxx"

18. Section 35 provides for notice of nominations and the time and place for their scrutiny.

19. The provision concerning scrutiny of nomination is made in Section 36 of the 1951 Act. To the extent it is relevant, it reads as follows :

"S. 36. Scrutiny of nomination.—(1) On the date fixed for the scrutiny of nominations under section 30, the candidates, their election agents, one proposer of each candidate, and one other person duly authorized in writing by each candidate but no other person, may attend at such

time and place as the returning officer may appoint; and the returning officer shall give them all reasonable facilities for examining the nomination papers of all candidates which have been delivered within the time and in the manner laid down in section 33.

(2) The returning officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds:-

(a) xxx xxx xxx

(b) that there has been a failure to comply with any of the provisions of section 33 or section 34; or

(c) that the signature of the candidate or the proposer on the nomination paper is not genuine.

xxx xxx xxx

(4) The returning officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character.

(5) The returning officer shall hold the scrutiny on the date appointed in this behalf under clause (b) of section 30 and shall not allow any adjournment of the proceedings except when such proceedings are interrupted or obstructed by riot or open violence or by causes beyond his control:

Provided that in case an objection is raised by the returning officer or is made by any other person the candidate concerned may be allowed time to rebut it not later than the next day but one following the date fixed for scrutiny, and the returning officer shall record his decision on the date to which the proceedings have been adjourned.

xxx xxx xxx"

20. The Conduct of Elections Rules, 1961 (for short, '1961 Rules') have been framed under the 1951 Act. Rule 4 provides that every nomination paper presented under sub-section (1) of Section 33 shall be completed in such one of the Forms 2A to 2E as may be appropriate. Proviso that follows Rule 4 makes a provision that a failure to complete or defect in completing, the declaration as to symbols in a nomination paper in Form 2A or Form 2B shall not be deemed to be a defect of substantial character within the meaning of sub-section (4) of Section 36.

21. Form 2B under Rule 4 is in three parts. Part-I is to be used by a candidate set up by a recognised political party. Part-II is required to be filled by a candidate for election to the legislative assembly not set up by a recognised political party and it provides that there should be ten electors of the constituency as proposers. Part-III of Form 2B is a declaration to be made by the candidate giving assent to his nomination. Clause (b)(i) is applicable to a candidate who has been set up by a recognised political party with a request that symbol reserved for such party be allotted to him. Clause (b)(ii), on the other hand is applicable to a candidate not set up by any registered recognised political party or a candidate who is contesting the election as an independent candidate. A recognised political party means a political party recognised by the Commission under the 1968 Order.

22. Rule 5 of the 1961 Rules makes a provision for symbols for elections in parliamentary and assembly constituencies. Rule 10 of 1961 Rules provides for preparation of list of contesting candidates.

23. In exercise of the powers conferred by Article 324 of the Constitution of India read with Section 29A of the 1951 Act and Rules 5 and 10 of the 1961 Rules, the Commission made Election Symbols (Reservation and Allotment) Order, 1968 (for short '1968 Order'). Unregistered political parties are out of its purview. The registered recognized and unrecognized political parties and independent candidates are dealt with by the 1968 Order. 1968 Order came to be amended by notification no. 56/2000/Judl. III dated 1st December, 2000. Para 13 of the 1968

Order is relevant for consideration of the present matter. It reads as follows :

> "13. When a candidate shall be deemed to be set up by a political party.—For the purposes of an election form any Parliamentary or Assembly Constituency to which this Order applies, a candidate shall be deemed to be set up by a political party in any such Parliamentary or Assembly Constituency, if, and only if—
>
> (a) the candidate has made the prescribed declaration to this effect in his nomination paper,
>
> (aa) the candidate is a member of that political party and his name is borne on the rolls of members of the party;
>
> (b) a notice by the political party in writing in Form B, to that effect has, not later than 3.p.m. on the last date for making nominations, been delivered to the Returning Officer of the constituency;
>
> (c) the said notice in Form B is signed by the President, the Secretary or any other office-bearer of the party, and the President, Secretary or such other office bearer sending the notice has been authorised by the party to send such notice;
>
> (d) the name and specimen signature of such authorised person are communicated by the party, in Form A, to the Returning Officer of the constituency and to the Chief Election Officer of the State or Union Territory concerned, not later than 3 p.m. on the last date for making nominations; and
>
> (e) Forms A and B are signed, in ink only, by the said office-bearer or person authorised by the party:
>
> Provided that no fascimile signature or signature by means of rubber stamp, etc. of any such office bearer or authorised person shall be accepted and no form transmitted by fax shall be accepted."

24. Chapter VI of the handbook deals with the scrutiny of

nominations by the Returning Officer. Para 2 emphasises that scrutiny of nomination papers is an important quasi-judicial function and the Returning Officer has to discharge this duty with complete judicial detachment and in accordance with the highest judicial standards. Para 6 provides that even if no objection has been raised to a nomination paper, the Returning Officer has to satisfy himself that the nomination paper is valid in law. If any objection is raised to any nomination paper, the Returning Officer has to hold a summary inquiry to decide the same and treat the nomination paper to be either valid or invalid. It states that brief reasons in support of the decision must be set out, particularly, where an objection has been raised or the nomination paper has been rejected. Para 7 provides for presumption of validity of every nomination paper unless the contrary is prima facie obvious or has been made out. In case of a reasonable doubt, as to the validity of a nomination paper, the benefit of such doubt must go to the candidate concerned and the nomination paper should be held to be valid. Para 7 seeks to remind the Returning Officer that whenever a candidate's nomination paper is improperly rejected and he is prevented from contesting the election, there is a legal presumption that the result of the election has been materially affected by such improper rejection and the election is liable to be set aside. Para 9.6 sets out some of the defects which may be treated by the Returning Officer as defects of substantial nature. It, inter alia, provides that failure to submit written authorisation form from the political party, within prescribed time and in prescribed form, where a candidate claims to have been set up by a national or state party, is a defect of substantial nature. Para 10.3 says that the nomination paper filed by a candidate claiming to have been set up by a recognised national/state party subscribed by only an elector as proposer is liable to be rejected, if a notice in writing to that effect has not been delivered to the Returning Officer of the Constituency by an authorised office-bearer of that political party by 3 p.m. on the last date for making nominations in Forms A and B devised by the Commission for the purpose under para 13 of the 1968 Order.

