ISHWAR DASS NASSA & ORS.
v.
STATE OF HARYANA & ORS.
(Civil Appeal No. 4211 of 2004)

DECEMBER 12, 2011

[G.S. SINGHVI & SUDHANSU JYOTI MUKHOPADHAYA JJ.]

Housing Board Haryana (Allotment, Management and Sale of Tenements) Regulations, 1972 – Regulation 11(4) – Haryana Housing Board Act, 1971 – s.74 – Housing Board's power to revise the price of the tenements – Tenements had been allotted to the appellants – They deposited amount in accordance with the stipulations contained in the allotment letters and executed Hire Purchase Tenancy Agreements – After about 10 years, the Estate Manager issued notices to the appellants and directed them to pay additional price in lieu of the enhanced compensation allegedly paid by the Improvement Trust for the land which was sold to the Housing Board – Demand of additional price – Justification – Held: In view of the bar contained in clause 2(w) of the Hire Purchase Tenancy Agreement, the Housing Board could not revise the price after 7 years of the allotment of tenement, irrespective of the justification for such revision –While preparing the format of Hire Purchase Tenancy Agreement, the Housing Board must have taken into consideration various factors which could lead to an increase in the cost of tenements and consciously incorporated a prohibition against change in the price after 7 years from the date of allotment of tenements – Once the Housing Board, after due deliberations, incorporated a prohibition against change in the price after a period of 7 years from the allotment of tenements, there is no reason why it should not be asked to honour the commitment made to the allottees – The Single Judge and the Division Bench of the High Court were not right in deciding the writ petitions and the writ appeals on the premise that once the cost of land gets increased on account of payment of higher compensation to the landowners the Housing Board is entitled to demand additional price from the allottees – Demand notices issued by Estate Manager requiring the appellants to pay the additional price accordingly quashed.

In response to an advertisement issued by the Haryana Housing Board in 1975, the appellants applied for the houses proposed to be constructed at Sonepat for Economically Weaker Sections (EWS), Lower Income Group (LIG) and Middle Income Group (MIG). After scrutiny of the applications, the competent authority allotted tenements of different categories to the appellants. The appellants deposited the amount in accordance with the stipulations contained in the allotment letters and executed Hire Purchase Tenancy Agreements.

After about 10 years, the Estate Manager, Sonepat issued notices to the appellants and directed them to pay additional price in lieu of the enhanced compensation allegedly paid by Improvement Trust, Sonepat for the land which was sold to the Haryana Housing Board. The appellants challenged the notices by filing writ petitions under Article 226 of the Constitution. They pleaded that in view of clause 2(w) of the Hire Purchase Tenancy Agreement, the Board cannot demand additional price after 7 years of the allotment of tenements. The Single Judge of the High Court rejected the appellants' challenge to the demand of additional price. Letters patent appeals filed against the orders of the Single Judge were dismissed by High Court.

The question which therefore arose for consideration in the instant appeals was whether the Haryana Housing Board could ignore the time limit of 7 years specified in clause 2(w) of the Hire Purchase Tenancy Agreement executed by the appellants as per the requirement of Regulation 11(4) of the Housing Board Haryana (Allotment, Management and Sale of Tenements) Regulations, 1972 framed by the Haryana Housing Board

in exercise of the power conferred upon it under Section 74 of the Haryana Housing Board Act, 1971 and demand additional price from them after 10 years of the allotment of tenements.

Allowing the appeals, the Court

HELD:1.1. A conjoint reading of the allotment letter and clause 2 (w) of the Hire Purchase Tenancy Agreement, which every allottee is required to execute makes it clear that the price of the tenement specified in the allotment letter is tentative and the Board can revise the price after receiving final bills representing the cost of construction or if as a result of an order of the Court or an award made by the Arbitrator it is required to pay higher cost for the land used for construction of the tenements. In either case, the allottee is bound to pay the additional amount which would represent the final price of the tenement. If the cost of land is enhanced for any other similar reason then too the Board can revise the price and ask the allottees to pay additional price. In a given case, the Board may revise the tentative price more than once and the allottees are bound to share the burden of additional cost. However, in these cases, the Board's power to revise the price of the tenements is hedged with the limitation of 7 years contained in clause 2(w) of the Hire Purchase Tenancy Agreement. That clause contained an express bar against the change in price after 7 years of the allotment of tenement. To put it differently, in view of the bar contained in clause 2(w) of the Hire Purchase Tenancy Agreement, the Board could not revise the price after 7 years of the allotment of tenement, irrespective of the justification for such revision. The Board's understanding of the prohibition contained in clause 2 (w) of the Hire Purchase Tenancy Agreement is evinced from Resolution dated 10.5.1989 wherein it was clearly mentioned that enhanced cost is not to be recovered from the allottees after 7 years from the date of allotment. This is also the reason why the

Board accorded *ex post facto* sanction for payment of Rs.53,98,091/- to Improvement Trust, Sonepat. [Para 10] [315-H; 316-A-E]

1.2. While preparing the format of Hire Purchase Tenancy Agreement, the Board must have taken into consideration various factors which could lead to an increase in the cost of tenements and consciously incorporated a prohibition against change in the price after 7 years from the date of allotment of tenements. The rationale of this embargo was that once the allottee pays the total price, he may not be subjected to the burden of additional cost after a number of years. Surely, adjudication of the landowners' claim for higher compensation is not within the domain of the Board or the allottees but once the Board has, after due deliberations, incorporated a prohibition against change in the price after a period of 7 years from the allotment of tenements, there is no reason why it should not be asked to honour the commitment made to the allottees that they will not live under the fear of being asked to pay additional price after an indefinite period. Unfortunately, the Single Judge and the Division Bench of the High Court did not give due weightage to the prohibition contained in Clause 2(w) of the Hire Purchase Tenancy Agreement and negatived the appellants' challenge to the demand of additional price by assuming that the Board is vested with the power to revise the price at any time. The use of the expression 'or enhancement in cost of land on any account' after the expression 'the receipt of the final bill for the construction of tenements or as the result of land award or arbitration proceeding' shows that while framing the regulations, the Board had kept in view all the eventualities which could lead to an increase in the cost of land made available for construction of the tenements and yet it thought proper to put an embargo against the revision of price after 7 years. Therefore, the Single Judge and the Division Bench of the High Court were not right in deciding the writ petitions and the writ appeals on the

premise that once the cost of land gets increased on account of payment of higher compensation to the landowners the Board is entitled to demand additional price from the allottees. [Para 11] [316-F-H; 317-A-E]

1.3. The impugned order as also the one passed by the Single Judge are set aside and the demand notices issued by Estate Manager, Sonepat requiring the appellants to pay the additional price are quashed. [Para 12] [317-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4211 of 2004.

From the Judgment & Order dated 7.8.2000 of the High Court of Punjab & Haryana at Chandigarh in L.P.A.No. 919 of 2000.

WITH

C.A. No. 4209 of 2004

Harish Chander, Sanjeev Malhotra for the Appellants.

T.V. George, Dushyant Kumar for the Respondents.

The Judgment of the Court was delivered by

G. S. SINGHVI, J. 1. Whether the Haryana Housing Board (for short, 'the Board') could ignore the time limit of 7 years specified in clause 2(w) of the Hire Purchase Tenancy Agreement executed by the appellants as per the requirement of Regulation 11(4) of the Housing Board Haryana (Allotment, Management and Sale of Tenements) Regulations, 1972 (for short, 'the Regulations') framed by the Board in exercise of the power conferred upon it under Section 74 of the Haryana Housing Board Act, 1971 (for short, 'the Act') and demand additional price from them after 10 years of the allotment of tenements is the question which arises for consideration in these appeals filed against the orders passed by the Division Bench of the Punjab and Haryana High Court whereby the letters patent appeals filed by the appellants were dismissed and the order passed by the learned Single Judge declining their prayer for

quashing the demand of additional price was upheld.

2. In response to an advertisement issued by the Board in 1975, the appellants applied for the houses proposed to be constructed at Sonepat for Economically Weaker Sections (EWS), Lower Income Group (LIG) and Middle Income Group (MIG). After scrutiny of the applications, the competent authority allotted tenements of different categories to the appellants. The allotment letters were issued in their favour in November/ December 1978. For the sake of reference, the allotment letter issued in favour of one of the appellants, namely, Dharam Pal is reproduced below:

"HOUSING BOARD HARYANA

HOUSING BOARD COLONY

SONEPAT

DATED 9.12.78

REGD.

No.830

Sh.Dharam Pal

c/o Mangat Ram Redy,

Model Town ,

Smalkha (Karnal)

Reference: Your application for registration No.64/EWS

2. EWS/LIG|MIG Tenement No.285 Area 49.94 S.Yds. The Housing Colony at Sonepat is allottes to you on hire-purchase basis on a tentative price noted below:

i)	Price of House (Normal area)	Rs.8000/- (Tentative)
ii)	Cost of additional land, if any	——-
iii)	Additional charges for preferential (corner) plot	
	TOTAL	Rs.8000/-

3. The detail of the amount deposited by you as per your application etc., is given below:

(a) Registration deposit	Rs. 500/-
(b) Amount deposited for preferential allotment	——
(c) Amount deposit for preferential (corner)house.	——
(d) ——	

4. You are requested to deposit the following amounts and take possession of the house within 30 days of the issue this letter:-

i) Cost of additional land	——
ii) Additional charges for(corner) preferential plot	——
iii) Initial instalments/Ist yearly instalment	Rs. 700/-
iv) Cost of H.P.T.A.form	Rs. 2.25
Total	Rs.702.25/-

5. The balance price of the house is payable in monthly/ yearly instalments of Rs. 481/- each over a period of 18 years.

Sd/-
Estate Manager
Housing Board Haryana
Sonepat

CONDITIONS

1. The allottee shall be bound by the Haryana Housing Board Act, Rules and Regulations thereunder.

2. If the allottee fails to execute the agreement and to take possession of the house within 30 days of the issue of this letter his name shall be removed from the allotment register and any amount upto 50% of the earnest money deposited by him shall be forfeited.

3. Possession of the tenement will be given after the Hire - Purchase Tenancy Agreement is duly executed as prescribed under the rules and the allottee has paid the initial deposit, first instalment and such other dues as shall have been demanded by the Board.

4.	xxxx	xxxx	xxxx
5.	xxxx	xxxx	xxxx
6.	xxxx	xxxx	xxxx
7.	xxxx	xxxx	xxxx

8. The conveyance deed will be executed after the entire amount due is paid by the allottee. All expenses for the registration etc. shall be borne by the allottee."

3. The appellants deposited the amount in accordance with the stipulations contained in the allotment letters and executed Hire Purchase Tenancy Agreements. The relevant portions of the Hire Purchase Tenancy Agreement executed by the Board and Dharam Pal are extracted below:

"HIRE PURCHASE TENANCY AGREEMENT

This INDENTURE MADE THIS 7th day of December One thousand nine hundred and seventy eight (7.12.78) BETWEEN HOUSING BOARD HARYANA constituted under the Haryana Board Act 1971 (Act. No. 20 of 1971) (Hereinafter called the owner and includes its successors and assigns) of the one part and Shri Dharam Pal (Hereinafter called the hirer which expression shall, unless inconsistent with the context of meaning, includes, as hereinafter provide, the nominees approved and failing which is heir, executors, administrators, legal representatives and permitted assigns) of the other part.

WHEREAS in pursuance of the Housing Board

Haryana Act Rule & Regulation (hereinafter called the regulations) the hirer has apparently applied to the owner for allotment of a house under the Hire-Purchase Scheme and the owner has agreed to allot a house to hirer upon the terms and conditions hereinafter set forth."

xx xx xx xx xx
xx xx xx xx xx

"2(w) If after the receipt of the final bills for the construction of tenements or as the result of land award or arbitration proceeding or *enhancement in cost of land on any account*, the Board considers it necessary to revise the price, already specified, it may do so and determine the final price payable by the hirer who shall be bound by this determination and shall pay dues, if any, between final price so determined and price paid by him including the price paid in lump sum, *provided that no change in the price shall be made after 7 years from the date of allotment*."

4. After about 10 years, the Estate Manager, Sonepat issued notices to the appellants and directed them to pay additional price in lieu of the enhanced compensation allegedly paid by Improvement Trust, Sonepat for the land which was sold to the Board. The appellants challenged the notices by filing writ petitions under Article 226 of the Constitution. They pleaded that in view of clause 2(w) of the Hire Purchase Tenancy Agreement, the Board cannot demand additional price after 7 years of the allotment of tenements. The appellants further pleaded that most of them had already paid the installments of price specified in the allotment letters and many of them had also obtained no dues certificates. They relied upon Resolution dated 10.05.1989 passed by the Board not to recover the additional cost of land from the allottees and prayed that in view of the decision taken by the Board, the demand notices should be quashed. In the written statement filed on behalf of the respondents it was not denied that the Board had decided not to charge additional price from the allottees but it was averred that they were under a moral obligation to share the burden of additional cost paid to the

Improvement Trust.

5. The learned Single Judge rejected the appellants' challenge to the demand of additional price by making the following observations:

"Where judgments are passed by the Court of Competent jurisdiction increasing the amount of compensation awarded to the land owners, whose land was acquired for development of these projects at a much subsequent stage, cannot be hit by this clause as the increase in the basic cost of the land is a compulsion imposed upon the acquiring as well as on the authority for the benefit of which the same was acquired. The judgments of the Court are obviously not controlled either by the acquiring body or by the Board. If the cost of acquisition is increased by the Court of Competent jurisdiction, it will be unfortunate that the general public is called upon to pay such increased costs, while the land for the flats/plots has been acquired for the benefit, utilization and enjoyment by the petitioners exclusively. Such an interpretation in fact would be opposed to public policy. Every contract or instrument should be construed harmoniously so as to fall in line with the principles of public policy rather than be opposed to it. A Bench of this court in the case of Subhash Chander Arora and others versus Housing Board, Haryana, Chandigarh through its Chief Administrator and others - 1991-2 P.L.R. 698, relating to the same clause held as under:-

"As far as the first point is concerned I find no merit in the same. No doubt, the tentative price had been made final but the increase in the price was due to the enhancement in the compensation of the land which was done by a Court of Law. It was not at the instance of the Board that the prices were being increased. Since the Board had to pay more compensation, naturally the burden will fall on all the allottees of the land of which the compensation has been enhanced. Accordingly the Board was right in demanding enhanced price. However question

arises as whether the burden of enhanced compensation should be borne only by allottees of residential area or by all persons including who have commercial property, like Cinema, shops etc."

Even otherwise, the language of the Letter of Allotment or clause 2(w) does not suggest the interpretation as put forward by the petitioners. Every contract or document of this kind must be read in its entirety and construed to give it a meaning permissible in Law. The power of the Board is whether it intends to revise the price payable by an allottee, allottee should be bound by such determination. Obviously, this clause would operate where there is increase in the price by the act or deed of the Board in relation to construction or any other factor. But if there is increase in the price for circumstances beyond the control of the Board and in furtherance to the Judgment of a Court of Law, there appears to be least scope for the Board to apply its mind. Application of mind is a well accepted canon of administrative law, but it must have some basis or field to be operated upon. The judgments of the Court are binding on the parties and the concerned Govt. or authority is obliged to pay the compensation awarded to the land owners for acquisition of their respective lands except where such Judgments is set aside by the highest Court of Competent jurisdiction which admittedly is not the case here. The judgments of the Courts have attained finality and have directed the Government of Haryana and HUDA to pay enhanced compensation to the land-owners-claimants.

As a result of this compulsive directive of the Court over which the State of Haryana, the HUDA or the Board had no discretion to exercise, HUDA had issued the Letters for recovery of the enhanced amount from the Board to whom the land was given with the condition of recovery of enhanced amount. All that the Estate Officer has done is to raise the letter of demand, forward the demand of HUDA with added interest for the interregnum period of HUDA's letter and recovery, more particularly in the background that it had already paid amounts to HUDA. The argument of the

petitioners has an inherent and inbuilt fallacy. If such interpretation, as suggested by the petitioners is accepted, it will be opposed to public policy. In other words, the lands which are to be enjoyed and are being enjoyed by the petitioners, higher compensation would have to be paid by the State from the money of the ordinary income tax payer, who is neither the beneficiary nor even remotely connected with such land. Such welfare schemes of the State are founded on the principles of fairness and to meet the general requirements of the Society at large. Such schemes cannot act detrimental to the very basis of State Welfare policies."

6. The Division Bench of the High Court summarily dismissed the letters patent appeals filed against the orders of the learned Single Judge and thereby approved the demand of additional price.

7. Shri Harish Chander, learned senior counsel appearing for the appellants argued that in view of the express bar contained in para 2(w) of the Hire Purchase Tenancy Agreement against change in the price after 7 years, the Board did not have the jurisdiction to demand additional price simply because it was required to pay additional cost for the land purchased from the Improvement Trust. He submitted that the reasons assigned by the learned Single Judge for upholding the demand of additional price are legally untenable and the Division Bench committed serious error by summarily dismissing the letters patent appeals.

8. Shri T.V. George, learned counsel for the Board argued that the terms and conditions incorporated in the Hire Purchase Tenancy Agreement are not applicable to the cases in which the Board is required to pay additional cost for the land on which the tenements are constructed. He submitted that if the State Government or the Board is required to pay higher compensation to the landowners in compliance of the direction given by the competent Court or an award of the Arbitrator, the burden thereof is bound to be passed on to the allottees of plots/houses/ tenements. Learned counsel emphasized that the demand notices were issued to the appellants because Improvement Trust, Sonepat had asked the Board to pay additional cost for

the land in lieu of the enhanced compensation payable to the landowners. He submitted that time bound adjudication of the landowners' claim for higher compensation is not within the control of the State Government or the Board and the fact that the appeals filed by the landowners are decided after considerable time cannot be a ground to relieve the allottees of their obligation to share the burden of additional cost.

9. We have considered the respective submissions. For deciding the question arising in these appeals, it will be useful to notice the extracts of agenda item Nos.109-113 of the Board's meeting held on 10.5.1989, resolution passed in that meeting and Clauses 10(1) and (2) and 11(1), (3) and (4). The same are reproduced below:

AGENDA ITEM AND RESOLUTION OF THE BOARD

"To consider and accord ex-post-facto sanction to the payment of enhanced land compensation for the land purchased by Board at Sonepat Phase I & II from Improvement Trust, Sonepat.

The Board purchased the land from I.T.S. during 1972-75 @ Rs.3/- per sq. yard. As per agreement executed with ITS in respect of land allotted for Phase I, the land enhancement was payable by Board as and when demand raised by Improvement Trust. The land of Phase-II was allotted on the same terms of Phase-I, its agreement could not be executed reasons for which are not available in the record. As per the advise obtained from the Advocate, the term applicable in agreement of Phase-I was so applicable in case of Phase-II in respect of execution of agreement of Phase-II.

Improvement Trust, Sonepat vide its letter No.279, dated 24.3.86 informed that the land owner filed a writ in the court for land enhancement and as per judgment of A.D.J. Sonepat dated 3.10.85 the land sale has been enhanced from Rs.3/- per sq. yard to Rs.22/- (Rs.25/- per sq. yard) in respect of the adjoining 100 wide road in the scheme.

As per H.P.T.A. executed with allottees of Phase-I the cost of houses once fixed cannot be enhanced to disadvantage

of allottees, similarly as per H.P.T.A. executed with allottees of Phase-II to whom houses were allotted in 1978-79 the enhanced out of the house cannot be recovered from the allottees after expiry of 7 years from the date of allotment. Hence State Govt. was requested vide Housing Board Officer letter No.1100 dated 15.1.87 to pay the amount from State Govt. fund as Board was not in a position to pay such huge amount. However, State Govt. decided vide letter No.6/1/87-IHG dated 4.2.87 that the Board should meet with this expenditure from its overall budget.

Board is further requested to approve the raising the demand from allottees of Sonepat Phase I & II at the tentative recovery rate of Rs.229/- per sq. yard.

The following resolution passed by the Board on dated 11.5.89.

(1) The consider & accord ex-post-facto sanction to the payment of enhance land compensation for the purchase of land phase I & II from Improvement Trust, Sonepat.

(2) The Board accorded ex-post-facto sanction for the payment of Rs.53,98,091-00 the Improvement Trust, Sonepat and State Govt. may be approached for reimbursing this amount as demand from allottees cannot be raised at this stage."

(emphasis supplied)

THE REGULATIONS

10. Allotment letter, conditions of allotment etc.- (1) After the allotment of tenements is finalized the Estate Manager shall issue an allotment letter informing the allottee that it is proposed to allot to him the tenement on the terms and conditions specified in the letter, and asking him to call at the concerned office of the Board and take delivery of the authority letter and to take over possession of the tenement within the period specified in the letter.

(2) On receipt of an allotment letter, the allottee may, within

the period specified in the letter, accept the allotment of a tenement and shall execute a hire purchase tenancy agreement if required by the Board and shall comply with the terms and conditions of such agreement.

11. General liability of allottees.—(1) Every allottee shall regularly pay to the Board the instalments due from him in respect of the purchase price of the tenement allotted to him. He shall also pay municipal taxes, water and electricity charges, ground rent, his share of common services (e.g., common lights, sweeper, watchman and the like) and other public charges, due in respect of the land and the building occupied by him to the authorities to whom such taxes and charges are due.

(3) The hirer shall make full and regular payment of all the dues that are required to be made by him in pursuance of these presents or the Regulation. If any such payment is delayed, he shall be liable to pay a penalty at the rate of one per cent per month. In case of defaults of more than two months, the tenancy shall stand determined and the hirer shall be liable to be evicted. All the outstanding dues of the owner shall be recoverable as arrears of land revenue. The proceedings of eviction shall be governed by the provisions of Chapter VI of the Act.

Provided further that in the case of eviction, the amount already deposited by the hirer shall be utilised for recovering all dues whatsoever of the owner as the first charge and all the dues of the public bodies as the second charge and only the remainder shall be refunded to the hirer on his demand.

(4) On payment of the first instalment and such other dues as shall have been demanded by the Board, the hirer shall execute a hire-purchase agreement in the form "A".

10. A conjoint reading of the allotment letter and clause 2 (w) of the Hire Purchase Tenancy Agreement, which every allottee is required to execute makes it clear that the price of the tenement specified in the allotment letter is tentative and the Board can revise the price after receiving final bills representing

the cost of construction or if as a result of an order of the Court or an award made by the Arbitrator it is required to pay higher cost for the land used for construction of the tenements. In either case, the allottee is bound to pay the additional amount which would represent the final price of the tenement. If the cost of land is enhanced for any other similar reason then too the Board can revise the price and ask the allottees to pay additional price. In a given case, the Board may revise the tentative price more than once and the allottees are bound to share the burden of additional cost. However, in these cases, the Board's power to revise the price of the tenements is hedged with the limitation of 7 years contained in clause 2(w) of the Hire Purchase Tenancy Agreement. That clause contained an express bar against the change in price after 7 years of the allotment of tenement. To put it differently, in view of the bar contained in clause 2(w) of the Hire Purchase Tenancy Agreement, the Board could not revise the price after 7 years of the allotment of tenement, irrespective of the justification for such revision. The Board's understanding of the prohibition contained in clause 2 (w) of the Hire Purchase Tenancy Agreement is evinced from Resolution dated 10.5.1989 wherein it was clearly mentioned that enhanced cost is not to be recovered from the allottees after 7 years from the date of allotment. This is also the reason why the Board accorded *ex post facto* sanction for payment of Rs.53,98,091/- to Improvement Trust, Sonepat.

11. While preparing the format of Hire Purchase Tenancy Agreement, the Board must have taken into consideration various factors which could lead to an increase in the cost of tenements and consciously incorporated a prohibition against change in the price after 7 years from the date of allotment of tenements. The rationale of this embargo was that once the allottee pays the total price, he may not be subjected to the burden of additional cost after a number of years. Surely, adjudication of the landowners' claim for higher compensation is not within the domain of the Board or the allottees but once the Board has, after due deliberations, incorporated a prohibition against change in the price after a period of 7 years from the

allotment of tenements, there is no reason why it should not be asked to honour the commitment made to the allottees that they will not live under the fear of being asked to pay additional price after an indefinite period. Unfortunately, the learned Single Judge and the Division Bench of the High Court did not give due weightage to the prohibition contained in Clause 2(w) of the Hire Purchase Tenancy Agreement and negatived the appellants' challenge to the demand of additional price by assuming that the Board is vested with the power to revise the price at any time. The use of the expression 'or enhancement in cost of land on any account' after the expression 'the receipt of the final bill for the construction of tenements or as the result of land award or arbitration proceeding' shows that while framing the regulations, the Board had kept in view all the eventualities which could lead to an increase in the cost of land made available for construction of the tenements and yet it thought proper to put an embargo against the revision of price after 7 years. Therefore, the learned Single Judge and the Division Bench of the High Court were not right in deciding the writ petitions and the writ appeals on the premise that once the cost of land gets increased on account of payment of higher compensation to the landowners the Board is entitled to demand additional price from the allottees.

12. In the result, the appeals are allowed. The impugned order as also the one passed by the learned Single Judge are set aside and the demand notices issued by Estate Manager, Sonepat requiring the appellants to pay the additional price are quashed. The parties are left to bear their own costs.

B.B.B. Appeals allowed.

KAILASH GOUR & ORS.

v.

STATE OF ASSAM

(Criminal Appeal No. 1068 of 2006)

DECEMBER 15, 2011

[DALVEER BHANDARI, T.S. THAKUR AND DIPAK MISRA, JJ.]

Penal Code, 1860: ss.302, 448, 324 r/w s.34 – Murder – Conviction for – Mob attacked the house of PW-2 – PW-2 was away in fields – His wife and minor daughters killed – When his son PW-3 present in the house came out of the house, one member of the mob injured him with a spear – Seeing PW-2 coming towards house, PW-3 warned that the mob would kill him – One member of the mob shot an arrow which hit PW-3 – Courts below convicted appellants and others u/ ss.448, 324, 302 r/w s.34 – On appeal held: The evidence of prosecution witnesses showed that they were not eyewitnesses to the killing of the victims as such – The prosecution did not accuse any particular individual of assaulting or killing the three victims –No effort was made by the Investigating Officer nor was there any explanation for his failure to ascertain from the alleged eye witness the sequence of events and the names and particulars of those who were responsible for the crime – Failure of the prosecution to provide any explanation showed that the investigating agency had no clue about the perpetrators of the crime at the time when it reached the spot or soon thereafter nor did anyone claim to have seen the assailants, for otherwise there was no reason why they were not named and an FIR was not registered immediately – Use of torch light to look for bodies showed that there was no source of light – It was a foggy, cold December night – Presence of fog was a disabling factor that made visibility poor for any one to observe the occurrence from a distance when a huge mob of 30-40 people was on the rampage – Delay in the lodging of the FIR and the circumstances in which the

Ejahar was written, cast a serious doubt about the whole prosecution case – Non-examination of injured witness at the trial was also inexplicable – Medical evidence adduced also did not support the prosecution version –Enmity between complainant party and the accused did not rule out case of false implication – Appellants entitled to benefit of doubt – Order of acquittal passed.

Criminal jurisprudence: Presumption of innocence – Held: It is one of the fundamental principles of criminal jurisprudence that an accused is presumed to be innocent till he is proved to be guilty – It is equally well settled that suspicion howsoever strong can never take the place of proof – There is indeed a long distance between accused 'may have committed the offence' and 'must have committed the offence' which must be traversed by the prosecution by adducing reliable and cogent evidence – Presumption of innocence has been recognised as a human right – That an accused is presumed to be innocent till he is proved guilty beyond a reasonable doubt is a principle that cannot be sacrificed on the altar of inefficiency, inadequacy or inept handling of the investigation by the police – Investigation.

