SHANKER RAJU
v.
UNION OF INDIA
(W.P. (C) No. 311 of 2010)

JANUARY 04, 2011

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

Administrative Tribunals Act, 1985 – ss.10A and 8 – "Term of Office" of a Member of the Tribunal – Whether a Member of the Tribunal is eligible for re-appointment after completion of term of ten years – Held: A member of a Tribunal can hold such office for a fixed and definite period of time, i.e. for a period of five years from the date on which he enters upon his office and that period may be extended for one more term of five years – Thus the total term that a person can hold the office of the Member of the Tribunal is only for a period of 10 years – After completion of 10 years, he does not superannuate but goes out of the office.

Doctrines/Principles:

Doctrine of stare decisis – Held: A judgment, which has held the field for a long time, should not be unsettled only because another view is possible – The underlying logic of this doctrine is to maintain consistency and avoid uncertainty – Maxim "stare decisis et non quieta movere".

Doctrine of binding precedent – Held: The doctrine of binding precedent has the merit of promoting certainty and consistency in judicial decisions.

Words and Phrases – "Term of Office" – Expressions 'term' and 'tenure' – Meaning of – Held: The expression'term' signifies a fixed period or a determined or prescribed duration – The word 'term' when used in reference to the tenure of office, means ordinarily a fixed and definite time – There is

distinction between the words 'term' and 'tenure' as applied to a public officer or employee – The 'term', as applied to an office, refers to a fixed and definite period of time – The word 'tenure' has more extended meaning than the word 'term' and 'tenure' of an office means the manner in which the office is held especially with regard to time.

Interpretation of Statutes – Legislative intention – Ascertainment of – Duty of the Court – Held: In a court of law or equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from what it has chosen to enact either in express words or by reasonable and necessary implication – Where the Legislature clearly declares its intent in the scheme of a language of Statute, it is the duty of the Court to give full effect to the same without scanning its wisdom or policy and without engrafting, adding or implying anything which is not congenial to or consistent with such express intent of legislature.

Interpretation of Statutes – Held: A statute is designed to be workable, and the interpretation thereof by Court should be to secure that object unless crucial omission or clear direction makes that end unattainable.

The petitioner was appointed as a Judicial Member of the Central Administrative Tribunal on 10.12.2000. After completion of his five-year term, he was re-appointed for another term of five years and was due to complete his second term of five years on 09.12.2010. In April, 2010, in response to an advertisement issued by the respondent regarding vacancies of Members in the Tribunal, Principal Bench, Delhi, the Petitioner made application for the post of Judicial Member of the Tribunal, the post which he had held for nine and a half years at the time of making application. Though the petitioner was eligible for the appointment in terms of his qualification, the respondent vide the impugned communication dated 12-08-2010

refused to consider his claim for appointment for the vacancy, on the ground that the petitioner was to complete his second term of 5 years as a Judicial Member of the Tribunal on 09.12.2010.

The petitioner challenged the said communication contending that after completion of a tenure of 10 years, he was eligible to apply for the post afresh and should be considered on merits and should not be disqualified for appointment merely because he had completed 10 years in that office. The petitioner sought appropriate writ from this Court mainly in respect of the communication dated 12-08-2010 and for a direction to the respondent to consider his case for appointment to the advertised post of Judicial Member in Tribunal on its own merit sans eligibility.

The question which, therefore, arose for consideration in the present petition was whether a Member of the Tribunal is eligible for re-appointment after completion of term of ten years.

Dismissing the petition, the Court

HELD:1. The Administrative Tribunals Act, 1985 was amended in the year 2006 by the Administrative Tribunals (Amendment) Act 2006. The amendments were made effective from 19.02.2007. Some of the principal changes brought about were, the abolition of the post of Vice-Chairman; changes in the terms of office in the form of increase in the age of superannuation of the Chairman from 65 years to 68 years and that of the other Members from 62 years to 65 years; the term of the Members was fixed to 5 years, extendable by another term of 5 years; and, incorporation of Section 10A as a savings clause, for saving the term of office of the Chairman, Vice-Chairman and Members, who were appointed prior to the coming into force of the Amendment Act. [Para 3] [11-E-G]

2.1. In the case of *A.K. Behra*, a three Judges Bench of this Court had the occasion to consider the legislative competence and validity of the Administrative Tribunals (Amendment) Act, 2006. In that case, one of the reliefs sought for by the petitioner was to declare the newly inserted Section 10A of the Administrative Tribunals Act, 1985 as unconstitutional to the extent it stipulated that the term of office of the Member of the Central Administrative Tribunal shall not exceed 10 years. The Court declined to grant the said relief holding that the provision restricting the total tenure of a Member to ten years could not be held either arbitrary or illegal. The said decision of this Court is binding and is clearly applicable to the instant case. [Paras 4, 6 and 7] [11-H; 13-D-E; 16-A-B]

2. It is a settled principle of law that a judgment, which has held the field for a long time, should not be unsettled. The doctrine of *stare decisis* is expressed in the maxim "*stare decisis et non quieta movere*", which means "to stand by decisions and not to disturb what is settled." The underlying logic of this doctrine is to maintain consistency and avoid uncertainty. The guiding philosophy is that a view which has held the field for a long time should not be disturbed only because another view is possible. The doctrine of binding precedent has the merit of promoting certainty and consistency in judicial decisions. The pronouncement of law by a larger Bench of this Court is binding on a Division Bench of this Court, especially where the particular determination by this Court not only disposes of the case, but also decides a principle of law. Further it would be inappropriate to re-agitate the very issue or a particular provision, which this Court had already considered and upheld. [Paras 9, 17] [16-D-F; 20-D-E]

Waman Rao v. Union of India, **(1981) 2 SCC 362;** *Manganese Ore (India) Ltd. v. Regional Asstt. CST,* **(1976) 4**

SCC 124; *Ganga Sugar Corpn. v. State of U.P.,* **(1980) 1 SCC 223;** *Union of India v. Raghubir Singh,* **(1989) 2 SCC 754;** *Krishena Kumar v. Union of India,* **(1990) 4 SCC 207;** *Union of India & Anr. v. Paras Laminates (P) Ltd,* **(1990) 4 SCC 453;** *Hari Singh v. State of Haryana,* **(1993) 3 SCC 114 – relied on.**

A.K. Behra v. Union of India, **(2010) 5 SCALE 472 – referred to.**

Tiverton Estates Ltd. v. Wearwell Ltd., **(1975) Ch 146 – referred to.**

3. In any event, both prior to and after its amendment, Section 8 of the Act speaks of "Term of Office" (of the Chairman and other Members of the Tribunal). The Legislature has used this expression consciously. The expression 'term' signifies a fixed period or a determined or prescribed duration. The word 'term' when used in reference to the tenure of office, means ordinarily a fixed and definite time. There is a distinction between the words 'term' and 'tenure' as applied to a public officer or employee. The 'term', as applied to an office, refers to a fixed and definite period of time. The word 'tenure' has more extended meaning than the word 'term' and 'tenure' of an office means the manner in which the office is held especially with regard to time. [Para 25] [25-D-E]

4. The language employed in Section 8 of the Act does not admit any ambiguity. Section 8(1) of the Act provides the term of office of Chairman of the Tribunal, which shall be five years from the date he assumes his office. The proviso qualifies and carves out an exception to the main enactment. The exception is, though a Chairman can hold office as such for a term of five years, he cannot hold such office after he attains the age of sixty-eight years. Sub-section (2) of Section 8 of the Act

provides the "Term of Office" of a Member of the Tribunal. First part of the Section envisages that a member of the Tribunal shall hold the office for a 'term of five years'. The term as applied to an office, refers to a fixed and definite period of time that an appointee is authorised to serve in office. Alternatively, it can be said that the term of office that is used by the Legislature could only mean the period or limit of time during which the incumbent is permitted to hold the office. The second part of the Section gives discretion to the appointing authority to extend the term of office of a member of the Tribunal to one more term of five years. The expression 'extendable', that finds a place in the sub-section, could only mean that the term of office of an incumbent as a member of the Tribunal can be extended if the parties agree. The proviso appended to the sub-section again carves out an exception to the main provision and restricts a member for holding office after he has attained the age of sixty five years. The proviso takes care of a situation where a member whose term of office is extended for a further period of five years cannot hold such office if he has attained the age of 65 years during the extended period of five years. A combined reading of both parts of Section 8(2) of the Act clearly demonstrates that a member of a Tribunal can hold such office for a fixed and definite period of time, i.e. for a period of five years from the date on which he enters upon his office and that period may be extended for one more term of five years. The contention raised by the petitioner that there is neither prohibition nor any embargo for a member who has completed 10 years as Member to participate in the selection process for being appointed as a Member of the Tribunal for another term of five years, is not acceptable since the total term that a person can hold the office of the Member of the Tribunal is only for a period of 10 years. If the office is created by the Legislature under due authority, it may fix the term and alter it. One

can understand the heart burn of a person who has served as Member of the Tribunal for ten years and thereafter, is ineligible for being appointed as a Member of the Tribunal, but one cannot help this situation. In a court of law or equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from what it has chosen to enact either in express words or by reasonable and necessary implication. Where the Legislature clearly declares its intent in the scheme of a language of Statute, it is the duty of the Court to give full effect to the same without scanning its wisdom or policy and without engrafting, adding or implying anything which is not congenial to or consistent with such express intent of legislature. Hardship or inconvenience cannot alter the meaning employed by the Legislature if such meaning is clear on the face of the Statute. If the Statutory provisions do not go far enough to relieve the hardship of the member, the remedy lies with the Legislature and not in the hands of the Court. [Para 26] [25-H; 26-A-H; 27-A-E]

IRC v. Ross Minister Ltd. **(1979) 52 TC 160 (HL) – referred to.**

5. Section 10A of the Amended Act is the saving clause. By virtue of this Section, the Chairman, Vice-Chairman and Members of a Tribunal appointed prior to the commencement of the Administrative Tribunals (Amendment) Act, 2006, are to be governed by the provisions of the unamended Act, and the rules made thereunder, thereby their conditions of service are protected. From a plain reading of the proviso appended to Section 10A, it is clear that the only conclusion that could be reached is that the Chairman and Members appointed prior to the Amendment of 2007 on completion of either their term of service or on attainment of 65 years in the case of Chairman or 62 years in the case of

Members of the Tribunal, whichever is earlier, may be considered for fresh appointment. If they are eligible in terms of Section 8 of the Amended Act that only means if a member has not completed 10 years term as a member of the Tribunal, he is eligible for fresh appointment, provided he has not completed 65 years of age. The proviso makes it abundantly clear that such fresh appointment could be done provided they satisfy the criteria prescribed under the amended Section 8 of the Act and further, it is made subject to the condition that the total term of office of the Chairman shall not exceed 5 years and that of the Member, ten years. [Para 27] [27-F-H; 28-A-F]

6. Section 6 of the Act provides for qualification for appointment as Chairman, Vice-Chairman and other Members. Section 8 of the Amended Act provides for "Term of Office". These provisions are required to be read harmoniously. The term of office of a Member of a Tribunal is 10 years and after completion of 10 years, he does not superannuate but he goes out of the office. The language of Section 10A is plain and unambiguous, hence there is no need to call in aid any of the rules of construction. [Para 28] [28-G-H; 29-A-C]

7. If the construction suggested by the petitioner is accepted, then it would lead to a situation where a person who has been a Member of the Tribunal for 10 years would have to start at the bottom of the ladder as a fresh appointee. In that circumstance, those persons who are appointed as Members such as the Petitioner, who were till the previous day junior to persons such as the Petitioner, would suddenly become senior to Members such as the Petitioner. This would lead to an anomalous situation where a person who would have presided over a Bench in the Tribunal for years, would suddenly become the junior Member on the same Bench. This

certainly cannot be the intention of the Legislature. A statute is designed to be workable, and the interpretation thereof by Court should be to secure that object unless crucial omission or clear direction makes that end unattainable. The doctrine of 'independence of judiciary' has nothing to do when the tenure is fixed by a statute. [Paras 30, 32] [30-A-D; 32-D-E]

Nelson Motis Vs. Union of India & Anr. **(1992) 4 SCC 711;** *Oswal Agro Mills Ltd. Vs. CCE*, **1993 Supp. 3 SCC 316;** *Omvalika Das Vs. Hulisa Shaw*, **(2002) 4 SCC 539;** *Natni Devi Vs. Radha Devi Gupta*, **(2005) 2 SCC 271;** *Tirath Singh v. Bachittar Singh,* **(1955) 2 SCR 457;** *Nasiruddin v. STAT,* **(1975) 2 SCC 671 and** *Kashmir Singh v. Union of India*, **(2008) 7 SCC 259 – relied on.**

Holmes v. Bradfield Rural District Council, **(1949) 1 All ER 381 – referred to.**

Case law reference:

(2010) 5 SCALE 472	**referred to**	**Para 4**
(1981) 2 SCC 362	**relied on**	**Para 9**
(1976) 4 SCC 124	**relied on**	**Para 10**
(1980) 1 SCC 223	**relied on**	**Para 11**
(1989) 2 SCC 754	**relied on**	**Para 12**
(1990) 4 SCC 207	**relied on**	**Para 13**
(1990) 4 SCC 453	**relied on**	**Para 14**
(1993) 3 SCC 114	**relied on**	**Para 15**
(1975) Ch 146	**referred to**	**Para 16**
(1979) 52 TC 160 (HL)	**referred to**	**Para 26**
(1992) 4 SCC 711	**relied on**	**Para 30**
1993 Supp. 3 SCC 316	**relied on**	**Para 30**
(2002) 4 SCC 539	**relied on**	**Para 30**
(2005) 2 SCC 271	**relied on**	**Para 30**
(1949) 1 All ER 381	**referred to**	**Para 31**
(1955) 2 SCR 457	**relied on**	**Para 32**
(1975) 2 SCC 671	**relied on**	**Para 33**
(2008) 7 SCC 259	**relied on**	**Para 35**

CIVIL ORIGINAL JURISDICTION

Under Article 32 of the Constitution of India.

Indira Jaising, R. Venkataramani (A.C) and P.S. Narasimha, Aljo K. Joseph, Vinay Kumar Garg, Fazal Ahmad, Namarata Singh, Sonam Anand, Anil Katiyar and Samridhi Sinha for the appearing parties.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. Since the petitioner purports to invoke the jurisdiction of this Court under Article 32 of the Constitution of India, it is necessary to note the relevant facts and reliefs sought for in the petition.

2. The material facts which are essential to mention are very few and they lie within a narrow compass. Shri Shanker Raju, the petitioner, was appointed as a Judicial Member of the Central Administrative Tribunal (in short, "the Tribunal") on 10.12.2000. After completion of his five-year term, he was reappointed for another term of five years and was due to complete his second term of five years on 09.12.2010. In April, 2010, in response to an advertisement issued by the respondent regarding vacancies of Members in the Tribunal, Principal Bench, Delhi, he made application for the post of Judicial Member of the Tribunal, the post which he had held for

nine and a half years at the time of making application. Though the petitioner was eligible for the appointment in terms of his qualification, the respondent refused to consider his claim for appointment for the vacancy, for the reason that the petitioner would complete his second term of 5 years on 09.12.2010 as a Judicial Member of the Tribunal vide the impugned communication dated 12-08-2010. The main premise of the petitioner's challenge of the said communication is that after completion of a tenure of 10 years, he is eligible to apply for the post afresh and must be considered on merits for his appointment as a Member of the Tribunal and should not be disqualified for appointment merely because he has completed 10 years in that office. The petitioner seeks appropriate writ from this Court mainly in respect of the communication dated 12.08.2010 and for a direction to the respondent to consider his case for appointment to the post of Member (J) in Tribunal advertised vide D.O. No.A1103/9/2010-AT dated 20.04.2010 on its own merit sans eligibility.

3. The Administrative Tribunals Act, 1985 [hereinafter referred to as 'the Act'] was amended in the year 2006 by the Administrative Tribunals (Amendment) Act 2006. The amendments were made effective from 19.02.2007. Some of the principal changes brought about, which are relevant for the purpose of the case are, the abolition of the post of Vice-Chairman; changes in the terms of office in the form of increase in the age of superannuation of the Chairman from 65 years to 68 years and that of the other Members from 62 years to 65 years; the term of the Members was fixed to 5 years, extendable by another term of 5 years; and, incorporation of Section 10A as a savings clause, for saving the term of office of the Chairman, Vice-Chairman and Members, who were appointed prior to the coming into force of the Amendment Act.

4. It was just a few months ago, a Bench of three learned Judges of this Court had the occasion to consider the legislative competence and validity of the Administrative Tribunals

(Amendment) Act, 2006 in the case of *A.K. Behra v. Union of India,* (2010) 5 SCALE 472. The reliefs prayed for by the petitioner in that writ petition were:

(i) Quash and set aside the decision of the respondent to abolish the posts of Vice-Chairman in the Central Administrative Tribunal as reflected in the Administrative Tribunal (Amendment) Act 2006 and direct the respondents to restore the said posts of Vice-Chairman in Central Administrative Tribunal forthwith;

(ii) Declare that the newly inserted Section 10A of the Administrative Tribunals Act, 1985 to the extent it postulates different conditions of service for the Members of the Central Administrative Tribunal on the basis of their appointment under the Un-amended Rules and under the Amended Rules as unconstitutional, arbitrary and not legally sustainable;

(iii) Direct the respondents to accord the conditions of service as applicable to the Judges of the High Court to all the Members of the Central Administrative Tribunal irrespective of their appointment under the Un-amended or amended Rules;

(iv) Declare that the newly inserted Section 10A of the Administrative Tribunals Act is further unconstitutional to the extent it stipulates that the total term in office of the Members of the Tribunal shall not exceed 10 years;

(v) Direct the respondents to continue all the Members appointed under the un-amended or amended rules till they attain the age of superannuation of 65 years;

(vi) Declare the newly inserted qualifications for appointment as Administrative Members as reflected in the Amended Section 6(2) as arbitrary and unsustainable in the eyes of law and quash the same;

(vii) Quash and set aside the newly added Sec. 12(2) of the Act which impinges upon the independence of judiciary;

(viii) Pass any other order or direction which this Hon'ble Court thinks fit and proper in the facts and circumstances of the case."

5. In the case of *A.K. Behra* (*supra*), two learned judges (K.G. Balakrishnan, CJI and J.M. Panchal, J.) upheld the validity of the impugned amendment and dismissed the writ petition, whereas, the other learned Judge (Dalveer Bhandari, J.) allowed the writ petition and struck down the impugned amendment as being arbitrary and violative of Fundamental Rights guaranteed under the Constitution.

6. In *A.K. Behra*'s case (supra), the court has noticed, apart from others, one of the reliefs sought for by the petitioner. It is relevant to notice the prayer made and discussion on that issue by the Court. They are as under:-

"to declare that newly inserted Section 10 A of the Administrative Tribunals Act, 1985 as unconstitutional to the extent it stipulates that the term of office of the Member of the Central Administrative Tribunal shall not exceed 10 years."

The Court while considering the said relief has concluded:

"15. The plea that Section 10A, which restricts the total term of the Member of the Administrative Tribunal to ten years should be regarded as unconstitutional has also no substance at all. The age of retirement of a Government servant has been raised from 58 years to 60 years. Initially under the unamended provisions of the Act a retired Government servant had a tenure of only two years as a Member of the Tribunal and it was noticed that he was not able to contribute much while performing duties as a

Member of the Tribunal. It was felt necessary that every Member of the Tribunal should have a tenure of five years. Therefore, the provisions relating to term of office incorporated in Section 8 of the Act were amended in the year 1987 and provision was made fixing term of office of Chairman, Vice-chairman and Members at five years period. This Court, in S.P. Sampath Kumar v. Union of India and others [(1987) 1 SCC 124], expressed the view that the term of five years, for holding the posts mentioned in Section 8 of the Act was so short that it was neither convenient to the person selected for the job nor expedient to the scheme. This Court found that it became a disincentive for well qualified people as after five years, they had no scope to return to the place from where they had come. The constitutional validity of the provisions of Section 8, fixing term of office of Chairman, Vice-chairman and Members of the Tribunal at five years period was upheld by this Court in Durgadas Purkyastha v. Union of India and others [(2002) 6 SCC 242]. Therefore, now provision is made for extension of term of office by a further period of five years. Thus the Government has decided to provide for extension in term of office by five years of a Member so that he can effectively contribute to speedy disposal of cases, on merits after gaining expertise in the service jurisprudence and having good grip over the subject. Under the unamended provisions of the Act also the term of Vice-Chairman and Member was extendable by a further period of five years and under the unamended provisions also a Member of the Bar, who was appointed as Judicial Member of the Tribunal, had maximum tenure of ten years. It is not the case of the petitioners that the unamended provisions of the Act, which prescribed total tenure of ten years for a Member of the Bar was/is unconstitutional. The provisions of Section 8 fixing maximum term of office of the chairman at sixty eight years and of a Member of the Tribunal at 10 years, cannot be

regarded as unconstitutional because concept of security of tenure does not apply to such appointments. Said provision cannot be assailed as arbitrary having effect of jeopardizing security of tenure. An Advocate practising at the Bar is eligible to be appointed as Member of Tribunal subject to his fulfilling required qualifications. In all, such a Member would have term of office for ten years. On ceasing to hold office, a Member, subject to the other provisions of the Act, is eligible for appointment as the Chairman of the Tribunal or as the Chairman, Vice-chairman or other Member of any other Tribunal and is also eligible to appear, act or plead before any Tribunal except before the Tribunal of which he was Member. Under the circumstances, this Court fails to appreciate as to how the amended provisions restricting the total tenure of a Member of the Tribunal to ten years would be unconstitutional. The unamended Section 6 of the Administrative Tribunals Act, 1985 indicated that the Chairman, Vice-Chairman and other Members, held respective offices in one capacity or the other, had reasonably spent sufficient number of years of service in those posts before they were appointed in the Tribunal and, therefore, the concept of security of tenure of service in respect of those whose term was reduced was not regarded as appropriate. The impugned provision, therefore, cannot be assailed on the ground of arbitrariness having the effect of jeopardizing the security of tenure of Members of the Bar beyond reasonable limits. An option is reserved to the Government to re-appoint a Member on the expiry of the first term beyond five years. The outer limit for the Member is that he should be within the age of 65 years. Thus, it would not be in every case that the Government would put an end to the term of the office at the end of five years because such Chairman or Member is eligible for appointment for another period of five years after consideration of his case by a committee headed by a Judge of the Supreme Court to be nominated

by the Chief Justice of India and two other Members, one of whom will be the Chairman of the Tribunal. Under the circumstances, it is difficult to conclude that the provision restricting the total tenure of a Member to ten years is either arbitrary or illegal."

7. The decision of the aforesaid Bench of this Court is binding on us and is clearly applicable to the case before us. However, out of respect to the learned senior counsel, who pressed the contentions very seriously, we may briefly and independently examine the question in this case also.

8. Before we turn to the facts of the present petition, we would like to make certain general observations and explain the legal position with regard to them.

The Doctrine of Stare Decisis

9. It is a settled principle of law that a judgment, which has held the field for a long time, should not be unsettled. The doctrine of *stare decisis* is expressed in the maxim "*stare decisis et non quieta movere"*, which means "to stand by decisions and not to disturb what is settled." Lord Coke aptly described this in his classic English version as "*those things which have been so often adjudged ought to rest in peace.*" The underlying logic of this doctrine is to maintain consistency and avoid uncertainty. The guiding philosophy is that a view which has held the field for a long time should not be disturbed only because another view is possible. This has been aptly pointed out by Chandrachud, C.J. in *Waman Rao v. Union of India,* (1981) 2 SCC 362 at pg. 392 thus:

"40. … for the application of the rule of stare decisis, it is not necessary that the earlier decision or decisions of longstanding should have considered and either accepted or rejected the particular argument which is advanced in the case on hand. Were it so, the previous decisions could more easily be treated as binding by applying the law of

precedent and it will be unnecessary to take resort to the principle of stare decisis. It is, therefore, sufficient for invoking the rule of stare decisis that a certain decision was arrived at on a question which arose or was argued, no matter on what reason the decision rests or what is the basis of the decision. In other words, for the purpose of applying the rule of stare decisis, it is unnecessary to enquire or determine as to what was the rationale of the earlier decision which is said to operate as stare decisis."

10. In *Manganese Ore (India) Ltd. v. Regional Asstt. CST,* (1976) 4 SCC 124, at page 127, it was opined that the doctrine of *stare decisis* is a very valuable principle of precedent which cannot be departed from unless there are extraordinary or special reasons to do so.

11. In *Ganga Sugar Corpn. v. State of U.P.,* (1980) 1 SCC 223 at page 233, this Court cautioned that, *"the Judgments of this Court are decisional between litigants but declaratory for the nation."* This Court further observed:

"28. … Enlightened litigative policy in the country must accept as final the pronouncements of this Court…unless the subject be of such fundamental importance to national life or the reasoning is so plainly erroneous in the light of later thought that it is wiser to be ultimately right rather than to be consistently wrong. Stare decisis is not a ritual of convenience but a rule with limited exceptions."

12. In *Union of India v. Raghubir Singh,* (1989) 2 SCC 754, at page 766, this Court has enunciated the importance of doctrine of binding precedent in the development of jurisprudence of law:

"8. Taking note of the hierarchical character of the judicial system in India, it is of paramount importance that the law declared by this Court should be certain, clear and consistent. It is commonly known that most decisions of

the courts are of significance not merely because they constitute an adjudication on the rights of the parties and resolve the dispute between them, but also because in doing so they embody a declaration of law operating as a binding principle in future cases. In this latter aspect lies their particular value in developing the jurisprudence of the law.

9. The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transactions forming part of his daily affairs. And, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a court."

13. In *Krishena Kumar v. Union of India,* (1990) 4 SCC 207, at page 233, this Court has explained the meaning and importance of sparing application of the doctrine of *Stare Decisis*:

"*33. Stare decisis et non quieta movere. To adhere to precedent and not to unsettle things which are settled. But it applies to litigated facts and necessarily decided questions. Apart from Article 141 of the Constitution of India, the policy of courts is to stand by precedent and not to disturb settled point. When court has once laid down a principle of law as applicable to certain state of facts, it will adhere to that principle, and apply it to all future cases where facts are substantially the same. A deliberate and solemn decision of court made after argument on question of law fairly arising in the case, and necessary to its determination, is an authority, or binding precedent in the same court, or in other courts of equal or lower rank in subsequent cases where the very point is again in controversy unless there are occasions when departure is rendered necessary to vindicate plain,*

obvious principles of law and remedy continued injustice. It should be invariably applied and should not ordinarily be departed from where decision is of long standing and rights have been acquired under it, unless considerations of public policy demand it."

14. In *Union of India & Anr. v. Paras Laminates (P) Ltd,* (1990) 4 SCC 453 at pg. 457, this Court observed as under :-

"9. It is true that a bench of two members must not lightly disregard the decision of another bench of the same Tribunal on an identical question. This is particularly true when the earlier decision is rendered by a larger bench. The rationale of this rule is the need for continuity, certainty and predictability in the administration of justice. Persons affected by decisions of tribunals or courts have a right to expect that those exercising judicial functions will follow the reason or ground of the judicial decision in the earlier cases on identical matters".

It has been opined that in the absence of a strict rule of precedent, litigants would take every case to the highest court, in spite of a ruling to the contrary, in the hope that the decision may be overruled.

15. In *Hari Singh v. State of Haryana,* (1993) 3 SCC 114, at page 120, this Court stated the importance of consistent opinions in achieving harmony in Judicial System**:**

"*10. It is true that in the system of justice which is being administered by the courts, one of the basic principles which has to be kept in view, is that courts of coordinate jurisdiction, should have consistent opinions in respect of an identical set of facts or on a question of law. If courts express different opinions on the identical sets of facts or question of law while exercising the same jurisdiction, then instead of achieving harmony in the judicial system, it will lead to judicial anarchy.*"

16. In *Tiverton Estates Ltd. v. Wearwell Ltd.,* (1975) Ch 146 at page 371, Sorman L. J., while not agreeing with the view of Lord Denning, M.R. about desirability of not accepting previous decisions, said as follows:

"*I decline to accept his lead only because I think it damaging to the law to the long term—though it would undoubtedly do justice in the present case. To some it will appear that justice is being denied by a timid, conservative adherence to judicial precedent. They would be wrong. Consistency is necessary to certainty—one of great objectives of law*."

17. The second observation we wish to make is, the doctrine of binding precedent has the merit of promoting certainty and consistency in judicial decisions. The pronouncement of law by a larger Bench of the this Court is binding on a Division Bench of this court, especially where the particular determination by this Court not only disposes of the case, but also decides a principle of law. We further add that it would be inappropriate to reagitate the very issue or a particular provision, which this Court had already considered and upheld.

18. Faced with this situation, Shri. P.S. Narasimha, learned senior counsel appearing for the petitioner, submits that the issue before this Court in the present writ petition is different from the issue raised and canvassed in *A.K. Behra's case* (supra) by pointing out that the relief sought for in the two cases are not identical. He contends that the case of *A.K. Behra* (supra) was limited to the challenge to Constitutional validity of the Administrative Tribunal (Amendment) Act, 2006, and further in that case, the question, whether a Member of the Tribunal appointed under the Act, prior to its amendment, is eligible for re-appointment after completion of a term of ten years, was neither argued, nor considered by this Court. It is further contended by Shri Narasimha that this Court was not called

upon to decide the validity of Section 8 and Section 10A of the Act. It is contended that in *A.K. Behara's* case (supra), this Court did not deal with the question of appointment of a member afresh after completion of his term under Section 8 or of the appointment of the existing members protected under Section 10 of the pre-amended Act. According to the learned senior counsel, a person who is appointed as a Member of the Tribunal, is appointed for a term of five years, which is extendable by one more term of five years by the Government, if such person is found to be suitable and effective for the job, and there is no embargo for such a person to re-apply again after completion of his term of 10 years and such person can be appointed again on a fresh term, if the eligibility criteria prescribed in Section 6(2)(b) are met, till he attains the age of 65 years. The learned senior counsel further submits that the "Terms of Office" for a Member as prescribed in Section 8, and Section 10A is merely a transitory provision meant only to save the terms and conditions of service of existing members, as on the date of amendment and not a substantive provision that regulates the eligibility for fresh appointment. In sum and substance, the argument of Shri Narasimha is that a person is eligible for appointment as a Member as many times as he is selected and appointed, but after a term of 10 years, he has to seek fresh appointment. He states that this can be done by a member till such time, he attains the age of 65 years.

19. Ms. Indira Jaising, learned Additional Solicitor General, per contra, would submit that Section 8 of the Amended Act is clear and unambiguous. The Legislature clearly declares the term of office for a member of the Tribunal as 10 years and, therefore, petitioner is ineligible for fresh appointment. However, on a pointed query by the Court, the learned ASG submits that a person, who has completed term of 10 years, is eligible for appointment as Chairman of such other Tribunal, but not member of the Tribunal. The learned ASG states that the Amended Act has put in clear terms that there is a limitation of 10 years for a person to hold office as a Member, and this

amendment made explicit what was implicit earlier. In a nut-shell, the argument of the learned ASG is that once a person has completed 10 years in office as Member of the Tribunal, he is not eligible for re-appointment.

20. This Court was also assisted by Shri R. Venkataramani, learned senior counsel, in his role as Amicus Curiae. Shri Venkataramani, submits that the interpretation of Section 10A of the Amended Act did not come up for consideration before this Court in the case of *A.K. Behra* (*supra.*). He further submits that Section 10A of the Act was in the form of a transitory provision, which was made applicable to those persons who had been appointed prior to Amendment Act (Act No.1 of 2007). He further submits that the persons who are appointed after coming into force of the Amendment Act of 2006, Section 10A will have no application.

21. In order to appreciate the contentions urged, it will be necessary to have regard to some of the relevant provisions of the Act. Section 3(ia) defines 'Member' to mean a Member (whether Judicial or Administrative) of a Tribunal, and includes the Chairman. Section 6 of the Act prescribes qualification for appointment as Chairman, Vice-Chairman and other Members. We may now trace somewhat vacillating steps by which Section 8 reached its present form. For immediate reference, we may set out Section 8 of the Act prior to and after its amendment by Act 1 of 2007. We may set out the two Sections in juxta position. :

Section 8 (Before Amendment)	Section 8 (After Amendment)
8. Term of office. – The Chairman, Vice-Chairman or other Member shall hold office as such for a term of five years from the date on which he enters upon his office, but shall be eligible for re-appointment for another term of five years: Provided that no Chairman, Vice-Chairman or other Member shall hold office as such after he has attained, – (a) in the case of the Chairman or Vice-Chairman, the age of sixty-five years, and (b) in the case of any other Member, the age of sixty-two years.	**8. Term of office.** – (1) The Chairman shall hold office as such for a term of five years from the date on which he enters upon his office: Provided that no Chairman shall hold office as such after he has attained the age of sixty-eight years. (2) A Member shall hold office as such for a term of five years from the date on which he enters upon his office extendable by one more term of five years: Provided that no Member shall hold office as such after he has attained the age of sixty-five years. (3) The conditions of service of Chairman and Members shall be the same as applicable to Judges of the High Court.

22. Since some emphasis was laid on Section 10A of the Amended Provision by the Amendment Act of 2006, we notice that provision also and it reads as under:

> *"10A. Saving terms and conditions of service of Vice-Chairman.* – The Chairman, Vice-Chairman and Member of the Tribunal appointed before the commencement of the Administrative Tribunals (Amendment) Act, 2006 shall

> continue to be governed by the provisions of the Act, and the rules made thereunder as if the Administrative Tribunals (Amendment) Act, 2006 had not come into force:
>
> Provided that, however, such Chairman and the Members appointed before the coming into force of Administrative Tribunals (Amendment) Act, 2006, may on completion of their term or attainment of the age of sixty-five or sixty-two years, as the case may be, whichever is earlier may, if eligible in terms of section 8 as amended by the Administrative Tribunals (Amendment), 2006 be considered for fresh appointments subject to the condition that the total term in office of the Chairman shall not exceed five years and that of the Members, ten years."

23. Section 8 of the Act, prior to its amendment, provided for the term of office of Chairman, Vice Chairman and other Members of the Tribunal. By virtue of this provision, they would hold the office as such for a term of five years from the date they enter upon such office. However, they are eligible for re-appointment for another term of five years. The proviso that is appended to the Section, provides some sort of restriction of 'age bar' in the case of Chairman, Vice-Chairman and Members. The Chairman and Vice Chairman shall not hold their offices as such after they have attained the age of sixty five years and in the case of any other Member, he shall not hold office after the age of sixty-two years.

24. Section 8 was amended by Act 1 of 2007. The amended provision also provides the "Term of Office" of the Chairman and Members of the Tribunal. From the language employed in the Section, what we can decipher is that the Chairman of the Tribunal shall hold office as such for a term of five years from the date on which he enters upon his office. The proviso appended to the Section is couched in the negative language. It states that a person appointed as a Chairman cannot hold office as such after he has attained the age of sixty eight years. Sub section (2) of Section 8 speaks of the term of

office of a Member of the Tribunal. It only says that a person appointed as a Member of the Tribunal, if he is found eligible for the post in terms of Section 6, shall hold office, for a term of five years. In the normal course, this term of five years is extendable by a term of another five years, giving a person a total term of ten years. Continuation from 5 years to 10 years appears to be as a matter of course subject to exceptions as provided in service law jurisprudence. Further, if such person has attained the age of 65 years, then he will have to retire, irrespective of whether he has completed ten years in office as a Member or not.

25. Prior to and after its amendment, Section 8 speaks of "Term of Office". In our view the Legislature has used this expression consciously. The expression 'Term' signifies a fixed period or a determined or prescribed duration. The word 'term' when used in reference to the tenure of office, means ordinarily a fixed and definite time. There is a distinction between the words 'term' and 'tenure' as applied to a public officer or employee. The 'term', as applied to an office, refers to a fixed and definite period of time. The word 'tenure' has more extended meaning than the word 'term' and 'tenure' of an office means the manner in which the office is held especially with regard to time.

26. The learned counsel Shri Narasimha submits that the Legislature, while amending Section 8 of the Act, has not placed any bar or embargo or any outer limit of number of years that can be served by a Member of the Tribunal. Therefore, a Member of the Tribunal who has served for ten years as a Member is still eligible to apply and participate in the selection process for being appointed as a Member. Though the argument advanced looks attractive, but on a deeper consideration, we find no merit in the contention canvassed by the learned counsel. In our view, the language employed in the Section does not admit any ambiguity. The language of the Statute is clear and unambiguous. Section 8(1) of the Act

provides the term of office of Chairman of the Tribunal, which shall be five years from the date he assumes his office. The proviso qualifies and carves out an exception to the main enactment. The exception is, though a Chairman can hold office as such for a term of five years, he cannot hold such office after he attains the age of sixty-eight years. Sub-section (2) of Section 8 of the Act provides the "Term of Office" of a Member of the Tribunal. First part of the Section envisages that a member of the Tribunal shall hold the office for a 'term of five years'. The term as applied to an office, refers to a fixed and definite period of time that an appointee is authorised to serve in office. Alternatively, it can be said that the term of office that is used by the Legislature could only mean the period or limit of time during which the incumbent is permitted to hold the office. The second part of the Section gives discretion to the appointing authority to extend the term of office of a member of the Tribunal to one more term of five years. The expression 'extendable', that finds a place in the sub-section, could only mean that the term of office of an incumbent as a member of the Tribunal can be extended if the parties agree. The proviso appended to the sub-section again carves out an exception to the main provision and restricts a member for holding office after he has attained the age of sixty five years. The proviso takes care of a situation where a member whose term of office is extended for a further period of five years cannot hold such office if he has attained the age of 65 years during the extended period of five years. A combined reading of both parts of Section 8(2) of the Act clearly demonstrates that a member of a Tribunal can hold such office for a fixed and definite period of time, i.e. for a period of five years from the date on which he enters upon his office and that period may be extended for one more term of five years. What is contended before us by the learned counsel for the petitioner is that there is neither prohibition nor any embargo for a member who has completed 10 years as Member to participate in the selection process for being appointed as a Member of the Tribunal for another term of five years. This, in our opinion, is impermissible since the

total term that a person can hold the office of the Member of the Tribunal is only for a period of 10 years. In our view, if the office is created by the Legislature under due authority, it may fix the term and alter it. We can understand the heart burn of a person who has served as Member of the Tribunal for ten years and thereafter, is ineligible for being appointed as a Member of the Tribunal. We cannot help this situation. In a court of law or equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from what it has chosen to enact either in express words or by reasonable and necessary implication. It is apt to remember the words of Lord Salmon in IRC Vs. Ross Minister Ltd. (1979) 52 TC 160 (HL). It is stated, *"however, much the courts may deprecate an Act, they must apply it. It is not possible by torturing its language or by any other means to construe it so as to give it a meaning which Parliament clearly intend it to bear."* We may also add that where the Legislature clearly declares its intent in the scheme of a language of Statute, it is the duty of the Court to give full effect to the same without scanning its wisdom or policy and without engrafting, adding or implying anything which is not congenial to or consistent with such express intent of legislature. Hardship or inconvenience cannot alter the meaning employed by the Legislature if such meaning is clear on the face of the Statute. If the Statutory provisions do not go far enough to relieve the hardship of the member, the remedy lies with the Legislature and not in the hands of the Court.

27. Section 10 A of the Amended Act is the saving clause. By virtue of this Section, the Chairman, Vice-Chairman and Members of a Tribunal appointed prior to the commencement of the Administrative Tribunals (Amendment) Act, 2006, are to be governed by the provisions of the unamended Act, and the rules made thereunder, thereby their conditions of service are protected. The proviso appended to the Section fell for discussion at the time of hearing of the petition. According to Shri Venkataramani, learned Amicus and Shri Narasimha, proviso to Section 10A of the Act provides that the Chairman

and Members appointed prior to coming into force of the Amendment Act may, on completion of their term or attainment of the age of sixty five or sixty two years, as the case may be, be considered for a fresh appointment, provided they are eligible in terms of Section 8 of the Amendment Act. The other condition that requires to be satisfied is that the total term in the office of the Chairman shall not exceed five years and that of the members ten years. According to the learned counsel, reference of Section 8 in the proviso to Section 10A merely refers to the tenure and does not create any ineligibility in a Member only because he has once completed the tenure prescribed thereunder. We cannot agree with this contention. The proviso, if read plainly, the only conclusion that could be reached is that the Chairman and Members appointed prior to Amendment Act 1 of 2007 on completion of either their term of service or on attainment of 65 years in the case of Chairman or 62 years in the case of Members of the Tribunal, whichever is earlier, may be considered for fresh appointment. If they are eligible in terms of Section 8 of the Amended Act that only means if a member has not completed 10 years term as a member of the Tribunal, he is eligible for fresh appointment, provided he has not completed 65 years of age. The proviso makes it abundantly clear that such fresh appointment could be done provided they satisfy the criteria prescribed under the amended Section 8 of the Act and further, it is made subject to the condition that the total term of office of the Chairman shall not exceed 5 years and that of the Member, ten years.

28. Section 6 of the Act provides for qualification for appointment as Chairman, Vice-Chairman and other Members. Section 8 of the Amended Act provides for "Term of Office". These provisions require to be read harmoniously. However, the learned counsel for the petitioner wants us to read both these Sections separately, if so read according to him, since the petitioner satisfies all the conditions prescribed under Section 6(2)(b) of the Amended Act, the requirements of Section 8 of the Act should not be put against the Petitioner

and make him ineligible for fresh appointment. It is difficult for us to accept this argument. In our view, if the argument now put forward is accepted, it would mean that the amendment achieved no purpose whatsoever. Undoubtedly, the words of the amendment, on their plain reading, are sufficient to hold that the term of office of a Member of a Tribunal is 10 years and after completion of 10 years, he does not superannuate but he goes out of the office. In our view, the language of Section 10A is plain and unambiguous, hence there is no need to call in aid any of the rules of construction. We wish to add that the Constitutional validity of the proviso to Section 10A pertaining to the eligibility of a Member for being considered for a fresh appointment after completing his term of office as a member was specifically pleaded in *A.K. Behra's* case (supra) and the Constitutional validity of the said proviso has been upheld by the said decision in para 16 of the Judgment.

29. Shri Narasimha, learned senior counsel, contends that a member, who has completed a term of five years, can get an extension of another term of five years. Even after completing a term of ten years in office, he is still eligible for fresh appointment and this can continue till such person attains the age of 65 years. He contends that the embargo, if any, is on the tenure of a Member and not on the person applying for the post of Member. The only embargo on such person is the age limit prescribed by Section 8 of the Act. In support of his contention, Shri Narasimha pointed out to the Court that one Shri J.S. Dhaliwal was re-appointed as a Member of the Tribunal for a fresh term, after completion of his 10 year tenure. However, the learned ASG was quick to point out that the case of Shri Dhaliwal was the only a stray case in which this had happened, and attributed this to administrative lapses, rather than accede to the interpretation that a Member was eligible for fresh appointment after completion of 10 years. We are inclined to agree with the learned ASG that the appointment of Shri Dhaliwal for another term after completion of his 10 year tenure is an exception and not the rule as Shri Narasimha has

put forth before us.

30. If we have to accept the construction suggested by Shri Narasimha, then it would lead to a situation where a person who has been a Member of the Tribunal for 10 years would have to start at the bottom of the ladder as a fresh appointee. In that circumstance, those persons who are appointed as Members such as the Petitioner, who were till the previous day junior to persons such as the Petitioner, would suddenly become senior to Members such as the Petitioner. This would lead to an anomalous situation where a person who would have presided over a Bench in the Tribunal for years, would suddenly become the junior Member on the same Bench. This certainly cannot be the intention of the Legislature. A statute is designed to be workable, and the interpretation thereof by Court should be to secure that object unless crucial omission or clear direction makes that end unattainable. [see *Nelson Motis Vs. Union of India & Anr.* (1992) 4 SCC 711, *Oswal Agro Mills Ltd. Vs. CCE,* 1993 Supp. 3 SCC 316, *Omvalika Das Vs. Hulisa Shaw,* (2002) 4 SCC 539, *Natni Devi Vs. Radha Devi Gupta,* (2005) 2 SCC 271].

31. This principle is stated in the case of *Holmes v. Bradfield Rural District Council,* (1949) 1 All ER 381 at pg. 384, in which Finnemore, J. held:

> "The mere fact that the results of a statute may be unjust or absurd does not entitle this Court to refuse to give it effect, but, if there are two different interpretations of the words in an Act, the Court will adopt that which is just, reasonable and sensible rather than that which is none of those things."

32. In the case of *Tirath Singh v. Bachittar Singh,*(1955) 2 SCR 457, this Court observed:

> "5. …But it is a rule of interpretation well-established that, "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest

contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence....."

33. In the case of *Nasiruddin v. STAT,* (1975) 2 SCC 671, this Court held:

"27. ...If the precise words used are plain and unambiguous, they are bound to be construed in their ordinary sense. The mere fact that the results of a statute may be unjust does not entitle a court to refuse to give it effect. If there are two different interpretations of the words in an Act, the Court will adopt that which is just, reasonable and sensible rather than that which is none of those things. If the inconvenience is an absurd inconvenience, by reading an enactment in its ordinary sense, whereas if it is read in a manner in which it is capable, though not in an ordinary sense, there would not be any inconvenience at all; there would be reason why one should not read it according to its ordinary grammatical meaning. Where the words are plain the Court would not make any alteration."

34. Before we conclude, we intend to notice the statement made by learned senior counsel that we need to place our interpretation on the provisions of the Amended Act, which further principles of Judicial independence. Reference is made to a passage from the book of an American author, Laurence H. Tribe named "Constitutional Choices". The author, while offering his views on the topic "Entrusting Federal Judicial Power to Hybrid Tribunals", has stated:

"The independence of the federal judiciary is at least as important a constitutional value today as it was when Hamilton articulated the need for it in Federalist 78 and 79: "{A}s liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments;...{permanence in office}

may therefore be justly regarded as an indispensable ingredient in its constitution, and, in great measure, as the citadel of the public justice and the public security.: Next to life tenure, Hamilton argued, "nothing can contribute more to the independence of judges than a fixed provision for their support..... [A] power over a man's subsistence amounts to a power over his will."

35. In our view, firstly, the passage from the book, referred to by the learned senior counsel, pertains to the legal system in American Courts and Hybrid Tribunals, which has nothing to do with our legal system. Secondly, the statement relied on by the learned senior counsel is an extract from the book of a jurist, which in our view has neither any persuasive value nor legal binding on us. If the suggestion made by an American author suits our legal system, it is for the Legislature to take note of it and at any rate not for us. This Court, in the case of *Kashmir Singh vs. Union of India* (2008) 7 SCC 259 at page 273, has observed that *"the doctrine of 'independence of judiciary' has nothing to do when the tenure is fixed by a statute"*. We are in agreement with this view.

36. In view of the above discussion, we do not see any merit in this writ petition filed under Article 32 of the Constitution of India.

37. Before parting with the case, we place on record our deep appreciation for the assistance rendered by Shri Venkataramani, the learned Amicus Curiae in understanding and appreciating the nuances of the controversy involved in this petition.

38. For the foregoing reasons, we dismiss the petition. No order as to costs.

B.B.B. Writ Petition dismissed.

UNNI MENON

v.

UNION OF INDIA & ORS.

(Civil Appeal No. 7113 of 2005)

JANUARY 07, 2011

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

Service Law – Promotion – Audit/Accounts Officers – Appellant, Assistant Accounts Officer in the Office of Accountant General, deputed in Central Administrative Tribunal (CAT) – On the basis of his lien and seniority, promoted as Accounts Officer in his parent office i.e. in the office of Accountant General – Thereafter, he was absorbed as Accounts Officer in CAT – Pursuant to recommendations of IVth Pay Commission, Government of India issued Office Memorandum giving promotional grade for Audit/Accounts Officers of 'Organized Accounts Cadres' – Appellant filed application claiming entitlement to be considered for promotion as Sr. Accounts Officer in CAT based on the said Official Memorandum – Tribunal allowed the application – High Court set aside the order holding that the Accounts Department in CAT did not fall within the ambit of 'Organized Accounts Cadres' – Justification of – Held: Justified – CAT is a separate entity created under statute and is not a department of the Central Government – Cadre hierarchy in CAT is regulated by the 1990 Recruitment Rules, which are independent and self-contained – They could not be intermingled with the Rules of Central Government Departments – Appellant could not claim the benefit of the said Office Memorandum, as by the relevant time, he had lost his lien in the parent department and was borne on the cadre of Accounts Department of CAT – In the hierarchy of accounts cadre of the CAT, there was no cadre called the 'Sr. Accounts

Officer', to which the appellant wanted promotion – Administrative Tribunals Act, 1985 – s.13(2) – Central Administrative Tribunal (Accounts Personnel Posts) Recruitment Rules, 1990 – Rule 3 and Schedule 2.

While the appellant was working as Assistant Accounts Officer in the Office of the Accountant General, he went on deputation to work in the Central Administrative Tribunal (CAT) w.e.f. 21st August, 1989. As the appellant was on deputation, his lien was maintained in his parent department, i.e., Accountant General. On the basis of his lien and seniority, he was promoted as Accounts Officer in his parent office, i.e., in office of the Accountant General, w.e.f. 1st April 1992. Thereafter, he was absorbed as Accounts Officer in CAT w.e.f. 23rd March, 1994.

The IVth Pay Commission made certain recommendations in the matter of pay scales between the Accounts Officers in the Accounts Wing and the Accounts Officers in the Audit Wing of the Indian Audit and Accounts Department. Pursuant to the recommendations of the IV Pay Commission, Government of India issued a circular vide No. F.6(82)/IC/ 91 dated 22nd September, 1992 giving promotional grade for Audit/Accounts Officers of 'Organized Accounts Cadres'.

It was the case of the appellant that he should have been promoted to the cadre of Sr. Accounts Officer w.e.f. 1st April, 1995 on his completion of three years' of service in the cadre of Accounts Officer pursuant to the aforesaid circular dated 22nd September, 1992. He contended that the persons junior to him in his parent department had been promoted on completion of three years' service and that since the nature of duties performed and responsibilities shouldered by him in CAT

are identical or very similar to the duties and responsibilities in the parent cadre, he was entitled to parity in designation and pay with his counterparts in the Indian Audit & Accounts Department. The appellant's plea for promotion to the cadre of Sr. Accounts Officer was rejected on the ground that CAT did not have 'Organized Accounts Cadres' and, therefore, the benefit of O.M. dated 22nd September, 1992, could not be extended to him.

The appellant then filed an application before the Tribunal. The Tribunal allowed his application holding that even though there was no 'Organized Accounts Service' in CAT, the Accounts Department in CAT is also liable to be considered as an 'Organized Accounts Cadre' and that the Memorandum dated 22nd September, 1992 was applicable as it had a general application to all Organized Accounts Cadres.

Aggrieved, the respondents filed writ petition before the High Court. The High Court allowed the petition and set aside the order of CAT holding that the Accounts Department in CAT did not fall within the ambit of 'Organized Accounts Cadres'.

Dismissing the appeal, the Court

HELD:1. On the question whether the appellant was entitled to be considered for promotion as Sr. Accounts Officer in CAT with effect from 1-4-1995 base on the Official Memorandum of 1992, the High Court rightly held that (i) the Central Administrative Tribunal is a separate entity created under statute, is not a department of the Central Government; ii) the Official Memorandum in question was issued for the purpose of re-designating the promotional grade of Audit/Accounts Officers in 'Organized Accounts Cadres' as Sr. Audit Officer, Sr. Accounts Officer and consequent upon the creation of

promotional grade for 80 per cent of the Audit/Accounts Officer in a different scale; iii) the Memorandum specifically stated that it is applicable to Indian Audits and Accounts Department and other 'Organized Accounts Cadres', except Railway Accounts Cadres; iv) at best, it could apply to all Central Government departments and every establishment under the Central Services, where there is an organized cadre; v) there is no possibility of re-designation of posts in CAT as there is no post of Sr. Accounts Officer in the hierarchy of the accounts cadre of the CAT; and vi) the cadre hierarchy in CAT is regulated by the Central Administrative Tribunal (Accounts Personnel Posts) Recruitment Rules, 1990. Also, the appellant having lost his lien in the parent department w.e.f. 26th March, 1994, he cannot claim the benefit of the O.M. dated 22nd September, 1992, as by the relevant time, he was borne on the cadre of Accounts Department of CAT. The promotions, if any of junior in the parent department would be of no relevance for consideration of the case of the appellant. The service conditions of the officers of CAT are admittedly governed by the Recruitment Rules, 1990. Schedule 2 of the aforesaid Rules does not include any cadre called the 'Sr. Accounts Officer', to which the appellant wanted promotion. In fact, the cadre of accounts personnel in CAT consists of five categories of posts, namely, 'Deputy Controller of Accounts, Accounts Officer, Junior Accounts Officer, Senior Accountant and Junior Accountant'. The appellant was designated as the Accounts Officer at the relevant time. Therefore, his promotion could only have been to the next post of Deputy Controller of Accounts. In view of the above, O.M. dated 22nd September, 1992 clearly had no application in the case of the appellant. [Paras 13, 14] [42-F-H; 43-A-H; 44-A-C]

2. The appellant submitted that the definition of the

term 'Organized Accounts Cadre' would include the accounts service in CAT cannot be accepted. The Central Administrative Tribunal (CAT) is an independent entity created under the Administrative Tribunals Act, 1985. Section 13(2) of the aforesaid Act provides that the salaries and allowances and conditions of the service of the officers and other employees of a Tribunal shall be such, as may be specified by rules made by the appropriate governments. Undoubtedly, the Accounts and Personnel Department is governed by the Recruitment Rules, 1990 framed under the Administrative Tribunals Act, 1985, which are independent and self-contained. They could not be intermingled with the Rules of Central Government Departments. [Paras 15, 16] [44-D-H; 45-A-B]

Union of India & Ors. v. J.R. Chobedar, **W.P.(C) No. 20065-67 of 2004 decided on 25th January, 2005;** *State of Mizoram & Anr. v. Mizoram Engineering Service Association & Anr.* **(2004) 6 SCC 218 – held inapplicable.**

Case Law Reference:

(2004) 6 SCC 218 held inapplicable Para 16

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7113 of 2005.