25. In light of the above provisions, particularly Sections 33(1) and 36(1) of the 1951 Act, Rule 4 of the 1961 Rules, Part-III of Form 2B, para 13(e) of the 1968 Order and Forms A and B appended to 1968 Order and the guidelines issued to the Returning Officers in the handbook, Mr. Gopal Subramanian, learned senior counsel for the appellant submitted that where a candidate for the election to Assembly has been set up by a recognised political party, the filing of original Forms A and B duly signed in ink by an authorised person of such political party is non-negotiable and non-filing of original Forms A and B signed in ink constitutes a defect of substantial nature. Learned senior counsel argued that proviso to Rule 4 carves out an exception in respect of declaration in relation to symbol by candidates of unrecognised political party and independent candidates as per clause (b)(ii) of Part-III of Form 2-B and has no application to the case of a candidate belonging to a recognised political party who has to make a declaration as required by clause(b)(i) thereof. According to Mr. Gopal Subramanian, the proviso appended to Rule 4 and para 13 of the 1968 Order operate in completely different fields without any overlap or conflict. He vehemently contended that the present case squarely falls under Section 36(2)(b) of the 1951 Act for failure to comply with the requirement of nomination paper completed in prescribed form. He would argue that the nomination having been subscribed by one proposer, basing on the declaration given by the election petitioner, it is intrinsic mandatory requirement of the 1968 Order that ink signed Forms A and B were filed prior to 3 P.M. on the last date of making nomination so as to sustain the declaration of the candidate having been set up by a recognised political party.

26. On the other hand, Mr. K.K. Venugopal, learned senior counsel for the proposed candidate contended that Section 36(4) of the 1951 Act read with proviso to Rule 4 of the 1961 Rules and Form 2 B (Part III) would make the filing of xerox copy of Form A and Form B permissible (assuming that xerox copy of Form A and Form B were filed only) and cannot form the basis of the rejection of the nomination paper. He submitted that failure to file original Form A and Form B signed in ink was

not defect of a substantial character within the meaning of Section 36(4) of the 1951 Act. According to him, para 13(e) of the 1968 Order that states "Forms A and B are signed, in ink only, by the said office bearer or person authorised by the party" is only an expression of hope and is not mandatory as it does not use the expression 'shall be signed'. He referred to a decision of this Court in the case of *Jagan Nath v. Jaswant Singh & Ors.*[1] in support of his submission that the election law is technical and unless express provision is found, one cannot read the word "are" as "shall". With reference to Section 33(1) of the 1951 Act, Mr. Venugopal would submit that the expression "a nomination paper completed in the prescribed form and signed by the candidate and by an elector of the constituency as proposer" did not require the nomination paper to be accompanied by specified documents. Rule 4 of the 1961 Rules deals with the nomination paper while para 13 of the 1968 Order deals with the political party's authorisation. The two are separate and distinct and para 13 of 1968 Order cannot be read into Rule 4 of the 1961 Rules.

27. Mr. K.K. Venugopal, learned senior counsel submitted that neither Section 33 nor Section 34 of the 1951 Act required that the nomination should be accompanied by the sponsorship or authorisation of a political party. Section 36(2) of the 1951 Act sets out the grounds on which nomination paper can be rejected. Neither clause (a) which deals with qualifications and disqualifications nor clause (b) that deals with failure to comply with Section 33 nor Section 34 or clause (c) which deals with signature of the candidate or his proposer is relevant to the present controversy.

28. On the above contentions, the question presented for our consideration is, whether it is mandatory for a candidate set up by a recognised political party to file original ink signed Forms A and B appended to para 13 of the 1968 Order.

29. Before we consider the above question, it is important to recapitulate the general rule relating to election law stated by the Constitution Bench of this Court in the case of Jagan

1. 1954 SCR 892

Nath1. This Court (at page 895) stated :

> "The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the court possesses no common law power. It is also well settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law. None of these propositions, however, have any application if the special law itself confers authority on a tribunal to proceed with a petition in accordance with certain procedure and when it does not state the consequences of non-compliance with certain procedural requirements laid down by it. It is always to be borne in mind that though the election of a successful candidate is not to be lightly interfered with, one of the essentials of that law is also to safeguard the purity of the election process and also to see that people do not get elected by flagrant breaches of that law or by corrupt practices. In cases where the election law does not prescribe the consequence or does not lay down penalty for non-compliance with certain procedural requirements of that law, the jurisdiction of the tribunal entrusted with the trial of the case is not affected."

30. Section 33 of the 1951 Act enacts that a candidate shall file nomination paper on or before the appointed date in the prescribed form. The form in which nomination paper shall be presented and completed is provided in Rule 4 of the 1961 Rules. According to Rule 4, every nomination paper presented under sub-section (1) of Section 33 shall be completed in such one of the forms 2-A to 2-E, as may be appropriate. Proviso that follows Rule 4 provides that a failure to complete or defect in completing, the declaration as to symbols in a nomination paper in Form 2-A or Form 2-B shall not be deemed to be a defect of substantial character within the meaning of Section