Police force: Investigation – Allegation of anti-minority bias – Held: It may not be wholly correct to say that the police deliberately make no attempt to prevent incidents of communal violence or that efforts to protect the life and property of the minorities is invariably half hearted or that instead of assailants the victims themselves are picked up by the police – There is also no reason to generalise that there is an attempt not to register cases against assailants and when such cases are registered loopholes are intentionally left to facilitate acquittals or that the evidence led in the Courts is deliberately distorted – No dispute that in certain cases such aberrations may take place – But such instances are not enough to denounce or condemn the entire force – The reports of the Commissions of Enquiry set up in the past cannot justify a departure from the rules of evidence or the fundamental tenets of the criminal justice system – The

benefit arising from any such faulty investigation ought to go to the accused and not to the prosecution – So also, the quality and creditability of the evidence required to bring home the guilt of the accused cannot be different in cases where the investigation is satisfactory vis-à-vis cases in which it is not – Investigation.

The prosecution case was that on the fateful day, PW2 was guarding his paddy crop in his field close to his house. PW3, one of the two sons of PW2 was sleeping at home while PW4 and one 'Z', said to be a close relative, was sleeping in the kitchen. The wife of PW2 and his daughters were sleeping in another room. A mob allegedly comprising nearly twenty people entered the house of PW2 and forcibly opened the door. Around the same time another house situated at some distance from PW2's house was on fire. PW3 heard accused 'G' calling for 'Munshi' which ostensibly was also how PW2 was known. Apprehending danger, PW3 escaped from the house. Accused 'G' injured him with the help of a spear. On his way out PW3 recognised two persons standing outside the house allegedly armed with *dao,* dagger etc. PW3 saw his father PW2 coming homeward. PW3 warned him that he may be killed by the mob that had attacked the house. PW2 watched the incident from a distance. One of the members of the mob shot an arrow at him which hit his right hand. After the mob left the place, PW-2 shouted to attract the attention of an army vehicle that was passing by and reached the spot. The daughters of PW2 were lying dead and his wife was lying injured in the middle of a paddy field near the house. He carried her home where she died after some time. 'Z' who was sleeping along with PW4 in the kitchen was also injured by the mob. PW4 stepped out of his house to take shelter behind the banana trees near the house and witnessed the entire incident from there. The trial court convicted and awarded sentence of life imprisonment to the appellant and others for offences punishable under Sections 448, 324 and 302 read with Section 34 IPC. The

High Court upheld the same.

An appeal was filed challenging the order of the High Court. The appeal was initially heard by a Division Bench of the Supreme Court comprising S.B. Sinha, J. and H.S. Bedi, J., who differed in their conclusions. While S.B. Sinha, J. acquitted the appellants giving them the benefit of doubt, Bedi, J. upheld their conviction and sentence and consequently dismissed the appeal. The matter thereafter came up before the 3 Judge Bench.

Allowing the appeal, the Court

Held: 1. A careful reading of the statement of PW2 showed that he was not an eyewitness to the killing of the victims as such. All that the witness saw from a distance was that 30-40 people had gathered in front of his house and there was a commotion including the shouts of his son who ran towards him to tell him not to go home because people were being attacked there. PW2 did not accuse any particular individual of assaulting or killing of the three victims. Even regarding identification of those persons he claimed to know only four who had come to his house and had called him. An injury said to have been received by him from an arrow shot was not mentioned in the First Information Report or medico-legally examined by the doctor. The deposition of PW2 suggested that a mob had entered his house and attacked the inmates. Besides, who committed what act resulting in what injury to either the prosecution witnesses or any one out of the dead was not evident from the deposition of the witness. Thus, PW2 was not a witness of the murder of any one of the three victims. [para 15] [337-B-E]

2. PW-3 did not claim to have seen the act of violence against the victims. He simply stated that 'G' and three others had entered the house and injured him with a spear whereupon he made good his escape, recognising two intruders on his way out. As to when and where and

by whom were his mother and sisters hacked to death was something on which the witness pleaded complete ignorance. Thus, PW3 was not an eye-witness to the occurrence although he might have observed certain incidents that preceded the actual act of killing of the victims. PW3 did not make any disclosure to the police, who was on the spot within five minutes of the occurrence, about the assailants nor did he do so till 2-3 days after the incident when the Investigating Officer interrogated him in the hospital. He also did not know about the lodging of the FIR nor did he know as to who had lodged the same and when. [para 19] [339-B-E]

3. All the prosecution witnesses except the two doctors examined at the trial deposed that the communal atmosphere in the area was surcharged as an aftermath of the demolition of the mosque, an event that took place just about a week before the occurrence in this case. Those affected by the disturbances were shifted to camps established by the administration. Deployment of a large police force in the area to which the Investigation Officer has referred in his deposition also was clear indicator of the atmosphere being surcharged and tense. That a house was set afire in the neighbourhood of the place of occurrence was also amply proved by the evidence on record. As a matter of fact, the police arrived on the spot within minutes of the commission of the gruesome murders not because any report was made to it about the said crime but because it had received information about a house having been set on fire. Once on the spot the police and the Army realised that there was much more at their hands than just an incident of fire. A mob comprising 35-40 people had intruded in the homestead of PW2 and committed cold blooded murder of three innocent persons, two of whom were female children of tender age. If the prosecution version were to be believed, the Investigating Officer had the opportunity of getting an eye witness and first hand account of the incident within minutes of the commission

of the crime. In the ordinary course, the Investigating Officer would have immediately recorded the First Information Report based on the eye witness account of the occurrence given by PW4 and started his investigation in the right earnest. That however did not happen. No effort was made by the Investigating Officer nor was there any explanation for his failure to ascertain from the alleged eye witness the sequence of events and the names and particulars of those who were responsible for the same. Instead, without the registration of the First Information Report, the Investigating Officer completed the inquest, prepared a site plan and got the post mortem of the dead conducted on 15th December, 1992, long before the First Information Report was registered at 11.00 p.m. late in the evening on that date. There can be only two explanations for this kind of a situation. One could be, that the Investigating Officer was so stupid, ill-trained, ignorant of the law and procedure that he did not realise the importance of getting a crime registered in the police station concerned before undertaking any investigation including conduct of an inquest, post mortem etc. The other explanation could be that since neither the Investigating Officer had any clue as to who the perpetrators of the crime were nor did the witnesses now shown as witnesses of the occurrence had any idea, the investigations started without any First Information Report being recorded till late at night on 15th December, 1992. The second explanation seemed more probable of the two. The Investigating Officer was a Sub Inspector of Police and the Station House Officer of Police Station Doboka. This would mean that he had sufficient experience in conducting investigations especially in cases involving heinous crimes like murder. The incident having taken place in an area which was apparently susceptible to communal violence and widespread disturbances as a result of the dispute over the demolition of the mosque, the same would have been reported to the higher officers in the police administration

who would in turn ensure appropriate action being taken with suitable care in the matter. The least which the Investigating Officer would do was to record the statement of the eye witnesses or send the eye witnesses to the police station for getting the First Information Report recorded. Interestingly, while the alleged witnesses to the occurrence were first sent to the police station, no one ever questioned them about the incident nor did the witnesses volunteer to make a statement. PW4 who was on the spot and who was alleged to have seen the occurrence was not even questioned by the Investigating Officer especially when he did not have any injury much less a serious one requiring immediate medical care and attention. Even if the eye witness was injured, there was no reason why his statement could not be recorded in the hospital to ensure registration of an FIR without undue delay and those responsible for committing the crime brought to book. Failure of the prosecution to provide any explanation much less a plausible one showed that the investigating agency had no clue about the perpetrators of the crime at the time when it reached the spot or soon thereafter nor did anyone claim to have seen the assailants, for otherwise there was no reason why they could not be named and an FIR registered immediately. From the deposition of PW2, it is clear that the FIR was drawn only after the Investigating Officer had through this witness got the people from the locality gathered. The officer then interrogated them and after deliberations with the elders of the community got a report scribed by PW5 naming as many as 13 persons as accused. PW5 in his deposition clearly admitted that PW2 had discussed in the gathering of the prominent people of the area the facts to be mentioned in the *ejahar.* There were nearly 100/200 people who had assembled when the *ejahar* was written by him. It is difficult to appreciate how a report prepared after such wide consultation and deliberations could carry a semblance of spontaneity to be credible in a

criminal trial of such a serious nature. Even the Investigating Officer was contributing to the creation of a report after confabulations with elders of the area. According to PW2 he had recognised only four of the accused who had come looking for him. There was no explanation as to how were the remaining accused named when he had not identified them at the time of the occurrence and at whose instance especially when according to the witness his sons were in the hospital when the *ejahar* was scribed. The Investigating Officer having prepared a site plan of the place of occurrence before the registration of the case and even before the statements of the witnesses were recorded under Section 161 Cr.P.C., did not make any mention about the banana trees behind which PW4 is said to have hidden himself. If the story regarding PW4 having had observed the occurrence from behind the banana trees was correct, the trees ought to appear in the site plan which was not the case. Absence of any banana trees in the area around the house was an indication of the fact that no implicit reliance could be placed upon the version of PW4. According to PW3 and PW4, after they emerged from their hideouts and after their father returned to the spot they started looking for the dead bodies with the help of a torch. If PW4 was right in his version, then the victims were hacked in front of the door of the house, there was no question of searching for the dead bodies with the help of torch light. The use of torch light to look for bodies showed that there was no source of light. The night was a foggy, cold December night. The presence of fog was admitted by PW4 in his deposition. Assuming that there was moonlight, the presence of fog was a disabling factor that made visibility poor for any one to observe the occurrence from a distance when a huge mob of 30-40 people was on the rampage. According to PW7, the Investigating Officer in the case a written *ejahar* was presented to him by PW2 when the former reached the spot on 14th December, 1992. If that were so, the least

which the officer would have done was to take that *ejahar* as the first information report regarding the occurrence and register a case of murder against those named in it. This admittedly was not done. In cross-examination the witness said that a written *ejahar* was presented to him by PW2 on 15th December, 1992 at 12.10 p.m. Now, even if that were true, there was no explanation why the officer delayed registration of the FIR till 11.00 p.m. on that day. The delay in the lodging of the FIR and the circumstances in which the *ejahar* was written, cast a serious doubt about the whole prosecution case especially when there was no explanation whatsoever for the failure of the Investigating Officer to record the report based on the alleged eye witness account immediately after he reached the spot. The non-examination of 'Z' injured witness at the trial was also inexplicable. 'Z' was allegedly taken out of the house by the accused persons and assaulted. The best person to say who were the persons responsible for the assault was this witness himself. The failure of the prosecution to put him in the witness box, in support of its version was also an important circumstance that cannot be legally brushed aside. The prosecution failed to examine other inmates who were inside the house and who had escaped unhurt in the occurrence. The medical evidence adduced in the case also did not support the prosecution version. According to the doctor PW1, who conducted the post-mortem examination on the dead bodies of the victims had deposed that the death had occurred 48 to 72 hours prior to the examination. If the prosecution version as given by alleged eye witnesses is accepted the victims had died within 12 hours of the post-mortem examination. This inconsistency in the medical evidence and the ocular evidence assumed importance rendering the version given by the prosecution witnesses suspicious. According to PW2, the appellant had shot an arrow towards him which missed the target but hurt the witness in his hand. There was no corroborative medical

evidence to suggest that PW2 had sustained any injury on the hand or any other part of his body. Even regarding the motive for commission of the crime the prosecution case was that the incident had its genesis in the demolition of the mosque and the large scale disturbances that followed. While it was evident that large scale disturbances had indeed taken place in the area including an incident of a house being set on fire in the neighbourhood of the place of occurrence, the previous enmity between some of the appellants and PW2 on account of a land dispute between them could be a possible reason for PW2 naming appellants and others close to him as assailants. Enmity between complainant party and the accused being a double-edged weapon there could be motive on either side for the commission of offence as also for false implication. [Para 26, 27] [341-D-H; 348-A-C]

4. It is one of the fundamental principles of criminal jurisprudence that an accused is presumed to be innocent till he is proved to be guilty. It is equally well settled that suspicion howsoever strong can never take the place of proof. There is indeed a long distance between accused 'may have committed the offence' and 'must have committed the offence' which must be traversed by the prosecution by adducing reliable and cogent evidence. Presumption of innocence has been recognised as a human right which cannot be wished away. [Para 28] [348-C-E]

Narendra Singh and Anr. v. State of M.P. **(2004) 10 SCC 699: 2004 (3) SCR 1148;** *Ranjitsingh Brahmajeetsingh Sharma v. State of Mahsrashtra and Ors.* **(2005) 5 SCC 294: 2005 (3) SCR 345;** *Ganesan v. Rama SRaghuraman and Ors.* **(2011) 2 SCC 83: 2011 (1) SCR 27;** *State of U.P. v. Naresh and Ors.* **(2011) 4 SCC 324: 2011 (4) SCR 1176 – relied on.**

5. In his dissenting judgment, Bedi, J. referred to as many as five different Reports of Commissions of

Enquiry set up over the past five decades or so to point out that the findings recorded in the reports submitted by the Commissions indicated an anti-minority bias among the police force in communal riot situations and investigations. Copious extracts from the reports reproduced in the judgment no doubt suggested that in situations when the police ought to protect the citizens against acts of communal violence, it has at times failed to do so giving rise to the perception that the police force as a whole is insensitive to the fears, concerns, safety and security of the minority communities. These reforms should be brought soon for the benefit of our society where every citizen regardless of his caste or creed is entitled to protection of his life, limb and property. It will indeed be a sad day for the secular credentials of this country if the perception of the minority communities about the fairness and impartiality of the police force were to be what the reports are suggestive of. And yet it may not be wholly correct to say that the police deliberately make no attempt to prevent incidents of communal violence or that efforts to protect the life and property of the minorities is invariably half hearted or that instead of assailants the victims themselves are picked up by the police. So also there is no reason to generalise and say that there is an attempt not to register cases against assailants and when such cases are registered loopholes are intentionally left to facilitate acquittals or that the evidence led in the Courts is deliberately distorted. No one can perhaps dispute that in certain cases such aberrations may have taken place. But such instances are not enough to denounce or condemn the entire force. For every life lost in a violent incident the force may have saved ten, who may have but for timely intervention been similarly lost to mindless violence. While the police force may have much to be sorry about and while there is always room for improvement in terms of infusing spirit of commitment, sincerity and selfless service towards the citizens it cannot be said that the entire force stands

discredited. At any rate the legal proposition formulated by Bedi J. based on the past failures do not appear to be the solution to the problem. The reports of the Commissions of Enquiry set up in the past cannot thus justify a departure from the rules of evidence or the fundamental tenets of the criminal justice system. That an accused is presumed to be innocent till he is proved guilty beyond a reasonable doubt is a principle that cannot be sacrificed on the altar of inefficiency, inadequacy or inept handling of the investigation by the police. The benefit arising from any such faulty investigation ought to go to the accused and not to the prosecution. So also, the quality and creditability of the evidence required to bring home the guilt of the accused cannot be different in cases where the investigation is satisfactory vis-à-vis cases in which it is not. The rules of evidence and the standards by which the same has to be evaluated also cannot be different in cases depending upon whether the case has any communal overtones or in an ordinary crime for passion, gain or avarice. The prosecution it is axiomatic, must establish its case against the accused by leading evidence that is accepted by the standards that are known to criminal jurisprudence regardless whether the crime is committed in the course of communal disturbances or otherwise. In short there can only be one set of rules and standards when it comes to trials and judgment in criminal cases unless the statute provides for any thing specially applicable to a particular case or class of cases. [para 30] [348-H; 349-A-H; 350-A-F]

7.Three innocent persons including two young children have been done to death in the incident in question which needs to be deprecated in the strongest terms but unless proved to be the perpetrators of the crime beyond a reasonable doubt, the appellants cannot be convicted and sentenced for the same. The appellants are acquitted giving them the benefit of doubt. [para 31] [350-G-H]

State of H.P. v. Gian Chand **(2001) 6 SCC 71: 2001 (3) SCR 247;** *Dilawar Singh v. State of Delhi* **(2007) 12 SCC 641;** *State of Punjab v. Daljit Singh* **(2004) 10 SCC 141;** *State of Punjab v. Ramdev Singh* **(2004) 1 SCC 421: 2003 (6) Suppl. SCR 995 – referred to.**

Case Law Reference:

2001 (3) SCR 247	**referred to**	**Para 27**
(2007) 12 SCC 641	**referred to**	**Para 27**
2003 (6) Suppl. SCR 995	**referred to**	**Para 27**
(2004) 10 SCC 141	**referred to**	**Para 27**
2004 (3) SCR 1148	**relied on**	**Para 28**
2005 (3) SCR 345	**relied on**	**Para 28**
2011 (1) SCR 27	**relied on**	**Para 28**
2011 (4) SCR 1176	**relied on**	**Para 29**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1068 of 2006.

From the Judgment & Order dated 29.6.2006 of the High Court of Gauhati in Criminal Appeal No. 133 of 2005.

Azim H. Laskar, Sachin Das and Abhijit Sengupta for the Appellants.

Avijit Roy, Deepika Ghatowar, Vartika Sahay (for Corporate Law Group) for the Respondent.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. This appeal arises out of a judgment and order dated 29th June, 2006, passed by the High Court of Judicature at Gauhati whereby Criminal Appeal No.133 of 2005 filed by the appellants has been dismissed and the conviction and sentence of life imprisonment awarded to them by the trial Court for offences punishable under Sections 448, 324 and 302 read with Section 34 IPC upheld.

2. The appeal was initially heard by a Division Bench of this Court comprising S.B. Sinha and H.S. Bedi, JJ., who differed in their conclusions. While S.B. Sinha, J. acquitted the

appellants giving them the benefit of doubt, Bedi, J. upheld their conviction and sentence and consequently dismissed the appeal. The appeal has, in that backdrop, been listed before us to resolve the conflict.

3. Briefly stated, the prosecution case is that at about 10.00 p.m. on December 14, 1992, Mohd. Taheruddin (PW2) a resident of village, Changmazi Pathar situate within the limits of Police Station Doboka, District Nagaon in the State of Assam was guarding his paddy crop in his field close to his house. Md. Mustafa Ahmed (PW3), one of the two sons of Mohd. Taheruddin was sleeping at home in one of the rooms while Md. Hanif Ahmed (PW4) was together with one Zakir, said to be a close relative, was sleeping in the kitchen. Sahera Khatoon wife of Mohd. Taheruddin and his daughters Hazera Khatoon, Jahanara Begum, Samana Khatoon and Bimala were sleeping in another room. A mob allegedly comprising nearly twenty people entered the house of Mohd. Taheruddin and forcibly opened the door. Around the same time another house belonging to one Nandu situate at some distance from Mohd. Taheruddin's house was on fire. The prosecution case is that Md. Mustafa Ahmed (PW3) heard accused Gopal Ghose calling for 'Munshi' which ostensibly is also how Mohd. Taheruddin was known. Md. Mustafa Ahmed (PW3) is said to have replied that Taheruddin was not at home. Apprehending danger, Md. Mustafa Ahmed escaped from the house but not before Gopal Ghose had injured him with the help of a spear. On his way out Md. Mustafa Ahmed is said to have recognised two persons standing outside the house allegedly armed with *dao,* dagger etc. Out of the house and in the field, he saw his father Mohd. Taheruddin coming homeward. Md. Mustafa Ahmed told him not to do so for he may be killed by the mob that had attacked the house. Taheruddin paid heed to the advice and watched the incident from a distance. According to his version Rahna Gour, one of the members of the mob, shot an arrow at him which hit his right hand. After the crowd had left the place he shouted to attract the attention of an army vehicle that was passing by and reached the spot only to find his daughters Bimala and Hazera lying dead and his wife

Sahera Khatoon lying injured in the middle of a paddy field near the house. He carried her home where she died after some time. Zakir Hussain who was sleeping along with Md. Hanif Ahmed (PW4) in the kitchen was also injured by the mob. According to the version of Md. Hanif Ahmed (PW4) three accused persons, namely, Kailash, Hari Singh and Ratan entered his room and took away Zakir with them. Hanif is said to have stepped out of his house to take shelter behind the banana trees growing near the house and witnessed the entire incident from there. According to his version Gopal Ghose, Kailash Gour, Gundulu Gour, Krishna Gour and Harendra Sarkar assaulted his mother while his sister Hazera Khatoon was attacked by Budhuram Timang, Hari Singh and Rahna. Bimala, the other sister, was similarly assaulted by Gopal, Ratan Das and Harendra Sarkar. The rest of the sisters, however, managed to escape unhurt.

4. The injured were then taken to Nagaon Civil Hospital by the police who had also arrived at the place of occurrence on receipt of intimation about a house having been put on fire in the neighbourhood. The dead bodies were removed in the army vehicle, while Zakir Hussain and Md. Mustafa Ahmed were medically examined by the medical officer who found the following injuries on them:

"Zakir Hussain

(1) There was vertical cut injury over the lip. Size 2" x ½".

(2) There are six cut injuries over the scalp each about 2" x ½".

(3) Left little finger was severed at the bone of the proximal phalange.

(4) There is swelling and tenderness over the right hand.

(5) There were two cut injuries over the back, on each side.

There was multiple cut injury with blunt injury of the

right hand with sharp cutting. Wounds were dangerous in nature.

Md. Mustafa Ahmed

(1) Penetrating injury of the right leg with sharp pointed weapon. Size 1/3" x ½".

The injury is fresh and margins were irregular.

(2) Simply cut injury by sharp pointed object."

5. The post-mortem examination on the dead bodies was conducted by Dr. Madhusudhan Dev Goswami (PW1) who reported incised wound on the right upper neck of Hazera Khatoon and two incised wounds one on the neck and other on left upper neck of Bimala Khatoon. Similarly, injuries were also noticed by the doctor on the dead body of Sahera Khatoon. After completion of the investigation the police filed a charge sheet against 14 persons out of whom 13 were named in the First Information Report. The accused persons were charged with offences punishable under Sections 302, 326, 324, 323, and 448 read with Section 34, IPC. The accused pleaded not guilty to the charges and claimed a trial. Accused Gopal Ghose, it is noteworthy, passed away during the trial.

6. By its judgment and order dated 18th June, 2005, the trial Court convicted 8 out of 14 persons for the offence of murder and sentenced them to undergo imprisonment for life and a fine of Rs.2,000/-, and in default of payment to suffer rigorous imprisonment for six months. The High Court has, as seen earlier, upheld the conviction of the appellants while acquitting Ratan Das, Gundulu Gour and Budhu Timang giving them benefit of doubt. Two appeals were filed against the said judgment and order, out of which viz. Crl. Appeal No.907 of 2006 filed by Harendra Sarkar has since been dismissed as abated upon the death of the appellant in that appeal. The present criminal appeal is, therefore, relevant only to appellants Kailash Gour, Krishna Gour, Hari Singh Gour and Rahna Gour.

7. We have heard learned counsel for the parties at considerable length. The prosecution has examined 7 witnesses in all. These are Dr. Madhusudhan Dev Goswami

(PW1), Mohd. Taheruddin (PW2), Md. Mustafa Ahmed (PW3), Md. Hanif Ahmed (PW4), Abdul Jabbar (PW5), Dr. Jiauddin Ahmed (PW6) and B.N. Kalita (PW7).

8. The deposition of Dr. Madhusudhan Dev Goswami (PW1) who conducted the post-mortem on the dead bodies of the three unfortunate victims leaves no manner of doubt that they suffered a homicidal death. The nature of the injuries found on the dead body of the deceased Smt. Sahera Khatoon and her two minor daughters Hazera Khatoon aged 7 years and Bimala Khatoon aged 3 years manifestly show that they suffered a homicidal death. To that extent we see no reason to interfere with the findings recorded by the trial Court and the High Court in appeal. It is noteworthy that even in the dissenting judgments delivered by S.B. Sinha and H.S. Bedi, JJ., their Lordships are unanimous on the cause of death of the three victims. The question, however, is whether the prosecution has established beyond a reasonable doubt that the appellants were the perpetrators of the crime. The prosecution has, in that regard, placed reliance upon the deposition of Mohd. Taheruddin (PW2) and his two sons named Md. Mustafa Ahmed (PW3) and Md. Hanif Ahmed (PW4). We shall refer in some detail to the depositions of these three witnesses especially because while Sinha J. has held that only Md. Hanif Ahmed (PW4) claims to be an eye witness to the occurrence, Bedi J. has taken the view that all the three witnesses were eye witnesses to the incident.

9. Mohd. Taheruddin (PW2) has in his deposition stated that the accused persons were known to him as they live within one mile from his village. On the date of occurrence he was guarding harvested paddy in the field to the West of his house. In his house his sons Md. Mustafa Ahmed and Md. Hanif and Zakir Hussain, a young boy, were sleeping. In another room of the house were his wife Sahera Khatoon and daughters Hazera Khatoon, Jahanara, Bimala and Samana Khatoon. He also used to sleep in that very room but on the date of occurrence he was in the field. He saw a group of 10-12 men coming from the North of his homestead and another group of 10-12 men

coming from the South. They assembled in front of his house and entered the premises. Accused Gopal Ghose called out his name and asked if 'Munshi' was at home. Hearing this, the witness started moving towards his house as there was a commotion. In the meantime his eldest son Mustafa Ahmed came and advised him not to do so as people were being attacked there. The boy ran towards the West through the paddy fields out of fear. The witness came close to the house to have a look and saw the mob striking the walls of his house with *dao* and *lathi*. A couple of youth were running away towards the West. Rahna Gour shot an arrow at the witness which hit the witness on his right hand. The accused came out from the house on the road, blew whistles and went away. The witness then reached his house and raised an alarm. An army vehicle also arrived. He saw the injured Bimala who had died. He also saw Hazera lying dead besides the road to the house. He took Bimala on his shoulder and stood on the road. He then found his wife Sahera Khatoon lying injured in the paddy field near the house and carried her home. She died immediately after being given water. His son Mustafa and Zakir sustained cut injuries. The Army personnel saw all this. Police was also with them. The Army sent the injured to Nagaon Civil hospital and took the dead bodies to Doboka Police Station.

10. There were disturbances over demolition of a mosque in the year 1992. He got his statement (*ejahar*) written by Abdul Jabbar and lodged the same under his signature in the police station. In cross-examination the witness stated that *ejahar* was written at his house on the 3rd day in the evening and that Investigating Officer Shri Kalita was present at that time. Other police personnel were also with him. The dead bodies were buried before the *ejahar* was written. Police, Army and the Magistrate were present there. While *ejahar* was being written at the house of the witness, he called the village President Abdul Jabbar and other prominent persons of the village and upon being advised by the Investigating Officer, Gaji Saheb also came. At the time of writing the *ejahar* his injured sons were at Nagaon Civil Hospital. Witness further stated that before the *ejahar* had been written, the Daroga had interrogated the

prominent persons. But the witness did not discuss anything with the prominent persons. He told them about his recognising a couple of the accused persons. After Jabbar had written the *ejahar*, he had read it out to the witness. Witness further stated that he and his son together named 13 persons in the *ejahar* out of whom he knew only 4 who had come to his house and called him.

12. In the *ejahar* he had written that apart from the 13 people named by him there were 30-35 other people. Rahna Gour's name was also written in the *ejahar*. The house of the witness is in the middle of a field and there are no houses nearby. The occurrence had taken place one week after the demolition of the mosque. He also had a case concerning a land dispute against accused Hari Singh and Kailash but did not know whether Gopal had got them out on bail in that case. He had also been arrested in connection with a case the year before. He denied having been arrested by the police on a number of other occasions.

13. The witness did not see whether the people who had assembled there were carrying anything in their hands. The rest of the people were in the courtyard when Gopal shouted and asked whether Munshi was at home. Till before hearing Mustafa's shout the witness had not moved. After being cautioned by Mustafa, the witness went back towards West and then stopped. Witness further stated that Nandu's brother's house was burnt when the Army personnel arrived. His house was 40-50 nals (70 ft.) away from that of Nandu. Before the Army vehicle had returned for the second time, Jabbar Bari, Gaji Sahah, Noor Islam, Hamid and others had arrived at his house.

