S.K. JHA COMMODRE
v.
STATE OF KERALA AND ANOTHER
(Criminal Appeal No. 1017 of 2010)

JANUARY 11, 2011

[HARJIT SINGH BEDI AND CHANDRAMAULI KR. PRASAD, JJ.]

Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1978: Rule 3 r.w. s.475, Cr.P.C. – Naval Officers-accused arrested for offences punishable u/ss. 143, 147, 148. 452, 307, 326, 427 r.w. s. 149, IPC – Remanded to judicial custody – Application by the Commanding Officer of the Naval unit (to which the accused belonged) for handing over the accused for trial under the Navy Act, 1957 – Held: Not maintainable at this stage since the investigation had not been completed and charge-sheet had yet to be submitted – The option as to whether the accused be tried before the criminal court or by a court martial could be exercised only after police had completed investigation and submitted the charge-sheet and the provisions of the Rule could not be invoked in a case where police has merely started the investigation against the personnel who is subject to Military, Naval or Air Force law – Navy Act, 1957 – Code of Criminal Procedure, 1973 – s.475.

Som Dutt Datta vs. Union of India and Ors. **AIR (1969) SC 414, Followed.**

Case Law Reference:

AIR (1969) SC 414	**Followed.**	**Para 2**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1017 of 2010.

From the Judgment & Order dated 16.01.2008 of the High Court of Kerala at Ernakulam in Crl. M.C. 212 of 2008.

P.P. Malhotra, ASG, Rajiv Nanda, S.K. Sahajpal, Anil Katiyar (for B. Krishna Prasad) for the Appellant.

G. Prakash for the Respondent.

The following Order of the Court was delivered

ORDER

Heard the learned counsel for the parties in extenso.

It is clear to us that the judgment of the High Court is in conformity with the judgment of the Constitution Bench of this Court in *Som Dutt Datta vs. Union of India and Others* reported in AIR (1969) SC 414. The Constitution Bench while construing Rule 3 of the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules 1978 read with Sec. 549 of the Cr.P.C. (now Section 475 of the Cr.P.C.) held that the option as to whether the accused be tried before the Criminal Court or by a Court Martial could be exercised only after the Police had completed the investigation and submitted the charge-sheet and that the provisions of the Rule could not be invoked in a case where the police had merely started an investigation against a personnel subject to Military, Naval or Air Force law. The facts of the present case indicate that three Naval Officers were arrested on 10th January, 2008 for offences punishable under Sections 143, 147, 148, 452, 307, 326, 427 read with Section 149 of the I.P.C. and some other penal laws. They were produced before the Magistrate on the 11th January, 2008 who remanded them to judicial custody. An application was filed on the 14th January, 2008 by the Commanding Officer of the Naval Unit to which they belonged for handing over the accused for trial under the Navy Act, 1957. This application was rejected by the Magistrate holding that the stage of consideration of the application would arise only on the completion of the police

investigation which was still at a preliminary stage and that the request of the Commanding Officer was premature. The order of the Magistrate was challenged before the High Court of Kerala in revision. This too has been dismissed on similar grounds. We see from the facts that the observations of the Constitution Bench apply fully to the facts herein. The stage at which the option can be exercised by the Commanding Officer (as to whether the accused should be tried before a Court Martial or a Criminal Court) cannot be examined at this stage as the investigation has not been completed and a charge-sheet has yet to be submitted.

The appeal is accordingly dismissed.

D.G. Appeal dismissed.

STATE BANK OF INDIA AND ORS.
v.
BIDYUT KUMAR MITRA AND ORS.
(Civil Appeal No. 296 of 2011)

JANUARY 11, 2011

[B. SUDERSHAN REDDY AND SURINDER SINGH NIJJAR, JJ.]

Service Law:

Dismissal from service – Branch Manager – Subjected to disciplinary inquiry – Punishment of dismissal – Writ petition on the grounds of non-supply of vigilance report and refusal by Bank to summon the documents and the witnesses mentioned in the list – HELD: The delinquent officer neither raised the issue of non-supply of the documents during the entire course of the inquiry proceedings nor was it canvassed even before the Single Judge of the High Court – Besides, he failed to submit within stipulated time the list of documents and witnesses and, therefore, could not complain of breach of procedural requirement – The challenge before the Single Judge was restricted to denial of natural justice for non-supply of vigilance report – But the recommendations of the CVC were not taken into consideration by the authorities concerned – The delinquent officer failed to prove any prejudice or that the non-supply of C.V.C. report has resulted in miscarriage of justice – State Bank of India (Supervising Staff) Service Rules – r.50(11) – Clause (4), Note – Administrative Law – Natural justice.

Disciplinary inquiry – *Non-supply of documents to delinquent employee – HELD: Except in cases falling under "no notice", "no opportunity" and "no hearing" categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice – It was*

incumbent on the delinquent officer to plead and prove the prejudice caused by the non-supply of the documents – He has failed to place on record any facts or material to prove what prejudice has been caused to him – State Bank of India (Supervising Staff) Service Rules.

Respondent no.1, a Branch Manager in the appellant Bank, was subjected to a departmental inquiry for granting loans far in excess of the discretionary powers vested in him and improperly compiling the ne cessary opinion reports on the borrowers/guarantors and thereby exposing the Bank to the risk of substantial financial loss. The Commissioner of Departmental Enquiries, Central Vigilance Commission (CVC), was appointed as the Enquiry Officer. The disciplinary authority, agreeing with the findings of the Inquiry Officer, recommended imposition of penalty of dismissal on the respondent. The appointing authority imposed the punishment of dismissal. The appellate authority upheld the order and the Review Committee declined to interfere. The respondent then filed a writ petition and, for the first time, raised the ground of non-supply of the vigilance report. It was also submitted that the refusal of the Bank to requisition the documents and to summon the witnesses enumerated in the list of witnesses resulted in denial of reasonable opportunity of hearing at the inquiry and serious prejudice to his defence. The Single Judge of the High Court dismissed the writ petition, but the Division Bench allowed the appeal of the delinquent officer and quashed the enquiry report, the order of punishment, and the order of the appellate authority as also the resolution passed by the Review Committee. Aggrieved, the Bank filed the appeal.

Allowing the appeal, the Court

HELD:

1.1 A perusal of the judgment of the Single Judge of the High Court indicates that the challenge before him was restricted to denial of natural justice for not supplying the vigilance report, but the judgment also makes it abundantly clear that the recommendations of the CVC were not taken into consideration by the authorities concerned. There was also no material on the record to show that before taking the impugned decisions, any of the authorities concerned took into consideration any advice or recommendations of the CVC. It was also not even the case of the respondent that under any rule, usage, customs or practice, the authorities concerned were bound to take into account such advice or recommendations of the CVC. The authorities concerned would be within their right to ignore totally any advice or recommendations of the CVC, if they so chose. [para 21-22] [314-B-G]

State Bank of India and Ors. Vs. D.C. Aggarwal and Anr. **1992 (1) Suppl. SCR 956 = 1993 (1) SCC 13** *Committee of Management, Kisan Degree College Vs. Shambhu Saran Pandey and Ors.* **1994 (5) Suppl. SCR 269 = 1995 (1) SCC 404 - distinguished**

1.2 The Division Bench of the High Court erroneously proceeded to presume that there has been either any breach of the statutory rules or violation of rules of natural justice. It failed to take into consideration the fact that the respondent neither cared to raise the issue of non-supply of the documents during the entire course of the enquiry proceedings nor was the issue canvassed even before the Single Judge at the time of arguments. The respondent also totally omitted to raise such an issue in the written brief containing his defence arguments. Also no further issue was raised about any prejudice having been caused to the respondent. The appellate authority in its order dated 6.6.1984 noticed that

the respondent had "failed to submit his list of documents and witnesses, which he wanted to produce for the purpose of his defence, within the date stipulated by the Inquiring Authority and he also did not raise any objection during the course of enquiry." The Review Committee in its order dated 12.11.1987 indicated that even though the grievance was made belatedly, the same was duly considered by the highest authority of the Bank. Even at that stage, the respondent failed to point out as to what prejudice had been caused to him during the course of the enquiry. In such circumstances, the Division Bench was wholly unjustified in setting aside the entire disciplinary proceedings and the findings recorded by the Single Judge. [para 23-24] [314-G-H; 315-A-C; 316-B-C]

1.3 Except in cases falling under "no notice", "no opportunity" and "no hearing" categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. It was incumbent on the respondent to plead and prove the prejudice caused by the non-supply of the documents. He has failed to place on record any facts or material to prove what prejudice has been caused to him, or the non-supply of CVC report has resulted in miscarriage of justice. The appellant Bank has not transgressed any of the principles whilst conducting and concluding the departmental proceedings against the respondent. [para 26] [317-D-F]

Haryana Financial Corporation and Anr. Vs. Kailash Chandra Ahuja **2008 (10) SCR 222 = 2008 (9) SCC 31 – relied on.**

State Bank of Patiala and Ors Vs. S.K. Sharma **1996 (3) SCR 972 = 1996 (3) SCC 364; and** *Nagarjuna Construction Company Limited Vs. Government of Andhra Pradesh and Ors.* **2008 (14) SCR 859 = 2008 (16) SCC 276 – held inapplicable.**

1.4 It cannot be said that mere breach of Rule 50(11) of State Bank of India (Supervising Staff) Service Rules would give rise to a presumption of prejudice having been caused to the respondent. A perusal of the note under Clause 4 of the said rule would make it obvious that the respondent was not only to submit a list of documents and witnesses but was also required to state the relevancy of the documents and the examination of the witnesses. The respondent himself having not complied with the procedural requirements can hardly complain that a breach of the procedural requirements under Clause xi would ipso facto result in rendering the enquiry null and void. In any event, since the Disciplinary Authority has not relied on any recommendations of the CVC and the respondent has failed to plead or prove any prejudice having been caused, the disciplinary proceedings can not be said to be vitiated. The judgment of the Division Bench of the High Court can not be sustained in law, and is set aside and that of the Single Judge is restored. [para 28-29] [318-H; 319-A; 320-C-D-F]

State Bank of India and Ors.Vs. S. N. Goyal **2008 (7) SCR 631=2008 (8) SCC 92;** *Disciplinary Authority-cum-Regional Manager and Ors. Vs. Nikunja Bihari Patnaik* **1996 (1) Suppl. SCR 314 = 1996 (9) SCC 69; and** *Regional Manager, U.P. SRTC, Etwah and Ors Vs. Hoti Lal and Anr.* **2003 (1) SCR 1019 = 2003 (3) SCC 605 – cited.**

Case Law Referenc:

1992 (1) Suppl. SCR 956	**distinguished**	**para 18 and 19**
2008 (7) SCR 631	**cited**	**para 18**

2003 (1) SCR 1019	**cited**	**para 18**
1996 (1) Suppl. SCR 314	**cited**	**para 18**
1994 (5) Suppl. SCR 269	**distinguished**	**para 19 and 26**
2008 (14) SCR 859	**held inapplicable**	**para 19**
1996 (3) SCR 972	**held inapplicable**	**para 19**
2008 (10) SCR 222	**relied on**	**para 27**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 296 of 2011.

From the Judgment & Order dated 06.02.2009 of the High Court at Calcutta in M.A.T. No. 3613 of 2001.

Shyam Divan, Sanjay Kapur, Shubhra Kapur, Abhishek Kumar, Ashmi Mohan for the Appellants.

Kalyan Bandopadhyay, Dr. Kailash Chand, Kunat Chatterji for the Respodnets.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. Leave granted.

2. This appeal is directed against the final judgment and order dated 6th February, 2009 passed by the Division Bench of the High Court at Calcutta in M.A.T. No. 3613 of 2001 whereby the Division Bench quashed the enquiry proceedings against the respondent held on the basis of the charge sheet dated 14th December, 1981, enquiry report dated 22nd September, 1982, the order of punishment dated 4th July, 1983, the order dated 6th June, 1984 passed by the Appellate Authority as also the resolution dated 12th November, 1987 adopted in the meeting of the Review Committee of the appellant Bank.

3. The respondent was appointed as a Clerk in the Imperial Bank of India, which is a predecessor of the appellant Bank. Way back in November, 1944, he had joined in the capacity of a Clerk. Subsequently, by the year 1978-79, he was working as Branch Manager at the Biplabi Rash Behari Bose Road Branch, Calcutta of the appellant Bank. In the capacity of a Branch Manager, he granted numerous mid-term loans to a number of transport operators without making appropriate scrutiny of the applications as required under the rules. He had also granted the loans in excess of his discretionary power thereby exposed the Bank to the risk of serious financial loss.

4. A charge sheet dated 14th December, 1981 was served upon him alleging that he, during his incumbency as the Branch Manager of the Biplabi Rash Behari Bose Road Branch, Calcutta from 29th February, 1978 to 21st August, 1979 had granted medium term loans to large number of transport operators without making thorough scrutiny of the relative proposals. He had sanctioned the loans even before completion of the necessary formalities. The loans were granted without making any discreet enquiries to the credit worthiness of the borrowers/guarantors. He had thus violated the laid down norms and instructions of the Bank in this regard and thereby exposed the Bank to grave risk of financial loss. The gist of the allegations was as follows:-

"(i) (a) granting loans, in as many as 29 cases (as per Annexure 'B') out of 57 such cases, far in excess of the discretionary powers vested in you in terms of H.O. 'SIB' Circular No.57 of 1979;

(b) Sanctioning the loans in question without compiling the necessary opinion reports on the borrowers/ guarantors properly; and

(c) allowing most of these borrowers to stand AS guarantors for the advances granted to others and vice-versa (as per Annexure 'C');

(ii) It has further been alleged against you that-

(a) You had failed to submit the necessary control returns in respect of the Medium Terms Loans in question to the Controlling Authority at the appropriate time despite reminders:

(b) You had made full payment to a body building firm viz. M/s. C.A. Engineers and Body Buildings, Calcutta as per their quotation long before the delivery of the chassis by the suppliers, in respect of a loan of Rs.1,92,000/- granted to Shri Ashoke Kumar Sengupta (MTL No.21) on the 21st April, 1979;

(c) You had allowed clean overdrafts to some of these borrowers (as per Annexure 'D'), presumably to meet their margin requirements, without obtaining any letters of request and without stipulating any repayment programme therefore and even without reporting the matter to your Controlling Authority."

5. It was alleged that he had acted in an extremely negligent manner and thereby contravened the provisions of Rules 32(3) and 32(4) of the State Bank of India (Supervising Staff) Service Rules (hereinafter referred to as 'Service Rules'). It was further stated that the above charges, if proved, would amount to lapses involving lack of devotion to duty and would be construed as prejudicial to the interests of the Bank. Consequently, he was asked to show cause within fifteen days as to why disciplinary action should not be taken against him. A copy of the list of documents and list of witnesses relied upon by the Bank were supplied to the respondent.

6. On 11th March, 1982, Shri A.R. Banerjee, Commissioner of Departmental Enquiries, Central Vigilance Commission (hereinafter referred to as 'CVC') was appointed as the Enquiry Officer. The Enquiry Officer instructed the Bank

to show all the documents including the additional documents relied upon by it to the defence by 20th March, 1982. The defence assistant of the respondent was also instructed to submit the list of the defence documents required, if any, by 31st March, 1982 along with the respective relevancy to the charge sheet and likely whereabouts of the documents. He was also instructed to submit the list of additional witnesses, which were required to be summoned along with their latest addresses. By letter dated 31st March, 1982, the respondent informed the Enquiry Officer that he shall submit the list of defence witnesses and documents within "a couple of days". Thereafter, the defence representative of the respondent by letter dated 3rd April, 1982 addressed to the Enquiry Officer, submitted a list of witnesses and documents of the defence. According to the respondent, all the witnesses referred to in the list of witnesses were officers of the Bank. Similarly, the documents referred to, were also in the possession of the management of the Bank. Therefore, the respondent claimed that he was unable to produce either the witnesses or the documents in support of his defence, unless they were summoned by the Enquiry Officer.

7. It appears that the two witnesses referred to in the said application of the respondent were summoned. However, the documents relied upon by the respondent were not requisitioned. It was the case of the respondent that in fact his prayer in respect of the aforesaid documents was never disposed of and no reason was assigned by the Enquiry Officer for not requisitioning such documents. It appears that the aforesaid issue was also not dealt with by the Enquiry Officer in the Enquiry Report dated 22nd September, 1982. On this short ground, the respondent had claimed that he was denied reasonable opportunity of hearing at the enquiry and the same has caused serious prejudice to his defence.

8. On 16th September, 1982, the respondent submitted the defence arguments in the form of a written brief. In the aforesaid brief, the respondent did not raise the issue of non-

supply of any documents. On 16th June, 1983, the Disciplinary Authority forwarded his comments and a note on the enquiry proceeding to the Appointing Authority. In this note, the Disciplinary Authority agreed with the findings of the Enquiry Officer. It was mentioned that it has been proved at the enquiry that the respondent granted medium term loans to a large number of transport operators, not in a proper manner, thus exposed the Bank to a risk of substantial financial loss. It was further mentioned that while granting advances, the respondent should have ascertained his discretionary powers and followed the Bank instructions. The Disciplinary Authority recommended the imposition of penalty of dismissal on the respondent.

9. By order dated 4th July, 1983, the Appointing Authority, upon examination of the records pertaining to the enquiry, agreed with the findings of the Disciplinary Authority and imposed the punishment of dismissal on the respondent in terms of Rule 49(h) read with Rule 50(3)(iii) of the Service Rules effective from the date of the receipt of the aforesaid order.

10. Aggrieved by the aforesaid order of dismissal, the respondent filed a departmental appeal on 31st August, 1983. In the aforesaid appeal, the respondent for the first time alleged violation of principle of natural justice due to non-supply of documents as requested through his letter dated 3rd April, 1982. However, there was no averment with regard to the non-supply of CVC recommendations. Furthermore, the respondent had not given any particulars as to what prejudice had been caused to him during the course of the enquiry proceeding. Such an objection was also not raised by the respondent while the enquiry was being conducted.

11. By order dated 6th June, 1984, the Appellate Authority upheld the order of the Appointing Authority imposing the punishment of dismissal. With regard to the non-supply of some documents, the Appellate Authority held that respondent had failed to submit the list of documents and witnesses within the

stipulated time. Furthermore, he did not raise any objection during the course of the enquiry.

12. Being aggrieved by the aforesaid order of 1st December, 1984, the respondent filed a review application. He made a grievance that neither the Enquiry Officer nor the Disciplinary Authority or the Appellate Authority while passing the orders considered the material contentions raised by the respondent in his written statement of defence as well as in his petition of appeal. According to him, all the authorities proceeded with a predetermined mind and the orders have been passed mechanically. For the first time, he made a grievance that neither the documents mentioned in the application dated 3rd April, 1982 were requisitioned nor the witnesses mentioned in the list of witnesses were summoned. He then proceeded to set out the relevance of the documents which according to him would have enabled him to prove at the enquiry that priority sector advance was given utmost importance in the Bank's policy. It was, therefore, incumbent upon him as Branch Manager to make all efforts to increase advances in the priority sector which includes transport loans. The opinion reports submitted by the respondent with regard to the loans were never incomplete. They were not produced at the enquiry. He also highlighted that production of documents listed at Sr. No. 12 would have shown that the respondent was absorbed with the work relating to IDBI Refinance, which resulted in a little delay in submitting the controlled return. He stated that the documents mentioned at Sr. No. 14 would have shown that the overdrafts of borrowers were sanctioned on the basis of request letters. According to him, the document at Sr. No. 17 would have enabled him to prove that in priority sector group guarantee or counter guarantee was permissible in case of loans to transport borrowers. He, therefore, submitted that non-summoning of such documents resulted in denial of reasonable opportunity and was in gross violation of principle of natural justice.

13. By a detailed order dated 12th/16th November, 1987, the Review Committee declined to interfere with the order of the Appointing Authority which had been upheld by the Appellate Authority.

14. Aggrieved by the action of the Bank in passing the aforesaid order, the respondent challenged the same in a Writ Petition Civil Order No. 7390 (W) of 1988 in the High Court at Calcutta. It would appear that for the first time, the respondent raised the ground of non-supply of the vigilance report. He also submitted that the refusal of the Bank to requisition the documents mentioned in the list of witnesses and to summon the witnesses named in the list of witnesses resulted in denial of reasonable opportunity of hearing at the enquiry and the same caused serious prejudice to his defence. He stated that out of the seventeen documents referred to in the application dated 3rd April, 1982, the documents at Sr. No. 1, 2, 6, 12, 14 and 17 were most vital documents. He reiterated the pleas which were raised in the Review Petition.

15. The appellant Bank filed a detailed counter affidavit in opposition to the writ petition denying all allegations and claims of the respondent. In reply to paras 10, 11 and 12 of the petition, it was stated that respondent was asked to submit his list of documents and witnesses by 31st March, 1982, but he failed to do so. He submitted the list after nearly two months and as such no action could be taken there upon. It is reiterated that the respondent did not make any grievance about the non-production of documents at the enquiry. He also did not raise any objection with regard to non-calling of any witness at the enquiry. It was stated that the allegations with regard to denial of natural justice are baseless and the respondent had in fact admitted that he committed the irregularity but he blamed the Head Office for not warning the respondent well in advance. His justification about the group guarantee was nullified by his own defence witness, a Development Manager, who deposed that the group guarantee is meant for poor sections of the community under Differential Interest Rate (DIR) loans and not for transport operators. It was also pointed out that group guarantees are taken only for loans of about Rs.6,500/- or so and not for large amounts of Rs. 1 Lac and above. The appellant Bank also submitted that there were no violations of principle of natural justice. The appellant Bank also submitted that Presenting Officer made repeated requests to the respondent to submit the list of documents and witnesses but the respondent ignored the requests. It was only about two months later when the enquiry was virtually completed when the respondent submitted a request letter dated 3rd April, 1982.

16. By judgment and order dated 18th April, 2001, the learned Single Judge dismissed the writ petition. Aggrieved by the judgment of the learned Single Judge, the respondent challenged the same in appeal before the Division Bench. The Division Bench vide judgment and order dated 6th February, 2009 set aside the judgment of the learned Single Judge dated 18th April, 2001 and allowed the writ petition. Consequently, the Enquiry Report, order of punishment and the subsequent orders of the Appellate Authority as also the resolution passed by the Review Committee were quashed and set aside. The Bank has challenged the aforesaid judgment of the Division Bench in the present appeal.

17. We have heard the learned counsel for the parties.

18. It is submitted by Mr. Shyam Divan, learned senior counsel appearing for the Bank that the Division Bench without adverting to the fact situation held that there has been a breach of rules of natural justice, which has vitiated the entire disciplinary proceedings from the stage of holding of the departmental enquiry till the passing of the resolution by the Review Committee. Learned Single Judge, according to the learned senior counsel, had given cogent reasons to justify its conclusions on facts. It was rightly observed by the learned Single Judge that respondent never raised the issue of any prejudice having been caused by the non-supply of the

documents during the proceedings. The Division Bench also failed to appreciate that all material documents relied upon by the Bank had been supplied to or inspected by the respondent. The Division Bench, wrongly relying on a judgment of this Court in the case of *State Bank of India and Ors. Vs. D.C. Aggarwal and Anr.*[1] held that the non-supply of the report of the CVC had vitiated the entire proceedings. Learned senior counsel submitted that both the grounds on which the judgment of the Division Bench is based are factually non-existent in this case. According to Mr. Divan, the matter herein is in fact covered by the judgment of this Court in the case of *State Bank of India and Ors Vs. S. N. Goyal*[2] wherein the judgment in *D.C. Aggarwal's case* (supra) has been distinguished. Learned senior counsel had also relied on *Disciplinary Authority-cum-Regional Manager and Ors Vs. Nikunja Bihari Patnaik*[3] and *Regional Manager, U.P. SRTC, Etwah and Ors Vs. Hoti Lal and Anr.*[4].

19. On the other hand, Mr. Kalyan Bandopadhyay, learned senior counsel appearing for the respondent submitted that there has been a clear breach of procedure prescribed under Rule 50 sub-clause xi of the Service Rules. The Division Bench on consideration of the aforesaid rule concluded that the learned Single Judge did not take care of the procedural impropriety, i.e., breach of Rule 50 in conducting the enquiry proceeding against the respondent. Learned senior counsel further submitted that the procedural requirements under Rule 50 are mandatory in nature to ensure that there is a fair enquiry. Mr. Bandopadhyay further submitted that non-supply of the recommendations of the CVC being contrary to the requirements of the Service Rules, any further proof of prejudice was not required. Once the procedural rule had been

1. (1993) 1 SCC 13.
2. (2008) 8 SCC 92.
3. (1996) 9 SCC 69.
4. (2003) 3 SCC 605.

violated, prejudice would be presumed. In support of his submissions, Mr. Bandopadhyay relied on a number of judgments of this Court in the case of *D.C. Aggarwal's case (supra), Committee of Management, Kisan Degree College Vs. Shambhu Saran Pandey and Ors.*[5], *State Bank of Patiala and Ors Vs. S.K. Sharma*[6] and *Nagarjuna Construction Company Limited Vs. Government of Andhra Pradesh and Ors.*[7].

20. Mr. Bandopadhyay submits that the Division Bench had passed a just order to remove an injustice. The respondent had been dismissed from service arbitrarily. The entire disciplinary proceedings were vitiated being violative of principle of natural justice. According to the learned senior counsel, the appeal observes to be dismissed.

21. We have considered the submissions made by the learned counsel for the parties. Before we consider the judgment of the Division Bench, it would be appropriate to notice the opening remarks made by the learned Single Judge in its order dated 18th April, 2001. The learned Single Judge observed as follows:-

> "Very many points had been urged in the writ petition in support of the challenged thrown to the charge sheet, proceedings pursuant thereto and the orders passed therein, but at the hearing the same was restricted to denial of natural justice for not supplying the vigilance report, which, according to the petitioner, was considered while taking the decision for completion of the disciplinary proceedings."

From the above, it become obvious that even before the learned Single Judge, the respondent had made no grievance about the non-supply of documents. Also no further issue was raised

5. (1995) 1 SCC 404.
6. (1996) 3 SCC 364.
7. (2008) 16 SCC 276.

about any prejudice having been caused to the respondent. With regard to the non-supply of the recommendations of the CVC, the learned Single Judge made the following observations:-

> "It is true that if in a disciplinary proceeding a decision is taken on the basis of a recommendation or advice, not supplied to the delinquent, such a decision would be bad. On the pleadings there is no dispute that in the case of the Petitioner advice and recommendations were sent by the Central Vigilance Commission. There is also no dispute that such advice and recommendations were not communicated to the Petitioner. If the decisions impugned in this writ petition have been taken on the basis of such advice and recommendations, the same are equally bad. It is not the case of the Petitioner that by reason of any application rule or by reason of usage, custom or practice, the Authorities concerned, who have decided the matters, are bound to take into account such advice or recommendations of the Central Vigilance Commission. Therefore, despite such advice and recommendations having been given, the Authorities concerned, who are empowered to decide, may totally ignore such advice and recommendations and if they so ignore they will be well within their right to do so. In the instant case it has been denied that such advice or recommendations were taken note of or considered by the Authorities concerned, who passed the impugned orders. The orders in question have been set out above. From that it does not appear that the Authorities concerned have in fact considered any of the said advices or recommendations of the Central Vigilance Commission. Merely because the Central Vigilance Commission had given advice or recommendations, but the same were not furnished to the Petitioner to give him an opportunity to deal with the same, would not make the decisions impugned in the instant case bad, unless it is shown and established that the decisions in the instant case are influenced by such advice or recommendations.

> There is nothing on record from where it can be safely said that at or before making the impugned decisions, any of the authorities concerned in fact looked into or considered such advices or recommendations of the Central Vigilance Commission. In that view of the matter, it cannot be said that there has been denial of natural justice in the instant case for not supplying the subject Vigilance reports case for not supplying the subject Vigilance reports or advice and recommendations as the case may be."

22. The aforesaid observations make it abundantly clear that the recommendations of the CVC were not taken into consideration by the authorities concerned. There was also no other material on the record to show that before taking the impugned decisions, any of the authorities concerned took into consideration any advice or recommendations of the CVC. It was also not even the case of the respondent that under any rule, usage, customs or practice, the authorities concerned were bound to take into account such advice or recommendations of the CVC. The authorities concerned would be within their right to totally ignore any advice or recommendations of the CVC, if they so chose. The learned Single Judge also observed that in case of *D.C. Aggarwal's case* (supra), the authorities had relied upon the recommendations of the CVC, which were not at all disclosed to the delinquent officer. On the fact situation in the present case, the learned Single Judge held that the authorities concerned have not looked at the advice or recommendations of the CVC before taking any of the impugned decisions. The aforesaid judgment was distinguishable as it did not apply in the facts of this case.

23. The Division Bench, in our opinion, erroneously proceeded to presume that there has been either any breach of the statutory rules or violation of rules of natural justice. The Division Bench also failed to take into consideration that the issue with regard to the non-supply of the documents listed in

the letter dated 3rd April, 1982 was not even canvassed before the learned Single Judge at the time of arguments. As is evident from the remarks of the learned Single Judge at the hearing of the writ petition, counsel for the respondent restricted the challenge only to denial of natural justice for not supplying the vigilance report. This apart, the Division Bench totally ignored the fact that the respondent did not care to raise the issue of non-supply of the documents during the entire course of the enquiry proceedings. He also totally omitted to raise such an issue in the written brief containing his defence arguments. The Appellate Authority in its order dated 6th June, 1984 noticed that the respondent had "failed to submit his list of documents and witnesses which he wanted to produce for the purpose of his defence within the date stipulated the Inquiring Authority and he also did not raise any objection during the course of enquiry." The Review Committee in its order dated 12th November, 1987 upon consideration of the entire matter observed as follows:-

> "The Petitioner has contended that certain documents required by him were not made available to him by the prosecution at the inquiry. The records reveal, in this respect, that he was asked to submit his lists of documents and witnesses by the 31st March, 1982 and that he had failed to do so. The lists were in fact received by the Presenting Officer on the 28th May 1982, far beyond the stipulated time, and as such no action was taken thereon. However, the Committee is at a loss to understand as to why the Petitioner did not press at the Inquiry for the production of the requisite documents if they were so vital as to cause serious prejudice to his defence as alleged. The Petitioner's accusation that the Inquiry Authority refused to summon all the defence witnesses is also not acceptable for the same reason that the list was not received within the stipulated period. The committee, however, observes that the Inquiring Authority had, in fact, permitted the Petitioner to produce his witnesses for deposition."

24. These observations indicate even though the grievance was made belatedly, the same was duly considered by the highest authority of the Bank. Even at that stage, the respondent had failed to point out as to what prejudice had been caused to him during the course of the enquiry. In such circumstances, the Division Bench was wholly unjustified in setting aside the entire disciplinary proceedings and the findings recorded by the learned Single Judge.

25. In our opinion, the Division Bench has erroneously relied on the judgment in *D.C. Aggarwal's case* (supra). As rightly observed by the learned Single Judge, in that case this Court considered a situation where the Disciplinary Authority passed an elaborate order regarding findings against the Charge Sheet Officer agreeing on each charge on which CVC had found against him. In these circumstances, this Court observed that:-

> "The order is vitiated not because of mechanical exercise of powers or for non-supply of the inquiry report but for relying and acting on material which was not only irrelevant but could not have been looked into. Purpose of supplying document is to contest its veracity or give explanation. Effect of non-supply of the report of Inquiry Officer before imposition of punishment need not be gone into nor it is necessary to consider validity of sub-rule (5). But non-supply of CVC recommendation which was prepared behind the back of respondent without his participation, and one does not know on what material which was not only sent to the disciplinary authority but was examined and relied on, was certainly violative of procedural safeguard and contrary to fair and just inquiry."

These observations would not be applicable in the facts of the present case as the Disciplinary Authority did not take into

consideration any recommendations of the CVC. The judgment was, therefore, rightly distinguished by the learned Single Judge.

26. We may now consider the other judgments relied upon by Mr. Bandopadhyay. In the case of *Kisan Degree College* (supra), this Court noticed that the respondent was dismissed from service on the basis of an Enquiry Report. In that case, the respondent had at the earliest sought for inspection of the documents. He was, however, told to inspect the same at the time of final arguments in the enquiry. It was, therefore, held that the enquiry proceeding had been conducted in breach of rule of natural justice. The aforesaid judgment would have no relevance in the facts of this case. In the case of *S.K. Sharma* (supra), this Court held that violation of any and every procedural provision can not be said to automatically vitiate the enquiry held or order passed. Except in cases falling under – "no notice", "no opportunity" and "no hearing" categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. In the present case, we have noticed above that the respondent did not even care to submit the list of documents within the stipulated time. Further, he did not even care to specify the relevance of the documents sought to be requisitioned. In our opinion, the appellant Bank has not transgressed any of the principles laid down in the aforesaid judgment whilst conducting and concluding the departmental proceedings against the respondent. Therefore, the aforesaid observations in *S.K. Sharma's* case are of no avail to the respondent. In the case of *Nagarjuna Construction Company Limited* (supra), this Court observed as follows:-

> "The basic principles of natural justice seem to have been disregarded by the State government while revising the order. It acted on materials which were not supplied to the appellants. Accordingly, the High Court for the first time made reference to the report/inspection notes which were not even referred to by the State Government while exercising revisional power."

These observations are of no relevance in the facts and circumstances of the present case. The respondent herein is merely trying to make capital of his own lapse in not submitting the list of documents in time and also not stating the relevance of the documents required to be produced. By now, the legal position is well settled and defined. It was incumbent on the respondent to plead and prove the prejudice caused by the non-supply of the documents. The respondent has failed to place on record any facts or material to prove what prejudice has been caused to him.

27. At this stage, it would be relevant to make a reference to certain observations made by this Court in the case of *Haryana Financial Corporation and Anr. Vs. Kailash Chandra Ahuja*[8], which are as under:-

> "From the ratio laid down in B. Karunakar1 it is explicitly clear that the doctrine of natural justice requires supply of a copy of the inquiry officer's report to the delinquent if such inquiry officer is other than the disciplinary authority. It is also clear that non-supply of report of the inquiry officer is in the breach of natural justice. But it is equally clear that failure to supply a report of the inquiry officer to the delinquent employee would not ipso facto result in the proceedings being declared null and void and the order of punishment non est and ineffective. It is for the delinquent employee to plead and prove that non-supply of such report had caused prejudice and resulted in miscarriage of justice. If he is unable to satisfy the court on that point, the order of punishment cannot automatically be set aside."

28. We may also notice here that there is not much substance in the submission of Mr. Bandopadhyay that mere

8. (2008) 9 SCC 31.

breach of Rule 50(11) would give rise to a presumption of prejudice having been caused to the respondent. The aforesaid rule is as under:-

"(x) (a) the inquiring authority shall where the employee does not admit all or any of the articles of charge furnish to such employee a list of documents by which, and a list of witnesses by whom, the articles of charge are proposed to be proved.

(b) The Inquiring Authority shall also record an order that the employee may for the purpose of preparing his defence:

I. inspect and take notes of the documents listed within five days of the order or within such further time not exceeding five days as the Inquiring Authority may allow:

II. submit a list of documents and witnesses that he wants for inquiry:

III. be supplied with copies of statements of witnesses, if any, recorded earlier and the Inquiring Authority shall furnish such copies not later than three days before the commencement of the examination of the witnesses by the Inquiring Authority.

IV. give a notice within ten days of the order or within such further time not exceeding ten days as the Inquiry Authority may allow for the discovery or production of the documents referred to at (II) above.

Note: The relevancy of the documents and the examination of the witnesses referred to at (II) above shall be given by the employee concerned.

(xi) the Inquiry Authority shall, on receipt of the notice for the discovery of production of the documents, forward the same or copies thereof to the authority in whose custody or possession the documents are kept with a requisition for the production of the documents on such date as may be specified."

A perusal of the note under Clause 4 of the aforesaid rule would make it obvious that the respondent was not only to submit a list of documents and witnesses but was also required to state the relevancy of the documents and the examination of the witnesses. The respondent himself having not complied with the procedural requirements can hardly complain that a breach of the procedural requirements under Clause xi would ipso facto result in rendering the enquiry null and void. In any event, since the Disciplinary Authority has not relied on any recommendations of the CVC and the respondent has failed to plead or prove any prejudice having been caused, the disciplinary proceedings can not be said to be vitiated.

29. In our opinion, the aforesaid observations of this Court are fully applicable to the facts and circumstances of this case. In our opinion, the respondent has failed to prove any prejudice caused which has resulted in miscarriage of justice. In our opinion, the judgment of the Division Bench can not be sustained in law. The appeal is, therefore, allowed, the impugned judgment of the Division Bench is set aside and the judgment of the learned Single Judge is restored.

R.P. Appeal allowed.

RAJENDRA PRASAD GUPTA
v.
PRAKASH CHANDRA MISHRA & ORS.
(Civil Appeal No. 984 of 2006)

JANUARY 12, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Code of Civil Procedure, 1908 – s. 151 – Application for withdrawal of suit – During pendency of the application, plaintiff filed another application praying for withdrawal of the earlier withdrawal application – Maintainability of the second application – Held: Application praying for withdrawal of the earlier withdrawal application was maintainable since there was no express bar in filing such an application – Section 151 gives inherent powers to the court to do justice – It has to be interpreted to mean that every procedure is permitted to the court for doing justice unless expressly prohibited, and not that every procedure is prohibited unless expressly permitted – Order of the High Court that once the application for withdrawal of the suit was filed the suit stood dismissed as withdrawn even without any order on the withdrawal application, and thus, the second application was not maintainable, cannot be accepted and is set aside.

Narsingh Das v. Mangal Dubey **ILR 5 All 163 (1882) (FB);** *Raj Narain Saxena v. Bhim Sen and Ors.* **AIR 1966 Allahabad 84 (FB) – approved.**

Case Law Reference:

ILR 5 All 163 (FB) (1882)	**approved**	**Para 6**
AIR 1966 Allahabad 84 FB	**approved**	**Para 7**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 984 of 2006.

From the Judgment & Order dated 06.02.2004 of the High Court of Allahabad in first Appeal in Order No. 2103 of 2003.

S.S. Mishra, Rajkumar Parasher, Sibo Sankar Mishra for the Appellant.

P.K. Jain, P.K. Goswami, Ashok K. Sharma, Praveen Kr. Mutreja, Sobodh Kumar, Goodwill Indeevar for the Respondents.

The following Order of the Court was delivered

ORDER

Heard learned counsel for the appellant and respondent Nos. 1 to 3. No one appeared for respondent No. 4.

This Appeal, by special leave, has been filed against the impugned judgment of the High Court of Allahabad dated 6.2.2004 passed in FAFO No. 2103/2003.

It appears that the appellant was the plaintiff in Suit No. 1301 of 1997 before the Court of Civil Judge (Junior Division) Varanasi. He filed an application to withdraw the said suit. Subsequently, it appears that he changed his mind and before an order could be passed in the withdrawal application he filed an application praying for withdrawal of the earlier withdrawal application. The second application had been dismissed and that order was upheld by the High Court. Hence, this appeal by special leave.

The High Court was of the view that once application for withdrawal of the suit is filed the suit stands dismissed as withdrawn even without any order on the withdrawal application. Hence, the second application was not maintainable. We do not agree.

Rules of procedure are handmaids of justice. Section 151 of the Code of Civil Procedure gives inherent powers to the

court to do justice. That provision has to be interpreted to mean that every procedure is permitted to the court for doing justice unless expressly prohibited, and not that every procedure is prohibited unless expressly permitted. There is no express bar in filing an application for withdrawal of the withdrawal application.

In *Narsingh Das v. Mangal Dubey,* ILR 5 All 163 (FB) (1882), Mr. Justice Mahmood, the celebrated Judge of the Allahabad High Court, observed:-

> "Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle prohibition cannot be presumed.

The above view was followed by a Full Bench of the Allahabad High Court in Raj Narain Saxena v. Bhim Sen & others, AIR 1966 Allahabad 84 FB, and we agree with this view.

Accordingly, we are of the opinion that the application praying for withdawal of the withdrawal application was maintainable. We order accordingly.

In the result, the impugned judgment of the High Court is set aside and the Appeal is allowed. No costs.

The suit shall proceed and to be decided on merit, expeditiously.

N.J. Appeal allowed.

LAND ACQUISITION OFFICER-CUM-RDO, CHEVELLA DIVISION RANGA REDDY DISTRICT

v.

A. RAMACHANDRA REDDY & ORS.

(Civil Appeal No. 438 of 2011)

JANUARY 12, 2011

[R.V. RAVEENDRAN AND H.L. GOKHALE, JJ.]

Land Acquisition Act, 1894 – ss. 4(1) read with s. 17 (as amended in Andhra Pradesh) – Land acquisition for public purpose – Issuance of preliminary and final Notification – Award not passed within stipulated period – Subsequent publication of another preliminary and final Notification – Relevant date for determination of market value for the purpose of compensation – High Court took the relevant date as the date of publication of the second preliminary Notification and awarded compensation at the rate of Rs. 15,000/- per acre – On appeal, held: State Government had clearly abandoned the earlier Notifications by issuing the subsequent Notifications – High Court was justified in holding that the compensation should be determined with reference to the date of publication of the second preliminary notification – Quantum of compensation awarded by High Court also does not call for interference since it was determined with reference to a sale transaction just a few days prior to the publication of the second preliminary notification.

A Preliminary Notification was issued under Section 4 (1) read with Section 17 of the Land Acquisition Act, 1894 on 03.01.1990 for acquisition of certain land for a public purpose and the final declaration under Section 6 of the Act was published in the Gazette on 10.01.1990. On 18.09.1991 the possession of the acquired land was taken. The Land Acquisition Officer failed to estimate the

compensation. The respondent-land owners filed a writ petition. The High Court directed the appellant-Land Acquisition Officer to pass an award. However, the award was not passed within the stipulated period of two years. The State Government being of the view that the acquisition had lapsed, published a fresh preliminary Notification in the Gazette on 19.11.1993 and the final declaration on 16.2.1994. Thereafter, the Land Acquisition Officer passed an award. The compensation was determined the rate of Rs. 24000/- per acre taking the relevant date for determining the market value as 03.01.1990, the date of the first preliminary Notification. The Reference Court awarded compensation at the rate of Rs. 50,000/ per acre taking the relevant date as 03.01.1990. On appeal, the High Court awarded compensation at the rate of Rs. 150,000/- per acre. The relevant date for determining the compensation was taken as 19.11.1993. Therefore, the appellant-Land Acquisition Officer filed the instant appeals.

Dismissing the appeals, the Court

HELD: 1.1 Section 17 of the Land Acquisition Act, 1894, as amended in Andhra Pradesh, no doubt provided that the land would vest absolutely in the government even before making the award, on taking possession of the land needed for a public purpose. But as the Land Acquisition Officer failed to estimate the compensation and tender 80% thereof to the land-owners, as required under section 17(3A) of the Act, the land-owners approached the High Court by filing a writ petition seeking a direction to the appellant to pass the award. As possession had been taken as the land had already vested in the government, the land owners could not and did not challenge the acquisition in the said writ petition. Keeping these facts in view, the High Court disposed of the said writ petition with a specific direction to make an award before 11.02.1992. Admittedly, the award was not made and the order of the High Court was not complied with. Also, under sub-section (5) of section 17 of the Act, inserted by a State Amendment in Andhra Pradesh, if the Collector does not take possession of the land within three months from the date when State Government directs under sub-section (4) of section 17 that the provisions of section 5A would not apply, the effect would be that the provisions of section 5A would apply and the period of 30 days referred to in section 5A would be reckoned from the date of expiration of three months. In these peculiar circumstances, the government after considering the facts and circumstances, with a view to avoid further challenge, issued a fresh Notification dated 09.09.1993 (gazetted on 19.11.1993) followed by final declaration dated 16.02.1994. The State Government did not subsequently cancel/rescind/withdraw the Notifications dated 09.09.1993 and 16.02.1994. The State Government had clearly abandoned the earlier Notifications dated 3.1.1990 and 10.1.1990 by issuing the subsequent Notifications dated 9.9.1993 and 16.2.1994. Therefore, the appellant cannot contend that the second preliminary Notification is redundant or that first preliminary Notification continues to hold good. In the circumstances, the High Court was justified in holding that the compensation should be determined with reference to the date of publication of the second preliminary notification. [Para 10] [332-B-H; 333-A-B]

1.2 On examining the quantum of compensation awarded by the High Court with reference to the date of Gazetting of the second preliminary notification, it is found that the compensation award is not excessive and does not call for interference. It was determined with reference to a sale transaction dated 12.11.1993, just a few days prior to the publication of the second preliminary

notification in the Gazette. The High Court also made a deduction of 40% in the market value disclosed by the said sale transaction. [Para 11] [333-C-D]

1.3 In some of the counter affidavits filed in the special leave petitions by the claimants, they have alleged that their special leave petitions (challenging the judgment of the High Court and seeking higher compensation) were dismissed as barred by time and, therefore, they may be permitted to make a counter claim for a higher compensation. Such counter-claims in counter-affidavits in special leave petitions are impermissible and not maintainable and cannot be entertained. [Para 12] [333-E-F]

Satendra Prasad Jain v. State of U.P. **1993 (4) SCC 369 – distinguished.**

Case Law Reference:

1993 (4) SCC 369 distinguished Para 8

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 438 of 2011.

From the Judgment & Order dated 16.02.2005 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Appeal No. 4477 of 2004.

WITH

C.A. Nos. 440, 441, 442, 443, 444 & 445 of 2011.

Anoop Choudhari, C.K. Sucharita, Nirada Das for the Appellant.

Manjeet Kirpal, T.N. Rao, S.S. Dharma Teja for the Respondents.

The Judgment of the Court was delivered by

R.V.RAVEENDRAN, J. 1. Leave granted in all the SLPs.

2. An extent of 24 acres in Survey No.24 of Peeram Cheruvu Village, Rajendranagar Mandal, Ranga Reddy District on the outskirts of Hyderabad was acquired for Andhra Pradesh Police Academy. For this purpose, a preliminary notification under section 4(1) read with section 17 of the Land Acquisition Act, 1894 ('Act' for short) was issued and published in the A.P. Gazette on 3.1.1990. It was also published in two newspapers circulating in that locality on 12.2.1990. The final declaration under section 6 of the Act was published in the A.P. Gazette dated 10.1.1990 (published in two newspapers circulating in that locality on 12.2.1990). Possession of the acquired lands was taken on 18.9.1991 by invoking the urgency clause under section 17 of the Act.

3. The respondents filed W.P.No.14396/1991 in the A.P. High Court seeking a direction to the appellant to pass an award. The High Court disposed of the said writ petition with a direction to pass an award before 11.2.1992 as the final notification had been published in the Gazette on 10.1.1992. The award was not be passed within the stipulated two years. The State government, being of the view that as a consequence, the acquisition had lapsed, published a fresh preliminary notification dated 9.9.1993 under section 4(1) of the Act in the A.P. Gazette dated 19.11.1993, followed by a fresh final declaration under section 6 of the Act published in the Gazette dated 16.2.1994.

4. Ultimately, the Land Acquisition Officer made an award dated 31.8.1996. Before doing so he appears to have sought legal opinion as to the date with reference to which the compensation should be determined. The legal opinion was that as possession was taken on 18.9.1991 by invoking section 17, the acquisition proceedings did not lapse under section 11A of the Act and the fresh acquisition notifications dated 19.11.1993 and 16.2.1994 could be ignored and the award could be passed with reference to the market value as on the

date of issue of the first preliminary notification dated 3.1.1990. The Land Acquisition Officer, after referring the sales statistics and nature of land, by award dated 31.8.1996 offered compensation at the rate of Rs.24,000/- per acre with 30% solatium under section 23(2), additional market value at 12% per annum under section 23(1A) from 12.2.1990 to 18.9.1991 and interest at the rate of 9% per annum for the period 18.9.1991 to 17.9.1992 and at the rate of 15% per annum from 18.9.1992 to 31.8.1996.

5. Not being satisfied with the quantum of compensation, the respondents-landowners sought reference to Civil Court. Before the Reference Court, the respondents let in evidence about market value as on 19.11.1993, which is the date of publication of the second preliminary notification. The Reference Court held that the relevant date of determination of market value was 3.1.1990 (which was the date of the first preliminary notification), that there was no evidence about the market value as on 3.1.1990. He held that none of the sale deeds relied upon by the landowners was relevant, as they were all with reference to the second preliminary notification published on 19.11.1993. However having regard to the situation and potential of the land, it concluded that approximately double the amount offered by the Land Acquisition Officer would be the appropriate market value and therefore awarded compensation at the rate of Rs.50,000 per acre.

6. The respondents were not satisfied with the amount awarded by the Reference Court. They therefore filed a batch of appeals before the Andhra Pradesh High Court. Some of the appeals were decided by judgment dated 16.2.2005 and some were decided by judgment dated 3.1.1996 following the judgment dated 16.2.2005. The High Court was of the view that the relevant date for determination of compensation was not 3.1.1990 as the said preliminary notification was superseded by notification under section 4(1) of the Act published on

19.11.1993 and therefore the compensation had to be determined with reference to the said date. The High Court relied upon a sale deed dated 12.11.1993 (Ex. A7) relating to sale of a land at a distance of about 30 yards from the acquired lands to arrive at the market value of the acquired land as on 19.11.1993. The said sale deed (Ex.A7) related to a sale of an area of 1 acre 38 guntas (a little less than two acres) in favour of an educational institution for a consideration of Rs.490,000/- (which works out Rs.250,000/- per acre). The High Court rounded off the market value to Rs. 250,000/- per acre, deducted 40% from the said value to make it a comparable transaction for determination of market value and consequently awarded compensation at the rate of Rs.150,000/- per acre. The said judgment is under challenge in these appeals by special leave by the Land Acquisition Officer.

7. On the contentions urged, two questions arise for consideration :

(i) Whether relevant date for determination of market value is 3.1.1990 as contended by the appellant (or 19.11.1993)?

(ii) Whether the compensation determined at Rs.150,000/- per acre requires interference?

8. The appellant submitted that the first preliminary notification under section 4(1) read with section 17 of the Act was gazetted on 3.1.1990 followed by a final declaration under section 6 of LA Act on 10.1.1990. As the urgency provision in section 17 of the Act was invoked, there was no inquiry under section 5A of the Act and possession was taken on 18.9.1991 even before making an award. The appellant contended that where possession is taken invoking section 17 of the Act, the acquisition would not lapse under section 11A of the Act even if the award was not made within two years from the date of final declaration. In support of the said contention, the appellant relied upon the decision of this Court in *Satendra Prasad Jain*

v. State of U.P. [1993 (4) SCC 369], wherein it was held that when section 17(1) of the Act is invoked by reason of urgency and the State Government takes possession of the land prior to the making of the award under section 11 of the Act and thereupon the owner is divested of the title of the land which vested in the Government, section 11A would have no application. It was also held that ordinarily if the Government fails to make an award within two years of the declaration under section 6 of the Act, the acquisition would lapse, if the land had not vested in the Government. But where the land has already vested in the Government by taking possession, there is no provision in the Act by which the lands statutorily vested in the Government could revert back to the land owner and therefore section 11A was inapplicable. This Court further held that even if the 80% estimated compensation required to be paid under section 17(3-A) of Act was not paid to the owner, that would not mean that the possession was taken illegally or that the land did not vest in the Government.

9. The appellant contended that as the land vested in the government by reason of possession being taken by invoking section 17 of the Act on 18.9.1991, section 11A of the Act would be inapplicable and the acquisition did not lapse. It was further submitted that as a consequence, the preliminary notification dated 3.1.1990 and final declaration dated 10.1.1990 continued to operate and consequently, the fresh notification dated 9.9.1993 (gazetted on 19.11.1993) followed by final declaration dated 16.2.1994 became redundant and inapplicable. The appellant contends that the High Court was therefore not justified in proceeding on the basis that the compensation should be fixed with reference to the date of publication of the second preliminary notification that is 19.11.1993, instead of determining the market value as on 3.1.1990.

10. On a careful consideration, we are of the view that the decision in *Satayender Prasad Jain* will not apply to this case.