36(4) of 1951 Act. The controversy in the present case relates to a candidate set up by a recognised political party of the State and, therefore, the relevant form in this regard is Form 2-B. Form 2-B is in three parts. Part-II is not relevant and, therefore, it is not necessary to refer to that. Part-I and Part-III of Form 2-B are relevant. Part-I of Form 2-B is required to be completed by a candidate set up by a recognised political party. Part-III of Form 2-B is a declaration to be made by the candidate giving assent to his nomination. The candidate is required to declare, in case of a candidate set up by a recognised State party in terms of para b(i), "that I am set up at this election by the ……party, which is recognised national party/state party in this State and that the symbol reserved for the above party be allotted to me". Para b (ii) of Part-III is applicable to a candidate set up by any registered unrecognised political party or a candidate who is contesting the election as an independent candidate. A plain reading of proviso that follows Rule 4 leaves no manner of doubt that a failure to complete or defect in completing, the declaration as to symbols in a nomination paper in Form 2A or Form 2B by a candidate set up by a recognised political party or a candidate set up by registered unrecognised political party or a candidate who seeks to contest the election as an independent candidate is not a defect of substantial nature. It is not possible to catalogue defects contemplated by the proviso. However, to illustrate the few; wrong description of symbol, omission to fill blank space given in proforma in respect of choice of symbols, selecting a symbol which is reserved, etc., fall in the category of defects not of a substantial character. We are fortified in our view by a decision of this Court in *Krishna Mohini (Ms) v. Mohinder Nath Sofat*[2] wherein this Court said in para 32 (Pg. 159) :

> "32. Though Rule 4 of the Conduct of Elections Rules requires every nomination paper presented under sub-section (1) of Section 33 to be complete in such one of the Forms 2-A to 2-E as may be appropriate and, therefore, the blank space meant for showing three symbols in order of preference as symbols of the candidate's choice, has to be filled in; however, non-filling of the space as to choice of symbol is not a defect of a substantial character. Such deficiency in the nomination paper is saved by the proviso to Rule 4 of the Conduct of Elections Rules, 1961 which provides that failure to complete or defect in completing the declaration as to symbols in a nomination paper shall not be deemed to be a defect of a substantial character within the meaning of sub-section (4) of Section 36. Choosing a wrong symbol, leaving blank the space meant for filling the choice of symbols and an error in describing the symbol — are all defects not of a substantial character. An independent candidate may mention as his preference the symbol reserved for a recognised political party, but that again will not be a defect of a substantial character. Dealing with such cases, this Court has held in *K.S. Abdul Azeez v. Ramanathan Chettiar* (AIR 1967 SC 85) that the question of symbols should not play an important part because symbols can be assigned by political parties till the date for withdrawal and nomination paper should not be cancelled, on this ground, during the interval."

2. (2000) 1 SCC 145.

31. The applicability of proviso that follows Rule 4, however, is limited to defect in the declaration as to symbol made by a candidate in Form 2-A or 2-B appended to 1961 Rules. Its operation does not extend to the defects in forms required to be filled or completed by a candidate set up by a recognised political party under 1968 Order or non-fulfilment of requirements set out in clauses (a) to (e) of para 13 of the 1968 Order.

32. 1968 Order has been made by the Commission to provide for specification, reservation, choice and allotment of symbols of elections in Parliamentary and Assembly Constituencies for the registered political parties (recognised or unrecognised) and the independent candidates. Para 13 provides in unmistakable terms that for a candidate to be considered to have been set up by a political party in a

parliamentary or assembly constituency, he has to comply with the conditions set out in clauses (a) to (e) thereof. In Krishna Mohini (Ms)2, this Court held that in order to be a candidate set up by a registered and recognised political party so as to take advantage of being proposed by a single elector, all the four requirements set out in clauses (a), (b), (c) and (d) of para 13 of 1968 Order must be satisfied. The Court went on to say that if any one or more of the requirements are not satisfied, the benefit of nomination being proposed by a single elector is not available to him. Clause (e) of para 13 of the 1968 Order is equally important. It reads, "Forms A and B are signed, in ink only, by the said office-bearer or person authorised by the party". Proviso appended to para 13 makes a provision that no facsimile signature or signature by means of rubber stamp, etc. of any such office-bearer or authorised person shall be accepted and no form transmitted by fax shall be accepted. In other words, for a candidate, proposed by a single elector alone, to be treated as a candidate set up by a recognised political party, the filing of notice and communication in Forms A and B referable to clauses (b), (c) and (d) and in accord with clause (e) of para 13 of the 1968 Order is essential and on its non-compliance, the nomination of such candidate is liable to be rejected.

33. That clause (e) of para 13, 1968 Order does not use the expression "shall be signed" is obvious from the bare reading of the provision but the significance of the word "only" therein cannot be ignored.

34. In Concise Oxford English Dictionary (Tenth Edition, Revised), the word 'only' is explained :

> Only • adv. 1 and no one or nothing more besides.. . . . . • **adj.** alone of its or their kind; single or solitary. . . . . .

35. In Webster Comprehensive Dictionary, International Edition (Volume Two), the word 'only' is defined thus :

> Only (?n'l?) adv. . . . . **2** In one manner or for one purpose alone. . . . . **4** Solely; merely; exclusively: limiting a statement to a single defined person, thing, or number.

> – adj. **1** Alone in its class; having no fellow or mate; sole; single; solitary:

36. The word 'only' is ordinarily used as an exclusionary term. In the American case of *Henry R. Towne v. Mark Eisner* (245 US 418 at 425), the court said, "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used". In ascertaining the meaning of the word 'only', its placement is material and so also the context in which the word has been used. The use of the word 'only' in clause (e), para 13, 1968 Order emphasises that Forms A and B are to be signed in ink by the office bearer or person authorised by the recognised party and in no other way. Thus, it excludes any other mode of filing Forms A and B when a candidate is set up by a recognised political party. In our view, therefore, the word 'only' used in clause (e) of para 13 is indicative of the mandatory character of that provision.

