M/S SBEC SUGAR LIMITED & ANR.
v.
UNION OF INDIA & ORS.
(Civil Appeal No. 2899 of 2006)

FEBRUARY 7, 2011

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

Customs Act, 1962 – ss. 72(1)(b), 68 and 15(1)(b) – Imported goods improperly removed from warehouse – Rate of duty – Held: When the goods are cleared from the warehouse after the expiry of the permitted period or its permitted extension, the goods are deemed to have been improperly removed u/s. 72(1)(b) – Rate of duty has to be computed according to the rate applicable on the date of expiry of the permitted period u/s. 61 – Section 15(1)(b) whereby rate of duty is computed according to the rate and valuation applicable on the date on which goods are actually removed from the warehouse, would be applicable only when the goods are cleared from the warehouse u/s. 68, within the initially permitted period or during the permitted extended period – On facts, benefit of exemption from payment of duty in terms of the Export Promotion Capital Goods Scheme was not available to the importer because after the expiry of the warehousing period, the goods had been removed u/s. 72 and not u/s. 68 and, thus, s. 15(1)(b) had no application.

Appellant No. 1 imported certain capital goods for its sugar manufacturing unit. Appellant No. 1-importer opted for getting these goods warehoused under Bond. The importer made an application for extension of the bond period in respect of all the said consignments and the same was rejected. Meanwhile, the Central Government extended the Export Promotion Capital Goods Scheme (EPCG) Scheme to Agro based Industries. The capital goods used in the manufacture of agro-products, like

sugar and covered under EPCG licence were exempted from the payment of whole of the customs duty, and additional duty leviable in terms of Section 3 of the Customs Act, 1962. The Superintendent of Customs raised the demand u/s. 72 of the Act directing the importer to clear the goods covered under the Bond on payment of full duty of customs and other charges within stipulated period. Appellant No. 1 acquired licence under the EPCG Scheme, and filed three bills of entry for ex-bond clearance for home consumption of the goods lying in the warehouse. By that time the bond period had expired and demand for payment of full amount of customs duty chargeable on account of goods lying in the warehouse, along with interest, penalty etc. had already been raised against the importer. Appellant No. 1 made a representation to the Chief Commissioner of Customs stating that since zero duty was chargeable on the goods under the EPCG licence, no interest could be levied but the same was rejected. Appellant No. 1 filed a writ petition challenging the demand for interest in respect of the three consignments. The Assistant Commissioner of Customs confirmed the levy of duty and interest. The High Court passed an interim order directing the respondents to permit the importer to remove the consignments on their executing a bond without payment of interest but on payment of other charges. Appellant No. 1 challenged the confirmation order. The High Court dismissed the writ petition. It directed the department to finally assess the custom duty and other charges payable by the appellant in respect of goods covered under subject bills of entry. Therefore, the appellants filed the instant appeals.

Dismissing the appeals, the Court

HELD: 1.1 From a bare reading of Section 61 of the Customs Act, 1962, it is manifest that warehousing is

permissible for a limited period, as contemplated under sub-sections (1)(a) and (1)(b) of Section 61; and such period is extendable on showing sufficient cause for the same. However, by operation of sub-section (2), interest on the amount of duty is payable from the period of expiry of the permissible period till the date of clearance from the warehouse, regardless of whether the goods have remained in the warehouse beyond the permitted periods by reasons of extension or otherwise. [Para 19] [597-H; 598-A-B]

Kesoram Rayon vs. Collector of Customs, Calcutta **(1996) 5 SCC 576 – relied on.**

1.2 Section 68 deals with the clearance of warehoused goods for home consumption and provides that an importer of any warehoused goods may clear the goods for home consumption if: (1) a bill of entry for home consumption of the said goods has been presented in the prescribed form, (ii) the import duty leviable on such goods, all penalties, rent, interest and other charges payable in respect of such goods have been paid, and (iii) the proper officer has made an order for the clearance of such goods. In relation to goods cleared under Section 68, Section 15(1)(b) of the Act provides that the rate of duty shall be computed according to the rate and valuation applicable on the date on which goods are actually removed from the warehouse. [Para 20] [598-C-E]

D.C.M and Anr. vs. Union of India and Anr. **1995 Supp (3) SCC 223 – relied on.**

1.3 It is plain that Section 15(1) (b) would be applicable only when the goods are cleared from the warehouse under Section 68 of the Act, i.e., within the initially permitted period or during the permitted extended period. When the goods are cleared from the warehouse after the

expiry of the permitted period or its permitted extension, the goods are deemed to have been improperly removed under Section 72(1) (b) of the Act, with the consequence that the rate of duty has to be computed according to the rate applicable on the date of expiry of the permitted period under Section 61. [Para 23] [600-C-E]

1.4 While it is true that Condition 6 of the licence granted under the EPCG Scheme was valid against goods which had already been shipped but not cleared, but, the benefit of exemption granted under the Scheme to the already imported goods would be available only in respect of those goods which are cleared under Section 68 of the Act. Any other interpretation of the said clause would render Section 72 otiose, and would result in the said Scheme operating as an amnesty scheme, granting an unintended and undue advantage to the importer, which is ordinarily to be avoided. It is a cardinal principle of construction that the provisions of a Notification have to be harmoniously construed as to prevent any conflict with the provisions of the Statute. The decision of the High Court cannot be faulted with. [Paras 24 and 25] [600-F-H; 601-A-C]

State of Maharashtra and Ors. vs. Swanstone Multiplex Cinema Private Limited **(2009) 8 SCC 235;** *Gudur Kishan Rao and Ors. vs. Sutirtha Bhattachaarya and Ors.* **(1998) 4 SCC 189;** *Kesoram Rayon vs. Collector of Customs, Calcutta* **(1996) 5 SCC 576 – relied on.**

Pratibha Processors and Ors. vs. Union of India and Ors. **(1996) 11 SCC 101 – distinguished.**

Case Law Reference:

(1996) 5 SCC 576	**Relied on**	**Paras 19, 25**
1995 Supp (3) SCC 223	**Relied on**	**Para 20**

(2009) 8 SCC 235	**Relied on**	**Para 24**
(1998) 4 SCC 189	**Relied on**	**Para 24**
(1996) 11 SCC 101	**Relied on**	**Para 25**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2899 of 2006.

From the Judgment & Order dated 03.04.2006 of the High Court of Judicature at Bombay in Writ Petition No. 775 of 1998.

WITH

C.A. No. 2900 of 2006.

S. Ganesh, Rohina Nath, Priyadeep, Umesh Kumar Khaitan for the Appellants.

Harish Chander, Arijit Prasad, Anil Katiyar, B. Krishna Prasad for the Respondents.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. These appeals, by grant of leave, are directed against the judgments and orders dated 3rd April, 2006 delivered by the High Court of Bombay, whereby the High Court has dismissed the two writ petitions (Nos.775 and 4173 of 1998) filed by the appellants herein, and has directed the Assistant Commissioner of Customs, Bond Department to finally assess the customs duty and other charges payable by the appellants in respect of the goods covered under the subject bills of entry. The High Court has further directed that if the payment of customs duty, interest and other charges is not made by the appellant company within two weeks from the date of such determination and communication thereof, the customs authorities shall enforce the bond executed by the company, pursuant to the interim order passed by the Court.

2. As a common question of law is involved in the appeals

and in fact the latter order is based on the former, these are being disposed of by this common judgment. However, in order to appreciate the controversy involved, for the sake of convenience, the facts emerging from C.A. No.2899/2006 are being adverted to. These are:

Appellant No. 1 (hereinafter referred to as "the importer") a body corporate, is engaged in the manufacture of sugar. Appellant No.2 is the Vice-President of the first appellant. With a view to set up a sugar manufacturing unit, the importer imported certain capital goods. Instead of getting the goods released for home consumption, the importer opted for getting these goods warehoused under Bond. The present appeal is confined to three consignments under Bond No. CW-20-4732 dated 26th December, 1995; CW-20-4733 dated 26th December, 1995 and CW-20-4842 dated 2nd January, 1996, which were to expire respectively on 25th December, 1996, 25th December, 1996 and 1st January, 1997. It is pertinent to note that on the original bonds and the bills of entry, the Assistant Commissioner of Customs made an endorsement for payment of interest @ 20% per annum from the date of expiry of the bond.

3. On 19th December, 1996, the importer made an application for extension of the bond period by six months in respect of all the afore-mentioned consignments. However, the said request was rejected by the Assistant Commissioner of Customs vide letter dated 13th January, 1997 on the ground that the application was not received in the Bond department at least 15 days before the expiry of the current period of bond and was also not accompanied by an examination certificate by the Customs Officer/staff of the warehouse, the mandatory terms and conditions stipulated in para 2(i)(iii) of the Public Notice No.102/96 dated 5th June, 1996. Notwithstanding, rejection of prayer for extension of Bond period, the importer continued making representations dated 21st January, 1997; 21st April, 1997; 20th May, 1997, 26th May, 1997 and 27th May, 1997 to the respondents, requesting for re-consideration

of their request for extension of bond period and not to issue notice for auction of the goods.

4. In the meantime, vide notification No.29/97 dated 1st April, 1997, issued under Section 25(1) of the Customs Act, 1962 (for short "the Act"), the Central Government extended the Export Promotion Capital Goods Scheme (for short "the EPCG Scheme") for the period 1997-2002 to Agro based Industries. The effect of the notification was that the capital goods used in the manufacture of agro-products, like sugar and covered under EPCG licence, were exempted from the payment of whole of the customs duty, and additional duty leviable in terms of Section 3 of the Act, w.e.f. 1st April, 1997. Para 6.6 of Chapter 6 of the Exim Policy, containing the EPCG Scheme provided that:

> "The licence issued under this scheme shall be valid for the goods already shipped/arrived provided customs duty has not been paid and the goods have not been cleared from Customs."

5. On 22nd August, 1997, a licence under the EPCG Scheme, allowing concessional duty at the rate of 10% was issued to the importer. On an application by the importer, the said licence was rectified and endorsed as "zero duty."

6. Vide order dated 26th September, 1997, issued under Section 72(1) of the Act, the Superintendent of Customs directed the importer to clear the goods covered under Bond No. CW-20-4842 dated 2nd January, 1996 on payment of full duty of customs and other charges within a period of 15 days.

7. On 14th January, 1998, the importer executed a bond and furnished a bank guarantee for 100% of the duty saved as required under Notification No. 29/97 dated 1st April, 1997. Having acquired licence under the EPCG Scheme, on 21st January, 1998, the importer filed three bills of entry for ex-bond clearance for home consumption of the goods lying in the

warehouse. As afore-stated, by that time the bond period in respect of the three consignments had expired and demand for payment of full amount of customs duty chargeable on account of goods lying in the warehouse, along with interest, penalty etc. had already been raised against the importer. On 5th and 9th February, 1998, the importer made a representation to the Chief Commissioner of Customs stating that since zero duty was chargeable on the goods under the EPCG licence, there was no question of levy of interest thereon.

8. Vide letter dated 17th March, 1998, the Deputy Commissioner of Customs informed the importer that its request for waiver of interest had been rejected. Being aggrieved, on 3rd April, 1998, the importer preferred a writ petition (Writ Petition No. 775/1998) before the High Court questioning the demand for interest in respect of the three consignments.

9. On 30th March, 1998, the Assistant Commissioner of Customs issued an order, confirming the levy of duty and interest amounting to ` 1,01,03,535/-, together with interest at 20% p.a., which order, according to the appellants, was received by them on 7th April, 1998.

10. On 29th April, 1998, the High Court passed an interim order directing the respondents to permit the importer to remove the consignments on their executing a bond without payment of interest but on payment of other charges.

11. On receiving the confirmation letter dated 30th March, 1998, the importer sought to impugn the said confirmation order by amending the Writ Petition by filing Chamber Summons No. 72/1998 on 5th August, 1998.

12. As afore-mentioned, the High Court has dismissed the writ petition, *inter alia*, observing:

"19. In the backdrop of the aforesaid legal position

exposited by the Supreme Court in Kesoram Rayon, when we turn to the facts of the present case, it would be seen that the bond period expired in respect of two bonds on 25th December, 1996 and with regard to third bond on 1st January, 1997. Undisputedly, the application for extension of bond period made on 19th December, 1996 by the company was rejected on 13th January, 1997. That the demand under Section 72 was raised by the Proper Officer on 26th June, 1997 to pay amount of duty chargeable on account of the subject goods lying in the bonded warehouse after expiry of bonded period is not in dispute. As a matter of fact, the petitioners have not challenged the said demand made under Section 72 of the Customs Act vide notice dated 26th January, 1997. On expiry of bond period, as aforenoticed, the subject goods are treated to have been improperly removed under Section 72 from the warehouse. That improper removal took place even when the goods remained in the warehouse beyond the permitted period of permitted extension. Thus, at the time the bills of entry were filed by the company on 21st January, 1998, the Proper Officer was justified in computing the duty from the date of expiry of the bond period and the interest payable thereon. As a matter of fact the company was aware that the duty has been calculated by the concerned Officer along with interest on the reverse of the bill of entry but this fact has been suppressed.

20. The edifice has been built on erroneous premise in the writ petition that no duty was payable on the goods and since no duty was payable on the goods no interest could be levied or demanded as interest is only the accessory to the principal and if the principal is not payable the interest is not payable. In challenging the demand of interest, the petitioners has misrepresented that the duty was not payable by virtue of notification dated 1st April,

1997 and the licence issued to the company under EPCG scheme and endorsement made thereon of zero duty.

21. Having noticed the facts above, we have no hesitation in holding that the provisions of Section 68 and consequently of Section 15(1)(b) have no application since the goods were not cleared from the warehouse within the bond period. Admittedly, no extension was granted. By reason of goods having remained in the warehouse beyond 25th December, 1996 insofar as two consignments were concerned and beyond 1st January, 1997 with regard to the third consignment, the goods shall be deemed to have been improperly removed from the warehouse under Section 72 and the Proper Officer was justified in calling upon the company to pay the customs duty on them as may be payable at the rate applicable at the rate on the date on which the bond period expired. As a matter of fact, there is no challenge to the demand made under Section 72 on 26th September, 1997 calling upon the company to pay full amount of duty chargeable on account of the subject goods together with penalties, rent, interest and other charges. We are surprised that the respondents permitted the company to remove the goods on execution of bond alone though by the order dated 29th April, 1998 what the Court permitted the petitioners was to remove the goods on their executing bond without payment of interest but on payment of other charges. In other words, as per the interim order dated 29th April, 1998 passed by this Court, save and except, demand of interest, the company was liable to pay all other charges including the full amount of duty together with other charges as demanded vide notice dated 26th September, 1997."

13. As stated above, following this order, the second writ petition was also dismissed.

14. Hence, the present appeals.

15. Mr. S. Ganesh, learned senior counsel appearing on behalf of the appellants, strenuously urged that the impugned judgments are clearly erroneous in light of the judgment of this Court in *Pratibha Processors & Ors. Vs. Union of India & Ors.*[1] wherein this Court had observed that if by operation of an exemption, the goods cleared were duty free and if no duty was recoverable on the imported goods at the time of clearance, no interest was payable thereon under Section 61(2) of the Act. It was strenuously argued that in the instant case the goods were cleared from the warehouse under Section 68 and had not been removed on the basis of an order under Section 72 of the Act and, therefore, having regard to the provisions of Section 15(1)(b) of the Act, by virtue of the exemption notification No.29/97, on the date of removal of the goods, no duty was payable thereon. It was asserted that reliance on the decision of this Court in *Kesoram Rayon Vs. Collector of Customs, Calcutta*[2] by the High Court was clearly misplaced because unlike in the present case, the goods in that case had been removed on the basis of the order under Section 72 of the Act.

16. Per contra, Mr. Harish Chander, learned senior counsel appearing on behalf of the respondents, while supporting the impugned judgments contended that the benefit of exemption from payment of duty in terms of the EPCG Scheme was not available to the importer because after the expiry of the warehousing period, the goods had been removed under Section 72 and not under Section 68 of the Act and therefore, Section 15(1)(b) of the Act had no application. It was stressed that the removal of all the consignments in question was by virtue of demand notice dated 26th September, 1997, which was admittedly not questioned in the writ petition filed on 3rd April, 1998 and therefore, the dictum laid down in *Kesoram Rayon* (supra) was squarely applicable on the facts of the present case.

1. (1996) 11 SCC 101.
2. (1996) 5 SCC 576.

17. Having considered the matters in the light of the statutory provisions, we are of the considered opinion that there is no merit in these appeals.

18. Section 61 of the Act prescribes the period for which goods may remain warehoused. In so far as is relevant, it reads as follows:

"61. Period for which goods may remain warehoused.—(1) Any warehoused goods may be left in the warehouse in which they are deposited or in any warehouse to which they may be removed,—

(a) in the case of—

(i) non-consumable store; or

(ii) goods intended for supply to a foreign diplomatic mission; or

(iii) goods intended for use in any manufacturing process or other operations in accordance with the provisions of Section 65; or

(iv) goods intended for use in any hundred per cent export-oriented undertaking; or

(v) goods which the Central Government may, if it is satisfied that it is necessary or expedient so to do, by notification in the Official Gazette, specify for the purposes of this clause,

till the expiry of one year.

Explanation.—For the purposes of sub-clause (iv), 'hundred per cent export-oriented undertaking' has the same meaning as in Explanation 2 to sub-section (1) of Section 3 of the Central Excises and Salt Act, 1944 (1 of 1944);

(b) in the case of any other goods, till the expiry of three months, after the date on which the proper officer made an order under Section 60 permitting the deposit of the goods in a warehouse:

Provided that—

… … …

(ii) in the case of any goods which are not likely to deteriorate, the aforesaid period of one year or three months, as the case may be, may, on sufficient cause being shown, be extended by the Collector of Customs for a period not exceeding six months and by the Board for such further period as it may deem fit:

… … …

(2) Where any warehoused goods remain in a warehouse beyond the period of one year or three months specified in clause (a) or clause (b) of sub-section (1) by reason of the extension of the aforesaid period or otherwise, interest at such rate, not exceeding eighteen per cent per annum as is for the time being fixed by the Board, shall be payable on the amount of duty on the warehoused goods for the period from the expiry of the period of one year or, as the case may be, three months, till the date of the clearance of the goods from the warehouse:

Provided that the Board may, if it considers it necessary so to do in the public interest, waive, by special order and under circumstances of an exceptional nature to be specified in such order, the whole or part of any interest payable under this sub-section in respect of any warehoused goods."

19. From a bare reading of the afore-extracted Section, it is manifest that warehousing is permissible for a limited period, as contemplated under sub-sections (1)(a) and (1)(b) of

Section 61; and such period is extendable on showing sufficient cause for the same. However, by operation of sub-section (2), interest on the amount of duty is payable from the period of expiry of the permissible period till the date of clearance from the warehouse, regardless of whether the goods have remained in the warehouse beyond the permitted periods by reasons of extension or otherwise. [See: *Kesoram Rayon* (supra)]

20. Section 68 deals with the clearance of warehoused goods for home consumption and provides that an importer of any warehoused goods may clear the goods for home consumption if : (i) a bill of entry for home consumption of the said goods has been presented in the prescribed form, (ii) the import duty leviable on such goods, all penalties, rent, interest and other charges payable in respect of such goods have been paid, and (iii) the proper officer has made an order for the clearance of such goods. In relation to goods cleared under Section 68, Section 15(1)(b) of the Act provides that the rate of duty shall be computed according to the rate and valuation applicable on the date on which goods are actually removed from the warehouse. (See: *D.C.M & Anr. Vs. Union of India & Anr.*[3]).

21. Section 72 of the Act, which is relevant for our purpose, provides for the consequences for improper removal of goods from warehouse. It reads thus:

"72. Goods improperly removed from warehouse, etc.— (1) In any of the following cases, that is to say,—

(a) where any warehoused goods are removed from a warehouse in contravention of Section 71;

(b) where any warehoused goods have not been removed from a warehouse at the expiration of the period during which such goods are permitted under Section 61 to

3. 1995 Supp (3) SCC 223.

remain in a warehouse;

(c) where any warehoused goods have been taken under Section 64 as samples without payment of duty;

(d) where any goods in respect of which a bond has been executed under Section 59 and which have not been cleared for home consumption or exportation are not duly accounted for to the satisfaction of the proper officer,

the proper officer may demand, and the owner of such goods shall forthwith pay, the full amount of duty chargeable on account of such goods together with all penalties, rent, interest and other charges payable in respect of such goods.

(2) If any owner fails to pay any amount demanded under sub-section (1), the proper officer may, without prejudice to any other remedy, cause to be detained and sold, after notice to the owner (any transfer of the goods notwithstanding) such sufficient portion of his goods, if any, in the warehouse, as the said officer may select."

22. The scope and purport of Section 72 was examined by this Court in *Kesoram Rayon* (supra). It was held that:

"13. Goods which are not removed from a warehouse within the permissible period are treated as goods improperly removed from the warehouse. Such improper removal takes place when the goods remain in the warehouse beyond the permitted period or its permitted extension. The importer of the goods may be called upon to pay customs duty on them and, necessarily, it would be payable at the rate applicable on the date of their deemed removal from the warehouse, that is, the date on which the permitted period or its permitted extension came to an end.

14. Section 15(1)(b) applies to the case of goods cleared under Section 68 from a warehouse upon presentation of

a bill of entry for home consumption; payment of duty, interest, penalty, rent and other charges; and an order for home clearance. The provisions of Section 68 and, consequently, of Section 15(1)(b) apply only when goods have been cleared from the warehouse within the permitted period or its permitted extension and not when, by reason of their remaining in the warehouse beyond the permitted period or its permitted extension, the goods have been deemed to have been improperly removed from the warehouse under Section 72."

23. We respectfully concur with the enunciation of law on the point. It is plain that Section 15(1)(b) would be applicable only when the goods are cleared from the warehouse under Section 68 of the Act, i.e., within the initially permitted period or during the permitted extended period. It is trite to say that when the goods are cleared from the warehouse after the expiry of the permitted period or its permitted extension, the goods are deemed to have been improperly removed under Section 72(1)(b) of the Act, with the consequence that the rate of duty has to be computed according to the rate applicable on the date of expiry of the permitted period under Section 61.

24. While it is true that Condition 6 of the licence granted under the EPCG Scheme was valid against goods which had already been shipped but not cleared, but, we have no hesitation in holding that the benefit of exemption granted under the Scheme to the already imported goods would be available only in respect of those goods which are cleared under Section 68 of the Act. In our opinion, any other interpretation of the said clause would render Section 72 of the Act otiose, and would result in the said Scheme operating as an amnesty scheme, granting an unintended and undue advantage to the importer, which is ordinarily to be avoided. (See: *State of Maharashtra & Ors. Vs. Swanstone Multiplex Cinema Private Limited)*[4]. It is also a cardinal principle of construction that the provisions

4. (2009) 8 SCC 235.

of a notification have to be harmoniously construed as to prevent any conflict with the provisions of the Statute. (See: *Gudur Kishan Rao & Ors. Vs. Sutirtha Bhattachaarya & Ors.*[5].)

25. We are, therefore, of the opinion that the decision in *Pratibha Processors* (supra) on which heavy reliance is placed by learned counsel for the appellants, is clearly distinguishable on facts inasmuch as apart from the fact that in that case the clearance of goods was under Section 68 of the Act, the import of Section 72(1)(b) of the Act was not considered. On the contrary, the dictum laid down in *Kesoram Rayon* (supra) is on all fours on facts at hand, and therefore, the decision of the High Court cannot be faulted with.

26. For the fore-going reasons, the appeals, being devoid of any merit, are dismissed with costs quantified at Rs. 25,000/-.

N.J. Appeals dismissed.

5. (1998) 4 SCC 189.

KANAIYALAL LALCHAND SACHDEV AND ORS.
v.
STATE OF MAHARASHTRA AND ORS.
(Criminal Appeal Nos.338-340 of 2011)

FEBRUARY 7, 2011

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

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002: s.17 – Default in repayment of secured debt – Notice issued u/s.13(2) to borrower to discharge liability –Application u/s.14 by secured creditor before Magistrate for taking possession of mortgaged properties, allowed – Writ petition by borrower/ guarantors before High Court, dismissed on the ground that an alternative remedy was available to them u/s.17 – On appeal, held: s.13(4) provides that if borrower fails to discharge his liability within the period specified in s.13(2) then secured creditor may take recourse to action to recover his debt – Secured creditor may, in order to enforce his rights u/s.13(4) take recourse to s.14 of the Act – An action u/s.14 constitutes an action taken after the stage of s.13(4), and, therefore, the same would fall within the ambit of s.17(1) – Thus, the Act itself contemplates an efficacious remedy for the borrower or any person affected by an action u/s.13(4) by providing for an appeal before the DRT – Ordinarily relief under Articles 226/ 227 of the Constitution is not available if an efficacious alternative remedy is available to any aggrieved person – Therefore, High Court was fully justified in declining to exercise its jurisdiction under Articles 226 and 227 of the Constitution – Constitution of India, 1950 – Articles 226 and 227.

Respondent no.3 had advanced a loan amount of Rs. 4.50 crores to appellant no.6 on an equitable mortgage by deposit of title deeds of certain properties. Appellant

Nos.1 to 5 were the guarantors. Respondent no.3 issued a notice under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Thereafter, respondent no.3 filed an application before the Chief Metropolitan Magistrate under Section 14 of the Act for taking possession of the mortgaged properties. The Magistrate allowed the said application and directed the Assistant Registrar to take possession of the mortgaged properties after issuing notice to the appellants.

Aggrieved by such notice issued by the Assistant Registrar, the appellants filed a writ petition before the High Court. The writ petition was dismissed on the ground that an alternative remedy was available to the appellants under Section 17 of the Act. The High Court also directed the respondents to maintain status quo in the matter for a period of 10 weeks from the date of its order, so as to enable the appellants to approach the Debt Recovery Tribunal under Section 17 of the Act.

The appellants filed an application before the High Court seeking an extension of the status quo period. The High Court rejected the said application. The instant appeals were filed challenging the orders whereby the writ petition and the application were dismissed.

Dismissing the appeals, the Court

HELD: 1.1. Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 deals with enforcement of security interest, providing that notwithstanding anything contained in Sections 69 or 69A of the Transfer of Property Act, 1882, any security interest created in favour of any secured creditor may be enforced, without the court's intervention, by such creditor in accordance with

the provisions of the Act. Section 13(2) of the Act provides that when a borrower, who is under a liability to a secured creditor, makes any default in repayment of secured debt, and his account in respect of such debt is classified as non-performing asset, then the secured creditor may require the borrower, by notice in writing, to discharge his liabilities within sixty days from the date of the notice, failing which the secured creditor shall be entitled to exercise all or any of the rights given in Section 13(4) of the Act. Section 13(3) of the Act provides that the notice under Section 13(2) of the Act shall give details of the amount payable by the borrower as also the details of the secured assets intended to be enforced by the bank. Section 13(3-A) of the Act provides for a last opportunity for the borrower to make a representation to the secured creditor against the classification of his account as a non-performing asset. The secured creditor is required to consider the representation of the borrowers, and if the secured creditor comes to the conclusion that the representation is not tenable or acceptable, then he must communicate, within one week of the receipt of the communication by the borrower, the reasons for rejecting the same. Section 13(4) of the Act provides that if the borrower fails to discharge his liability within the period specified in Section 13(2), then the secured creditor, may take recourse to actions, to recover his debt. [Para 16] [610-G-H; 611-A-H; 612-A]

1.2. Section 14 of the Act provides that the secured creditor can file an application before the Chief Metropolitan Magistrate or the District Magistrate, within whose jurisdiction, the secured asset or other documents relating thereto are found for taking possession thereof. If any such request is made, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, is obliged to take possession of such asset or document

and forward the same to the secured creditor. Therefore, it follows that a secured creditor may, in order to enforce his rights under Section 13(4), in particular Section 13(4)(a), may take recourse to Section 14 of the Act. An action under Section 14 of the Act constitutes an action taken after the stage of Section 13(4), and therefore, the same would fall within the ambit of Section 17(1) of the Act. Thus, the Act itself contemplates an efficacious remedy for the borrower or any person affected by an action under Section 13(4) of the Act, by providing for an appeal before the DRT. Therefore, the High Court rightly dismissed the petition on the ground that an efficacious remedy was available to the appellants under Section 17 of the Act. It is well-settled that ordinarily relief under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person. [Paras 16, 20 and 21] [612-G-H; 615-C-E]

United Bank of India v. Satyawati Tondon & Ors. **(2010) 8 SCC 110;** *Authorised Officer, Indian Overseas Bank & Anr. v. Ashok Saw Mill* **(2009) 8 SCC 366;** *Sadhana Lodh v. National Insurance Co. Ltd. & Anr.* **(2003) 3 SCC 524;** *Surya Dev Rai v. Ram Chander Rai & Ors.* **(2003) 6 SCC 675;** *State Bank of India v. Allied Chemical Laboratories & Anr.* **(2006) 9 SCC 252;** *City and Industrial Development Corporation v. Dosu Aardeshir Bhiwandiwala & Ors.* **(2009) 1 SCC 168 – relied on.**

Transcore v. Union of India & Anr. **(2008) 1 SCC 125,** *Mardia Chemicals Ltd. & Ors. v. Union of India & Ors.* **(2004) 4 SCC 311 – referred to.**

1.3. In the instant case, apart from the fact that admittedly certain disputed questions of fact viz. non-receipt of notice under Section 13(2) of the Act, non-communication of the order of the Chief Judicial Magistrate etc. were involved, an efficacious statutory

remedy of appeal under Section 17 of the Act was available to the appellants, who ultimately availed of the same. Therefore, having regard to the facts obtaining in the case, the High Court was fully justified in declining to exercise its jurisdiction under Articles 226 and 227 of the Constitution. The impugned judgments cannot be flawed, warranting interference by this Court. [Paras 22, 23] [616-D-F]

Case Law Reference:

(2008) 1 SCC 125	**referred to**	**Para 13**
(2004) 4 SCC 311	**referred to**	**Paras 14, 16**
(2010) 8 SCC 110	**relied on**	**Para 16**
(2009) 8 SCC 366	**relied on**	**Para 19**
(2003) 3 SCC 524	**relied on**	**Para 21**
(2003) 6 SCC 675	**relied on**	**Para 21**
(2006) 9 SCC 252	**relied on**	**Para 21**
(2009) 1 SCC 168	**relied on**	**Para 21**

CRIMINAL APPELLATE JURISDICTON : Criminal Appeal Nos. 338-340 of 2011.

From the Judgment & Order dated 28.4.2009 of the High Court of Judicature at Bombay in Crl. Writ Petition No. 707 of 2009 and order dated 08.5.2009 in Crl. Writ Petition No. 707 of 2009 and order dated 01.07.2009 in Application No. 178 of 2009 in Crl. Writ Petition No. 707 of 2009.

Kranti Anand, Aishwarya Bhati, Rashid Khan, Angeline S. A. Rodriques, Buddy A. Ranganadhan, A.V. Rangam, Sushil Karanjakar, Sanjay Kharde, Asha Gopalan Nair for the appearing parties.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. Leave granted.

2. Challenge in these appeals, by special leave, is to the judgments and orders dated 28th April, 2009 and 1st July, 2009 delivered by the High Court of Bombay in W.P. No. 707 of 2009, and Criminal Application No. 178 of 2009 in W.P. No. 707 of 2009, respectively whereby it has dismissed the writ petition filed by the appellants herein, and also declined to extend the status-quo order granted by it to them.

3. Briefly stated, the facts, material for adjudication of the present appeals, may be stated thus:

Respondent No. 3, viz. the State Bank of India had advanced a loan of Rs. 4,50,00,000/- to appellant No. 6 on an equitable mortgage by deposit of the title deeds of certain properties, subject matter of these appeals, on 6th February, 2006. Appellant Nos.1 to 5 and one Mr. Lalchand Sachdeo stood as personal guarantors to the said loan.