14. None of the 30-35 people had chased the witness. Witness also stated that till before filing the *ejahar* he had not told the Investigating Officer about the occurrence. The next day the *Daroga* asked him to go gather a few people so that he could interrogate them. When the Investigating Officer came next day, he called the people. They were all muslims. He did not remember whether he had mentioned the moonlight in the *ejahar*. The witness was confronted with certain omissions in

the statement recorded under Section 161 Cr.P.C.

15. On a careful reading of the statement of Md. Taheruddin (PW2) we are of the view that he is not an eyewitness to the killing of the victims as such. All that the witness saw from a distance was that 30-40 people had gathered in front of his house and there was a commotion including the shouts of his son Mustafa, who ran towards him to tell him not to go home because people were being attacked there. The witness does not accuse any particular individual of assaulting or killing of the three victims. Even regarding identification of those persons he claimed to know only four who had come to his house and had called him. What is interesting is that an injury said to have been received by him from an arrow shot by Rahna Gour was not mentioned in the First Information Report or medico-legally examined by the doctor. The deposition of the witness suggests that a mob had entered his house and attacked the inmates. Besides, who committed what act resulting in what injury to either the prosecution witnesses or any one out of the dead is not evident from the deposition of the witness. We shall presently revert back to the deposition of this witness when we examine credibility of the First Information Report. We may for the present simply state that we agree with Sinha, J. that this witness is not a witness for the murder of any one of the three victims.

16. We may for now take up the deposition of Md. Mustafa Ahmed (PW3). In his deposition this witness stated that his family consisted of 9 persons including his father Taheruddin, mother Sahera Khatoon. On the fateful day of 14th December, 1992 he was at home while his father was guarding paddy in the field, 50 meters away. Accused Gopal came to the house calling for his father. The witness could recognise him by his voice and responded that he was not at home. He then asked where he had gone, the witness said that he had been guarding paddy in the field. Gopal and 12-14 people who had come with him then started thrusting daggers, spears etc. into the walls. They opened the bamboo door of his house. Gopal, Hari Singh and Kailash stood in front of the door. Gopal started poking him

with a spear which injured him. He pulled the spear out and ran out of the room along with the spear. He recognised two more men Haren Sarkar and Rahna Gour who were armed with *dao*, dagger, arrows etc. He knew them as they were from the same village. Thereafter the witness ran towards the field. His father was also coming towards the house but the witness stopped him and told him not to go home as he would be killed. The witness stated that he did not recognise the man who had hacked his two sisters Bimala Khatoon and Hazera Khatoon and his mother. He returned after 15 minutes and found his mother lying in a critical condition but had not died till then. He called the villagers and with their help got his mother home. His sisters were lying dead. Their bodies were also taken home. By the time his mother also died. Police also arrived within five minutes and took the witness and Zakir to the Civil Hospital. Both the witness and Zakir had sustained injuries.

17. In cross-examination the witness said that Zakir was not his consanguine brother but is distantly related to him. Within five minutes of the occurrence, officer in charge of Doboka P.S. arrived there with five policemen. But the witness did not know who had informed them about the incident. The witness did not tell the officer in charge about the occurrence. The officer in charge stayed back and the policemen and the driver took the witness to the police station from where they were taken to the hospital. The witness and Zakir stayed at the police station for half an hour. Police did not ask the witness about the occurrence. He was interrogated in the hospital two or three days after the incident. It is not known who lodged the *ejahar* and when. Disturbance over the demolition of the mosque were going on. People whose houses had been burnt or whose family members had died had taken shelter in the camp out of fear. He was terribly afraid when spears were being thrust into his room. While coming out he saw 15-20 men outside. But while inside he recognised three men and two more when coming out. Witness deposed :

"I had not seen who had killed my two sisters and where. A lot of people were there when I came out of the

house. I did not notice who had been assaulting whom and where."

18. When his father and he had been discussing the names of the assailants or the probable assailants, the men whom he had called were also with them.

19. From the above it is clear that the witness does not claim to have seen the act of violence against the victims. The witness simply says that Gopal and three others had entered the house and injured him with a spear whereupon he made good his escape, recognising two intruders on his way out. As to when and where and by whom were his mother and sisters hacked to death is something on which the witness pleads complete ignorance. In that view we respectfully agree with the opinion expressed by Sinha, J. that Md. Mustafa Ahmed (PW3) is not an eye-witness to the occurrence although he may have observed certain incidents that preceded the actual act of killing of the victims. It was also relevant that the witness did not make any disclosure to the police, who was on the spot within five minutes of the occurrence, about the assailants nor did he do so till 2-3 days after the incident when the Investigating Officer interrogated him in the hospital. He also did not know about the lodging of the FIR nor did he know as to who had lodged the same and when.

20. That brings us to the deposition of the only other witness who is said to be a witness to the occurrence. Md. Hanif Ahmed (PW4) was also like Md. Mustafa Ahmed at home when the mob attacked their house. The witness has stated that accused Kailash, Hari Singh and Ratan entered his room and took away Zakir with them. Out of fear the witness ran out of the house and took shelter under the banana trees growing near his house and observed the incident from there. The witness claimed to have seen accused Gopal, Kailash, Gundulu, Krishna and Haren Doctor giving blows on the person of his mother. Similarly, he also claimed to have seen Budhuram Timang, Hari Singh and Rahna hacking his sister Hazera. Bimala who was 4-5 years old was also similarly assaulted by accused Gopal, Ratan and Haren Doctor according to the witness. After the

incident accused persons left by which time his father had come to the house from the paddy field. The Army personnel who had come there sent Zakir and Mustafa to the Civil Hospital Nagaon for treatment.

21. The incident, according to the witness, happened on a moonlit night which enabled him to identify the assailants. The witness claimed that the police arrived at the place of occurrence in the meantime. The witness and his father searched for his mother and sisters with the help of a torch in the field and discovered their bodies within 3-4 minutes. While both the sisters had died, his mother died 10 minutes later. Police, according to the witness, came on the following day and interrogated them. FIR was written at the police station on the dictation of the witness and was signed by him. Witness further stated that he did not know whether his father had lodged any FIR to the police. Finally the police took a written report from him and his father. The witness was confronted with certain significant omissions in the statement made under Section 161 Cr.P.C.

22. Abdul Jabbar (PW5) is a witness who had scribed Ext.1. According to the witness *ejahar* was written at the house of Taher Ali whose house is 2 Kms. from that of this witness. He went to Taher's house where 100-200 people had gathered. Taher had discussed the things that should be mentioned in the *ejahar* and had given the names of the accused persons himself.

23. Dr. Ziauddin Ahmed (PW6) is a witness to the medical examination of the injured witnesses Mustafa Ahmed and Zakir and has proved the injury report.

24. Shri B.N. Kalita (PW7) is the Investigating Officer. In his statement this witness deposed that he was attached to the Doboka Police Station and received message from Biresh Dutta that a fire had occurred at the place of occurrence which information was entered in General Diary under Entry No.532 dated 14th December, 1992. He led the police staff to Mikir Gaon. Taheruddin lodged a formal *ejahar* there. The case was

registered and investigation taken up. He drew sketch of the place and conducted inquest and post-mortem on the dead-bodies and arrested the accused persons. The charge sheet was finally submitted by S.I. Dharma Kanta Talukdar.

25. In cross-examination this witness has stated that a large number of police had been deployed in the area for maintenance of law and order on account of disturbances arising out of the dispute over the demolition of the mosque. He received a written *ejahar* at the police station on 15th December, 1992 from Taheruddin at 12.10 p.m. He proved the omissions in the very statements of Mohd. Taheruddin (PW2), Md. Mustafa Ahmed (PW3) and Md. Hanif Ahmed (PW4) recorded under Section 161 Cr.P.C.

26. That being the state of evidence adduced in the case, the question is whether the deposition of Md. Hanif, the solitary eye witness, is reliable, having regard to the attendant circumstances. The prosecution witnesses except the two doctors examined at the trial have all deposed that the communal atmosphere in the area was surcharged as an aftermath of the demolition of the mosque, an event that took place just about a week before the occurrence in this case. Those affected by the disturbances were shifted to camps established by the administration. Deployment of a large police force in the area to which the Investigation Officer has referred in his deposition also was clear indicator of the atmosphere being surcharged and tense. That a house was set afire in the neighbourhood of the place of occurrence is also amply proved by the evidence on record. As a matter of fact, the police arrived on the spot within minutes of the commission of the gruesome murders not because any report was made to it about the said crime but because it had received information about a house having been set on fire. Once on the spot the police and the Army realised that there was much more at their hands than just an incident of fire. A mob comprising 35-40 people had intruded in the homestead of Taheruddin and committed cold blooded murder of three innocent persons, two of whom were female children of tender age. If the prosecution version were

to be believed, the Investigating Officer had the opportunity of getting an eye witness and first hand account of the incident within minutes of the commission of the crime. In the ordinary course, the Investigating Officer would have immediately recorded the First Information Report based on the eye witness account of the occurrence given by Md. Hanif and started his investigation in the right earnest. That is not, however, what happened. No effort was made by the Investigating Officer nor is there any explanation for his failure to ascertain from the alleged eye witness the sequence of events and the names and particulars of those who were responsible for the same. Instead, without the registration of the First Information Report, the Investigating Officer completes the inquest, prepares a site plan and gets the post mortem of the dead conducted on 15th December, 1992, long before the First Information Report was registered at 11.00 p.m. late in the evening on that date.

27. There can be only two explanations for this kind of a situation. One could be, that the Investigating Officer was so stupid, ill-trained, ignorant of the law and procedure that he did not realise the importance of getting a crime registered in the police station concerned before undertaking any investigation including conduct of an inquest, post mortem etc. The other explanation could be that since neither the Investigating Officer had any clue as to who the perpetrators of the crime were nor did the witnesses now shown as witnesses of the occurrence had any idea, the investigations started without any First Information Report being recorded till late at night on 15th December, 1992. We are inclined to believe that the second explanation is more probable of the two. We say so for reasons that may be summarised as under:

(i) The Investigating Officer was a Sub Inspector of Police and the Station House Officer of Police Station Doboka. It follows that he had sufficient experience in conducting investigations especially in cases involving heinous crimes like murder. We also assume that the incident having taken place in an area which was apparently susceptible to

communal violence and widespread disturbances as a result of the dispute over the demolition of the mosque, the same would have been reported to the higher officers in the police administration who would in turn ensure appropriate action being taken with suitable care in the matter.

(ii) The least which the Investigating Officer would do was to record the statement of the eye witnesses or send the eye witnesses to the police station for getting the First Information Report recorded. Interestingly, while the alleged witnesses to the occurrence were first sent to the police station, no one ever questioned them about the incident nor did the witnesses volunteer to make a statement. It defies one's imagination how Md. Hanif who was on the spot and who is alleged to have seen the occurrence was not questioned by the Investigating Officer especially when he did not have any injury much less a serious one requiring immediate medical care and attention. Even if the eye witness was injured, there is no reason why his statement could not be recorded in the hospital to ensure that an FIR is registered without undue delay and those responsible for committing the crime brought to book. Failure of the prosecution to provide any explanation much less a plausible one shows that the investigating agency had no clue about the perpetrators of the crime at the time when it reached the spot or soon thereafter nor did anyone claim to have seen the assailants, for otherwise there was no reason why they could not be named and an FIR registered immediately. This Court in *State of H.P. v. Gian Chand* (2001) 6 SCC 71 dealt with the effect of failure of prosecution to satisfactorily explain the delay in the lodging of the FIR and declared that if the delay is not satisfactorily explained the same is fatal to the prosecution. This Court observed:

> "If the prosecution fails to satisfactorily explain the delay and there is a possibility of embellishment in the prosecution version on account of such delay, the delay would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the court, the delay cannot by itself be a ground for disbelieving and discarding the entire prosecution case."

To the said effect is the decision of this Court in *Dilawar Singh v. State of Delhi* (2007) 12 SCC 641, where this Court observed:

> "In criminal trial one of the cardinal principles for the Court is to look for plausible explanation for the delay in lodging the report. Delay sometimes affords opportunity to the complainant to make deliberation upon the complaint and to make embellishment or even make fabrications. Delay defeats the chance of the unsoiled and untarnished version of the case to be presented before the court at the earliest instance. That is why if there is delay in either coming before the police or before the court, the courts always view the allegations with suspicion and look for satisfactory explanation. If no such satisfaction is formed, the delay is treated as fatal to the prosecution case."

Reference may also be made to the decisions of this Court in *State of Punjab v. Daljit Singh* (2004) 10 SCC 141 and *State of Punjab v. Ramdev Singh* (2004) 1 SCC 421 which also reiterated the legal position stated in the earlier mentioned decisions.

(iii) From the deposition of Mohd. Taheruddin (PW2), it is clear that the FIR was drawn only after the Investigating Officer had through this witness got the people from the locality gathered. The officer then interrogated them and after deliberations with the elders of the community got a report scribed by Abdul Jabbar (PW5) naming as many as 13 persons as accused. PW5 has in his deposition clearly admitted that Mohd. Taheruddin had

discussed in the gathering of the prominent people of the area the facts to be mentioned in the *ejahar.* There were nearly 100/200 people who had assembled when the *ejahar* was written by him. It is difficult to appreciate how a report prepared after such wide consultation and deliberations could carry a semblance of spontaneity to be credible in a criminal trial of such a serious nature. Even the Investigating Officer was contributing to the creation of a report after confabulations with elders of the area. Mohd. Taheruddin has in this regard deposed:

"While ejahar was being written at his house, he called the village President Abdul Jabbar and other prominent persons of the village and upon being advised by the I.O. Gaji Sahab also came. xxxxx The Daroga had interrogated prominent persons before the writing of ejahar."

(iv) According to Mohd. Taheruddin (PW2) he had recognised only four of the accused who had come looking for him. There is no explanation as to how were the remaining accused named when he had not identified them at the time of the occurrence and at whose instance especially when according to the witness his sons were in the hospital when the *ejahar* was scribed.

(v) The Investigating Officer having prepared a site plan of the place of occurrence before the registration of the case and even before the statements of the witnesses were recorded under Section 161 Cr.P.C., did not make any mention about the banana trees behind which Md. Hanif (PW4) is said to have hidden himself. If the story regarding PW4 having had observed the occurrence from behind the banana trees was correct, the trees ought to appear in the site plan which is not the case. Absence of any banana trees in the area around the house is an indication of the fact that no implicit

reliance can be placed upon the version of Md. Hanif (PW4).

(vi) According to PW3 and PW4, after they emerged from their hideouts and after their father returned to the spot they started looking for the dead bodies with the help of a torch. If PW4 was right in his version, then the victims were hacked in front of the door of the house, there was no question of searching for the dead bodies with the help of torch light.

(vii) The use of torch light to look for bodies shows that there was no source of light. The night was a foggy, cold December night. The presence of fog is admitted by PW4 in his deposition. Assuming that there was moonlight, the presence of fog was a disabling factor that made visibility poor for any one to observe the occurrence from a distance when a huge mob of 30-40 people was on the rampage.

(viii) According to Shri B.N. Kalita (PW7) the Investigating Officer in the case a written *ejahar* was presented to him by Taheruddin when the former reached the spot on 14th December, 1992. If that were so, the least which the officer would have done was to take that *ejahar* as the first information report regarding the occurrence and register a case of murder against those named in it. This admittedly was not done. In cross-examination the witness said that a written *ejaha*r was presented to him by Taheruddin on 15th December, 1992 at 12.10 p.m. Now, even if that were true, there is no explanation why the officer delayed registration of the FIR till 11.00 p.m. on that day. The delay in the lodging of the FIR and the circumstances in which the *ejahar* was written, cast a serious doubt about the whole prosecution case especially when there is no explanation whatsoever for the failure of the Investigating Officer to record the report based on

the alleged eye witness account immediately after he reached the spot.

(ix) The non-examination of Zakir, injured witness at the trial is also inexplicable. Zakir was allegedly taken out of the house by the accused persons and assaulted. The best person to say who were the persons responsible for the assault was this witness himself. The failure of the prosecution to put him in the witness box, in support of its version is also an important circumstance that cannot be legally brushed aside. The prosecution has failed to examine other inmates who were inside the house and who had escaped unhurt in the occurrence.

(x) The medical evidence adduced in the case also does not support the prosecution version. According to Dr. Madhusudhan Dev Goswami (PW1), who conducted the post-mortem examination on the dead bodies of the victims had deposed that the death had occurred 48 to 72 hours prior to the examination. If the prosecution version as given by alleged eye witnesses is accepted the victims had died within 12 hours of the post-mortem examination. This inconsistency in the medical evidence and the ocular evidence assumes importance rendering the version given by the prosecution witnesses suspicious.

(xi) According to Mohd. Taheruddin (PW2) the appellant had shot an arrow towards him which missed the target but hurt the witness in his hand. There is no corroborative medical evidence to suggest that Taheruddin has sustained any injury on the hand or any other part of his body.

(xii) Even regarding the motive for commission of the crime the prosecution case is that the incident had its genesis in the demolition of the mosque and the large scale disturbances that followed. While it is evident that large scale disturbances had indeed

taken place in the area including an incident of a house being set on fire in the neighbourhood of the place of occurrence, the previous enmity between some of the appellants and Taheruddin on account of a land dispute between them could be a possible reason for Taheruddin naming appellants and others close to him as assailants. Enmity between complainant party and the accused being a double-edged weapon there could be motive on either side for the commission of offence as also for false implication.

28. It is one of the fundamental principles of criminal jurisprudence that an accused is presumed to be innocent till he is proved to be guilty. It is equally well settled that suspicion howsoever strong can never take the place of proof. There is indeed a long distance between accused 'may have committed the offence' and 'must have committed the offence' which must be traversed by the prosecution by adducing reliable and cogent evidence. Presumption of innocence has been recognised as a human right which cannot be wished away. *See Narendra Singh and Anr. v. State of M.P.* (2004) 10 SCC 699 and *Ranjitsingh Brahmajeetsingh Sharma v. State of Mahsrashtra and Ors.* (2005) 5 SCC 294. To the same effect is the decision of this Court in *Ganesan v. Rama SRaghuraman and Ors.* (2011) 2 SCC 83 where this Court observed:

> "Every accused is presumed to be innocent unless his guilt is proved. The Presumption of innocence is human right. Subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence in India."

29. The above views were reiterated by this Court in *State of U.P. v. Naresh and Ors.* (2011) 4 SCC 324.

30. In his dissenting judgment our esteemed Brother, Bedi, J. has referred to as many as five different Reports of Commissions of Enquiry set up over the past five decades or so to point out that the findings recorded in the reports

submitted by the Commissions indicate an anti-minority bias among the police force in communal riot situations and investigations. Copious extracts from the reports reproduced in the judgment no doubt suggest that in situations when the police ought to protect the citizens against acts of communal violence, it has at times failed to do so giving rise to the perception that the police force as a whole is insensitive to the fears, concerns, safety and security of the minority communities. Whether these reports have been accepted by the governments concerned and if so how far have they contributed to the reform of the force is a matter with which we are not directly concerned in this case. All that we need to say is that sooner such reforms are brought the better it would be for an inclusive society like ours where every citizen regardless of his caste or creed is entitled to protection of his life, limb and property. It will indeed be a sad day for the secular credentials of this country if the perception of the minority communities about the fairness and impartiality of the police force were to be what the reports are suggestive of. And yet it may not be wholly correct to say that the police deliberately make no attempt to prevent incidents of communal violence or that efforts to protect the life and property of the minorities is invariably half hearted or that instead of assailants the victims themselves are picked up by the police. So also there is no reason for us to generalise and say that there is an attempt not to register cases against assailants and when such cases are registered loopholes are intentionally left to facilitate acquittals or that the evidence led in the Courts is deliberately distorted. No one can perhaps dispute that in certain cases such aberrations may have taken place. But we do not think that such instances are enough to denounce or condemn the entire force for ought we know that for every life lost in a violent incident the force may have saved ten, who may have but for timely intervention been similarly lost to mindless violence. Suffice it to say that while the police force may have much to be sorry about and while there is always room for improvement in terms of infusing spirit of commitment, sincerity and selfless service towards the citizens it cannot be said that the entire force stands discredited. At any rate the legal proposition formulated by Bedi

J. based on the past failures do not appear to us to be the solution to the problem. We say with utmost respect to the erudition of our Brother that we do not share his view that the reports of the Commissions of Enquiry set up in the past can justify a departure from the rules of evidence or the fundamental tenets of the criminal justice system. That an accused is presumed to be innocent till he is proved guilty beyond a reasonable doubt is a principle that cannot be sacrificed on the altar of inefficiency, inadequacy or inept handling of the investigation by the police. The benefit arsing from any such faulty investigation ought to go to the accused and not to the prosecution. So also, the quality and creditability of the evidence required to bring home the guilt of the accused cannot be different in cases where the investigation is satisfactory vis-à-vis cases in which it is not. The rules of evidence and the standards by which the same has to be evaluated also cannot be different in cases depending upon whether the case has any communal overtones or in an ordinary crime for passion, gain or avarice. The prosecution it is axiomatic, must establish its case against the accused by leading evidence that is accepted by the standards that are known to criminal jurisprudence regardless whether the crime is committed in the course of communal disturbances or otherwise. In short there can only be one set of rules and standards when it comes to trials and judgment in criminal cases unless the statute provides for any thing specially applicable to a particular case or class of cases. Beyond that we do not consider it necessary or proper to say anything.

31. We are conscious of the fact that three innocent persons including two young children have been done to death in the incident in question which needs to be deprecated in the strongest terms but unless proved to be the perpetrators of the crime beyond a reasonable doubt, the appellants cannot be convicted and sentenced for the same. We accordingly allow this appeal and acquit the appellants giving them the benefit of doubt. They shall be set free forthwith unless required in connection with any other case.

D.G. Appeal allowed.

SHANKER SINGH
v.
NARINDER SINGH & ORS.
(Civil Appeal No. 3249 of 2005)

DECEMBER 15, 2011

[P. SATHASIVAM AND H.L. GOKHALE, JJ.]

Specific Relief Act, 1963 – ss. 12, 14 and 20 – Agreement for sale of immovable property between appellant-vendor and respondent-purchaser – Suit for specific performance by respondent-purchaser – Decreed by trial court – First Appellate Court, however, held that the whole of the agreement was incapable of specific performance and set aside the decree of specific performance – High Court decreed the suit after recording the statement on behalf of the respondents that they were relinquishing that part of the agreement which was not capable of being performed – Held: The party seeking part performance must unambiguously relinquish all claims to performance of remaining part of the contract – In the present case the offer of relinquishment by the respondents was not unambiguous and it was not clear as to how the agreement could be acted upon – In the peculiar facts and circumstances of the case inspite of the offer of relinquishment made by the respondents, the specific performance of the agreement cannot be granted, solely on the ground that it is incapable of being performed – The High Court erred in applying the provisions of ss.12, 14 and 20 of the Act to the facts of the present case and in exercising its discretion, since this was not a case for specific performance – Order passed by High Court set aside – Suit filed by the respondents dismissed – However, to meet the ends of justice, appellant directed to pay the respondents an amount of Rs. 5,00,000/- (inclusive of the earnest money with due return thereon, and compensation).

The appellant-vendor entered into an agreement to

sell certain property with respondent no.1-purchaser and received earnest money therefor. The property to be sold consisted of two parts viz. agricultural land, and a house property. On the agreed date of registration, the appellant did not turn up at the office of the Sub-Registrar, whereupon the respondent gave a notice to the appellant to execute the sale deed. The appellant did not respond, on which respondent no.1 filed suit for specific performance of the agreement. The appellant *inter alia* contended that he did not have the authority to enter into the agreement to sell ½ share in the house property which belonged to his wife. The trial court, however, decreed the suit for specific performance. Appellant challenged the judgment by filing appeal. The First Appellate court found fault with the respondents' claim on two counts - firstly, that the appellant could not sell, or agree to sell the property of his wife without her written consent, and therefore the agreement was incapable of being performed in respect of the house and secondly- that though the agreement provided for the sale of 92 Kanals and 17 Marlas of land, it was actually found to be 94 Kanals and 16 Marlas (i.e. 1 Kanal and 19 Marlas in excess) and such excess share of land could not be segregated. The court therefore, held that the whole of the agreement was incapable of specific performance and setting aside the decree of specific performance, directed refund of the earnest money.

The respondents challenged the judgment of the First Appellate Court by filing a Regular Second Appeal in the High Court. However, the respondents submitted in the High Court that they were ready to give up the claim for ½ the share of the appellant's wife in the house, and were also ready to restrict themselves to the purchase of land of 92 Kanals and 17 Marlas as per the agreement, and nothing more. The respondents submitted that they were entitled to relinquish the part of the agreement which was not enforceable, and the same was permissible under Section 12(3) of the Specific Relief

Act, 1963. The High Court accepted the submission, and decreed the suit filed by the respondents for specific performance for agriculture land admeasuring 92 Kanals and 17 Marlas after recording the statement of the counsel for the respondents that they were relinquishing that part of the agreement which was not capable of being performed.

In the instant appeal, the appellant *inter alia* contended that the agreement was incapable of being implemented as rightly held by the First Appellate Court, and that the High Court had erred in its application of the provisions of Section 12, 14 and 20 of the Act - Firstly, since there was no specific reference to the price of the land per Kanal or per Marla as held by the First Appellate Court and secondly, since the relinquishment was not unambiguous. It was contended that the respondents had offered to give up their claim for excess land, but it was not possible to state that the claim was being given up with respect to a particular parcel of land bearing a specific Khasra number and that the agreement was vague in nature and since the proposed relinquishment was also ambiguous, the agreement was incapable of being performed.

The questions which therefore arose for determination in the instant appeal were mainly two viz. (a) whether the High Court erred in applying the provisions of Sections 12, 14 and 20 of the Specific Relief Act 1963, and (b) whether the agreement in question being vague in nature was incapable of being performed.