The issue in this case is not whether the acquisition lapsed or not. The issue is where the earlier preliminary and final notifications are superseded by the subsequent preliminary and final notifications and whether the market value should be fixed with reference to the first preliminary notification or the second preliminary notification. Section 17 as amended in Andhra Pradesh, no doubt provided that the land would vest absolutely in the government even before making the award, on taking possession of the land needed for a public purpose. But as the Land Acquisition Officer failed to estimate the compensation and tender 80% thereof to the land-owners, as required under section 17(3A) of the Act, the land-owners approached the High Court by filing WP No.14396 of 1991 seeking a direction to the appellant to pass the award. As possession had been taken as the land had already vested in the government, the land owners could not and did not challenge the acquisition in the said writ petition. Keeping these facts in view, the High Court disposed of the said writ petition with a specific direction to make an award before 11.2.1992. Admittedly, the award was not made and the order of the High Court was not complied with. It is also of some relevance to note that under sub-section (5) of section 17 of the Act, inserted by a State Amendment in Andhra Pradesh, if the Collector does not take possession of the land within three months from the date when State Government directs under sub-section (4) of section 17 that the provisions of section 5A shall not apply, the effect would be that the provisions of section 5A would apply and the period of 30 days referred to in section 5A shall be reckoned from the date of expiration of three months. In these peculiar circumstances, the government after considering the facts and circumstances, with a view to avoid further challenge, issued a fresh notification dated 9.9.1993 (gazetted on 19.11.1993) followed by final declaration dated 16.2.1994. The State Government did not subsequently cancel/rescind/withdraw the notifications dated 9.9.1993 and 16.2.1994. The State Government had clearly abandoned the earlier notifications dated 3.1.1990 and

10.1.1990 by issuing the subsequent notifications dated 9.9.1993 and 16.2.1994. The appellant cannot therefore contend that the second preliminary notification is redundant or that first preliminary notification continues to hold good. In the circumstances, the High Court was justified in holding that the compensation should be determined with reference to the date of publication of the second preliminary notification, namely 19.11.1993.

11. If we examine the quantum of compensation awarded by the High Court with reference to the date of gazetting of the second preliminary notification, that is 19.11.1993, we find that the compensation award is not excessive and does not call for interference. It has been determined with reference to a sale transaction dated 12.11.1993, just a few days prior to the publication of the second preliminary notification in the gazette dated 19.11.1993. The High Court has also made a deduction of 40% in the market value disclosed by the said sale transaction.

12. In some of the counter affidavits filed in the special leave petitions by the claimants, they have alleged that their special leave petitions (challenging the judgment of the High Court and seeking higher compensation) were dismissed as barred by time and therefore, they may be permitted to make a counter claim for a higher compensation. Such counter-claims in counter-affidavits in special leave petitions are impermissible and not maintainable and cannot be entertained.

13. In view of the above, these appeals are dismissed.

N.J. Appeals dismissed.

PUSHPA @ LEELA & ORS.
v.
SHAKUNTALA & ORS.
(Civil Appeal No.6924 of 2005)

JANUARY 12, 2011

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

Motor Vehicles Act, 1988:

s. 166 read with ss.2(30) and 50 – Fatal accident – Claim petitions by heirs of deceased persons – At the time of accident offending truck in possession of transferee but change of ownership not recorded in registration certificate – Truck covered under insurance policy taken out in the name of recorded owner – Claims Tribunal held the claimants entitled to compensation – Liability to pay compensation – HELD: In view of the omission to change the name of owner in certificate of registration, the transferor (recorded owner) must be deemed to continue as the owner of the vehicle for the purposes of the Act – Therefore, he was equally liable for payment of compensation amount – Further, since the insurance policy was taken out in his name, he was indemnified and the claim will be shifted to the insurer.

Constitution of India, 1950:

Article 136 – Appeal – Similar relief to non-appellants – Claims Tribunal allowed two claim petitions filed by heirs of two victims of a motor accident and held them entitled to specified amounts of compensation – Appeal before Supreme Court only in one case by heirs of one of the deceased – Directions given to insurance company for payment of compensation to heirs of both the deceased in both the cases – Motor Vehicles Act, 1988 - Appeal.

One 'PC' hired a truck for carrying some materials and engaged 'NR' as labourer for loading and unloading the materials. The truck met with an accident as a result, all the three, namely, 'PC', 'NR' and the driver of the truck died. On the date of the accident the truck was in possession of the transferee although the transferor was the registered owner thereof as the transferee was not registered as the owner, and the truck was covered by an insurance policy taken out in the name of the registered owner. The heirs of deceased 'PC' and 'NR' filed claim petitions against the transferee, the registered owner, and the insurer. The Motor Accident Claims Tribunal held the heirs of 'PC' entitled to Rs.5,16,000/- and heirs of 'NR' to Rs.2,42,000/- as compensation and held the transferee alone as liable for payment of compensation. The appeals of the claimants were dismissed by the High Court.

In the instant appeal filed by the heirs of deceased 'PC', the question for consideration before the Court was: "whether in the fact and circumstances of the case the liability to pay the compensation amount as determined by the Motor Accident Claims Tribunal was of the purchaser of the vehicle alone or whether the liability of the recorded owner of the vehicle was coextensive and from the recorded owner it would pass on to the insurer of the vehicle?"

Allowing the appeal, the Court

HELD:

1. It is undeniable that notwithstanding the sale of the vehicle neither the transferor nor the transferee took any step for the change of the name of the owner in the certificate of registration of the vehicle. In view of this omission, the transferor must be deemed to continue as

the owner of the vehicle for the purposes of the Motor Vehicles Act, even though under the civil law he ceased to be its owner after its sale on 2.2.1993. Therefore, he was equally liable for payment of the compensation amount. Further, since an insurance policy in respect of the truck was taken out in his name he was indemnified and the claim will be shifted to the insurer. The compensation amount is equally realisable from respondent no.3, Oriental Insurance Company Ltd., and it is directed to make full payment of the compensation amount, as determined by the Claims Tribunal, to the appellants. [para 11,14 and 16] [342-F-G; 344-G-H; 345-A-G]

Dr. T.V. Jose vs. Chacko P.M., **2001 (3) Suppl. SCR 366 = 2001 (8) SCC 748;** *P.P. Mohammed vs. K. Rajappan & Ors.*, **(2008) 17 SCC 624 - relied on**

National Insurance Company Ltd. vs. Deepa Devi & Ors., **2007 (13) SCR 134 = (2008) 1 SCC 414 – distinguished.**

2. Even though the claimants in the other case, namely, the heirs and legal representatives of deceased 'NR', have not come to this Court, it would be appropriate to give the same direction in respect of their case. There is absolutely no difference in the two cases. It is quite possible that the heirs and legal representatives of 'NR' were unable to come to this Court simply for want of sufficient means. The insurance company must pay the compensation amount determined in case of 'NR' to his heirs and legal representatives in case the amount has so far not been realised from the transferee as directed by the Claims Tribunal. [para 17] [345-H; 346-A-B]

Case Law Reference:

2001 (3) Suppl. SCR 366	**relied on**	**para 12**
(2008) 17 SCC 624	**relied on**	**para 13**

2007 (13) SCR 134 distinguished para 15

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6924 of 2005.

From the Judgment & Order dated 15.07.2004 of the High Court of Himachal Pradesh at Shimla in FAO No. 77 of 1999.

E.C. Agrawala, Amit Kumar Sharma, Neha Agarwal for the Appellants.

Dr. K.S. Chauhan, Tej Singh Varun, Ajit Kumar Ekka, Kartar Singh, Dr. Meera Aggrawal, Ramesh Chandra Mishra for the Respondents.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. Whether in the fact and circumstances of the case the liability to pay the compensation amount as determined by the Motor Accident Claims Tribunal was of the purchaser of the vehicle alone or whether the liability of the recorded owner of the vehicle was coextensive and from the recorded owner it would pass on to the insurer of the vehicle? This is the short question that arises for consideration in this appeal by special leave filed at the instance of the claimants.

2. The appellants, claimants before the Claims Tribunal are the heirs and legal representatives of one Prem Chand who died in a motor accident on May 7, 1994. Prem Chand had hired the truck bearing registration no.HPA-1435 for carrying some materials and food articles for a wedding in the family. He got the materials to be transported loaded on the truck by a labourer, Nikku Ram whom he had engaged for that purpose and took him along with him on the truck for unloading the consignment at the destination. According to the claimants, the driver Roop Ram was driving the truck rashly and at a very high speed. As a result, the truck met with an accident and at about

6.30-7pm while running on Dhararu Dhar Road near Bangora, Tehsil Arki, District Solan, in the State of Himachal Pradesh, it went off the road and overturned leading to the death of all the three persons, including the driver.

3. The truck had a little history of its own that actually gives rise to the question set out at the beginning of the judgment. It earlier belonged to one Jitender Gupta who was its registered owner. Jitender Gupta sold the truck to Salig Ram on February 2, 1993 and gave its possession to the transferee. On the date of the sale, the truck was covered by an insurance policy taken out by Jitender Gupta from New India Assurance Company Ltd. The insurance policy was issued on February 25, 1992 and it was due to expire on February 24, 1993. Despite the sale of the vehicle by Jitender Gupta to Salig Ram, the change of ownership of the vehicle was not entered in its certificate of registration. After the earlier policy issued by New India Assurance Company Ltd. expired on February 24, 1993, there was a period when the truck was not covered by any insurance policy. Later on, however, Salig Ram took out an insurance policy for the truck from Oriental Insurance Company Ltd. bearing policy no.31/94/00628. The policy was taken in the name of Jitender Gupta, the earlier owner of the truck, and it was valid from December 8, 1993 to December 7, 1994. The accident in which Prem Chand and Nikku Ram lost their lives took place on May 7, 1994, i.e. during the period when the policy taken out from the Oriental Insurance Company Ltd. was subsisting and valid.

4. The heirs and legal representatives of both the deceased, Prem Chand and Nikku Ram filed separate claim applications before the Motor Accident Claims Tribunal, Solan, Himachal Pradesh. In both the claim applications Salig Ram, the transferee was impleaded as respondent no.1, Jitender Gupta, the original owner of the truck as respondent no.2 and Oriental Insurance Company Ltd. as respondent no.3. The two claim applications, MAC petition no.62-NS/2 of 1994 filed by

the heirs and legal representatives of the deceased Prem Chand (appellants in this appeal) and MAC petition no.63-NS/2 of 1994 filed by the heirs and legal representatives of the deceased Nikku Ram (who pursued the matter only up to the High Court and who have not been able to come to this Court in appeal) were consolidated and heard together. All the three respondents appeared before the Tribunal and filed their separate replies resisting the claims of the two claimants. But none of the respondents led any evidences before the Claims Tribunal.

5. The Claims Tribunal, on the basis of the *ex parte* evidence adduced on behalf of the claimants, found and held that both Prem Chand and Nikku Ram died on May 7, 1994, in the accident caused by truck no.HPA-1435 which was being driven by its driver Roop Ram in a rash and negligent manner. It also found that Prem Chand and Nikku Ram were not travelling in the ill-fated truck as unauthorised or gratuitous passengers. The Claims Tribunal further held that the heirs and legal representatives of Prem Chand were entitled to a sum of Rs.5,04,000/- for the loss of dependency and Rs.10,000/- for loss of consortium and Rs.2000/- as cremation charges. The heirs and legal representatives of Prem Chand were, thus, held entitled to a total compensation of Rs.5,16,000/-. In case of the heirs and legal representatives of the deceased Nikku Ram, the Claims Tribunal held that they were entitled to a total compensation of Rs.2,42,000/-.

6. Coming next to the question of liability of payment, the issue that is most crucial for the claimants from the practical point of view, the Claims Tribunal held that no liability for payment of compensation to the claimants would attach to Jitender Gupta since he had ceased to be the owner of the vehicle after its sale to Salig Ram on February 2, 1993. It further held that even though an insurance policy for the truck was taken out from Oriental Insurance Company Ltd., the policy was in the name of Jitender Gupta, who was no longer the owner of the truck on the date the policy was taken out and there was no

privity of contract between Salig Ram, the owner of the truck and the insurance company. Hence, the insurance policy was of no use for indemnifying Salig Ram, the owner of the truck. In short, Salig Ram alone was liable for payment of the compensation amount to the two claimants. In this connection, the Claims Tribunal in paragraph 46 of its judgment held and observed as followed:

> "Because the subsequent policy was taken by respondent no.2 effective from 08.12.1993 to 07.12.1994 when he was not owner having no right, title or interest to obtain the policy. The owner at that time was respondent no.1 who never entered into any privy of contract with respondent no.3 to cover third party risks qua the vehicle."

7. Against the judgment and award made by the Claims Tribunal the claimants filed appeals before the Himachal Pradesh High Court being FAO no.459 of 2000 (by the heirs and legal representatives of Prem Chand) and FAO no.77 of 1999 (by the heirs and legal representatives of Nikku Ram). Both the appeals were dismissed by the High Court by a common judgment and order dated July 15, 2004.

8. We have examined the judgments passed by the Claims Tribunal and the High Court and we find that both the Tribunal and the High Court addressed the question of the liability of the recorded owner of the vehicle on the basis of a provision that has no relevance to the issue. Both the Tribunal and the High Court discussed at length the provision of section 157 of the Motor Vehicles Act, 1988 ("the Act" for short) that deals with "Transfer of Certificate of Insurance". So far as that section is concerned the Tribunal and the High Court were right in holding that section 157 of the Act would apply only to the earlier policy (being that of New India Assurance Company Ltd.) taken out by Jitender Gupta during the validity period of which the truck was sold by him to Salig Ram and it can have no application to the second policy taken out from Oriental Insurance Company Ltd. in the name of Jitender Gupta after the sale of

the truck. But as stated earlier, section 157 has no application in the facts of this case.

9. The question of the liability of the recorded owner of the vehicle has to be examined under different provisions of the Act. Section 2(30) of the Act defines "owner" in the following terms:

> "2(30) "**owner" means a person in whose name a motor vehicle stands registered**, and where such person is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase agreement, or an agreement of lease or an agreement of hypothecation, the person in possession of the vehicle under that agreement;"
>
> (Emphasis added)

10. Then, section 50 of the Act lays down the procedure for transfer of ownership. It is a long section and insofar as relevant it is reproduced below:

> "**50. Transfer of ownership.**
>
> (1) Where the ownership of any motor vehicle registered under this Chapter is transferred,-
>
> (a) the transferor shall,-
>
> (i) in the case of a vehicle registered within the same State, within fourteen days of the transfer, report the fact of transfer, in such form with such documents and in such manner, as may be prescribed by the Central Government to the registering authority within whose jurisdiction the transfer is to be effected and shall simultaneously send a copy of the said report to the transferee; and
>
> (ii) xxxxxxx

> (b) the transferee shall, within thirty days of the transfer, report the transfer to the registering authority within whose jurisdiction he has the residence or place of business where the vehicle is normally kept, as the case may be, and shall forward the certificate of registration to that registering authority together with the prescribed fee and a copy of the report received by him from the transferor in order that particulars of the transfer of ownership may be entered in the certificate of registration.
>
> (2) xxxxxxx
>
> (3) xxxxxxx
>
> (4) xxxxxxx
>
> (5) xxxxxxx
>
> (6) On receipt of a report under sub-section (1), or an application under subsection (2), the registering authority may cause the transfer of ownership to be entered in the certificate of registration.
>
> (7) A registering authority making any such entry shall communicate the transfer of ownership to the transferor and to the original registering authority, if it is not the original registering authority."

11. It is undeniable that notwithstanding the sale of the vehicle neither the transferor Jitender Gupta nor the transferee Salig Ram took any step for the change of the name of the owner in the certificate of registration of the vehicle. In view of this omission Jitender Gupta must be deemed to continue as the owner of the vehicle for the purposes of the Act, even though under the civil law he ceased to be its owner after its sale on February 2, 1993.

12. The question of the liability of the recorded owner of a vehicle after its sale to another person was considered by this

Court in *Dr. T.V. Jose* vs. *Chacko P.M.*, (2001) 8 SCC 748. In paragraphs 9 and 10 of the decision, the Court observed and held as follows:

"9. Mr. Iyer appearing for the Appellant submitted that the High Court was wrong in ignoring the oral evidence on record. He submitted that the oral evidence clearly showed that the Appellant was not the owner of the car on the date of the accident. *Mr. Iyer submitted that merely because the name had not been changed in the records of R.T.O. did not mean that the ownership of the vehicle had not been transferred.* Mr. Iyer submitted that the real owner of the car was Mr. Roy Thomas. Mr. Iyer submitted that Mr. Roy Thomas had been made party-Respondent No.9 to these Appeals. He pointed out that an Advocate had filed appearance on behalf of Mr. Roy Thomas but had then applied for and was permitted to withdraw the appearance. He pointed out that Mr. Roy Thomas had been duly served and a public notice had also been issued. He pointed out that Mr. Roy Thomas had chosen not to appear in these Appeals. He submitted that the liability, if any, was of Mr. Roy Thomas.

10. We agree with Mr. Iyer that the High Court was not right in holding that the Appellant continued to be the owner as the name had not been changed in the records of R.T.O. *There can be transfer of title by payment of consideration and delivery of the car. The evidence on record shows that ownership of the car had been transferred. However the Appellant still continued to remain liable to third parties as his name continued in the records of R.T.O. as the owner. The Appellant could not escape that liability by merely joining Mr. Roy Thomas in these Appeals.* Mr. Roy Thomas was not a party either before MACT or the High Court. In these Appeals we cannot and will not go into the question of inter se liability between the Appellant and Mr. Roy Thomas. It will be for the Appellant

to adopt appropriate proceedings against Mr. Roy Thomas if, in law, he is entitled to do so."

(Emphasis added)

13. Again, in *P.P. Mohammed vs. K. Rajappan & Ors.*, (2008) 17 SCC 624, this Court examined the same issue under somewhat similar set of facts as in the present case. In paragraph 4 of the decision, this Court observed and held as follows:

"4. These appeals are filed by the appellants. The insurance company has chosen not to file any appeal. The question before this Court is whether by reason of the fact that the vehicle has been transferred to Respondent 4 and thereafter to Respondent 5, the appellant got absolved from liability to the third person who was injured. This question has been answered by this Court in *T.V. Jose (Dr.)* v. *Chacko P.M.* wherein it is held that *even though in law there would be a transfer of ownership of the vehicle, that, by itself, would not absolve the party, in whose name the vehicle stands in RTO records, from liability to a third person.* We are in agreement with the view expressed therein. *Merely because the vehicle was transferred does not mean that the appellant stands absolved of his liability to a third person. So long as his name continues in RTO records, he remains liable to a third person."* (Emphasis added)

14. The decision in *Dr. T.V. Jose* was rendered under the Motor Vehicles Act, 1939. But having regard to the provisions of section 2(30) and section 50 of the Act, as noted above, the ratio of the decision shall apply with equal force to the facts of the case arising under the 1988 Act. On the basis of these decisions, the inescapable conclusion is that Jitender Gupta, whose name continued in the records of the registering authority as the owner of the truck was equally liable for payment of the compensation amount. Further, since an insurance policy in

respect of the truck was taken out in his name he was indemnified and the claim will be shifted to the insurer, Oriental Insurance Company Ltd.

15. Learned counsel for the insurance company submitted that even though the registered owner of the vehicle was Jitender Gupta, after the sale of the truck he had no control over it and the possession and control of the truck were in the hands of the transferee, Salig Ram. No liability can, therefore, be fastened on Jitender Gupta, the transferor of the truck. In support of this submission he relied upon a decision of this Court in *National Insurance Company Ltd.* vs. *Deepa Devi & Ors.*, (2008) 1 SCC 414. The facts of the case in *Deepa Devi* are entirely different. In that case the vehicle was requisitioned by the District Magistrate in exercise of the powers conferred upon him under the Representation of the People Act, 1951. In that circumstance, this Court observed that the owner of the vehicle cannot refuse to abide by the order of requisition of the vehicle by the Deputy Commissioner. While the vehicle remained under requisition, the owner did not exercise any control over it: the driver might still be the employee of the owner of the vehicle but he had to drive the vehicle according to the direction of the officer of the State, in whose charge the vehicle was given. Save and except the legal ownership, the registered owner of the vehicle had lost all control over the vehicle. The decision in *Deepa Devi* was rendered on the special facts of that case and it has no application to the facts of the case in hand.

16. In light of the discussion made above it is held that the compensation amount is equally realisable from respondent no.3, Oriental Insurance Company Ltd. and it is directed to make full payment of the compensation amount as determined by the Claims Tribunal to the appellants within two months from the date of this judgment.

17. Even though the claimants in the other case, the heirs and legal representatives of Nikku Ram, have not come to this

Court, we consider it appropriate to give the same direction in respect of their case. There is absolutely no difference in the case of Nikku Ram and Prem Chand. Nikku Ram, being a daily wage earner was given a compensation of Rs.2,42,000/-. It is quite possible that his heirs and legal representatives were unable to come to this Court simply for want of sufficient means. The insurance company must pay the compensation amount determined in case of Nikku Ram to his heirs and legal representatives in case the amount has so far not been realised from Salig Ram as directed by the Claims Tribunal.

18. The appeal is allowed but with no order as to costs.

R.P. Appeal allowed.

M/S. USHA RECTIFIER CORPN. (I) LTD. (PRESENTLY KNOWN AS M/S. USHA (I) LTD.)
v.
COMMISSIONER OF CENTRAL EXCISE, NEW DELHI
(Civil Appeal no.6866 of 2000)

JANUARY 13, 2011

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

Central Excise Rules, 1944: rr.9 and 49, explanation – Captive consumption – Manufacture of testing equipment by assessee for testing its own final products – Testing equipment manufactured within the factory – Admission by assessee that the import of testing equipment was avoided to save foreign exchange and parts and components were purchased to develop the testing equipment – Demand of duty on testing equipment – Held: Duty payable on the testing equipment – It was admitted by the assessee that they had undertaken such manufacturing process of the testing equipments to avoid importing of such equipment – Such a statement confirmed the position that such testing equipments were saleable and marketable – Explanations to Rule 9 and 49 provides that excisable goods manufactured and consumed or utilized within the factory premises as such are deemed to have been removed from the premises immediately for such consumption or utilization and duty is leviable on such excisable goods.

Central Excise Act, 1944: s.11A – Demand – Limitation – Suppression of relevant facts – Non-payment of duty on the testing equipment manufactured for the purpose of testing the final products – L-4 licence not obtained by the assessee nor the fact of manufacturing of the said equipment disclosed to the department – The said knowledge of manufacture acquired by the department only subsequently – Held: In view

of non-disclosure of such information by the assessee and suppression of relevant facts, the extended period of limitation was rightly invoked by the department.

The appellant-assessee, a manufacturer of electronics equipments, manufactured a machinery in the nature of testing equipments costing Rs.31.27 lacs to test its final products. A show cause notice was issued on the assessee demanding duty on the plant and machinery including the testing equipments manufactured by them. After considering the reply of the assessee, the authorities confirmed the demand. The CEGAT dismissed the appeal filed by assessee. The instant appeal was filed challenging the order of the CEGAT.

Dismissing the appeal, the Court

HELD: 1. The demand for payment of central excise duty in the instant case was made on the basis of statement made by the appellant-assessee in their balance sheet to the effect that there was an addition to plant and machinery including testing equipments worth Rs. 31.26 lacs which were made in the company by capitalisation of the expenditure on raw material, stores and spares and salary/wages and other benefits. The said statement and details were mentioned in Schedule 'Q' appended to notice of balance sheet and profit and loss account of the appellant for the year ending December, 1987. The said position was further corroborated by the Director's report appearing in the Annual Report for the year ending December, 1988, wherein it was mentioned that during the year the company developed a large number of testing equipments on its own for using the same for the testing of semi-conductors manufactured by it. Once the appellant had themselves made admission in their own balance sheet, which was not rebutted and was further substantiated in the Director's report, they could not later

turn around and make submissions contrary to their own admissions. Moreover, they also clearly took a stand in their reply to the said show cause notice that they bought various parts and components to develop the testing equipments for use within the factory and that such steps were undertaken to avoid importing of such equipments from the developed countries with a view to save foreign exchange. Even if the testing equipments were used for captive consumption and within the factory premises, considering the fact that they were saleable and marketable, duty was payable on the said goods. The fact that the equipments were marketable and saleable was also an admitted position as the appellant has admitted it in their reply to the show cause notice that they had undertaken such manufacturing process of the testing equipments to avoid importing of such equipments. Such a statement confirmed the position that such testing equipments were saleable and marketable. The provision of Explanations to Rule 9 and 49 of the Central Excise Rules are very clear as it provides that for the purpose of the said rules, excisable goods manufactured and consumed or utilized as such would be deemed to have been removed from the premises immediately for such consumption or utilization. Therefore, the contention that no such duty could be levied unless it is shown that they were taken out from the factory premises is without any merit. [Paras 7 to 11] [352-G-H; 353-A-B-D-H; 354-D]

Calcutta Electric Supply Corpn. v. CWT **(1972) 3 SCC 222 – relied on.**

2. The appellant had not obtained L-4 licence nor they had disclosed the fact of manufacturing of the said goods to the department. The said knowledge of manufacture came to be acquired by the department only subsequently. In view of non-disclosure of such information by the appellant and suppression of relevant facts, the extended period of limitation was rightly

invoked by the department. [Para 12] [354-F-G]

Case Law Reference:

(1972) 3 SCC 222	**relied on**	**Para 8**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6866 of 2000.

From the Judgment & Order dated 10.08.2000 of the Customs, Excise & Gold (Control) Appellate Tribunal (CEGAT), New Delhi in Excise Appeal No. 5496/92-B.

Vinod K. Shukla, Shiv Kumari Suri for the Appellant.

R.P. Bhatt, B. Krishna Prasad, Gautam Jha for the Respondent.

The Judgment of the Court was delivered by

Dr. MUKUNDAKAM SHARMA, J. 1. By this judgment and order we propose to dispose of the appeal which is filed by the appellant herein being aggrieved by the judgments and orders passed by the authorities including the Customs, Excise & Gold [Control] Appellate Tribunal [for short 'CEGAT'] demanding duty of Rs. 4,92,566.28 from the appellant on the plant and machinery including testing equipments manufactured by them.

2. The appellant herein is a manufacturer of electronic transformers, semi-conductor devices and other electrical and electronics equipments. During the course of such manufacture the appellant also manufactured machinery in the nature of testing equipments to test the final products of the assessee company costing Rs. 31,27,405/- as per Note 6 of the Schedule 'Q' page 15 of the balance sheet for the year ending December, 1987. The aforesaid position was further reiterated in the Director's report appearing at page no. 2 of the Annual Report for the year ending December, 1988.

3. A show cause notice was issued to the appellant

directing them to show cause as to why central excise duty should not be levied on it along with interest and penalty. The appellant submitted its reply to the aforesaid show cause notice wherein they took a stand that no manufacture of plant and machinery of the nature alleged had taken place during the year to warrant levy of central excise duty. It was further stated that for research and development wing of the company and to carry out trials, experiments and for undertaking development job based on the latest technology available worldwide or through their own resources it had bought out items, parts, components, etc., and for that purpose such items were assembled in the factory. It was also stated that after research is so done, and if it was not successful, the same was disassembled. It was contended that the job that was carried out in that process was purely for research and developmental works and it was not manufacture of testing equipments. In the said reply it was also stated that project to develop the aforesaid testing equipment for use within the factory was undertaken to avoid importing of such equipment from the developed countries with a view to save foreign exchange but since the project failed, no serious effort had since been made to complete the manufacture of the said testing equipments. It was further contended that under Section 3 of the Central Excises and Salt Act, 1944 the imposition of excise duty is on the act of manufacture or production and when there is no manufacture or production, there cannot be any duty so leviable, particularly, when the aforesaid processed material was not marketable.

4. The Additional Collector, Central Excise under order-in-original No. 6/92-93 dated 27.5.1992 after consideration of the contentions confirmed the demand of duty amounting to Rs. 4,92,566.28 and imposed a penalty of Rs. 50,000/- holding that in view of the documentary evidence and the balance sheet it had been proved beyond doubt that they had manufactured plant and machinery/testing equipments worth Rs. 31.26 lacs. Being aggrieved by the said order, an appeal was filed before the Collector (Appeals), who dismissed the said appeal. Still

aggrieved, the appellant filed an appeal before the CEGAT which was also rejected after hearing the counsel appearing for the parties and after extensively going through various facets arising in the case. Thereafter, the appellant has filed the present appeal on which we have heard the learned counsel appearing for the parties.

5. It was submitted by the counsel appearing for the appellant that the appellant have their own research and development wing in which trials and experiments are undertaken from time to time for the developmental jobs based on latest technology and that during the course of such trials and experiments they bought out various parts and components which were assembled by them and that after the research is done the same were disassembled and, therefore, such research and development process undertaken by them cannot be said to be manufacturing process by any stretch of imagination. It was also submitted by the counsel that the aforesaid equipments were not taken out from the factory premises of the appellant and rather they were dismantled and, therefore, the respondent acted illegally in levying tax on the said goods. He also submitted that the department was also not entitled to invoke the extended period of limitation inasmuch as there was no cause for invoking the provision of extended limitation.

6. The aforesaid submissions of the counsel appearing for the appellant were however refuted by the counsel appearing for the respondent. We have very carefully scrutinized the records and examined the submissions of the counsel appearing for the parties in the light of the said records.

7. The demand for payment of central excise duty in the present case appears to have been made on the basis of statement made by the appellants in their balance sheet to the effect that there is an addition to plant and machinery including testing equipments worth Rs. 31.26 lacs which have been made in the company by capitalisation of the expenditure on (i) raw

material, (ii) stores and spares and (iii) salary/wages and other benefits. The aforesaid statement and details were mentioned in Schedule 'Q' appended to notice of balance sheet and profit and loss account of the appellant for the year ending December, 1987. Serial No. 6 of the said Schedule reads as follows: -

> "*Addition to plant and machinery includes testing equipments worth Rs. 31.26 lakhs fabricated in the company by capitalisation of following expenditure:-*
>
> (i) Raw material Rs. 26.31 lakhs,
>
> (ii) Stores and spares Rs. 0.02 lakh, and
>
> (iii) Salary/wages and other benefits Rs. 4.93 lakhs (On the basis of estimated time spent)"

8. The aforesaid position is further corroborated by the Director's report appearing at page no. 2 of the Annual Report for the year ending December, 1988, wherein it was mentioned that during the year the company developed a large number of testing equipments on its own for using the same for the testing of semi-conductors. Once the appellant has themselves made admission in their own balance sheet, which was not rebutted and was further substantiated in the Director's report, the appellant now cannot turn around and make submissions which are contrary to their own admissions. (See: *Calcutta Electric Supply Corpn. v. CWT,* (1972) 3 SCC 222 para 8). Moreover, they have also clearly taken a stand in their reply to the aforesaid show cause notice that they bought various parts and components to develop the testing equipments for use within the factory and that such steps were undertaken to avoid importing of such equipments from the developed countries with a view to save foreign exchange.

9. From the aforesaid own admission of the appellant and from the facts brought out from the records it is clearly proved and established that the appellant had manufactured machines in the nature of testing equipments worth Rs. 31.26 lacs to test

the final products manufactured by them.

10. Even if such equipments were used for captive consumption and within the factory premises, considering the fact that they are saleable and marketable, we are of the view that duty was payable on the said goods. The fact that the equipments were marketable and saleable is also an admitted position as the appellant has admitted it in their reply to the show cause notice that they had undertaken such manufacturing process of the testing equipments to avoid importing of such equipments from the developed countries with a view to save foreign exchange. Such a statement confirms the position that such testing equipments were saleable and marketable.

11. The provision of Explanations to Rule 9 and 49 of the Central Excise Rules are very clear as it provides that for the purpose of the said rules excisable goods manufactured and consumed or utilized as such would be deemed to have been removed from the premises immediately for such consumption or utilization. Therefore, the contention that no such duty could be levied unless it is shown that they were taken out from the factory premises is without any merit.

12. Submission was also made regarding use of the extended period limitation contending *inter alia* that such extended period of limitation could not have been used by the respondent. The aforesaid contention is also found to be without any merit as the appellant has not obtained L-4 licence nor they had disclosed the fact of manufacturing of the aforesaid goods to the department. The aforesaid knowledge of manufacture came to be acquired by the department only subsequently and in view of non-disclosure of such information by the appellant and suppression of relevant facts, the extended period of limitation was rightly invoked by the department.

13. Consequently, we find no merit in this appeal, which is dismissed without any order as to costs.

D.G. Appeal dismissed.

ARUNDHATI ASHOK WALAVALKAR
v.
STATE OF MAHARASHTRA
(Civil Appeal No. 6966 OF 2004)

JANUARY 13, 2011

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

Service Law:

Maharashtra Civil Services (Discipline and Appeal) Rules, 1979 – rr.3 (iii), 5 (1) (vii) – Misconduct by Judicial Officer – Charged with travelling ticket less in a local train and misusing her official identity card – Punishment of compulsory retirement by disciplinary authority – Justification of – Held: Justified – Offence as alleged against the officer in memo of charges, established on her own showing, thus, the Inquiry officer was justified in holding that charges levelled against her stood proved – Punishment of compulsory retirement awarded to her not disproportionate to offence alleged against her – Thus, order passed by the High Court upholding the punishment of compulsory retirement by disciplinary authority does not call for interference.

Judiciary – Judicial Officers – Code of Conduct – Held: Judge's official and personal conduct must be in tune with the highest standard of propriety and probity.

It is alleged that the appellant - Judicial Officer travelled without ticket in a local train thrice; and that she misused her official identity card, made unnecessary scene on the Railway platform and gave threats to the Railway staff. The charges were framed against her and the disciplinary proceedings were held. The disciplinary authority held the appellant guilty of misconduct as per Rule 3 (iii) of the Maharashtra Civil Services Conduct

Rules, 1979 and imposed the penalty of compulsory retirement in terms of r. 5 (1) (vii) of the Rules. The appellant filed a writ petition challenging the order of compulsory retirement. The High Court dismissed the petition. Therefore, the appellant filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1 There is no reason to take a different view from the findings recorded by the High Court that she had indeed travelled on that day without any ticket and when accosted, she simply passed the identity card to the hands of the ticket collector and walked away from the place. The Railway and the departmental authority in the inquiry took the same specific stand. If it was her case that she lost her identity card, it was required for her to immediately lodge a complaint thereto with the concerned authority or with the police which she never did. The said identity card was in fact returned to her by the Railway three days later. There is no justifiable reason of the identity card being recovered at the 'D' Railway Station if she had not at all travelled by train on that day. [Para 16 and 17] [365-C-E]

1.2 So far as the incident of 13.5.1997 is concerned, the specific defence of the appellant is that she had purchased a first class ticket on 13.5.1997 but the same was lost while boarding the train which was not accepted by the High Court holding the same to be highly improbable as she had voluntarily paid the charges after stating that Magistrates travelling without ticket could not be asked to pay the fine. The fact remains that on 13.5.1997 also the appellant could not produce any valid ticket or pass when she was accosted and asked to produce her valid ticket/pass. The defence that she lost ticket while boarding the train could always be taken by anybody, but there must be some basic facts supporting such statement which could not be produced by the

appellant in the instant case. [Para 18] [365-G-H; 366-A-B]

1.3 Regarding the incident on 5.12.1997, there is no dispute with regard to the fact that on that particular day, she boarded a first class compartment at 'M' Station although she did not have a valid ticket/pass in her possession. She paid a penalty which was given to her by one of her colleagues. Later on she took a stand that she had purchased a season ticket but the said ticket was also found to have been purchased at 'D' Station. Furthermore, on 5.12.1997, when the appellant was caught without ticket and when she was asked to produce the ticket, she could not do so nor was she prepared to pay the charges on the ground that she was a Magistrate and, therefore, has a right to travel without ticket. It is established from the record that subsequently, however, she paid the amount of Rs. 102/-. [Paras 19 and 20] [366-C-E]

1.4 The letter written by the appellant to the General Manager, Railway, as also the fact that she could not produce any ticket or pass for her travel between M and D station clearly establishes the fact that on 5.12.1997, she had travelled without ticket. In the said letter, to the General Manager, Central Railway, Mumbai the appellant clearly stated that at times she is unable to buy tickets because of shortage of time for which she had been harassed by the ticket collectors, therefore, she should be provided a free passage in a First Class compartment of local trains for the purpose of reaching the courts in time during such emergencies. A letter written immediately after the incident on 5.12.1997 clearly indicates that she had travelled without ticket on 5.12.1997 and she had taken offence for demanding a ticket from her as she is a Magistrate and she had made complaint against the ticket collectors. The offence as

alleged against the appellant in the memo of charges, therefore, for 5.12.1997 is established on her own showing and, therefore, the inquiry officer was justified in coming to the conclusion that the charges levelled against her stood proved. [Para 23 and 24] [367-G-H; 368-A-B]

2.1 Rule 8(25)(e) of the Maharashtra Civil Services(Discipline and Appeal) Rules, 1979 provided and permitted an inquiry officer to recommend for the punishment to be provided in the facts of the case. [Para 26] [368-D]

2.2 On going through the records, it is found that the disciplinary authority considered the records and, thereafter, came to an independent finding that the appellant is guilty of the charges framed against her of misconduct and that in the facts and circumstances of the case, a major penalty like compulsory retirement from service could only be imposed on her and consequently such a punishment was decided to be imposed. The entire disciplinary proceedings got terminated with the imposition of penalty of compulsory retirement. [Para 27] [368-F-H]

2.3 The submission that the punishment awarded to the appellant is disproportionate to the charges levelled against her and that she should at least be directed to be paid her pension which could be paid to her if she was allowed to work for another two years; and that the appellant had completed 8 years of service and if she would have worked for another two years, she would have been entitled to pension by addition of another 10 years of service, cannot be accepted since the quantum of punishment could be interfered only when the punishment awarded is found shocking to the conscience of the court. [Paras 28, 29] [369-A-C]

2.4 The instant case is of judicial officer who was required to conduct herself with dignity and manner becoming of a judicial officer. A judicial officer must be able to discharge his/her responsibilities by showing an impeccable conduct. In the instant case, she not only travelled without tickets in a railway compartment thrice but also complained against the ticket collectors who accosted her, misbehaved with the Railway officials and in those circumstances, the punishment of compulsory retirement awarded to her cannot be said to be disproportionate to the offence alleged against her. [Para 29] [369-C-E]

2.5 In a country governed by rule of law, nobody is above law, including judicial officers. In fact, as judicial officers, they have to present a continuous aspect of dignity in every conduct. If the rule of law is to function effectively and efficiently under the aegis of the democratic setup, Judges are expected to, nay, they must nurture an efficient and enlightened judiciary by presenting themselves as a role model. Needless to say, a Judge is constantly under public glaze and society expects higher standards of conduct and rectitude from a Judge. Judicial office, being an office of public trust, the society is entitled to expect that a Judge must be a man of high integrity, honesty and ethical firmness by maintaining the most exacting standards of propriety in every action. Therefore, a judge's official and personal conduct must be in tune with the highest standard of propriety and probity. Obviously, this standard of conduct is higher than those deemed acceptable or obvious for others. Indeed, in the instant case, being a judicial officer, it was in her best interest that she carries herself in a decorous and dignified manner. If she has deliberately chosen to depart from these high and exacting standards, she is appropriately liable for disciplinary action. [Para 29] [369-F-H; 370-A-B]

3. The conclusions arrived at by the disciplinary authority are accepted. There is no reason to interfere with the findings arrived at by the High Court giving reason for its decision with which are fully concurred with and finds justification. [Para 30] [370-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6966 of 2004.

From the Judgment & Order dated 13.04.2004 of the High Court of Judicature at Bombay in Writ Petition No. 20 of 2001.

C.U. Singh, K.K. Tyagi, Iftekhar Ahmad, N. Annapoorani, Bipin Joshi for the Appellant.

Aniruddha P. Mayee, Charudatta Mahindrakar, S. J. Patil, Sanjay V. Kharde, Asha Gopalan Nair for the Respondents.

The Judgment of the Court was delivered by

Dr. MUKUNDAKAM SHARMA, J. 1. This appeal was filed by the appellant herein being aggrieved by the judgment and order passed by the Division Bench of the Bombay High Court dismissing the writ petition filed by the appellant herein.

2. The issue that is sought to be raised in this appeal by the appellant is whether the Disciplinary Authority was justified in imposing on the appellant the punishment of compulsory retirement in terms of Rule 5(1)(vii) of the Maharashtra Civil Services (Discipline & Appeal) Rules, 1979 on the ground that the said appellant-Magistrate was found travelling without ticket in a local train thrice and on each occasion, the behaviour of the said appellant-Magistrate with the Railway staff in asserting that the Magistrates need not have a ticket was improper and constituted grave misconduct.

3. The allegation against the appellant was that she had travelled without tickets on 21.2.1997, 13.5.1997 and also on 5.12.1997 when she was caught. The charges here not only related to such incidents of ticketless travelling but also about

misusing her official identity card and for making unnecessary scene on the Railway platform and giving threats to the Railway staff which was considered to be misconduct unbecoming of a judicial officer as per Rule 3(iii) of the Maharashtra Civil Services Conduct Rules, 1979.

4. In order to understand the gravity of the charges and since it was the submission of the counsel appearing for the appellant that she was not responsible for any travelling without tickets, we have to narrate the background facts leading to the issuance of memorandum of charges against her.

5. On 28.5.1992, the appellant was appointed as a Metropolitan Magistrate at Bombay. Allegations were made by the Railway officials against the appellant for three incidents that happened on 21.2.1997, 13.5.1997 and on 5.12.1997. While the appellant on 5.12.1997 boarded the train at Mulund, she was accosted by two ticket collectors during the course of her journey from Mulund to Dadar who asked her to produce ticket or her pass. The appellant, however, stated that she had given her orderly money to buy a season pass which would be produced at the Dadar Railway Station. Even at Dadar Railway Station, she could not produce any ticket for her travel between the stations i.e. from Mulund to Dadar when she was asked to pay the Railway fare and fine for having travelled without ticket from Mulund to Dadar. However, another Metropolitan Magistrate travelling by the next train reached the Dadar Station and on being informed about the plight of the appellant, he came to the Station Superintendent and handed over to the appellant Rs. 102/- which was paid by the appellant to the railway officers against a receipt. Even prior to the said date, it was alleged that the appellant travelled without tickets on two dates i.e. 21.2.1997 and 13.5.1997.

6. On receipt of the aforesaid allegations made against the appellant by the Railway officers, a preliminary inquiry was held, on completion of which a Report was submitted on 25.3.1998 holding that the incidents of ticketless travelling by

the appellant on the aforesaid three dates had been established against the appellant.

7. Consequent thereto, a Memorandum of Charges was framed against the appellant and the same was issued on 17.12.1998. There were two specific articles of charges framed against the appellant which were to the following effect:-

(a) The petitioner claimed that the Magistrates are not required to buy ticket or pass and are allowed to travel in any local train, in first class without any travel authority for the purpose of attending duties.

(b) The petitioner was caught thrice for travelling in first class compartment of local train without ticket / travel authority and when caught the petitioner entered into arguments with ticket checking staff and on 05.12.1997 at about 10:30 to 11 a.m., created a scene and threatened the ticket collectors at Dadar railway station when the authorities insisted that the petitioner pay the necessary charges for travelling without ticket.

8. Alongwith the aforesaid Memorandum of Charges, the articles of charges with the statement of imputation of misconduct with list of charges alongwith list of witnesses were forwarded to the appellant.

9. The aforesaid disciplinary proceeding of the appellant was held alongwith two other Metropolitan Magistrates namely Mrs. Rama Waghule and Mr. V.V. Phand. Since we are not concerned with the charges framed against the other two officers, we refrain from referring to the same in the present case.

10. After receipt of the aforesaid Memorandum of Charges, the appellant sent her reply taking up a definite stand that the alleged incident of ticketless travelling on 21.2.1997 was deliberately concocted and imaginary whereas regarding the

remaining two incidents of ticketless travelling, it was stated by her that the same were due to unavoidable circumstances as set out more particularly in the said reply.

11. The disciplinary authority having not been satisfied with the reply submitted by the appellant ordered for conducting an inquiry against the appellant and appointed the inquiry officer for holding a departmental inquiry against the appellant with reference to the charges levelled against her. After conducting a detailed inquiry and examining a number of witnesses, the inquiry officer on 28.10.1999 submitted his report stating that the charges alleged against the appellant are proved. The inquiry officer held that the appellant was found travelling without ticket at least thrice and her behaviour on each occasion was far from proper and not commensurate with the behaviour of a judicial officer. The aforesaid Report submitted by the Inquiry Officer was considered by the disciplinary authority consisting of the Chief Justice and Judges of the Bombay High Court and it was decided to issue a notice to the appellant to show cause. Consequently, a show cause notice was issued to the appellant asking her to explain as to why the findings recorded by the inquiry officer would not be accepted and why a major penalty including a penalty of dismissal from service would not be imposed on the appellant.

12. The appellant submitted an application on 24.01.2000, pleading that she may be permitted to examine herself and three independent witnesses as and by way of additional evidence. The said application was, however, rejected by the disciplinary authority, but the High Court extended the time for filing the reply pursuant to which she submitted her reply to the show cause notice on 9.3.2000. After receipt of the aforesaid reply, the disciplinary authority considered her case and took a decision that she was guilty of misconduct and therefore decided to impose the penalty of compulsory retirement which was accepted by the State Government and consequently the impugned order of compulsory retirement was issued against

the appellant on 27.9.2000.

13. Being aggrieved by the order passed, the appellant filed a writ petition in the High Court challenging the legality and validity of the aforesaid order of compulsory retirement from the service.

14. The Division Bench of the High Court, as stated earlier dismissed the writ petition as against which the present appeal was filed. When the matter was listed, we heard the learned counsel appearing for the parties at length and also perused the records and scrutinised the same very minutely in order to arrive at a categorical finding regarding the guilt of the appellant. Before dwelling further it will be useful to examine few relevant facts of the present case. There are three incidents on the basis of which charges of misconduct against the appellant were framed. The said incidents were on 21.2.1997, 13.5.1997 and 5.12.1997. So far as the incident of ticketless travelling on 21.2.1997 is concerned, it is the case of the Railway as also of the Disciplinary Authority that she had travelled without ticket on the said date and when she was accosted to show her pass or ticket, she simply passed her identity card to the hands of the ticket collector and went away before she could be caught physically. The aforesaid identity card of the appellant was however, returned to her on 24.2.1997 by the Railway officials. The aforesaid incident was made a charge against which she had taken a categorical defence that she had lost her official identity card and on receiving information that the same was found at the Dadar Railway Station, she got it collected through a Constable from the Railway authorities on 24.2.1997. Her specific case in the departmental proceeding against the said charge was that she had never travelled by train on 21.2.1997.

15. So far as the said defence is concerned, the High Court found the same to be without any basis particularly in view of the fact that if the appellant was travelling as stated by her in a car during the month of February, 1997, there was no reason why her official identity card could be found and traced at Dadar

Railway Station. It was also held that she was the best person to give some idea as to how she lost her identity card at the Dadar Railway Station. It was also held that since no evidence was led by the appellant on that behalf and since also the Constable who had allegedly collected the identity card from the Railway authorities on 24.2.1997 had not been examined by her to establish her defence, the aforesaid defence taken by the appellant was not accepted by the High Court and it was held that the said charge of ticketless travelling on 21.2.1997 is proved in the facts and circumstances of the present case.

16. We find no reason to take a different view from the aforesaid findings recorded by the High Court. The specific stand of the Railway and also of the departmental authority in the inquiry is that the appellant when accosted for her ticketless travelling, she simply passed her identity card to the hands of the ticket collector and went away and giving no opportunity to the ticket collector to detain her. If it was her case that she lost her identity card, it was required for her to immediately lodge a complaint thereto with the concerned authority or with the police which she never did. The said identity card was in fact returned to her by the Railway officials on 24.2.1997. We could not find any justifiable reason of the identity card being recovered at the Dadar Railway Station if she had not at all travelled by train on that day.

17. There could be no other conclusions than what is arrived at by the High Court that she had indeed travelled on that day without any ticket and when accosted, she simply passed the identity card to the hands of the ticket collector and walked away from the place.

18. So far as the incident of 13.5.1997 is concerned, the specific defence of the appellant is that she had purchased a first class ticket on 13.5.1997 but the same was lost while boarding the train which was not accepted by the High Court holding the same to be highly improbable as she had voluntarily paid the charges after stating that Magistrates travelling without

ticket could not be asked to pay the fine. Fact remains that on 13.5.1997 also the appellant could not produce any valid ticket or pass when she was accosted and asked to produce her valid ticket/pass. The defence that she lost ticket while boarding the train could always be taken by anybody, but in our concerned view, there must be some basic facts supporting such statement which could not be produced by the appellant in the instant case.

19. So far as the incident on 5.12.1997 is concerned, we find that there is no dispute with regard to the fact that on that particular day, she boarded a first class compartment at Mulund Station although she did not have a valid ticket/pass in her possession. She had paid a penalty which was given to her by one of her colleagues. Later on she had taken a stand that she had purchased a season ticket but the said ticket was also found to have been purchased at Dadar station.

20. On 5.12.1997, when the appellant was caught without ticket and when she was asked to produce the ticket, she could not do so nor was she prepared to pay the charges on the ground that she was a Magistrate and therefore has a right to travel without ticket. It is established from the record that subsequently, however, she paid the amount of Rs. 102/-

21. In this connection, we may also refer to a letter written by her on 8.12.1997 to the General Manager, Central Railway, Mumbai. The said letter was admittedly written by her and it reads as follows:-

> "I would like to mention to you that sometimes, I am required to enter into your local Trains to reach my Court in time, as the vehicle given to us is a pooling one which takes a very long time due to unexpected traffic on the roads or break downs. During such occasions, I am unable to buy tickets because of short of time and consequently it had happened so, that I had to face your nagging ticket collectors. Your lady ticket collectors at Dadar instead of

understanding our difficulties have further harassed us in the most insulting manner and this has left a deed scar in our mind. If you care to know how nasty your people could be, you may depute a representative to whom we can explain the facts.

I am aware that the Metropolitan Magistrates handling the matters of any railway police station on central line get first class free pass right from Nagpur to Igapturi. Even the staff attached to such Magistrates also get free passes. We also attend to the work of railways on Saturdays, Sundays and holidays. Are we therefore, not entitled, at least to stand in the first class compartments of local trains only for the purpose of reaching our Courts in time during such emergencies ? Please do the needful in this matter urgently by giving necessary instructions to the ticket collectors so that we are not humiliated by your ticket collectors on this count and made to pay fine.

If you are of the negative opinion, that even this little courtesy cannot be extended to us, please communicate to me, so that I am prepared for such eventualities. Your early response would be highly appreciated."

22. The aforesaid letter as also the fact that she could not produce any ticket or pass for her travel between Mulund and Dadar station clearly establishes the fact that on 5.12.1997, she had travelled without ticket.

23. Despite the aforesaid position, she had written a letter to the General Manager, Central Railway, Mumbai clearly stating that at times she is unable to buy tickets because of shortage of time for which she had been harassed by the ticket collectors, therefore, she should be provided a free passage in a First Class compartment of local trains for the purpose of reaching the courts in time during such emergencies.

24. A letter written immediately after the incident on

5.12.1997 clearly indicates that she had travelled without ticket on 5.12.1997 and she had taken offence for demanding a ticket from her as she is a Magistrate and she had made complaint against the ticket collectors. The offence as alleged against the appellant in the memo of charges therefore for 5.12.1997 is established on her own showing and therefore, the inquiry officer was justified in coming to the conclusion that the charges levelled against her stood proved.

25. The next question that is posed before us is whether the inquiry officer was justified in recommending punishment to the appellant.

26. We have looked into the aforesaid issue also in the light of the provisions of the Rules. Rule 8(25)(e) of the Rules provided and permitted an inquiry officer to recommend for the punishment to be provided in the facts of the case. That provision which found place in the earlier Rules, however, came to be deleted from the aforesaid Rules by the amendment brought in the Rules in the year 1997. In that context, it was submitted by the learned counsel appearing for the appellant that since a recommendation has been made by the inquiry officer regarding punishment, the entire findings are vitiated and therefore liable to be set aside and quashed.

27. We are, however, unable to accept the aforesaid submissions. On going through the records, we find that the disciplinary authority considered the records and thereafter came to an independent finding that the appellant is guilty of the charges framed against her of misconduct and that in the facts and circumstances of the case, a major penalty like compulsory retirement from service could only be imposed on her and consequently such a punishment was decided to be imposed. Finally, the entire disciplinary proceedings got terminated with the imposition of penalty of compulsory retirement.

28. It was also submitted by the learned counsel appearing for the appellant that the aforesaid punishment awarded is disproportionate to the charges levelled against her and that she should at least directed to be paid her pension which could be paid to her if she was allowed to work for another two years. It was submitted by the learned counsel for the appellant that the appellant had completed 8 years of service and if she would have worked for another two years, she would have been entitled to pension by addition of another 10 years of service.