4. On default of re-payment of loan amount, respondent No. 3 issued a notice under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (Second) Ordinance, 2002 on 18th November, 2006. On 12th February, 2007, the officers of respondent No. 3 dispossessed the appellants of one of the secured properties viz. T-125, CTS, No. 1729. Being aggrieved, the appellants filed a writ petition being CRL. W.P. No.286 of 2007 before the Bombay High Court, inter-alia, contending that the notice issued by respondent No. 3 was illegal, no action could be taken in pursuance thereof, and if at all, the respondent wanted to take any action, it was required to approach the Chief Metropolitan Magistrate under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the Act").

5. Before the High Court, respondent No. 3 offered to withdraw the notice dated 18th November, 2006 without prejudice to the rights and contentions advanced by them, and to return the possession of the said property to the appellants, subject to the appellants and all adult members furnishing an undertaking to the effect that they shall not alienate, encumber, transfer, dispose of and/or create any third party interest in the said premises for a period of six months. Accepting the statement made on behalf of respondent No. 3, the High Court dismissed the writ petition vide order dated 7th March, 2007.

6. Thereafter, on 11th April, 2007 respondent No. 3 issued to the appellants a notice under Section 13(2) of the Act. The appellants replied to the said notice on 23rd May, 2007. Vide letter dated 29th May, 2007, respondent No. 3, communicated its reasons for not accepting the reply. Subsequently, respondent No. 3 issued a public notice in newspapers, informing the appellants of the issuance of notice under Section 13(2) of the Act.

7. In pursuance thereof, respondent No.3, filed C.C. No. 223/M/2008 before the Chief Metropolitan Magistrate under Section 14 of the Act for taking possession of the secured assets. Vide order dated 3rd February, 2009, the Magistrate allowed the said application and directed the Assistant Registrar, Kurla Centre of Courts, to take possession of the mortgaged properties after issuing notice to the appellants.

8. Vide notice dated 27th February, 2009, the Assistant Registrar, directed the appellants to hand over the possession of the mortgaged properties to respondent No. 3 within 15 days from the receipt of the said notice. At this juncture, it would be expedient to extract the relevant portions of the said notice:

> "Whereas, the Chief Metropolitan Magistrate, Esplanade, Mumbai has passed the following order on 3.2.2009 on the application filed before him by State Bank of India, Mazda Complex, Parsi Agari Lane, Thana (W) 400601

through its Authorized Officer Fazlur Rehman Sheikh.

ORDER

The Application is allowed. Asst. Registrar, Mr. P.A. Tendolkar, Kurla Centre of Court after issuing notice of taking possession of the secured assets……"

It is manifest from a bare perusal of the said notice that the order passed by the Magistrate dated 3rd February, 2009 was referred to by the Assistant Registrar in his notice.

9. Being aggrieved by the said notice, the appellants herein again approached the High Court. As afore-stated, the High Court dismissed the said writ petition, vide order dated 28th April, 2009, on the ground that an alternative remedy was available to the appellants under Section 17 of the Act. Nevertheless, the High Court directed the respondents to maintain status quo in the matter for a period of 10 weeks from the date of its order, so as to enable the appellants to approach the Debts Recovery Tribunal (for short the "DRT") under Section 17 of the Act.

10. Thereafter, the appellants filed Criminal Application No. 178 of 2009 in W.P. No. 707 of 2009 seeking an extension of the status quo period granted vide order dated 28th April, 2009. As afore-stated, the High Court rejected the said application filed by the appellants.

11. Hence, the present appeals against both the said orders.

12. Ms. Kranti Anand, learned counsel appearing on behalf of the appellants, while assailing the impugned orders, strenuously urged that apart from the fact that the notice issued by the Assistant Registrar was vague, it was never served on the appellants. In fact, appellants received a copy of the order of the Magistrate during the proceedings before the High Court,

pleaded the learned counsel. Learned counsel also urged that the notice issued by the Assistant Registrar was vitiated on account of non-compliance with Rule 8 of the Security Interest (Enforcement) Rules, 2002 (for short "the 2002 Rules") as well. It was argued that the High Court had also erred in equating action under Section14 of the Act with action under Section 13(4)(a) of the Act. It was thus, asserted that for all these reasons, the impugned orders deserve to be set aside.

13. Per contra, Mr. Buddy A. Ranganadhan, learned counsel appearing on behalf of respondent No.3—Bank, supporting the impugned judgments, contended that in light of the decision of this Court in *Transcore Vs. Union of India & Anr.*[1], no fault could be found with the impugned judgments. It was also urged that the appellants having already availed of the remedy of approaching the DRT, they are estopped from challenging the decision of the High Court.

14. Mr. Sushil Karanjakar, learned counsel appearing on behalf of the State of Maharashtra contended that Rule 8 of the 2002 Rules was inapplicable in the instant case, in as much as it deals with sale of secured assets. According to the learned counsel, it was Rule 4 which was applicable to the facts of the instant case. In support, reliance was placed on the decision of this Court in *Mardia Chemicals Ltd. & Ors. Vs. Union of India & Ors.*[2].

15. Having bestowed our anxious consideration to the facts at hand, we are of the opinion that the appeals are utterly misconceived.

16. Section 13 of the Act deals with enforcement of security interest, providing that notwithstanding anything contained in Sections 69 or 69A of the Transfer of Property Act, 1882, any security interest created in favour of any secured creditor may be enforced, without the court's intervention, by such creditor

1. (2008) 1 SCC 125.
2. (2004) 4 SCC 311.

in accordance with the provisions of the Act. Section 13(2) of the Act provides that when a borrower, who is under a liability to a secured creditor, makes any default in repayment of secured debt, and his account in respect of such debt is classified as non-performing asset, then the secured creditor may require the borrower, by notice in writing, to discharge his liabilities within sixty days from the date of the notice, failing which the secured creditor shall be entitled to exercise all or any of the rights given in Section 13(4) of the Act. Section 13(3) of the Act provides that the notice under Section 13(2) of the Act shall give details of the amount payable by the borrower as also the details of the secured assets intended to be enforced by the bank. Section 13(3-A) of the Act was inserted by Act 30 of 2004 after the decision of this Court in *Mardia Chemicals* (supra), and provides for a last opportunity for the borrower to make a representation to the secured creditor against the classification of his account as a non-performing asset. The secured creditor is required to consider the representation of the borrowers, and if the secured creditor comes to the conclusion that the representation is not tenable or acceptable, then he must communicate, within one week of the receipt of the communication by the borrower, the reasons for rejecting the same. Section 13(4) of the Act provides that if the borrower fails to discharge his liability within the period specified in Section 13(2), then the secured creditor, may take recourse to any of the following actions, to recover his debt, namely-

> "(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;
>
> (b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:
>
> Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:
>
> Provided further that where the management of whole, of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;
>
> (c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;
>
> (d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt."

Section 14 of the Act provides that the secured creditor can file an application before the Chief Metropolitan Magistrate or the District Magistrate, within whose jurisdiction, the secured asset or other documents relating thereto are found for taking possession thereof. If any such request is made, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, is obliged to take possession of such asset or document and forward the same to the secured creditor. (See: *United Bank of India Vs. Satyawati Tondon & Ors.*[3]). Therefore, it follows that a secured creditor may, in order to enforce his rights under Section 13(4), in particular Section 13(4)(a), may take recourse to Section 14 of the Act.

17. Section 17 of the Act which provides for an appeal to the DRT, reads as follows:

3. (2010) 8 SCC 110.

"17. Right to appeal.—(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application along with such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:

Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation.—For the removal of doubts it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under sub-section (1) of Section 17.

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder."

18. The 2002 Rules, enacted under sub-section (1) and clause (b) of sub-section (2) of Section 38 read with sub-sections (4), (10) and (12) of Section 13 of the Act, set down the procedure for enforcing a security interest. Rule 4 of the 2002 Rules deals with the possession of movable assets, whereas Rule 8 deals with the possession of immoveable assets. It is manifest that Rule 4 has no application to the facts of the instant case, as contended by the learned counsel for the State.

19. In *Authorised Officer, Indian Overseas Bank & Anr. Vs. Ashok Saw Mill*[4], the main question which fell for determination was whether the DRT would have jurisdiction to consider and adjudicate post Section 13(4) events or whether its scope in terms of Section 17 of the Act will be confined to the stage contemplated under Section 13(4) of the Act? On an examination of the provisions contained in Chapter III of the Act, in particular Sections 13 and 17, this Court, held as under :

"35. In order to prevent misuse of such wide powers and to prevent prejudice being caused to a borrower on account of an error on the part of the banks or financial institutions, certain checks and balances have been introduced in Section 17 which allow any person, including the borrower, aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor, to make an application to the DRT having jurisdiction in the matter within 45 days from the date of such measures having taken for the reliefs indicated in sub-section (3) thereof.

36. The intention of the legislature is, therefore, clear that while the banks and financial institutions have been vested with stringent powers for recovery of their dues, safeguards have also been provided for rectifying any error or wrongful use of such powers by vesting the DRT with authority after conducting an adjudication into the matter to declare any such action invalid and also to restore possession even though possession may have been made over to the transferee.

.....

39. We are unable to agree with or accept the submissions made on behalf of the appellants that the DRT had no jurisdiction to interfere with the action taken by the secured creditor after the stage contemplated under Section 13(4)

4. (2009) 8 SCC 366.

of the Act. On the other hand, the law is otherwise and it contemplates that the action taken by a secured creditor in terms of Section 13(4) is open to scrutiny and cannot only be set aside but even the status quo ante can be restored by the DRT."

(Emphasis supplied by us)

20. We are in respectful agreement with the above enunciation of law on the point. It is manifest that an action under Section 14 of the Act constitutes an action taken after the stage of Section 13(4), and therefore, the same would fall within the ambit of Section 17(1) of the Act. Thus, the Act itself contemplates an efficacious remedy for the borrower or any person affected by an action under Section 13(4) of the Act, by providing for an appeal before the DRT.

21. In our opinion, therefore, the High Court rightly dismissed the petition on the ground that an efficacious remedy was available to the appellants under Section 17 of the Act. It is well-settled that ordinarily relief under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person. (See: *Sadhana Lodh Vs. National Insurance Co. Ltd. & Anr.*[5]; *Surya Dev Rai Vs. Ram Chander Rai & Ors.*[6]; *State Bank of India Vs. Allied Chemical Laboratories & Anr.*[7]). In City and Industrial Development Corporation Vs. Dosu Aardeshir Bhiwandiwala & Ors.8, this Court had observed that:

"The Court while exercising its jurisdiction under Article 226 is duty-bound to consider whether:

(a) adjudication of writ petition involves any complex and

5. (2003) 3 SCC 524.
6. (2003) 6 SCC 675.
7. (2006) 9 SCC 252.
8. (2009) 1 SCC 168.

disputed questions of facts and whether they can be satisfactorily resolved;

(b) the petition reveals all material facts;

(c) the petitioner has any alternative or effective remedy for the resolution of the dispute;

(d) person invoking the jurisdiction is guilty of unexplained delay and laches;

(e) ex facie barred by any laws of limitation;

(f) grant of relief is against public policy or barred by any valid law; and host of other factors."

22. In the instant case, apart from the fact that admittedly certain disputed questions of fact viz. non-receipt of notice under Section 13(2) of the Act, non-communication of the order of the Chief Judicial Magistrate etc. are involved, an efficacious statutory remedy of appeal under Section 17 of the Act was available to the appellants, who ultimately availed of the same. Therefore, having regard to the facts obtaining in the case, the High Court was fully justified in declining to exercise its jurisdiction under Articles 226 and 227 of the Constitution.

23. For the foregoing reasons, the impugned judgments cannot be flawed, warranting interference by this Court. Accordingly, the appeals, being devoid of any merit, are dismissed with costs, quantified at Rs. 20,000/-.

D.G. Appeals dismissed.

STATE OF PUNJAB
v.
AMARJIT SINGH AND ANR.
(Civil Appeal No. 1494 of 2011)

FEBRUARY 8, 2011

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

Land Acquisition Act, 1894: ss.23(1A), 23(2) – Additional amount u/s. 23(1A) whether awardable on solatium u/s.23(2) – Acquisition of land belonging to the respondents – Reference court awarding compensation alongwith statutory benefits u/s.23(1A), 23(2) and 28 – Before executing court, claim of respondents for additional amount u/s. 23(1A) not only on the market value of the land but also on solatium amount – Executing court accepting claim of respondents – Revision thereagainst dismissed by High Court – On appeal, Held: Additional amount u/s.23(1A) is awardable only on the market value determined under the first factor of s.23(1) and cannot be calculated on the solatium payable u/s.23(2) – The orders of executing court and the High Court that additional amount u/ s.23(1A) is payable on solatium are set aside.

Assistant Commissioner, Gadag Sub-division, Gadag v. MathapathiBasavannewwa **(1995) 6 SCC 355,** *State of Tamil Nadu v. L. Krishnan* **(1996) 1 SCC 250;** *P. Ram Reddy v. Land Acquisition Officer* **(1995)2 SCC 305;** *Sunder v. Union of India* **(2001) 7 SCC 211;** *GurpreetSingh v. Union of India* **(2006) 8 SCC 457 – relied on.**

Commissioner of Income Tax, Faridabad v. Ghanshyam (HUF) **(2009) 8 SCC 412 – referred to.**

Case Law Reference:

(1995) 6 SCC 355	**relied on**	**Para 5**

(1996) 1 SCC 250	**relied on**	**Para 5**
(1995) 2 SCC 305	**relied on**	**Para 5**
(2001) 7 SCC 211	**relied on**	**Para 5**
(2006) 8 SCC 457	**relied on**	**Para 7**
(2009) 8 SCC 412	**referred to**	**Para 8**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1494 of 2011.

From the Judgment & Order dated 4.9.2008 of the High Court of Punjab & Haryana at Chandigarh in C.R. No. 4382 of 2008.

Kuldip Singh, K.K. Pandey, H.S. Sandhu for the Appellant.

Arun Nehra, Shobha, Mohinder Pal Thakur, Ridhima Garg for the Respondents.

The Order of the Court was delivered by

O R D E R

R.V.RAVEENDRAN, J. 1. Leave granted. The question raised in this appeal is whether additional amount under Section 23(1A) of the Land Acquisition Act, 1894 ('Act' for short) is payable on the solatium under Section 23(2) of the Act.

2. In regard to acquisition of land belonging to the respondents, the reference Court by judgment dated 5.3.2001 awarded compensation at the rate of Rs.6,96,000/- per acre alongwith statutory benefits under Section 23(1A), 23(2) and 28 of the Act. The respondents filed an execution application wherein they claimed additional amount of 12% per annum for the period 11.11.1993 to 16.6.1994 (that is from the date of notification under Section 4(1) of the Act till the date of the award) under Section 23(1A) of the Act, not only on the market value of the land, but also on the solatium amount. The said

claim was accepted by the Executing Court by order dated 8.5.2008. The revision filed by the appellant was rejected by the High Court on 4.9.2008. The said revisional order of the High Court is challenged in this appeal by special leave.

3. To find an answer to the question arising for consideration, it is necessary to refer to Section 23 of the Act dealing with matters to be considered in determining compensation. The said provision is extracted below:

"23. Matters to be considered in determining compensation:

(1) In determining the *amount of compensation* to be awarded for land acquired under this Act, the Court shall take into consideration-

first, the *market-value of the land* at the date of the publication of the notification under section 4, sub-section (1);

secondly, the damage sustained by the person interested, by reason of the taking of any standing crops or trees which may be on the land at the time of the Collector's taking possession thereof;

t*hirdly*, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of severing such land from his other land;

fourthly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, movable or immovable, in any other manner, or his earnings;

fifthly, in consequence of the acquisition of the land by the Collector, the person interested is compelled to change his

residence or place of business, the reasonable expenses (if any) incidental to such change; and

sixthly, the damage (if any) bona fide resulting from diminution of the profits of the land between the time of the publication of the declaration under section 6 and the time of the Collector's taking possession of the land.

(1A) In addition to the market value of the land, as above provided, the Court shall in every case award *an amount calculated at the rate of twelve per centum per annum on such market value* for the period commencing on and from the date of the publication of the notification under section 4, sub-section (1), in respect of such land to the date of the award of the Collector or the date of taking possession of the land, whichever is earlier.

Explanation. - In computing the period referred to in this sub-section, any period or periods during which the proceedings for the acquisition of the land were held up on account of any stay or injunction by the order of any Court shall be excluded.

(2) *In addition to the market value of the land as above provided*, the Court shall in every case award *a sum of thirty per centum on such market value,* in consideration of the compulsory nature of the acquisition."

(emphasis supplied)

4. Section 23 of the Act refers to four distinct amounts:

(i) *Market value* of the land on the date of publication of the notification under Section 4(1) of the Act is first and foremost of the six factors to be taken note of for determining the amount of compensation for the land acquired. It is the major component (and in most cases, the only component) of the compensation determined by the court under Section 23(1) of the Act.

(ii) *Compensation* to be awarded to a person for the acquired land, is to be determined under Section 23(1) of the Act by taking into consideration six factors – (i) the market value of the land, on the date of publication of the notification under section 4(1) of the Act; (ii to iv) damage sustained by the person interested by reason of the taking of any standing crops or trees in the lands, or severing such land from his other land/s, or the acquisition injuriously affecting his other property or earnings; (v) the reasonable expenses incidental to the person interested being compelled to change the residence or place of business as a consequence of acquisition; and (iv) the damage bonafide resulting from diminution of the profits of the land between the time of publication of declaration under section 6 and the time of the Collector's taking possession of the land.

(iii)*Additional amount* at the rate of 12% per annum *on such market value* (for the period commencing on and from the date of publication of notification under Section 4(1) of the Act to date of award of the Collector or the date of taking possession of the land, whichever is earlier).

(iv) *Solatium at 30% on such market value,* in consideration of the compulsory nature of acquisition.

While *market value and compensation* are factors to be assessed and determined by the court, no such judicial exercise is involved in regard to *additional amount* payable under Section 23(1A) and *solatium* payable under Section 23(2) as they are statutory benefits payable automatically at the rates specified in those sub-sections, qua the market price. No reasons need be assigned for grant of additional amount or solatium.

5. This court explained the object of granting *additional amount* under Section 23(1A) of the Act in *Assistant Commissioner, Gadag Sub-Division, Gadag v. Mathapathi*

Basavannewwa (1995) 6 SCC 355 and in *State of Tamil Nadu v. L. Krishnan* (1996) 1 SCC 250. In *Mathapathi Basavannewwa* (supra) this court observed:

> "The object of introducing Section 23(1-A) is to mitigate the hardship caused to the owner of the land, who has been deprived of the enjoyment of the land by taking possession from him and using it for the public purpose, because of considerable delay in making the award and offering payment thereof. To obviate such hardship, Section 23(1-A) was introduced and the Legislature envisaged that the owner of the land is entitled to 12 per cent per annum additional amount on the market value……."

In *L.Krishnan* (supra) this court observed:

> "The provisions in this Sub-section are designed to compensate the owners of the land for the rise in prices during the pendency of the land acquisition proceedings. It is a measure to off-set the effects of inflation and the continuous rise in the values of properties over the last few decades……."

In *P.Ram Reddy v. Land Acquisition Officer* (1995) 2 SCC 305 this court held that additional amount under Section 23(1A) of the Act was payable only on the market value determined under Section 23(1) of the Act, thereby clearly implying that it was not reckonable on any other amount:

> "*The amount awardable under Sub-section (1-A) of Section 23 of the LA Act, therefore, would be an amount of 12 per centum per annum on the market value of the land determined under first Clause of Sub-section (1) of Section 23* for the period between the date of publication of Notification under Section 4(1) and to the dale of the award of the Collector or the date of taking possession of the land, whichever is earlier……In this context is has to be noted that the amount payable *is 12 per centum*

per annum on the market value in the first Clause of Sub-section (1) of Section 23 of the LA Act. It has also to be noted that solatium under Sub-section (2) is not payable in respect of the amount awardable under Sub-section (1-A), in that, Sub-section (2) says that in addition to the market value of the land, as above provided, the Court shall in every case award a sum of thirty per centum on such market value, in consideration of the compulsory nature of the acquisition."

(emphasis supplied)

In *Sunder v. Union of India* (2001) 7 SCC 211, a Constitution Bench of this court held that the terms 'sum awarded' or 'amount awarded' occurring in sections 34 and 28 of the Act would include not only the compensation determined by taking note of the six factors mentioned in Section 23(1) of the Act, but also amounts awarded under the remaining sub-sections of section 23 as well, for the purpose of calculating interest. The words 'compensation to be awarded' used in Section 23(1) of the Act refers to the total of the sums awarded with reference to the six factors enumerated in Section 23(1). On the other hand, the words 'amount awarded' or 'sum awarded' in Sections 28 and 34 of the Act refers to the aggregate of the compensation determined by the court under Section 23(1), the additional amount payable under Section 23(1A) and the solatium payable under Section 23(2) of the Act.

6. Section 23(1) refers to market value of the land on the date of publication of the notification under Section 4(1) of the Act as a relevant factor for determining the amount of compensation to be awarded for land acquired under the Act. Sub-section (2) provides that in addition to the market value of the land determined under Section 23(1), the Court shall, in every case, award a sum of 30% *on such market value* in consideration of the compulsory nature of acquisition. Sub-section (1A) of Section 23, inserted by Act 68 of 1984 provides that in addition to the market value of the land, as provided

under Section 23(1), the Court shall, in every case, award an amount calculated at the rate of 12% per annum on *such market value* for the period commencing on or from the date of publication of the notification under Section 4(1) in respect of such land to the date of award of the collector or the date of taking possession of the land, whichever is earlier. The additional amount under Section 23(1A) and solatium under Section 23(2) are both payable only on the market value determined under Section 23(1) of the Act and not on any other amount. Solatium under Section 23(2) is not payable on the additional amount nor additional amount under Section 23(1A) payable on solatium. Solatium and additional amount are also not payable on the damages/expenses that may be awarded under second to sixth factors under Section 23(1) of the Act.

7. Thus a person whose land is acquired is entitled to the following amounts under the Act.

(a) Compensation determined under Section 23(1) of the Act (comprising the market value of the land referred to as the first factor and any damages/expenses referred to as the second to sixth factors under the said sub-section).

(b) Solatium at 30% on the market value determined as the first factor under section 23(1) of the Act.

(c) Additional amount at 12% per annum of the market value of the land referred to as the first factor under Section 23(1) of the Act, for the period specified in Section 23(2).

(d) Interest on the aggregate of (a), (b) and (c) above for the period between the date of taking possession to date of payment/deposit at the rate of 9% per annum for the first year and 15% per annum for the remaining period.

Payments made are to be adjusted and accounted in the manner set out in *Gurpreet Singh v. Union of India* (2006) 8 SCC 457.

8. Learned counsel for the respondents placed reliance on the following observations of this Court in *Commissioner of Income Tax, Faridabad* Vs. *Ghanshyam (HUF)* - (2009) 8 SCC 412:

> "The additional amount payable under Section 23(1A) of the 1894 Act is neither interest nor solatium. It is an additional compensation designed to compensate the owner of the land, for the rise in price during the pendency of the land acquisition proceedings. It is a measure to offset the effect of inflation and the continuous rise in the value of properties. Therefore, the amount payable under Section 23(1A) of the 1894 Act is an additional compensation in respect to the acquisition and has to be reckoned as part of the market value of the land."

The learned counsel for respondents submitted that as this court has treated additional amount under Section 23(1A) as part of the market value, additional amount is payable on the solatium. There is no logic in the contention as the decision nowhere holds that solatium is part of market value nor holds that additional amount under Section 23(1A) is payable on the solatium amount. Be that as it may. More importantly, what requires to be noticed is that the entire consideration and analysis in that decision was with reference to the question whether solatium, additional amount and interest are part of 'enhanced compensation' for the purposes of Section 45(5)(b) of the Income Tax Act,1961. The observations therein should be understood in the context of the provisions of the Income Tax Act. For example the decision also holds that interest payable under Section 28 of the Act is 'enhanced compensation' for the purposes of Section 45(5)(b) of Income Tax Act, which if taken as the interpretation with reference to

the Land Acquisition Act, 1894, will be contrary to the constitution bench decision in *Sunder* (supra). We may also note that the decision clearly holds that additional amount is awardable only against the market value and not solatium:

> "It is clear from reading of Sections 23(1A), 23(2) as also Section 28 of the 1894 Act that additional benefits are available on the market value of the acquired lands under Section 23(1A) and 23(2) whereas Section 28 is available in respect of the entire compensation."

9. In view of the above, the appeal is allowed, the orders of the High Court and the Executing Court, in so far as they hold that additional amount under Section 23(1A) is payable on solatium, are set aside. It is declared that additional amount under Section 23(1A) is awardable only on the market value determined under the first factor of Section 23(1) of the Act and cannot be calculated on the solatium payable under Section 23(2) of the Act.

D.G. Appeal allowed.

BACHNI DEVI AND ANR.

v.

STATE OF HARYANA THROUGH SECRETARY, HOME DEPARTMENT

(Criminal Appeal No. 831 of 2006)

FEBRUARY 8, 2011

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

Penal Code, 1860 – s.304B:

Offence of Dowry death – Ingredients required to be proved by the prosecution – Stated.

Dowry – Meaning of – Held: For purposes of s.304B IPC, 'dowry' has the same meaning as in s.2 of the Dowry Prohibition Act – Mere demand for 'dowry' before marriage, at the time of marriage or any time after the marriage is an offence – The term 'dowry' is defined comprehensively to include properties of all sorts as it takes within its fold 'any property or valuable security' given or agreed to be given in connection with marriage either directly or indirectly – If a demand for property or valuable security, directly or indirectly, has a nexus with marriage, such demand would constitute 'demand for dowry'; the cause or reason for such demand being immaterial – Dowry Prohibition Act, 1961 – s.2

Dowry death – Wife of appellant no.2 died within 3 months of her marriage – She was found dead by hanging from a ceiling fan in the appellants' house – Allegation that deceased was subjected to cruelty and harassment by appellant no.1 (mother-in-law) and appellant no.2 in connection with demand of motorcycle – Conviction of the appellants u/s.304-B IPC – Challenge to – Held: That the deceased was subjected to harassment and ill-treatment by the appellants after PW-8 (father of the deceased) refused to accede to their demand

for purchase of motorcycle is established by the evidence of PW-8 and PW-9 – Then there is evidence of PW-10 that PW-8 had called him and DW-1 to his house where appellant no.1 had made demand of motorcycle – PW-10 stated that he sought to reason to appellant no.1 about inability of PW-8 to give motorcycle at which appellant no.1 got angry and warned that the deceased would not be allowed to stay in her matrimonial home – It was established that unlawful demand of motorcycle was made by the appellants from PW-8 and the deceased was harassed on account of his failure to provide the motorcycle and that led the deceased to commit suicide by hanging – The demand of motorcycle by appellant no.1 from PW-8 was for the appellant no.2 and when PW-8 showed his inability to meet that demand, the appellant no.2 started harassing and ill-treating the deceased – In this view of the matter, it cannot be said that there was no demand by the appellant no.2 – No merit in the contention of the appellants that the demand of motorcycle does not qualify as a 'demand for dowry' – All the essential ingredients to bring home the guilt under s.304B IPC were established against the appellants by the prosecution evidence –Presumption under s.113B of the Evidence Act was fully attracted – The appellants failed to rebut such presumption – Evidence Act, 1872 – s.113B.

Dowry Prohibition Act, 1961 – Enactment of – Purpose stated.

The wife of appellant no.2/(A-2) died within 3 months of her marriage. She was found dead by hanging from a ceiling fan in the appellants' house. PW-8, the father of the deceased, is a Rikshawpuller.

The trial court held that the prosecution was able to establish that the death was within seven years of her marriage and otherwise than under normal circumstances; that before her death, the deceased was

subjected to cruelty and harassment by appellant no.1/(A-1) (mother-in-law) and appellant no.2 in connection with the demand of motorcycle and that the appellants were guilty of causing dowry death. The appellants were convicted by the trial court under Section 304-B IPC and sentenced to suffer seven years' rigorous imprisonment. The High Court affirmed the conviction and sentence.

In the instant appeal, the appellants submitted that it was highly improbable that a demand for a motorcycle would be made from PW-8 knowing well that it could not be fulfilled by him as he was a Rikshawpuller earning Rs. 20/- per day. The appellants contended that the evidence let in by the prosecution was not trustworthy at all and the demand for dowry is not established. They submitted that the only independent witness of demand was DW-1 but he was not examined by the prosecution, though, DW-1 was examined in defence and he has denied that any demand was made by appellant no.1 in his presence. The appellants argued that there was no evidence of demand of motorcycle by the appellant no.2 and further that in any case the demand of motorcycle for the purposes of the business does not qualify as a 'demand for dowry' and, therefore, no offence under Section 304-B IPC can be said to have been made out against the appellants.

Dismissing the appeal, the Court

HELD:1.1. Section 304B was inserted in IPC with effect from November 19, 1986 by the Dowry Prohibition (Amendment) Act, 1986. Thereby substantive offence relating to 'dowry death' was introduced in the IPC. For making out an offence of 'dowry death' under Section 304B, the following ingredients have to be proved by the prosecution:(a) death of a woman must have been caused by anyburns or bodily injury or her death must have occurred otherwise than under normal circumstances; (b)such death must have occurred

within seven years of her marriage;(c) soon before her death, she must have been subjected to cruelty or harassment by her husband or any relative of her husband; and (d) such cruelty or harassment must be in connection with the demand for dowry. Pertinently, for the purposes of Section 304B IPC, 'dowry' has the same meaning as in Section 2 of the Dowry Prohibition Act, 1961. [Paras 11, 12, 13 and 14] [635-E-F; 636-B-F]

1.2. The Dowry Prohibition Act, 1961 was enacted to prohibit the giving or taking of 'dowry' and for the protection of married woman against cruelty and violence in the matrimonial home by the husband and in-laws. The mere demand for 'dowry' before marriage, at the time of marriage or any time after the marriage is an offence. The definition of 'dowry' show that the term is defined comprehensively to include properties of all sorts as it takes within its fold 'any property or valuable security' given or agreed to be given in connection with marriage either directly or indirectly. If a demand for property or valuable security, directly or indirectly, has a nexus with marriage, such demand would constitute 'demand for dowry'; the cause or reason for such demand being immaterial. [Paras 15, 17] [637-D-F; 640-C-D]

Appasaheb & Anr. v. State of Maharashtra. **(2007) 9 SCC 721;** *S. Gopal Reddy* v. *State of A.P.* **(1996) 4 SCC 596;** *Panjiyar @ Kamlesh Panjiyar* v. *State of Bihar* **(2005) 2 SCC 388 – referred to.**

2. In the facts of the case, it is clearly established that the deceased died otherwise than under normal circumstances. There is no dispute of fact that death occurred within seven years of her marriage. That the deceased was subjected to harassment and ill-treatment by the appellants after PW-8 refused to accede to their demand for purchase of motorcycle is established by the evidence of PW-8 and PW-9. Then there is evidence of

PW-10 that PW-8 had called him and DW-1 to his house where A-1 had made demand of motorcycle. PW-10 stated that he sought to reason to A-1 about inability of PW-8 to give motorcycle at which A-1 got angry and warned that the deceased would not be allowed to stay in her matrimonial home. It is true that the appellants produced DW-1 in defence and he did state in his examination-in-chief that he did not meet A-1 at the house of PW-8 but in cross-examination when he was confronted with his statement under Section 161 Cr.P.C. where it was recorded that he and PW-10 had gone to the house of PW-8 and both of them (PW-10 and DW-1) counselled A-1 to desist from demanding motorcycle but she stuck to her demand, DW-1 had no explanation to offer. The evidence of DW-1 is, therefore, liable to be discarded. In light of the evidence let in by the prosecution, the trial court cannot be said to have erred in holding that it was established that unlawful demand of motorcycle was made by A-1 and A-2 from PW-8 and the decesded was harassed on account of his failure to provide the motorcycle and that led the deceased to commit suicide by hanging. Pertinently, the demand of motorcycle by A-1 from PW-8 was for A-2 and when PW-8 showed his inability to meet that demand, A-2 started harassing and ill-treating the deceased. In this view of the matter, it cannot be said that there was no demand by A-2. [Para 18] [640-D-H; 641-A-C]

3. The High Court has also examined the matter thoroughly and reached the finding that A-1 and A-2 had raised a demand for purchase of motorcycle from PW-8; this demand was made within two months of the marriage and was a demand towards 'dowry' and when this demand was not met, the deceased was maltreated and harassed continuously which led her to take extreme step of finishing her life. The above view of the High Court is acceptable. There is no merit in the contention of the

appellants that the demand of motorcycle does not qualify as a 'demand for dowry'. All the essential ingredients to bring home the guilt under Section 304B IPC are established against the appellants by the prosecution evidence. As a matter of law, the presumption under Section 113B of the Evidence Act, 1872 is fully attracted in the facts and circumstances of the present case. The appellants have failed to rebut the presumption under Section 113B. [Para 19] [641-D-F]

Case Law Reference:

(2007) 9 SCC 721	**referred to**	**Para 9**
(1996) 4 SCC 596	**referred to**	**Para 15**
(2005) 2 SCC 388	**referred to**	**Para 16**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 831 of 2006.