Allowing the appeal, the Court

HELD:1.1. Damages and specific performance are both remedies available upon breach of obligations by a party to the contract. The former is considered to be a substantial remedy, whereas the latter is a specific remedy. It is true that explanation (i) to Section 10 of the Act provides that unless and until the contrary is proved,

the Court shall presume that breach of contract to transfer immovable property cannot be adequately relieved by compensation in money. However, this presumption is not an irrebuttable one. That apart, for a specific performance of a contract of sale of immovable property, there must be certainty with respect to the property to be sold. [Para 19] [366-B-C]

1.2. Though the respondents submitted that the relinquishment of a part of the agreement was permissible, however, the relinquishment has to be unambiguous. The party seeking part performance must unambiguously relinquish all claims to performance of remaining part of the contract. In the present case the offer of relinquishment by the respondents cannot be said to be an unambiguous one, and it will be difficult to decide as to which portion of the land is to be segregated to be retained with the appellant, and which portion is to be sold. Firstly, this is because as rightly noted by the First Appellate Court, the agreement does not specifically mention the price of the land, and in the proposed relinquishment, the respondents have not stated as to which portion of land (admeasuring 1 Kanal and 19 Marlas) they were agreeable to retain with the appellant. Secondly, in the agreement there is also a mention of 'a motor, bore, passage, fan and water pump fitted with engine and without engine along with the place for placing garbage including shamlat' amongst the properties which were being sold. It is not on record as to which parcel of land is having all these features. A question will therefore arise as to with whom such a parcel of land is to be retained. Obviously, a segregation of the land in dispute into two portions will be difficult. [Para 20] [366-G-H; 367-A-D]

1.3. In the present case there is one more difficulty viz. with respect to the relinquishment concerning the house. The First Appellate Court had categorically observed in its judgment, that the appellant's brother

appeared to be the owner of the other ½ share of the house, and the remaining ½ share was in the name of his wife, and that the appellant did not have any authority to sell it. The judgment of the High Court does not show that this finding had been challenged in the Second Appeal. Nor was any submission made in this behalf before this Court. What the respondents offered was to give up the claim for the share of the appellant's wife, and also the claim for the excess land of 1 Kanal and 19 Marlas which was accepted by the High Court in its impugned judgment. The respondents, however, claimed to retain the alleged ½ share of the appellant, as can be seen from the order dated 19.10.1983 passed at the time of admission of the second appeal. The respondents made a statement at the admission stage that they were ready to pay the full consideration for the land as stipulated in the agreement, and for the share of the appellant in the house. This order dated 19.10.1983 records that the respondents were ready to give up their claim for ½ the share of the house owned by the appellant's wife, but maintained the claim for the share of the appellant in the house. As against that it appears from the judgment of the First Appellate Court, that the appellant did not have any such share in the house. His wife had ½ share, and his brother had ½ share. In the teeth of this finding of the First Appellate Court, which is neither challenged nor reversed by the High Court, the proposed relinquishment cannot be said to be a correct and unambiguous one. It does not alter the scenario and the agreement continues to remain incapable of performance. In any case it is not clear as to how such an agreement could be acted upon. [Paras 21, 22] [367-E-H; 368-A-C]

1.4. In the peculiar facts and circumstances of this case inspite of the offer of relinquishment made by the respondents, the specific performance of the agreement cannot be granted, solely on the ground that it is incapable of being performed. The High Court erred in applying the provisions of Sections 12, 14 and 20 of the

Act to the facts of the present case and in exercising its discretion, since this was not a case for specific performance. The order passed by the High Court in Regular Second Appeal is set aside. The suit filed by the respondents will have to be dismissed. [Para 23] [368-D-E]

1.5. The respondents had paid the earnest money of Rs. 28,000/- at the time of entering into the agreement way back on 12.1.1977 i.e. nearly 35 years ago. The respondents will therefore have to be compensated adequately. It cannot be ignored that inspite of the agreement, the land has remained with the appellant all throughout in view of the orders passed by the courts from time to time, due to which he has benefited. The specific performance of the agreement is being denied basically because of the finding that the agreement was incapable of being performed inspite of the offer of relinquishment. It is an adage that money doubles itself in ten years, and on that basis the amount of Rs. 28,000/- with an appropriate interest will come to atleast Rs. 3,50,000/-. If the land was with the respondents, they would have earned much more. An adequate amount is to be paid to the respondents by way of compensation and in lieu of specific performance of the concerned agreement. Accordingly, to meet the ends of justice, the appellant should be directed to pay the respondents an amount of Rs. 5,00,000/- which will be inclusive of the earnest money with due return thereon, and compensation. [Para 24] [368-F-H; 369-A-D]

Mayawanti v. Kaushalya Devi **1990 (3) SCC 1: 1990 (2) SCR 350 and** *Surjit Kaur v. Naurata Singh* **2000 (7) SCC 379: 2000 (3) Suppl. SCR 259 – relied on.**

Kalyanpur Lime Works Ltd. v. State of Bihar **AIR 1954 SC 165: 1954 SCR 958 and** *Rachakonda Narayana v. Ponthala Parvathamma* **2001 (8) SCC 173: 2001 (2) Suppl. SCR 71 – referred to.**

Case Law Reference:

1954 SCR 958	**Referred to.**	**Para 15**
2001 (2) Suppl. SCR 71	**Referred to.**	**Para 15**
1990 (2) SCR 350	**Relied on.**	**Para 19**
2000 (3) Suppl. SCR 259	**Relied on.**	**Para 20**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3249 of 2005.

From the Judgment & Order dated 8.4.2003 of the High Court of Punjab & Haryana at Chandigarh in Civil Regular Second Appeal No. 1338 of 1983.

R. Venkatramni, Sanjiv Das, B.P. Gupta, Mohan Pandey for the Appellants.

K.V. Viswanathan, Rohit Tondon, Rajat Khatry, Shyam D. Nandan, Subramonium Prasad for the Respondents.

The Judgment of the Court was delivered by

H.L. GOKHALE J.1. This appeal by special leave under Article 136 of the Constitution of India, seeks to challenge the judgment and order dated 8.4.2003 rendered by a learned Single Judge of the Punjab and Haryana High Court, in Civil Regular Second Appeal No. 1338/1983. The learned Single Judge has allowed the said second appeal by the respondent Nos. 1 and 2 (contesting respondents and original plaintiffs), who had filed a suit for specific performance of an agreement entered into with the appellant (original defendant No. 1). Although various questions of law are sought to be raised in this appeal, the relevant questions for our determination are mainly two viz. (a) whether the High Court has erred in applying the provisions of Sections 12, 14 and 20 of the Specific Relief Act 1963 (hereinafter referred as 'the act' for short), and (b) whether the agreement in question being vague in nature was incapable of being performed?

Facts leading to this present appeal are as follows:-

2. On 12.1.1977 the appellant herein, a resident of Village

Dera Saidan entered into an agreement to sell certain property with the respondent No. 1, a resident of Dera Mainda, both villages being in Tehsil Sultanpur, Distt. Kapurthala of State of Punjab. The property to be sold consisted of two parts viz. agricultural land, and a house property. The Agricultural lands were bearing Khasra nos. 25/21/1-1/11-19, 26//24/6-11, 10/8-0, 12/5-8, 19/6-13, 20/8-0, 25//5/8-0, 15/8-0, 16/8-0, 17-8-0, 18/6-14, 21/2/5/7, 22/5-14, 23/8-0, 24/8-0, 25/7-18, 26/2-0, 34//2/6-14, 25//13/3-13.

3. The relevant clause of the agreement stated as follows:-

"Whereas the first party is the owner of ½ share in 65-13 and the total area of the first party is 92-K-17M and the remaining one house in the abadi Dera Saidan bounded by the custodian on the east, Kartar Singh on west, Pahar-passage on the south and the ½ share belongs to the wife of the first party namely Pritam Kaur. Now I am in need of purchasing property and therefore, now I am executing this writing in my full senses and dealing to sell the ½ share in lands measuring 92K-17M along with motor, bore, passage, fan and water pump fitted with engine and without engine along with the place for placing garbage including shamlat and including passage and all the rights which vest in Pritam Kaur and also execute this deal for sale on behalf of Pritam, with the party of the 2nd part for a total consideration of Rs. 1,24,500/- and I have received a sum of Rs. 28,000/- in cash as advance money in front of the witnesses. The purchaser will get the registry executed on 25th day of Magh 2034 and the possession will be handed over at the time of registry."

It was also agreed that if the appellant violated the terms of the agreement, then the respondents were entitled to the recovery of Rs. 28,000/- as earnest money and Rs. 28,000/- as damages, the total coming to Rs. 56,000/. It was further agreed that if there was any addition or decrease in the area agreed to be sold belonging to appellant, the price of the same was to be adjusted accordingly.

4. It so transpired, that on the agreed date of registration

the appellant did not turn up at the office of the Sub-Registrar, and hence the respondent gave a notice to the appellant to execute the sale deed. The appellant did not respond, and therefore the respondent No. 1 filed Suit No. 21/1978 in the Court of Sub Judge 1st Class, Sultanpur Lodhi for the specific performance of the agreement. The wife of Shanker Singh, Pritam Kaur was joined as defendant No.2. (She is reported to have expired in 1997). The other co-sharers of the land had sold their land in dispute in favour of one Joginder Kaur and three others who were joined as defendant Nos. 3 to 6 (Respondent Nos. 4 to 7 in the Civil Appeal).

5. The appellant raised various defences. Firstly he denied having entered into the agreement, and then he claimed of having received only Rs. 8,000/- and not Rs. 28,000/- as earnest money. Thereafter, he contended that he did not have the authority to enter into the agreement to sell ½ share in the house property which belonged to his wife. Lastly he contended that he alongwith his two minor sons Amrik Singh and Balbinder Singh formed a Hindu Undivided Family (HUF), and that he could not sell the coparcenery property except in the case of legal necessity and for the benefit of the family.

6. The Trial Court framed the following issues:

(1) Whether the agreement in question was executed by ShankerSingh defendant in his own behalf and on behalf of defendant No.2 for consideration?

(2) Whether Shanker Singh was competent to enter into agreement onbehalf of defendant No. 2?

(3) Whether the property in suit is the co-parcenary property asalleged in para No. 1 (on merits) of the written statement filed bydefendants No. 1 & 2?

(4) Whether the plaintiffs have been ready and willing to perform theirpart of the agreement?

(5) Whether defendant No. 1 has committed breach of the agreement?

(6) Whether the plaintiffs are entitled for specific performance of theamount claimed?

(7) Relief.

7. The respondent examined himself, the writer of the agreement and one of the witnesses of the agreement to prove the document of sale. The Trial Court held on issue No. 1 that the evidence of the writer of the agreement and that of the attesting witness was reliable, and that the earnest money of Rs. 28,000/- had in fact been paid. The agreement in question was therefore proved to be a duly executed document. This finding has been left undisturbed in the first appeal as well as in the second appeal.

8. As far as the second issue with respect to the competence of the appellant to enter into the agreement on behalf of his wife is concerned, although the wife of appellant Smt. Pritam Kaur did file a separate written statement, she did not enter into the witness box. The Trial Court therefore, held that an adverse inference will have to be drawn that she had given such an authority to her husband to sell her property. It further held that when Shanker Singh had agreed to sell his entire land, there was no logic on his part to retain the house, when he alongwith his wife had decided to shift to some other place after purchasing some other property as is evidenced from the agreement.

9. As far as issue No. 3 is concerned, the appellant contended that he had purchased the land in dispute from the proceeds of the sale of his ancestral land at village Nihaluwal, which ancestral land belonged to his father Lachhman Singh. He produced documents which showed that he as well as his brother Puran Singh and his sisters had sold their lands at village Nihaluwal. However, the appellant could not prove that the land in dispute was purchased from the proceeds of the sale of the land which came to his share from his father. The learned Single Judge noted that in any case the property in dispute was not one inherited by the appellant from his father. He observed that the land in dispute for being proved to be an ancestral one, must be shown to have been held at one time by the ancestor,

and that it has come to the appellant by survivorship. The learned Trial Judge therefore held that the disputed land could not be held to be a co-parcenery property wherein the minors had any share. The burden that the disputed land, was a co-parcenery property was on the appellant, and he had failed to discharge the same.

10. The Trial Judge held that the respondents were of course ready and willing to perform their part of agreement, and it is the appellant who had failed to discharge his obligation. The learned Judge therefore decreed the suit for specific performance by his judgment and order dated 20.2.1980.

11. The appellant herein challenged this judgment in Civil Appeal No. 62 of 1980 (which appears to have been numbered subsequently as Civil Appeal No. 92 of 1981). The learned Additional District Judge who heard the appeal held that as far as the agreement is concerned, the same had been duly executed, and that the appellant had received the amount of Rs. 28,000/- as earnest money. As far as the issue with respect to the interest of the minors is concerned, he held that for proving the property to be ancestral, the appellant had to show that the land in Village Nihaluwal was originally held by his father Lachhman Singh, and it was the same land which was sold by him and those proceeds had led to the purchase of the land at Dera Saidan. The learned Judge however, noted that no documentary evidence of holding of Lachhman Singh with respect to the land at Nihaluwal had been produced, nor was there any revenue entry of the name of Lachhman Singh in the disputed land at Dera Saidan. Hence the disputed land could not be held to be co-parcenery property.

12. The First Appellate Court however found fault with the respondents' claim on two counts. Firstly, it noted in para 6 of its judgment that 'although it has not been made clear in the agreement, it appears that Puran Singh, (the brother of the appellant) was the owner of the other ½ share in the house as Puran Singh and Shanker Singh had purchased their land jointly in equal shares in Village Dera Saidan.' There was no dispute that ½ share of the house was owned by Pritam Kaur, wife of

the appellant. She had filed a written statement opposing the decree. Therefore, in the same paragraph the court subsequently observed 'it has already been held that even in respect of half the share in the house, Shanker Singh, defendant No. 1 had no authority to sell the same and the plaintiffs have no right to claim a decree for the same.' The Court therefore held by its judgment and order dated 23.2.1983 that the appellant could not sell, or agree to sell the property of his wife without her written consent, and therefore the agreement was incapable of being performed in respect of the house.

13. The second count on which the First Appellate Court found the claim of the respondents to be incapable of acceptance was that though the agreement provided for the sale of 92 Kanals and 17 Marlas of land, it was actually found to be 94 Kanals and 16 Marlas (i.e. 1 Kanal and 19 Marlas in excess). After examining the evidence on record, the Court observed as follows:-

> "……Now in the agreement Ex. P.1 the consideration of the whole property has been fixed at Rs. 1,24,500/- and the consideration for the house has not been determined separately. Again, the agreement provides for the sale of 92 Kanals 17 Marlas of land and at the end it has been added that if any land was found to be in excess or deficient, then the consideration would be increased or decreased correspondingly. Now, in actual fact it has been found that the holding of Shanker Singh is 94 Kanals 16 Marlas. However, in the agreement no separate consideration for the land has been given nor is the rate of the sale given and it is not possible to determine as to what should be the cost of the excess land of 1 Kanals 10 Marlas. Had the price of the land been mentioned separately, it could have been possible to work out the price of the excess area by mathematical calculation but as the agreement stands this is not possible….."

It was obvious that such an excess share of land could not be segregated. The court therefore, held that the whole of the agreement was incapable of specific performance. Hence it set

aside the decree of specific performance. The Court found fault with the appellant also for entering into the agreement for sale of ½ share in the house belonging to his wife without any authority. It, therefore, directed refund of the earnest money of Rs. 28,000/-.

14. The respondents challenged the judgment of the First Appellate Court by filing a Regular Second Appeal No. 1338 of 1983 in the High Court. However, having noted the finding of the First Appellate Court that Smt. Pritam Kaur had ½ share in the house property, and it could not be sold by the appellant herein, and also since the land was found to be in excess by 1 Kanal and 19 Marlas, the respondents submitted in the High Court that they were ready to give up the claim for ½ the share of Smt. Pritam Kaur in the house, and were also ready to restrict themselves to the purchase of land of 92 Kanals and 17 Marlas as per the agreement, and nothing more. The order passed at the time of admission of the second appeal reads as follows:-

Dt. The 19th October, 1983.

Present

The Hon'ble Mr. Justice J.M. Tandon

For the appellant :- Mr. Anand Swaroop, Sr. Advocate

with Mr. Sanjiv Pabbi, Adv.

For the respondents:- Mr. H.S. Kathuria, Adv. For Res. No. 1 and 2

Order

Mr. Sanjiv Pabbi, learned counsel for the appellants, states that the appellants are prepared to pay full consideration of Rs. 1,24,000/- as stipulated in the agreement for the purchase of the land and the share of Shanker Singh respondent in the house. Says further that the appellants will not press for the transfer of half share of the house which is owned by Pritam Kaur, wife of Shanker Singh.

Admitted.

Sd/-
J.M. Tandon
Judge"

15. The High Court therefore, framed the substantial questions of law as follows:-

> "Whether the plaintiffs are entitled to specific performance of the agreement in respect of valid part of the agreement on payment of the entire sale consideration in terms of Section 12 of Specific Relief Act, 1963."

It was submitted on behalf of the respondents herein that they were entitled to relinquish the part of the agreement which was not enforceable, and the same was permissible under Section 12 (3) of the Act. They relied upon the dicta of this Court in *Kalyanpur Lime Works Ltd. Vs. State of Bihar* reported in AIR 1954 SC 165 to the effect that such an relinquishment can be made at any stage of the proceedings. This proposition of a Bench of three Judges in *Kalyanpur Lime Works* (supra) has been reiterated by this Court in *Rachakonda Narayana Vs. Ponthala Parvathamma* reported in 2001 (8) SCC 173. The learned Judge hearing the second appeal accepted this submission, and by his impugned judgment and order allowed the second appeal, and decreed the suit filed by the respondents for specific performance for agriculture land admeasuring 92 Kanals and 17 Marlas after recording the statement of the counsel for the respondents that they were relinquishing that part of the agreement which was not capable of being performed.

16. Mr. Venkataramani, learned senior counsel appearing for the appellant assailed the impugned judgment on various grounds, as against which Mr. Vishwanathan, learned senior counsel appearing for the respondents defended the judgment as a proper one in the facts of the case. Amongst other submissions, it was contented on behalf of the appellant that minors' share could not have been sold without the permission of the Court in view of the provision of Section 8 (2) of the Hindu

Minority and Guardianship Act, 1956. However in view of the concurrent findings as recorded all throughout in the present case, one cannot say that the minor sons of the appellant had any share in the concerned property which required the permission of the Court for its sale. It is, therefore, not possible to accept this submission.

17. It was then submitted that the agreement was incapable of being implemented as rightly held by the Additional District Judge, and that the High Court had erred in its application of the provisions of Section 12, 14 and 20 of the act. Firstly, this was on the ground that there was no specific reference to the price of the land per Kanal or per Marla as held by the Additional District Judge. Secondly, it was submitted that the relinquishment was not unambiguous. The respondents had offered to give up their claim for such excess land, but it was not possible to state that the claim was being given up with respect to a particular parcel of land bearing a specific Khasra number. The agreement was vague in nature and since the proposed relinquishment was also ambiguous, the agreement was incapable of being performed.

Consideration of the rival submissions

18. In this connection, we may refer to the relevant provisions of the Act. Section 12(3) of the Act permits a party to an agreement to relinquish a part of the agreement which is not enforceable. However, it should be possible to identify and demarcate that part of the agreement which is not to be enforced. We must also keep in mind the provision of Section 14 of the Act which deals with contracts which are not specifically enforceable, and Sub-Section 1 (b) thereof includes therein a contract which runs into minute and numerous details, as is seen in the present case. In this connection, we must as well refer to Section 20 (1) of the Act which reads as follows:-

> *"Section 20. Discretion as to decreeing specific performance* – (1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so;

> but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal."

19. Damages and specific performance are both remedies available upon breach of obligations by a party to the contract. The former is considered to be a substantial remedy, whereas the latter is of course a specific remedy. It is true that explanation (i) to Section 10 of the Act provides that unless and until the contrary is proved, the Court shall presume that breach of contract to transfer immovable property cannot be adequately relieved by compensation in money. However, this presumption is not an irrebuttable one. That apart, for a specific performance of a contract of sale of immovable property, there must be certainty with respect to the property to be sold. As held by this Court in para 18 of *Mayawanti Vs. Kaushalya Devi* reported in 1990 (3) SCC 1:-

> "18. The specific performance of a contract is the actual execution of the contract according to its stipulations and terms, and the courts direct the party in default to do the very thing which he contracted to do. The stipulations and terms of the contract have, therefore, to be certain and the parties must have been consensus ad idem. The burden of showing the stipulations and terms of the contract and that the minds were ad idem is, of course, on the plaintiff. If the stipulations and terms are uncertain, and the parties are not ad idem, there can be no specific performance, for there was no contract at all……."

20. Mr. Vishwanathan, learned senior counsel for the respondents submitted that the relinquishment of a part of the agreement was permissible. As far as the propositions of law concerning relinquishment as canvassed by the respondents are concerned, there is no difficulty in accepting the same. However, the relinquishment has to be unambiguous. As held by this Court in *Surjit Kaur Vs. Naurata Singh* reported in 2000 (7) SCC 379, the party seeking part performance must unambiguously relinquish all claims to performance of remaining part of the contract. In the present case the offer of

relinquishment by the respondents cannot be said to be an unambiguous one, and it will be difficult to decide as to which portion of the land is to be segregated to be retained with the appellant, and which portion is to be sold. Firstly, this is because as rightly noted by the Additional District Judge, the agreement does not specifically mention the price of the land, and in the proposed relinquishment, the respondents have not stated as to which portion of land (admeasuring 1 Kanal and 19 Marlas) they were agreeable to retain with the appellant. Secondly, in the agreement there is also a mention of 'a motor, bore, passage, fan and water pump fitted with engine and without engine along with the place for placing garbage including shamlat' amongst the properties which were being sold. It is not on record as to which parcel of land is having all these features. A question will therefore arise as to with whom such a parcel of land is to be retained. Obviously, a segregation of the land in dispute into two portions will be difficult.

21. In the present case there is one more difficulty viz. with respect to the relinquishment concerning the house. The First Appellate Court had categorically observed in para 6 of its judgment as quoted above, that the brother of the appellant, Puran Singh appeared to be the owner of the other ½ share of the house, and the remaining ½ share was in the name of Pritam Kaur, and that Shanker Singh did not have any authority to sell it. The judgment of the High Court does not show that this finding had been challenged in the Second Appeal. Nor was any submission made in this behalf before this Court. What the respondents offered was to give up the claim for the share of Pritam Kaur, and also the claim for the excess land of 1 Kanal and 19 Marlas which was accepted by the High Court in its impugned judgment. The respondents, however, claimed to retain the alleged ½ share of Shanker Singh, as can be seen from the order dated 19.10.1983 which is passed at the time of admission.

22. Thus, the respondents made a statement at the admission stage that they were ready to pay the full consideration for the land as stipulated in the agreement, and

for the share of Shanker Singh in the house. This order dated 19.10.1983 records that the respondents were ready to give up their claim for ½ the share of the house owned by Pritam Kaur, but maintained the claim for the share of Shanker Singh in the house. As against that it appears from the judgment of the First Appellate Court, that Shanker Singh did not have any such share in the house. His wife had ½ share, and his brother Puran Singh had ½ share. In the teeth of this finding of the First Appellate Court, which is neither challenged nor reversed by the High Court, the proposed relinquishment cannot be said to be a correct and unambiguous one. It does not alter the scenario and the agreement continues to remain incapable of performance. In any case it is not clear as to how such an agreement could be acted upon.

23. Therefore, for the reasons stated above, we have to hold in the peculiar facts and circumstances of this case that inspite of the offer of relinquishment made by the respondents herein, the specific performance of the agreement cannot be granted, solely on the ground that it is incapable of being performed. We have also to hold that the High Court erred in applying the provisions of Sections 12, 14 and 20 of the Act to the facts of the present case and in exercising its discretion, since this was not a case for specific performance. We have therefore to allow this appeal and set-aside the order passed by the High Court in Regular Second Appeal No. 1338 of 1983. The suit filed by the respondents will have to be dismissed.

24. We have however to note that the respondents had paid the earnest money of Rs. 28,000/- at the time of entering into the agreement way back on 12.1.1977 i.e. nearly 35 years ago. The respondents will therefore have to be compensated adequately. On the question of the appropriate compensation, it was submitted by Mr. Venktaramani, the learned senior counsel for the appellant that the agreement was made at a difficult time in the social life of Punjab for a throw away price. However, no evidence is placed on record to that effect. He then pointed out that the appellant had contended in the lower courts that respondents were influential people. Even so, it cannot be

ignored that inspite of the agreement, the land has remained with the appellant all through out in view of the orders passed by the courts from time to time, due to which he has benefited. The specific performance of the agreement is being denied basically because of the finding that the agreement was incapable of being performed inspite of the offer of relinquishment. It is an adage that money doubles itself in ten years, and on that basis the amount of Rs. 28,000/- with an appropriate interest will come to atleast Rs. 3,50,000/-. If the land was with the respondents, they would have earned much more. Having seen this position, Mr. Venktaramani has fairly left it to the Court to decide an adequate amount to be paid to the respondents by way of compensation and in lieu of specific performance of the concerned agreement. Accordingly, having considered all the relevant aspects, we are of the view that to meet the ends of justice, the appellant should be directed to pay the respondents an amount of Rs. 5,00,000/- which will be inclusive of the earnest money with due return thereon, and compensation.

25. We, therefore, allow this appeal and set-aside the judgment and order dated 8.4.2003 passed by the High Court in Civil Regular Second Appeal No.1338/1983, as well as the one dated 20.2.1980 rendered by the Sub Judge at Sultanpur Lodhi in Suit No.21/1978. The suit shall stand dismissed. There will be no order as to costs. However, the appellant is hereby directed to pay an amount of Rs. 5,00,000/- to the respondents which amount shall be paid in any case by the end of March, 2012.

B.B.B. Appeal allowed.

JETHA BHAYA ODEDARA

v.

GANGA MALDEBHAI ODEDARA AND ANR.

(SLP (Crl.) No. 4010 of 2011)

DECEMBER 16, 2011

[CYRIAC JOSEPH AND T.S. THAKUR, JJ.]

Code of Criminal Procedure, 1973 – s. 439 – Bail – Respondent and his companions charged u/ss. 302, 307, 324, 147, 148, 149, 323, 504, 507(2) IPC read with s.25(1) of the Arms Act and s. 135 of Bombay Police Act – Trial court rejected the application for grant of bail, however, the High Court granted bail to the respondent – Special Leave Petition by the respondent seeking cancellation of grant of bail – Held: Bail order was passed nearly two years back – It is not the case of the complainant that the respondent has during this period either tried to tamper with the evidence or committed any other act that may affect the fairness of the trial – There was no gun shot injury caused by the firearm carried by the respondent to either the complainant or any other person involved in the incident – Thus, order granting bail not interfered with at this stage.

Appellant-complainant registered an FIR against the respondent and his companions for offences punishable under Sections 302, 307, 324, 147, 148, 149, 323, 504, 507(2) IPC read with Section 25(1) of the Arms Act, and Section 135 of the Bombay Police Act. A charge sheet was filed before the Sessions Judge and thereafter, the case was taken up for trial. The respondent filed an application before the trial court for grant of bail and the same was dismissed. The respondent filed an application before the High Court which was allowed. Therefore, the appellant-complainant filed the instant appeal.

Dismissing the Special Leave Petition, the Court

HELD: If the allegations made in the special leave petition and those made in the counter affidavit are correct, the incident appears to have been the result of a gang war between 'K' Gang of which the respondent is said to be a member and 'A' Gang of which the complainant-petitioner and some of the witnesses are said to be active members. While no one including a gangster has any right to take law into his own hands or to criminally assault any other gangster operating in any area or any one else for that matter, the fact that two gangs appear to be at war with each other and involved in commission of several offences, makes it imperative that the rival versions presented before the Court in connection with the incident in question are examined carefully and with added circumspection. The bail order was passed nearly two years back. It is not the case of the complainant that the respondent has during this period either tried to tamper with the evidence or committed any other act that may affect the fairness of the trial. Equally significant is the fact that there was no gunshot injury to either the complainant or the deceased or any other person involved in the incident. In the circumstances and keeping in view the fact that the prosecution shall be free to apply for cancellation of bail should the respondent fail to comply with any of the conditions imposed upon him by the High Court in the order under challenge, the order granting bail is not interfered with at this stage. [Para 6] [377-D-H; 378-A]

CRIMINAL APPELLATE JURISDICTION : SLP (Crl.) No. 4010 of 2011.

From the Judgment & Order dated 13.9.2010 of the High Court of Gujarat at Ahmedabad in Criminal Misc. Application No. 9119 of 2010.

D.N. Ray, Lokesh K. Choudhary, Sumita Ray for the Petitioner.

Meenakshi Arora, Hemantika Wahi, Jesal, Ashwini Kumar for the Respondents.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. The High Court of Gujarat at Ahmedabad has by its order dated 13th September, 2010 allowed Criminal Misc. -Application No.9119/2010 and enlarged the respondent, Ganga Maldebhai Odedara on bail under Section 439 of Code of Criminal Procedure. The present Special Leave Petition has been filed by the complainant assailing the said order.