37. Where a candidate is set up by a recognised political party, clause (b)(i), Part-III of Form 2-B becomes relevant as by making declaration therein the candidate makes a request that symbol reserved for such party be allotted to him. It is for this reason that the requirements of para 13 of the 1968 Order become integral part of Form 2-B, Part-III under Rule 4 of the 1961 Rules where a candidate is set up by a recognised political party. We are unable to accept the submission of Mr. K.K. Venugopal that para 13 of the 1968 Order cannot be read into Rule 4. Non-compliance of requirements of para 13 of the 1968 Order, in our view, is a defect of substantial character and the nomination paper of a candidate proposed by a single elector set up by a recognised political party having such defect is liable to be rejected under Section 36(2)(b) as it tantamounts to non-compliance of the provisions of Section 33, namely, the nomination paper having not been completed in the prescribed form.

38. The proposed candidate admittedly filed his nomination paper proposed by a single elector having been set

up by BJD, a recognised political party in the State of Orissa, and, therefore, it was incumbent upon him that the requirements of para 13 of the 1968 Order were fully complied with. In other words, it was necessary for the proposed candidate that Forms A and B referable to clauses (b), (c) and (d) of para 13, 1968 Order were submitted to the Returning Officer duly signed in ink by the authorised person of BJD not later than 3.00 p.m. on April 4, 2009.

39. Having held so, the other questions that need to be considered by us in these appeals are, whether the High Court erred in framing issue no. 6 at the time of decision in the election petitions, i.e., whether the election petitioner Ranendra Pratap Swain filed the original Form-A and Form-B being duly signed in ink by the authorised person with the first set of his nomination and whether the finding recorded by the High Court on that issue suffers from any illegality.

40. The pleadings of the parties as well as the evidence let in by them clearly show that the parties were seriously in issue whether the original Form-A and Form-B duly signed in ink by the authorised person of BJD were filed by the proposed candidate with the first set of his nomination paper. The election petitioners (in both election petitions) asserted that the proposed candidate had filed original Forms A and B duly signed in ink by Shri Navin Patnaik (authorised person of BJD) before the Returning Officer on April 4, 2009 at the time of presentation of nomination paper and check list was issued acknowledging receipt of these forms. The returned candidate disputed the said assertion made in the election petitions. The evidence of the Returning Officer, who was examined as court witness no. 1, and his cross-examination on behalf of the proposed candidate as well as the returned candidate also indicate that the factual controversy in the election petitions centered around on the filing of the original Form-A and Form-B duly signed in ink by the authorised person of BJD with the first set of his nomination. It follows that by framing issue no. 6 at the time of final decision of the election petitions, no prejudice has been caused to the returned candidate. As a

matter of fact, no ground of prejudice has been raised in the appeals nor such argument was advanced before us by the learned senior counsel for the returned candidate. We, accordingly, hold that the High Court did not commit any error in framing issue no. 6 which was quite vital and material for decision in the election petitions. We further hold that no prejudice has been caused to the returned candidate by framing such additional issue at the time of the decision in the election petitions.

41. The proposed candidate PW-2 deposed that he had contested Orissa Assembly Elections held in 1990, 1995, 2000 and 2004 from 89-Athagarh Constituency and had won all these four elections. While giving the details of nomination papers and the documents presented personally by him on April 4, 2009 at 11.25 a.m., he stated that in the first set of nomination, Rabindra Nath Rout (PW-1) was the proposer and along with the first set of nomination paper, original Form-A and Form-B signed in ink by Shri Naveen Patanaik, President and the authorised signatory of BJD were filed. He deposed that he had presented four sets of nominations as the nominee of BJD for 89-Athagarh Assembly Constituency and all his four sets of nominations were complete in all respect. He also deposed that immediately after he presented four sets of nominations, as a nominee of BJD, the Returning Officer asked him to take oath before him and he, accordingly, took oath before the Returning Officer. From 11.25 a.m. to 11.45 a.m., the Returning Officer examined the four sets of nominations presented by him and thereafter the Returning Officer personally prepared the check list of documents; put his signature on that and asked him (proposed candidate) to sign on the said documents. The Returning Officer retained with him one of such check list ticked duplicate (Ex. 22) and handed over another to him (proposed candidate) ticked original (Ex. 11).

42. The deposition of the proposer—Rabindra Nath Rout (PW-1) is not of much help as he has stated that he was not present in the office room of the Returning Officer when the proposed candidate filed his nomination.

43. Significantly, the Returning Officer (CW-1) in his deposition has not specifically denied that Form-A and Form-B in original duly signed in ink by the authorised officer of BJD were not filed by the proposed candidate. Rather he stated that had it come to his notice that Form-A and Form-B duly signed in ink by the authorised signatory were not filed by the proposed candidate, he would have made an endorsement on the bottom of the check list to that effect and asked the proposed candidate to file the original ink signed forms within time. He admitted that no such endorsement was made in the check list. The Returning Officer also stated in his deposition that the nomination papers filed by the proposed candidate were examined by him only from technical stand point and it was not his duty to examine the correctness or validity of the documents at the time of filing of the same.

44. Although there is voluminous documentary evidence, in our view, the three documents viz; the check list (Ex. 11), Form 3-A (Ex. 42/F) and the consolidated list of nominated candidates (Ex. 44) are important. The check list marked 'original' (Ex. 11) given to the proposed candidate is as follows:

Sl.	Documents No.	Whether filed (write yes/no)
1.	Affidavit in Form-26	yes
2.	Affidavit as per the Commission's order dated 27.03.03	yes
3.	Certified extract of electoral roll (when candidate is an elector of a different constituency)	Not needed
4.	Forms A and B (applicable in the case of candidates set up by political parties)	yes
5.	Copy of caste certificate (if the candidate claims to belong to SC/ST)	Not needed

6.	Security deposit (whether made)	yes
7.	Oath/affirmation (whether taken)	yes

The following documents which have not been filed should be filed as indicated below :

(a) _____should be filed latest by _____.

(b) _____should be filed latest by _____.

Received.

.....

(Signature of candidate)

Date & time : 04.04.2009 -- 11.45 a.m.