From the Judgment & Order date 16.12.2004 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 113-S.B. of 1991.

V. Madhukar, Paritosh Anil (for Hemantikar Wahi) for the Appellants.

Kamal Mohan Gupta, Gaurav Teotia, Sanjeev Kumar for the Respondent.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. The mother (A-1) and son (A-2) are in appeal as both of them have been convicted by the Additional Sessions Judge (I), Kurukshetra for the offence punishable under Section 304B of the Indian Penal Code (IPC) and sentenced to suffer rigorous imprisonment of seven years. The High Court of Punjab and Haryana affirmed their conviction and sentence and did not interfere with the judgment of the trial court.

2. Kanta died within 3 months of her marriage. On August 11, 1990, she was found dead by hanging from a ceiling fan in the appellants' house. Kanta hailed from a poor family. Her father, Pale Ram (PW-8) is a Rikshawpuller. A-2 and Kanta got married on May 12, 1990. About 20 days prior to Kanta's death, A-1 had gone to the house of PW-8 and told him that her son A-2 wanted to start milk vending business and for that a motorcycle is needed for carrying the milk to the city. She demanded a motorcycle for A-2 to be purchased by PW-8. PW-8 did not accede to her demand and told A-1 that he was not in a position to purchase motorcycle as demanded by her. A-1 warned PW-8 that if he failed to provide a motorcycle to A-2, then Kanta would not be allowed to stay in the matrimonial home. PW-8 called Amar Singh (PW-10) and Mam Chand (DW-1) to his house and told them about the demand made by A-1. A-1 reiterated the demand and warning in their presence and left the house of PW-8.

3. This was the beginning of Kanta's end. A-1 and A-2 started harassing and ill-treating her. Some five days prior to Rakshabandhan, A-2 brought Kanta to the house of PW-8. A-2 left Kanta there and returned to his house the same day. Kanta told PW-8 about harassment and ill-treatment being meted out to her by A-1 and A-2. Three days thereafter, A-2 went to the house of PW-8 and told him that he had come to take Kanta with him as there was engagement ceremony of his brother. A-2 assured PW-8 that he would bring Kanta on the day of Rakshabandhan. Kanta, however, was reluctant in going with A-2 as she knew that there was no engagement ceremony at her in-laws place. She had apprehension that if she went to her matrimonial home, her life would not be spared. PW-8 persuaded his daughter to go along with A-2 as she has to spend her entire life with him.

4. On the insistence of her father, Kanta went to her matrimonial home along with A-2. On the day of Rakshabandhan, PW-8 and the members of the family waited

for Kanta for whole day but she did not come. After about eight days i.e. on August 12, 1990, PW-8 was informed by some villager that Kanta was dead. PW-8 then went to the house of A-1 and A-2 along with few persons and saw the dead body of Kanta lying in a room. It appeared to PW-8 that Kanta's death had occurred some 2/3 days earlier.

5. Kanta's death having taken place in unnatural circumstances, PW-8 reported the matter to the police immediately and a First Information Report (FIR) was registered on that very day (August 12, 1990) at Police Station Ladwa under Section 304B IPC. Karnail Chand (PW-11) started investigation, visited the spot and also sent the dead body of Kanta for post-mortem. Dr. P.K. Goel (PW-1) conducted postmortem on the dead body of Kanta. Upon completion of investigation and after committal, A-1 and A-2 were sent up for trial under Section 304-B IPC.

6. Besides PW-1, PW-8, PW-10 and PW-11, the prosecution examined seven other witnesses including the deceased's mother Premo (PW-9). In defence, the accused examined DW-1 and Amarjit Kaur (DW-2).

7. The trial court vide its judgment dated March 6, 1991 held that the prosecution has been able to establish that the death of Kanta was within seven years of her marriage and otherwise than under normal circumstances; that before her death she was subjected to cruelty and harassment by A-1 and A-2 in connection with the demand of motorcycle and that A-1 and A-2 were guilty of causing dowry death. A-1 and A-2 were convicted under Section 304-B IPC accordingly and sentenced to suffer seven years' rigorous imprisonment as noticed above. The High Court in the appeal preferred by the appellants concurred with trial court and dismissed their appeal.

8. Mr. V. Madhukar, learned counsel for the appellants submitted that it was highly improbable that a demand for a motorcycle would be made from PW-8 knowing well that it

could not be fulfilled by him as he was a Rikshawpuller earning Rs. 20/- per day. He argued that the evidence let in by the prosecution was not trustworthy at all and the demand for dowry is not established. He would submit that the only independent witness of demand was DW-1 but he was not examined by the prosecution. However, DW-1 was examined in defence and he has denied that any demand was made by A-1 in his presence.

9. Learned counsel for the appellants argued that there was no evidence of demand of motorcycle by A-2. He further argued that in any case the demand of motorcycle for the purposes of the business does not qualify as a 'demand for dowry' and, therefore, no offence under Section 304-B IPC can be said to have been made out against the appellants. In this regard, he relied upon a decision of this Court in *Appasaheb & Anr.* v. *State of Maharashtra*[1].

10. On the other hand, Mr. Kamal Mohan Gupta, learned counsel for the State of Haryana, supported the judgment of the High Court.

11. Section 304B was inserted in IPC with effect from November 19, 1986 by the Dowry Prohibition (Amendment) Act, 1986 (for short, '(Amendment) Act, 1986'). Thereby substantive offence relating to 'dowry death' was introduced in the IPC. Section 304-B IPC reads as follows :

> "304B. Dowry death.—(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.

1. (2007) 9 SCC 721.

> *Explanation*.- For the purposes of this sub- section," dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).
>
> (2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life."

12. For making out an offence of 'dowry death' under Section 304B, the following ingredients have to be proved by the prosecution:

(a) death of a woman must have been caused by any burns or bodily injury or her death must have occurred otherwise than under normal circumstances;

(b) such death must have occurred within seven years of her marriage;

(c) soon before her death, she must have been subjected to cruelty or harassment by her husband or any relative of her husband; and

(d) such cruelty or harassment must be in connection with the demand for dowry.

13. Pertinently, for the purposes of Section 304B IPC, 'dowry' has the same meaning as in Section 2 of the Dowry Prohibition Act, 1961 (for short, '1961 Act').

14. Section 2 of the 1961 Act defines 'Dowry' as follows:

"2. Definition of `dowry'.- "Dowry" means any property or valuable security given or agreed to be given either directly or indirectly—

(a) By one party to a marriage to the other party to the marriage; or

(b) By the parent of either party to a marriage or by any

other person to either party to the marriage or to any other person,

at or before or any time after the marriage in connection with the marriage of the said parties, but does not include dower or *mahr* in the case of persons to whom the Muslim Personal Law (Shariat) applies.

Explanation I—……(Omitted).

Explanation II—The expression "valuable security" has the same meaning as in section 30 of the Indian Penal Code (45 of 1860)."

15. 1961 Act was enacted to prohibit the giving or taking of 'dowry' and for the protection of married woman against cruelty and violence in the matrimonial home by the husband and in-laws. The mere demand for 'dowry' before marriage, at the time of marriage or any time after the marriage is an offence. 1961 Act has been amended by the Parliament on more than one occasion and by the (Amendment) Act, 1986, Parliament brought in stringent provisions and provided for offence relating to 'dowry death'. The amendments became imperative as the dowry deaths continued to increase to disturbing proportions and the existing provisions in 1961 Act were found inadequate in dealing with the problems of dowry deaths. The definition of 'dowry' reproduced above would show that the term is defined comprehensively to include properties of all sorts as it takes within its fold 'any property or valuable security' given or agreed to be given in connection with marriage either directly or indirectly. In *S. Gopal Reddy* v. *State of A.P.*[2], this Court stated as follows :

"**9.** The definition of the term 'dowry' under Section 2 of the Act shows that any property or valuable security given or "agreed to be given" either directly or indirectly by one party to the marriage to the other party to the marriage "*at*

2. (1996) 4 SCC 596.

or before or after the marriage" as a "*consideration for the marriage* of the said parties" would become 'dowry' punishable under the Act. Property or valuable security so as to constitute 'dowry' within the meaning of the Act must therefore be given or demanded "as consideration for the marriage".

……

11. The definition of the expression 'dowry' contained in Section 2 of the Act cannot be confined merely to the 'demand' of money, property or valuable security "made at or after the performance of marriage" as is urged by Mr Rao. The legislature has in its wisdom while providing for the definition of 'dowry' emphasised that any money, property or valuable security given, *as a consideration for marriage, "before, at or after*" the marriage would be covered by the expression 'dowry' and this definition as contained in Section 2 has to be read wherever the expression 'dowry' occurs in the Act. Meaning of the expression 'dowry' as commonly used and understood is different than the peculiar definition thereof under the Act. Under Section 4 of the Act, mere demand of 'dowry' is sufficient to bring home the offence to an accused. Thus, any 'demand' of money, property or valuable security made from the bride or her parents or other relatives by the bridegroom or his parents or other relatives or vice versa would fall within the mischief of 'dowry' under the Act where such demand is not properly referable to any legally recognised claim and is *relatable only to the consideration of marriage*. Marriage in this context would include a proposed marriage also more particularly where the non-fulfilment of the "demand of dowry" leads to the ugly consequence of the marriage not taking place at all. The expression 'dowry' under the Act must be interpreted in the sense which the statute wishes to attribute to it……The definition given in the statute is the

determinative factor. The Act is a piece of social legislation which aims to check the growing menace of the social evil of dowry and it makes punishable not only the actual receiving of dowry but also the very demand of dowry made *before or at the time or after the marriage* where such demand *is referable to the consideration of marriage*. Dowry as a quid pro quo for marriage is prohibited ……. .".

16. While dealing with the term 'dowry' in Section 304B IPC, this Court in the case of *Kamesh Panjiyar @ Kamlesh Panjiyar* v. *State of Bihar*[3] held as under :

"14**.** The word "dowry" in Section 304-B IPC has to be understood as it is defined in Section 2 of the Dowry Act. Thus, there are three occasions related to dowry. One is before the marriage, second is at the time of marriage and the third "at any time" after the marriage. The third occasion may appear to be unending period. But the crucial words are "in connection with the marriage of the said parties". As was observed in the said case "suicidal death" of a married woman within seven years of her marriage is covered by the expression "death of a woman is caused ... or occurs otherwise than under normal circumstances" as expressed in Section 304-B IPC."

17. Learned counsel for the appellants heavily relied upon the following observations made by this Court in the case of *Appasaheb1:*

"A demand for money on account of some financial stringency or for meeting some urgent domestic expenses or for purchasing manure cannot be termed as a demand for dowry as the said word is normally understood".

The above observations of this Court must be understood in

3. (2005) 2 SCC 388.

the context of the case. That was a case wherein the prosecution evidence did not show 'any demand for dowry' as defined in Section 2 of the 1961 Act. The allegation to the effect that the deceased was asked to bring money for domestic expenses and for purchasing manure in the facts of the case was not found sufficient to be covered by the 'demand for dowry'. *Appasaheb1* cannot be read to be laying down an absolute proposition that a demand for money or some property or valuable security on account of some business or financial requirement could not be termed as 'demand for dowry'. It was in the facts of the case that it was held so. If a demand for property or valuable security, directly or indirectly, has a nexus with marriage, in our opinion, such demand would constitute 'demand for dowry'; the cause or reason for such demand being immaterial.

18. In the backdrop of the above legal position, if we look at the facts of the case, it is clearly established that Kanta died otherwise than under normal circumstances. There is no dispute of fact that death of Kanta occurred within seven years of her marriage. That Kanta was subjected to harassment and ill-treatment by A-1 and A-2 after PW-8 refused to accede to their demand for purchase of motorcycle is established by the evidence of PW-8 and PW-9. Then there is evidence of PW-10 that PW-8 had called him and DW-1 to his house where A-1 had made demand of motorcycle. PW-10 stated that he sought to reason to A-1 about inability of PW-8 to give motorcycle at which A-1 got angry and warned that Kanta would not be allowed to stay in her matrimonial home. It is true that the appellants produced DW-1 in defence and he did state in his examination-in-chief that he did not meet A-1 at the house of PW-8 but in cross-examination when he was confronted with his statement under Section 161 Cr.P.C. (portion A to A) where it was recorded that he and PW-10 had gone to the house of PW-8 and both of them (PW-10 and DW-1) counselled A-1 to desist from demanding motorcycle but she stuck to her demand, DW-1 had no explanation to offer. The evidence of

DW-1 is, therefore, liable to be discarded. In light of the evidence let in by the prosecution, the trial court cannot be said to have erred in holding that it was established that unlawful demand of motorcycle was made by A-1 and A-2 from PW-8 and Kanta was harassed on account of his failure to provide the motorcycle and that led Kanta to commit suicide by hanging. Pertinently, the demand of motorcycle by A-1 from PW-8 was for A-2 and when PW-8 showed his inability to meet that demand, A-2 started harassing and ill-treating Kanta. In this view of the matter, it cannot be said that there was no demand by A-2.

19. The High Court has also examined the matter thoroughly and reached the finding that A-1 and A-2 had raised a demand for purchase of motorcycle from PW-8; this demand was made within two months of the marriage and was a demand towards 'dowry' and when this demand was not met, Kanta was maltreated and harassed continuously which led her to take extreme step of finishing her life. We agree with the above view of the High Court. There is no merit in the contention of the counsel for the appellants that the demand of motorcycle does not qualify as a 'demand for dowry'. All the essential ingredients to bring home the guilt under Section 304B IPC are established against the appellants by the prosecution evidence. As a matter of law, the presumption under Section 113B of the Evidence Act, 1872 is fully attracted in the facts and circumstances of the present case. The appellants have failed to rebut the presumption under Section 113B.

20. For the foregoing reasons, we find no merit in the appeal and it is dismissed accordingly. Two months' time is given to A-1 to surrender for undergoing the sentence awarded to her.

B.B.B. Appeal dismissed.

BHOLA SINGH

v.

STATE OF PUNJAB

(Criminal Appeal No. 448 of 2006)

FEBRUARY 8, 2011

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

Narcotic Drugs and Psychotropic Substances Act, 1985: ss.25, 35 – Applicability of – Contraband goods recovered from the truck co-owned by the appellant – While purchasing the truck, the appellant had given his residential address in Rajasthan whereas he was resident of Haryana – High Court drew presumption against the appellant u/s.35 to hold that by giving a fake address, his culpability was writ large on the facts of the case – Conviction of appellant us/ss.25 and 35 – Held: s.25 would not be applicable as there was no evidence to indicate that the appellant had knowingly permitted the use of the vehicle for any improper purpose – s.35 also presupposes that the culpable mental state of an accused has to be proved as a fact beyond reasonable doubt and not merely when its existence is established by a preponderance of probabilities – Burden to prove that the appellant had knowledge that the vehicle he owned was being used for transporting narcotics lay on the prosecution and it is only after the evidence proved beyond reasonable doubt, that he had knowledge, would presumption u/s.35 arise – In the absence of any evidence with regard to the mental state of the appellant, no presumption u/s.35 can be drawn – The only evidence which the prosecution sought to rely on was the appellant's conduct in giving his residential address in Rajasthan although he was a resident of Haryana while registering the offending truck cannot fasten him, with the knowledge of its misuse by the driver and others – Judgments

of the courts below set aside and acquittal ordered.

Noor Aga vs. State of Punjab and Anr. **(2008) 16 SCC 417 – relied on.**

Case law reference:

(2008) 16 SCC 417 relied on Para 10

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 448 of 2006.

From the Judgment & Order dated 5.7.2004 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 292-DB, 579-DB, and 580-DB of 2003.

Triloki Nath Razdan, Smirti Razdan, P.P.N. Razdan for the Appellant.

Kuldeep Singh, K.K. Pandey, H.S. Sandhu for the Respondent.

The following order of the Court was delivered

O R D E R

We have heard the learned counsel for the State.

This appeal by way of special leave arises out of the following facts:

On 22nd November, 1999 PW.6-Sub-Inspector Manohar Singh along with other police officials was present on the bridge over the seepage drain near village Akkanwali. One Janak Raj, was also along with them. At about 7.00 a.m. Truck No. RJ-31 G-0859 driven by accused Bansi Lal came from the side of village Akkanwali. The truck was stopped on the signal of Sub-Inspector Manohar Singh and on enquiry the Driver disclosed his name as Bansi Lal son of Neki Ram, resident of Mira Khan

Ki Dhani, Village Maur Bingar, Police Station, Fatehabad. Three other persons namely Nirbhai Singh, Gora Singh and Gurmit Singh were found sitting on the bags which were lying in the body of the truck. It also came to the notice of the Sub-Inspector that Gora Singh and Gurmit Singh were the brothers-in-law of Nirbhai Singh.

An offer under Section 50 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter called the 'Act') was made to the accused. They opted to be searched in the presence of a Gazetted Officer. DSP Baljit Singh (PW.1) was then requested to reach the spot. The truck was thereafter searched and 16 bags of poppy husk each containing 30 kg. were found in the truck. Samples etc. were taken and sent to the laboratory for analysis which opined that the contraband was indeed poppy husk. It also transpired during the investigation that Bhola Singh, the appellant before us, was a co-owner of the truck. He along with others was accordingly charged for an offence punishable under Section 15 of the Act whereas Bhola Singh and Bansi Lal were also charged under Section 25 thereof. The Trial Court on a consideration of the evidence convicted the accused and sentenced them to undergo 12 years RI each and a fine of rupees one lakh and in default of payment, RI for two years.

The matter was thereafter taken in appeal by the accused. The High Court dismissed the appeal and it is the admitted case that the SLP filed by the accused other than the appellant herein has also been dismissed by this Court.

We have gone through the judgment of the Trial Court and High Court insofar as Bhola Singh is concerned. We see that he was not present at the spot and the allegation against him is that he was the co-owner of the truck and that while purchasing the truck he had given his residential address in Rajasthan whereas he was a resident of Haryana. The High Court has accordingly drawn a presumption under Section 35

of the Act against him to hold that by giving a fake arrest his culpability was writ large on the facts of the case.

Mr. T.N. Razdan, the learned counsel for the appellant has raised only one argument before us during the course of the hearing. He has pointed out that there was no evidence that the appellant had been involved in the smuggling of contraband and even if the prosecution story that he was the co-owner of the truck and had given a wrong address while purchasing the truck was correct, these factors could not fasten him with any liability under Sections 15 and 25 of the Act. He has also submitted that the "culpable mental state" and the conditions for the applicability of Section 35 of the Act were not made out.

Mr. Kuldip Singh, the learned counsel for the State of Punjab, has however supported the judgment of the Trial Court. We however repeatedly asked the learned counsel as to whether there was any evidence as to the involvement of the appellant, other than that he was the co-owner of the truck and that he had given a wrong address. The learned counsel fairly stated that there was no other evidence against the appellant.

We have considered the arguments advanced by the learned counsel. We see that Section 25 of the Act would not be applicable in the present case as there is no evidence to indicate that Bhola Singh the appellant had either knowingly permitted the use of the vehicle for any improper purpose. The sine qua non for the applicability of Section 25 of the Act is thus not made out. The High Court has however drawn a presumption against the appellant under Section 35 of the Act. This provision is reproduced below:

"35. Presumption of culpable mental state:-

(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had

no such mental state with respect to the act charged as an offence in that prosecution.

Explanation:-In this section "culpable mental state" includes intention, motive knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.:

While dealing with the question of possession in terms of Section 54 of the Act and the presumption raised under Section 35, this Court in *Noor Aga vs. State of Punjab and Anr.* (2008) 16 SCC 417 while upholding the constitutional validity of Section 35 observed that as this Section imposed a heavy reverse burden on an accused, the condition for the applicability of this and other related sections would have to be spelt out on facts and it was only after the prosecution had discharged the initial burden to prove the foundational facts that Section 35 would come in to play. Applying the facts of the present case to the cited one, it is apparent that the initial burden to prove that the appellant had the knowledge that the vehicle he owned was being used for transporting Narcotics still lay on the prosecution, as would be clear from the word "knowingly", and it was only after the evidence proved beyond reasonable doubt that he had the knowledge would the presumption under Section 35 arise. Section 35 also presupposes that the culpable mental state of an accused has to be proved as a fact beyond reasonable doubt and not merely when its existence is established by a preponderance of probabilities. We are of the opinion that in the absence of any evidence with regard to the mental state of the appellant no presumption under Section 35 can be drawn. The only evidence which the prosecution seeks to rely on is the appellant's conduct in giving his residential address in Rajasthan although he was a resident of

Fatehabad in Haryana while registering the offending truck cannot by any stretch of imagination fasten him, with the knowledge of its misuse by the driver and others. We accordingly allow the appeal, set aside the judgments of the Courts below and order the appellant's acquittal. His bail bonds shall stand discharged.

D.G. Appeal allowed.

PARIMAL

v.

VEENA @ BHARTI

(Civil Appeal No. 1467 of 2011)

FEBRUARY 8, 2011

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

Code of Civil Procedure, 1908: Order IX Rule 13, second proviso – Ex parte decree, when can be set aside – Held: An ex-parte decree can be set aside if the defendant satisfies the court that summons were not duly served or he was prevented by sufficient cause from appearing when the suit was called for hearing – However, the court shall not set aside the said decree on mere irregularity in the service of summons or in a case where defendant had notice of the date and sufficient time to appear in the court – In order to determine the application under Order IX, Rule 13, the test that has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing and did his best to do so – Sufficient cause is to be judged by reasonable standard of cautious man – In the instant case, trial court passed ex parte decree for divorce in favour of the husband – High Court set aside the ex parte decree without dealing with the issue of service of summons – High Court held that presumption stood rebutted by a bald statement made by the respondent/wife that she was living at different address with her brother – Order of the High Court not sustainable – However, in order to meet the ends of justice, a sum of Rs.10 lakhs awarded to wife as a lump sum amount for maintenance – Compromise/Settlement.

Order XLIII, Rule 2 – Appeal from orders – Power of appellate court to interfere with an ex-parte order – Held: The first appeal is a valuable right and the parties have a right to

be heard both on question of law and on facts – The first appellate court should not disturb and interfere with the valuable rights of the parties which stood crystallised by the trial court's judgment without opening the whole case for re-hearing both on question of facts and law – More so, the appellate court should not modify the decree of the trial court by a cryptic order without taking note of all relevant aspects, otherwise the order of the appellate court would fall short of considerations expected from the first appellate court in view of the provisions of Order XLI, Rule 31 and such judgment and order would be liable to be set aside – The manner in which the language of the second proviso to Order IX, Rule 13 has been couched by the legislature makes it obligatory on the appellate Court not to interfere with an ex-parte decree unless it meets the statutory requirement.

Evidence Act, 1872:

s.114, Illustration (f) – Presumption of service – Registered letter – Held: There is a presumption of service of registered letter – However, the presumption is rebuttable on a consideration of evidence of impeccable character – General Clauses Act, 1897 – s.27.

ss.101, 103 – Burden of proof of facts – Held: Rests on the party who substantially asserts it and not on the party who denies it – Burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any special law that the proof of that fact shall lie on any particular person.

Practice and procedure: Technicalities of the law should not prevent the court from doing substantial justice and doing away the illegality perpetuated on the basis of the judgment impugned before it – Code of Civil Procedure, 1908.

Words and phrases: "Sufficient", "Sufficient Cause" – Meaning of.

The appellant-husband filed a divorce petition against the respondent-wife. A notice of petition was sent to her by court which she allegedly refused to accept. The notice was sent again on 7.8.1989, which the respondent again refused to accept. The notice sent by registered AD was also returned to the court with report of refusal. Under the court's order, summons were affixed at the house of the respondent, but she did not appear. She was also served through public notice published in a newspaper, which was also sent to her. Thereafter, on 08.11.1989, the respondent was proceeded *ex parte* and *ex parte* judgment was passed in favour of the appellant and the marriage between the parties was dissolved.

Two years after the passing of the decree of divorce, the appellant got married and became father of two sons from the said marriage.

The respondent, after the expiry of 4 years of the passing of the *ex-parte* decree of divorce filed an application under Order IX Rule 13, CPC for setting aside the same on the grounds that *ex-parte* decree had been obtained by fraud and collusion with the postman etc., to get the report of refusal and that she had not been served notice even by substituted service and also that even subsequent to obtaining decree of divorce, the appellant did not disclose the fact of grant of divorce to her during the proceedings of maintenance under Section 125 Cr.P.C. The said application was accompanied by an application under Section 5 of the Limitation Act, 1963, for condonation of delay.

The trial court dismissed the applications. The High Court set aside the order of the trial court. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

HELD: 1.1. An *ex-parte* decree against a defendant has to be set aside if the party satisfies the court that summons had not been duly served or he was prevented by sufficient cause from appearing when the suit was called on for hearing. However, the court shall not set aside the said decree on mere irregularity in the service of summons or in a case where the defendant had notice of the date and sufficient time to appear in the court. It is not permissible for the court to allow the application in utter disregard of the terms and conditions incorporated in the second proviso to Order IX Rule 13, CPC. "Sufficient Cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a cautious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously. [Paras 8 and 9] [662-A-G]

Ramlal & Ors. v. Rewa Coalfields Ltd. **AIR 1962 SC 361;** *Sarpanch, Lonand Grampanchayat v. Ramgiri Gosavi & Anr.* **AIR 1968 SC 222;** *Surinder Singh Sibia v. Vijay Kumar Sood* **AIR 1992 SC 1540;** *Oriental Aroma Chemical Industries Limited v. Gujarat Industrial Development Corporation & Another* **(2010) 5 SCC 459);***Arjun Singh v. Mohindra Kumar*

& Ors. **AIR 1964 SC 993;** *Brij Indar Singh v. Lala Kanshi Ram & Ors.* **AIR 1917 P.C. 156;** *Manindra Land and Building Corporation Ltd. v. Bhutnath Banerjee & Ors.* **AIR 1964 SC 1336;** *Mata Din v. A. Narayanan* **AIR 1970 SC 1953 – relied on.**

1.2. While deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and the technicalities of the law should not prevent the court from doing substantial justice and doing away the illegality perpetuated on the basis of the judgment impugned before it. [Para 11] [663-C-E]

State of Bihar & Ors. v. Kameshwar Prasad Singh & Anr. **AIR 2000 SC 2306;** *Madanlal v. Shyamlal* **AIR 2002 SC 100;** *Davinder Pal Sehgal & Anr. v. M/s. Partap Steel Rolling Mills (P) Ltd. & Ors.* **AIR 2002 SC 451;** *Ram Nath Sao alias Ram Nath Sao & Ors. v. Gobardhan Sao & Ors.* **AIR 2002 SC 1201;** *Kaushalya Devi v. Prem Chand & Anr*. **(2005) 10 SCC 127;** *Srei International Finance Ltd. v. Fair growth Financial Services Ltd. & Anr.* **(2005) 13 SCC 95;** *Reena Sadh v. Anjana Enterprises* **AIR 2008 SC 2054) – relied on.**

1.3. In order to determine the application under Order IX, Rule 13 CPC, the test that has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Therefore, the applicant must approach the court with a reasonable defence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a strait-jacket formula of universal application. [Para 12] [663-F-H]

2.1. In view of the provisions of Section 114 Illustration (f) of the Evidence Act, 1872 and Section 27 of the General Clauses Act, 1897 there is a presumption that the addressee has received the letter sent by registered post. However, the presumption is rebuttable on a consideration of evidence of impeccable character. The provisions of Section 101 of the Evidence Act provide that the burden of proof of the facts rests on the party who substantially asserts it and not on the party who denies it. In fact, burden of proof means that a party has to prove an allegation before he is entitled to a judgment in his favour. Section 103 provides that burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any special law that the proof of that fact shall lie on any particular person. The provision of Section 103 amplifies the general rule of Section 101 that the burden of proof lies on the person who asserts the affirmative of the facts in issue. The High court did not deal with the issue of service of summons or as to whether there was "sufficient cause" for the wife not to appear before the court at all, nor did it set aside the said findings recorded by the trial court. The High Court held that presumption stood rebutted by a bald statement made by the respondent/wife that she was living at different address with her brother and this was duly supported by her brother who appeared as a witness in the court. The High Court erred in not appreciating the facts in the correct perspective as substituted service is meant to be resorted to serve the notice at the address known to the parties where the party had been residing last. More so, it was nobody's case that respondent/wife made any attempt to establish that there had been a fraud or collusion between the appellant and the postman. Not a single document was summoned from the post office. No attempt was made by the respondent/wife to examine the postman. It is nobody's case that the "National

Herald" daily newspaper published from Delhi did not have a wide circulation in Delhi or in the area where the respondent/wife was residing with her brother. In such a fact-situation, the impugned order of the High Court was liable to be set aside. [Paras 13,15, 17, 18 and 19] [664-B-C; G-H; 665-A-B; 666-G-H; 667-A-C]

Greater Mohali Area Development Authority & Ors. v. Manju Jain & Ors. **AIR 2010 SC 3817;** *Dr. Sunil Kumar Sambhudayal Gupta & Ors. v. State of Maharashtra,* **JT 2010 (12) SC 287;** *Gujarat Electricity Board & Anr. v. Atmaram Sungomal Poshani* **AIR 1989 SC 1433** ***and*** *Rabindra Singh v. Financial Commissioner, Cooperation, Punjab & Ors*. **(2008) 7 SCC 663 – relied on.**

2.2. The appellate court has to decide the appeal preferred under Section 104 CPC following the procedure prescribed under Order XLIII, Rule 2 CPC, which provides that for that purpose, procedure prescribed under Order XLI shall apply, so far as may be, to appeals from orders. Order XLI, Rule 31 CPC provides for a procedure for deciding the appeal. The law requires substantial compliance of the said provisions. The first appellate court being the final court of facts has to formulate the points for its consideration and independently weigh the evidence on the issues which arise for adjudication and record reasons for its decision on the said points. The first appeal is a valuable right and the parties have a right to be heard both on question of law and on facts. [Para 20 and 21] [667-D-G]

Moran Mar Basselios Catholicos & Anr. v. Most Rev. Mar Poulose Athanasius & Ors. **AIR 1954 SC 526;** *Thakur Sukhpal Singh v. Thakur Kalyan Singh & Anr.* **AIR 1963 SC 146;** *Santosh Hazari v. Purshottam Tiwari* **AIR 2001 SC 965;** *Madhukar v. Sangram* **AIR 2001 SC 2171;** *G. Amalorpavam & Ors. v. R.C. Diocese of Madurai & Ors.* **(2006) 3 SCC 224;**

Shiv Kumar Sharma v. Santosh Kumari **(2007) 8 SCC 600;** *Gannmani Anasuya & Ors. v. Parvatini Amarendra Chowdhary & Ors.* **AIR 2007 SC 2380 – relied on.**

2.3. The first appellate court should not disturb and interfere with the valuable rights of the parties which stood crystallised by the trial court's judgment without opening the whole case for re-hearing both on question of facts and law. More so, the appellate court should not modify the decree of the trial court by a cryptic order without taking note of all relevant aspects, otherwise the order of the appellate court would fall short of considerations expected from the first appellate court in view of the provisions of Order XLI, Rule 31 CPC and such judgment and order would be liable to be set aside. In view of the said statutory requirements, the High Court was duty bound to set aside at least the material findings on the issues, in spite of the fact that approach of the court while dealing with such an application under Order IX, Rule 13 CPC would be liberal and elastic rather than narrow and pedantic. However, in case the matter does not fall within the four corners of Order IX, Rule 13 CPC, the court has no jurisdiction to set aside ex-parte decree. The manner in which the language of the second proviso to Order IX, Rule 13 CPC has been couched by the legislature makes it obligatory on the appellate Court not to interfere with an ex-parte decree unless it meets the statutory requirement. The High Court has not set aside the material findings recorded by the trial court in respect of service of summons by process server/registered post and substituted service. The High Court failed to discharge the obligation placed on the first appellate court as none of the relevant aspects have been dealt with in proper perspective. It was not permissible for the High Court to take into consideration the conduct of the appellant subsequent to passing of the ex-parte decree. More so, the High Court did not consider the grounds on

which the trial Court had dismissed the application under Order IX, Rule 13 CPC filed by the respondent/wife. The appeal has been decided in a casual manner. [Paras 22, 23 and 24] [668-G-H; 669-A]

B.V. Nagesh & Anr. v. H.V. Sreenivassa Murthy, **JT (2010) 10 SC 551 – relied on.**

3. In view of the fact that the appellant got married in 1991 and has two major sons, it would not be possible for him to keep the respondent as a wife. A lump sum amount of Rs. 5 lakhs had been offered by the counsel for the appellant to settle the issue. However, the demand by the respondent/wife had been of Rs. 50 lakhs. Considering the income of the appellant as he had furnished the pay scales etc. An award of Rs. 10 lakhs to the wife would meet the ends of justice as a lump sum amount of maintenance for the future. The said amount be paid by the appellant to the respondent in two equal instalments within a period of six months from today. [Para 25] [669-B-E]

Case LAW REFERENCE:

AIR 1962 SC 361	**Relied on**	**Para 9**
AIR 1968 SC 222	**Relied on**	**Para 9**
AIR 1992 SC 1540	**Relied on**	**Para 9**
(2010) 5 SCC 459)	**Relied on**	**Para 9**
AIR 1964 SC 993	**Relied on**	**Para 10**
AIR 1917 P.C. 156	**Relied on**	**Para 10**
AIR 1964 SC 1336	**Relied on**	**Para 10**
AIR 1970 SC 1953	**Relied on**	**Para 10**
AIR 2000 SC 2306	**Relied on**	**Para 11**

AIR 2002 SC 100	**Relied on**	**Para 11**
AIR 2002 SC 451	**Relied on**	**Para 11**
AIR 2002 SC 1201	**Relied on**	**Para 11**
(2005) 10 SCC 127	**Relied on**	**Para 11**
(2005) 13 SCC 95	**Relied on**	**Para 11**
AIR 2008 SC 2054)	**Relied on**	**Para 11**
AIR 2010 SC 3817	**Relied on**	**Para 13**
JT 2010 (12) SC 287	**Relied on**	**Para 13**
AIR 1989 SC 1433	**Relied on**	**Para 14**
(2008) 7 SCC 663)	**Relied on**	**Para 18**
AIR 1954 SC 526	**Relied on**	**Para 21**
AIR 1963 SC 146	**Relied on**	**Para 21**
AIR 2001 SC 965	**Relied on**	**Para 21**
AIR 2001 SC 2171	**Relied on**	**Para 21**
(2006) 3 SCC 224	**Relied on**	**Para 21**
(2007) 8 SCC 600	**Relied on**	**Para 21**
AIR 2007 SC 2380)	**Relied on**	**Para 21**
JT (2010) 10 SC 551)	**Relied on**	**Para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1467 of 2011.