2. Briefly stated, the prosecution case is that 14th January, 2007, being Makar Sankranti Day, the complainant-Jetha Bhaya Odedara, the petitioner before us, was sitting at the house of one Abha Arjan, along with Navgan Arasi, Rama Arasi Jadeja, Suresh Sanghan Odedara and a few ladies of the house, named, Aarsi Munja, Maliben and Puriben. At around 8.00 p.m. one Ramde Rajsi Odedara, one of the accused persons is alleged to have come to the place where the complainant was sitting and started using abusive language. He was asked not to do so, thereupon he left the place only to return a few minutes later with accused Punja Ram, Lakha Ram, Devsi Rama, Vikram Keshu Odedara, Gangu Ranmal, Vikram Devsi Odedara, Ramde Rajsi Odedara and the respondent and some others armed with knives and a pistol which the -- respondent was allegedly carrying with him. The accused persons started abusing and assaulting the complainant and others who were sitting with him resulting in knife injuries to Vikram Keshu, Navgan Arasi, Rama Arasi and Puriben. Respondent Ganga Maldebhai Odedara is alleged to have fired multiple rounds from the pistol in the air exhorting his companions to kill the complainant and others with him. Navgan Arasi died in the hospital on account of the injuries sustained by him leading to the registration of FIR No. I Cr.No.4/2007 in the Kirti Mandir Police Station, Porbandar City against the respondent and his companions for offences punishable under Sections 302, 307, 324, 147, 148, 149, 323, 504, 507 (2) of IPC read with Section 25(1) of the Arms Act and Section 135

of the Bombay Police Act. With the death of the deceased, Navgan Arasi, in due course the investigation was completed and a charge sheet for the offences mentioned above filed before the Sessions Judge, Porbandar, who made over the case to Fast Track Court, Porbandar for trial and disposal in accordance with law.

3. An application, being Crl. Misc. Application No.3/2010 was then filed by the respondent before the trial Court for grant of bail which was opposed by the prosecution and eventually dismissed by its order dated 11th February, 2010. The trial Court was of the view that no case for the grant of bail to the respondent-applicant had in the facts and circumstances of the case been made out particularly in view of the fact that the respondent was involved in several criminal cases apart from the one in which he was seeking bail. The trial Court was also of the view that the respondent was a member of the gang operating in Porbandar area and that he had absconded for a month before he was arrested. It was also of the view that the role played by the respondent and his association with the other accused persons was likely to affect the smooth conduct of the trial.

4. Aggrieved by the order passed by the trial Court the respondent filed Criminal Misc. Application No.9119/2010 before the High Court of Gujarat at Ahmedabad which application as noticed earlier, was allowed by the High -Court in terms of the impugned order in this petition. The High Court has without scrutinizing and appreciating the evidence in detail come to the conclusion that the respondent had made out a case for grant of bail. The High Court also noticed the fact that no injury was caused with the help of the firearm which the respondent was allegedly carrying with him. The High Court accordingly allowed the application subject to the condition that the respondent shall not take undue advantage of his liberty, tamper with or pressurize the witnesses and that he shall maintain law and order and mark his presence before the concerned police station once in a month. He was also directed to surrender his passport and not to enter Porbandar Taluka

limits for a period of six months. The present special leave petition assails the correctness of the above order.

5. We have heard learned counsel for the parties at some length. We have also gone through the record. While the petitioner-complainant has described the respondent and other accused persons as a desperate gang active in Porbandar area and involved in commission of several -offences, the respondent has in the counter affidavit filed by him made a similar allegation giving particulars of the cases registered against the petitioner and some of the witnesses. In para 4 of the counter affidavit the respondent has stated thus:

"4. xxxxxxxxx

I state that the complainants' side is a well recognised Gang, properly known as 'Arjun Gang' and 'God Mother Gang'. Prosecution witness-Abha Arjan, who is the brother of the deceased is the real son of Arjan Munja Jadeja. Arjan Munja Jadega is the real brother of deceased Sarman Munja Jadeja who was a well known history sitter of Porbandar. After death of Sarman Munja, Santokben Jadeja, properly known as 'God Mother' took the charge of Gang and it was known as God Mother Gang. Series of offences have been registered against 'Arjun Gang' and 'God Mother Gang'. Abha Arjan is the nephew of Santokben Jadeja. Abha Arjan Jadeja is involved in series of offences stated herein below:

ABHA ARJAN JADEJA

C.R. No.	**Offence U/s.**	**Police Station**
II-3068/2001	25 (1B) A, etc. of Arms Act	Madhavpur
II-101/1995	25 (1B) A, etc. of Arms Act	Kutiyana
II-28/1995	25 (1B) A, etc. of Arms Act	Kutiyana
II-33/1990	504, 506(2), etc. of IPC	Kamlabaug
I-193/1997	302, 120-B of IPC and Sec. 25 (1B) of Arms Act	Kamlabaug

I-170/1994	307, 302 etc. of IPC	Kamlabaug
II-30/1990	506(2), 114, etc. of IPC	Kamlabaug
II-54/1997	25 (1B) (A), 25 (1) (D) of Arms Act	Ranavav
II-3/1994	25 (1B) (A), 25 (1) (D) of the Arms Act	Ranavav
I-20/1990	367, 147, 325, etc. of IPC and 25 (1) A of the Arms Act	Kutiyana
I-91/1990	147, 148, 149, 323, 324 of IPC	Kirti Mandir

I say and submit that the complainants' side is a well recognized Gang, properly known as 'Arjun Gang' and 'God Mother Gang'. Prosecution witnesses viz. Jetha Bhaya, Suresh Sangan Odedra, Keshu Chana Kudechha, Bhima Rama Bhutiya, Prakash Punja Kadechha, Rama Arshi, Amit Nebha Bhutiya are the members of 'Arjun Gang' and 'God Mother Gang'. All these prosecution witnesses are involved in series of offences stated herein below:

JETHA BHAYA ODEDRA-COMPLAIANT

C.R. No.	Offence U/s.	Police Station
I-44/1995	302 of IPC	Udhyognagar
I-177/1994	307, 147, 148, 149 etc. of IPC	Kamlabaug

SURESH SANGAN ODEDRA

C.R. No.	Offence U/s.	Police Station
II-79/1993	135-B of B.P. Act	Kamlabaug
I-189/1993	302 of IPC	Kamlabaug
I-24/2001	323, 324 etc. of IPC	Kamlabaug
II-20/1992	110, 117, 135 of B.P. Act	Kamlabaug
II-61/1995	122-C of B.P. Act	Kirti Mandir

BHIMA RAMA BHUTIYA

C.R. No.	Offence U/s.	Police Station
III- /1991	66B & 65E of Prohibition Act	Kirti Mandir
I-101/1991	323, 324, 325, 114 of IPC and Section 135 of B.P. Act.	Kirti Mandir
III-5132/2003	66(1) B and 65(1)E of Prohibition Act	Kirti Mandir
I-44/1993	279, 337, 338 of IPC and 177, 184, etc. M.V. Act	Udhyognagar
I-252/1991	302 of IPC and 25(1) of Arms Act and 135 of B.P. Act	Kamlabaug
I-30/1993	302 of IPC	Madhavpur
I-46/1993	147, 325, 149, etc. of IPC	Madhavpur
III-18/1992	66-B, 65E of the Prohibition Act	Madhavpur
II-28/1995	25 (1) B-A of Arms Act	Kutiyana
II-3003/2001	142 of B.P. Act	Madhavpur
I-49/2001 III-5085/2000	447, 323, 506 (2), etc. of IPC 66-B, 66EE of Prohibition Act	Udhyognagar Madhavpur
I-54/2000	66-B, 65Ee of Prohibition Act	Madhavpur
II-3054/2000	142 of B.P. Act	Madhavpur
I-17/1994	143, 506 (2) of IPC	Madhavpur

PRAKASH PUNJA KUCHHADIYA

C.R. No.	Offence U/s.	Police Station
II-97/2007	135 of B.P. Act	Kirti Mandir
II-3025/2002	135 of B.P. Act	Kirti Mandir
III-5275/2002	66-1-B, 85(1-3) of Prohibition Act	Kirti Mandir

III-5052/1999	66-1-B, 85(1-3) of Prohibition Act	Kirti Mandir
I-102/2001	279, 337 of IPC and 337, 184, 177 of M.V. Act	Kirti Mandi

RAMA ARSHI JADEJA

C.R. No.	Offence U/s.	Police Station
II-96/2007	135 of B.P. Act	Kirti Mandir

AMIT NEBHA BHUTIYA

C.R. No.	Offence U/s.	Police Station
III-5019/1999	66(1) B of Prohibition Act	Kirti Mandir

6. The petitioner has not filed any rejoinder to the counter affidavit filed on behalf of the respondent. If the allegations made in the special leave petition and those made in the counter affidavit are correct, the incident appears to have been the result of a gang war between 'Kotda Gang' of which the respondent is said to be a member and 'Arjun Gang' of which the complainant-petitioner and some of the witnesses are said to be active members. It is true that while no one including a gangster has any right to take law into his own hands or to criminally assault any other gangster operating in any area or any one else for that matter, the fact that two gangs appear to be at war with each other and involved in commission of several offences, makes it imperative that the rival versions presented before the Court in connection with the incident in question are examined carefully and with added circumspection. Having said that we need to note that the bail order was passed as early as on 11th February, 2010 i.e. nearly two years back. It is not the case of the complainant that the respondent has during this period either tried to tamper with the evidence or committed any other act that may affect the fairness of the trial. Equally significant is the fact that there was no gunshot

injury to either the complainant or the deceased or any other person involved in the incident. In the circumstances and keeping in view the fact that the prosecution shall be free to apply for cancellation of bail should the respondent fail to comply with any of the conditions imposed upon him by the High Court in the order under challenge, we are not inclined to interfere with the order granting bail at this stage.

7. The special leave petition is dismissed with these observations. We make it clear that nothing said by us in this order shall prejudice either the prosecution or the defence. The observations made by us are relevant only for the disposal of the petition and will not be taken to be the expression of any opinion on the merits of the case pending before the court below.

N.J. Special Leave Petition dismissed.

GAYTRI BAJAJ

v.

JITEN BHALLA

(SLP(C) No. 35468-35469 of 2009)

DECEMBER 16, 2011

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

Guardianship and Wards Act, 1890 – Hindu Minority and Guardianship Act, 1956 – Custody of children – Marriage of petitioner-wife and respondent-husband had been dissolved by divorce decree – Two daughters were born out of the wedlock – One daughter aged 17 years and the other aged 11 years – Both of them living with respondent-husband and in his custody – Petitioner-wife had no access to the children or even a brief meeting with them – Both daughters very clear and firm that they wanted to continue to live with their father and did not want to go with their mother – Held: In the facts and circumstances of the case, if the children are forcibly taken away from the father and handed over to the mother, undoubtedly, it will affect their mental condition and it will not be desirable in the interest of their betterment and studies – In a matter relating to custody of children, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute – Heavy duty is cast upon the Court to exercise its discretion judiciously bearing in mind the welfare of the child as paramount consideration – The better course would be that the petitioner-wife should first be allowed to make initial contact with the children, build up relationship with them and gradually restore her position as their mother – Appropriate directions accordingly given for grant of interim visitation rights to petitioner-wife.

CIVIL APPELLATE JURSDICTION : SLP (Civil) No. 35468-35469 of 2009.

From the Judgment & Order dated 10.7.2009 of the High Court of Delhi at New Delhi in Review Petition No. 371 of 2008 in Matrimonial Appeal No. 72 of 2007 and Judgment & Order dated 8.9.2008 in Matriominal Appeal No. 72 of 2007.

Indu Malhotra, N.S. Bajwa, Sumit Sinha, Ajay Marwah, Arun K. Sinha for the Petitioner.

Ranjeet Kumar, Pinaki Misra, Sunil Kumar Jain, Aneesh Mittal for the Respondent.

The following Order of the Court was delivered

O R D E R

1. The petitioner-wife and the respondent-husband were married on 10.12.1992 and two daughters were born out of the said wedlock. The elder daughter was born on 20.08.1995 and the younger daughter on 19.04.2000. It is the grievance of the petitioner-wife that the Additional District Judge by order dated 03.06.2003 passed a decree of divorce within eight days from the presentation of the first and second Motions under Section 13-B(1) of the Hindu Marriage Act, 1955 (hereinafter referred to as "the Act"). The petitioner-wife has filed a suit for declaration on 01.02.2006 seeking a declaratory decree that the respondent has obtained a decree by fraud.

2. On 10.10.2007, the respondent-husband filed an appeal under Section 28 of the Act in the High Court of Delhi at New Delhi. The petitioner-wife filed cross-objections to the said appeal on 07.11.2007. The learned single Judge of the High Court, by order dated 08.09.2008, allowed the appeal filed by the respondent-husband without deciding and adjudicating on the cross-objections filed by the petitioner-wife. Being aggrieved by the order of the learned single Judge, the respondent-wife filed a review petition on 13.10.2008. The said review petition was also dismissed on 10.07.2009 by the learned single Judge of the High Court. Both the said orders were impugned in the present special leave petitions.

3. By order dated 14.12.2009, this Court issued notice to the respondent-husband.

4. The short question which falls for consideration in these SLPs for the present is with regard to the custody of the two children.

5. During the course of hearing, at one stage, considering the issue raised, namely, relating to the custody of children, both being daughters, at the request of counsel for both sides, we decided to interact with the children as well as their parents, namely, petitioner-wife and respondent-husband in our Chambers to find out the actual friction in order to arrive at the possibility of any amicable settlement. Pursuant to the same, both parties including their children were present before us and a detailed interaction was held with the children and their parents separately. In the course of interaction, we were able to ascertain the following facts:

(a) The date of birth of first daughter is 20.08.1995 and presently she is aged about 17 years. The date of birth of second daughter is 19.04.2000 and presently she is aged about 11 years. Both of them were living with their father and are in his custody and the petitioner-wife had no access to the children or even a brief meeting with them.

(b) After interacting with the children separately and putting several questions about their age, education, their future and importance of company of mother as of now, both of them were very clear and firm that they want to continue to live with their father and they do not want to go with their mother.

6. In the aforesaid facts and circumstances, we feel that if the children are forcibly taken away from the father and handed over to the mother, undoubtedly, it will affect their mental condition and it will not be desirable in the interest of their betterment and studies. In such a situation, the better course would be that the mother should first be allowed to make initial contact with the children, build up relationship with them and gradually restore her position as their mother.

7. In a matter relating to the custody of children the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. Even the

statues, namely, the Guardianship and Wards Act, 1890 and Hindu Minority and Guardianship Act, 1956 make it clear that the welfare of the child is a predominant consideration. In a matter of this nature, particularly, when father and mother fighting their case without reference to the welfare of the child, a heavy duty is cast upon the Court to exercise its discretion judiciously bearing in mind the welfare of the child as paramount consideration.

8. In the relevant facts and circumstances of the case, we are convinced that the interest and welfare of the children will be best served if they continue to be in the custody of the father. In our opinion, at present, it is not desirable to disturb the custody with the father. However, we feel that ends of justice would be met by providing visitation rights to the mother. In fact, during the hearing on 12.12.2011, Ms. Indu Malhotra, learned senior counsel for the petitioner-wife represented that if such visitation rights, namely, visiting her children once in a fortnight is ordered that would satisfy the petitioner-wife. Learned senior counsel also represented that if the said method materializes, the petitioner-wife is willing to withdraw all civil and criminal cases filed against the respondent-husband which are pending in various courts.

9. Mr. Ranjit Kumar, learned senior counsel for the respondent-husband made it clear that this Court is free to pass appropriate interim arrangement if the same is feasible and in the interest of the children. Since both are residing at Delhi, it is desirable to pass appropriate direction for the meeting of the petitioner-wife either in the house of the respondent-husband or in a common place like Mediation Centre of this Court or the High Court.

10. We, accordingly, make the following interim arrangement:

(i) The respondent-husband is directed to bring both daughters, namely, Kirti Bhalla and Ridhi Bhalla, to the Supreme Court Mediation Centre at 10 a.m. on Saturday of every fortnight and hand over both of them to the

petitioner-wife. The mother is free to interact with them and take them out and keep them in her house for overnight stay. On the next day, i.e., Sunday at 10 a.m. the petitioner-wife is directed to hand over the children at the residence of the respondent-husband. The above arrangement shall commence from 17.12.2011 and continue till the end of January, 2012.

(ii) The respondent-husbad is directed to inform the mobile number of elder daughter (in the course of hearing, we were informed that she is having separate mobile phone) and also landline number to enable the petitioner-wife to interact with the children.

11. Inasmuch as the petitioner-wife is willing to withdraw all civil and criminal proceedings filed against the respondent-husband, in view of the interim visitation rights being granted to her, we hope and trust that the respondent-husband will cooperate and persuade the children to spend time with their mother as directed above.

12. It is also made clear that for any reason if the said visitation is not workable due to the attitude of any of the parties or due to the children, counsel appearing for them are free to mention before this Court for the next course of action.

13. Put up on 03.02.2012.

B.B.B. Matter adjourned.

GRIDCO LIMITED & ANR.

v.

SRI SADANANDA DOLOI & ORS.

(Civil Appeal No. 11303 of 2011)

DECEMBER 16, 2011

[CYRIAC JOSEPH AND T.S. THAKUR, JJ.]

Service Law – Appointment – Nature of – Regular or simply contractual – Held: The documentary evidence on record made it evident that the parties were ad idem regarding the tenure of appointment given to respondent-employee and that while the initial contract period was limited to three years the same could be renewed until the respondent attained the age of superannuation – Reference to superannuation of respondent in the appointment letter was only in the nature of providing an outer limit to which the employment of contract could have been extended – It did not suggest that there was any specific or implied condition of employment that the respondent would continue to serve till he attained the age of superannuation – The fact that the appellant-employer extended the tenure, was also suggestive of the parties having clearly understood that the appointment was a tenure appointment, extendable at the discretion of the appellant – These extensions were themselves subject to the terms and conditions stipulated in the appointment letter which, inter-alia, provided that the arrangement could be terminated by either party on three months' notice or on payment of three months' salary in lieu thereof – In the totality of the circumstances, it is clear that the nature of appointment made by appellant-employer was contractual and not regular as held by the High Court – The Service Regulations also did not envisage a regular appointment at E-10 level to which the respondent stood appointed on the terms of the contract of employment – GRIDCO Service Officers Regulations, 1996.

Service Law – Termination – Of contractual appointment – Termination order passed by public authority – Scope for judicial review – Held: A writ Court can now examine the validity of a termination order passed by public authority – It is no longer open to the authority passing the order to argue that its action being in the realm of contract is not open to judicial review – A writ Court is entitled to judicially review the action and determine whether there was any illegality, perversity, unreasonableness, unfairness or irrationality that would vitiate the action, no matter the action is in the realm of contract – However, judicial review cannot extend to the Court acting as an appellate authority sitting in judgment over the decision – The Court cannot sit in the arm chair of the Administrator to decide whether a more reasonable decision or course of action could have been taken in the circumstances – So long as the action taken by the authority is not shown to be vitiated by the infirmities referred to above and so long as the action is not demonstrably in outrageous defiance of logic, the writ Court would do well to respect the decision under challenge – In the case at hand, no material to show that there was any unreasonableness, unfairness, perversity or irrationality in the action taken by the appellant-authority – There was no element of any unfair treatment or unequal bargaining power between the appellant and the respondent to call for an over-sympathetic or protective approach towards the latter – GRIDCO Service Officers Regulations, 1996 – Constitution of India, 1950 – Article 226.

The appellant-Grid Corporation of Orissa Ltd. ('GRIDCO') is a company wholly owned by the Government of Orissa. It issued a letter dated 8th January, 1997, by which it offered to respondent no.1, appointment as Senior General Manager on contract basis for a period of three years subject to renewal on the basis of his performance. A formal order of appointment dated 6th February, 1997, was, in due course, issued in favour of respondent No.1 by the appellant-Corporation, which embodied the condition regarding the tenure of his appointment as contained in the initial offer. The

appointment letter further stipulated that respondent no.1 shall be governed by the Grid Corporation Officers Service Regulations, 1996.

Respondent no.1 joined the appellant-Corporation as Senior General Manager (HRD) on 30th April, 1997. With the coming into force of the Grid Corporation Officers Service Regulations, 1996, the Officers working in the Corporate Office of GRIDCO were re-designated including respondent No.1, whom the Corporation re-designated as Chief General Manager (HR). Respondent No.1 soon after re-designation wrote a letter dated 29th October, 1997, requesting for an amendment of Clause (2) of the appointment letter to bring the same in conformity with the Para 13(3) of the GRIDCO Officers Regulations. The request of respondent no.1 was accepted. On the expiry of the contractual period of three years stipulated in the appointment letter the appellant-Corporation extended the employment of respondent no.1 upto 3rd November, 2000, by a letter dated 29th March, 2000, on the same terms and conditions as were stipulated in the appointment letter. Respondent No.1, however, made a representation to the Chairman-cum-Managing Director of the appellant, seeking extension of his tenure till superannuation. In the meantime, the extended period of his employment also expired whereupon the Corporation granted to respondent no.1 a further extension of one year upto 3rd November, 2001, on the same terms and conditions as stipulated in the letters dated 6th February, 1997, and 29th October, 1997. Two further representations by respondent no.1 for extension of the tenure of appointment till superannuation did not find favour with the appellant-Corporation. Instead the appointment of respondent no.1 was terminated with three months' salary in lieu of notice paid to him. Aggrieved by the termination of his services, respondent no.1 filed a writ petition in the High Court. A Single Bench of the High Court, however, dismissed the said petition holding that the appointment of respondent no.1, being purely

temporary and contractual in nature and the termination being in no way stigmatic, respondent no.1 had no legal right to claim continuance in service. Respondent No.1 then filed writ appeal which was allowed by a Division Bench of the High Court. The Division Bench held that 'introduction of a contractual condition' in a regular appointment under the State was opposed to the principles of Articles 14 and 16 of the Constitution, and that the freedom of contract was rendered illusory by an unequal bargaining power between a citizen seeking appointment to public service on the one hand and a giant employer like a State Corporation on the other. The Division Bench took the view that the appointment of respondent no.1 was a regular appointment that could not be terminated summarily by issuing a notice or paying three months' salary in lieu thereof. The order terminating the services of respondent No.1 was accordingly quashed.

In the instant appeal, two questions arose for consideration: 1) What was the true nature of the appointment of respondent no.1 and in particular, was the appointment regular or simply contractual in nature and 2) If the appointment was contractual, was the termination thereof vitiated by any legal infirmity to call for interference under Article 226 of the Constitution.

Allowing the appeal, the Court

HELD:

Re: Question No.1

1.1. It is trite that the power to make a contractual employment is implicit in the power to make a regular permanent appointment unless the statute under which the authority exercises its powers and discharges its functions or the Rules & Regulations governing recruitment under the authority specifically forbid the making of such an appointment. No such prohibition was pointed out in the present case. All that was argued was

that the Rules did not at the relevant time specifically provide for making a contractual employment. That is no reason to hold that an appointment made on contractual basis would constitute a breach of the Rules or that such an appointment had to be necessarily treated as a regular appointment. The selection process culminating in the appointment of respondent no.1 started with the publication of an advertisement to fill up two vacancies of human resource professionals at senior management level. The advertisement, it is common ground, did not indicate the nature of appointment (whether regular or contractual) that may be offered to the selected candidates. The absence of any such indication in the advertisement notice did not make any material difference having regard to the fact that the offer of appointment made to respondent No.1 in terms of appellant-Corporation's letter dated 8th January, 1997, specifically described the appointment to be a tenure appointment. A careful reading of paragraph 3 of the offer letter leaves no manner of doubt that the tenure of appointment offered to the respondent No.1 as Senior General Manager, HRD was limited to a period of three years subject to renewal on the basis of his performance. It also made it abundantly clear that the contract of employment was terminable even during the currency of the three years term on three months' notice or on payment of three months' salary in lieu thereof by either side. It is difficult to read any element of regular appointment in the offer made to respondent no.1 or any assurance that the appointment is in the nature of a regular appointment or that the respondent was on probation to be regularised on satisfactory completion of his probation period. That apart, appointment order issued on 6th February, 1997, also specifically embodied the stipulation regarding the tenure as it was in clause (3) of the offer letter. [Para 12] [397-B-H; 398-A-C]

1.2. It is not the case of respondent no.1 that there was any uncertainty or ambiguity in the appointment

made by the respondent in so far as the tenure on the post to which he was appointed, was concerned. What puts the matter beyond any shadow of doubt is the understanding of the respondent evident from his letter dated 29th October 1997 asking for an amendment of clause (2) of the appointment order so as to bring the same in conformity with para 13 of the GRIDCO Officers' Regulation. The request manifestly demonstrated that the parties were *ad idem* regarding the tenure of appointment given to the respondent and that while the initial contract period was limited to three years the same could be renewed by the Board or the Committee of the Board until the respondent attained the age of superannuation as provided in the GRIDCO Service Officers Regulations. It is quite evident that reference to the superannuation of the respondent in this appointment letter was only in the nature of providing an outer limit to which the employment on contract could have been extended. It did not suggest that there was any specific or implied condition of employment that the respondent would continue to serve till he attains the age of superannuation. Even after the amendment of clause (2) of the appointment letter, the condition that the contract of employment could be terminated at any time during the period of three years on three months' notice or payment of three months' salary in lieu thereof by either side continued to be operative between the parties. The fact that the appellant-Corporation extended the tenure upto 3rd November, 2000, in the first place and upto 3rd November, 2001 later, is also suggestive of the parties having clearly understood that the appointment was a tenure appointment, extendable at the discretion of the Board of Directors/Corporation. These extensions, it is noteworthy, were themselves subject to the terms and conditions stipulated in the appointment letter which, *inter-alia*, provided that the arrangement could be terminated by either party on three months' notice or on payment of three months' salary in lieu thereof. In the

totality of the above circumstances, it is clear that the nature of appointment made by the appellant-Corporation was contractual and not regular as held by the Division Bench of the High Court. [Para 13] [398-D-H; 399-A-D]

1.3. Further, the appointment order issued in favour of the respondent specifically stated that the respondent will be governed by the GRIDCO Officers Service Regulations, 1996. With the coming into force of the said Regulations, the respondent was re-designated as Chief General Manager, HR which was in terms of the Regulations, a post in the Executive Grade of E-10. This re-designation was not at any stage questioned by the respondent. On the contrary it was he who had prayed for amendment of clause (2) of the appointment letter to bring the same in tune with para 13(3) of the GRIDCO Officers Service Regulation. Para 13(3) of the Regulations makes it manifest that an appointment to the post in category E-10 could be made only on a contractual basis. The Regulations do not envisage a regular appointment at E-10 level to which the respondent stands appointed on the terms of the contract of employment. That being the case it is difficult to see how the said appointment could be treated to be a regular appointment when the Rules did not permit any such appointment. The question of the so called unequal bargaining power of the parties did not have any relevance or role to play in the facts and circumstances of the case. [Paras 14, 15] [399-E-G; 400-A-D]

Re: Question No.2

2.1. It is true that judicial review of matters that fall in the realm of contracts is also available before the superior courts, but the scope of any such review is not all pervasive. It does not extend to the Court substituting its own view for that taken by the decision-making authority. Judicial review and resultant interference is permissible where the action of the authority is mala fide, arbitrary, irrational, disproportionate or unreasonable but

impermissible if the petitioner's challenge is based only on the ground that the view taken by the authority may be less reasonable than what is a possible alternative. The legal position is settled that judicial review is not so much concerned with the correctness of the ultimate decision as it is with the decision-making process unless of course the decision itself is so perverse or irrational or in such outrageous defiance of logic that the person taking the decision can be said to have taken leave of his senses. [Para 16] [401-D-F]

2.2. A conspectus of the pronouncements of this court and the development of law over the past few decades show that there has been a notable shift from the stated legal position settled in earlier decisions, that termination of a contractual employment in accordance with the terms of the contract was permissible and the employee could claim no protection against such termination even when one of the contracting parties happened to be the State. Remedy for a breach of a contractual condition was also by way of civil action for damages/compensation. With the development of law relating to judicial review of administrative actions, a writ Court can now examine the validity of a termination order passed by public authority. It is no longer open to the authority passing the order to argue that its action being in the realm of contract is not open to judicial review. A writ Court is entitled to judicially review the action and determine whether there was any illegality, perversity, unreasonableness, unfairness or irrationality that would vitiate the action, no matter the action is in the realm of contract. However, judicial review cannot extend to the Court acting as an appellate authority sitting in judgment over the decision. The Court cannot sit in the arm chair of the Administrator to decide whether a more reasonable decision or course of action could have been taken in the circumstances. So long as the action taken by the authority is not shown to be vitiated by the infirmities referred to above and so long as the action is not

demonstrably in outrageous defiance of logic, the writ Court would do well to respect the decision under challenge. [Para 26] [407-G-H; 408-A-D]

2.3. Applying the above principles to the case at hand, it is clear that there is no material to show that there is any unreasonableness, unfairness, perversity or irrationality in the action taken by the Corporation. The Regulations governing the service conditions of the employees of the Corporation, make it clear that officers in the category above E-9 had to be appointed only on contractual basis. [Para 27] [408-E]

2.4. It is also evident that the renewal of the contract of employment depended upon the perception of the management as to the usefulness of the respondent and the need for an incumbent in the position held by him. Both these aspects rested entirely in the discretion of the Corporation. The respondent was in the service of another employer before he chose to accept a contractual employment offered to him by the Corporation which was limited in tenure and terminable by three months' notice on either side. In that view, therefore, there was no element of any unfair treatment or unequal bargaining power between the appellant and the respondent to call for an over-sympathetic or protective approach towards the latter. [Para 28] [408-F-H; 409-A]

Shrilekha Vidyarthi & Ors. v. State of UP & Ors. **(1991) 1 SCC 212: 1990 (1) Suppl. SCR 625;** *Assistant Excise Commissioner & Ors. v. Issac Peter & Ors..* **(1994) 4 SCC 104: 1994 (2) SCR 67;** *State of Orissa v. Chandra Sekhar Mishra* **(2002) 10 SCC 583;** *Satish Chandra Anand v. Union of India* **AIR 1953 SC 250: 1953 SCR 655;** *Parshotam Lal Dhingra v. Union of India* **AIR 1958 SC 36: 1958 SCR 828;** *Delhi Transport Corporation v. DTC Mazdoor Congress & Ors.* **(1991) Supp (1) SCC 600 : 1990 (1) Suppl. SCR 142 and** *Central Inland Water Transport Corporation Ltd. & Anr.*

v. Brojo Nath Ganguly & Anr. **(1986) 3 SCC 156: 1986 (2) SCR 278 – referred to.**

3. The impugned judgment and order passed by the Division Bench of the High Court is set aside. However, it is directed that the salary and allowances if any paid to respondent No.1 pursuant to the impugned judgment shall not be recovered from him. [Para 29] [409-C]

Case Law Reference:

1990 (1) Suppl. SCR 625	**referred to**	**Para 17**
1994 (2) SCR 67	**referred to**	**Para 19**
(2002) 10 SCC 583	**referred to**	**Para 22**
1953 SCR 655	**referred to**	**Para 23**
1958 SCR 828	**referred to**	**Para 24**
1990 (1) Suppl. SCR 142	**referred to**	**Para 24**
1986 (2) SCR 278	**referred to**	**Para 25**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 11303 of 2011.