From the Judgment and Order dated 12.04.2004 of the High Court of Kaqrnataka at Bangalore in W.P. No. 33496 of 2000(S-CAT).

S.R. Singh, Shakil Ahmed Syed, Daanish Syed, Ram Shivomani Yadav and Pradeep Kumar Dwivedi for the Appellant.

S. Wasim A. Qadri, Kunal Bahri, Saima Bakshi and P. Parmeswaran for the Respondents.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. This appeal has been filed against the final judgment and order dated 12th April, 2004 passed by the High Court of Karnataka at Bangalore rendered in Civil Writ Petition No. 33496 of 2000(S-CAT) whereby the High Court set aside and quashed the order passed by the Central Administrative Tribunal, Bangalore, ('CAT' for short) dated 1st March, 2000 and held that the Accounts Department in the CAT does not fall within the ambit of 'Organized Accounts Cadres'.

2. We may notice here the essential facts necessary for the adjudication of the present appeal. Unni Menon, appellant herein, joined the Indian Audit and Accounts Department as Upper Division Clerk w.e.f. 10th October, 1967. He thereafter cleared the SAS examination and was promoted as Section Officer, w.e.f. 24th October, 1973, in the office of Accountant General, Bangalore, Karnataka. The appellant was further promoted as Assistant Accounts Officer w.e.f. 1st April, 1987 by virtue of his seniority and merit.

3. While he was working as Assistant Accounts Officer in the office of the Accountant General, he went on deputation to work in the CAT, Bangalore Bench w.e.f. 21st August, 1989. As the appellant was on deputation, his lien was maintained in his parent department, i.e., Accountant General, Karnataka Circle, Bangalore. On the basis of his lien and seniority, he was promoted as Accounts Officer in his parent office, i.e., in office of the Accountant General, Bangalore, w.e.f. 1st April 1992. Thereafter, he was absorbed as Accounts Officer in the Central Administrative Tribunal w.e.f. 23rd March, 1994.

4. The IV Pay Commission made certain recommendations in the matter of pay scales between the Accounts Officers in the Accounts Wing and the Accounts Officers in the Audit Wing of the Indian Audit and Accounts Department. The relevant extract of the recommendations is as under :-

"There has all along been parity between the staff in the IA & AD and Accounts staff and other Departments which has been disturbed by restructuring of IA & AD into two separate cadres viz, Audit Cadre and Accounts and Establishment Cadre and giving higher pay scales to a major portion of staffs on the audit side. The audit and accounts functions are complementary to each other and are generally performed in many government offices in an integrated manner which is necessary for their effective functioning. The Staff in these offices perform functions of internal check and audit suited to the requirements of each organization which are equally important. There is direct recruitment in the scale of Rs. 330–560 in all the audit and accounts cadres through Staff Selection Commission, Railway Recruitment Boards from amongst University graduates. Therefore, in view of this, there should be board parity in the pay scales of the staff of IA & AD and other accounts organizations. Accordingly, it is recommended that the posts in the pay scale of Rs. 475–700 in the organized accounts cadres may be given the scale of Rs. 1400-2600."

5. Pursuant to the recommendations of the IV Pay Commission, Government of India issued a circular vide No. F.6(82)/IC/91 dated 22nd September, 1992 giving promotional grade for Audit/Accounts Officers of 'Organized Accounts Cadres'.

6. It is the case of the appellant that he should have been promoted to the cadre of Sr. Accounts Officer w.e.f. 1st April, 1995 on his completion of three years' of service in the cadre of Accounts Officer in the scale of Rs. 2375 – 3500 pursuant to the aforesaid circular dated 22nd September, 1992. He further pointed out that the persons junior to him in his parent department had been promoted on completion of three years' service. Since the nature of duties performed and responsibilities shouldered by him in CAT are identical or very

similar to the duties and responsibilities in the parent cadre, he was entitled to parity in designation and pay with his counterparts in the Indian Audit & Accounts Department.

7. Being aggrieved, the appellant made a representation to the Chairman, CAT, New Delhi. The Chairman, CAT, New Delhi wrote to the Department of Personnel and Training, Bangalore. The matter was taken up by Department of Personnel and Training in a detailed manner for conversion of 80% posts of Accounts Officer/ Junior Accounts Officer to the post of Senior AIO, AAO and Senior Accountant vide letter dated 16th September, 1997.

8. Thereafter, CAT, Principal Bench, New Delhi informed the Registrar, CAT, Bangalore, that as the CAT did not have 'Organized Accounts Cadres', therefore, the benefit of O.M. dated 22nd September, 1992, could not be extended to the appellant and, therefore, he is not entitled to get the promotion as mentioned under the Memorandum dated 22nd September, 1992. Subsequently, the CAT rejected appellant's plea for promotion to the cadre of Sr. Accounts Officer.

9. The appellant then filed an application being OA No. 15 of 1999 before the CAT, Bangalore. The CAT vide its final order dated 1st March, 2000 allowed his application and held that CAT is also to be considered as an 'Organized Accounts Cadre'. The CAT actually noticed that the appellant having been absorbed in CAT, Bangalore, w.e.f. 23rd March, 1994, about one year prior to his completion of three years, had lost his lien in the parent department. It had been duly terminated on 26th March, 1994.

10. Having noticed as above, the CAT also noticed that Central Administrative Tribunal (Accounts Personnel Posts) Recruitment Rules, 1990 (hereinafter referred to as 'Recruitment Rules, 1990'), were applicable to the officials of CAT. But on interpretation of the aforesaid rules, it observed that the recruitment rules would indicate that there is an 'Organized

Accounts Cadre', even though there is no 'Organized Accounts Service' in CAT. Therefore, the respondents, according to CAT, were making an artificial distinction between 'Organized Accounts Cadres' and 'Organized Accounts Services', which very much existed in CAT. The conclusion was justified on the basis that the recruitment rules clearly provided a hierarchy of posts available in the accounts cadre. The highest post available is 'Deputy Controller of Accounts, next one Accounts Officer, the third one Junior Accounts Officer, the fourth one Senior Accountant and then the Junior Accountant'. It, therefore, held that CAT has an 'Organized Accounts Cadre' and the Memorandum dated 22nd September, 1992 would be applicable. It was further observed by CAT that the O.M. dated 22nd September, 1992, has a general application to all Organized Accounts Cadres. Its application cannot be restricted only to some specified cadres. The action of the respondents was held to be arbitrary and discriminatory. This would be evident from the following observations in the order of CAT:-

> "Annexure A – 4 which is by Govt. of India, Ministry of Commerce dated 10.09.1995, this order deals with similar cases where two officers of Commerce Department by names, Smt. Dhakshayani Ramalingam and Shri. V. K. Gopalakrishnan who were Account Officers in the zones of Madras and Cochin were sent on deputation where they were observed in the regular service of those zones and those posts of account officers are also isolated posts. In such cases, the Government of India has created promotional posts as prayed by this applicant in this case and in pursuance of this O. M. at Annexure A1 those officers were directed to be appointed after following due process by following principles of fitness. This letter would clearly show that at that time the Government has not taken the objection that because those officers are from isolated posts and did not belong to the organized accounts cadres, they were not entitled. On the other hand, this

> benefit was given to those officers. In view of enclosure to Annexure A4 when the applicant is also similarly placed, we have to hold that he is also entitled for similar consideration by the Government."

With the aforesaid observations CAT held that the Accounts Department is also to be considered as an 'Organized Accounts Cadre'. The respondents were directed to reconsider the representations of the appellant and to pass suitable orders in the light of the observations made in the order within a period of three months from the date of receipt of a copy of the order.

11. Aggrieved by the aforesaid order of the CAT, the respondents filed a writ petition before the High Court of Karnataka. The Division Bench of the High Court has allowed the writ petition and set aside the impugned order of CAT. The application filed by the appellant before the CAT has been dismissed.

12. Aggrieved by the judgment of the High Court, the appellant is before us in the present appeal. The short question which arises in these proceedings was formulated by the High Court as follows:-

> "Whether the respondent is entitled to be considered for promotion as Sr. Accounts Officer in CAT with effect from 1-4-1995 base on the Official Memorandum dated 23.3.1992 bearing No.2402-GE.II/116-92?"

13. Answering the aforesaid question, the High Court held:-

(i) The Central Administrative Tribunal is a separate entity created under statute, is not a department of the Central Government.

(ii) The Official Memorandum in question is issued for the purpose of re-designating the promotional

grade of Audit/Accounts Officers in 'Organized Accounts Cadres' as Sr. Audit Officer, Sr. Accounts Officer. Consequent upon the creation of promotional grade for 80 per cent of the Audit/ Accounts Officer in a different scale.

(iii) The Memorandum specifically states that it is applicable to Indian Audits and Accounts Department and other 'Organized Accounts Cadres', except Railway Accounts Cadres.

(iv) Therefore, at best, it could apply to all Central Government departments and every establishment under the Central Services, where there is an organized cadre.

(v) There is no possibility of re-designation of posts in CAT as there is no post of Sr. Accounts Officer in the hierarchy of the accounts cadre of the CAT.

(vi) The cadre hierarchy in CAT is regulated by the Recruitment Rules, 1990. The Division Bench noticed the provision contained in Rule 3 which governs the number of posts, classification and their scales of pay which read as under:-

> "The number of the said posts, their classification and the scale of pay attached thereto shall be as specified in column 2 to 4 of the said schedule".

14. We are entirely in agreement with the observations made by the High Court. We may, however, add that the respondent having lost his lien in the parent department w.e.f. 26th March, 1994, can not claim the benefit of the O.M. dated 22nd September, 1992, as by the relevant time, he was borne on the cadre of Accounts Department of CAT. The promotions, if any of junior in the parent department would be of no

relevance for consideration of the case of the appellant. The service conditions of the officers of CAT are admittedly governed by the Recruitment Rules, 1990. Schedule 2 of the aforesaid Rules does not include any cadre called the 'Sr. Accounts Officer', to which the appellant wanted promotion. In fact, the cadre of accounts personnel in CAT consists of five categories of posts, namely, 'Deputy Controller of Accounts, Accounts Officer, Junior Accounts Officer, Senior Accountant and Junior Accountant'. The appellant was designated as the Accounts Officer at the relevant time. Therefore, his promotion could only have been to the next post of Deputy Controller of Accounts. In view of the above, the O.M. dated 22nd September, 1992 clearly would have no application in the case of the appellant.

15. Learned counsel for the appellant, however, submitted before us that the definition of the term 'Organized Accounts Cadre' would include the accounts service in CAT. The appellant cannot be denied the benefit merely because he is occupying an isolated post. Learned counsel further pointed out that in a number of cases, even in the case of isolated posts, the respondents have granted the benefit of O.M. dated 22nd September, 1992 to the officers working on such posts. Since the same benefit had been illegally denied to the appellant, the CAT had correctly applied the principle of 'equal pay for equal work' and non-discrimination amongst similarly situated employees of Union of India.

16. We are wholly unimpressed by both limbs of the submissions. It cannot be disputed that CAT is an independent entity created under the Administrative Tribunals Act, 1985. Section 13 sub-section 2 of the aforesaid Act provides that the salaries and allowances and conditions of the service of the officers and other employees of a Tribunal shall be such, as may be specified by rules made by the appropriate governments. Undoubtedly, the Accounts and Personnel Department is governed by the Recruitment Rules, 1990 framed under the

Administrative Tribunals Act, 1985, which are independent and self-contained. They could not be intermingled with the Rules of Central Government Departments. Therefore, the examples given by the learned counsel for the appellant relating to an isolated post in the BSF on the basis of the judgment of the Delhi High Court in the case of *Union of India & Ors. Vs. J.R. Chobedar,* W.P. (C) No. 20065-67 of 2004 decided on 25th January, 2005 would be of no assistance to the appellant. Similarly, the judgment of this Court in the case of *State of Mizoram & Anr. Vs. Mizoram Engineering Service Association & Anr.*[1] would have no application as it related to discrimination with regard to pay revision in the Engineering Department of Mizoram. It was in the context of the submission that the Engineering service in the State was not an organized service, this Court observed that there can be hardly any difference in organized and unorganized service so far as Government service is concerned. We may note here the observations made by this Court in Paragraph 6 of the judgment, which is as under:-

> "6. Great stress was laid on the fact that Engineering Service in the State was not an organised service and therefore, it did not have categorisation by way of entrance-level and senior-level posts and for that reason the higher scale of Rs 5900-6700 which was admissible for senior-level posts could not be given in the Engineering Service. The main reason for dubbing Engineering Service as an unorganised service in the State is absence of recruitment rules for the service. Who is responsible for not framing the recruitment rules? Are the members of the Engineering Service responsible for it? The answer is clearly "No". For failure of the State Government to frame recruitment rules and bring Engineering Service within the framework of organised service, the engineers cannot be made to suffer. Apart from the reason of absence of recruitment rules for the Engineering Service, we see hardly any

1. [(2004) 6 SCC 218.

> difference in organised and unorganised service so far as government service is concerned. In government service such a distinction does not appear to have any relevance. Civil service is not trade unionism. We fail to appreciate what is sought to be conveyed by use of the words "organised service" and "unorganised service". Nothing has been pointed out in this behalf. The argument is wholly misconceived."

These observations clearly show that the Engineering Service had been dubbed as unorganized service as the State had failed to frame the necessary recruitment rules. This Court, therefore, observed that the State Government can not take advantage of its own failure to frame the recruitment rules and bring the Engineering Service within the framework of organized service. For such failure, the Engineers could not be made to suffer. The aforesaid observations have no application to the facts and circumstances of this case.

17. We, therefore, find no merit in the submissions made by the learned counsel for the appellant. In view of the above, the appeal is dismissed.

B.B.B. Appeal dismissed.

GAYATHRI WOMEN WELFARE ASSOCIATION
v.
GOWRAMMA AND ANR.
(Civil Appeal No. 6344 of 2009)

JANUARY 11, 2011

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

Code of Civil Procedure, 1908 – Order VI, Rule 17 – Application for amendment of pleading at the stage of appeal from the original decree – Maintainability of – Suit filed by appellant for permanent injunction decreed – Defendant-respondent sought to introduce counter claim for recovery of possession at the stage of appeal – Prayer allowed by High Court – Held: The High Court was not justified in permitting the respondents to raise the counter claim at a stage after the issues had been framed by the trial court – Permitting a counter claim at this stage would reopen the decree granted by the trial court – The respondents failed to establish any factual or legal basis for modification/nullifying the decree of the trial court – Pleadings – Amendment of pleadings.

The appellant filed suit for permanent injunction contending that it had purchased the land in question under an agreement of sale and was in possession thereof, in part performance of such agreement, however, the respondents were trying to interfere with such lawful possession of the appellant. The trial court decreed the suit. The High Court, however, set aside the decree of the trial court and remanded the matter to the trial court for disposal afresh.

After remand, the respondents amended their written statement and incorporated a counter claim to direct the appellants to demolish the structures put up on the said

land, whereafter the trial court framed two additional issues, and ultimately again decreed the suit of the appellants. At the same time, the trial court dismissed the counter claim filed by the respondents and further held that the appropriate remedy available to them was to file an independent suit for possession.

Aggrieved by the dismissal of the counter claim, the respondents again came before the High Court in appeal. During pendency of the appeal, the respondents filed an application seeking amendment of the written statement to include an additional prayer in the counter claim for recovery of possession. The High Court allowed amendment of the counter claim holding that since the dispute was pending between the parties from the year 1981 and the suit was pending since 1999, no injustice would be caused to the appellant if the prayer for possession was also permitted to be incorporated in the counter claim, which would also avoid multiplicity of proceedings.

The question which arose for consideration in the present appeal was whether the High Court erred in permitting the respondents to raise the counter claim at a stage after the issues had been framed by the trial court.

Allowing the appeal, the Court

HELD:1.1. The High Court, while allowing the claim of the respondent to include the prayer for possession in the counter claim, failed to appreciate that the order passed by the trial court did not cause any prejudice to the respondents. The trial court had merely held that the remedy of an independent suit was available to the respondents. The trial court had clearly held that the cause of action for the relief of possession arose to the respondents many years ago and they, therefore, had

cause of action, if any, for an independent suit. [Paras 25, 31] [62-B; 64-H; 65-A]

1.2. One circumstance required to be taken into consideration, before an amendment is granted, is the delay in making the application seeking such amendment and, if made at the appellate sage, the reason why it was not sought in the trial court. In the present case, not only there was wholly untenable delay in the application but the appellants had a decree for permanent injunction in their favour. [Para 28] [63-B-C]

1.3. Generally speaking, a counter claim not contained in the original written statement may be refused to be taken on record, especially if issues have already been framed. In the present case, the counter claim was sought to be introduced at the stage of appeal before the High Court. In such circumstances, one is unable to accept the conclusions of the High Court that the discretion exercised by the trial court was in any manner, illegal or arbitrary in rejecting the counter claim of the respondents. [Paras 33, 34] [67-A-C]

1.4. Permitting a counter claim at this stage would reopen the decree granted in favour of the appellants by the trial court. The respondents have failed to establish any factual or legal basis for modification/nullifying the decree of the trial court. [Para 36] [68-C-D]

Ishwardas v. The State of Madya Pradesh & Ors. **1979 (4) SCC 163;** *Rohit Singh & Ors. v. State of Bihar & Ors.* **2006(12) SCC 734;** *Revajeetu Builders & Developers v. Narayana Swamy & Sons* **2009 (10) SCC 84;** *Ganga Bai v. Vijay Kumar* **1974 2 SCC 393 – relied on.**

Sampath Kumar v. Ayyakannu and Another JT **2002 (7) SC 182;** *Jag Mohan Chawla & Anr. v. Dera Radha Swami Satsang and Ors*. **1996 (4) SCC 699;** *K. Moosa Hajji's Widow*

Smt. Kannadiyil Ayissu & Ors. v. Executive Officer Sree Lakshmi Narsimha Temple **AIR 1996 SC 2224;** *Nanduri Yogananda Lakshminarasimhachari & Ors v. Sri Agastheswaraswamivaru* **AIR 1960 SC 622;** *Surinder Singh v. Kapoor Singh (dead) through Lrs. & Ors.* **2005 (5) SCC 142 ;** *Sant Lal Jain v. Avtar Singh* **AIR 1985 SC 857;** *Ramesh Chand Ardawatiya v. Anil Panjwani* **2003 (7) SCC 350;** *Dhanpal Balu Lhawale v. Adagouda Nemagouda Patil* **2009 (7) SCC 457;** *Nanduri Yogananda Lakshminarasimhachari v. Sri Agastheswaraswamivaru* **AIR 1960 SC 622 ;** *Sangaram Singh v. Election Tribunal, Kotah* **AIR 1955 SC 425;** *Arjun singh v. Mohindra Kumar* **AIR 1964 SC 993;** *Nanabhai Chunilal Kabrawala* **AIR 1964 SC 11 – referred to.**

Case Law Reference:

1979 (4) SCC 163	**relied on**	**Para 12**
JT 2002 (7) SC 182	**referred to**	**Para 13**
1996 (4) SCC 699	**referred to**	**Para 13**
AIR 1996 SC 2224	**referred to**	**Para 13**
AIR 1960 SC 622	**referred to**	**Para 13**
2005 (5) SCC 142	**referred to**	**Para 13**
2006(12) SCC 734	**relied on**	**Para 13**
AIR 1985 SC 857	**referred to**	**Para 16**
2003 (7) SCC 350	**referred to**	**Para 18**
2009 (10) SCC 84	**relied on**	**Para 19**
2009 (7) SCC 457	**referred to**	**Para 19**
AIR 1960 SC 622	**referred to**	**Para 27**
1974 2 SCC 393	**relied on**	**Para 31**

AIR 1955 SC 425	**referred to**	**Para 33**
AIR 1964 SC 993	**referred to**	**Para 33**
AIR 1964 SC 11	**referred to**	**Para 33**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6344 of 2009.

From the Judgment & Order dated 23.07.2008 of the High Court of Karnataka in R.F.A. No. 1732/2005.

p. Vishwanatha Setty, Kempe Gowda, Sharan Dev Singh Thakur, Mahesh Kumar, Vijay Kumat, Dr. Sushil Balwada for the Appellant.

K.N. Balgopal, B.M. Arun, Balaji Srinivasan, Madhusmita Bora, S. Srinivasan for the Respondents.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. This appeal is directed against the final judgment and decree/order dated 23rd of July, 2008 passed by the learned Single Judge of the High Court of Karnataka in RFA No.1732 of 2005 filed by the respondents whereby the High Court in part modified and in part set aside the judgment and decree dated 4th August, 2005 passed by the Vth Additional City Civil Judge, Bangalore in OS No.163 of 1999.

2. The short issue which arises before us is whether the High Court was justified in permitting the respondents to raise the counter claim at a stage after the issues had been framed by the trial court.

3. In order to decide the aforesaid issue, it is not necessary to make a detailed reference to the chequered history of the litigation between the parties. We may, however, briefly narrate the facts.

4. The appellants herein were the plaintiffs before the trial court and the respondents were the defendants.

5. The appellant is an Association registered under the Societies Registration Act. The appellant contends that it purchased 2 acres 30 guntas of land in Sy.No.110/2 of Laggere Village (the schedule property) under an agreement of sale dated 26th November, 1988 from its vendors Sri B.C. Vijayakumar and Smt. Mayamma. In part performance of this agreement of sale, the appellant was put in possession of the schedule property. The appellant and is members are in peaceful possession and enjoyment of the same. In the month of December, 1998, the respondents tried to interfere with the appellant's possession and enjoyment of the schedule property and therefore, they filed O.S.No.163 of 1999 for grant of decree of permanent injunction.

6. The respondents 1 and 2 entered appearance before the trial court, filed written statement inter alia contended that they are the owners of a portion of land in Sy.No110/1 of Laggere village and the appellants are trespassing into their property. The respondents, therefore, opposed the claim of the appellants. On the basis of the pleadings, the trial court framed the following three issues for its consideration:

> "1. Whether the appellant proves that it has been in lawful possession of the suit schedule property ?
>
> 2. Whether the appellant proves interference?
>
> 3. To what order and reliefs the parties are entitled ?"

7. Before the trial court, the appellant examined six witnesses as PWs1 to 6 and got marked Exs.P1 to P58. The respondents examined one witness as DW-1 and got marked Ex.D1 to D44. The trial court after hearing both the parties and on appreciation of the pleadings oral and documentary evidence on record held that the appellants are in peaceful

possession and enjoyment of the schedule property; there is interference by the respondents and consequently, decreed the suit of the appellants for permanent injunction vide judgment dated 4th August, 2005.

8. Aggrieved by this judgment and decree of the trial court, the respondents approached the High Court of Karnataka in RFA No.497 of 2002. The High Court by its judgment dated 18th June, 2002 allowed the appeal, set aside the judgment and decree of the trial court and remanded the matter to the trial court for fresh disposal in accordance with law. The High Court while remanding the matter observed as under :

> "Therefore, keeping in view the submissions made, I deem it desirable that fresh survey is to be carried out in this suit by the Assistant Director of Land Records (hereinafter referred to as 'ADLR') by giving notice to both the parties and in their presence the survey is to be made. The appellants are however entitled to produce the records of the survey done earlier as an additional document before the trial Court and after survey, considering the reports of the Surveyor and the additional documents, if any, and if necessary by allowing oral evidence, the trial court shall dispose of the suit in accordance with law."

9. After remand from the High Court, the respondents amended their written statement and incorporated counter claim to direct the appellants to demolish the structures put up subsequent to passing of the status quo order by the trial Court on the schedule property mentioned in the written statement. To this counter claim of respondents, the appellants filed written statement. On the basis of the amended pleadings, the trial court framed the following two additional issues:

> "1. Whether the respondents prove that the appellant Association have erected temporary sheds on the schedule property subsequent to passing of interim order in the above said suit.
>
> 2. Whether the respondents are entitled to the relief of Mandatory Injunction by way of counter claim."

10. After remand and framing of additional issues, both the parties adduced oral evidence and produced additional documents. Pursuant to the directions issued by the High Court in RFA No.497 of 2002, the trial court appointed Assistant Director of Land Records (hereinafter referred to as 'ADLR') as Court Commissioner to survey the schedule property in the presence of both the parties. Accordingly, the Court Commissioner conducted survey of the schedule property and submitted his report to the trial court. The Court Commissioner was examined as CW-1 and through him three documents came to be marked as Ex.C1 to Ex.C3.

11. Again the trial court after hearing both the parties and upon appreciation of the pleadings, oral as well as documentary evidence, on record decreed the suit of the appellants by judgment and decree dated 4th August, 2005. At the same time, the trial court dismissed the counter claim filed by the respondents.

12. Aggrieved by the dismissal of the counter claim, the respondents again came before the High Court in Regular First Appeal No.1732 of 2005. It was conceded before the High Court that the respondents do not have any grievance in so far as the trial court decreed the suit of the appellants. The only marginal issue raised by the respondents was that the judgment and the decree of the trial court had to be classified with reference to the survey conducted by the ADLR after the matter was remanded by the High Court. The other grievance made by the respondents was that the trial court had committed a serious error in not decreeing the counter claim. This, according to the respondents, has resulted failure of justice. In support of this submission, the respondents had relied upon the following judgments :-

a. *Ishwardas Vs. The State of Madhya Pradesh & Ors.*[1]

b. Sampath Kumar Vs. Ayyakannu and Another[2].

c. Jag Mohan Chawla & Anr. Vs. Dera Radha Swami Satsand & Ors.[3]

d. *K.Moosa Hajji's Widow Smt.Kannadiyil Ayissu & Ors. Vs. Executive Officer Sree Lakshmi Narasimha Temple*[4].

e. *Nanduri Yogananda Lakshminarasimhachari & Ors. Vs. Sri Agastheswaraswamivaru*[5].

f. *Surinder Singh Vs. Kapoor Singh (dead) through Lrs. & Ors.*[6]

13. On the other hand, the appellants supported the judgment of the trial court on the ground that they had been put in possession of the land on the basis of the survey conducted in the year 1981, under the agreement of sale dated 26th November, 1988. The survey in 2003 after remand, by virtue of order of the High Court dated 18th June, 2002 in RFA No.497 of 2002, however, indicated that the appellants were in possession of a portion in Survey No.110/1 and another portion in Survey No.110/2. It was the case of the appellants that unless they are legally dispossessed by due process of law, they were entitled to continue in the portion occupied by them in Survey No.110/1. In support of their submission the appellants relied on a judgment of this Court in *Rohit Singh & Ors. Vs. State of Bihar & Ors.*[7].

1. 1979 (4) SCC 163.
2. JT 2002 (7) SC 182.
3. 1996 (4) SCC 699.
4. AIR 1996 SC 2224.
5. AIR 1960 SC 622.
6. 2005 (5) SCC 142.
7. 2006 (12) SCC 734.

14. Upon consideration of the entire issues, the High Court concluded that the plaint schedule property of the appellants to the extent of 2 acres and 30 guntas was in survey No.110/2 of Laggere Village. The High Court also held that the survey dated 24th March, 1981 on the basis of which the appellants had been put in possession on a portion of survey No.110/1 and portion of survey No.110/2 had been set aside by the Joint Director of Land Records (hereinafter referred to as 'JDLR) on 22nd June, 1998 in Appeal No.4/98. The High Court noted that this order of JDLR was prior to the filing of the suit before the trial court on 6th January, 1999. The fact that the appellants were in possession of portions of Sy.No.110/1 and Sy.No.110/2 ought to have been pleaded in the original plaint. It is further observed that, in any event, the appellants ought to have amended the plaint contending that they are in possession of a portion of Sy.No.110/1 and a portion in Sy.No.110/2. Instead of making the necessary averments in the original plaint or amending the pleadings, the prayer of the appellants remained that they are in possession of 2 acres and 30 guntas in Survey No.110/2. The High Court further noted that the location of 2 acres and 30 guntas in Survey No.110/2 was clearly specified in the survey sketch prepared by the ADLR in the year 2003. This is also depicted in Ex.C3. The High Court noted that the learned counsel for the respondents had no objection for grant of decree for permanent injunction in favour of the appellants, classified by the survey of 2003. Relying on the submission of learned counsel for the respondents, the High Court has confirmed the decree of permanent injunction in favour of the appellant, with the modification in reference to the survey sketch Ex.C3.

15. With reference to the counter claim, the High Court observed that upon remand of the matter by the High Court in RFA No.497 of 2002, the trial court permitted the respondents to amend the written statement to incorporate the relief of counter claim for mandatory injunction. After the respondents had filed the amended written statement, the appellants filed

the written statement to the counter claim. On the basis of the amended pleadings, the trial court had framed additional issues. Upon the pleadings of the parties and upon consideration of the material on record, as noticed earlier, the trial court again decreed the suit of the appellants but dismissed the counter claim.

16. During the pendency of the appeal before the High Court, the respondents filed an application seeking amendment of the written statement to include the additional prayer in the counter claim for recovery of possession of the suit schedule property falling within Survey No.110/1. The High Court noticed that in the normal course an application for amendment of the written statement at the stage of appeal from the original decree was not entertainable. However, since the dispute was pending between the parties from the year 1981 and the suit was pending since 1999, no injustice would be caused to the appellant if the prayer for possession was also permitted to be incorporated in the counter claim. Justification given for taking such a view was to avoid multiplicity of proceedings. To buttress its conclusion, the High Court relied on a judgment of this Court in the case of *Sant Lal Jain Vs. Avtar Singh*[8]. Allowing the appeal filed by the respondents, the High Court passed the following order :-

> "1. The appeal is partly allowed.
>
> 2. The impugned judgment and decree of the trial court decreeing the suit of appellant for permanent injunction is modified specifying that the plaint schedule property as ABFH shown in green colour in survey sketch.
>
> 3. The respondents or anybody claiming under them are hereby permanently restrained from interfering from the peaceful possession and enjoyment of the plaint schedule property as stated above.
>
> 4. The impugned judgment and decree of the trial court dismissing the counter claim of the respondents is hereby set aside.
>
> 5. The application filled by the respondents for amendment of the counter claim is hereby allowed.
>
> 6. The learned counsel for the respondents to amend the counter claim of the written statement before the trial court within two weeks from the date of receipt of the order. The trial court to provide an opportunity to the appellants to file additional written statement for this counter claim and to decide the matter in accordance to both the parties.
>
> 7. In view of the fact that already abundant evidence available on record and the matter is pending for a long time, a direction is issued to the trial court to expedite the matter and to dispose the counter claim of the of the respondents as expeditiously as possible and in any event not later than four months from the date of receipt of copy of this order."

It is the aforesaid order which is challenged by the appellants herein.

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

18. Mr. Vishwanatha Shetty, learned counsel for the appellants submitted that the judgment of the High Court runs counter to the law laid down by this Court in the case of *Ramesh Chand Ardawatiya Vs. Anil Panjwani*[9] and the judgment of this Court in *Rohit Singh's* case (supra). Learned counsel further submitted that the mere fact the respondents now wish to incorporate the prayer of possession of the suit

8. AIR 1985 SC 857.

9. 2003 (7) SCC 350.

schedule property falling within Survey No.110/1, is sufficient proof of possession of the property by the appellants. Therefore, the trial court had not committed any error in granting the decree of permanent injunction for the entire suit schedule property. The appellant and its members have built a number of residential building and their members are residing in those houses. Now if the respondents wish to take possession of the aforesaid property they would have to seek the necessary relief in appropriate proceedings, i.e., by filing a separate suit for possession. According to the learned counsel, the High Court had committed an error of jurisdiction in permitting an amendment of the counter claim when the dispute had already been pending between the parties for more than 27 years. It is further the submission of he learned counsel that by now incorporating the prayer for possession, the respondents have successfully obliterated the decree passed in their favour by the trial court. He submits that by adopting such a circuitous route, the respondents are trying to avoid the legal objection including that the suit for possession is barred by limitation which would be open to the appellants, if such suit was to be filed now by the respondents with regard to the portion of the suit schedule property falling within Survey No.110/1.

19. On the other hand, Mr. Balgopal, learned senior counsel appearing for the respondents also relied on certain judgments of this Court, in support of his submission that an amendment can be allowed by the court, at any stage of the proceedings notwithstanding the law of limitation. He has pointed out that the law is well settled that the amendments in the pleadings are to be liberally permitted by the court. The only rider is the court being satisfied that such amendment is necessary for the determination of the real question in controversy. In support of his submissions, the learned counsel has made particular reference to the judgment of this Court in *Revajeetu Builders & Developers Vs. Narayana Swamy & Sons*[10] and *Dhanpal Balu Lhawale Vs. Adagouda*

10. 2009 (10) SCC 84.

Nemagouda Patil[11].

20. Learned counsel by making a detailed reference to the factual situation has submitted that the boundaries of the land were fixed in the presence of the parties on 3rd March, 2000 by the ADLR. The order of the ADLR was upheld by the Revenue Authorities. The Karnataka Appellate Tribunal dismissed Appeal No.398 of 2001 filed by the appellants on 13th December, 2001. The order of the Tribunal was challenged by the appellants in the High Court of Karnataka in Writ Petition Nos.2661-64 of 2002. The High Court dismissed the aforesaid writ petition by order dated 4th March, 2002. In view of the above, the matter regarding hudbust and fixing of boundaries and rights of interest over the respective portions of the land between the vendors of the appellants on the one hand and the respondents had attained finality.

21. This apart, after the remand of the matter by the High Court in RFA No.497 of 2002, the ADLR again conducted the survey on 25th July, 2003. At that time, the survey showed only 27 constructions in the disputed area i.e. survey No.110/1. Only 16 constructions were in the land belonging to the appellants in survey No.110/2. The survey report of the ADLR clearly demonstrated that the appellants had encroached on the land belonging to the respondents. This had necessitated the amendment to the counter claim for incorporation of the plea for possession of the same. It was next submitted by the learned counsel that the High Court was fully justified in allowing the application under Order VI Rule 17 seeking amendment of the counter claim, the aforesaid application was filed along with RFA No.1732 of 2005. According to the learned counsel, the order passed by the High Court under appeal was fully justified in the interest of justice.

22. Learned counsel then submitted that the judgment of this Court in *Rohit Singh's* case (supra) is not applicable to the

11. 2009 (7) SCC 457.

facts of this case. It is still further submitted by the learned counsel that the counter claim of the respondent is independent of the claim made by the appellants. It stands on a different footing. The counter claim is required to be treated as an independent suit in view of the provisions of Order VIII Rule 6A of the Code of Civil Procedure. Finally, it is submitted by the learned counsel that the appellants are not a bonafide litigants. Till date, the sale deed has not been executed in their favour by the vendors. They are raising all frivolous objections only on the basis of an alleged agreement for sale. According to the learned counsel, the appellants have been put up by the legal heirs of the original owners from whom the respondents had purchased the land.

23. We have considered the submissions made by the learned counsel for the parties. The trial court upon a detailed appreciation of the evidence led by the parties concluded that on the basis of the material on record, it can be said that the possession of the appellant in respect of the plaint schedule property as against the respondents was long, settled and uninterrupted. On the basis of the aforesaid conclusion, the trial court proceeded to decide the issue with regard to the counter claim of the respondents.

24. It was noticed that the respondents wanted a direction in the nature of the Mandatory Injunction, to be given to the appellant to demolish the illegal construction, which came subsequent to the passing of the status quo order. We may notice here that the status quo order referred to by the trial court had been passed on 7th January, 1999. The trial court, however, observed that "the order of status quo was granted in respect to disputed property. The disputed property is what is described in the plaint schedule and not in the schedule to the written statement." Therefore, it was observed that the respondents would have the cause of action available to seek possession based on title and not on the basis of mandatory injunction on account of violation of status quo order. In these circumstances,

the trial court observed that the appropriate remedy available to the respondents is to sue for possession.

25. In our opinion, the High Court, while allowing the claims of the respondent to include the prayer for possession in the counter claim, failed to appreciate that the order passed by the trial court did not cause any prejudice to the respondents. The trial court had merely held that the remedy of an independent suit was available to the respondents.

26. In our opinion, the judgments relied upon by the respondents are really of no assistance in the facts and circumstances of this case.

27. In *Nanduri Yogananda Lakshminarasimhachari Vs. Sri Agastheswaraswamivaru*[12], this Court observed that the amendment could be permitted in a plaint as there was no new fact to be alleged and the parties were alive to the real nature of the dispute.

28. In the case of *Pandit Ishwardas* (supra), it has been observed as follows :-

> "There is no impediment or bar against an appellate Court permitting amendment of pleadings so as to enable a party to raise a new plea. All that is necessary is that the appellate Court should observe the well known principles subject to which amendments of pleadings are usually granted. Naturally one of the circumstances which will be taken into consideration before an amendment is granted is the delay in making the application seeking such amendment and, if made at the appellate stage, the reason why it was not sought in the trial court. If the necessary material on which the plea arising from the amendment may be decided is already there, the amendment may be more readily granted than otherwise. But, there is no prohibition against an appellate Court

12. AIR 1960 SC 622.

permitting an amendment at the appellate stage merely because the necessary material is not already before the Court."

These observations clearly indicate that one of the circumstances which will be taken into consideration before an amendment is granted is the delay in making the application seeking such amendment and, if made at the appellate sage, the reason why it was not sought in the trial court. In the present case, not only there is wholly untenable delay in the application but the appellants had a decree for permanent injunction in their favour.

29. In the case of *Jagmohan Chawla* (supra), this Court considered the scope of Rule 6A to 6G of Order VIII CPC and observed as follows:-

"It is true that in money suits, decree must be conformable to Order 20, Rule 18, CPC but the object of the amendments introduced by Rules 6-A to 6-G are conferment of a statutory right on the defendant to set up a counter-claim independent of the claim on the basis of which the appellant laid the suit, on his own cause of action. In sub-rule (1) of Rule 6-A, the language is so couched with words of wide width as to enable the parties to bring his own independent cause of action in respect of any claim that would be the subject-matter of an independent suit. Thereby, it is no longer confined to money claim or to cause of action of the same nature as original action of the plaintiff. It need not relate to or be connected with the original cause of action or matter pleaded by the plaintiff. The words "any right or claim in respect of a cause of action accruing with the defendant" would show that the cause of action from which the counter-claim arises need not necessarily arise from or have any nexus with the cause of action of the plaintiff that occasioned to lay the suit. The only limitation is that the cause of action should arise before

the time fixed for filing the written statement expires."

The aforesaid observations, in our opinion, have no relevance to the controversy in the present case, as the claim of the respondent has been rejected by the trial court on the ground that the cause of action arose a long time ago.

30. In the case of *Revajeetu Builders* (supra), this Court reiterated the very wide discretion the Courts have in the matter of amendment of pleadings. These observations were in the context of an application filed by the appellant, seeking amendment of the original plaint including the prayer clause being rejected by the High Court upon coming to a definite conclusion that the appellant while seeking permission to amend the plaint is trying to introduce a new case, which was not his case in the original plaint and the proposed amendment, if allowed, would certainly affect the rights of the respondents adversely. It was also held that any such amendment, which changes the entire character of the plaint, can not be permitted and that too, after a lapse of four years and after the institution of the suit. This Court, upon a detailed consideration of the historical background of Order VI Rule 17 and upon a comprehensive survey of the case law, concluded that the amendment can be permitted, if it was necessary for the determination of the real question in controversy. If that condition is not satisfied, the amendment can not be allowed. It was also observed as follows:-

"22. …. The power to allow an amendment is undoubtedly wide and may at any stage be appropriately exercised in the interest of justice, the law of limitation notwithstanding. But the exercise of such far-reaching discretionary powers is governed by judicial considerations and wider the discretion, greater ought to be the care and circumspection on the part of the court."

31. In our opinion, the decision of the trial court is in conformity with the aforesaid principles. The trial court has

clearly held that the cause of action for the relief of possession arose to the respondents many years ago. They may, therefore, have a cause of action, if any, for an independent suit. In the aforesaid case, the Court further reiterated the principle in *Ganga Bai Vs. Vijay Kumar*[13] wherein it was rightly observed :

> "The power to allow an amendment is undoubtedly wide and may at any stage be appropriately exercised in the interest of justice, the law of limitation notwithstanding. But the exercise of such far-reaching discretionary powers is governed by judicial considerations and wider the discretion, greater ought to be the care and circumspection on the part of the Court."

32. Similarly in *Dhanpal Balu* (supra), this Court permitted the amendment in the facts and circumstances of that case. Thus the judgment would not advance the case of the appellant in any manner.

33. We may notice here the observations made by this Court in the case of *Ramesh Chand* (supra) which may be of some relevance. Upon considering the ratio of earlier cases in the case of *Sangaram Singh Vs. Election Tribunal, Kotah*[14]*, Arjun Singh Vs. Mohindra Kumar*[15] and *Laxmidas Dayabhai Kabrawala Vs. Nanabhai Chunilal Kabrawala*[16]*,* it was held that a right to make a counter claim is statutory and a counter claim is not admissible in a case which is admittedly not within the statutory provisions. It is further observed that :

> "Looking to the scheme of Order 8 as amended by Act 104 of 1976, we are of the opinion, that there are three modes of pleading or setting up a counter-claim in a civil suit.

13. 1974 2 SCC 393.
14. AIR 1955 SC 425.
15. AIR 1964 SC 993.
16. AIR 1964 SC 11.

> Firstly, the written statement filed under Rule 1 may itself contain a counter-claim which in the light of Rule 1 read with Rule 6-A would be a counter-claim against the claim of the appellant preferred in exercise of legal right conferred by Rule 6-A. Secondly, a counter-claim may be preferred by way of amendment incorporated subject to the leave of the court in a written statement already filed. Thirdly, a counter-claim may be filed by way of a subsequent pleading under Rule 9. In the latter two cases the counter-claim though referable to Rule 6-A cannot be brought on record as of right but shall be governed by the discretion vesting in the court, either under Order 6 Rule 17 CPC if sought to be introduced by way of amendment, or, subject to exercise of discretion conferred on the court under Order 8 Rule 9 CPC if sought to be placed on record by way of subsequent pleading. The purpose of the provision enabling filing of a counter-claim is to avoid multiplicity of judicial proceedings and save upon the court's time as also to exclude the inconvenience to the parties by enabling claims and counter-claims, that is, all disputes between the same parties being decided in the course of the same proceedings. If the consequence of permitting a counter-claim either by way of amendment or by way of subsequent pleading would be prolonging of the trial, complicating the otherwise smooth flow of proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the court, the court would be justified in exercising its discretion not in favour of permitting a belated counter-claim. The framers of the law never intended the pleading by way of counter-claim being utilized as an instrument for forcing upon a reopening of the trial or pushing back the progress of proceeding. Generally speaking, a counter-claim not contained in the original written statement may be refused to be taken on record if the issues have already been framed and the case set down for trial, and more so when the trial has already commenced."

These observations make it clear that generally speaking the counter claim not contained in the original written statement may be refused to be taken on record, especially if issues have already been framed. In the present case, the counter claim is sought to be introduced at the stage of appeal before the High Court.

34. In such circumstances, we are unable to accept the conclusions of the High Court that the discretion exercised by the trial court was in any manner, illegal or arbitrary in rejecting the counter claim of the respondents. We may notice here the observations of this Court in the case of *Rohit Singh* (supra) which are as follows :-

> "A counterclaim, no doubt, could be filed even after the written statement is filed, but that does not mean that a counterclaim can be raised after issues are framed and the evidence is closed. Therefore, the entertaining of the so-called counterclaim of Respondents 3 to 17 by the trial court, after the framing of issues for trial, was clearly illegal and without jurisdiction."

These observations would show that the dismissal of the counter claim by the trial court was neither illegal nor without jurisdiction. In fact the direction issued by the High Court would clearly run counter to the aforesaid observations. In the aforesaid case, this Court was considering a situation where the evidence had been closed, arguments on behalf of the respondents had been concluded, the suit was adjourned for arguments of the appellants, the suit was dismissed for default. Subsequently, it was restored. Thereafter the respondents filed an application for amending the written statement. The counter claim was filed by the intervener. In these circumstances, it was observed that at this stage no counter claim could be entertained.

35. In the present case, after the matter had been remanded back, the trial court again decreed the suit of the appellants, the counter claim was dismissed for the reasons

stated in the judgment of the trial court. We may restate here that the prayer in the original counter claim was only for a mandatory injunction to demolish the illegal structures in Sy.No.110/1. It was only when the Regular First Appeal was filed for challenging the original decree that the respondents made an application under Order VI Rule 17 for amendment of the original written statement to incorporate the counter claim with a prayer for possession of the land in dispute in Survey No.110/1. In such circumstances, the High Court erred in disturbing the findings recorded by the trial court.

36. The matter herein symbolizes the concern highlighted by this Court in the case of *Ramesh Chand* (supra). Permitting a counter claim at this stage would be to reopen a decree which has been granted in favour of the appellants by the trial court. The respondents have failed to establish any factual or legal basis for modification/nullifying the decree of the trial court.

37. We are of the considered opinion that the High Court committed a serious error of jurisdiction in allowing the appeal filed by the respondents. Consequently, the appeal is allowed. The Judgment of the High Court is set aside.

B.B.B. Appeal allowed.

MAHANT JAWALA SINGH CHELA OF MAHANT BISHAN SINGH (DEAD) THROUGH LEGAL REPRESENTATIVE

v.

THE SHIROMANI GURDWARA PRABHANDHAK COMMITTEE, AMRITSAR

(Civil Appeal No. 6386 of 1983)

JANUARY 12, 2011

[G.S. SINGHVI AND ASOK KUMAR GANGULY, JJ.]

Sikh Gurdwaras Act, 1925:

s. 7(1), 8 and 16(2)(iii) - Declaration of an institution-Gurdwara Sri Guru Granth Sahib as a Sikh Gurdwara – Challenge to – Tribunal and the High Court holding that the institution is a Sikh Gurdwara – Sustainability of – Held: Not sustainable – Findings recorded by the Tribunal and the High Court on the use of the institution for worship by Sikhs too sketchy – In the absence of any evidence to show that the institution was established for use by Sikhs for the purpose of public worship, the Tribunal did not have the jurisdiction to declare it to be a Sikh Gurdwara – Tribunal simply relied upon the entries in the revenue records or the fact that Prakash of Guru Granth Sahib is done and on some occasion people come to worship Guru Granth Sahib – More so, fifty-three persons who filed petition u/s. 7(1) for declaring the institution as a Sikh Gurdwara did not support their plea – There was assertion by some of the petitioners who filed petition u/s. 8 seeking declaration that Dera was not a Sikh Gurdwara that their signatures were obtained by fraud – Respondent, Shiromani Gurdwara Prabhandhak Committee who impleaded itself and contested the petition filed u/s. 8, was silent on the twin requirements of s. 16(2)(iii) and did not examine any of them – Thus, order passed by the Tribunal as upheld by the High Court declaring the institution as a Sikh Gurdwara set aside.

ss. 16(2)(iii) and 7(1) – Declaration of an institution as a Sikh Gurdwara – Conditions to be fulfilled – Held: A person seeking such declaration must satisfy the Tribunal that the institution was established for use by Sikhs for the purpose of public worship and that the same was used as such before and at the time of presentation of the petition u/s. 7(1) – These two conditions are required to be fulfilled separately and conjointly and unless that is done, the Tribunal cannot declare an institution to be a Sikh Gurdwara – Onus to prove that an institution is a Sikh Gurdwara lies on the person who asserts the same.