From the Judgment & Order dated 17.7.2007 of the High Court of Delhi at New Delhi in FAO No. 63 of 2002.

Vikrant Yadav, Vishal Malik, Piyush Kant Roy, Gaurav Dhingra, M.C. Dhingra for the Appellant.

Geeta Dhingra, Chander Shekhar Ashri 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 17.7.2007, passed by the High Court of Delhi at New Delhi, in FAO No.63 of 2002, by which the High Court has allowed the application under Order IX Rule 13 of the Code of Civil Procedure, 1908 (hereinafter called CPC), reversing the judgment and order dated 11.12.2001, passed by the Additional District Judge, Delhi.

3. **FACTS**:

(A) Appellant got married to the respondent/wife on 9.12.1986 and out of the said wed lock, a girl was born. The relationship between the parties did not remain cordial. There was acrimony in the marriage on account of various reasons. Thus, the appellant/husband filed a case for divorce on 27.4.1989, under section 13(1)(i-a) and (i-b) of the Hindu Marriage Act, 1955, against the respondent/wife.

(B) Respondent/wife refused to receive the notice of the petition sent to her by the Court on 4.5.1989 vide registered AD cover for the date of hearing on 6.7.1989. Respondent/wife on 28.6.1989 was present at her house when the process server showed the summons to her. She read the same and refused to accept it. Refusal was reported by the process server, which was proved as Ex.OPW1/B.

(C) Again on 7.8.1989, she refused to accept the notice for 8.9.1989, sent by the Court through process server. The Court ordered issuance of fresh notices. One was issued vide ordinary process and the other vide Registered AD cover for 8.9.1989. Registered AD was returned to the Court with report of refusal, as she declined to receive the AD notice. Under the

Court's orders, summons were affixed at the house of the respondent/wife, but she chose not to appear.

(D) She was served through public notice on 6.11.1989 published in the newspaper 'National Herald' which was sent to her address, 3/47, First Floor, Geeta Colony, Delhi. This was placed on record and was not rebutted by the respondent/wife in any manner.

(E) After service vide publication dated 8.11.1989 as well as by affixation, respondent/wife was proceeded ex- parte in the divorce proceedings. Ex-parte judgment was passed by Addl. District Judge, Delhi on 28.11.1989 in favour of the appellant/husband and the marriage between the parties was dissolved.

(F) Two years after the passing of the decree of divorce, on 16.10.1991, the appellant got married and has two sons aged 17 and 18 years respectively from the said marriage.

(G) The respondent, after the expiry of 4 years of the passing of the ex-parte decree of divorce dated 28.11.1989, moved an application dated 17.12.1993 for setting aside the same basically on the grounds that ex-parte decree had been obtained by fraud and collusion with the postman etc., to get the report of refusal and on the ground that she had not been served notice even by substituted service and also on the ground that even subsequent to obtaining decree of divorce the appellant did not disclose the fact of grant of divorce to her during the proceedings of maintenance under Section 125 of the Code of Criminal Procedure, 1973 (hereinafter called Cr.P.C.). The said application under Order IX, Rule 13 CPC was also accompanied by an application under Section 5 of the Indian Limitation Act, 1963, for condonation of delay.

(H) The trial Court examined the issues involved in the application at length and came to the conclusion that respondent/wife miserably failed to establish the grounds taken

by her in the application to set aside the ex-parte decree and dismissed the same vide order dated 11.12.2001.

(I) Being aggrieved, respondent/wife preferred First Appeal No.63 of 2002 before the Delhi High Court which has been allowed vide judgment and order impugned herein. Hence, this appeal.

RIVAL SUBMISSIONS:

4. Shri M.C. Dhingra, Ld. counsel appearing for the appellant has submitted that the service stood completed in terms of statutory provisions of the CPC by the refusal of the respondent to take the summons. Subsequently, the registered post was also not received by her as she refused it. It was only in such circumstances that the trial Court entertained the application of the appellant under Order V, Rule 20 CPC for substituted service. The summons were served by publication in the daily newspaper 'National Herald' published from Delhi which has a very wide circulation and further service of the said newspaper on the respondent/wife by registered post. The High Court committed a grave error by taking into consideration the conduct of the appellant subsequent to the date of decree of divorce which was totally irrelevant and unwarranted for deciding the application under Order IX, Rule 13 CPC. More so, the High Court failed to take note of the hard reality that after two years of the ex-parte decree the appellant got married and now has two major sons from the second wife. Therefore, the appeal deserves to be allowed and the judgment impugned is liable to be set aside.

5. On the contrary, Ms. Geeta Dhingra, Ld. counsel appearing for the respondent/wife has vehemently opposed the appeal, contending that once the respondent/wife made the allegations of fraud and collusion of the appellant with postman etc. as he succeeded in procuring the false report, the burden of proof would be upon the appellant and not upon the respondent/wife to establish that the allegations of fraud or

collusion were false. The conduct of the appellant even subsequent to the date of decree of divorce, i.e. not disclosing this fact to the respondent/wife during the proceedings under Section 125 Cr.P.C., disentitles him from any relief before this court of equity. No interference is required in the matter and the appeal is liable to be dismissed.

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

7. **Order IX, R.13 CPC:**

The aforesaid provisions *read as under:*

"Setting aside decree ex-parte against defendant

In any case in which a decree is passed ex-parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he **satisfies** the Court that the *summons was not duly served,* or *that he was prevented by any sufficient cause from appearing* when the suit was called on for hearing, *the Court shall make an order setting aside the decree* as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit;

xx xx xx

Provided further that *no Court shall set aside* a decree passed ex-parte merely on the ground that there has been an irregularity in the service of summons, *if it is satisfied that the defendant had notice of the date of hearing* and had sufficient time to appear and answer the plaintiff's claim.

xx xx xx"

(Emphasis added)

8. It is evident from the above that an ex-parte decree against a defendant has to be set aside if the party satisfies the Court that *summons had not been duly served* or he *was prevented by sufficient cause* from appearing when the suit was called on for hearing. However, the court shall not set aside the said decree on mere irregularity in the service of summons or in a case where the defendant had notice of the date and sufficient time to appear in the court.

The legislature in its wisdom, made the second proviso, mandatory in nature. Thus, it is not permissible for the court to allow the application in utter disregard of the terms and conditions incorporated in the second proviso herein.

9. "Sufficient Cause" is an expression which has been used in large number of Statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a cautious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously. (Vide: *Ramlal & Ors. v. Rewa Coalfields Ltd.,* AIR 1962 SC 361; *Sarpanch, Lonand Grampanchayat v. Ramgiri Gosavi & Anr.,* AIR 1968 SC 222; *Surinder Singh Sibia v. Vijay Kumar Sood,* AIR 1992 SC 1540; and *Oriental Aroma Chemical Industries Limited v. Gujarat Industrial Development Corporation & Another,* (2010) 5 SCC 459)

10. In *Arjun Singh v. Mohindra Kumar & Ors.,* AIR 1964 SC 993, this Court observed that every good cause is a sufficient cause and must offer an explanation for non-appearance. The only difference between a "good cause" and "sufficient cause" is that the requirement of a good cause is complied with on a lesser degree of proof than that of a "sufficient cause". (See also: *Brij Indar Singh v. Lala Kanshi Ram & Ors.,* AIR 1917 P.C. 156; *Manindra Land and Building Corporation Ltd. v. Bhutnath Banerjee & Ors.,* AIR 1964 SC 1336; and *Mata Din v. A. Narayanan,* AIR 1970 SC 1953).

11. While deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing *substantial justice to all the parties concerned* and that the technicalities of the law should not prevent the court from doing substantial justice and doing away the illegality perpetuated on the basis of the judgment impugned before it. (Vide: *State of Bihar & Ors. v. Kameshwar Prasad Singh & Anr.,* AIR 2000 SC 2306; *Madanlal v. Shyamlal,* AIR 2002 SC 100; *Davinder Pal Sehgal & Anr. v. M/s. Partap Steel Rolling Mills (P) Ltd. & Ors.,* AIR 2002 SC 451; *Ram Nath Sao alias Ram Nath Sao & Ors. v. Gobardhan Sao & Ors.,* AIR 2002 SC 1201; *Kaushalya Devi v. Prem Chand & Anr.* (2005) 10 SCC 127; *Srei International Finance Ltd., v. Fair growth Financial Services Ltd. & Anr.,* (2005) 13 SCC 95; and *Reena Sadh v. Anjana Enterprises,* AIR 2008 SC 2054).

12. In order to determine the application under Order IX, Rule 13 CPC, the test has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Therefore, the applicant must approach the court with a reasonable defence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a strait-jacket formula of universal application.

PRESUMPTION OF SERVICE BY REGISTERED POST & BURDEN OF PROOF:

13. This Court after considering large number of its earlier judgments in *Greater Mohali Area Development Authority & Ors. v. Manju Jain & Ors.,* AIR 2010 SC 3817, held that in view of the provisions of Section 114 Illustration (f) of the Evidence Act, 1872 and Section 27 of the General Clauses Act, 1897 there is a presumption that the addressee has received the letter sent by registered post. However, the presumption is rebuttable on a consideration of evidence of impeccable character. A similar view has been reiterated by this Court in *Dr. Sunil Kumar Sambhudayal Gupta & Ors. v. State of Maharashtra,* JT 2010 (12) SC 287.

14. In *Gujarat Electricity Board & Anr. v. Atmaram Sungomal Poshani,* AIR 1989 SC 1433, this Court held as under:

> "There is presumption of service of a letter sent under registered cover, if the same is returned back with a postal endorsement that the addressee refused to accept the same. No doubt the presumption is rebuttable and it is open to the party concerned to place evidence before the Court to rebut the presumption by showing that the address mentioned on the cover was incorrect or that the postal authorities never tendered the registered letter to him or that there was no occasion for him to refuse the same. *The burden to rebut the presumption lies on the party, challenging the factum of service."*
>
> (Emphasis added)

15. The provisions of Section 101 of the Evidence Act provide that the burden of proof of the facts rests on the party who substantially asserts it and not on the party who denies it. In fact, burden of proof means that a party has to prove an allegation before he is entitled to a judgment in his favour.

Section 103 provides that burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any special law that the proof of that fact shall lie on any particular person. The provision of Section 103 amplifies the general rule of Section 101 that the burden of proof lies on the person who asserts the affirmative of the facts in issue.

PRESENT CONTROVERSY:

16. The case at hand is required to be considered in the light of the aforesaid settled legal propositions. The trial Court after appreciating the entire evidence on record and pleadings taken by the parties recorded the following findings:

> "The applicant/wife as per record was served with the notice of the petition, firstly, on 4.5.89 when she had refused to accept the notice of the petition vide registered AD cover for the date of hearing i.e. 6.7.89 and thereafter on 7.8.89 when again she refused to accept the notice for 8.9.89 and thereafter when the notice was published in the newspaper `National Herald' on 6.11.89. The UPC Receipt dated 6.11.89 vide which the newspaper `National Herald' dated 6.11.89 was sent to the respondent/ applicant at her address 3/47, First Floor, Geeta Colony, Delhi is on record and has not been rebutted in any manner.
>
> In these circumstances, the application u/o 9 Rule 13 CPC filed by the respondent/applicant/wife on 7.1.1994 is hopelessly barred by time and no sufficient ground has been shown by the applicant/wife for condoning the said inordinate delay."

17. So far as the High Court is concerned, it did not deal with this issue of service of summons or as to whether there was "sufficient cause" for the wife not to appear before the court at all, nor did it set aside the aforesaid findings recorded by

the trial Court. The trial Court has dealt with only the aforesaid two issues and nothing else. The High Court has not dealt with these issues in correct perspective. The High Court has recorded the following findings:

> "The order sheets of the original file also deserve a look. The case was filed on 1.5.1989. It was ordered that respondent be served vide process fee and Regd. AD for 6.7.1989. The report of process server reveals that process server did not identify the appellant and she was identified by the respondent himself. In next date's report appellant was identified by a witness. The Retd. AD mentions only one word "refused". It does not state that it was tendered to whom and who had refused to accept the notice. The case was adjourned to 8.9.1989. It was recorded that respondent had refused to take the notice. Only one word, "Refused" appears on this registered envelope as well. On 8.9.1989 itself it was reported that respondent had refused notice and permission was sought to move an application under Order 5 Rule 20 of CPC. On 8.9.1989, application under Section 5 Rule 20 CPC was moved and it was ordered that the appellant be served through "National Herald". The presumption of law if any stands rebutted by the statement made by the appellant because she has stated that she was staying in the said house of her brother for a period of eight months. The version given by her stands supported by the statement made by her brother."
>
> (Emphasis added)

18. The High Court held that presumption stood rebutted by a bald statement made by the respondent/wife that she was living at different address with her brother and this was duly supported by her brother who appeared as a witness in the court. The High Court erred in not appreciating the facts in the correct perspective as substituted service is meant to be resorted to serve the notice at the address known to the parties where the party had been residing last. (Vide *Rabindra Singh*

v. Financial Commissioner, Cooperation, Punjab & Ors., (2008) 7 SCC 663).

19. More so, it is nobody's case that respondent/wife made any attempt to establish that there had been a fraud or collusion between the appellant and the postman. Not a single document had been summoned from the post office. No attempt has been made by the respondent/wife to examine the postman. It is nobody's case that the "National Herald" daily newspaper published from Delhi did not have a wide circulation in Delhi or in the area where the respondent/wife was residing with her brother. In such a fact-situation, the impugned order of the High Court becomes liable to be set aside.

20. The appellate Court has to decide the appeal preferred under Section 104 CPC following the procedure prescribed under Order XLIII, Rule 2 CPC, which provides that for that purpose, procedure prescribed under Order XLI shall apply, so far as may be, to appeals from orders. In view of the fact that no amendment by Delhi High Court in exercise of its power under Section 122 CPC has been brought to our notice, the procedure prescribed under Order XLI, Rule 31 CPC had to be applied in this case. .

21. Order XLI, Rule 31 CPC provides for a procedure for deciding the appeal. The law requires substantial compliance of the said provisions. The first appellate Court being the final court of facts has to formulate the points for its consideration and independently weigh the evidence on the issues which arise for adjudication and record reasons for its decision on the said points. The first appeal is a valuable right and the parties have a right to be heard both on question of law and on facts. (vide: *Moran Mar Basselios Catholicos & Anr. v. Most Rev. Mar Poulose Athanasius & Ors.,* AIR 1954 SC 526; *Thakur Sukhpal Singh v. Thakur Kalyan Singh & Anr.,* AIR 1963 SC 146; *Santosh Hazari v. Purshottam Tiwari,* AIR 2001 SC 965; *Madhukar v. Sangram,* AIR 2001 SC 2171; *G. Amalorpavam & Ors. v. R.C. Diocese of Madurai & Ors.,*

(2006) 3 SCC 224; *Shiv Kumar Sharma v. Santosh Kumari,* (2007) 8 SCC 600; and *Gannmani Anasuya & Ors. v. Parvatini Amarendra Chowdhary & Ors.,* AIR 2007 SC 2380).

22. The first appellate Court should not disturb and interfere with the valuable rights of the parties which stood crystallised by the trial Court's judgment without opening the whole case for re-hearing both on question of facts and law. More so, the appellate Court should not modify the decree of the trial Court by a cryptic order without taking note of all relevant aspects, otherwise the order of the appellate Court would fall short of considerations expected from the first appellate Court in view of the provisions of Order XLI, Rule 31 CPC and such judgment and order would be liable to be set aside. (Vide *B.V. Nagesh & Anr. v. H.V. Sreenivassa Murthy,* JT (2010) 10 SC 551).

23. In view of the aforesaid statutory requirements, the High Court was duty bound to set aside at least the material findings on the issues, in spite of the fact that approach of the court while dealing with such an application under Order IX, Rule 13 CPC would be liberal and elastic rather than narrow and pedantic. However, in case the matter does not fall within the four corners of Order IX, Rule 13 CPC, the court has no jurisdiction to set aside ex-parte decree. The manner in which the language of the second proviso to Order IX, Rule 13 CPC has been couched by the legislature makes it obligatory on the appellate Court not to interfere with an ex-parte decree unless it meets the statutory requirement.

24. The High Court has not set aside the material findings recorded by the trial Court in respect of service of summons by process server/registered post and substituted service. The High Court failed to discharge the obligation placed on the first appellate Court as none of the relevant aspects have been dealt with in proper perspective. It was not permissible for the High Court to take into consideration the conduct of the appellant subsequent to passing of the ex-parte decree.

More so, the High Court did not consider the grounds on which the trial Court had dismissed the application under Order IX, Rule 13 CPC filed by the respondent/wife. The appeal has been decided in a casual manner.

25. In view of the above, appeal succeeds and is allowed. The judgment and order dated 17.7.2007 passed by the High Court of Delhi in FAO No. 63 of 2002 is set aside and the judgment and order of the trial Court dated 11.12.2001 is restored.

Before parting with the case, it may be pertinent to mention here that the court tried to find out the means of re-conciliation of the dispute and in view of the fact that the appellant got married in 1991 and has two major sons, it would not be possible for him to keep the respondent as a wife. A lump sum amount of Rs. 5 lakhs had been offered by Shri M.C. Dhingra, Ld. counsel for the appellant to settle the issue. However, the demand by the respondent/wife had been of Rs. 50 lakhs. Considering the income of the appellant as he had furnished the pay scales etc., the court feels that awarding a sum of Rs. 10 lakhs to the wife would meet the ends of justice as a lump sum amount of maintenance for the future. The said amount be paid by the appellant to the respondent in two equal instalments within a period of six months from today. The first instalment be paid within three months.

D.G. Appeal allowed.

HARSHENDRA KUMAR D.
v.
REBATILATA KOLEY ETC.
(Criminal Appeal Nos. 360-377 of 2011)

FEBRUARY 8, 2011

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

NEGOTIABLE INSTRUMENTS ACT, 1881 :

ss. 138 and 141(1) –Vicarious liability of Director of a company –Complaints against a Company for dishonour of cheques –Metropolitan Magistrate directing summons to issue to accused –Revision petitions by one of the Directors contending that he had resigned as Director of the Company before issuance of the cheques by it –Held :The words "every person who, at the time of the offence was committed", occurring in s.141 are not without significance, and indicate that criminal liability of a Director must be determined on the date the offence is alleged to have been committed –A Director whose resignation has been accepted and notified to Registrar of Companies, cannot be made accountable for the acts of the company committed after his resignation – Complaints against Director concerned quashed – Companies Act, 1956 –s.303 –Code of Criminal Procedure, 1973 –ss.397, 401 r/w s. 402.

CODE OF CRIMINAL PROCEDURE, 1973 :

Section 397 r/w ss. 401 and 482 –Revisional jurisdiction of High Court –Complaints filed against a company and its officers for dishonour of cheques issued by the company – Metropolitan Magistrate directing summons to issue – Revision petitions filed by one of the Directors of the company seeking to quash the proceedings against him as he had resigned before the cheques were issued by the company –

Dismissed by High Court –Held : High Court fell into grave error in not taking into consideration the uncontroverted documents relating to resignation of the Director concerned –On the date the offence was committed by the Company the revision-petitioner was not the Director and he had nothing to do with the affairs of the Company –Therefore, if the criminal proceedings are allowed to proceed against him, it would result in gross-injustice to him and would be tantamount to abuse of process of the court –Judgment of the High Court and the order of the Magistrate directing summons to issue to Director concerned are set aside and complaints gainst him quashed –Negotiable Instruments Act, 1881 –ss. 138 and 141(1) –Administration of Criminal Justice.

Eighteen complaints for offences punishable u/s 138 read with s. 141 of the Negotiable Instruments Act, 1881 were filed against the appellant and others. The case of the complainants was that they placed orders with the Company, of which the appellant was one of the Directors, for the sale of certain products, and issued demand drafts in favour of the Company; but the Company did not deliver the products and when they asked the Company for return of their money, the Company, on 30-4-2004, issued 18 cheques in their favour ; that the said 18 cheques, on presentation were dishonoured by the Bank/s. The Metropolitan Magistrate directed to issue summons to all the accused.

The appellant challenged the proceedings by filing 18 revision applications u/s 397 read with s. 401 of the Code of Criminal Procedure 1973, before the High Court, primarily on the ground that the cheques were issued on behalf of the Company to the complainants after he had resigned from the post of Director of the Company and, thus, at the time when the cheques were issued, the appellant had no concern or connection with the Company. The High Court, however, held that resignation

by the appellant as Director of the Company was a defence for consideration at the trial on the basis of evidence which could not be decided by the High Court in revisional jurisdiction.

Allowing the appeals, the Court

HELD: 1.1. By virtue of the provisions of s.303 of the Companies Act, 1956, there is statutory requirement of informing the Registrar of Companies about change among Directors of the company. In this view of the matter, a Director –whose resignation has been accepted by the company and that has been duly notified to the Registrar of Companies –cannot be made accountable and fastened with liability for anything done by the company after the acceptance of his resignation. The words 'every person who, at the time the offence was committed', occurring in s. 141 (1) of the NI Act are not without significance and these words indicate that criminal liability of a Director must be determined on the date the offence is alleged to have been committed. [para 15] [686-G-H; 687-A]

S.M.S. Pharmaceuticals Ltd. v. *Neeta Bhalla and Another* **2005 (3) Suppl. SCR 371 = (2005) 8 SCC 89;** *N. Rangachari* v. *Bharat Sanchar Nigam Ltd.* **2007 (5) SCR 329 = *2007(5) SCC 108 ;*** *K.K. Ahuja v. V.K. Vora & Another* ***(2009) 10 SCC 48 and*** *National Small Industries Corporation Limited v. Harmeet Singh Paintal and Another* **2010 (2) SCR 805 = *(2010) 3 SCC 330 – relied on***

1.2. In the instant case, the documents placed on record, which have not been controverted, show that on 2-3-2004, the appellant sent a letter of resignation to the Managing Director of the Company. The Board of Directors held the meeting on 2-3-2004 and accepted the appellant's resignation on that day itself. On 4-3-2004, the

Company informed the Registrar of Companies in the prescribed form (Form no. 32) about the resignation of the appellant from the post of Director of the Company and, thus, change among directors. [para 16-18] [687-A-G]

2.1. It is fairly settled that while exercising inherent jurisdiction u/s 482 or revisional jurisdiction u/s 397 of the Code of Criminal Procedure, 1973, in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of merits of the accusations. However, in an appropriate case, if on the face of the documents – which are beyond suspicion or doubt – placed by accused, the accusations against him cannot stand, it would be travesty of justice if accused is relegated to trial and asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the High Court may look into the materials which have significant bearing on the matter at prima facie stage. [para 21] [689-B-E]

Saroj Kumar Jhunjhunwala v. State of West Bengal and Anr. **(2007) 1 C Cr. LR (Cal) 793***;* *State of Madhya Pradesh v. Awadh Kishore Gupta and Others* **2003 (5) Suppl. SCR 672 = (2004) 1 SCC 691** ***and*** *Fateh Chand Bhansali v. M/s. Hindustan Development Corporation Ltd.* **(2005) 1 C Cr.LR (Cal) 581- referred to**

2.2. Criminal prosecution is a serious matter; it affects the liberty of a person. No greater damage can be done to the reputation of a person than dragging him in a criminal case. In the instant case, the High Court fell into grave error in not taking into consideration the uncontroverted documents relating to appellant's resignation from the post of Director of the Company. The facts leave no manner of doubt that on the date the offence was committed by the Company, the appellant

was not the Director; he had nothing to do with the affairs of the Company. In this view of the matter, if the criminal complaints are allowed to proceed against the appellant, it would result in gross injustice to the appellant and would be tantamount to abuse of process of the court. The judgment of the High Court and the order of the Metropolitan Magistrate directing summons to issue to the appellant are set aside. The complaints as against the appellant stand quashed. [para 22-23] [689-F-H; 690-A-F]

Case Law Reference:

(2005) 1 C Cr.LR (Cal) 581	**relied on**	**para 7**
2005 (3) Suppl. SCR 371	**relied on**	**para 9**
2007 (5) SCR 329	**relied on**	**para 11**
(2009) 10 SCC 48	**relied on**	**para 12**
2010 (2) SCR 805	**relied on**	**para 14**
(2007) 1 C Cr. LR (Cal) 793	**referred to**	**para 19**
2003 (5) Suppl. SCR 672	**referred to**	**para 19**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 360-377 of 2011.

From the Judgment & Order dated 06.09.2007 of the High Court of Calcutta in C.R.R. Nos. 3716, 3718, 3719, 3720, 3722, 3723, 3724, 3725, 3726, 3731, 3732, 3733, 3734, 3735, 3736, 3737, 3738 & 3739 of 2006.

Basava Prabhu S. Patil, B. Subrahmanya Prasad (for V.N. Raghupathy) for the Appellant.

Subhasish Bhowmick, S.C. Patel, Tara Chandra Sharma, Neelam Sharma for the Respondent.

The Judgment of the Court was delivered by

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

2. These 18 appeals, by special leave, are directed against the common judgment and order dated September 6, 2007 passed by Calcutta High Court whereby 18 criminal revision applications filed by the appellant for quashing the proceedings initiated by the complainants in 18 complaint cases under Section 138 read with Section 141 of Negotiable Instruments Act, 1881 (for short, 'NI Act') against him have been dismissed.

3. The brief facts are these. The complainants were interested in business relationship with Rifa Healthcare (India) Pvt. Ltd. (for short, 'the Company') for the sale of bio-ceramic products. The complainants, for the orders they had placed, issued demand drafts in favour of the Company. It appears that the Company had not delivered the products ordered by the complainants and accordingly they asked the Company for return of their money. On April 30, 2004, the Company issued 18 cheques bearing Nos. (i) 000843 for Rs. 30,000/-; (ii) 00870 for Rs. 40,000/-; (iii) 000845 for Rs. 30,000/-; (iv) 000852 for Rs. 3,00,000/-; (v) 00842 for Rs. 60,000/-; (vi) 000862 for Rs. 40,000/-; (vii) 000834 for Rs. 60,000/-; (viii) 000572 for Rs. 40,000/-; (ix) 000827 for Rs. 30,350/-; (x) 000854 for Rs. 3,00,000/-; (xi) 000826 for Rs. 60,000/-; (xii) 000855 for Rs. 3,00,000/-; (xiii) 000857 for Rs. 3,00,000/-; (xiv) 000858 for Rs. 3,00,000/-; (xv) 000841 for Rs. 60,000/-; (xvi) 000871 for Rs. 40,000/-; (xvii) 000568 for Rs. 40,000/- and (xviii) for Rs. 60,130/- drawn on UTI Bank Ltd., Jayanagar, Bangalore in favour of the complainants. These 18 cheques were dishonoured by the Bank/s on presentation.

4. In the month of December, 2004, the complainants filed 18 complaints under Section 138 read with Section 141 of the NI Act. For the sake of brevity and convenience, we shall refer to the complaint no. 14512 of 2004. In the complaint, besides the Company, the appellant was arraigned as accused No. 3. It was alleged in the complaint that the Managing Director and

the two Directors (including the appellant) were responsible for day-to-day affairs of the Company and that it was on their assurance that the complainant issued demand draft in favour of the Company and when the products of the Company were not received by the complainant, she contacted the accused persons and told them that she could not continue business with them and asked for return of her money. Accordingly, for and on behalf of the Company, in discharge of the existing liability, an account payee cheque was issued but the cheque was returned by the complainant's banker on presentation with the endorsement 'insufficient fund'. The complainant then sent legal notice asking the accused persons to pay the amount of cheque within 15 days from the date of the receipt of the notice but despite service of notice, no payment has been made.

5. The concerned Metropolitan Magistrate issued summons to all the accused persons including the appellant.

6. The appellant challenged the proceedings initiated by the complainants against him by filing 18 revision applications under Section 397 read with Section 401 of the Criminal Procedure Code, 1973 (for short, 'Code') before the Calcutta High Court. In these revision applications, notices were issued to the complainants. On behalf of the appellant, the principal contention canvassed was that the appellant was appointed as Director of the Company on August 27, 2003. He resigned from the directorship on March 2, 2004 which was accepted by the Board of Directors on that day itself with immediate effect. The factum of his resignation is also recorded in Form No. 32 filed by the Company with the Registrar of Companies on March 4, 2004. The 18 cheques which were issued on behalf of the Company to the complainants were issued after his resignation. The dishonour of these cheques through the complainants' bankers' was also subsequent to his resignation. In other words, it was submitted by the counsel for the appellant before High Court that at the time when the cheques were issued or when the cheques were dishonoured, the appellant

had no concern or connection with the Company.