From the Judgment & Order dated 2.4.2008 of the High Court of Orissa at Cuttack in W.A. No. 11 of 2003.

P.P. Rao, Raj Kumar Mehta, Antaryami Upadhyay, David A., Utsav Sidhu, Filza Moonis, Apeksha Sharan for the Appellants.

Subhasish Bhowmick, Joydeep Mukherjee for the Respondents.

The Judgment of the Court was delivered by

T.S. THAKUR, J.1. Leave granted.

2. Two questions fall for our determination in this appeal by special leave, which arises out of a judgment and order dated 2nd April, 2008, passed by a Division Bench of the High Court of Orissa whereby Writ Appeal No.11 of 2003 filed by respondent No.1 has been allowed, order dated 26th September, 2003, passed by a Single Judge of the High Court

in O.J.C. No.2225 of 2001 set aside and order of termination of the services of respondent No.1. quashed.

3. The questions are:

1. What was the true nature of the appointment of the respondent? In particular, was the appointment regular or simply contractual in nature? and
2. If the appointment was contractual, was the termination thereof vitiated by any legal infirmity to call for interference under Article 226 of the Constitution?

4. Before we advert to the questions and possible answers to the same, we may briefly set out the facts in the backdrop:

5. The appellant-Grid Corporation of Orissa Ltd. ('GRIDCO' for short) is a company wholly owned by the Government of Orissa. By an advertisement notice dated 28th May, 1996, issued by the appellant, applications were invited from eligible candidates for appointment against the post of Senior General Manager: HR Policy, Job Evaluation, Appraisal, Remuneration. Respondent No.1 was one among several others who applied for selection and appointment against the said post. A Selection Committee constituted by the appellant short-listed three candidates including respondent No.1-Shri Sadananda Doloi for an appointment. The Corporation eventually issued a letter dated 8th January, 1997, by which it offered to the respondent, appointment as Senior General Manager on contract basis for a period of three years subject to renewal on the basis of his performance. Clause (3) of the letter stipulated the tenure of the proposed appointment as under:

> "(3) Period:- The tenure of appointment as Sr. General Manager (HRD) is for a period of three years on contract basis subject to renewal on the basis of your performance. This contract of employment is, however terminable even during this three year term on three months' notice or on payment of three months salary in lieu thereof by either side."

6. A formal order of appointment dated 6th February, 1997, was, in due course, issued in favour of respondent No.1 by the appellant-Corporation, which embodied the condition regarding the tenure of his appointment as contained in the initial offer. Clause (12) of the appointment letter further stipulated that the respondent shall be governed by the Grid Corporation Officers Service Regulations, 1996.

7. The respondent joined the appellant-Corporation as Senior General Manager (HRD) on 30th April, 1997. With the coming into force of the Grid Corporation Officers Service Regulations, 1996, the Officers working in the Corporate Office of GRIDCO were re-designated including respondent No.1, whom the Corporation re-designated as Chief General Manager (HR). Respondent No.1 soon after re-designation wrote a letter dated 29th October, 1997, requesting for an amendment of Clause (2) of the appointment letter to bring the same in conformity with the Para 13(3) of the GRIDCO Officers Regulations. That request of the respondent was accepted and Clause (2) of the Appointment Order dated 6th February, 1997, amended to read as under:

> "(2) Period:- Your tenure of appointment shall be on a contract basis initially for a period of three years & renewable thereafter for such period(s) as the Board or the Committee of the Board may prescribe until you attain the age of superannuation as provided in GRIDCO Officers Service Regulations. This contract of employment is, however, terminable even during this three year term on three months' notice or on payment of three months' salary in lieu thereof by either side."

8. On the expiry of the contractual period of three years stipulated in the appointment letter the appellant-Corporation extended the employment of the respondent upto 3rd November, 2000, by a letter dated 29th March, 2000, on the same terms and conditions as were stipulated in the appointment letter. Respondent No.1, however, made a representation to the Chairman-cum-Managing Director of the

appellant on 3rd June, 2000, seeking extension of his tenure till superannuation. In the meantime, the extended period of his employment also expired whereupon the Corporation granted to the respondent a further extension of one year upto 3rd November, 2001, on the same terms and conditions as stipulated in the letters dated 6th February, 1997, and 29th October, 1997. Two further representations dated 22nd November, 2000, and 13th February, 2001, to the appellant-Corporation for extension of the tenure of appointment till superannuation did not find favour with the appellant. Instead the appointment of the respondent was terminated in terms of an order dated 19th February, 2001 with three months' salary in lieu of notice paid to him.

9. Aggrieved by the termination of his services, respondent no.1 filed a writ petition in the High Court of Orissa for issue of a Writ of Certiorari quashing the same on several grounds. A learned Single Bench of the High Court, however, dismissed the said petition holding that the appointment of the writ petitioner, respondent herein, being purely temporary and contractual in nature and the termination being in no way stigmatic, the respondent had no legal right to claim continuance in service. The writ petition was, on that basis, dismissed.

10. Respondent No.1 then filed Writ Appeal No.11 of 2003 which was heard and allowed by a Division Bench of the High Court of Orissa in terms of the impugned judgment and order. The Division Bench held that 'introduction of a contractual condition' in a regular appointment under the State was opposed to the principles of Articles 14 and 16 of the Constitution, and that the freedom of contract was rendered illusory by an unequal bargaining power between a citizen seeking appointment to public service on the one hand and a giant employer like a State Corporation on the other. The order passed by the learned Single Judge was on that reasoning set aside by the High Court and the order terminating the services of respondent No.1 quashed.

11. We have heard learned counsel for the parties at

considerable length and propose to take up the two questions that we have formulated for determination *ad-seriatim*.

Re: Question No.1

12. As noticed earlier, while the learned Single Judge has held the appointment of the respondent to be contractual in nature and termination thereof to be valid and permissible in terms of the contract, the Division Bench has in appeal taken the view that the appointment was a regular appointment that could not be terminated summarily by issuing a notice or paying three months' salary in lieu thereof. It is trite that the power to make a contractual employment is implicit in the power to make a regular permanent appointment unless the statute under which the authority exercises its powers and discharges its functions or the Rules & Regulations governing recruitment under the authority specifically forbid the making of such an appointment. No such prohibition has been pointed out to us in the present case. All that was argued was that the Rules did not at the relevant time specifically provide for making a contractual employment. That is, in our opinion, no reason to hold that an appointment made on contractual basis would constitute a breach of the Rules or that such an appointment had to be necessarily treated as a regular appointment. Having said that, let us now see the background in which the appointment was made in the present case. As seen above, the selection process culminating in the appointment of the respondent started with the publication of an advertisement to fill up two vacancies of human resource professionals at senior management level. The advertisement, it is common ground, did not indicate the nature of appointment (whether regular or contractual) that may be offered to the selected candidates. The absence of any such indication in the advertisement notice did not, in our opinion, make any material difference having regard to the fact that the offer of appointment made to respondent No.1 in terms of appellant-Corporation's letter dated 8th January, 1997, specifically described the appointment to be a tenure appointment. A careful reading of paragraph 3 of the

offer letter leaves no manner of doubt that the tenure of appointment offered to the respondent No.1 as Senior General Manager, HRD was limited to a period of three years subject to renewal on the basis of his performance. It also made it abundantly clear that the contract of employment was terminable even during the currency of the three years term on three months' notice or on payment of three months' salary in lieu thereof by either side. We find it difficult to read any element of regular appointment in the offer made to the respondent or any assurance that the appointment is in the nature of a regular appointment or that the respondent was on probation to be regularised on satisfactory completion of his probation period. That apart, appointment order issued on 6th February, 1997, also specifically embodied the stipulation regarding the tenure as it was in clause (3) of the offer letter.

13. It is not the case of the respondent that there was any uncertainty or ambiguity in the appointment made by the respondent in so far as the tenure on the post to which he was appointed, was concerned. What puts the matter beyond any shadow of doubt is the understanding of the respondent evident from his letter dated 29th October 1997 asking for an amendment of clause (2) of the appointment order so as to bring the same in conformity with para 13 of the GRIDCO Officers' Regulation. The request manifestly demonstrated that the parties were *ad idem* regarding the tenure of appointment given to the respondent and that while the initial contract period was limited to three years the same could be renewed by the Board or the Committee of the Board until the respondent attained the age of superannuation as provided in the GRIDCO Service Officers Regulations. It is quite evident that reference to the superannuation of the respondent in this appointment letter was only in the nature of providing an outer limit to which the employment on contract could have been extended. It did not suggest that there was any specific or implied condition of employment that the respondent would continue to serve till he attains the age of superannuation. Even after the amendment of clause (2) of the appointment letter, the condition that the

contract of employment could be terminated at any time during the period of three years on three months' notice or payment of three months' salary in lieu thereof by either side continued to be operative between the parties. The fact that the appellant-Corporation extended the tenure upto 3rd November, 2000, in the first place and upto 3rd November, 2001 later, is also suggestive of the parties having clearly understood that the appointment was a tenure appointment, extendable at the discretion of the Board of Directors/Corporation. These extensions, it is noteworthy, were themselves subject to the terms and conditions stipulated in the appointment letter which, *inter-alia*, provided that the arrangement could be terminated by either party on three months' notice or on payment of three months' salary in lieu thereof. In the totality of the above circumstances, we are of the opinion that the nature of appointment made by the appellant-Corporation was contractual and not regular as held by the Division Bench of the High Court.

14. There is one other aspect to which we must advert before we part with the question of nature of appointment offered to the respondent. The appointment order issued in favour of the respondent specifically stated that the respondent will be governed by the GRIDCO Officers Service Regulations, 1996. With the coming into force of the said Regulations, the respondent was re-designated as Chief General Manager, HR which was in terms of the Regulations, a post in the Executive Grade of E-10. This re-designation was not at any stage questioned by the respondent. On the contrary it was he who had prayed for amendment of clause (2) of the appointment letter to bring the same in tune with para 13(3) of the GRIDCO Officers Service Regulation. Para 13(3) of the Regulations reads as:

> "13(3): The appointment to grades above E-9 shall be on a contract basis initially for a period of 3 years and renewable thereafter for such period(s) as the Board or the Committee of the Board may prescribe until the Officer attains the age of superannuation as provided in these Regulations."

15. The above makes it manifest that an appointment to the post in category E-10 could be made only on a contractual basis. The Regulations do not envisage a regular appointment at E-10 level to which the respondent stands appointed on the terms of the contract of employment. That being the case it is difficult to see how the said appointment could be treated to be a regular appointment when the Rules did not permit any such appointment. We may mention to the credit of learned senior counsel who appeared for the respondent that although at one stage an attempt was made to argue that the appointment of the respondent was regular in nature, that line of argument was not pursued further and in our opinion, rightly so having regard to what we have said above. Such being the case the question of the so called unequal bargaining power of the parties did not have any relevance or role to play in the facts and circumstances of the case. Question No.1 is answered accordingly.

Re: Question No.2

16. This question has to be answered in two distinct parts. The first part relates to the aspect whether the order passed by the appellant-Corporation is amenable to judicial review and if so what is the scope of such review. The second part of the question is whether on the standards of judicial review applicable to it, the order of termination is seen to be suffering from any legal infirmity. Before we refer to certain decisions of this Court that have dealt with similar issues in the past we may at the outset say that there was no challenge either before the High Court or before us as to the competence of the authority that passed the termination order. There was indeed a feeble argument that the order was *mala fide* in character but having regard to the settled legal position regarding the proof of *mala fides* and the need for providing particulars to substantiate any such plea, we are of the view that the charge of *mala fide* does not stand scrutiny. Neither before the learned Single Judge nor before the Division Bench was the ground based on *mala fides* seriously argued by the respondent. What was contended on

behalf of the respondent was that the appellant-Corporation did not act fairly and objectively in taking the decision to terminate the arrangement. It was contended that the decision to terminate the contractual employment was not a fair and reasonable decision having regard to the fact that the respondent had performed well during his tenure and the requirement of the Corporation to have a Chief General Manager (HR) continued to subsist. In substance, the contention urged on behalf of the respondent was that this Court should reappraise and review the material touching the question of performance of the respondent as Chief General Manager (HR) as also the question whether the Corporation's need for a General Manager (HR) had continued to subsist. We regret our inability to do so. It is true that judicial review of matters that fall in the realm of contracts is also available before the superior courts, but the scope of any such review is not all pervasive. It does not extend to the Court substituting its own view for that taken by the decision-making authority. Judicial review and resultant interference is permissible where the action of the authority is mala fide, arbitrary, irrational, disproportionate or unreasonable but impermissible if the petitioner's challenge is based only on the ground that the view taken by the authority may be less reasonable than what is a possible alternative. The legal position is settled that judicial review is not so much concerned with the correctness of the ultimate decision as it is with the decision-making process unless of course the decision itself is so perverse or irrational or in such outrageous defiance of logic that the person taking the decision can be said to have taken leave of his senses.

17. In *Shrilekha Vidyarthi & Ors. v. State of U.P. & Ors.* (1991) 1 SCC 212, the State Government had by a circular terminated the engagement of all the government counsels engaged throughout the State and sought to defend the same on the ground that such appointments being contractual in nature were terminable at the will of the government. The question of reviewability of administrative action in the realm of contract was in that backdrop examined by this Court. The

Court also examined whether the personality of the State Government undergoes a change after the initial appointment of government counsels so as to render its action immune from judicial scrutiny. The answer was in the negative. The Court held that even after the initial appointment had been made and even when the matter is in the realm of contract, the State could not cast off its personality and exercise a power unfettered by the requirements of Article 14 or claim to be governed only by private law principles applicable to private individuals. The Court observed:

> "… we are also clearly of the view that this power is available even without that element on the premise that after the initial appointment, the matter is purely contractual. Applicability of Article 14 to all executive actions of the State being settled and for the same reason its applicability at the threshold to the making of a contract in exercise of the executive power being beyond dispute, can it be said that the State can thereafter cast off its personality and exercise unbridled power unfettered by the requirements of Article 14 in the sphere of contractual matters and claim to be governed therein only by private law principles applicable to private individuals whose rights flow only from the terms of the contract without anything more? We have no hesitation in saying that the personality of the State, requiring regulation of its conduct in all spheres by requirements of Article 14, does not undergo such a radical change after the making of a contract merely because some contractual rights accrue to the other party in addition. It is not as if the requirements of Article 14 and contractual obligations are alien concepts, which cannot co-exist."

18. Recognizing the difference between public and private law activities of the State, this Court reasoned that unlike private individuals, the State while exercising its powers and discharging its functions, acts for public good and in public interest. Consequently every State action has an impact on the public interest which would in turn bring in the minimal

requirements of public law obligations in the discharge of such functions. The Court declared that to the extent, the challenge to State action is made on the ground of being arbitrary, unfair and unreasonable hence offensive to Article 14 of the Constitution, judicial review is permissible. The fact that the dispute fell within the domain of contractual obligations did not, declared this Court, relieve the State of its obligation to comply with the basic requirements of Article 14. The court said :

> "This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions."
>
> *(emphasis supplied)*

19. In *Assistant Excise Commissioner & Ors. v. Issac Peter & Ors.* (1994) 4 SCC 104, the dispute related to supply of additional quantities of arrack demanded by the license-holder. Supply of arrack was, however, controlled by the Government and the entire transaction relating to the supply and sale of arrack was based on licenses granted under the relevant rules to persons who emerged successful in a public

auction. The Government claimed that the only obligation cast upon it under the Rules was to provide the monthly quota of arrack to each license-holder, supply of additional quantity being discretionary with the authorities. The license-holders, on the other hand, argued that supply of additional quantity was implicit in the conditions of the license. In support they relied upon the past practice and argued that if the supply is limited to the monthly quota only it would not be possible for the license holder to pay even the license fee. The license-holders questioned the refusal of the State Government to issue additional quantities of arrack as unfair and unreasonable. This court, however, rejected that contention and held :

> "Doctrine of fairness or the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the Rule of Law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. This is so, even if the contract is governed by statutory provisions, i.e., where it is a statutory contract – or rather more so."
>
> (emphasis supplied)

20. Taking note of the decision of this Court in *Shrilekha Vidyarthi's* case (supra), this court held that there was no room for invoking the doctrine of fairness and reasonableness against one party to the contract, for the purpose of altering or adding to the terms and conditions of the contract merely because it happens to be the State. The Court said :

> "It was a case of termination from a post involving public element. It was a case of non-government servant holding a public office, on account of which it was held to be a matter within the public law field. This decision too does not affirm the principle now canvassed by the learned

Counsel (that being of incorporating the doctrine of fairness in contracts where State is a party). We are, therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some cases) and the laws relating to contracts. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides."

(emphasis supplied)

21. In conclusion, the Court made it clear that the opinion expressed by it was only in the context of contracts entered into between the State and its citizens pursuant to public auction, floating of tenders or by negotiation. The court considered it unnecessary to express any opinion about the legal position applicable to contracts entered into otherwise than by public auction, floating of tenders or negotiation.

22. In *State of Orissa v. Chandra Sekhar Mishra* (2002) 10 SCC 583, the respondent had been appointed as a Homeopathic Medical Officer whose services were subsequently terminated by issue of a notice. While rejecting the challenge to the termination order, the Court observed *"when the respondent was only a contractual employee, there could be no question of his being granted the relief of being directed to be appointed as a regular employee."*

23. We may also refer to the decision of this court in *Satish Chandra Anand v. Union of India* (AIR 1953 SC 250), where the petitioner, an employee of the Directorate General of Resettlement and Employment, was removed from contractual

employment after being served a notice of termination. The contract of service in that case was initially for a period of five years which was later extended. A five-Judge Bench hearing the matter, dismissed the petition, challenging the termination primarily on the ground that the petitioner could not prove a breach of a fundamental right since no right accrued to him as the whole matter rested in contract and termination of the contract did not amount to dismissal, or removal from service nor was it a reduction in rank. The Court found it to be an ordinary case of a contract being terminated by notice under one of its clauses. The Court observed :

"10. There was no compulsion on the Petitioner to enter into the contract he did. He was as free under the law as any other person to accept or reject the offer which was made to him. Having accepted, he still had open to him all the rights and remedies available to other persons similarly situated to enforce any rights under his contract, which has been denied to him, assuming there are any, and to pursue in the ordinary Courts of the land, such remedies for a breach as are open to him to exactly the same extent as other persons similarly situated. He has not been discriminated against and he has not been denied the protection of any laws which others similarly situated could claim…

11. …

……...

The Petitioner has not been denied any opportunity of employment or of appointment. He has been treated just like any other person to whom an offer of temporary employment under these conditions was made. His grievance when analysed, not one of personal differentiation but is against an offer of temporary employment on special terms as opposed to permanent employment. But of course the State can enter into contracts of temporary employment and impose special terms in each case, provided they are not inconsistent with

the Constitution, and those who chose to accept those terms and enter into the contract are bound by them, even as the State is bound."

(emphasis supplied)

24. In *Parshotam Lal Dhingra v. Union of India (AIR 1958 SC 36)*, this court followed the view taken in *Satish Chandra's* case (supra). Any reference to the case law on the subject would remain incomplete unless we also refer to the decision of the Constitution Bench of this court in *Delhi Transport Corporation v. D.T.C. Mazdoor Congress & Ors. (1991) supp (1) SCC 600*, where this Court was dealing with the constitutional validity of Regulation 9 (b) that authorized termination on account of reduction in the establishment or in circumstances other than those mentioned in clause (a) to Regulation 9 (b) by service of one month's notice or pay in lieu thereof. Sawant, J. in his concurring opinion held that the provision contained the much hated rules of hire and fire reminiscent of the days of *laissez faire* and unrestrained freedom of contract and that any such rule would have no place in service conditions.

25. To the same effect was an earlier decision of this Court in *Central Inland Water Transport Corporation Ltd. & Anr. v. Brojo Nath Ganguly & Anr. (1986) 3 SCC 156*, where the Court had refused to enforce an unfair and unreasonable contract or an unfair and unreasonable clause in a contract entered into between parties who did not have equal bargaining power.

26. A conspectus of the pronouncements of this court and the development of law over the past few decades thus show that there has been a notable shift from the stated legal position settled in earlier decisions, that termination of a contractual employment in accordance with the terms of the contract was permissible and the employee could claim no protection against such termination even when one of the contracting parties happened to be the State. Remedy for a breach of a contractual condition was also by way of civil action for damages/

compensation. With the development of law relating to judicial review of administrative actions, a writ Court can now examine the validity of a termination order passed by public authority. It is no longer open to the authority passing the order to argue that its action being in the realm of contract is not open to judicial review. A writ Court is entitled to judicially review the action and determine whether there was any illegality, perversity, unreasonableness, unfairness or irrationality that would vitiate the action, no matter the action is in the realm of contract. Having said that we must add that judicial review cannot extend to the Court acting as an appellate authority sitting in judgment over the decision. The Court cannot sit in the arm chair of the Administrator to decide whether a more reasonable decision or course of action could have been taken in the circumstances. So long as the action taken by the authority is not shown to be vitiated by the infirmities referred to above and so long as the action is not demonstrably in outrageous defiance of logic, the writ Court would do well to respect the decision under challenge.

27. Applying the above principles to the case at hand, we have no hesitation in saying that there is no material to show that there is any unreasonableness, unfairness, perversity or irrationality in the action taken by the Corporation. The Regulations governing the service conditions of the employees of the Corporation, make it clear that officers in the category above E-9 had to be appointed only on contractual basis.

28. It is also evident that the renewal of the contract of employment depended upon the perception of the management as to the usefulness of the respondent and the need for an incumbent in the position held by him. Both these aspects rested entirely in the discretion of the Corporation. The respondent was in the service of another employer before he chose to accept a contractual employment offered to him by the Corporation which was limited in tenure and terminable by three months' notice on either side. In that view, therefore, there was no element of any unfair treatment or unequal bargaining power between the appellant and the respondent to call for an

over-sympathetic or protective approach towards the latter. We need to remind ourselves that in the modern commercial world, executives are engaged on account of their expertise in a particular field and those who are so employed are free to leave or be asked to leave by the employer. Contractual appointments work only if the same are mutually beneficial to both the contracting parties and not otherwise.

29. In the result, we allow this appeal, set aside the impugned judgment and order passed by the Division Bench of the High Court of Orissa dismissing the Writ Appeal No.11 of 2003. We, however, direct that the salary and allowances if any paid to respondent No.1 pursuant to the impugned judgment shall not be recovered from him. Parties shall bear their own costs in this Court as also in the courts below.

B.B.B. Appeal allowed.

HELIOS & MATHESON INFORMATION TECHNOLOGY LTD. & ORS.

v.

RAJEEV SAWHNEY & ANR.

(Special Leave Petition (Crl.) No. 4606 of 2011)

DECEMBER 16, 2011

[DR. B.S. CHAUHAN AND T.S. THAKUR, JJ.]

Code of Criminal Procedure, 1973:

Criminal Revision – Scope of – Order of Additional Chief Metropolitan Magistrate taking cognizance and directing summons to issue on a criminal complaint alleging offences of cheating and forgery, set aside by the Additional Sessions Judge – Order of Additional Sessions Judge set aside by High Court – Held: The averments made in the complaint when taken at their face value, make out a case against the accused – The complaint does contain assertions with sufficient amount of clarity on facts and events which if taken as proved can culminate in an order of conviction – Therefore, there is no error or perversity either in the order of the Magistrate taking cognizance and issuing process or in the order of the High Court in setting aside the order of Additional Sessions Judge – There is no reason to interfere with the order passed by the High Court in exercise of jurisdiction under Article 136 of the Constitution – Constitution of India, 1950 – Article 136.

Criminal Revision – Adducing of evidence – Accused producing photocopies of documents in revision before Additional Sessions Judge, who set aside the order of the Magistrate – Held: In a revision petition, photocopies of documents produced by the accused for the first time could not be entertained and made a basis for setting aside an order passed by the trial court and dismissing a complaint which otherwise made out the commission of an offence – The accused is entitled to set up his defence before the trial court at the proper stage.

s.202 – Criminal complaint – Non-disclosure of the fact of a previous complaint – Order of Additional chief Metropolitan Magistrate taking cognizance and issuing process set aside by Additional Sessions Judge in revision – HELD: On the date the Magistrate took cognizance of the offences alleged in the complaint filed before him, no other complaint was pending in any other court, as the previous complaint had been quashed without a trial on merits – Mere filing of a previous complaint could not in the circumstances be a bar to the filing of another complaint or to the proceedings based on such complaint being taken to their logical conclusion – So also the High Court was correct in holding that there was no violation of the provision of s. 202 Cr.P.C. to warrant interference in exercise of revisional powers by the Sessions Judge.