29. We are, however, unable to accept the aforesaid contention for the simple reason that we could probably interfere with the quantum of punishment only when we find that the punishment awarded is shocking to the conscience of the court. This is a case of judicial officer who was required to conduct herself with dignity and manner becoming of a judicial officer. A judicial officer must be able to discharge his/her responsibilities by showing an impeccable conduct. In the instant case, she not only travelled without tickets in a railway compartment thrice but also complained against the ticket collectors who accosted her, misbehaved with the Railway officials and in those circumstances we do not see how the punishment of compulsory retirement awarded to her could be said to be disproportionate to the offence alleged against her. In a country governed by rule of law, nobody is above law, including judicial officers. In fact, as judicial officers, they have to present a continuous aspect of dignity in every conduct. If the rule of law is to function effectively and efficiently under the aegis of our democratic setup, Judges are expected to, nay, they must nurture an efficient and enlightened judiciary by presenting themselves as a role model. Needless to say, a Judge is constantly under public glaze and society expects higher standards of conduct and rectitude from a Judge. Judicial office, being an office of public trust, the society is entitled to expect that a Judge must be a man of high integrity, honesty and ethical firmness by maintaining the most exacting standards of propriety in every action. Therefore, a judge's

official and personal conduct must be in tune with the highest standard of propriety and probity. Obviously, this standard of conduct is higher than those deemed acceptable or obvious for others. Indeed, in the instant case, being a judicial officer, it was in her best interest that she carries herself in a decorous and dignified manner. If she has deliberately chosen to depart from these high and exacting standards, she is appropriately liable for disciplinary action.

30. We fully agree with the conclusions arrived at by the disciplinary authority. We also find no reason to interfere with the findings arrived at by the High Court giving reason for its decision with which we fully agree and find justification.

31. We, therefore, find no merit in this appeal and the same is dismissed but without any costs.

N.J. Appeal dismissed.

M/S. SARAF TRADING CORPORATION ETC. ETC.
v.
STATE OF KERALA
(Civil Appeal nos. 474-481 of 2011)

JANUARY 13, 2011

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

Central Sales Tax Act, 1956:

s.5(3) – Sale in the course of export – Exemption from sales tax – Exporter of tea – Purchasing tea from tea planters – Claim for exemption – HELD: Though there is no agreement on record to indicate that the purchase was made for the purpose of export, but, there is a clear finding by the assessing authority that the export documents indicated that the entire exports were effected pursuant to prior contract or prior orders of foreign buyers and, therefore, the claim for exemption was genuine – The appellate authority and the Appellate Tribunal having upheld the said finding of fact, it would not be appropriate to reopen the same – Kerala General Sales Tax Act, 1963.

Kerala General Sales Tax Act, 1963:

s.44 – Refund – Exporters of tea – Claim for exemption from sales tax found genuine – Claim for refund – Declined on the ground that refund can only be claimed by the dealer – HELD: All the authorities have clearly recorded a finding that it is only the dealer of the tea on whom the assessment has been made, who can claim refund of excess tax and since the exporter is not the dealer, and the tax collected from him has been remitted by the dealer to the Government, exporter cannot claim the refund – The findings recorded by the authorities below are clearly findings of fact and have also been arrived at on the basis of the mandate of the provisions

of the State Act – Therefore, the decision does not call for any interference – In view of the facts of the case, doctrine of unjust enrichment is not attracted – Central Sales Tax Act, 1956 – Doctrine of unjust enrichment.

The appellant-assessees, engaged in the business of export of tea, purchased tea from the tea planters directly in open auction and thereafter exported the same to foreign countries, and claimed exemption as exporter of the consignments on the ground that the purchase was exempted u/s 5(3) of the Central Sales Tax Act, 1956 (CST Act). The assessing authority, allowed the claim in regard to the exemption. However, the claim for refund was rejected. The appeals filed by the assesses were dismissed by the Deputy Commissioner (Appeals) as also by the Kerala Sales Tax Appellate Tribunal. Their revision petitions were also dismissed by the High Court.

In the instant appeals filed by the assessees, the questions for consideration before the Court were: (i) whether the appellant-assessees would at all be entitled to claim exemption u/s 5(3) of the Central Sales Tax Act, 1956 as, at the time of sale, they could not allegedly show any evidence that it was the penultimate sale and (ii) whether in view of the provisions of s. 44 of the Kerala General Sales Tax Act, 1963, the appellant-assessees would be entitled to refund of the tax, which was paid by them to the seller.

Dismissing the appeals, the Court

HELD:

1.1 In view of sub-s. (3) of s. 5 of the Central Sales Tax Act, 1956, the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export, if such last

sale or purchase took place after, and was for the purpose of complying with, the agreement or order for or in relation to such export. [para 15] [381-C-D]

1.2 It was held by the Constitution Bench of this Court in *Azad Builders'* **case* that if it is clear that the local sale or purchase between the parties is inextricably linked with the export of goods, then only a claim u/s 5(3) for exemption under the Sales Tax Act would be justified. [para 17] [383-F-G]**

State of Karnataka Vs. Azad Coach Builders Pvt. Ltd. & Anr* **2010 (12) SCR 895 = 2010(9) SCALE 364 – followed.

1.3 It is true that in the instant case, there is no agreement available on record to indicate that the purchase was made for the purpose of export. In the absence of the said document, it is not possible to specifically state as to whether it was clear that the sale or purchase between the parties i.e. the dealer and the purchaser was inextricably linked with the export of goods. It is only when a claim is established, the claim u/s 5(3) of the CST Act would be justified. At the time of auction sale when the appellant purchased the tea from the dealer, there is nothing on record to show that a definite stand was taken by the purchaser that the purchase of tea was for the purpose of occasioning an export for which an agreement has been entered into. Since, no such claim was made at that stage, sales tax was realised which was paid to the government by the dealer. However, there is a clear finding recorded by the assessing authority that the export documents were verified by him with the accounts from which it is indicated that the entire exports were effected pursuant to the prior contract or prior orders of the foreign buyers and that the export sales are supported by bills of lading, export invoices and such other valid documents. In the light of the said findings, the assessing authority allowed

the exemption, clearly holding that the claim for exemption was genuine. The next two authorities, namely, the appellate authority and the Tribunal, agree with the said findings and there does not appear to be any serious challenge to the said findings before the said two authorities. The High Court also does not appear to have gone into the said issue at all. In that view of the matter, this Court would not reopen the finding of fact which is recorded by the assessing authority. [para 18-20] [382-H; 383-A-E; 384-A-B]

2.1 So far as the refund is concerned, the assessing authority, the appellate authority as also the Appellate Tribunal have clearly recorded a finding that when a dealer has paid the tax in excess of what is due from him, it has to be refunded to the dealer in as much as the dealer is entitled to receive a refund, if tax is paid in excess of what was due from him. Referring to the provisions of Section 44 of the KGST Act, the Deputy Commissioner (Appeals) i.e. appellate authority, also held that it is the seller (the dealer) on whom the burden lies to prove before the assessing authority that the sale is for fulfilling an agreement or order of the foreign buyer, since s.5(3) means or refers to the foreign buyer and not any agreement with the local party and in the instant case seller was not in a position to discharge his burden and, therefore, he is not entitled for refund. In view of the said position, all the authorities have held that a question of refund of tax would not arise in the case of the appellant, since no tax had been demanded from the appellant for the tea. Considering the facts and circumstances of the case, tax was collected from the appellant at the time of purchase of tea in the occasion sale conducted by the tea planters since tea is a commodity which was liable to tax at the time of first sale in the State. The tax which was collected from the appellant by the dealer has been remitted to the government by the dealer of tea. It further

appears that the appellant claimed for refund of the said amount to be paid to it, despite the fact that it is not a dealer in the eye of law. Section 44 of the KGST Act is very clear and it stipulates that it is only the dealer of tea on whom the assessment has been made and it is only he who can claim for refund of tax and the Court cannot overlook the mandate. In view of the clear and unambiguous position, the appellant cannot claim for refund of tax collected from the seller of tea. When the meaning and the language of a statute is clear and unambiguous, nothing could be added to the language and the words of the statute. [para 19 and 22] [383-F-H; 384-A-F]

Sales Tax Commissioner Vs. Modi Sugar Mills 1961 SCR 189 **=AIR 1961 SC 1047 - relied on.**

2.2. The findings recorded by the authorities below are clearly findings of fact and have also been arrived at on the basis of the mandate of the provisions of the State Act. Therefore, the decision does not call for any interference. [para 26] [385-G-H]

2.3. There is no possibility of taking a proactive stance although it is clear that the State cannot retain the tax which is overpaid, but at the same time such overpaid tax cannot be paid to the assessee/appellants. The principles laid down in the decision in *Mafatlal's case** **would also not be applicable to the facts of the instant case in view of the provisions of s.44 of the KGST Act, which refers to claim for refund and specifically states that such refund could be made only to a dealer and not to any other person claiming for such refund. [para 25, 26] [385-F-H; 386-A]**

Mafatlal Industries Ltd. & Ors. Vs. Union of India & Ors.* **1996 (10) Suppl. SCR 585 = **(1997) 5 SCC 536 – held inapplicable.**

Case Law Reference:

1996 (10) Suppl. SCR 585	**held inapplicable**	**para 11**
2010 (12) SCR 895	**followed**	**para 16**
1961 SCR 189	**relied on**	**para 24**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 474-481 of 2011.

From the Judgment & Order dated 07.08.2007 of the High Court of Kerala at Ernakulam in TRC No. 519, 533, 534, 537 of 2001 & 25, 27, 30, 34 of 2002.

S. Ganesh, C.N. Sree Kumar, Anil D. Nair for the Appellant.

Yasobant Das, R. Sahtish, S. Getha for the Respondent.

The Judgment of the Court was delivered by

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

2. The issue that falls for consideration in the present appeals is whether the appellant/assessee would be entitled for refund of the tax which was paid by him to the seller, in view of the provisions of Section 44 of the Kerala General Sales Tax Act, 1963 (for short "the KGST Act") . One additional issue which was urged at the time of hearing of the appeals and requires consideration by this Court is as to whether the appellant would at all be entitled to claim exemption under Section 5(3) of the Central Sales Tax Act, 1956 (for short "the CST Act"), as at the time of sale, the appellant could not allegedly show any evidence that it was the penultimate sale.

3. The aforesaid two issues have arisen for consideration in the light of the submissions made on the basic facts of these appeals which are hereinafter being set out:-

4. The appellants are exporters of tea. The appellants purchased tea from the tea planters directly in open auction and thereafter exported the same to foreign countries. The appellant being the exporter of the aforesaid consignment claimed for exemption on the ground that purchase was exempted under Section 5(3) of the CST Act. The said claim for exemption was found to be genuine by the Assessing Authority, and was allowed in full. The appellant also made a claim for refund of tax collected from them by the seller at the time of purchase of tea. The said claim was rejected by the Assessing authority and it was held that they cannot claim for refund under Section 44 of the KGST Act since they have not paid the tax to the Department but it was the sellers who have paid the tax and therefore under the provisions of Section 44 of the KGST Act, the refund that could be made is to the dealer only and the assessee being not a dealer no such refund could be made to the appellant/assessee.

5. Being aggrieved by the aforesaid order, the appellant filed an appeal before the Deputy Commissioner (Appeals) who considered the contentions of the appellant and upon going through the records found that there is an observation recorded by the assessing authority that the export sales is pursuant to the prior contract or prior order of the foreign buyers and also that export sales are supported by bill of lading, export invoices etc. The appellate authority also recorded the finding that the claim of exemption under Section 5(3) of the CST Act is envisaged for the penultimate sales or purchase preceding the sale or purchase occasioning the export. However with regard to the refund it was noted that the goods purchased are taxable at the sale point and hence the liability to pay tax is on the part of the seller. Accordingly, it was for the Seller to prove that the sales are effected to an exporter in pursuance of prior contract or prior orders of the foreign buyers.

6. It was held by the Appellate Authority that since, in the present case the aforesaid sellers namely the planters who sold

tea to the appellant and on whom the burden lies to prove before the assessing authority that his sale is for fulfilling an agreement or order of the foreign buyer had not satisfied those conditions and had also not discharged his burden, therefore, there is no question of refund in the present case to the appellant as they are not entitled to any such refund under the provisions of Section 44 of the KGST Act.

7. The appeal was filed therefrom to the Kerala Sales Tax Appellate Tribunal, which after going through the records referred to the provisions of refund as contained in Section 44 of the KGST Act, which reads as follows:-

"44. Refunds:- (1) When an assessing authority finds, at the time of final assessment, that the dealer has paid tax in excess of what is due from him, it shall refund the excess to the dealer.

(2) When the assessing authority receives an order from any appellate or revisional authority to make refund of tax or penalty paid by a dealer it shall effect the refund.

(3) Notwithstanding anything contained in sub-section (1) and (2), the assessing authority shall have power to adjust the amount due to be refunded under sub-section (1) or sub-section (2) towards the recovery of any amount due, on the date of adjustment, from the dealer.

(4) In case refund under sub-section (1) or sub-section (2) or adjustment under sub-section (3) is not made within ninety days of the date of final assessment or, as the case may be, within ninety days of the date of receipt of the order in appeal or revision or the date of expiry of the time for preferring appeal or revision, the dealer shall be entitled to claim interest at the rate of six percent per annum on the

amount due to him from the date of expiry of the said period up to the date of payment or adjustment."

8. After referring to the said provision, it was held by the Tribunal that in case the dealer has paid the tax in excess of what was due from him it could be refunded to the dealer, but here is a case where not the dealer but the appellant had claimed exemption under Section 5(1) read with Section 5 (3) of the CST Act. The assessing authority accepted the claim and allowed exemption. But so far as the question of refund of tax is concerned, the Tribunal held that there is no question of refund of tax in the case of the appellant since no tax had been demanded from the appellant for all the four years and therefore in those circumstances, there could be no question of refund under Section 44 of the KGST Act to the appellant.

9. In the light of the aforesaid findings, the appellate Tribunal dismissed the appeal as against which a Revision Petition was filed by the appellant before the Kerala High Court which was also dismissed under the impugned judgment and order as against which the present appeals were filed. We have heard the learned counsel appearing for the parties who had taken us through all the orders which gave rise to the aforesaid two issues which fall for our consideration in the present appeals.

10. Learned counsel appearing for the appellant submitted before us that appellant has admittedly paid the tax to the dealer at the time of occasion of sale made to it by the dealer namely the tea planters. It was also submitted by him that department has received the aforesaid tax paid in excess by the appellant and that there is a prohibition on the State to retain the excess tax in lieu of the provisions of Article 265 and 286 of the Constitution of India.

11. It was also submitted by him that in addition to the provisions of Section 44 of the KGST Act, a proactive view has

to be taken by this Court in the facts and circumstances of the present case by referring to the decision of this Court in the case of *Mafatlal Industries Ltd. & Ors. Vs. Union of India & Ors.* reported in (1997) 5 SCC 536.

12. The learned counsel appearing for the State, however, not only refuted the aforesaid submissions but also stated that since there is a specific provision in the State Act for giving refund of the excess amount of tax, if any, paid only to the dealer and not to any other person, there cannot be a pro-active consideration in the facts and circumstances of the present case as sought to be submitted by the learned counsel appearing for the appellant. He also submitted that aforesaid reference to the decision of *Mafatlal* (supra) is misplaced. The learned counsel for the State went a step further and submitted that the appellant is not entitled to claim any exemption under Section 5(3) of the CST Act in view of the fact that assessee could not produce any agreement at the time of purchase of the tea in the auction sale indicating that the purchase is made in relation to export.

13. In support of the aforesaid contentions, he referred to provision of Section 5(3) of the CST Act which is extracted hereinbefore:-

Section 5 - When is a sale or purchase of goods said to take place in the course of import or export ;

(1) ***** ****** ******

(2) ****** ****** ******

(3) Notwithstanding anything contained in sub-section (1), the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export, if such last sale or purchase took place after, and was for the purpose of complying with, the agreement or order for or in relation to such export.

14. We have considered the aforesaid submissions of the learned counsel appearing for the parties in the light of the records placed before us. Since, the contentions of the learned counsel appearing for the respondent State are with regard to the fact that the appellant cannot claim exemption in absence of proof of an agreement in support of the claim for exemption under Section 5(3) and the same goes to the very root of the claim made, we deem it proper to take the aforesaid stand at the first stage.

15. Sub-section (3) of Section 5 has already been extracted hereinbefore. According to the said provision, the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export, if such last sale or purchase took place after, and was for the purpose of complying with, the agreement or order for or in relation to such export.

16. In the case of *State of Karnataka Vs. Azad Coach Builders Pvt. Ltd. & Anr.,* reported in 2010(9) SCALE 364, the Constitution Bench of this Court took note of the aforesaid sub-section (3) and after noticing the said provision laid down the principles which emerged therefrom as follows:-

> 23. When we analyze all these decisions in the light of the Statement of Objects and Reasons of the Amending Act 103 of 1976 and on the interpretation placed on Section 5(3) of the CST Act, the following principles emerge:
>
> - To constitute a sale in the course of export there must be an intention on the part of both the buyer and the seller to export;
>
> - There must be obligation to export, and there must be an actual export.
>
> - The obligation may arise by reason of statute, contract between the parties, or from mutual understanding or agreement between them, or even from the nature of the transaction which links the sale to export.
>
> - To occasion export there must exist such a bond between the contract of sale and the actual exportation, that each link is inextricably connected with the one immediately preceding it, without which a transaction sale cannot be called a sale in the course of export of goods out of the territory of India.
>
> 24. The phrase 'sale in the course of export' comprises in itself three essentials: (i) that there must be a sale: (ii) that goods must actually be exported and (iii) that the sale must be a part and parcel of the export. The word 'occasion' is used as a verb and means 'to cause' or 'to be the immediate cause of'. Therefore, the words 'occasioning the export' mean the factors, which were immediate course of export. The words 'to comply with the agreement or order' mean all transactions which are inextricably linked with the agreement or order occasioning that export. The expression 'in relation to' are words of comprehensiveness, which might both have a direct significance as well as an indirect significance, depending on the context in which it is used and they are not words of restrictive content and ought not be so construed.

17. It was held by the Constitution Bench that there has to be an inextricable link between local sales or purchase and if it is clear that the local sales or purchase between the parties is inextricably linked with the export of goods, then only a claim under Section 5(3) for exemption under the Sales Tax Act would be justified. The principle which was laid down in the said decision is required to be applied to the facts of the present case in view of the submissions made by the counsel appearing for the respondent State and refuted by the counsel appearing for the appellant.

18. It is true that in the present case, there is no agreement

available on record to indicate that the aforesaid purchase was made for the purpose of export. In the absence of the said document, it is not possible for us to specifically state as to whether it was clear that the sale or purchase between the parties i.e. the dealer and the purchaser was inextricably linked with the export of goods. It is only when a claim is established, the claim under Section 5(3) of the Central Sales Tax would be justified. At the time of auction sale when the appellant purchased the tea from the dealer, there is nothing on record to show that a definite stand was taken by the purchaser that the aforesaid purchase of tea is for the purpose of occasioning an export for which an agreement has been entered into. Since, no such claim was made at that stage, so therefore sales tax was realised which was paid to the government by the dealer. Despite the said fact, there is a clear finding recorded by the assessing authority himself that the export documents were verified by him with the accounts from which it is indicated that the entire exports were effected pursuant to the prior contract or prior orders of the foreign buyers and that the export sales are supported by bills of lading, export invoices and such other valid documents.

19. In the light of the said findings, the assessing Authority clearly held that the claim for exemption was genuine and the same has to be allowed in full. But so far as refund is concerned, the assessing Authority held that the claim for refund cannot be allowed since the dealer has paid the tax and therefore, refund cannot be granted to the assessee/appellant who is not the dealer. Referring to the provisions of Section 44 of the KGST Act, the Deputy Commissioner (Appeals) i.e. appellate authority also held that it is the seller (the dealer) on whom the burden lies to prove before the assessing authority that the sale is for fulfilling an agreement or order of the foreign buyer, since Section 5(3) means or refers to the foreign buyer and not any agreement with the local party and in the present case seller was not in a position to discharge his burden and therefore, he is not entitled for refund.

20. It is established from the records that after the aforesaid findings of the assessing authority accepting the claim and allowing the exemption, the next two authorities namely the appellate authority and the Tribunal agree with the said findings and that there does not appear to be any serious challenge to the said findings before the said two authorities. The High Court also does not appear to have gone into the said issue at all. In that view of the matter, we would not like to reopen the finding of fact which is recorded by the assessing authority.

21. We now proceed to address the first issue which is in fact the main issue arising for consideration in these appeals i.e. as to whether the appellants are entitled for refund of tax collected from them at the time of purchase of tea in view of the provisions relating to refund as contained in Section 44 of the KGST Act.

22. The Assessing Authority, the Appellate Authority as also the Appellate Tribunal have clearly recorded a finding that when a dealer has paid the tax in excess of what is due from him, it has to be refunded. The said excess tax is only to be refunded to the dealer inasmuch as dealer is entitled to receive a refund, if tax is paid in excess of what was due from him. In view of the said position, all the aforesaid authorities have held that a question of refund of tax would not arise in the case of the appellant, since no tax had been demanded from the appellant for the tea of all the four years.

23. Considering the facts and circumstances of the present case, we find that tax was collected from the appellant at the time of purchase of tea in the occasion sale conducted by the tea planters since tea is a commodity which was liable to tax at the time of first sale in the State. The aforesaid tax which was collected from the appellant by the dealer has been remitted to the government by the dealer of tea.

24. It further appears that the appellant claimed for refund of the said amount to be paid to it, despite the fact that it is not

a dealer in the eye of law. Section 44 of the KGST Act is very clear and it stipulates that it is only the dealer of tea on whom the assessment has been made and it is only he who can claim for refund of tax. In view of the clear and unambiguous position, the appellant cannot claim for refund of tax collected from the seller of tea. It is clearly provided in the principles of Interpretation of Statutes that when the meaning and the language of a statute is clear and unambiguous, nothing could be added to the language and the words of the statute.

This Court in the case of *Sales Tax Commissioner Vs. Modi Sugar Mills* reported in AIR 1961 SC 1047 observed as follows:-

> 10. ....In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions'. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed : it cannot imply anything which is not expressed it cannot import provisions in the statutes so as to supply any assumed deficiency.

25. Therefore, we cannot overlook the mandate of the provisions of the KGST Act which clearly rules that it is only the dealer of tea on whom an assessment has been made, can claim for refund of tax and no one else. There is no possibility of taking a proactive stance although it is clear that the State cannot retain the tax which is overpaid, but at the same time such overpaid tax cannot be paid to the assessee/appellant here.

26. The aforesaid findings which are recorded are clearly findings of fact and have also been arrived at on the basis of the mandate of the provisions of the State Act. Therefore, in our considered opinion, the decision does not call for any interference at our end. The principles laid down in the decision

in *Mafatlal* (supra) would also not be applicable to the facts of the present case in view of the provisions of Section 44 of the KGST Act, which clearly refers to claim for refund. The said principle is not applicable in view of the fact that the statute involved specifically states that such refund could be made only to a dealer and not to any other person claiming for such refund. On the other hand, the decision of *Mafatlal* (supra) was rendered in the context of Section 11B of the Central Excise and Salt Act, 1944 where the expression is "any person". Therefore, ratio of the decision of *Mafatlal* (supra) would not be applicable to the facts in hand.

27. Considering the facts and circumstances of the present case, we find no merit in these appeals which are dismissed but without costs.

R.P. Appeals dismissed.

B.S. KRISHNA MURTHY AND ANR.
v.
B.S. NAGARAJ AND ORS.
(Special Leave Petition (C) No. 2896 of 2010)

JANUARY 14, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Alternative disputes redressal: Mediation – Disputes involving family and business relationships – Resolution of, by mediation – Responsibility of lawyers – Held: It is the responsibility of lawyers to advise their clients to try for mediation for resolving the disputes, especially where relationships like family and business relationships are involved, otherwise the litigation would drag on for years and decades – Lawyers as well as litigants ought to follow Mahatma Gandhi's advice in the matter and try for arbitration/ mediation – This is also the purpose of s.89 – In the instant case, dispute was between the brothers – Matter referred to the Bangalore Mediation Centre – Code of Civil Procedure, 1908 – s.89.

'My Experiments with Truth' by Mahatama Gandhi – referred to.

CIVIL APPELLATE JURISDICTION : SLP (CIVIL) No. 2896 of 2010.

From the Judgment & Order dated 17.09.2009 of the High Court of Karnataka at Bangalore in RFA No. 1387 of 2004.

G.V. Chandrashekar, N.K. Verma (for Anjana Chandrashekhar) for the Petitioners.

P. Vishwanatha Shetty, Vijay Kumar Pardesi, Mahesh Kumar. G.N. Reddy for the Respondents.

The following order of the Court was delivered

ORDER

Heard learned counsel for the appearing parties.

This is a dispute between brothers. In our opinion, an effort should be made to resolve the dispute between the parties by mediation.

In this connection, we would like to quote the following passages from Mahatma, Gandhi's book 'My Experiments with Truth':-

"I saw that the facts of Dada Abdulla's case made it a very strong indeed, and that the law was bound to be on his side. But I also saw that the litigation, if it were persisted in, would ruin the plaintiff and the defendant, who were relatives and both belonged to the same city. No one knew how long the case might go on. Should it be allowed to continue to be fought out in Court, it might go on indefinitely and to no advantage of either party. Both, therefore, desired an immediate termination of the case, if possible.

I approached Tyeb Sheth and requested and advised him to go to arbitration. I recommended him to see his counsel. I suggested to him that if an arbitrator commanding the confidence of both parties could be appointed, the case would be quickly finished. The lawyer' fees were so rapidly mounting up that they were enough to devour all the resources of the clients, big merchants as they were. The case occupied so much of their attention that they had no time left for any other work. In the meantime mutual ill-will was steadily increasing. I became disgusted with the profession. As lawyers the counsel on both sides were bound to rake up points of law in support of their own clients. I also saw for the first time that the winning party never recovers all the costs incurred. Under the Court Fees Regulation there was a fixed scale of costs to be allowed

as between party and party, the actual costs as between attorney and client being very much higher. This was more than I could bear. I felt that my duty was to befriend both parties and bring them together. I strained every nerve to bring about a compromise. At last Tyeb Sheth agreed. An arbitrator was appointed, the case was argued before him, and Dada Abdulla won.

But that did not satisfy me. If my client were to seek immediate execution of the award, it would be impossible for Tyeb Sheth to meet the whole of the awarded amount, and there was an unwritten law among the Porbandar Memons living in South Africa that death should be preferred to bankruptcy. It was impossible for Tyeb Sheth to pay down the whole sum of about 37,000 and costs. He meant to pay not pie less than the amount, and he did not wnat to be declared bankrupt. There was only one way. Dada Abdulla should allow him to pay in moderate installments. he was equal to the occasion, and granted Tyeb Sheth installments spread over a very long period. It was more difficult for me to secure the concession of payment by instalments than to get the parties to agree to arbitration. But both were happy over the result, and both rose in the public estimation. My joy was boundless. I had learnt the practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby-not even money, certainly not my soul."

In our opinion, the lawyers should advise their clients to try for mediation for resolving the disputes, especially, where relationships, like family relationships, business relationships, are involved, otherwise, the litigation drags on for years and dacades aften ruining both the parties.

Hence, the lawyers as well as litigants should follow Mahatma Gandhi's advice in the matter and try for arbitration/ mediation. This is also the purpose of Section 89 of the Code of Civil Procedure.

Let the matter be referred to the Bangalore Mediation Centre. The parties are directed to appear before the Bangalore Mediation Centre on 21.02.2011.

List after receiving report from the Mediation Centre.

D.G. Matter Pending.

R.L. KALATHIA & CO.
v.
STATE OF GUJARAT
(Civil Appeal No. 3245 of 2003)

JANUARY 14, 2011

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

CONTRACT:

Construction contract – Claim for additional work carried out – Refused on the ground that the claim was laid after receiving final payment –Held : If there is accepted claim, the court cannot reject the same merely because the contractor has issued "No Due Certificate" – Principles as regards claims after acceptance of final bill, enumerated – In the instant case, the contractor accepted the amount of the final bill under protest – The contractor had performed additional work and had a genuine claim which was considered in detail and was rightly allowed by trial court – High Court without adverting to factual details erred in reversing the judgment and decree of trial court on the ground of estoppel – Instead of remitting the matter to High Court, claim examined on merits – Judgment of High Court set aside and judgment and decree of trial court restored – Estoppel.

The appellant-contractor, a partnership firm, engaged in the construction business, was awarded a contract by the respondent-State Government for construction of a Dam. During the execution of the said work, the Executive Engineer in-charge of the project, made certain additions, alterations and variations in respect of certain items of work and directed the appellant to carry out the same also. The appellant filed a consolidated statement of claims for the additional/altered works, but in vain. Ultimately, the contractor filed a suit for recovery of a sum

of Rs.3,66,538/- with running interest. The trial court decreed the suit for Rs. 2,27,758/- with proportionate costs and interest at the rate of 6% p.a. from the date of the suit till realization. However, the Division Bench of the High Court allowed the appeal of the employer-State Government and dismissed the suit mainly on the ground that the plaintiff-contractor had accepted the amount as per final bill "under protest" without disclosing any real grievance on merits and it amounted to accepting the final bill without any valid objection and grievance. It further held that the conduct of the contractor in accepting the final bill and thereafter sending statutory notice and filing the suit for recovery of the differential amount was barred by the principle of estoppel. Aggrieved, the plaintiff-contractor filed the appeal.

Allowing the appeal, the Court

HELD: 1.1 From various decisions of this Court, the following principles emerge: (i) Merely because the contractor has issued "No Due Certificate", if there is acceptable claim, the court cannot reject the same on the ground of issuance of "No Due Certificate"; (ii) Inasmuch as it is common that unless a discharge certificate is given in advance by the contractor, payment of bills are generally delayed, therefore, such a clause in the contract would not be an absolute bar to a contractor raising claims which are genuine at a later date even after submission of such "No-claim Certificate".; (iii) even after execution of full and final discharge voucher/receipt by one of the parties, if the said party is able to establish that he is entitled to further amount for which he is having adequate materials, he is not barred from claiming such amount merely because of acceptance of the final bill by mentioning "without prejudice" or by issuing 'No Due Certificate'. [para 9] [402-B-E]

Chairman and MD, NTPC Ltd. vs. Reshmi Constructions, Builders & Contractors, **2004 (1) SCR 62 = (2004) 2 SCC 663;** *Ambica Construction vs. Union of India,* **2006 (9) Suppl. SCR 188 = (2006) 13 SCC 475**; *National Insurance Company Limited vs. Boghara Polyfab Private Ltd.,* **2008 (13) SCR 638 = (2009) 1 SCC 267 – relied on**

1.2 In the instant case, it is true that when the final bill was submitted, the plaintiff had accepted the amount as mentioned in the final bill but "under protest". It is also the specific claim of the plaintiff that on the direction of the Department, it had performed additional work and, therefore, was entitled to additional amount/damages as per the terms of agreement. Merely because the plaintiff had accepted the final bill, it cannot be deprived of its right to claim damages if it had incurred additional amount and able to prove the same by acceptable materials. From the materials on record, it is evident that the appellant/plaintiff had a genuine claim which was considered in great detail by the trial court and supported by oral and documentary evidence. The High Court has not adverted to any of the factual details/claim of the plaintiff except reversing the judgment and decree of the trial court on the principle of estoppel. [paras 5 and 10] [398-G-H; 399-A; 402-E-F]

1.3 Though the matter could be remitted to the High Court for consideration in respect of merits of the claim and the judgment and decree of the trial court, inasmuch as the work had been completed in August, 1973, final bill was raised on 31.03.1974 and additional claim was raised on 16.07.1976, to curtail the period of litigation, it would be appropriate that this Court scrutinizes all the issues framed by the trial court, its discussion and ultimate conclusion based on the pleadings and supported by the materials. Issue No. 15 in the trial court judgment related to estoppel which has been decided in favour of the plaintiff. In respect of other issues relating to execution

of extra work, the trial court based its findings on the materials placed, accepted certain items in toto and rejected certain claims and, ultimately, rightly granted a decree for a sum of Rs. 2,27,758/- with proportionate costs and interest @ 6 per cent per annum from the date of the suit till realization and the plaintiff is entitled to the said amount. The impugned judgment of the High Court is set aside and the judgment and decree of the trial court restored. [paras 10-12] [402-F-H; 403-A-B; 404-F-H; 405-A-B]

Case Law Reference:

2004 (1) SCR 62	**relied on**	**para 6**
2006 (9) Suppl. SCR 188	**relied on**	**para7**
2008 (13) SCR 638	**relied on**	**para 8**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3245 of 2003.

From the Judgment and Order dated 07.10.2002 of the High Court of Gujarat at Ahmedabad in first Appeal No. 2038 of 1983.

Altaf Ahmed, Bhargava V. Desai and Rahul Gupta for the Apellant.

Madhi Divan, Hemantika Wahi and Jesal for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. This appeal is directed against the judgment and final order dated 07.10.2002 passed by the Division Bench of the High Court of Gujarat whereby the High Court set aside the judgment and decree dated 14.12.1982 passed by the Civil Judge, (S.D.), Jamnagar directing the State Government to pay a sum of Rs.2,27,758/- with costs and

interest and dismissed the Civil Suit as well as cross objections filed by the appellant-Firm for recovery of the aggregate amount of Rs. 3,66,538.05 on account of different counts as specified in the claim of the said suit.

2. Brief facts:

a) The appellant-Firm, a partnership firm registered under The Indian Partnership Act, is carrying on the business of construction of roads, buildings, dams etc. mostly in Saurashtra and also in other parts of the State of Gujarat. In response to the invitation of tender by the State Government for construction of Fulzer Dam II in Jamnagar District, the appellant-Firm quoted and offered to construct the same for the quotation, specifications and design of the Dam vide covering letter dated 05.06.1970. In the said letter, the appellant-Firm also offered that they would give rebate of 3/4% provided the final bill be paid within three months from the date of completion of the work. The offer of the appellant being the lowest amongst other parties, it was accepted by the State Government with the clause that the construction work was to be completed within a period of 24 months from the works order dated 07.09.1970 which was subsequently clarified that the period of 24 months was to be commenced from the date of commencement of work i.e., 29.11.1970.

b) During execution of the said work, the Executive Engineer, who was in-charge of the project, made certain additions, alterations and variations in respect of certain items of work and directed the appellant to carry out additional and alteration work as specified in writing from time to time. The final decision as to the alteration in respect of certain items of work and particularly, in respect of the depth of foundation which is known as cut off trenches (COT) took long time with the result that the Firm was required to attend the larger quantity of work and thus entitled for extra payment for the additional work. As per the works contract, the Firm was not paid the running bill within the specified time and, therefore, suffered loss.

c) On 16.07.1976, the Firm lodged a consolidated statement of their claims for the additional or altered works etc. to the Executive Engineer. As there was no response, the Firm served a statutory notice dated 04.01.1977 under Section 80 of the Code of Civil Procedure (hereinafter referred to as 'the Code'). Again, on 24.03.1977, after getting no reply, the Firm filed Civil Suit No. 30 of 1977 on the file of the Civil Judge (S.D.), Jamnagar praying for a decree of the aggregate amount of Rs.3,66,538.05 with running interest at the rate of 9% p.a. from the date of final bill till the date of Suit and at the rate which may be awarded by the Court from the date of Suit till payment. Vide order dated 14.12.1982, the Civil Judge allowed the suit and passed a decree for a sum of Rs.2,27,758/- with proportionate costs together with interest @ 6% p.a. from the date of suit till realization.

d) Being aggrieved by the said judgment and decree, the State Government filed First Appeal No. 2038 of 1983 before the High Court of Gujarat at Ahmedabad. The Division Bench of the High Court, vide its order dated 07.10.2002, allowed the appeal of the State Government and dismissed the suit of the appellant-Firm and also directed that the decretal amount deposited by the State Government and as permitted to be withdrawn by the Firm should be refunded within a period of four months from the date of the judgment. Being aggrieved by the said judgment, the appellant-Firm has filed this appeal by way of special leave petition before this Court.

3. Heard Mr. Altaf Ahmed, learned senior counsel for the appellant and Ms. Madhavi Divan, learned counsel for the respondent-State.

4. Though the trial Court after accepting the claim of the plaintiff granted a decree to the extent of Rs. 2,27,758/- with proportionate costs and interest @ 6 per cent per annum from the date of suit till realization, in the appeal filed by the State after finding that the plaintiff was estopped from claiming damages against the Department as the final bill was accepted,

the High Court allowed the appeal of the State and dismissed the suit of the plaintiff. The High Court non-suited the plaintiff mainly on the ground of Clauses 8 and 10 of the agreement and of the fact that the final bill was accepted by the plaintiff under protest. In view of the same, it is relevant to refer Clauses 8 and 10 of the agreement which are as follows:

> "Clause 8.—No payment shall be made for any work estimated to cost less than Rs 1,000/- till after the whole of the said work shall have been completed and a certificate of completion given. But in the case of work estimated to cost more than Rs 1,000/- the contractor shall, on submitting a monthly bill therefore, be entitled to receive payment proportionate to the part of the work then approved and passed by the engineer in charge whose certificate of such approval and passing of the sum so payable shall be final and conclusive against the contractor. All such intermediate payments, shall be regarded as payments by way of advance against the final payments only and not as payments for work actually done and completed and shall not preclude the engineer in charge from requiring bad, unsound, imperfect or unskillful work to be removed and taken away and reconstructed or re-erected, nor shall any such payment be considered as an admission of the due performance of the contract or any part thereof in any respect of the occurring of any claim nor shall it conclude, determine, or effect any way of the powers of the engineer in charge as to the final settlement and adjustments of the accounts of otherwise, or in any other way vary or affect the contract. The final bills shall be submitted by the contractor within one month of the date fixed for the completion of the work, otherwise the engineer in charge's certificate of the measurement and of the total amount payable for the work shall be final and binding on all parties.
>
> Clause 10. A bill shall be submitted by the contractor each month on or before the date fixed by the engineer in charge for all work executed in the previous months and the engineer in charge shall take or caused to be taken the requisite measurement for the purpose of having the same verified, and the claim, so far as it is admissible, shall be adjusted, if possible within 10 days from the presentation of the bill. If the contractor does not submit the bill within the time fixed as aforesaid, the engineer in charge may depute a subordinate to measure up the said work in the presence of the contractor or his duly authorized agent whose counter signature to the measurement list shall be sufficient warrant, and the engineer in charge may prepare a bill from such list which shall be binding on the contractor in all respects."

It is the stand of the State and accepted by the High Court that the plaintiff-Firm has not fully complied with Clauses 8 and 10 of the agreement. It is also their stand that mere endorsement to the effect that the plaintiff has been accepting the amount as per final bill "under protest" without disclosing real grievance on merits is not sufficient and it amounts to accepting the final bill without any valid objection and grievance on merits by the plaintiff. The High Court has also accepted the claim of the State that by the conduct of the plaintiff in accepting the final bill and the Department has made full payment to the plaintiff, sending statutory notice and filing suit for recovery of the differential amount was barred by the principle of estoppel. On going through the entire materials including the oral and documentary evidence led in by both the parties and the judgment and decree of the trial Judge, we are unable to accept the only reasoning of the High Court in non-suiting the plaintiff.

5. It is true that when the final bill was submitted, the plaintiff had accepted the amount as mentioned in the final bill but "under protest". It is also the specific claim of the plaintiff that on the direction of the Department, it had performed additional work and hence entitled for additional amount/damages as per the

terms of agreement. Merely because the plaintiff had accepted the final bill, it cannot be deprived of its right to claim damages if it had incurred additional amount and able to prove the same by acceptable materials.

6. Before going into the factual matrix on this aspect, it is useful to refer the decisions of this Court relied on by Mr. Altaf Ahmed. In the case of *Chairman and MD, NTPC Ltd.* vs. *Reshmi Constructions, Builders & Contractors,* (2004) 2 SSC 663, which relates to termination of a contract, one of the questions that arose for consideration was "Whether after the contract comes to an end by completion of the contract work and acceptance of the final bill in full and final satisfaction and after issuance a 'No Due Certificate' by the contractor, can any party to the contract raise any dispute for reference to arbitration? While answering the said issue this Court held:-

> "27. Even when rights and obligations of the parties are worked out, the contract does not come to an end inter alia for the purpose of determination of the disputes arising thereunder, and, thus, the arbitration agreement can be invoked. Although it may not be strictly in place but we cannot shut our eyes to the ground reality that in a case where a contractor has made huge investment, he cannot afford not to take from the employer the amount under the bills, for various reasons which may include discharge of his liability towards the banks, financial institutions and other persons. In such a situation, the public sector undertakings would have an upper hand. They would not ordinarily release the money unless a "No-Demand Certificate" is signed. Each case, therefore, is required to be considered on its own facts.
>
> 28. Further, *necessitas non habet legem* is an age-old maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of the other party to the bargain who is in a stronger position."

7. In *Ambica Construction* vs. *Union of India,* (2006) 13 SCC 475 which also deals with issuance of "No-claim Certificate" by the contractor. The following conclusions are relevant which read as under:-

> "**16.** Since we are called upon to consider the efficacy of Clause 43(2) of the General Conditions of Contract with reference to the subject-matter of the present appeals, the same is set out hereinbelow:
>
> > "43. (2) *Signing of 'no-claim' certificate.*—The contractor shall not be entitled to make any claim whatsoever against the Railways under or by virtue of or arising out of this contract, nor shall the Railways entertain or consider any such claim, if made by the contractor, after he shall have signed a 'no-claim' certificate in favour of the Railways, in such form as shall be required by the Railways, after the works are finally measured up. The contractor shall be debarred from disputing the correctness of the items covered by 'no-claim certificate' or demanding a reference to arbitration in respect thereof."
>
> **17.** A glance at the said clause will immediately indicate that a no-claim certificate is required to be submitted by a contractor once the works are finally measured up. In the instant case the work was yet to be completed and there is nothing to indicate that the works, as undertaken by the contractor, had been finally measured and on the basis of the same a no-claim certificate had been issued by the appellant. On the other hand, even the first arbitrator, who had been appointed, had come to a finding that no-claim certificate had been given under coercion and duress. It is the Division Bench of the Calcutta High Court which, for the first time, came to a conclusion that such no-claim certificate had not been submitted under coercion and duress.

18. From the submissions made on behalf of the respective parties and in particular from the submissions made on behalf of the appellant, it is apparent that unless a discharge certificate is given in advance, payment of bills are generally delayed. Although, Clause 43(2) has been included in the General Conditions of Contract, the same is meant to be a safeguard as against frivolous claims after final measurement. Having regard to the decision in *Reshmi Constructions* it can no longer be said that such a clause in the contract would be an absolute bar to a contractor raising claims which are genuine, even after the submission of such no-claim certificate.

19. We are convinced from the materials on record that in the instant case the appellant also has a genuine claim which was considered in great detail by the arbitrator who was none other than the counsel of the respondent Railways."

8. In *National Insurance Company Limited* vs. *Boghara Polyfab Private Ltd.,* (2009) 1 SCC 267, the question involved was whether a dispute raised by an insured, after giving a full and final discharge voucher to the insurer, can be referred to arbitration. The following conclusion in para 26 is relevant:-

"26. When we refer to a discharge of contract by an agreement signed by both the parties or by execution of a full and final discharge voucher/receipt by one of the parties, we refer to an agreement or discharge voucher which is validly and voluntarily executed. If the party which has executed the discharge agreement or discharge voucher, alleges that the execution of such discharge agreement or voucher was on account of fraud/coercion/ undue influence practised by the other party and is able to establish the same, then obviously the discharge of the contract by such agreement/voucher is rendered void and

cannot be acted upon. Consequently, any dispute raised by such party would be arbitrable."

9. From the above conclusions of this Court, the following principles emerge:

(i) Merely because the contractor has issued "No Due Certificate", if there is acceptable claim, the court cannot reject the same on the ground of issuance of "No Due Certificate".

(ii) Inasmuch as it is common that unless a discharge certificate is given in advance by the contractor, payment of bills are generally delayed, hence such a clause in the contract would not be an absolute bar to a contractor raising claims which are genuine at a later date even after submission of such "No-claim Certificate".

(iii) Even after execution of full and final discharge voucher/ receipt by one of the parties, if the said party able to establish that he is entitled to further amount for which he is having adequate materials, is not barred from claiming such amount merely because of acceptance of the final bill by mentioning "without prejudice" or by issuing 'No Due Certificate'.

10. In the light of the above principles, we are convinced from the materials on record that in the instant case, the appellant/plaintiff also had a genuine claim which was considered in great detail by the trial Court and supported by oral and documentary evidence. Though the High Court has not adverted to any of the factual details/claim of the plaintiff except reversing the judgment and decree of the trial Court on the principle of estoppel, we have carefully perused and considered the detailed discussion and ultimate conclusion of the trial Judge. Though we initially intend to remit the matter to the High Court for consideration in respect of merits of the claim and the judgment and decree of the trial Court, inasmuch as the contract was executed on 05.06.1970 and work had been

completed in August, 1973, final bill was raised on 31.03.1974 and additional claim was raised on 16.07.1976, to curtail the period of litigation, we scrutinized all the issues framed by the trial Court, its discussion and ultimate conclusion based on the pleadings and supported by the materials. The trial Court framed the following issues:-

" The following issues were framed at Ex. 16:-

1. Whether Plaintiff proves that he executed extra work of change and entitled to claim Rs. 3,600/-?

2. Whether Plaintiff proves that he did extra work of C.O.T. filing and hence entitled to claim Rs. 1,800/-?

3. Whether Plaintiff is entitled to claim Rs. 15,625/- in connection with excavated stuff?

4. Whether Plaintiff is entitled to claim Rs. 7,585/- for guide bunds?

5. Whether Plaintiff is entitled to claim Rs 5,640/- for pitching work?

6. Whether Petitioner is entitled to claim Rs. 13,244/- for providing sand filter in river.?

7. Whether Plaintiff is entitled to claim Rs. 1,375/- for waster weir back filling?

8. Whether Plaintiff is entitled to claim Rs. 30,600/- for extra item of masonry?

9. Whether Plaintiff is entitled to claim Rs. 14,339.84 for breach of condition and irregular payment?

10. Whether Plaintiff is entitled to claim Rs 12,386.64 ps. for providing heavy gate?

11. Whether Plaintiff is entitled to claim Rs. 1,37,478.17 ps for rising of prices?

12. Whether Plaintiff is entitled to claim Rs. 30,000/- for establishment charges?

13. Whether Plaintiff is entitled to claim Rs. 93,049.76 towards interest?

14. Whether notice under Section 80 of the CPC is defective?

15. Whether Plaintiff is estopped from filing suit in view of fact that he has signed and accepted bills prepared by Defendant?

16. Whether suit is barred by time?

17. Whether Court has jurisdiction to decide the present suit?

18. What order and decree?"

11. We have already considered and answered the issue relating to No. 15 in the earlier paragraphs and held in favour of the plaintiff. In respect of other issues relating to execution of extra work, excavation, construction of guide bunds, pitching work, providing sand filter in river, waste weir back filling, extra masonary, providing heavy gate, additional amount due to raising of prices, additional amount towards establishment charges, interest etc., the trial Court based on the materials placed accepted certain items in toto and rejected certain claims and ultimately granted a decree for a sum of Rs. 2,27,758/- with proportionate costs and interest @ 6 per cent per annum from the date of the suit till realization. On going through the materials placed, relevant issues framed, ultimate discussion and conclusion arrived at by the trial Court, we fully agree with the same and the plaintiff is entitled to the said amount as granted by the trial Court.

12. In the result, the impugned judgment of the High Court in First Appeal No. 2038 of 1983 dated 07.10.2002 is set aside and the judgment and decree of the trial Court in Civil Suit No. 30 of 1977 dated 14.12.1982 is restored. The civil appeal is allowed with no order as to costs.

R.P. Appeal allowed.

STATE OF U.P.
v.
CHHOTEYLAL
(Criminal Appeal No. 769 of 2006)

JANUARY 14 , 2011

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

PENAL CODE, 1860 :

ss. 363, 366, 368 and 376 – Kidnapping, wrongful confinement and rape –Conviction by trial court with 7 years R.I. – Acquittal by High Court –Held : Prosecutrix being less than 18 years of age, was removed from the lawful custody of her brother and was taken to a city by two adult males under threat and kept in a room for many days where one of the accused had forcible sexual intercourse with her – The High Court was not at all justified in taking a different view from the trial court – High Court has dealt with the matter with casual approach and its judgment is not only cryptic and perfunctory but it has also not taken into consideration the crucial evidence on record – Rape is a heinous crime, and once it is established, justice must be done to the victim of crime by awarding suitable punishment to the accused – Judgment of High Court set aside and that of trial court restored – Evidence – Sentence/sentencing

s. 90 and s.375, Clauses 'Firstly' and 'Secondly' – Rape – Expressions 'against her will' and 'without her consent' – Explained – Held: The concept of consent in the context of s. 375 has to be read with s.90.

s.375, Clause 'Sixthly' –Held: Prosecutrix at the relevant time being about 17 ½ years of age, Clause 'Sixthly' would not be applicable.

EVIDENCE:

Age of prosecutrix – Medical evidence and oral testimony – The evidence of prosecutrix and her elder brother stating her age as 13 years at the relevant time –Medical evidence indicating her age as 17 years – Held : The trial court on consideration of evidence on record rightly recorded a categorical finding that the prosecutrix was about 17 ½ years of age at the time of occurrence – It cannot be said that best evidence has been withheld – There is no rule, much less an absolute rule that two years have to be added to the age determined by the doctor – High Court fell in grave error in observing that prosecutrix could be even 19 years of age at the time of occurrence.

Evidence of the victim of rape – Held : A victim of sexual assault is not an accomplice to the crime – Her evidence is similar to that of an injured complainant or witness – The testimony of prosecutrix, if found reliable, by itself may be sufficient to convict the culprit and no corroboration of her evidence is necessary – Court must be sensitive and responsive to the plight of such victim of sexual assault.

F.I.R. – Delay in registration of –A village girl kidnapped from her village and taken to city – FIR registered after 10 days – Held: The brother has given a plausible explanation – The delay in registration of the FIR has been reasonably explained – Delay/Laches.

ADMINISTRATION OF CRIMINAL JUSTICE:

Criminal justice – Criminal cases relating to offences against the State, corruption, dowry death, domestic violence, sexual assault, financial fraud and cyber crimes – Need to be fast tracked – Immediate and urgent steps required to be taken in amending the procedural and other laws – The investigators need to have professional orientation and modern tools – Police reforms as directed in Prakash Singh's case[1] suggested to be carried out.

The respondent (A-1) along with two others (A-2 and A-3) kidnapped the prosecutrix from the fields of her village on 19.9.1989. A-3, the woman accomplice, accompanied them up to the road. Thereafter A-1 and A-2 took the prosecutrix to a city and was kept in a rented room for few days, where she was ravished by A-1. Meanwhile P.W.1, the elder brother of the prosecutrix, made a complaint to the Superintendent of Police on 28.9.1989 that A-1 to A-3 had kidnapped her. The FIR was registered the following day and the prosecutrix was recovered on 13.10.1989. She was medically examined the same day. Her statement u/s 164 Cr. P.C. was recorded by the Magistrate on 17.10.1989. A-1 was charged with for offences punishable u/ss 363, 366, 368 and 376 IPC, A-2 u/ss 363, 366 and 368 IPC and A-2 u/ss 363 and 366 IPC. On the basis of the medical evidence, the trial court recorded the age of the prosecutrix about 17-1/2 years. A-2 died during the trial. The trial court acquitted A-3. A-1 was convicted of the offences charged and was, inter alia, sentenced to 7 years RI u/s 376. However, the High Court having acquitted A-1, the State filed the appeal.