7. The High Court, however, relying upon a decision of Single Judge of that Court in *Fateh Chand Bhansali* v. M/s. *Hindustan Development Corporation Ltd.*[1], held that resignation by the petitioner as Director of the Company is a defence of the accused and the defence is a matter for consideration at the trial on the basis of evidence which cannot be decided by the Court in revisional jurisdiction. The High Court considered the matter thus:

> "The question of the learned Advocate for the petitioner is that the petitioner was not director of a company at the material point of time because there is form 32 which shows the date when the petitioner was appointed a director and when there came to be a change of directorship of the company. According to Mr. Trivedi learned Advocate for the petitioner, a Hon'ble Judge of this Court in *Saroj Kumar Jhunjhunwala Vs. State of West Bengal and Anr.* (2007) 1 C Cr.LR (Cal) 793 was pleased to hold that if before the issuance of cheques, the accused-petitioner had resigned from the directorship, then he cannot be held liable for the offence. This decision which favours the petitioner has been pitted against the decision in *Fateh Chand Bhansali Vs. M/s. Hindustan Development Corporation Ltd.,* (2005) 1 C Cr. LR (Cal) 581 wherein another Hon'ble Single Judge of this court with reference to a good number of decisions including the decision in *State of M.P. Vs. Awadh Kishore Gupta & Ors.,* 2004 SCC (Cr.) 352 held that the High Court while considering the revisional application cannot look into the papers and documents annexed to such application as those were neither verified nor tested. In that decision also the point was raised with reference to form 32 and His Lordship held that the decision of *State of M.P. Vs. Awadh Kishore Gupta and Ors.* (Supra) is an authority regarding

1. (2005) 1 C Cr.LR (Cal) 581.

> permissibility of the High Court to look into the papers and documents annexed to the revisional application and the story of the petitioner that they resigned from the company by submitting Form 32 and are, in no way, responsible for the alleged offence is a defence of the accused person and the defence is a matter for consideration at the trial on the basis of evidence which cannot be decided by the court. It is worth mentioning that this decision in Fateh Chand Bhansali was rendered on 23.3.2005 while the decision in Saroj Kumar Jhunjhunwala was rendered on 05.04.2007 and in this decision Fateh Chand Bhansali was not placed before his Lordship for consideration and judicial discipline demands that I should go by the earlier decision, namely, *Fateh Chand Bhansali* (Supra)."

8. Section 138 and Section 141 were brought in the NI Act by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 (Act 66 of 1988) with effect from April 1, 1989. These provisions as amended from time to time read as under :

> "S.138. Dishonour of cheque for insufficiency, etc., of funds in the accounts.—Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless—

(a) The cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) The payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) The drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.—For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

S. 141. Offences by companies.—(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section,—

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm.]

9. The legal position concerning the vicarious liability of a director in a company which is being prosecuted for the offence under Section 138, NI Act has come up for consideration before this Court on more than one occasion. In the case of *S.M.S. Pharmaceuticals Ltd.* v. *Neeta Bhalla and Another*[2], the following questions were referred to a 3-Judge Bench for determination :

"(*a*) Whether for purposes of Section 141 of the Negotiable Instruments Act, 1881, it is sufficient if the substance of the allegation read as a whole fulfil the requirements of the said

2. 2005 (8) SCC 89.

section and it is not necessary to specifically state in the complaint that the person accused was in charge of, or responsible for, the conduct of the business of the company.

(b) Whether a director of a company would be deemed to be in charge of, and responsible to, the company for conduct of the business of the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary.

(*c*) Even if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and or the managing directors or joint managing director who admittedly would be in charge of the company and responsible to the company for conduct of its business could be proceeded against."

10. The 3-Judge Bench of this Court answered the aforesaid questions thus:

"(*a*) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(*b*) The answer to the question posed in sub-para (*b*) has to be in the negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for the conduct of its business. The requirement of Section 141 is that the person sought to be made liable

should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

(*c*) The answer to Question (*c*) has to be in the affirmative. The question notes that the managing director or joint managing director would be admittedly in charge of the company and responsible to the company for the conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as managing director or joint managing director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as the signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141."

11. In *N. Rangachari v. Bharat Sanchar Nigam Ltd.*[3], a 2-Judge Bench of this Court discussed and considered S*.M.S. Pharmaceuticals Ltd.2* and observed as follows :

"…….The scope of Section 141 has been authoritatively discussed in the decision in *S.M.S. Pharmaceuticals Ltd.* [2005 (8) SCC 89] binding on us and there is no scope for redefining it in this case. Suffice it to say, that a prosecution could be launched not only against the company on behalf of which the cheque issued has been dishonoured, but it could also be initiated against every person who at the time the offence was committed, was in charge of and was responsible for the conduct of the business of the company. In fact, Section 141 deems such persons to be guilty of such offence, liable to be proceeded against and punished for the offence, leaving it to the

3. 2007 (5) SCC 108

person concerned, to prove that the offence was committed by the company without his knowledge or that he has exercised due diligence to prevent the commission of the offence. Sub-section (2) of Section 141 also roped in Directors, Managers, Secretaries or other officers of the company, if it was proved that the offence was committed with their consent or connivance.

.....

But as has already been noticed, the decision in *S.M.S. Pharmaceuticals Ltd.* [2005 (8) SCC 89] binding on us, has postulated that a Director in a company cannot be deemed to be in charge of and responsible to the company for the conduct of his business in the context of Section 141 of the Act. Bound as we are by that decision no further discussion on this aspect appears to be warranted."

12. In the case of *K.K. Ahuja* v. *V.K. Vora & Another.*[4], a 2-Judge Bench of this Court had an occasion to consider the earlier decisions of this Court including the decision in the case of *S.M.S. Pharmaceuticals Ltd.2* It was held that mere fact that at some point of time an officer of a company had played some role in the financial affairs of the company, that will not be sufficient to attract the constructive liability under Section 141 of the NI Act. The Court summarized the legal position as follows:

"(*i*) If the accused is the Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. It is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix

4. (2009) 10 SCC 48.

"Managing" to the word "Director" makes it clear that they were in charge of and are responsible to the company, for the conduct of the business of the company.

(*ii*) In the case of a Director or an officer of the company who signed the cheque on behalf of the company, there is no need to make a specific averment that he was in charge of and was responsible to the company, for the conduct of the business of the company or make any specific allegation about consent, connivance or negligence. The very fact that the dishonoured cheque was signed by him on behalf of the company, would give rise to responsibility under sub-section (2) of Section 141.

(*iii*) In the case of a Director, secretary or manager as defined in Section 2(24) of the Companies Act or a person referred to in clauses (*e*) and (*f*) of Section 5 of the Companies Act, an averment in the complaint that he was in charge of, and was responsible to the company, for the conduct of the business of the company is necessary to bring the case under Section 141(1) of the Act. No further averment would be necessary in the complaint, though some particulars will be desirable. They can also be made liable under Section 141(2) by making necessary averments relating to consent and connivance or negligence, in the complaint, to bring the matter under that sub-section.

(*iv*) Other officers of a company cannot be made liable under sub-section (1) of Section 141. Other officers of a company can be made liable only under sub-section (2) of Section 141, by averring in the complaint their position and duties in the company and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence."

13. In *K.K. Ahuja*[4], this Court observed that if a mere reproduction of the wording of Section 141(1) in the complaint

was sufficient to make a person liable to face prosecution, virtually every officer/employee of a company without exception could be impleaded as accused by merely making an averment that at the time when the offence was committed they were in charge of and were responsible to the company for the conduct and business of the company.

14. In a recent decision in the case of *National Small Industries Corporation Limited* v. *Harmeet Singh Paintal and Another*[5], after survey of earlier decisions wherein legal position concerning Section 138 and Section 141 of the NI Act was considered, this Court culled out the following principles:

> "(*i*) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.
>
> (*ii*) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.
>
> (*iii*) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make the accused therein vicariously liable for offence committed by the company along with averments in the petition containing that the accused were in charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.
>
> (*iv*) Vicarious liability on the part of a person must be pleaded and proved and not inferred.

5. 2010 (3) SCC 330.

> (*v*) If the accused is a Managing Director or a Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.
>
> (*vi*) If the accused is a Director or an officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in the complaint.
>
> (*vii*) The person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases."

15. Every company is required to keep at its registered office a register of its directors, managing director, manager and secretary containing the particulars with respect to each of them as set out in clauses (a) to (e) of sub-section (1) of Section 303 of the Companies Act, 1956. Sub-section (2) of Section 303 mandates every company to send to the Registrar a return in duplicate containing the particulars specified in the register. Any change among its directors, managing directors, managers or secretaries specifying the date of change is also required to be furnished to the Registrar of Companies in the prescribed form within 30 days of such change. There is, thus, statutory requirement of informing the Registrar of Companies about change among directors of the company. In this view of the matter, in our opinion, it must be held that a director - whose resignation has been accepted by the company and that has been duly notified to the Registrar of Companies - cannot be made accountable and fastened with liability for anything done by the company after the acceptance of his resignation. The words 'every person who, at the time the offence was committed', occurring in Section 141 (1) of the NI Act are not without significance and these words indicate that criminal liability of a director must be determined on the date the offence

is alleged to have been committed.

16. On March 2, 2004, the appellant sent a letter of resignation to the Managing Director of the Company, the relevant part of that reads as follows:

> "Subject : Resignation to the Post of Director
>
> With reference to the above subject I hereby resign to the post of Director in your company (*sic.)* immediate effect as I am pre-occupied with my other business activities and unable to concentrate, participate in the affairs of the company.
>
> Therefore it is kind request with you to accept my resignation and intimate the R.O.C. by filing necessary applications to comply the legal formality."

17. The Board of Directors held the meeting on March 2, 2004 and accepted the appellant's resignation on that day itself. The extract of resolution to that effect reads as follows :

> "Mr. Harshendra Kumar D S/o Rathnavarma Hegde residing at No. -55, Vittal Mallya Road, Bangalore. Due to his personal inconivenceses (*sic.)* he requested to accept his resignation for the Director, and the Board accepted the resignation and it will be effected immediately on the date of resignation."

18. On March 4, 2004, the Company informed the Registrar of Companies in the prescribed form (Form no. 32) about the resignation of the appellant from the post of Director of the Company and, thus, change among directors.

19. The above documents placed on record by the appellant have not been disputed nor controverted by the complainants. As a matter of fact, it was not even the case of the complainants before the High Court that the change among Directors of the Company, on resignation of the appellant with

effect from March 2, 2004, has not taken place. The argument on behalf of the complainants before the High Court was that it was not permissible for the High Court to look into the papers and documents relating to the appellant's resignation since these are the matters of defence of the accused person and defence is a matter for consideration at the trial on the basis of evidence which cannot be decided by the High Court. The complainants in this regard relied upon a decision of Single Judge of that Court in the case of *Fateh Chand Bhansali1* . The counsel for the present appellant (revision petitioner therein) on the other hand referred to a later decision of a Single Judge of the Calcutta High Court in the case of *Saroj Kumar Jhunjhunwala* v. *State of West Bengal and Anr*[6]*.* wherein it was held that if before the issuance of cheques, the accused had resigned from the directorship, then he cannot be held liable for the offence. Confronted with two Single Bench decisions of that Court in *Fateh Chand Bhansali1* and *Saroj Kumar Jhunjhunwala6*, the Single Judge held that the judicial discipline demanded that he should go by the earlier decision, namely, *Fateh Chand Bhansali1* and, accordingly, refused to take into consideration the documents relating to the appellant's resignation as Director from the Company with effect from March 2, 2004. While relying upon *Fateh Chand Bhansali1,* the Single Judge referred to a decision of this Court in *State of Madhya Pradesh* v. *Awadh Kishore Gupta and Others* which was referred in *Fateh Chand Bhansali1* .

20. In *Awadh Kishore Gupta*[7], this Court while dealing with the scope of power under Section 482 of the Code observed:

> "**13.** It is to be noted that the investigation was not complete and at that stage it was impermissible for the High Court to look into materials, the acceptability of which is essentially a matter for trial. While exercising jurisdiction

6. (2007) 1 C Cr. LR (Cal) 793.
7. (2004) 1 SCC 691.

under Section 482 of the Code, it is not permissible for the Court to act as if it was a trial Judge……."

21. In our judgment, the above observations cannot be read to mean that in a criminal case where trial is yet to take place and the matter is at the stage of issuance of summons or taking cognizance, materials relied upon by the accused which are in the nature of public documents or the materials which are beyond suspicion or doubt, in no circumstance, can be looked into by the High Court in exercise of its jurisdiction under Section 482 or for that matter in exercise of revisional jurisdiction under Section 397 of the Code. It is fairly settled now that while exercising inherent jurisdiction under Section 482 or revisional jurisdiction under Section 397 of the Code in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of merits of the accusations. However, in an appropriate case, if on the face of the documents – which are beyond suspicion or doubt – placed by accused, the accusations against him cannot stand, it would be travesty of justice if accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the High Court may look into the materials which have significant bearing on the matter at prima facie stage.

22. Criminal prosecution is a serious matter; it affects the liberty of a person. No greater damage can be done to the reputation of a person than dragging him in a criminal case. In our opinion, the High Court fell into grave error in not taking into consideration the uncontroverted documents relating to appellant's resignation from the post of Director of the Company. Had these documents been considered by the High Court, it would have been apparent that the appellant has resigned much before the cheques were issued by the Company. As noticed above, the appellant resigned from the post of Director on March 2, 2004. The dishonoured cheques

were issued by the Company on April 30, 2004, i.e., much after the appellant had resigned from the post of Director of the Company. The acceptance of appellant's resignation is duly reflected in the resolution dated March 2, 2004. Then in the prescribed form (Form No. 32), the Company informed to the Registrar of Companies on March 4, 2004 about appellant's resignation. It is not even the case of the complainants that the dishonoured cheques were issued by the appellant. These facts leave no manner of doubt that on the date the offence was committed by the Company, the appellant was not the Director; he had nothing to do with the affairs of the Company. In this view of the matter, if the criminal complaints are allowed to proceed against the appellant, it would result in gross injustice to the appellant and tantamount to an abuse of process of the court.

23. These appeals are, accordingly, allowed. The judgment of the Calcutta High Court dated September 6, 2007 and the summons issued by the Metropolitan Magistrate, Calcutta to the appellant are set aside. The complaints as against the appellant stand quashed.

R.P. Appeals allowed.

RBF RIG CORPORATION, MUMBAI

v.

THE COMMISSIONER OF CUSTOMS (IMPORT), MUMBAI

(Civil Appeal No. 3478 of 2006)

FEBRUARY 08, 2011

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

Customs Act, 1962 – Refund claim under – Importer's claim for refund of customs duty – Rejection by the adjudicating authority on the ground that assessment not challenged – Adjudicating authority ignored the specific directions by the High Court to consider the refund claim on basis of the Essentiality Certificates – Justification of – Held: Not Justified – Subordinate Tribunal cannot examine whether a direction issued by the High Court under its writ powers was correct and refusal to carry it out as such, amounts to denial of justice and destroys the principle of hierarchy of courts in the administration of justice – Same court can be approached for clarification/modification or the superior forum for appropriate relief in case the directions issued by the court is contrary to statutory provision or well established principles of law – On facts, the revenue department did not question the order passed by the High Court, which order has reached finality – Thus, the adjudicating authority cannot be permitted to circumvent the order passed by the High Court – Customs authorities directed to consider the importer's claim for refund of customs duty – Constitution of India 1950 – Article 226 – Administration of justice.

The appellant imported consignments of certain goods in pursuance to the contract with ONGC and filed Bills of Entry for the same. The said imported goods were exempted from customs duty under a Notification which required the importer to produce Essentiality Certificates issued by Director General of Hydrocarbons (DGH) and

the DGH issued Essentiality Certificate on the basis of recommendatory letters issued by ONGC. However, ONGC refused to entertain the appellant's request for the recommendatory letters and as such DGH refused to issue Essentiality Certificates. The appellant had to clear the consignments of the imported goods on full payment of the customs duty. The appellant filed a writ petition challenging the refusal of ONGC to issue recommendatory letters and refusal of DGH to issue Essentiality Certificate. The High Court passed an interim order. In pursuance to the direction by the High Court, ONGC issued recommendatory letters and on the strength of these, DGH issued Essentiality Certificates to the appellant. The High Court then disposed of the writ petition directing the custom authorities to dispose of the appellant's refund claim of customs duty taking into consideration the Essentiality Certificate issued by DGH. The appellant filed a refund claim in respect of customs duty paid on the import of goods. The Deputy Commissioner of Customs rejected the claim. The Commissioner as also the Tribunal rejected the appeals. Therefore, the appellant filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1 Article 226 of the Constitution confers powers on the High Court to issue certain writs for the enforcement of fundamental rights conferred by Part-III of the Constitution or for any other purpose. The question, whether any particular relief should be granted under Article 226 of the Constitution depends on the facts of each case. The guiding principle in all cases is promotion of justice and prevention of injustice. In the instant case, the High Court, has moulded the relief in such a manner to meet out justice to an aggrieved person. It is not open to the subordinate Tribunal to examine whether a direction issued by the High Court

under its writ powers was correct and refusal to carry it out as such amounts to denial of justice and destroys the principle of hierarchy of courts in the administration of justice. [Paras 15 and 18] [700-D-E; 701-G-H; 702-A]

Comptroller and Auditor-General of India v. K.S. Jagannathan **(1986) 2 SCC 679;** *Dwarkanath* v. *ITO* **AIR 1966 SC 81;** *Bishnu Ram Borah v. Parag Saikia* **(1984) 2 SCC 488 – referred to.**

1.2. If for any reason, the subordinate authority is of the view that the directions issued by the court is contrary to statutory provision or well established principles of law, it can approach the same court with necessary application/petition for clarification or modification or approach the superior forum for appropriate reliefs. In the instant case, the respondents have not questioned the order passed by the High Court, which order has reached finality. In such circumstances, the adjudicating authority cannot be permitted to circumvent the order passed by the High Court. Therefore, the refund claim of appellant was erroneously rejected by the Deputy Commissioner of Customs ignoring the specific directions issued by the High Court to the customs authorities to dispose of the appellant's claim of refund by taking into consideration the Essentiality Certificates issued by the DGH. The Deputy Commissioner of Customs rejected the refund claim of appellant on the ground of unjust enrichment and failure to challenge the assessment of the Bills of Entry at the appellate stage, without even considering the Essentiality Certificates in the light of specific and binding directions of the High Court.[Paras 19 and 20] [702-G-H; 703-A-D]

1.3. The Customs Authorities are directed to consider the appellant's claim of refund of customs duty paid under protest in accordance with the directions issued

by High Court as expeditiously as possible. [Para 21] [703-E-F]

CCE v. Flock (India) (P) Ltd. **(2000) 6SCC 650;** *Priya Blue Industries Ltd. v. Commissioner of Customs* (Preventive) **(2005) 10 SCC 433;** *Mafatlal Industries Ltd. v. Union of India* **(1997) 5 SCC 536 – referred to.**

Halsbury's Laws of England, **4th Edn., Vol. I, para 89 – referred to.**

Case Law Reference:

(1997) 2 SCC 536	**Referred to.**	**Para 11**
(2000) 6 SCC 650	**Referred to.**	**Para 13**
(2005) 10 SCC 433	**Referred to.**	**Para 13**
(1986) 2 SCC 679	**Referred to.**	**Para 15**
AIR 1966 SC 81	**Referred to.**	**Para 16**
(1984) 2 SCC 488	**Referred to.**	**Para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3478 of 2006.

From the Judgment & Order dated 12.5.2006 of the Customs, Excise and Gold (Control) Appellate Tribunal, West Zonal Bench, in Appeal Nos. C/790, 793 and 794 of 2005-Mum.

Harish N. Salve, Amar Dave, Armaan Dalal, Nandini Gore, Debmalya Banerjee, Abhishek Roy, Kamal Deep Dayal, Manik Karanjawala (for Karanjawala & Co.) for the Appellant.

K. Swami, Arti Singh, B.K. Prasad for the Respondent.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. This appeal is directed against the

Order of the Customs, Excise and Gold (Control) Appellate Tribunal, West Zonal Bench [hereinafter referred to as 'the Tribunal'] dated 12.05.2006.

2. The issue raised for our consideration and decision in this appeal is: 'Whether the adjudicating authority was justified in rejecting the appellant's claim for refund of the duty paid under the Customs Act, 1962 (hereinafter referred to as, "the Act") without considering Essentiality Certificates, produced on a later date, particularly, in view of the specific and positive directions issued by the Delhi High Court.'

3. The brief factual matrix involved in this appeal are:

The appellant is an importer of spares and stores for use on rigs for petroleum operations pursuant to contract with Oil and Natural Gas Corporation Limited [hereinafter referred to as 'ONGC']. The appellant has imported three consignments of spares and duly filed the Bills of Entry dated 10.06.2002 and 25.06.2002 in respect of these imported goods. These imported goods are covered by List 12 of Notification No. 21/2002, Customs, dated 01.03.2002 as goods exempted from customs duty on fulfilling Condition 29 of the said Notification, which requires the importer to produce Essentiality Certificates issued by Director General of Hydrocarbons [hereinafter referred to as 'the DGH'] to the effect that these imported goods were required for the petroleum operations. The DGH issues the Essentiality Certificates only on the strength of recommendatory letters issued by ONGC.

4. The appellant had requested ONGC to issue recommendatory letters in order to enable the DGH to issue the Essentiality Certificates, which were not granted. The DGH, in the absence of such recommendatory letters, refused to entertain the appellant's request for the Essentiality Certificates.

5. In this backdrop, the appellant requested the Customs authority, *vide* endorsement on Bill of Entry presented on

10.06.2002 for one consignment and *vide* letter dated 28.06.2002 for other two consignments, to make provisional assessment of the said imported goods in view of the pending proceedings for procurement of the Essentiality Certificates. However, these requests were not acceded to, and the appellant, on account of commercial exigencies, had cleared the said three consignments of the imported goods on full payment of the customs duty pursuant to the Order of the Customs Authority dated 15.06.2002, 03.07.2002 and 09.07.2002.

6. In the month of July 2002, the appellant filed a Writ Petition before the Delhi High Court *inter-alia* challenging the refusal of ONGC to issue the requisite recommendatory letters and also the refusal of the DGH to issue the Essentiality Certificates. The High Court, by its *ad-interim* order dated 30.07.2002, directed ONGC to take a final decision in the matter within a fixed time frame and granted liberty to the appellant to clear consignments on payment of duty under protest and subject to further orders of the High Court.

7. Subsequently, ONGC, whilst complying with the abovementioned directions of the High Court, issued recommendatory letters and on the strength of these recommendatory letters, the DGH issued Essentiality Certificates to the appellant. In view of this, the said Writ Petition was finally disposed of by the High Court by its order dated 11.03.2003, wherein the High Court directed the customs authorities to dispose of the appellant's refund claim of customs duty paid by taking into consideration the Essentiality Certificates issued by the DGH in the following terms:

> "Mr. Setalvad, learned senior counsel for the petitioners, on the other hand, submits that in view of the fact that almost all essentiality certificates have been issued by Respondent No. 2 on the recommendation of Respondent No. 3 the only controversy which survives for consideration is with regard to the disposal of the refund applications

filed by the petitioner with the customs authorities. He, therefore, prays that instead of adjourning the matter, it may be disposed of with a direction to the custom authorities to take final decision on the refund applications filed by the petitioner.

We find substance in the suggestion made by learned counsel for the Petitioner. Accordingly, we dispose of the Writ Petition with a direction to the customs authorities to consider and dispose of such refund claims as had been preferred by the petitioner with them by taking into consideration the essentiality certificates, issued on the petitioners by Respondents No. 2. We further direct that the said applications shall be disposed of by a speaking and reasoned order after giving an opportunity of hearing to the petitioners. The applications shall be disposed of as expeditiously as practicable but in any case not later then eight weeks from the date of receipt of a copy of this order."

(Emphasis supplied)

8. Accordingly, the appellant filed refund claim dated 06.05.2003 and 04.06.2003 in respect of the customs duty paid on the import of the said three consignments, which was rejected by the Deputy Commissioner of Customs *vide* its order dated 23.12.2004 on the ground of unjust enrichment and failure to challenge the assessment of the Bills of Entry by filing an appeal before the Appellate Forum. Reliance was also placed on the judgment of this court in *CCE v. Flock (India) (P) Ltd.*, (2000) 6 SCC 650 and *Priya Blue Industries Ltd. v. Commissioner of Customs (Preventive)*, (2005) 10 SCC 433. Being aggrieved, the appellant preferred an appeal against the Order of Deputy Commissioner of Customs before the Commissioner (Appeals). This appeal of the appellant was rejected by the Commissioner (Appeals) vide Order dated 18.04.2005. The appellant, aggrieved by the Order of Commissioner (Appeals), further preferred an appeal before the

Tribunal. The Tribunal, by its impugned Order dated 12.05.2006, dismissed the appeal. Aggrieved by these orders, the appellant is before us in this appeal filed under Section 130-E of the Act.

9. Shri Harish N. Salve, learned senior counsel and Shri Amar Dave, learned counsel, appear for the appellant and the Revenue is represented by Shri K. Swamy, learned counsel. We will refer to their submissions while dealing with the issue canvassed before us.

10. This Court in *Flock* (*supra*) has held that a refund claim under the Central Excise Act, 1944 is not maintainable, if an assessment order, which is appealable, has not been challenged. In other words, it was held that such assessment order is not liable to be questioned and reopened in a proceeding for refund, which is in the nature of execution of a decree or order. Further, this Court in *Priya Blue* (*supra*), adopting the ratio of the *Flock* (*supra*), has held that a refund claim under the Act is not an appeal proceeding and the officer considering a refund claim cannot sit in appeal or review an assessment order made by a competent authority. Such assessment order is final unless it is reviewed and/or modified in an appeal.

11. The learned senior counsel Shri. Harish N. Salve submits that the decisions of this court in *Flock (supra*) and *Priya Blue* (*supra*) are incorrectly decided and require reconsideration. He submits that the present appeal should be referred to a larger bench to finally and correctly decide the questions of law arising in this appeal. He further submits that the appellant is entitled to claim refund by virtue of Section 27 of the Act, even after the assessment order of imported goods has attained the finality. He contends that the claim of refund under Section 27 after final assessment order is different from the refund claim under Section 18, which is after provisional assessment of the imported goods. He submits that Section 27 of the Act provides that the claim for refund shall be made within a period of one year or six months. This short period of

limitation indicates that a claim for refund is maintainable even without preferring an appeal against the assessment order. In other words, if the claim for refund is permissible only after filing of an appeal by the party, then Section 27 of the Act will become redundant as the appeal proceedings would never be over within abovementioned period. In this regard, learned senior counsel further argues at great length by analyzing Section 27 of the Act in view of its legislative history and the philosophy and the broad scheme of the Act *vis-à-vis* Central Excise Act, 1944 and Income Tax Act, 1961. He further contends that decisions of this Court in *Flock (supra*) and *Priya Blue* (*supra*) have ignored or not considered the decision of nine Judge-Bench of this court in *Mafatlal Industries Ltd. v. Union of India*, (1997) 5 SCC 536, which suggests that if the duty has been collected contrary to law, i.e., on account of a misinterpretation or misconstruction of a provision of law, rule, notification or regulation and the assessment order has attained finality, then the assessee is entitled to claim refund in accordance with section 11B of Central Excise Act, 1944 read with Rule 11 of the Central Excise Rules, 1944 on account of subsequent discovery of such mistake of law by any judgment of High Court or of this Court.

12. Shri K. Swamy, learned counsel for the Revenue, justifies the reasoning and the conclusions reached by the Tribunal.

13. In our considered view, the elaborate submissions made by the learned senior counsel for the appellant challenging the correctness of *Flock (supra)* and *Priya Blue (supra)* may not be necessary to be considered in the light of the peculiar facts involved in the present appeal. *Ergo*, we are not inclined to go into the merits of Shri Salve's arguments.

14. The facts in the present case are that, since the request of the appellant for issuance of Essentiality Certificates was delayed, the appellant was constrained to approach the Delhi

High Court by filing a petition under Article 226 of the Constitution of India, *inter-alia* requesting the Court to direct ONGC to consider the request of the appellant for issuance of Essentiality Certificates vide its letter dated 21st May, 2002. On a concession made by learned counsel for ONGC, the Court, while permitting the parties to file their pleadings, further observed that the appellants, if they are willing to get their consignment of spare parts released, may do so by paying the customs duty as demanded under protest subject to final orders in the petition. The writ petition was finally disposed of by the Court by its order dated 11th March, 2003, in the presence of learned counsel for respondents, wherein the Court specifically directed the respondents to consider the refund claims preferred by the petitioners taking into consideration the Essentiality Certificates issued by ONGC.

15. Article 226 of the Constitution confers powers on the High Court to issue certain writs for the enforcement of fundamental rights conferred by Part-III of the Constitution or for any other purpose. The question, whether any particular relief should be granted under Article 226 of the Constitution, depends on the facts of each case. The guiding principle in all cases is promotion of justice and prevention of injustice. In *Comptroller and Auditor-General of India v. K.S. Jagannathan,* (1986) 2 SCC 679, this Court has held:

> "20. There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or

> the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the court may itself pass an order or give directions which the government or the public authority should have passed or given had it properly and lawfully exercised its discretion."

16. In *Dwarkanath* v. *ITO,* AIR 1966 SC 81, this Court pointed out that Article 226 is designedly couched in a wide language in order not to confine the power conferred by it only to the power to issue prerogative writs as understood in England, such wide language being used to enable the High Courts "*to reach injustice wherever it is found*" and "*to mould the reliefs to meet the peculiar and complicated requirements of this country."*

17. In *Halsbury's Laws of England,* 4th Edn., Vol. I, para 89, it is stated that the purpose of an order of mandamus

> "is to remedy defects of justice; and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."

18. The High Court, in the present case, has moulded the relief in such a manner to meet out justice to an aggrieved person. It is not open to the subordinate Tribunal to examine whether a direction issued by the High Court under its writ

powers was correct and refuse to carry it out as such amounts to denial of justice and destroys the principle of hierarchy of courts in the administration of justice. This court in *Bishnu Ram Borah v. Parag Saikia,* (1984) 2 SCC 488, has held:

> "11. It is regrettable that the Board of Revenue failed to realize that like any other subordinate tribunal, it was subject to the writ jurisdiction of the High Court under Article 226 of the Constitution. Just as the judgments and orders of the Supreme Court have to be faithfully obeyed and carried out throughout the territory of India under Article 142 of the Constitution, so should be the judgments and orders of the High Court by all inferior courts and tribunals subject to their supervisory jurisdiction within the State under Articles 226 and 227 of the Constitution. We cannot but deprecate the action of the Board of Revenue in refusing to carry out the directions of the High Court. In Bhopal Sugar Industries Limited v. ITO, (1961) 1 SCR 474, the Income Tax Officer had virtually refused to carry out the clear and unambiguous directions which a superior tribunal like the Income tax Appellate Tribunal had given to him by its final order in exercise of its appellate powers in respect of an order of assessment made by him. The Court held that such refusal was in effect a denial of justice and is furthermore destructive of one of the basic principles in the administration of justice based as it is in this country on the hierarchy of courts. The facts of the present case are more or less similar and we would have allowed the matter to rest at that but unfortunately the judgment of the High Court directing the issue of a writ of mandamus for the grant of a liquor licence to Respondents 1 and 2 cannot be sustained."

19. We hasten to add, if for any reason, the subordinate authority is of the view that the directions issued by the Court is contrary to statutory provision or well established principles of law, it can approach the same Court with necessary

application/petition for clarification or modification or approach the superior forum for appropriate reliefs. In the present case, as we have already noticed, the respondents have not questioned the order passed by the High Court, which order has reached finality. In such circumstances, we cannot permit the adjudicating authority to circumvent the order passed by the High Court.

20. Therefore, in our view, the refund claim of appellant has been erroneously rejected by the Deputy Commissioner of Customs *vide* its order dated 23.12.2004 ignoring the specific directions issued by the Delhi High Court vide its order dated 11.03.2003, to the customs authorities to dispose of the appellant's claim of refund by taking into consideration the Essentiality Certificates issued by the DGH. The Deputy Commissioner of Customs has rejected the refund claim of appellant on the ground of unjust enrichment and failure to challenge the assessment of the Bills of Entry at the appellate stage, without even considering the Essentiality Certificates in the light of specific and binding directions of the High Court.