Place : ATHAGARH"

45. List of nominated candidates—Checks If (Ex.44) to the extent it is relevant is as follows :

Name of Parliamentary/Assembly Constituency -89 Athagarh

No.	Name of the candidat	Address of candidate	Symbols chosen in Order of prefe-rence by the candidate	Name of political Party (National/ State or regis-tered) by which the candidate claims to have been set up/indepe-ndent can-didate	Whether Forms 'A' and 'B' have been received by 3.00 p.m. on the last date for making nomina-tions in respect of the candidate	Whether main candidate or substitute candidate of the party (as per Party's intimation in Form B)
1	2	3	4	5	6	7
1	Ranendra	At-	Cunch	Biju	Yes	Main

	Pratap Swain	Radhagovindapur P.O.-Dhaipur, P.S. Athagarh Dist.-Cuttack		Janata Dal		Candidate

46. On April 4, 2009, the Returning Officer published a notice in Form 3A on the notice board of his office in respect of the nomination papers presented before him on that day. In that notice – Form 3A (Ex. 42/F), it was mentioned in column no. 6 that proposed candidate was nominee of BJD. Pertinently, April 4, 2009 was the last day of nominations. Form 3A was displayed on the notice board after 3 p.m. Had the proposed candidate not filed Forms A and B as required, i.e., duly signed in ink by an authorised person of BJD, he would not have been shown as a nominee of that party in Form 3A.

47. On behalf of the returned candidate it was contended before the High Court and reiterated before us that none of these documents indicate that Forms A and B were filed in original. It was submitted that these documents only indicate that Forms A and B were filed as endorsed in the check list and were received before 3.00 p.m. on the last date of making nominations but these documents do not prove that original Forms A and B signed in ink by the authorised signatory of the party were filed.

48. It is true that neither in the check list nor in the list of nominated candidates, the word 'original' before Forms A and B is mentioned but it was not required to be mentioned as in the case of candidates set up by political parties; the requirement is that such candidates file Form A and Form B duly signed in ink by the authorised officer of the concerned political party. In the event of filing of Form A and Form B otherwise, an endorsement would obviously be made against that column in the check list and time would be given to make up the deficiency by 3.00 p.m. on the last day of nomination. In the circumstances, having regard to the significance of the check list, if Forms A and

B were not filed in original by the proposed candidate, an endorsement would have been made by the Returning Officer that only xerox copies of Forms A and B were filed. No doubt under Section 33(4) of the 1951 Act, the Returning Officer is not expected to make a detailed scrutiny of the nomination paper presented before him but in the case of a candidate who has filed his nomination paper as a candidate set up by a recognised political party and in view of para 13 of the 1968 Order, the Returning Officer would surely check whether Form A and Form B suffer from any defect.

49. As a matter of fact, to obviate unnecessary dispute about presentation of nomination paper by a candidate, the Commission in the handbook has provided for guidelines pertaining to check list. Accordingly, a check list is required to be prepared duly certified by the Returning Officer that all documents have been received. Such check list is signed by the Returning Officer as well as by the candidate. Where a check list certifies that Forms A and B (in the case of candidates set up by a recognised political parties), have been filed, such certificate leads to presumption that the procedural requirement of filing the documents as prescribed in para 13 of the 1968 Order has been complied with. The presumption is of course rebuttable but there must be sufficient evidence by the other side to displace such presumption. In the present case, the check list (Ex.11), Form 3A (Ex. 42/F) and the list of the nominated candidates—checks IF (Ex. 44) give rise to presumption in favour of the proposed candidate that he had filed Form-A and Form-B duly signed in ink by the authorised person of BJD with the first set of his nomination paper. The question is whether this presumption has been rebutted by the returned candidate? We do not think so. The oral evidence of the returned candidate (RW-1) and his witness (RW-2) is not of much help insofar as this aspect is concerned. The Returning Officer has not stated firmly and with certainty in his evidence that the proposed candidate had not filed Form-A and Form-B signed in ink by the authorised person of the BJD. Rather he stated that had it come to his notice that the original Form-A and Form-B duly signed in ink were not filed along with the nomination paper by the proposed candidate,

he would have made an endorsement to that effect in the check list. Moreover, between 11.46 a.m. when the check list was prepared by the Returning Officer and given to the candidate and 3.00 p.m. on April 4, 2009 (last date of nominations) no intimation was issued by the Returning Officer or received by the candidate with regard to non-filing of original Forms A and B. No doubt, the burden is on the candidate set up by a recognised political party to prove that he had filed Forms A and B duly signed in ink by the authorised person of that party but that burden gets discharged on production of evidence that raises presumption in his favour. In the present case the proposed candidate has been successful in discharging the burden placed upon him.

50. The evidence of the Returning Officer is the important part of the case. He admitted in his evidence that the xerox copies of the nomination papers and documents were got prepared through his officials for the purpose of displaying on the notice board. He also admitted that since proposed candidate had filed all documents required in the nomination form, no further endorsement was made in the check list that he (proposed candidate) was required to file any documents. Moreover, with regard to another candidate, Janaki Rout in respect of 89-Athagarh Assembly Constituency, the Returning Officer stated that he asked him to file the document which he had not filed along with the nomination paper by 3.00 p.m. at the latest. In respect of yet another candidate Bijaya Kumar Biswal, in the check list, he had endorsed therein that the certified extract of the electoral roll was not filed and asked him to file the same at 11.00 a.m. on April 6, 2009 at the latest. It is, thus, seen that the Returning Officer was conscious of his duties as per the statutory provisions and the guidelines issued by the Commission by way of handbook. On presentation of nomination papers by respective candidates wherever deficiencies were found, he made endorsement in the check list and gave them time to make up the deficiency as per law. A careful consideration of the evidence of Returning Officer leaves no manner of doubt that he has not distorted the facts nor withheld anything from the court with regard to presentation of nomination

papers by the candidates including the proposed candidate. The evidence on record, i.e, the evidence of the Returning Officer, the documentary evidence, namely, the check list, Form 3A displayed on the notice board, the consolidated list of nominated candidates and the evidence of PW-2 clearly establish that original Form-A and Form-B signed in ink by authorised officer of the party (BJD) were presented by the proposed candidate along with 1st set of nomination paper on April 4, 2009. The finding returned by the High Court in this regard cannot be said to be wrong or unjustified.