Fifty three persons claiming to be Sikh worshippers submitted a petition to the State Government under Section 7(1) of the Sikh Gurdwaras Act, 1925 for declaring the Gurdwara Sri Guru Granth Sahib situated within the revenue estate of village Jalal, Tehsil and District Bhatinda as a Sikh Gurdwara. Thereafter, separate petitions were filed under Section 8 of the Act. One of the petition was filed by the appellant, the hereditary office holder of the said Dera praying that the said Dera may not be declared as a Sikh Gurdwara. The State Government forwarded the petitions to the Tribunal. The Tribunal issued notices to all the persons who had submitted a petition under Section 7(1) but none of them appeared to contest the petitions filed under Section 8 of the Act. The respondent-Shiromani Gurudwara Prabandhak Committee got itself impleaded as party to the proceedings pending before the Tribunal. They filed a written statement questioning the maintainability of the petition filed by the appellant. The Tribunal relying on the entries contained in the revenue records held that the institution is a Sikh Gurudwara. The High Court upheld the order passed by the Tribunal. Therefore, the appellant filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1 Before the Tribunal can declare an institution to be a Sikh Gurdwara under Section 16(2)(iii) of the Sikh Gurdwara's Act 1925, it must be satisfied that (a) the institution was established for use by Sikhs for the purpose of public worship, and (b) was used for such worship by Sikhs before and at the time of presentation of the petition under Section 7(1). These two conditions are required to be fulfilled separately and conjointly and unless that is done, the Tribunal cannot declare an institution to be a Sikh Gurdwara. [Para 22] [103-G-H; 104-A-B]

Lachhman Dass and Ors. v. Atma Singh and Ors. **AIR 1935 Lahore 666;** *Shiromani Gurdwara Parbandhak Committee, Amritsar v. Bagga Singh* **(2003) 1 SCC 619,** *Shiromani Gurdwara Parbandhak Committee v. Mahant Harnam Singh* **(2003) 11 SCC 377;** *Shiromani Gurdwara Parbandhak Committee v. Mahant Prem Dass* **(2009) 15 SCC 381 – referred to.**

1.2 The onus to prove that an institution is a Sikh Gurdwara lies on the person who asserts the same. If Shiromani Gurdwara Parbandhak Committee comes forward to support the plea or espouse the cause of the one who files petition under Section 7(1) that the particular institution is a Sikh Gurdwara and is liable to be declared as such under Section 16(2)(iii) of the Act, then the burden to prove the two conditions is on the Committee. If it fails to fulfill either of the conditions, the Tribunal does not get the jurisdiction to declare the institution as a Sikh Gurdwara. [Para 23] [104-E-G]

Shiromani Gurdwara Parbandhak Committee v.sss Mahant Prem Dass **2009 (15) SCC 318 – relied on.**

Kirpa Singh v. Ajaypal Singh **AIR 1930 Lahore 1;** *Mahant Harnam Singh v. Gurdiyal Singh* **AIR 1967 SC 1415;** *Pritam Dass v. Shiromani Gurdwara Parbandhak Committee* **(1984) 2 SCC 600;** *Mahant Dharam Dass v. State of Punjab* **(1975) 1 SCC 343;** *Shiromani Gurdwara Prabhandhak Committee v. Mahant Kirpa Ram* **(1984) 2 SCC 614;** *Uttam Das v. Shiromani Gurdwara Parbandhak Committee* **(1996) 5 SCC 71 – referred to.**

2.1 None of the fifty-three persons who submitted petition under Section 7(1) of the Act for declaring the institution in question as a Sikh Gurdwara responded to the notice issued by the Tribunal or appeared before it to support their plea. Rather, some of them filed petition under Section 8 asserting that their signatures were obtained by fraud and at least four of them filed affidavits in support of that assertion. It is a different thing that they did not pursue the petition filed under Section 8, which was dismissed in default and the Tribunal erroneously discarded the affidavits by observing that they were not examined by the appellant. As a matter of fact, it was for the respondent to examine those fifty-three persons or at least some of them. Unfortunately, the Tribunal and the High Court did not direct their attention towards this important omission and decided the matter by relying upon the oral evidence of those who were not party to the petition filed under Section 7(1) and the revenue records produced by the respondent. [Para 32] [115-B-D]

2.2 The written statement filed by the respondent was conspicuously silent on the twin requirements of Section 16(2)(iii) of the Act. In the written statement filed on behalf of the respondent, it was pleaded that Gurdwara in dispute was established in the memory of Baba Kharak Singh, who was a Sikh saint or in the alternative it was established by him for worship by Sikhs and has been so used by Sikhs, that the case falls either under Section 16(2)(iii) or 16(2)(iv) [erroneously written as 16(2)(3) or 16(2)(4)] and that existence of Samadhi does not alter the

nature of the institution. In the amended written statement, the case originally pleaded was given up and an altogether new case was set up by asserting that the Gurdwara in dispute was built in the memory of the visit of Tenth Guru who came to this place from Dina and Lohagarh and stayed there for some time and that the Gurdwara is being used as a place of worship by Sikhs on account of the traditional visit of Tenth Guru. Although, in the amended written statement reference was not made to Section 16(2)(iv), the averments contained clearly suggests that the respondent wanted the institution to be declared as a Sikh Gurdwara with reference to that Section. A casual reference was also made to Section 16(2)(iii) by incorporating the following words: "or in the alternative under Section 16(2)(iii)" [Para 33] [115-E-H; 116-A-C]

2.3 The Tribunal did not accept the plea of the respondent that the Gurdwara was built in the memory of the visit of Tenth Guru and held that Section 16(2)(iv) is not attracted in the case. The Tribunal then adverted to the two conditions required to be fulfilled before an institution can be declared to be a Sikh Gurdwara. As a result to this, the Tribunal made detailed analysis of the evidence produced by the respondent and held that the institution was established by Baba Kharak Singh, a Sikh gentleman of piety and prestige in the illaqa for the Sikhs for the purpose of pubic worship of Shri Guru Granth Sahib. While recording the said finding, the Tribunal overlooked the fact that in the amended written statement the respondent had altogether given up the plea that Baba Kharak Singh was a Sikh saint and Gurdwara in dispute was established in his memory or in the alternative it was established by him for worship by Sikhs. The High Court altogether discarded the plea that Baba Kharak Singh had founded the institution by observing that there was no evidence of any type, oral

or documentary of the time of establishment of the institution pointing to the purpose of its establishment. These contradictions in the findings of the Tribunal and the High Court are too prominent to be overlooked. [Para 34] [116-C-G]

2.4 The Tribunal and the High Court also became oblivious of the fact that even though in the amended written statement filed on behalf of the respondent, an alternative plea was taken for treating the institution in dispute as a Sikh Gurdwara under Section 16(2)(iii), but no foundation was laid for raising that plea inasmuch as there was no averment that the Gurdwara was established in the particular year by the particular individual or a group of persons for use by Sikhs for the purpose of public worship and was used for such worship by Sikhs before and at the time of presentation of petition under Section 7(1). The manner in which the Tribunal analyzed the evidence produced by the parties gives an impression that it had assumed that a specific case had been set up by the respondent in the context of Section 16(2)(iii) of the Act. In the absence of basic pleadings, the Tribunal was not, at all, justified in examining the issue whether the Gurdwara is a Sikh Gurdwara within the meaning of Section 16(2)(iii) and the findings recorded by it with reference to twin requirements embodied in that section are liable to be treated as *non est*. Unfortunately, the Division Bench of the High Court also overlooked this fatal flaw in the case put forward by the respondent and thereby compounded the grave error committed by the Tribunal. [Para 35] [116-H; 117-A-D]

2.5 The findings recorded by the Tribunal and the High Court demonstrate how mis-directed consideration of the issues raised by the parties resulted in recording of patently erroneous conclusions and miscarriage of

justice. A reading of the Tribunal's order shows that it recorded satisfaction with reference to first part of Section 16(2)(iii) primarily by relying upon the entries made in khataunis and jamabandis in which Guru Granth Sahib is described as the owner of land and Baba Bishan Singh Chela of Baba Gulab Singh is shown as non-occupancy/ gair maurisi tenant. The Tribunal also attached considerable importance to use of the words "Deh Hazah" after the words Guru Granth Sahib and Gurdwara Sahib and the fact that muafi was granted in perpetuity on 14th Phagan, Samvat 1912 for the purpose of meeting the expenses of Dhup Deep and also for serving food etc. to Sadhus and wayfarers on their visit to the institution. Another factor relied upon by the Tribunal was that the institution was established by Baba Kharak Singh, who was a dedicated Sikh and this was done by him for the purpose of public worship of Guru Granth Sahib. In this process, the Tribunal completely lost sight of the fact that all the witnesses examined on behalf of the respondent spoke about establishment of the institution in dispute in the memory of the visit of Tenth Guru and his stay in the village for a few days on his way from Dina to Lambwali and none of them said a word about establishment of Gudwara by Baba Kharak Singh. The High Court altogether discarded the theory that the Gurdwara was established by or in the memory of Baba Kharak Singh. The revenue records produced by the respondent did show that Guru Granth Sahib was recorded as owner, but neither the khataunis nor jamabandis could be made basis for recording a finding that the institution was established for use by Sikhs for the purpose of public worship. The entries in the revenue records may be relevant for determining title and possessory rights over lands mentioned therein but the same could not be relied upon for recording a finding that the institution to which land belongs was established by the particular individual

for a particular purpose. The emphasis placed by the Tribunal and the High Court on the entries made in the different revenue records and the fact that Muafi was given for meeting the expenses of Dhoop Deep was clearly misplaced. Both the Tribunal and the High Court appear to be obsessed with the idea that when Guru Granth Sahib is recorded as the owner of land in the khatauni and the jamabandis and Prakash is being done in front of Guru Granth Sahib, the institution must have been established for use by Sikhs for the purpose of public worship and was used for such worship by Sikhs. This approach was clearly erroneous and the findings recorded by the Tribunal and the High Court, though concurrent are liable to be set aside being contrary to the law laid down by this Court. [Para 36] [117-E-H; 118-A-G]

2.6 The Tribunal and the High Court have not given due weightage to the evidence, oral and documentary produced by the appellant. The appellant, JS-PW-8 and seven witnesses examined by him consistently stated that the institution, that is, the Dera was established by Nirmala faquir and Baba Bishan Singh was its first Mahant. The various report show that Maharaja Bharpur Singh had given 56 Ghumaons of land to Bhai Bir Singh in Sammat 1913. It is also borne out that in Samvat 1914, the land in both the patties was given by Maharaja Bharpur Singh to Bhai Bir Singh on periodical lease. In the report of Tehsildar, Phul it was noted that there is no mention regarding the ownership but inquiry from Lambardar revealed that the ownership was of Bhai Bir Singh who was shown as Nirmal Sadhu. In the report of Revenue Superintendent, there is a mention of Dera on the land and as per the instructions given by the government on 29th Poh Samvat 1954, the entry in the column of ownership was to be made in the name of Dera Granth Sahib as per the desire of real owners. It was also indicated that the Sadhus residing in the Dera shall have

no right to sell and mortgage the land. The muafi was granted by Maharaja Bharpur Singh for dharamarth, to meet expenses of Sadhus and poor. The last order passed by the Maharaja shows that entry regarding ownership of the Dera was to be made as proposed at the time of settlement. Unfortunately, the High Court brushed aside the documentary evidence produced by the appellant by recording one line observation that his counsel could not establish its relevance. While hearing the appeal, it was duty of the High Court to have adverted to the various documents and then determined their relevance. [Para 37] [118-H; 119-A-G]

2.7 The findings recorded by the Tribunal and the High Court on the question of use of the institution for worship by Sikhs are too sketchy. The only statement made by the witnesses examined by the respondent was that sometimes the residents go for worship of Guru Granth Sahib. In the absence of any evidence to show that the institution was established for use by Sikhs for the purpose of public worship, the Tribunal did not have the jurisdiction to declare it to be a Sikh Gurdwara by simply relying upon the entries in the revenue records or the fact that Prakash of Guru Granth Sahib is done and on some occasion people come to worship Guru Granth Sahib and the High Court committed serious error by dismissing the appeal. The declaration made by the Tribunal that the institution in question is a Sikh Gurdwara is also set aside. [Paras 38 and 40] [119-H; 120-A-C-E]

Banta Singh v. Gurdwara Sahib Dasvi Patshai and another **Civil Appeal No. 446 of 1962 decided by S.C. on 09.11.1964;** *Ram Parshad and others v. Shiromani Gurdwara Parbandhak Committee, Amritsar and others* **AIR 1931 Lahore 161;** *Arjan Singh and another v. Inder Dass and another* **AIR 1934 Lahore 13;** *Maghar Singh and others v.*

Hardit Dass **AIR 1935 Lahore 879;** *Santa Singh and others v. Puran Dass and others* **AIR 1936 Lahore 216;** *Hardit Dass v. Gurdit Singh and another* **AIR 1936 Lahore 819;** *Dial Singh v. Bhagat Ram and others* **AIR 1936 Lahore 822;** *Harnam Dass v. Kartar Singh and another* **AIR 1936 Lahore 825;** *Ishar Dass v. Bhagwan Singh and another* **AIR 1936 Lahore 841;** *Mukand Singh v. Puran Dass* **AIR 1936 Lahore 924;** *Arjan Singh and another v. Harbhajan Dass and another* **AIR 1937 Lahore 280;** *Hem Singh and others v. Basant Dass and others* **AIR 1936 PC 93 – Referred to.**

Case Law Reference:

AIR (1931) Lahore 161	**Referred to**	**Para 13**
AIR (1934) Lahore 13	**Referred to**	**Para 13**
AIR (1935) Lahore 666	**Referred to**	**Para 13 and 22**
AIR (1935) Lahore 879	**Referred to**	**Para 13**
AIR (1936) Lahore 216	**Referred to**	**Para 13**
AIR (1936) Lahore 819	**Referred to**	**Para 13**
AIR (1936) Lahore 822	**Referred to**	**Para 13**
AIR (1936) Lahore 825	**Referred to**	**Para 13**
AIR (1936) Lahore 814	**Referred to**	**Para 13**
AIR (1936) Lahore 924	**Referred to**	**Para 13**
AIR (1937) Lahore 280	**Referred to**	**Para 13**
AIR (1936) PC 93	**Referred to**	**Para 13**
AIR (1967) SC 1415	**Referred to**	**Para 13,25 and 26**
(2003) 1 SCC 619	**Referred to**	**Para 22 and 30**

(2003) 11 SCC 377	**Referred to**	**Para 22**
(2009) 15 SCC 381	**Relied on**	**Para 23**
AIR (1930) Lahore 1	**Referred to**	**Para 24**
(1984) 2 SCC 600	**Referred to**	**Para 26 and 27**
(1975) 1 SCC 343	**Referred to**	**Para 26 and 27**
(1984) 2 SCC 614	**Referred to**	**Para 27**
(1996) 5 SCC 71	**Referred to**	**Para 28**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6386 of 1983.

From the Judgment & Order dated 13.09.1982 of the High Court of Punjab and Haryana at Chandigarh in Regular First Appeal No. 380 of 1972.

Sarvesh Bisaria, P.C. Sharma, Dr. Sita Ram Sharma (for S. Usha Reddy) for the Appellants.

Jaspal Singh, Alok Prakash, Madhu Moolchandani for the Respondent.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. This appeal is directed against judgment dated 13.9.1982 of the Division Bench of the Punjab and Haryana High Court whereby the appeal preferred by Mahant Jawala Singh (the appellant herein), who died during the pendency of the appeal before the High Court and is now represented by his legal representative against the order passed by Sikh Gurdwara Tribunal, Chandigarh (for short, 'the Tribunal') declaring Gurdwara Sri Guru Granth Sahib situated within the revenue estate of village Jalal, Tehsil and District

Bhatinda as a Sikh Gurdwara was dismissed.

2. Fifty-three persons claiming to be Sikh worshippers submitted a petition to the State Government under Section 7(1) of the Sikh Gurdwaras Act, 1925 (for short, 'the Act') for declaring the institution in question as a Sikh Gurdwara was published in the Punjab Government Gazette vide notification No.385-G.P. dated 25.1.1963 issued under Section 7(3) of the Act. In response to the aforesaid notification, four separate petitions were filed under Section 8 of the Act. One of the petitions was filed by the appellant. In paragraphs 2, 3 and 5 of his petition, the appellant averred as under:

> "(2) That the petitioner is a hereditary office-holder of the said Dera and is above 21 years of age and is thus entitled to forward this petition under Section 8 of the Act.
>
> (3) That the said Dera now described as Gurdwara Sri Guru Granth Sahib in the above-said Notification is not at all a Sikh Gurdwara. It was not established by or in memory of any of the ten Sikh Gurus or in commemoration of any incident in the life of any of the ten Sikh Gurus or in memory of any Sikh Martyr, Saint or Historical person and has never been used for public worship by Sikhs owing to any tradition connected with any of the ten Sikh Gurus or the Sikh religion nor was established for use by Sikhs for purposes of public worship at any time before or at the time of the presentation of the petition under sub-section (1) of Section 7 of the Act. In short none of the ingredients mentioned in Section 16 of the Act applied to the said Dera.
>
> On the other hand, the institution in question is only a Dera known as 'Wada Dera Jalal'. It was founded and established by Baba Kharak Singh, a Nirmala Sadhu long long ago. Baba Kharak Singh was a religious and pious person and was very much revered in the Ilaqa. He

established the said Dera to serve as a resting place for Nirmala Sadhus and to impart religious teachings to the disciples. It was neither established for use by Sikhs for the purpose of public worship nor was it used for such worship by the Sikhs at any time. The said Dera is partly a religious and partly a charitable institution of a private nature. Guru Granth Sahib Ji is held in great reverence by the Nirmalas. Therefore, the same is opened in one room of the Dera for recitation to the Nirmala Sadhus – The Samadhies of the previous Mahants also exist which are also the objects of worship by the disciples of the previous Mahants. The said Dera is not a Sikh Gurdwara, but is only a Nirmala institution. Nirmalas are not Sikhs as defined in the said Act.

(5) That the signatures of the persons on the petition under Section 7(1) of the Act were obtained by the employees of the Shiromani Gurdwara Parbandhak Committee, Amritsar fraudulently representing that the Shiromani Gurdwara Parbandhak Committee, Amritsar was going to request the Punjab State Government to grant annual Jagirs to all the religious institutions situate in erstwhile Pepsu, hence they should subscribe their signatures on the paper. Most of the signatures are only bogus. As a matter of fact, the said persons, never applied for declaring the said Dera to be a Sikh Gurdwara."

3. Of the remaining three petitions, two were filed by different sets of the worshippers of the institution. The fourth petition was filed by some of the persons whose names appeared in notification dated 25.1.1963. They claimed that their signatures were obtained by fraud and prayed that the Dera in question may not be declared as Sikh Gurdwara.

4. All the petitions were forwarded by the State Government to the Tribunal constituted under Section 14(1) of the Act. The Tribunal issued notices to all the persons who originally moved the State Government under Section 7(1) but

none of them appeared to contest the petitions filed under Section 8. Respondent – Shiromani Gurdwara Prabandhak Committee got itself impleaded as party to the proceedings pending before the Tribunal and filed written statement questioning the very maintainability of the petition filed by the appellant on the ground that he was not a hereditary office-holder and the petition does not disclose the custom relating to devolution of Mahantship in this Gurdwara. In paragraph 3 of the reply, the following averments were made:

"Para No.3 is right, in this respect that Baba Kharak Singh is a Sikh saint and the Gurdwara in dispute was established in his memory or in the alternative it was established by him for worship of Sikhs and has been so used i.e. for worship by Sikhs. The case falls either U/S. 16(2) (3) or 16(2) (4). This is a Gurdwara which is a public religious and charitable institution. Existence of Samadhi does not alter the nature of the institution."

5. On the pleadings of the parties, the Tribunal framed the following preliminary issue:

"Whether the petitioner is a hereditary office-holder of the institution in dispute? OPP"

6. On 2.3.1965, Shri Charan Singh, Advocate appearing on behalf of the respondent stated that he does not want to contest the status of the appellant to file petition under Section 8 of the Act as a hereditary office-holder because there are two other petitions to be decided on merits. Accordingly, the preliminary issue was decided in favour of the appellant.

7. On the same day i.e., 2.3.1965, an application was filed on behalf of the respondent for amendment of the written statement by substituting the original paragraph 3 with the following:

"The institution in dispute is a Sikh Gurdwara built in memory of a visit of the 10th Guru who came to this place

from Dina and Lohgarh and stayed here for some time. This Gurdwara was built in memory of that visit and is being used as a place of worship by Sikhs on account of the traditional visit of the 10th Guru and is therefore, being worshipped by the Sikhs or in the alternative under Section 16(2) (3)."

The amended written statement was also filed along with the application for amendment.

8. By an order dated 31.3.1965, the Tribunal granted leave to the respondent to amend the written statement and framed the following issue:

"Whether the institution in dispute is a Sikh Gurdwara?"

9. The appellant examined himself and seven other witnesses. He also produced documentary evidence in the form of Exhibits P-1 to P-31. On behalf of the respondent, six witnesses were examined and eighteen documents marked Exhibits R-1 to R-18 were produced.

10. The Tribunal first considered the question whether the institution could be declared as a Sikh Gurdwara because the same was established to commemorate the visit of 10th Guru, Shri Guru Gobind Singh Ji to village Jalal and answered the same in negative by recording the following observations:

"……. In this connection, he placed reliance on the statements of RW-1, Mal Singh, RW-2 Santa Singh, RW-3 Gurnam Singh, RW-4 Balbinder Singh, RW-5 Jagir Singh, RW-6 Baga Singh, who have all deposed that according to the tradition, the 10th Guru visited village Jalal on his way from Village Dina to village Lambra of Lambwali. The Ld. Counsel also referred us the same books of History for substantiating his said contention. But when confronted with narration to the contrary in quite a large number of historical works, relied upon and referred to us by the Ld. Counsel for the Petitioner, S. Charan Singh did

not press this plea any further. There is evidently not enough evidence on the record either factual or historical from which it may be concluded that this institution has any connection with the visit of 10th Guru to this place. Under the circumstances, we feel constrained to hold that the provisions of Section 16(2) (iv) are not attracted to the facts of the present case. The plea taken by the Respondent Committee regarding the establishment of this institution in memory of the visit of Tenth Guru to this place is, therefore, rejected."

11. The Tribunal then considered the question whether the institution could be treated as a Sikh Gurdwara under Section 16(2) (iii) of the Act, analysed the oral and documentary evidence produced by the parties and held that the institution is a Sikh Gurdwara. For recording this conclusion, the Tribunal mainly relied on the entries contained in the revenue records i.e. Exhibit R-1 (Khatauni of village Jalal), Exhibit R-2 (copy of Jamabandi pertaining to years 1981-85 BK), Exhibits R-3 and R-4 (certified copies of Jamabandies for the year 2000-2001), Exhibit R-5 (certified copy of an extract from the register of Muafi and Pensions pertaining to village Jalal), Exhibit R-7 (copy of the revised entries from the register of Muafi of village Jalal), Exhibit R-6 (certified copy of the pedigree table of village Jalal), Exhibits R-8 and R-9 (certified copies of the statements of Bhaktawar Singh Lambardar and Mahant Bishan Singh recorded on 9.11.1985 BK in Muafi File No.9), Exhibit R-14 (attested copy of an application made by Dial Singh Lambardar and some other proprietors of village Jalal dated 12, Bhadon, Sammat 1941 from file No.192 decided on 11 Asuj, 1941 (1884 A.D.), Exhibit R-18 (copy of the Jamabandi for the year 1969-70 A.D.) and observed:

"Thus from the documents placed and proved on the file on behalf of the Respondent Committee, it comes abundantly evidence that from its very inception, Guru Granth Sahib has been ceremoniously opened and recited

in the said institution which has throughout been described as a Gurdwara in the oldest as well up to date revenue record pertaining to its lands and Muafi…….. The presence and Parkash of Shri Guru Granth Sahib in Dera in question is clearly mentioned in this document which also incorporates the request and recommendation of the village proprietors to the effect that the land should be entered in the name of the Dera Granth Sahib. The counsel also argued that none of the documents marked Exhibit P-1 to P-31 in any way supported the claim of the Petitioner regarding Nirmala Character of the institution. On the other hand most of the Petitioner's documents themselves show that the Muafi of this institution was granted for the purposes of Dharam Arth and that the incumbents of this institution were all "Bhais" and not Nirmala Sadhs as now alleged by the Petitioner. Among Sikhs the title "Bhai" is generally meant and used for the most learned and venerable one's who are supposed to be well versed in Sikh Scriptures, literature and history. It is also worth mentioning here that none of the documents exhibited on behalf of the Petitioner suggest any other mode or object of worship in the said institution, at any stage of its existence. The plea of Samadh worship seems to be clearly an after thought and appears to have been introduced solely for the sake of casting doubt on the claim of the persons who have claims this institution to be Sikh Gurdwara."

12. The Tribunal noted the argument made by the counsel for the respondent that there is a statutory presumption regarding correctness of the entries in the record of rights and observed:

"……..As the Petitioner has not been able to rebute the presumption the entries in the Jamabandi Exhibits R-1, R-2, R-3, R-4 and R-18 showing Guru Granth Sahib Wakia Deh Hazah and Gurdwara Sahib Wakia Deh Hazab

as the executive owner of the landed property attached to the institution, must be presumed to be correct. There seems to be much force in this argument of the counsel. It is now for the Petitioner to satisfy us how far he has succeeded in rebutting the said presumption."

13. The Tribunal also referred to the statements of the witnesses examined by the appellant and held that the same were not sufficient to discard the evidence produced by the respondent to show that the institution was in fact established as a Sikh Gurdwara for use by Sikhs for the purpose of public worship. The Tribunal was also of the view that the affidavits (Exhibits P7 to P10) of Ginder Singh, Gurjant Singh, Nand Singh, Jiwan and Harnam Singh, who stated that their signatures on the petition filed under Section 7(1) of the Act were obtained by fraud cannot be relied upon because they were not examined as witnesses. The Tribunal then considered the argument that the Dera was established by Baba Kharak Singh, who was a Nirmala saint and rejected the same by observing that no documentary evidence was produced to prove this fact. The argument of the appellant that the use of the word 'Dera' in various documents is indicative of the fact that it was not a Gurdwara was rejected by the Tribunal by relying upon the judgments of this Court in Banta Singh v. Gurdwara Sahib Dasvi Patshai and another (Civil Appeal No.446 of 1962 decided on 9.11.1964) and three unreported judgments of the Division Bench of the High Court wherein it was held that 'Dera' and 'Gurdwara' are interchangeable terms. The Tribunal distinguished the judgments of the Lahore High Court in Ram Parshad and others v. Shiromani Gurdwara Parbandhak Committee, Amritsar and others AIR 1931 Lahore 161; Arjan Singh and another v. Inder Dass and another AIR 1934 Lahore 13; Lachhman Dass and others v. Atma Singh and others AIR 1935 Lahore 666; Maghar Singh and others v. Hardit Dass AIR 1935 Lahore 879; Santa Singh and others v. Puran Dass and others AIR 1936 Lahore 216; Hardit Dass v. Gurdit Singh and another AIR 1936 Lahore 819; Dial Singh v.

Bhagat Ram and others AIR 1936 Lahore 822; Harnam Dass v. Kartar Singh and another AIR 1936 Lahore 825; Ishar Dass v. Bhagwan Singh and another AIR 1936 Lahore 841; Mukand Singh v. Puran Dass AIR 1936 Lahore 924; Arjan Singh and another v. Harbhajan Dass and another AIR 1937 Lahore 280 and of the Privy Council in Hem Singh and others v. Basant Dass and others AIR 1936 PC 93 and distinguished the same by observing that the factual matrix of those cases was substantially different. The Tribunal rejected the plea of the appellant that the institution was established by Nirmala Sadh and distinguished the judgment of this Court in *Mahant Harnam Singh v. Gurdial Singh and another* AIR 1967 SC 1415 by making the following observations:

> "But we do not see what benefit can be derived therefrom by Petitioners, in view of the overwhelming documentary evidence which repeatedly describe this institution to be a Sikh Gurdwara, where Guru Granth Sahib has been the object of worship throughout its existence. There is no an iota of evidence to show that the building mentioned as para 4 of the Notification No.385 G.P. dated 25th January 1963 was ever established as a Nirmala institution. The gift of the land was never made to Bhai Bir Singh individually or for his personal use. It is also not mentioned in any of the documents that the institution was established for being used as Nirmala monastery or college or for the purposes of Smadh-worship or anything of that type. If anything, the statement of the previous manager Bhai Bishan Singh in the year 1928 A.D. copy marked Exhibit R-9 closed the matter in regard to his religion as well as in regard to the nature of the institution. He declared in unequivocal terms that he was a Sikh Jat and further that he was merely a manager or mahant of Gurdwara Sahib. In our opinion, the Petitioner has not been able to make out any case regarding the Nirmala character of the institution. On the other hand, on the basis of the documentary evidence discussed above, we feel inclined

> to hold that this institution was established by Baba Kharak Singh. A Sikh gentleman of piety and prestige in the Illaqa for use by Sikhs for the purposes of public worship of Sri Guru Granth Sahib, the holy Sikh Scripture."

14. In the end, the Tribunal considered whether the requirement of user of the institution by Sikhs for the purpose of public worship was satisfied and held:

> "Next coming to the second requirement as to the user before and at the time of the presentation of the Petition, we have mainly to draw material from the oral evidence adduced on behalf of the parties. It is conceded by all the PWs that the village is a Sikh Proprietory village and the major part of the population of the said Village belongs to the Sikh faith. PW-7, Sampuran Singh and PW-8 Jawala Singh Petitioner have further recorded that there is no other Sikh Gurdwara in the revenue estate of village Jalal. The consistent evidence of the Respondents witnesses is, that the object of worship in the said Gurdwara is Shri Guru Granth Sahib and nothing else. RW-1 Mal Singh has deposed that Guru Granth Sahib is the only object of worship in the institution and Sikhs comes to pay reverence in this Gurdwara on account of tradition associated with it. In cross-examination he says that the Chhota Dera of Isher Singh has nothing to do with the institution in dispute. RW-2, Santa Singh says that the Sikhs of the village come to pay reverences to the Gurdwara due to the tradition. In cross-examination, he says that he has not noticed any Smadhi in the Gurdwara but on the back side in the cremation ground there are some Samadhis. RW-3 Gurnam Singh states that Shri Guru Granth Sahib is the object of worship in this institution and that the Petitioner who is a follower of the Sikh faith is a Granthi and Mahant of this Gurudwara now. He has further mentioned that the Petitioner has started wearing saffron colour clothes for the last five or six months. RW-

4, Balbinder Singh says that the Sikhs come to worship this institution where Holy Granths is the object of worship. He also states that the birth day of 10th Guru is celebrated as a Gurpurab in the institution in dispute. In cross-examination, he asserts that there are no Smadhis on the premises of the institution, but there may be Smadhis of some persons in the cremation ground of the village, which is at the back of the village institution. Towards the end of the cross-examination, he says that he visits the institution in dispute fortnightly or monthly and he last visited it about 15 days prior to his coming to the witness box. RW-5 Jagir Sigh has stated that the institution in dispute is a Sikh Gurdwara where Sikhs go to worship and pay reverence. According to this RW, Mahant Bishan Singh was a Sikh and the Mahants, who preceded him were also Sikhs like him. RW-6, Baga Singh has deposed that the Sikhs who predominate the village go to the institution for worship where the object of worship is Guru Granth Sahib. According to RW Baga Singh, Mahant Bishan Singh was a Sikh. In cross-examination, he was confronted with the writing marked Exhibit RW-6/1 but he explained that the statement which he made in the Court of Subordinate Judge, Phool, related to another institution which was described as Dera Jawala Singh.

In fairness to Mr. Sajjan Singh, we must also notice his last submission regarding the Nirmala nature of the institution in the light of certain passages occurring at pages 172 to 181 of the Gurmukhi book 'Nirmal Panth Darshan' Volume III, written and published by Mahant Dial Singh of Mahabir Nagar, New Delhi. On the basis of the version given therein the learned counsel for the petitioner strongly stressed that the institution be declared to be dera of the Nirmala Sadhus.

The learned counsel for the Respondent Committee took a strong objection a reference being made to this book

on the ground that the same was purposely published by the Nirmalas sometime in 1963 after the publication of the notification under Section 7(3) in this case. The date of the publication of the Book is not mentioned anywhere on the title page or anywhere else in the book. S. Charan Singh however, pointed out to us that the printed matter appearing to page 553 clearly indicated that this volume was published after July 1962. The two dates 1st July 1962 and 10th July 1962 mentioned at the said page regarding the execution of some gift deed by the donor whose life is depicted thereafter, as well as the mention of some incidents of Sammat 2018 both at page 553 and page 4 also afforded a clue that this book was published only recently. Another objection raised was that no attempt having been made by the petitioner to prove that the author had any special knowledge about the subject about which he had dealt with in the book or that he had done any research in the Sikh history as a research scholar or as a historian, not much reliance can be placed on the narrations given in the said book. It was further urged that the petitioner has neither shown that the book in question was based on the material obtained from old books on religion or history, nor has he brought its author in the witness box to depose about the source of correctness of the material collected in the said compilation. Taken together, the above factors do create an impression that the present Volume of "Nirmala Panth Darshan" may have been brought out with a purpose by and at the instance of the persons who were likely to be adversely affected by the various notifications issued by the State Government under the relevant provisions of the Sikh Gurdwaras Act as amended by Act 1 of 1959. In dealing with it, we have thus to exercise much caution, more so, when the learned counsel for the petitioner has failed to support the statements made in this volume by and from any other authoritative or standard work on the subject.

Not only that, the disclosure made in the said book about the spiritual heritage of Baba Kharak Singh, the founder of the institution in dispute, damages the case of the petitioner beyond repairs. According to the pleadings and evidence of the petitioner, the said Baba Kharak Singh was a Nirmala Sadh. In the book under discussion Baba Kharak Singh is shown as disciple of Baba Gurbux Singh, the first mohatmim of historic Sikh Shrine known as Gurdwara Padshi Naumi at Dhamdhan, now a notified Sikh Gurdwara entered at Serial No. 314 of Schedule I of the S.G. Act. It is next mentioned in it that the above said Baba Gurbax Singh was administered Amrit by Bhai Daya Singh Jee who had received Nectar (Amrit) directly from the 10th Guru. It may be noted here that the said Baba Daya Singh was the first among the Five Pyaras or Beloved One's who had offered their heads to Shri Guru Gobind Singh Jee upon his command at Keshgarh on the Baisakhy festival of 1699 A.D. "Nirmal Panth Darshan" however reveals that the aforementioned Baba Kharak Singh received Amrit as well as his entire spiritual and religious training at the hands of said Baba Gurbax Singh, who after bidding farewell to Anandpur Sahib, had taken his abode at Gurdwara Dhamdhan Sahib. There is no denying the fact that Baba Daya Singh Jee and Baba Gurbax Singh Jee above mentioned were both famous Sikh heroes and historical persons, about whom references have been repeatedly made in all the important works of Sikh history. The fact that Baba Kharak Singh was initiated into Sikh-fold by administration of Amrit that is Sikh Baptism by Baba Gurbux Singh, in itself is enough to enable us to conclude that the former also came to be known as a Sikh saint of great repute during his life time. The institution established by such a devoted and dedicated Sikh as Baba Kharak Singh, for the purpose of public worship of Shri Guru Granth Sahib, cannot by any stretch of imagination or argument be held to a non-Sikh or Nirmala institution. Since, we find no substance

whatsoever, even in the above submission of the learned counsel for the petitioner, which he urged as an argument of last resort, we accordingly repel the same."

15. The appellant challenged the order of the Tribunal by filing an appeal, which was dismissed by the impugned judgment. The Division Bench of the High Court discarded the documentary evidence produced by the appellant by making the following observations:

> "At the outset, we may point out that the documentary evidence led by the petitioner in the form of Exhibits P-1 to P-31 is not of much use to him for proving his case to rebut the evidence led by the Respondent-Committee. The Tribunal in para 38 of its judgment observed:-
>
> > "The learned counsel for the petitioner has not been able to convince us as to how the documents Exhibits P-1 to P-31 in any manner substantiate the allegations of the petitioners."
>
> We also repeatedly asked the learned counsel for the appellant to explain how he derived any help from these documents to counter the case of the respondent. He was unable to derive any support from these documents. We, therefore, will not refer to those as they do not contain any substantial matter to dispute that the institution in dispute is not a Sikh Gurdwara."

16. The Division Bench of the High Court then referred to Exhibits R1 and R7 in which Guru Granth Sahib is shown as the owner of land in Patti Suleman and Patti Shamer and held that as per these entries, Bhai Bishan Singh Chela of Bhai Gulab Singh, Nirmala sadh, resident of village Jalal was only a non-occupancy tenant. The Bench did take note of the appellant's plea that Baba Kharak Singh had founded the institution but did not accept the same and observed:

"In the case of the Appellant that Baba Kharak Singh had founded the institution, but there is no direct evidence of any type, oral or documentary of the time of the establishment of the institution pointing to the purpose of its establishment. We have to fall back upon the available records of the earliest times. The revenue records referred to above are the only authentic and reliable evidence available to assess the situation. These documents show that the land of both the Pattis Suleman and Shamir in Village Jalal stood in the name of Gurdwara Sahib or Guru Granth Sahib right from the earlier times, the records came into existence. In Exhibits R-2 and R-7, the entries in red ink show that the Muafi was granted for Dhoop Deep of Guru Granth Sahib, serving the Sadhus and also serving feed to the wayfarers till the continuance of the Dera. These records, which are unimpeachable and no effect was made to doubt their veracity on behalf of the Appellant, go to establish the presence of Guru Granth Sahib in the institution since the earliest times. Muafi for Dhoop Deep of Guru Granth Sahib also indicates that it was being worshipped there and such worship was done publicly. Unless it was worshipped openly, the Rulers could not have sanctioned the Muafi and continued it in the terms which are recorded in red ink in the revenue documents."

(emphasis supplied)

The Division Bench then referred to the statement of Dogar Singh Lamberdar of Patti Suleman, which was recorded on 23rd Asuj Samvat 1956, statement of another Lamberdar of village Jalal, namely, Bakhtawar Singh, which was recorded on 8th November, 1985 Bk. and statement of Bishan Singh, an office-holder of the institution recorded on 8th November, 1985 Bk. and proceeded to observe:

"In this statement, he made an unequivocal declaration that it is a Gurdwara and that the income is being spent on Dhoop Deep and also for serving travellers. He wanted the

Muafi to be continued as before, that is, in the name of the Gurdwara or Guru Granth Sahib, as is indicated from the entries in red ink incorporated in the revenue record referred to above. Serving the travellers or running a Langer etc. is a charitable purpose of a Sikh Gurdwara.

When the other places of evidence referred to above are considered with the admission of Bishan Singh, in Exhibit R-9, then it makes the matter very clear that the institution was established as a Sikh Gurdwara for the use of Sikh for public worship. It has to be held so; especially when no direct evidence has been led that Baba Kharak Singh had founded it or that he was a Nirmala.

It becomes clear from the above discussed evidence that it was a Gurdwara and not a Dera of the Nirmalas.

All the documents leave no room for doubt that Guru Granth Sahib was the only object of worship in this institution. In the Petition itself, the presence of Guru Granth Sahib is mentioned though the purpose was sought to be restricted only for the benefit of the Nirmalas. In the light of the discussion in the previous paragraphs, we are inclined to accept this assertion about the restricted use only by the Nirmalas. If it was for a limited purpose, then the Lamberdars and Biswadars, who made statements during the enquiries about the Muafi could not make those statements, which have been referred to in the previous paragraphs in the revenue records, it could not be referred to as a Gurdwara. Even Bhai Bishan Singh admitted it to be a Gurdwara in his statement Exhibit R-9. The Muafi could not be granted and continued in the terms given. The Bws were emphatical in their assertion that Guru Granth Sahib was the only object of worship. They get very strong support from the circumstances discussed above."

17. In support of its conclusion that the institution in question is a Sikh Gurdwara, the Division Bench of the High

Court, in addition to the documentary evidence produced by the respondent, strongly relied upon the following factors:

1. The majority of the population of village Jalal was Sikh;

2. There is no other Gurdwara in the village where the Sikhs could go for worship; and

3. Maharaja of Nabha who gave Muafi and other grants was himself a Sikh ruler.

18. Shri Sarvesh Bisaria, learned counsel for the appellant referred to Section 16(2)(iii) of the Act to show that an institution can be declared to be a Sikh Gurdwara only if it is proved that the same was established for use by Sikhs for the purpose of public worship and was so used before and at the time of presentation of petition under Section 7(1). Learned counsel emphasized that the burden to prove both the ingredients of Section 16(2)(iii) was on the respondent, which it miserably failed to discharge and argued that the Tribunal committed a jurisdictional error by declaring the institution in question to be a Sikh Gurdwara only on the ground that in the revenue records produced by the respondent, Guru Granth Sahib was shown as the owner of various parcels of land and Baba Bishan Singh Chela of Baba Gulab Singh was shown as a non-occupancy tenant. Learned counsel pointed out that in the amended written statement, the respondent had specifically pleaded that the Gurdwara in question was established to commemorate the visit of 10th Guru and is being used as a place of worship on account of the said visit, but failed to substantiate the same. Learned counsel then submitted that even though in paragraph 3 of the amended written statement a reference was also made to Section 16(2)(iii), there was not a whisper that the institution was established for use by Sikhs for the purpose of public worship and was used as such before and at the time of presentation of the petition under Section 7(1) and argued that in the absence of a foundation having been laid, the Tribunal

was not justified in granting a declaration that the institution is a Sikh Gurdwara. Shri Bisaria criticized the impugned judgment and argued that the High Court committed serious error by deciding the appeal without even adverting to the documentary evidence produced by the appellant on the specious ground that the counsel appearing on his behalf could not explain as to how the same were helpful to the cause of his client. Shri Bisaria extensively referred to documents produced before this Court which, according to the learned counsel formed part of the record of the Tribunal and the High Court to show that Maharaja Bharpur Singh of Nabha State (village Jalal was part of the princely State of Nabha) had granted land measuring 50 Ghumaon (approximately 200 bighas) to Bhai Bir Singh as early as in Samvat 1908 and that in Samvat 1914 the land was given to Bhai Bir Singh on periodical lease when Maharaja Bharpur Singh visited Phul and argued that the documentary evidence showing grant of Muafi in respect of a portion of the land granted to Bhai Bir Singh and recording of the name of Dera Granth Sahib as per the desire of the owners was clearly indicative of the fact that the institution in question was a Dera and not a Gurdwara much less a Sikh Gurdwara established for use by Sikhs for the purpose of public worship. In the end, Shri Bisaria relied upon Section 4 of the Places of Worship (Special Provisions) Act, 1991 (for short, 'the 1991 Act') and argued that religious character of the Dera cannot be changed on the basis of the order passed by the Tribunal.

19. Shri Jaspal Singh, learned senior counsel appearing for the respondent supported the impugned judgment and the order of the Tribunal and argued that even though the respondent had not specifically pleaded that the institution in question was established for use by Sikhs for the purpose of public worship and was used as such by Sikhs before and at the time of presentation of the petition by 53 persons under Section 7(1) of the Act, the Tribunal did not commit any error by declaring it to be a Sikh Gurdwara because the parties had gone to the trial knowing fully well that the Tribunal was required

to decide whether the institution is a Sikh Gurdwara and led evidence in support of their respective cases. Learned senior counsel referred to the entries made in the Khatauni and Jamabandis of village Jalal to show that the Guru Granth Sahib has throughout been recorded as the owner of land and Baba Bishan Singh Chela of Baba Gulab Singh was merely a non-occupancy tenant. Learned senior counsel submitted that Muafi granted by Maharaja of Nabha did not alter the character of the institution, which was established for use by Sikhs for the purpose of public worship. Shri Jaspal Singh emphasized that the appellant did not lead any substantive evidence to prove that the institution was established by Nirmala Sadhs and worship of Guru Granth Sahib was only incidental to their activities. Shri Jaspal Singh argued that the provisions of Section 4 of the 1991 Act cannot be relied upon for the purpose of nullifying the declaration granted by the Tribunal because no evidence was produced by the appellant to show that the Dera was a religious place established by Nirmala Sadhs.

20. We have considered the respective submissions. For deciding the questions raised in this appeal, it will be useful to notice the relevant provisions of the Act. The same are as under:

> *"7. Petition to have a gurdwara declared a Sikh Gurdwara.*— (1) Any fifty or more Sikh worshippers of a gurdwara, each of whom is more than twenty-one years of age and was on the commencement of this Act or, in the case of the extended territories from the commencement of the Amending Act resident in the police station area in which the gurdwara is situated, may forward to the appropriate Secretary to the Government so as to reach the Secretary within one year from the commencement of this Act or within such further period as the State Government may by notification fix for this purpose, a petition praying to have the gurdwara declared to be a Sikh Gurdwara:

> Provided that the State Government may in respect of any such gurdwara declare by notification that a petition shall be deemed to be duly forwarded whether the petitioners were or were not on the commencement of this Act or, in the case of extended territories, on the commencement of the Amending Act, as the case may be, residents in the police-station area in which such gurdwara is situated, and shall thereafter deal with any petition that may be otherwise duly forwarded in respect of any such gurdwara as if the petition had been duly forwarded by petitioners who were such residents:
>
> Provided further that no such petition shall be entertained in respect of any institution specified in schedule I or schedule II unless the institution is deemed to be excluded from specification in schedule I under the provisions of section 4.
>
> (2) *List of property claimed for the gurdwara and of persons in possession thereof to accompany a petition under sub-section (1).*— A petition forwarded under the provisions of sub-section (1) shall state name of the gurdwara to which it relates and of the district, tehsil and revenue estate in which it is situated, and shall be accompanied by a list, verified and signed by the petitioners, of all rights, titles or interests in immovable properties situated in Punjab inclusive of the gurdwara and in all monetary endowments yielding recurring income or profit received in Punjab, which the petitioners claim to belong within their knowledge to the gurdwara the name of the person in possession of any such right, title or interest, and if any such person is insane or a minor the name of his legal or natural guardian, or if there is no such guardian, the name of the person with whom the insane person or minor resides or is residing, or if there is no such person, the name of the person actually or constructively in possession of such right, title or interest on behalf of the

insane person or minor, and if any such right, title or interest is alleged to be in possession of the gurdwara through any person, the name of such person shall be stated in the list; and the petition and the list shall be in such form and shall contain such further particulars as may be prescribed.

(3) *Publication of petition and list received under sub-sections (1) and (2).*— On receiving a petition duly signed and forwarded under the provisions of sub-section (1) the State Government shall, as soon as may be, publish it alongwith the accompanying list, by notification, and shall cause it and the list to be published, in such manner as may be prescribed, at the headquarters of the district and of the tehsil and in the revenue estate in which the gurdwara is situated and at the headquarters of every district and every tehsil and in every revenue estate in which any of the immovable properties mentioned in the list is situated and shall also give such other notice thereof as may be prescribed:

Provided that such petition may be withdrawn by notice to be forwarded by the Board so as to reach the appropriate Secretary to Government, at any time before publication, and on such withdrawal it shall be deemed as if no petition had been forwarded under the provisions of sub-section (1).

(4) & (5) xxx xxx xxx

8. *Petition to have it declared that a place asserted to be a Sikh Gurdwara is not such a gurdwara.*— When a notification has been published under the provisions of sub-section (3) of section 7 in respect of any gurdwara, any hereditary office-holder or any twenty or more worshippers of the Gurdwara, each of whom is more than twenty-one years of age and was on the commencement of this Act or, in the case of the extended territories, on

the commencement of the Amending Act, as the case may be, a resident of a police-station area in which the gurdwara is situated, may forward to the State Government, through the appropriate Secretary to Government so as to reach the secretary within ninety days from the date of the publication of the notification, a petition signed and verified by the petitioner, or petitioners, as the case may be, claiming that the Gurdwara is not a Sikh Gurdwara, and may in such petition make a further claim that any hereditary office-holder or any person who would have succeeded to such office-holder under the system of management prevailing before the first day of January 1920 or in the case of the extended territories, before the 1st day of November, 1956, as the case may be, may be restored to office on the grounds that such gurdwara is not a Sikh Gurdwara and that such office-holder ceased to be an office-holder after that day:

Provided that the State Government may in respect of any such gurdwara declare by notification that a petition of twenty or more worshippers of such gurdwara shall be deemed to be duly forwarded whether the petitioners were or were not on the commencement of this Act or, in the case of the extended territories, on the commencement of the Amending Act, as the case may be, resident in the police-station area in which such gurdwara is situated, and shall thereafter deal with any petition that may be otherwise duly forwarded in respect of any such gurdwara as if the petition had been duly forwarded by petitioners who were such residents.

16. *Issue as to whether a gurdwara is a Sikh Gurdwara to be decided first and how issue is to be decided.*— (1) Notwithstanding anything contained in any other law in force, if in any proceeding before a tribunal it is disputed that a gurdwara should or should not be declared to be a Sikh Gurdwara, the tribunal shall, before enquiring into any

other matter in dispute relating to the said gurdwara, decide whether it should or should not be declared a Sikh Gurdwara in accordance with the provisions of sub-section (2).

(2) If the tribunal finds that the gurdwara—

(i) xxx xxx xxx

(ii) xxx xxx xxx

(iii) was established for use by Sikhs for the purpose of public worship and was used for such worship by Sikhs, before and at the time of the presentation of the petition under sub-section (1) of section 7; or

(iv) was established in memory of a Sikh martyr, saint or historical person and was used for public worship by Sikhs, before and at the time of the presentation of the petition under sub-section (1) of section 7.

(v) xxx xxx xxx

(3) Where the tribunal finds that a gurdwara should not be declared to be a Sikh Gurdwara, it shall record its finding in an order, and, subject to the finding of the High Court on appeal, it shall cease to have jurisdiction in all matters concerning such gurdwara, provided that, if a claim has been made in accordance with the provisions of section 8 praying for the restoration to office of a hereditary office-holder or person who would have succeeded such office-holder under the system of management prevailing before the first day of January, 1920 or, in the case of the extended territories, before the first day of November, 1956 the tribunal shall, notwithstanding such finding continue to have jurisdiction in all matters relating to such claim; and , if the tribunal finds it proved that such office-holder ceased to be an office-holder on or after the first day of January, 1920 or, in the case of the extended

territories, after the first day of November, 1956, it may by order direct that such office-holder or person who would have so succeeded be restored to office.

21. A reading of the above reproduced provisions shows that 50 or more Sikh worshippers of a gurdwara each of whom is more than 21 years of age and is resident of the area of police station within which the gurdwara is situated can file a petition under Section 7(1) with the prayer that the gurdwara may be declared to be Sikh Gurdwara. By virtue of proviso to that section, such a petition cannot be entertained in respect of any institution specified in Schedule-I or Schedule-II unless the same is deemed to be excluded from specification in Schedule I under Section 4 of the Act. Section 7(2) specifies the particulars which are required to be incorporated in a petition filed under sub-section (1). These include the name of gurdwara to which it relates and the district, tehsil and revenue estate in which the gurdwara is situated. The petition shall also contain details of all rights, titles or interests in immovable properties situated in Punjab inclusive of the gurdwara. The names of the persons who are actually or constructively in possession of title and interest on behalf of an insane or a minor are also required to be disclosed. On receiving a petition under Section 7(1), the State Government is required to ensure that the same is published in the prescribed manner at the headquarters of the district and of the tehsil and in the revenue estate in which the gurdwara is situated. Notice is also required to be published at the headquarters of every district/tehsil/ revenue estate in which any of the immovable properties mentioned in the list is situated. The movers of the petition under Section 7(1) can withdraw by giving notice, which must reach the appropriate Secretary to the Government before publication of notification. Section 8 provides for filing of petition to contest the prayer made in a petition made under Section 7(1). A petition under Section 8 can be filed by any hereditary office holder or any 20 or more worshippers of the gurdwara each of whom is more than 21 years of age and is a resident

of a police station area in which the gurdwara is situated. In terms of Section 14(1), the State Government is required to forward to a Tribunal all petitions received by it under Sections 5, 6, 8,10 and 11 and the Tribunal is required to dispose of such petitions in accordance with the provisions of the Act. Section 16(1) contains a *non obstante* clause. It lays down that notwithstanding anything contained in any other law in force, the Tribunal shall decide the dispute whether a gurdwara should or should not be declared as a Sikh Gurdwara before inquiring into any other matter in dispute relating to the said gurdwara. Section 16(2) enumerates the types of cases in which a gurdwara can be declared to be a Sikh Gurdwara. In terms of Section 16(2)(iii), the Tribunal can declare a gurdwara to be a Sikh Gurdwara if it finds that the same was established for use by Sikhs for the purpose of public worship and was used for such worship by Sikhs before and at the time of presentation of the petition under Section 7(1). Section 16(2)(iv) empowers the Tribunal to declare a gurdwara to be a Sikh Gurdwara if it finds that the gurdwara was established in the memory of a Sikh martyr, saint or historical person and was used for such worship by Sikhs before and at the time of presentation of the petition under Section 7(1). Section 16(3) deals with cases in which the Tribunal finds the Gurdwara should not be declared as a Sikh Gurdwara. In the event of recording such finding, the Tribunal ceases to have jurisdiction in all matters concerning such Gurdwara except to the extent of restoration of office of a hereditary office holder or person who would have succeeded such office holder under the system of management prevailing before 1.1.1920 or in the case of an extended territories before 1.11.1956.

22. Section 16 of the Act has received fair amount of judicial consideration and it has been repeatedly held by the Courts that before the Tribunal can declare an institution to be a Sikh Gurdwara under Section 16(2)(iii), it must be satisfied that (a) the institution was established for use by Sikhs for the purpose of public worship, and (b) was used for such worship

by Sikhs before and at the time of presentation of the petition under Section 7(1). These two conditions are required to be fulfilled separately and conjointly and unless that is done, the Tribunal cannot declare an institution to be a Sikh Gurdwara. In other words, a person seeking a declaration that the particular institution is a Sikh Gurdwara, he must satisfy the Tribunal that the institution was established for use by Sikhs for the purpose of public worship and that the same was used as such before and at the time of presentation of the petition under Section 7(1) of the Act. If he fails to prove either of the conditions, the Tribunal cannot declare the institution as a Sikh Gurdwara. In this connection, reference may be made to the judgments of the Lahore High Court in *Lachhman Dass and others v. Atma Singh and others* (supra) and of this Court in *S.G.P.C. v. M.P. Dass Chella* (supra), *Shiromani Gurdwara Parbandhak Committee, Amritsar v. Bagga Singh* (2003) 1 SCC 619, *Shiromani Gurdwara Parbandhak Committee v. Mahant Harnam Singh* (2003) 11 SCC 377 and *Shiromani Gurdwara Parbandhak Committee v. Mahant Prem Dass* (2009) 15 SCC 381.

23. It is also a settled law that the onus to prove that an institution is a Sikh Gurdwara lies on the person who asserts the same. If Shiromani Gurdwara Parbandhak Committee comes forward to support the plea or espouse the cause of the one who files petition under Section 7(1) that the particular institution is a Sikh Gurdwara and is liable to be declared as such under Section 16(2)(iii) of the Act, then the burden to prove the two conditions is on the Committee. If it fails to fulfill either of the conditions, the Tribunal does not get the jurisdiction to declare the institution as a Sikh Gurdwara – *S.G.P.C. v. M.P. Dass Chella* (supra) and *Shiromani Gurdwara Parbandhak Committee v. Mahant Prem Dass* (supra).

24. Before proceeding further, we may notice the judgment of the Lahore High Court in *Kirpa Singh v. Ajaypal Singh* AIR 1930 Lahore 1 on which reliance was placed by the learned

counsel for the appellant to support of his argument that the institution was established by Nirmala Sadhus and, therefore, the same cannot be declared as a Sikh Gurdwara merely because Guru Granth Sahib is worshipped by the appellant and other Nirmala Sadhus. The facts of that case show that the plaintiffs-respondents had filed a suit under Section 92 of the Code of Civil Procedure for removal of the appellant from the management of the institution named "Guru Sar Satlani" situated at a distance of about 13 miles from Amritsar. According to the plaintiffs-respondents, the institution was a Sikh Gurdwara, that is, a place of public worship for the Sikhs and constitutes a trust for public purposes of charitable and religious nature. They alleged that the defendant-appellant was a man of loose character and he had committed breach of trust by mismanaging the Gurdwara, mal-administering its properties, misapplying the income, misappropriating its funds and by otherwise misbehaving and mis-conducting himself in a manner which injured and scandalized the Sikh community and worshippers of the Gurdwara. The plaintiffs-respondents also prayed for framing of a scheme for future management of the Gurdwara. The defendant-appellant denied all the allegations and also pleaded that the institution was meant for Nirmala Sadhus only and that the plaintiffs-respondents who were not Nirmalas had no interest therein. One of the issues framed by the trial Court was whether Guru Sar Satlani is a general Sikh Gaddi as distinguished form a Nirmala Sikh Gaddi and whether the plaintiffs-respondents have any interest in it and they are entitled to maintain the suit. The trial Court decreed the suit and directed removal of the defendant-appellant from the management of the institution. During the pendency of the appeal, the Sikh Gurdwaras Act, 1925 was enacted and brought into force. Bhide, J. extensively referred to the evidence produced by the parties, various books and reports on Nirmalas and observed:

> "The origin of the Nirmalas seems to be somewhat obscure and there are different traditions in connection with it. But

> it seems to be generally accepted that they came into existence in Guru govind Singh's time. Defendant Kirpa Singh has himself admitted in his statement: vide p.85, part 1 of the Printed Paper Book, that "Nirmalas" are chelas of Guru Gobind Singh, and hence it is unnecessary to dilate on this point. But although the Nirmalas appear to have been originally followers of Guru Gobind Singh the important point for consideration is whether they are now distinct from the general body of the Sikhs and in particular from the plaintiffs who are "Akalis." On this point, the authorities seem to be agreed that the Nirmalas have drifted to a great extent towards the practices of the Hindu religion. The following extract from Sir Edward Maclagan's Census report for this Province for the year 1891 is very instructive in this connection.
>
> The Nirmalas represent a different aspect of the history of Gobind's followers; for this order has by degrees rid itself of the main distinguishing marks of the Khalsa faith and is gradually returning to a pure form of orthodox Hinduism. The Nirmalas originated, like the Akalis, in the time of Gobind Singh, but there are two stories regarding the manner of their origin. According to the one, a water carrier was seized by Gobind's soldiers for supplying water to the enemy during a battle, but the Guru recognized the virtue of his act and embracing him exclaimed, Thou art without stain (Nirmala).
>
> This story, however, has too much resemblance to that regarding Kanhaiya Lal quoted in para. 103 above; and the following appears the more probable account. It is said that Guru Gobind Singh sent three followers named Karm Singh, Harchand and Mihr Rai to Benares to acquire a knowledge of Sanskrit, when the Pandits of that city refused to come themselves to Gobind Singh; and that, on their return, the Guru blessed them as being the only Earned men among the Sikhs and called them "Nirmala."