21. In view of the above, we allow this appeal and direct the Customs authorities to consider the appellant's claim of refund of customs duty paid under protest in accordance with the directions issued by Delhi High Court vide its order dated 11.03.2003 as expeditiously as possible. In the facts and circumstances of the case, we direct the parties to bear their own costs.

N.J. Appeal allowed.

STATE OF ORISSA & ANR.
v.
MAMATA MOHANTY
(CIVIL APPEAL NO. 1272 OF 2011 ETC.)

FEBRUARY 9, 2011

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

SERVICE LAW :

ORISSA EDUCATION (RECRUITMENT AND CONDITIONS OF SERVICE OF TEACHERS AND MEMBERS OF THE STAFF OF AIDED EDUCATIONAL INSTITUTIONS) RULES, 1974 :

Rules 2(1), 4 to 7 – Lecturers receiving grant-in-aid – Claiming UGC pay scale w.e.f. 1.1.1986, as per Notification dated 6.10.1989 – Writ petitions allowed by High Court placing reliance on earlier decisions – Held : Questions raised in instant appeals had never been considered by courts earlier – A teacher who had been appointed without possessing the requisite qualification at initial stage, cannot get the benefit of grant-in-aid scheme unless he/she acquires the additional qualification and, therefore, question of grant of UGC pay scale would not arise unless such teacher acquires the additional qualification for benefit of grant-in-aid scheme – However, terminating the services of those who had been appointed illegally and/or withdrawing the benefit of grant-in-aid scheme would not be desirable as a long period has elapsed – But, UGC pay scale cannot be granted prior to the date of acquisition of higher qualification – Delay/ laches –Constitution of India, 1950 – Articles 14, and 16 and 21 – Stare decisis – Rule of per incurium.

CONSTITUTION OF INDIA, 1950 :

Article 226 – Writ petition – Limitation for filing of – Held

: Doctrine of limitation being based on public policy is applicable to writ petitions which may be dismissed at initial stage on ground of delay and laches – Relief granted in similar case cannot furnish a proper explanation for delay/ laches – Limitation Act, 1963 – s.3

Article 226 – Writ petition – Held : Relief not founded on pleadings should not be granted – Relief – Pleadings.

Article 14 –Held : Does not envisage negative equality –The principle also applies to judicial pronouncements – Once the court comes to the conclusion that a wrong order has been passed, it becomes the solemn duty of the court to rectify the mistake.

Articles 14 and 16 –Held: Even if names of candidates are requisitioned from Employment Exchange, in addition thereto, it is mandatory on the part of employer to invite applications from open market by advertising the vacancies in newspapers having wide circulation or by announcement in Radio and Television –Service Law –Appointments.

Article 14 and 16 – Relaxation or condoning of deficiency – Held : Granting relaxation subsequently amounts to change of criteria after issuance of advertisement and is violative of fundamental rights enshrined under Articles 14 and 16 of similarly situated persons who did not apply for want of eligibility – An appointment which is bad in inception does not get sanctified at a later stage –Concept of adverse possession of lien on post or holding over are not applicable in service jurisprudence – A person not possessing the requisite qualification cannot hold the post nor can he approach the court as he does not have a right which can be enforced through court – Service Law – Relaxation in eligibility.

Article 21-A –Education –Held : It is not permissible for State while controlling education to impinge the standard of education –Paucity of funds cannot be a ground for State not

to provide quality education to its future citizens –Therefore, State provides grant-in-aid to private schools –However, while granting recognition and affiliation, it is mandatory to adhere to the conditions imposed which include the minimum eligibility for appointment of teaching staff –The selection of the most suitable persons is essential in order to maintain excellence and the standard of teaching – Service Law – Eligibility of teaching staff.

CIRCULARS/GOVERNMENT ORDERS/ NOTIFICATIONS:

Circulars/Letters – Filing of in courts – HELD: Some of the Circulars/letters/ orders filed in court may not be in conformity with law and may be violative of the mandatory provisions of the Constitution – Such circulars/letters cannot be given effect to.

STARE DECISIS :

Rule of per incurium –Held : Courts have developed this principle in relaxation of the rule of stare decisis –Thus, the "quotable in law" is avoided and ignored if it is rendered in ignoratium of a statute or other binding authority –The judgments passed without noticing the judgments in Damodar Nayak and Bhanu Prasad Panda are held to be not of binding nature.

WORDS AND PHRASES :

Expression 'per incurium' – Connotation of.

Respondent No. 1 in CA No. 1272/2011 was appointed as a Lecturer on 9.7.1979 and her appointment was approved by the Director of Higher Education. By order dated 18.12.1985 she was granted the benefit of receiving 1/3rd grant-in-aid Scheme. The Government of Orissa, by Notification dated 6.10.1989, revised the pay scale enforceable with effect from 1.1.1986 as per the

recommendations of UGC. The Notification was applicable only in cases where the post was granted the benefit of grant-in-aid Scheme by 1.4.1989 and the person manning that post must have a good academic record i.e. 54% or its equivalent grade in a Master's Course. The respondent filed a writ petition before the High Court on 11.11.2005 seeking a direction from the State Government to pay her the revised pay scale as per Notification dated 6.10.1989 with effect from 1.1.1986 as had been granted by the High Court in OJC No. 3705 of 1987 and other similar cases. The writ petition was contested by the appellants on the ground that since the respondent had secured only 40% marks in her Master's Course, she was not eligible for appointment and her appointment being not in consonance with law, remained illegal. The High Court, however, placing reliance on its earlier judgments, allowed the writ petition. Aggrieved, the State Government filed an appeal. Similarly, the other appeals were also filed.

It was contended for the respondents that the High Court had been dealing with the subject matter for a long time and once SLPs against judgments of the High Court had been dismissed by the Supreme Court, in limine, judicial discipline and decorum would demand the Supreme Court to follow the same order and, therefore, the judgment impugned in the instant appeals did not warrant any interference. On the other hand, it was contended for the appellants that factual and legal issues involved in the instant appeals had never been considered either by the High Court or by the Supreme Court.

The questions for consideration before the Court were : (i) whether the orders of the High Court could be given effect to or be considered by the courts to grant a relief to the persons whose appointments had been illegal for want of eligibility and for not following the

procedure prescribed by law, i.e. advertisement, etc. and (ii) whether the delay and laches could be condoned all together giving the respondents the impetus of the earlier judgments in cases of persons who had been diligent enough to approach the court within a reasonable period.

Disposing of the appeals, the Court

HELD: 1. The questions raised in the instant appeals had never been considered by any of the courts, however, they involve substantial questions of law of public importance and, therefore, require proper adjudication. [para 11] [729-F]

2. STATUTORY PROVISIONS – RELEVANT PARTS

2. In view of the definition of 'University' in Rule 2(i) of the Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974, "University" means all the four universities of Orissa, as enumerated in the Rules, namely, Utkal University, Behrampur University, Sambalpur University and Sri Jagannath Sanskrit Vishwa Vidyalaya. The instant cases relate to Utkal University. It is the Selection Board constituted by the Government under Rule 4 of the Rules 1974, which could call the candidates for interview/tests and make the selection according to merit [Rule 5]. The Selection Board shall make the teachers available to individual colleges as per their need. Thus, the Committee of Management does not have a right to make the appointment of a teacher of its own. More so, under the Rules 1979, the teachers so appointed are liable to be transferred throughout the State of Orissa even to a College which may be affiliated to any of the four Universities. [para 12] [731-D; 730-A; 731-D-F]

3. EDUCATION :

3.1. Education is the systematic instruction,

schooling or training given to the young persons in preparation for the work of life. It also connotes the whole course of scholastic instruction which a person has received. Education connotes the process of training and developing the knowledge, skill, mind and character of students by formal schooling. The excellence of instruction provided by an educational institution mainly depends directly on the excellence of the teaching staff. Therefore, unless they themselves possess a good academic record/minimum qualifications prescribed as an eligibility, it is beyond imagination of anyone that standard of education can be maintained/enhanced. [para 14] [733-H; 734-A-C]

The Sole Trustee Loka Shikshana Trust v. The Commissioner of Income Tax, Mysore, **AIR 1976 SC 10;** *Frank Anthony Public School Employees' Association v. Union of India & Ors.,* **AIR 1987 SC 311;** *Osmania University Teachers' Association v. State of Andhra Pradesh & Anr.,* **AIR 1987 SC 2034; and** *Director (Studies), Dr. Ambedkar Institute of Hotel Management, Nutrition & Catering Technology, Chandigarh & Ors. v. Vaibhav Singh Chauhan,* **2008 (15) SCR 224 = (2009) 1 SCC 59);** *Meera Massey (Dr) v. S.R. Mehrotra (Dr) & Ors.,* **AIR 1998 SC 1153 and** *Chandigarh Administration & Ors. v. Rajni Vali & Ors.,* **AIR 2000 SC 634 –relied on**

Report of the University Education Commission, i.e., Radhakrishnan Commission; Report of the Committee on University Administration **1964(1967) – referred to**

3.2. Paucity of funds cannot be a ground for the State for not providing quality education to its future citizens. It is for this reason that in order to maintain the standard of education, the State Government provides grant-in-aid to private schools to ensure the smooth running of the institution so that the standard of teaching may not suffer for want of funds. Article 21A of the Constitution of India

has been added by amending the Constitution with a view to facilitate the children to get proper and good quality of education. The selection of the most suitable persons is essential in order to maintain excellence and the standard of teaching. It is not permissible for the State that while controlling the education it may impinge the standard of education. [para 17] [736-C-G]

3.3. This Court in *Damodar Nayak* **has categorically held that a person cannot get the benefit of grant-in-aid unless he completes the deficiency of educational qualification. Further, this Court in Dr. *Bhanu Prasad Panda* upheld the termination of services of the appellant therein for not possessing 55% marks in Master Course. [para 46(xii)] [753-D-E]**

State of Orissa & Anr. v. Damodar Nayak & Anr., **AIR 1997 SC 2071 and** *Dr. Bhanu Prasad Panda v. Chancellor, Sambalpur University & Ors.,* **(2001) 8 SCC 532 –relied on**

3.4. In case, a person cannot get the benefit of grant-in-aid scheme unless he completes the deficiency of educational qualification, question of grant of UGC pay scale does not arise. [para 46(xiv)] [753-H; 753-A]

4. <u>APPOINTMENT/EMPLOYMENT WITHOUT ADVERTISEMENT</u>:

4.1. Keeping in view the requirements of Article 16 of the Constitution, there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly. Even if the names of candidates are requisitioned from Employment Exchange, in addition thereto it is mandatory on the part of the employer to invite applications from all eligible candidates from the open market by advertising the vacancies in newspapers having wide circulation or by announcement in Radio

and Television. An appointment made by merely calling the names from the Employment Exchange or putting a note on the Notice Board etc. violates the mandates of Articles 14 and 16 of the Constitution as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. [para 18-19] [737-A-C; F-H; 738-A]

Delhi Development Horticulture Employees' Union v. Delhi Administration, Delhi & Ors., **AIR 1992 SC 789;** *State of Haryana & Ors. v. Piara Singh & Ors.,* **AIR 1992 SC 2130;** *Excise Superintendent Malkapatnam, Krishna District, A.P. v. K.B.N. Visweshwara Rao & Ors.,* **1996 (5) Suppl. SCR 73 = (1996) 6 SCC 216;** *Arun Tewari & Ors. v. Zila Mansavi Shikshak Sangh & Ors.,* **AIR 1998 SC 331;** *Binod Kumar Gupta & Ors. v. Ram Ashray Mahoto & Ors.,* **AIR 2005 SC 2103;** *National Fertilizers Ltd. & Ors. v. Somvir Singh,* **AIR 2006 SC 2319;** *Telecom District Manager & Ors. v. Keshab Deb,* **2008 (7) SCR 835 = (2008) 8 SCC 402;** *State of Bihar v. Upendra Narayan Singh & Ors.,* **2009 (4) SCR 866 = (2009) 5 SCC 65; and** *State of Madhya Pradesh & Anr. v. Mohd. Ibrahim,* **2009 (8) SCR 229 = (2009) 15 SCC 214) - referred to.**

4.2. In the instant matters, the procedure prescribed under the Rules, 1974 has not been followed in all the cases while making appointments of the respondents/ teachers at initial stage. Some of the persons had admittedly been appointed merely by putting some note on the Notice Board of the College. Some of these teachers did not face the interview test before the Selection Board. Their appointments were approved by the statutory authority i.e. Director of Higher Education after a long long time; in some cases even after 10-12 years of their initial appointment. [para 46 (i) and (iii)] [750-G-H; 751-B-C]

5. <u>ORDER BAD IN INCEPTION</u> :

5.1. It is a settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A subsequent action/development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. If an order at the initial stage is bad in law, then all further proceedings consequent thereto will be non est and have to be necessarily set aside. A right in law exists only and only when it has a lawful origin. [para 20] [738-C-D]

Upen Chandra Gogoi v. State of Assam & Ors., **AIR 1998 SC 1289;** *Mangal Prasad Tamoli (Dead) by L.Rs. v. Narvadeshwar Mishra (Dead) by L.Rs. & Ors. ,* **AIR 2005 SC 1964; and** *Ritesh Tiwari & Anr. v. State of U.P. & Ors.,* **AIR 2010 SC 3823- relied on**

5.2. The concept of adverse possession of lien on post or holding over is not applicable in service jurisprudence. Therefore, continuation of a person wrongly appointed on post does not create any right in his favour. [para 20 and 46(xx)] [753-G-H; 738-F]

Dr. M.S. Patil v. Gulbarga University & Ors., **AIR 2010 SC 3783 – relied on**

6. <u>ELIGIBILITY LACKING</u>:

6.1. A person who did not possess the requisite percentage of marks as per the statutory requirement or is lacking the eligibility cannot hold the post, nor can he approach the court for the reason that he does not have a right which can be enforced through court. [para 21-22] [738-H; 739-F-G]

Dr. Prit Singh v. S.K. Mangal & Ors., **1992 (1) Suppl. SCR 337 = 1993 Supp (1) SCC 714;** *Pramod Kumar v. U.P. Secondary Education Services Commission & Ors.,* **AIR 2008**

SC 1817 –relied on

6.2. A candidate becomes eligible to apply for a post only if he fulfils the required minimum benchmark fixed by the rules/advertisement. At the relevant time of appointment of the respondents/teachers there has been a requirement of possessing good second class i.e. 54% marks in Master's Course and none of the said respondents had secured the said percentage. Thus, none of the respondents could even submit the application. [para 46 (ii) and (iv)] [751-A-C-D]

7. <u>RELAXATION :</u>

7.1. In absence of an enabling provision for grant of relaxation, no relaxation can be made. Even if such a power is provided under the Statute, it cannot be exercised arbitrarily. Such a power cannot be exercised treating it to be an implied, incidental or necessary power for execution of the statutory provisions. Even an implied power is to be exercised with care and caution with reasonable means to remove the obstructions or to overcome the resistance in enforcing the statutory provisions or executing its command. Incidental and ancillary powers cannot be used in utter disregard of the object of the Statute. Such power can be exercised only to make the legislation effective so that the ultimate power does not become illusory, which otherwise would be contrary to the intent of the legislature. [para 30-31] [743-F-H; 744-A]

Dr. J.P. Kulshrestha & Ors. v. Chancellor, Allahabad University & Ors., **AIR 1980 SC 2141;***Rekha Chaturvedi v. University of Rajasthan & Ors.,* **1993 (1) SCR 186 =1993 Supp (3) SCC 168;** *P.K. Ramachandra Iyer & Ors. v. Union of India & Ors.,* **AIR 1984 SC 541;** *Secretary, A.P. Public Service Commission v. B. Swapna & Ors.,* **2005 (2) SCR 991 = (2005) 4 SCC 154;** *Kendriya Vidyalaya Sangathan & Ors.*

v. Sajal Kumar Roy & Ors., **2006 (7) Suppl. SCR 607 = (2006) 8 SCC 671;** *Food Corporation of India & Ors. v. Bhanu Lodh & Ors.,* **AIR 2005 SC 2775;** *Dr. Bhanu Prasad Panda v. Chancellor, Sambalpur University & Ors.* **2001 (3) Suppl. SCR 62 = (2001) 8 SCC 532; :** *Union of India v. Dharam Pal & Ors.,* **2009 (2) SCR 193 = (2009) 4 SCC 170);** *Matajog Dobey v. H.S. Bhari,* **AIR 1956 SC 44; and** *State of Karnataka v. Vishwabharathi House Building Co-operative Society & Ors.,* **2003 (1) SCR 397 = (2003) 2 SCC 412;** *K. Manjusree v. State of Andhra Pradesh & Anr.,* **AIR 2008 SC 1470; and** *Ramesh Kumar v. High Court of Delhi & Anr.,* **AIR 2010 SC 3714– relied on**

7.2. Granting relaxation subsequently amounts to change of criteria after issuance of advertisement, which is impermissible in law. More so, it is violative of fundamental rights, enshrined under Articles 14 and 16 of the Constitution, of the similarly situated persons, who did not apply considering themselves to be ineligible for want of required marks. [para 46 (viii)] [751-G-H; 752-A]

7.3. The Circulars/Letters issued by the Government from time to time fixed the minimum 54% marks in Master's Course as eligibility. In the instant matters, the relaxation has been granted only by Utkal University; condonation of deficiency had not been exercised by any University other than Utkal University. The so-called relaxation was accorded by the Utkal University by passing a routine order applicable to large number of colleges, that too after a lapse of long period i.e. about a decade. [para 12 and 46 (v)] [733-D; 751-D-E]

7.4. Fixation of eligibility falls within the exclusive domain of the executive and once it has been fixed by the State authorities under the Rules 1974, the question of according relaxation by Utkal University could not arise and, therefore, the order of condonation etc. is nullity. [para 46 (vi)] [751-E-F]

7.5. The power to grant relaxation in eligibility had not been conferred upon any authority, either the University or the State. In absence thereof, such power could not have been exercised. [para 46 (xi)] [752-C]

8. <u>DELAY/LACHES</u> :

8.1. Although Limitation Act does not apply in writ jurisdiction, however, the doctrine of limitation being based on public policy, the principles enshrined therein are applicable and writ petitions are dismissed at initial stage on the ground of delay and laches. In alike case, getting a particular pay scale may give rise to a recurring cause of action. In such an eventuality, the petition may be dismissed on the ground of delay and laches and the court may refuse to grant relief for the initial period in case of an unexplained and inordinate delay. Most of the petitions had been filed before the High Court after 10-20 years for grant of UGC pay scales w.e.f. 1.1.1986 and to pay the arrears etc. The High Court in all the cases, granted relief with effect from 1.1.1986 or even with effect from 1.6.1984, though even the Notification dated 6.10.1989 makes it applicable w.e.f. 1.1.1986. The cases had been entertained and relief had been granted by the High Court without considering the issue of delay and laches merely placing reliance upon earlier judgments obtained by diligent persons approaching the courts within a reasonable time. [paras 9, 32, 33 and 46(xv)] [744-G-H; 745-A; 729-B-C; 753-B]

Lachhmi Sewak Sahu v. Ram Rup Sahu & Ors., **AIR 1944 Privy Council 24; and** *Kamlesh Babu & Ors. v. Lajpat Rai Sharma & Ors,* **2008 (6) SCR 653 = (2008) 12 SCC 577 –relied on.**

8.2. Relief granted by the Court in a similar case, cannot furnish a proper explanation for delay and laches. A litigant cannot claim impetus from the judgment in

cases where some diligent person had approached the Court within a reasonable time. [para 34] [745-B-C]

M/s Rup Diamonds & Ors., v. Union of India & Ors., **AIR 1989 SC 674;** *State of Karnataka & Ors. v. S.M. Kotrayya & Ors.,* **1996 (5) Suppl. SCR 426 = (1996) 6 SCC 267; and** *Jagdish Lal & Ors. v. State of Haryana & Ors.,* **AIR 1997 SC 2366 – relied on.**

9. <u>RELIEF NOT CLAIMED – CANNOT BE GRANTED</u> :

9.1. A decision of a case cannot be based on grounds outside the pleadings of the parties. 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 about the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that "as a rule relief not founded on the pleadings should not be granted." [para 35] [745-E-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;*** *Ishwar Dutt v. Land Acquisition Collector & Anr.,* **AIR 2005 SC 3165; and** *State of Maharashtra v. Hindustan Construction Company Ltd.,* **2010 (4) SCR 46 = (2010) 4 SCC 518 -relied on**

9.2. The High Court granted relief in some cases which had not even been asked for, as in some cases the UGC pay scale had been granted with effect from 1.6.1984, i.e., the date prior to 1.1.1986 though the same relief could not have been granted and was not permissible in law in view of the law laid down by this Court in *Damodar Nayak* *. Thus, it clearly makes out a case of deciding a matter without any application of mind. [para 46 (xvii-xviii)] [753-D-F]

State of Orissa & Anr. v. Damodar Nayak & Anr., **AIR 1997 SC 2071 and** *Dr. Bhanu Prasad Panda v. Chancellor, Sambalpur University & Ors.,* **(2001) 8 SCC 532 –relied on**

10. ARTICLE 14 OF THE CONSTITUTION OF INDIA.

10.1. It is a settled legal proposition that Article 14 is not meant to perpetuate illegality and it does not envisage negative equality. Thus, even if some other similarly situated persons have been granted some benefit inadvertently or by mistake, such order does not confer any legal right on the petitioner to get the same relief. This principle also applies to judicial pronouncements. Once the court comes to the conclusion that a wrong order has been passed, it becomes the solemn duty of the court to rectify the mistake rather than perpetuate the same. [para 36] [746-A-D]

Chandigarh Administration & Anr v. Jagjit Singh & Anr., **AIR 1995 SC 705;** *Yogesh Kumar & Ors. v. Government of NCT Delhi & Ors.,* **AIR 2003 SC 1241;** *M/s Anand Buttons Ltd. etc. v. State of Haryana & Ors.,* **AIR 2005 SC 565;** *K.K. Bhalla v. State of M.P. & Ors.,* **AIR 2006 SC 898;** *Maharaj Krishan Bhatt & Anr. v. State of Jammu & Kashmir & Ors.,* **2008 (11) SCR 670 = (2008) 9 SCC 24;** *Upendra Narayan Singh (supra); and Union of India & Anr. v. Kartick Chandra Mondal & Anr.,* **AIR 2010 SC 3455);** *Hotel Balaji & Ors. v. State of A.P. & Ors.,* **AIR 1993 SC 1048;** *Sanjiv Datta, Dy. Secy., Ministry of Information & Broadcasting,* **1995 (3) SCR 450 = (1995) 3 SCC 619;** *Nirmal Jeet Kaur v. State of M.P. & Anr.,* **2004 (3) Suppl. SCR 1006 = (2004) 7 SCC 558; and** *Mayuram Subramanian Srinivasan v. CBI,* **AIR 2006 SC 2449 - relied on.**

10.2. The grievance of the respondents that not upholding the orders passed by the High Court in their favour would amount to a hostile discrimination, is not worth acceptance for the reason that Article 14 of the

Constitution envisages only positive equality. [para 46 (xix)] [753-G]

11 ARBITRARINESS :

11.1. The rule of law inhibits arbitrary action and also makes it liable to be invalidated. Every action of the State or its instrumentalities should not only be fair, legitimate and above-board but should be without any affection or aversion. Procedural fairness is an implied mandatory requirement to protect against arbitrary action where Statute confers wide power coupled with wide discretion on an authority. If the procedure adopted by an authority offends the fundamental fairness or established ethos or shocks the conscience, the order stands vitiated. The decision making process remains bad. [para 38] [747-E-F]

Haji T.M. Hassan Rawther v. Kerala Financial Corporation, **AIR 1988 SC 157;** *Dr. Rash Lal Yadav v. State of Bihar & Ors.,* **1994 (1) Suppl. SCR 231 = (1994) 5 SCC 267; and** *Tata Cellular v. Union of India,* **1994 (2) Suppl. SCR 122 =(1994) 6 SCC 651;** *State of Andhra Pradesh & Anr. v. Nalla Raja Reddy & Ors.,* **AIR 1967 SC 1458;** *S.G. Jaisinghani v. Union of India & Ors.,* **AIR 1967 SC 1427;** *Commissioner of Police, Bombay v. Gordhandas Bhanji,* **AIR 1952 SC 16 – relied on.**

11.2. The object and purpose of according recognition and affiliation to educational institutions can not be ignored. Therefore, while granting the recognition and affiliation even for non-governmental and non-aided private colleges, it is mandatory to adhere to the conditions imposed which also include the minimum eligibility for appointment of teaching staff. In the instant case, it appears to be a clear cut case of arbitrariness which cannot be approved. [para 37] [747-A-D]

11.3. The submission on behalf of the respondents that Government orders/circulars/letters have been complied with, therefore, no interference is called for, is preposterous for the simple reason that such orders/ circulars/letters being violative of statutory provisions and constitutional mandate are just to be ignored in terms of the judgment of this Court in *Ram Ganesh Tripathi *.* **[para 46 (xxi)] [754-A-B]**

Ram Ganesh Tripathi & Ors. v. State of U.P. & Ors.,* ***AIR 1997 SC 1446* **– relied on.**

11.3. It is a matter of common experience that a large number of orders/letters/circulars, issued by the State/ statutory authorities, are filed in court for placing reliance and acting upon it. However, some of them are definitely found to be not in conformity with law. There may be certain such orders/circulars which are violative of the mandatory provisions of the Constitution. [para 41] [749-F]

11.4. The authority passed illegal orders in contravention of the constitutional provisions arbitrarily without any explanation whatsoever polluting the entire education system of the State, ignoring the purpose of grant-in-aid scheme itself that it has been so provided to maintain the standard of education. [para 46 (xvi)] [753-C]

11.5. The whole exercise done by the State authorities suffers from the vice of arbitrariness and, thus, is violative of Article 14 of the Constitution. Therefore, it cannot be given effect to. [para 42] [749-B-C]

12. <u>PER INCURIAM – DOCTRINE</u> :

12.1. "Incuria" literally means "carelessness". In practice *per incuriam* is taken to mean per ignoratium. The

Courts have developed` this principle in relaxation of the rule of stare decisis. Thus the "quotable in law", is avoided and ignored if it is rendered in ignoratium of a Statute or other binding authority. [para 43] [749-D]

Mamleshwar Prasad & Anr. v. Kanahaiya Lal (Dead) by Lrs., **AIR 1975 SC 907;** *State of Orissa & Anr. v. Damodar Nayak & Anr.,* **AIR 1997 SC 2071 – relied on.**

12.2. The two judgments in *Damodar Nayak* and *Bhanu Prasad Panda* could not be brought to the notice of either the High Court or this Court while dealing with the issue. Special leave petition in the case of *Kalidas Mohapatra & Ors. has been dealt with without considering the requirement of law merely making the reference to Circular dated 6.11.1990, which was not the first document ever issued in respect of eligibility. Thus, all the judgments and orders passed by the High Court as well as by this Court cited and relied upon by the respondents are held to be not of a binding nature (Per in curiam). [para 46(xiii)] [753-F-G]**

State of Orissa & Anr. v. Damodar Nayak & Anr., **AIR 1997 SC 2071 and** *Dr. Bhanu Prasad Panda v. Chancellor, Sambalpur University & Ors.,* **(2001) 8 SCC 532 –relied on**

State of Orissa & Anr. v. Kalidas Mohapatra & Ors., **[SLP(C) Nos. 14206-14209 of 2001 decided by Supreme Court on 11.3.2001- held per incurium.**

12.3. Thus, it stands crystal clear that a teacher who had been appointed without possessing the requisite qualification at initial stage cannot get the benefit of grant-in-aid scheme unless he acquires the additional qualification and, therefore, question of grant of UGC pay scale would not arise in any circumstance unless such teacher acquires the additional qualification making him eligible for the benefit of grant-in-aid scheme. The

cumulative effect, therefore, comes to that such teacher will not be entitled to claim the UGC pay scale unless he acquires the higher qualification i.e. M.Phil/Ph.D. [para 47] [754-C-D]

12.4. In the facts and circumstances of the case, terminating the services of those who had been appointed illegally and/or withdrawing the benefits of grant-in-aid scheme from those who had not completed the deficiency in eligibility/educational qualification or from those who had been granted from the date prior to completing the deficiency, may not be desirable as a long period has elapsed. So far as the grant of UGC pay scale is concerned, it cannot be granted prior to the date of acquisition of higher qualification. In view of the above, the impugned judgment/order cannot be sustained in the eyes of law. [para 48] [754-E-F]

12.5. The full particulars of the respondent-teachers are not before this Court as in some cases there had been claims and counter claims of possessing the requisite marks i.e. 54% in Master's Course. Therefore, it is directed : (i) In case of dispute regarding possessing of 54% marks, the authorities, Secretary of Higher Education/Director of Higher Education may examine the factual position and decide the case of individual teachers in accordance with law laid down in this case; and (ii) If a person did not possess the requisite qualification on the date of appointment and was not entitled for grant-in-aid scheme, unless he completes the deficiency, his case would be considered from the date of completing the deficiency for grant of UGC pay scale. However, in no case, the UGC pay scale can be granted prior to the date of according the benefit of the grant-in-aid scheme, i.e. by acquiring the degree of M.Phil/Ph.D. [para 49] [754-G-H; 755-A-C]

Case Law Reference:

AIR 1976 SC 10	relied on	para 14
AIR 1987 SC 311	relied on	para 14
AIR 1987 SC 2034	relied on	para 14
2008 (15) SCR 224	relied on	para 14
AIR 1998 SC 1153	relied on	para 14
AIR 2000 SC 634	relied on	para 15
AIR 1992 SC 789	referred to	para 18
AIR 1992 SC 2130	referred to	para 18
1996 (5) Suppl. SCR 73	referred to	para 18
AIR 1998 SC 331	referred to	para 18
AIR 2005 SC 2103	referred to	para 18
AIR 2006 SC 2319	referred to	para 18
2008 (7) SCR 835	referred to	para 18
2009 (4) SCR 866	referred to	para 18
2009 (8) SCR 229	referred to	para 18
AIR 1998 SC 1289	relied on	para 20
AIR 2005 SC 1964	relied on	para 20
AIR 2010 SC 3823	relied on	para 20
AIR 2010 SC 3783	relied on	para 20
1992 (1) Suppl. SCR 337	relied on	para 21
AIR 2008 SC 1817 337	relied on	para 22
AIR 1980 SC 2141	relied on	para 23
1993 (1) SCR 186	relied on	para 24

AIR 1984 SC 541	**relied on**	**para 25**
2005 (2) SCR 991	**relied on**	**para 26**
2006 (7) Suppl. SCR 607	**relied on**	**para 27**
AIR 2005 SC 2775	**relied on**	**para 28**
2001 (3) Suppl. SCR 62	**relied on**	**para 29**
2009 (2) SCR 193	**relied on**	**para 30**
AIR 1956 SC 44	**relied on**	**para 31**
2003 (1) SCR 397	**relied on**	**para 31**
AIR 2008 SC 1470	**relied on**	**para 31**
AIR 2010 SC 3714	**relied on**	**para 31**
AIR 1944 Privy Council 24	**relied on**	**para 32**
2008 (6) SCR 653	**relied on**	**para 32**
AIR 1989 SC 674	**relied on**	**para 34**
1996 (5) Suppl. SCR 426	**relied on**	**para 34**
AIR 1997 SC 2366	**relied on**	**para 34**
(1898) 25 Ind. App. 195	**relied on**	**para 35**
AIR 1953 SC 235	**relied on**	**para 35**
AIR 2005 SC 3165	**relied on**	**para 35**
2010 (4) SCR 46	**relied on**	**para 35**
AIR 1995 SC 705	**relied on**	**para 36**
AIR 2003 SC 1241	**relied on**	**para 36**
AIR 2005 SC 565	**relied on**	**para 36**
AIR 2006 SC 898	**relied on**	**para 36**

2008 (11) SCR 670	**relied on**	**para 36**
AIR 2010 SC 3455	**relied on**	**para 36**
AIR 1993 SC 1048	**relied on**	**para 36**
1995 (3) SCR 450	**relied on**	**para 36**
2004 (3) Suppl. SCR 1006	**relied on**	**para 36**
AIR 2006 SC 2449	**relied on**	**para 36**
AIR 1988 SC 157	**relied on**	**para 38**
1994 (1) Suppl. SCR 231	**relied on**	**para 38**
1994 (2) Suppl. SCR 122	**relied on**	**para 38**
AIR 1967 SC 1458	**relied on**	**para 39**
AIR 1967 SC 1427	**relied on**	**para 40**
AIR 1952 SC 16	**relied on**	**para 40**
AIR 1997 SC 1446	**relied on**	**para 41**
AIR 1975 SC 907	**relied on**	**para 43**
AIR 1997 SC 2071	**relied on**	**para 44**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1272 of 2011.