51. It is a fact that the original Forms A and B were not available on record before the Returning Officer on April 6, 2009 at the time of scrutiny. However, we are not persuaded by the submission made on behalf of the returned candidate that in the absence of original Forms A and B on record, the Returning Officer had to proceed on the basis of records available before him on that day and he had no option but to reject the nomination. The least expected of the Returning Officer, when he found that original forms A and B were not available on record, was to make brief enquiry about non-availability of the forms A and B. It was all the more necessary as the nomination papers along with accompanying documents were sent for xeroxing.

52. Section 83 of the 1951 Act requires that an election petition shall contain a concise statement of the material facts on which the petitioner relies. It has been repeatedly held by this Court that Section 83 is peremptory. In *Samant N. Balakrishna, etc. v. George Fernandez and others etc.*[3], this Court observed in para 29 (Pg. 1212) of the Report thus:

> ".....The section is mandatory and requires first a concise statement of material facts and then requires the fullest possible particulars. What is the difference between material facts and particulars? The word 'material' shows that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of particulars is to

3. AIR 1969 SC 1201.

present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet. There may be some overlapping between material facts and particulars but the two are quite distinct……."

53. In *Azhar Hussain v. Rajiv Gandhi*[4], this Court held that an election petition must be dismissed if the mandatory requirements enjoined by Section 83 to incorporate the material facts and particulars relating to alleged corrupt practice in the election petition are not complied with.

54. In *Hari Shanker Jain v. Sonia Gandhi*[5], this Court reiterated the mandatory provision contained in Section 83(1)(a) of the 1951 Act and observed therein that the material facts required to be stated are those facts which can be considered as materials supporting the allegations made. In other words, this Court said that they must be such facts as would afford the basis for the allegations made in the petition and would constitute the cause of action as understood in the Code of Civil Procedure, 1908.

55. A 3-Judge Bench of this Court in *Pothula Rama Rao v. Pendyala Venakata Krishna Rao and Others*[6], stated in paragraph 8 (at Pg. 6) of the Report as follows :

"If an election petitioner wants to put forth a plea that a nomination was improperly rejected, as a ground for declaring an election to be void, it is necessary to set out the averments necessary for making out the said ground. The reason given by the Returning Officer for rejection and the facts necessary to show that the rejection was improper, should be set out. If the nomination had been rejected for non-compliance with the first proviso to Sub-section (1) of Section 33, that is, the candidate's nomination not being subscribed by ten voters as proposers, the election petition should contain averments to the effect that the nomination

4. AIR 1986 SC 1253.

5. (2001) 8 SCC 233.

6. (2007) 11 SCC 1.

was subscribed by ten proposers who were electors of the Constituency and therefore, the nomination was valid. Alternatively, the election petition should aver that the candidate was set up by a recognized political party by issue of a valid 'B' Form and that his nomination was signed by an elector of the Constituency as a proposer, and that the rejection was improper as there was no need for ten proposers. In the absence of such averments, it cannot be said that the election petition contains the material facts to make out a cause of action."

56. In a recent decision in *Nandiesha Reddy v. Kavitha Mahesh*[7], this Court observed that where election petitioner alleges improper rejection of his/her nomination paper by the Returning Officer, he/she must set out in election petition reasons given by the Returning Officer for refusal to accept nomination paper and facts necessary to show that refusal was improper. In paragraphs 36 and 37 of the Report (at Pg. 734), this Court held as under

"36. Section 83 (1)(a) inter alia provides that an election petition shall contain a concise statement of the material facts. Further, Section 87 of the Act provides that subject to the provisions of the Act and the Rules framed thereunder every election petition shall be tried in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits. Order VI of the Code of Civil Procedure is devoted to the pleadings generally and Rule 2(i) thereof, inter alia, provides that every pleading shall contain a statement in a concise form of all the material facts on which the party pleading relies for claim. In an election petition, which does not contain material facts, no relief can be granted.

37. The phrase "material fact" as used in Section 83 (1) (a) of the Act or Order 6 Rule 2 of the Code of Civil Procedure has not been defined in the Act or the Code of Civil Procedure. In our opinion all specific and primary facts which are required to be proved by a party for the relief

7. (2011) 7 SCC 721.

claimed are material facts. It is settled legal position that all material facts must be pleaded by the party on which the relief is founded. Its object and purpose is to enable the contesting party to know the case which it has to meet. An election petition can be summarily dismissed if it does not furnish the material facts to give rise to a cause of action. However, what are the material facts always depend upon the facts of each case and no rule of universal application is possible to be laid down in this regard."

57. In view of the above legal position, there is no doubt that in a case under Section 100(1)(c) of the 1951 Act, the only issue before the Court is improper rejection of nomination paper and the court is required to examine the correctness and propriety of the order by which the nomination paper of a candidate is rejected. The grounds set out in the election petition challenging the order of rejection of nomination paper, thus, form the basis of adjudication in the election petition.

58. The learned senior counsel for the appellant submitted that the material facts relating to the ground on which election of the returned candidate has been set aside have neither been pleaded in the election petition nor have been proved by leading cogent evidence. We do not find any merit in this contention.