Respondent no. l filed a criminal complaint before the Additional Chief Metropolitan Magistrate, alleging commission of offences punishable u/s 417, 420, 465, 467, 468 and 471 read with s. 120B, IPC, by the petitioners. Specific allegations were made in the complaint to the effect that the petitioners had entered into a conspiracy to defraud the complainant and for that purpose accused no 4 had played an active role apart from fabricating a Board resolution when no such resolution had in fact been passed. The Magistrate recoded prima facie satisfaction about the commission of offences stated to have been committed, took cognizance and directed issuance of process against the accused. The said order was challenged in revisions petitions before the Additional Sessions Judge, who set aside the order of the Magistrate holding that although the allegations regarding fabrication of a resolution, taken at their face value, made out a prima facie case of fraud against the accused yet the minutes of a subsequent meeting allegedly held on 19.7.2005, a photocopy whereof was filed in the criminal revisions, ratified the resolution allegedly passed on 28.6.2005, and as such no case of fraud or cheating was made out against the

accused. The High Court set aside the order of the Additional Sessions Judge.

Dismissing the petitions, the Court

HELD: 1.1. The averments made in the complaint when taken at their face value, make out a case against the accused. The complaint does contain assertions with sufficient amount of clarity on facts and events which if taken as proved can culminate in an order of conviction against the accused persons. That is, precisely the test to be applied while determining whether the court taking cognizance and issuing process was justified in doing so. [para 8] [417-G-H; 418-A]

1.2. There is no error or perversity in the view taken by the High Court that in a revision petition photocopies of documents produced by the accused for the first time, could not be entertained and made a basis for setting aside an order passed by the trial court and dismissing a complaint which otherwise made out the commission of an offence. The accused is, doubtless, entitled to set up his defence before the trial court at the proper stage, confront the witnesses appearing before the court with any document relevant to the controversy and have the documents brought on record as evidence to enable the trial court to take a proper view regarding the effect thereof. But no such document, the genuineness whereof was not admitted by the parties to the proceedings, could be introduced by the accused in the manner it was sought to be done. That apart, whether or not the document dated 19.7.2005, could possibly have the effect of ratifying the resolution allegedly passed on 28.6.2005 was also a matter that could not be dealt with summarily, especially when the former did not even make a reference to the latter. [para 9-10] [418-C-F; 420-C]

Minakshi Bala v. Sudhir Kumar and Ors. **(1994) 4 SCC 142 – relied on**

2.1. On the date the Additional Chief Metropolitan Magistrate, Mumbai, took cognizance of the offences in

the complaint filed before him no other complaint was pending in any other court, as the complaint before the Magistrate at Bangalore had been quashed without a trial on merits. Mere filing of a previous complaint could not in the circumstances be a bar to the filing of another complaint or for proceedings based on such complaint being taken to their logical conclusion. So also the High Court was correct in holding that there was no violation of the provision of s. 202 Cr.P.C. to warrant interference in exercise of revisional powers by the Sessions Judge. [para 11] [420-D-G]

2.2. The complaint in the instant case, does make specific allegations which would call for a proper inquiry and trial and the Magistrate had indeed recorded a prima facie conclusion to that effect. There is no reason to interfere with the order passed by the High Court, in exercise of jurisdiction under Article 136 of the Constitution of India. [para 12-13] [421-B-C; G]

Pepsi Foods Ltd. and Anr. V. Special Judicial Magistrate and Ors. **1997 (5) Suppl. SCR 12 = (1998) 5 SCC 749 and** *State of Orissa v. Debendra Nath Padhi* **2004 (6) Suppl. SCR 460 = (2005) 1 SCC 568 – relied on.**

Case Law Reference:

(1994) 4 SCC 142	**relied on**	**para 9**
1997 (5) Suppl. SCR 12	**relied on**	**para 12**
2004 (6) Suppl. SCR 460	**relied on**	**para 12**

CRIMINAL APPELLATE JURISDICTION : SLP (Crl.) No. 4606 of 2011.

From the Judgment & Order dated 6.5.2011 of the High Court of Judicature at Bombay in Criminal Revision Application No. 441 of 2008.

WITH

SLP (Crl.) No. 4672 of 2011.

K.K. Venugopal, Altaf Ahmed, Siddhartha Dave, Jemtiben AO, Vibha Datta Makhija, Ankur Tomer, Navkesh Betia,

Sandeep Narain, S. Narain & Co. for the Petitioners.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. These Special Leave Petitions arise out of an order dated 6th May, 2011, passed by the High Court of Judicature at Bombay in Criminal Revision Application No.441 of 2008 whereby the High Court has set aside order dated 13th August, 2008 passed by the Additional Sessions Judge, Greater Bombay in Revision Applications No.449, 460 and 853 of 2007 and restored that made by the Additional Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai taking cognizance of offences allegedly committed by the petitioners.

2. Respondent No.1, Rajeev Sawhney filed Criminal Complaint No.20/SW/2007 before Additional Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai, alleging commission of offences punishable under Sections 417, 420, 465, 467, 468, 471 read with Section 120B of IPC by the petitioners. The complaint set out the relevant facts in great detail and made specific allegations to the effect that petitioners had entered into a conspiracy to defraud him and for that purpose Shri Pawan Kumar, arrayed as accused No.4 in the complaint, had played an active role apart from fabricating a Board resolution when no such resolution had, in fact, been passed. On receipt of the complaint the Additional Chief Metropolitan Magistrate recorded prima facie satisfaction about the commission of offences punishable under Sections 417, 420, 465, 467, 468, 471, read with Section 120B of IPC, took cognizance and directed issuance of process against the accused persons. Aggrieved by the said order, Revision Petitions No.449, 460, 853 of 2007 were filed by the accused persons before the Additional Sessions Judge, Greater Bombay, challenging the order taking cognizance and the maintainability of the complaint on several grounds. The revision petitions were eventually allowed by the Additional Sessions Judge, Greater Bombay by his order dated 13th August, 2008 and the summoning order set aside. The Additional Sessions Judge came to the conclusion that although

the allegations regarding fabrication of a resolution, taken at their face value, made out a prima facie case of fraud against the accused persons yet the minutes of a subsequent meeting allegedly held on 19th July, 2005, a photocopy of which was filed along with Criminal Revision No.460/2007 ratified the resolution allegedly passed on 28th June, 2005. The Court on that premise concluded that no fraud or cheating was made out against the accused persons. The Court observed:

> "The question is only in respect of the incident 28/06/2005 if this incident averred in the complaint is taken as it is without any more facts then certainly leads a prima facie case of playing fraud. However, in this case, it is seen from the record that the complainant had meeting on 19/07/2005, the minutes of the meeting are produced at page No.293 in Criminal Revision No.460/2007. This meeting and its minutes are not disputed. The relevant portion of the minutes on 19/07/2005 relevant for our purposes are as under:
>
> > "Mr. Rajeev Sawhney has agreed to approve and sign the circular resolution for opening the Bank Account of VMoksha Mauritius with State Bank of Mauritius and obtaining the loan facility for the purposes of receiving the purchase consideration and remittance of the subscription money for the issue of preference shares in favour of VMoksha Mauritius with effect from the time of execution and exchange of the above Undertaking and the modification letter for the Escrow Arrangement."
>
> This ratifies the act of 28/06/2005, therefore the minutes of the meeting which is signed by the complainant himself and accused No.4. Mr. Pawan Kumar and other directors etc. if perused the act of 28/06/2005 is ratified and the complainant thus consented to that act. Therefore, there remained nothing of the cheating to the complainant by the accused."
>
> (emphasis is supplied)

3. The Court also found fault with the complainant suppressing the fact of a complaint having been filed before the Additional Chief Metropolitan Magistrate at Bangalore and the alleged non-observance of the provisions of Section 202 of the Cr.P.C.

4. The above order was then challenged by the complainant, Shri Rajeev Sawhney before the High Court of Bombay in Criminal Revision Application No.441 of 2008. The High Court came to the conclusion that the Additional Sessions Judge had fallen in error on all three counts. The High Court noticed that the complaint filed before the IV Additional Chief Metropolitan Magistrate at Bangalore had been quashed by the Karnataka High Court on account of a more comprehensive complaint having been filed before the Additional Chief Metropolitan Magistrate at Mumbai. Consequently, on the date the Additional Chief Metropolitan Magistrate took cognizance of the offence alleged against the accused persons there was no complaint other than the one pending before the said Court. The complainant could not, therefore, be accused of having suppressed any material information from the trial Court to call for any interference by the Sessions Court on that count.

5. As regards the alleged non-observance of the provisions of Section 202 Cr.P.C. the High Court came to the conclusion that the provision of Section 202 Cr.P.C. had been complied with by the Magistrate while taking cognizance and issuing process.

6. On the question of ratification of the resolution allegedly passed on 28th June, 2005, the High Court held that the Sessions Judge was not justified in entertaining a photocopy of the document relied upon by the accused at the revisional stage, placing implicit reliance upon the same and interfering with the on-going proceedings before the Magistrate. The High Court observed:

> "The third ground on which the learned Addl. Sessions Judge had allowed the revision of the accused persons and quashed the process was that the acts in dispute were ratified in the meeting dated 19.7.2001. It appears that

during the arguments before the Addl. Sessions Judge, a photocopy of a document purporting to be minutes of the meeting of the advisers of the complainant and accused No.4 Pawan Kumar held on 19.7.2005 was produced to show that the parties had approved the act of opening the account in the name of the Company and securing the loan on 28.6.2005. Firstly, this document was produced for the first time before the Addl. Sessions Judge in the revision application. This document could be treated as a defence of the accused persons. That document was not available before the Addl. C.M.M. when he passed the order. Secondly, this document being the defence could not be taken into consideration for the purpose of deciding whether prima facie case is made out for issuing process. The learned Addl. Sessions Judge observed that signature on the document was not disputed. In fact, the stage of proving that document or admitting signature on that document had never arisen. The original document was not before the Court and only a photocopy of the document purporting to be minutes of the meeting was filed and on the basis of such photocopy produced during the revision application by the accused persons, the learned Addl. Sessions Judge jumped to the conclusion that such a resolution was passed and the acts of 28.6.2005 were ratified. In my opinion, it will not be appropriate for the Addl. Sessions Judge."

7. The present Special Leave Petitions assail the correctness of the view taken by the High Court.

8. Appearing for the petitioners M/s. K.K. Venugopal and Altaf Ahmed, learned senior counsels strenuously argued that the High Court was not justified in reversing the view taken by the Sessions Judge and in remitting the matter back to the trial Court. We do not think so. The reasons are not far to seek. We say so because the averments made in the complaint when taken at their face value, make out a case against the accused. We have gone through the averments made in the complaint and are of the view that the complaint does contain assertions

with sufficient amount of clarity on facts and events which if taken as proved can culminate in an order of conviction against the accused persons. That is, precisely the test to be applied while determining whether the Court taking cognizance and issuing process was justified in doing so. The legal position in this regard is much too well-settled to require any reiteration.

9. Learned counsel for the petitioners made a valiant attempt to argue that the Revisional Court was justified in receiving documents from the accused persons at the hearing of the revision and decide the legality of the order taking cognizance on that basis. Before the High Court a similar contention was raised but has been turned down for reasons that are evident from a reading of the passage extracted by us above. We see no error or perversity in the view taken by the High Court that in a revision petition photocopies of documents produced by the accused for the first time, could not be entertained and made a basis for setting aside an order passed by the trial Court and dismissing a complaint which otherwise made out the commission of an offence. The accused is doubtless entitled to set up his defence before the trial Court at the proper stage, confront the witnesses appearing before the Court with any document relevant to the controversy and have the documents brought on record as evidence to enable the trial Court to take a proper view regarding the effect thereof. But no such document, the genuineness whereof was not admitted by the parties to the proceedings, could be introduced by the accused in the manner it was sought to be done. We may in this regard gainfully refer to the decision of this Court in *Minakshi Bala v. Sudhir Kumar and Ors.* (1994) 4 SCC 142 where one of the questions that fell for consideration was whether in a revision petition challenging an order framing charges against the accused, the latter could rely upon documents other than those referred to in Sections 239 and 240 of the Cr.P.C. and whether the High Court would be justified in quashing the charges under Section 482 of the Cr.P.C. on the basis of such documents. Answering the question in the negative this Court held that while an order framing charges could be challenged in revision by the accused persons before

the High Court or the Sessions Judge, the revisional Court could in any such case only examine the correctness of the order framing charges by reference to the documents referred to in Sections 239 and 240 of the Cr.P.C and that the Court could not quash the charges on the basis of documents which the accused may produce except in exceptional cases where the documents are of unimpeachable character and can be legally translated into evidence. The following passage is, in this regard, apposite:

> **"7.** If charges are framed in accordance with Section 240 CrPC on a finding that a prima facie case has been made out — as has been done in the instant case — the person arraigned may, if he feels aggrieved, invoke the revisional jurisdiction of the High Court or the Sessions Judge to contend that the charge-sheet submitted under Section 173 CrPC and documents sent with it did not disclose any ground to presume that he had committed any offence for which he is charged and the revisional court if so satisfied can quash the charges framed against him. To put it differently, once charges are framed under Section 240 CrPC the High Court in its revisional jurisdiction would not be justified in relying upon documents other than those referred to in Sections 239 and 240 CrPC; nor would it be justified in invoking its inherent jurisdiction under Section 482 CrPC to quash the same except in those rare cases where forensic exigencies and formidable compulsions justify such a course. We hasten to add even in such exceptional cases the High Court can look into only those documents which are unimpeachable and can be legally translated into relevant evidence."

10. It is interesting to note that even in the present SLPs the petitioner has filed an unsigned copy of the alleged minutes of the meeting dated 19th July, 2005. We do not think that we can possibly look into that document without proper proof and without verification of its genuineness. There was and is no clear and unequivocal admission on the record, at least none was brought to our notice, regarding the genuineness of the

document or its probative value. The complainant-respondent in this petition was also not willing to concede that the document relied upon could possibly result in the ratification of an act which was *non est* being a mere forgery. At any rate the document could not be said to be of unimpeachable character nor was there any judicial compulsion much less an exceptional or formidable one to allow its production in revisional proceedings or to accept it as legally admissible evidence for determining the correctness of the order passed by the trial Court. That apart whether or not document dated 19th July, 2005, could possibly have the effect of ratifying the resolution allegedly passed on 28th June, 2005 was also a matter that could not be dealt with summarily, especially when the former did not even make a reference to the latter.

11. The alternative contention urged by learned counsel for the petitioners that there was suppression of information by the complainant as regards filing of a previous complaint before the Magistrate at Bangalore is also without any substance. The fact that the complaint previously filed had been quashed by the High Court on account of filing of a comprehensive complaint out of which these proceedings arise is, in our opinion, a complete answer to the charge of suppression. As on the date the Additional Chief Metropolitan Magistrate, Mumbai, took cognizance of the offences in the complaint filed before him no other complaint was pending in any other Court, the complaint before the Magistrate at Bangalore having had been quashed without a trial on merits. Mere filing of a previous complaint could not in the above circumstances be a bar to the filing of another complaint or for proceedings based on such complaint being taken to their logical conclusion. So also the High Court was, in our opinion, correct in holding that there was no violation of the provision of Section 202 Cr.P.C. to warrant interference in exercise of revisional powers by the Sessions Judge.

12. Reliance placed by learned counsel for the petitioners upon the decisions of this Court in *Pepsi Foods Ltd. and Anr. v. Special Judicial Magistrate and Ors. (1998) 5 SCC 749* and *State of Orissa v. Debendra Nath Padhi (2005) 1 SCC 568*

is of no avail. In the former case this Court simply recognized that taking of cognizance is a serious matter and that the magistrate must apply his mind to the nature of the allegations in the complaint, and the material placed before him while issuing process. The complaint in the present case, as noticed earlier, does make specific allegations which would call for a proper inquiry and trial and the magistrate had indeed recorded a prima facie conclusion to that effect. So also the decision in *Debendra Nath Padhi* (supra) does not help the petitioner. That was a case where the question was whether at the stage of framing of charge, the accused could seek production of documents to prove his innocence. Answering the question in the negative this Court held:

> "The law is that at the time of framing charge or taking cognizance the accused has no right to produce any material. No provision in the Code of Criminal Procedure, 1973 (for short the "Code") grants to the accused any right to file any material or document at the stage of framing of charge. That right is granted only at the stage of the trial. Satish Mehra case, (1996) 9 SCC 766 holding that the trial court has powers to consider even materials which the accused may produce at the stage of Section 227 of the Code has not been correctly decided. It is well settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence."

13. In the result, we see no reason to interfere with the order passed by the High Court in exercise of our jurisdiction under Article 136 of the Constitution of India. The Special Leave Petitions are accordingly dismissed.

R.P. Special Leave Petitions dismissed.

M/S ALLIED MOTORS LTD.

v.

M/S BHARAT PETROLEUM CORPN. LTD.

(Civil Appeal No. 11200 of 2011)

DECEMBER 16, 2011

[DALVEER BHANDARI AND DIPAK MISRA, JJ.]

PUBLIC DISTRIBUTION :

Petrol pump – Samples of petrol/motor spirit taken – The following day dealership terminated – Held: There has been a total violation of the provisions of law and the principles of natural justice – Samples were collected in complete violation of the procedural laws and in non-adherence to the guidelines – The haste in which 30 years old dealership was terminated even without giving show-cause notice and/or giving an opportunity of hearing, clearly indicates that the entire exercise was carried out on non-existent, irrelevant and extraneous considerations – Motor Spirit and High Speed Diesel Regulation of Supply and Distribution and Prevention of Malpractices) Order,1999 – Marketing Discipline Guidelines – Costs.

The appellant, who was running a Petrol Pump, filed a writ petition before the High Court challenging the order dated 16.5.2000 by which its dealership was terminated. It was the case of the appellant that in the morning of 15.5.2000, an unauthorized Police Officer accompanied by the official of the respondent-Bharat Petroleum Corporation Ltd., conducted a raid at its petrol pump; that the samples taken were in complete violation of the mandatory provisions of the Motor Spirit and High Speed Diesel (Regulation of Supply and Distribution and Prevention of Malpractices) Order, 1999: that the samples were taken from six sources but the prescribed number of 12 samples were not handed over to the appellant; that the samples were taken in plastic containers, which was

in complete violation of Clause 5(3) of the Order of 1999; and that the action of the respondent was pre-meditated and malafied. The writ petition of the appellant was dismissed by the Single Judge and so also its letter patent appeal by the Division Bench of the High Court.

Allowing the appeal, the Court

HELD: 1.1. In the instant case, the samples were taken on 15-5-2000. On the very next day i.e. on 16-5-2000, without even giving a show-cause notice and/or giving an opportunity of hearing, the respondent-Corporation terminated the dealership of the appellant. The appellant had been operating the petrol pump for the respondent for the last 30 years and was given 10 awards declaring its dealership as the best petrol pump in the entire State of NCT Delhi. During this period, on a number of occasions, samples were tested by the respondent and were found to be as per specifications. The haste in which 30 years old dealership was terminated even without giving show-cause notice and/or giving an opportunity of hearing clearly indicates that the entire exercise was carried out by the respondent-Corporation on non-existent, irrelevant and extraneous considerations. There has been a total violation of the provisions of law and the principles of natural justice. Samples were collected in complete violation of the procedural laws and in non-adherence to the guidelines of the respondent Corporation. [Para 58-59] [442-B-D]

1.2. It is clear from Clause (d) of s.1 of the Marketing Discipline Guidelines, that its provisions prescribe termination only in case of second instance of adulteration of Motor Spirits. It is an admitted case that this was the first instance of alleged adulteration of Motor Spirits. [para 19] [431-C-D]

1.3. On consideration of the totality of the facts and circumstances of the case, it becomes imperative in the interest of justice to quash and set aside the termination

order of the dealership. Accordingly, the same is quashed. Consequently, the respondent-Corporation is directed to handover the possession of the petrol pump and restore the dealership of petrol pump to the appellant within three months. The Costs to be paid by the respondent Corporation to the appellant are quantified at Rs. 1,00.000. [Para 60-61] [442-E-G]

Harbanslal Sahnia and Another v. Indian Oil Corporation Ltd. and Another **(2003) 2 SCC 107;** *Bharat Filling Station and Anr. vs. Indian Oil Corporaion Ltd.* **104 (2003) DLT 601** *Bharat Filling Station and Another v. Indian Oil Corporation Ltd. Ramana Dayaram Shetty v. International Airport Authority of India and Others* **1979 (3) SCR 1014 = (1979) 3 SCC 489;** *Kumari Shrilekha Vidyarthi and Others v. State of U.P. and Others* **1990 (1) Suppl. SCR 625 = (1991) 1 SCC 212;** *Karnataka State Forest Industries Corporation v. Indian Rocks* **2008 (15) SCR 96 = (2009) 1 SCC 150;** *Gujarat State Financial Corporation v. M/s. Lotus Hotels Pvt. Ltd*. **(1983) 3 SCC 379 – cited.**

Nazir Ahmad v. King Emperor **AIR 1936 PC 253 - cited.**

Case Law Reference:

(2003) 2 SCC 107	**cited**	**para 17**
104 (2003) DLT 601	**cited**	**para 25**
1979 (3) SCR 1014	**cited**	**para 26**
AIR 1936 PC 253	**cited**	**para 51**
1990 (1) Suppl. SCR 625	**cited**	**para 54**
2008 (15) SCR 96	**cited**	**para 55**
(1983) 3 SCC 379	**cited**	**para 56**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 11200 of 2011.

From the Judgment & Order dated 11.8.2009 of the High Court of Delhi at New Delhi in L.P.A. No. 296 of 2009.

Mukul Rohatgi, Ranjit Kumar, Diya Kapur, Paromita

Mukherjee, Nikhil Pillai, Arjun Puri (for Karanjawala & Co.) for the Appellant.

Sudhir Chandra, Parijat Sinha, Reshmi Rea Sinha, Anil Kumar Mishra, Bhagbati Prasad Padhy, Vikram Ganguly, S.C. Ghosh for the Respondent.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. Leave granted.

2. This appeal is directed against the judgment dated 11th August, 2009 delivered in Letters Patent Appeal No.296 of 2009 by the Division Bench of the High Court of Delhi upholding the judgment dated 6th May, 2009 passed by the learned Single Judge in Writ Petition (Civil) No.2927 of 2005.

3. The main issue which arises for adjudication in this appeal pertains to the termination of the dealership of the appellant in an illegal and arbitrary manner.

4. According to the appellant, it had been operating the petrol pump for the last 30 years and during this period it was given 10 awards from time to time declaring its dealership as the best petrol pump in the entire State of NCT of Delhi. On a number of occasions, samples of the appellant were tested by the respondent-Corporation and on each occasion its samples were found to be as per the specifications.

5. According to the appellant, it had maintained highest standards and norms of an excellent petrol pump, yet, the respondent-Corporation, in a clandestine manner, terminated its dealership in the most arbitrary manner and in total violation of the principles of natural justice.

6. It was further urged by the appellant that its dealership was terminated without even issuing any show cause notice and/or giving an opportunity of hearing to it. The termination of dealership was contrary to the mandatory procedural provisions of law. According to the appellant, the said termination was mala fide, arbitrary and illegal.

7. It may be pertinent to mention that in the morning of 15th

May, 2000, an unauthorized police officer accompanied by the officials of the respondent conducted a raid at the appellant's petrol pump. According to the appellant, the raid was illegal as an unauthorized police officer could not conduct a search and seize the samples of the appellant.

8. The appellant urged that the samples taken in this raid were in complete violation of the mandatory procedural provisions of law as provided under the Motor Spirit and High Speed Diesel (Regulation of Supply and Distribution and prevention of Malpractices) Order, 1999 (hereinafter referred to as "Order"). The appellant while reproducing the relevant provisions of law has submitted as under:-

(a) Clause 4 of the said Order provides for power of search and seizure. Sub-Clause (A) of the section authorizes any police officer not below the rank of the Deputy Superintendent of Police (for short, DSP) duly authorized or any Officer of the concerned Oil Company not below the rank of Sales Officer to take samples of the products and/or seize any of the stocks of the product which the officer has reason to believe has been or is being or is about to be used in contravention of the said Order.

9. In the present case, however, the samples were collected in complete violation of the aforesaid provisions. The Police official who had conducted the raid and collected the samples was admittedly below the rank of DSP. This is also recorded in the Metropolitan Magistrate's order dated 27.5.2002 passed in FIR No.193 of 2000 wherein it is stated as under:

"In the present case the search and seizure was conducted by an unauthorized police officer of the rank of Inspector which is totally contrary to the mandatory provisions of the said Clause 4."

(b) Sub-Clause (B) of Clause 4 of the said Order provides that while exercising the power of seizure under Clause 4 (A) (iv) the authorised officer shall

record in writing the reasons for doing so, a copy of the which shall be given to the dealer.

10. According to the appellant, in the present case, no such reasons in writing were provided.

(c) Clause 5(2) of the said Order lays down the procedure for sampling of product which provides that "the Officer authorised in Cl. 4 shall take, sign and seal six samples of 1 litre each of the Motor Spirit or 2 of 1 lit. each of the High Speed Diesel, 2 samples of the Motor Spirit (or one of High Speed Diesel) would be given to the Dealer or transporter or concerned person under acknowledgement with instruction to preserve the sample in his safe custody till the testing or investigations are completed, 2 samples of MS (and/or one of HSD), would be kept by the concerned Oil Company or department and the remaining two samples of MS (and/or one of HSD) would be used for laboratory analysis."

11. The appellant urged that in the present case, samples were allegedly taken from 6 sources. Therefore, the respondent Corporation as per the provision should have taken 36 samples (6 samples from each of the source) and handed over 12 samples (2 from each of the 6 sources) to the appellant, being the dealer, under acknowledgement. The respondent Corporation however, neither took 36 samples, nor did it hand over the prescribed number of 12 samples to the appellant. This is clear from the counter affidavit filed by the respondent in Writ Petition (C) No.7382 of 2001 placed on record. It is clearly stated in the counter affidavit filed by the respondent Corporation that it is pertinent to state that two samples from each of the tanks containing adulterated products were drawn by the answering respondent in the presence of the police officials of the crime branch and the representative of the appellant as well.

12. Out of these two samples, one sample was retained by the crime Branch of Delhi Police and another by the respondent, Bharat Petroleum Corporation Limited (for short BPCL). It has, therefore, been clearly admitted that only 2 samples as opposed

to 6 samples were drawn from each tank and that no sample was handed over to the appellant. Furthermore, the learned counsel appearing for the respondent in the proceedings before the Division Bench in LPA No.296 of 2009, has specifically admitted, as is also recorded in page 8 of the impugned order that "there was no receipt of two samples from each source being handed over to appellant". It is also relevant to state that in all previous representations made by the appellant to the respondent and previous writ petitions filed, the respondent has never denied the averment that 2 samples were not handed over to the appellant.

(d) Clause 5(3) of the said Order provides that "Samples shall be taken in clean glass or aluminium containers. Plastic containers shall not be used for drawing samples."

13. According to the appellant, in the present case, plastic containers were used for drawing samples in complete violation of the said provision. This is also recorded in the Metropolitan Magistrate's order dated 27.5.2002 wherein it is stated that in Clause 5 of the order it was specifically legislated that the sample shall be taken in clean glass or aluminium containers and plastic containers would not be used for drawing out the samples. But in clear contravention to the mandatory provisions, plastic containers were used by the police officer while drawing samples. From the file, it is clear that sample Nos.7, 8 and 9 were drawn from the car of the complainant in plastic containers by the police and therefore, the report on the basis of the samples taken in the plastic containers cannot be relied upon at all.

(e) Clause 5(4) of the said Order provides that "The sample label should be jointly signed by the officer who has drawn the sample, and the dealer or transporter or concerned person or his representative and the label shall contain information as regards the product, name of retail outlet, quantity of sample, date, name and signature of the officer, name and signature of the dealer or transporter or concerned person or his representative."