From the Judgment & Order dated 22.3.2006 of the High Court of Orissa at Cuttack in W.P. (C) No. 14157 of 2005.

WITH

C.A. 1246-1271, 1273-1274, 1277-1281, 1283, 1285-1287, 1289-1293, 1295-1300, 1302-1313. 1315-1321 & 1284 of 2011.

P.N. Misra, A.K. Sanghi, Shambhu Prasad Singh, Shibashish Misra, Kirti Renu Mishra, R.S. Jena, Ghanshyam

Yadav, Suresh Chandra Tripathy, Satya Mitra Garg, Kirti Renu Mishra, Rishi Jain, Radha Shyam Jena, Rutwik Kumar, A. Raghunath , Kedar Nath Tripathy, Bharat Sangal, K.N. Tripathi, Shovan Mishra, Sounnak S. Das, S.K. Malik, Hara Prasad Sahu, Kedar Nath Tripathy, Saraswati Malik, Ashok Panigrahi, Shiv Kanungo, Satya Mitra Garg, Nilkanta Nayak, A.P. Mayee, Prasanna Kumar Nanda, V.S. Raju, T.N. Rao, Soumyajit Pani, Sunil K. Jain, P.V. Dinesh, P. Rajesh, Sindhu, Nikhil Goel, Marsook Bafaki, H.K. Puri, Vikay Verma, Kirti Mishra, Rishi Jain, Sanjay Parikh, Anish R. Shah, Soumya Ray, A.N. Singh, V.K. Monga, Swetaketu Mishra, Ajay Choudhary, Sanjay Das, RItin Rai, Bharat Sangal, R.R. Kumar, Vernika Tomar, Alka Singh, Abhishth Kumar, Sibo Sankar Mishra, Raj Kumar Parashar, V.K. Sidharthan, Promila, Sanjay Kr. Das, Rono Mohanty, R.P. Goyal, A.P. Mohanty, P.K. Pattanaik, Rutwik Panda, Rajib Sankar Roy, Abhijit Sankar Roy, S.K. Patri, Pranab Kumar Mullick, Ajay Choudhary, Sanjay Das, Prashant Jha, Manjula Gupta, Prem Sunder Jha, P.K. Mullick, S.K. Patri, M.N. Mishra, Suresh Chandra, Sanjay V. Kharde, Asha G. Nair, Manoranjan Mishra, S.C. Triparthy, Shibashish Mishra, Anitha Shenoy for the appearing parties.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J.1. All the aforesaid appeals have been filed against the judgments and orders of the High Court of Orissa at Cuttack which have been passed placing reliance on its earlier judgments in similar cases. The facts and legal issues involved herein are the same. Thus, they are heard together and are being disposed of by the common judgment and order. However, for convenience, Civil Appeal No. 1272 of 2011 is taken to be the leading case and some reference to facts would be taken from other appeals as and when necessary in the context of legal issues involved herein.

2. The appeal has been preferred against the judgment and order dated 22.3.2006 of the High Court of Orissa at Cuttack in Writ Petition (Civil) No. 14157 of 2005.

FACTS:

3. (A) The respondent was appointed as a Lecturer in Niali College, Niali, on 9.7.1979 and her appointment as such was approved by the Director of Higher Education, Orissa, a statutory authority – the appellant No. 2, vide order dated 18.12.1985, and she was granted the benefit of receiving 1/3rd grant-in-aid.

(B) In order to provide better facilities to teachers and enhance the standard of higher education, the Government of Orissa, came out with a Notification dated 6.10.1989 with a revised pay scale enforceable with effect from 1.1.1986 as per the recommendations of UGC. However, the said Notification was applicable only in such cases where the post has been granted the benefit of grant-in-aid Scheme by 1.4.1989 and person manning that post had a good academic record i.e. 54 per cent or its equivalent grade in a Masters' Course.

(C) Respondent did not make any representation before any authority to get the benefit of the said Notification dated 6.10.1989, rather approached the High Court on 11.11.2005 by filing Writ Petition (Civil) No. 14157 of 2005 seeking a direction to the State Government to pay the pre-revised pay scale with effect from 1.1.1986 placing reliance on the various orders passed by the High Court earlier in cases of other persons e.g. in case OJC No. 3705 of 1987.

(D) The present appellants contested the said writ petition pointing out that the respondent had secured only 40 per cent marks in her Master's course. She was by no means, eligible for appointment. Her appointment, being not in consonance with law, remained illegal.

(E) The High Court placing reliance on its earlier judgments, allowed the said writ petition giving the benefit of the U.G.C. pay scale to her w.e.f. 1.6.1984. Hence, this appeal.

4. The submissions made in all these appeals, particularly by the respondents are that the High Court had been dealing with the subject matter for a long time and judgments of the High Court have been upheld by this court. Once the SLPs against the judgments of the High Court which had been relied upon by the High Court while deciding these cases, have been dismissed in limine, judicial discipline and decorum demand that this Court should follow the same order. Thus, the judgments and orders impugned herein did not warrant any interference.

5. On the other hand, it has been submitted by learned counsel for the appellants that factual and legal issues involved in these cases have never been considered either by the High Court or by this Court in proper perspective. For example, in Civil Appeal No. 1274 of 2011, *State of Orissa v. Mrs. Manju Patnaik,* the matter had initially been filed before the Orissa Education Tribunal. Therein, the question arose as to whether the respondent herein had been appointed by following the procedure prescribed by the law for making the appointment. As the State had raised the issue that respondent had been appointed without following any procedure known in law for this purpose her appointment itself was illegal and void. The vacancy on the post of Lecturer in Chemistry in Paramananda College, Bolgarh, Dist. Khurda was never advertised nor were the names of eligible candidates requisitioned from the Employment Exchange. Admitted facts in the said case remain that the vacancy was advertised merely by affixing notices on the notice board of the College and of Bolgarh Block Office inviting applications from the eligible candidates. More so, the respondent had not even faced an interview before the Selection Board, as envisaged by the Statutory Rules in force at the relevant time, rather she had been interviewed merely by representatives of the Committee of Management of the College. The Tribunal accepted the case of the State to that effect, but granted her reliefs sought by her. The High Court did not even consider the issue of validity of her appointment.

6. It is further submitted that none of the courts till today has considered that in case the institution has been accorded the benefit of grant-in-aid scheme subsequent to 1.6.1986, there could be no liability of the government to contribute partly or fully to the salary of any employee of the said college, prior to the date of grant of such benefit, whether UGC pay scale could be given prior to the date of according grant-in-aid benefits. In Civil Appeal No. 1318 of 2011, *State of Orissa v. Smt. Manjushree Patnaik,* the post of respondent was included under grant-in-aid scheme w.e.f. 1.6.1988. She did not possess the requisite qualifications and the said respondent was put in grant-in-aid with effect from 1988 though vide impugned judgment she has been given benefit from 1.1.1986.

7. In all these cases, admittedly most of the respondents did not possess the minimum eligibility, i.e., 54% marks in Master's course and some of them acquired it at a much later stage. It is pointed out by the learned counsel for the respondents herein, that Utkal University at Bhubneshwar had condoned the deficiency of eligibility-qualification by passing general orders from time to time. However, they failed to point out any statutory provision conferring competence upon the University to condone the deficiency, what to talk of reasonableness or propriety in condoning such deficiency. It is evident from Civil Appeal No. 1280 of 2011, *State of Orissa & Ors. v. Dr. Jadumani Sahoo,* that the respondent was appointed as a Lecturer in Political Science in Begunia College, Begunia, Khurda, on 5.9.1978 and the post which he held came into grant-in-aid scheme on 1.6.1984. He acquired the degree of Ph.D. in 2000. His deficiency in qualification was condoned after about 10 years by the Utkal University on 28.10.1987, and he has also been granted the benefit of UGC pay scale w.e.f. 1.1.1986.

8. There are letters/circulars issued by the University as well as by the State of Orissa for condonation of the deficiency. However, the question does arise as to whether this kind of

orders can be given effect to or be considered by the courts to grant a relief to the persons whose appointments had been illegal for want of eligibility and for not following the procedure prescribed by law, i.e. advertisement, etc.

9. Most of the petitions had been filed before the High Court after 10-15-20 years for grant of UGC pay scales w.e.f. 1.1.1986 and to pay the arrears etc. The High Court in all the cases granted the same with effect from 1.1.1986 or even with effect from 1.6.1984, without considering the issue of delay and laches, merely placing reliance upon its earlier judgments. Thus, the question does arise as to whether the delay and laches could be condoned all together giving the respondents the impetus of the earlier judgments in cases of persons who had been diligent enough to approach the Court within a reasonable period.

10. It has been further submitted by learned counsel for the respondents that teachers in government colleges have also been granted the said benefit though not entitled and the respondents herein cannot be given hostile treatment in case the impugned judgments and orders herein are not upheld. Thus, the question does arise as to whether Article 14 of the Constitution is meant to perpetuate an illegality.

11. Considering the rival submissions made by learned counsel for the parties, we are of the view that as the questions raised hereinabove had never been considered by any of the courts and involve substantial questions of law of public importance, the cases require proper adjudication.

12.**(A) <u>STATUTORY PROVISIONS - RELEVANT PARTS:</u>**

The Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974 (hereinafter called 'Rules 1974').

Rule 2 (i) - "University" means Utkal University, Berhampur University, Sambalpur University and Sri Jagannath Sanskrit Vishwa Vidyalaya.

Chapter II provides for establishment of the Selection Board and Rule 4 reads that there will be a Selection Board constituted by the Government for the purpose of making appointments of teaching and other staffs in aided schools.

Rule 5(1) thereof provides that the educational institutions would determine the vacancies subject-wise and indicate the same to the Director of Education who shall process the applications so received for those posts and transmit the same to the Selection Board after determining the genuineness of the vacancies in a particular college.

Rule 5(2) - The Selection Board shall, on receipt of applications and certificates referred to in Sub-rule (1) recommend a list of candidates in order of merit strictly according to the number of vacancies, to the concerned Directors who shall thereupon, allot candidates to the concerned institutions strictly in order of merit as per vacancy.

Rule 5(3) – Appointment shall be made by Managing Committee or the Governing Body as the case may be, of the candidates allotted under Sub-rule (2).

Rule 6 provides for Procedure of Selection – (1) The Selection Board shall, at such intervals as it deems proper, call for applications for various posts in respect of which vacancies are likely to arise in the course of the next one year in such manner as may be determined in the regulation of the Selection Board.

(2) The Selection Board shall conduct examinations including a *viva voce* examination of any candidate or all

candidates with a view to determining their merit and suitability in the matter appointed in its regulations.

Rule 7 - Condition of eligibility of candidates – Provided that upper age limit may be relaxable in respect of candidates belonging to Scheduled Castes, Scheduled Tribes and such other categories as may be specified by Government from time to time for recruitment to the similar or corresponding post under the Government.

The Orissa Aided Educational Institutions Employee's Common Cadre and Inter transferability Rules, 1979 (hereinafter called Rules 1979), make the post of teaching staff transferable to any other college, affiliated to any other University.

In view of the above, University means all the four universities of Orissa, not only Utkal University at Bhubneshwar. It is the Selection Board constituted under the Rules 1974, which could call the candidates for interview/tests and make the selection according to merit. The Selection Board shall make the teachers available to individual colleges as per their need. Thus, the Committee of Management does not have a right to make the appointment of a teacher of its own. More so, the teachers so appointed are liable to be transferred throughout the State of Orissa even to a College which may be affiliated to either of the aforesaid universities.

(B) <u>RELEVANT PART OF NOTIFICATIONS/ CIRCULARS/ LETTERS:</u>

(i) Government of Orissa – Education and Youth Services Department Resolution dated 5.9.1978 dealt with the subject- qualification for recruitment of lecturers in affiliated colleges of the State of Orissa and the relevant part reads as under:

> "A consistently good academic record with at least Ist or high second class (B in the seven point scale) at the Master's degree in a relevant subject. In other words, the University Grants Commission intended to determine high second class as average of minimum percentage of marks of second division and first division as (48+60) 54%....."

(ii) Orissa State Gazette, August 19, 1983 published a resolution dated 16.7.1983 prescribing the eligibility for appointment of teachers in affiliated colleges. The relevant part reads as under:

(a) *Candidate should have an M.Phil degree or a recognized degree beyond Master's level with atleast a second class Master's degree;*

(b) A candidate not holding an M.Phil degree should possess a high second class Master's degree i.e. 54% of marks and a second class Honours/Pass in the B.A./ B.Sc./B.Com examination; or

(c) A candidate not holding an M.Phil degree but possessing a second class Master's degree should have obtained a first class in the Honours/Pass in B.A./B.Sc./ B.Com examination.

(iii) Utkal University passed a resolution dated 20.8.1986 and condoned the deficiency of qualification of different non-government college teachers.

(iv) Government of Orissa, Education and Youth Services Department Circular dated 27.11.1986 dealt with the subject - Continuance of under-qualified teachers in Non-Government Colleges-Eligibility to receive grant-in-aid from Government. The relevant part reads as under:

"The decision of Utkal University communicated to Government in their letter NO. A.13570/86 dated 20.8.86 cannot be treated as a valid order of condonation of under qualification unless the concurrence of University Grants

Commission has been obtained. The Universities which have made order of condonation after the concerned Regulation of the U.G.C. may refer the matter to U.G.C. and secure their concurrence for condonation."

(v) Government of Orissa, Education and Youth Services Department Circular dated 23.4.1987 provides that the requirement of seeking condonation by two other universities had been withdrawn.

(vi) Resolution dated 6.10.1989 published in the Gazette on 3.11.1989 provided for the revised pay scale of teachers i.e. UGC pay scales w.e.f. 1.1.1986.

(vii) Resolution dated 6.11.1990 provides for grant of UGC pay scales as the Utkal University has condoned the deficiency of eligibility i.e. qualifications.

The aforesaid Circulars/Letters fixed the minimum 54% marks in Master's Course as eligibility and the University has condoned the deficiency in eligibility i.e. educational qualification. The UGC pay scale granted by the Notification dated 6.10.1989 could be made available w.e.f. 1.1.1986.

13. While dealing with the aforesaid issues we have taken into consideration all submissions made by all the counsel involved in these group matters. However, the main arguments have been advanced by Shri Shibashish Misra, Ms. Kirti Renu Mishra and Shri Radhey Shyam Jena, Advocates for the State and Shri A.K. Sanghi, Shri P.N. Misra, Shri Shambhu Prasad Singh, Senior Advocates, Shri Ashok Panigrahi, Shri Kedar Nath Tripathy, and Shri Bharat Sangal, Advocates for the respondents.

EDUCATION:

14. Education is the systematic instruction, schooling or training given to the young persons in preparation for the work of life. It also connotes the whole course of scholastic instruction

which a person has received. Education connotes the process of training and developing the knowledge, skill, mind and character of students by formal schooling. *The excellence of instruction provided by an educational institution mainly depends directly on the excellence of the teaching staff.* Therefore, unless they themselves possess a good academic record/minimum qualifications prescribed as an eligibility, it is beyond imagination of anyone that standard of education can be maintained/enhanced. "We have to be very strict in maintaining high academic standards and maintaining academic discipline and academic rigour if our country is to progress". "Democracy depends for its very life on a high standard of general, vocational and professional education. Dissemination of 'learning with search for new knowledge with discipline all round must be maintained at all costs". (Vide: *The Sole Trustee Loka Shikshana Trust v. The Commissioner of Income Tax, Mysore,* AIR 1976 SC 10; *Frank Anthony Public School Employees' Association v. Union of India & Ors.,* AIR 1987 SC 311; *Osmania University Teachers' Association v. State of Andhra Pradesh & Anr.,* AIR 1987 SC 2034; and *Director (Studies), Dr. Ambedkar Institute of Hotel Management, Nutrition & Catering Technology, Chandigarh & Ors. v. Vaibhav Singh Chauhan,* (2009) 1 SCC 59).

15. In *Meera Massey (Dr) v. S.R. Mehrotra (Dr) & Ors.,* AIR 1998 SC 1153, this Court extensively quoted the Report of the University Education Commission, i.e., Radhakrishnan Commission, wherein grave concern was expressed observing that "there is negligence in applying criteria of merit in the selection" of teachers.

The Court also quoted from another Report of the Committee on some problems of University Administration 1964(1967) as:

"The most important factor in the field of higher education is the type of person entrusted with teaching. Teaching cannot be improved without competent teachers. ... The

most critical problem facing the universities is the dwindling supply of good teachers. ... The supply of the right type of teachers assumes, therefore, a vital role in the educational advancement of the country.

The Court further observed as under:

"University imparts education which lays foundation of wisdom. Future hopes and aspiration of the country depends on this education, hence proper and disciplined functioning of the educational institutions should be the hallmark. If the laws and principles are eroded by such institutions it not only *pollutes its functioning, deteriorating its standard* but also exhibits to its own students the wrong channel adopted. If that be so, how could such institutions produce good citizens? It is the educational institutions which are the future hope of this country. They lay the seed for the foundation of morality, ethics and discipline. If there is any erosion or descending by those who control the activities all expectations and hopes are destroyed."

(emphasis added)

16. In *Chandigarh Administration & Ors. v. Rajni Vali & Ors.,* AIR 2000 SC 634, this Court observed as under:

"It is a constitutional mandate that the State shall ensure proper education to the students on whom the future of the society depends. In line with this principle, the State has enacted statutes and framed rules and regulations to control/regulate establishment and running of private schools at different levels. The State Government provides grant-in-aid to private schools with a view to ensure smooth running of the institution and to ensure that the standard of teaching does not suffer on account of paucity of funds. It needs no emphasis that appointment of qualified and

efficient teachers is a sine qua non for maintaining high standards of teaching in any educational institution."

(emphasis added)

17. In view of the above, it is evident that education is necessary to develop the personality of a person as a whole and in totality as it provides the process of training and acquiring the knowledge, skills, developing mind and character by formal schooling. Therefore, it is necessary to maintain a high academic standard and academic discipline along with academic rigour for the progress of a nation. Democracy depends for its own survival on a high standard of vocational and professional education. Paucity of funds cannot be a ground for the State not to provide quality education to its future citizens. It is for this reason that in order to maintain the standard of education the State Government provides grant-in-aid to private schools to ensure the smooth running of the institution so that the standard of teaching may not suffer for want of funds. Article 21A has been added by amending our Constitution with a view to facilitate the children to get proper and good quality education. However, the quality of education would depend on various factors but the most relevant of them is excellence of teaching staff. In view thereof, quality of teaching staff cannot be compromised. The selection of the most suitable persons is essential in order to maintain excellence and the standard of teaching in the institution. It is not permissible for the State that while controlling the education it may impinge the standard of education. It is, in fact, for this reason that norms of admission in institutions have to be adhered to strictly. Admissions in mid academic sessions are not permitted to maintain the excellence of education.

APPOINTMENT/EMPLOYMENT WITHOUT ADVERTISEMENT:

18. At one time this Court had been of the view that calling the names from Employment Exchange would curb to certain

extent the menace of nepotism and corruption in public employment. But, later on, came to the conclusion that some appropriate method consistent with the requirements of Article 16 should be followed. In other words there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly. Even if the names of candidates are requisitioned from Employment Exchange, in addition thereto it is mandatory on the part of the employer to invite applications from all eligible candidates from the open market by advertising the vacancies in newspapers having wide circulation or by announcement in Radio and Television as merely calling the names from the Employment Exchange does not meet the requirement of the said Article of the Constitution. (Vide: *Delhi Development Horticulture Employees' Union v. Delhi Administration, Delhi & Ors.*, AIR 1992 SC 789; *State of Haryana & Ors. v. Piara Singh & Ors.*, AIR 1992 SC 2130; *Excise Superintendent Malkapatnam, Krishna District, A.P. v. K.B.N. Visweshwara Rao & Ors.,* (1996) 6 SCC 216; *Arun Tewari & Ors. v. Zila Mansavi Shikshak Sangh & Ors.,* AIR 1998 SC 331; *Binod Kumar Gupta & Ors. v. Ram Ashray Mahoto & Ors.,* AIR 2005 SC 2103; *National Fertilizers Ltd. & Ors. v. Somvir Singh,* AIR 2006 SC 2319; *Telecom District Manager & Ors. v. Keshab Deb,* (2008) 8 SCC 402; *State of Bihar v. Upendra Narayan Singh & Ors.,* (2009) 5 SCC 65; and *State of Madhya Pradesh & Anr. v. Mohd. Ibrahim,* (2009) 15 SCC 214).

19. Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the Employment Exchange or putting a note on the Notice Board etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions

is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance of the said Constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit.

ORDER BAD IN INCEPTION:

20. It is a settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A subsequent action/development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. It would be beyond the competence of any authority to validate such an order. It would be ironic to permit a person to rely upon a law, in violation of which he has obtained the benefits. If an order at the initial stage is bad in law, then all further proceedings consequent thereto will be non est and have to be necessarily set aside. A right in law exists only and only when it has a lawful origin. (vide: *Upen Chandra Gogoi v. State of Assam & Ors.,* AIR 1998 SC 1289; *Mangal Prasad Tamoli (Dead) by L.Rs. v. Narvadeshwar Mishra (Dead) by L.Rs. & Ors.* , AIR 2005 SC1964; and *Ritesh Tiwari & Anr. v. State of U.P. & Ors.,* AIR 2010 SC 3823).

The concept of adverse possession of lien on post or holding over are not applicable in service jurisprudence. Therefore, continuation of a person wrongly appointed on post does not create any right in his favour. (Vide *Dr. M.S. Patil v. Gulbarga University & Ors.,* AIR 2010 SC 3783).

ELIGIBILITY LACKING:

21. In *Dr. Prit Singh v. S.K. Mangal & Ors.,* 1993 Supp (1) SCC 714, this Court examined the case of a person who did not possess the requisite percentage of marks as per the statutory requirement and held that he cannot hold the post observing:

"……It need not be pointed out that the sole object of prescribing qualification that the candidate must have a consistently good academic record with first or high second class Master's Degree for appointment to the post of a Principal, is to select a most suitable person in order to maintain excellence and standard of teaching in the institution apart from administration….. The appellant had not secured even second class marks in his Master of Arts Examination whereas the requirement was first or high second class (55%). The irresistible conclusion is that on the relevant date the appellant did not possess the requisite qualifications……..On the date of the appointment the appellant did not possess the requisite qualifications and as such his appointment had to be quashed."

(emphasis added)

22. In *Pramod Kumar v. U.P. Secondary Education Services Commission & Ors.,* AIR 2008 SC 1817, this Court examined the issue as to whether a person lacking eligibility can be appointed and if so, whether such irregularity/illegality can be cured/condoned. After considering the provisions of the U.P. Secondary Education Services Commission Rules, 1983 and U.P. Intermediate Education Act, 1921, this Court came to a conclusion that lacking eligibility as per the rules/ advertisement cannot be cured at any stage and making appointment of such a person tantamounts to an illegality and not an irregularity, thus cannot be cured. A person lacking the eligibility cannot approach the court for the reason that he does not have a right which can be enforced through court.

This Court further held as under:

"If the essential educational qualification for recruitment to a post is not satisfied, ordinarily the same cannot be condoned. Such an act cannot be ratified. An appointment

which is contrary to the statute/statutory rules would be void in law. An illegality cannot be regularised, particularly, when the statute in no unmistakable term says so. Only an irregularity can be.(See *Secy., State of Karnataka v. Umadevi* (3), (2006) 4 SCC 1;, *National Fertilizers Ltd. v. Somvir Singh,* (2006) 5 SCC 493; and *Post Master General, Kolkata v. Tutu Das (Dutta),* (2007) 5 SCC 317)".

RELAXATION:

23. In *Dr. J.P. Kulshrestha & Ors. v. Chancellor, Allahabad University & Ors.,* AIR 1980 SC 2141, issue of relaxation of eligibility came for consideration before this Court wherein it was held as under:

"…….We regretfully but respectfully disagree with the Division Bench and uphold the sense of high second class attributed by the learned single Judge. The midline takes us to 54% and although it is unpalatable to be mechanical and mathematical, we have to hold that those who have not secured above 54% marks cannot claim to have obtained a high second class and are ineligible…….We have earlier held that the **power to relax**, as the Ordinance now runs, in so far as high second class is concerned, does not exist. Inevitably, the appointments of the 3 respondents violate the Ordinance and are, therefore, *illegal*."

(emphasis added)

24. In *Rekha Chaturvedi v. University of Rajasthan & Ors.,* 1993 Supp (3) SCC 168, this Court again dealt with the power of relaxation of minimum qualifications as the statutory provisions applicable therein provided for relaxation, but to what extent and under what circumstances, such power could be exercised was not provided therein. Thus, this Court issued the following directions:

"A. The University must note that the qualifications it advertises for the posts should not be at variance with those prescribed by its Ordinance/Statutes.

B. The candidates selected must be qualified as on the last date for making applications for the posts in question or on the date to be specifically mentioned in the advertisement/notification for the purpose.

C. When the University or its Selection Committee *relaxes* the minimum required qualifications, *unless* it is specifically stated in the advertisement/notification both that the qualifications will be relaxed and also the conditions on which they will be relaxed, the relaxation will be illegal.

D. The University/Selection Committee must mention in its proceedings of selection *the reasons for making relaxations,* if any, in respect of each of the candidates in whose favour relaxation is made.

E. The minutes of the meetings of the Selection Committee should be preserved for a sufficiently long time, and if the selection process is challenged until the challenge is finally disposed of. An adverse inference is liable to be drawn if the minutes are destroyed or a plea is taken that they are not available."

(emphasis added)

25. In *P.K. Ramachandra Iyer & Ors. v. Union of India & Ors.,* AIR 1984 SC 541, this Court while dealing with the same issue, held that once it is established that there is no power to relax the essential qualifications, the entire process of selection of the candidate was in contravention of the established norms prescribed by advertisement. The power to relax must be clearly spelt out and cannot otherwise be exercised.

26. In *Secretary, A.P. Public Service Commission v. B. Swapna & Ors.,* (2005) 4 SCC 154, this Court held that:

"Another aspect which this *Court* has highlighted is scope for relaxation of norms….. Once it is most satisfactorily established that the Selection Committee did not have the power to relax essential qualification, the entire process of selection so far as the selected candidate is concerned gets vitiated."

27. This Court in *Kendriya Vidyalaya Sangathan & Ors. v. Sajal Kumar Roy & Ors.,* (2006) 8 SCC 671, held:

"The appointing authorities are required to apply their mind while exercising their discretionary jurisdiction to relax the age-limits….The requirements to comply with the rules, it is trite, were required to be complied with fairly and reasonably. They were bound by the rules. The discretionary jurisdiction could be exercised for relaxation of age provided for in the rules and within the four corners thereof."

(emphasis added)

28. In *Food Corporation of India & Ors. v. Bhanu Lodh & Ors.,* AIR 2005 SC 2775**,** this Court held:

"Even assuming that there is a power of relaxation under the Regulations……. the power of relaxation cannot be exercised in such a manner that it completely distorts the Regulations. The power of relaxation is intended to be used in marginal cases…. We do not think that they are intended as an "open sesame" for all and sundry. The wholesale go-by given to the Regulations, and the manner in which the recruitment process was being done, was very much reviewable as a policy directive, in exercise of the power of the Central Government under Section 6(2) of the Act."

29. In *Dr. Bhanu Prasad Panda v. Chancellor, Sambalpur University & Ors.,* (2001) 8 SCC 532, one of the questions

raised has been as to whether a person not possessing the required eligibility of qualification i.e. 55% marks in Master's degree can be appointed in view of the fact that the UGC refused to grant relaxation.

On the issue of relaxation of eligibility, the Court held as under:

> "….the essential requirement of academic qualification of a particular standard and grade viz. 55%, in the "relevant subject" for which the post is advertised, cannot be rendered redundant or violated…… The rejection by UGC of the request of the Department in this case *to relax the condition relating to 55% marks* at post-graduation level…. is to be the last word on the claim of the appellant and there could be no further controversy raised in this regard…."
>
> (emphasis added)

In view of the above, this Court held that the appointment of the appellant therein has rightly been quashed as he did not possess the requisite eligibility of 55% marks in Master's course.

30. In absence of an enabling provision for grant of relaxation, no relaxation can be made. Even if such a power is provided under the Statute, it cannot be exercised arbitrarily. (See: *Union of India v. Dharam Pal & Ors.,* (2009) 4 SCC 170).

31. Such a power cannot be exercised treating it to be an implied, incidental or necessary power for execution of the statutory provisions. Even an implied power is to be exercised with care and caution with reasonable means to remove the obstructions or overcome the resistance in enforcing the statutory provisions or executing its command. Incidental and ancillary powers cannot be used in utter disregard of the object of the Statute. Such power can be exercised only to make such

legislation effective so that the ultimate power will not become illusory, which otherwise would be contrary to the intent of the legislature. (vide: *Matajog Dobey v. H.S. Bhari,* AIR 1956 SC 44; and *State of Karnataka v. Vishwabharathi House Building Co-operative Society & Ors.,* (2003) 2 SCC 412).

More so, relaxation in this manner is tantamount to changing the selection criteria after initiation of selection process, which is not permissible at all. Rules of the game cannot be changed after the game is over. (Vide *K. Manjusree v. State of Andhra Pradesh & Anr.,* AIR 2008 SC 1470; and *Ramesh Kumar v. High Court of Delhi & Anr.,* AIR 2010 SC 3714).

DELAY/LACHES:

32. In the very first appeal, the respondent filed Writ Petition on 11.11.2005 claiming relief under the Notification dated 6.10.1989 w.e.f. 1.1.1986 without furnishing any explanation for such inordinate delay and on laches on her part. Section 3 of the Limitation Act 1963, makes it obligatory on the part of the court to dismiss the Suit or appeal if made after the prescribed period even though the limitation is not set up as a defence and there is no plea to raise the issue of limitation even at appellate stage because in some of the cases it may go to the root of the matter. (See: *Lachhmi Sewak Sahu v. Ram Rup Sahu & Ors.,* AIR 1944 Privy Council 24; and *Kamlesh Babu & Ors. v. Lajpat Rai Sharma & Ors,* (2008) 12 SCC 577).

33. Needless to say that Limitation Act 1963 does not apply in writ jurisdiction. However, the doctrine of limitation being based on public policy, the principles enshrined therein are applicable and writ petitions are dismissed at initial stage on the ground of delay and laches. In a case like at hand, getting a particular pay scale may give rise to a recurring cause of action. In such an eventuality, the petition may be dismissed on the ground of delay and laches and the court may refuse to grant relief for the initial period in case of an unexplained and

inordinate delay. In the instant case, the respondent claimed the relief from 1.1.1986 by filing a petition on 11.11.2005 but the High Court for some unexplained reason granted the relief w.e.f. 1.6.1984, though even the Notification dated 6.10.1989 makes it applicable w.e.f. 1.1.1986.

34. This Court has consistently rejected the contention that a petition should be considered ignoring the delay and laches in case the petitioner approaches the Court after coming to know of the relief granted by the Court in a similar case as the same cannot furnish a proper explanation for delay and laches. A litigant cannot wake up from deep slumber and claim impetus from the judgment in cases where some diligent person had approached the Court within a reasonable time. (See: *M/s Rup Diamonds & Ors., v. Union of India & Ors.,* AIR 1989 SC 674; *State of Karnataka & Ors. v. S.M. Kotrayya & Ors.,* (1996) 6 SCC 267; and *Jagdish Lal & Ors. v. State of Haryana & Ors.,* AIR 1997 SC 2366).

RELIEF NOT CLAIMED – CANNOT BE GRANTED:

35. 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 a 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; *Ishwar Dutt v. Land Acquisition Collector & Anr.,* AIR 2005 SC 3165; and *State of Maharashtra v. Hindustan Construction Company Ltd.,* (2010) 4 SCC 518.)