59. In the Election Petition No. 4 of 2009 filed by the proposed candidate, the order of rejection of nomination has been assailed, inter alia, on the following grounds:

"5(C) That the reasonings given in the decision of the Retuning Officer, in his order of rejection dtd. 06.04.2009 is also not legally sustainable for the following reasons :-

(a) The Nominee of B.J.D. Nominee for 87-BARAMBA Assembly Constituency was submitted on 03.04.2009. The Returning Officer had the occasion to examine the same and grant the Check List on 03.04.2009 i.e. one day before the submission of the Nomination of the Election Petitioner, whereas the Election Petitioner submitted his Nomination on

04.04.2009. If according to the Returning Officer, "from comparison of two sets of Form A & B submitted in 87- BARAMBA, he came to conclusion that the set of Form A & B, submitted by the Election Petitioner along with his first set of Nomination was not original and not signed in ink but a xerox copy, then in ordinary course of human conduct and in view of instruction of the Election Commission", he would have recorded an endorsement to that effect in the CHECK LIST which he himself gave at 11.45 AM on 04.04.2009, and would have further called upon the Election Petitioner to produce the same by 3 PM on the same day.

(b) The Returning Officer instead of making a comparison with the Form A & B submitted along with the Nominations of 87-BARAMBA, should have referred to the Form A & B, which was communicated both to him & to the CEO under the provisions of Election Symbol (Reservation & Allotment) Order – 1968.

5(D) That a plain reading of four Orders of rejection recorded by the Returning Officer on four sets of Nominations submitted by the Election Petitioner spells out so much so discrepancy that the same itself is sufficient to conclude that the order suffers from inconsistency and is an outcome of non application of mind.

5(E) That on the date of scrutiny no objection was raised by any of the contesting candidates or any person on their behalf present at the time and place of scrutiny to the effect that the Form A & B, filed by the Election Petitioner with his first set of "NOMINATION" were not original not it contains the signature of the authorised person IN INK were Xerox copies.

The complaint was raised by the Returning Officer himself who had received all the four sets of Nominations, along with other affidavits, documents

original money receipt and original Form A & B, duly signed in ink, by the authorised person, and had signed the CHECK LIST which is a document required to be signed & delivered to the candidate in exercise of his statutory powers on 04.04.2009. The partisan attitude and hostility of the Returning Officer towards the Election Petitioner emanates from his own conduct, when he refused minimum opportunity to the Election Petitioner to REBUT the so called allegations regarding non-submission of original Form – A & B containing signature of authorised person in ink, which a candidate is entitled to as of right under the Rules of Election Law."

60. The High Court, inter alia, considered the evidence of PW-2 and also the evidence of the Returning Officer, the documentary evidence, namely, the check list (original-exhibit 11), Form 3-A (exhibit 42/F) and consolidated list of nominated candidates—checks IF (exhibit-44) and the contentions of the returned candidate and held as under :

"13. As found from the evidence of P.Ws 1 and 2, the latter filed four sets of Nomination along with other accompanying documents. In the 1st set of Nomination Papers, he filed original ink signed Form A and Form B. Accordingly, the Returning Officer issued the Check List to Sri Ranendra Pratap Swain. They further deposed that while handing over the Check List, the Returning Officer stated that "whatever original forms and documents that you have submitted and I have received from you have been clearly mentioned by me in the Check List. You preserve the Check List with you. If in fact the Returning Officer had stated so, it being a material fact, the same should have been averred in the election petition. In absence of pleading this part of evidence of P.Ws 1 and 2 cannot be relied upon. According to the evidence of Returning Officer, on examining the documents on technical stand point, he found the election Petitioner, Sri Ranendra Pratap Swain to have filed all required documents and accordingly he issued the Check List marked Ext. 22 to him. He fairly admitted in his evidence that he can distinguish a xerox copy from its original. He further deposed that had it come to his notice that Sri Ranendra Pratap Swain filed the xerox copies of the original ink signed Form A and Form B, he would have endorsed it in the bottom of the Check List and directed him to file the original ones. Again on 04.04.2009 after the time fixed for filing the Nomination Papers was over, he prepared copy of those documents in Form 3A to publish in the notice board. At that time also he could not detect the filing of Xerox Copies of the original ink signed Form A and Form B. Furthermore, when he prepared the consolidated "List of Nominated Candidates-Checks if". He could not detect the so called defect. He mentioned the symbol "Conch" in the appropriate column of the said form so also the name of political party, which set up the candidate, Sri Ranendra Pratap Swain. Since the signature of P.W. 1 the proposer of Ranendra Pratap Swain, partially got effected, the Returning Officer asked him to put another signature and accordingly he did it. When the Returning Officer was alive to find out an effaced signature in the Nomination, it appears some what fishy how he filed to detect the Xerox copies of the original ink signed Form A and Form B, if filed. The original ink signed Form A and Form B, if filed. The contention of learned counsel for the respondent that there was no pleading with regard to Form 3A and consolidated "List of Nominated Candidates-Checks If" in either of the election petitions and as such the same cannot be relied upon cannot be accepted. It is the fundamental rule of pleadings that pleading must contain a statement of the material facts, but not the evidence by which they are to be proved. In the present case, it has been averred in the election petitions that Shri Ranendra Pratap Swain filed the Nomination along with required documents including original Form A and Form B ink signed, before the Returning Officer. Moreover, Form 3A and consolidated "List of Nominated Candidates-Checks if" have been admitted as

Exts. 42/f and 44 respectively without objection. So their validity cannot be questioned. As per the decision *State of Orissa and others* (supra) their probative value is also very high. Even if those documents were not referred to in the election petitions, the evidence led in that respect can be accepted."

61. The High Court finally concluded that the proposed candidate had filed the original Form-A and Form-B duly signed in ink by the authorised person of BJD with the first set of his nomination and, accordingly, decided Issue No. 6 in favour of election petitioners. The consideration of the matter by the High Court in para 14 of the judgment may be reproduced as it is.