Allowing the appeal, the Court

HELD: 1.1. The expression 'with or without her consent, when she is under sixteen years of age' in s. 375, Clause 'Sixthly' of the Penal Code, 1860 assumes importance where a victim is under sixteen years of age. In the instant case, the prosecutrix had no formal education and, therefore, there is no school certificate available on record. In the FIR, the age of the prosecutrix has been stated to be 13 years. The prosecutrix in her statement u/s 164, Cr.P.C., and her elder brother (PW-1)

1. Prakash Singh & Ors. vs. Union of India & Ors. 2006 (6) Suppl. SCR 473 = 2006 (8) SCC 1.

in his deposition stated her age as 13 years at the relevant time. However, the doctor (PW-5), on the basis of the X-ray as well as physical examination of the prosecutrix, opined that she was 17 years of age. The trial court on consideration of the entire evidence recorded a categorical finding, and rightly, that the prosecutrix was about 17 ½ years of age at the time of occurrence and, therefore, Clause Sixthly of s.375 IPC is not applicable. [para 10] [419-H; 420-A-C]

1.2 The High Court conjectured that the age of the prosecutrix could be even 19 years. This appears to have been done by adding two years to the age opined by PW-5. There is no such rule much less an absolute one that two years have to be added to the age determined by a doctor. In the instant case, the brother of the prosecutrix has been examined as PW-1 and, therefore, it cannot be said that best evidence has been withheld. The High Court fell in grave error in observing that the prosecutrix could be even 19 years of age at the time of alleged occurrence. [paras 11-12] [420-H; 421-A-E]

State of Karnataka v. Bantara Sudhakara @ Sudha & Anr. **2008 (10) SCR 1161 = 2008 (11) SCC 3*;* ** *Mussauddin Ahmed v. State of Assam* **(2009) 14 SCC 541- relied on**

2.1 As regards clause 'Firstly', or clause 'Secondly' of s. 375 IPC, the expressions 'against her will' and 'without her consent' may overlap sometimes but surely the two expressions in clause 'Firstly' and clause 'Secondly' have different connotation and dimension. The expression 'against her will' would ordinarily mean that the intercourse was done by a man with a woman despite her resistance and opposition. On the other hand, the expression 'without her consent' would comprehend an act of reason accompanied by deliberation. [para 13] [421-F-H; 422-A-B]

2.2 The concept of 'consent' in the context of s. 375 IPC has to be read with s. 90 of the IPC. This Court in a long line of cases has given wider meaning to the word 'consent' in the context of sexual offences as explained in various judicial dictionaries. [paras 13-14] [422-A-B; 423-A]

Jowitt's Dictionary of English Law (Second Edition), Volume 1 **(1977) page 422;** *Stroud's Judicial Dictionary (Fourth Edition), Volume 1* **(1971) at page 555*;* In Words and Phrases, Permanent Edition, (Volume 8A) at pages 205-206-referred to**

Holman v. The Queen **([1970] W.A.R. 2) – referred to**

State of H.P. v. Mango Ram **2000 (2) Suppl. SCR 626 = (2000) 7 SCC 224*;* ** *Uday v. State of Karnataka* **2003 (2) SCR 231 = 2003 (4) SCC 46 – relied o*n***

3.1 A woman who is victim of sexual assault is not an accomplice to the crime. Her evidence cannot be tested with suspicion as that of an accomplice. As a matter of fact, the evidence of the prosecutrix is similar to the evidence of an injured complainant or witness. The testimony of prosecutrix, if found to be reliable, by itself, may be sufficient to convict the culprit and no corroboration of her evidence is necessary. In prosecutions of rape, the law does not require corroboration. It is only by way of abundant caution that court may look for some corroboration so as to satisfy its conscience and rule out any false accusations. [para-19] [426-B-D]

State of Maharasthra v. Chandraprakash Kewalchand Jain **1990 (1) SCR 115 = 1990 (1) SCC 550 ;** *State of Punjab v. Gurmit Singh & Ors.* **1996 (1) SCR 532 = 1996 (2) SCC 384*;* ** *Vijay @ Chinee v. State of Madhya Pradesh* **2010 (8) SCR 1150 = 2010 (8) SCC 191 –relied on.**

3.2 In examining the evidence of the prosecutrix the courts must be alive to the conditions prevalent in the Indian society and must not be swayed by beliefs in other countries. The courts must be sensitive and responsive to the plight of the female victim of sexual assault. The stigma that attaches to the victim of rape in Indian society, ordinarily, rules out the leveling of false accusations. The observations made in the case of *Bharwada Bhoginbhai Hirjibhai* must be kept in mind invariably while dealing with a rape case. [para 22] [429-C-G]

Bharwada Bhoginbhai Hirjibhai v. *State of Gujarat* **1983 (3) SCR 280 = 1983 (3) SCC 217 –relied on**

3.3 The contention on behalf of the respondent that no alarm was raised by the prosecutrix at the bus stand or the other places where she was taken and that creates serious doubt about truthfulness of her evidence, overlooks the situation in which the prosecutrix was placed. She had been kidnapped by two adult males, one of them - A-1 - wielded fire-arm and threatened her and she was taken away from her village, and kept in a rented room for many days where A-1 had sexual intercourse with her. Whenever she asked A-1 for return to her village, she was threatened and her mouth was gagged. The absence of alarm by her at the public place cannot lead to an inference that she had willingly accompanied A-1 and A-2. The circumstances made her submissive victim and that does not mean that she was inclined and willing to intercourse with A-1. She had no free act of the mind during her stay with A-1 as she was under constant fear. Although there are certain contradictions and omissions in her testimony, but such omissions and contradictions are minor and on material aspects, her evidence is consistent. The prosecutrix being illiterate and rustic young woman, some contradictions and omissions are

natural as her recollection, observance, memory and narration of chain of events may not be precise. [para 23] [431-G-H; 432-A-E]

3.4 Except the bald statement of A-1 u/s 313 Cr.P.C. that he has been falsely implicated due to enmity, nothing has been brought on record that may probabalise that the prosecutrix had motive to falsely implicate him. The circumstances even do not remotely suggest that the prosecutrix would put her reputation and chastity at stake for the reason stated by A-1 u/s 313 Cr.P.C. that a case was pending between A-1 and one 'SR'. The evidence of the prosecutrix is reliable and has rightly been acted upon by the trial court. [para 24] [432-G-H; 433-A]

4. Although the lady doctor (PW-5) did not find any injury on the external or internal part of body of the prosecutrix and opined that the prosecutrix was habitual to sexual intercourse but, that does not make the testimony of the prosecutrix unreliable. The fact of the matter is that the prosecutrix was recovered almost after three weeks. Obviously the sign of forcible intercourse would not persist for that long period. It is wrong to assume that in all cases of intercourse with the women against will or without consent, there would be some injury on the external or internal part of the victim. The prosecutrix has clearly deposed that she was not in a position to put up any struggle as she was taken away from her village by two adult males. The absence of injuries on the person of the prosecutrix is not sufficient to discredit her evidence; she was a helpless victim. Due to fear she did not and could not inform the neighbours where she was kept. [para 25] [433-B-D]

5. As regards the belated FIR, suffice it to observe that PW-1 He deposed that when he returned to his home in the evening from agricultural field, he was informed

that his sister (prosecutrix) who had gone to ease herself had not returned. He searched for her and he was told by the two villagers that she was seen with the accused. He contacted the relatives of the accused for return of his sister. He did not lodge the report immediately as the honour of the family was involved. It was only after few days that when his sister did not return and there was no help from the relatives of the accused that he made the complaint on 28.9.1989 to the Superintendent of Police, who marked the complaint to the Circle Officer and the FIR was registered on 30.9.1989. The delay in registration of the FIR is, thus, reasonably explained. The High Court was in grave error in concluding that there was no reasonable and plausible explanation for the belated FIR and that it was lodged after consultation and due deliberation and that creates doubt about the case. [para 26] [433-E-H; 434-A]

6. The High Court was not at all justified in taking a different view or conclusion from the trial court. The judgment of the High Court is vitiated by non-consideration of the material evidence and relevant factors eloquently emerging from the prosecution evidence. The High Court in a sketchy manner reversed the judgment of the trial court without discussing the deposition of the witnesses as well as all relevant points which were considered and touched upon by the trial court. The High Court has dealt with the matter with casual approach. The judgment of the High Court is not only cryptic and perfunctory but it has also not taken into consideration the crucial evidence on record. On flimsy grounds, the accused convicted of a serious crime of kidnapping and rape has been acquitted. There is no application of mind to the evidence of the prosecutrix at all. There is no proper consideration of the evidence by the High Court. The judgment of the High Court cannot

be sustained and is set aside, and that of the trial court restored. [paras 27 and 29] [434-C-D; 435-D-E]

7. Rape is a heinous crime and once it is established against a person charged of the offence, justice must be done to the victim of crime by awarding suitable punishment to the crime doer. The facts that the incident is of 1989; the prosecutrix has married after the incident and A-1 has a family of his own and sending A-1 to jail now may disturb his family life, cannot be considered for a soft option. [para 28] [434-E]

8.A strong and efficient criminal justice system is a guarantee to the rule of law and vibrant civil society. Administration of criminal justice system is not working in our country as it should. The police reforms have not taken place despite directions of this Court in the case of *Prakash Singh & Ors. vs. Union of India & Ors.* The investigators need to have professional orientation and modern tools. On many occasions impartial investigation suffers because of political interference. The criminal trials are protracted because of non-appearance of official witnesses on time and the non-availability of the facilities for recording evidence by video conferencing. The public prosecutors have their limitations; the defence lawyers do not make themselves available and the court would be routinely informed about their pre-occupation with other matters; the courts remain over-burdened with the briefs listed on the day and they do not have adequate infrastructure. The adjournments thus become routine; the casualty is justice. It is imperative that the criminal cases relating to offences against the State, corruption, dowry death, domestic violence, sexual assault, financial fraud and cyber crimes are fast tracked and decided in a fixed time frame, preferably, of three years including the appeal provisions. It is high time that immediate and urgent steps are taken in amending the

procedural and other laws to achieve the objectives. [para 28] [434-E-H; 435-A-C]

Prakash Singh & Ors. vs. Union of India & Ors. **2006 (6) Suppl. SCR 473 = 2006 (8) SCC 1 – relied on.**

Case Law Reference::

2008 (10) SCR 1161	**relied on**	**para 11**
(2009) 14 SCC 541	**relied on**	**para 12**
2000 (2) Suppl. SCR 626	**relied on**	**para 17**
2003 (2) SCR 231	**relied on**	**para 18**
1990 (1) SCR 115	**relied on**	**para 19**
1996 (1) SCR 532	**relied on**	**para 20**
2010 (8) SCR 1150	**relied on**	**para 21**
1983 (3) SCR 280	**relied on**	**para 22**
2006 (6) Suppl. SCR 473	**relied on**	**para 28**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 769 of 2006.

From the Judgment & Order dated 11.03.2003 of the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow in Criminal Appeal No. 484 of 1990.

S.K. Dwivedi, AAG, S.N. Pandey, M.K. Dwivedi, Vandana Mishra, Ashutosh Sharma, Aviral Shukla (for Gunnam Venkateswara Rao) for the Appellant.

Vishal Arun (for Abhijit Sengupta) for the Respondent.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. The State of Uttar Pradesh is in appeal, by special leave, because the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow reversed the judgment

of the trial court and acquitted the respondent.

2. The prosecution case in brief is this: On September 19, 1989 the prosecutrix (name withheld by us) had gone to relieve herself in the evening. Ram Kali (A-3) followed her on the way. While she was returning and reached near the plot of one Vijai Bahadur, Chhotey Lal (A-1) and Ramdas (A-2) came from behind; A-1 caught hold of her and when she raised alarm, A-1 showed fire-arm to her and gagged her mouth. A-1 along with A-2 and A-3 brought the prosecutrix upto the road. There, A-3 parted company with A-1 and A-2. A-1 and A-2 then took the prosecutrix to Village Sahora. On the night of September 19, 1989, the prosecutrix was kept in the house of Girish and Saroj Pandit in Village Sahora. On the next day i.e., September 20, 1989, in the wee hours, A-1 and A-2 took the prosecutrix in a bus to Shahajahanpur where she was kept in a rented room for few days. During their stay in Shahajahanpur, A-1 allegedly committed forcible intercourse with the prosecutrix. Whenever prosecutrix asked for return to her house, A-1 would gag her mouth and threaten her. In the meanwhile, Rampal – brother of the prosecutrix – made a complaint to the Superintendent of Police, Hardoi on September 28, 1989 that A-1, A-2 and A-3 have kidnapped her sister (prosecutrix) on September 19, 1989. Based on this complaint, the First Information Report (FIR) was registered on September 30, 1989. The prosecutrix was recovered by the police on October 13, 1989 from Shahabad - Pihani Road near Jalalpur culvert. On that day itself, the prosecutrix was sent for medical examination to the Women Hospital, Hardoi where she was examined by Dr. Shakuntala Reddy. Ram Manohar Misra to whom the investigation of the case was entrusted then took steps for determination of the age of the prosecutrix as advised by the doctor and sent her for X-ray examination.

3. On October 17, 1989, the prosecutrix was produced before the Judicial Magistrate I, Hardoi, where her statement under Section 164 Cr.P.C. was recorded by the Judicial Magistrate.

4. A-1 was arrested on December 2, 1989. On completion of investigation, A-1 was chargesheeted for the offences punishable under Sections 363, 366, 368 and 376 of the Indian Penal Code (IPC); A-2 was chargesheeted under Sections 363, 366 and 368, IPC and A-3 under Sections 363 and 366, IPC.

5. The prosecution in support of its case examined five witnesses, namely, complainant – Rampal (PW-1), prosecutrix (PW-2), Investigating Officer – Ram Manohar Misra (PW-3), Subhash Chandra Misra – Head Constable (PW-4) and Dr. Shakuntala Reddy (PW-5).

6. A-2 had died and the trial abated as against him. The III Additional Sessions Judge, Hardoi vide his judgment dated September 5, 1990 acquitted A-3 as the prosecution was not able to establish any case against her. However, on the basis of the prosecution evidence, the III Additional Sessions Judge held that the prosecutrix was about 17 ½ years of age at the time of occurrence of crime and found A-1 guilty under Sections 363, 366, 368 and 376, IPC and sentenced him to undergo 7 years' rigorous imprisonment under Section 376 IPC and the different sentences for other offences which were ordered to run concurrently.

7. A-1 challenged the judgment passed by the III Additional Sessions Judge, Hardoi before the Allahabad High Court, Lucknow Bench, Lucknow. The High Court vide its judgment dated March 11, 2003 reversed the judgment of the trial court and acquitted A-1. While acquitting A-1, the High Court gave three reasons, namely; (one) kidnapping took place on September 19, 1989 whereas the report of the occurrence was lodged after ten days and there was no reasonable and plausible explanation as to why the report could not be lodged promptly and why it had been delayed for ten days; (two) according to medical evidence, the prosecutrix was found to be 17 years of age and she could be even of 19 years of age

at the time of occurrence and (three) no internal or external injury was found on her body and she was habitual to sexual intercourse. We deem it appropriate to reproduce the entire reasoning of the High Court as it is which reads as follows:

> "It has been submitted by the learned counsel for the appellant that according to the prosecution, alleged kidnapping took place on 19-9-1989 whereas the report of the occurrence was lodged after ten days. There was no reasonable and plausible explanation forthcoming from the side of the prosecution as to why after alleged kidnapping of a minor girl a report could not be lodged promptly and why it has been delayed for ten days. This by itself shows that the report had been lodged after consultation and after due deliberation and the prosecution can be safely looked with doubt. I fully agree with the contention of the learned counsel for the appellant and furthermore, according to medical evidence on record, girl in question was found 17 years of age and she could be even 19 years of age at the time of alleged occurrence. No internal or external injury was found on her body and she was used to sexual intercourse. The charge of rape also stands not proved. The learned court below was thus not justified in believing the prosecution theory and convicting the appellant."

8. We are indeed surprised by the casual approach with which the High Court has dealt with the matter. The judgment of the High Court is not only cryptic and perfunctory but it has also not taken into consideration the crucial evidence on record. On flimsy grounds, the accused convicted of a serious crime of kidnapping and rape has been acquitted. There is no application of mind to the evidence of the prosecutrix at all. Having not been benefited by the proper consideration of the evidence by the High Court, we have looked into the entire evidence on record carefully.

9. Section 375 IPC defines rape as follows :

"S. 375. Rape.—A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions :—

First.— Against her will

Secondly.—Without her consent.

Thirdly.— With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.— With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.— With or without her consent, when she is under sixteen years of age.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.—Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

10. Clause Sixthly—'with or without her consent, when she

is under sixteen years of age' assumes importance where a victim girl is under sixteen years of age. The prosecutrix is an illiterate and rustic young woman. She does not seem to have had formal education and, therefore, there is no school certificate available on record. In the FIR, the age of the prosecutrix has been stated to be 13 years. In her statement recorded under Section 164, Cr.P.C., the prosecutrix stated that her age was 13 years. PW-1, who is elder brother of the prosecutrix, in his deposition also stated that the age of the prosecutrix was 13 years at the relevant time. However, the doctor - PW-5 on the basis of her X-ray as well as physical examination opined that the prosecutrix was 17 years of age. The trial court on consideration of the entire evidence recorded a categorical finding that the prosecutrix was about 17 ½ years of age at the time of occurrence. This is what the trial court said:

> "According to the complainant Rampal, PW-2 was aged 13 years at the time of the occurrence, but during the cross-examination, the complainant has stated in para 7 of her cross examination that he was aged about 24 years and PW-2 was younger to him by 8-9 years. Thus, the age of the prosecutrix, according to the statement of the complainant appearing in para 7 of his cross examination, comes to about 15 or 16 years. PW-2, the prosecutrix, gave her age as 13 years at the time of the occurrence. According to the supplementary report, Ext. Ka. 12 on record, prepared by Lady Dr. Shakuntala Reddy, P.W. 5, PW-2 was aged about 17 years. During the cross-examination, Lady Dr. Shakuntala Reddy, P.W. 5, has stated in para 9 of cross-examination that there could be a difference of 6 months both ways in the age of PW-2. Thus PW-2 can be said to be aged 17 ½ years at the time of the occurrence."

11. We find ourselves in agreement with the view of the trial court regarding the age of the prosecutrix. The High Court conjectured that the age of the prosecutrix could be even 19

years. This appears to have been done by adding two years to the age opined by PW-5. There is no such rule much less an absolute one that two years have to be added to the age determined by a doctor. We are supported by a 3-Judge Bench decision of this Court in *State of Karnataka* v. *Bantara Sudhakara @ Sudha & Anr.*[1] wherein this Court at page 41 of the Report stated as under:

> "Additionally, merely because the doctor's evidence showed that the victims belong to the age group of 14 to 16, to conclude that the two years' age has to be added to the upper age-limit is without any foundation."

12. Learned counsel for the respondent relied upon a decision of this Court in the case of *Mussauddin Ahmed v. State of Assam*[2] in support of his submission that the best evidence concerning the age of prosecutrix having been withheld, the finding of the High Court that the prosecutrix could be 19 years of age cannot be said to erroneous. In the present case, the brother of the prosecutrix has been examined as PW-1 and, therefore, it cannot be said that best evidence has been withheld. The decision of this Court in *Mussauddin Ahmed* 2 has no application at all. In our view, the High Court fell in grave error in observing that the prosecutrix could be even 19 years of age at the time of alleged occurrence.

13. Be that as it may, in our view, clause Sixthly of Section 375 IPC is not attracted since the prosecutrix has been found to be above 16 years (although below 18 years). In the facts of the case what is crucial to be considered is whether clause First or clause Secondly of Section 375 IPC is attracted. The expressions 'against her will' and 'without her consent' may overlap sometimes but surely the two expressions in clause First and clause Secondly have different connotation and dimension. The expression 'against her will' would ordinarily

1. (2008) 11 SCC 38.
2. (2009) 14 SCC 541.

mean that the intercourse was done by a man with a woman despite her resistance and opposition. On the other hand, the expression 'without her consent' would comprehend an act of reason accompanied by deliberation. The concept of ` consent' in the context of Section 375 IPC has come up for consideration before this Court on more than one occasion. Before we deal with some of these decisions, reference to Section 90 of the IPC may be relevant which reads as under :

> "S. 90. Consent known to be given under fear or misconception.—A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or
>
> Consent of insane person.—if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or
>
> Consent of child.—unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age."

14. This Court in a long line of cases has given wider meaning to the word 'consent' in the context of sexual offences as explained in various judicial dictionaries. In Jowitt's Dictionary of English Law (Second Edition), Volume 1 (1977) at page 422 the word 'consent' has been explained as an act of reason accompanied with deliberation, the mind weighing, as in a balance, the good or evil on either side. It is further stated that consent supposes three things—a physical power, a mental power, and a free and serious use of them and if consent be obtained by intimidation, force, meditated imposition, circumvention, surprise, or undue influence, it is to

be treated as a delusion, and not as a deliberate and free act of the mind.

15. Stroud's Judicial Dictionary (Fourth Edition), Volume 1 (1971) at page 555 explains the expression 'consent', inter alia, as under :-

> "Every 'consent' to an act, involves a submission; but it by no means follows that a mere submission involves consent," e.g. the mere submission of a girl to a carnal assault, she being in the power of a strong man, is not consent (per Coleridge J., R.v. Day, 9 C. & P. 724)."

Stroud's Judicial Dictionary also refers to decision in the case of *Holman v. The Queen* ([1970] W.A.R. 2) wherein it was stated: 'But there does not necessarily have to be complete willingness to constitute consent. A woman's consent to intercourse may be hesitant, reluctant or grudging, but if she consciously permits it there is "consent".'

16. In Words and Phrases, Permanent Edition, (Volume 8A) at pages 205-206, few American decisions wherein the word 'consent' has been considered and explained with regard to the law of rape have been referred. These are as follows :

> "In order to constitute "rape", there need not be resistance to the utmost, and a woman who is assaulted need not resist to the point of risking being beaten into insensibility, and, if she resists to the point where further resistance would be useless or until her resistance is overcome by force or violence, submission thereafter is not "consent". *People v. McIlvain* (55 Cal. App. 2d 322)."
>
> . . . .
>
> " "Consent," within Penal Law, § 2010, defining rape, requires exercise of intelligence based on knowledge of its significance and moral quality and there must be a choice between resistance and assent. *People v. Pelvino*, 214 N.Y.S. 577"
>
> . . . .
>
> " "Consenting" as used in the law of rape means consent of the will and submission under the influence of fear or terror cannot amount to real consent. Hallmark v. State, 22 Okl. Cr. 422"
>
> . . . .
>
> "Will is defined as wish, desire, pleasure, inclination, choice, the faculty of conscious, and especially of deliberate, action. It is purely and solely a mental process to be ascertained, in a prosecution for rape, by what the prosecuting witness may have said or done. It being a mental process there is no other manner by which her will can be ascertained, and it must be left to the jury to determine that will by her acts and statements, as disclosed by the evidence. It is but natural, therefore, that in charging the jury upon the subject of rape, or assault with intent to commit rape, the courts should have almost universally, and, in many cases, exclusively, discussed "consent" and resistance. There can be no better evidence of willingness is a condition or state of mind no better evidence of unwillingness than resistance. No lexicographer recognizes "consent" as a synonym of willingness, and it is apparent that they are not synonymous. It is equally apparent, on the other hand, that the true relation between the words is that willingness is a condition or state of mind and "consent" one of the evidences of that condition. Likewise resistance is not a synonym of unwillingness, though it is an evidence thereof. In all cases, therefore, where the prosecuting witness has an intelligent will, the court should charge upon the elements of "consent" and resistance as being proper elements from which the jury may infer either a favourable or an opposing will. It must, however, be recognized in all

cases that the real test is whether the assault was committed against the will of the prosecuting witness. *State* v. *Schwab,* 143 N.E. 29"

17. Broadly, this Court has accepted and followed the judgments referred to in the above judicial dictionaries as regards the meaning of the word 'consent' as occurring in Section 375 IPC. It is not necessary to refer to all the decisions and the reference to two decisions of this Court shall suffice. In *State of H.P.* v. *Mango Ram*[3] , a 3-Judge Bench of this Court while dealing with the aspect of 'consent' for the purposes of Section 375 IPC held at page 230 of the Report as under:

> "Submission of the body under the fear of terror cannot be construed as a consented sexual act. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances."

18. In the case of *Uday* v. *State of Karnataka*[4], this Court put a word of caution that there is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. The Court at page 57 of the Report stated :

> "…….In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may

3. (2000) 7 SCC 324.

4. (2003) 4 SCC 46.

> have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact.. . . . ..".

19. In the backdrop of the above legal position, with which we are in respectful agreement, the evidence of the prosecutrix needs to be analysed and examined carefully. But, before we do that, we state, as has been repeatedly stated by this Court, that a woman who is victim of sexual assault is not an accomplice to the crime. Her evidence cannot be tested with suspicion as that of an accomplice. As a matter of fact, the evidence of the prosecutrix is similar to the evidence of an injured complainant or witness. The testimony of prosecutrix, if found to be reliable, by itself, may be sufficient to convict the culprit and no corroboration of her evidence is necessary. In prosecutions of rape, the law does not require corroboration. The evidence of the prosecutrix may sustain a conviction. It is only by way of abundant caution that court may look for some corroboration so as to satisfy its conscience and rule out any false accusations. In *State of Maharasthra* v. *Chandraprakash Kewalchand Jain*[5], this Court at page 559 of the Report said:

> "A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can

5. (1990) 1 SCC 550.

act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."

20. In *State of Punjab* v. *Gurmit Singh & Ors.*[6], this Court made the following weighty observations at pages 394-396 and page 403:

"The court overlooked the situation in which a poor helpless minor girl had found herself in the company of three desperate young men who were threatening her and preventing her from raising any alarm. Again, if the investigating officer did not conduct the investigation properly or was negligent in not being able to trace out the driver or the car, how can that become a ground to discredit the testimony of the prosecutrix? The prosecutrix had no control over the investigating agency and the negligence of an investigating officer could not affect the credibility of the statement of the prosecutrix.... The courts must, while evaluating evidence remain alive to the fact that in a case of rape, no self- respecting woman would come

6. (1996) 2 SCC 384.

forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case.... Seeking corroboration of her statement before replying upon the same as a rule, in such cases, amounts to adding insult to injury.... Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances.

The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."

21. In *Vijay @ Chinee* v. *State of Madhya Pradesh*[7], decided recently, this Court referred to the above two decisions of this Court in *Chandraprakash Kewalchand Jain5* and *Gurmit Singh*[6] and also few other decisions and observed as follows :

7. (2010) 8 SCC 191.

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

22. The important thing that the court has to bear in mind is that what is lost by a rape victim is face. The victim loses value as a person. Ours is a conservative society and, therefore, a woman and more so a young unmarried woman will not put her reputation in peril by alleging falsely about forcible sexual assault. In examining the evidence of the prosecutrix the courts must be alive to the conditions prevalent in the Indian society and must not be swayed by beliefs in other countries. The courts must be sensitive and responsive to the plight of the female victim of sexual assault. Society's belief and value systems need to be kept uppermost in mind as rape is the worst form of woman's oppression. A forcible sexual assault brings in humiliation, feeling of disgust, tremendous embarrassment, sense of shame, trauma and lifelong emotional scar to a victim and it is, therefore, most unlikely of a woman, and more so by a young woman, roping in somebody falsely in the crime of rape. The stigma that attaches to the victim of rape in Indian society ordinarily rules out the leveling of false accusations. An Indian woman traditionally will not concoct an untruthful story and bring charges of rape for the purpose of blackmail, hatred, spite or revenge. This Court has repeatedly laid down the guidelines as to how the evidence of the prosecutrix in the crime of rape should be evaluated by the court. The observations made in the case of *Bharwada Bhoginbhai Hirjibhai* v. *State of Gujarat*[8] deserve special mention as, in our view, these must be kept in mind invariably while dealing with a rape case. This Court observed as follows :

"9**.** In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration

8. (1983) 3 SCC 217.

as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the western world which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society, and its profile. The identities of the two worlds are different. The solution of problems cannot therefore be identical………"

This Court went on to observe at page 225:

"………Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because (*1*) A girl or a woman in the tradition-bound non-permissive society

of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (*2*) She would be conscious of the danger of being ostracized by the society or being looked down by the society including by her own family members, relatives, friends, and neighbours. (*3*) She would have to brave the whole world. (*4*) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (*5*) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (*6*) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (*7*) The fear of being taunted by others will always haunt her. (*8*) She would feel extremely embarassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition-bound society where by and large sex is taboo. (*9*) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (*10*) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (*11*) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (*12*) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross-examination by counsel for the culprit, and the risk of being disbelieved, acts as a deterrent."

23. We shall now examine the evidence of the prosecutrix. The prosecutrix at the relevant time was less than 18 years of age. She was removed from the lawful custody of her brother in the evening on September 19, 1989. She was taken to a different village by two adult males under threat and kept in a rented room for many days where A-1 had forcible sexual intercourse with her. Whenever she asked A-1 for return to her village, she was threatened and her mouth was gagged. Although we find that there are certain contradictions and omissions in her testimony, but such omissions and contradictions are minor and on material aspects, her evidence is consistent. The prosecutrix being illiterate and rustic young woman, some contradictions and omissions are natural as her recollection, observance, memory and narration of chain of events may not be precise. Learned counsel for the respondent submitted that no alarm was raised by the prosecutrix at the bus stand or the other places where she was taken and that creates serious doubt about truthfulness of her evidence. This argument of the learned counsel overlooks the situation in which the prosecutrix was placed. She had been kidnapped by two adult males, one of them – A-1 – wielded fire-arm and threatened her and she was taken away from her village. In the circumstances, it made sensible decision not to raise alarm. Any alarm at unknown place might have endangered her life. The absence of alarm by her at the public place cannot lead to an inference that she had willingly accompanied A-1 and A-2. The circumstances made her submissive victim and that does not mean that she was inclined and willing to intercourse with A-1. She had no free act of the mind during her stay with A-1 as she was under constant fear.

24. We have also examined the evidence of prosecutrix, her brother and the statement of A-1 under Section 313 Cr.P.C. to satisfy ourselves whether there was likelihood of false implication or motive for false accusations. Except the bald statement of A-1 under Section 313 Cr.P.C. that he has been falsely implicated due to enmity, nothing has been brought on record that may probabalise that the prosecutrix had motive to falsely implicate him. The circumstances even do not remotely suggest that the prosecutrix would put her reputation and chastity at stake for the reason stated by A-1 in the statement under Section 313 Cr.P.C. that a case was pending between

A-1 and one Sheo Ratan. In our view, the evidence of the prosecutrix is reliable and has rightly been acted upon by the trial court.

25. Although the lady doctor - PW-5 did not find any injury on the external or internal part of body of the prosecutrix and opined that the prosecutrix was habitual to sexual intercourse, we are afraid that does not make the testimony of the prosecutrix unreliable. The fact of the matter is that the prosecutrix was recovered almost after three weeks. Obviously the sign of forcible intercourse would not persist for that long period. It is wrong to assume that in all cases of intercourse with the women against will or without consent, there would be some injury on the external or internal part of the victim. The prosecutrix has clearly deposed that she was not in a position to put up any struggle as she was taken away from her village by two adult males. The absence of injuries on the person of the prosecutrix is not sufficient to discredit her evidence; she was a helpless victim. She did not and could not inform the neighbours where she was kept due to fear.

26. As regards the belated FIR, suffice it to observe that PW-1 (brother of the prosecutrix) has given plausible explanation. PW-1 deposed that when he returned to his home in the evening from agricultural field, he was informed that her sister (prosecutrix) who had gone to ease herself had not returned. He searched his sister and he was told by the two villagers that her sister was seen with the accused. He contacted the relatives of the accused for return of his sister. He did not lodge the report immediately as the honour of the family was involved. It was only after few days that when his sister did not return and there was no help from the relatives of the accused that he made the complaint on September 28, 1989 to the Superintendent of Police, Hardoi who marked the complaint to the Circle Officer and the FIR was registered on September 30, 1989. The delay in registration of the FIR is, thus, reasonably explained. The High Court was in grave error

in concluding that there was no reasonable and plausible explanation for the belated FIR and that it was lodged after consultation and due deliberation and that creates doubt about the case. Unfortunately, the High Court did not advert to the evidence of PW-1 and the reasoning of the trial court in this regard.

27. The High Court was not at all justified in taking a different view or conclusion from the trial court. The judgment of the High Court is vitiated by non-consideration of the material evidence and relevant factors eloquently emerging from the prosecution evidence. The High Court in a sketchy manner reversed the judgment of the trial court without discussing the deposition of the witnesses as well as all relevant points which were considered and touched upon by the trial court. We are satisfied that the judgment of the High Court cannot be sustained and has to be set aside.

28. We are not oblivious of the fact that the incident is of 1989; the prosecutrix has married after the incident and A-1 has a family of his own and sending A-1 to jail now may disturb his family life. But none of these factors individually or collectively persuades us for a soft option. Rape is a heinous crime and once it is established against a person charged of the offence, justice must be done to the victim of crime by awarding suitable punishment to the crime doer. We are constrained to observe that criminal justice system is not working in our country as it should. The police reforms have not taken place despite directions of this Court in the case of *Prakash Singh & Ors. vs. Union of India & Ors.*[9]. We do not intend to say anything more in this regard since matter is being dealt with separately by a 3-Judge Bench. The investigators hardly have professional orientation; they do not have modern tools. On many occasions impartial investigation suffers because of political interference. The criminal trials are protracted because of non-appearance of official witnesses on time and the non-availability of the

9. (2006) 8 SCC 1.

facilities for recording evidence by video conferencing. The public prosecutors have their limitations; the defence lawyers do not make themselves available and the court would be routinely informed about their pre-occupation with other matters; the courts remain over-burdened with the briefs listed on the day and they do not have adequate infrastructure. The adjournments thus become routine; the casualty is justice. It is imperative that the criminal cases relating to offences against the State, corruption, dowry death, domestic violence, sexual assault, financial fraud and cyber crimes are fast tracked and decided in a fixed time frame, preferably, of three years including the appeal provisions. It is high time that immediate and urgent steps are taken in amending the procedural and other laws to achieve the above objectives. We must remember that a strong and efficient criminal justice system is a guarantee to the rule of law and vibrant civil society.

29. The appeal is, accordingly, allowed and the judgment of acquittal passed by the High Court of Judicature at Allahabad, Lucknow Bench, in Criminal Appeal No. 484 of 1990 is set aside. The judgment passed by the III Additional Sessions Judge, Hardoi is restored. The respondent shall now surrender within two months from today to serve out the remaining sentence as awarded by the trial court.

R.P. Appeal allowed.

TGN KUMAR

v.

STATE OF KERALA AND ORS.

(Criminal Appeal No. 1854 of 2008)

JANUARY 14, 2011

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

CODE OF CRIMINAL PROCEDURE, 1973:

Sections 205, 313, 482 and 483 r/w Article 227 of the Constitution – Powers of High Court – Complaint for offence punishable u/s 138 of NI Act – Petition u/s 482 by accused before High Court praying for dispensing with personal presence before Magistrate – General directions by High Court to all criminal courts as regards cases involving offences technical in nature and not involving moral turpitude, to invoke the discretion u/s 205 CrPC and a further direction that only a summons shall be issued at the first instance – HELD: The satisfaction whether or not an accused deserves to be exempted from personal attendance has to be of the Magistrate and none else and this discretion cannot be circumscribed by any general directions – Similarly, the direction to accept and consider written statement of the accused is not in accord with the language of s.313 CrPC nor with the dictum laid down by Supreme Court – Inherent powers of High Court u/s 482 and power of superintendence under Article 227 of the Constitution have to be exercised sparingly and only in appropriate cases – In the instant case, High Court exceeded its jurisdiction u/s 482 CrPC and/or Article 227 of the Constitution in laying down the general directions which are inconsistent with the clear language of ss. 205 and 313 CrPC – Impugned order containing general directions set aside – Constitution of India, 1950 – Article 227 – Judicial propriety – Administration of Criminal Justice.

JUDICIAL PROPRIETY:

High court issuing general directions as regards dispensing with personal presence of accused u/s 205 and to accept written statement of the accused u/s 313 CrPC – Held: In light of guidelines laid down by Supreme Court, further directions on same issue laid down by High Court are uncalled for – Code of Criminal Procedure, 1973 – ss. 205, 313 and 482 – Constitution of India, 1950 – Article 227.

The appellant filed a complaint u/s 138 of the Negotiable Instruments Act, 1881 (N.I. Act). The accused, on being summoned by the Magistrate, filed a petition before the High Court u/s 482 CrPC, *inter alia,* praying for dispensing with her personal appearance before the Magistrate. The Single Judge of the High Court, while allowing the petition and permitting the accused to appear before the trial court through her counsel, issued general directions to all the criminal courts as regards holding of trials, particularly, in cases involving offences u/s 138 of the N.I. Act as also in all other cases involving offences technical in nature and not involving moral turpitude.

The appeal filed by the complainant was listed before a Division Bench of the Supreme Court which felt the necessity of referring the matter to a larger Bench and, thus, the appeal was referred to the three-Judge Bench to consider the question: whether the High Court in exercise of its jurisdiction u/ss 482 and 483 of the Code of Criminal Procedure, 1973 and/or under Article 227 of the Constitution of India could issue guidelines directing all courts taking cognizance of offences u/s 138 of the N I Act, *inter alia*, to invoke the discretion u/s 205 of the Code and only with a further direction that summons u/s 205 shall be issued at the first instance.

Answering the question in negative and allowing the appeal, the Court

HELD:

1.1 Section 205 of the Code of Criminal Procedure, 1973 confers a discretion on the court to exempt an accused from personal appearance till such time his appearance is considered by the court to be not necessary during the trial. It is manifest from a plain reading of the provision that while considering an application u/s 205 of the Code, the Magistrate has to bear in mind the nature of the case as also the conduct of the person summoned. He shall examine whether any useful purpose would be served by requiring the personal attendance of the accused or whether the progress of the trial is likely to be hampered on account of his absence. Therefore, the satisfaction whether or not an accused deserves to be exempted from personal attendance has to be of the Magistrate, who is the master of the court in so far as the progress of the trial is concerned and none else. [paras 6 and 7] [446-C-H; 447-A]

S.V. Muzumdar & Ors. Vs. Gujarat State Fertilizer Co. Ltd. & Anr. **2005 (3) SCR 857 = (2005) 4 SCC 173- relied on.**

1.2 The guidelines, laid down by this Court in *Bhaskar Industries Ltd., are concurred with and while re-affirming the same, this Court would add that the order of the Magistrate should be such which does not result in unnecessary harassment to the accused and at the same time does not cause any prejudice to the complainant. The Court must ensure that the exemption from personal appearance granted to an accused is not abused to delay the trial. In view of the legal principles enunciated by this Court, the impugned order is clearly erroneous in as much as the discretion of the Magistrate**

u/s 205 of the Code cannot be circumscribed by laying down any general directions in that behalf. [paras 8 and 9]. [447-F-H; 448-A]

Bhaskar Industries Ltd. Vs. Bhiwani Denim & Apparels Ltd. & Ors.* **2001 (2) Suppl. SCR 219 = (2001) 7 SCC 401-reaffirmed.

Manoj Narain Agrawal Vs. Shashi Agrawal & Ors. **2009 (5) SCR 976 = (2009) 6 SCC 385-relied on.**

Saseendran Nair Vs. General Manager **1996 (2) KLT 482,** *K.S.R.T.C. Vs. Abdul Latheef Kerala* **2005 (3) KLT 955;** *Raman Nair Vs. State of Kerala* **1999 (3) KLT 714;** *Noorjahan Vs. Moideen* **2000 (2) KLT 756; and** *Helen Rubber Industries & Ors. Vs. State of Kerala & Ors.* **1972 K.L.T. 794 - cited**

1.3 It is equally trite that the inherent powers of the High Court u/s 482 of the Code have to be exercised sparingly with circumspection, and in rare cases to correct patent illegalities or to prevent miscarriage of justice. [para 10] [448-D]

Madhu Limaye Vs. The State of Maharashtra **1978 (1) SCR 749 = (1977) 4 SCC 551-relied on.**

1.4. Similarly, while it is true that the power of superintendence conferred on the High Court under Article 227 of the Constitution of India is both administrative and judicial, but such power is to be exercised sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority. In any event, the power of superintendence cannot be exercised to influence the subordinate judiciary to pass any order or judgment in a particular manner. [para 11] [448-G-H; 449-A-B]

Jasbir Singh Vs. State of Punjab **2006 (7) Suppl. SCR 174 = (2006) 8 SCC 294-relied on.**

1.5 As regards direction (iv) in the order of the Single Judge of the High Court to accept and consider the written statement made by the accused, it is again not in accord with the language of s. 313 of the Code nor with the dictum laid down by this Court in *Basavaraj R. Patil's case. On the plain language of s. 313, it is evident that in a summons case, when the personal appearance of the accused has been dispensed with u/s 205 of the Code, a discretion is vested in the Magistrate to dispense with the rigour of personal examination of the accused u/s 313 of the Code as well. It is manifest from the judgment in *Basavraj R. Patil's case* that dispensation with the personal examination of an accused in terms of the provision of s. 313(1)(h) is within the trial court's discretion, to be exercised keeping in view certain parameters, enumerated therein and not as a matter of course. [paras 12, 13 and 15] [449-G; 450-F; 451-G]**

Basavaraj R. Patil's case & Ors. Vs. State of Karnataka & Ors.* **2000 (3) Suppl. SCR 658 = (2000) 8 SCC 740-relied on.

1.6 It is true that in direction (vii) in the impugned judgment, the Single Judge has clarified that the stipulations in the preceding paragraphs are not intended to fetter the discretion of the court to follow any different procedure, if there be compelling need but the requirement of recording 'specific reasons' by the Magistrate for deviating from the directions given in the order, as stipulated in the same paragraph is by itself tantamount to putting fetters on the jurisdiction of the Magistrate. This is not warranted in law. [para 16] [451-H; 452-A-B]

1.7 Thus, in the instant case, the High Court exceeded its jurisdiction u/s 482 of the Code and/or Article 227 of the Constitution by laying down the general directions, which are inconsistent with the clear language

of ss. 205 and 313 of the Code. In light of the guidelines laid down by this Court, further directions on the same issue by the High Court were wholly uncalled for. The impugned order containing general directions to the lower courts is set aside. However, if the accused moves the trial court with an application u/s 205 of the Code for exemption from personal attendance within the time stated, the exemption granted to her by the High Court shall continue to be in force till her application is disposed of by the trial court. [paras 17 and 18] [452-C-D; F-G]

S. Palani Velayutham & Ors. Vs. District Collector, Tirunelveli, Tamil Nadu & Ors. **2009 (12) SCR 1215 = (2009) 10 SCC 664-referred to.**

Case Law Reference:

1996 (2) KLT 482	**cited**	**para 2**
2005 (3) KLT 955	**cited**	**para 2**
1999 (3) KLT 714	**cited**	**para 2**
2000 (2) KLT 756	**cited**	**para 2**
1972 K.L.T. 794	**cited**	**para 2**
2005 (3) SCR 857	**relied on**	**para 7**
2001 (2) Suppl. SCR 219	**reaffirmed**	**para 2**
2009 (5) SCR 976	**relied on**	**para 9**
1978 (1) SCR 749	**relied on**	**para 10**
2006 (7) Suppl. SCR 174	**relied on**	**para 11**
2000 (3) Suppl. SCR 658	**relied on**	**para 12**
2009 (12) SCR 1215	**referred to**	**para 17**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1854 of 2008.

From the Judgment & Order dated 04.09.2008 of the High Court of Kerala at Ernakulam in Criminal Misc. Case No. 1977 of 2007.

Sumita Hazarika, Z.K. Jami, Tapesh Kumar Singh, Gopal Jha, Ashutosh, G. Prakash, Beena Prakash, V. Senthil, Sibo Sankar Mishra for the appearing parties.

The Judgment of the Court was delivered by

D.K. JAIN, J.: 1. Challenge in this appeal, by special leave, is to the order dated 4th September, 2008 passed by a learned Single Judge of the High Court of Kerala in Crl. M.C. No.1977 of 2007 whereby a number of general directions have been issued to all the criminal courts, which are called upon to hold trials, particularly in cases involving an offence under Section 138 of the Negotiable Instruments Act, 1881 (for short "the N.I. Act"), as also in all other cases involving offences which are technical in nature and do not involve any moral turpitude.

2. In view of the controversy at hand, it is unnecessary to state the facts giving rise to this appeal in detail, except to note that the present case arises out of a complaint filed under Section 138 of the N.I. Act. On being summoned by the Magistrate, the accused preferred a petition before the High Court under Section 482 of the Criminal Procedure Code, 1973 (for short "the Code"), *inter alia,* praying for dispensing with her personal appearance before the Magistrate. As afore-stated, the High Court, while allowing the said application, and permitting the accused to appear before the Trial Court through her counsel, felt that there was great need for rationalising, humanising and simplifying the procedure in criminal courts with particular emphasis on the attitude to the "criminal with no moral turpitude" or the criminal allegedly guilty of only a technical offence, including an offence under Section 138 of the

N.I. Act. Relying on the decision of this Court in *Bhaskar Industries Ltd. Vs. Bhiwani Denim & Apparels Ltd. & Ors.*[1] and of the Kerala High Court in *Saseendran Nair Vs. General Manager*[2]; *K.S.R.T.C. Vs. Abdul Latheef*[3]; *Raman Nair Vs. State of Kerala*[4]; *Noorjahan Vs. Moideen*[5] and *Helen Rubber Industries & Ors. Vs. State of Kerala & Ors.*[6], the learned Judge has issued the following 'rules of guidance', with a direction that these can and must certainly be followed by the court below in the instant case as also by all criminal courts which are called upon to deal with trials under Section 138 of the N.I. Act:-

> "i) Hereafter in all 138 prosecutions, the very fact that the prosecution is one under Section 138 of the Negotiable Instruments Act shall be reckoned as sufficient reason by all criminal courts to invoke the discretion under Section 205 Cr.P.C and only a summons under Section 205 Cr.P.C shall be issued by the criminal courts at the first instance. In all pending 138 cases also applications under Section 205 Cr.P.C shall be allowed and the accused shall be permitted to appear through their counsel.
>
> ii) The plea whether of guilty or of innocence can be recorded through counsel duly appointed and for that purpose personal presence of the accused shall not be insisted.
>
> iii) Evidence can be recorded in a trial under Section 138 of the Negotiable Instruments Act in the presence of the counsel as enabled by Section 273 Cr.P.C when the accused is exempted from personal appearance and for that purpose, the personal presence of the accused shall not be insisted.
>
> iv) Examination under Section 313(b) Cr.P.C can be dispensed with under the proviso to Section 313(1) and if the accused files a statement explaining his stand, the same can be received by the court notwithstanding the absence of a provision similar to Section 233 and 243 Cr.P.C in the procedure for trial in a summons case. The power and the obligation to question the accused to enable him to explain the circumstances appearing in evidence against him must oblige the court in such situation to accept and consider the written statement made by the accused.
>
> v) To receive the judgment also, it is not necessary or essential to insist on the personal presence of the accused if the sentence is one of fine or the judgment is one of acquittal. After the pronouncement of judgment, the case can be posted to a specific date with directions to the accused to appear in person to undergo the sentence. By that date, it shall, of course, be open to the accused to get the order of suspension of the superior court produced before court.
>
> vi) Where warrants are to be issued in a 138 prosecution, ordinarily a bailable warrant under Section 88 Cr.P.C must be issued at the first instance before a non-bailable warrant without any stipulations under Section 87 Cr.P.C is issued.
>
> vii) The above stipulations can only be reckoned as applicable in the ordinary circumstances and are not intended to fetter the discretions of the court to follow any different procedure if there be compelling need. In such event, the orders/directions of the Magistrate shall clearly show the specific reasons as to why deviations are resorted to.

1. (2001) 7 SCC 401.
2. 1996 (2) KLT 482.
3. 2005 (3) KLT 955.
4. 1999 (3) KLT 714.
5. 2000 (2) KLT 756.
6. 1972 K.L.T, 794.

viii) Needless to say, any person having a grievance that the above procedure has not been followed unjustifiably shall always have the option of approaching this Court for directions under Section 482 Cr.P.C. The Sessions Judges and the Chief Judicial Magistrates must also ensure that these directions are followed in letter and spirit by the subordinate courts. Commitment to human rights and the yearning to ensure that courts are user friendly are assets to a modern judicial personality and assessment of judicial performance by the superiors must make note of such commitments of a judicial officer.

ix) Even though the above directions are issued with specific reference to prosecutions under Section 138 of the Negotiable Instruments Act, they must be followed in all other cases also where the offence alleged is technical and involves no moral turpitude."

3. Being aggrieved with the order granting a general exemption to the accused from personal appearance before the Trial Court, the complainant has filed this appeal.

4. On 17th November, 2008, while granting leave in this matter, a bench of two learned judges referred the instant case to a larger Bench, posing the following question for determination:

"One of the questions which arises for consideration in this special leave petition is as to whether the High court in exercise of its jurisdiction under Sections 482 and 483 of the Code of the Criminal Procedure and/or under Article 227 of the Constitution of India could issue guidelines directing all courts taking cognizance of offences under section 138 of the Negotiable Instruments Act *inter alia* to invoke the discretion under Section 205 of the Code of Criminal Procedure and only with a further direction that summons under Section 205 shall be issued at the first instance. Keeping in view importance of the question involved as also the various decisions of this Court upon

which the learned Judge of the High Court has placed reliance, in our opinion, we think that this is a matter which should be heard by a larger Bench. It is directed accordingly."

This is how the present appeal has been placed before this Bench.

5. Having heard learned counsel for the parties, we are convinced that the impugned order is unsustainable.

6. Section 205 of the Code, which clothes the Magistrate with the discretion to dispense with the personal appearance of the accused, reads as follows:

"**205. Magistrate may dispense with personal attendance of accused.**—(1) Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of' the accused and permit him to appear by his pleader.

(2) But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of' the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in the manner hereinbefore provided."

7. The Section confers a discretion on the court to exempt an accused from personal appearance till such time his appearance is considered by the court to be not necessary during the trial. It is manifest from a plain reading of the provision that while considering an application under Section 205 of the Code, the Magistrate has to bear in mind the nature of the case as also the conduct of the person summoned. He shall examine whether any useful purpose would be served by requiring the personal attendance of the accused or whether the progress of the trial is likely to be hampered on account of his absence. (See: *S.V. Muzumdar & Ors. Vs. Gujarat State*

7. (2005) 4 SCC 173.

Fertilizer Co. Ltd. & Anr.[7]) . Therefore, the satisfaction whether or not an accused deserves to be exempted from personal attendance has to be of the Magistrate, who is the master of the court in so far as the progress of the trial is concerned and none else.

8. In *Bhaskar Industries Ltd.* (supra), this Court had laid down the following guidelines, which are to be borne in mind while dealing with an application seeking dispensation with the personal appearance of an accused in a case under Section 138 of the N.I. Act:

> "19. …it is within the powers of a Magistrate and in his judicial discretion to dispense with the personal appearance of an accused either throughout or at any particular stage of such proceedings in a summons case, if the Magistrate finds that insistence of his personal presence would itself inflict enormous suffering or tribulations on him, and the comparative advantage would be less. Such discretion need be exercised only in rare instances where due to the far distance at which the accused resides or carries on business or on account of any physical or other good reasons the Magistrate feels that dispensing with the personal attendance of the accused would only be in the interests of justice. However, the Magistrate who grants such benefit to the accused must take the precautions enumerated above, as a matter of course."

We respectfully concur with the above guidelines and while re-affirming the same, we would add that the order of the Magistrate should be such which does not result in unnecessary harassment to the accused and at the same time does not cause any prejudice to the complainant. The Court must ensure that the exemption from personal appearance granted to an accused is not abused to delay the trial.

9. In light of the afore-extracted legal principles, the impugned order is clearly erroneous in as much as the

discretion of the Magistrate under Section 205 of the Code cannot be circumscribed by laying down any general directions in that behalf. In *Manoj Narain Agrawal Vs. Shashi Agrawal & Ors.*[8], this Court, while observing that the High Court cannot lay down directions for the exercise of discretion by the Magistrate under Section 205 of the Code, had echoed the following views:

> "Similarly, the High Court should not have, for all intent and purport, issued the direction for grant of exemption from personal appearance. Such a matter undoubtedly shall be left for the consideration before the learned Magistrate. We are sure that the Magistrate would exercise his jurisdiction in a fair and judicious manner."

10. It is equally trite that the inherent powers of the High Court under Section 482 of the Code have to be exercised sparingly with circumspection, and in rare cases to correct patent illegalities or to prevent miscarriage of justice. In *Madhu Limaye Vs. The State of Maharashtra*,[9] a Bench of three learned Judges of this Court had observed that:

> "…the following principles may be noticed in relation to the exercise of the inherent power of the High Court….: -
>
> (1) That the power is not to be resorted to if there is a specific provision in the Code for the redress of the grievance of the aggrieved party;
>
> (2) That it should be exercised very sparingly to prevent abuse of process of any Court or otherwise to secure the ends of justice;
>
> (3) That it should not be exercised as against the express bar of law engrafted in any other provision of the Code."

11. Similarly, while it is true that the power of superintendence conferred on the High Court under Article 227 of the Constitution of India is both administrative and judicial,

8. (2009) 6 SCC 385.