They were allowed to take the pahul and founded the order of Nirmala Sadhus. This order was at first devoted to the regulations of Gobind Singh, wore white garments, and had considerable influence with his followers. But their taste for Sanskrit literature (which is to this day cultivated by them with considerable care) led them to imbibe the principles of the Vedanta and to re-adopt many of the customs of the Shastras. They gave up the use of meat and spirits. They also began to adopt the ordinary ochre-coloured dress of the Indian faqir, which is strictly prohibited to the true followers of Gobind, and some of them are now only distinguishable from the Udasi followers of Nanak by the wearing; of the kes or uncut hair. They are almost always celibate and almost always in monasteries. They have generally some pretensions to learning, and, unlike most of the religious orders in the Punjab, have a high reputation for morality. They are said to live on offerings voluntarily presented, and to abstain from begging but there are some who say that the ochre-coloured dress has been adopted mainly for its convenience in begging. Their principal Akhara is at Hardwar, and it is said that their societies throughout the province are periodically visited by a controlling council. They have three considerable monasteries; in the Hoshiarpur District at Munak, Adamwal and Alampur Kotla; and by our returns they appear to be strong in Gurdaspur, where they are mainly returned as Hindus, and in Ambala, Ferozepor and Amritsar, where they are mainly-returned as Sikhs. It is supposed that, they are to be found in some numbers in Patiala, but our tables would intimate that they are as strong in Faridkot They are looked on as unorthodox by most true Sikhs, and it will be observed that more of them are returned in the Census as Hindu than as Sikhs. The Akalis are specially bitter against them and there have been great contentions between the two sects with regard to the right of worship at the great Sikh shrine at Apchalanagar on the Godaveri."

25. The aforementioned judgment was approved by this Court in *Mahant Harnam Singh v. Gurdiyal Singh* AIR 1967 SC 1415. In that case, the appellant had challenged the decree passed by the High Court which had reversed dismissal of the suit filed by the respondent for removal of the appellant from the office of Mahant of an institution described as Gurdwara Jhandawala. In the plaint, the respondent pleaded that is one Guru Granth Sahib at Village Jhandawala in the name of Gurdwara Jhandawala which is managed by Mahant Harnam Singh appellant as a Mahatmim, and that he is in possession of the "Dera" and agricultural land belonging to Guru Granth Sahib, Gurdwara Jhandawala. The Gurdwara was said to be a public religious place which was established by the residents of the village. It was pleaded that this religious institution was a public trust created by the residents of the village for the service of the public to provide food to the visitors from the Lungar (free kitchen) to allow the people to fulfil religious beliefs and for worship, etc. The plaintiff-respondents stated that, in the capacity of representatives of owners of lands situated at village Jhandawala and of the residents of village Jhandawala, they submitted an application for permission to institute this suit on the ground that the appellant was indulging in various undesirable activities and was misusing the funds of the trust which justified his removal from the office of the Mahant. The respondents claimed that, in their capacity of representatives of the owners of the land situated at village Jhandawala and of residents of the said village, they were entitled to institute this suit under Section 92 CPC. The trial Court held that Nirmalas are not Sikhs and the institution was not a Sikh institution and further that the plaintiffs do not have the right to file suit. The High Court did not agree with the trial Court and held that Nirmalas are a section of Sikhs and as such the Sikhs had interest in the institution because it was a Sikh Gurdwara. This Court noted that although the Punjab High Court had referred to the judgment of Lahore High Court, but overlooked the ratio thereof and held:

"We are unable to agree that these passages relied upon by the High Court are enough to lead to an inference that Nirmala Sadhus are Sikhs and that they still retain the essential characteristics of the Sikh faith. It is true that, in their origin, Nirmala Sadhus started as a section of Sikhs who were followers of Guru Gobind Singh, but, subsequently, in the period of about 300 years that has since elapsed, they have veered away from the Sikh religion. That is why, after giving their historical origin, Macauliffe expressed the opinion that Nirmalas were only nominally Sikhs. In Maclagan's Census Report also it was mentioned that Nirmala Sadhus are treated as Sikhs in some places, while in other place they are returned as Hindus. He has mentioned the Districts in Punjab where they are returned mainly as Hindus, and others where they were considered as Sikhs. Faridkot, the District within which the institution with which we are concerned is situated, is mentioned as a place where they are regarded as Hindus and in the Census they have been returned as such. In these circumstances, we do not think that this material by itself, which the High Court called out of the judgment of Bhide, J., could properly lead to the inference that Nirmalas are Sikhs. ….

…. ….. ….

Further, in this case, there was material showing that this institution at Jhandawala was registered as one of the branches of the principal institution of Nirmala Sadhus known as the Panchayati Akhara situated at Kankhal near Hardwar. There was further evidence showing that in this institution the worship is primarily of a Samadh which is against all tenets of the Sikh religion. Nirmala Sadhus, it appears, as a class worship at Samadhs which goes to show that they can no longer be regarded as people following the Sikh religion. In their beliefs and practices, the Nirmala Sadhus are now quite akin to Udasis, and

there is a series of cases which has laid down that members of the Udasi sect are not Sikhs. ……."

26. In *Pritam Dass v. Shiromani Gurdwara Parbandhak Committee* (1984) 2 SCC 600, a three-Judge Bench of this Court was called upon to consider whether the religious institution in dispute, which was situated in village Ramgarh (also known as Bhagtuana), Tehsil Faridkot, District Bhatinda was a Sikh Gurdwara. Sixty-five persons claiming to be members of the Sikh community filed a petition under Section 7(1) of the Act for declaring the institution to be a Sikh Gurdwara. The State Government notified the application under Section 7(3) of the Act. Thereupon, the appellant filed an application under Sections 8 and 10 claiming that the institution was not a Sikh Gurdwara but an Udasi institution known as Dera Bhai Bhagtu. The respondent contested the application. The Tribunal held that the institution was a Sikh Gurdwara. The High Court confirmed the findings of the Tribunal and dismissed the appeal. This Court referred to the distinctive features of Sikh Gurdwaras, the judgments in *Mahant Harnam Singh v. Gurdiyal Singh* (supra), *Mahant Dharam Dass v. State of Punjab* (1975) 1 SCC 343 and held that the Tribunal and the High Court had not examined the issues raised by the parties in a correct perspective and ignored Section 16(2). The Court then proceeded to analyze the evidence and observed:

"What emerges from this discussion is that as found by the Tribunal, the succession was from Guru to Chela; that Bhai Bhagtu was an Udasi saint and there are Samadhs on the premises — one of Bhai Bhagtu and the other of his mother. Evidence shows that there are photos of Hindu deities in the institution. These three facts, without anything more, would be sufficient to reject the case of the respondent that the institution is a Sikh gurdwara. We would like to reiterate that existence of Samadhs and succession from Guru to Chela would clearly be destructive of the character of the institution as a Sikh gurdwara

because they are inconsistent with the tenets of the Sikh religion. ..... Counsel for the respondent emphasised the feature that there was evidence to show that Guru Granth Sahib was recited and read in this institution. It is well established that Udasis are midway between Sikhs on the one hand and Hindus on the other. Srichand, son of Guru Nanak, the founder of the Sikhism, had, as already indicated, broken away and set up the Udasi sect. Udasis while venerating Guru Granth Sahib, retained Hindu practices and also showed their veneration to the Samadhs. *From the very fact that Guru Granth Sahib was recited in this institution, no support can be drawn for the claim that the institution was a Sikh gurdwara."*

(emphasis supplied)

27. In *Shiromani Gurdwara Prabhandhak Committee v. Mahant Kirpa Ram* (1984) 2 SCC 614, another three-Judge Bench relied upon the judgment in *Mahant Dharam Dass v. State of Punjab* (supra) and *Pritam Dass v. Shiromani Gurdwara Parbandhak Committee* (supra) and held:

"It must be conceded that nearly a century after the setting up of the institution, Granth Sahib was venerated and read in this institution. Does it provide conclusive evidence that the institution was set up and used for public worship by Sikhs? In order to bring the case under Section l6(2)(iii) it must not only be established that the institution was established for use by Sikhs for the purpose of public worship but was used for such worship by Sikhs before and at the time of the presentation of the petition. The use of the conjunctive "and" clearly imports that in order to attract Section 16(2) (iii), both the conditions must be cumulatively satisfied. Not only that it must be satisfactorily established that the institution was established for use by Sikhs for the purpose of public worship but was used for such worship by the Sikhs

before and at the time of the presentation of the petition. It was so held in *Gurmukh Singh* v. *Risaldar Deva Singh* and in our opinion that represents the correct interpretation of Section 16(2)(*iii*). In this case there is no evidence to show that the institution was established for use by Sikhs for the purpose of public worship. *It must be conceded that the institution may be established by anyone, may be a Sikh or follower of any other faith, but it must be established for use by Sikhs for the purpose of public worship. One can therefore, ignore the fact that the original grantor was a Muslim ruler Rai Kalha but there is nothing to show that when Gulabdas Faquir of Udasi Sect established the institution, he did it for use by Sikhs for the purpose of public worship. Later on as the majority of the population of the village was follower of Sikh religion and as Udasis also venerate Granth Sahib, reading of Granth Sahib may have commenced and therefore, generally speaking people may describe and revenue record may show it to be Gurdwara but that would neither be decisive of the character of the institution nor sufficient to bring the institution within Section 16(2)(iii) of the Act.*"

2 (AIR 1937 Lah.577)

(emphasis supplied)

28. In *Uttam Das v. Shiromani Gurdwara Parbandhak Committee* (1996) 5 SCC 71, this Court reiterated that the Udasis are a sect distinct from the Sikhs and the mere fact that they recite Guru Granth Sahib in the presence of Sikh congregation is not by itself sufficient to declare the institution to be a Sikh Gurdwara unless it is proved that the same was established for use by Sikhs for the purpose of public worship and was used for such worship by Sikhs as per the requirement of Section 16(2)(iii) of the Act.

29. In *S.G.P.C. v. M.P. Dass Chela* (supra), this Court

considered the question whether the entries in jamabandi register and mutation register to the effect that Dera Guru Granth Sahib is the owner proves that the institution was established for use by Sikhs for the public purpose and the same was used for such worship by Sikhs and answered the same in negative. In that case, an application was made by sixty persons claiming to be worshippers of Gurdwara Dera Lang Shri Guru Granth Sahib situated within the revenue estate of village Sardargarh, Tehsil and District Bhatinda under Section 7(1) of the Act. On publication of the notification under Section 7(3), Mahant Puran Dass filed a petition under Section 8 of the Act claiming that the institution was not a Sikh Gurdwara but was a Dera of Udasi sadhus. The Tribunal impleaded the appellant as a party in that petition. After considering the evidence adduced by both the parties, the Tribunal held that the respondent was not a hereditary office-holder and had no right to file petition under Section 8. The Tribunal also held that the institution in question is a Sikh Gurdwara within the meaning of Section 16(2)(iii) of the Act. On appeal, two Judges of the High Court constituting the Division Bench expressed divergent opinions. When the matter was referred to the third Judge, he agreed with one of the Judges that the respondent was a hereditary office-holder and that the institution in question was not a Sikh Gurdwara. This Court approved the view expressed by the majority and observed:

> "It is quite evident from the language of Section 16(2) that the burden of proving an institution to be a Sikh gurdwara is on the person who asserts the same. Significantly in this case, none of the sixty persons who presented the petition under Section 7(1) has chosen to enter the witness box and give evidence in support thereof. There is no explanation for the same. The oral evidence adduced on behalf of the appellant has not inspired even the Tribunal. *All that is relied on by the appellant is the entry in Jamabandi Register and Mutation Register. The entries*

> *in those registers are to the effect that Dera Guru Granth Sahib is the owner. Those entries can hardly prove either the purpose of establishment of the institution or the use thereof before and at the time of the petition under Section 7(1) of the Act*. Tiwana, J. has himself pointed out that the appellant herein who was the respondent before him was not in a position to furnish any direct evidence that it is a Sikh gurudwara.
>
> On the other hand, the entries in Ex. R-14, containing the proceedings of the Settlement Commissioner held in 1903 prove beyond doubt that the institution is not a Sikh gurdwara. Column 2 thereof shows that the original donor was Sardar Jodh Singh Saboke and the donee was Khem Dass Faqir Udasi. Column 9 refers to Guru Granth Sahib (Dera Lang) under the management of Jawahar Dass, chela Gian Dass Udasi of the village. Column 20 contains the report of the Superintendent. That shows that the muafi was granted by Sardar Jodh Singh of Sobo for expenses of the building of Sawara Guru Granth Sahib. The opinion of the Assistant Settlement Officer is set out in Column 21. The order of the Settlement Commissioner dated 1-5-1903 in Column 22 reads thus: "*Muafi as detailed continued to the Lang Dera in the name of the custodian for the time being*." Thus it is clear that the institution was not established for use by Sikhs."
>
> (emphasis supplied)

30. In *Shiromani Gurdwara Parbandhak Committee, Amritsar v. Bagga Singh* (supra), this Court held that reading of Granth Sahib or veneration of Sikh scriptures in an institution of Udasi sect cannot lead to an inference that it is a Sikh Gurdwara.

31. In the light of the propositions laid down in the aforementioned judgments, we shall now consider whether the declaration made by the Tribunal that the institution in question

is a Sikh Gurdwara was legally correct and the High Court did not commit any error by confirming the order of the Tribunal.

32. At the outset, it needs to be mentioned that none of the fifty-three persons who submitted petition under Section 7(1) of the Act for declaring the institution in question as a Sikh Gurdwara responded to the notice issued by the Tribunal or appeared before it to support their plea. Rather, some of them filed petition under Section 8 asserting that their signatures were obtained by fraud and at least four of them filed affidavits in support of that assertion. It is a different thing that they did not pursue the petition filed under Section 8, which was dismissed in default and the Tribunal erroneously discarded the affidavits by observing that they were not examined by the appellant. As a matter of fact, it was for the respondent to examine those fifty-three persons or at least some of them. Unfortunately, the Tribunal and the High Court did not direct their attention towards this important omission and decided the matter by relying upon the oral evidence of those who were not party to the petition filed under Section 7(1) and the revenue records produced by the respondent.

33. Another important aspect which has been ignored both by the Tribunal and the High Court is that the written statement filed by the respondent was conspicuously silent on the twin requirements of Section 16(2)(iii) of the Act. In the written statement filed on behalf of the respondent, it was pleaded that Gurdwara in dispute was established in the memory of Baba Kharak Singh, who was a Sikh saint or in the alternative it was established by him for worship by Sikhs and has been so used by Sikhs, that the case falls either under Section 16(2)(iii) or 16(2)(iv) [erroneously written as 16(2)(3) or 16(2)(4)] and that existence of Samadhi does not alter the nature of the institution. In the amended written statement, the case originally pleaded was given up and an altogether new case was set up by asserting that the Gurdwara in dispute was built in the memory of the visit of Tenth Guru who came to this place from Dina and

Lohagarh and stayed there for some time and that the Gurdwara is being used as a place of worship by Sikhs on account of the traditional visit of Tenth Guru. Although, in the amended written statement reference was not made to Section 16(2)(iv), the averments contained in paragraph 3 clearly suggests that the respondent wanted the institution to be declared as a Sikh Gurdwara with reference to that section. Of course, a casual reference was also made to Section 16(2)(iii) by incorporating the following words:

"or in the alternative under Section 16(2)(iii)"

34. The Tribunal did not accept the plea of the respondent that the Gurdwara was built in the memory of the visit of Tenth Guru and held that Section 16(2)(iv) is not attracted in the case. The Tribunal then adverted to the two conditions required to be fulfilled before an institution can be declared to be a Sikh Gurdwara. As a sequel to this, the Tribunal made detailed analysis of the evidence produced by the respondent and held that the institution was established by Baba Kharak Singh, a Sikh gentleman of piety and prestige in the illaqa for the Sikhs for the purpose of pubic worship of Shri Guru Granth Sahib. While recording this finding, the Tribunal overlooked the fact that in the amended written statement the respondent had altogether given up the plea that Baba Kharak Singh was a Sikh saint and Gurdwara in dispute was established in his memory or in the alternative it was established by him for worship by Sikhs. Interestingly, in paragraph 9 of the impugned judgment, the High Court altogether discarded the plea that Baba Kharak Singh had founded the institution by observing that there was no evidence of any type, oral or documentary of the time of establishment of the institution pointing to the purpose of its establishment. These contradictions in the findings of the Tribunal and the High Court are too prominent to be overlooked.

35. The Tribunal and the High Court also became oblivious of the fact that even though in paragraph 3 of the amended written statement filed on behalf of the respondent, an

alternative plea was taken for treating the institution in dispute as a Sikh Gurdwara under Section 16(2)(iii), but no foundation was laid for raising that plea inasmuch as there was no averment that the Gurdwara was established in the particular year by the particular individual or a group of persons for use by Sikhs for the purpose of public worship and was used for such worship by Sikhs before and at the time of presentation of petition under Section 7(1). The manner in which the Tribunal analyzed the evidence produced by the parties gives an impression that it had assumed that a specific case had been set up by the respondent in the context of Section 16(2)(iii) of the Act. In our view, in the absence of basic pleadings, the Tribunal was not, at all, justified in examining the issue whether the Gurdwara is a Sikh Gurdwara within the meaning of Section 16(2)(iii) and the findings recorded by it with reference to twin requirements embodied in that section are liable to be treated as *non est*. Unfortunately, the Division Bench of the High Court also overlooked this fatal flaw in the case put forward by the respondent and thereby compounded the grave error committed by the Tribunal.

36. At this stage, it is appropriate to mention that the findings recorded by the Tribunal and the High Court have been extracted in detail only to demonstrate how mis-directed consideration of the issues raised by the parties has resulted in recording of patently erroneous conclusions and miscarriage of justice. A reading of the Tribunal's order shows that it recorded satisfaction with reference to first part of Section 16(2)(iii) primarily by relying upon the entries made in khataunis and jamabandis in which Guru Granth Sahib is described as the owner of land and Baba Bishan Singh Chela of Baba Gulab Singh is shown as non-occupancy/gair maurisi tenant. The Tribunal also attached considerable importance to use of the words "Deh Hazah" after the words Guru Granth Sahib and Gurdwara Sahib and the fact that muafi was granted in perpetuity on 14th Phagan, Samvat 1912 for the purpose of meeting the expenses of Dhup Deep and also for serving food

etc. to Sadhus and wayfarers on their visit to the institution. Another factor relied upon by the Tribunal was that the institution was established by Baba Kharak Singh, who was a dedicated Sikh and this was done by him for the purpose of public worship of Guru Granth Sahib. In this process, the Tribunal completely lost sight of the fact that all the witnesses examined on behalf of the respondent spoke about establishment of the institution in dispute in the memory of the visit of Tenth Guru and his stay in the village for a few days on his way from Dina to Lambwali and none of them said a word about establishment of Gudwara by Baba Kharak Singh. Of course, as mentioned above, the High Court altogether discarded the theory that the Gurdwara was established by or in the memory of Baba Kharak Singh. The revenue records produced by the respondent did show that Guru Granth Sahib was recorded as owner, but neither the khataunis nor jamabandis could be made basis for recording a finding that the institution was established for use by Sikhs for the purpose of public worship. The entries in the revenue records may be relevant for determining title and possessory rights over lands mentioned therein but the same could not be relied upon for recording a finding that the institution to which land belongs was established by the particular individual for a particular purpose. The emphasis placed by the Tribunal and the High Court on the entries made in the different revenue records and the fact that Muafi was given for meeting the expenses of Dhoop Deep was clearly misplaced. Both the Tribunal and the High Court appear to be obsessed with the idea that when Guru Granth Sahib is recorded as the owner of land in the khatauni and the jamabandis and Prakash is being done in front of Guru Granth Sahib, the institution must have been established for use by Sikhs for the purpose of public worship and was used for such worship by Sikhs. This approach was clearly erroneous and the findings recorded by the Tribunal and the High Court, though concurrent are liable to be set aside being contrary to the law laid down by this Court.

37. We also find that the Tribunal and the High Court have

not given due weightage to the evidence, oral and documentary produced by the appellant. Appellant, Jawala Singh, who appeared as PW-8 and seven witnesses examined by him consistently stated that the institution, that is, the Dera was established by Nirmala faquir and Baba Bishan Singh was its first Mahant. The report of Tehsildar, Phul dated 16 Sawan Samvat 1941, report of the Revenue Superintendent dated 18 Har Samvat 1956, report of Nazar in Mahkama Aliya Ijlas dated 18 Bhadon, Samvat 1956, order dated 28th Bhado Samvat 1956 passed by Mahkama Aliya Ijlas and the order passed by the then Maharaja Sahib on 24 Kartik Samvat 1956 show that Maharaja Bharpur Singh had given 56 Ghumaons of land to Bhai Bir Singh in Sammat 1913. It is also borne out that in Samvat 1914, the land in both the patties was given by Maharaja Bharpur Singh to Bhai Bir Singh on periodical lease. In the report of Tehsildar, Phul it was noted that there is no mention regarding the ownership but inquiry from Lambardar revealed that the ownership was of Bhai Bir Singh who was shown as Nirmal Sadhu. In the report of Revenue Superintendent, there is a mention of dera on the land and as per the instructions given by the government on 29th Poh Samvat 1954, the entry in the column of ownership was to be made in the name of Dera Granth Sahib as per the desire of real owners. It was also indicated that the Sadhus residing in the dera shall have no right to sell and mortgage the land. The muafi was granted by Maharaja Bharpur Singh for dharamarth i.e., to meet expenses of Sadhus and poor. The last order passed by the Maharaja shows that entry regarding ownership of the Dera was to be made as proposed at the time of settlement. Unfortunately, the High Court brushed aside the documentary evidence produced by the appellant by recording one line observation that his counsel could not establish its relevance. In our view, while hearing the appeal, it was duty of the High Court to have adverted to the various documents and then determined their relevance.

38. The findings recorded by the Tribunal and the High

Court on the question of use of the institution for worship by Sikhs are too sketchy. The only statement made by the witnesses examined by the respondent was that sometimes the residents go for worship of Guru Granth Sahib. In our view, in the absence of any evidence to show that the institution was established for use by Sikhs for the purpose of public worship, the Tribunal did not have the jurisdiction to declare it to be a Sikh Gurdwara by simply relying upon the entries in the revenue records or the fact that Prakash of Guru Granth Sahib is done and on some occasion people come to worship Guru Granth Sahib and the High Court committed serious error by dismissing the appeal.

39. Since we have held that the orders passed by the Tribunal and the High Court are legally unsustainable, it is not necessary to deal with argument advanced by the learned counsel with reference to Section 4 of the 1991 Act.

40. In the result, the appeal is allowed. The impugned judgment as also the order passed by the Tribunal are set aside. As a sequel to this, the declaration made by the Tribunal that the institution in question is a Sikh Gurdwara is also set aside. The parties are left to bear their own costs.

N.J. Appeal allowed.

IQBAL MOOSA PATEL
v.
STATE OF GUJARAT
(Criminal Appeal Nos.1231-1232 of 2009)

JANUARY 12, 2011

[MARKANDEY KATJU AND T.S. THAKUR, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985 – s.8(c) r/w ss.21 and 29 – Smuggling and interstate trafficking of narcotic substances – A-3 allegedly carrying out operations at the instance of A-2 – Large quantity of heroin seized from truck driven by A-4 in which A-3 was also traveling – A-3 and A-4 made statements revealing that buyer of the consignment was A-1 – Raid carried out which led to seizure of heroin and cash from residence of A-1 – Trial court convicted all the accused – High Court upheld the conviction – Appeals by A-1, A-3 and A-4 – Held: The prosecution had established that raid was conducted and the truck driven by A-4 intercepted and searched in course of which heroin was recovered from a bag kept under the seat on which A-3 was sitting – The evidence on record totally belies the version belatedly advanced by both A-3 and A-4, that both or any one of them were/was unaware of the presence of the bag or its contents – Seizure of contraband from the residence of A-1 in raid is also established on the basis of evidence on record – The accused-appellants cannot be given the benefit of doubt – Both trial court as also the High Court minutely examined all aspects of the matter – No reason to interfere, all the more so when an appeal filed by A-2 against the judgment of High Court has been already dismissed by Supreme Court – Constitution of India, 1950 – Article 136.

Criminal Jurisprudence – Proof beyond reasonable doubt – Degree of proof required – Held: It is true that the prosecution is required to establish its case beyond a

reasonable doubt, but that does not mean that the degree of proof must be beyond a shadow of doubt.

According to the prosecution, A-2 was the kingpin of a syndicate involved in smuggling and interstate trafficking of narcotic substances and A-3 was carrying out the operations at the instance of A-2.

On the basis of secret information received by the Anti-Terrorist Squad which was passed on to the Narcotics Control Bureau (NCB), a large quantity of heroin was seized from a truck driven by A-4 in which A-3 was also traveling. A-3 and A-4 made statements revealing that the consignment in question had been supplied by A-2 and that the buyer of the consignment was A-1. A-1 was taken into custody and his statement under Section 67 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) was recorded. A raid was then carried out which led to the seizure of heroin and cash from the residence of A-1.

The trial court eventually held all the accused guilty and convicted them under Section 8(c) read with Sections 21 and 29 of the NDPS Act. The High Court upheld the conviction. An appeal filed by A-2 against the judgment of High Court has already been dismissed by this Court. The instant appeals are filed by A-1, A-3 and A-4.

Dismissing the appeals, the Court

HELD:1.1. There is no error or perversity in the view taken by the Trial Court or the High Court for that matter to warrant interference under Article 136 of the Constitution. The prosecution had on the depositions of the witnesses examined by it and the documents produced at the trial, established that a raid based on the secret information received by the Anti-Terrorist Squad

which was passed on to the Narcotic Control Bureau was indeed conducted and truck bearing registration number RJ-04-G-1305 was intercepted and searched. In the course of the said search 3.056 kgs. of heroin was recovered from the possession of A-4 who was driving the truck and A-3 accompanying him. The heroin was recovered from the bag that was kept under the seat on which A-3 traveling with him in the truck was sitting. The evidence on record totally belies the version belatedly advanced by both A-3 and A-4, that both or any one of them were/was unaware of the presence of the bag or its contents. [Para 11] [130-F-H; 131-A-C]

1.2. So also the seizure of the contraband from the residence of A-1 in a raid is established on the basis of the evidence on record. The argument urged on behalf of the A-1 that the house from where recovery was made was not in his exclusive possession as other members of his family were also living in the same has also been correctly repelled. The accused-appellants cannot be given the benefit of doubt having regard to the nature of the evidence adduced by the prosecution against them. It is true that the prosecution is required to establish its case beyond a reasonable doubt, but that does not mean that the degree of proof must be beyond a shadow of doubt. [Para 12, 13] [131-D, H; 132-A-B]

1.3. In the totality of the above circumstances and having regard to the fact that the Trial Court as also the High Court have examined all aspects of the matter and minutely looked into various facets of the case set up by the prosecution and that by the defence including the defence evidence adduced at the trial, there is no reason to interfere. Also, an appeal arising out of the same judgment filed by A-2 has already been dismissed by this Court. That being so, there is no reason, much less a compelling one, to strike a discordant note. [Para 15] [133-D-E]

Sucha Singh and Anr. v. State of Punjab **(2003) 7 SCC 643 – relied on.**

Jagdish v. State of M.P. **(2003) 9 SCC 159 – referred to.**

Miller v. Minister of Pensions **(1947) 2 ALL ER 272 – referred to.**

Case Law Reference:

(2003) 9 SCC 159	**referred to**	**Para 6**
(1947) 2 ALL ER 272	**referred to**	**Para 13**
(2003) 7 SCC 643	**relied on**	**Para 14**

CRIMINAL APPELLATE JURISDICITION : Criminal Appeal No. 1231-1232 of 2009.

From the Judgment & Order dated 17.03.2008 & 24.04.2008 of the High Court of Gujarat at Ahmedabad in Criminal Appeal No. 2327 of 2006.

WITH

Crl. A. Nos. 1574 of 2009 & 129 of 2011.

Jayant Bhushan, S.K. Dubey, Sushil Gupta, Kamal Mohan Gupta, Javed Khan, Satyendra Kumar, Sanjeev Kumar for the Appellant.

T.S. Deobia, Hemantika Wahi, Enatoli Sema, Rajkumar Tanwar, S.N. Tersal for the Respondent.

The Judgment of the Court was delivered by

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

2. These appeals by special leave are directed against a

common judgment and order passed by the High Court of Gujarat whereby Criminal Appeals No.2327 of 2006, 343 of 2007, 754 of 2007 and 1235 of 2007 have been dismissed and the conviction of the appellants for offences punishable under Section 8(c), read with Sections 21 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the NDPS Act") upheld. While appellants in Criminal Appeals No.2327 of 2006 and 754 of 2007 have been sentenced to undergo twelve years of rigorous imprisonment with a fine of Rs.2 lakhs, and in default to further undergo simple imprisonment for two years, appellants in Criminal Appeals No.343 of 2007 and 1235 of 2007 have been sentenced to undergo ten years of rigorous imprisonment with a fine of Rs.1 lakh, and in default to further undergo simple imprisonment for one year. The facts giving rise to the conviction and sentence of the appellants have been set out in detail by the High Court in the order under appeal hence need not be detailed over again except to the extent it is absolutely necessary to do so. Briefly stated the prosecution case is that a certain secret information was received by Mr. K.C Chudasma, Inspector, Anti-Terrorist Squad which was passed on to Mr. P.S.Tomar, Zonal Director, Narcotics Control Bureau, Ahmedabad. The information suggested that Accused No.2 Mr. Hemaram Chaudhary was the kingpin of a syndicate involved in smuggling and interstate trafficking of narcotic substances. Accused No.3-Shri Derajram Jat was the man allegedly carrying out the operations at the instance of the said Mr. Hemaram Chaudhary. The information so received was used to intercept and search a truck bearing registration number RJ-04-G-1305 on 29thJune, 2001 at Lal Bahadur Shashtri Bridge, Pirana area in the city of Ahmedabad while the same was returning from Bharuch. The truck was driven by accused no.4-Ashuram Durgaram Choudhary while accused no.3-Derajram Jat was accompanying him. The search of the truck led to the seizure of psychotropic drugs from the aforesaid two persons who revealed that the consignment in question had been supplied by Mr. Hemaram Choudhary-accused no.2. On the basis of the

information so collected and the disclosure made by the driver of the truck and Derajram Jat-accused no.3. Appellant-Iqbal Moosa Patel was taken into custody and his statement under Section 67 of the NDPS Act recorded. A raid was then carried out on 7th July, 2001 at village Varadia, Khadaki Street, District Bharuch, which led to the seizure of heroin weighing 3.056 kgs. and cash of Rs.1,17,500/- from the residence of appellant No.1 Iqbal Moosa Patel. In his statement recorded under Section 67 of the N.D.P.S. Act the said accused admitted having purchased four packets of brown sugar from one Master and Bhaikhanbhai both residents of Badmer in Rajasthan in the month of March 2001, out of which one packet had already been sold to one Shakur while the remaining three were seized by the respondent from his residence as mentioned above. On the basis of the material placed before the Trial Court the accused persons were charged with different offences to which the accused pleaded not guilty and claimed a trial.

3. In support of its case the prosecution examined eight witnesses apart from relying upon several documents. In their statements under Section 313 of the Cr.P.C., the accused denied their involvement and alleged that their statements under Section 67 of the NDPS Act had been recorded under duress. Accused also examined as many as fourteen witnesses in their defence.

4. The Trial Court eventually held all the accused guilty and convicted and sentenced them to undergo imprisonment for varying terms. Aggrieved by the judgment and order passed by the Sessions Court the appellants preferred appeals before the High Court which, as noticed earlier, have been dismissed by the High Court, upholding the judgment and order passed by the Trial Court. The present appeals by special leave assail the said judgment and order of the High Court.

5. We have heard learned counsel for the parties at some length and perused the record. Apart from the oral submissions made at the bar; written submissions have also been filed on

behalf of appellants in Criminal Appeals No.1231-1232 of 2009 and No.1574 of 2009. According to learned counsel for Ashuram Durgaram Chaudhary appellant in Criminal Appeal No.1574 of 2009 and the written submissions filed by him the truck driven by the said appellant was no doubt intercepted and searched on 29th June, 2001 but nothing incriminating was found even when the truck was unloaded and searched thoroughly and all the relevant papers such as insurance, permit etc. recovered from the driver's cabin. A bag was no doubt recovered from under the seat on which the accused No.3-Derajram Jat was sitting who admitted before the raiding party that the same belonged to him. Written submissions further state that four packets of heroin were found from the said bag eventually leading to the filing of the charge-sheet against the said accused no.3-Derajram Jat including appellant-Ashuram Durgaram Chaudhary-accused no.4 the driver of the truck. It is contended that appellant-Ashuram Durgaram Chaudhary has been falsely implicated as he had no knowledge of the fact that accused no.3-Derajram Jat was carrying any contraband in his bag which the latter had kept under his seat. Para 3 of the written submissions filed on behalf of the appellant- Ashuram Durgaram Chaudhary reads as under:

> "3. That the petitioner herein has been falsely implicated in the matter. The other accused persons are stranger to the petitioner. He has nothing to do with the other accused person or with the goods seized from them. *On the date of incidence the petitioner herein had no knowledge of the fact that accused no.3 was carrying any contraband with him in his bag which was kept under the seat on which the accused no.3 was sitting.* The entire story of the prosecution is false and concocted as is clear from the judgment of the Trial Court which eschewed the statement recorded under section 67 of the NDPS Act and also of Mr. Tomar (PW-5). The Evidence of the Panch witnesses to the recovery shows that there was no ring of truth in the prosecution story."

6. On behalf of the appellant-Iqbal Moosa Patel it was, *inter alia*, contended that the prosecution story was totally false and that the Trial Court had rightly rejected as unworthy of any credit the statement allegedly recorded under Section 67 of the NDPS Act. It was further submitted that out of two Panch witnesses PW3-Jignesh Jaswantbhai Modi had not supported the prosecution case including the recovery of the contraband from the residence of the appellant-Iqbal Moosa Patel. Relying upon the decision of this Court in *Jagdish v. State of M.P.* 2003 (9) SCC 159 the appellant claimed benefit of doubt. It was further argued that the deposition of Mr. Bhalla, the Investigating Officer was not reliable and could not be made a basis for finding the appellant-Iqbal Moosa Patel guilty. The statement of the appellant-Iqbal Moosa Patel had been according to the learned counsel recorded after the search of the residence of the appellant had been completed. It was contended that the appellant-Iqbal Moosa Patel is an agriculturist and a law-abiding citizen of India who had already spent 9½ years in jail out of a total 12 years to which he has been sentenced.

7. Learned counsel for the remaining appellants submitted that the prosecution had failed to prove its case beyond a reasonable doubt and the evidence adduced by it suffered from serious contradictions which made it unsafe to place any reliance upon the same.

8. On behalf of the respondents it was argued that on the basis of the secret information received by the Anti-Terrorist Squad which was passed on to the Narcotics Control Bureau (NCB) Ahmedabad, a large quantity of heroin weighing 3.056 kgs. was seized from the truck in which accused no.3-Derajram Jat and accused no.4-Ashuram Durgaram Chaudhary were traveling. All the accused persons had made statements revealing that the buyer of the consignment was one Shri Iqbal Moosa Patel-accused no.1 whom they could not contact and, therefore, they were returning back to Rajasthan. It was also

stated that a consignment of 4 kgs. was earlier supplied to accused no.1-Iqbal Moosa Patel sometime around mid March 2001 which led the NCB to raid the house of accused no. 1-Iqbal Moosa Patel. It was further submitted that pursuant to the said information the house of appellant-accused no.1-Iqbal Moosa Patel was raided on 7th July, 2001 that led to the seizure of 3 kgs. of heroin and a cash of Rs.1,17,500/- It was submitted that special leave petition (Crl.) No.8029 of 2008 filed against the very same judgment by accused no.2-Hemaram Chaudhary having been dismissed by this Court, there was no reason for this Court to take a different view, in the present appeals.

9. We have given our careful consideration to the submissions made at the bar including those made in writing. The Trial Court as also the High Court have concurrently come to the conclusion that the statements made by all the accused persons except accused no.1-Iqbal Moosa Patel were voluntary and reliable. So also the Trial Court and the High Court have held that the recovery of the narcotic substance from the truck driven by appellant no.4-Ashuram Durgaram Chaudhary in which the appellant no.3 was also traveling had been clearly established. The recovery of the narcotic substance from the house of the appellant-Iqbal Moosa Patel has also been held by both the Courts below to have been proved beyond a reasonable doubt. The assertion of appellant-Iqbal Moosa Patel that the said substance was planted to implicate him has been rejected by the Trial Court in the following words:

> "However, the Court is of the firm belief that considering the evidence of Mr. Bhalla, who was an intelligence officer at the relevant point of time and from other documentary evidence and other proved circumstances, there is no reason as to why visit of officer of NCB at the residence of A-1 at Bharuch should not be believed. Going by the version of DW-13, wife of A-1 also said that these officers had visited on 07.07.2001 her residence alongwith her

> husband although she had charged them for ransacking the entire household and other belongings, but this further fortifies factum of visit and the search having been carried out and also the seizure of 3.056 kgs. of heroin. The Court also has to bear in mind that had there been an intention to concoct and plant heroin so as to implicate A-1, the commercial quantity as per the law is only 250 gms. and there would not have been any need for NCB to keep moiré than 250 gms. of heroin and the same could have been also done at Mumbai rather bringing him to his own residence and thereby creating an evidence for the defence with regard to the treatment meted out to the accused and other facts. As this house where the search had been carried out belongs to A-1 and this huge quantity of heroin had been seized from his bed room, vivid description of which has been given in the cross-examination by Mr. Bhalla, there is earthly no reason not to believe him on this vital aspect."

10. The High Court affirmed the above finding and rejected the contention that the appellants were entitled to the benefit of doubt for in the opinion of the High Court the charge framed against the appellant had been satisfactorily proved.

11. There is, in our opinion, no error or perversity in the view taken by the Trial Court or the High Court for that matter to warrant our interference under Article 136 of the Constitution of India. The prosecution had on the depositions of the witnesses examined by it and the documents produced at the trial, established that a raid based on the secret information received by the Anti-Terrorist Squad which was passed on to the Narcotic Control Bureau indeed conducted and truck bearing registration number RJ-04-G-1305 intercepted and searched. In the course of the said search 3.056 kgs. of heroin was recovered from the possession of accused no.4-Ashuram Durgaram Chaudhary who was driving the truck and accused no.3-Derajram Jat accompanying him. It is noteworthy that the

fact that the truck was intercepted and searched by the authorities was not disputed by appellant-Ashuram Durgaram Chaudhary the driver of the said truck nor is it disputed that 3.056 kgs. of heroin was recovered from the bag that was kept under the seat on which accused no.3-Derajram Jat traveling with him in the truck was sitting. Para 3 of the written submissions which we have extracted earlier simply suggests that the appellant-Ashuram Durgaram Chaudhary the driver of the truck was not aware of the contents of the bag. The evidence on record totally belies the version belatedly advanced by both these appellants, that both or any one of them were/ was unaware of the presence of the bag or its contents.

12. So also the seizure of the contraband from the residence of appellant-Iqbal Moosa Patel in Bharuch in a raid conducted on 7th July, 2001 is established on the basis of the evidence on record. The argument urged on behalf of the appellant-Iqbal Moosa Patel that the house from where recovery was made was not in his exclusive possession as other members of his family were also living in the same has also been correctly repelled. The Trial Court has in this regard observed:

> "With the seizure of narcotic substance from the bed room of A-1, which had no access except to the accused and, therefore, it is to be held that A-1 alone was in possession and control as far as seizure on 7.7.2001 is concerned and for the seizure of 29th it was clearly found from the custody of A-3 and within the knowledge of A-4, at the instance of A-2, therefore, invoking these provisions under Section 35 and Section 54 of NDPS Act qua these accused, it becomes their duty to prove beyond reasonable doubt that they were not in possession even by leading the evidence given by defence witnesses and in the opinion of this they have failed to so prove and nullify the case of prosecution as had been proved on record."

13. That brings us to the question whether the appellants

could be given the benefit of doubt having regard to the nature of the evidence adduced by the prosecution against them. We do not think that the appellants have made out a case for grant of any such benefit. It is true that the prosecution is required to establish its case beyond a reasonable doubt, but that does not mean that the degree of proof must be beyond a shadow of doubt. The principle as to what degree of proof is required is stated by Lord Denning in his inimitable style in *Miller v. Minister of Pensions* (1947) 2 ALL ER 272:

> "That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it permitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with sentence 'of course, it is possible but not in the least probable,' the case is proved beyond reasonable doubt….
>
> It is true that under our existing jurisprudence in a criminal matter, we have to proceed with presumption of innocence, but at the same time, that presumption is to be judged on the basis of conceptions of a reasonable prudent man. Smelling doubts for the sake of giving benefit of doubt is not the law of the land."

14. Reference may also be made to the decision of this Court in *Sucha Singh & Anr. v. State of Punjab* (2003) 7 SCC 643 where this Court has reiterated the principle in the following words:

> **"**…….Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let a hundred guilty escape than punish an innocent. Letting the guilty escape

is not doing justice according to law. (See *Gurbachan Singh* v. *Satpal Singh AIR 1990 SC 209*). Prosecution is not required to meet any and every hypothesis put forward by the accused. A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some flaws inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish."

15. In the totality of the above circumstances and having regard to the fact that the Trial Court as also the High Court have examined all aspects of the matter and minutely looked into various facets of the case set up by the prosecution and that by the defence including the defence evidence adduced at the trial, we see no reason to interfere. As rightly pointed out by the respondent an appeal arising out of the same judgment and order filed by accused no.2-Hemaram Chaudhary has already been dismissed by this Court. That being so we do not see any reason much less a compelling one to strike a discordant note. In the result these appeals also fail and are hereby dismissed.

B.B.B. Appeals dismissed.

CUSTODIAN OF TEXTILES UNDERTAKING, BOMBAY
v.
HALL & ANDERSON LTD. & ORS.
(Civil Appeal No. 666 of 2011)

JANUARY 17, 2011

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

Textile Undertaking Nationalisation Act, 1995 – s.8 – Textiles Undertakings (Taking Over of Management) Act, 1983 – Respondent-company had premises at Calcutta and textile undertaking in Bombay – Besides textile business, the company also had the business of letting out various portions of the Calcutta premises to different business organizations – Textile undertaking was taken over by the Government – Whether the Calcutta premises also could be said to be taken over by the Government – Held, No, since the Calcutta premises was by no means related to the textile business – The premises in Calcutta did not form part of the textile undertaking nor was it appurtenant thereto – It was not shown that for the purpose of determining total compensation (on nationalization of the textile undertaking), the premises at Calcutta was also included.

M/s Hall & Anderson Ltd., incorporated under the Indian Companies Act, 1913, was running a departmental store business on the premises in question (situated at Calcutta). Subsequently, in 1950, the company purchased a textile mill in Bombay from M/s. Madhusudan Mills Ltd. and commenced business of manufacturing and selling of cotton. In 1959, the name of the company was changed to M/s Shree Madhusudan Mills Ltd., having its registered office at the premises in question. In 1976, the business of departmental store was stopped due to economic loss and the premises was let

out on rent. In 1989, because of strike by workers of textile mills, several mills suffered losses and it became difficult to run the business and therefore, the Government after having due deliberations with Reserve Bank of India and other authorities first came with the Ordinance and later on replaced it by the Textile Undertakings (Taking over of Management) Act, 1983.

Respondent no.1 filed writ petition before the High Court challenging the provisions of the 1983 Act whereupon an injunction was granted by the High Court restraining the appellant from interfering with the bank accounts relating to the property business as well as textile undertaking business. Meanwhile, the Textile Undertaking Nationalisation Act, 1995 came into existence and the mills stood acquired and M/s Shree Madhusudan Mills Ltd. was renamed as M/s Hall & Anderson on 11.2.1999.

The High Court, ultimately, allowed the said writ petition holding that the premises in question was by no means related to the textile undertakings and therefore, it could not be part and parcel of textile undertakings and not covered by the said 1983 or the 1995 Act. The appellant, therefore, filed the instant appeal.

Dismissing the appeal, the Court

HELD:1.1. From the factual matrix of the case, it is evident that the respondent initially started the business of selling various goods and articles from the departmental store operating from the premises in question (situated at Calcutta) under the name and style of M/s Hall & Anderson. The Company purchased the textile mill in Bombay on 12.6.1950 and commenced the additional business of manufacturing and selling cotton textile. The departmental store continued its business

upto 1976. Subsequent thereto, the building was developed as an income yielding asset and as such started the business of letting out various portions of the said building to different business organizations. The total area of the premises is about 4 acres and on an area of 345 sq. ft. the registered office of the company is situated. The business of textile mill remained completely separate from the premises business of letting out. They had not been interconnected and the premises business has no connection with running the textile undertakings. The accounts of the property business were separately and independently maintained. Staff engaged in the property business were also not connected. They had no concern with the working of the textile mill, except the Secretary of the Company, as he had to be the same person in view of the requirement of the provisions of Companies Act, 1961. No amount for the textile mill business had ever been borrowed from any financial institution or utilized for its running. Profit and Loss accounts of both the business have been prepared separately in spite of amalgamation since 1970. The books of account had been maintained for both the business separately. The premises had been mortgaged with the Central Bank of India, Bombay by deposit of title deeds with a view to secure advance granted by the Central Bank of India to the Company for the purpose of running the textile mill, but it stood only as a security. It had not become an integral part of the textile industries or had any nexus or relation with the working of textile mill. [Para 10] [141-D-H; 142-A-D]

1.2. The textile mill had been under the ownership of M/s Hall & Anderson at Calcutta. M/s Shree Madhusudan Mills Ltd., Bombay, had been purchased using funds generated from the premises at Calcutta. Section 8 of the Textile Undertaking Nationalisation Act, 1995 provides for

payment of amount to owners of textile undertaking by the Central Government, in cash and in the manner specified in Chapter VI, for the transfer to, and vesting in, it, under sub-section (1) of section 3, of such textile undertaking and the right, title and interest of the owner in relation to such textile undertaking, an amount equal to the amount specified against it in the corresponding entry in column (4) of the First Schedule. So far as the present textile industry is concerned, it is evident from column (4) of the First Schedule, that what has been acquired is the property at Bombay. Column 3 of the First Schedule makes it clear that it was under the ownership of M/s Shree Madhusudan Mills Ltd., Calcutta, and after the property acquired at Bombay, a sum of Rs.2,70,85,000/- had been paid as compensation. No compensation was paid for the premises at Calcutta. The quoted chart does not show that for determining the compensation, premises property at Calcutta had also been included. The premises in Calcutta did not form part of the textile industry nor was it appurtenant thereto. In view of the above, there is no cogent reason not to concur with the view expressed by the High Court. [Paras 12 to 15 & 16, 17] [143-F; 144-B-E; 145-A-B; F-G; 146-G]

National Textile Corporation Ltd. & Ors etc. v. Sitaram Mills Ltd. & Ors. etc., **AIR 1986 SC 1234;** *M/s. Doypack Systems Pvt. Ltd. v. Union of India & Ors.,* **AIR 1988 SC 782 – distinguished.**

Minerva Mills Ltd. v. Union of India, **AIR 1986 SC 2030 – referred to.**

Case law reference:

AIR 1986 SC 1234	**distinguished**	**Para 8**
AIR 1988 SC 782	**distinguished**	**Para 8**
AIR 1986 SC 2030	**referred to**	**Para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 666 of 2011.

From the Judgment & Order dated 14.12.2007 of the High Court of Calcutta in FMA No. 761 of 2005 in CAN No. 7885 of 2007.

Goolam E. Vahanvati, AG, R.F. Nariman, L. Nageshar Rao, Uday U. Lalit Ranjit Kumar, Sanjay Ghose, Anitha Shenoy, Prateek Jalan, Siddharth Bhatnagar, Sonia Dube, S. Chakraborty, Legal Options, Ankur S. Kulkarni, Nirmimesh Dube, Anand Srivastava for the appearing parties.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. Leave granted.

2. This appeal has been preferred against the judgment and order dated 14.12.2007 in FMA No.761/05 and CAN No.7885/07 passed by the High Court of Calcutta affirming the judgment and order of the Learned Single Judge dated 6.1.2005 in CR No. 10289(W)/83 by which the Learned Single Judge has held that the appellant cannot take the management or possession of the suit premises, No.31, Chowringhee Road, Calcutta, in view of the provisions of the Textile Undertakings (Taking Over of Management) Act, 1983, (hereinafter called the 'Act 1983').

3. Facts and circumstances giving rise to this case are that Hall & Anderson Ltd. (hereinafter called 'Hall'), incorporated under the Indian Companies Act, 1913, came into existence on 8.11.1946 and started primarily a departmental store business on the premises at No.31, Chowringhee Road (hereinafter called the premises styled as Hall & Anderson). Hall purchased the textile mill situated at Globe Mills Passage (Lower Parel) from M/s. Madhusudan Mills Ltd. on 12.6.1950 and commenced business of manufacturing and selling of cotton. The name of the company M/s. Hall & Anderson Ltd.

was changed to M/s Shree Madhusudan Mills Ltd., having its registered office at the premises on 21.7.1959. Amalgamation of Profit & Loss Account was prepared henceforth for M/s Shree Madhusudan Mills Ltd. from 1970.

4. In 1976, the business of departmental store was stopped due to economic loss and after winding up of the said business, the premises was let out on rent. In 1989, because of strike by workers of textiles mills, several mills suffered losses and it became difficult to run the business and therefore, the Government after having due deliberations with Reserve Bank of India and other authorities first came with the Ordinance and later on it was replaced by Act 1983.

5. The respondent No.1 herein filed Writ Petition No.10289/83 before the Calcutta High Court challenging the provisions of the Act 1983 and an injunction was granted by the High Court vide order dated 26.10.1983 restraining the present appellant from interfering with bank accounts relating to the property business as well as textile undertaking business. It was during pendency of the business that Textile Undertaking Nationalisation Act, 1995 came into existence and the mills stood acquired. M/s Shree Madhusudan Mills Ltd. was renamed as Hall on 11.2.1999. Learned Single Judge allowed the said writ petition vide judgment and order dated 6.1.2005 holding that the suit premises situated at Calcutta was by no means related to the textile undertakings and therefore, it could not be part and parcel of textile undertakings and not covered by the said Acts 1983 or 1995.

6. Being aggrieved, the present appellant preferred the FMA No.761/05 which has been dismissed by the Division Bench, and in concurrence with the learned Single Judge. Hence, the present appeal.

7. Shri G.E. Vahanvati, Learned Attorney General for India has submitted that the Division Bench, as well as the Learned

Single Judge of the High Court of Calcutta, failed to appreciate the purpose of taking over the management of textile undertakings. Because of mismanagement and strike of workers, the textile undertakings became unworkable and the Government of India in public interest and taking recourse to the provisions of Articles 39B & 39C of the Constitution appointed a Committee to examine the issue and after considering its report with consultation and considering the guidance of the Reserve Bank of India, it took up a decision to take over the management of the same units of the textile undertakings. The present textile industry was in category III, and it was evident that the undertaking made viable after investment of a huge amount which could be raised by selling the extra land with the textile industries. In the instant case, the accounts of the textile undertakings and of the premises stood amalgamated in 1970. The courts below failed to appreciate the law laid down by this Court in various judgments and held that the premises was not related to textile industries by any means and was a separate and independent entity and the business of letting out the premises was totally separate business having no nexus to the textile undertakings. Thus, the appeal deserves to be allowed.

8. On the contrary, S/Shri R.F. Nariman, L. Nageswar Rao, U.U. Lalit and Ranjit Kumar, learned senior counsel appearing for the respondents, have opposed the appeal contending that the judgments cited by the Learned Attorney General in the cases of *National Textile Corporation Ltd. & Ors etc. v. Sitaram Mills Ltd. & Ors. etc.,* AIR 1986 SC 1234 and *M/s. Doypack Systems Pvt. Ltd. v. Union of India & Ors.,* AIR 1988 SC 782 have no bearing in this case for the reason that the facts therein are quite distinguishable. In the case of *Sitaram Mills* (supra) there had been the finding of fact recorded by this Court reversing the finding of the courts below that the real estate division of that company was not having separate and independent business and the income of real estate division

came into existence from the funds of the company itself. Therefore, it was the assets of that company, namely, Sitaram Mills. In the instant case as the Calcutta High Court has held that the premises had totally separate entity having no nexus to the textile undertakings or its activities had not come into existence from the funds of textile undertakings, it could not be the asset of the said company. More so, the premises had been mortgaged wherein the mortgagee had already sold this property because it could not be redeemed. In fact, the mortgage became the liability and under the Act 1995, it is the only assets which have been taken over and not the liabilities of the nationalised company. The appeal lacks merit and is liable to be dismissed.

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

10. The pleadings in the writ petition before the High Court revealed the factual matrix of the case and it is evident from the same that the respondent initially started the business of selling various goods and articles from the departmental store operating from the premises under the name and style of M/s Hall & Anderson. The Company purchased the textile mill in Bombay on 12.6.1950 and commenced the additional business of manufacturing and selling cotton textile. The departmental store continued its business upto 1976. Subsequent thereto, the building was developed as an income yielding asset and as such started the business of letting out various portions of the said building to different business organizations. The total area of the premises is about 4 acres and on an area of 345 sq. ft. the registered office of the company is situated. The business of textile mill remained completely separate from the premises business of letting out. They had not been interconnected and the premises business has no connection with running the textile undertakings. The accounts of the property business were separately and independently maintained. Staff engaged in the property business were also

not connected. They had no concern with the working of the textile mill, except the Secretary of the Company, as he had to be the same person in view of the requirement of the provisions of Companies Act, 1961. No amount for the textile mill business had ever been borrowed from any financial institution or utilized for its running. Profit and Loss accounts of both the business have been prepared separately in spite of amalgamation since 1970. The books of account had been maintained for both the business separately. The premises had been mortgaged with the Central Bank of India, Bombay by deposit of title deeds with a view to secure advance granted by the Central Bank of India to the Company for the purpose of running the textile mill, but it stood only as a security. It has not become an integral part of the textile industries or had any nexus or relation with the working of textile mill. In the counter affidavit, reference has been made to the report of the Committee that disposal of immovable property of the Company, i.e., premises would provide substantial amount for making the undertaking viable within a few years provided, the said premises was sold. Further reference had been made to the observations made by the task force under the terms of reference that Company would be viable with the sale of land.