"14. No doubt at the time of filing of Nomination, the Returning Officer is not required to scrutinize the Nomination and the accompanying documents in minor details, but he is duty bound to examine the same on technical stand point. Now the pertinent question is whether he was expected to examine whether the original ink signed Form A and Form B were filed, while examining the Nomination Paper along with the accompanying documents, on technical stand point. In my considered opinion, he had to do so, particularly when he deposed that had it come to his notice that Sri Ranendra Pratap Swain filed the Xerox copies of the original ink signed Form-A and Form-B, he would have endorsed it in the bottom of the Check List and directed him to file the original ones. At this stage Mr. Palit, learned counsel for the respondent submitted that unless, an election petitioner fully established his case, it would not be proper to set aside the election. In support of his submission, he relied on the decision in the case of *Ram Phal Kundu Vs. Kamal Sharma,* AIR 2004 Supreme Court 1657, where the apex Court held as follows.

> "Therefore, unless the election petitioner fully established his case, it will not be legally correct to set aside the election of the appellant."

As found from the evidence of P.Ws. 1 and 2 the latter filed

the original ink signed Form A and Form B in his 1st set of Nomination. This part of their evidence could not be shaken. Even no suggestion was given to P.W. 1 that P.W. 2 did not file original ink signed Form A and Form B in his 1st set of Nomination. So, the above decision is not applicable to the present case.

The Returning Officer has admitted in his evidence that the Nominations along with all the accompanying documents of all the eight candidates were Xeroxed outside in Anand Xerox of Athagarh. He has also admitted that on 04.04.2009 all the four sets of Nomination papers of Sri Ranendra Pratap Swain were Xeroxed to display the same in his Notice Board. The possibility that, in the process the original ink signed Form A and Form B were inadvertently exchanged for the Xerox copies thereof, cannot be ruled out. Under such premises, in my considered opinion, Sri Ranendra Pratap Swain had filed the original Form-A and Form-B duly signed in ink by the authorised person with the 1st set of his Nomination. Accordingly, issue no. 6 is answered in affirmative.

62. In what we have already discussed above, we do not find any error in the consideration of the matter by the High Court.

63. The election petitioner, as noticed above, in ground 5(E) set up the case that the objection of non-filing of original Forms A and B signed in ink by the authorised officer of the party was not raised by any of the contesting candidates or any person on their behalf present at the time and place of scrutiny. It was the Returning Officer who raised the issue of non-filing of original Forms A and B but he refused minimum opportunity to the election petitioner to rebut the same. In our view, the Returning Officer ought to have acted in terms of proviso to Section 36(5) of the 1951 Act and afforded an opportunity to the election petitioner until next day to rebut the objection and show to the Returning Officer that the proposed candidate had filed Forms A and B duly singed in ink by the authorised person of BJD. PW-3, the authorised representative of the election petitioner did state in his evidence that he requested to the Returning Officer,

when he raised the objection that original Forms A and B were not filed, to enquire into the matter about the missing Forms A and B. It was not necessary to state in the election petition the evidence of PW-3 in support of ground 5(E).

64. The proviso that follows sub-section (5) of Section 36 of the 1951 Act provides that in case an objection is raised by the returning officer or is made by any other person the candidate concerned may be allowed time to rebut it not later than the next day but one following the date fixed for scrutiny, and the returning officer shall record his decision on the date to which the proceedings have been adjourned.

65. In *Rakesh Kumar v. Sunil Kumar*[8], this Court held in para 21 (Pg. 500) as under:

> "21. ……The use of the expression "not later than the next day but one following the date fixed for scrutiny" under the proviso to Sub-section (5) of Section 36 of the Act unmistakably shows that the Returning Officer has been vested with the discretion to fix time to enable a candidate to rebut an objection to the validity of his nomination paper and such a discretion has to be fairly and judicially exercised. The refusal to grant an opportunity to the respondent and rejecting his nomination paper was clearly an arbitrary exercise of the discretion vested in the Returning Officer. The Returning Officer has also not given any cogent reasons for his refusal to grant an opportunity as prayed for by the respondent. The Returning Officer appears to have been labouring under some misconception when he recorded that the political party "cannot be given further time to change such authorisation after scrutiny". Under the proviso to Section 36(5) of the Act, the scrutiny itself would have been postponed to the adjourned time and, therefore, it was not a case of meeting the objection after scrutiny of the nomination papers. The failure to exercise his jurisdiction to postpone the decision as to the validity of the nomination paper of the respondent, even after the respondent had sought time to meet the objection, indeed rendered the

8. (1999) 2 SCC 489.

> rejection of the nomination paper of the respondent as both improper and illegal. The Returning Officer is not expected to reject a nomination paper, without giving an opportunity to the candidate or his representative present at the time of scrutiny to meet an objection, capable of being met, particularly where such an opportunity is sought for by the candidate or his representative and no one present on behalf of the other candidates had opposed the claim made by the respondent. Having raised the objection suo motu, the request of the respondent who was present and sought time in writing to seek clarification from the BJP as to who was its official candidate, the Returning Officer in all fairness was obliged to grant time to the respondent as prayed for by him and postponed the scrutiny to the next day but he ought not to have rejected his nomination paper in hot haste. The Returning Officer, obviously, failed to exercise his jurisdiction under Section 36(5) of the Act properly and thereby fell in a grave error in rejecting the nomination paper of the respondent……."

66. In the facts and circumstances of the present case, which have already been noticed above, the Returning Officer erred in acting in hot haste in rejecting the nomination paper of the proposed candidate and not postponing the scrutiny to the next day, particularly, when a request was made by the authorised representative of the proposed candidate. The election petitioners have been successful in proving the improper rejection of the proposed candidate's nomination paper. In other words, they have been able to prove the ground for setting aside appellant's election to 89-Athagarh Assembly Constituency under Section 100(1)(c) of the 1951 Act.

67. The consideration of the matter by the High Court does not suffer from any factual or illegal infirmity. In this view of the matter – and the factual and legal position discussed above – we see no ground to interfere with the impugned judgment.

68. The appeals, accordingly, fail and are dismissed with no order as to costs.

R.P. Appeals dismissed.