9. (1977) 4 scc 551.

but such power is to be exercised sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority. In any event, the power of superintendence cannot be exercised to influence the subordinate judiciary to pass any order or judgment in a particular manner. In *Jasbir Singh Vs. State of Punjab*[10], this Court observed that:

> "So, even while invoking the provisions of Article 227 of the Constitution, it is provided that the High Court would exercise such powers most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority. The power of superintendence exercised over the subordinate courts and tribunals does not imply that the High Court can intervene in the judicial functions of the lower judiciary. The independence of the subordinate courts in the discharge of their judicial functions is of paramount importance, just as the independence of the superior courts in the discharge of their judicial functions. It is the members of the subordinate judiciary who directly interact with the parties in the course of proceedings of the case and therefore, it is no less important that their independence should be protected effectively to the satisfaction of the litigants." (See also: *Trimbak Gangadhar Telang & Anr. Vs. Ramchandra Ganesh Bhide & Ors.*[11]; *Mohd. Yunus Vs. Mohd. Mustaqim & Ors.*[12] and *State, New Delhi Vs. Navjot Sandhu & Ors.*[13].)

12. As regards direction (iv) supra to accept and consider the written statement made by the accused, in our opinion, it is again not in accord with the language of Section 313 of the Code as also the dictum laid down by this Court in *Basavaraj*

10. (2006) 8 SCC 294.

11. (1977) 2 SCC 437.

12. (1983) 4 SCC 566.

13. (2003) 6 SCC 641.

R. Patil & Ors. Vs. State of Karnataka & Ors.[14]. Section 313 of the Code deals with the personal examination of the accused, and provides that:

> "**313. Power to examine the accused.**—(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court—
>
> (*a*) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;
>
> (*b*) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:
>
> *Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).*
>
> ………………………………………………………………….."

(emphasis supplied by us)

13. On the plain language of Section 313, it is evident that in a summons case, when the personal appearance of the accused has been dispensed with under Section 205 of the Code, a discretion is vested in the Magistrate to dispense with the rigour of personal examination of the accused under Section 313 of the Code as well.

14. In *Basavaraj R. Patil & Ors.* (supra) while advocating a pragmatic and humanistic approach in less serious offences, Thomas, J. speaking for the majority in a Bench of three learned Judges, explained the scope of clause (b) to Section 313(1) of the Code as follows :

14. (2000) 8 SCC 740.

"The word "shall" in clause (*b*) to Section 313(1) of the Code is to be interpreted as obligatory on the court and it should be complied with when it is for the benefit of the accused. But if it works to his great prejudice and disadvantage the court should, in appropriate cases, e.g., if the accused satisfies the court that he is unable to reach the venue of the court, except by bearing huge expenditure or that he is unable to travel the long journey due to physical incapacity or some such other hardship, relieve him of such hardship and at the same time adopt a measure to comply with the requirements in Section 313 of the Code in a substantial manner. How could this be achieved?

If the accused (who is already exempted from personally appearing in the court) makes an application to the court praying that he may be allowed to answer the questions without making his physical presence in court on account of justifying exigency the court can pass appropriate orders thereon, provided such application is accompanied by an affidavit sworn to by the accused himself containing the following matters:

(*a*) A narration of facts to satisfy the court of his real difficulties to be physically present in court for giving such answers.

(*b*) An assurance that no prejudice would be caused to him, in any manner, by dispensing with his personal presence during such questioning.

(*c*) An undertaking that he would not raise any grievance on that score at any stage of the case."

15. It is manifest from the afore-extracted passage that dispensation with the personal examination of an accused in terms of the said provision is within the trial court's discretion, to be exercised keeping in view certain parameters, enumerated therein and not as a matter of course.

16. It is true that in direction (vii) supra, the learned Judge

has clarified that the stipulations in the preceding paragraphs are not intended to fetter the discretion of the court to follow any different procedure, if there be compelling need but the requirement of recording 'specific reasons' by the Magistrate for deviating from the directions given in the order, as stipulated in the same paragraph, in our view, is by itself tantamount to putting fetters on the jurisdiction of the Magistrate. This is not warranted in law.

17. Thus, in the instant case, we have no hesitation in holding that the High Court exceeded its jurisdiction under Section 482 of the Code and/or Article 227 of the Constitution by laying down the afore-extracted general directions, which are inconsistent with the clear language of Sections 205 and 313 of the Code, as noted above. We feel that in light of the afore-noted guidelines laid down by this Court, further directions on the same issue by the High Court were wholly uncalled for. In this regard, the following observations in *S. Palani Velayutham & Ors. Vs. District Collector, Tirunelveli, Tamil Nadu & Ors.*[15], are quite apt:

"The courts should avoid the temptation to become authoritarian. We have been coming across several instances, where in their anxiety to do justice, the courts have gone overboard, which results in injustice, rather than justice. It is said that all power is trust and with greater power comes greater responsibility."

18. In light of the foregoing discussion, the appeal is allowed, and the impugned order containing general directions to the lower courts is set aside. However, we direct that if the accused moves the trial court with an application under Section 205 of the Code for exemption from personal attendance within four weeks of the receipt of a copy of this judgment, the exemption granted to her by the High Court shall continue to be in force till her application is disposed of by the trial court.

R.P. Appeal allowed.

18. (2009) 10 SCC 664.

OFFSHORE HOLDINGS PVT. LTD.
v.
BANGALORE DEVELOPMENT AUTHORITY & ORS.
(Civil Appeal No. 711 of 2011)

JANUARY 18, 2011

[S.H. KAPADIA, CJI, DR. MUKUNDAKAM SHARMA, K.S. PANICKER RADHAKRISHNAN, SWATANTER KUMAR AND ANIL R. DAVE, JJ.]

Bangalore Development Authority Act, 1976:

ss. 19(1), 27 and 36 – Applicability of provisions of s.11-A of Land Acquisition Act, to BDA Act – HELD: Object of the BDA Act being planned development, acquisition is merely incidental – Acquisition stands on a completely distinct footing from the scheme formulated which is subject matter of execution under provision of BDA Act – A conjoint reading of ss. 27 and 36 of BDA Act makes it clear that where a scheme lapses, the acquisition may not – Where upon completion of acquisition proceedings, the land has vested in the State Government in terms of s.16 of the L.A. Act, the acquisition would not lapse as a result of lapsing of the scheme u/s 27 of BDA Act – Neither of the Acts contain any provision in terms of which property vested in the State can be reverted to the owner – This being the scheme of the acquisition within the framework of the BDA Act, r/w relevant provisions of LA Act, it will not be permissible to bring the concept of 'lapsing of acquisition' as stated in provisions of s.11-A of L.A. Act into Chapter IV of BDA Act – Language of s.36 of BDA Act clearly mandates legislation by incorporation and as per the scheme of the two Acts effective and complete implementation of State law without any conflict is possible – The provisions of ss. 6 and 11-A of L.A. Act which provide for time frame for compliance and consequences of default thereof are not applicable to BDA Act – BDA Act is a self-

contained code – Interpretation of Statutes – Legislation by incorporation – Constitution of India, 1950 – Article 246 and 254 – Seventh Schedule – List II – Entries 5 and 8 – List III – Entry 42.

Constitution of India, 1950:

Article 246, Seventh Schedule, List III, Entry 42, List II, Entries 5 and 8 – Acquisition of land under Bangalore Development Authority Act, 1976 – HELD: BDA Act provides for formulation and implementation of schemes relating to development – Acquisition of land is neither its purpose nor its subject, but is merely an incidental consequence of principal purpose of development of land – The State Legislature is competent to enact such a law and it is referable to power and field contained in Article 246(2) r/w Entries 5 and 18 of List II of Seventh Schedule – Entry 42 of List III relates to 'acquisition and requisitioning of property' – Development is not a subject that finds a place either in the Concurrent List or in the Union List – It cannot be said that Entry 42 of List III denudes the State Legislature of the power to the extent that in an enactment within its legislative competence, it cannot incidentally refer/enact in regard to the subject matter falling in Concurrent List.

Article 246, Seventh Schedule, Lists I,II and III – Legislative power of the Centre and the States – HELD: It is the essence of a Federal Constitution that there should be distribution of legislative powers between the Centre and the Provinces – Entries in the legislative Lists are not the source of power for the legislative constituents, but they merely demarcate the fields of legislation – The power to legislate flows, amongst others, from Article 246 – Land Acquisition Act relates to Entry 42 of List III while BDA Act is relatable to Entries 5 and 18 of List II – Doctrine of separation of powers.

Article 254 – Rule of repugnancy – HELD: Repugnancy would arise only when the provisions of Provincial law and

those of Central legislation both are in respect of the matter enumerated in concurrent list, and they are repugnant to each other – To examine the repugnancy the doctrine of pith and substance is to be applied – Doctrine of pith and substance, overlapping and incidental encroachments, are in fact species of the same law – Repugnancy would arise in the cases where both the pieces of legislation deal with the same matter but not where they deal with separate and distinct matters, though of a cognate and allied character – To the doctrine of occupied field resulting in repugnancy, the principle of incidental encroachment would be an exception – On due application of the principle, BDA Act is actually referable to Entry 5, List II of the Seventh Schedule – Even if s.36 of BDA Act is said to be traceable to Entry 42 of List III, in that event this reference would have to be suppressed to give weightage to provisions aimed at development referable to Entries 5 and 18 of List II – Doctrine of pith and substance, overlapping, and incidental encroachment, doctrine of ancillariness, Concept of fragmentation (disintegration), doctrine of severability – Discussed – Interpretation of Constitution – Legislative entries – Interpretation of Statutes - Precedent.

The Bangalore Development Authority, on 3.1.1977, issued a preliminary notification in terms of the Bangalore Development Authority Act, 1976 (BDA Act) for acquisition of certain lands of which the land in question (2 acres and 34 guntas located in Survey No. I 9/20) was a part. The final notification was issued on 2.8.1978. However, non-finalisation of the acquisition proceedings led to filing of a writ petition before the High Court. The Authority by Resolution No. 1084 dated 28.6.1988 de-notified 1 acre and 2 guntas of the land in question. The writ petition was withdrawn. The appellant purchased the said land. Subsequently, by a letter dated 30.8.2001, the appellant was informed that the de-notification Resolution No. 1084 had been withdrawn by Resolution No. 325/97 dated 31.12.1997. The appellant filed a writ

petition before the High Court seeking to quash the preliminary and the final notifications dated 3.1.1977 and 2.8.1978, respectively. It was contended that the provisions of s. 11-A of the Land Acquisition Act, 1894 were applicable to the BDA Act and the award having been made after a period of more than two years from the date of declaration u/s 6 of the 1894 Act, the acquisition proceedings had lapsed. The writ petition and the writ appeals of the purchaser-appellant having been dismissed by the Single Judge and the Division Bench of the High Court respectively, it filed the instant appeal.

A two Judge Bench of the Supreme Court in *Girnar Traders'* **case[1] considered the question of reading the provisions of the Land Acquisition Act, 1894, as amended by Central Act of 1984, into the provisions under Chapter VII of the Maharashtra Regional and Town Planning Act, 1966 for acquisition of land thereunder and feeling difficulty to agree with the observations made in *Sant Joginder Singh's*[2] case, referred the matter to a larger Bench. When the case came up before a three Judge Bench, even it was of the opinion (*Girnar Traders II*)[3] that the question of reading the provisions of s. 11-A of the 1894 Act into the provisions of the MRTP Act required consideration by a larger Bench and, as such, the matters were referred to the Constitution Bench. A number of other matters including the instant appeal were tagged with the case of *Girnar Traders(II),* which was decided by the Constitution Bench on January 11, 2011 [*Girnar Traders(III)*][4].**

Answering the reference, the Court

1. Girnar Traders v. State of Maharashtra 2004 (5) Suppl. SCR 490.
2. State of Maharashtra v. Sant Joginder Singh 1995 (2) SCR 242.
3. Girnar Traders v. State of Maharashtra 2007 (9) SCR 383.
4. Girnar Traders v. State of Maharashtra 2011 (3) SCC 1.

HELD:

1. Though the object of the Bangalore Development Authority Act, 1976 (BDA) Act may be pari materia to the Maharashtra Regional and Town Planning Act, 1966 (MRTP Act), there are certain stark distinctions between some of the provisions of the respective Acts, particularly, where they relate to functions and powers of the Authority in preparation of plans as well as with respect to acquisition of the land. The instant appeal relates to the BDA Act. [para 10] [489-E-F]

2.1 The respondent-Bangalore Development Authority (the Authority) came to be constituted in terms of s.3 of the BDA Act. The object of the Authority has been spelt out in s. 14 of the BDA Act which states that the Authority, *inter alia,* shall promote and secure the development of the Bangalore Metropolitan Area and for that purpose, the Authority shall have the power to acquire, hold, manage and dispose of moveable and immoveable property, whether within or outside the area under its jurisdiction, to carry out building, engineering and other operations and generally to do all things necessary or expedient for the purpose of such development and for purposes incidental thereto. Thus, the primary object of the BDA Act was to provide for establishment of the development authority, for development of the city of Bangalore and areas adjacent thereto and for the matters connected therewith; and other matters are incidental thereto. The acquisition of immoveable property is, therefore, for the said purpose alone. The development scheme has to provide for every detail in relation to development of the area under the scheme as well as acquisition of land, if any, required. Upon sanction of the scheme, the Government shall publish, in the Official Gazette, a declaration stating the fact of such sanction and that the land proposed to be acquired by the Authority for the purposes of the scheme is required for a public purpose. [para 11 and 13] [487-B-E; 486-B-C; 487-F-H; 489-C-D]

2.2 A very important aspect which, unlike the MRTP Act, is specified in the BDA Act is that once the land is acquired and it vests in the State Government in terms of s.16 of the Land Acquisition Act, then the Government upon (a) payment of the cost of acquisition and (b) the Authority agreeing to pay any further cost, which may be incurred on account of acquisition, shall transfer the land to the Authority whereupon, it shall vest in the Authority. The Government is further vested with the power to transfer the land to the Authority belonging to it or to the Corporation as per s. 37 of the BDA Act. [para 16] [492-B-D]

2.3 The provisions of s. 27 of the BDA Act mandate the Authority to execute the scheme, substantially, within five years from the date of publication of the declaration under sub-s. (1) of s. 19. If the Authority fails to do so, then the scheme shall lapse and provisions of s. 36 of the BDA Act will become inoperative. The provisions of s.27 have a direct nexus with the provisions of s.36, which provide that the provisions of the Land Acquisition Act, so far as they are applicable to the State Act, shall govern the cases of acquisition otherwise than by agreement. Acquisition stands on a completely distinct footing from the scheme formulated which is the subject matter of execution under the provisions of the BDA Act. [para 18] [494-E-H]

2.4 On a conjunct reading of the provisions of ss. 27 and 36 of the State Act, it is clear that where a scheme lapses, the acquisition may not. This, of course, will depend upon the facts and circumstances of a given case. Where, upon completion of the acquisition proceedings, the land has vested in the State

Government in terms of s. 16 of the Land Acquisition Act, the acquisition would not lapse or terminate as a result of lapsing of the scheme u/s 27 of the BDA Act. On vesting, the land stands transferred and vested in the State/Authority free from all encumbrances and such status of the property is incapable of being altered by fiction of law either by the State Act or by the Central Act. Both these Acts do not contain any provision in terms of which property, once and absolutely, vested in the State can be reverted to the owner on any condition. There is no reversal of the title and possession of the State. However, this may not be true in cases where acquisition proceedings are still pending and land has not been vested in the Government in terms of s.16 of the Land Acquisition Act. [para 18] [494-H; 495-A-D]

2.5 What is meant by the language of s.27 of the BDA Act, i.e. "provisions of s. 36 shall become inoperative", is that if the acquisition proceedings are pending and where the scheme has lapsed, further proceedings in terms of s.36(3) of the BDA Act, i.e. with reference to proceedings under the Land Acquisition Act shall become inoperative. Once the land which, upon its acquisition, has vested in the State and thereafter vested in the Authority in terms of s. 36(3); such vesting is incapable of being disturbed except in the case where the Government issues a notification for re-vesting the land in itself, or a Corporation, or a local Authority in cases where the land is not required by the Authority under the provisions of s.37(3) of the BDA Act. This being the scheme of the acquisition within the framework of the State Act, read with the relevant provisions of the Central Act, it will not be permissible to bring the concept of `lapsing of acquisition' as stated in the provisions of s. 11A of the Land Acquisition Act into Chapter IV of the BDA Act. [para 18] [496-D-G]

2.6 Under the scheme of the BDA Act, there are two situations, amongst others, where the rights of a common person are affected - one relates to levy of betterment tax u/s 20 and property tax u/s 28B of the BDA Act while the other relates to considering the representation made upon drawing up of a notification in terms of s.17(1) of the said Act in regard to acquisition of building or land and the recovery of betterment tax. For determination of the rights and claims in this regard, a complete adjudicatory mechanism has been provided under the State Act itself[ss.18(1), 21, 28-B]. There is a provision of appeal [s.62A]. Further, the Government and the Authority are vested with revisional powers [s.63]. All these provisions show that the BDA Act has provided for a complete adjudicatory process for determination of rights and claims. Only in regard to the matters which are not specifically dealt with in the BDA Act, reference to Land Acquisition Act, in terms of s.36, has been made, for example acquisition of land and payment of compensation. This also is a pointer to the BDA Act being a self-contained Act. [para 19] [495-H; 496-A-G]

2.7 The provisions of the Land Acquisition Act, which provide for timeframe for compliance and the consequences of default thereof, are not applicable to acquisition under the BDA Act. They are ss. 6 and 11A of the Land Acquisition Act. As per s. 11A, if the award is not made within a period of two years from the date of declaration u/s 6, the acquisition proceedings will lapse. Similarly, where declaration u/s 6 of this Act is not issued within three years from the date of publication of notification u/s 4 of the Land Acquisition [such notification being issued after the commencement of the Land Acquistion (Amendment and Validation) Ordinance, 1967 but before the commencement of Central Act 68 of 1984] or within one year where s. 4 notification was published subsequent to the passing of Central Act 68

of 1984, no such declaration u/s 6 of the Land Acquisition Act can be issued. [para 17] [492-G-H; 493-A-B]

Bondu Ramaswamy v. Bangalore Development Authority **2010 (6) SCR 29 = (2010) 7 SCC 129 – relied on**

2.8 One of the apparent and unavoidable consequences of reading the provisions of s.11A of the Central Act into the State Act would be that it is bound to adversely affect the 'development scheme' under the State Act and may even frustrate the same. It is a self-defeating argument that the Government can always issue fresh declaration and the acquisition in all cases should lapse in terms of s.11A of the Central Act. The argument also does not stand when tested on the touchstone of the principles, 'test of unworkability', 'test of intention' and 'test of frustration of the object of the principal legislation'. As per the scheme of the two Acts, the conclusion has to be that they can be construed and applied harmoniously to achieve the object of the State Act and it is not the requirement of the same that provisions of s.11A of the Central Act should be read into the State Act. The obvious animus, is that the provisions providing time-frames, defaults and consequences thereof, which are likely to have adverse effect on the development schemes, were intended to be excluded. [para 20-22] [496-G-H; 497-A-B; F-H; 498-A-B]

Girnar Traders v. State of Maharashtra, **2011 (3) SCC 1 - relied on**

Land Acquisition Officer, City Improvement Trust Board v. *H. Narayanaiah* **1977 (1) SCR 178 = (1976) 4 SCC 9 – referred to.**

2.9 Thus, it will be clear that the provisions relating to acquisition like passing of an award, payment of compensation and the legal remedies available under the

Central Act would have to be applied to the acquisitions under the State Act but the bar contained in ss. 6 and 11A of the Central Act cannot be made an integral part of the State Act as the State Act itself has provided specific time-frames under its various provisions as well as consequences of default thereto. The scheme, thus, does not admit such incorporation. [para 24] [499-B-C]

Bondu Ramaswamy v. Bangalore Development Authority **2010 (6) SCR 29 = (2010) 7 SCC 129;** *Munithimmaiah* v. *State of Karnataka* **2002 (2) SCR 825 = (2002) 4 SCC 326 and** *K.K. Poonacha* v. *State of Karnataka* **2010 (10) SCR 1022 = (2010) 9 SCC 671– relied on**

2.10 The BDA Act has already been held to be a valid law by this Court not repugnant to the Land Acquisition Act as they operate in their respective fields without any conflict. For the reasons stated in different decision as well as the detailed reasons given in the case of *Girnar Traders III*, which reasoning would form part of this judgment, it is concluded that the BDA Act is a self-contained code. The language of s. 36 of the BDA Act clearly mandates legislation by incorporation and as per the scheme of the two Acts, effective and complete implementation of the State law without any conflict is possible. The object of the State law being planned development, acquisition is merely incidental thereto and, therefore, such an approach does not offend any of the known principles of statutory interpretation. [para 29] [504-F-H; 505-A-B]

3.1 The Land Acquisition Act certainly relates to Entry 42 of List III while the BDA Act is undoubtedly relatable to Entries 5 and 18 of List II of Schedule VII to the Constitution of India. [para 39] [508-F]

3.2 The Entries in the legislative Lists are not the source of powers for the legislative constituents but they

merely demarcate the fields of legislation. These Entries are to be construed liberally and widely so as to attain the purpose for which they have been enacted. Narrow interpretation of the Entries is likely to defeat their object as it is not always possible to write these Entries with such precision that they cover all possible topics and without any overlapping.The power to legislate flows, amongst others, from Article 246 of the Constitution. Article 246(2), being the source of power incorporates the *non-obstante* clause, 'notwithstanding anything contained in Clause (3), Parliament and, subject to clause (1), the legislature of any State' have power to make laws with respect to any of the matters enumerated in List III. Article 246 clearly demarcates the fields of legislative power of the two legislative constituents. [para 40 and 44] [508-G-H; 509-A; 511-G-H; 512-A-B]

Union of India v. *Harbhajan Singh Dhillon* **1972 (2) SCR 33 = (1971) 2 SCC 779;** *Ujagar Prints v. Union of India*, **1988 (3) Suppl. SCR 770 = (1989) 3 SCC 488;** *Jijubhai Nanabhai Kachar v. State of Gujarat*, **1994 (1) Suppl. SCR 807 = (1995) Suppl. 1 SCC 596;** *Hoechst Pharmaceuticals Ltd. v. State of Bihar*, **1983 (3) SCR 130 = (1983) 4 SCC 45– relied on**

3.3 It is the essence of a Federal Constitution that there should be a distribution of legislative powers between the Centre and the Provinces. Wherever legislative powers are so distributed, situation may arise where two legislative fields might apparently overlap, it is then the duty of the Courts, however, difficult it may be, to ascertain to what degree and to what extent, the Authority to deal with the matters falling within these classes of subjects exist in each legislature and to define, in the particular case before them, the limits of respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a

result, the two provisions must be read together, and the language of one interpreted, and, where necessary modified by that of the other. [para 45] [512-E-H]

A.S. Krishna v. Madras State, **1957 SCR 399 =AIR 1957 SC 297 and** *Federation of Hotels and Restaurants* v. *Union of India*, **1989 (2) SCR 918 = (1989) 3 SCC 634 – relied on**

3.4 Article 246 of the Constitution of India provides the subject matters on which laws can be enacted by Parliament or by the State legislatures, as the case may be. In terms of Article 246(1) of the Constitution, Parliament has the exclusive power to make laws with respect to any of the matters enumerated in List I of Schedule VII, referred to as 'Union List'. Article 246(2) empowers Parliament and the State legislature, subject to Article 246(1), to make laws on any of the matters enumerated in List III of Schedule VII, termed as 'Concurrent List'. Subject to clauses (1) and (2) of Article 246, the State has exclusive powers to make laws for such State, or any part thereof, with respect to any of the matters enumerated in List II of Schedule VII, termed as State List under Article 246(3). Article 246(4) gives power to Parliament to make laws with respect to any matter for any part of the territory of India not included in a 'State' and notwithstanding that such matter is a matter enumerated in the State List. [para 37] [507-C-F]

3.5 Entry 42 of List III of Schedule VII relates to 'acquisition and requisitioning of property'. This Entry, read with Article 246 of the Constitution, empowers the Parliament as well as the State legislatures to enact laws in that field. Development of land is not a subject that finds place either in the Concurrent List or in the Union List for that matter. [para 38] [507-G]

3.6 BDA Act is an Act which provides for formulation and implementation of schemes relating to development

of the Bangalore City. Acquisition of land is neither its purpose nor its object, but is merely an incidental consequence of principal purpose of development of land. Planned development under the scheme is a very wide concept and the Authorities concerned are accordingly vested with amplified functions and powers. It has a self-contained scheme with a larger public purpose. The State legislature is competent to enact such a law and it is referable to power and field contained in Article 246(2) of the Constitution read with Entries 5 and 18 of List II of Schedule VII. Such legislation may incidentally refer to Land Acquisition Act for attaining its own object. Thus, only those provisions of the Land Acquisition Act which relate to the acquisition, and have not been enacted under the State law, have to be read into the BDA Act. [para 47] [515-C-F]

3.7 It cannot be said that Entry 42 in List III of Schedule VII denudes the power of the State Legislature to the extent that in an enactment within its legislative competence, it cannot incidentally refer/enact in regard to the subject matter falling in the Concurrent List. [para 48] [515-H; 516-A]

3.8 The BDA Act is relatable to the Entries which squarely fall into a field assigned to the State legislature and, thus, would be a matter within the legislative competence of the State. For that matter State legislature is equally competent to enact a law even with relation to matters enumerated in List III provided it is not a covered field. The BDA Act relates to planned development under the scheme and it has been enacted with that legislative object and intent. An ancillary point thereto or reference to certain other provisions which will help in achieving the purpose of the State law, without really coming in conflict with the Central law, is a matter on which a State can enact according to the principle of incidental

encroachment. The Court also has to keep in mind the distinction between 'ancillariness' and 'incidentally affecting'. The distinction is that 'ancillariness' relates to a law which merely falls in the periphery of an Entry and the 'incidental effect' relates to a law which, in potential, is not controlled by the other legislation. [para 49-50] [516-B-D; G-H]

Federation of Hotels and Restaurants v. Union of India, **1989 (2) SCR 918 = (1989) 3 SCC 634 – relied on**

Ishwari Khetan Sugar Mills (P) Ltd. v. State of U.P. **1980 (3) SCR 331 = (1980) 4 SCC 136 – held inapplicable**

Rustom Cavas Jee Cooper v. Union of India **1970 (3) SCR 530 = (1970) 1 SCC 248 - referred to**

3.9 The dictum stated in every judgment should be applied with reference to the facts of the case as well as its cumulative impact. Similarly, a statute shoul d be construed with reference to the context and its provisions to make a consistent enactment, i.e. *ex visceribus actus*. [para 53] [519-E-F]

A.S. Krishna v. Madras State, 1957 SCR 399 =**AIR 1957 SC 297 – relied on**

Prafulla Kumar Mukherjee v. Bank of Commerce Ltd., Khulna **AIR 1947 PC 60 - referred to.**

3.10 It is not correct to say that the BDA Act is a law relatable exclusively to Entry 42 of List III of Schedule VII and is beyond the legislative competence of the State legislature. [para 56] [523-C]

4.1 In view of the law laid down by the Constitution Bench of this Court in the case of *A.S. Krishna* for application of Article 254 of the Constitution, two conditions are necessary; one, that the provisions of

provincial law and those of the Central legislation, both must be in respect of the matter which is enumerated in the Concurrent List and second, that they must be repugnant to each other. Once these conditions are satisfied, then alone the repugnancy would arise and the provincial law, to the extent of repugnancy, may become void. [para 57] [523-E-H]

Kerala State Electricity Board v. *Indian Aluminium Co. Ltd.* **1976 (1) SCR 552 = (1976) 1 SCC 466 – relied on**

4.2 One of the settled principles to examine the repugnancy or conflict between the provisions of a law enacted by one legislative constituent and the law enacted by the other, under the Concurrent List, is to apply the doctrine of pith and substance. The purpose of applying this principle is to examine, as a matter of fact, what is the nature and character of the legislation in question. To examine the 'pith and substance' of a legislation, it is required of the Court to examine the legislative scheme, object and purpose of the Act and practical effect of its provisions. After examining the statute and its provisions as a whole, the Court has to determine whether the field is already covered. While examining these aspects, it should further be kept in mind that the legislative constituent enacting the law has the legislative competence with respect to Article 246 read with the Lists contained in Schedule VII to the Constitution. It is the result of this collective analysis which will demonstrate the pith and substance of the legislation and its consequential effects upon the validity of that law. [para 57] [524-A-D]

4.3 The BDA Act is a social welfare legislation intended to achieve social object of planned development under the schemes made by the Authority concerned in accordance with the provisions of the Act. The fact that this subject falls within the legislative competence of the

State is unquestionable. Acquisition of land is not its primary purpose but, of course, acquisition of some land may become necessary to achieve its object which is to be specified at the outset of formation of schemes in terms ofs. 16 of the BDA Act. Thus, acquisition of land is nothing but incidental to the main object of the State law. [para 57] [524-D-G]

State of West Bengal v. *Kesoram Industries Ltd.* **2004 (1) SCR 564 = (2004) 10 SCC 201 – relied on**

Central Bank of India v. *State of Kerala* **2009 (3) SCR 735 = (2009) 4 SCC 94 - relied on**

Association of Natural Gas v. *Union of India* **(2004) 4 SCC 489- relied on**

4.4 On due application of the principle of pith and substance, the BDA Act is actually referable to Entry 5 of List II of Schedule VII to the Constitution. [para 60] [526-G]

5.1 The essence of a federal constitution is the distribution of legislative powers between the Centre and the State. The Lists enumerate, elaborately, the topics on which either of the legislative constituents can enact. Despite that, some overlapping of the field of legislation may be inevitable. Article 246 lays down the principle of federal supremacy that in case of inevitable and irreconcilable conflict between the Union and the State powers, the Union power, as enumerated in List I, shall prevail over the State and the State power, as enumerated in List II, in case of overlapping between List III and II, the former shall prevail. This principle of federal supremacy laid down in Article 246(1) of the Constitution should normally be resorted to only when the conflict is so patent and irreconcilable that co-existence of the two laws is not feasible. Such conflict must be an actual one

and not a mere seeming conflict between the Entries in the two Lists. While Entries have to be construed liberally, their irreconcilability and impossibility of co-existence should be patent. One, who questions the constitutional validity of a law as being *ultra vires*, takes the onus of proving the same before the Court. [para 61] [526-H; 527-A-D]

5.2 Doctrines of pith and substance, overlapping and incidental encroachment are, in fact, species of the same law. It is quite possible to apply these doctrines together to examine the repugnancy or otherwise of an encroachment. In a case of overlapping, the Courts have taken the view that it is advisable to ignore an encroachment which is merely incidental in order to reconcile the provisions and harmoniously implement them. If, ultimately, the provisions of both the Acts can co-exist without conflict, then it is not expected of the Courts to invalidate the law in question. [para 61] [527-D-F]

Deep Chand v. *State of U.P.* **1959 Suppl. SCR 8 = AIR 1959 SC 648- relied on**

5.3 The repugnancy would arise in the cases where both the pieces of legislation deal with the same matter but not where they deal with separate and distinct matters, though of a cognate and allied character. Where the State legislature has enacted a law with reference to a particular Entry with respect to which, the Parliament has also enacted a law and there is an irreconcilable conflict between the two laws so enacted, the State law will be a stillborn law and it must yield in favour of the Central law. To the doctrine of occupied/overlapping field, resulting in repugnancy, the principle of incidental encroachment would be an exception. [para 62] [528-B-D]

Fatehchand Himmatlal v. *State of Maharashtra* **1977 (2) SCR 828 = (1977) 2 SCC 670- relied on**

Canadian Constitutional Law by Laskin **— pp. 52-54, 1951 Edn).” – referred to.**

6.1 It is an established principle of law that an Act should be construed as a complete instrument and not with reference to any particular provision or provisions. When a law is impugned as *ultra vires* the powers of the legislature which enacted it, what has to be ascertained is the true character of the legislation. To do so one must have regard to the enactment as a whole, to its object and to the scope and effect of its provisions. It would be quite an erroneous approach to view such a statute not as an organic whole but as a mere collection of sections, then disintegrate it into parts, examine under what head of legislation those parts would severally fall and by that process determine what portions thereof are *intra vires*, and what are not. Essentially, the statute should be examined as a whole and its true nature and character should be spelt out in the reasoning leading to the conclusion whether a law is repugnant or *ultra vires*. Collective and cohesive reading of an Act has been considered by the Courts as a pre-requisite to interpretation. Thus, the concept of fragmentation (disintegration) is least applied by the Courts for proper interpretation. [para 65 and 68] [535-E-H; 536-A; 537-B]

A.S. Krishna v. Madras State, **1957 SCR 399 =AIR 1957 SC 297 – relied on**

Concise Oxford English Dictionary, 11th Edition, 2008; P. Ramanatha Aiyar’s Law Lexicon, 2nd Edition, 1997; *Canadian Constitutional Law,* **by Larkin 4th edition, 1973 – referred to.**

6.2 The doctrine of ancillariness adds further

legitimacy to the statute whose validity has been upheld on the basis of the doctrine of pith and substance. On the other hand, the doctrine of severability comes into play to determine the issue of guilt by association or salvation by disassociation. [para 71] [538-C-D]

6.3 In case of repugnancy when a State Act is repugnant to a Central law, within the meaning of Article 254, what becomes void is not the entire Act but, only in so far as it is repugnant to the Central Act and this is the occasion where the doctrine of severability would operate. For the application of this doctrine, it has to be determined whether the valid parts of statute are separable from the invalid parts thereof and it is the intention of the Legislature which is the determining factor. The test to be applied is whether the Legislature would have enacted the valid part if it had known that rest of the statute was invalid. This may not be true where valid and invalid provisions are so inextricably mixed up that they cannot be separated. [para 74] [539-F-H; 540-A-B]

6.4 Another principle used by the courts, while applying the doctrine of severability, is to find whether the separated valid part forms a single scheme which is intended to operate as a whole independent of the invalid part. Thus, severability is not fragmentation. Fragmentation may be used to effectively consider the statutory provisions at a threshold stage prior to declaration of repugnancy or *ultra vires* of a statute, while severability is a doctrine to be applied post such declaration. Fragmentation serves as a means to achieve the end, i.e. severability. The principle of severability becomes relevant only on the premise that at least one of the matters, whether that of the whole statute or part thereof, may not come within any class of the subjects within the ambit of the enacting legislature's authority. [paras 74, 75] [540-B-E]

R.M.D. Chamarbaugwalla v. Union of India, **1957 SCR 930 = AIR 1957 SC 628 - relied on**

6.5 The BDA Act is an Act aimed at implementation of schemes for planned development and stoppage of haphazard construction. On the other hand, the Land Acquisition Act is an Act dealing strictly with acquisition of land. Section 36(1) of the BDA Act refers to application of the provisions of the Land Acquisition Act to that Act as far as practicable. The other provision making a reference, that too indirectly, to acquisition is s. 27 of the BDA Act which contemplates that in the event of a scheme having lapsed, the provisions of s.36 shall become inoperative. One also finds reference to acquisition in s.16 of the BDA Act where the scheme prepared for implementation shall also indicate the land to be acquired for proper implementation of the provisions of the BDA Act. [para 76] [540-G-H; 541-A-B]

6.6 Even if, s. 36 is said to be traceable to Entry 42 of List III of Schedule VII to the Constitution, in that event, this reference would have to be suppressed to give weightage to the provisions aimed at development which are referable to Entries 5 and 18 of List II of Schedule VII to the Constitution. The entire BDA Act is directed towards implementation of the schemes for development, and acquisition is only incidental to the same. Different provisions of the BDA Act are found to be pointing towards the one central matter, i.e. development, one provision in the entire scheme of the BDA Act cannot be conceived as having an independent direction. [para 76] [541-B-E]

6.7 Firstly, there is no reason to apply the concept of fragmentation to determine the pith and substance of the Act which, in fact, is 'planned development', referable to Entries 5 and 18 of List II of Schedule VII. Secondly,

even if various provisions of the Act are fragmented, then it would still lead to the same result and the pith and substance of the Act would still be traceable to the same Entries. [para 76] [541-D-E]

6.8 The pith and substance of the impugned legislation is relatable to Entries 5 and 18 of List II of Schedule VII of the Constitution and, therefore, the question of repugnancy can hardly arise. [para 77] [541-G-H]

6.9 Furthermore, the constitutionality of the impugned Act is not determined by the degree of invasion into the domain assigned to the other Legislature but by its pith and substance. The true nature and character of the legislation is to be analysed to find whether the matter falls within the domain of the enacting Legislature. The incidental or ancillary encroachment on a forbidden field does not affect the competence of the legislature to make the impugned law. [para 77] [541-H; 542-A-B]

6.10 The BDA Act is an Act which has a self-contained scheme dealing with all the situations arising from the formation of the scheme for planned development to its execution. It is not a law enacted for acquisition or requisitioning of properties. Various terms used in the Act, like amenity, civic amenities, betterment tax, building, operations, development, streets etc. are directly, and only, relatable to 'development' under a 'scheme' framed under the provisions of the Act. The BDA Act also provides for an adjudicatory process for the actions which may be taken by the authorities or functionaries against the persons; except to the limited extent of acquisition of land and payment of compensation thereof. For that very purpose, s. 36 of the BDA Act has been incorporated into the provisions of Land Acquisition Act. To the limited extent of acquisition of land and payment of compensation, the provisions of

the Land Acquisition Act would be applicable for the reason that they are neither in conflict with the State law nor do such provisions exist in that Act. The provisions of the Land Acquisition Act relating thereto would fit into the scheme of the BDA Act. Both the Acts, therefore, can co-exist and operate without conflict. It is no impossibility for the Court to reconcile the two statutes, in contrast to invalidation of the State law which is bound to cause serious legal consequences. There appears to be no direct conflict between the provisions of the Land Acquisition Act and the BDA Act. [para 78] [542-C-H; 543-A]

Poonacha v. *State of Karnataka* **2010 (10) SCR 1022 = (2010) 9 SCC 671– relied on**

6.11 The BDA Act does not admit reading of provisions of Section 11A of the Land Acquisition Act into its scheme as it is bound to debilitate the very object of the State law. Parliament has not enacted any law with regard to development, the competence of which, in fact, exclusively falls in the domain of the State Legislature with reference to Entries 5 and 18 of List II of Schedule VII. Both these laws cover different fields of legislation and do not relate to the same List, leave apart the question of relating to the same Entry. Acquisition being merely an incident of planned development, the Court will have to ignore it even if there was some encroachment or overlapping. The BDA Act does not provide any provision in regard to compensation and manner of acquisition for which it refers to the provisions of the Land Acquisition Act. There are no provisions in the BDA Act which lay down detailed mechanism for the acquisition of property, i.e. they are not covering the same field and, thus, there is no apparent irreconcilable conflict. [para 78] [543-A-E]

6.12 The BDA Act provides a specific period during which the development under a scheme has to be implemented and if it is not so done, the consequences thereof would follow in terms of s.27 of the BDA Act. None of the provisions of the Land Acquisition Act deals with implementation of schemes. The acquisition under the Land Acquisition Act cannot, in law, lapse if vesting has taken place. Therefore, the question of applying the provisions of s.11A of the Land Acquisition Act to the BDA Act does not arise. Section 27 of the BDA Act takes care of even the consequences of default, including the fate of acquisition, where vesting has not taken place u/s 27(3). Thus, there are no provisions under the two Acts which operate in the same field and have a direct irreconcilable conflict. [para 78] [543-D-G]

6.13 The BDA Act is a self-contained code. Provisions introduced in the Land Acquisition Act, 1894 by Central Act 68 of 1984, limited to the extent of acquisition of land, payment of compensation and recourse to legal remedies provided under the said Act, can be read into an acquisition controlled by the provisions of the BDA Act but with a specific exception that the provisions of the Land Acquisition Act in so far as they provide different time frames and consequences of default thereof, including lapsing of acquisition proceedings ,cannot be read into the BDA Act. Section 11A of the Land Acquisition Act being one of such provisions cannot be applied to the acquisitions under the provisions of the BDA Act." [para 79] [544-A-C]

Case Law Reference:

2010 (6) SCR 29	**relied on**	**para 18**
2011 (3) SCC 1	**relied on**	**para 20**
1977 (1) SCR 178	**referred to**	**para 23, 25**
2002 (2) SCR 825	**relied on**	**para 25**
2010 (10) SCR 1022	**relied on**	**para 28**
1972 (2) SCR 33	**relied on**	**para 41**
1988 (3) Suppl. SCR 770	**relied on**	**para 42**
1994 (1) Suppl. SCR 807	**relied on**	**para 43**
1983 (3) SCR 130	**relied on**	**para 44**
1957 SCR 399	**relied on**	**para 45**
1989 (2) SCR 918	**relied on**	**para 45**
1980 (3) SCR 331	**held inapplicable**	**para 51**
1970 (3) SCR 530	**referred to**	**para 51**
AIR 1947 PC 60	**referred to**	**para 54**
1976 (1) SCR 552	**relied on**	**para 57**
2004 (1) SCR 564	**relied on**	**para 58**
2009 (3) SCR 735	**relied on**	**para 58**
(2004) 4 SCC 489	**relied on**	**para 59**
1959 Suppl. SCR 8	**relied on**	**para 61**
1977 (2) SCR 828	**relied on**	**para 62**
1957 SCR 930	**relied on**	**para 74**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 711 of 2011.

From the Judgment & Order dated 16.10.2008 of the High Court of Karnataka at Bangalore in Writ Appeal No. 1012 of 2007.

A.K. Ganguli, Arvind Savant, Altaf Ahmad, Pallav

Shidshodia, T.V. Ratnam, Sanjay V. Kharde, Chinmoy A. Khaladkar, Sachin J. Patil, Asha G. Nair, Shivaji M. Jadhav, Bhargava V. Desai, Rahul Gupta, Nikhil Sharma, S.K. Bhattacharya, A.S. Bhasme, Brajesh Pande, Shailendra Kumar Mishra, V.N. Raghupathy, S.K. Kulkarni, Ankur S. Kulkarni, Jitendra Mohan Sharma, Vinay Navare Ranjan, Abha R. Shamra, S.U.K. Sagar (for Lawyer's Knit & Co.), Prakash Ahuja, Jitendra Kumar, Shiv Kumar Suri, J. Rahman, Rajesh Kumar, S.C. Birla, Subhash Chandra Birla, R.K. Adsure, Satyajit A, Desai, Anagha S. Desai for the appearing parties.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Leave granted.

2. A two Judge Bench of this Court in the case of *Girnar Traders v. State of Maharashtra* [(2004) 8 SCC 505] had considered the question whether all the provisions of the Land Acquisition Act, 1894, (for short, the 'Land Acquisition Act' or the 'Central Act') as amended by the Land Acquisition (Amendment) Act, 1984 (hereinafter referred to as the 'Central Act 68 of 1984'), can be read into the provisions under Chapter VII of the Maharashtra Regional and Town Planning Act, 1966 (for short, 'the MRTP Act') for acquisition of land thereunder. The Bench was of the opinion that the observations made by another Bench of this Court in the case of *State of Maharashtra* v. *Sant Joginder Singh* [(1995) Supp (2) SCC 475] did not enunciate the correct law by answering the said question in the negative and, thus, requires reconsideration by a larger Bench. While recording variety of reasons for making a reference to the larger Bench the learned Judges in paragraphs 20 and 21 of the Order observed as under:

> "**20.** We, therefore, see no good reason as to why the provisions introduced in the Land Acquisition Act, 1894 by Central Act 68 of 1984 should not be read into an acquisition under Chapter VII of the MRTP Act, to the extent not precluded by the MRTP Act, 1966. Section 11-A being one such section, it may have to be applied to the acquisition under Chapter VII of the MRTP Act.
>
> **21.** For these reasons, in our considered view, the decision in *Sant Joginder Singh* requires reconsideration by a larger Bench."

3. This appeal came up for hearing before a larger Bench consisting of three learned Judges along with other matters in *Girnar Traders* v. *State of Maharashtra* [(2007) 7 SCC 555] (hereinafter referred to as '*Girnar Traders-II*'). In those appeals, *inter alia*, arguments were addressed as to the interpretation of Sections 126 and 127 of the MRTP Act as well as reading the provisions of the Land Acquisition Act, including Section 11A, into the provisions of the MRTP Act as legislation by reference. There was some divergence of opinion between the learned Judges hearing that matter. P.K. Balasubramanyan, J. (as he then was) expressed an opinion that both the questions; in regard to interpretation of Sections 126 and 127 of the MRTP Act as well as incorporation of Section 11A of the Land Acquisition Act into that Act should be referred for consideration to a larger Bench. Expressing the majority view, B.N. Agrawal and P.P. Naolekar, JJ. (as they then were) agreed that Section 11A of the Land Acquisition Act is part of the law which creates and defines rights and is not an adjective law which defines method of enforcing rights. For this and other reasons assigned by P.K. Balasubramanyan, J., they agreed that the question involved required consideration by a larger Bench. However, in para 3 of the majority judgment, they regretfully declined to make reference on interpretation of Section 127 of the MRTP Act to a larger Bench and decided the matter in that regard on merits. While setting aside the judgment of the High Court under appeal, the minority view expressed by Balasubramanyan, J. is as under:

> "123**.** I would, therefore, hold that there has been sufficient compliance with the requirement of Section 127

of the MRTP Act by the authority under the Act by the acquisition initiated against the appellant in the appeal arising out of SLP (C) No. 11446 of 2005 and the reservation in respect of the land involved therein does not lapse by the operation of Section 127 of the Act. But since on the main question in agreement with my learned Brothers I have referred the matter for decision by a Constitution Bench, I would not pass any final orders in this appeal merely based on my conclusion on the aspect relating to Section 127 of the MRTP Act. The said question also would stand referred to the larger Bench.

124. I therefore refer these appeals to a larger Bench for decision. It is for the larger Bench to consider whether it would not be appropriate to hear the various States also on this question considering the impact of a decision on the relevant questions. The papers be placed before the Hon'ble Chief Justice for appropriate orders."

4. While the majority view, expressed by B.N. Agrawal and P.P. Naolekar, JJ., is as under :

"3. A two-Judge Bench of this Court in *State of Maharashtra* v. *Sant Joginder Singh Kishan Singh* has held that Section 11-A of the LA Act is a procedural provision and does not stand on the same footing as Section 23 of the LA Act. We find it difficult to subscribe to the view taken. Procedure is a mode in which the successive steps in litigation are taken. Section 11-A not only provides a period in which the land acquisition proceedings are to be completed but also provides for consequences, namely, that if no award is made within the time stipulated, the entire proceedings for the acquisition of the land shall lapse. Lapsing of the acquisition of the land results in owner of the land retaining ownership right in the property and according to us it is a substantive right accrued to the owner of the land, and that in view thereof we feel Section 11-A of the LA Act is part of the law which

creates and defines right, not adjective law which defines method of enforcing rights. It is a law that creates, defines and regulates the right and powers of the party. For this and the other reasons assigned by our learned Brother, we are in agreement with him that the question involved requires consideration by a larger Bench and, accordingly, *we agree with the reasons recorded by my learned Brother for referring the question to a larger Bench. However, on consideration of the erudite judgment prepared by our esteemed and learned Brother Balasubramanyan, J., regretfully we are unable to persuade ourselves to agree to the decision arrived at by him on interpretation of Section 127 of the MRTP Act and also reference of the case to a larger Bench.*

67. In view of our decision on the interpretation and applicability of Section 127 of the MRTP Act to the facts of the present case, the appellants are entitled to the relief claimed, and the other question argued on the applicability of the newly inserted Section 11-A of the LA Act to the acquisition of land made under the MRTP Act need not require to be considered by us in this case.

68. For the aforesaid reasons, the impugned judgment and order dated 18-3-2005 passed by the Division Bench of the Bombay High Court is set aside and this appeal is allowed. As no steps have been taken by the Municipal Corporation for acquisition of the land within the time period, there is deemed dereservation of the land in question and the appellants are permitted to utilise the land as permissible under Section 127 of the MRTP Act."

(emphasis supplied)

5. This is how the above cases were listed before the Constitution Bench for answering the question framed in the order of Reference. A number of other matters were ordered to be tagged with *Girnar Traders-II* (supra). Similarly, when the

present appeal came up for hearing on 17th July, 2009, a two Judge Bench passed the following order:

"Issue notice.

Interim stay of the High Court judgment.

Tag with *Girnar Traders* v. *State of Maharashtra* referred to the Constitution Bench."

6. The question in the referred matter was related to Section 11A of the Land Acquisition Act being read as part of the MRTP Act on the doctrine of legislation by reference. In the present case, we are concerned with the provisions of the Bangalore Development Authority Act, 1976 (for short, the 'BDA Act' or the 'State Act'). The statutory provisions and scheme under the two State laws, in regard to acquisition of land for planned development, are significantly different. Therefore, and rightly so, it was stated at the Bar that the case relating to BDA Act should be heard and decided separately and so was it heard separately and reserved for judgment.

Facts

7. The land admeasuring 2 acre and 34 guntas located in Survey No. 9/2 of Lottegollahalli Village, Kasaba Hobli, Bangalore North Taluk was owned by M/s Uttanallappa, Munishamappa etc. The Bangalore Development Authority (for short, 'the Authority') had issued a preliminary notification dated 3rd January, 1977 for acquisition of land of which, the land in question was a part. Non-finalisation of acquisition proceedings resulted in filing of the Writ Petition by the owners of the land being W.P. Nos. 16065-69 of 1987 before the High Court of Karnataka praying for quashing of preliminary as well as the final notification dated 2nd August, 1978. On the representation of the said owners, the Authority passed Resolution No.1084 dated 28th June, 1988 de-notifying to the extent of 1 acre and 2 guntas of the land from acquisition. Thus, out of the total land

of the said owners, land admeasuring 1 acre 32 guntas was acquired, while according to the appellant, remaining land was de-notified by the said resolution. In view of the resolution having been passed by the Authority, the Writ Petition was withdrawn. Thereafter the Deputy Commissioner of the said Authority issued an endorsement on 11th March, 1991 in favour of one of the owners of the land informing him that by virtue of the aforesaid Resolution No.1084 there was no acquisition of the land to the extent of 1 acre 2 guntas. The present appellant purchased the said land by means of seven different sale deeds executed by the said owners in favour of the present appellant. It is averred that permission was granted by the Authority to the erstwhile owners to construct culvert/bridge on the storm water drain abutting their land at their own cost. The appellant submitted the drawings to Respondent No.3 for permission for the said construction which was granted vide order dated 24th February, 2001 in furtherance to which the appellant commenced the construction. In the meantime, Respondent No.3 issued a letter to the appellant stating that the said permission was temporarily withdrawn until further orders. This was followed by another letter dated 30th August, 2001 in which Respondent No.3 informed the appellant that de-notification of the land for acquisition vide Resolution No.1084 had been withdrawn vide Resolution No.325/97 dated 31st December, 1997 passed by the Authority and the appellant was not entitled to raise any construction on the land in question. The appellant made certain enquiries and it was discovered that as a result of Resolution No.325/97 acquisition proceedings had already been revived. Aggrieved by the action of the respondents, appellant filed Writ Petition No.41352 of 2001 before the Karnataka High Court praying for quashing of Resolution No.325/97 and acquisition proceedings initiated from the preliminary and final notification dated 3rd January, 1977 and 2nd August, 1978 respectively. The principal argument raised by the appellant before the High Court was that the provisions of Section 11A are applicable to the BDA Act and the award having been made after a period of more than two years from

the date of declaration under Section 6 of the Land Acquisition Act, the acquisition proceedings have lapsed. The learned Single Judge of Karnataka High Court, vide his judgment dated 25th January, 2007, rejected all the contentions raised holding that the appellant herein has no *locus-standi* to question the acquisition proceedings and withdrawal of the earlier Resolution by the subsequent Resolution was not bad in law. The correctness of the judgment of the learned Single Judge was questioned before the Division Bench of that Court in Writ Appeal No.1012 of 2007. This Writ Appeal also came to be dismissed vide judgment dated 16th October, 2008 and the Court declined to interfere with the reasoning recorded by the learned Single Judge which resulted in filing of the present Special Leave Petition.