11. After considering the pleadings as well as the submissions made on behalf of the parties, a learned Single Judge as well as the Division Bench recorded the following findings:

(i) M/s Hall and Anderson premises at Calcutta deals with different business and cannot be treated as part and parcel of the textile undertaking at Bombay.

(ii) The company was engaged in multifarious activities.

(iii) The textile undertaking at Bombay carries no other business other than the textile business.

(iv) The bank accounts and balance-sheets of both the units are different.

(v) The lump sum compensation to the tune of Rs.2,70,85,000/- has been fixed and paid under the Act 1995. 415 acres of land, building and the material acquired at Bombay leaving aside the premises at Calcutta.

(vi) The textile mill at Bombay had been purchased as an asset of M/s Hall & Anderson as it had been purchased totally out of the resources of M/s Hall & Anderson. The premises at Calcutta by no means can be part and parcel having any nexus or related to the textile undertaking at Bombay.

12. The judgment in *Sitaram Mills* (supra) was distinguishable as it had been argued in that case that the land appurtenant to the said mill was not a part of the textile undertaking. However, this Court came to the conclusion that as a result of modernization resulted in a formation of mill of a much smaller size, the land had become surplus. It was lying vacant. It was not in dispute that the surplus land was under the ownership of the textile undertaking. It was in fact the land on which the different division of the old mill had been functioning. Thus, this Court held that the land was an integral part of the textile undertaking. In the instant case, position is otherwise. The textile mill has been under the ownership of M/s Hall & Anderson at Calcutta.

13. In *M/s Doypack Systems Pvt. Ltd. v. Union of India & Ors.,* AIR 1988 SC 782, this Court while interpreting the provisions of Section 3 of the Swadeshi Cotton Mills (Acquisition and Transfer of Undertaking) Act, 1986, observed that the provisions of such a statute require broad and liberal interpretation in consonance and conformity with the principles enshrined in Articles 39B and 39C of the Constitution.

In the said case, the issue was whether shares purchased

using funds of the textile company could be held to be covered under the terms of said provision. The ratio of the said case has no application in the present case, as, admittedly, in that case the shares in question had been purchased from the funds of the textile company. In the instant case, the fact situation is the other way around. M/s Shree Madhusudan Mills Ltd., Bombay, had been purchased using funds generated from the premises at Calcutta.

14. We have gone through the provisions of the Act 1995. Section 8 thereof, provides for payment of amount to owners of textile undertaking:

"8. Payment of amount to owners of textile undertakings – The owner of every textile undertaking shall be given by the Central Government, in cash and in the manner specified in Chapter VI, for the transfer to, and vesting in, it, under sub-section (1) of section 3, of such textile undertaking and the right, title and interest of the owner in relation to such textile undertaking, an amount equal to the amount specified against it in the corresponding entry in column (4) of the First Schedule."

However, the column (4) of the First Schedule, so far as the present textile industry is concerned, reads as under:

Sl. No.	**Name of the textile undertaking**	**Name of the owner**	**Amount (in rupees)**
(1)	(2)	(3)	(4)
11.	Shree Madhusudan Mills, Pandurang Budhkar Marg, Bombay	Shree Madhusudan Mills Ltd., 31, Chowringhee Road, Calcutta – 16	2,70,85,000

From the above, it is evident that what has been acquired is the property at Bombay. Column 3 makes it clear that it was under the ownership of M/s Shree Madhusudan Mills Ltd., Calcutta, and after the property acquired at Bombay, a sum of Rs.2,70,85,000/- had been paid as compensation. No compensation has been paid for the premises at Calcutta.

15. The relevant part of the judgment in *Sitaram Mills* (supra) reads as under:

> "The High Court completely ignored the fact that all the assets of the company were held in relation to the textile business. The company required all its real estate in the nineteenth century when it was formed for carrying on textile business and, admittedly, no new assets had been acquired by it thereafter…….
>
> Even for determining the total compensation to be paid on nationalization, the Task Force takes values into account the total surplus lands of the company and does not exclude any land belonging to the so-called Real Estate Division……"

Therefore, it is evident that in the said case, the land appurtenant to the textile undertaking and belonging to it, was converted into real estate and even on nationalisation, for the purpose of determining the compensation, the said land had been included in the assets. In the instant case, a contrary picture emerges as explained hereinabove. More so, the chart quoted from the Act, does not show that for determining the compensation, premises property at Calcutta had also been included. As the premises in Calcutta does not form part of or has been appurtenant to the textile industry, the judgment in *M/s Doypack Systems Pvt. Ltd.* (supra) is also distinguishable.

16. This Court in *Minerva Mills Ltd. v. Union of India,* AIR 1986 SC 2030, dealt with judgment of this Court in *Sitaram Mills* (supra) and held as under:

> **"25.** The learned Counsel for the petitioners has placed reliance upon an observation of this Court in National Textile Corpn. Ltd. v. Sitaram Mills Ltd. The question that was involved in that case was whether surplus land in the precinct of the taken-over undertaking was an asset in relation to the undertaking. It was observed: (SCC p. 133 bottom) "The test is whether it was held for the benefit of, and utilised for, the textile mill". Relying upon this observation, it is contended by the learned Counsel for the petitioners that as the vacant land, in the instant case, has not been utilised for the undertaking, it is not an asset of the undertaking. We do not think that in Sitaram Mills case this Court really meant to lay down a proposition that in order that a piece of land be considered as the asset of the textile undertaking, it must be held for the benefit of and utilised for the undertaking in question. Can it be said that a piece of land which is held for the benefit of but not utilised for the textile undertaking, as in the instant case, is not an asset of the undertaking? The answer must be in the negative. *In Sitaram Milks case that observation was made in the context of facts of that case, namely, that the surplus land was held for the benefit of and also utilised for the textile undertaking."*
>
> (Emphasis added)

17. In view of the above, we do not see any cogent reason not to concur with the view expressed by the High Court. The appeal lacks merit and is, accordingly, dismissed. In the facts and circumstances of the case, there will be no order as to costs.

B.B.B. Appeal dismissed.

ALAMELU & ANR.

v.

STATE REPRESENTED BY INSPECTOR OF POLICE

(Criminal Appeal No.1053 of 2009)

JANUARY 18, 2011.

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

Penal Code, 1860 – ss.366 and 376 r/w s.109:

PW-2 was allegedly abducted and thereafter subjected to forcible marriage and rape – Eight accused – Conviction of, by Courts below – Justification of – Held: Not justified – The entire story about the abduction by car and the forced marriage was seemingly concocted – It cannot be ruled out that PW-2's father suspected that PW-2 was romantically involved with A-1 – Therefore, when she disappeared from home, A-1 was presumed to be responsible for it and hence the false story of abduction – Conclusions made by the High Court that PW-2 would not have voluntarily gone with A-1 and that she was not a major at the relevant time are contrary to the evidence on record – No reliable evidence to vouchsafe the correctness of the date of birth as recorded in the school transfer certificate of PW-2 – Expert evidence did not rule out the possibility of PW-2 being a major – Even after the alleged marriage with A-1, PW-2 continued to be a willing partner in the entire episode – She did not protest nor made any complaint though she had the opportunity to do so on many occasions – Conduct of PW-2 from the time of her alleged abduction till the time of her alleged recovery was not natural for a girl who had been compelled to marry and subjected to illicit sexual intercourse – The trial court as well as the High Court failed to take into consideration the inherent improbabilities in the case – The findings recorded by both the Courts below were perverse and unsupportable by the

evidence on record – Accused-appellants clearly entitled to benefit of doubt, thus, acquitted.

Rape victim – Date of birth of the victim – Entry in her school transfer certificate – Evidentiary value of – Held: The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined – On facts, the father of the victim said nothing about the transfer certificate in his evidence – The Headmaster of the school was also not examined – There was no reliable evidence to vouchsafe for the truth of the facts stated in the transfer certificate – The burden of proof having not been discharged by the prosecution, the entry in the transfer certificate could not be relied upon to definitely fix the age of the victim – Evidence Act, 1872 – s.35.

Rape victim – Determination of victim's age – Radiological examination – Margin of error in age as ascertained in radiological examination.

Rape victim – Conviction based on sole evidence of the victim – Permissibility of – Held: The testimony of a victim of sexual assault stands at par with testimony of an injured witness, and is entitled to great weight – Corroboration is not the sine qua non for conviction in a rape case – Conviction can be recorded on the sole, uncorroborated testimony of a victim provided it does not suffer from any basic infirmities or improbabilities which render it unworthy of credence.

Constitution of India, 1950 – Article 136 – Powers under – Scope and ambit of – Held: Even though the powers of the Supreme Court under Article 136 are very wide, but in criminal appeals, the Supreme Court cannot interfere with the concurrent findings of facts, save in very exceptional cases – The assessment of the evidence by the High Court is accepted as final except where the conclusions recorded by

the High Court are manifestly perverse and unsupportable by the evidence on record.

According to the prosecution, when PW2, the daughter of PW1, was walking on the way to her house, A-1 told her that he loved her and wanted to marry her but PW-2 did not agree to such proposal; that thereafter, a car came near PW-2 and she was forcibly pushed into the car by A-1; that A-2, A-4 and A-5 were already inside the car; that thereafter PW-2 was forcibly taken to a temple where A-1 married her in spite of her resistance and subsequently kept her in a house and repeatedly raped her for three days. The prosecution alleged that PW-2 was a minor on the relevant date.

Charge-sheet was filed against A-1 for offences punishable under Sections 366 and 376 IPC and accused Nos. 2 to 8 for offences punishable under Sections 366 and 376 read with Section 109 IPC. The trial court convicted all the accused. The conviction was affirmed by the High Court.

In the instant appeals, the conviction of the accused-appellants was challenged on the ground that the conclusions reached by both the Courts below were perverse and that they ignored the inconsistencies and contradictions in the evidence of the witnesses. It was contended that the facts of the case clearly suggested that there was no question of any abduction, forcible marriage or rape.

Per contra, the State contended that the prosecution version was consistent and further that, in exercise of its powers under Article 136 of the Constitution, the Supreme Court normally does not interfere with the concurrent findings recorded by the Courts below and, thus, the instant appeals were liable to be dismissed.

Allowing the appeals, the Court

HELD:1. Even though the powers of this Court under Article 136 of the Constitution are very wide, but in criminal appeals, this Court would not interfere with the concurrent findings of facts, save in very exceptional cases. In an appeal under Article 136 of the Constitution, this Court does not normally appreciate the evidence by itself and go into the question of credibility of witnesses. The assessment of the evidence by the High Court is accepted as final except where the conclusions recorded by the High Court are manifestly perverse and unsupportable by the evidence on record. [Para 19] [166-D-F]

1.2. In the instant case, the trial court as well as the High Court failed to take into consideration the inherent improbabilities in the case sought to be projected by the prosecution. The findings recorded by both the Courts below were perverse and unsupportable by the evidence on record. [Para 20] [166-G]

2.1. The prosecution version was distorted from beginning to the end, in an effort to suppress the actual truth.The subsequent events make the story of abduction wholly improbable. 'S', who had informed the father of the abduction, was not examined in the Court. It would be rather odd that A-1 would himself inform 'S' of the abduction, if he was responsible for the same. Further, PW1 admits that A-1 was not on visiting terms with the family of the girl. There is no previous history of any relationship between A-1 and the girl. Even the High Court concluded that there was no familiarity between the two. There was no material placed on the record to show that A-1 was involved with the girl. Even in this Court, no explanation was offered as to why A-1 would want to marry the victim; in the absence of any previous familiarity between the two. [Paras 21 and 22] [166-H; 167-A-F]

2.2. There is no evidence to prove that the victim was forcibly taken in a car. Neither the owner nor the driver of the car has been examined in the Court. [Para 23] [167-F-G]

2.3. The very close relatives of PW1, who were almost family members, had told PW1 that his daughter could not be located. But surprisingly, these very relatives, according to PW2, were present at the temple just before the marriage. Although, PW2 knew that if she was in trouble they would come forward to help her, she did not raise any alarm. The presence of these blood relatives is also confirmed by PW3, a cousin of PW-2. He stated that even though these relatives were present at the marriage, they could not prevent the forced marriage. Knowing fully well that the PW2 was being compelled to marry A1, they did not send someone to the police station with the necessary complaint. [Para 24] [168-B-D]

2.4. PW1 admits that he had been told that PW2 had been abducted by A1. The distance between the house of A1 and the house of PW1 was only one kilometer. PW-1 did not go to the house of A1 to complain to his mother. He also did not go to the police station. Even the complaint with the police was registered only at 6.00 p.m. a couple of days later. From the evidence of PW-1, it becomes quite clear that there was a dispute between him and his wife about the proposed marriage of PW-2. PW1 states that he did not want his daughter to get married at all till she completes higher studies. He wanted her to get married only after she had become a teacher like himself. On the other hand, his wife had thought that PW2 should be married to the son of her maternal uncle's son. PW2 did not want to marry her cousin. [Para 26] [168-G-H; 169-A-D]

2.5. Taking the aforesaid evidence into consideration,

one cannot rule out the possibility that PW-2 had run away from her parental house. This is further apparent from the statement of PW1 himself. He had stated that soon after the incident a Panchayat was held in the house of the local MLA. At that meeting, his wife and his daughter were also present. But, in his anxiety to deny that his daughter had agreed to go back home on asking of MLA, he made a very relevant disclosure. He stated that "My daughter was asked to talk with myself and wife separately in a room for one hour. After the lapse of one hour my daughter told me that she will accompany me and we also brought her." This statement itself is indicative of the fact that disappearance of his daughter for few days may not have been the responsibility of the accused persons. Otherwise, it would not have taken over one hour to convince the girl to return home. [Para 27] [169-E-G]

2.6. The testimony of PW1 in fact makes it further clear that the whole prosecution version was concocted to falsely implicate the accused. This witness had admitted that the police had arrived on 3rd August, 1993 and though during that time, A1 was also present, no demand was made for his arrest at all. He also stated that all the other accused were also present, but he did not ask for the arrest of those accused also. No complaint was made to the police at that stage that any of the accused persons were involved in any incident of abduction. [Para 28] [169-H; 170-A-B]

2.7. Even the testimony given by PW2 also seems to be wholly unreliable and contrary to the evidence of PW1. According to her, she was walking towards her house and she was being followed by A1. He had told her that he liked her and wanted to marry her. She simply told him to go away and continued to walk towards the house. There was a car parked near the house of A-1's maternal

aunt. She then narrates the story as to how she was pushed into the car. She stated that she had dropped her books on the road but, surprisingly though the car was parked in front of A-1's aunt's house, no one found the books. She then stated that when she was being taken to the temple, she saw some known persons standing at a distance. But she did not yell out for help. According to her, A1 had raped her on three consecutive days, i.e., 1st, 2nd and 3rd of August. On 5th August, 1993 A1 took PW2 to the police station and told the police that they were married. She again did not complain; nor did seek help to be returned home. Thereafter, on 10th August, 1993 the Circle Inspector (PW11) had arrived and arrested A1. It was only after that she was left with her parents. On the other hand, PW 1 stated that she has been at home with her parents since 3rd August, 1993. This leads to an inescapable conclusion that the versions of the father and the girl are in sharp contrast, if not contradictory to each other. [Paras 29, 30] [170-D-H; 171-A-B]

2.8. PW-2 had further stated that during the night of 10th August, 1993, she had narrated the entire sequence of events to the police. The police had also given her alternative clothing to wear and taken her clothes in possession. According to PW-2 herself, even after she was recovered on the 10th August, 1993, she did not go to the house of her parents, instead she went to the house of her senior paternal uncle. Therefore, it becomes increasingly difficult to place reliance on any one of the prosecution witnesses. Talking about her alleged forced stay in a house, again PW-2 was unable to state whether it was thatched house or terraced house. She was also unable to state as to whether the door of the room in which she was kept could be locked only from outside or from inside. In the same breath, she said that she remained in the room by locking it from inside. But again she changed her mind and said that the door was not

locked but it was closed. She talked of one Rangasamy being present. But then she said that there were two individuals by that name, one old and one young. But she did not give any of their particulars to the police, as the police did not ask for them. Yet she claimed that both the Rangasamy had taken her to the temple. But then she said to the police that only one Rangasamy took her. [Paras 31, 32] [171-C-G]

2.9. PW-2 reiterated that some known persons/ relatives were present at the temple but on seeing them she did not raise any alarm. She also admits that if she had told them that she was in trouble they would have helped her. But she did not complain to her relatives. This would be wholly unnatural behaviour from a girl who had been abducted and was being compelled to marry someone, she did not want to marry. The scene after the alleged marriage is equally blurred. The girl denied ever going to the house of local MLA on 3rd August, 1993. She was not aware that any panchayat had been held in his house on that day. She also stated that she did not go to the house of her father on 3rd August, 1993. She further denied that she had ever narrated the events that had occurred between 31st July, 1993 to 10th August, 1993 to her parents. [Paras 33, 34] [171-H; 172-A-C]

3. The trial court as well as the High Court had failed to bestow proper attention on the inherent improbabilities contained in the evidence of the prime witnesses of the prosecution. Both the courts below had failed to notice that the prosecution did not even care to produce any witness from the temple where the marriage has been allegedly solemnized. No cogent reason was given as to why the 'Pujari' of the Temple or some other office bearer could not have been summoned. The entire story about the abduction by car and the forced marriage seems to have been concocted to falsely implicate all the accused

under Section 366 IPC. There is no reliable evidence to support the conviction of A-1, or the accused relatives of A-1, for the offence of abduction under Section 366 IPC. Possibility cannot be ruled out of the father, PW1 suspecting that his daughter was romantically involved with A-1. Therefore, when she disappeared from home, A-1was presumed to be responsible for it. Hence the false story of abduction. Even in the face of the wholly unreliable evidence, both the Courts have convicted all the accused under Section 366 and 376 IPC. The High Court committed a grave error in confirming the conviction of the accused/appellants under Section 366 IPC. [Paras 35, 36] [172-D-H]

4.1. Whilst upholding the conviction of A-1 under Section 376 IPC, the High Court held that PW-2 would not have voluntarily gone with A-1. It also held that she was not a major at the relevant time. Both the conclusions recorded by the High Court are contrary to the evidence on record. [Para 37] [173-A-B]

4.2. With regard to the age of the girl, the High Court based its conclusion on the transfer certificate and the certificate issued by PW8, Radiologist. The transfer certificate indicates that the girl's date of birth was 15th June, 1977. Therefore, even according to the aforesaid certificate, she would be above 16 years of age (16 years 1 month and 16 days) on the date of the alleged incident, i.e., 31st July, 1993. The transfer certificate has been issued by a Government School and has been duly signed by the Headmaster. Therefore, it would be admissible in evidence under Section 35 of the Indian Evidence Act. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which the age was recorded. The date of

birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined. PW1, in his evidence, made no reference to the transfer certificate. He did not mention her age or date of birth. PW2, when examined, also made no reference either to her age or to the transfer certificate. In her cross-examination, she had merely stated that she had signed on the transfer certificate issued by the School and accordingly her date of birth noticed as 15th June, 1977. She also stated that the certificate has been signed by her father as well as the Headmaster. But the Headmaster has not been examined. Therefore, there was no reliable evidence to vouchsafe for the truth of the facts stated in the transfer certificate. [Para 38] [173-C-H; 174-A-B]

Birad Mal Singhvi v. Anand Purohit, **1988 (Suppl.) SCC 604;** *Narbada Devi Gupta v. Birendra Kumar Jaiswal,* **(2003) 8 SCC 745 – relied on.**

4.3. The burden of proof was not discharged by the prosecution. Therefore, the entry in the transfer certificate cannot be relied upon to definitely fix the age of the girl. In fixing the age of the girl as below 18 years, the High Court relied solely on the certificate issued by PW8. However, the High Court failed to notice that in his evidence before the Court, PW8, the X-ray Expert had clearly stated in the cross-examination that on the basis of the medical evidence, generally, the age of an individual could be fixed *approximately.* He had also stated that it is likely that the age *may vary from individual to individual*. The doctor had also stated that in view of the possible variations in age, the certificate mentioned the possible age between one specific age to another specific age. On the basis of the above, it would not be possible to give a firm opinion that the girl was definitely

below 18 years of age. In addition, the High Court failed to consider the expert evidence given by PW13, who had medically examined the victim. In his cross-examination, he had clearly stated that a medical examination would only point out the age approximately with a variation of two years. He had stated that in this case, the age of the girl could be from 17 to 19 years. This margin of error in age (as ascertained by radiological examination) has been judicially recognized by this Court. In the facts of this case, the age of the girl could not have been fixed on the basis of the transfer certificate. There was no reliable evidence to vouchsafe the correctness of the date of birth as recorded in the transfer certificate. The expert evidence does not rule out the possibility of the girl being a major. The prosecution, thus, failed to prove that the girl was a minor, at the relevant date. [Paras 41, 42] [175-E-H; 176-A-D]

Jaya Mala v. Home Secretary, Government of Jammu & Kashmir & Ors., **(1982) 2 SCC 538 – relied on.**

4.4. Further, even with reference to Section 35 of the Indian Evidence Act, a public document has to be tested by applying the same standard in civil as well as criminal proceedings. In such circumstances, the High Court, without examining the factual and legal issues, unnecessarily rushed to the conclusion that PW-2 was a minor at the time of the alleged abduction. There is no satisfactory evidence to indicate that she was a minor. [Paras 43, 44] [176-E-F; 177-D]

Ravinder Singh Gorkhi v. State of U.P., **(2006) 5 SCC 584 – relied on.**

4.5. The High Court concluded that even if one was to exclude the evidence given by PW3, the conviction for abduction and rape by A-1 could be recorded on the sole

evidence of PW2. Undoubtedly, the testimony of victim of sexual assault stands at par with testimony of an injured witness, and is entitled to great weight. Therefore, corroboration for the testimony of the victim would not be insisted upon provided the evidence does not suffer from any basic infirmities and the probability factors do not render it unworthy of credence. However, the evidence of PW2 does not satisfy the aforesaid test. [Para 45 and 46] [177-E-G; 178-C-E]

Rameshwar v. State of Rajasthan, **(1952) SCR 377 – relied on.**

4.6. The High Court erroneously concluded that the girl had not willingly gone with A-1. The conclusion could only be recorded by ignoring the entire evidence with regard to the conduct of the girl from the time of the alleged abduction till the time of the alleged recovery. PW-2 did not make any complaint on so many occasions when she had the opportunity to do so. Even after the alleged marriage, the girl continued to be a willing partner in the entire episode. Even if the prosecution version is accepted in its totality, it would be established that the girl was staying with A1 from 31st July, 1993 till 10th August, 1993. Even PW5, stated that A1 had brought the girl with him to his house and told him that he had married her. They had come to see Trichy and requested a house to stay. This witness categorically stated that he thought that they were newly married couple. He had made them stay, which was under his responsibility. On 10th August, 1993, the police inspector, who arrived there at 10.00 p.m. told this witness that A1 had married the girl by threatening her and "spoiled her". The girl, according to the prosecution, was recovered from the aforesaid premises. Therefore, for six days, this girl was staying with A1. She did not raise any protest. She did not even complain to this witness or any other residents in the

locality. Her behavior of not complaining to anybody at any of the stages after being allegedly abducted would be wholly unnatural. Earlier also, she had many opportunities to complain or to run away, but she made no such effort. She made no protest on seeing some known persons near the car, after her alleged abduction. She did not make any complaint at the residence of the sister of A1. Again, there was no complaint on seeing her relatives allegedly assembled at the temple. Her relatives apparently took no steps at the time when *mangalsutra* was forcibly tied around her neck by A1. No one sent for police help even though a car was available. She made no complaint when she was taken to the house of PW5, and stayed at his place. Again, there was no protest when A1 took her to the police station on 5th day of the alleged abduction and told at the Police Station that they had already been married. The above behaviour would not be natural for a girl who had been compelled to marry and subjected to illicit sexual intercourse. [Para 46] [178-E-H; 179-A-E]

5. The prosecution failed to prove beyond reasonable doubt any of the offences with which the appellants had been charged. It appears that the entire prosecution story was concocted for reasons best known to the prosecution. The conclusions recorded by both the courts below were wholly perverse. The accused-appellants are clearly entitled to the benefit of doubt. All the appellants are acquitted. [Para 47 and 48] [179-F-H]

Case Law Reference:

1988 (Suppl.) SCC 604	**relied on**	**Para 39**
(2003) 8 SCC 745	**relied on**	**Para 39**
(1982) 2 SCC 538	**relied on**	**Para 41**
(2006) 5 SCC 584	**relied on**	**Para 43**

(1952) SCR 377 relied on Para 45

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal NO. 1053 of 2009.

From the Judgment & Order dated 06.02.2008 of the High Court of Judicature at Madras in Criminal Appeal No. 414 of 2000.

WITH

Crl. A. Nos. 1063 & 1062 of 2009.

R. Venkataramani, R. Ayyam Perumal, Aljo K. Joseph for the Appellants.

S. Thananjayan for the Respodent.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. These three appeals are directed against the common judgment of the High Court of Judicature at Madras dated 6th February, 2008 in Criminal Appeal Nos. 406 and 414 of 2000 confirming the common judgment passed in S.C. No. 255 of 1997 by the learned Assistant Sessions Judge, Namakkal dated 28th April, 2000 whereby the trial court had convicted and sentenced the appellants as under:-

The appellants in Criminal Appeal No. 1053 of 2009 had been convicted under Sections 366 and 376 read with Section 109 IPC and sentenced to undergo rigorous imprisonment for ten years and a fine of Rs.500/-, in default of payment of fine to further undergo rigorous imprisonment for a period of three months.

In Criminal Appeal No. 1063 of 2009, Sekar, appellant No.1, had been convicted under Sections 366 and 376 IPC and sentenced to undergo rigorous imprisonment for

ten years and a fine of Rs.500/- in default of payment of fine to further undergo rigorous imprisonment for a period of three months. Appellant No.2 Kandasamy had been convicted under Sections 366 and 376 read with Section 109 IPC and sentenced to undergo rigorous imprisonment for ten years and a fine of Rs.500/-, in default of payment of fine to further undergo rigorous imprisonment for a period of three months.

In Criminal Appeal No.1062 of 2009, both the appellants were convicted under Sections 366 and 376 read with Section 109 IPC and sentenced to undergo rigorous imprisonment for ten years and a fine of Rs.500/- in default of payment of fine to further undergo rigorous imprisonment for a period of three months.

2. Briefly stated the prosecution story is that PW2 (hereinafter referred to as the "victim" or "girl" according to context) is the daughter of Chinnathambi, (PW1) who is a teacher and resident of Nedupatti Village, Namakkal District, Tamil Nadu. The victim had failed in the SSLC examination. Therefore, she was admitted in private tutorial college called Seran Tutorial College.

3. It is alleged that on 31st July, 1993 at about 3.00 p.m. when she was walking near Nedupatti on the way to her house from the local bus stop, after attending her tutorial classes, Sekar (A1) told her that he loved her and wanted to marry her. The victim, however, did not agree to such proposal. Thereafter, a car bearing registration No. TTA 1886 came near the victim and she was forcibly pushed into the car by Sekar (A1). Rangaswami (A2), Paramasivam (A4) and Alamelu (A5) were already inside the car. This incident was informed to the father (PW1) of the victim by one Sugavanam, who had received a call from Sekar (A1). The incident was confirmed by another person called Thangavel (PW3) who informed PW1 about an hour later.

4. Since PW1 is a handicapped person and unable to walk, he sent his relatives in search of his daughter. According to the prosecution case, the car was taken to the residence of Selvi, who is the sister of Sekar (A1) at Pudupatti. Thereafter, Parmasivam (A4), Alamelu (A5) and Subramani (A8) were advising the victim to marry Sekar (A1), however, she refused to do so. At that stage, Kandasamy (A7) declared that it is not necessary to take the consent of PW2 and they should just go to the temple in the morning and perform the marriage ceremony.

5. The next morning, on 1st August, 1993 at 4 'o' clock, they all took the victim to Arapaleeswarar Temple at Kolli Hills. On reaching the temple, Sekar (A1) tied the mangalsutra on the neck of the victim in spite of her resistance. Thereafter, she was taken to Mullukurichi. She was kept in a house and repeatedly raped for three days.

6. On 4th August, 1993, she was taken by Sekar (A1) to Palampatti. Since it was known to Sekar (A1) that the police was searching for the girl (PW2), he took her to Thiruverumbur Police Station. He told the police officials there that they were husband and wife and had been legally married.

7. In the meantime on 3rd August, 1993, PW-10, the Sub-Inspector of Police of Vennandur Police Station on the basis of the complaint dated 2nd August, 1993 went to the place of occurrence and prepared observations mahazar (Ex.P8) and rough sketch (Ex.P7) and recorded the statements of the witnesses.

8. On receipt of a copy of the FIR on 6th August, 1993, the Circle Inspector of Rasipuram Circle (PW11) took over the investigation. On the basis of the information gathered, PW11 arrested Sekar (A1) and rescued the girl (PW2) from door No.86, Thiruverumbur Police colony on 10th August, 1993. In the presence of the witnesses PW11 recovered mangalasutra, the dresses worn by the accused (A1) and the victim under

mahazars. He arranged to send the seized properties for chemical analysis. In the morning of 11th August, 1993, Sekar (A1) and Thangamani were sent to the local Magistrate's Court. Thereafter, he (A1) was remanded to judicial custody.

9. At the same time, the victim was sent for a medical examination. PW13 Dr. Manimegalaikumar examined the victim on 12th August, 1993 at 2.00 p.m. and recorded her findings in report Ex.P13. In the report, she opined that age of the victim was between 17 to 19 years. On the other hand, PW8, Dr. Gunasekaran, the Radiologist had given her age as above 17 years and below 18 years. Dr. Chidambaram (PW14) examined A1 on 11th August, 1993 at 8.00 p.m. In his report (Ex.P15) he stated about the potency of A1.

10. Thereafter, PW12, the successor of PW11, after seizing the vehicle used for abduction and after completing the investigation filed the charge sheet on 19th June, 1996 (Ex.P13) against Sekar (A1) for offences punishable under Sections 366 and 376 IPC and accused Nos. 2 to 8 for offences punishable under Sections 366 and 376 read with Section 109 IPC.

11. In order to establish its case, the prosecution examined PWs.1 to 14. Ex. P1 to P16 have been marked besides M.O.1 to 11. No one was examined on behalf of the accused and no documents were produced on their behalf.

12. When the accused were questioned with regard to incriminating circumstances appearing against them in the evidence of witnesses, the accused had denied the same as false. Sekar (A1) filed a written statement which reads as follows :-

> "I am innocent. The charge that I have kidnapped PW2 and married her and raped her is false. On my enquiry I came to know that PW1 and his wife parents of PW2 compelled her to marry her uncle's son. But PW2 refused and she had left the house voluntarily. To suppress the mistake committed by PW2, at the instance of my enemies after several days a false case has been filed against me. The evidence that PW11 arrested me along with PW2 at Thiruverumbur Police colony is false. I was staying in my village and they took me from my house and foisted the case. PW3 is the sister's son of PW2 and, therefore, he is deposing falsely. PW4 is the co-brother of PW1 and therefore, he is giving evidence in support of PW1. PW6 is the close relative of PW2 and therefore, is giving false evidence."

13. On consideration of the oral and documentary evidence, the trial court convicted and sentenced the accused as noticed in the opening paragraph of the judgment. The conviction as well as the sentence have been maintained in appeals. Hence the present appeals.

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

15. The learned counsel has submitted that the conclusions reached by both the Courts are perverse. According to him the inconsistencies and contradictions in the evidence of the witnesses which have been ignored by both the courts would destroy the very root and foundation of the prosecution case. The High Court has even failed to take note of the plea raised by the appellant (A1) in the statement under Section 313 of the Criminal Procedure Code. Learned counsel submitted that this is a clear case of false implication. The prosecution is based on an imaginary story. The witnesses of the prosecution are procured. They are all close relatives of PW1. He submits that non appreciation of the evidence by the Courts below has resulted in miscarriage of justice.

16. Elaborating his submissions, the learned counsel then submitted that the complaint was falsely lodged by the father (PW1) of the girl (PW2) due to old enmity against A1. PW2 had only given evidence under pressure from her father and her relatives. Learned counsel submitted that the prosecution has

deliberately suppressed the true story which would clearly show that there was no incidence of abduction. The girl had run away from home as she was being compelled to marry one of her relatives. The entire abduction story is due to enmity because of a dispute over land. According to the learned counsel, the prosecution has deliberately suppressed the material particulars which were duly narrated by the prosecution witnesses themselves. There was no question of any forced marriage between the victim and Sekar (A1) Learned counsel has pointed out that at the time of the alleged marriage, according to the victim (PW2) and Thangavel (PW3), the relatives of the victim were present. In their presence, there could be no forced marriage. He further submitted that had it been a case of abduction PW1, the father of the victim, would not have waited for two days to lodge a complaint. Referring to the evidence of PW1, it is pointed out that he had stated that there was a panchayat held in the house of the local MLA Palaniammal. It was on the direction of the Panchayat that the victim had decided to go with her father. Since then she has been with her parents.

17. The learned counsel has further pointed out that if Sekar (A1) had taken the victim to the police station, she would have complained. According to the learned counsel, the truth of the matter is, which has been admitted by PW1 in his evidence, that the mother of the girl did not want her daughter to get married to her maternal uncle's son. The entire story has been concocted subsequent to the time when the panchayat was held in the house of the local MLA. At that time, the police was present but PW1 did not demand that any one of the accused be arrested. Learned counsel submitted that a close scrutiny of evidence of the prosecution witnesses would show that deliberate efforts have been made to suppress the true version. In any event, there is no question of any abduction, forcible marriage or rape.

18. The learned counsel for the State submitted that the

prosecution version is consistent. The trial court as well as the High Court, upon a thorough scrutiny of the evidence, have given concurrent conclusions about the abduction as well as rape. Learned counsel further submitted that according to the father (PW1), the girl (PW2) was only 15 years and 2 months old on 31st July, 1993. Therefore, all the accused have rightly been found to be guilty of the offences under Sections 366 and 376 read with Section 109 IPC. He submits that in exercise of the powers under Article 136, this Court would normally not interfere with the concurrent findings recorded by the Courts below. He, therefore, prayed that the appeal be dismissed.

19. We have considered the submissions made by the learned counsel for the parties. Before we embark upon an examination of the evidence, we may point out that even though the powers of this Court under Article 136 of the Constitution are very wide, but in criminal appeals, this Court would not interfere with the concurrent findings of facts, save in very exceptional cases. In an appeal under Article 136 of the Constitution, this Court does not normally appreciate the evidence by itself and go into the question of credibility of witnesses. The assessment of the evidence by the High Court is accepted as final except where the conclusions recorded by the High Court are manifestly perverse and unsupportable by the evidence on record. Keeping in view the aforesaid principles, we have examined the findings recorded by the Courts below.

20. In our opinion, there is much substance in the submissions of the learned counsel for the appellant. The trial court as well as the High Court have failed to take into consideration the inherent improbabilities in the case sought to be projected by the prosecution. In our opinion, the findings recorded by both the Courts below are perverse and unsupportable by the evidence on record.

21. In our opinion, the prosecution version has been

distorted from beginning to the end, in an effort to suppress the actual truth. It was the case of the prosecution that Sugavanam had seen the victim being abducted on 31st July, 1993. This fact was brought to the notice of the father (PW1) of the victim (PW2) immediately. Sugavanam had been told about the abduction on the phone by Sekar (A1) himself. The abduction was further confirmed by Thangavel (PW3) about an hour later. According to PW1, he had sent his relatives, namely, Kuppusami, Athiappan, Velumani and Thangavel (PW3) in search of his daughter. But he did not go with them. According to this witness, these persons told him that his daughter could not be located. Therefore, on 2nd August, 1993 he lodged a complaint with the police.

22. The subsequent events make the story of abduction wholly improbable. Sugavanam, who had informed the father of the abduction, was not examined in the Court. It would be rather odd that Sekar would himself inform Sugavanam of the abduction, if he was responsible for the same. Further, PW1 admits that Sekar was not on visiting terms with the family of the girl. There is no previous history of any relationship between Sekar and the girl. Even the High Court concluded that there was no familiarity between the two. There was no material placed on the record to show that Sekar was involved with the girl. Even in this court, no explanation was offered as to why Sekar would want to marry the victim; in the absence of any previous familiarity between the two.

23. There is no evidence to prove that the victim was forcibly taken in a car. Neither the owner nor the driver of the car has been examined in the Court. PW3 states that they had made enquiries and had been told that the car used in abduction had gone towards Senthamangalam. They had also hired a car to go after them. None of these persons have been examined.

24. Proceeding further, we notice that PW1 admits that all

the relatives mentioned above are very close blood relations. In fact, Thangavel (PW3) is the son of his elder sister. In other words, PW3 is a cousin of the girl. Athiappan is the son of his coparcener Kailasam. Palanivel is the brother-in-law of Murugesan. Murugesan is the son of Kailasam. Kuppusamy is the elder brother of Velumani who is the son of his senior coparcener. Kumaravel is the grand son of the aunt of Kuppusami. These very close relatives, who were almost family members, had told PW1 that his daughter could not be located. But surprisingly, these very relatives, according to PW2, were present at the temple just before the marriage. Although, the victim (PW2) knew that if she was in trouble they would come forward to help her, she did not raise any alarm. The presence of these blood relatives is also confirmed by Thangavel (PW3). He stated that even though these relatives were present at the marriage, they could not prevent the forced marriage. Knowing fully well that the victim (PW2), was being compelled to marry Sekar (A1), they did not send someone to the police station with the necessary complaint.

25. The presence of the relatives at the alleged wedding is confirmed by Thangavel (PW3). He has stated that they could not find the girl (PW2) or Sekar (A1) in Rasipuram. But the search party was told on enquiry that Sekar (A1) and the girl (PW2) had gone in a car towards Santhamangalam. Therefore, Thangavel (PW3) and his relatives also hired a car and reached Arapaleeswar Temple. But since none of the accused were present, they decided to stay the night in the temple itself. He further stated that they had suspected that the marriage will take place in the morning, therefore, they had waited till the morning. This witness also stated that he informed his uncle about the marriage on 2nd August, 1993.

26. PW1 admits that he had been told that his daughter (PW2) had been abducted by Sekar (A1). The distance between the house of Sekar (A1) and the house of PW1 was only one kilometer. He also admits that Sekar (A1) is a local

boy but is not related to him. He had received the information about the alleged abduction on 31st July, 1993. He did not go to the house of Sekar (A1) to complain to his mother. He also did not go to the police station. Even the complaint with the police was registered only at 6.00 p.m. on 2nd August, 1993. In his cross-examination, he reiterated that his relatives had gone to the neighbouring village and searched but were not able to locate his daughter. From the evidence of this witness, it becomes quite clear that there was a dispute between the husband and wife i.e. mother and father of the victim (PW2) about the proposed marriage of the girl. Chinnathambi (PW1) states that he did not want his daughter to get married at all till she completes higher studies. He wanted her to get married only after she had become a teacher like himself. On the other hand, his wife had thought that her daughter (PW2) should be married to the son of Kuppusami, her maternal uncle's son. The girl (PW2) did not want to marry her cousin.

27. Taking the aforesaid evidence into consideration, one cannot rule out the possibility that the victim girl had run away from her parental house. This is further apparent from the statement of PW1 himself. He had stated that soon after the incident a panchayat was held in the house of Rasipuram MLA, Palaniammal. At that meeting, his wife and his daughter were also present. But, in his anxiety to deny that his daughter had agreed to go back home on asking of MLA, he made a very relevant disclosure. He stated that "My daughter was asked to talk with myself and wife separately in a room for one hour. After the lapse of one hour my daughter told me that she will accompany me and we also brought her." This statement itself is indicative of the fact that disappearance of his daughter for few days may not have been the responsibility of the accused persons. Otherwise, it would not have taken over one hour to convince the girl to return home.

28. The testimony of PW1 in fact makes it further clear that the whole prosecution version has been concocted to falsely

implicate the accused. This witness had admitted that the police had arrived on 3rd August, 1993. During that time, Sekar (A1) was also present but no demand was made for his arrest at all. He also stated that all the accused were also present, he did not ask for the arrest of those accused also. No complaint was made to the police at that stage that any of the accused persons were involved in any incident of abduction. In fact he made another startling disclosure where he states that "till date I am not aware as to what happened to Thangamani. On 3rd August, 1993 either myself or any other witness had not furnished any information against the accused to the police." According to this witness, the victim, has been with her family since 3rd August, 1993. He went on to state that after 3rd August, 1993 the police did not undertake any further enquiry.

29. Even the testimony given by PW2 also seems to be wholly unreliable and contrary to the evidence of PW1. According to her, she was walking towards her house and she was being followed by Sekar (A1). He had told her that he liked her and wanted to marry her. She simply told him to go away and continued to walk towards the house. There was a car parked near the house of Sekar's mother's elder sister. She then narrates the story as to how she was pushed into the car. She stated that she had dropped her books on the road but, surprisingly though the car was parked in front of Sekar's aunt's house, no one found the books.

30. She then states that when she was being taken to the temple, she saw some known persons standing at a distance. But she did not yell out for help. According to her, Sekar (A1) had raped her on three consecutive days, i.e., 1st, 2nd and 3rd of August at Mullukurichi. On 4th of August she was taken to Palampatti. However, on 5th August, 1993 when Sekar (A1) received the news that the police was looking for her, she was taken to Tiruchy police station. There he had told the police that they were married. She again did not complain; nor did seek

help to be returned home. Thereafter, on 10th August, 1993 Rasipuram Circle Inspector (PW11) had arrived and arrested Sekar (A1). It was only after that she was left with her parents. On the other hand, as noticed earlier, father states that she has been at home with her parents since 3rd August, 1993. This in our opinion leads to an inescapable conclusion that the versions of the father and the girl are in sharp contrast, if not contradictory to each other.

31. She had further stated that during the night of 10th August, 1993, she had narrated the entire sequence of events to the police. The police had also given her alternative clothing to wear and taken her clothes in possession. According to the victim herself, even after she was recovered on the 10th August, 1993, she did not go to the house of her parents, instead she went to the house of her senior paternal uncle situated at Thengalpalayam. Therefore, it becomes increasingly difficult to place reliance on any one of the prosecution witnesses.

32. Talking about her alleged forced stay in the house at Pudupatti, again she was unable to state whether it was thatched house or terraced house. She was also unable to state as to whether the door of the room in which she was kept could be locked only from outside or from inside. In the same breath, she says that she remained in the room by locking it from inside. But again she changed her mind and said that the door was not locked but it was closed. She talks of one Rangasamy being present. But then she says that there were two individuals by that name, one old and one young. But she did not give any of their particulars to the police, as the police did not ask for them. Yet she claims that both the Rangasamy had taken her to the temple. But then she says to the police that only one Rangasamy took her.

33. Now coming to the marriage, she reiterates that some known persons were present at the temple but on seeing them she did not raise any alarm. She admits that Kuppusami, Velumani, Athiappan, Thangavel and Palaniammal are her

close relatives. She also admits that if she had told them that she was in trouble they would have helped her. But she did not complain to her relatives. This would be wholly unnatural behaviour from a girl who had been abducted and was being compelled to marry someone, she did not want to marry.

34. The scene after the alleged marriage is equally blurred. The girl denies ever going to the house of MLA on 3rd August, 1993. She was not aware that any panchayat had been held in his house on that day. She also states that she did not go to the house of her father on 3rd August, 1993. She further denies that she had ever narrated the events that had occurred between 31st July, 1993 to 10th August, 1993 to her parents.

35. In our opinion, the trial court as well as the High Court had failed to bestow proper attention on the inherent improbabilities contained in the evidence of the prime witnesses of the prosecution. Both the courts below had failed to notice that the prosecution did not even care to produce any witness from the temple where the marriage has been allegedly solemnized. No cogent reason has been given as to why the 'Pujari' of the Temple or some other office bearer could not have been summoned.

36. In our opinion, the entire story about the abduction by car and the forced marriage seems to have been concocted to falsely implicate all the accused under Section 366 IPC. There is no reliable evidence to support the conviction of Sekar, or the accused relatives of Sekar, for the offence of abduction under Section 366 IPC. Possibility can not be ruled out of the father, PW1 suspecting that his daughter was romantically involved with Sekar. Therefore, when she disappeared from home, Sekar was presumed to be responsible for it. Hence the false story of abduction. Even in the face of the wholly unreliable evidence, as noticed above, both the Courts have convicted all the accused under Section 366 and 376 IPC. The High Court, in our opinion, committed a grave error in confirming the conviction of the accused/appellants under Section 366 IPC.

37. We may now take up the issue of Sekar's conviction under Section 376 IPC. Whilst upholding the conviction of Sekar under Section 376 IPC, the High Court has held that the girl would not have voluntarily gone with Sekar. It has also been held that she was not a major at the relevant time. In our opinion, both the conclusions recorded by the High Court are contrary to the evidence on record.

38. We will first take up the issue with regard to the age of the girl. The High Court has based its conclusion on the transfer certificate, Ex.P16 and the certificate issued by PW8 Dr. Gunasekaran, Radiologist, Ex.P4 and Ex.P5. Undoubtedly, the transfer certificate, Ex.P16 indicates that the girl's date of birth was 15th June, 1977. Therefore, even according to the aforesaid certificate, she would be above 16 years of age (16 years 1 month and 16 days) on the date of the alleged incident, i.e., 31st July, 1993. The transfer certificate has been issued by a Government School and has been duly signed by the Headmaster. Therefore, it would be admissible in evidence under Section 35 of the Indian Evidence Act. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which the age was recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined. We may notice here that PW1 was examined in the Court on 9th August, 1999. In his evidence, he made no reference to the transfer certificate (Ex.P16). He did not mention her age or date of birth. PW2 was also examined on 9th August, 1999. She had also made no reference either to her age or to the transfer certificate. It appears from the record that a petition was filed by the complainant under Section 311 Cr.P.C. seeking permission to produce the transfer certificate and to recall PW2. This petition was allowed. She was actually recalled and her examination was continued on 26th April, 2000. The transfer certificate was marked as Ex.P16 at that stage, i.e., 26th April, 2000. The

judgment was delivered on 28th April, 2000. In her cross-examination, she had merely stated that she had signed on the transfer certificate, Ex.P16 issued by the School and accordingly her date of birth noticed as 15th June, 1977. She also stated that the certificate has been signed by the father as well as the Headmaster. But the Headmaster has not been examined. Therefore, in our opinion, there was no reliable evidence to vouchsafe for the truth of the facts stated in the transfer certificate.

39. Considering the manner in which the facts recorded in a document may be proved, this Court in the case of *Birad Mal Singhvi Vs. Anand Purohit*[1], observed as follows:-

> *"The date of birth mentioned in the scholars' register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined……*Merely because the documents Exs. 8, 9, 10, 11, and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exs. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmi Chand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or contents of the documents. *The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouchsafe for the truth of the facts in issue.* No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. *In the circumstances the dates of*

1. 1988 (Supp) SCC 604

birth as mentioned in the aforesaid documents have no probative value and the dates of birth as mentioned therein could not be accepted."

The same proposition of law is reiterated by this Court in the case of *Narbada Devi Gupta Vs. Birendra Kumar Jaiswal,*[2] where this Court observed as follows:-

"The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the "evidence of those persons who can vouchsafe for the truth of the facts in issue"."

40. In our opinion, the aforesaid burden of proof has not been discharged by the prosecution. The father says nothing about the transfer certificate in his evidence. The Headmaster has not been examined at all. Therefore, the entry in the transfer certificate can not be relied upon to definitely fix the age of the girl.

41. In fixing the age of the girl as below 18 years, the High Court relied solely on the certificate issued by PW8 Dr. Gunasekaran. However, the High Court failed to notice that in his evidence before the Court, PW8, the X-ray Expert had clearly stated in the cross-examination that on the basis of the medical evidence, generally, the age of an individual could be fixed *approximately.* He had also stated that it is likely that the age *may vary from individual to individual.* The doctor had also stated that in view of the possible variations in age, the certificate mentioned the possible age between one specific age to another specific age. On the basis of the above, it would not be possible to give a firm opinion that the girl was definitely below 18 years of age. In addition, the High Court failed to consider the expert evidence given by PW13 Dr. Manimegalaikumar, who had medically examined the victim. In

2. (2003) 8 SCC 745.

his cross-examination, he had clearly stated that a medical examination would only point out the age approximately with a variation of two years. He had stated that in this case, the age of the girl could be from 17 to 19 years. This margin of error in age has been judicially recognized by this Court in the case of *Jaya Mala Vs. Home Secretary, Government of Jammu & Kashmir & Ors.*[3], In the aforesaid judgment, it is observed as follows:-

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

42. We are of the opinion, in the facts of this case, the age of the girl could not have been fixed on the basis of the transfer certificate. There was no reliable evidence to vouchsafe the correctness of the date of birth as recorded in the transfer certificate. The expert evidence does not rule out the possibility of the girl being a major. In our opinion, the prosecution has failed to prove that the girl was a minor, at the relevant date.

43. We may further notice that even with reference to Section 35 of the Indian Evidence Act, a public document has to be tested by applying the same standard in civil as well as criminal proceedings. In this context, it would be appropriate to notice the observations made by this Court in the case of *Ravinder Singh Gorkhi Vs. State of U.P.*[4] held as follows:-

"The age of a person as recorded in the school register or otherwise may be used for various purposes, namely, for obtaining admission; for obtaining an appointment; for contesting election; registration of marriage; obtaining a separate unit under the ceiling laws; and even for the purpose of litigating before a civil forum e.g. necessity of being represented in a court of law by a guardian or where a suit is filed on the ground that the plaintiff being a minor

3. (1982) 2 SCC 538.

4. (2006) 5 SCC 584.

he was not appropriately represented therein or any transaction made on his behalf was void as he was a minor. *A court of law for the purpose of determining the age of a party to the lis, having regard to the provisions of Section 35 of the Evidence Act will have to apply the same standard. No different standard can be applied in case of an accused as in a case of abduction or rape, or similar offence where the victim or the prosecutrix although might have consented with the accused, if on the basis of the entries made in the register maintained by the school, a judgment of conviction is recorded, the accused would be deprived of his constitutional right under Article 21 of the Constitution, as in that case the accused may unjustly be convicted."*

44. In such circumstances, we are constrained to hold that the High Court without examining the factual and legal issues has unnecessarily rushed to the conclusion that the girl was a minor at the time of the alleged abduction. There is no satisfactory evidence to indicate that she was a minor.

45. The High Court concluded that even if one was to exclude the evidence given by PW3, the conviction for abduction and rape by Sekar could be recorded on the sole evidence of PW2. Undoubtedly, the testimony of victim of sexual assault stands at par with testimony of an injured witness, and is entitled to great weight. Therefore, corroboration for the testimony of the victim would not be insisted upon provided the evidence does not suffer from any basic infirmities and the probability factors do not render it unworthy of credence. This Court in *Rameshwar Vs. State of Rajasthan*[5] declared that corroboration is not the sine qua non for a conviction in a rape case. In the aforesaid case, Vivian Bose, J. speaking for the Court observed as follows:-

"The rule, which according to the cases has hardened into

5. (1952) SCR 377.

one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge, … The only rule of law is that this rule of prudence must be present to the mind of the judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand."

The aforesaid proposition of law has been reiterated by this Court in numerous judgments subsequently. These observations leave no manner of doubt that a conviction can be recorded on the sole, uncorroborated testimony of a victim provided it does not suffer from any basic infirmities or improbabilities which render it unworthy of credence.

46. In our opinion, the evidence of PW2 does not satisfy the aforesaid test. The High Court erroneously concluded that the girl had not willingly gone with Sekar. The conclusion could only be recorded by ignoring the entire evidence with regard to the conduct of the girl from the time of the alleged abduction till the time of the alleged recovery. We have noticed earlier that she did not make any complaint on so many occasions when she had the opportunity to do so. We may, however, notice that even after the alleged marriage, the girl continued to be a willing partner in the entire episode. Even if the prosecution version is accepted in its totality, it would be established that the girl was staying with Sekar (A1) from 31st July, 1993 till 10th August, 1993. Even PW5, Thiru Thirunavukarasu stated that Sekar (A1) had brought the girl with him to his house and told him that he had married her. They had come to see Trichy and requested a house to stay. This witness categorically stated that he thought that they were newly married couple. He had made them stay in door no. 86 of the Police Colony, which was under his responsibility. On 10th August, 1993, the police inspector, who arrived there at 10.00 p.m. told this witness that Sekar (A1)

had married the girl by threatening her and "spoiled her". The girl, according to the prosecution, was recovered from the aforesaid premises. Therefore, for six days, this girl was staying with Sekar (A1). She did not raise any protest. She did not even complain to this witness or any other residents in the locality. Her behavior of not complaining to anybody at any of the stages after being allegedly abducted would be wholly unnatural. Earlier also, she had many opportunities to complain or to run away, but she made no such effort. It is noteworthy that she made no protest on seeing some known persons near the car, after her alleged abduction. She did not make any complaint at the residence of Selvi, sister of Sekar (A1) at Pudupatti. Again, there was no complaint on seeing her relatives allegedly assembled at the temple. Her relatives apparently took no steps at the time when mangalsutra was forcibly tied around her neck by Sekar (A1). No one sent for police help even though a car was available. She made no complaint when she was taken to the house of PW5, Thiru Thirunavukarasu and stayed at his place. Again, there was no protest when Sekar (A1) took her to the police station on 5th day of the alleged abduction and told at the Tiruchi Police Station that they had already been married. The above behaviour would not be natural for a girl who had been compelled to marry and subjected to illicit sexual intercourse.