According to the appellant, this was not done.

14. The Metropolitan Magistrate's order dated 27.5.2002 passed in FIR No.193 of 2000 specifically records as follows:

> "The law being as noticed above, it is very clear that the search and seizure is bad in law and is in contravention of mandatory provisions of the Essential Commodities Act and contravention of Motor Spirits (High Speed Diesel Act) and in any case the prosecution cannot establish its case against any of the accused and accused persons are liable to be discharged on this very ground and no charge should be framed… There is no evidence whatsoever to show that petrol supplied was adulterated or not."

15. The appellant referred to section I (c) of Chapter 6 of the Guidelines of 1998 which provides as follows:

> "Wherever samples are drawn, either pursuant to random checks or where adulteration is suspected, 3 sets of signed and sealed samples (6x1 ltr of MS and 3x1 ltr of HSD) should be collected from the RO, out of which one set should be kept with the dealer, one with the company and the third to be sent for laboratory resting within 10 days. For the sample kept with the dealer, proper acknowledgement will be obtained and the dealer will be instructed to preserve the same in his safe custody till the testing/investigation are completed."

16. According to the appellant, it is clear that the samples were collected in violation of mandatory procedure of law as provided under the said Order and therefore the termination order passed on the basis of test reports of samples so collected is completely illegal and liable to be set aside.

17. The appellant relied on the case of *Harbanslal Sahnia and Another v. Indian Oil Corporation Ltd. and Another* (2003) 2 SCC 107, wherein the Indian Oil Corporation terminated the dealership of Harbanslal Sahnia on the basis that the sample drawn from the petrol pump did not meet the standard specification. This Court found that two government orders

providing for the procedure for taking samples had been violated and in view of the same found that the failure of the sample taken became irrelevant and non-existent fact which could not have been relied upon for terminating dealership, and quashed the order terminating the dealership and restored possession. It is submitted that the fact that two samples were not left with the appellant is not only a violation of the mandatory principles of law but also of fair play and natural justice as the appellant is deprived of its valuable right to contest the veracity of the test reports. This provision of law is the single most important check on arbitrary action by the respondent.

18. According to the appellant, these samples were taken in violation of the mandatory provisions of law. The test reports, given on 16.5.2000, formed the basis for the termination of the appellant's dealership. The termination was in clear violation of the procedures prescribed by law. The termination was also in violation of mandatory Marketing Discipline Guidelines and the prescribed procedures. The termination was also in violation of the principles of natural justice and fairplay. According to the appellant, this is clear from the following facts:-

(a) Clause (d) of Section 1 of the Marketing Disciplines provides that: If the samples is certified to be adulterated, after laboratory test, a show cause notice should be served on the dealer and explanation of the dealer sought within 7 days of the receipt of the show cause notice. Thus under the said provision seven days is to be given to the dealer to provide an explanation and only if explanation is found unsatisfactory can appropriate action be taken. In the instant case, however, no show cause notice was given and no opportunity was given to the appellant to provide any explanation. Instead appellant's dealership was summarily terminated on the very date the alleged test reports certifying the sample to be adulterated was received i.e. 16.5.2000, the very next day after the samples were taken. It is relevant to state that the premeditated

nature and mala fide of the test reports was writ large as the test reports on the basis of which the appellant's dealership was allegedly terminated itself indicated "terminated dealer".

(b) Clause (d) of Section 1 of the Marketing Discipline Guidelines further provides that if the explanation of dealer is not satisfactory, the Company should take action as follows:

a. Fine of Rs.1 lakh and suspension of sales and supplies for 45 days in the first instances;

b. Termination in the second instance.

19. It is thus clear from the above provision that the Guidelines prescribe termination only in case of second instance of adulteration of Motor Spirits. It is an admitted case that this was the first instance of alleged adulteration of Motor Spirits.

20. One of the grounds taken by the respondent-Corporation for termination in its letter dated 16.5.2000 was that "in the past also a product sample collected from the retail outlet was found to have failed specification." This earlier offence in respect of the "product sample" referred to in the order of 16.5.2000, was, however, in respect of lube sample and not petrol/MS. This is clear from the Delhi High Court's order dated 9.9.2004 passed in WP (C) No.7382 of 2001, which records respondent Corporation's counsel's submission in that respect as below: "It was also emphasized that there was a past history where inspection of the outlet had been carried out on 12.12.1998 and Lubes samples were collected which were found off-specifications."

21. It is also submitted that a previous alleged case of off-spec lube, does not make the first alleged case of motor spirit adulteration, a second offence of motor spirit adulteration. Off-spec lube is not a case of adulteration which is clear from the definition of "adulteration" set out in the Marketing Discipline Guidelines which defines "adulteration" as "the introduction of any foreign substance into motor spirit/high speed diesel illegally or unauthorizedly." Lube falls into a completely different category

and is in a separate chapter in the Marketing Discipline Guidelines being Chapter 7 as contrasted from Chapter 6 which deals with "Adulteration of Product". Chapter 7 of the said guidelines separately provides for prevention of irregularities at retail outlet in respect of lubes. Clause 9 of the said Chapter provides the following punishments in case of sales of adulterated lubes.

a. Suspension of sales and supplies of all products for 15 days along with a fine of Rs.20,000/- in the first instance.

b. Suspension of sales and supplies for 30 days along with a fine of Rs.50,000/- in the second instance.

c. Termination in the third instance.

22. Thus while the guidelines provide for termination of dealership in the second instance of adulteration of petrol/MS, the punishments prescribed for adulteration of lubes provides for termination only in case of third instance.

23. Further, the fourth note provided at the end of this Chapter 6 provides as under:

"In case, two or more irregularities are detected at the same time at the same RO, action will be taken in line with what is listed in MDG under the relevant category for each irregularity."

24. According to the appellant, the respondent has clearly acted in violation/contravention of, or at the very least in departure from, the Motor Spirits High Speed Diesel Order and the Marketing Discipline Guidelines and has also acted contrary to the principles of natural justice and fair play both in respect of taking samples which formed the basis of termination, as also in respect of the termination of dealership.

25. The appellant referred to the decision in *Bharat Filling Station and Another v. Indian Oil Corporation Ltd.* 104 (2003) DLT 601 wherein the Delhi High Court specifically referred the Market Discipline Guidelines. Relevant part of the judgment is reproduced as under:-

"As noted above, IOC, whenever enters into dealership agreement, executes memorandum of agreement which lays down standard terms and conditions. These conditions, *inter alia*, include provisions for termination of the dealership as well. It is provided that the agreement can be terminated by giving required notice. It may however be mentioned that at the same time in order to ensure that such agreements with the dealers are worked out in a systematic manner and the respondent IOC does not invoke the termination clause arbitrarily, Government of India has issued Marketing Discipline Guidelines.

26. The appellant also referred to the decision of this Court in *Ramana Dayaram Shetty v. International Airport Authority of India and Others* (1979) 3 SCC 489, wherein this Court held that "it is well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them." It is submitted that the respondent was bound to act in accordance with the Marketing Discipline Guidelines.

27. It is further submitted that in the case of *Ramana Dayaram Shetty (supra)*, this Court held that "the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including awards of jobs, contracts, quotas, licenses etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

28. The appellant further submitted that in the present case the respondent has departed from the standard norms laid down

in the Marketing Discipline Guidelines and the standard norms of natural justice and fairplay and that such departure was clearly arbitrary, irrational, unreasonable and discriminatory.

29. The appellant urged that the respondent Corporation terminated the dealership without even issuing show-cause notice and/or providing any opportunity of hearing. The termination is clearly in violation of the principles of natural justice.

30. The appellant also asserted that the termination was mala fide is further strengthened by the fact of an internal email of the respondent dated 3 days after the raid on May 18, 2000 stating that "the samples were taken as complaint samples but the comments on the test result were given due to reasons explained to you over the phone."

31. It is also stated that another email dated 22nd May, 2000 recorded that "Delhi Territory had drawn samples regularly from the retail outlet. All 10 samples drawn in 1999-2000 were found on spec." Despite this, the dealership had already been terminated the very day after the raid.

32. The appellant also urged that the order of the Delhi High Court in Writ Petition (Civil) No.7382 of 2001 dated 9.9.2004 directed the respondent to give a show cause notice, personal hearing and pass a reasoned order. It was not given and the appellant was constrained once again to approach the High Court who then directed the respondent to grant the appellant a personal hearing at a higher level. The action of the respondent is *mala fide* which is reflected from the fact that at various stages the respondent-Corporation has tried to improve its case by supplanting reasons in support of the termination. This is clear from the following facts:

i. The first notice dated 16.5.2000 terminating the dealership points out the following three grounds for termination:

a. One of the samples during the raid and taken from the laboratory testing had failed specification of U.L.P.

b. In the past also a product sample collected from the retail outlet was found to have failed specification; and

c. Breach of agreement between the parties vide which the appellant had covenanted not to adulterate petroleum products.

ii. Despite the fact that termination order was quashed by the High Court vide its order dated 9.9.2004 passed in W.P. (C) No.7328 of 2001, with specific direction to the respondent to give the appellant personal hearing and pass a reasoned order, the respondent Corporation vide letter 22.11.2004 confirmed the original order of termination without granting the appellant an opportunity of hearing. Further despite Court's specific order to treat the original termination order dated 16.5.2005 as the show-cause notice, the respondent added additional grounds of termination and terminated the dealership on these grounds in addition to the grounds taken in 16.5.2000. The additional grounds were:

a. Loss of Market Share in 1997.

b. Non-availability of density record during routine mobile inspection on 28.4.1998 and 30.5.1995;

c. Failure to meet specifications during a routine inspection on 12.12.1998;

d. Two complaints received in 1997.

33. The appellant submitted that it is pertinent to note that all the grounds pertain to a period prior to the termination of the dealership in 2000 and hence were known to the respondent even at the time it issued its termination order dated 16.5.2000. Despite the same these were taken as grounds for the first time in the year 2004 making it abundantly clear that these grounds were added as an after thought only with a view to improve its case of termination.

34. The appellant further urged that in the order dated 16.5.2000 it was simply stated that one of the samples drawn had failed specification of ULP without clarifying which ULP specification it had failed. However, as per the order dated 22.11.2004, the ULP specification that the samples were said to have failed were in respect of Research Octane Number and ASTM distillation which were co-incidentally the only two tests that IIP Dehradun had not carried out when the samples were sent to IIP Dehradun pursuant to Delhi High Court's order dated 6.12.2000 passed in W.P. (Crl.) No.877 of 2000. In fact since these two tests were not carried out by IIP Dehradun in its order dated 22.11.2004, the test reports were not considered as being irrelevant.

35. The appellant further urged that the mala fide intention of the respondent is clearly evident that even at the stage of final disposal and two years after the filing of the present special leave petition, the respondent has made serious effort to improve its case by filing a supplementary affidavit dated 19.8.2011, vide which the respondent has sought to allege for the first time that it handed over requisite number of samples to the appellant. The supplementary affidavit states that "Samples of products were collected from five tanks of petrol/motor spirit. From each of the five tanks of petrol/motor spirit, six sets of samples in aluminium bottles (i.e. total of thirty 30 sample bottles) were taken. In addition to this, six samples in aluminium bottles were taken from the tank lorry which was found to be decanting petrol/motor spirit in the underground tanks for petrol/motor spirit. As such, the total number of samples taken in bottles were 36. Out of the 36 sample bottles collected, 12 were retained by the BPCL, 12 were handed over to the dealer and 12 were sent for testing to the specified laboratory.

36. The appellant further submitted that the said averment is completely false and contradictory to its own pleadings before the High Court in WP (C) No.7382 of 2001 produced on record by the respondent itself with the counter filed by it in the present proceedings. It is stated that "it is pertinent to state that two samples from each of the tanks containing adulterated products

were drawn by the answering respondent in the presence of the police officials of crime branch and representative of the petitioner as well. Out of these two samples one sample was retained by the crime branch of Delhi Police and the other by BPCL."

37. The appellant further submitted that it is also pertinent to mention that in the proceedings before the Division Bench of the High Court in LPA No.296 of 2009 the learned counsel appearing for the respondent Corporation has specifically admitted and is also recorded in page 8 of the impugned order that "there was no receipt of two samples from each of source being handed over to the appellant-petitioner."

38. The appellant submitted that it is clear that the termination of the dealership by the respondent Corporation was pre-determined and mala fide and hence liable to be set aside.

39. On behalf of the respondent, Shri Arjun Hira, General Manager (Retail), North, Bharat Petroleum Corporation Ltd., has filed an affidavit before this Court refuting the allegation that the termination of the agency was predetermined or mala fide. The respondent Corporation submitted that because of adulteration in the petrol, the respondent-Corporation had taken swift action in order to save its reputation. The respondent-Corporation referred to clause 10(g) of the DPSL Agreement dated 28.1.1971 which reads thus:

> "Not to adulterate the Petroleum products supplied by the Company and at all times to take all reasonable precautions to ensure that the Motor Spirit or H.S.D. is kept free from water, dirt and other impurities and served from the pumps in such conditions."

40. The respondent-Corporation submitted that the termination was in line with the terms and conditions of the Agreement entered into between the parties and the breach of trust has been committed by the appellant. It is also mentioned that since the respondent-Corporation had not received any response to the letter dated 16.5.2000 it was assumed that the appellant had accepted the wrong deeds and had no grievances.

41. The respondent also submitted that the respondent-Corporation did not show any haste in getting the samples tested. The samples were drawn and tested as per the procedure laid down and on the receipt of the results indicating the adulteration of products. Thus, the action contemplated under the provisions of the DPSL Agreement dated 28.01.1971 was taken.

42. The respondent-Corporation denied that the action initiated against the appellant was in any manner mala fide or manipulated for grabbing the business outlet on the false pretext. The respondent-Corporation also submitted that reliance cannot be placed upon the Report submitted by the IIP Dehradun as the tests conducted by them do not comply the specifications laid down by the Bureau of Indian Standards. Moreover, the IIP, Dehradun did not conduct the RON Test. Not following the specifications and conducting of the RON Test was essential for testing the quality and the specification of the ULP for meeting specifications of the Motor Spirit.

43. According to the respondent, the report submitted by the IIP, Dehradun is sacrosanct. The said sample was sent much after the incident of adulteration and the same is not in accordance with the MS/HSD Control October, 1998 issued by the Government of India.

44. In the rejoinder affidavit, the appellant reiterated its submissions mentioned in the petition and denied the allegations levelled in the counter affidavit.

45. The appellant submitted that the accuracy and veracity of the original test report also comes into question as the results of the independent laboratory, the IIP Dehradun report indicated no adulteration. In addition, the original test report on the basis of which the appellant's dealership was terminated can also not be relied upon in view of the conclusive finding of the Metropolitan Magistrate that the samples had been taken in violation of mandatory provisions of law.

46. According to the appellant, as per the report submitted by IIP, Dehradun the samples were not adulterated though the

report had not gone into the aspect of RON on account of which the samples were alleged to have failed the specification. Thus, even assuming, though not conceding, that there was no test report which conclusively established that the petrol was not adulterated there was also no test report which conclusively established that the petrol was in fact adulterated.

47. The appellant urged in the rejoinder that the Metropolitan Magistrate vide his order dated 27.5.2002 discharged all the accused persons as the Court was satisfied that prima facie there was no material on record even to frame charges against them. The order clearly records that the search and seizure carried out was unlawful and in complete contravention and disregard of the mandatory provisions of law inasmuch as the raid was conducted by an official below the rank of Sub-Inspector and the samples were drawn in plastic containers. The Court also observed that there was no evidence whatsoever to show that the petrol supplied was adulterated. The finding of the Metropolitan Magistrate reads thus:

> "the law being as noticed above, it is very clear that the search and seizure is bad in law and is contravention to the mandatory provisions of Essential Commodities Act and contravention to the Motor Spirits (High Speed Diesel) Act and in any case the prosecution cannot establish its case against any of the accused and accused persons are liable to be discharged on this ground alone and no charges can be framed.
>
> It is very clear that the search and seizure is bad in law and is in contravention to the mandatory provisions of Essential Commodities Act and contravention to the Motor Spirits (High Speed Diesel) Act and in any case the prosecution cannot establish its case against any of the accused and accused persons are liable to be discharged on this ground alone and no charges can be framed. Further, it is an admitted that that there was no receipt of two samples from each source being handed over to the petitioner. This is clear evidence of the fact that the samples were never handed over. In addition, the High Court in its order dated

> 9.9.2004 held that ".. there is no manner of doubt that the principles of law applied to the given facts of the present case are squarely covered by the judgment of the Supreme court in *Harbanslal Sahnia's case.*"

48. Mr. Mukul Rohtagi, learned Senior Advocate appearing for the appellant in support of his contentions placed reliance on some of the following judgments.

49. In *Harbanslal Sahnia and Another* (supra), the Court dealt with the question of termination of dealership by the Indian Oil Corporation Ltd. In this case, it was asserted before this Court that dealership has been terminated on irrelevant and non-existent grounds, therefore, the order of termination is liable to be set aside. In this case, there has not been compliance of the procedure. The failure of the sample taken from appellants' outlet on 11.2.2000 becomes an irrelevant and non-existent fact which could not have been relied on by the respondent Corporation for cancelling the appellants' licence.

50. In the above case, the Court came to the conclusion that the dealership was terminated on irrelevant and non-existent cause. The Court while allowing the appeal quashed and set aside the Corporation's order terminating dealership of the appellants.

51. Reliance has been placed on the celebrated judgment of the Privy Council in *Nazir Ahmad v. King Emperor* AIR 1936 PC 253 wherein the principle has been enunciated that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.

52. Reliance has also been placed on decision in *Ramana Dayaram Shetty (supra)* wherein this Court has held thus:

> "The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences, etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any

particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

53. In this case, the Court held that the action of the respondent was invalid. The acceptance of the tender was invalid as being violative of equality clause of Constitution as also of the rule of administrative law inhibiting arbitrary action.

54. Reliance has been placed on *Kumari Shrilekha Vidyarthi and Others v. State of U.P. and Others* (1991) 1 SCC 212, the Court observed thus:

"48. ……Non-arbitrariness, being a necessary concomitant of the rule of law, it is imperative that all actions of every public functionary, in whatever sphere, must be guided by reason and not humour, whim, caprice or personal predilections of the persons entrusted with the task on behalf of the State and exercise of all power must be for public good instead of being an abuse of the power."

55. Reliance has also been placed on *Karnataka State Forest Industries Corporation v. Indian Rocks* (2009) 1 SCC 150, the Court observed thus:

"38. Although ordinarily a superior court in exercise of its writ jurisdiction would not enforce the terms of a contract qua contract, it is trite that when an action of the State is arbitrary or discriminatory and, thus, violative of Article 14 of the Constitution of India, a writ petition would be maintainable (*See: ABL International Ltd. v. Export Credit Guarantee Corpn. Of India Ltd.* (2004) 3 SCC 553).

56. Reliance has also been placed on *Gujarat State Financial Corporation v. M/s. Lotus Hotels Pvt. Ltd.* (1983) 3 SCC 379. In this case the Court held that the public corporation dealing with public cannot act arbitrarily and its action must be in conformity with some principles which meets the test of reason and relevance.

57. We have heard the learned counsel for the parties at length and have perused the decisions relied on by the parties.

58. In the instant case, samples were taken on 15th May, 2000. On the very next day i.e. on 16th May, 2000, without even giving a show-cause notice and/or giving an opportunity of hearing, the respondent-Corporation terminated the dealership of the appellant. The appellant had been operating the petrol pump for the respondent for the last 30 years and was given 10 awards declaring its dealership as the best petrol pump in the entire State of NCT Delhi. During this period, on a number of occasions, samples were tested by the respondent and were found to be as per specifications.

59. In the instant case, the haste in which 30 years old dealership was terminated even without giving show-cause notice and/or giving an opportunity of hearing clearly indicates that the entire exercise was carried out by the respondent Corporation non-existent, irrelevant and on extraneous considerations. There has been a total violation of the provisions of law and the principles of natural justice. Samples were collected in complete violation of the procedural laws and in non-adherence of the guidelines of the respondent Corporation.

60. On consideration of the totality of the facts and circumstances of this case, it becomes imperative in the interest of justice to quash and set aside the termination order of the dealership. We, accordingly, quash the same. Consequently, we direct the respondent-Corporation to handover the possession of the petrol pump and restore the dealership of petrol pump to the appellant within three months from the date of this judgment.

61. The appeal is consequently allowed with costs which is quantified at Rs.1,00,000/- (Rupees one Lakh only) to be paid by the respondent Corporation to the appellant within four weeks from today.

R.P. Appeal allowed.

END OF 2011

****

A

B

C

D

E

F

G

H

A

B

C

D

E

F

G

H

A A

B B

C C

D D

E E

F F

G G

H H

A

B

C

D

E

F

G

H

A

B

C

D

E

F

G

H

A A

B B

C C

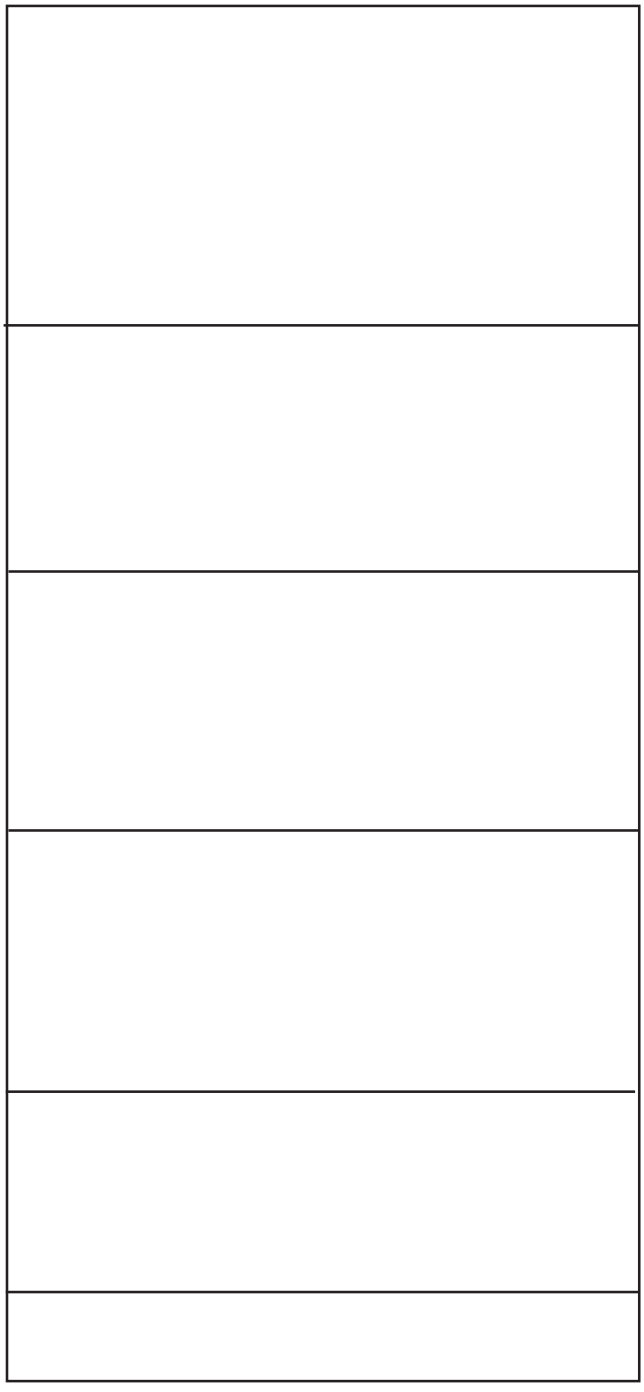
D D

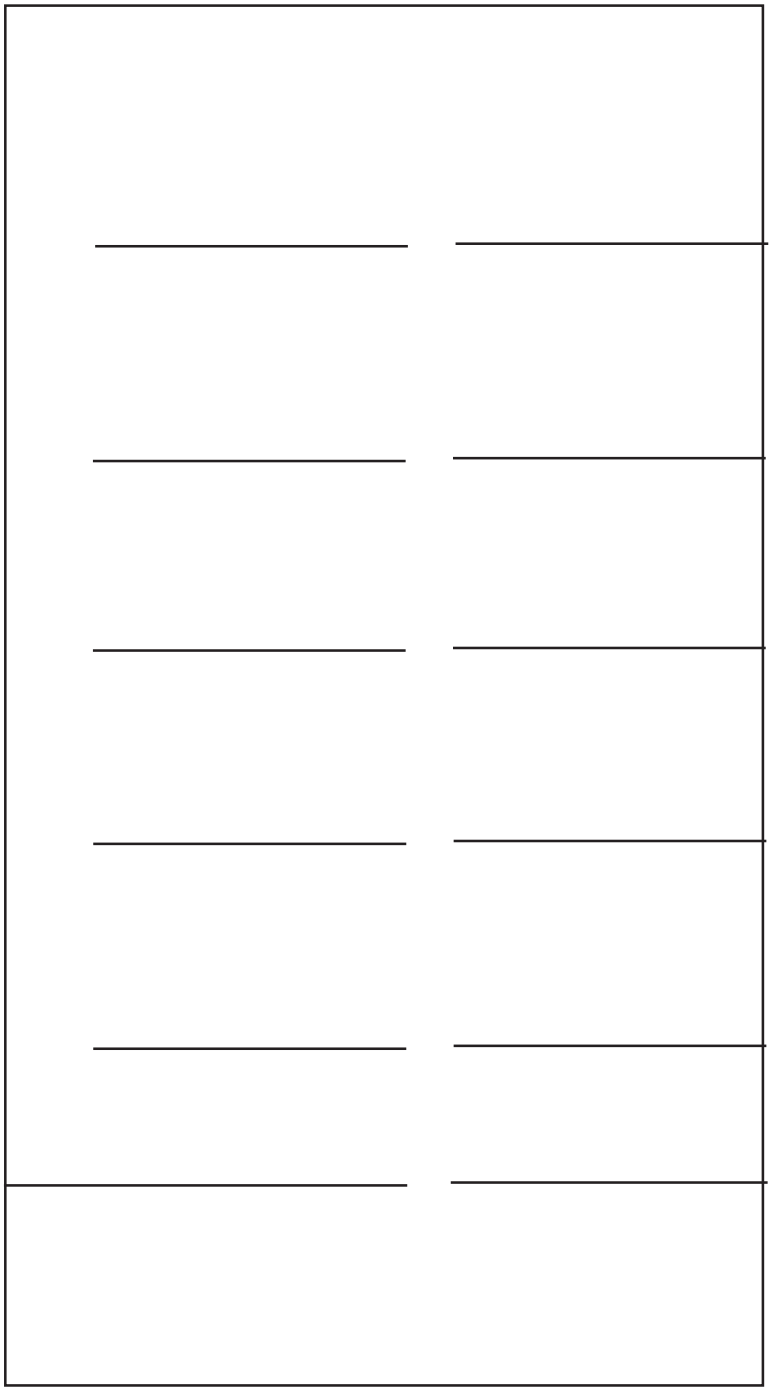
E E

F F

G G

H H





A

B

C

D

E

F

G

H

A

B

C

D

E

F

G

H

A

B

C

D

E

F

G

H

A

B

C

D

E

F

G

H

A A

B B

C C

D D

E E

F F

G G

H H

A

B

C

D

E

F

G

H

A

B

C

D

E

F

G

H

A

B

C

D

E

F

G

H

A

B

C

D

E

F

G

H

A A

B B

C C

D D

E E

F F

G G

H H

A A

B B

C C

D D

E E

F F

G G

H

A A

B B

C C

D D

E E

F F

G G

H H

A A

B B

C C

D D

E E

F F

G G

H H

A A

B B

C C

D D

E E

F F

G G

H H

A A

B B

C C

D D

E E

F F

G G

H H