8. We are not concerned with various grounds on which challenge is made to the legality and correctness of the impugned judgment as we have to answer the question of law that has been referred to the Constitution Bench. The learned counsel appearing for the appellant has contended that the provisions of Section 11A of the Land Acquisition Act are to be read into the provisions of the BDA Act and that would result in lapsing of the acquisition proceedings upon expiry of the period specified therein. Thus, the land of the appellant shall be deemed to be de-notified and available to him free of any reservation or restriction even under the provisions of the BDA Act. The learned counsel raised the following issues in support of his principal contention:

1. 'Acquisition and requisitioning of property' is relatable only to Entry 42 of the Concurrent List (List III) of Schedule VII, read with Article 246 of the Constitution of India. This, being a 'stand alone entry', cannot be incidental to any other law. The State has legislative competence to enact BDA Act with reference to Article 246 read with Entry 5 and/ or 18 of List II of Schedule VII to the Constitution. State Legislature may even combine both the laws but cannot make 'Acquisition' incidental to State law.

2. Since Entry 42 in List III provides a concurrent subject matter of legislation, both the Parliament and the State Legislature would be competent to enact their respective laws covering the subject matter of acquisition and requisitioning of property. The Parliament has enacted a law with reference to Entry 42, List III. The law could be enacted by the State in combination of subject matters covered under other entries, i.e., Entries 5 and 18 of List II. The law enacted by the Centre would take precedence and the State Act, insofar as it provides to the contrary, shall be repugnant. Thus, the field being covered by the Central law, Section 11A of the Land Acquisition Act will prevail and has to be read into the provisions of Section 27 of the BDA Act.

3. The provisions of Land Acquisition Act, as amended by the Central Act 68 of 1984, are adopted vide Section 36 of the BDA Act by the principle of legislation by reference as opposed to legislation by incorporation, i.e. writing of the provisions by pen and ink. Thus, the amended provisions of the Central Act shall be read into the State Act and Section 11A, being one of such provisions, would form an integral part of the State Legislation.

4. There is no repugnancy between the two legislations. They operate in different areas. The BDA Act does not provide for lapsing of acquisition but refers only to lapsing of the scheme under Section 27. Lapsing of acquisition is contemplated only under Section 11A of the Land Acquisition Act.

Thus, the contention is that the acquisition, as a result of default in terms of Section 11A of the Land Acquisition Act, shall always lapse.

5. Provisions of Section 11A can purposefully operate as a part of the scheme under the BDA Act. Such approach would be in consonance with the larger policy decision of balancing the rights of the individuals, who are deprived of their properties by exercise of the State power of eminent domain. The public authorities would be required to act with reasonable dispatch. Lapsing of acquisition does not take away the right of the State to issue fresh notification/declaration within the currency of the scheme.

9. In order to examine the merit or otherwise of these contentions, it is necessary for this Court to examine the scheme of the BDA Act read in conjunction with the provisions of the Land Acquisition Act.

10. Though the object of the BDA Act may be *pari materia* to the MRTP Act, there are certain stark distinctions between some of the provisions of the respective Acts, particularly, where they relate to functions and powers of the Authority in preparation of plans as well as with respect to acquisition of the land. Hence, it will be appropriate for the Court to examine the scheme of the BDA Act at this juncture itself.

Scheme under the Bangalore Development Authority Act, 1976

11. Different authorities like City of Bangalore Municipal Corporation, the City Improvement Trust Board, the Karnataka Industrial Area Development Board, the Housing Board and the Bangalore City Planning Authority were exercising jurisdiction over Bangalore City. Due to overlapping functions there were avoidable confusions, besides hampering of coordinated

development. Therefore, in order to set up a single authority to ensure proper development and to check the haphazard and irregular growth as it would not be possible to rectify or correct these mistakes in the future, the BDA Act was enacted by the Karnataka State Legislature in the year 1976. The primary object of the BDA Act was to provide for establishment of the development authority for development of the city of Bangalore and areas adjacent thereto and for the matters connected therewith. For different reasons, various provisions of this Act were amended from time to time.

12. The term 'Development' under Section 2(j) of the BDA Act, with its grammatical variations, means the carrying out of building, engineering, or other operations in or over or under land or the making of any material change in any building or land and includes redevelopment. Similarly, Section 2(r) defines the word 'to erect' which in relation to any building includes:

"(i) any material alteration or enlargement of any building;

(ii) the conversion by structural alteration into a place for human habitation of any building not originally constructed for human habitation;

(iii) the conversion into more than one place for human habitation of a building originally constructed as one such place;

(iv) the conversion of two or more places of human habitation into a greater number of such places;

(v) such alterations of a building as affect an alteration of its drainage or sanitary arrangements, or materially affect its security;

(vi) the addition of any rooms, buildings, houses or other structures to any building; and

(vii) the construction in a wall adjoining any street or land not belonging to the owner of the wall, or a door opening on to such street or land."

13. The definitions afore-stated clearly show that they were given a very wide meaning to ensure that the check on haphazard and unauthorized development is maintained. The Authority came to be constituted in terms of Section 3 of the BDA Act. The object of the Authority has been spelt out in Section 14 of the BDA Act which states that the Authority shall promote and secure the development of the Bangalore Metropolitan Area and for that purpose, the Authority shall have the power to acquire, hold, manage and dispose of moveable and immoveable property, whether within or outside the area under its jurisdiction, to carry out building, engineering and other operations and generally to do all things necessary or expedient for the purpose of such development and for purposes incidental thereto. The language of this section shows that powers of wide magnitude are vested in the Authority and the purpose for which such powers are vested is absolutely clear from the expression 'to do all things necessary or expedient for the purpose of such development and for purposes incidental thereto'. In other words, the primary purpose is planned development and other matters are incidental thereto. The acquisition of immoveable property is, therefore, also for the said purpose alone. Chapter III of the BDA Act deals with development plans. Under Section 15, the Authority has to draw up detailed schemes termed as 'Development Scheme'. The Government in terms of Section 15(3) is empowered to direct the Authority to take up any development scheme subject to such terms and conditions as may be specified by it. In terms of Section 16(1) of the BDA Act, every development scheme has to provide, within the limits of the area comprised in the scheme, for the acquisition of any land which, in the opinion of the Authority, will be necessary for or affected by the execution of the scheme. It should, inter alia, also provide for laying and re-laying out all or any land including the construction/ reconstruction of buildings and formation and

alteration of streets, drainage, water supply and electricity, forming open spaces for betterment and sanitary arrangements. The Authority may provide for construction of houses within or without the limits of the area comprised in the scheme. It is clear that the development scheme has to provide for every detail in relation to development of the area under the scheme as well as acquisition of land, if any, required. It may be noticed, even at the cost of repetition, that such acquisition is only in regard to the development scheme. Once the development scheme has been prepared, the Authority is expected to draw up a notification stating that the scheme has been made and give all the particulars required under Section 17 of the BDA Act including a statement specifying the land which is proposed to be acquired and land on which betterment tax is to be levied. A copy of this notification is required to be sent to the Government through the Corporation which is obliged to forward the same to the appropriate Government within the specified time along with any representation, which the Corporation may think fit to make, with regard to the scheme. After receiving the scheme, the Government is required to ensure that the notification is published in the Official Gazette and affixed in some conspicuous part of its own office as well as in such other places as the Authority may consider necessary. In terms of Section 17(5) of the BDA Act, within 30 days from the date of publication of such notification in the Official Gazette, the Authority shall serve a notice on every person whose name appears in the assessment list of the Local Authority or the Land Revenue Register as being primarily liable to pay the property tax or land revenue assessment on any building or land which is proposed to be acquired in executing the scheme or in regard to which the Authority proposes to recover betterment tax and to issue show cause notice giving thirty days time to the person concerned, as to why such acquisition of building or land and the recovery of betterment tax should not be made. Thus, the provisions of Section 17 of the BDA Act are of some significance. They describe various time frames within which the Authority/Government is expected to take action. A deemed

fiction is introduced in terms of Section 17(4) of the BDA Act where if the Corporation does not make a representation within the time specified under Section 17(2), the concurrence of the Corporation shall be deemed to have been given to enable the authorities to proceed with the matter in accordance with Section 17(5) of the Act. Having gone through the prescribed process, the Authority is required to submit the scheme for sanction of the Government. The Authority has been given power to modify the scheme keeping in view the representations received. The scheme shall also provide for the various details as required under Sections 18 (1)(a) to 18(1)(f) and 18(2) of the BDA Act. After considering this proposal, the Government may give sanction to the scheme in terms of Section 18(3). Upon sanction of the scheme, the Government shall publish, in the Official Gazette, a declaration stating the fact of such sanction and that the land proposed to be acquired by the Authority for the purposes of the scheme is required for a public purpose. This declaration shall be conclusive evidence that the land is needed for a public purpose. The Authority has also been given the power to alter or amend the scheme if an improvement can be made. If the scheme, as altered, involves acquisition otherwise than by an agreement, then the provisions of Sections 17, 18 and 19(1) shall apply to the scheme in the same manner as if such altered part were the scheme. This entire exercise is to be taken in terms of Section 19 of the BDA Act post grant of sanction in terms thereof. The next relevant provision for our purpose, which is of significance, is Section 27 of the BDA Act which reads as under:

> "**27. Authority to execute the scheme within five years.—**Where within a period of five years from the date of the publication in the official Gazette of the declaration under sub-section (1) of Section 9, the Authority fails to execute the scheme substantially, the scheme shall lapse and the provisions of Section 36 shall become inoperative."

14. It places an obligation upon the Authority to complete the scheme within a period of five years and if the scheme is not substantially carried out within that period, it shall lapse and the provisions of Section 36 shall become inoperative, i.e. this is a provision which provides for serious consequences in the event the requisite steps are not taken within the specified time. Section 30 of the BDA Act provides that the streets, which are completed under the scheme, shall vest in the Corporation as well as the open spaces as per Section 30(2). The disputes, if any, between the Authority and the Corporation in respect of Sections 30(1) and 30(2) are to be referred for determination to the Government whose decisions shall be final. Section 31 of the BDA Act puts a rider on the right of the Authority to sell or otherwise dispose of sites. Sections 32 to 34 of the BDA Act deal with imposition of restriction by virtue of the provisions of the Act where no person shall form or attempt to form any extension or layout for the purposes of constructing building thereon without the express sanction in writing of the Authority and except as per the conditions stated therein. In terms of Section 32(6) of the BDA Act, the Authority may refuse such sanction but where it does not refuse sanction within six months from the date of application made under sub-section (2) or from the date of receipt of all information asked for under-sub-section (7), such sanction shall be deemed to have been granted and the applicant has the right to proceed to form the extension or layout or to make the street but not so as to contravene any of the provisions of the Act or the Rules made thereunder. Similarly, alteration, demolition of extension is controlled by Section 33 and in terms of Section 33A, there is prohibition of unauthorized occupation of land belonging to the Authority. Section 34 of the BDA Act empowers the Authority to order work to be carried out or to carry it out itself in the event of default.

15. It is possible that some land may have to be acquired for the purpose of completing the scheme; such land has to be identified in the scheme itself as per Section 16 of the BDA

Act. Chapter IV of the BDA Act deals with 'acquisition of land'. This Chapter contains only two sections, i.e. Sections 35 and 36 which read as under:

> "**35. Authority to have power to acquire land by agreement.—**subject to the provisions of this Act and with the previous approval of the Government, the Authority may enter into an agreement with the owner of any land or any interest therein, whether situated within or without the Bangalore Metropolitan Area for the purchase of such land.
>
> **36. Provisions applicable to the acquisition of land otherwise than by agreement.—**(1) The acquisition of land under this Act otherwise than by agreement within or without the Bangalore Metropolitan Area shall be regulated by the provisions, so far as they are applicable, of the Land Acquisition Act, 1894.
>
> (2) For the purpose of sub-section (2) of Section 50 of the Land Acquisition Act, 1894, the Authority shall be deemed to be the local authority concerned.
>
> (3)After the land vests in the Government under Section 16 of the Land Acquisition Act, 1894, the Deputy Commissioner shall, upon payment of the cost of the acquisition, and upon the Authority agreeing to pay any further costs which may be incurred on account of the acquisition, transfer upon the Authority agreeing to pay any further costs which may be incurred an account of the acquisition, transfer the land to the Authority, and the land shall thereupon vest in the Authority."

16. These provisions postulate acquisition of land by two modes. Firstly, by entering into an agreement with the owner of the land; and secondly, otherwise than by agreement which shall be regulated by the provisions of Land Acquisition Act, in so far as they are applicable. Where the lands are acquired

by agreement, there would be hardly any dispute either on fact or in law. Controversies, primarily, would arise in the cases of compulsory acquisition under the provisions of the Act. The intention of the Legislature, thus, is clear to take recourse to the provisions of the Land Acquisition Act to a limited extent and subject to the supremacy of the provisions of the State Act. A very important aspect which, unlike the MRTP Act, is specified in the BDA Act is that once the land is acquired and it vests in the State Government in terms of Section 16 of the Land Acquisition Act, then the Government upon (a) payment of the cost of acquisition and (b) the Authority agreeing to pay any further cost, which may be incurred on account of acquisition, shall transfer the land to the Authority whereupon, it shall vest in the Authority. The Government is further vested with the power to transfer land to the Authority belonging to it or to the Corporation as per Section 37 of the BDA Act. In terms of Section 69 of the BDA Act, the Government is empowered to make rules to carry out the purposes of the Act. Under Section 70, the Authority can make regulations not inconsistent with the provisions of the Act, while in terms of Section 71, the Authority is again vested with the powers to make bye-laws not inconsistent with the Rules or the Regulations. Both these powers of the Authority are subject to previous approval of the Government. Sections 73 of the BDA Act gives overriding effect to the provisions of this Act and vide Section 77, the BDA Act repealed the Karnataka Ordinance 29 of 1975. It is not necessary for us to deal with other provisions of the BDA Act as they hardly have any bearing on the controversy in question.

17. The provisions of the Land Acquisition Act, which provide for timeframe for compliance and the consequences of default thereof, are not applicable to acquisition under the BDA Act. They are Sections 6 and 11A of the Land Acquisition Act. As per Section 11A, if the award is not made within a period of two years from the date of declaration under Section 6, the acquisition proceedings will lapse. Similarly, where declaration under Section 6 of this Act is not issued within three

years from the date of publication of notification under Section 4 of the Land Acquisition Act [such notification being issued after the commencement of the Land Acquisition (Amendment and Validation) Ordinance, 1967 but before the commencement of Central Act 68 of 1984] or within one year where Section 4 notification was published subsequent to the passing of Central Act 68 of 1984, no such declaration under Section 6 of the Land Acquisition Act can be issued in any of these cases.

18. A three Judge Bench of this Court in the case of *Bondu Ramaswamy* v. *Bangalore Development Authority* [(2010) 7 SCC 129] while dealing with the contention that notification issued in terms of Section 17(1) and (3) of the BDA Act appears to be equivalent to Section 4 of the Land Acquisition Act and the declaration under Section 19(1) of the BDA Act appears to be equivalent to the final declaration under Section 6 of the Land acquisition Act, held that all the provisions of the Land Acquisition Act will not apply to the acquisition under the BDA Act and only those provisions of the Land Acquisition Act, relating to stages of acquisition, for which there is no corresponding provision in the BDA Act, are applicable to an acquisition under the BDA Act. The provisions of Sections 4 and 6 of the Land Acquisition Act would not be attracted to the BDA Act as the Act itself provides for such mechanism. Be that as it may, it is clear that the BDA Act is a self-contained code which provides for all the situations that may arise in planned development of an area including acquisition of land for that purpose. The scheme of the Act does not admit any necessity for reading the provisions of Sections 6 and 11A of the Land Acquisition Act, as part and parcel of the BDA Act for attainment of its object. The primary object of the State Act is to carry out planned development and acquisition is a mere incident of such planned development. The provisions of the Land Acquisition Act, where the land is to be acquired for a specific public purpose and acquisition is the sum and substance of that Act, all matters in relation to the acquisition

of land will be regulated by the provisions of that Act. The State Act has provided its own scheme and provisions for acquisition of land. The co-relation between the two enactments is a very limited one. The provisions of Land Acquisition Act would be attracted only in so far as they are applicable to the State law. Where there are specific provisions under the State Act the provisions of Central Act will not be attracted. Furthermore, reading the provisions of default and consequences thereof, as stated under the Central Act into the State Act, is bound to frustrate the very scheme formulated under the State Act. Only because some of the provisions of the Land Acquisition Act are attracted, it does not necessarily contemplate that all the provisions of the Central Act would *per se* be applicable to the provisions of the State Act irrespective of the scheme and object contained therein. The Authority under the BDA Act is vested with complete powers to prepare and execute the development plans of which acquisition may or may not be a part. The provisions of the State Act can be implemented completely and effectively on their own and reading the provisions of the Land Acquisition Act into the State Act, which may result in frustrating its object, is not called for. We would be dealing with various facets which would support this view shortly. The provisions of Section 27 of the BDA Act mandate the Authority to execute the scheme, substantially, within five years from the date of publication of the declaration under sub-section (1) of Section 19. If the Authority fails to do so, then the scheme shall lapse and provisions of Section 36 of the BDA Act will become inoperative. The provisions of Section 27 have a direct nexus with the provisions of Section 36 which provide that the provisions of the Land Acquisition Act, so far as they are applicable to the State Act, shall govern the cases of acquisition otherwise than by agreement. Acquisition stands on a completely distinct footing from the scheme formulated which is the subject matter of execution under the provisions of the BDA Act. On a conjunct reading of the provisions of Sections 27 and 36 of the State Act, it is clear that where a scheme lapses the acquisition may not. This, of course, will depend

upon the facts and circumstances of a given case. Where, upon completion of the acquisition proceedings, the land has vested in the State Government in terms of Section 16 of the Land Acquisition Act, the acquisition would not lapse or terminate as a result of lapsing of the scheme under Section 27 of the BDA Act. An argument to the contrary cannot be accepted for the reason that on vesting, the land stands transferred and vested in the State/Authority free from all encumbrances and such status of the property is incapable of being altered by fiction of law either by the State Act or by the Central Act. Both these Acts do not contain any provision in terms of which property, once and absolutely, vested in the State can be reverted to the owner on any condition. There is no reversal of the title and possession of the State. However, this may not be true in cases where acquisition proceedings are still pending and land has not been vested in the Government in terms of Section 16 of the Land Acquisition Act. What is meant by the language of Section 27 of the BDA Act, i.e. "provisions of Section 36 shall become inoperative", is that if the acquisition proceedings are pending and where the scheme has lapsed, further proceedings in terms of Section 36(3) of the BDA Act, i.e. with reference to proceedings under the Land Acquisition Act shall become inoperative. Once the land which, upon its acquisition, has vested in the State and thereafter vested in the Authority in terms of Section 36(3); such vesting is incapable of being disturbed except in the case where the Government issues a notification for re-vesting the land in itself, or a Corporation, or a local Authority in cases where the land is not required by the Authority under the provisions of Section 37(3) of the BDA Act. This being the scheme of the acquisition within the framework of the State Act, read with the relevant provisions of the Central Act, it will not be permissible to bring the concept of 'lapsing of acquisition' as stated in the provisions of Section 11A of the Land Acquisition Act into Chapter IV of the BDA Act.

19. Under the scheme of the BDA Act, there are two situations, amongst others, where the rights of a common

person are affected – one relates to levy of betterment tax under Section 20 and property tax under Section 28B of the BDA Act while the other relates to considering the representation made upon drawing up of a notification in terms of Section 17(1) of the said Act in regard to acquisition of building or land and the recovery of betterment tax. For determination of the rights and claims in this regard, a complete adjudicatory mechanism has been provided under the State Act itself. The competent functionary in the Authority has to consider such representations received and alter or modify the scheme accordingly in terms of Section 18(1) of the BDA Act before its submission to the Government. With regard to levy of betterment tax, the assessment has to be made by the Authority in terms of Section 21 of the State Act. The person concerned, if he does not accept the assessment, can make a reference to the District Court for determining the betterment tax payable by such person under Section 21(4) of the BDA Act. Section 28B of that Act empowers the Authority to levy tax on the land and building and such levy is appealable to an Authority notified by the Government for that purpose being the Appellate Authority in terms of Section 62A of the BDA Act whose decision is final. Besides all this, under Section 63 of the BDA Act, the Government and the Authority are vested with revisional powers. All these provisions show that the BDA Act has provided for a complete adjudicatory process for determination of rights and claims. Only in regard to the matters which are not specifically dealt with in the BDA Act, reference to Land Acquisition Act, in terms of Section 36, has been made, for example acquisition of land and payment of compensation. This also is a pointer to the BDA Act being a self-contained Act.

20. One of the apparent and unavoidable consequences of reading the provisions of Section 11A of the Central Act into the State Act would be that it is bound to adversely affect the 'development scheme' under the State Act and may even frustrate the same. It is a self-defeating argument that the

Government can always issue fresh declaration and the acquisition in all cases should lapse in terms of Section 11A of the Central Act. This aspect has been dealt with by us in *Girnar Traders v. State of Maharashtra, Civil Appeal No.3703 of 2003 decided on January 11, 2011* (hereinafter referred to as 'Girnar Traders III') wherein it was held as under :

> "… If this entire planned development which is a massive project is permitted to lapse on the application of Section 11A of the Central Act, it will have the effect of rendering every project of planned development frustrated. It can hardly be an argument that the Government can always issue fresh declaration in terms of Section 6 of the Land Acquisition Act and take further proceedings. Recommencement of acquisition proceedings at different levels of the hierarchy of the State and Planning Authority itself takes considerable time and, thus, it will be difficult to achieve the target of planned development. This clearly demonstrates that all the provisions of the Land Acquisition Act introduced by later amendments would not, *per se,* become applicable and be deemed to be part and parcel of the MRTP Act. The intent of the legislature to make the State Act a self-contained Code with definite reference to required provisions of the Land Acquisition Act is clear."

21. When tested on the touchstone of the principles, 'test of unworkability', 'test of intention' and 'test of frustration of the object of the principal legislation' this argument, amongst others, has been specifically rejected. As per the scheme of the two Acts, the conclusion has to be that they can be construed and applied harmoniously to achieve the object of the State Act and it is not the requirement of the same that provisions of Section 11A of the Central Act should be read into the State Act.

22. Another way to look at the controversy in issue is whether the provisions of the BDA Act, specifically or by implication, require exclusion and/or inclusion of certain provisions like Sections 6 and 11A of the Land Acquisition Act.

The obvious animus, as it appears to us, is that the provisions providing time-frames, defaults and consequences thereof which are likely to have adverse effect on the development schemes were intended to be excluded.

23. A three Judge Bench of this Court in the case of *Land Acquisition Officer, City Improvement Trust Board* v. *H. Narayanaiah* [(1976) 4 SCC 9], while dealing with the provisions of the City of Bangalore Improvement Act, 1945 and the Mysore Land Acquisition Act, 1894, held that the expression used in Section 27 of the City of Bangalore Improvement Act, 1945 was somewhat similar to Section 36 of the present BDA Act. It provided that acquisition, other than by way of agreement, shall be regulated by provisions, *so far as* they are applicable, of Mysore Land Acquisition Act, 1894. The Court while taking the view that the provisions of Section 23 of the Mysore Act may be applicable to the acquisitions under the Bangalore Act, other provisions of the same would stand excluded as per the intention of the framers, held as under:

> "**22.** There was some argument on the meaning of the words "so far as they are applicable", used in Section 27 of the Bangalore Act. These words cannot be changed into "insofar as they are specifically mentioned" with regard to the procedure in the Acquisition Act. On the other hand, the obvious intention, in using these words, was to exclude only those provisions of the Acquisition Act which become inapplicable because of any special procedure prescribed by the Bangalore Act (e.g. Section 16) corresponding with that found in the Acquisition Act [e.g. Section 4(1)]. These words bring in or make applicable, so far as this is reasonably possible, general provisions such as Section 23(1) of the Acquisition Act. They cannot be reasonably construed to exclude the application of any general provisions of the Acquisition Act. They amount to laying down the principle that what is not either expressly, or, by a necessary implication, excluded must be applied. It is

surprising to find misconstruction of what did not appear to us to be reasonably open to more than one interpretation."

24. Applying the above principle to the facts of the case in hand, it will be clear that the provisions relating to acquisition like passing of an award, payment of compensation and the legal remedies available under the Central Act would have to be applied to the acquisitions under the State Act but the bar contained in Sections 6 and 11A of the Central Act cannot be made an integral part of the State Act as the State Act itself has provided specific time-frames under its various provisions as well as consequences of default thereto. The scheme, thus, does not admit such incorporation.

25. These controversies have drawn attention of this Court on different occasions in the past as well. It will be of great help to discuss the previous judgments of this Court on the issues involved in the present case relating to the same or similar legislations. In the case of *H. Narayanaiah* (supra), while dealing with the City of Bangalore Improvement Act, 1945 which was repealed by the BDA Act, this Court observed in para 4 of the judgment, "it does not, however, contain a separate Code of its own for such acquisition………." but, after discussing the scheme under the old Act, the Court held that the provisions of Bangalore Act, 1945 were not similar to those of the Mysore Land Acquisition Act and its general provisions, only in relation to acquisition of land, could be read into the Bangalore Act as other provisions stood excluded by the language of Section 27 of that Act. After the BDA Act came into force, the scheme was subjected to consideration of this Court in *Munithimmaiah* v. *State of Karnataka* [(2002) 4 SCC 326] wherein the Court discussed the provisions of the BDA Act vis-à-vis the provisions of the Land Acquisition Act, 1894 as amended by the Central Act 68 of 1984. The Court took the view that the BDA Act is a complete code in itself. It is an Act which provide for planned development and growth of Bangalore and not just 'acquisition

of land'. The law relating to acquisition of land, i.e. the Land Acquisition Act, is a special law for a special purpose. Describing the BDA Act as complete code, the Court held that the provisions of Section 11A of the Land Acquisition need not be read into the State Act. After noting the meticulous comparative analysis of the relevant provisions of the BDA Act and the Land Acquisition Act by the High Court this Court further observed that scheme of Land Acquisition Act, as modified by the BDA Act, would only be applicable by reason of provisions of Sections 17, 18, 27 and 36 of the BDA Act and held as under :

"**15.** So far as the BDA Act is concerned, it is not an Act for mere acquisition of land but an Act to provide for the establishment of a development authority to facilitate and ensure planned growth and development of the city of Bangalore and areas adjacent thereto and acquisition of lands, if any, therefor is merely incidental thereto. In pith and substance the Act is one which will squarely fall under, and be traceable to the powers of the State Legislature under Entry 5 of List II of the Seventh Schedule and not a law for acquisition of land like the Land Acquisition Act, 1894 traceable to Entry 42 of List III of the Seventh Schedule to the Constitution of India, the field in respect of which is already occupied by the Central enactment of 1894, as amended from time to time. If at all, the BDA Act, so far as acquisition of land for its developmental activities is concerned, in substance and effect will constitute a special law providing for acquisition for the special purposes of BDA and the same was not also considered to be part of the Land Acquisition Act, 1894. It could not also be legitimately stated, on a reading of Section 36 of the BDA Act that the Karnataka Legislature intended thereby to bind themselves to any future additions or amendments, which might be made by altogether a different legislature, be it Parliament, to the Land Acquisition Act, 1894. The procedure for acquisition under

the BDA Act vis-à-vis the Central Act has been analysed elaborately by the Division Bench, as noticed supra, in our view, very rightly too, considered to constitute a special and self-contained code of its own and the BDA Act and Central Act cannot be said to be either supplemental to each other, or *pari materia* legislations. That apart, the BDA Act could not be said to be either wholly unworkable and ineffectual if the subsequent amendments to the Central Act are not also imported into consideration. On an overall consideration of the entire situation also it could not either possibly or reasonably be stated that the subsequent amendments to the Central Act get attracted or applied either due to any express provision or by necessary intendment or implication to acquisitions under the BDA Act. When the BDA Act, expressly provides by specifically enacting the circumstances under which and the period of time on the expiry of which alone the proceedings initiated thereunder shall lapse due to any default, the different circumstances and period of limitation envisaged under the Central Act, 1894, as amended by the amending Act of 1984 for completing the proceedings on pain of letting them lapse forever, cannot be imported into consideration for purposes of the BDA Act without doing violence to the language or destroying and defeating the very intendment of the State Legislature expressed by the enactment of its own special provisions in a special law falling under a topic of legislation exclusively earmarked for the State Legislature. A scheme formulated, sanctioned and set for implementation under the BDA Act, cannot be stultified or rendered ineffective and unenforceable by a provision in the Central Act, particularly of the nature of Sections 6 and 11-A, which cannot also on its own force have any application to actions taken under the BDA Act. Consequently, we see no infirmity whatsoever in the reasoning of the Division Bench of the Karnataka High Court in *Khoday Distilleries Ltd. case*[1] to exclude the applicability of Sections 6 and 11-A as

amended and inserted by the Central Amendment Act of 1984 to the proceedings under the BDA Act. The submissions to the contra on behalf of the appellant have no merit whatsoever and do not commend themselves for our acceptance."

26. The principle stated in *Munithimmaiah's case* (supra) that the BDA Act is a self-contained code, was referred with approval by a three Judge Bench of this Court in the case of *Bondu Ramaswamy* (supra). The Court, *inter alia*, specifically discussed and answered the questions whether the provisions of Section 6 of the Land Acquisition Act will apply to the acquisition under the BDA Act and if the final declaration under Section 19(1) is not issued within one year of the publication of the notification under Section 17(1) of the BDA Act, whether such final declaration will be invalid and held as under:

"**79.** This question arises from the contention raised by one of the appellants that the provisions of Section 6 of the Land Acquisition Act, 1894 ("the LA Act", for short) will apply to the acquisitions under the BDA Act and consequently if the final declaration under Section 19(1) is not issued within one year from the date of publication of the notification under Sections 17(1) and (3) of the BDA Act, such final declaration will be invalid. The appellants' submissions are as under: the notification under Sections 17(1) and (3) of the Act was issued and gazetted on 3-2-2003 and the declaration under Section 19(1) was issued and published on 23-2-2004. Section 36 of the Act provides that the acquisition of land under the BDA Act within or outside the Bangalore Metropolitan Area, shall be regulated by the provisions of the LA Act, so far as they are applicable. Section 6 of the LA Act requires that no declaration shall be made, in respect of any land covered by a notification under Section 4 of the LA Act, after the expiry of one year from the date of the publication of such notification under Section 4 of the LA Act. As the provisions

of the LA Act have been made applicable to acquisitions under the BDA Act, it is necessary that the declaration under Section 19(1) of the BDA Act (which is equivalent to the final declaration under Section 6 of the LA Act) should also be made before the expiry of one year from the date of publication of notification under Sections 17(1) and (3) of the BDA Act [which is equivalent to Section 4(1) of the LA Act].

80. The BDA Act contains provisions relating to acquisition of properties, up to the stage of publication of final declaration. The BDA Act does not contain the subsequent provisions relating to completion of the acquisition, that is, issue of notices, enquiry and award, vesting of land, payment of compensation, principles relating to determination of compensation, etc. Section 36 of the BDA Act does not make the LA Act applicable in its entirety, but states that the acquisition under the BDA Act, shall be regulated by the provisions, so far as they are applicable, of the LA Act. Therefore it follows that where there are already provisions in the BDA Act regulating certain aspects or stages of acquisition or the proceedings relating thereto, the corresponding provisions of the LA Act will not apply to the acquisitions under the BDA Act. Only those provisions of the LA Act, relating to the stages of acquisition, for which there is no provision in the BDA Act, are applied to the acquisitions under the BDA Act.

81. The BDA Act contains specific provisions relating to preliminary notification and final declaration. In fact the procedure up to final declaration under the BDA Act is different from the procedure under the LA Act relating to acquisition proceedings up to the stage of final notification. Therefore, having regard to the scheme for acquisition under Sections 15 to 19 of the BDA Act and the limited application of the LA Act in terms of Section 36 of the BDA Act, the provisions of Sections 4 to 6 of the LA Act will not

apply to the acquisitions under the BDA Act. If Section 6 of the LA Act is not made applicable, the question of amendment to Section 6 of the LA Act providing a time-limit for issue of final declaration, will also not apply."

27. We may notice that, in the above case, the Court declined to examine whether the provisions of Section 11A of the Central Act would apply to the acquisition under the BDA Act but categorically stated that Sections 4 and 6 of the Central Act were inapplicable to the acquisition under the BDA Act.

28. It will be useful to notice that correctness of the judgment of this Court in the case of *Bondu Ramaswamy* (supra) was questioned in the case of *K.K. Poonacha* v. *State of Karnataka* [(2010) 9 SCC 671]. It was argued that the three Judge Bench judgment required reconsideration on the grounds that it had not noticed other relevant judgments of this Court as well as the BDA Act had not been reserved for and received the assent of the President as per the requirement of Article 31(3) of the Constitution and, thus, this law, being in conflict with the Central law, was void and stillborn. These contentions were rejected by the Bench and in para 13 of the judgment, it held that the judgment of this Court in *Bondu Ramaswamy* (supra) needs no reconsideration by the Constitution Bench and more importantly, it specifically referred and reiterated the principles stated in the cases of *Munithimmaiah* and *Bondu Ramaswamy* (supra).

29. *Sequitur* to the above principle is that the BDA Act has already been held to be a valid law by this Court not repugnant to the Land Acquisition Act as they operate in their respective fields without any conflict. For the reasons afore-referred as well as the detailed reasons given by us in the case of *Girnar Traders III (supra)*, which reasoning would form part of this judgment, we have no hesitation in concluding that the BDA Act is a self-contained code. The language of Section 36 of the BDA Act clearly mandates legislation by incorporation and as

per the scheme of the two Acts, effective and complete implementation of the State law without any conflict is possible. The object of the State law being planned development, acquisition is merely incidental thereto and, therefore, such an approach does not offend any of the known principles of statutory interpretation.

30. Points 3 to 5 of submissions raised on behalf of the appellant, as noticed above relate to:

a. Whether it is a case of legislation by reference or legislation by incorporation?

b. Whether the BDA Act is a complete code in itself?

c. Whether the BDA Act and Land Acquisition Act can co-exist and operate without conflict?

d. Whether, there being no contravention between the two laws, they can be harmoniously applied and Section 11A of the Land Acquisition Act can be read into the BDA Act without disturbing its scheme?

31. Most of these submissions have been specifically dealt with by us in the reasons afore recorded but usefully reference can be made to some of the important principles stated and conclusions arrived at in the case of *Girnar Traders III (supra)*.

32. In light of this discussion, submissions 3 to 5 advanced on behalf of the appellant are liable to be rejected.

33. Having dealt with contentions 3 to 5, raised by the appellant, now we will proceed to discuss the merit or otherwise of the contentions 1 and 2 respectively. Both these contentions have a common thread relating to scheme and object of the two Acts and are based on common premise in law, thus, can be conveniently dealt with together. The contention of Mr. Ganguly, Senior Advocate, is that acquisition and requisitioning

of property is referable only to Entry 42 of the Concurrent List in Schedule VII to the Constitution of India and being a 'stand alone entry', it cannot be incidental to any other law. Whenever the State enacts a law with reference to other entries including Entry 5 and/or 18 of List II, it may have legislative competence to combine such law with the law enacted by the Parliament with reference to Entry 42 which is a 'stand alone entry' but it cannot make the Central law incidental to the State law.

34. This argument is, primarily based upon the principles of prevalence of 'stand alone entry' and 'field covered by the Central law' and where there is repugnancy between the laws enacted by two different constituents, the Central law shall prevail and the State law will be stillborn unless it falls within the exception contemplated under Article 254(2) of the Constitution.

35. Per contra, it is argued that there is no repugnancy between the two laws. They can be easily harmonized and co-exist without conflict. The submission is that Court should normally assume the validity of the legislation rather than declaring it invalid or stillborn on the ground of repugnancy or otherwise unless, on the facts of a given case, it is not so possible.

36. There cannot be any doubt that acquisition and requisitioning of property, as specified in Entry 42 of List III of Schedule VII which, read with Article 246, is a stand-alone Entry for acquisition of land. The very fact that the subject falls in the Concurrent List means that both the legislative constituents, i.e. the Parliament and the State legislatures, have legislative competence to legislate on that subject. Further, it can also not be disputed that the Land Acquisition Act has been enacted earlier, in point of time, in comparison to BDA Act. The Land Acquisition Act is a law enacted by the Parliament while BDA Act is a State legislation. Therefore, the question that really requires consideration of the Court is whether the State law is in conflict with or repugnant to Central law, if so, what would

be its effect? There is no dispute that the State law, though enacted subsequent to the Central law, is not saved if repugnancy results according to the provisions of Article 254(1) of the Constitution as the BDA Act was never reserved for consideration of the President and never received his assent in terms of Article 254(2) of the Constitution. As this was the principal argument vehemently addressed by the learned counsel appearing for the appellant, let us examine the ambit and scope of these Entries and its impact on the validity of law so enacted.

37. Article 246 of the Constitution of India provides the subject matters on which laws can be enacted by the Parliament or by the State legislatures, as the case may be. In terms of Article 246(1) of the Constitution, the Parliament has the exclusive power to make laws with respect to any of the matters enumerated in List I of Schedule VII, referred to as 'Union List'. Article 246(2) empowers the Parliament and the State legislature, subject to Article 246(1), to make laws on any of the matters enumerated in List III of Schedule VII, termed as 'Concurrent List'. Subject to clauses (1) and (2) of Article 246, the State has exclusive powers to make laws for such State, or any part thereof, with respect to any of the matters enumerated in List II of Schedule VII, termed as State List under Article 246(3). Article 246(4) gives power to the Parliament to make laws with respect to any matter for any part of the territory of India not included in a 'State' and notwithstanding that such matter is a matter enumerated in the State List.

38. As already noticed Entry 42 of List III of Schedule VII relates to 'acquisition and requisitioning of property'. This Entry, read with Article 246 of the Constitution, empowers the Parliament as well as the State legislatures to enact laws in that field. Development of land is not a subject that finds place either in the Concurrent List or in the Union List for that matter. We may now refer to the relevant Entries in the State List. Entry 5 of List II reads as under:

"5. Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration."

And Entry 18 of List II reads as under:

"18. Land, that is to say, right in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization."

39. In other words, the State legislature has legislative competence to enact laws to constitute and define powers of the Municipal Corporation, Improvement Trust and other local authorities for the purpose of local self-governance or village administration. The State is also empowered to enact laws with respect to land, i.e. right in or over the land, transfer and alienation of agricultural land, land improvement, colonising, etc. Thus, these two Entries, which have been worded very widely, give power to the State legislature to constitute and define powers of any local authority which, in furtherance to the powers vested in it, can deal with the subject of development, colonising and even transfer of land etc. The Land Acquisition Act certainly relates to Entry 42 of List III while the BDA Act is undoubtedly relatable to Entries 5 and 18 of List II of Schedule VII.

40. The Entries in the legislative Lists are not the source of powers for the legislative constituents but they merely demarcate the fields of legislation. It is by now well settled law that these Entries are to be construed liberally and widely so as to attain the purpose for which they have been enacted. Narrow interpretation of the Entries is likely to defeat their object as it is not always possible to write these Entries with such precision that they cover all possible topics and without

any overlapping. We may refer to some of the judgments which have enunciated these principles over a considerable period.

41. While interpreting the Entries in the constitutional Lists a seven Judge Bench of this Court in the case of *Union of India* v. *Harbhajan Singh Dhillon* [(1971) 2 SCC 779], held as under:

"**22.** It must be remembered that the function of the lists is not to confer powers; they merely demarcate the legislative field. The Federal Court, while interpreting the Government of India Act in the *Governor-General-in- Council* v. *Releigh Investment Co.* [1944 FCR 229, 261] observed:

"It would not be right to derive the power to legislate on this topic merely from the reference to it in the List, because the purpose of the Lists was not to create or confer powers, but only to distribute between the Federal and the Provincial Legislatures the powers which had been conferred by Sections 99 and 100 of the Act.

23. In *Harakchand Ratanchand Banthia* v. *Union of India* [(1969) 2 SCC 166] Ramaswami, J., speaking on behalf of the Court, while dealing with the Gold (Control) Act (45 of 1968), observed:

"Before construing these entries it is useful to notice some of the well-settled rules of interpretation laid down by the Federal Court and by this Court in the matter of construing the entries. The power to legislate is given to the appropriate Legislature by Article 246 of the Constitution. The entries in the three Lists are only legislative heads or fields of legislation, they demarcate the area over which the appropriate Legislatures can operate."

24. We are compelled to give full effect to Article 248 because we know of no principle of construction by which we can cut down the wide words of a substantive article like Article 248 by the wording of entry in Schedule VII. If the argument of the respondent is accepted. Article 248 would have to be re-drafted as follows:

"Parliament has exclusive power to make any law with respect to any matter not mentioned in the Concurrent List or State List, provided it has not been mentioned by way of exclusion in any entry in List I."

We simply have not the power to add a proviso like this to Article 248."

42. A Constitution Bench of this Court in the case of *Ujagar Prints v. Union of India*, [(1989) 3 SCC 488] described these Entries and also stated the principles which would help in interpretation of these Entries. While enunciating these principles, the Court held as under:

"**48.** Entries to the legislative lists, it must be recalled, are not sources of the legislative power but are merely topics or fields of legislation and must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. The expression "with respect to" in Article 246 brings in the doctrine of "Pith and Substance" in the understanding of the exertion of the legislative power and wherever the question of legislative competence is raised the test is whether the legislation, looked at as a whole, is substantially 'with respect to' the particular topic of legislation. If the legislation has a substantial and not merely a remote connection with the entry, the matter may well be taken to be legislation on the topic."

43. This Court, while referring to the principles of interpretation of Entries in the legislative Lists, expanded the application to all ancillary or subsidiary matters in the case of

Jijubhai Nanabhai Kachar v. State of Gujarat, [(1995) Suppl. 1 SCC 596] and held as under:

> "**7**. It is settled law of interpretation that entries in the Seventh Schedule are not powers but fields of legislation. The legislature derives its power from Article 246 and other related articles of the Constitution. Therefore, the power to make the Amendment Act is derived not from the respective entries but under Article 246 of the Constitution. The language of the respective entries should be given the widest scope of their meaning, fairly capable to meet the machinery of the Government settled by the Constitution. Each general word should extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it. When the vires of an enactment is impugned, there is an initial presumption of its constitutionality and if there is any difficulty in ascertaining the limits of the legislative power, the difficulty must be resolved, as far as possible in favour of the legislature putting the most liberal construction upon the legislative entry so that it may have the widest amplitude…."

44. This line of interpretation had been stated in the case of *Hoechst Pharmaceuticals Ltd. v. State of Bihar*, [(1983) 4 SCC 45] and followed in different judgments of this Court including the judgments cited above. The Courts have taken a consistent view and it is well-settled law that various Entries in three lists are not powers of legislation but are fields of legislation. The power to legislate flows, amongst others, from Article 246 of the Constitution. Article 246(2), being the source of power incorporates the *non-obstante* clause, 'notwithstanding anything contained in Clause (3), Parliament and, subject to clause (1), the legislature of any State' have power to make laws with respect to any of the matters enumerated in List III. Article 246 clearly demarcates the fields of legislative power of the two legislative constituents. It clearly states on what field, with reference to the relevant constitutional

Lists and which of the legislative constituents has power to legislate in terms of Article 246 of the Constitution. While the States would have exclusive power to legislate under Article 246(2) of the Constitution in relation to List II; the Concurrent List keeps the field open for enactment of laws by either of the legislative constituents. In the event the field is covered by the Central legislation, the State legislature is not expected to enact a law contrary to or in conflict with the law framed by the Parliament on the same subject. In that event, it is likely to be hit by the rule of repugnancy and it would be a stillborn or invalid law on that ground. Exceptions are not unknown to the rule of repugnancy/covered field. They are the constitutional exceptions under Article 254(2) and the judge enunciated law where the Courts declare that both the laws can co-exist and operate without conflict. The repugnancy generally relates to the matters enumerated in List III of the Constitution.

45. The Court has to keep in mind that it is construing a Federal Constitution. It is the essence of a Federal Constitution that there should be a distribution of legislative powers between the Centre and the Provinces. In a Federal Constitution unlike a legally omnipotent legislature like British Parliament, the constitutionality of a law turns upon the construction of entries in the legislative Lists. If a legislature with limited or qualified jurisdiction transgresses its powers, such transgression may be open, direct or overt, or disguised, indirect or covert and it may encroach upon a field prohibited to it. Wherever legislative powers are so distributed, situation may arise where two legislative fields might apparently overlap, it is then the duty of the Courts, however, difficult it may be, to ascertain to what degree and to what extent, the Authority to deal with the matters falling within these classes of subjects exist in each legislature and to define, in the particular case before them, the limits of respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result the two provisions must be read together, and the language of one interpreted, and, where necessary modified by that of the other.

[Refer *A.S. Krishna v. Madras State*, AIR 1957 SC 297 and *Federation of Hotels and Restaurants* v. *Union of India*, {(1989) 3 SCC 634}].

46. Keeping these principles in mind and applying different doctrines, as already referred, different Benches of this Court had the occasion to deal with the BDA Act. In the case of *Munithimmaiah* (supra), the Court had taken the view that BDA Act was a self-contained code enacted with reference to Entry 5 of List II and provisions of the Central Act 68 of 1984 cannot form an integral part of the BDA Act. This two Judge Bench judgment was reiterated with approval by a three Judge Bench of this Court in the case of *Bondu Ramaswamy* (supra) and while referring to the Entries in the constitutional Lists the Court rejected the contention that the law enacted under the BDA Act was referable to Entry 42 of List III of Schedule VII and held as under:

> "**90.** The second contention urged by the appellants is as follows: a Development Authority is a city improvement trust referred to in Entry 5 of the State List (List II of the Seventh Schedule). "Acquisition of property" is a matter enumerated in Entry 42 in the Concurrent List (List III of the Seventh Schedule). The LA Act relating to acquisition of property, is an existing law with respect to a matter (Entry 42) enumerated in the Concurrent List. The BDA Act providing for acquisition of property is a law made by the State Legislature under Entry 42 of the Concurrent List. Article 254 of the Constitution provides that if there is any repugnancy between a law made by the State Legislature (the BDA Act) and an existing Central law in regard to a matter enumerated in the Concurrent List (the LA Act), then subject to the provisions of clause (2) thereof, the existing Central law shall prevail and the State law, to the extent of repugnancy, shall be void. Clause (2) of Article 254 provides that if the law made by the State Legislature in regard to any matter enumerated in the Concurrent List, contains any provision repugnant to an existing law with respect to that matter, then, the law so made by the State Legislature, if it had been reserved for the consideration of the President and has received his assent, shall prevail in that State. It is contended that the provisions of Section 19 of the BDA Act are repugnant to the provisions of Section 6 of the LA Act; and as the BDA Act has not been reserved for consideration of the President and has not received his assent, Section 6 of the LA Act will prevail over Section 19 of the BDA Act. This contention also has no merit.
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> XXX XXX XXX
>
> **92.** Where the law covered by an entry in the State List made by the State Legislature contains a provision which directly and substantially relates to a matter enumerated in the Concurrent List and is repugnant to the provisions of any existing law with respect to that matter in the Concurrent List, then the repugnant provision in the State List may be void unless it can coexist and operate without repugnancy to the provisions of the existing law. This Court in *Munithimmaiah v. State of Karnataka [(2002) 4 SCC 326]* has held that the BDA Act is an Act to provide for the establishment of a Development Authority to facilitate and ensure planned growth and development of the city of Bangalore and areas adjacent thereto, and that acquisition of any lands, for such development, is merely incidental to the main object of the Act, that is, development of Bangalore Metropolitan Area. This Court held that in pith and substance, the BDA Act is one which squarely falls under Entry 5 of List II of the Seventh Schedule and is not a law for acquisition of land like the LA Act, traceable to Entry 42 of List III of the Seventh Schedule, the field in respect of which is already occupied by the Central Act, as amended from time to time. This Court held that if at all, the BDA Act, so far as acquisition of land for its

developmental activities is concerned, in substance and effect will constitute a special law providing for acquisition for the special purposes of BDA and the same will not be considered to be a part of the LA Act. The fallacy in the contention of the appellants is that it assumes, erroneously, that the BDA Act is a law referable to Entry 42 of List III, while it is a law referable to Entry 5 of List II. Hence the question of repugnancy and Section 6 of the LA Act prevailing over Section 19 of the BDA Act would not at all arise."

47. Once we analyze the above-stated principle, it is obvious that Entries in the constitutional Lists play a significant role in examining the legislative field taking its source of power from Article 246 of the Constitution. BDA Act is an Act which provides for formulation and implementation of schemes relating to development of the Bangalore City. Acquisition of land is neither its purpose nor its object and is merely an incidental consequence of principal purpose of development of land. Planned development under the scheme is a very wide concept and the concerned Authorities are accordingly vested with amplified functions and powers. We have already held that the provisions of the BDA Act constitute a self-contained code in itself, object of which is planned development under the scheme and not acquisition of land. Thus, only those provisions of the Land Acquisition Act which relate to the acquisition, and have not been enacted under the State law, have to be read into the BDA Act. It has a self-contained scheme with a larger public purpose. The State legislature is competent to enact such a law and it is referable to power and field contained in Article 246(2) of the Constitution read with Entries 5 and 18 of List II of Schedule VII. Such legislation may incidentally refer to Land Acquisition Act for attaining its own object.

48. We are not impressed by the submission that Entry 42 in List III of Schedule VII denudes the power of the State Legislature to the extent that in an enactment within its legislative

competence, it cannot incidentally refer/enact in regard to the subject matter falling in the Concurrent List.

49. At the cost of repetition we need to notice that the BDA Act is relatable to the Entries which squarely fall into a field assigned to the State legislature and, thus, would be a matter within the legislative competence of the State. For that matter State legislature is equally competent to enact a law even with relation to matters enumerated in List III provided it is not a covered field. The BDA Act relates to planned development under the scheme and it has been enacted with that legislative object and intent. An ancillary point thereto or reference to certain other provisions which will help in achieving the purpose of the State law, without really coming in conflict with the Central law, is a matter on which a State can enact according to the principle of incidental encroachment. The Court also has to keep in mind the distinction between 'ancillariness' and 'incidentally affecting'. This distinction was noticed by this Court in the case of *Federation of Hotels and Restaurants* (supra) wherein it held as under:

> "33. On the distinction between what is "ancillariness" and what "incidentally affecting" the treatise says:
>
> "There is one big difference though it is little mentioned. Ancillariness is usually associated with an explicit statutory provision of a peripheral nature; talk about 'incidentally affecting' crops up in connection with the potential of a non-differentiating statute to affect indiscriminately in its application matters assertedly immune from control and others. But it seems immaterial really whether it is its words or its works which draw the flotsam within the statute's wake."

50. The distinction is that 'ancillariness' relates to a law which merely falls in the periphery of an Entry and the 'incidental effect' relates to a law which, in potential, is not controlled by the other legislation.

51. In support of the argument raised by the appellant, heavy reliance was placed upon the case of *Ishwari Khetan Sugar Mills* (P) *Ltd*. v. *State of U.P*. [(1980) 4 SCC 136] to emphasize the submission that an independent Entry, like the Entry for acquisition and requisitioning of property, cannot be made subject matter of an ancillary law. The Court, in paragraph 25 of this judgment, while referring to *Rustom Cavas Jee Cooper v. Union of India* [(1970) 1 SCC 248] held as under:

> "**25**….. that power to legislate for acquisition of property is independent and separate power and is exercisable only under Entry 42 of List II and not as an incident of the power to legislate in respect of a specific head of legislation in any of the three lists".