47. In view of the aforesaid, we are of the considered opinion that the prosecution has failed to prove beyond reasonable doubt any of the offences with which the appellants had been charged. It appears that the entire prosecution story has been concocted for reasons best known to the prosecution.

48. In our opinion, the conclusions recorded by both the courts below are wholly perverse. The appellants are clearly entitled to the benefit of doubt. In view of the above, the appeals are allowed. All the appellants are acquitted. They are directed to be released forthwith.

B.B.B. Appeals allowed.

GODAVARI SUGAR MILLS LTD.
v.
THE STATE OF MAHARASHTRA & ORS.
(Civil Appeal No.819 of 2011)

JANUARY 20, 2011

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

Constitution of India, 1950: Article 226 – Scope of – Acquisition of land – Writ petition seeking declaration that total compensation including interest for acquisition @ 3% per annum was unjust and unreasonable and seeking mandamus to pay the compensation with interest at 9% per annum from the date of surrender of possession to date of actual payment – Maintainability of – Held: Writ petition is of a public law character as it related to the public law functions on the part of the state government and its officers, and therefore maintainable.

Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961: s.26 – Award of interest @ 3% per annum on the compensation – Held: s.26 contemplates the payment of compensation with interest at 3% per annum in annual instalments spread over a period of 20 years or at the end of 20 years – Rate of interest can be only at 3% per annum for a period of 20 years from the date of taking possession – s.26 is silent about the rate of interest payable, if the compensation is not paid within 20 years – For the period beyond 20 years, the said provision regarding interest will cease to apply and the general equitable principles relating to interest will apply; and interest can be awarded at any reasonable rate, in the discretion of the court – In the instant case, interest @ 6% per annum, beyond 20 years found to be appropriate.

The appellant was the owner of large extent of sugarcane land. A Notification was issued on 15.6.1961

under Section 21 of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 declaring that the appellant held surplus agricultural land. The possession of surplus land was thereafter taken. On 13.11.1978, the appellant submitted its claim in regard to the said land with interest @ 9% per annum. On 13.12.2001, proceedings for determination of compensation were commenced and award was made on 30.3.2005 with interest @ 3% per annum. Aggrieved by the interest rate, the appellant filed writ petition. The High Court dismissed the writ petition on the ground that since the prayer was made only for payment of money by way of interest, the writ petition was not entertainable.

The questions which arose for consideration in the instant appeal was whether the writ petition was for "recovery of money" and therefore not maintainable; and whether the authority was justified in awarding interest @ 3% per annum only on the compensation payable under Section 25 of the Act.

Partly allowing the appeal, the Court

HELD: 1.1. The writ petition was for a declaration that the Notice dated 30.3.2005 informing the appellant that total compensation including interest for acquisition of 12127.4 acres of land as Rs.88,77,538/- was unjust and arbitrary and discriminatory insofar as it offered interest only at the rate of 3% per annum on the compensation amount and for a mandamus to pay the compensation with interest at 9% per annum from the date of surrender of possession to date of actual payment. The writ petition was of a public law character as it related to the public law functions on the part of the state government and its officers, and, therefore, maintainable. [Para 6] [187-G-H; 188-A-B, E]

Suganmal v. State of MP **- AIR 1965 SC 1740;** *UP*

Pollution Control Board v. Kanoria Industrial Ltd. **2001 (2) SCC 549;** *ABL International Ltd v. Export Credit Guarantee Corporation of India Ltd.* **2004 (3) SCC 553 – referred to.**

1.2. Normally a petition under Article 226 of the Constitution of India will not be entertained to enforce a civil liability arising out of a breach of a contract or a tort to pay an amount of money due to the claimants. The aggrieved party will have to agitate the question in a civil suit. But an order for payment of money may be made in a writ proceeding, in enforcement of statutory functions of the State or its officers. [Para 7(i)] [189-B-D]

Burmah Construction Co.v. State of Orissa **(1962) Supp 1 SCR 242 – relied on.**

1.3. If a right has been infringed – whether a fundamental right or a statutory right – and the aggrieved party comes to the court for enforcement of the right, it will not be giving complete relief if the court merely declares the existence of such right or the fact that existing right has been infringed. The High Court, while enforcing fundamental or statutory rights, has the power to give consequential relief by ordering payment of money realized by the government without the authority of law. [Para 7(ii)] [189-C-D]

State of Madhya Pradesh v. Bhailal Bhai **AIR 1964 SC 1006 – relied on.**

1.4. A petition for issue of writ of mandamus will not normally be entertained for the purpose of merely ordering a refund of money, to the return of which the petitioner claims a right. The aggrieved party seeking refund has to approach the civil court for claiming the amount, though the High Courts have the power to pass appropriate orders in the exercise of the power conferred under Article 226 for payment of money. [Para 7(iii)] [189-E-F]

Suganmal v. State of Madhya Pradesh **AIR 1965 SC 1740 – relied on.**

1.5. There is a distinction between cases where a claimant approaches the High Court seeking the relief of obtaining only refund and those where refund is sought as a consequential relief after striking down the order of assessment etc. While a petition praying for mere issue of a writ of mandamus to the state to refund the money alleged to have been illegally collected is not ordinarily maintainable, if the allegation is that the assessment was without a jurisdiction and the taxes collected was without authority of law and, therefore, the respondents had no authority to retain the money collected without any authority of law, the High Court has the power to direct refund in a writ petition. [Para 7(iv)] [189-G-H; 190-A-B]

Salonah Tea Co.Ltd. v. Superintendent of Taxes, Nangaon **(1988) 1 SCC 401 – relied on.**

1.6. It is one thing to say that the High Court has no power under Article 226 of the Constitution to issue a writ of mandamus for making refund of the money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each case. For instance, where the facts are not in dispute, where the collection of money was without the authority of law and there was no case of undue enrichment, there is no good reason to deny a relief of refund to the citizens. But even in cases where collection of cess, levy or tax is held to be unconstitutional or invalid, refund is not an automatic consequence but may be refused on several grounds depending on facts and circumstances of a given case. [Para 7(v)] [190-C-E]

U.P. Pollution Control Board v. Kanoria Industrial Ltd **2001 (2) SCC 549 – relied on.**

1.7. Where the lis has a public law character, or involves a question arising out of public law functions on the part of the State or its authorities, access to justice by way of a public law remedy under Article 226 of the Constitution will not be denied. [Para 7(vi)] [190-F]

Sanjana M.Wig v. Hindustan Petroleum Corporation Ltd. **(2005) 8 SCC 242 – relied on.**

2.1. Section 24 of the Act requires the Collector, after possession of surplus land was taken over under Section 21(4) of the Act, to cause public notice requiring persons interested to lodge their claims. Section 25 of the Act provides for determination of compensation and apportionment thereof. Section 26 deals with mode of payment of amount of compensation. The said section contemplates the payment of compensation with interest at 3% per annum in annual instalments spread over a period of 20 years or at the end of 20 years. It also contemplates payment being made either by transferable bonds or in cash. Sub-section (3) of Section 26 enabling payment of compensation by cash, in cases where it could not be paid by such bonds, does not disturb the rate of interest, which is 3% per annum for 20 years, provided in sub-section (1) thereof. Whether the payment is made by transferable bonds or by cash, the rate of interest can be only at 3% per annum for a period of 20 years from the date of taking possession. [Para 11] [192-G-H; 193-F-H]

2.2. Section 26 is silent about the rate of interest payable, if the compensation is not paid within 20 years. Section 26 contemplates payment of the compensation within 20 years from the date of taking possession with interest at 3% per annum; and for the period beyond 20 years, the said provision regarding interest will cease to apply and the general equitable principles relating to

interest will apply; and interest can be awarded at any reasonable rate, in the discretion of the court. Interest at the rate of 6% per annum, beyond 20 years would be appropriate and payable, on equitable principles. [Para 12] [194-A-C]

Union of India v. Parmal Singh **(2009) 1 SCC 618 – relied on.**

2.3. The respondents are directed to pay interest on the compensation amount from the date of taking possession to date of payment, at the rate of 3% per annum for the first twenty years and thereafter (that is from the date of expiry of the period of 20 years) to 31.3.2005 (date of payment) at the rate of 6% per annum. Out of the interest so calculated, the sum of Rs.45,54,881/84 already paid towards interest on 31.3.2005 shall be deducted and the balance shall be paid by the respondents to the appellants within three months from today. [Para 13] [194-D-H; 195-A-B]

Case Law Reference:

AIR 1965 SC 1740	**referred to**	**Para 7**
2001 (2) SCC 549	**referred to**	**Para 7**
2004 (3) SCC 553	**referred to**	**Para 7**
(1962) Supp 1 SCR 242	**relied on**	**Para 7(i)**
AIR 1964 SC 1006	**relied on**	**Para7(ii)**
AIR 1965 SC 1740	**relied on**	**Para 7(iii)**
(1988) 1 SCC 401	**relied on**	**Para 7(iv)**
2001 (2) SCC 549	**relied on**	**Para 7(v)**
(2005) 8 SCC 242	**relied on**	**Para 7(vi)**
(2009) 1 SCC 618	**relied on**	**Para 10**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 819 of 2011.

From the Judgment & Order dated 04.10.2005 of the High Cout of Judicature at Bombay in Writ Petition No. 6375 of 2005.

P.H. Parekh, Sumit Goel, Anand Jha, Shivani B. (for Parekh & Co.) for the Appellant.

Madhavi Divan, Sanjay V. Kharde, Asha Gopalan Nair for the Respondents.

The Judgment of the Court was delivered by

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

2. The appellant was the owner of a large extent of sugarcane land. The Special Deputy Collector, Ahmednagar issued a notification dated 15.6.1961 under section 21 of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 ('Act' for short) declaring that the appellant held 12127.4 acres as surplus agricultural land. In pursuance of it, possession of 7407 acres and 33 ½ guntas of land at Sakarwadi and 2910 acres and 4 guntas in Lakshmiwadi was taken over on 25.5.1968. Possession of another 608 acres and 38 ½ guntas in Sakarwadi and 525 acres 1½ gunta in Lakshmiwadi was taken on 23.1.1976. Ultimately possession of the remaining 99 acres 13 guntas at Lakshmiwadi was taken on 6.4.1990.

3. On 13.11.1978 the appellant submitted its claim in regard to the entire lands (except the 99 acres 13 guntas which was taken subsequently) under Section 24(1) of the Act. Several reminders were sent by the appellant wherein the delay was highlighted and demand was made for payment of interest at 9% per annum. Ultimately on 13.12.2001 proceedings for determination of compensation were commenced by issue of notices for enquiry under Section 24(1) and (2) of the Act. The second respondent made an award dated 30.3.2005 determining the amount due as Rs.88,77,538.49 comprising Rs.43,22,656.65 as compensation and Rs.45,54,881.84 as interest thereon at 3% per annum from the date of possession

to 31.3.2004. The said payment was accepted under protest by the appellant on 31.3.2005.

4. Aggrieved by the interest awarded only at the rate of 3% per annum, the appellant filed a writ petition (WP No.6375/2005). The appellant sought quashing the award insofar as it awarded interest at 3% per annum and prayed for award of interest at 9% from the date of delivery of possession till date of actual payment. According to the appellant, a sum of Rs.97,66,189.16 was due as on the date of writ petition (WP No.6375/2005) being the difference in interest on calculating interest at 9% per annum on the principal amount instead of 3% awarded. The High Court dismissed the said petition at admission stage by the impugned order dated 4.10.2005 on the ground that the prayer being only for payment of money (by way of interest), the writ petition was not entertainable and it was open to the appellant to pursue any other remedy that may be available. The said order is challenged in this appeal by special leave.

5. The following two questions arise for our consideration in this appeal:

(i) Whether the writ petition was for "recovery of money" and therefore not maintainable?

(ii) Whether the second respondent was justified in awarding interest only at the rate of 3% per annum on the compensation payable under Section 25 of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961?

Re: Question No.(i)

6. The writ petition was for a declaration that the Notice dated 30.3.2005 informing the appellant that total compensation including interest for acquisition of 12127.4

acres of land as Rs.88,77,538/- was unjust and arbitrary and discriminatory insofar as it offered interest only at the rate of 3% per annum on the compensation amount and for a mandamus to pay the compensation with interest at 9% per annum from the date of surrender of possession to date of actual payment. The appellant contended in the writ petition that having regard to decisions of the Bombay High Court in *Krishnakumar Vithalrao Jamdar vs. State of Maharashtra* (WP No.83 of 1986 decided on 29.6.1991) and *Shree Changdeo Sugar Mills vs. State of Maharashtra* (WP No.3805/2000 decided on 7.7.2000*)* wherein interest was awarded at the rate of 9% per annum in regard to compensation payable under the said Act, the second respondent acted illegally in awarding interest at a lesser rate of 3% per annum. Therefore, the writ petition filed by appellant did not relate to a simple money claim. It required adjudication in regard to the allegations of arbitrariness and discrimination on the part of the state government and its officers in the exercise of their statutory functions, before the issue of rate of interest could be examined or determined. Primarily, therefore the writ petition was of a public law character as it related to the public law functions on the part of the state government and its officers, and therefore maintainable.

7. The High Court relying upon the decision of this court in *Suganmal v. State of MP* - AIR 1965 SC 1740 has held that the prayer in the writ petition being one for payment of interest, it should be considered to be a writ petition filed to enforce a money claim and therefore, not maintainable. The observations in *Suganmal* related to a claim for refund of tax and have to be understood with reference to the nature of claim made therein. The decision in *Suganmal* has been explained and distinguished in several subsequent cases, including in *UP Pollution Control Board vs. Kanoria Industrial Ltd* – 2001 (2) SCC 549 and *ABL International Ltd vs. Export Credit Guarantee Corporation of India Ltd*. - 2004 (3) SCC 553. The legal position becomes clear when the decision in *Suganmal*

read with the other decisions of this Court on the issue, referred to below :

(i) Normally a petition under Article 226 of the Constitution of India will not be entertained to enforce a civil liability arising out of a breach of a contract or a tort to pay an amount of money due to the claimants. The aggrieved party will have to agitate the question in a civil suit. *But an order for payment of money may be made in a writ proceeding, in enforcement of statutory functions of the State or its officers.* [vide *Burmah Construction Co.v. State of Orissa* - (1962) Supp 1 SCR 242].

(ii) If a right has been infringed – whether a fundamental right or a statutory right – and the aggrieved party comes to the court for enforcement of the right, it will not be giving complete relief if the court merely declares the existence of such right or the fact that existing right has been infringed. The High Court, while enforcing fundamental or statutory rights, has the power to give consequential relief by ordering payment of money realized by the government without the authority of law (vide *State of Madhya Pradesh v. Bhailal Bhai* - AIR 1964 SC 1006).

(iii) A petition for issue of writ of mandamus will not normally be entertained for the purpose of merely ordering a refund of money, to the return of which the petitioner claims a right. The aggrieved party seeking refund has to approach the civil court for claiming the amount, *though the High Courts have the power to pass appropriate orders in the exercise of the power conferred under Article 226 for payment of money.* (vide *Suganmal v. State of Madhya Pradesh* - AIR 1965 SC 1740).

(iv) *There is a distinction between cases where a claimant approaches the High Court seeking the relief of obtaining only refund and those where refund is sought as a consequential relief after striking down the order of assessment etc.* While a petition praying for mere issue of a

writ of mandamus to the state to refund the money alleged to have been illegally collected is not ordinarily maintainable, if the allegation is that the assessment was without a jurisdiction and the taxes collected was without authority of law and therefore the respondents had no authority to retain the money collected without any authority of law, the High Court has the power to direct refund in a writ petition [vide *Salonah Tea Co.Ltd. v. Superintendent of Taxes, Nangaon* (1988) 1 SCC 401].

(v) It is one thing to say that the High Court has no power under Article 226 of the Constitution to issue a writ of mandamus for making refund of the money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each case. For instance, where the facts are not in dispute, where the collection of money was without the authority of law and there was no case of undue enrichment, there is no good reason to deny a relief of refund to the citizens. But even in cases where collection of cess, levy or tax is held to be unconstitutional or invalid, refund is not an automatic consequence but may be refused on several grounds depending on facts and circumstances of a given case. (Vide *U.P. Pollution Control Board vs. Kanoria Industrial Ltd* – 2001 (2) SCC 549).

(vi) Where the lis has a public law character, or involves a question arising out of public law functions on the part of the State or its authorities, access to justice by way of a public law remedy under Article 226 of the Constitution will not be denied. [Vide *Sanjana M.Wig v. Hindustan Petroleum Corporation Ltd.* (2005) 8 SCC 242.]

We are therefore of the view that reliance upon *Suganmal* was misplaced, to hold that the writ petition filed by the appellant was not maintainable.

Re : Question (ii)

8. The appellant contended that the compensation amount

became due when possession of the lands was taken and as it was unjustly withheld, the appellant was entitled to interest on the compensation amount at a reasonable rate of 9% per annum, upto the date of payment. In support of their claim, they relied upon two decisions of the Bombay High Court in *Krishna Kumar* and *Shree Changdeo Sugar Mills* where interest was awarded at 9% per annum in similar matters. The respondents on the other hand submitted that there was sufficient indication in section 26 of the Act to indicate that the rate of interest should be only 3% per annum, and therefore interest can be awarded only at 3% per annum. The respondents submitted that the two decisions of the Bombay High Court were distinguishable as they related to cases where compensation had not been paid at all whereas in this case compensation with interest at 3% per annum had already been paid on 31.3.2005 and therefore the said decisions would not apply. It was pointed out that in *Krishnakumar* possession of surplus land were taken in the year 1973 but till the date of disposal of the writ petition, no compensation had been paid; in *Shree Changdeo Sugar Mills* possession of surplus land had been taken by the State Government and though compensation payable was determined on 29.12.1966, 23.2.1967 and 13.12.1968, it was not paid; and that in those circumstances, the High Court had directed payment of compensation with interest at the rate of 9% per annum from the date of taking possession of lands till date of actual payment. Alternatively it was submitted that the said decisions not having considered section 26 of the Act, they were not rightly decided.

9. There is considerable force in the submissions of Mrs. Madhavi Divan, the learned counsel for the respondents that the decisions of Bombay High Court in *Krishna Kumar* and *Changdeo* are not sound, as they completely ignore section 26 of the Act, while awarding interest at 9% per annum on the belated payment of compensation.

10. The question as to when and what circumstances,

interest could be awarded on belated payment of compensation, was considered by this Court in *Union of India vs. Parmal Singh* - (2009) 1 SCC 618. This Court first referred to the general principle and then the exceptions thereto, as under :

> "When a property is acquired, and law provides for payment of compensation to be determined in the manner specified, ordinarily compensation shall have to be paid at the time of taking possession in pursuance of acquisition. By applying equitable principles, the courts have always awarded interest on the delayed payment of compensation in regard to acquisition of any property……. The said general principle will not apply in two circumstances. One is where a statute specifies or regulates the interest. In that event, interest will be payable only in terms of the provisions of the statute. The second is where a statute or contract dealing with the acquisition specifically bars or prohibits payment of interest on the compensation amount. In that event, interest will not be awarded. Where the statute is silent about interest, and there is no express bar about payment of interest, any delay in paying compensation or enhanced compensation for acquisition would require award of interest at reasonable rates on equitable grounds."

This Court, dealing with an acquisition under the Defence of India Act, 1962 (which did not contain any provision either requiring or prohibiting payment of interest), upheld the award of interest at 6% per annum.

11. Section 24 of the Act requires the Collector, after possession of surplus land was taken over under Section 21(4) of the Act, to cause public notice requiring persons interested to lodge their claims. Section 25 of the Act provides for determination of compensation and apportionment thereof. Section 26 deals with mode of payment of amount of compensation and the same is extracted below :

"26. (1) The amount of compensation may, subject to the provisions of sub-section (3), be payable in *transferable bonds carrying interest at three per cent per annum*.

(2) The bonds shall be —

(a) of the following denominations, namely:— Rs.50; Rs.100;Rs.200; Rs.500; Rs. 1,000; Rs. 5,000 and Rs. 10,000; and

(b) of two classes – one being repayable during a *period of twenty years*from the date of issue by equated annual instalment of principle and interest, and the other being redeemable at par at the end of twenty *years* from the date of issue. It shall be at the option of the person receiving compensation to choose payment in one or other class of bonds, or partly in one class and partly in another.

(3) Where the amount of compensation or any part thereof, cannotbe paid in the aforesaid denomination*, it may be paid in cash."*

(emphasis supplied)

The said section contemplates the payment of compensation with interest at 3% per annum in annual intalments spread over a period of 20 years or at the end of 20 years. It also contemplates payment being made either by transferable bonds or in cash. Sub-section (3) of Section 26 enabling payment of compensation by cash, in cases where it could not be paid by such bonds, does not disturb the rate of interest, which is 3% per annum for 20 years, provided in sub-section (1) thereof. We are therefore of the view that whether the payment is made by transferable bonds or by cash, the rate of interest can be only at 3% per annum for a period of 20 years from the date of taking possession.

12. The next question that requires consideration is about the rate of interest if the payment is not made even after 20 years, and whether it should be only at the rate of 3% per annum, even after 20 years. Section 26 is silent about the rate of interest payable, if the compensation is not paid within 20 years. We are therefore of the view that section 26 contemplates payment of the compensation within 20 years from the date of taking possession with interest at 3% per annum; and for the period beyond 20 years, the said provision regarding interest will cease to apply and the general equitable principles relating to interest will apply; and interest can be awarded at any reasonable rate, in the discretion of the court. Interest at the rate of 6% per annum, beyond 20 years would be appropriate and payable, on equitable principles.

13. We therefore allow this appeal in part and direct the respondents to pay interest on the compensation amount from the date of taking possession to date of payment, at the rate of 3% per annum for the first twenty years and thereafter (that is from the date of expiry of the period of 20 years) to 31.3.2005 (date of payment) at the rate of 6% per annum.

Date of taking possession	Principal Amount	Period	Rate of Interest
20.5.1968	Rs.41,31,821.59	20.5.1968 to 19.5.1988	3% per annum
		20.5.1988 to 31.3.2005	6% per annum
23.1.1996	Rs. 1,77,478.61	23.1.1976 to 22.1.1996	3% per annum
		23.1.1996 to 31.3.2005	6% per annum
6.4.1990	Rs. 13,365.45	6.4.1990 to 31.3.2005	3% per annum

Out of the interest so calculated, the sum of Rs.45,54,881/84 already paid towards interest on 31.3.2005 shall be deducted and the balance shall be paid by the respondents to the appellants within three months from today.

D.G. Appeal partly allowed.

SAMITTRI DEVI AND ANR.
v.
SAMPURAN SINGH AND ANR.
(Civil Appeal No. 846 of 2011)

JANUARY 21, 2011

[DALVEER BHANDARI AND H. L. GOKHALE, JJ.]

Benami Transactions (Prohibition) Act 1988: s.4 – Benami transaction – Suit filed prior to the Act coming into force to recover the possession of benami property – Held: Would not be hit by the prohibition u/s.4 of the Act.

Evidence Act, 1872: s.114 – Presumption of service – In the instant case, notice sent under postal certificate from one house to another house on the same road – Inference can be drawn u/s.114 that such notice must have been duly served in the normal course of business within 5 days.

Appellant no.1 purchased the suit house on 26.2.1985 for a consideration of Rs. 40,000. The sale deed was, however, executed in the name of her son-defendant-appellant no.2 and his brother-in-law-respondent no. 2. It was the case of appellant no. 1 that appellant no.2 and respondent no. 2 sold half share of the suit house to respondent no.1 without her consent and knowledge. The said transaction of sale was executed by a registered sale deed dated 13.4.1987 despite the fact that appellant no.1 had sent letter dated 8.4.1987 to respondent no.1 informing him that she was the real owner of the suit house.

Appellant no. 1 filed a suit for declaration that she was the real owner in possession of the suit house. She also prayed for a permanent injunction restraining the defendants from alienating any part of the suit house. By

amendment, she claimed an alternative relief for a decree of Rs. 40,000 with interest. Appellant no. 2 admitted the claim of appellant no. 1, but respondent no. 2 disputed it and contended that half of the consideration of Rs. 40,000 has been paid by him. He denied that it was a Benami Transaction. Respondent no.1 contended in written statement that even if it is proved to be a Benami Transaction, due to the recent legislation of Benami Transactions (Prohibition) Act 1988, appellant no.2 and respondent no.2 were the owners of the suit property, and that the alienation by respondent no. 2 of his share in the property was effected legally.

Appellant No. 1 had produced before the trial court a copy of the notice dated 8.4.1987 alongwith the certificate of posting which she had sent to defendant no. 3, to state that she was the real owner of the suit house. The trial court held that the delivery of the notice was not proved, and therefore, respondent no.1 was a bonafide purchaser for valuable consideration. It also held that the prohibition under Section 4 of the Act to recover the Benami property was applicable to suits, claims or action pending on the date of commencement of the Act. Appellant no.1 had filed the suit on 30.9.1987. The Benami Transactions (Prohibition) Act 1988 came into force on 5.9.1988. Thus, this suit was pending on the date on which the Act came into force and the appellant no longer retained the right to recover the property from the Benami holder. The suit was, therefore, dismissed for being barred by virtue of the provisions of the said Act.

The first appellate court held that the suit was not prohibited by the Act and respondent no. 1 could not be held to be a bonafide purchaser without any notice of the rights of appellant no. 1 in the suit property. The first

appellate court, therefore, decreed the suit to the effect that appellant no. 1 was the real owner in possession of the house and the sale deed dated 13.4.1987 was null and void. It also granted an injunction against the defendants that they shall not alienate any part of the suit house and will not interfere in her possession of the suit house.

The High Court did not give any importance to the notice dated 8.4.1987 being sent under postal certificate, but held that there was nothing on record to prove that respondent no.1 had been served with that notice. The High Court, therefore, found fault with the finding of the first appellate court to the effect that respondent no. 1 was not a bonafide purchaser, and further held that, it amounted to misreading of evidence. The Regular Second Appeal was therefore, allowed and the judgment and decree of the first appellate court was set aside. The appellants filed the instant appeal challenging the order of the High Court.

Allowing the appeal, the court

HELD: 1.1. As far as the purchase of the suit house by appellant no. 1 from her own money was concerned that finding of the trial court has remained undisturbed all throughout and cannot be re-opened in the instant appeal. Appellant no.1 led cogent evidence before the trial court, and it was held in her favour that she had purchased the suit house that out of her funds. The submission of respondent no. 2 that he had arranged the amount of Rs. 20,000/- through friendly loans was negated by the trial court since there was no supporting evidence at all. There was no reason to disturb that finding. Once the High Court held that appellant no.1 had purchased the suit house out of her funds, it ought to have held that it follows that respondent no. 2 had no

right to deal with it or to sell his half share merely because his name was shown as a purchaser alongwith appellant no.2. Consequently, the purchase of the share of respondent no.2 by respondent no. 1 without the consent of appellant no.1 gave him no rights whatsoever. Therefore, the High Court ought to have held that the suit of appellant no.1 for declaration of her ownership was valid and maintainable. The High Court has, therefore, committed a serious error of law in holding that the first appellate court has misread the evidence on record while coming to the conclusion that the suit property was the Benami Property of appellant no.1 and that her suit to enforce the right concerning the same shall not lie. In fact, there was no such misreading of evidence on the part of the first appellate court, and hence there was no occasion for the High Court to frame such a question of law in view of the prevailing judgment in *R. Rajagopal Reddy which was rightly followed by the first appellate court. [Paras 15, 17] [207-F-H; 211-A-C]

R. Rajagopal Reddy v. Padmini Chandrasekharan* **decided on 31.1.1995 and AIR 1996 SC 238 – relied on.

Mithilesh Kumari and Anr. v. Prem Behari Khare **AIR 1987 SC 1247 – referred to.**

1.2. The appellant's premises was situated on College Road, Pathankot and so also the residence of the first respondent where the notice was sent. Therefore, there was nothing wrong in drawing the inference which was permissible under Section 114 of the Evidence Act that such notice must have been duly served in the normal course of business before 13.4.1987. In the present case it has already been established that the appellant had purchased the property out of her own funds. Therefore, it could certainly be expected that when she came to know about the clandestine sale of her

property to respondent no.1, she would send him a notice, which she sent on 8.4.1987. The notice is sent from one house on the College Road to another house on the same road in the city of Pathankot. The agreement of purchase was signed by the respondent no.3 five days thereafter i.e. 13.4.1987. The appellant had produced a copy of the notice along with postal certificate in evidence. There was no allegation that the postal certificate was procured. In the circumstances, it could certainly be presumed that the notice was duly served on respondent No.1 before 13.4.1987. The High Court, therefore, erred in interfering in the finding rendered by the first appellate court that respondent no.1 did receive the notice and, therefore, was not a bona fide purchaser for value without a notice. [Paras 18, 23] [210-F-G; 214-C-F]

Harihar Banerji v. Ramshashi Roy **AIR 1918 PC 102;** *Gresham House Estate Co. v. Rossa Grande Gold Mining Co.* **1870 Weekly Notes 119;** *Ganga Ram v. Smt. Phulwati* **AIR 1970 Allahabad 446;** *Mst. L.M.S. Ummu Saleema v. B.B. Gujaral & Anr.* **1981 (3) SCC 317;** *M.S. Madhusoodhanan v. Kerala Kaumudi (P) Ltd. and others* **2004 (9) SCC 204;** *VS Krishnan v. Westfort Hi-Tech Hospital Ltd.* **2008 (3) SCC 363 – relied on.**

2. The suit filed by appellant no.1 is decreed and it is declared that appellant no. 1 is the owner of the suit house. There shall be a permanent injunction restraining the defendants from alienating any part of the suit house and forcibly interfering with the possession of the plaintiff of the house in dispute. In view of the offer given by the appellants to compensate the first respondent, the appellants shall pay him the amount of Rs. 30,000/-, with simple interest at the rate of 10% for the period from 13.4.1987 till the decision of the first appellate court i.e.

22.2.1996, within twelve weeks from today, though it is up to respondent no. 1 to receive the amount. The interest is restricted upto 22.2.1996 for the reason that respondent no.1 ought to have accepted the decision of the first appellate court, particularly in view of the judgment of this Court in *R. Rajagopal Reddy and should not have dragged the appellants to the High Court. [Para 25] [215-B-E]

Case Law Reference:

AIR 1987 SC 1247	**Referred to**	**Para 10**
AIR 1996 SC 238	**Relied on**	**Para 11**
AIR 1918 PC 102	**Relied on**	**Para 19**
1870 Weekly Notes 119	**Relied on**	**Para 19**
AIR 1970 All 446	**Relied on**	**Para 20**
1981 (3) SCC 317	**Relied on**	**Para 21**
2004 (9) SCC 204	**Relied on**	**Para 22**
2008 (3) SCC 363	**Relied on**	**Para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 846 of 2011.

From the Judgment & Order dated 10.09.2009 of the High Court of Punjab & Haryana at Chandigarh in R.S.A. No. 1367 of 1996.

Sai Krishna Rajagopal, Hari Shankar K., Vikas Jangra, Bharat S. Kumar for the Appellants.

V.K. Monga for the Respondents.

The Judgment of the Court was delivered by

GOKHALE, J. 1. Leave Granted.

2. This Appeal by Special Leave raises the question as to whether the suit of the first appellant for the recovery of her house property filed prior to the Benami Transactions (Prohibition) Act, 1988 coming into force could be considered to be prohibited by Section 4 of that Act.

3. This appeal seeks to challenge the judgment and order passed by a Learned Judge of the Punjab and Haryana High Court dated 10.9.2009 in Regular Second Appeal (R.S.A) No. 1367 of 1996 (O & M), whereby the Judge has allowed the Second Appeal filed by Respondent No. 1 herein, and set aside the judgment and order dated 22.2.1996 passed by the Additional District Judge, Gurdaspur in Civil Appeal No. 203 of 1991 filed by appellant No.1 herein. The Learned Additional District Judge had allowed the Civil Appeal filed by appellant No. 1 herein whereby he decreed Civil Suit No. 138 of 1987 filed by appellant No.1, which suit had been dismissed by the Sub-Judge at Pathankot by his judgment and order dated 3.10.1991.

4. Short facts leading to this appeal are as follows:-

The appellant No.1 herein purchased a house property situated at Pathankot from Sarvashri Romesh Chand and Chatar Chand sons of Shri Kartar Singh, vide registered sale deed dated 26.2.1985 for a consideration of Rs. 40,000/-. This sale deed was, however, executed in the name of her son namely Shri Kamal Chand (the appellant No.2 herein) and his brother-in-law Shri Jiwan Kumar (respondent No.2 herein). The appellant no.1 paid the money by two bank drafts for purchasing the house property which was actually in the possession of a tenant of the previous owner i.e. Home Guard Department and it continues to be in their possession.

5. It is the case of the appellant No.1 that taking advantage of her old age (presently 93 years), the above referred Kamal Chand and Jiwan Kumar stealthily removed the sale deed from her possession, and this Jiwan Kumar sold half share of the

suit house to one Sampuran Singh (Respondent No. 1 herein) and that too without her knowledge and consent. The sale was executed by a registered sale deed dated 13.4.1987 despite the fact that appellant No.1 had sent, in the meanwhile, a letter dated 8.4.1987 to Respondent No. 1 herein informing him that she was the real owner of the Suit House.

6. The appellant No. 1 therefore, filed Suit No. 138 of 1987 on 30.9.1987 for a declaration that she was the real owner in possession of the Suit House shown in red in the site plan attached by letters A B C D part of No. Khasra 574/1, No. Khawat 262, No. Khatauni 401, as entered in the Jamabandi for the year 1976-77 situated in village Daulatpur HB No. 331, Pathankot. She prayed for a permanent injunction also restraining the defendants from alienating any part of the suit house and forcibly interfering with the possession of the plaintiff of the suit house. By moving an amendment, she claimed an alternative relief for a decree of Rs. 40,000/- with interest. Her son Kamal Chand was joined as defendant No. 1, his brother-in-law the above referred Jiwan Kumar as defendant No. 2, and the purchaser Sampuran Singh as defendant No. 3. They are appellant No.2, respondent No.2 and respondent No. 1 respectively to this appeal.

7. Defendant No. 1 admitted the entire claim of the appellant, but the defendant No. 2 disputed it, and contended that half of the consideration of Rs. 40,000/- had been paid by him. He denied that it was a Benami Transaction. Defendant No. 3 filed his written statement and contended in para 5 thereof that even if it is proved to be a Benami Transaction, due to the recent legislation of Benami Transactions (Prohibition) Act 1988, the defendants Nos. 1 & 2 were the owners of the Suit property, and that the alienation of his share in the property by defendant No. 2 in his favour had been effected legally. He contended that he had purchased the share of the defendant No. 2 by sale deed dated 13.4.1987 for a consideration of Rs. 30,000/-, and that he was a bonafide purchaser for value, and

that the Suit should be dismissed.

8. The trial court framed the necessary issues including whether the sale deed dated 26.2.1985 was Benami, and whether the sale deed dated 13.4.1987 was illegal, and also whether defendant No. 3 was a bonafide purchaser without notice.

9. The appellant No. 1 laid the evidence amongst others of a clerk from a branch of State Bank of Patiala at Chaki, Pathankot, who deposed to the fact that the appellant had made the payment for the sale consideration from her account. Defendant No. 2 had contended that he had arranged Rs. 20,000/- from friendly loans to purchase half the share of the Suit House, but he did not lead any evidence for proving the availability of such funds with him. The Trial Court therefore, held that it was obvious that the payment was not made by defendant nos. 1 & 2, but by the plaintiff i.e. the appellant No.1 herein.

10. The appellant No.1 had produced before the trial court a copy of the notice dated 8.4.1987 which she had sent to defendant no. 3, to point out to him that she was the real owner of the suit house. She produced the same alongwith the certificate of posting. The sale deed between defendant Nos. 2 & 3 was executed on 13.4.1987. The trial court held that the delivery of the notice was not proved, and therefore, defendant No. 3 was a bonafide purchaser for valuable consideration without notice. That apart, at the time when the Suit was decided on 3.10.1991, the law laid down by this Court in *Mithilesh Kumari and Anr. Vs. Prem Behari Khare* [AIR 1987 SC 1247] : [1989 (2) SCC 95] was governing the field viz. that the provisions of Benami Transactions (Prohibition) Act 1988 were retroactive. It had been held that the prohibition under Section 4 of the Act to recover the Benami property was applicable to suits, claims or action pending on the date of commencement of the Act. The appellant No.1 had filed her suit on 30.9.1987. The Benami Transactions (Prohibition) Act 1988 came into force on 5.9.1988. Thus, this Suit was pending on

the date on which the Act came into force. The Trial Court, therefore, followed the judgment in *Mithilesh Kumari* (supra), and held that the appellant no longer retained the right to recover the property from the Benami holder. The suit was, therefore, dismissed for being barred by virtue of the provisions of the said Act, though without any order as to costs.

11. The appellant No.1 carried the matter in first appeal to the Additional District Judge, Gurdaspur. As we have noted, the trial court had already held that appellant No. 1 had purchased the suit house by making the payment from her account. It had, however, declined to decree her suit on two grounds, firstly due to the prohibition under Section 4 of the Benami Transactions (Prohibition) Act 1988 as interpreted in Mithilesh Kumari judgment (supra), and secondly on the ground that the appellant did not prove the service of her notice dated 8.4.1987 on respondent No. 1 herein. By the time the first appeal was being heard, the judgment of the two Judges bench in Mithilesh Kumari (supra) had been over-ruled by a bench of three Judges of this Court in R.Rajagopal Reddy Vs. Padmini Chandrasekharan decided on 31.1.1995 and reported in [AIR 1996 SC 238] : [1995 (2) SCC 630]. This Court had held that Section 4 or for that matter the Act as a whole was not a piece of declaratory or curative legislation. It creates substantive rights in favour of benamidars and destroys substantive rights in favour of the real owners. It creates a new offence of entering into such benami transactions. It had therefore, been held that when a statutory provision creates a new liability and a new offence, it would naturally have a prospective operation, and Section 4 will not apply to pending suits which were already filed and entertained prior to the Act coming into force. The first appellate Court therefore, held that the suit filed by appellant No.1 was not prohibited by the said Act. As far as the notice dated 8.4.1987 is concerned, the Court held that there was a presumption under the law that the letter which was proved to have been posted well in advance must have reached the addressee. The first appellate court therefore, held that the

notice will have to be presumed to have been served, and yet respondent No. 1 herein got the sale deed executed on 13.4.1987. It was therefore, held that respondent No. 1 could not be held to be a bonafide purchaser without any notice of the rights of appellant No.1 in the suit property. The first appellate court therefore, decreed the suit filed by appellant No.1 to the effect that she was the real owner in possession of the house and the sale deed dated 13.4.1987 was null and void. It also granted an injunction against the defendants that they shall not alienate any part of the suit house and will not interfere in her possession of the suit house. The Court awarded cost of Rupees 1,000/-.

12. Feeling aggrieved by this decision, the first respondent herein filed a Regular Second Appeal bearing RSA No. 1367 of 1996. The Learned single Judge of the High Court, who heard the matter, framed the following substantial question of law - "Whether the Learned Additional District Judge has misread the evidence on record while coming to the conclusion that the suit property was benami property of the plaintiff." The Learned Judge did not dispute the fact that appellant No. 1 had purchased the suit house out of her money, but he noted that the office of the Home Guard continued in that property. The Learned Judge did not give any importance to the notice dated 8.4.1987 being sent under postal certificate, but held that there was nothing on record to prove that defendant No.3 had been served with that notice. The Learned Single Judge therefore, found fault with the finding of the Additional District Judge to the effect that defendant No. 3 (Respondent No. 1 herein) was not a bonafide purchaser, and further held that, it amounted to misreading of evidence. The Regular Second Appeal was therefore, allowed and the judgment and decree of the Addl. District Judge was set aside.

13. Being aggrieved by the judgment and order passed by the High Court this Appeal has been filed by the appellant. This time, the son of appellant No.1, the original defendant No.1

has joined her as appellant No. 2. Mr. Saikrishna Rajagopal, learned counsel appearing for the appellants pointed out that the order passed by the High Court does not deal with the law laid down in the judgment of this Court in R. Rajagopal Reddy case (Supra). The Judgment was binding on the Learned Judge, and in view thereof the suit filed by the appellant No.1 was not hit by the prohibition under Section 4 of the Act. He also pointed out that the appellants as well as the respondent No. 1 were staying in the same area i.e. College Road, Pathankot, and therefore, the Learned Additional District Judge was right in his inference that the notice dated 8.4.1987 must be presumed to have been duly served on respondent No. 1 prior to 13.4.1987 when respondent No. 3 purchased half share of the suit house. He submitted that the appellants were ready to return the amount of Rs.30,000/- with interest to respondent No. 1 which amount he claims to have paid to respondent No. 2 to purchase his half share in the property.

14. As against this submission of the appellant, Mr. V.K. Monga, learned counsel appearing for respondent No. 1 repeated the same submissions made in the courts below, namely, that he was a bonafide purchaser without notice, and that the original defendant No. 2 had purchased half the share of the suit house from his money, and from him the respondent No.1 had purchased that share, and therefore, the present appeal should be dismissed.

15. We have noted the submission of the rival parties. As far as the purchase of the suit house by the appellant No. 1 from her own money is concerned that finding of the trial court has remained undisturbed all throughout and cannot be re-opened in this appeal. The appellant No.1 led cogent evidence before the trial court, and it had been held in her favour that it is out of her funds that she had purchased the suit house. The submission of the original defendant no. 2 that he had arranged the amount of Rs. 20,000/- through friendly loans was negated by the trial court since there was no supporting evidence at all.

There is no reason for us to disturb that finding. Once the High Court held that the appellant had purchased the suit house out of her funds, it ought to have held that it follows that the defendant No. 2 had no right to deal with it or to sell his half share merely because his name was shown as a purchaser alongwith the appellant No. 2. Consequently the purchase of the share of the defendant No. 2 by the respondent No. 1 herein without the consent of the appellant No. 1 gave him no rights whatsoever. Therefore, the High Court ought to have held that the suit of appellant No. 1 for declaration of her ownership to be valid and maintainable.

16. The High Court has clearly erred in ignoring the binding judgment of a Bench of three Judges of this Court in *R. Rajagopal Reddy* (supra). By this decision, this Court had reversed its earlier judgment in *Mithilesh Kumari* (supra) and had held in terms that suits filed prior to the application of the act would not be hit by the prohibition under Section 4 of that act. Section 4(1) of the Benami Transactions (Prohibition) Act 1988 reads as follows:

> "Prohibition of the right to recover property held benami.- (1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property."

While reversing the earlier decision of this Court in *Mithilesh Kumari* (supra), a bench of three Judges observed in para 11 of

R. Rajagopal Reddy (supra) as follows:-

> "Before we deal with these six considerations which weighed with the Division Bench for taking the view that Section 4 will apply retrospectively in the sense that it will get telescoped into all pending proceedings, howsoever

earlier they might have been filed, if they were pending at different stages in the hierarchy of the proceedings even up to this Court, when Section 4 came into operation, it would be apposite to recapitulate the salient feature of the Act. As seen earlier, the preamble of the Act itself states that it is an Act to prohibit benami transactions and the right to recover property held benami, for matters connected therewith or incidental thereto. Thus it was enacted to efface the then existing right of the real owners of properties held by others benami. Such an Act was not given any retrospective effect by the legislature. Even when we come to Section 4, it is easy to visualise that sub-section (1) of Section 4 states that no suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other shall lie by or on behalf of a person claiming to be the real owner of such property. As per Section 4(1) no such suit shall thenceforth lie to recover the possession of the property held benami by the defendant. Plaintiff's right to that effect is sought to be taken away and any suit to enforce such a right after coming into operation of Section 4(1) that is 19-5-1988, shall not lie. *The legislature in its wisdom has nowhere provided in Section 4(1) that no such suit, claim or action pending on the date when Section 4 came into force shall not be proceeded with and shall stand abated.* On the contrary, clear legislative intention is seen from the words "no such claim, suit or action shall lie", meaning thereby no such suit, claim or action shall be permitted to be filed or entertained or admitted to the portals of any court for seeking such a relief after coming into force of Section 4(1)." (Emphasis supplied)

17. In the impugned judgment, the High Court nowhere refers to the judgment in *R. Rajagopal Reddy's* case (supra) although the same was very much referred to and relied upon by the appellant to counter the contrary submission of the

respondent No. 1. The High Court has therefore, committed a serious error of law in holding that the Additional District Judge has misread the evidence on record while coming to the conclusion that the suit property was the Benami Property of the plaintiff-appellant No.1 herein and that her suit to enforce the right concerning the same shall not lie. In fact there was no such misreading of evidence on the part of the first appellate court, and hence there was no occasion for the High Court to frame such a question of law in view of the prevailing judgment in R. Rajagopal Reddy which had been rightly followed by the first appellate court.

18. The High Court has held that there is nothing on record to suggest that respondent No.1 herein had, in fact, been served with the notice dated 8.4.1987 and thereby reversed the finding rendered by the first appellate court. It is material to note in this behalf that it was canvassed by respondent No.1 before the first appellate court that a certificate of posting is very easy to procure and it does not inspire confidence. The Additional District Judge observed that there was no dispute with this proposition of law, but there was no such averment or even allegation against appellant No.1 herein, that she had procured the certificate of posting nor was there any such pleading to that effect. It is on this background that the first appellate court has drawn the inference that the notice must be deemed to have been served within the period of five days thereafter i.e. before 13.4.1987, the date on which the respondent No.1 herein entered into an agreement to purchase the suit property. It is also material to note that the appellant's premises are situated on College Road, Pathankot and so also the residence of the first respondent where the notice was sent. Therefore, there was nothing wrong in drawing the inference which was permissible under Section 114 of the Evidence Act that such notice must have been duly served in the normal course of business before 13.4.1987.

19. We may fruitfully refer to a few judgments laying down

the propositions relating to service of notice. To begin with, we may note two judgments in the context of the notice to quit, sent to the tenants under Section 106 of the Transfer of Property Act 1882, though both the judgments are concerning the notices sent by registered post. Firstly, the judgment in the case of *Harihar Banerji Vs. Ramshashi Roy* [AIR 1918 PC 102], wherein the Privy Council quoted with approval the following observations in *Gresham House Estate Co. Vs. Rossa Grande Gold Mining Co.* [1870 Weekly Notes 119] to the following effect:

> "…….if a letter properly directed, containing a notice to quit, is proved to have been put into the post office, it is presumed that the letter reached its destination at the proper time according to the regular course of business of the post office, and was received by the person to whom it was addressed. That presumption would appear to their Lordships to apply with still greater force to letters which the sender has taken the precaution to register, and is not rebutted but strengthened by the fact that a receipt for the letter is produced signed on behalf of the addressee by some person other than the addressee himself."

20. Secondly, we may refer to the judgment of a Full Bench of the Allahabad High Court in the case of *Ganga Ram Vs. Smt. Phulwati* [AIR 1970 Allahabad 446], wherein the Court observed in paragraphs 12 and 13 as follows:

> "12. When a registered article or a registered letter is handed over to an accepting or receiving post office, it is the official duty of the postal authorities to make delivery of it to the addressee. Human experience shows that except in a few exceptional cases letters or articles received by the post office are duly, regularly and properly taken to the addressee. Consequently as a proposition it cannot be disputed that when a letter is delivered to an accepting or receiving post office it is reasonably expected that in the normal course it would be delivered

> to the addressee. That is the official and the normal function of the post office.
>
> 13. Help can also be taken from Section 16 of the Indian Evidence Act which reads as follows:-
>
> "When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.
>
> Illustrations:
>
> (a) The question is, whether a particular letter was dispatched. The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put in that place, are relevant.
>
> (b) The question is, whether a particular letter reached A. The facts that it was posted in due course, and was not returned through the Dead Letter Office, are relevant."

21. As far as a notice sent under postal certificate is concerned, in *Mst. L.M.S. Ummu Saleema Vs. B.B. Gujaral & Anr.* [1981 (3) SCC 317], a bench of three judges of this Court on the facts of that case, refused to accept that the notice sent under a postal certificate by a detenue under the Conservation of Foreign Exchange and Smuggling Activities Act, 1974, to the Assistant Collector of Customs, retracting his original statement had been duly served on the concerned office. This was because the respondent rebutted the submission by producing their file to show that such a letter had not been received in their office in the normal course of business. However, the proposition laid down in that case is relevant for our purpose. This Court observed in paragraph 6 of that judgment as follows:

> "6. ……The certificate of posting might lead to a

presumption that a letter addressed to the Assistant Collector of Customs was posted on August 14, 1980 and in due course reached the addressee. But, that is only a permissible and not an inevitable presumption. Neither Section 16 nor Section 114 of the Evidence Act compels the court to draw a presumption. The presumption may or may not be drawn. On the facts and circumstances of a case, the court may refuse to draw the presumption. On the other hand the presumption may be drawn initially but on a consideration of the evidence the court may hold the presumption rebutted and may arrive at the conclusion that no letter was received by the addressee or that no letter was ever despatched as claimed. After all, there have been cases in the past, though rare, where postal certificates and even postal seals have been manufactured. In the circumstances of the present case, circumstances to which we have already referred, we are satisfied that no such letter of retraction was posted as claimed by the detenu."

22. The proposition laid down in this judgment has been followed in two subsequent cases coming before this Court in the context of Section 53(2) of the Companies Act 1956 providing for presumption of service of notice of the board meeting, sent by post. In *M.S. Madhusoodhanan vs. Kerala Kaumudi (P) Ltd. and others* [2004 (9) SCC 204], a bench of two Judges of this Court referred to the proposition in *Mst. L.M.S. Ummu Saleema* (supra) in para 117 of its judgment, and held in the facts of that case, that the notice by postal certificate could not be presumed to have been effected, since the relations between the parties were embittered, and the certificate of posting was suspect. As against that, in a subsequent matter under the same section, in the case of *VS Krishnan Vs. Westfort Hi-Tech Hospital Ltd.* [2008 (3) SCC 363], another bench of two Judges referred to the judgment in *M.S. Madhusoodhanan* (supra), and drew the presumption in the facts of that case that the notice sent under postal certificate had been duly served for the purposes of Section 53(2) of the

Companies Act, 1956, since the postal receipt with post office seal had been produced to prove the service. Thus, it will all depend on the facts of each case whether the presumption of service of a notice sent under postal certificate should be drawn. It is true that as observed by the Privy Council in its above referred judgment, the presumption would apply with greater force to letters which are sent by registered post, yet, when facts so justify, such a presumption is expected to be drawn even in the case of a letter sent under postal certificate.

23. Having seen the factual and the legal position, we may note that in the present case it has already been established that the appellant had purchased the property out of her own funds. Therefore, it could certainly be expected that when she came to know about the clandestine sale of her property to respondent No.1, she would send him a notice, which she sent on 8.4.1987. As noted earlier, the notice is sent from one house on the College Road to another house on the same road in the city of Pathankot. The agreement of purchase is signed by the defendant No.3 five days thereafter i.e. 13.4.1987. The appellant had produced a copy of the notice along with postal certificate in evidence. There was no allegation that the postal certificate was procured. In the circumstances, it could certainly be presumed that the notice was duly served on respondent No.1 before 13.4.1987. The High Court, therefore, erred in interfering in the finding rendered by the Additional District Judge that respondent No.1 did receive the notice and, therefore, was not a bona fide purchaser for value without a notice.

24. The judgment of the High Court, therefore, deserves to be set aside. The appellants through their counsel have, however, in all fairness offered to compensate the first respondent herein by paying him the amount of Rs. 30,000/- with appropriate interest. The first respondent did not evince any interest in this suggestion. Yet, the end of justice will be met,

if this amount of Rs. 30,000/- is returned by the appellants to him as offered by them with simple interest at the rate of 10%.

25. In the circumstances this appeal is allowed. The Judgment and order dated 10.2.2009 passed by the High court in R.S.A No. 1367 of 1996 and that of the Sub-Judge, Pathankot in Civil Suit No. 138 of 1987 dated 3.10.1991 are set aside. The judgment and order dated 22.2.1996 passed by Addl. District. Judge, Gurdaspur in Civil Appeal No. 203 of 1991 is confirmed. The suit filed by the appellant No.1 bearing Civil Suit No. 138 of 1987 is decreed and it is declared that the appellant No. 1 is the owner of the suit house. There shall be a permanent injunction restraining the defendants from alienating any part of the suit house and forcibly interfering with the possession of the plaintiff of the house in dispute. In view of the offer given by the appellants to compensate the first respondent, the appellants shall pay him the amount of Rs. 30,000/-(Rupees thirty thousand only), with simple interest at the rate of 10% for the period from 13.4.1987 till the decision of the first appellate court i.e. 22.2.1996, within twelve weeks from today, though it is up to the respondent No. 1 to receive the amount. The interest is restricted upto 22.2.1996 for the reason that respondent No.1 ought to have accepted the decision of the First Appellate Court, particularly in view of the judgment of this Court in *R. Rajagopal Reddy* (supra), and should not have dragged the appellants to the High Court in Second appeal.

26. The first respondent will pay a cost of Rs. 10,000/- to the 1st appellant for this appeal.

D.G. Appeal allowed.

KALYAN SINGH CHOUHAN

v.

C.P. JOSHI

(Civil Appeal No. 870 of 2011)

JANUARY 24, 2011

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

Election Laws:

Election petition – Trial and adjudication of – Held: The procedure provided for trial of civil suits under CPC is not applicable in its entirety to the trial of election petition – The procedure prescribed in CPC applies to election trial with flexibility and only as a guidelines.

Representation of People Act, 1951 – ss. 80, 81, 100(1)(d)(iii) and s.97 – Election petition – Right of a party to lead evidence – Elections held to constitute State Legislative Assembly – Allegation that 10 votes were cast by imposters and thus, 10 tendered votes cast under the Rules – Appellant declared elected – Election petition filed by respondent before High Court – Appellant filed written statement – Later filed application to summon list of all tendered votes – High Court rejected the application – On appeal, held: The pleadings in the election petition related only to 6 tendered votes – There was no reference in respect of the remaining 4 tendered votes either in the election petition or in the written statement filed by the appellant – In absence of any Recrimination petition, the appellant could not be permitted to lead evidence on a fact not in issue – Also, in the application, no reason nor justification was given by the appellant for summoning of the other 4 tendered votes – Therefore, the High Court rightly did not allow the appellant to lead evidence which was not in the line of the pleadings – Conduct of Election Rules, 1961 – Rule 42.

Pleadings – Jurisdiction of the Court to grant relief – Held: A decision of a case cannot be based on grounds outside the pleadings of the parties.

Code of Civil Procedure, 1908 – Order XIV, Rule 1– Framing of issues – Object and purpose of – Held: The object of framing issues is to ascertain/ shorten the area of dispute and pinpoint the points required to be determined by the court – It is the issues fixed and not the pleadings that guide the parties in the matter of adducing evidence – It is neither desirable nor required for the court to frame an issue not arising on the pleadings – The Court should not decide a suit on a matter/point on which no issue has been framed.

Elections were held to constitute the 13th Legislative Assembly for the State of Rajasthan. During the process of polling, there were allegations that in respect of the constituency in question, at least 10 votes were cast by imposters and thus, 10 tendered votes were cast under Rule 42 of the Conduct of Election Rules, 1961. The appellant was declared elected from the said constituency by a margin of one vote.

The respondent, an unsuccessful candidate, filed election petition before the High Court under Sections 80, 81, 100(1)(d)(iii) and Section 100(1)(d)(iv) of 1951 Act, *inter-alia*, alleging: (i) that the name of the appellant's wife was registered at two places in the electoral rolls of the constituency and hence she had cast two votes in the election; and (ii) that six (6) tendered votes cast in the election must be counted and the six (6) votes originally polled against the tendered votes must be rejected. The appellant filed written statement contesting the election petition. After framing of the issues, the appellant filed an application to summon inter alia the list of all tendered votes. The High Court rejected the application on the ground that it was not permissible to summon tendered

votes in respect of which none of the parties had taken the pleadings nor an issue had been framed in respect of those tendered votes and, thus, it was not permissible to lead any evidence on the fact which is not in issue; more so, on the ground of delay, as the application had been filed after framing of the issues.

In appeal to this Court, the question which arose for consideration was whether the result of the election had been materially affected and, therefore, once the appellant raised his statutory right to lead evidence, in order to prevent miscarriage of justice, it was necessary that all the tendered votes were summoned and taken into consideration i.e. be counted.

Dismissing the appeal, the Court

HELD: 1. The trial of an election petition is entirely different from the trial of a civil suit, as in a civil suit trial commences on framing the issues while trial of an election petition encompasses all proceedings commencing from the filing of the election petition up to the date of decision. Therefore, the procedure provided for the trial of civil suits under CPC is not applicable in its entirety to the trial of the election petition. For the purpose of the election petition, the word 'trial' includes the entire proceedings commencing from the time of filing the election petition till the pronouncement of the judgment. The applicability of the procedure in Election Tribunal is circumscribed by two riders: firstly, the procedure prescribed in CPC is applicable only "as nearly as may be", and secondly, the CPC would give way to any provisions of the Act or any rules made thereunder. Therefore, the procedure prescribed in CPC applies to election trial with flexibility and only as guidelines. [Para 10] [230-A-D]

Kailash v. Nanhku & Ors. **AIR 2005 SC 2441;** *Harcharan*

Singh v. S. Mohinder Singh & Ors. **AIR 1968 SC 1500;** *Jyoti Basu & Ors. v. Debi Ghosal & Ors.* **AIR 1982 SC 983;** *Chanda Singh v. Ch. Shiv Ram Varma & Ors.* **AIR 1975 SC 403 – relied on.**

2. During the trial of an election petition, it is not permissible for the court to permit a party to seek a roving enquiry. The party must plead the material fact and adduce evidence to substantiate the same so that the court may proceed to adjudicate upon that issue. Before the court permits the recounting, the following conditions must be satisfied: i) the Court must be satisfied that a prima facie case is established; ii) the material facts and full particulars have been pleaded stating the irregularities in counting of votes; iii) a roving and fishing inquiry should not be directed by way of an order to recount the votes; iv) an opportunity should be given to file objection; and v) secrecy of the ballot requires to be guarded. [Para 14] [232-D-G]

Dr. Jagjit Singh v. Giani Kartar Singh & Ors, **AIR 1966 SC 773;** *Suresh Prasad Yadav v. Jai Prakash Mishra & Ors.* **AIR 1975 SC 376;** *M. Chinnasamy v. K.C. Palanisamy & Ors.* **AIR 2004 SC 541;** *Chandrika Prasad Yadav v. State of Bihar & Ors.* **AIR 2004 SC 2036;** *Tanaji Ramchandra Nimhan v. Swati Vinayak Nimhan* **AIR 2006 SC 1218;** *Gursewak Singh v. Avtar Singh & Ors.* **AIR 2006 SC 1791;** *Baldev Singh v. Shinder Pal Singh & Anr.* **(2007) 1 SCC 341;** *Gajanan Krishnaji Bapat & Anr. v. Dattaji Raghobaji Meghe & Ors.* **AIR 1995 SC 2284 – relied on.**

3. Pleadings and particulars are required to enable the court to decide the rights of the parties in the trial. Thus, the pleadings are more to help the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said

issue. It is settled legal proposition that "as a rule relief not founded on the pleadings should not be granted." Therefore, a decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. [Para 16] [233-D-F]

Sri Mahant Govind Rao v. Sita Ram Kesho **(1898) 25 Ind. App. 195;** *M/s. Trojan & Co. v. RM. N.N. Nagappa Chettiar* **AIR 1953 SC 235;** *Raruha Singh v. Achal Singh & Ors.*; **AIR 1961 SC 1097;** *Om Prakash Gupta v. Ranbir B. Goyal* **AIR 2002 SC 665;** *Ishwar Dutt v. Land Acquisition Collector & Anr.* **AIR 2005 SC 3165;** *State of Maharashtra v. Hindustan Construction Company Ltd.* **(2010) 4 SCC 518;** *Ram Sarup Gupta (dead) by L.Rs. v. Bishun Narain Inter College & Ors.,* **AIR 1987 SC 1242;** *Bachhaj Nahar v. Nilima Mandal & Ors.* **AIR 2009 SC 1103;** *J.K. Iron & Steel Co. Ltd, Kanpur v. The Iron and Steel Mazdoor Union, Kanpur*, **AIR 1956 SC 231 – relied on.**

4.1. It is neither desirable nor required for the court to frame an issue not arising on the pleadings. The Court should not decide a suit on a matter/point on which no issue has been framed. The object of framing issues is to ascertain/shorten the area of dispute and pinpoint the points required to be determined by the court. The issues are framed so that no party at the trial is taken by surprise. It is the issues fixed and not the pleadings that guide the parties in the matter of adducing evidence. [Paras 20, 21] [235-C-F]

Sita Ram v. Radha Bai and Ors. **AIR 1968 SC 535;** *Gappulal v. Thakurji Shriji Dwarkadheeshji and Anr.* **AIR 1969 SC 1291;** *Biswanath Agarwalla v. Sabitri Bera* **(2009) 15 SCC 693;** *Kashi Nath (Dead) through L.Rs. v. Jaganath* **(2003) 8 SCC 740 – relied on.**

Raja Bommadevara Venkata Narasimha Naidu & Anr. v. Raja Bommadevara Bhashya Karlu Naidu & Ors. **(1902) 29 Ind. App. 76 (PC);** *Sayad Muhammad. v. Fatteh Muhammad* **(1894-95) 22 Ind. App. 4 (PC) and** *Siddik Mohd. Shah v. Saran* **AIR 1930 PC 57 – referred to.**

4.2 However, there may be an exceptional case wherein the parties proceed to trial fully knowing the rival case and lead all the evidence not only in support of their contentions but in refutation thereof by the other side. In such an eventuality, absence of an issue would not be fatal and it would not be permissible for a party to submit that there has been a mis-trial and the proceedings stood vitiated. [Para 23] [235-H; 236-A-B]

Nagubai Ammal and Ors. v. B. Shama Rao & Ors. **AIR 1956 SC 593;** *Nedunuri Kameswaramma v. Sampati Subba Rao* **AIR 1963 SC 884;** *Kunju Kesavan v. M.M. Philip & Ors.* **AIR 1964 SC 164;** *Kali Prasad Agarwalla (dead) by L.Rs. & Ors. v. M/s. Bharat Coking Coal Ltd. & Ors.* **AIR 1989 SC 1530;** *Sayed Akhtar v. Abdul Ahad* **(2003) (7) SCC 52;** *Bhuwan Singh v. Oriental Insurance Co. Ltd.* **AIR 2009 SC 2177 – relied on.**

5.1. A party to the election petition must plead the material fact and substantiate its averment by adducing sufficient evidence. The court cannot travel beyond the pleadings and the issue cannot be framed unless there are pleadings to raise the controversy on a particular fact or law. It is, therefore, not permissible for the court to allow the party to lead evidence which is not in the line of the pleadings. Even if the evidence is led that is just to be ignored as the same cannot be taken into consideration. [Para 24] [236-D-E]

5.2. In the case at hand, the election petitioner/ respondent claimed that there was irregularity/illegality in counting of 6 tendered votes and the case squarely fell

within the ambit of Section 100(1)(d)(iii) of the 1951 Act. The election petitioner further pleaded that the result of the election stood materially affected because of improper reception of the six tendered votes and in absence of any Recrimination petition in the case (at the instance of appellant-returned candidate), the appellant cannot be permitted to lead evidence on the fact which is not in issue. It is evident from the pleadings that the case was limited only to 6 tendered votes and there had been no pleading in respect of the remaining 4 tendered votes either in the election petition or the written statement filed by the appellant. There is no reference to the other 4 tendered votes either in the election petition or in the written statement. The said other 4 tendered votes neither had been relied upon in the reply by the appellant nor had been entered in the list of documents. Also, in the application in question, the other 4 tendered votes were stated to be required by the parties to resolve the controversy without giving any reason or justification for the same. The facts and circumstances of the case, therefore, do not warrant review of the order passed by the High Court. [Paras 9, 27, 28, 29] [240-E-F; 229-G-H; 241-F-H; 242-A-B]

Dr. Wilfred D'Souza v. Francis Menino Jesus Ferrao **AIR 1977 SC 286 – distinguished.**

Jabar Singh v. Genda Lal **AIR 1964 SC 1200 – followed.**

T.A. Ahammed Kabeer v. A.A. Azeez & Ors. **AIR 2003 SC 2271 – relied on.**

Case Law Reference:

AIR 1977 SC 286	**distinguished**	**Para 4,5, 28**
AIR 2005 SC 2441	**relied on**	**Para 10**

AIR 1968 SC 1500	**relied on**	**Para 11**
AIR 1982 SC 983	**relied on**	**Para 12**
AIR 1975 SC 403	**relied on**	**Para 13**
AIR 1966 SC 773	**relied on**	**Para 14**
AIR 1975 SC 376	**relied on**	**Para 14**
AIR 2004 SC 541	**relied on**	**Para 14**
AIR 2004 SC 2036	**relied on**	**Para 14**
AIR 2006 SC 1218	**relied on**	**Para 14**
AIR 2006 SC 1791	**relied on**	**Para 14**
(2007) 1 SCC 341	**relied on**	**Para 14**
AIR 1995 SC 2284	**relied on**	**Para 14**
(1898) 25 Ind. App. 195	**referred to**	**Para 16**
AIR 1953 SC 235	**relied on**	**Para 16**
AIR 1961 SC 1097	**relied on**	**Para 16**
AIR 2002 SC 665	**relied on**	**Para 16**
AIR 2005 SC 3165	**relied on**	**Para 16**
(2010) 4 SCC 518	**relied on**	**Para 16**
AIR 1987 SC 1242	**relied on**	**Para 17**
AIR 2009 SC 1103	**relied on**	**Para 18**
AIR 1956 SC 231	**relied on**	**Para 19**
(1902) 29 Ind. App. 76 (PC)	**referred to**	**Para 20**
AIR 1968 SC 535	**relied on**	**Para 20**
AIR 1969 SC 1291	**relied on**	**Para 20**

(2009) 15 SCC 693	**relied on**	**Para 20**
(2003) 8 SCC 740	**relied on**	**Para 22**
AIR 1930 PC 57	**referred to**	**Para 22**
(1894-95) 22 Ind. App. 4 (PC)	**referred to**	**Para 21**
AIR 1956 SC 593	**relied on**	**Para 23**
AIR 1963 SC 884	**relied on**	**Para 23**
AIR 1964 SC 164	**relied on**	**Para 23**
AIR 1989 SC 1530	**relied on**	**Para 23**
(2003) (7) SCC 52	**relied on**	**Para 23**
AIR 2009 SC 2177	**relied on**	**Para 23**
AIR 1964 SC 1200	**followed**	**Para 25**
AIR 2003 SC 2271	**relied on**	**Para 26**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 870 of 2011.

From the Judgment & Order dated 24.05.2010 of the High Court of Judicature for Rajasthan at Jodhpur in I.A. No. 6839 of 2010 in S.B. Election Petition No. 1 of 2009.

Ram Jethmalani, U.U. Lalit, Miss P.R. Mala, Pranav Diesh, Karan Kalia, Samir Ali Khan for the Appellant.

M.R. Calla, Mukul Kumar, V.K. Biju, Pratiksha Sharma, Milind Kumar for the Respondent.

The Judgment of the Court was delivered by

DR. B. S. CHAUHAN, J. 1. Leave granted.

2. This appeal has been preferred against the judgment and order dated 24.5.2010 in S.B. Election Petition No. 1 of

2009 and I.A. No. 6839 of 2010 of the High Court of Judicature for Rajasthan at Jodhpur. By the impugned judgment and order the High Court rejected the application dated 11.5.2010 praying for the summoning of certain documents on the ground that it was not permissible to summon the said documents, i.e., those tendered votes in respect of which none of the parties had taken the pleadings nor an issue had been framed in respect of those tendered votes and, thus, it was not permissible to lead any evidence on the fact which is not in issue. More so, on the ground of delay, the application had been filed after framing of the issues.

3. **FACTS** :

(A) A Notification under Section 30 of the Representation of People Act, 1951 (hereinafter called as the 'Act 1951') dated 10.11.2008 was issued by Election Commission for holding elections to constitute 13th Legislative Assembly for the State of Rajasthan including the election scheduled for Nathdwara Legislative Assembly No. 176 (hereinafter called as 'the constituency'). The appellant as well as the respondent filed their nominations and were candidates of recognised National Parties. The poll was held on 4.12.2008.

(B) During the process of polling, there had been allegations/ challenges at various booths that at least 10 votes alleged to have been cast by imposters and thus, 10 tendered votes were cast under Rule 42 of the Conduct of Election Rules, 1961 (hereinafter called as the 'Rules 1961'). The counting of votes took place on 8.12.2008 and the appellant contesting on the BJP ticket secured 62216 votes, while Shri C.P. Joshi (INC) secured 62215 votes. At the request of the election agent, a recounting took place under Rule 63 of the Rules 1961. However, the result remained the same and, thus, the appellant was declared duly elected by a margin of one vote.

(C) The respondent filed an election petition on 15.1.2009 being S.B. Election Petition No. 1 of 2009 before the High

Court of Rajasthan under Sections 80, 81, 100(1)(d)(iii) and Section 100(1)(d)(iv) of 1951 Act, inter-alia, alleging that:

(i) Smt. Kalpana Kunwar and Smt. Kalpana Singh (wife of Petitioner) were one and the same person, but her name was registered at two places in the electoral rolls of the constituency and hence she had cast two votes in the election;

(ii) Six (6) tendered votes cast in the election must be counted and the six (6) votes originally polled against the tendered votes must be rejected.

(D) The appellant filed the written statement contesting the said election petition and the trial is in progress in the High Court.

Both the parties have filed several applications before the High Court during the trial of the election petition and the appellant has approached this Court time and again as is evident from the orders dated 16.12.2009 passed in S.L.P(C) No. 33725 of 2009; 1.4.2010 in S.L.P.(C) No. 8212 of 2010; and 23.4.2010 in S.L.P(C) No. 10633 of 2010. Appellant filed an application under Order VI Rule 16 read with Section 151 of the Code of Civil Procedure 1908 (hereinafter called as the 'CPC') and Section 87 of the Act 1951 for the deletion of paragraph Nos. 13 to 19 of the election petition. The said application was dismissed by the High Court vide order dated 19.11.2009. The appellant preferred S.L.P (C) No. 34688 of 2009 which was dismissed by this Court vide order dated 16.12.2009.

(E) The appellant preferred an application being I.A. No.6839 of 2010 dated 11.5.2010 to summon the marked copies of the electoral rolls; register of voters in Form No.17-A; and list of tendered votes in Form No.17-B relating to the polling station nos.68, 124 and 192 of the constituency. However, the said application has been dismissed by the High

Court vide impugned judgment and order dated 24.5.2010. Hence, this appeal.

4. Shri Ram Jethmalani, learned senior advocate appearing for the appellant, has submitted that in order to do complete justice, all 10 tendered votes have to be recounted. In view of the fact that there was margin of only one vote, the law requires that all the tendered votes be counted. In order to fortify his submission, Shri Jethmalani placed reliance on the judgment of this Court in *Dr. Wilfred D'Souza v. Francis Menino Jesus Ferrao,* AIR 1977 SC 286, wherein it had been directed that all the tendered votes would be summoned and taken into consideration, i.e., that all the tendered votes have to be counted. The material issue in all the cases falling under Clause (d) of Section 100 of the Act 1951 remains whether the result of the election has been materially affected and, therefore, once the appellant raised his statutory right to lead evidence, in order to prevent the miscarriage of justice, it is necessary that all the tendered votes be counted. Thus, the impugned order is liable to be set aside.

5. On the other hand, Shri M.R. Calla, learned senior advocate appearing for the respondent, has vehemently opposed the appeal contending that the principles of equity and concept of substantial justice cannot be pressed into service in the present case. The election petition is to be adjudicated giving strict adherence to the statutory provisions without being influenced by any other concepts. The Court cannot permit a party to lead evidence unless an issue has been framed on the controversy and an issue cannot be framed unless there are actual pleadings in respect thereof. The pleadings in the instant case related only to the 6 tendered votes and an issue has been framed only to that extent. Therefore, it is not permissible to take into consideration all 10 tendered votes. The judgment so heavily relied upon by Shri Ram Jethmalani, learned senior counsel, in *Wilfred D'Souza's case* (Supra) is quite distinguishable as Recrimination Petition under Section 97 of

Act 1951 had been filed in that case. Thus, the ratio of the said judgment has no bearing in the case at hand. The appeal lacks merit and is liable to be dismissed.

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

The relevant pleadings, taken in the election petition, in this regard, are in paragraph Nos. 13 to 19 of the election petition which cumulatively specifically provide:

The names of Smt. Kamla W/o Shri Champa Lal R/o Near Charbhuja Temple, Village Gudla, Tehsil Nathdwara, District Rajasmand appeared at serial number 311 in Part 27; Shri Mana S/o Shri Roda R/o Guda, Village Sema, Tehsil Nathdwara, District Rajsamand, appeared at serial number 1122 in Part 61; Ms. Bargat Banu D/o Shri Gani R/o Talesara Bhawan, Ward No. 19, Nathdwara, District Rajsamand appeared at serial number 146 in Part 73; Shri Dalu S/o Shri Navla R/o Village Soi Ki Bhagai, Post Khamnor, Tehsil Nathdwara, District Rajsamand appeared at serial no. 714 in Part 117; Smt. Nanu W/o Shri Peer Mohammed R/o Neelgar Basti, Village Railmagra, Tehsil Railmagra, District Rajsamand appeared at serial number 866 in Part No. 180; and Shri Shamboo Lal S/o Shri Tulsi Ram R/o Kalbelia Basti, Village Banerdia, Tehsil Railmagra, District Rajsamand appeared at serial number 502 in Part 199 of the electoral roll of the constituency. When the aforesaid six voters reached the concerned polling station to cast their respective votes, they found that some imposters had already cast their votes by electronic voting machine. They completed the legal formalities by filling up Form 17-B and were allowed to have tendered ballot papers and, thereafter, they cast their votes.

7. It was further pleaded in paragraph 19 of the election petition that the aforesaid 6 tendered votes have been cast by genuine voters and must be counted. In paragraph 20, it has been submitted that because of the non-counting of the 6

tendered votes, the result of the election stood materially affected on account of improper reception of those votes. Thus, the same was liable to be rejected being not cast by genuine voters but by imposters.

8. In the written statement, the appellant has raised his doubts in respect of the aforesaid 6 tendered votes but has not taken any specific pleadings in respect of remaining 4 tendered votes. In paragraph 20 of the written statement, it has been denied that the result of the election stood materially affected on account of improper reception of those 6 tendered votes.

In fact, the pleadings by both the parties in the election petition as well as in the written statement make reference only to 6 tendered votes and not to 10 tendered votes.

9. In view of the pleadings taken by the parties, the High Court framed only two issues:

(i) Whether Smt. Kalpana Kunwar, wife of the respondent, is also known as Kalpana Singh and whether she cast her vote at two Polling Stations Viz. Polling Station No. 39 and Polling Station No. 40 of the Nathdwara Legislative Assembly Constituency No. 176 and if so, what is the effect on the election of the respondent?

(ii) Whether the six votes mentioned in Para Nos. 13 to 18 of the election petition were initially improperly received and should be removed from the valid votes and in their place tendered votes should be taken into account?

Therefore, it is evident from the pleadings that the case has been limited only to 6 tendered votes and there had been no pleading in respect of the remaining 4 tendered votes either in the election petition or the written statement filed by the appellant.

10. In *Kailash v. Nanhku & Ors.,* AIR 2005 SC 2441, this Court held that the trial of an election petition is entirely different from the trial of a civil suit, as in a civil suit trial commences on framing the issues while trial of an election petition encompasses all proceedings commencing from the filing of the election petition up to the date of decision. Therefore, the procedure provided for the trial of civil suits under CPC is not applicable in its entirety to the trial of the election petition. For the purpose of the election petition, the word 'trial' includes the entire proceedings commencing from the time of filing the election petition till the pronouncement of the judgment. The applicability of the procedure in Election Tribunal is circumscribed by two riders : firstly, the procedure prescribed in CPC is applicable only "as nearly as may be", and secondly, the CPC would give way to any provisions of the Act or any rules made thereunder. Therefore, the procedure prescribed in CPC applies to election trial with flexibility and only as guidelines.

11. In *Harcharan Singh v. S. Mohinder Singh & Ors.,* AIR 1968 SC 1500, this Court considered the application of doctrine of equity and substantial justice etc. in election law and came to the conclusion as under :-

"The statutory requirements of election law must be strictly observed. An election dispute is a statutory proceeding unknown to the common law; ***it is not an action at law or in equity****. …… The primary purpose of the diverse provisions of the election law which may appear to be technical is to safeguard the purity of the election process, and the Courts will not ordinarily minimise their operation."* (Emphasis added)

12. Similarly in *Jyoti Basu & Ors. v. Debi Ghosal & Ors.,* AIR 1982 SC 983; this Court held as under :-

"A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a

Common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction and a special jurisdiction has always to be exercised in accordance with the statute creating it. *Concepts familiar to Common Law and Equity must remain strangers to Election Law* unless statutorily embodied. *A Court has no right to resort to them on considerations of alleged policy* because policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, Court is put in a straight jacket. ……*We have noticed the necessity to rid ourselves of notions based on Common Law or Equity.* We see that we must seek an answer to the question within the four corners of the statute."

(Emphasis added)

13. In *Chanda Singh v. Ch. Shiv Ram Varma & Ors.,* AIR 1975 SC 403, this Court held as under:-

"A democracy runs smooth on the wheels of periodic and pure elections. The verdict at the polls announced by the Returning Officers lead to the formation of governments. A certain amount of stability in the electoral process is essential. If the counting of the ballots are interfered with by too frequent and flippant re-counts by courts a new threat to the certainty of the poll system is introduced through the judicial instrument. Moreover, the secrecy of the ballot which is sacrosanct becomes exposed to deleterious prying, if re-count of votes is made easy. The general reaction, if there is judicial relaxation on this issue, may well be a fresh pressure on luckless candidates, particularly when the winning margin is only of a few hundred votes as here, to ask for a re-count Micawberishly looking for numerical good fortune or windfall of chance discovery of illegal rejection or reception of ballots. This may tend to a dangerous disorientation which invades the democratic order by injecting widespread scope for reopening of declared returns, unless the court restricts recourse to re-count to cases of genuine apprehension of miscount or illegality or other compulsions of justice necessitating such a drastic step."

14. During the trial of an election petition, it is not permissible for the court to permit a party to seek a roving enquiry. The party must plead the material fact and adduce evidence to substantiate the same so that the court may proceed to adjudicate upon that issue. Before the court permits the recounting, the following conditions must be satisfied:

(i) *The Court must be satisfied that a prima facie case is established;*

(ii) The material facts and full particulars have been pleaded stating the irregularities in counting of votes;

(iii) A roving and fishing inquiry should not be directed by way of an order to recount the votes;

(iv) An opportunity should be given to file objection; and

(v) *Secrecy of the ballot requires to be guarded*.

(Vide : *Dr. Jagjit Singh v. Giani Kartar Singh & Ors.,* AIR 1966 SC 773; *Suresh Prasad Yadav v. Jai Prakash Mishra & Ors.,* AIR 1975 SC 376; *M. Chinnasamy v. K.C. Palanisamy & Ors.,* AIR 2004 SC 541; *Chandrika Prasad Yadav v. State of Bihar*

& Ors., AIR 2004 SC 2036; *Tanaji Ramchandra Nimhan v. Swati Vinayak Nimhan,* AIR 2006 SC 1218; *Gursewak Singh v. Avtar Singh & Ors.,* AIR 2006 SC 1791; and *Baldev Singh v. Shinder Pal Singh & Anr.,* (2007) 1 SCC 341).

15. In *Gajanan Krishnaji Bapat & Anr. v. Dattaji Raghobaji Meghe & Ors.,* AIR 1995 SC 2284; this Court held that the court cannot consider any fact which is beyond the pleadings of the parties. The parties have to take proper pleadings and establish by adducing evidence that by a particular irregularity/illegality the result of the election has been materially affected.

16. Pleadings and particulars are required to enable the court to decide the rights of the parties in the trial. Thus, the pleadings are more to help the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is settled legal proposition that "as a rule relief not founded on the pleadings should not be granted." Therefore, a decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. (Vide : *Sri Mahant Govind Rao v. Sita Ram Kesho,* (1898) 25 Ind. App. 195; *M/s. Trojan & Co. v. RM. N.N. Nagappa Chettiar,* AIR 1953 SC 235; *Raruha Singh v. Achal Singh & Ors.;* AIR 1961 SC 1097; *Om Prakash Gupta v. Ranbir B. Goyal,* AIR 2002 SC 665; *Ishwar Dutt v. Land Acquisition Collector & Anr.,* AIR 2005 SC 3165; and *State of Maharashtra v. Hindustan Construction Company Ltd.,* (2010) 4 SCC 518.)

17. This Court in *Ram Sarup Gupta (dead) by L.Rs. v. Bishun Narain Inter College & Ors.,* AIR 1987 SC 1242 held as under:

"It is well settled that in the absence of pleading, evidence,

if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet…….. In such a case it is the duty of the court to ascertain the substance of the pleadings to determine the question."

18. This Court in *Bachhaj Nahar v. Nilima Mandal & Ors.,* AIR 2009 SC 1103, held as under:

"The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration.

The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue…….. Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief.

The jurisdiction to grant relief in a civil suit necessarily depends on the pleadings, prayer, court fee paid, evidence let in, etc."

19. In *J.K. Iron & Steel Co. Ltd, Kanpur v. The Iron and*

Steel Mazdoor Union, Kanpur, AIR 1956 SC 231, this Court observed:

> "It is not open to the Tribunals to fly off at a tangent and, disregarding the pleadings, to reach any conclusions that they think are just and proper."

20. **Order XIV Rule 1 CPC reads**:

> "Issues arise when a material proposition of fact or law is affirmed by the party and denied by the other."

Therefore, it is neither desirable nor required for the court to frame an issue not arising on the pleadings. The Court should not decide a suit on a matter/point on which no issue has been framed. (Vide: *Raja Bommadevara Venkata Narasimha Naidu & Anr. v. Raja Bommadevara Bhashya Karlu Naidu & Ors.,* (1902) 29 Ind. App. 76 (PC); *Sita Ram v. Radha Bai & Ors.,* AIR 1968 SC 535; *Gappulal v. Thakurji Shriji Dwarkadheeshji & Anr.,* AIR 1969 SC 1291; and *Biswanath Agarwalla v. Sabitri Bera,* (2009) 15 SCC 693).

21. The object of framing issues is to ascertain/shorten the area of dispute and pinpoint the points required to be determined by the court. The issues are framed so that no party at the trial is taken by surprise. It is the issues fixed and not the pleadings that guide the parties in the matter of adducing evidence. [Vide : *Sayad Muhammad. v. Fatteh Muhammad* (1894-95) 22 Ind. App. 4 (PC).]

22. In *Kashi Nath (Dead) through L.Rs. v. Jaganath,* (2003) 8 SCC 740, this Court held that where the evidence is not in line with the pleadings and is at variance with it, the said evidence cannot be looked into or relied upon. While deciding the said case, this Court placed a very heavy reliance on the judgment of the Privy Council in *Siddik Mohd. Shah v. Saran,* AIR 1930 PC 57.

23. There may be an exceptional case wherein the parties

proceed to trial fully knowing the rival case and lead all the evidence not only in support of their contentions but in refutation thereof by the other side. In such an eventuality, absence of an issue would not be fatal and it would not be permissible for a party to submit that there has been a mis-trial and the proceedings stood vitiated. (vide: *Nagubai Ammal & Ors. v. B. Shama Rao & Ors.,* AIR 1956 SC 593; *Nedunuri Kameswaramma v. Sampati Subba Rao,* AIR 1963 SC 884; *Kunju Kesavan v. M.M. Philip & Ors.,* AIR 1964 SC 164; *Kali Prasad Agarwalla (dead) by L.Rs. & Ors. v. M/s. Bharat Coking Coal Ltd. & Ors.,* AIR 1989 SC 1530; *Sayed Akhtar v. Abdul Ahad,* (2003) (7) SCC 52; and *Bhuwan Singh v. Oriental Insurance Co. Ltd.,* AIR 2009 SC 2177).

24. Therefore, in view of the above, it is evident that the party to the election petition must plead the material fact and substantiate its averment by adducing sufficient evidence. The court cannot travel beyond the pleadings and the issue cannot be framed unless there are pleadings to raise the controversy on a particular fact or law. It is, therefore, not permissible for the court to allow the party to lead evidence which is not in the line of the pleadings. Even if the evidence is led that is just to be ignored as the same cannot be taken into consideration.

25. In *Jabar Singh v. Genda Lal,* AIR 1964 SC 1200, a Constitution Bench of this court while dealing with a similar issue observed as under:

> "It would be convenient *if we take a simple case of an election petition whether the petitioner makes only one claim and that is that the election of the returned candidate is void.* This claim can be made under Section 100. Section 100(1)(a),(b) and (c) refer to three distinct grounds on which the election of the returned candidate can be challenged. We are not concerned with any of these grounds. In dealing with the challenge to the validity of the election of the returned candidate under Section 100(1)(d),

it would be noticed that what the election petitioner has to prove is not only the existence of one or the other of the grounds specified in clauses (i) to (iv) of Section 100(1)(d), but it has also to establish that as a result of the existence of the said ground the result of the election insofar as it concerns a returned candidate has been materially affected. It is thus obvious that *what the Tribunal has to find is whether or not the election insofar as it concerns the returned candidate has been materially affected, and that means that the only point which the Tribunal has to decide is has the election of the returned candidate been materially affected? And no other enquiry is legitimate or permissible in such a case.* This requirement of Section 100(1)(d) necessarily imports limitations on the scope of the enquiry. Confining ourselves to clause (iii) of Section 100(1)(d), what the Tribunal has to consider is *whether there has been an improper reception of votes in favour of the returned candidate.* It may also enquire whether there has been a refusal or rejection of any vote in regard to any other candidate or whether there has been a reception of any vote which is void and this can only be the reception of a void vote in favour of the returned candidate. In other words, *the scope of the enquiry in a case falling under Section l00(1)(d)(iii) is to determine whether any votes have been improperly cast in favour of the returned candidate,* or any votes have been improperly refused or rejected in regard to any other candidate. These are the only two matters which would be relevant in deciding whether the election of the returned candidate has been materially affected or not. At this enquiry, the onus is on the petitioner to show that by reason of the infirmities specified in Section 100(1)(d)(iii), the result of the returned candidate's election has been materially affected, and that, incidentally, helps to determine the scope of the enquiry. Therefore, it seems to us that in the case of a petition where the *only claim* made is that the election of the returned candidate is void,

the scope of the enquiry is clearly limited by the requirement of Section 100(l)(d) itself. The enquiry is limited not because the returned candidate has not recriminated under Section 97(1); in fact, Section 97(1) has no application to the case falling under Section 100(1)(d)(iii); the scope of the enquiry is limited for the simple reason that what the clause requires to be considered is whether the election of the returned candidate has been materially affected and nothing else. If the result of the enquiry is in favour of the petitioner who challenges the election of the returned candidate, the Tribunal has to make a declaration to that effect, and that declaration brings to an end the proceedings in the election petition."

(Emphasis added)

26. In *T.A. Ahammed Kabeer v. A.A. Azeez & Ors.,* AIR 2003 SC 2271, this Court dealt with the judgment of the Constitution Bench observing:

"We have already stated that the rigorous rule propounded by the Constitution Bench in *Jabar Singh v. Genda Lal,* AIR 1964 SC 1200, has met with criticism in some of the subsequent decisions of this Court though by Benches of lesser coram and an attempt at seeking reconsideration of the majority opinion in *Jabar Singh* case (supra) has so far proved to be abortive. The view of the law taken by the Constitution Bench in *Jabar Singh* (supra) is binding on us. Analysing the majority opinion in *Jabar Singh* case (supra) and the view taken in several decisions of this Court, referred to hereinabove, we sum up the law as under:

(1) In an election petition wherein the limited relief sought for is the declaration that the election of the returned candidate is void on the ground under Section 100(1)(d)(iii) of the Act, the scope of enquiry shall remain

confined to two questions: (a) finding out any votes having been improperly cast in favour of the returned candidate, and (b) any votes having been improperly refused or rejected in regard to any other candidate. In such a case an enquiry cannot be held into and the election petition decided on the finding (a) that any votes have been improperly cast in favour of a candidate other than the returned candidate, or (b) any votes were improperly refused or rejected in regard to the returned candidate.

(2) A recrimination by the returned candidate or any other party can be filed under Section 97(1) in a case where in an election petition an additional declaration is claimed that any candidate other than the returned candidate has been duly elected.

(3) For the purpose of enabling an enquiry that any votes have been improperly cast in favour of any candidate other than the returned candidate or any votes have been improperly refused or rejected in regard to the returned candidate the Election Court shall acquire jurisdiction to do so only on two conditions being satisfied: (i) the election petition seeks a declaration that any candidate other than the returned candidate has been duly elected over and above the declaration that the election of the returned candidate is void; and (ii) a recrimination petition under Section 97(1) is filed.

(4) A recrimination petition must satisfy the same requirements as that of an election petition in the matter of pleadings, signing and verification as an election petition is required to fulfil within the meaning of Section 83 of the Act and must be accompanied by the security or the further security referred to in Sections 117 and 118 of the Act.

(5) The bar on enquiry enacted by Section 97 read with Section 100(1)(d)(iii) of the Act is attracted when the validity of the votes is to be gone into and adjudged or in

other words the question of improper reception, refusal or rejection of any vote or reception of any vote which is void is to be gone into. The bar is not attracted to a case where it is merely a question of correct counting of the votes without entering into adjudication as to propriety, impropriety or validity of acceptance, rejection or reception of any vote. In other words, where on a re-count the Election Judge finds the result of re-count to be different from the one arrived at by the Returning Officer or when the Election Judge finds that there was an error of counting the bar is not attracted because the court in a pure and simple counting carried out by it or under its directions is not adjudicating upon any issue as to improper reception, refusal or rejection of any vote or the reception of any vote which is void but is performing mechanical process of counting or re-counting by placing the vote at the place where it ought to have been placed. A case of error in counting would fall within the purview of sub-clause (iv), and not sub-clause (iii) of clause (d) of sub-section (1) of Section 100 of the Act."

27. Therefore, in the case at hand, the election petitioner/ respondent has claimed only that there has been irregularity/ illegality in counting of 6 tendered votes and the case squarely falls within the ambit of Section 100(1)(d)(iii) of the Act, 1951. Election petitioner has further pleaded that the result of the election stood materially affected because of improper receiving the six tendered votes and in absence of any Recrimination Petition in the case the appellant cannot be permitted to lead evidence on the fact which is not in issue.

28. The judgment in *Wilfred D'Souza's case* (Supra) has distinguishable features. In that case, the appellant had asserted that the result of the election of the respondent had been materially affected by the improper reception, refusal and rejection of votes and a specific prayer had been made by the appellant in the election petition that the *election of the*

respondent be declared void and the appellant be declared to be duly elected. The respondent had denied that the tendered votes were cast by genuine voters. The issue had been framed in that case as under:

> "Whether the petitioner proves that the vote or votes were initially improperly received and should be removed and in their place tendered vote or votes should be taken into account."

The Election Tribunal therein did not record any evidence on behalf of the respondents and proceeded to decide the case after the evidence of the witnesses of the appellant had been recorded and after the box containing the relevant papers had been opened and those papers were examined. In view of the fact that the appellant had adduced prima facie proof in respect of two of the tendered ballot papers, the Election Tribunal was to call upon the respondent to adduce his evidence and the evidence should not be constrained only to the two tendered ballot papers in respect of which the appellant had not adduced any evidence, but would relate to some or all the other 8 tendered ballot papers in respect of which the appellant had not adduced any evidence.

That was, admittedly, a case wherein a Recrimination Petition under Section 97 of the Act 1951 had been filed. In the instant case, there is no such claim made by the parties. In the instant case, an application had been filed to summon the other 4 tendered votes, also making a submission that those documents were required by the parties to resolve the controversy without giving any reason or justification for the same. Admittedly, there is no reference to these 4 tendered votes either in the election petition or in the written statement. The said 4 tendered votes neither had been relied upon in the reply by the appellant nor had been entered in the list of documents. Thus, the judgment in this case is quite distinguishable from the case at hand.

29. In view of the above, we do not find any cogent reason to interfere with the well reasoned judgment and order of the High Court impugned herein. The facts and circumstances of the case do not warrant review of the order passed by the High Court. The appeal lacks merit and is accordingly dismissed.

B.B.B. Appeal dismissed.

AMAR BAHADUR SINGH

v.

STATE OF U.P.

(Criminal Appeal No. 107 of 2006)

JANUARY 25, 2011

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

Penal Code, 1860: s.376 – Rape – Allegation of rape on prosecutrix in her house – Prosecutrix was 26 years of age and mother of seven children – Rape allegedly committed in the presence of her children and other family members – Trial court convicted the accused u/s.376 and sentenced him to undergo rigorous imprisonment for seven years – High Court reduced the sentence from seven to five years observing that the facts indicated that the prosecutrix was a consenting party – On appeal, held: The possibility of commission of rape in the presence of so many members in a small house is not convincing – The finding of High Court that the prosecutrix was a consenting party appears to be correct – The story of rape might have been cooked up to salvage family honour when the accused and the prosecutrix were caught red-handed – This is often the tendency in such matters – High Court went completely wrong in dismissing the appeal even after its categoric observations – Conviction set aside.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 107 of 2006.

From the Judgment & Order dated 23.08.2005 of the High Court of Judicature at Allahabad Lucknow Bench (Lucknow) in Criminal Appeal No. 140 of 1995.

Praveen Chaturvedi for the Appellant.

The following order of the Court was delivered

O R D E R

The respondents have been served but they are not represented before us.

As per the prosecution story on the 2nd April, 1989 at about 11.45 p.m. the prosecutrix, the daughter in law of Santu, was sleeping in her in laws' house along with her daughter and other family members. Her husband was however away to the Punjab in connection with his employment. On an alarm raised by the prosecutrix all those at home woke up and saw that the appellant was committing rape on the prosecutrix. The appellant was accordingly apprehended on the spot with the help of a police party which was passing close by. It was also noticed that the prosecutrix was bleeding from her private parts. The appellant was accordingly brought to the police station where a report was lodged and a case under Section 376 of the IPC was registered.

The Trial Court relying on the evidence of PW.1 the prosecutrix, PW.2 Santu, her father-in-law, and PW.6, her sister-in-law, held that the case against the accused was made out and accordingly sentenced him to undergo R.I. for seven years. The matter was thereafter taken in appeal to the High Court and the High Court while observing that the facts of the case indicated that the prosecutrix was a consenting party thought that in the circumstance it was a fit case where the sentence ought to be reduced from seven to five years. The appeal was nevertheless dismissed with the reduction in the quantum of sentence. This appeal by way of special leave is now before us.

We have heard the learned counsel for the appellant. He has raised only one argument before us. He has pointed out that the prosecutrix was 26 years of age as on the date of the incident and was the mother of seven children and the very fact that the rape had been allegedly committed in her house not only in the presence of her children and other family members,

the story itself appeared to be unacceptable. It has also been highlighted that in the background of the fact that the High Court had observed that the prosecutrix was a consenting party the accused ought to have been acquitted on that basis alone.

We find merit in this plea. We find that under the circumstance the possibility that rape could have been committed on her in the presence of so many members in a small house is difficult to believe. On the contrary the findings of the High Court that the prosecutrix was a consenting party appear to be correct and it was perhaps when the accused and the prosecutrix had been caught red-handed that the story of rape had been cooked up, to salvage some of the family honour. This is often the tendency in such matters. The High Court has therefore gone completely wrong in dismissing the appeal even after its categoric observations. We accordingly allow the appeal, set aside the conviction of the appellant and order his acquittal. The appellant is on bail; his bail bonds are discharged.

D.G. Appeal allowed.

ASHOK SURAJLAL ULKE
v.
STATE OF MAHARASHTRA
(Criminal Appeal No. 251 of 2006)

JANUARY 27, 2011

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

Penal Code, 1860: s.376 – Rape – Accused-teacher committing rape on 15 year old girl – Conviction u/s.376 – Challenged on the ground that the FIR was filed three days after the alleged incident and the medical evidence did not support the commission of rape – Held: In a case of rape, the fact that the FIR has been lodged after a little delay is of very little significance – An allegation of rape, and that too of a young child 15 years of age, is a matter of shame for the entire family and in many such cases the parents or even the prosecutrix are reluctant to go to the police to lodge a report and it is only when a situation particularly unpleasant arises for the prosecutrix that an FIR is lodged – The evidence showed that after the incident the father of the prosecutrix had first gone to the Head Master of the school (in which the accused was a teacher) who had advised him to wait for a few days to see if something could be done in the matter and it was only after having failed to get any reply from the Head Master that an FIR was lodged – This also would explain the fact that the doctor had found nothing to suggest that rape had been committed and was not in position to give any definite opinion on that account as the medical examination was conducted after three days – The doctor nevertheless found that there was a minor injury on the finger which was about four days old and that the hymen was also missing – In the light of categoric statements of the prosecutrix, her father and her brother and in the light of the fact that no case for false

implication was pointed out by accused, conviction is upheld.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 251 of 2006.

From the Judgment & Order dated 16.03.2005 of the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in Criminal Appeal No. 327 of 2002.

Kishore Ram Lambat, Deven S. Lambat, S. Rajappa for the Appellant.

Shankar Chillagre, Asha Gopalan Nair for the Respondent.

The following order of the Court was delivered

O R D E R

1. The facts of this case are as under:

1.1 The prosecutrix, P.W. 1, was studying in the Zila Parishad School at Mohali, District Gadchiroli. On the day of the incident, the accused met her and enquired as to how she had performed in the Mathematics paper in the examination. P.W. 1 replied that she had not done too well on which the accused advised her to bring the question paper to his house. Tukaram, P.W. 2, P.W.1's father told her to go along with her younger brother Kapil, P.W. 3. The two, accordingly, went to the house of the accused which was near the school. They found that the accused was sitting outside his house and he directed them to go towards the school and told Kapil, to go out and bring some snacks from the shop of Naitam. Kapil, accordingly, left for the shop whereafter the accused held the hand of the prosecutrix and pushed her towards the verandah of the school and raped her. The shouts of alarm raised by the prosecutrix could not heard by any one on account of the operating loud speakers all around as it was the day of the Sharda Devi festival. The prosecutrix thereafter returned home and disclosed what had happened to her parents. A report was, accordingly,

lodged at the police station on the 11th of October, 1997. On the completion of investigation, the accused was charged for an offence punishable under Section 376 of the Indian Penal code.

1.2 The trial court relying on the evidence of P.W. 1, as supported by the circumstantial evidence of P.W. 2 and P.W. 3 and noticing that the medical evidence was uncertain as the Doctor had opined that it was not possible to give any opinion as to the rape, nevertheless held that a case of rape had been made out. A sentence of 7 years was, accordingly, imposed on the appellant. An appeal taken to the High Court was also dismissed. It is in this situation that the matter is before us after the grant of special leave.

2. Mr. Lambat, the learned counsel for the appellant, has raised several arguments before us during the course of the hearing. He has first pointed out that the First Information Report had been lodged belatedly as the offence had taken place on the 8th October, 1997 and the FIR had been lodged three days thereafter and that in any case the doctor's evidence did not support the commission of rape and at the worst (for the appellant) the matter fell under Section 354 of the IPC.

3. The learned counsel for the State of Maharashtra has, however, pointed out that there was no reason whatsoever to disbelieve the evidence of P.W. 1, P.W. 2 and P.W. 3 and in fact no suggestion had come from the defence as to why they would give a false story. It has also been pleaded that in the light of the completely acceptable evidence of P.W. 1 even if the doctor's evidence with regard to the commission of rape was slightly uncertain it would not in any manner detract from the prosecution story.

4. We have considered the arguments of the learned counsel. We are of the opinion that in a case of rape the fact that the FIR had been lodged after a little delay is of very little significance. There can be no doubt that an allegation of rape,

and that too of a young child 15 years of age, is a matter of shame for the entire family and in many such cases the parents or even the prosecutrix are reluctant to go to the police to lodge a report and it is only when a situation particularly unpleasant arises for the prosecutrix that an FIR is lodged. We also see from the evidence that P.W. 2 had first gone to the Head Master of the school (in which the accused was a teacher) and he had advised him to wait for a few days to see if some thing could be done in the matter and it was only after having failed to get any reply from the Head Master that an FIR was lodged. This also explains the fact that the doctor had found nothing to suggest that rape had been committed and was not in a position to give any definite opinion on that account as the had incident happened on the 8th October, 1997 and the medical examination had been conducted on the 11th October, 1997, that is after three days. The doctor nevertheless found that there was a minor injury on the finger which was about four days old and that the hymen was also missing.

5. In the light of the very categoric statements of P.W. 1 as corraborated by P.W. 2 and P.W. 3 and in the light of the fact that no cause for false implication has been pointed out by the accused, we find no merit in the appeal. Dismissed. Accused is on bail. His bail bonds are cancelled. He should be taken into custody forthwith to undergo the remaining part of the sentence.

D.G. Appeal dismissed.

JAGPAL SINGH & ORS.
v.
STATE OF PUNJAB & ORS.
(Civil Appeal No. 1132 of 2011)

JANUARY 28, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Punjab Village Common Lands (Regulation) Act, 1961 – s. 7 – Gram Sabha land, gram panchayat land, shamlat deh, mandeveli/ poramboke land – Illegal/Unauthorized occupation – Land recorded as a village pond – Unauthorized occupation by appellants and construction of houses therein – Application u/s. 7 to evict the appellants – Collector regularizing the possession of unauthorized occupants – Commissioner as also the High Court setting aside the same – On appeal, held: Appellants were trespassers who illegally encroached on to the Gram Panchayat land by using muscle power/money power and in collusion with the officials and the Gram Panchayat – Letter of the State Government permitting regularization of possession of these unauthorized occupants not valid – Regularizing such illegalities must not be permitted – Gram Sabha land must be kept for the common use of villagers – Common interest of the villagers cannot be allowed to suffer merely because the unauthorized occupation subsisted for many years – Appellants directed to vacate the land occupied by them illegally – Direction also issued to all State Government to prepare Scheme for eviction of illegal/ unauthorized occupants of such land.

The Gram Panchayat, Rohar jagir filed an application under Section 7 of the Punjab Village Common Lands (Regulation) Act, 1961 to evict the appellants alleging that the appellants had unauthorizedly occupied the land recorded as village pond which belongs to the Gram

Panchayat, and made constructions. The Collector regularized the illegality holding that it would not be in public interest to dispossess the appellants. It directed the Gram Panchayat to recover the cost of the land as per the Collector's rates from the appellants. On appeal against the order of the Collector, the Commissioner held that the said village pond has been used for the common purpose of the villagers and cannot be allowed to be encroached upon by any private respondents; and that the illegal construction of the houses at the site was without jurisdiction and without the resolution of the Gram Panchayat. The High Court upheld the order passed by the Commissioner. Therefore, the appellants filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1 A Writ Petition was filed before the Single Judge of the High Court. The appellants were trespassers who illegally encroached on to the Gram Panchayat land by using muscle power/money power and in collusion with the officials and even with the Gram Panchayat. Such kind of blatant illegalities must not be condoned. Even if the appellants have built houses on the land in question they must be ordered to remove their constructions, and possession of the land in question must be handed back to the Gram Panchayat. Regularizing such illegalities must not be permitted because it is Gram Sabha land which must be kept for the common use of villagers of the village. The letter of the Government of Punjab permitting regularization of possession of these unauthorized occupants is not valid. Such letters are wholly illegal and without jurisdiction. Such illegalities cannot be regularized. The common interest of the villagers cannot be allowed to suffer merely because the unauthorized occupation has subsisted for many years. [Para 13] [257-D-G]

M.L. Builders (P) Ltd. vs. Radhey Shyam Sahu **1999 (6) SCC 464;** *Friends Colony Development Committee vs. State of Orissa* **2004 (8) SCC 733 – relied on.**

1.2 The instant case is a case of land recorded as a village pond. The appellants are directed to vacate the land they had illegally occupied. [Para 16] [258-E-F]

Hinch Lal Tiwari vs. Kamala Devi AIR 2001 SC 3215; *L. Krishnan vs. State of Tamil Nadu* **2005 (4) CTC 1 Madras – relied on.**

2. In many States, the Government Orders have been issued by the State Government permitting allotment of Gram Sabha land to private persons and commercial enterprises on payment of some money. All such Government Orders are illegal, and should be ignored. [Para 15] [258-D]

3. Our ancestors knew that in certain years there may be droughts or water shortages for some other reason, and water was also required for cattle to drink and bathe in etc. Thus, they built a pond attached to every village, a tank attached to every temple, etc. these were their traditional rain water harvesting methods, which served them for thousands of years. Over the last few decades, however, most of these ponds in the country have been filled with earth and built upon by greedy people, thus, destroying their original character. This has contributed to the water shortages in the country. Also, many ponds are auctioned off at throw away prices to businessmen for fisheries in collusion with authorities/Gram Panchayat officials, and even this money collected from these so-called auctions are not used for the common benefit of the villagers but misappropriated by certain individuals. The time has come when these malpractices must stop. The time has now come to review all the orders by which the common village land has been grabbed by such

fraudulent practices. [Paras 17, 18, 19 and 20] [258-G-H; 259-A-E]

4. All the State Governments in the country are directed that they should prepare schemes for eviction of illegal/unauthorized occupants of Gram Sabha/Gram Panchayat/Poramboke/ Shamlat land and these must be restored to the Gram Sabha/Gram Panchayat for the common use of villagers of the village. [Para 22] [259-F-G]

Case Law Reference:

1999 (6) SCC 464	**Referred to.**	**Para 14**
2004 (8) SCC 733	**Referred to.**	**Para 14**
2001 SC 3215	**Referred to.**	**Para 16**
2005 (4) CTC 1 Madras	**Referred to.**	**Para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1132 of 2011.

From the Judgment & Order dated 21.5.2010 of the High Court of Punjab & Haryana at Chandigarh in LPA No. 668 of 2010 (O & M(.

R.K. Kapoor, Neelam Sharma, H.C. Pant (for Anis Ahmed Khan) for the Appellants.

The Judgment of the Court was delivered by

MARKANDEY KATJU, J. 1. Leave granted.