52. In order to examine the impact of these observations we must refer to the facts of this case. As a result of serious problems created by the owners of certain sugar mills in the State of Uttar Pradesh for cane growers and the labourers employed in those mills, having an adverse impact on the general economy of the areas where these sugar mills were situated, and with a view to ameliorate the situation posing a threat to the economy, the Governor of Uttar Pradesh promulgated an Ordinance titled as U.P. Sugar Undertaking (Acquisition) Ordinance, 1971. With a view to transferring and vesting of sugar undertakings set out in the Schedule to the Ordinance a Government Company, within the meaning Section 617 of the Companies Act, 1956, being U.P. State Sugar Corporation Limited was constituted. Subsequently, U.P. Sugar Undertaking (Acquisition) Ordinance, 1971, was repealed and replaced by the U.P. Sugar Undertaking (Acquisition) Act, 1971. The Act came to be challenged before the High Court on the grounds that the State legislature has no legislative competence to enact the same and that it was violative of Articles 19(1)(f), 19(1)(g) and 31 and it also impugned the guarantee of equality enshrined under Article 14

of the Constitution. The appellant had contended that in exercise of legislative power with reference to Entry 52 of List I, the Parliament made the requisite declaration under Section 2 of the Industrial Development and Regulation Act, 1951 (for short the 'IDR Act'), in respect of the industries specified in the First Schedule of that Act. Sugar, being a declared industry, falls outside the purview of Entry 24 of List II and hence the U.P. State legislature was denuded of legislative powers in respect of sugar industries. This contention was countered by the Attorney General by saying that power to acquire property derived from Entry 42 in List III of Schedule VII, is an independent power. The impugned Act, in pith and substance, being an Act to acquire scheduled undertakings, meaning thereby the properties of the scheduled undertakings, the power of the State legislature to legislate in that behalf is referable to Entry 42 of List III which remained intact irrespective of the fact that 'sugar' has been declared as an industry under the control of the Union Government. The purpose of the State Act in that case was, primarily, to acquire the property, i.e. the land and the sugar factories. The taking over of management of such factory was merely an ancillary or incidental cause. Thus, the Court accepted the argument that it was a matter covered under Entry 42 of List III. Another aspect of that case was that it was a law enacted for acquisition of property and not intended to achieve any other object. Even in that case the Court had taken the view that both these legislations could co-exist without conflict and in para 30 of the judgment held as under:

> "**30.** The impugned legislation was not enacted for taking over management or control of any industrial undertaking by the State Government. In pith and substance it was enacted to acquire the scheduled undertakings. If an attempt was made to take over management or control of any industrial undertaking in a declared industry indisputably the bar of Section 20 would inhibit exercise of such executive power. However, if pursuant to a valid legislation for acquisition of scheduled undertaking the

management stands transferred to the acquiring body it cannot be said that this would be in violation of Section 20. Section 20 forbids executive action of taking over management or control of any industrial undertaking under any law in force which authorises State Government or a local authority do to so. The inhibition of Section 20 is on exercise of executive power but if as a sequel to an acquisition of an industrial undertaking the management or control of the industrial undertaking stands transferred to the acquiring authority, Section 20 is not attracted at all. Section 20 does not preclude or forbid a State Legislature from exercising legislative power under an entry other than Entry 24 of List II, and if in exercise of that legislative power, to wit, acquisition of an industrial undertaking in a declared industry the consequential transfer of management or control over the industry or undertaking follows as an incident of acquisition, such taking over of management or control pursuant to an exercise of legislative power is not within the inhibition of Section 20. Therefore, the contention that the impugned legislation violates Section 20 has no merit."

53. Reliance by the leaned counsel appearing for the appellant on this judgment of the Constitution Bench is misplaced on the facts and in law. The dictum stated in every judgment should be applied with reference to the facts of the case as well as its cumulative impact. Similarly, a statute should be construed with reference to the context and its provisions to make a consistent enactment, i.e. *ex visceribus actus*. The submission, as advanced, is also not supported by the judgment relied upon. In that case, the Court itself declared the State Legislation as not offending or *ultra vires* the Central Act as the State had the legislative competence to enact the same. The Court also held that the provisions of the IDR Act and the U.P. Sugar Undertaking (Acquisition) Act, 1971 can co-exist without any conflict. It was for the reason that the IDR Act was related to organization and management of a declared industry

placed in the Schedule to the IDR Act by Parliament, while acquisition of property was entirely a different constitutional subject. Another aspect of the case is that the observations in para 25 of the judgment were not made after discussing the law on that issue in detail, but were made with regard to the peculiar facts of the case and for the reasons afore-recorded.

54. In the case of *A.S. Krishna* (supra), a Constitution Bench of this Court was concerned with examining the validity of some of the provisions of the Madras Prohibition Act, 1937 as it conflicted with the provisions of the Indian Evidence Act, 1872 and Criminal Procedure Code, 1898. Two contentions were raised on behalf of the appellant; one, that in view of Section 107 of the Government of India Act, 1935, which was the Constitution Act in force when the impugned Act was passed, the provisions repugnant to the existing law are void; second, that the impugned Sections are repugnant to Article 14, and are, thus, void in terms of Article 13(1) of the Constitution. We may notice that the provisions of the Madras Act had provided for search, seizure and certain presumptions which could be raised against an accused person under that Act. The challenge was made on the ground that the field is covered by the Central law and, therefore, State Act was repugnant and consequently void. The Court relied upon previous judgments, including the judgment of Privy Council in the case of *Prafulla Kumar Mukherjee v. Bank of Commerce Ltd., Khulna* [AIR 1947 PC 60] and held as under:

> "... After quoting with approval the observations of Sir Maurice Gwyer, C.J. in *Subrahmanyan Chettiar* v. *Muttuswami Goundan*, above quoted, Lord Porter observed:
>
> > "Their Lordships agree that this passage correctly describes the grounds on which the rule is founded, and that it applies to Indian as well as to Dominion legislation.

> No doubt experience of past difficulties has made the provisions of the Indian Act more exact in some particulars, and the existence of the Concurrent List has made it easier to distinguish between those matters which are essential in determining to which list particular provision should be attributed and those which are merely incidental. But the overlapping of subject-matter is not avoided by substituting three lists for two, or even by arranging for a hierarchy of jurisdictions. Subjects must still overlap, and where they do, the question must be asked what in pith and substance is the effect of the enactment of which complaint is made, and in what list is its true nature and character to be found. If these questions could not be asked, much beneficent legislation would be stifled at birth, and many of the subjects entrusted to Provincial legislation could never effectively be dealt with."

Then, dealing with the question of the extent of the invasion by the Provincial legislation into the Federal fields, Lord Porter observed:

"No doubt it is an important matter, not, as Their Lordships think, because the validity of an Act can be determined by discriminating between degrees of invasion, but for the purpose of determining what is the pith and substance of the impugned Act. Its provisions may advance so far into Federal territory as to show that its true nature is not concerned with provincial matters, but the question is not, has it trespassed more or less, but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not money-lending but promissory notes or banking? Once that question is determined the Act falls on one or the other side of the line and can be seen as valid or invalid according to its true content."

11. Then, there is the decision of the Federal Court in *Lakhi Narayan Das* v. *Province of Bihar*. There, the question related to the validity of Ordinance 4 of 1949 promulgated by the Governor of Bihar. It was attacked on the ground that as a legislation in terms of the Ordinance would have been void, under Section 107(1) of the Government of India Act, the Ordinance itself was void. The object of the Ordinance was the maintenance of public order, and under Entry I of List II, that is a topic within the exclusive competence of the Province. Then the Ordinance provided for preventive detention, imposition of collective fines, control of processions and public meetings, and there were special provisions for arrest and trial for offences under the Act. The contention was that though the sections of the Ordinance relating to maintenance of public order might be covered by Entry I in List II, the sections constituting the offences and providing for search and trial fell within Items 1 and 2 of the Concurrent List, and they were void as being repugnant to the provisions of the Criminal Procedure Code. In rejecting this contention, Mukherjee, J. observed:

> "Thus all the provisions of the Ordinance relate to or are concerned primarily with the maintenance of public order in the Province of Bihar and provide for preventive detention and similar other measures in connection with the same. It is true that violation of the provisions of the Ordinance or of orders passed under it have been made criminal offences but offences against laws with respect to matters specified in List II would come within Item 37 of List II itself, and have been expressly excluded from Item 1 of the Concurrent List. The ancillary matters laying down the procedure for trial of such offences and the conferring of jurisdiction on certain courts for that purpose would be covered completely by Item 2 of List II and it is not necessary for the Provincial

> Legislature to invoke the powers under Item 2 of the Concurrent List."

He accordingly held that the entire legislation fell within Entries I and 2 of List II, and that no question of repugnancy under Section 107(1) arose. This reasoning furnishes a complete answer to the contention of the appellants."

55. In our view the above judgments also furnish a complete answer to the contentions raised before us.

56. Having bestowed our careful consideration to the matter in issue, we are unable to persuade ourselves to accept the contentions that the BDA Act is a law relatable exclusively to Entry 42 of List III of Schedule VII and is beyond the legislative competence of the State legislature.

Application of different doctrines on the facts of the present case to determine repugnancy and/or overlapping

57. It is not necessary for us to refer to the scheme of the Act all over again. Suffice it to note that the BDA Act is a self-contained code with distinct and predominant purpose of carrying out planned development under the finalized schemes in accordance with the provisions of the Act. A Constitution Bench of this Court in the case of *A.S. Krishna* (supra), clearly stated that for application of Section 107 of the Government of India Act, which is *pari materia* to Article 254 of the Constitution, two conditions are necessary; one, that the provisions of provincial law and those of the Central legislation, both must be in respect of the matter which is enumerated in the Concurrent List and second, that they must be repugnant to each other. Once these conditions are satisfied, then alone the repugnancy would arise and the provincial law, to the extent of repugnancy, may become void. The same view was taken by another Constitution Bench of this Court in the case of *Kerala State Electricity Board* v. *Indian Aluminium Co. Ltd.* [(1976)

1 SCC 466]. One of the settled principles to examine the repugnancy or conflict between the provisions of a law enacted by one legislative constituent and the law enacted by the other, under the Concurrent List, is to apply the doctrine of pith and substance. The purpose of applying this principle is to examine, as a matter of fact, what is the nature and character of the legislation in question. To examine the 'pith and substance' of a legislation, it is required of the Court to examine the legislative scheme, object and purpose of the Act and practical effect of its provisions. After examining the statute and its provisions as a whole, the Court has to determine whether the field is already covered. While examining these aspects, it should further be kept in mind that the legislative constituent enacting the law has the legislative competence with respect to Article 246 read with the Lists contained in Schedule VII to the Constitution. It is the result of this collective analysis which will demonstrate the pith and substance of the legislation and its consequential effects upon the validity of that law. The BDA Act is a social welfare legislation intended to achieve social object of planned development under the schemes made by the Authority concerned in accordance with the provisions of the Act. The fact that this subject falls within the legislative competence of the State is unquestionable. The attempt of the State legislation is to provide complete measures and methodology to attain its object by establishment of a single Authority to check haphazard and irregular growth and to formulate and implement schemes providing for proper amenities and planned development of the city of Bangalore. Acquisition of land is not its primary purpose but, of course, acquisition of some land may become necessary to achieve its object which is to be specified at the outset of formation of schemes in terms of Section 16 of the BDA Act. Thus, acquisition of land is nothing but incidental to the main object of the State law.

58. It will be useful to notice that in the case of *State of West Bengal* v. *Kesoram Industries Ltd.* [(2004) 10 SCC 201],

a Constitution Bench of this Court, while examining the scheme of allocation of legislative powers under Part XI, Chapter-I of the Constitution, examined the relevant Entries and applied different principles of interpretation including the principle of pith and substance. Referring to the law laid down in *Hoechst Pharmaceuticals Ltd.* (supra), the Court held that in spite of the fields of legislation having been demarcated, the question of repugnancy between a law made by Parliament and a law made by the State legislature may arise only in cases when both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List and a direct conflict is seen. If there is a repugnancy due to overlapping found between List II on the one hand and List I and List III on the other, the State law will be *ultra vires* and shall have to give way to the Union law. Having stated the principle that the Court may apply the doctrine of pith and substance in terms of ascertaining the true character of the legislation, it was further held that the Entries in two Lists (I and II in that case) must be construed in a manner so as to avoid conflict. While facing an alleged conflict between the Entries in these Lists, what has to be decided first is whether there is actually any conflict. If there is none, the question of application of the *non-obstante* clause does not arise. In case of a *prima facie* conflict, the correct approach to the question is to see whether it is possible to effect reconciliation between the two Entries so as to avoid such conflict. Still further, the Court held that in the event of a conflict it should be determined by applying the doctrine of pith and substance to find out, whether, between Entries assigned to two different legislatures, the particular subject of the legislation falls within the ambit of the one or the other. Where there is a clear and irreconcilable conflict between the Union and a Provincial legislature it is the law of the Union that must prevail. In that event the Court can proceed to examine whether an incidental encroachment upon another field of legislation can be ignored, reference can be made to paras 31, 75 and 129 of that judgment. The judgment of *Kesoram Industries Ltd.* (supra) was followed by another Bench of this Court in the case

of *Central Bank of India* v. *State of Kerala* [(2009) 4 SCC 94], where, in para 32, the Court reiterated the dictum that an incidental encroachment upon the field assigned to another legislature is to be ignored.

59. A Constitution Bench, while answering a Presidential Reference and deciding connected cases, in the case of *Association of Natural Gas* v. *Union of India* [(2004) 4 SCC 489], stated the principle that it is the duty of the Court to harmonize laws and resolve conflicts. In para 13 of the judgment, the Court held as under:

> "**13.** The Constitution of India delineates the contours of the powers enjoyed by the State Legislature and Parliament in respect of various subjects enumerated in the Seventh Schedule. The rules relating to distribution of powers are to be gathered from the various provisions contained in Part XI and the legislative heads mentioned in the three lists of the Schedule. The legislative powers of both the Union and State Legislatures are given in precise terms. Entries in the lists are themselves not powers of legislation, but fields of legislation. However, an entry in one list cannot be so interpreted as to make it cancel or obliterate another entry or make another entry meaningless. In case of apparent conflict, it is the duty of the court to iron out the crease and avoid conflict by reconciling the conflict. If any entry overlaps or is in apparent conflict with another entry, every attempt shall be made to harmonise the same."

60. We shall shortly examine whether there is conflict between the two laws which are the subject matter of the present appeal but, on due application of the principle of pith and substance, we have no doubt in our minds that the BDA Act is actually referable to Entry 5 of List II of Schedule VII to the Constitution.

61. We are dealing with a federal Constitution and its essence is the distribution of legislative powers between the

Centre and the State. The Lists enumerate, elaborately, the topics on which either of the legislative constituents can enact. Despite that, some overlapping of the field of legislation may be inevitable. Article 246 lays down the principle of federal supremacy that in case of inevitable and irreconcilable conflict between the Union and the State powers, the Union power, as enumerated in List I, shall prevail over the State and the State power, as enumerated in List II, in case of overlapping between List III and II, the former shall prevail. This principle of federal supremacy laid down in Article 246(1) of the Constitution should normally be resorted to only when the conflict is so patent and irreconcilable that co-existence of the two laws is not feasible. Such conflict must be an actual one and not a mere seeming conflict between the Entries in the two Lists. While Entries have to be construed liberally, their irreconcilability and impossibility of co-existence should be patent. One, who questions the constitutional validity of a law as being *ultra vires*, takes the onus of proving the same before the Court. Doctrines of pith and substance, overlapping and incidental encroachment are, in fact, species of the same law. It is quite possible to apply these doctrines together to examine the repugnancy or otherwise of an encroachment. In a case of overlapping, the Courts have taken the view that it is advisable to ignore an encroachment which is merely incidental in order to reconcile the provisions and harmoniously implement them. If, ultimately, the provisions of both the Acts can co-exist without conflict, then it is not expected of the Courts to invalidate the law in question. While examining the repugnancy between the two statutes, the following principles were enunciated in the case of *Deep Chand* v. *State of U.P.* [AIR 1959 SC 648]:

"(1) There may be inconsistency in the actual terms of the competing statutes;

(2) Though there may be no direct conflict, a State law may be inoperative because the Commonwealth law, or the award of the Commonwealth Court, is intended to be a complete exhaustive code; and

(3) Even in the absence of intention, a conflict may arise when both State and Commonwealth seek to exercise their powers over the same subject matter."

62. The repugnancy would arise in the cases where both the pieces of legislation deal with the same matter but not where they deal with separate and distinct matters, though of a cognate and allied character. Where the State legislature has enacted a law with reference to a particular Entry with respect to which, the Parliament has also enacted a law and there is an irreconcilable conflict between the two laws so enacted, the State law will be a stillborn law and it must yield in favour of the Central law. To the doctrine of occupied/overlapping field, resulting in repugnancy, the principle of incidental encroachment would be an exception**.** While dealing with this aspect this Court, in the case of *Fatehchand Himmatlal* v. *State of Maharashtra* [(1977) 2 SCC 670], held as under :

> "It has been held that the rule as to predominance of Dominion legislation can only be invoked in case of absolutely conflicting legislation in pari materia when it will be an impossibility to give effect to both the Dominion and provincial enactments. There must be a real conflict between the two Acts i.e. the two enactments must come into collision. The doctrine of Dominion paramountcy does not operate merely because the Dominion has legislated on the same subject-matter. The doctrine of "occupied field" applies only where there is a clash between Dominion Legislation and Provincial Legislation within an area common to both. Where both can co-exist peacefully, both reap their respective harvests (Please see: *Canadian Constitutional Law by Laskin* — pp. 52-54, 1951 Edn)."

63. Besides the above principles, this Bench had an occasion to consider the provisions of the MRTP Act, an Act,

the object of which is quite similar to the BDA Act and while examining the alleged repugnancy on the touchstone of these very doctrines, the Court in the case of *Girnar Traders-III* (supra) held as under:

> "The doctrine of pith and substance can be applied to examine the validity or otherwise of a legislation for want of legislative competence as well as where two legislations are embodied together for achieving the purpose of the principal Act. Keeping in view that we are construing a federal Constitution, distribution of legislative powers between the Centre and the State is of great significance. Serious attempt was made to convince the Court that the doctrine of pith and substance has a very restricted application and it applies only to the cases where the Court is called upon to examine the enactment to be *ultra vires* on account of legislative incompetence. We are unable to persuade ourselves to accept this proposition. The doctrine of pith and substance find its origin from the principle that it is necessary to examine the true nature and character of the legislation to know whether it falls in a forbidden sphere. This doctrine was first applied in India in the case of *Prafulla Kumar Mukherjee v. Bank of Commerce Ltd., Khulna* [AIR 1947 PC 60]. The principle has been applied to the cases of alleged repugnancy and we see no reason why its application cannot be extended even to the cases of present kind which ultimately relates to statutory interpretation founded on source of legislation. In the case of *Union of India v. Shah Gobardhan L. Kabra Teachers' College* [(2002) 8 SCC 228], this Court held that in order to examine the true character of the enactment, the entire Act, its object and scope is required to be gone into. The question of invasion into the territory of another legislation is to be determined not by degree but by substance. The doctrine of pith and substance has to be applied not only in cases of conflict between the powers of two legislatures but also in any case where the question arises whether a

> legislation is covered by a particular legislative field over which the power is purported to be exercised. In other words, what is of paramount consideration is that the substance of the legislation should be examined to arrive at a correct analysis or in examining the validity of law, where two legislations are in conflict or alleged to be repugnant. An apparent repugnancy upon proper examination of substance of the Act may not amount to a repugnancy in law. Determination of true nature and substance of the laws in question and even taking into consideration the extent to which such provisions can be harmonized, could resolve such a controversy and permit the laws to operate in their respective fields. The question of repugnancy arises only when both the legislatures are competent to legislate in the same field, i.e. when both, the Union and the State laws, relate to a subject in List III [(*Hoechst Pharamaceuticals Ltd*. v. *State of Bihar* [(1983) 4 SCC 45)]. We have already noticed that according to the appellant, the source of legislation being Article 246 read with Entry No. 42 of the Concurrent List the provisions of the State Act in so far as they are in conflict with the Central Act, will be still born and ineffective. Thus, provisions of Section 11A of the Land Acquisition Act would take precedence. On the contrary, it is contended on behalf of the respondent that the planned development and matters relating to management of land are relatable to Entry 5/18 of State List and acquisition being an incidental act, the question of conflict does not arise and the provisions of the State Act can be enforced without any impediment. This controversy need not detain us any further because the contention is squarely answered by the Bench of this Court in *Bondu Ramaswami's* case (supra) where the Court not only considered the applicability of the provisions of the Land Acquisition Act vis-à-vis the Bangalore Act but even traced the source of legislative competence for the State law to Entry 5 of List II of Schedule VII and held as under:

"92. Where the law covered by an entry in the State List made by the State Legislature contains a provision which directly and substantially relates to a matter enumerated in the Concurrent List and is repugnant to the provisions of any existing law with respect to that matter in the Concurrent List, then the repugnant provision in the State List may be void unless it can coexist and operate without repugnancy to the provisions of the existing law. This Court in *Munithimmaiah v. State of Karnataka [(2002) 4 SCC 326]* has held that the BDA Act is an Act to provide for the establishment of a Development Authority to facilitate and ensure planned growth and development of the city of Bangalore and areas adjacent thereto, and that acquisition of any lands, for such development, is merely incidental to the main object of the Act, that is, development of Bangalore Metropolitan Area. This Court held that in pith and substance, the BDA Act is one which squarely falls under Entry 5 of List II of the Seventh Schedule and is not a law for acquisition of land like the LA Act, traceable to Entry 42 of List III of the Seventh Schedule, the field in respect of which is already occupied by the Central Act, as amended from time to time. This Court held that if at all, the BDA Act, so far as acquisition of land for its developmental activities is concerned, in substance and effect will constitute a special law providing for acquisition for the special purposes of BDA and the same will not be considered to be a part of the LA Act. The fallacy in the contention of the appellants is that it assumes, erroneously, that the BDA Act is a law referable to Entry 42 of List III, while it is a law referable to Entry 5 of List II. Hence the question of repugnancy and Section 6 of the LA Act prevailing over Section 19 of the BDA Act would not at all arise."

While holding as above, the Bench found that the question of repugnancy did not arise. The Court has to keep in mind that function of these constitutional Lists is not to confer power, but to merely demarcate the legislative heads or fields of legislation and the area over which the appropriate legislatures can operate. These Entries have always been construed liberally as they define fields of power which spring from the constitutional mandate contained in various clauses of Article 246. The possibility of overlapping cannot be ruled out and by advancement of law this has resulted in formulation of, amongst others, two principal doctrines, i.e. doctrine of pith and substance and doctrine of incidental encroachment. The implication of these doctrines is, primarily, to protect the legislation and to construe both the laws harmoniously and to achieve the object or the legislative intent of each Act. In the ancient case of *Muthuswami Goundan* v. *Subramanyam Chettiar* [1940 FCR 188], Sir Maurice Gwyer, CJ supported the principle laid down by the Judicial Committee as a guideline, i.e. pith and substance to be the true nature and character of the legislation, for the purpose of determining as to which list the legislation belongs to.

XXX XXX XXX

The primary object of applying these principles is not limited to determining the reference of legislation to an Entry in either of the lists, but there is a greater legal requirement to be satisfied in this interpretative process. A statute should be construed so as to make it effective and operative on the principle expressed in the maxim *ut res magis valeat quam pereat*. Once it is found that in pith and substance, an Act is a law on a permitted field then any incidental encroachment, even on a forbidden field, does not affect the competence of the legislature to enact that law [*State of Bombay* v. *Narottamdas Jethabhai* [1951 SCR 51]. To examine the true application of these

principles, the scheme of the Act, its object and purpose, the pith and substance of the legislation are required to be focused at, to determine its true nature and character. The State Act is intended only to ensure planned development as a statutory function of the various authorities constituted under the Act and within a very limited compass. An incidental cause cannot override the primary cause. When both the Acts can be implemented without conflict, then need for construing them harmoniously arises. We have already discussed in great detail that the State Act being a code in itself can take within its ambit provisions of the Central Act related to acquisition, while excluding the provisions which offend and frustrate the object of the State Act. It will not be necessary to create, or read into the legislations, an imaginary conflict or repugnancy between the two legislations, particularly, when they can be enforced in their respective fields without conflict. Even if they are examined from the point of view that repugnancy is implied between Section 11A of the Land Acquisition Act and Sections 126 and 127 of the MRTP Act, then in our considered view, they would fall within the permissible limits of doctrine of “incidental encroachment” without rendering any part of the State law invalid. Once the doctrine of pith and substance is applied to the facts of the present case, it is more than clear that in substance the State Act is aimed at planned development unlike the Central Act where the object is to acquire land and disburse compensation in accordance with law. Paramount purpose and object of the State Act being planned development and acquisition being incidental thereto, the question of repugnancy does not arise. The State, in terms of Entry 5 of List II of Schedule VII, is competent to enact such a law. It is a settled canon of law that Courts normally would make every effort to save the legislation and resolve the conflict/repugnancy, if any, rather than invalidating the statute. Therefore, it will be the purposive approach to permit both the enactments to

operate in their own fields by applying them harmoniously. Thus, in our view, the ground of repugnancy raised by the appellants, in the present appeals, merits rejection.

A self-contained code is an exception to the rule of referential legislation. The various legal concepts covering the relevant issues have been discussed by us in detail above. The schemes of the MRTP Act and the Land Acquisition Act do not admit any conflict or repugnancy in their implementation. The slight overlapping would not take the colour of repugnancy. In such cases, the doctrine of pith and substance would squarely be applicable and rigours of Article 254(1) would not be attracted. Besides that, the reference is limited to specific provisions of the Land Acquisition Act, in the State Act. Unambiguous language of the provisions of the MRTP Act and the legislative intent clearly mandates that it is a case of legislation by incorporation in contradistinction to legislation by reference. Only those provisions of the Central Act which precisely apply to acquisition of land, determination and disbursement of compensation in accordance with law, can be read into the State Act. But with the specific exceptions that the provisions of the Central Act relating to default and consequences thereof, including lapsing of acquisition proceedings, cannot be read into the State Act. It is for the reason that neither they have been specifically incorporated into the State law nor they can be absorbed objectively into that statute. If such provisions (Section 11A being one of such sections) are read as part of the State enactment, they are bound to produce undesirable results as they would destroy the very essence, object and purpose of the MRTP Act. Even if fractional overlapping is accepted between the two statutes, then it will be saved by the doctrine of incidental encroachment, and it shall also be inconsequential as both the constituents have enacted the respective laws within their legislative competence and, moreover, both the statutes can eloquently co-exist and

operate with compatibility. It will be in consonance with the established canons of law to tilt the balance in favour of the legislation rather than invalidating the same, particularly, when the Central and State Law can be enforced symbiotically to achieve the ultimate goal of planned development. Thus, the contentions raised by the appellants are unsustainable in law as considered by us under different heads and are liable to be rejected."

64. Another argument, that was advanced on behalf of the respondents, is that it is not permissible in law to disintegrate the provisions of the Act for the purposes of determining legislative competence. Such approach shall be contrary to the accepted canon of interpretative jurisprudence that the Act should be read as a whole for that purpose. This argument was raised to counter the contention raised on behalf of the appellant that adopted provisions of the Land Acquisition Act, in terms of Section 36 of the BDA Act, are relatable only to Entry 42 of List III and such law enacted by the Parliament cannot be construed incidental to any other law.

65. It is an established principle of law that an Act should be construed as a complete instrument and not with reference to any particular provision or provisions. "That you must look at the whole instrument inasmuch as there may be inaccuracy and inconsistency; you must, if you can, ascertain what is the meaning of the instrument taken as a whole in order to give effect, if it be possible to do so, to the intention of the framer of it", said Lord Halsbury. When a law is impugned as *ultra vires* the powers of the legislature which enacted it, what has to be ascertained is the true character of the legislation. To do so one must have regard to the enactment as a whole, to its object and to the scope and effect of its provisions. It would be quite an erroneous approach to view such a statute not as an organic whole but as a mere collection of sections, then disintegrate it into parts, examine under what head of legislation those parts would severally fall and by that process

determine what portions thereof are *intra vires*, and what are not [Reference can be made to *A.S. Krishna's case* (supra)].

66. The BDA Act is an Act, primarily, enacted by the State Legislature for checking haphazard construction and for planned development. This is undoubtedly referable to Entries 5 and 18 of List II of Schedule VII. Undoubtedly, Land Acquisition Act is a law enacted by the Parliament with reference to Entry 42 of List III read with Article 246 of the Constitution. The only question now to be considered is whether, in this backdrop, it is advisable and possible to disintegrate the provisions of an Act for the purpose of examining their legislative competence. Emphasis was laid on the disintegration of the provisions of the Act which we prefer to refer as 'Concept of Fragmentation'. 'Fragmentation' has been defined and clarified by the dictionaries as follows:

Concise Oxford English Dictionary, 11th Edition, 2008:

Fragment: *n. a small part broken off or detached, an isolated or incomplete part, v. break into fragments.*

Derivatives- fragmentation n.

P. Ramanatha Aiyar's Law Lexicon, 2nd Edition, 1997:

Fragmentation**:** *the action or process of breaking into fragments.*

67. The meaning given to this expression in common parlance is precept to its application in law as well. In other words, it would mean that you should fragment the Act and then trace its relevant entries in the constitutional Lists to finally examine the legislative competence. The concept of fragmentation may not be an appropriate tool to be used for examining the statutory repugnancy or plea of *ultra vires*. Essentially, the statute should be examined as a whole and its true nature and character should be spelt out in the reasoning

leading to the conclusion whether a law is repugnant or *ultra vires*.

68. Collective and cohesive reading of an Act has been considered by the Courts as a pre-requisite to interpretation. Thus, the concept of fragmentation is least applied by the Courts for proper interpretation. Fragmentation by itself is not a tool of interpretation which can lead to any final conclusion. It is a concept which can be pressed into service either to attain greater clarity of the relevant statutory provisions, its ingredients or spell out its requirements. Sometimes, it may be useful to disintegrate or fragment a statute to examine proper legislative intent and to precisely define its requirement. Mere dissection of the language of a provision would be inconsequential unless it is coupled with, or is intended to bring into play, another accepted doctrine of statutory interpretation. In other words, fragmentation may be of great help and used as a prior step to application of principles like ancillariness, pith and substance, incidental encroachment, severability etc. Concept of fragmentation has been understood differently in different contexts vis-à-vis doctrines of severability and ancillariness.

69. Laskin, in his classic, *Canadian Constitutional Law,* 4th edition, 1973, whilst studying the logic of Sections 91 and 92 of the Canadian Constitution, embarked on an analysis of what constitutes "matter," which he described as a concern with 'the pith and substance' of the statute, as follows at page 99:

> "The typical statute is a composite, assembling many specific and detailed provisions into a single package, separating them into parts and sections, each with its own morsel of meaning. Since ordinary litigation arises out of the attempt to apply some one provision and even many references have addressed themselves especially to designated portions, one must start by settling on the pith and substance of what is relevant."

70. In this manner, he termed the determination of the

"matter" of the statute as a threshold inquiry which precedes and must proceed independently of the content of the competing legal categories whose application flow from it. He acknowledges a situation where although the pith and substance of the whole statute is such as to come within an available class of subjects, the separately considered matter of a particular provision might not. This is the very situation that has seized us in the present case and in Laskin's own words, "Does the good redeem, perish with, or survive the bad?"

71. The doctrine of ancillariness adds further legitimacy to the statute whose validity has been upheld on the basis of the doctrine of pith and substance. On the other hand, the doctrine of severability comes into play to determine the issue of guilt by association or salvation by disassociation. It is Laskin's submission that the doctrine of ancillariness operates by suppressing the special tendencies of special provisions and treating them as merely elements in the common structure. In such manner "it polarizes the statute so that no part of it is conceived as having an independent direction but all are seen as pointed toward the one central matter."

72. Thus, Laskin uses ancillariness and severability as devices in identifying the statutory 'matter'. This view paves the way for fragmenting the statute theoretically to determine whether the impugned portion is redeemed by the rest of the statute or must perish so that the remainder may survive. Such a theory of fragmentation is supported by Laskin's discourse:

> "**Ancillariness deals with fusion, severability with fission**. Each arises where there is possibly a different orientation of a statute and of some of its components. They are mutually exclusive in their operation. With ancillariness, the pith and substance of the whole swallows up the matter of the part which then has no independent significance; with severability, the difference is not only preserved but insisted on and the question is what consequences flow from a plurality of 'matters'."

73. In a variation of the view that the statute is to be adjudged as an integrated whole Laskin, in the above discussed backdrop, entertains the alternative of disaggregating the statute into components or fragments as preceding such judgment as follows:

> "The quality of severability becomes relevant only on the premise that one at least of the "matters," whether that of the whole statute or that of a part, may not come within any class of subjects within the ambit of the enacting legislature's authority. If, in that situation, the portion is severable, the matter of each fragment into which the statute is decomposed is assigned to the class of subjects deemed appropriate. Either the portion exscinded or the mass from which it is drawn may then be sustained despite the shakiness of the other. But if, resisting assimilation under the doctrine of ancilliarity, a part of the statute deals with some 'matter' which is alien to the pith and substance of the whole statute and they are not severable, the illegitimacy of either's matter affects the other and both must fall."

74. Fragmentation is neither synonymous with nor an alternative to the doctrines of severability or ancillariness. Later are the doctrines which can be applied by themselves to achieve an end result, while fragmentation, as already noticed, is only a step prior to final determination with reference to any of the known principles. In this manner fragmentation of statute may be theoretically undertaken in the process of arriving at the pith and substance of a statute or even determining the field of ancillariness. In case of repugnancy when a State Act is repugnant to a Central law, within the meaning of Article 254, what becomes void is not the entire Act but, only in so far as it is repugnant to the Central Act and this is the occasion where the doctrine of severability would operate. For the application of this doctrine, it has to be determined whether the valid parts of statute are separable from the invalid parts thereof and it is

the intention of the Legislature which is the determining factor. The test to be applied is whether the Legislature would have enacted the valid part if it had known that rest of the statute was invalid. This may not be true where valid and invalid provisions are so inextricably mixed up that they cannot be separated. Another principle used by the courts, while applying the doctrine of severability, is to find whether the separated valid part forms a single scheme which is intended to operate as a whole independent of the invalid part. Reference in this regard can be made to *R.M.D. Chamarbaugwalla v. Union of India,* [AIR 1957 SC 628]. Doctrine of severability can also be applied to the legislation which is partly *ultra vires*.

75. Thus, severability is not fragmentation. Fragmentation may be used to effectively consider the statutory provisions at a threshold stage prior to declaration of repugnancy or *ultra vires* of a statute, while severability is a doctrine to be applied post such declaration. In other words, fragmentation serves as a means to achieve the end, i.e. severability. The principle of severability becomes relevant only on the premise that at least one of the matters, whether that of the whole statute or part thereof, may not come within any class of the subjects within the ambit of the enacting legislature's authority. We have already noticed, in detail, the view of Laskin in regard to projection of the entire Act as a whole rather than to signify any part thereof.

76. With the above distinctions in mind, let us now examine the impact of fragmentation on the BDA Act while determining its pith and substance and ultimately its source in the constitutional Lists. We have already noticed that the BDA Act is an Act aimed at implementation of schemes for planned development and stoppage of haphazard construction. On the other hand, the Land Acquisition Act is an Act dealing strictly with acquisition of land. Section 36(1) of the BDA Act refers to application of the provisions of the Land Acquisition Act to that Act as far as practicable. The other provision making a

reference, that too indirectly, to acquisition is Section 27 of the BDA Act which contemplates that in the event of a scheme having lapsed, the provisions of Section 36 shall become inoperative. One also finds reference to acquisition in Section 16 of the BDA Act where the scheme prepared for implementation shall also indicate the land to be acquired for proper implementation of the provisions of the BDA Act. Even if, for the sake of argument, Section 36 is said to be traceable to Entry 42 of List III of Schedule VII to the Constitution, in that event, this reference would have to be suppressed to give weightage to the provisions aimed at development which are referable to Entries 5 and 18 of List II of Schedule VII to the Constitution. The entire BDA Act is directed towards implementation of the schemes for development and acquisition is only incidental to the same as held by us in the earlier part of the judgment. Different provisions of the BDA Act are found to be pointing towards the one central matter, i.e. development, one provision in the entire scheme of the BDA Act cannot be conceived as having an independent direction. Firstly, we find no reason to apply the concept of fragmentation to determine the pith and substance of the Act which, in fact, we have held to be 'planned development', referable to Entries 5 and 18 of List II of Schedule VII. Secondly, even if various provisions of the Act are fragmented, then it would still lead to the same result and the pith and substance of the Act would still be traceable to the same Entries. We have discussed this concept only as an alternative submission put forth by the respondents. Their contention that it is not necessary to travel into the intricacies of this concept has some merit and application of fragmentation would serve no end and would also not be in consonance with the settled canons of statutory interpretation.

77. Having examined the pith and substance of the impugned legislation and holding that it is relatable to Entries 5 and 18 of List II of Schedule VII of the Constitution, the question of repugnancy can hardly arise. Furthermore, the

constitutionality of the impugned Act is not determined by the degree of invasion into the domain assigned to the other Legislature but by its pith and substance. The true nature and character of the legislation is to be analysed to find whether the matter falls within the domain of the enacting Legislature. The incidental or ancillary encroachment on a forbidden field does not affect the competence of the legislature to make the impugned law.

78. Now, on this anvil, let us examine the provisions of the BDA Act. It is an Act which has a self-contained scheme dealing with all the situations arising from the formation of the scheme for planned development to its execution. It is not a law enacted for acquisition or requisitioning of properties. Various terms used in the Act, like amenity, civic amenities, betterment tax, building, operations, development, streets etc. are directly, and only, relatable to 'development' under a 'scheme' framed under the provisions of the Act, as observed in *K.K. Poonacha* (supra). The BDA Act also provides for an adjudicatory process for the actions which may be taken by the authorities or functionaries against the persons; except to the limited extent of acquisition of land and payment of compensation thereof. For that very purpose, Section 36 of the BDA Act has been incorporated into the provisions of Land Acquisition Act. To the limited extent of acquisition of land and payment of compensation, the provisions of the Land Acquisition Act would be applicable for the reason that they are neither in conflict with the State law nor do such provisions exist in that Act. The provisions of the Land Acquisition Act relating thereto would fit into the scheme of the BDA Act. Both the Acts, therefore, can co-exist and operate without conflict. It is no impossibility for the Court to reconcile the two statutes, in contrast to invalidation of the State law which is bound to cause serious legal consequences. Accepting the argument of the appellant would certainly frustrate the very object of the State law, particularly when both the enactments can peacefully operate together. To us, there appears to be no direct conflict between

the provisions of the Land Acquisition Act and the BDA Act. The BDA Act does not admit reading of provisions of Section 11A of the Land Acquisition Act into its scheme as it is bound to debilitate the very object of the State law. The Parliament has not enacted any law with regard to development the competence of which, in fact, exclusively falls in the domain of the State Legislature with reference to Entries 5 and 18 of List II of Schedule VII. Both these laws cover different fields of legislation and do not relate to the same List, leave apart the question of relating to the same Entry. Acquisition being merely an incident of planned development, the Court will have to ignore it even if there was some encroachment or overlapping. The BDA Act does not provide any provision in regard to compensation and manner of acquisition for which it refers to the provisions of the Land Acquisition Act. There are no provisions in the BDA Act which lay down detailed mechanism for the acquisition of property, i.e. they are not covering the same field and, thus, there is no apparent irreconcilable conflict. The BDA Act provides a specific period during which the development under a scheme has to be implemented and if it is not so done, the consequences thereof would follow in terms of Section 27 of the BDA Act. None of the provisions of the Land Acquisition Act deals with implementation of schemes. We have already answered that the acquisition under the Land Acquisition Act cannot, in law, lapse if vesting has taken place. Therefore, the question of applying the provisions of Section 11Aof the Land Acquisition Act to the BDA Act does not arise. Section 27 of the BDA Act takes care of even the consequences of default, including the fate of acquisition, where vesting has not taken place under Section 27(3). Thus, there are no provisions under the two Acts which operate in the same field and have a direct irreconcilable conflict.

79. Having said so, now we proceed to record our answer to the question referred to the larger Bench as follows:

"For the reasons stated in this judgment, we hold that the

BDA Act is a self-contained code. Further, we hold that provisions introduced in the Land Acquisition Act, 1894 by Central Act 68 of 1984, limited to the extent of acquisition of land, payment of compensation and recourse to legal remedies provided under the said Act, can be read into an acquisition controlled by the provisions of the BDA Act but with a specific exception that the provisions of the Land Acquisition Act in so far as they provide different time frames and consequences of default thereof, including lapsing of acquisition proceedings ,cannot be read into the BDA Act. Section 11A of the Land Acquisition Act being one of such provisions cannot be applied to the acquisitions under the provisions of the BDA Act."

80. The Reference is answered accordingly. Matter now be placed before the appropriate Bench for disposal in accordance with law.

R.P. Reference answered.

COMMISSIONER OF CUSTOMS (IMPORT)
v.
STONEMAN MARBLE INDUSTRIES & ORS.
(Civil Appeal Nos. 4371-4383 of 2004 etc.)

JANUARY 21, 2011

[D.K. JAIN AND A.K. PATNAIK, JJ.]

CUSTOMS TARIFF ACT, 1975:

Section 130-A – Application by Revenue – Held: It is for the party applying for reference to clearly state the question of law which he seeks to be referred –In the instant case, the Revenue did not assail the Tribunal's finding to the effect that the facts in the instant case were similar to those in the cited judgment – Unless the correctness of facts, on the basis wherein an inference is drawn by the Tribunal, is put in issue, a question of law does not arise from its order – Revenue did not discharge its burden u/s 130-A in as much as it did not specifically challenge the Tribunal's finding as being perverse – Therefore, the High Court was justified in declining to issue direction to the Tribunal to make a reference u/s 130A.

Section 111(d), 112 and 125 – Confiscation of imported goods – Redemption fine and penalty – HELD: A standard formula cannot be laid down for imposition of redemption fine and penalty under the provisions of the Act and each case has to be examined on its own facts but when a final fact finding body returns a finding that the facts obtaining in each of the cases before it are similar, and such finding is not questioned, levy of redemption fine or penalty uniformly in all such cases cannot be construed as laying down an absolute formula.

The respondents, engaged in the business of import of rough marble blocks, classifiable under sub-heading

1515.12 of the Customs Tariff Act, 1975. The goods imparted by them were confiscated u/s 111(d) of the Act. They were given option to redeem the goods on payment of redemption fine, which was fixed adopting the margin of profit as the basis, u/s 125, with penalty levied u/s 112(a) of The Act. The appeals of importers were partly allowed by the Customs, Excise and Gold(Control) Appellate Tribunal, observing that the facts in each case were similar to those in *M/s Stonemann Marble Industries vs. Commissioner of Customs*; decided on 30.1.2002, and, therefore, reduced the redemption fine and penalty to 20% and 5% of the CIF value, respectively. The Revenue filed an application u/s 130 A of the Act before the High Court stating the questions for reference by the Tribunal to the High Court. The High Court rejected the applications on the ground that no question of law arose from orders of the Tribunal. Aggrieved, Revenue filed the appeals.

Dismissing the appeals, the Court

HELD:

1.1 On a bare perusal of the provisions of s. 130 A of the Customs Tariff Act, 1975, it is manifest that it is for the party applying for reference to clearly state the question of law which he seeks to be referred to the High Court and then it is for the High Court to consider whether any such question of law stated in the application for reference before it should be directed to be referred. In the instant cases, it is manifest from the format of the questions proposed by the Revenue, for reference to the High Court that the Revenue did not assail the Tribunal's finding to the effect that the facts in the instant cases were similar to those in *M/s. Stonemann Marble Industries*. It is a trite proposition that unless the correctness of facts, on the basis whereof an inference

is drawn by the Tribunal, is put in issue, a question of law does not arise from its order. Therefore, the High Court has rightly held that the questions raised by the Revenue for reference could not be said to be questions of law. The Revenue did not specifically challenge the finding of the Tribunal that the facts in the instant cases were similar to those in *M/s. Stonemann Marble Industries*, which was essentially a finding of fact. [paras 11 and 15] [553-B-D; 555-B-C]

Beer Sain Vs. Commissioner of Customs ***(ICD)*** **2007 (15) SCC 362;** *Dhirajlal Girdharilal Vs. Commissioner of Income Tax, Bombay* **AIR 1955 SC 271*; K.*** *Ravindranathan Nair Vs. Commissioner of Income Tax, Ernakulam* **2000 (5) Suppl. SCR 244 = 2001 (1) SCC 135*;*** *Sudarshan Silks & Sarees Vs. Commissioner of Income Tax, Karnataka* **2008 (6) SCR 456 = 2008 (12) SCC 458 – relied on.**

1.2 Although, a standard formula cannot be laid down for imposition of redemption fine and penalty under the provisions of the Act and each case has to be examined on its own facts but when a final fact finding body returns a finding that the facts obtaining in each of the cases before it are similar, and such finding is not questioned, levy of redemption fine or penalty uniformly in all such cases cannot be construed as laying down an absolute formula, which is the case at hand. The Revenue did not discharge its burden u/s 130A of the Act in as much as it did not specifically challenge the Tribunal's finding as being perverse. In this view of the matter, the High Court was justified in declining to issue direction to the Tribunal to make a reference u/s 130A of the Act. [para 15] [555-C-E]

Case Law Reference:

2007 (15) SCC 362	**relied on**	**para 11**
AIR 1955 SC 271	**relied on**	**para 12**
2000 (5) Suppl. SCR 244	**relied on**	**para 13**
2008 (6) SCR 456	**relied on**	**para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4371-4383 of 2004.

From the Judgment & Order dated 03.07.2003 of the High Court of Judicature of Bombay in Custom Applications No. 28, 29, 31, 34 of 2002, 2, 3, 4, 5, 6, 7, 8, 9,10 of 2003.

WITH

C.A. Nos. 840, 841, 842, 843, 844, 845 of 2011, 4384-4386 of 2004, 2904, 2860, 3531, 4042, 4135, 4136 of 2006 & 229, 348 of 2007.

R.P. Bhat, P. Parmeswaran, B. Sunita Rao, Rashmi Malhotra, B, Krishna Prasad for the Appellant.

Dr. Kailash Chand, V.M. Doiphode, Rajesh Kumar, R.K. Srivastava, P.N. Srivastava, Krishnakumar R.S. Sanjay R. Hedge, Anil Mishra, Shamim Haider, Aditya Jain, Rupesh Kumar, Amarjeet Singh, for the Respondents.

The Judgment of the Court was delivered by

D.K. JAIN, J.: 1. Delay in SLP (C) No. 11177 of 2006, SLP (C) No. 11180 of 2006, SLP (C) No. 11181 of 2006, SLP (C) No. 11182 of 2006, SLP (C) No. 12641 of 2006 and SLP (C) No. 14991 of 2006 is condoned and Leave granted.

2. Challenge in this batch of appeals is to the orders passed by the High Court of Bombay dated 3rd July, 2003 in Customs Application Nos. 27-29, 31, 34, 36 of 2002 and 2-10 of 2003; 24th March, 2005 in Customs Application Nos.17-18 of 2003; 30th March, 2005 in Customs Application Nos.26 and 29 of 2003; 16th March, 2005 in Customs Application Nos. 11-14 of 2003; 6th April, 2005 in Customs Application Nos. 31-33 and 35 of 2003 and 23rd March, 2005 in Customs

Application Nos. 15-16 of 2003. By the impugned orders, the High Court has rejected the applications filed by the Revenue under Section 130A of the Customs Act, 1962 (for short "the Act") on the ground that no question of law arose from the orders of the Customs, Excise and Gold (Control) Appellate Tribunal (for short "the Tribunal").

3. As common questions of law and facts are involved in all the appeals, these are being disposed of by this common judgment. However, to appreciate the controversy involved, a brief reference to the facts in C.A. Nos.4371-4383 of 2004, as being illustrative, would suffice.

The respondents-importers were engaged in the business of import of rough marble blocks, classifiable under sub-heading 2515.12 of the Customs Tariff Act, 1975, from various countries such as Italy, Iran, Turkey, Indonesia, Spain, China, Greece etc. in the year 1999. These goods were covered by Exim Code No. 25151200 of ITC [HS] Classification of Export & Import Items 1997-2002, and required a specific licence for importation under the EXIM Policy-1997-2002. Admittedly, when the imports were made all the respondents, in the instant cases, did not possess the licence as required under the EXIM Policy. Additionally, in some cases, the quantity and price of the imported goods was mis-declared in the bills of entry.

4. The goods imported by the respondents were confiscated under Section 111(d) of the Act. However, the importers were given an option to redeem the confiscated goods on payment of redemption fine, which was fixed, adopting the margin of profit as the basis, under Section 125 of the Act; and penalty levied under Section 112(a) of the Act.

5. Aggrieved, the importers approached the Tribunal in appeal. The Tribunal, in each case, partly allowed the appeal, observing that the facts in each case were similar to those in *M/s. Stonemann Marble Industries Vs. Commissioner of Customs* (Order No. CI/424-25/WZB/2002 dated 30th January, 2002), and therefore, the redemption fine and penalty was reduced to 20% and 5% of the CIF value respectively.

6. Being aggrieved, the Revenue preferred an application under Section 130A of the Act, stating that the following questions of law arose out of the orders of the Tribunal:

> "1. Whether on the facts and in the circumstances of the case the Tribunal was right in law reducing the redemption fine imposed under Section 125 of the Customs Act, 1962 from Rs.1.01 Crores to Rs. 25,00,000/- and penalty imposed u/s. 112[a] from Rs. 29,40,000/- to Rs. 7,50,000/- in Appeal No. C/1030/01-Mum and in reducing the redemption fine from Rs. 42,84,000/- to Rs. 7,00,000/- and penalty from Rs. 4,00,000/- to Rs. 2,00,000/- in Appeal No. C/1042/201-Mum by following its earlier orders in the case of Stonemann Marble Industries.
>
> 2. Whether on the facts and in the circumstances of the case the Tribunal was right in law in intervening with the redemption fines of Rs. 1.01 crores and Rs. 42,84,000/- imposed under Section 125 by the Commissioner of Customs, Jawahar Customs House, Nhava Sheva and reducing it to Rs. 25,00,000/- and Rs. 7,00,000/- and with penalties of Rs. 29,40,000/- & Rs. 4,00,000/- imposed under Section 112[a] by the Commissioner of Customs, Jawahar Customs House, Nhava Sheva & reducing them to Rs. 7,50,000/- and Rs. 2,00,000/- respectively without examining the facts of the case?"

7. As afore-mentioned, the High Court has, vide the impugned orders, rejected the applications filed by the Revenue on the ground that no question of law arose from the orders of the Tribunal. It has held as follows:

> "Having heard the counsel on both sides, we are of the opinion that there are no questions of law which can be said to arise out of the order of the Tribunal. It is not

disputed by the Revenue that the facts in the case of the Respondents i.e. Marmo Classic and the facts in the case of Stonemann Marble Industries and Jai Bhagwati Impex Pvt. Ltd. are similar. On perusal of the orders passed by the Tribunal in the case of Stonemann Marble Industries and Jai Bhagwati Impex Pvt. Ltd. it is seen (sic.) that the Tribunal has reduced the redemption fine and penalty by taking into account the margin of profits and the demurrage incurred by the importers of the said consignments. It is pertinent to note that the Tribunal in similar circumstances have taken a uniform view to restrict the redemption fine to 20% of the CIF value and penalty to 5% of the CIF value. Under these circumstances, it is evident that the decision of the Tribunal is essentially based on finding of fact. The Tribunal has reduced the redemption fine and penalty by taking into account its earlier decision as well as the margin profit and the amount of demurrage incurred on the goods. It is not disputed by the Revenue that the CEGAT has power to reduce the redemption fine and penalty. Therefore, in the facts of the case whether the reduction in redemption fine and penalty is justified or not, it is essentially a finding of fact and no material has been adduced by the revenue to establish that the order of the Tribunal is ex-facie perverse, arbitrary & contrary to the facts on record."

8. Hence, the present appeals by the Revenue.

9. Mr. R.P. Bhatt, learned senior counsel appearing on behalf of the Revenue, while assailing the impugned orders contended that the Tribunal could not lay down a standard formula for the computation of redemption fine and penalty as facts and circumstances of each case have to be examined independently. Learned counsel submitted that the Tribunal was only required to examine whether or not the Commissioner had exercised his discretion correctly on the facts and circumstances of each of the cases. Learned counsel thus,

asserted that the Tribunal erred in law in laying down an absolute rule in that behalf, giving rise to a question of law.

10. *Per contra,* Mr. V.M. Doiphode, learned counsel appearing on behalf of the respondents, strenuously urged that the impugned orders deserve to be affirmed in light of the fact that the Revenue has not challenged the Tribunal's finding that the facts in the instant cases were similar to those in *M/s. Stonemann Marble Industries* (supra). Relying on the decision of this Court in *Collector of Customs, Bombay Vs. Super Fasteners, Marwana (Haryana)*[1], learned counsel contended that it is settled that if the Tribunal in its discretion reduces redemption fine, this Court would not ordinarily interfere with the same.

11. Before adverting to the rival submissions, it would be expedient to make a reference to the provisions of Section 130A of the Act, which read as follows:

> "**130A. Application to High Court.** – (1) The Commissioner of Customs or the other party may, within one hundred and eighty days of the date upon which he is served with notice of an order under section 129B passed [before the 1st day of July, 2003] (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment), by application in the prescribed form, accompanied, where the application is made by the other party, by a fee of two hundred rupees, apply to the High Court to direct the Appellate Tribunal to refer to the High Court any question of law arising from such order of the Tribunal.
>
> (2)The Commissioner of Customs or the other party applying to the High Court under sub-section (1) shall clearly state the question of law which he seeks to be referred to the High Court and shall also specify the

1. (1997) 10 SCC 591.

paragraph in the order of the Appellate Tribunal relevant to the question sought to be referred."

On a bare perusal of the provisions, it is manifest that it is for the party applying for reference to clearly state the question of law which he seeks to be referred to the High Court and then it is for the High Court to consider whether any such question of law stated in the application for reference before it should be directed to be referred. (See: *Beer Sain Vs. Commissioner of Customs (ICD)*[2]). It is manifest from the format of the questions proposed by the Revenue, extracted in para 6 supra, for reference to the High Court that the Revenue did not assail the Tribunal's finding to the effect that the facts in the instant cases were similar to those in *M/s. Stonemann Marble Industries* (supra). It is a trite proposition that unless the correctness of facts, on the basis whereof an inference is drawn by the Tribunal, is put in issue, a question of law does not arise from its order.

12. In *Dhirajlal Girdharilal Vs. Commissioner of Income Tax*[3]*, Bombay* a Constitution Bench observed that:

"5. The question whether or not the Hindu undivided family was doing business in shares transferred to it by the firm, is undoubtedly a question of fact; but if the court of fact whose decision on a question of fact is final, arrives at this decision by considering material which is irrelevant to the enquiry, or by considering material which is partly relevant and partly irrelevant, or bases its decision partly on conjectures, surmises and suspicions, and partly on evidence, then in such a situation clearly an issue of law arises."

13. Similarly, in *K. Ravindranathan Nair Vs. Commissioner of Income Tax, Ernakulam*[4], while dealing with

2. (2007) 15 SCC 282.

3. AIR 1955 SC 271.

4. (2001) 1 SCC 135.

Section 256 of the Income Tax Act, 1961, a Bench of three learned Judges of this Court had held that:

"7. The High Court overlooked the cardinal principle that it is the Tribunal which is the final fact-finding authority. A decision on fact of the Tribunal can be gone into by the High Court only if a question has been referred to it which says that the finding of the Tribunal on facts is perverse, in the sense that it is such as could not reasonably have been arrived at on the material placed before the Tribunal. In this case, there was no such question before the High Court. Unless and until a finding of fact reached by the Tribunal is canvassed before the High Court in the manner set out above, the High Court is obliged to proceed upon the findings of fact reached by the Tribunal and to give an answer in law to the question of law that is before it.

8. The only jurisdiction of the High Court in a reference application is to answer the questions of law that are placed before it. It is only when a finding of the Tribunal on fact is challenged as being perverse, in the sense set out above, that a question of law can be said to arise."

14. In *Sudarshan Silks & Sarees Vs. Commissioner of Income Tax, Karnataka*[5], this Court had observed that:

"Question as to perversity of the findings recorded by the Tribunal on facts was neither raised nor referred to the High Court for its opinion. The Tribunal is the final court of fact. The decision of the Tribunal on the facts can be gone into by the High Court in the reference jurisdiction only if a question has been referred to it which says that the finding arrived at by the Tribunal on the facts is perverse, in the sense that no reasonable person could have taken such a view. In reference jurisdiction, the High Court can answer the question of law referred to it and it is only when a finding

5. (2008) 12 SCC 458.

of fact recorded by the Tribunal is challenged on the ground of perversity, in the sense set out above, that a question of law can be said to arise."

15. Thus tested, we are in complete agreement with the High Court that the questions raised by the Revenue for reference could not be said to be questions of law. It bears repetition that the Revenue did not specifically challenge the finding of the Tribunal that the facts in the instant cases were similar to those in *M/s. Stonemann Marble Industries* (supra), which was essentially a finding of fact. Although, we do find some substance in the submission of learned counsel for the Revenue that a standard formula cannot be laid down for imposition of redemption fine and penalty under the aforenoted provisions of the Act and each case has to be examined on its own facts but when a final fact finding body returns a finding that the facts obtaining in each of the cases before it are similar, and such finding is not questioned, levy of redemption fine or penalty uniformly in all such cases cannot be construed as laying down an absolute formula, which is the case here. We are convinced that the Revenue did not discharge its burden under Section 130A of the Act in as much as it did not specifically challenge the Revenue's aforestated finding as being perverse. In this view of the matter, the High Court was justified in declining to issue direction to the Tribunal to make a reference under Section 130A of the Act.

16. In the circumstances and for the foregoing reasons, these appeals, being devoid of any merit, are dismissed and the impugned orders are affirmed. Parties are left to bear their own costs.

R.P. Appeals dismissed.

GURDIAL SINGH & ORS.
v.
STATE OF PUNJAB
(Criminal Appeal No. 261 of 2006)

JANUARY 24, 2011

[HARJIT SINGH BEDI, P. SATHASIVAM AND CHANDRAMAULI KR. PRASAD, JJ.]

Penal Code, 1860 – s.304 Part I read with s.34 – Attempt made by accused to construct drain towards the victim's house in violation of injunction order passed in favour of the victim – Altercation between the parties – Accused and others armed with 'gandasa' and 'dangs' inflicting injuries on the victim and on the eye-witnesses – Conviction of accused u/s.302/34 with life imprisonment by courts below on the basis of evidence of the injured eye witnesses – On appeal held: Incident took place all of a sudden – No prior intention on part of the accused to commit murder – Thus, conviction modified from s.302/34 to s.304 Part I read with s.34 with 5 years rigorous imprisonment – Evidence – Witnesses – Sentence/ Sentencing.

Despite an injunction order of the court, the appellants made an attempt to construct a drain towards the house of 'BT'. This led to an altercation between the parties. The appellants- 'BS', 'GS' and 'DS' and others armed with 'gandasi' and 'dangs' caused injuries to 'BT' and the eye-witnesses. 'BT' later succumbed to his injuries in the hospital. The trial court convicted the appellants for offences punishable under Section 302/34 IPC and sentenced them to life imprisonment, however, acquitted the others. The High Court upheld the order passed by the trial court. Therefore, the appellants filed the instant appeals.

Dismissing the appeals, the Court

HELD: 1.1 The conviction of the appellants cannot be faulted in the light of the fact that the prosecution story rests on the evidence of three injured witnesses. The incident is virtually admitted by both sides although in different circumstances. However, a case under Section 302 IPC is not spelt out. It is clear from the prosecution story that the incident happened all of a sudden when 'BT' objected to the construction of the drain by 'GS' and others in violation of an injunction order in operation. 'BT' was apparently attacked as he was making his way to his fields when he objected to the taking of measurements as a prelude to the diversion of the drain. The evidence shows that some altercation took place on which the three appellants - 'GS' armed with a 'gandasi' and the other two with 'dangs', caused injuries to 'BT' and the prosecution witnesses. However, the weapons used were in fact implements of common use which are normally carried by villagers all over India and they do not reflect any prior intention on the part of the accused to commit murder. It also appears that 'GS' had used the 'gandasi' from its blunt side as would be clear from the evidence of the doctor. PW4, the doctor who had examined 'BT' in the Hospital opined that both the injuries on the deceased were caused by a blunt weapon. Therefore, if the appellants had intended to murder 'BT' there was nothing to stop 'GS' from using the 'gandasi' from its true side as that would have made it a much more effective weapon. Therefore, the appellants are liable for the offence under Section 304 Part I read with Section 34 IPC. Keeping in view the fact that the appellants have already undergone about 5 years of the sentence and also the age factor of 'GS' in particular, the ends of justice would be met if the appellants are imposed a sentence of 5 years R.I., under Section 304 Part I read with Section 34 of the IPC. [Para 5] [561-F-H; 562-A-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 261 of 2006.

From the Judgment & Order dated 31.05.2005 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 205-DB of 1997.

WITH

Crl. A. No. 878 of 2007.

R.P. Wadhwani, Dharam Bir Raj Vohra, Kuldeep Singh, Ajay Pal, Sanjay Jain, Vinay Arora, Vivek Kochal for appearing parties.

The Judgment of the Court was delivered by

HARJIT SINGH BEDI,J. 1. The appellants herein, Gurdial Singh now aged 85 years, his brother Bakshish Singh, now aged 70 years, and Darshan Singh now aged about 35 years were brought to trial and convicted for offences punishable under Section 302/34 etc. of the IPC and sentenced to life imprisonment by the Trial Court. The High Court dismissed the appeal filed by them and the matter is before us after grant of special leave.

2. The facts are as under:

3. A drain carrying the village sewage ran across the house of Gurdial Singh appellant. He attempted to divert the course of the drain away from his house towards the house of Buta Singh deceased. A civil suit was accordingly filed by Buta Singh against Gurdial Singh for restraining him from constructing the new drain. It appears that the appellants had a grudge against Buta Singh and his family on that account. At about 8 a.m. on the 10th September 1995, as Buta Singh and his brother Gurbachan Singh were going towards their fields, they were way-laid in front of the village Gurdwara by Gurdial Singh, Bakhshish Singh, Darshan Singh, the appellants herein, and in

addition Amrik Singh, Joginder Singh, Kulwant Singh and Balwant Singh. Gurdial Singh was armed with a Gandasi whereas the others were armed with Dangs. As the accused were taking measurements for the construction of the drain, Buta Singh raised an objection on which Gurdial Singh raised a lalkara exhorting the others to teach a lesson to Buta Singh. Gurdial Singh then gave a Gandasi blow on the head of Buta Singh whereas the other accused attacked Buta Singh with their dangs. PW5 Kulwinder Kaur, daughter-in-law of Buta Singh witnessed the occurrence. She raised an alarm which attracted her husband PW-7 Gurmeet Singh. Kulwant Singh and Darshan Singh gave injuries to him. PW Kulwinder Kaur also intervened but was chased away by Gurdial Singh, Balwant Singh, Amrik Singh and Joginder Singh and after entering her house Joginder Singh gave a dang blow on her left upper arm and when Mohinder Kaur, sister of PW Gurmeet Singh attempted to intervene Gurdial Singh gave a gandasi blow from its reverse side on Kulwinder Kaur and Balwant Singh and Amrik Singh caused dang blows to Kulwinder Kaur. Chint Kaur, wife of Buta Singh was also inflicted injuries by Gurdial Singh. The injured were thereafter removed to the hospital and information about their admission was conveyed to the police post. PW11 Rajesh Kumar, ASI also received the Medico-legal reports in respect of Buta Singh, Gurmeet Singh, Chint Kaur, Mohinder Kaur and Kulwinder Kaur in the Police Station. The ASI immediately reached the hospital and moved an application at 11.30 a.m. to find out if the injured were fit to make a statement. The doctor opined that they were unfit to do so. The ASI again went to the hospital at 8.30 p.m. and moved another application as to the fitness of the injured and the doctor reiterated that Buta Singh and Gurmeet Singh were unfit to make their statements but Kulwinder Kaur, Mohinder Kaur and Chint Kaur were found fit for the purpose. The ASI then recorded the statement of Kulwinder Kaur and on its basis the First Information Report under Section 307 etc. of the IPC was registered. The injured were also medically examined and it was found that Gurmeet Singh had 8 injuries in all, with injury No.1 being caused by a

sharp edged weapon and injury No.2 being grievous in nature. Chint Kaur was found to have two simple injuries, Mohinder Kaur one simple injury and Kulwinder Kaur three simple injuries. The doctor also examined Buta Singh at 11.20 a.m. and found two injuries on his person;

1. A lacerated wound 3.5 cm x ½ cm x bone deep on the left side of the scalp 8 cm lateral to the mid-line and 5 cm behind the anterior hair line. Bleeding was present.

2. A lacerated wound 2 cm x ½ cm x bone deep on the left side of the scalp 3 cm lateral to the midline and 5 cm medical (sic) to injury No.1. Bleeding was present.

The doctor also kept the injuries under observation and opined that injury No.1 could be caused from the reverse side of a Gandasi. He also opined that both the injuries were grievous in nature. Buta Singh expired at the 7.30 p.m. on the 17th September 1995 and his body was subjected to a post-mortem examination and the two injuries, noted above, were found thereon. On the completion of the investigation, all seven accused were charged for offences punishable under Sections 148,302, 323 and 324 read with Section 149 of the Code. They pleaded not guilty, and were brought to trial. The trial court relying on the evidence of PW5, PW7 and PW10, the injured three eye witnesses, held that the prosecution story in so far as the three appellants was proved beyond doubt, but the other accused, namely Amrik Singh, Joginder Singh, Kulwant Singh and Balwant Singh were entitled to benefit of doubt and they were accordingly acquitted. The plea of the right of private defence and that, if at all, the case fell within the ambit of Section 304 Part II read with Section 34 of the IPC was repelled. An appeal was thereafter taken to the High Court by the three appellants. The appeal was dismissed, leading to the present proceedings.

4. The learned counsel for the appellants has argued that in the light of the fact that Bakhshish Singh appellant had received an injury in the same incident which had not been explained by the prosecution, the prosecution story itself was in doubt and the accused-appellants were entitled to acquittal on that basis. It has also been pleaded that the trial court had found that four of the accused were not involved in the incident and it was thus apparent that the present case was one of false implication on account of animosity between the parties over the construction of the drain. It has finally been pleaded that there was absolutely no evidence to show that the appellants had an intention to commit murder as the Doctor had opined that the two injuries on Buta Singh had been caused by the reverse side of the Gandasi whereas the other injuries on the person of the PW's had been caused with dangs and as such the case fell under Section 304 Part II and not under Section 302 of the IPC. The learned State counsel and the complainant's counsel have, however, controverted the stand and pointed out that the trial court and the High Court had given categorical findings that the appellants were involved in a case of murder and had attempted to take the law into their hands and attempted to construct the drain despite the injunction order made by the Civil Court.

5. We have heard the learned counsel for the parties and gone through the record very carefully. We are of the opinion that no fault can be found with the conviction of the appellants in the light of the fact that the prosecution story rests on the evidence of three injured witnesses. The incident is virtually admitted by both sides although in different circumstances as the appellants' claim was that Bakhshish Singh had suffered injuries at the hands of the Gurdial Singh and others and that the prosecution had suppressed this part of the story. This plea has been rejected by the trial court as well as the High Court holding that the injuries suffered by Bakhshish Singh could not be related to the present incident. We are therefore of the opinion that the conviction of the appellants is fully justified on

A B C D E F G H

the facts of the case. We, however, feel that a case under Section 302 of the IPC is not spelt out. It is clear from the prosecution story that the incident happened all of a sudden when Buta Singh objected to the construction of the drain by Gurdial Singh and others in violation of an injunction order in operation. Buta Singh was apparently attacked as he was making his way to his fields when he objected to the taking of measurements as a prelude to the diversion of the drain. The evidence shows that some altercation took place on which the three appellants Gurdial Singh armed with a Gandasi and the other two with dangs caused injuries to Buta Singh and the PWs. We, however, see that the weapons used were in fact implements of common use which are normally carried by villagers all over India and they do not reflect any prior intention on the part of the accused to commit murder. It also appears that Gurdial Singh had used the Gandasi from its blunt side as would be clear from the evidence of the doctor. PW4 who had examined Buta Singh on the 11th September 1995 in the Dayanand Medical College Hospital, Ludhiana. He opined that both the injuries on the deceased had been caused by a blunt weapon. We, therefore, find that if the appellants had intended to murder Buta Singh, there was nothing to stop Gurdial Singh from using the Gandasi from its true side as that would have made it a much more effective weapon. We are, therefore, of the opinion that the appellants are liable for the offence under Section 304 Part I read with Section 34 of the IPC. We are told by the learned counsel that they have already undergone about 5 years of the sentence. In the light of this fact, and keeping in view the age factor of Gurdial Singh in particular, we feel that the ends of justice would be met if the appellants are imposed a sentence of 5 years R.I., under Section 304 Part I read with Section 34 of the IPC, the other parts of the sentence being maintained as it is. With this modification in the impugned judgments, the appeals are dismissed.

R.P. Appeals dismissed.

A B C D E F G H

M/S. B.FINE ART AUCTIONEERS PVT. LTD. & ORS.
v.
C.B.I. & ANR.
(Criminal Appeal Nos. 1235-1237 of 2007)

JANUARY 25, 2011

[B. SUDERSHAN REDDY, AND SURINDER SINGH NIJJAR, JJ.]

CONSTITUTION OF INDIA, 1950 :

Articles 226 and 136 – Jurisdiction under – Two paintings seized by A.S.I. – F.I.R. registered by CBI for offences punishable u/s 120-B IPC and u/s 25 read with s.3 of Antiquities and Art Treasures Act, and charge-sheet filed – Writ petition before High Court seeking to quash the FIR and the charge-sheet–Held : After registration of FIR, CBI made detailed investigation in the matter and also filed charge-sheet –Trial court having taken cognizance of offences has framed charges against all concerned – High court rightly refused to exercise its discretion under Article 226 –On facts and in the circumstances, it is not possible at this stage to quash the FIR and the Court is not inclined to exercise discretion under Article 136 –Trial court would proceed to consider as to whether the paintings in question are antiquities as alleged by prosecution –Antiquities and Art Treasures Act, 1972 –ss. 3 and 25 –Penal Code, 1860 –s. 120-B

Two paintings auctioned by the appellant company and purchased by two foreign nationals were seized by Archaeological Survey of India, as it found the same to be antique in nature. A complaint was made to the CBI, which prima facie found the commission of offence u/s 3 punishable u/s 25(1) of the Antiquities and Art Treasures Act, 1972, and registered an FIR on 29.1.2004 for offences punishable u/s 120-B IPC and s.25(1) read with s.3 of the Act, and after investigation filed charge-

sheet on 28.4.2004 against the appellants and the two foreign nationals. Thereafter the appellants filed Writ Petition No. 16598 of 2004 in the High Court challenging the report of the Director General, ASI and confiscation of the said two paintings under the Customs Act. In the writ petition neither the CBI was made a party nor was the FIR/charge sheet challenged. The writ petition was disposed of by a consent order dated 24.3.2005 directing the competent authority to pass a fresh order. Again Writ Petitions (Crl.) Nos. 2103-05 of 2005 were filed seeking to quash the FIR mainly on the ground that the basis of the FIR, i.e. the earlier report of the ASI had been rendered redundant in view of the decision of the Division of the High Court made on 24.3.2005. The High Court dismissed the writ petition. Aggrieved, the auctioneers filed the appeals.

Dismissing the appeals, the Court

HELD:

1.1 It is pertinent to note that in the instant writ petition, the relief prayed for is to quash the FIR and not the order passed by the trial Court refusing to discharge the appellants from the criminal case filed by the CBI. The writ petition is mainly based on the ground that the basis of the FIR i.e. the earlier report of Archaeological Survey of India has been rendered redundant in view of the decision rendered by the Division Bench of the High Court by order dated 24.3.2005. There is no explanation whatsoever forthcoming from the appellants as to why they did not implead the CBI in Writ Petition (C) No. 16598 of 2004 and challenge the FIR though they were aware of the same. [Paras 7, 8, 10] [568-G-H; 569-B, E]

1.2 It cannot be said that the basis of the FIR does not survive in view of the judgment of Delhi High Court in Writ Petition (C) No. 16598 of 2004. The High Court mainly observed that in view of the consensus arrived at

between the parties thereto, it will not be necessary for the parties to give effect to the earlier report and "if a new report is passed, the earlier report will not be given effect to". The earlier report has not been set aside by the High Court and obviously to continue its operation, a new order is to be made by the Director General, ASI which has not so far been passed. At any rate, all these pleas may be advanced, if at all, available to the appellants, in the pending criminal case. The observation made by the High Court that it will not be necessary for the parties to give effect to the earlier report binds only the parties to the proceedings and, admittedly, the CBI has not been impleaded as party respondent in that writ petition. [paras 10] [569-G-H; 570-A-C]

1.3 The jurisdiction of the High Court under Article 226 to issue appropriate writs is extra-ordinary, equitable and discretionary. Prerogative writs mentioned therein may be issued only for doing substantial justice. No person is entitled to claim relief under Article 226 of the Constitution as a matter of course. The High Court rightly refused to exercise its discretion under Article 226 in favour of the appellants. On the facts and circumstances, this Court is not inclined to exercise discretion under Article 136 of the Constitution of India to grant any relief to the appellants. [para 11] [571-D-E]

1.4 It is evident from the record that after registration of the first information report, the CBI made detailed investigation in the matter and filed charge sheet for the offence punishable u/s 25 (1) read with s. 3 of the Act. The trial court having taken cognizance of offences framed charges against all the concerned. The appellants have even filed discharge application before the trial court on 21.8.2006. It is not clear from the averments made in the writ petition as to the result of the said application. On the facts and in the circumstances and keeping in view the progress made in the case, it is not possible at this stage to quash the very first information report. [paras 12-13] [570-F-H]

1.4 It is made clear that it is for the trial court to consider as to whether the paintings in question are antiquities as alleged by the prosecution, uninfluenced by the observations made in the impugned order of the High Court and as well as the observations made, if any, in the instant order. [para 15] [571-D-E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1235-1237 of 2007.

From the Judgment and Order dated 9.7.2007 of the High Court of Delhi at New Delhi in Writ Petition (Crl.) No. 2103-05 of 2005.

Tasneem Ahamdi, Sudhir Kumar Gupta, Manish Gupta and Anuj Kumar Ranjan for the Appellants.

A. Mariarputham, T.A. Khan, P.K. Dey, Arvind Kumar Sharma and B.V. Balaram Das for the Respondents.

The Judgment of the Court was delivered by

B. SUDERSHAN REDDY, J. 1. These appeals are directed against the order of Delhi High Court whereby the High Court dismissed the Writ Petition filed by the appellants and refused to quash the FIR bearing No. RC SID 2004 E 001 registered by the CBI against the appellants.

2. In order to appreciate as to whether the impugned order suffers from any infirmity, few relevant facts leading to filing of these appeals may have to be noticed.

RELEVANT FACTS

3. The appellant No. 1—M/s Bowrings Fine Art Auctioneers Pvt. Ltd. had auctioned a number of paintings on 20th November, 2002. Two paintings titled "Reconciled" by Frederico Andreotti and "The kill" by George D. Rowlandson

were purchased by M/s Tony Haynes of England. The said two paintings were to be exported. The Customs authorities had detained these paintings on the suspicion that the said paintings were antiques within the meaning of the provisions of the Antiquities and Art Treasures Act, 1972 (hereinafter referred to as 'the Act'). The said paintings were examined by Deputy Superintendent, Archaeology Customs), Archeological Survey of India on 7.1.2003 and having opined that the paintings were antiques, referred the matter to the Director General, Archaeological Survey of India for final opinion under Section 24 of the Act. The said paintings were seized by the Department. This was followed by a complaint dated 6.1.2004 by Superintendent, Archaeologist (Ant.) DG/ASI (addressed to the Superintendent of Police, CBI) in which it is inter alia stated that after examination of the said two paintings, they were found to be antique in nature. After receiving the complaint, further verification was conducted by the CBI. On verification of facts, the CBI found prima facie the commission of offence under Section 3 of the Act punishable under Section 25(1) of the said Act. The CBI accordingly registered the FIR on 29.1.2004 under Section 120B, IPC read with Section 25(1) read with Section 3 of the Act. The CBI has after investigation filed the charge sheet against the appellants company and two foreign nationals who purchased the said paintings in the auction.

4. Be it noted that after the filing of charge sheet, the appellants filed Writ Petition (Civil) No. 16598 of 2004 in Delhi High Court challenging the report of Director General, ASI and for directing the Customs authorities not to proceed in the matter on the basis of the order dated 22.9.2004 passed by the Adjudicating Authority directing confiscation of the said two paintings under the Customs Act. In the said Writ Petition, the petitioner clearly admitted the factum of CBI registering FIR and copy of the said FIR was also made available for the perusal of the Court. It may be noted that by the time the said Writ Petition came to be filed, CBI had filed its charge sheet on 24.08.2004 yet the petitioner had not chosen to challenge the

FIR and the charge sheet filed by the CBI. The said Writ Petition was disposed of by a consent order directing the competent authority to pass a fresh order on the basis of fresh report submitted by a fresh Committee. It was agreed by the Archaeological Survey of India in that Writ Petition to reconstitute a Committee for the examination of the paintings and to pass a fresh order in regard to the matter in controversy. It may also be noted that CBI was not even impleaded as a party respondent in the Writ Petition.

5. That in compliance of the order dated 24.03.2005, a Committee consisting of six members was constituted to examine the said paintings. The Committee gave a fractured verdict due to which the competent authority could not give a final opinion.

6. The appellants again moved another Writ Petition (Civil) No. 5656 of 2006 before Delhi High Court seeking appropriate directions against the ASI so as not to give effect to undated minutes of meetings dated 26.7.2005, 2,5 & 16.08.2005 on various grounds with which we are not concerned for the present in these appeals.

7. The High Court vide order dated 28.4.2006, disposed of the Writ Petition directing the Director General, ASI to pass an order in terms of the decision of the Division Bench dated 24.3.2005 and granted stay of the prosecution till expiry of 30 days after the fresh determination/decision of Director General, ASI. Thereafter Writ Petition (Crl.) Nos. 2103-05 of 2005 have been filed resulting in the impugned order. It is interesting to note that in the present Writ Petition, the relief prayed for is to quash the FIR and not the order passed by the trial Court refusing to discharge the appellants from the criminal case filed by the CBI. The Writ Petition is mainly based on the ground that the basis of the FIR *i.e.* the earlier report of Archaeological Survey of India has been rendered redundant in view of the decision rendered by the Division Bench of the High Court vide

order dated 24.3.2005. The High Court dismissed the Writ Petition. Hence this appeal.

8. Ms. Tasneem Ahamdi, learned counsel for the appellants strenuously contended that the FIR registered by the CBI based on the earlier report of Archaeological Survey of India has been rendered redundant. The basis of the FIR does not survive in view of the order of the High Court dated 24.3.2005 and therefore, there cannot be any prosecution on the basis of the earlier report of the ASI.

9. Shri A. Mariarputham, learned senior counsel appearing on behalf of the CBI submitted that the conduct of the appellants disentitles them for grant of any relief in these appeals. It was submitted that on the date when the FIR was lodged, there was sufficient basis and information based on which the FIR has been registered and ultimately, resulting in filing of the charge sheet by the CBI which cannot be quashed at this stage.

10. A short question that arises for our consideration is as to whether the appellants are entitled for the relief to quash the very first FIR registered by the CBI. There is no explanation whatsoever forthcoming from the appellants as to why they did not implead the CBI in Writ Petition (C) No. 16598 of 2004 and challenge the FIR though they were aware of the same as is evident from their own affidavit filed in the High Court in support of Writ Petition (C) No. 16598 of 2004. It is not the case of the appellants that the FIR has been registered by the CBI without any proper intimation from the Archaeological Survey of India. The contention that the basis of the FIR does not survive in view of the judgment of Delhi High Court in Writ Petition (C)No. 16598 of 2004 appears to be untenable and unsustainable. A bare reading of the judgment of the High Court does not support the submission made by the learned counsel for the appellants. The High Court mainly observed that in view of the consensus arrived at between the parties thereto, it will not be necessary for the parties to give effect to the earlier report and

"if a new report is passed, the earlier report will not be given effect to". The earlier report has not been set aside by the High Court and obviously to continue its operation, a new order is to be made by the Director General, ASI which according to the learned counsel for the appellants is not so far passed. At any rate, all these pleas may be advanced, if at all, available to the appellants, in the pending criminal case. It is not necessary to restate that the observation made by the High Court that it will not be necessary for the parties to give effect to the earlier report binds only the parties to the proceedings and admittedly, the CBI has not been impleaded as party respondent in that Writ Petition.

11. On the facts and circumstances, we are not inclined to exercise our discretion under Article 136 of the Constitution of India to grant any relief to the appellants. We are of the opinion that the High Court rightly refused to exercise its discretion under Article 226 of the Constitution of India in favour of the appellants. The jurisdiction of the High Court under Article 226 of the Constitution to issue appropriate writs is extra-ordinary, equitable and discretionary. Prerogative writs mentioned therein may be issued only for doing substantial justice. No person is entitled to claim relief under Article 226 of the Constitution as a matter of course.

12. It is evident from the record that after registration of the first information report the CBI made detailed investigation in the matter and filed charge sheet for the offence punishable under Section 25 (1) read with Section 3 of the Act. The trial court having taken cognizance of offences framed charges against all the concerned. The appellants have even filed discharge application before the trial court on 21.8.2006. It is not clear from the averments made in the Writ Petition as to the result of the said application.

13. On the facts and in the circumstances, it is not possible at this stage to quash the very first information report, since much water has flown after registration of the FIR by the CBI.

14. Before parting with the judgment it is necessary to state that the learned senior counsel – Shri A. Mariarputham based on the Minutes of the Expert Committee dated 12.04.2010 and the order of Director General, ASI suggested that the prosecution of the appellants may be confined only with regard to the painting "Reconciled" which alone held to be antiquity. It was a fair suggestion but the learned counsel for the appellants expressed her reservation as regards the very validity of said minutes and order of Director General and wanted the question to be left open. We accordingly express no opinion as regards the validity of the minutes and order dated 12.4.2010 of Director General, Archaeology. In the circumstances, we wish to express no opinion on the same except to observe that the defence of the appellants based on the present report during the course of the hearing of these appeals is left open.

15. We, however, make it clear that it is for the trial court to consider as to whether the paintings in question are antiquities as alleged by the prosecution. The said question may have to be decided by the trial court upon appreciation of the evidence that may be brought on record. The trial court shall consider the same uninfluenced by the observations made in the impugned order of the High Court and as well as the observations made, if any, in this order.

16. For the aforesaid reasons, we do not find any merit in these appeals. They are accordingly dismissed.

R.P. Appeals dismissed.

JITEN KUMAR SAHOO & ORS.
v.
CHIEF GENERAL MANAGER MAHANADI COALFILEDS LTD. & ORS.
(Civil Appeal No. 1043 of 2011)

JANUARY 27, 2011

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

Service Law – Appointment – Government undertaking – Appointment of appellants who had undertaken apprenticeship with the undertaking – Writ petitions by respondents seeking quashing of the appointments – Direction by High Court to fill up the post from the merit list prepared earlier without giving preference to those who had undertaken apprenticeship with the government undertaking – On appeal held: Appellants were impleaded as party respondents in the writ petitions for the first time after ten years – They were not initially impleaded though primary relief was sought against them – Appellants have got three promotions and other candidates have been appointed to the post – Thus, writ petitions not entitled to any discretionary relief – Order passed by the High Court set aside.

38 vacancies of Mazdoors, category-I (ITI) occurred in MCL, a government undertaking. The candidates sponsored by the employment exchange appeared for the written test and the trade test. A merit list was prepared on basis of the qualifying marks. Out of 38 vacancies, 24 vacancies were filled up. Subsequently, 84 fresh vacancies arose. MCL requested the employment exchange for their permission to fill up fresh vacancies from amongst the candidates who had qualified in the written test and the trade test which was conducted earlier. There being no response from the employment exchange, MCI filled up 51 vacancies out of 84 fresh

vacancies by giving employment to the appellants-candidates who had already undergone the apprenticeship with MCL. The respondents filed writ petitions seeking quashing of the appointments given to 51 appointees; and that they be absorbed in the vacant posts. The High Court allowed the writ petitions. It directed MCL to fill up 51 newly sanctioned posts strictly in the order of merit as per the select list prepared earlier. Therefore, the appellants filed the instant appeals.

Allowing the appeals, the Court

HELD 1.1 The appellants were not initially impleaded as party respondents in the writ petitions although primary relief in the writ petitions was to quash their selection and appointments. The appellants were impleaded for the first time after ten years or so. By that time the appellants got promoted from Mazdoor Category-I to Mazdoor Category-II and then to Mazdoor Category-III and thereafter, to the posts of Fitter. In view of these circumstances, the writ petitioners were not entitled to any discretionary relief by the High Court in exercise of its extraordinary jurisdiction. [Para 8] [577-E-F]

1.2 The High Court failed to take into consideration the material aspects stated in the counter affidavit filed by the appellants that the writ petitioners impleaded the appellants after about 10 (ten) years of their appointment as well as selection to the post of Mazdoor Category-I; that the writ petitioners though had the knowledge of the appointment, posting, continuance in service and subsequent promotions of the appellants, they did not challenge the same for about 10 (Ten) years and acquiescenced their claim and waived their claim if any; and that the petitioners are estopped by acquiescence, waiver, conduct and by negligence to challenge the appointment of the appellants who are discharging their duties sincerely to the best satisfaction of the authority being selected and appointed to the post for about ten years. On promotion of the appellants to the higher posts, other candidates have been appointed to the posts of Mazdoor-Category I in place of the appellants. If the order of the High Court is allowed to stand, it would not only affect the appellants who, during the continuation of their service, had got three promotions, but would also seriously affect the persons who were appointed in their place and were not impleaded before the High Court. Thus, the order passed by the High Court is set aside. [Paras 9, 10 and 11] [577-G-H; 578-A-G]

U.P. State Road Transport Corporation and Anr. v. *U.P. ParivahanNigam Shishukhs Berozgar Sangh and Ors.* **(1995) 2 SCC 1 – referred to.**

Case Law Reference:

(1995) 2 SCC 1	**Referred to**	**Para 5**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1043 of 2011.

From the Judgment and Order dated 02.05.2008 of the High Court of Orissa at Cuttack in OJC No. 10722 of 1997.

WITH

Civil Appeal No. 1044 of 2011.

P.N. Misra and K.N. Gupta, Abhisth Kumar, Pankaj Sharma, Archana Singh, Shovan Misra, K.K. Patra, Sunil Roy, Neeraj K. Gupta, Sweta Kumari, P. Niroop, Brajesh Jha, Rajesh Kumar, Anip Sachthey, Mohit Paul and Shagun Matta for the appearing parties.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Delay condoned in SLP (Civil) No. 18031 of 2009. Leave granted in both petitions.

2. The appellants have preferred these two appeals, by

special leave, because consequent upon the judgment and order passed by the High Court of Orissa at Cuttack, they are likely to lose their job of more than 14 years with the Mahanadi Coalfields Limited (for short, 'MCL').

3. MCL is a Government of India undertaking. By the end of 1993, 38 vacancies of Mazdoors, Category-I (I.T.I.) had occurred in the MCL. MCL sent a requisition to the local employment exchange for sending a list of eligible candidates for filling up the said vacancies. The local employment exchange, in response to that requisition, sponsored 664 candidates. Out of these 664 candidates, 375 candidates submitted their biodata. After scrutiny of the biodata of these candidates, MCL called 316 candidates for the written test. Pursuant thereto, 289 candidates appeared for the same on October 29, 1995. They were also called for trade test in different batches during the period December 26, 1995 to January 5, 1996. Finally, 240 candidates secured qualifying marks. There is a dispute of fact about merit list as according to the contesting private respondents (writ petitioners before High Court), a merit list comprising 226 I.T.I. candidates was prepared by the MCL as they were found suitable in all respects, but MCL denies having prepared a merit list of 226 candidates for employment. However, it is an admitted position that, of the candidates who secured qualifying marks, 24 were given appointment as Mazdoor Category-I (I.T.I.). 14 vacancies –

5. vacancies in the trade of Auto Electrician and 9 vacancies in Scheduled Caste/ Scheduled Tribe category – could not be filled up due to non-availability of the candidates. Subsequently, it appears that fresh 84 vacancies of Mazdoor Category-I (I.T.I.) occurred and MCL requested the local employment exchange for their permission to fill up fresh vacancies from amongst the candidates who had qualified in the written test and the trade test conducted as above. There was no response from the local employment exchange to that requisition and, accordingly, MCL filled up 51 vacancies out of

84 fresh vacancies by giving employment to those candidates who had already undergone the apprenticeship with them in the year 1991-92. The present appellants are amongst those candidates.

4. The private respondents herein and few others aggrieved by the appointment of the appellants and some others to the posts of Mazdoor – Category I (I.T.I.) having been given preference as they had undergone the apprenticeship with the MCL, filed various writ petitions before the High Court of Orissa. They prayed that appointments given to 51 such appointees be quashed. They also prayed for their (writ petitioners') absorption in the vacant posts without calling them to appear for fresh written test and/or interview.

5. MCL and its functionaries who were impleaded as respondents in the writ petition filed their counter affidavit and contested the writ petitions on diverse grounds. The defence of the MCL was that the preference was given to the apprentices who had undergone training with them in the interest of the company as coal mines use very specific and specialized high value heavy earth moving machines like dragline, shovel, dumpers, heavy duty dazers, drills and craines and those who have been extensively trained on these machines are of much use than the candidates who were trained in other industries not dealing with heavy earth moving machines. MCL justified their action on the basis of a decision of this Court in *U.P. State Road Transport Corporation and Another* v. *U.P. Parivahan Nigam Shishukhs Berozgar Sangh and Others*[1]. It was submitted by MCL that the preference to MCL apprentices was not influenced by any consideration other than the interest of the company.

6. It is pertinent to mention here that neither the appellants nor others whose appointments were challenged in the writ petitions were impleaded initially. It was after 10 years or so that the present appellants were impleaded as party

1. (1995) 2 SCC 1.

respondents in the writ petitions. On their impleadment and service of notice, the present appellants filed their counter affidavit in opposition to the writ petitions and denied the claim of the writ petitioners.

7. The High Court vide its judgment dated May 2, 2008, however, held that MCL ought to have filled up the newly sanctioned 51 posts of Mazdoor – Category I (I.T.I.) from the merit list prepared earlier strictly in the order of merit and no preference could have been given to those who had undertaken apprenticeship with MCL. The High Court, accordingly, directed MCL to fill up 51 posts strictly in the order of merit as per the select list prepared earlier. The High Court further directed that those who were likely to lose their job could be adjusted in suitable posts in the existing and future vacancies without asking them to face any recruitment test. It is this judgment and order of the High Court which is impugned in these two appeals.

8. In our judgment, these appeals have to be allowed. There is no dispute of fact that the appellants herein were not initially impleaded as party respondents in the writ petitions although primary relief in the writ petitions was to quash their selection and appointments. The appellants were impleaded for the first time after ten years or so. By that time the appellants got promoted from Mazdoor Category-I to Mazdoor Category-II and then to Mazdoor Category-III and thereafter to the posts of Fitter. In view of these circumstances, the writ petitioners were not entitled to any discretionary relief by the High Court in exercise of its extraordinary jurisdiction.

9. The appellants in their counter affidavit before the High Court set up the following specific grounds:

> "5. That the petitioners have impleaded the present Opp. Parties after about 10 (ten) years of their appointment as well as selection to the post of Mazdoor Category-I (ITI). Therefore the writ application is liable to be dismissed as against the present Opp. Parties being grossly barred by limitation and on the ground of unexplained delay, latches and negligence of the petitioner.
>
> 6. That the petitioners though had the knowledge of the appointment, posting, continuance in service and subsequent promotions of the Opp. Parties had not challenged the same for about 10 (Ten) years and have acquiescence their claim and waived their claim if any. Therefore, this Hon'ble Court in exercise of its equitable jurisdiction may be pleased to dismiss the writ application.
>
> 7. That the petitioners are estopped by acquiescence, waiver, conduct and by negligence to challenge the appointment of the Opp. Parties who are discharging their duties sincerely to the best satisfaction of the authority being selected and appointed to the post for about ten years."

10. The High Court unfortunately has failed to take into consideration the material aspects stated in the counter affidavit filed by the appellants. As a matter of fact, on promotion of the appellants to the higher posts, other candidates have been appointed to the posts of Mazdoor – Category I in place of the appellants. If the order of the High Court is allowed to stand, it would not only affect the appellants who, during the continuation of their service, had got three promotions, but also will seriously affect the persons who have been appointed in their place and were not impleaded before the High Court.

11. For what we have discussed above, we do not think we need to deal with the merits of the issue as to whether the High Court was right in holding that MCL could not have preferred to give appointments to those who had undertaken training with them.

12. The appeals are, accordingly, allowed; the judgment and order dated May 2, 2008 passed by the High Court of Orissa, Cuttack is set aside. The parties shall bear their own costs.

N.J. Appeals allowed.

PRAFULL GORADIA
v.
UNION OF INDIA
(Writ Petition (Civil) No. 1 of 2007)

JANUARY 28, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Haj Committee Act, 2002 – Constitutional validity of – Challenge to – Writ petition – Plea of the petitioner that he is a Hindu but has to pay direct and indirect taxes, part of whose proceeds go for the purpose of Haj pilgrimage, which is only done by Muslims – Held: Article 27 would be violated if a substantial part of the entire income tax/ central excise/ customs duties/sales tax or any other tax collected in India, were to be utilized for promotion or maintenance of any particular religion or religious denomination – It is nowhere mentioned in the writ petition as to what percentage of any particular tax has been utilized for the purpose of the Haj pilgrimage – If only a relatively small part of any tax collected is utilized for providing some conveniences or facilities or concessions to any religious denomination, that would not be violative of Article 27 of the Constitution – Thus, there is no violation of Article 27 as also Articles 14 and 15 of the Constitution – Constitution of India, 1950 – Articles 27, 14, 15 and 32.

Constitution of India, 1950 – Article 27 – When attracted – Held: Article 27 is a provision in the Constitution, and not an ordinary statute – It is attracted when the statute by which the tax is levied specifically states that the proceeds of the tax would be utilized for a particular religion – Article 27 would be attracted even when the statute is a general statute, like the Income Tax Act or the Central Excise Act or the State Sales Tax Acts, which do not specify for what purpose the

proceeds would be utilized provided that a substantial part of such proceeds are in fact utilized for a particular religion.

Commissioner, Hindu Religious Endowments vs. Sri LakshmindraThirtha Swamiar **1954 (5) SCR 1005;** *Jagannath Ramanuj Das vs. State of Orissa and Anr.* **1954(5) SCR 1046;** *T.M.A. Pae Foundation vs. State of Karnataka* **AIR 2003 SC 355;** *Kesavanand Bharati vs. State of Kerala* **1973 (4) SCC 225;** *Tansport ans Dock Workers Union vs. Mumbai Port Trust* **2010(12) Scale 217;** *Government of Andhra Pradesh vs. P. Laxmi Devi* **AIR 2008 SC 1640;** *Kailas and Ors. vs. State of Maharashtra* **JT 2011 (1) 19;** *Hinsa Virodhak Sangh vs. Mirzapur Moti Kuresh Jamaat* **AIR 2008 SC 1892 – referred to.**

James vs. Commonwealth of Australia **(1936) AC 578;** *British Coal Corporation vs. The King* **AIR 1935 P.C. 158;** *McCulloch vs. Maryland* **17 U.S. 316(1819);** *Missourie vs. Holland* **252 U.S. 416 (1920);** ***B****ain Peanut Co. vs. Pinson***,** **282 U.S. 499 (1931);** *Missourie, Kansas and Tennessee Railroad vs. May* **194 U.S. 267 (1904) – referred to.**

Case Law Reference:

1954 (5) SCR 1005	**Referred to**	**Para 6**
1954(5) SCR 1046	**Referred to**	**Para 6**
AIR 2003 SC 355	**Referred to**	**Para 6**
1973 (4) SCC 225	**Referred to**	**Para 8, 9**
(1936) AC 578	**Referred to**	**Para 9**
AIR 1935 P.C. 158	**Referred to**	**Para 9**
17 US 316(1819)	**Referred to**	**Para 9**
252 U.S. 416(1920)	**Referred to**	**Para 9**
282 U.S. 499 (1931)	**Referred to**	**Para 17**

194 U.S. 267 (1904)	**Referred to**	**Para 17**
2010(12) Scale 217	**Referred to**	**Para 20**
AIR 2008 SC 1640	**Referred to**	**Para 21**
JT 2011 (1) 19	**Referred to**	**Para 24**
AIR 2008 SC 1892	**Referred to**	**Para 24**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 1 of 2007.

M.N. Krishnamani, Alok Singh, Soumyajit Pani, Amit Kumar, V.M. Srivastava, P.D. Sharma for the Petitioner.

Ashok Bhan, Shweta Verma, Arvind Kr. Sharma, Sushma Suri for the Respondent.

The following order of the Court was delivered

O R D E R

1. Heard learned counsel for the parties.

2. This Writ Petition under Article 32 of the Constitution had been initially filed challenging the constitutional validity of the Haj Committee Act 1959, but thereafter by an amendment application the Haj Committee Act of 2002 which replaced the 1959 Act, has been challenged.

3. The ground for challenge is that the said Act is violative of Articles 14, 15, and 27 of the Constitution. The grievance of the petitioner is that he is a Hindu but he has to pay direct and indirect taxes, part of whose proceeds go for the purpose of the Haj pilgrimage, which is only done by Muslims. For the Haj, the Indian Government inter alia grants a subsidy in the air fare of the pilgrims.

4. Particular emphasis has been given by the petitioner to Article 27 of the Constitution which states:-

> "**27. Freedom as to payment of taxes for promotion of any particular religion.**—No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination."

5. The petitioner contends that his fundamental right under Article 27 of the Constitution is being violated. We have, therefore, to correctly understand and interpret Article 27.

6. There are not many decisions which have given an indepth interpretation of Article 27. The decision in *Commissioner, Hindu Religious Endowments vs. Sri Lakshmindra Thirtha Swamiar,* 1954 (5) SCR 1005 held (vide page 1045) that since the object of the Madras Hindu Religious and Charitable Endowments Act, 1951 is not to foster or preserve the Hindu religion but to see that religious trusts and institutions are properly administered, Article 27 is not attracted. The same view was taken in *Jagannath Ramanuj Das vs. State of Orissa and Anr.* 1954(5) SCR 1046. The decision in *T.M.A. Pae Foundation vs. State of Karnataka,* AIR 2003 SC 355 (vide paragraph 85) does not really deal with Article 27 at any depth.

7. There can be two views about Article 27. One view can be that Article 27 is attracted only when the statute by which the tax is levied specifically states that the proceeds of the tax will be utilized for a particular religion. The other view can be that Article 27 will be attracted even when the statute is a general statute, like the Income Tax Act or the Central Excise Act or the State Sales Tax Acts (which do not specify for what purpose the proceeds will be utilized) *provided that a substantial part of such proceeds are in fact utilized for a particular religion.*

8. In our opinion Article 27 will be attracted in both these eventualities. This is because Article 27 is a provision in the Constitution, and not an ordinary statute. Principles of

interpreting the Constitution are to some extent different from those of interpreting an ordinary statute vide judgment of Hon'ble Sikri, J. in *Kesavanand Bharati vs. tate of Kerala,* 1973 (4) SCC 225 (vide para 15). The object of Article 27 is to maintain secularism, and hence we must construe it from that angle.

9. As Lord Wright observed in *James vs. Commonwealth of Australia,* (1936) AC 578, a Constitution is not to be interpreted in a narrow or pedantic manner (followed in re C.P. & Berar Act, AIR 1939 F.C.I.). This is because a Constitution is a constituent or organic statute, vide *British Coal Corporation vs. The King,* AIR 1935 P.C. 158 and *Kesavanand Bharati vs. State of Kerala,* 1973 (4) SCC 225 (vide para 506). While a statute must ordinarily be construed as on the day it was enacted, a Constitution cannot be construed in that manner, for it is intended to endure for ages to come, as Chief Justice Marshal of the U.S. Supreme Court observed in *McCulloch vs. Maryland,* 17 U.S. 316(1819) and by Mr. Justice Holmes in *Missourie vs. Holland,* 252 U.S. 416(1920). Hence a strict construction cannot be given to it.

10. In our opinion Article 27 would be violated if *a substantial part of the entire income tax* collected in India, or a substantial part of the entire central excise or the customs duties or sales tax, or a substantial part of any other tax collected in India, were to be utilized for promotion or maintenance of any particular religion or religious denomination. In other words, suppose 25 per cent of the entire income tax collected in India was utilized for promoting or maintaining any particular religion or religious denomination, that, in our opinion, would be violative of Article 27 of the Constitution.

11. However, the petitioner has not made any averment in his Writ Petition that a substantial part of any tax collected in India is utilized for the purpose of Haj. All that has been said in paragraph 5 (i) and (ii) of the Writ Petition is :-

> "(i) That the respondent herein has been imposing and collecting various kinds of direct and indirect taxes from the petitioner and other citizens of the country.
>
> (ii) That a part of the taxes so collected have been utilized for various purposes including promotion and maintenance of a particular religion and religious institutions."

12. Thus, it is nowhere mentioned in the Writ Petition as to what percentage of any particular tax has been utilized for the purpose of the Haj pilgrimage. The allegation in para 5(ii) of the Writ Petition is very vague.

13. In our opinion, if only a relatively small part of any tax collected is utilized for providing some conveniences or facilities or concessions to any religious denomination, that would not be violative of Article 27 of the Constitution. It is only when *a substantial part* of the tax is utilized for any particular religion that Article 27 would be violated.

14. As pointed out in para 8 (iv), (v) and (viii) of the counter affidavit filed on behalf of the Central Government, the State Government incurs some expenditure for the Kumbh Mela, the Central Government incurs expenditure for facilitating Indian citizens to go on pilgrimage to Mansarover, etc. Similarly in para 8 (vii) of the counter affidavit it is mentioned that some State Governments provide facilities to Hindu and Sikh pilgrims to visit Temples and Gurudwaras in Pakistan. These are very small expenditures in proportion to the entire tax collected.

15. Moreover, in para 8(iii) of the counter affidavit the Central Government has stated that it is not averse to the idea of granting support to the pilgrimage conducted by any community.

16. In our opinion, we must not be too rigid in these matters, and must give some free play to the joints of the State machinery. A balanced view has to be taken here, and we cannot say that even if one paisa of Government money is spent for a particular religion there will be violation of Article 27.

17. As observed by Mr. Justice Holmes, the celebrated Judge of the U.S. Supreme Court in *Bain Peanut Co. vs. Pinson,* 282 U.S. 499, 501 (1931) "The interpretation of constitutional principles must not be too literal. We must remember that the machinery of the government would not work if it were not allowed a little play in its joints" (see also *Missourie, Kansas and Tennessee Railroad vs. May,* 194 U.S. 267 (1904).

18. Hence, in our opinion, there is no violation of Article 27 of the Constitution.

19. There is also no violation of Articles 14 and 15 because facilities are also given, and expenditures incurred, by the Central and State Governments in India for other religions. Thus there is no discrimination.

20. In *Transport & Dock Workers Union vs. Mumbai Port Trust,* 2010(12) Scale 217 this Court observed that Article 14 cannot be interpreted in a doctrinaire or dogmatic manner. It is not prudent or pragmatic for the Court to insist on absolute equality when there are diverse situations and contingencies, as in the present case (vide paragraphs 39 and 43).

21. Apart from the above, we have held in *Government of Andhra Pradesh vs. P. Laxmi Devi,* AIR 2008 SC 1640 that Court should exercise great restraint when deciding the constitutionality of a statute, and every effort should be made to uphold its validity.

22. Parliament has the legislative competence to enact the Haj Committee Act in view of entry 20 to List 1 of the Seventh Schedule to the Constitution which states : "Pilgrimages to places outside India".

23. Thus there is no force in this petition and it is dismissed.

24. Before parting with this case we would like to mention that India is a country of tremendous diversity, which is due to

the fact that it is broadly a country of immigrants (like North America) as explained in detail by us in *Kailas & Others vs. State of Maharashtra,* JT 2011 (1) 19. As observed in paragraph 32 of the said decision, since India is a country of great diversity, it is absolutely essential if we wish to keep our country united to have tolerance and equal respect for all communities and sects (see also in this connection the decision in *Hinsa Virodhak Sangh vs. Mirzapur Moti Kuresh Jamaat,* AIR 2008 SC 1892 vide paragraphs 41 to 60). It is due to the wisdom of our founding fathers that we have a Constitution which is secular in character, and which caters to the tremendous diversity in our country.

25. It may be mentioned that when India became independent in 1947 there were partition riots in many parts of the sub-continent, and a large number of people were killed, injured and displaced. Religious passions were inflamed at that time, and when passions are inflamed it is difficult to keep a cool head. It is the greatness of our founding fathers that under the leadership of Pandit Jawaharlal Nehru they kept a cool head and decided to declare India a secular country instead of a Hindu country. This was a very difficult decision at that time because Pakistan had declared itself an Islamic State and hence there must have been tremendous pressure on Pandit Jawaharlal Nehru and our other leaders to declare a Hindu State. It is their greatness that they resisted this pressure and kept a cool head and rightly declared India to be a secular state.

26. This is why despite all its tremendous diversity India is still united. In this sub-continent, with all its tremendous diversity (because 92 per cent of the people living in the sub continent are descendants of immigrants) the only policy which can work and provide for stability and progress is secularism and giving equal respect to all communities, sects, denominations, etc.

N.J. Petition dismissed.