2. Heard learned counsel for the appellants.

3. Since time immemorial there have been common lands inhering in the village communities in India, variously called gram sabha land, gram panchayat land, (in many North Indian States), shamlat deh (in Punjab etc.), mandaveli and

poramboke land (in South India), Kalam, Maidan, etc., depending on the nature of user. These public utility lands in the villages were for centuries used for the common benefit of the villagers of the village such as ponds for various purposes e.g. for their cattle to drink and bathe, for storing their harvested grain, as grazing ground for the cattle, threshing floor, maidan for playing by children, carnivals, circuses, ramlila, cart stands, water bodies, passages, cremation ground or graveyards, etc. These lands stood vested through local laws in the State, which handed over their management to Gram Sabhas/Gram Panchayats. They were generally treated as inalienable in order that their status as community land be preserved. There were no doubt some exceptions to this rule which permitted the Gram Sabha/Gram Panchayat to lease out some of this land to landless labourers and members of the scheduled castes/ tribes, but this was only to be done in exceptional cases.

4. The protection of commons rights of the villagers were so zealously protected that some legislation expressly mentioned that even the vesting of the property with the State did not mean that the common rights of villagers were lost by such vesting. Thus, in *Chigurupati Venkata Subbayya vs. Paladuge Anjayya,* 1972(1) SCC 521 (529) this Court observed :

> "It is true that the suit lands in view of Section 3 of the Estates Abolition Act did vest in the Government. That by itself does not mean that the rights of the community over it were taken away. Our attention has not been invited to any provision of law under which the rights of the community over those lands can be said to have been taken away. The rights of the community over the suit lands were not created by the landholder. Hence those rights cannot be said to have been abrogated by Section 3) of the Estates Abolition Act."

5. What we have witnessed since Independence, however, is that in large parts of the country this common village land has

been grabbed by unscrupulous persons using muscle power, money power or political clout, and in many States now there is not an inch of such land left for the common use of the people of the village, though it may exist on paper. People with power and pelf operating in villages all over India systematically encroached upon communal lands and put them to uses totally inconsistent with its original character, for personal aggrandizement at the cost of the village community. This was done with active connivance of the State authorities and local powerful vested interests and goondas. This appeal is a glaring example of this lamentable state of affairs.

6. This appeal has been filed against the impugned judgment of a Division Bench of the Punjab and Haryana High Court dated 21.5.2010. By that judgment the Division Bench upheld the judgment of the learned Single Judge of the High Court dated 10.2.2010.

7. It is undisputed that the appellants herein are neither the owner nor the tenants of the land in question which is recorded as a pond situated in village Rohar Jagir, Tehsil and District Patiala. They are in fact trespassers and unauthorized occupants of the land relating Khewat Khatuni No. 115/310, Khasra No. 369 (84-4) in the said village. They appear to have filled in the village pond and made constructions thereon.

8. The Gram Panchayat, Rohar Jagir filed an application under Section 7 of the Punjab Village Common Lands (Regulation) Act, 1961 to evict the appellants herein who had unauthorizedly occupied the aforesaid land. In its petition the Gram Panchayat, Rohar Jagir alleged that the land in question belongs to the Gram Panchayat, Rohar as is clear from the revenue records. However, the respondents (appellants herein) forcibly occupied the said land and started making constructions thereon illegally. An application was consequently moved before the Deputy Commissioner informing him about the illegal acts of the respondents (appellants herein) and stating that the aforesaid land is recorded in the revenue

records as Gair Mumkin Toba i.e. a village pond. The villagers have been using the same, since drain water of the village falls into the pond, and it is used by the cattle of the village for drinking and bathing. Since the respondents (appellants herein) illegally occupied the said land an FIR was filed against them but to no avail. It was alleged that the respondents (appellants herein) have illegally raised constructions on the said land, and the lower officials of the department and even the Gram Panchayat colluded with them.

9. Instead of ordering the eviction of these unauthorized occupants, the Collector, Patiala surprisingly held that it would not be in the public interest to dispossess them, and instead directed the Gram Panchayat, Rohar to recover the cost of the land as per the Collector's rates from the respondents (appellants herein). Thus, the Collector colluded in regularizing this illegality on the ground that the respondents (appellants herein) have spent huge money on constructing houses on the said land.

10. Some persons then appealed to the learned Commissioner against the said order of the Collector dated 13.9.2005 and this appeal was allowed on 12.12.2007. The Learned Commissioner held that it was clear that the Gram Panchayat was colluding with these respondents (appellants herein), and it had not even opposed the order passed by the Collector in which directions were issued to the Gram Panchayat to transfer the property to these persons, nor filed an appeal against the Collector's order.

11. The learned Commissioner held that the village pond has been used for the common purpose of the villagers and cannot be allowed to be encroached upon by any private respondents, whether Jagirdars or anybody else. Photographs submitted before the learned Commissioner showed that recent attempts had been made to encroach into the village pond by filling it up with earth and making new constructions thereon. The matter had gone to the officials for removal of these illegal

constructions, but no action was taken for reasons best known to the authorities at that time. The learned Commissioner was of the view that regularizing such kind of illegal encroachment is not in the interest of the Gram Panchayat. The learned Commissioner held that Khasra No. 369 (84-4) is a part of the village pond, and the respondents (appellants herein) illegally constructed their houses at the site without any jurisdiction and without even any resolution of the Gram Panchayat.

12. Against the order of the learned Commissioner a Writ Petition was filed before the learned Single Judge of the High Court which was dismissed by the judgment dated 10.2.2010, and the judgment of learned Single Judge has been affirmed in appeal by the Division Bench of the High Court. Hence this appeal.

13. We find no merit in this appeal. The appellants herein were trespassers who illegally encroached on to the Gram Panchayat land by using muscle power/money power and in collusion with the officials and even with the Gram Panchayat. We are of the opinion that such kind of blatant illegalities must not be condoned. Even if the appellants have built houses on the land in question they must be ordered to remove their constructions, and possession of the land in question must be handed back to the Gram Panchayat. Regularizing such illegalities must not be permitted because it is Gram Sabha land which must be kept for the common use of villagers of the village. The letter dated 26.9.2007 of the Government of Punjab permitting regularization of possession of these unauthorized occupants is not valid. We are of the opinion that such letters are wholly illegal and without jurisdiction. In our opinion such illegalities cannot be regularized. We cannot allow the common interest of the villagers to suffer merely because the unauthorized occupation has subsisted for many years.

14. In *M.I. Builders (P) Ltd. vs. Radhey Shyam Sahu,* 1999(6) SCC 464 the Supreme Court ordered restoration of a park after demolition of a shopping complex constructed at

the cost of over Rs.100 crores. In *Friends Colony Development Committee vs. State of Orissa,* 2004 (8) SCC 733 this Court held that even where the law permits compounding of unsanctioned constructions, such compounding should only be by way of an exception. In our opinion this decision will apply with even greater force in cases of encroachment of village common land. Ordinarily, compounding in such cases should only be allowed where the land has been leased to landless labourers or members of Scheduled Castes/Scheduled Tribes, or the land is actually being used for a public purpose of the village e.g. running a school for the villagers, or a dispensary for them.

15. In many states Government orders have been issued by the State Government permitting allotment of Gram Sabha land to private persons and commercial enterprises on payment of some money. In our opinion all such Government orders are illegal, and should be ignored.

16. The present is a case of land recorded as a village pond. This Court in *Hinch Lal Tiwari vs. Kamala Devi,* AIR 2001 SC 3215 (followed by the Madras High Court in *L. Krishnan vs. State of Tamil Nadu,* 2005(4) CTC 1 Madras) held that land recorded as a pond must not be allowed to be allotted to anybody for construction of a house or any allied purpose. The Court ordered the respondents to vacate the land they had illegally occupied, after taking away the material of the house. We pass a similar order in this case.

17. In this connection we wish to say that our ancestors were not fools. They knew that in certain years there may be droughts or water shortages for some other reason, and water was also required for cattle to drink and bathe in etc. Hence they built a pond attached to every village, a tank attached to every temple, etc. These were their traditional rain water harvesting methods, which served them for thousands of years.

18. Over the last few decades, however, most of these

ponds in our country have been filled with earth and built upon by greedy people, thus destroying their original character. This has contributed to the water shortages in the country.

19. Also, many ponds are auctioned off at throw away prices to businessmen for fisheries in collusion with authorities/ Gram Panchayat officials, and even this money collected from these so called auctions are not used for the common benefit of the villagers but misappropriated by certain individuals. The time has come when these malpractices must stop.

20. In Uttar Pradesh the U.P. Consolidation of Holdings Act, 1954 was widely misused to usurp Gram Sabha lands either with connivance of the Consolidation Authorities, or by forging orders purported to have been passed by Consolidation Officers in the long past so that they may not be compared with the original revenue record showing the land as Gram Sabha land, as these revenue records had been weeded out. Similar may have been the practice in other States. The time has now come to review all these orders by which the common village land has been grabbed by such fraudulent practices.

21. For the reasons given above there is no merit in this appeal and it is dismissed.

22. Before parting with this case we give directions to all the State Governments in the country that they should prepare schemes for eviction of illegal/unauthorized occupants of Gram Sabha/Gram Panchayat/Poramboke/Shamlat land and these must be restored to the Gram Sabha/Gram Panchayat for the common use of villagers of the village. For this purpose the Chief Secretaries of all State Governments/Union Territories in India are directed to do the needful, taking the help of other senior officers of the Governments. The said scheme should provide for the speedy eviction of such illegal occupant, after giving him a show cause notice and a brief hearing. Long duration of such illegal occupation or huge expenditure in

making constructions thereon or political connections must not be treated as a justification for condoning this illegal act or for regularizing the illegal possession. Regularization should only be permitted in exceptional cases e.g. where lease has been granted under some Government notification to landless labourers or members of Scheduled Castes/Scheduled Tribes, or where there is already a school, dispensary or other public utility on the land.

23. Let a copy of this order be sent to all Chief Secretaries of all States and Union Territories in India who will ensure strict and prompt compliance of this order and submit compliance reports to this Court from time to time.

24. Although we have dismissed this appeal, it shall be listed before this Court from time to time (on dates fixed by us), so that we can monitor implementation of our directions herein. List again before us on 3.5.2011 on which date all Chief Secretaries in India will submit their reports.

N.J. Appeal dismissed.

SOU. SANDHYA MANOJ WANKHADE

v.

MANOJ BHIMRAO WANKHADE & ORS.

(Criminal Appeal No. 271 of 2011)

JANUARY 31, 2011

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Protection of Women from Domestic Violence Act, 2005 – s.2(q) read with proviso thereto – Expression "respondent" in s.2(q) – Interpretation of – Complaint under the provisions of the Act – Whether female members cannot be made parties in proceedings under the Act, as "females" are not included in the definition of "respondent" in s.2(q) – Held: Although s.2(q) defines a respondent to mean any adult male person, who is or has been in a domestic relationship with the aggrieved person, the proviso to s.2(q) widens the scope of the said definition by including a relative of the husband or male partner within the scope of a complaint, which may be filed by an aggrieved wife or a female living in a relationship in the nature of a marriage – Though the expression "female" has not been used in the proviso to s.2(q) also, but, if the Legislature intended to exclude females from the ambit of the complaint, which can be filed by an aggrieved wife, females would have been specifically excluded, instead of it being provided in the proviso that a complaint could also be filed against a relative of the husband or the male partner – No restrictive meaning has been given to the expression "relative", nor has the said expression been specifically defined in the Act, to make it specific to males only – In such circumstances, it is clear that the legislature never intended to exclude female relatives of the husband or male partner from the ambit of a complaint that can be made under the provisions of the Act.

The appellant had filed a complaint, being a Misc. Crl. Application, against her husband (respondent no.1), mother-in-law (respondent no.2) and sister-in-law (respondent no.3) under Sections 12, 18, 19, 20 and 22 of the Protection of Women from Domestic Violence Act, 2005.

The High Court, by the impugned judgment, confirmed the order of the Sessions Judge in regard to deletion of names of respondent Nos.2 and 3 from the proceedings, upon confirmation of the finding of the Sessions Judge that no female could be made a party to a petition under the Domestic Violence Act, 2005, since the expression "female" had not been included in the definition of "respondent" in the said Act.

The question which, therefore, arose for consideration in the instant appeal was whether female members cannot be made parties in proceedings under the Domestic Violence Act, 2005, as "females" are not included in the definition of "respondent" in Section 2(q) of the said Act.

Allowing the appeal, the Court

HELD:1. Although Section 2(q) of the Protection of Women from Domestic Violence Act, 2005 defines a respondent to mean any adult male person, who is or has been in a domestic relationship with the aggrieved person, the proviso to Section 2(q) widens the scope of the said definition by including a relative of the husband or male partner within the scope of a complaint, which may be filed by an aggrieved wife or a female living in a relationship in the nature of a marriage. [Paras 11, 12] [267-E-H; 268-A-B]

2. It is true that the expression "female" has not been used in the proviso to Section 2(q) also, but, on the other hand, if the Legislature intended to exclude females from

the ambit of the complaint, which can be filed by an aggrieved wife, females would have been specifically excluded, instead of it being provided in the proviso that a complaint could also be filed against a relative of the husband or the male partner. No restrictive meaning has been given to the expression "relative", nor has the said expression been specifically defined in the Domestic Violence Act, 2005, to make it specific to males only. [Para 13] [268-B-C]

3. In such circumstances, it is clear that the legislature never intended to exclude female relatives of the husband or male partner from the ambit of a complaint that can be made under the provisions of the Domestic Violence Act, 2005. [Para 14] [268-D]

4. Both the Sessions Judge and the High Court went wrong in holding otherwise, possibly being influenced by the definition of the expression "respondent" in the main body of Section 2(q) of the aforesaid Act. Consequently, the trial Court shall also proceed against the said Respondent Nos.2 and 3 on the complaint filed by the Appellant. [Paras 15, 16] [268-E-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 271 of 2011.

From the Judgment & Order dated 05.03.2010 of the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in Criminal Writ Petition NO. 588 of 2009.

Garvesh Kabra, Pooja Kabra, Nikita Kabra, Abhishek Chaudhary, Adarsh Upadhyay, Harshvardhan for the Appellant.

Satyajit A. Desai, Anagha S. Desai for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. This Appeal is directed against the judgment and order dated 5th March, 2010, passed by the Nagpur Bench of the

Bombay High Court in Crl. W.P. No.588 of 2009, *inter alia*, directing the Appellant to vacate her matrimonial house and confirming the order of the Sessions Judge deleting the names of the other Respondents from the proceedings.

3. The Appellant herein was married to the Respondent No.1 on 20th January, 2005, and the marriage was registered under the provisions of the Special Marriage Act, 1954. After her marriage, the Appellant began to reside with the Respondent No.1 at Khorej Colony, Amravati, where her widowed mother-in-law and sister-in-law, the Respondent Nos.2 and 3 respectively, were residing. According to the Appellant, the marriage began to turn sour after about one year of the marriage and she was even assaulted by her husband and by the other respondents. It is her specific case that on 16th June, 2007, she was mercilessly beaten by the Respondent No.1, which incident was reported to the police and a case under Section 498-A I.P.C. came to be registered against him.

4. In addition to the above, the Appellant appears to have filed a complaint, being Misc. Crl. Application No.203 of 2007, on 16th July, 2007, against all the Respondents under Sections 12, 18, 19, 20 and 22 of the Protection of Women from Domestic Violence Act, 2005, hereinafter referred to as "the Domestic Violence Act, 2005". An application filed by the Appellant before the Judicial Magistrate, First Class, Amravati, under Section 23 of the above Act was allowed by the learned Magistrate, who by his order dated 16th August, 2007, directed the Respondent No.1 husband to pay interim maintenance to the Appellant at the rate of Rs. 1,500/- per month from the date of the application till the final disposal of the main application and also restrained all the Respondents from dispossessing the Appellant from her matrimonial home at Khorej Colony, Amravati, till the final disposal of the main application.

5. It further appears that the said order of the learned Magistrate dated 16th August, 2007, was challenged by Respondent No.1 in Crl. Appeal No.115 of 2007 before the learned Sessions Judge, Amravati, who by his order dated 2nd

May, 2008, dismissed the said appeal. Aggrieved by the orders passed by the learned Sessions Judge, the Respondent No.1 filed Criminal Application No.3034 of 2008 in the High Court under Section 482 Cr.P.C. challenging the order dated 16th August, 2007 of the Judicial Magistrate, First Class, Amravati and the order dated 2nd May, 2008 of the Sessions Judge, Amravati. The said application was dismissed by the High Court on 4th September, 2009.

6. In the meanwhile, the Respondent No.2 filed an application in Misc. Crl. Application No.203 of 2007 in the Court of the Judicial Magistrate, First Class, Amravati, praying for modification of its order dated 16th August, 2007 and a direction to the Appellant to leave the house of Respondent No.2. The said application for modification was dismissed by the learned Magistrate on 14th July, 2008 holding that it was not maintainable. Thereupon, the Respondent Nos.2 and 3 filed Crl. Appeal No.159 of 2008 on 11th August, 2008, under Section 29 of the Domestic Violence Act, 2005, questioning the orders passed by the learned Magistrate on 16th August, 2007 and 14th July, 2008, on the ground that being women they could not be made Respondents in the proceedings filed by the Appellant under the provisions of the Domestic Violence Act, 2005, and that the matrimonial house of the Appellant at Khorej Colony, Amravati, belonged exclusively to Ramabai, the Respondent No.2 and mother-in-law of the Appellant and did not, therefore, come within the definition of "shared house". The said Criminal Appeal No.159 of 2008 was allowed by the learned Sessions Judge vide his judgment dated 15th July, 2009. The learned Sessions Judge allowed Criminal Appeal No.159 of 2008 and set aside the judgment and order dated 14th July, 2008 and also modified the order dated 16th August, 2007, to the extent of setting aside the injunction restraining the Respondents from dispossessing or evicting the Appellant from her matrimonial house at Khorej Colony, Amravati. The Respondent No.1 husband was directed to provide separate accommodation for the residence of the Appellant or to pay a sum of 1,000/- per

month to the Appellant from the date of filing of the application till its final decision, in lieu of providing accommodation.

7. In Criminal Writ Petition No.588 of 2009, the Appellant herein challenged the judgment and order dated 15th July, 2009, passed by the learned Sessions Judge, Amravati, in Crl. Appeal No.159 of 2008, claiming that she had a right to stay in her matrimonial house. Although, the question as to whether a female member of the husband's family could be made a party to the proceedings under the Domestic Violence Act, 2005, had been raised in Crl. Appeal No.159 of 2008, the learned Sessions Judge in his order dated 15th July, 2009, did not decide the said question and did not absolve the Respondent Nos.2 and 3 herein in his order, but only observed that female members cannot be made parties in proceedings under the Domestic Violence Act, 2005, as "females" are not included in the definition of "respondent" in Section 2(q) of the said Act.

8. The learned Single Judge of the High Court disposed of the writ petition by his judgment and order dated 5th March, 2010, with a direction to the Appellant to vacate her matrimonial house, which was in the name of the Respondent No.2, with a further direction to the Trial Court to expedite the hearing of the Misc. Crl. Application No.203 of 2007 filed by the Appellant herein and to decide the same within a period of six months. A further direction was given confirming the order relating to deletion of the names of the 'other members'.

9. Questioning the said judgment and order of the Nagpur Bench of the Bombay High Court, Mr. Garvesh Kabra, learned Advocate appearing for the Appellant, submitted that the High Court had erred in confirming the order of the learned Sessions Judge in regard to deletion of names of the Respondent Nos.2 and 3 from the proceedings, upon confirmation of the finding of the Sessions Judge that no female could be made a party to a petition under the Domestic Violence Act, 2005, since the expression "female" had not been included in the definition of "respondent" in the said Act. Mr. Kabra submitted that it would be evident from a plain reading of the proviso to Section 2(q) of

the Domestic Violence Act, 2005, that a wife or a female living in a relationship in the nature of marriage can, not only file a complaint against her husband or male partner but also against relatives of the husband or male partner. The term "relative" not having been defined in the Act, it could not be said that it excluded females from its operation.

10. Mr. Satyajit A. Desai, learned Advocate appearing for the Respondents, on the other hand, defended the orders passed by the Sessions Judge and the High Court and urged that the term "relative" must be deemed to include within its ambit only male members of the husband's family or the family of the male partner. Learned counsel submitted that when the expression "female" had not been specifically included within the definition of "respondent" in Section 2(q) of the Domestic Violence Act, 2005, it has to be held that it was the intention of the legislature to exclude female members from the ambit thereof.

11. Having carefully considered the submissions made on behalf of the respective parties, we are unable to sustain the decisions, both of the learned Sessions Judge as also the High Court, in relation to the interpretation of the expression "respondent" in Section 2(q) of the Domestic Violence Act, 2005. For the sake of reference, Section 2(q) of the above-said Act is extracted hereinbelow :-

> "2(q). "respondent" means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act:
>
> Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner."

12. From the above definition it would be apparent that although Section 2(q) defines a respondent to mean any adult male person, who is or has been in a domestic relationship with the aggrieved person, the proviso widens

the scope of the said definition by including a relative of the husband or male partner within the scope of a complaint, which may be filed by an aggrieved wife or a female living in a relationship in the nature of a marriage.

13. It is true that the expression "female" has not been used in the proviso to Section 2(q) also, but, on the other hand, if the Legislature intended to exclude females from the ambit of the complaint, which can be filed by an aggrieved wife, females would have been specifically excluded, instead of it being provided in the proviso that a complaint could also be filed against a relative of the husband or the male partner. No restrictive meaning has been given to the expression "relative", nor has the said expression been specifically defined in the Domestic Violence Act, 2005, to make it specific to males only.

14. In such circumstances, it is clear that the legislature never intended to exclude female relatives of the husband or male partner from the ambit of a complaint that can be made under the provisions of the Domestic Violence Act, 2005.

15. In our view, both the Sessions Judge and the High Court went wrong in holding otherwise, possibly being influenced by the definition of the expression "respondent" in the main body of Section 2(q) of the aforesaid Act.

16. The Appeal, therefore, succeeds. The judgments and orders, both of the learned Sessions Judge, Amravati, dated 15th July, 2009 and the Nagpur Bench of the Bombay High Court dated 5th March, 2010, in Crl. Writ Petition No.588 of 2009 are set aside. Consequently, the trial Court shall also proceed against the said Respondent Nos.2 and 3 on the complaint filed by the Appellant.

17. The appeal is allowed accordingly.

B.B.B. Appeal allowed.

VARGHESE K. JOSEPH

v.

THE CUSTODIAN & ORS.

(Criminal Appeal No. 948 OF 2006)

JANUARY 31, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Special Courts (Trial of Offences Relating to Transactions in Securities) Act, 1992:

Certification of tainted shares by Custodian and its release and payment of accruals – Application for – Filed by investor before Special Court – Dismissed on the ground of filing of the application after the cut off date – Justification of – Held: Not Justified – Custodian is justified in filing an application before the Special Court requesting to fix a cut off date for certification of the tainted shares – However, the cut off date fixed by the Special Court cannot be construed so as to have a binding effect of statutory nature under the provisions of the Transaction of Sale of Securities Act, 1956, wherein there is no fixed time limit for encashment of shares nor there is prescribed procedure for certification – Custodian cannot shirk away from his function and the duty cast upon him – Special Court is duty bound to guard the interest of the bonafide investors through the Custodian – On facts, investor had no role or involvement in treatment of the alleged equity shares as tainted which required certification before payment of dividend on the same – Investors cannot be denied his due on the ground of delay in filing the application for certification specially when they sought certification of his shares only after two months of the cut off date which had no statutory force – Transaction of Sale of Securities Act, 1956.

Application and interpretation of the provisions under the 1992 Act – Held: Salutary object and reasons of the Act are

to be taken into consideration – Different provisions are required to be construed so that each provision will have its play – In case of conflict, a harmonious construction should be adopted so that an honest and bonafide investor is not duped of his hard earned money which he invests by purchasing the equity shares – Interpretation of statutes

Object and reasons of the 1992 Act – Explained

The appellant - investor purchased 100 equity shares of the respondent No. 2 Company and made payment through respondent No. 4, the share broker. The appellant approached respondent No. 2 Company seeking dividend and other benefits on the shares, however, the appellant was informed that the shares were tainted and thus, his request was rejected. The appellant then filed an application before the Special Courts under the provisions of the Special Courts (Trial of Offences Relating to Transactions in Securities) Act, 1992 seeking certification of the tainted shares by the respondent No. 1-Custodian and its release and the payment of accruals. The appellant was informed by the office of the Special Court that the application could not be entertained since it was filed after the cut off date to submit application for certification. The appellant then filed an application before the Special Court that he was not aware of any cut off date regarding the filing of the application for certification of shares as also the procedure for the same. The Special Court dismissed the application. Therefore, the appellant filed the instant appeal u/s. 10 of the Act.

Allowing the appeal, the Court

HELD: 1.The order of the Special Court is set aside. The respondent-Custodian would entertain the application filed before the Special Court for certification

of the shares and verify the claim of the appellant in regard to the shares and ensure payment of dividends on those shares after certification by respondent No. 2. [Para 26] [290-E-F]

2.1 It is admitted by respondent No. 1 - Custodian himself that the appellant who had purchased the shares of respondent No. 2 through respondent No. 4 whose affairs were later taken care of by respondent No. 3 also and perhaps respondent No. 5, would clearly be deemed to be bonafide purchase. However, since the shares were held to be tainted by order of the Government of India due to which it was not honoured by respondent No. 2, the need arose for its certification through the Custodian under the control and supervision of the Special Court constituted under the Special Courts (Trial of Offences Relating to Transactions in Securities) Act, 1992. Meanwhile, long time had elapsed between the date of purchase and the application for certification of the shares and obviously during this long period it is the respondent-Custodian in co-ordination with the notified company and respondent Nos. 3 and 4- share brokers who was responsible to certify the shares of the notified company so that the dividends accruing on the shares could be paid. In the process, no doubt, respondent No. 1-Custodian encountered several procedural hassles as the claim of payment were made at frequent intervals by large number of investors holding the shares which were informed to be tainted and thus, required certification by the Custodian. [Para 20] [285-E-H; 286-A-B]

2.2 Respondent No. 1-Custodian although might have been justified in filing an application before the Special Court requesting to fix a cut off date during which it could facilitate certification of the tainted shares, the cut off date sought by the custodian and accepted by the

Special Court cannot be construed so as to have a binding effect of statutory nature under the provisions of the Transaction of Sale of Securities Act, 1956, wherein there is no fixed time limit for encashment of shares nor there is prescribed procedure for certification which emerged only on account of extra-ordinary situation when certain shares were found to be tainted which were floated by respondent No. 5 for respondent No. 2 and were traded through share brokers like respondent No. 3 and 4. [Para 21] [286-C-E]

2.3 The salutary object and reasons of the Act also would have to be taken into consideration while interpreting and applying the provisions of a statute wherein efforts are required to be made in construing the different provisions so that each provision will have its play and in the event of any conflict, a harmonious construction is required to be made so that an honest and bonafide investor is not duped of his hard earned money which he invests by purchasing the equity shares of a company. The Act of 1992 had been enacted and given effect to in order to prevent undesirable transactions in securities by regulating the business of dealing therein as also certain other matters connected therewith which also provided for the establishment of a special court for the trail of offences relating to transaction in securities and for matters connected therewith or incidental thereto. The courts specially the Special Courts has to bear in mind the objects and reasons of the Act which clearly indicate that in course of the investigations by the Reserve Bank of India, large scale irregularities and mal practices noticed in transactions by both the Government and other securities through some brokers in collusion with the employees of banks, companies and financial institutions. The other irregularities and malpractices led to the

divergence of funds from banks and financial institutions to the individual accounts of certain brokers. In order to deal with the situation and in particular to ensure speedy recovery of the huge amount involved, to punish the guilty and restore confidence and to maintain the basic integrity and credibility of the banks and financial institutions, the Act of 1992 was enacted for speedy trial of offences relating to transactions in securities and disposal of properties attached. This Act envisages the appointment of one or more custodians to take steps for guarding the interests with a view to check the diversion of funds invested in the form of shares by the offenders which may be in the form of companies or share brokers. Therefore, the duty of the Custodian as also the Special Court is to take into consideration that while the plea of the Custodian for facilitating certification of shares by fixing cut off date might have been reasonable in the given situation where large number of investors were filing applications for certification of the tainted shares time and again and thus, cut off date might have been justified, it was also expected to take care and guard the interest of the investors who are based and live not merely within the geographical boundaries of the Special Court which had fixed the cut off date but also live far and wide even across the boundaries of the country which is the fact in the instant matter also. [Para 22] [286-F-H; 287-A-H]

2.4 It was obligatory on the part of the Special Court and the Custodian to notice an important fact that when the shares purchased by the appellant were reported to be tainted which was issued through respondent No. 5 Company by the share broker companies i.e. respondent No. 4 and 5 and the same was ordered to be attached by the Custodian in view of the Government of India Regulation, it was clearly nefarious and dubious activity

on the part of the respondent No. 5 due to which the unnecessary hassle of certification of the shares issued in the name of respondent No. 5 became essential. The investors like the appellant had absolutely no role in such activity and thus, even if the cut off date was fixed by the Special Court for certification of such shares, the same could not have been enforced oblivious of its repercussion on those investors who could not approach the Special Court for certification for reasons beyond their control as it has happened in the case of the appellant who could not approach the Special Court for certification of his tainted shares for aforestated reasons. [Para 22] [286-H; 288-A-D]

2.5 The appellant had filed an application before the Special Court seeking a direction for certification of the shares on 27.8.2005 which even if counted from the cut off date, would at the most was delayed by two months as the appellant had not received any notice which could be proved, indicating that the application for certification had to be filed by 27.6.2005 although the same is asserted by the Custodian, which cannot be accepted in absence of appearance of respondent Nos. 3, 4. But even it if were so, the court should have certainly considered the circumstance whether a bonafide purchaser of shares could be denied his due merely on the ground of violation of a cut off date which clearly did not have its existence in the statue, and thus, had no statutory force. The order sought from the Special Court to fix a cut off date for receiving application for certification was, thus,based merely on the theory of convenience of the Custodian clearly ignoring its ramification on the bonafide investor. It is common knowledge that when public at large invest in securities by purchasing shares of a notified company, it purchases through various modes including the

modern tools and technique of internet and many other modern modes and methods. But thereafter, if the shares are held to be tainted which is clearly beyond the control of the investor and its certification is required, it is surely the custodian in co-ordination with the company floating shares as also the share broker company or the stock exchange, which has the onus and responsibility to take care of the interest of the investors under the supervision of the Special Court in view of the provision of the 1992 Act. Thus, the Custodian cannot shirk away from his function and the duty cast upon him by limiting his responsibilities and seeking a cut off date during which only he could perform the duty of certification, oblivious of its consequence and other ramification on the investors which include small investors also who put in their hard earned money in the shares of the company and later comes to know that the shares were tainted on which they have absolutely no role or control.[Para 23] [288-E-H; 289-A-E]

2.6 The Special Court clearly had the duty to ensure that in absence of statutory time limit prescribed for certification of shares under the Act of 1956, read with the Special Courts Act of 1992, the Special Court was duty bound to guard the interest of the investors through the Custodian at least in case of those investors who had bonafide purchased the shares of a notified company which for reasons beyond the control of investors, was held to be tainted. [Para 24] [288-F-G]

2.7 The appellant on the one hand was saddled with the tainted shares for no-fault on his part through respondent Nos. 4, 5 and 6 on which he had no control or any role to play and on the top of it, when he sought a remedy of certification for claiming dividends, he had to suffer an order by which his application was rejected on

the ground that he had not moved an application within the cut off date which had no statutory force as the same had been fixed at the instance of the Custodian seeking approval from the Special Court. [Para 25] [290-B-D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 948 of 2006.

From the Judgment & Order dated 28.11.2005 of the Special Court Constituted Under the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 in Misc. Application No. 536 of 2005.

Pravin Satale, Naresh Kumar for the Appellant.

Subramonium Prasad, Shyam D. Nandan, Shweta Mazumdar, Rajat Khattri for the Respondents.

The Judgment of the Court was delivered by

GYAN SUDHA MISRA, J. 1. This appeal has been filed under Section 10 of the Special Courts (Trial of Offences Relating to Transactions in Securities) Act, 1992 (hereinafter referred to as 'the Special Court Act of 1992') challenging the order dated 28.11.2005 passed by the Special Court constituted under the Special Courts Act 1992 bearing Miscellaneous Application No. 536 of 2005 whereby the Special Court was pleased to reject the application summarily indicating that the application of the appellant for certification of shares by the respondent – Custodian had been received on 27.8.2005 after the cut off date for the certification due to which it could not be entertained.

2. The question inter alia which arises for consideration in this appeal may be crystallised and stated as to whether the Special Court was right in rejecting the application of the appellant-investor seeking certification of the tainted shares on the ground of delay due to violation of cut off date in spite of absence of a statutory provision to that effect as also the fact

that the appellant-investor admittedly had no role or involvement in treatment of the alleged equity shares as tainted which required certification before payment of dividends on the same.

3. The substantial details and circumstances under which this appeal arises indicate that the appellant herein who is a small investor had purchased 100 equity shares of the respondent No.2 Company namely Reliance Industries Ltd. on 12.6.1989 and payment of the same was made through his share broker - respondent No.4 – Abex and Company which perhaps is not in existence now. However, the payment for purchase of the shares had admittedly been made through Union Bank of India by way of a demand draft. It is the case of the appellant herein that the respondent No.4 despite repeated enquiries never informed the appellant regarding the status of his shares and hence the appellant was absolutely in dark and had no clue about the same. The appellant in the meantime was also living abroad due to his professional obligation and could not ascertain the fate of his shares.

4. However, when the appellant finally approached respondent No.2 – Reliance Industries Ltd. seeking dividend and other consequential benefits like issue of rights and bonus on shares, it was informed to the appellant by the respondent No.2 that the shares of the appellant on which dividend was claimed, were found to be tainted and hence it was unable to consider the request of the appellant for payment of dividends. The appellant, thereafter also learnt that there had been mutual correspondence between the share broker companies i.e. respondent No.3 Karvy Consultants Ltd. and respondent No.4 – Abex and Company for taking the accounts of the shares in question vide Annexure-P1 in order to complete certain procedural formalities. But as per the case of the appellant, neither the respondent No.3 nor respondent No.4 cared to inform the appellant about the said development through which he had purchased the shares. The appellant has annexed the copy of the letter dated 12.7.1995 vide annexure P-1 which was

written by the respondent No.4 – Abex and Company to Respondent No.3 – Karvy Consultants Ltd.

5. Since the appellant had been informed by the respondent No.2 - Reliance Industries Ltd. that the dividends could not be paid to him as the shares were held to be tainted, the appellant also tried to ascertain the status of his shares purchased by him through respondent Nos. 3 and 4. However, it is alleged by the respondent No.3 –M/s. Karvy Consultants Ltd. that it had informed the appellant to submit appropriate application seeking certification of the tainted shares as the equity shares in question stood in the name of M/s. Fair Growth Financial Service Ltd. which subsequently became the subject matter of attachment as per the order of the Government of India since it was found to be involved in some scam and hence the shares issued by this company required certification by the Custodian as per order of the Special Court (Trial of Offences relating to Transactions in Securities) Act, 1992. But the appellant's case is that he never received the said communication nor the said letter indicated anything about the cut off date for making application for certification of the tainted shares. Annexure P-2 is the copy of the letter dated 5.1.2001 which is allegedly written by the respondent No. 3- M/s. Karvy Consultants Ltd. to the appellant directing him to file the application seeking certification of shares.

6. The appellant in the meantime had also made further enquiries in regard to the certification of the tainted shares and also for consequential benefits which accrued on the shares in question. He then learnt that he would have to file an application before the Special Court seeking direction to the Custodian for certification of shares as it was reiterated that the shares in question stood in the name of M/s. Fair Growth Financial Services Ltd. – respondent No.5 which were the subject-matter of attachment as per the Government of India order since they were found to be tainted. A clarification also is alleged to have been issued by the respondent No.3 –Karvy Consultants Ltd.

that in order to do justice to the bonafide investors, the Special Court in its orders dated 27.7.1992 and 31.7.1992 bearing Misc. Application Nos. 1, 2 and 3 of 1992 laid down a procedure for certification of the tainted shares through the representative of the Custodian. It was informed that the said Hon'ble Court had fixed the last date for submission of such application for certification which was 16.8.1995 and the Special Court had further directed that whoever fails to submit application for certification on or before 16.8.1995, the party would have to approach the Special Court directly for certification. Subsequently, the cut-off date appears to have been extended to 27.06.2005 as per order of the Special Court on application having been made by the custodian. Hence, it claims to have requested the appellant - Mr. Joseph that he should file an application/petition mentioning therein the reliefs/ directions intended to be sought from the Hon'ble Special Court (Torts) through the advocate along with the documents, papers at the address of the Special Court which was stated therein. It was further requested to the appellant to forward the relevant order from the Special Court along with original share certificates and transfer deeds to enable it to do the needful. But the appellant's case is that he never received the said communication etc.

7. As per the appellant's version the original shares and transfer deeds had been delivered to the respondent No.4 – Abex and Company – the share broker company through whom the appellant had purchased the shares as under the rules, the share certificates were not issued from the company to the appellant but the same was lying in the hands of respondent No.3 i.e. Karvy Consultants Ltd. through respondent No.4 and so the appellant could not produce the share certificates. However, the respondent No.4 –Abex and Company had assured the appellant that it would return the share along with the Clearance Certificate from the Stock Exchange but the respondent No. 3 i.e. Karvy Consultants Ltd. was unable to process the share through respondent No.6 – Madras Stock

Exchange as they were tainted. The appellant, therefore, stated that he is a bonafide purchaser and the owner of 100 tainted shares of respondent No. 2 and the said shares were required to be transferred in the name of the appellant along with all the accrual till dates after certification. The appellant as already stated also learnt that the tainted shares required certification through respondent No.1 – the Custodian and for this purpose he would be required to seek permission from the Special Court under the Special Courts Act of 1992.

8. In view of the aforesaid position, the appellant filed an application before the Special Court under the provisions of Special Courts Act of 1992 wherein he prayed for certification of the shares by the respondent No.1 - Custodian and its release and payment of accruals but as per the letter from the office of the Special Court it was intimated that the last date to submit application for certification was 27.6.2005 and hence it could not be entertained.

9. The appellant, therefore, filed an application before the Special Court on 27.08.2005 stating that he was not aware of any cut off date regarding the filing of the application for certification of shares by the Custodian and was also not aware of the procedure or the last date of filing any application for certification until he received the letter on 22.8.2005. Hence, the appellant/applicant was not able to file any application for certification of the tainted shares within the time fixed by the Special Court.

10. The learned Judge of the Special Court however, was pleased to dismiss the application on 28.11.2005 stating that the plea of the applicant that he was not aware of the procedure laid down by the Special Court for certification of the tainted securities etc. was devoid of merit and the application seeking permission for certification which was received on 27.8.2005 i.e. after the cut off date which was subsequently extended to 27.6.2005 was not found fit to be entertained. Hence, the application was dismissed by the Special Court against which

this appeal has been filed by the appellant under Section 10 of the Special Courts Act of 1992 as already indicated hereinbefore.

11. A show cause notice was issued to all the respondents in this appeal but no one appeared except respondent No.1 – the Custodian based at Mumbai who has filed reply in this appeal. As per the reply of the Custodian – Respondent No.1 herein, the process of certification was being done on a regular basis. But on 31.1.2005, the Custodian gave a report to the Special Court that the Custodian/Notified party receives accrual on shares which were in the name of the notified party but the same were not physically with the Custodian since such shares were with the 3rd party. Further, in respect of shares which may not be in the name of the notified party but which may have been dealt with by the notified party, the dividends on such shares were either kept in abeyance by the company or were passed on to the Custodian by the companies pending certification.

12. It is in view of the aforesaid procedure as also the fact that the shares were found to be tainted, the certification of the shares purchased through an intermediary which in this case is respondent No.4 – Abex and Company and respondent No. 3 –Karvy Consultants Ltd., became necessary. But it appears that the Custodian had been receiving applications for certification of the tainted shares off and on which dividend was to be paid to the party holding the shares and was to be disbursed to them through the Custodian. It has been admitted by the Custodian in his reply that the dividends which were received by the Custodian came automatically from the company either by way of dividend warrants or through the Electronically Clearing System (ECS). The Custodian stated that these dividends were not kept separately from other moneys of the concerned notified party in the attached accounts. It was therefore suggested that bonus shares may be kept in abeyance by the companies or may be sent to the Custodian by the concerned companies. In such case also bonus shares

received by the Custodian were disposed of by the Custodian as per the procedure for sale of shares laid down by the Special Court.

13. It was further stated by the custodian in his reply that the distribution/ad hoc payments from the attached account of the notified parties admittedly were made in accordance with the order passed by the Special Court from the moneys that were available in the attached bank account of the notified parties as these attached accounts also included accruals (dividends/sale proceeds of bonus shares) which was not separate from other moneys in the attached account. It was, therefore, submitted before the Special Court by the Custodian in Miscellaneous Petition No.1 in Bombay Stock Exchange vs. The Custodian and Assistant Commissioner of Income Tax along with a batch of several other analogous petitions that as there was no time limit for the affected persons to approach the Hon'ble Special Court for certification and such certification could be directed by the Hon'ble Court (Special Court) at any point of time, it was apprehended that in such circumstance a situation might arise where shares may be allowed to be certified by the Hon'ble Court even after substantial payments were made either by way of distribution or ad hoc payments due to which it would be difficult for the Custodian to pay over the accruals on certified shares for want of moneys in the attached accounts. A direction, therefore, was sought by the Custodian from the Special Court to the following effect:-

> "(a) That a Pubic Advertisement be issued by the Custodian calling upon all persons holding "Tainted" shares (i.e. shares either standing in the name of a notified party or dealt with by the notified party) to submit their applications for certification of such shares to this Hon'ble Court within such period as this Hon'ble Court considers appropriate.
>
> (b) That no applications for certification will be entertained

by the Custodian or by this Hon'ble Court on the expiry of such period as the Court may direct under Clause (a).

(c) That no claims shall lie against the Custodian or against a notified party for payment of accruals on shares with the third party unless such third party has filed his application for certification within the period specified in Clause (b).

(d) Any other orders/directions as deemed fit by this Hon'ble Court in the matter."

14. The Special Court taking an overall view of the matter granted the request in terms of prayer clause (a), (b) and (c). However, for the purpose of clause (a) 60 days period was fixed.

15. Pursuant to the order dated 16.3.2005 notices were issued in 32 dailies which stipulated that the application for certification by the purchasers must be made within 60 days from the date of issuance of the notice. It was also clearly stipulated that no application for certification would be entertained after the period of 60 days from the date of notice and that no claims shall lie against the Custodian or against the notified party after the lapse of 60 days of the notice. The public notice which were published in 32 different newspapers is dated 29.4.2005. Thus, according to the respondent – Custodian no claim for certification could have been entertained after the expiry of 60 days period which expired on 27.6.2005.

16. The appellant, however, filed an application bearing Misc. Application No.536/2005 in the Special Court at Bombay on 27.8.2005 praying therein for a direction to the Custodian that the 100 shares purchased by the appellant herein bearing Certificate Nos. 3489027 and 8170517, Distinctive Nos. D-915292605 to 654 and D-114196259 to 308 of the notified company may be declared as bonafide purchaser/owner of the said shares. A direction was sought to the Custodian and/or

company to release/pay all the accruals declared from time to time till date on the said 100 shares. As already stated, the application was rejected by the Special Court by a summary order indicating that the application could not be entertained since the same had been received after the cut off date of 27.6.2005.

17. Challenging the order passed by the Special Court, the counsel for the appellant submitted that the application filed by the appellant for certification of his shares and thereafter granting consequential benefits accruing on the 100 shares which were purchased by the appellant, could not have been rejected only on the ground that it had been filed beyond the cut off date i.e. 27.6.2005 as the appellant who was not in the country throughout and was living abroad had not been informed at all by any of the concerned respondents that the shares were tainted which required certification within a cut off date and when he made enquiries on his own, he could know of the developments.

18. Learned counsel for the respondent – Custodian however sought to justify when he submitted that the rejection of the application by the Special court for certification of the shares of the appellant was absolutely correct as the Special Court itself had permitted the Custodian to publish a notice inviting applications for certification of the shares held by the public at large in which 60 days time was granted to file such application which expired on 27.6.2005. The counsel for the respondent – Custodian submitted that the cut off date having been laid down by the Special Court fixing a cut off date for filing application for certification of the shares through the Custodian, could not have been entertained beyond the cut off date and hence even though the appellant might be a bonafide purchaser of the shares of respondent No. 2 – Reliance Industries Ltd. which was purchased through respondent No.4 – Abex and Company, the same could not have been entertained for certification after the cut off date.

19. While testing the relative strength of the submission of the learned counsel for the parties in the light of the background, facts and circumstances of the case, it could not be overlooked that the transaction of sale of securities (as defined under the Securities (Control) Regulation Act, 1956) by a notified person either as a registered holder or as an intermediary purchaser is deemed to be bonafide provided such a transaction under the provisions of Securities Contracts (Regulation) Act, 1956 is effected through a number of stock exchanges recognised under the provisions of Securities Contract Act and is in accordance with the rules and bye-laws of the stock exchanges. It further lays down that the purchase will be deemed to be bonafide provided the sale is at the price which is lower than the lowest price for which the securities were traded on the date of the transaction except in cases of discount given on bulk purchased by the institutions and the full sale price relating to the transaction is proved to have been received by the notified persons.

20. The aforesaid position is clearly admitted by the Custodian – Respondent No.1 himself which is borne out from the reply filed by him. Thus the appellant who had purchased the shares of the respondent No.2 – Reliance Industries Ltd. through respondent No.4 – Abex and Company whose affairs were later taken care of by respondent No.3 – Karvy Consultants Ltd. also and perhaps respondent No.5 – M/s. Fair Growth Financial Service Ltd. would clearly be deemed to be bonafide purchase. However, since the shares in question were held to be tainted by order of the Government of India due to which it was not honoured by the respondent No.2 – Reliance Industries Ltd., the need arose for its certification through the Custodian under the control and supervision of the Special Court constituted under the Act of 1992. Meanwhile, long time had elapsed between the date of purchase and the application for certification of the shares and obviously during this long period it is the respondent –Custodian in coordination with the notified company and the share brokers respondent Nos. 3 and

4 (Karvy Consultants Ltd. and Abex and Company) who was responsible to certify the shares of the notified company so that the dividends accruing on the shares could be paid. In the process, no doubt, the respondent No.1 – Custodian encountered several procedural hassels as the claim of payment were made at frequent intervals by large number of investors holding the shares which were informed to be tainted and hence required certification by the Custodian.

21. The respondent No.1 – Custodian, therefore, although might have been justified in filing an application before the Special Court requesting to fix a cut off date during which it could facilitate certification of the tainted shares, the cut off date sought by the custodian and accepted by the Special Court cannot be construed so as to have a binding effect of statutory nature under the provisions of the Transaction of Sale of Securities Act, 1956, wherein there is no fixed time limit for encashment of shares nor there is prescribed procedure for certification which emerged only on account of extraordinary situation when certain shares were found to be tainted which were floated by Respondent No.5 M/s. Fair Growth Financial Services for Respondent No.2 – Reliance Industries and were traded through share brokers like Respondent No.3 and 4 herein.

22. At this stage the salutary object and reasons of the Act also will have to be taken into consideration while interpreting and applying the provisions of a statute wherein efforts are required to be made in construing the different provisions so that each provision will have its play and in the event of any conflict, a harmonious construction is required to be made so that an honest and bonafide investor is not duped of his hard earned money which he invests by purchasing the equity shares of a company. Admittedly, the Trial of Offences Relating to Transactions in Securities Act, 1992 had been enacted and given effect to in order to prevent undesirable transactions in securities by regulating the business of dealing therein as also

certain other matters connected therewith which also provided for the establishment of a special court for the trial of offences relating to transactions in securities and for matters connected therewith or incidental thereto. The courts specially the Special Courts under the Act of 1992 has to bear in mind the objects and reasons of this Act which clearly indicate that in course of the investigations by the Reserve Bank of India, large scale irregularities and mal practices were noticed in transactions by both the Government and other securities through some brokers in collusion with the employees of banks, companies and financial institutions. The other irregularities and malpractices led to the divergence of funds from banks and financial institutions to the individual accounts of certain brokers. In order to deal with the situation and in particular to ensure speedy recovery of the huge amount involved, to punish the guilty and restore confidence and to maintain the basic integrity and credibility of the banks and financial institutions, the Special Courts (Trial of Offences Relating to Transactions in Securities) Act, 1992 was enacted for speedy trial of offences relating to transactions in securities and disposal of properties attached. This Act envisages the appointment of one or more custodians to take steps for guarding the interests with a view to check the diversion of funds invested in the form of shares by the offenders which may be in the form of companies or share brokers. Therefore, the duty of the custodian as also the special court is to take into consideration that while the plea of the custodian for facilitating certification of shares by fixing cut off date might have been reasonable in the given situation where large number of investors were filing applications for certification of the tainted shares time and again and hence cut off date might have been justified, it was also expected to take care and guard the interest of the investors who are based and live not merely within the geographical boundaries of the Special Court which had fixed the cut off date but also live far and wide even across the boundaries of the country which is the fact in the instant matter also. Hence, in our considered view, it was obligatory on the part of the Special Court and the

Custodian to notice an important fact that when the shares purchased by the appellant were reported to be tainted which was issued through Respondent No.5-M/s. Fair Growth Company by the share broker companies i.e. Respondent No. 4 and 5 and the same was ordered to be attached by the Custodian in view of the Government of India Regulation it was clearly nefarious and dubious activity on the part of the Respondent No.5-M/s. Fair Growth Financial Service Ltd. due to which the unnecessary hassle of certification of the shares issued in the name of M/s. Fair Growth Company became essential. The investors like the appellant herein had absolutely no role in such activity and hence even if the cut off date was fixed by the Special Court for certification of such shares, the same could not have been enforced oblivious of its repercussion on those investors who could not approach the Special Court for certification for reasons beyond their control as it has happened in the case of the appellant herein who could not approach the Special Court for certification of his tainted shares for reasons which have been elaborated hereinbefore.

23. In the instant matter, we have noticed that the appellant/applicant had filed an application before the Special Court seeking a direction for certification of the shares on 27.8.2005 which even if counted from the cut off date, would at the most was delayed by two months as the appellant had not received any notice which could be proved, indicating that the application for certification had to be filed by 27.6.2005 although the same is asserted by the respondent-Custodian, which cannot be accepted in absence of appearance of respondent Nos. 3 and 4. But even if it were so, the Court should have certainly considered the circumstance whether a bonafide purchaser of shares could be denied his due merely on the ground of violation of a cut off date which clearly did not have its existence in the statute and hence had no statutory force. The order sought from the Special Court to fix a cut off date for receiving application for certification was, therefore, based merely on the

theory of convenience of the custodian clearly ignoring its ramification on the bonafide investor. It is common knowledge that when public at large invest in securities by purchasing shares of a notified company, it purchases through various modes including the modern tools and technique of internet and many other modern modes and methods. But thereafter, if the shares are held to be tainted which is clearly beyond the control of the appellant/investor and its certification is required, it is surely the custodian in co-ordination with the company floating shares as also the share broker company or the stock exchange, which has the onus and responsibility to take care of the interest of the investors under the supervision of the Special Court in view of the provision of the Special Courts Act of 1992. The 'Custodian' therefore cannot shirk away from his function and the duty cast upon him by limiting his responsibilities and seeking a cut off date during which only he could perform the duty of certification, oblivious of its consequence and other ramification on the investors which include small investors also who put in their hard earned money in the shares of the company and later comes to know that the shares were tainted on which the investor has absolutely no role or control.

24. Even if we were to appreciate certain limitations on the discharge of duties of certification by the Custodian, the Special Court clearly had the duty to ensure that in absence of a statutory time limit prescribed for certification of shares under the Act of 1956, read with the Special Courts Act of 1992, the Special Court was duty bound to guard the interest of the investors through the Custodian at least in case of those investors who had bonafide purchased the shares of a notified company which for reasons beyond the control of investors, was held to be tainted.

25. Hence, in our considered opinion, the appellant under the facts and existing circumstances of the case where he ended up buying tainted shares for no fault on his part but had

to seek its certification from the Custodian under compelling circumstance which was not his creation and also had no control, could not have been denied his due on the ground of delay in filing the application for certification specially when the appellant had sought certification of his shares only after two months of the cut off date for reasons beyond his control which cut off date has no statutory effect or legal force. The appellant on the one hand was saddled with the tainted shares for no fault on his part through respondent Nos. 4, 5 and 6 on which he had no control or any role to play and on the top of it, when he sought a remedy of certification for claiming dividends, he had to suffer an order by which his application was rejected on the ground that he had not moved an application within the cut off date which had no statutory force as the same had been fixed at the instance of the Custodian seeking approval from the Special Court.

26. As a consequence of the aforesaid discussion, we set aside the impugned order of the Special Court and allow this appeal as a result of which the respondent – Custodian shall entertain the application filed before the Special Court for certification of his shares and verify the claim of the appellant in regard to the shares bearing Certificate Nos. 3489027 and 8170517 Distinctive Nos. D-915292605 to 654 and D-114196259 to 308 and ensure payment of dividends on those shares after certification by the respondent No.2. If necessary the Custodian may co-ordinate with the concerned stock exchange and the share broker companies i.e. respondent No.4 – Abex and Company as also respondent No.3 – Karvy Consultants Limited for ensuring release of payment accruing as dividend on the shares noted hereinbefore. In case of default in any manner, it shall be the duty of the Custodian to take recourse to the remedy against any defaulting party in accordance with law. The appeal accordingly is allowed.

N.J Appeal allowed.