ARTICLE 14:

36. It is a settled legal proposition that Article 14 is not meant to perpetuate illegality and it does not envisage negative equality. Thus, even if some other similarly situated persons have been granted some benefit inadvertently or by mistake, such order does not confer any legal right on the petitioner to get the same relief. (Vide *Chandigarh Administration & Anr v. Jagjit Singh & Anr.,* AIR 1995 SC 705; *Yogesh Kumar & Ors. v. Government of NCT Delhi & Ors.,* AIR 2003 SC 1241; *M/s Anand Buttons Ltd. etc. v. State of Haryana & Ors.,* AIR 2005 SC 565; *K.K. Bhalla v. State of M.P. & Ors.,* AIR 2006 SC 898; *Maharaj Krishan Bhatt & Anr. v. State of Jammu & Kashmir & Ors.,* (2008) 9 SCC 24; *Upendra Narayan Singh* (supra); and *Union of India & Anr. v. Kartick Chandra Mondal & Anr.,* AIR 2010 SC 3455).

This principle also applies to judicial pronouncements. Once the court comes to the conclusion that a wrong order has been passed, it becomes the solemn duty of the court to rectify the mistake rather than perpetuate the same. While dealing with a similar issue, this Court in *Hotel Balaji & Ors. v. State of A.P. & Ors.,* AIR 1993 SC 1048 observed as under:

> "…To perpetuate an error is no heroism. To rectify it is the compulsion of judicial conscience. In this, we derive comfort and strength from the wise and inspiring words of Justice Bronson in Pierce v. Delameter (A.M.Y. at page 18: 'a Judge ought to be wise enough to know that he is fallible and, therefore, ever ready to learn: great and honest enough to discard all mere pride of opinion and follow truth wherever it may lead: and courageous enough to acknowledge his errors'".

(See also *re: Sanjiv Datta, Dy. Secy., Ministry of Information & Broadcasting,* (1995) 3 SCC 619; *Nirmal Jeet Kaur v. State of M.P. & Anr.,* (2004) 7 SCC 558; and *Mayuram Subramanian Srinivasan v. CBI,* AIR 2006 SC 2449).

37. We are fully alive of the object and purpose of according recognition and affiliation to educational institutions. It is the educational authorities of the State which grant recognition to a Committee of Management for opening or running an educational institution. Affiliation is granted by the particular University or Board for undertaking the examination of the students of that college for awarding degrees and certificates. Therefore, while granting the recognition and affiliation even for non-governmental and non-aided private colleges, it is mandatory to adhere to the conditions imposed by them, which also include the minimum eligibility for appointment of teaching staff. The authority at the time of granting approval has to apply its mind to find out whether a person possessing the minimum eligibility has been appointed. In the instant case, it appears to be a clear cut case of arbitrariness which cannot be approved.

ARBITRARINESS:

38. The rule of law inhibits arbitrary action and also makes it liable to be invalidated. Every action of the State or its instrumentalities should not only be fair, legitimate and above-board but should be without any affection or aversion. It should neither be suggestive of discrimination nor even give an impression of bias, favouritism and nepotism. Procedural fairness is an implied mandatory requirement to protect against arbitrary action where Statute confers wide power coupled with wide discretion on an authority. If the procedure adopted by an authority offends the fundamental fairness or established ethos or shocks the conscience, the order stands vitiated. The decision making process remains bad. (Vide *Haji T.M. Hassan Rawther v. Kerala Financial Corporation,* AIR 1988 SC 157; *Dr. Rash Lal Yadav v. State of Bihar & Ors.,* (1994) 5 SCC 267; and *Tata Cellular v. Union of India,* (1994) 6 SCC 651).

39. In the *State of Andhra Pradesh & Anr. v. Nalla Raja Reddy & Ors.,* AIR 1967 SC 1458, a Constitution Bench of this Court observed as under:

> "Official arbitrariness is more subversive of doctrine of equality than the statutory discrimination. In spite of statutory discrimination, one knows where he stands but the wand of official arbitrariness can be waived in all directions indiscriminately."

40. Similarly, in *S.G. Jaisinghani v. Union of India & Ors.,* AIR 1967 SC 1427, a Constitution Bench of this Court observed as under:

> "….absence of arbitrary power is the first essence of the rule of law, upon which our whole Constitutional system is based….. Rule of law, from this point of view, means that the decision should be made by the application of known principle and rules and in general such decision should be predictable and the citizen should know where he is, if a decision is taken without any principle or without any rule, it is unpredictable and such a decision is antithesis to the decision taken in accordance with the rule of law."

(See also: *Commissioner of Police, Bombay v. Gordhandas Bhanji,* AIR 1952 SC 16).

41. It is a matter of common experience that a large number of orders/letters/circulars, issued by the State/statutory authorities, are filed in court for placing reliance and acting upon it. However, some of them are definitely found to be not in conformity with law. There may be certain such orders/circulars which are violative of the mandatory provisions of the Constitution of India. While dealing with such a situation, this Court in *Ram Ganesh Tripathi & Ors. v. State of U.P. & Ors.,* AIR 1997 SC 1446 came across with an illegal order passed by the statutory authority violating the provisions of Articles 14 and 16 of the Constitution. This Court simply brushed aside the same without placing any reliance on it observing as under:

> "The said order was not challenged in the writ petition as it had not come to the notice of the appellants. It has been

filed in this Court along with the counter affidavit….. *This order is also deserved to be quashed as it is not consistent with the statutory rules. It appears to have been passed by the Government to oblige the respondents……"*

(emphasis added)

42. The whole exercise done by the State authorities suffers from the vice of arbitrariness and thus is violative of Article 14 of the Constitution. Therefore, it cannot be given effect to.

PER IN CURIAM – Doctrine:

43. "Incuria" literally means "carelessness". In practice per incuriam is taken to mean per ignoratium. The Courts have developed` this principle in relaxation of the rule of stare decisis. Thus the "quotable in law", is avoided and ignored if it is rendered, in ignoratium of a Statute or other binding authority.

In *Mamleshwar Prasad & Anr. v. Kanahaiya Lal (Dead) by Lrs.,* AIR 1975 SC 907, this Court held :

"……where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, it may not have the sway of binding precedents. It should be a glaring case, an obtrusive omission."

(emphasis added)

44. In *State of Orissa & Anr. v. Damodar Nayak & Anr.,* AIR 1997 SC 2071, question arose that in case the teacher at the time of appointment, did not possess the requisite eligibility, i.e., qualifications, whether he could claim any benefit under the grant-in-aid Scheme. Respondent-teacher therein had secured 53.9 % marks and required eligibility provided for 54%. This Court held that undoubtedly 53.9% marks were very close to

required marks i.e. 54%, but the teacher so appointed did not possess the eligibility. The court took notice of the fact that he was appointed in 1978 but acquired further qualification on 10.7.1987, and held:

"Admittedly, since the first respondent on the date of his appointment was not possessing the requisite qualification and acquired the same only on 10.7.1987 he will be eligible to the benefit of the grant-in-aid w.e.f. 1.8.1987 and onwards"

45. This Court while hearing the SLP (C) Nos. 14206-14209 of 2001, *State of Orissa & Anr. v. Kalidas Mohapatra & Ors.,* on 11.3.2002 observed as under:

"Heard.

The so-called contention of deficiency in the qualification being much earlier in the circular of the Government dated 06.11.1990, we see no infirmity with the impugned judgment requiring our interference. The Special Leave Petitions are dismissed accordingly."

This Court further dismissed the Review Petition Nos. 1529-1532 of 2002 against the said judgment and order on 28.8.2002.

46. From the aforesaid discussion, the following picture emerges:

(i) The procedure prescribed under the Rules, 1974 has not been followed in all the cases while making the appointment of the respondents/teachers at initial stage. Some of the persons had admittedly been appointed merely by putting some note on the Notice Board of the College. Some of these teachers did not face the interview test before the Selection Board. Once an order of appointment itself had been bad at the time of initial appointment, it cannot be sanctified at a later stage.

(ii) At the relevant time of appointment of the respondents/ teachers there has been a requirement of possessing good second class i.e. 54% marks in Master's Course and none of the said respondents had secured the said percentage.

(iii) Their appointments had been approved after a long long time. In some cases after 10-12 years of their initial appointment by the statutory authority i.e. Director of Higher Education.

(iv) A candidate becomes eligible to apply for a post only if he fulfils the required minimum benchmark fixed by the rules/advertisement. Thus, none of the respondents could even submit the application what to talk of the appointments.

(v) The so-called relaxation by the Utkal University was accorded by passing a routine order applicable to large number of colleges, that too after a lapse of long period i.e. about a decade.

(vi) Fixation of eligibility falls within the exclusive domain of the executive and once it has been fixed by the State authorities under the Rules 1974, the question of according relaxation by Utkal University could not arise and, therefore, the order of condonation etc. is nullity.

(vii) The relaxation has been granted only by Utkal University though Rule 2(i) of Rules 1974 defined 'University' means Utkal University, Berhampur University, Sambalpur University and Sri Jagannath Sanskrit Vishwa Vidyalaya.

(viii) Granting relaxation at this stage amounts to change of criteria after issuance of advertisement, which is impermissible in law. More so, it is violative of fundamental rights enshrined under Articles 14 and 16 of the

Constitution of the similarly situated persons, who did not apply considering themselves to be ineligible for want of required marks.

(ix) The exercise of condonation of deficiency had not been exercised by any University other than Utkal University.

(x) The post of the teachers i.e. respondents is transferable to any college affiliated to any other University under the Rules 1979.

(xi) The power to grant relaxation in eligibility had not been conferred upon any authority, either the University or the State. In absence thereof, such power could not have been exercised.

(xii) This Court in *Damodar Nayak* (supra) has categorically held that a person cannot get the benefit of grant-in-aid unless he completes the deficiency of educational qualification. Further, this Court in *Dr. Bhanu Prasad Panda* (supra) upheld the termination of services of the appellant therein for not possessing 55% marks in Master Course.

(xiii) The aforesaid two judgments in *Damodar Nayak* (supra) and *Dr. Bhanu Prasad Panda* (supra), could not be brought to the notice of either the High Court or this Court while dealing with the issue. Special leave petition in the case of *Kalidas Mohapatra & Ors.* (supra) has been dealt with without considering the requirement of law merely making the reference to Circular dated 6.11.1990, which was not the first document ever issued in respect of eligibility. Thus, all the judgments and orders passed by the High Court as well as by this Court cited and relied upon by the respondents are held to be not of a binding nature. (Per in curiam)

(xiv) In case a person cannot get the benefit of grant-in-

aid scheme unless he completes the deficiency of educational qualification, question of grant of UGC pay scale does not arise.

(xv) The cases had been entertained and relief had been granted by the High Court without considering the issue of delay and laches merely placing reliance upon earlier judgments obtained by diligent persons approaching the courts within a reasonable time.

(xvi) The authority passed illegal orders in contravention of the constitutional provisions arbitrarily without any explanation whatsoever polluting the entire education system of the State, ignoring the purpose of grant-in-aid scheme itself that it has been so provided to maintain the standard of education.

(xvii) The High Court granted relief in some cases which had not even been asked for as in some cases the UGC pay scale had been granted with effect from 1.6.1984, i.e., the date prior to 1.1.1986 though the same relief could not have been granted. Thus, it clearly makes out a case of deciding a case without any application of mind.

(xviii) In some cases the UGC pay scale has been granted by the High Court prior to the date of according the benefit of grant-in-aid scheme to the concerned teachers which was not permissible in law in view of the law laid down by this Court in *Damodar Nayak* (supra).

(xix) The grievance of the respondents that not upholding the orders passed by the High Court in their favour would amount to a hostile discrimination is not worth acceptance for the reason that Article 14 of the Constitution envisages only positive equality.

(xx) Concept of adverse possession of lien on post or holding over are inapplicable in service jurisprudence.

(xxi) The submission on behalf of the respondents that Government orders/circulars/letters have been complied with, therefore, no interference is called for, is preposterous for the simple reason that such orders/ circulars/letters being violative of statutory provisions and constitutional mandate are just to be ignored in terms of the judgment of this Court in *Ram Ganesh Tripathi* (supra).

47. In view of the above, it stands crystal clear that a teacher who had been appointed without possessing the requisite qualification at initial stage cannot get the benefit of grant-in-aid scheme unless he acquires the additional qualification and, therefore, question of grant of UGC pay scale would not arise in any circumstance unless such teacher acquires the additional qualification making him eligible for the benefit of grant-in-aid scheme. The cumulative effect therefore comes to that such teacher will not be entitled to claim the UGC pay scale unless he acquires the higher qualification i.e. M.Phil/ Ph.D.

48. In the facts and circumstances of the case, we feel that terminating the services of those who had been appointed illegally and/or withdrawing the benefits of grant-in-aid scheme of those who had not completed the deficiency in eligibility/ educational qualification or withdrawing the benefit thereof from those who had been granted from the date prior to completing the deficiency, may not be desirable as a long period has elapsed. So far as the grant of UGC pay scale is concerned, it cannot be granted prior to the date of acquisition of higher qualification. In view of the above, the impugned judgment/order cannot be sustained in the eyes of law.

49. The full particulars of the respondent-teachers are not before us as in some cases there had been claim and counter claim of possessing the requisite marks i.e. 54% in Master's Course, as in Civil Appeal No. 1253 of 2011, *State of Orissa & Anr. v. Lokanath Mishra & Ors.* Thus, we pass the following directions:

(i) In case of dispute regarding possessing of 54% marks, the authorities, Secretary of Higher Education/Director of Higher Education may examine the factual position and decide the case of individual teachers in accordance with law laid down in this case;

(ii) If a person did not possess the requisite qualification on the date of appointment and was not entitled for grant-in-aid scheme unless he completes the deficiency, his case would be considered from the date of completing the deficiency for grant of UGC pay scale. However, in no case, the UGC pay scale can be granted prior to the date of according the benefit of the grant-in-aid scheme, i.e. by acquiring the degree of M.Phil/Ph.D;

(iii) The aforesaid exercise shall be completed within a period of four months from today; and

(iv) The arrears of pay, if any, shall be paid to the teacher concerned within a period of four months thereafter.

50. In view of the above, all appeals stand disposed of. No order as to costs.

R.P. Appeals disposed of.

RAVINDER RAJ

v.

M/S. COMPETENT MOTORS CO. PVT. LTD. & ANR.

(Special Leave Petition (Civil) No. 10364 of 2006)

FEBRUARY 10, 2011

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Sale of Goods Act, 1930 – s.64-A (1)(a) – Enhancement of excise duty prior to delivery of the vehicle – Liability to pay extra price – Customer booked a car with the manufacturer – Customer was asked to complete the modalities for delivery of the car – Indication in the proforma invoice that the price prevailing at the time of billing would be applicable – Billing of the car done a year later – Meanwhile, increase in excise duty resulting in price hike – Deposit of the excess amount by customer under protest – Plea of the customer that since he was not responsible for the delay in the delivery of the vehicle, he was not liable to bear the increase the price – Held: In terms of s. 64-A (1)(a), it is the liability of the customer to pay the extra price when the excise duty had been enhanced prior to the delivery of the vehicle – On facts, no evidence to show that there was any deliberate intention on the part of the manufacturer and the dealer to delay the delivery of the vehicle – Thus, the order passed by the National Commission that the increase in price by way of additional taxes is to be borne by the customer and not by the manufacturer, upheld.

Omprakash vs. Assistant Engineer, Haryana Agro Industries Corpn. Ltd. **1994 (3) SCC 504*;*** *Mohinder Pratap Dass vs. Modern Automobiles and Anr.* **1995 (3) SCC 581 – distinguished.**

Case law reference:

1994 (3) SCC 504	**Distinguished.**	**Para 12**
1995 (3) SCC 581	**Distinguished.**	**Para 12**

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 10364 of 2006.

From the Judgment & Order dated 19.07.2005 of the National Consumer Disputes Redressal Commission, New Delhi in Revision Petition No. 1485 of 2005.

WITH

SLP (C) No. 9739-9740 of 2009.

Petitioner-In-Person.

Nikunj Dayal, Pramod Dayal, Sapna Sinha, Rameshwar Prasad Goyal for the Respondent.

The following Order of the Court was delivered

O R D E R

1. Two Special Leave Petitions, being SLP(C) Nos. 10364 of 2006 and 9739-9740 of 2009, have been filed against the judgment and order dated 19th July, 2005, passed by the National Consumer Disputes Redressal Commission at New Delhi in Revision Petition No.1485 of 2005 and the order dated 7th August, 2008 passed by the said Commission in Revision Petition No.2974 of 2005 filed by the respondent No.1, Maruti Udyog Limited and also M.A.No.599 of 2006 in Revision Petition 1533 of 2005 filed by the respondent No.2, namely, Competent Motors Co.Pvt.Ltd., the dealer.

2. The petitioner, Mr. Ravinder Raj, who is appearing in person, applied to Maruti Udyog Ltd.in 1985-1986 for booking a Maruti Car-800 and deposited a sum of Rs.10,000/- as initial/ advance booking payment. On 15th July, 1988, the respondent

No.2 informed the petitioner by letter of even date that his Maruti Car Allotment No.0802-N-04051 had matured for delivery and requested the petitioner to make payment of the full amount of the price of the car for delivery of the vehicle after completing the necessary formalities. Pursuant to the above letter, the petitioner on 16th February, 1989, paid a total amount of Rs.78,351.05 which covered the price of the vehicle, insurance charges and other minor charges, including registration charges. There is no denial that the petitioner had opted for a cream colour vehicle.

3. On 1st March, 1989, there was an increase in the excise duty payable, causing a price hike of about Rs.6710.61. On 18th March, 1989, the petitioner received a letter from the respondent No.2 to deposit the excess amount payable as excise duty, and, accordingly, the petitioner did so under protest on 16th February, 1989.

4. The official billing in respect of the car was done on 5th April, 1989.

5. The petitioner has contended that the delay in delivery of the vehicle to him by the respondents was not occasioned by any failure or negligence on his part and the liability to pay the increased amount on account of increase in excise duty, was not that of the petitioner, but of the respondents concerned. The petitioner, therefore, applied to the District Consumer Forum for a direction upon the respondents to bear the increase in excise duty resulting in increase in the price. Such a prayer was rejected by the District Consumer Forum. The petitioner then went to the State Forum which allowed the petitioner's claim. Against the said order, the respondents went before the National Commission, which reversed the order passed by the State Forum. It is against the said order that the petitioner has come to this Court by way of this Special Leave Petition.

6. As indicated hereinabove, the main ground urged by the

petitioner is that since he was not responsible for the delay in the delivery of the vehicle, he should not be made to bear the increase in the price, particularly, when from the documents, as indicated by him, the vehicle of the colour chosen by him was available with the respondents. He, therefore, submitted that the order of the National Forum was erroneous and was liable to be set aside.

7. Appearing for the dealer, M/s.Competent Motors Co.Pvt.Ltd., Ms. Sapna Sinha, learned advocate pointed out that even from the receipt of the amount paid by the petitioner on 16th February, 1989, it will be clear that the amount paid was subject to the price prevailing on the date of the invoice. According to learned counsel, since the bill was dated 5th of April, 1989, it was the petitioner who was required to bear the increase in price on account of the increase in excise duty. Furthermore, she reiterated that the colour which the petitioner had wanted was not available at that point of time, although, from the documents it would appear that the same was available. According to her, the said documents only indicated that these were the colours in which the cars were being manufactured and did not really indicate the fact that such a colour was available on a particular date.

8. According to her, there was no negligence on the part of the dealer since having received intimation about the readiness of the vehicle, the respondent No.2 had immediately informed the petitioner, but unfortunately, in the meantime, the price had risen. According to the learned counsel, the respondent No.2 could not, therefore, be made liable for the increase in the price.

9. Mr. Dayal, appearing for the the Maruti Udyog Limited, while adopting the submissions made by Ms. Sinha, also added that having regard to Section 64A of the Sale of Goods Act, 1930, the burden of any increase in the price by way of additional taxes would have to be borne by the customer and not by the manufacturer. He also reiterated that since there was

no negligence on the part of the manufacturer in making the vehicle available to the petitioner and since no mala fide intention had been proved, the petitioner would have to bear the increase in the prices.

10. Having considered the submissions made, we may refer to the letter of 15th July, 1988, which had been written on behalf of the respondent No.2 to the petitioner indicating that the petitioner's allotment No. had matured for delivery. In the second paragraph of the letter, the respondent No.2 requested the petitioner to complete the modalities for effecting delivery of the car against the allotment number. It was categorically indicated that on receiving payment, delivery would be effected in the sequence of priority. Coupled with the above is the proforma invoice dated 15th July, 1988, where it was further indicated that the price prevailing at the time of billing would be applicable, despite the fact that the details of the price of the vehicle were set out in the said invoice.

11. As indicated hereinabove, even in the receipt given to the petitioner for payment of the amount in the proforma invoice, it had been indicated that the prices prevailing on the date of billing would apply.

12. In this case, the billing was done on 5th of April, 1989. In the absence of any evidence of any deliberate intention on the part of the respondents to delay delivery of the vehicle, we are unable to agree with the petitioner that the increase in price has to be borne by the respondents. The petitioner had relied on two decisions of this Court in the case of *Omprakash Vs. Assistant Engineer, Haryana Agro Industries Corpn. Ltd.,* 1994(3)SCC 504 and *Mohinder Pratap Dass Vs Modern Automobiles and Anr.* 1995(3)SCC 581, on the same issue. The said two decisions in our view are not applicable to the facts of this case, on account of the fact that in the said two matters patent deficiency in the service had been found by the Court and it was also pointed out that there was no satisfactory

explanation for the delay in delivery of the goods to the consumers, which is not the case as far as this particular matter is concerned.

13. Furthermore, having regard to the provisions of Section 64A(1)(a) of the Sale of Goods Act, 1930, it is the liability of the petitioner to pay the extra price when the excise duty had been enhanced prior to the delivery of the vehicle.

14. In such circumstances, the Special Leave Petition fails and is dismissed.

15. Consequently, in view of this order, the other Special Leave Petition in which interest on the amount claimed has been prayed for, does not survive and is also dismissed.

16. There will, however, be no orders as to costs in both the matters.

N.J. Special Leave Petition dismissed.

V.S. ACHUTHANANDAN

v.

R. BALAKRISHNA PILLAI & ORS.

(Criminal Appeal No. 350 of 2006)

FEBRUARY 10, 2011

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

CODE OF CRIMINAL PROCEDURE, 1973 :

Appeal against acquittal –Jurisdiction of appellate court –Held: The Code puts no limitation on exercise of powers of appellate court either on questions of fact or of law –However, an appellate court must bear in mind that in case of acquittal, there is double presumption in favour of accused – Constitution of India, 1950 –Article 136.

CONSTITUTION OF INDIA, 1950 :

Article 136 –Appeal by way of special leave – Filed by non-complainant/non party –Maintainability of –Conviction by trial court of a Minister and higher officials of State Electricity Board –For entering into conspiracy and awarding contract to accused-contractor at exorbitant rates causing huge loss to Board –Acquittal by High Court – Appeal by erstwhile leader of opposition party –Held: In the instant case, certain special features exist –State has not filed appeal –Taking note of the importance of the issue, appellant had earlier approached the Supreme Court when State wanted to close the prosecution against all the accused including the Minister, and accepting appellant's claim Special Judge was allowed to proceed in the case, which culminated in conviction of the accused by the Special Court –No objection as to locus of the appellant was raised on the earlier occasion –In view of the special circumstances, the instant appeal by the appellant against

order of acquittal passed by the High Court is maintainable –Locus standi.

PENAL CODE, 1860 :

ss. 120-B and 409, and ss. 5(1)(C) and 5(2) of Prevention of Corruption Act read with s. 120-B IPC –Contract awarded by State Electricity Board to accused-contractor on exorbitant rates –Member of the Board, Member of Consultative Council of the Board, Minister for Electricity in the State Government, the contractor along with others prosecuted –Death of contractor and another accused –Conviction by trial court of the Member of the Board, Member of its Consultative Council and the Minister –Acquittal by High Court –Held : The Board is empowered with the authority to award contracts, but being a Public Undertaking it is not expected to accept tenders at exorbitant rates causing loss to the Board –Except on policy matters the State Government had no role to play in the affairs of the Board –The evidence clearly shows that the Minister concerned used to interfere in awarding contracts of the Board and the accused-contractor had been chosen in advance by him –The evidence indicates that the conspiracy to award the work to the accused-contractor at exorbitant rates originated even prior to submission of tenders –Special Court has rightly concluded that a criminal conspiracy was hatched out at the instance of the Minister concerned and the Member of the Consultative Council –Prosecution has established against the three accused-appellants that the contract was awarded to the accused-contractor at and exorbitant rates –Besides the accused-contractor was favoured with special conditions in the contract causing further loss to the Board – There were procedural irregularities and omissions in dealing with the tenders and hasty steps were taken in awarding the contract in favour of the accused-contractor– Special Court accepting the prosecution case, rightly convicted the accused –High Court committed grave error in acquitting the accused without adverting to reliable and acceptable evidence adduced by

prosecution –Judgment of High Court set aside and conviction of all the three accused as recorded by Special Court upheld –However, keeping in view the facts and circumstances of the case, and the fact that the accused have undergone agony of the proceedings for nearly two decades, accused sentenced to rigorous imprisonment for one year with fine of Rs. 10,000/- each – Kerala State Electricity Board Tender Regulations –Regulation 25 (C).

***ADMINSTRATION OF CRIMINAL JUSTICE** :*

Disposal of cases relating to corruption by public servants –Held: When a matter of this nature is entrusted to a Special Court or a regular court, such trials should be given priority and concluded within a reasonable time –High Courts are expected to monitor and even call for quarterly report from courts concerned for speedy disposal –Inasmuch as accused is entitled to speedy justice, it is the duty of all in charge of dispensation of justice to see that the issue reaches its end as early as possible –Constitution of India, 1950 –Article 227.

The respondents (A-1, A-3 and A-6) along with others were prosecuted for various offences punishable under the IPC and the Prevention of Corruption Act, in connection with awarding of a contract relating to the works of power tunnel and surge shaft after completion of the Dam under the Idamalayar Hydro Electric Power Project in the State of Kerala (Idamalayar contract). The prosecution case was that as per decision of the Kerala State Electricity Board (the Board), the contract relating to power tunnel was awarded on 19.11.1982 to A-4 at 188% above the Probable Amount of Contract (PAC) and the work relating to surge shaft and allied works at 162% above the estimated amount with many special conditions involving heavy financial implications at the expense of the Board; that A-1 was the Minister for Electricity in the State Government at the relevant time and at his instance, the Board awarded the contract to

A-4. A-3 was the Member in the Consultative Committee of the Board and A-6 was the Member of the Board at the relevant time. The work carried out by the contractor revealed several leaks and cracks and other defects, were revealed in the work carried out by the contractor in the tunnel, which attracted public attraction and the matter was also discussed in the State Legislative Assembly and, ultimately, led to prosecution of several persons including the appellants. During the trial A-4 and A-7 died, A-22 became insane and some accused were discharged. The trial court convicted A-1, A-3 and A-6 of offences punishable u/ss 120-B and 409 IPC and ss. 5(1) (c) and 5(2) of the Prevention of Corruption Act read with s. 120-B IPC and sentenced each of them to 5 years RI and to pay a fine of Rs. 10,000/- each. All other accused were acquitted. All the three convicts filed appeals before the High Court, which acquitted them of all the charges. Aggrieved, the appellant, who was the leader of the Opposition in the State Assembly at the relevant time, filed the appeal.

It was contended for the appellant that (i) there was enough material to show that A-1 was very much interested in favour of A-3 and with the connivance/ assistance of the Board officials, more particularly, through A-6, the Member of the Board, made the Board to accept the tender offered by A-4 at exorbitant rates with various special conditions contrary to the norms and circulars/procedures of the Board, and there was inordinate delay in awarding the contract; and (ii) that the criminal breach of trust was committed by the accused: (a) by awarding both the works of Idamalayar contract at very high and exorbitant rates with special conditions having heavy financial implications; (b) by reducing the retention and security amount; (c) by allowing the contractor to return only fifty per cent of the empty

cement bags; and (d) by accepting the special condition for the sale of T & P items (tools & plants) which could not be sold as per the general conditions of the contract.

The respondents' case, on the other hand, was that: (i) inasmuch as the High Court acquitted all the accused in respect of all the charges on appreciation of oral and documentary evidence, interference by Supreme Court was very limited; in the absence of perversity in such conclusion, normally, the Court would not interfere with the order of acquittal; (ii) that the outcome of the contract in favour of A-4 was based on a "collective decision" by the Board and there was no external pressure from anyone including A-1; (iii) that there was no allegation that by awarding contract in favour of A-4, A-1 was monetarily benefited; and (iv) that in any event, inasmuch as the State did not challenge the order of acquittal, the appellant, who was neither a complainant nor a party to any of the proceedings had no locus to pursue the appeal. Accordingly, the appeal was not maintainable and on this ground was liable to be dismissed without going into the merits of the case.

Allowing the appeal, the Court

HELD:

1. Interference by Supreme Court in an order of acquittal

It is settled principle that an appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded. The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court is free to arrive at such conclusion, both on questions of fact and of law. An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. The

presumption of innocence is available to a person in the criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. It is also settled law that if two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court. [para 7] [791-E-G]

2. Statutory Provisions

2.1. The Electricity (Supply) Act, 1948 was in force at the relevant time and the Board had been constituted in terms of s.5 thereof, for the management and supply of electricity. As per s. 78-A, the Board, in discharge of its functions shall be guided by such directions and questions of policy as may be given to it by the State Government; and except on policy matters, the State Government had no role in the affairs of the Board. [para 8] [792-B-C]

3. A-1's interference in the affairs of the Board:

3.1. It is the case of the prosecution that A1 while he was holding office of the Minister for Electricity, Government of Kerala was interfering in the day-to-day affairs of the Board and used to interfere even in awarding of contracts of the Board. One of the main charges levelled against A1 and others is that he, in his capacity, as Minister for Electricity intended to settle contracts of the Board in the name of his favourites or persons of his choice at exorbitant rates with the ulterior object of making illegal profit either to himself or to his favourites. In order to establish its case, the prosecution has produced evidence through PW-64, PW-66, PW-138, and PW-146, who supported the prosecution case. [para 9] [792-E-H]

3.2. It is clear from the materials on record that the process of tendering of Idamalayar works was interrupted on several occasions mainly by the Board by cancelling the tenders and ordering re-tender and by extending the period of validity of tenders more than once. It was on the last date of extension of the validity of the tender i.e. on 30.06.1982, that A-4 appeared and submitted his tender with special conditions which was later accepted in the Board's meeting dated 19.11.1982. The Special Judge, placing reliance on Board's resolution [Ex. P550(a)], has rightly concluded that there was inordinate delay in awarding the work which reasoning was erroneously not accepted by the High Court. The materials placed clearly show that it was nearly three years to take a decision. It is also clear from the evidence of PWs 64, 66, 138 and 146 which clinchingly established the circumstances under which A-1 conceived the idea for fixing contract of the Board at exorbitant rates in order to derive monetary benefits. The contrary conclusion arrived by the High Court, is not in terms of the evidence led in by the prosecution. [para 14] [795-E-H]

4. Whether Idamalayar contract was awarded at exorbitant rates causing loss to the Board:

4.1. The basic stand of the prosecution is that A-1 entered into criminal conspiracy to award the disputed contract involving heavy financial gain to A-4 and the conspiracy and abuse of power by certain officials enabled the conspirators to earn a pecuniary advantage of Rs.2,39,64,253/-, in addition to the financial loss caused to the Board. It is the specific case of the prosecution that the rates awarded in both the contracts are exorbitant. It is not in dispute that the contract was awarded at 188% above PAC in the case of tunnel work and 162% above PAC for the surge shaft work. Verification of Ext. P-52(b) shows that the sanctioned estimate for the tunnel work

was Rs.1,17,20,633.90. On the other hand, the accepted tender amount as per the award of contract was Rs.2,45,80,796/- which is clear from Ext P 52. It is further seen as per Ext P-68 agreement, the sanctioned estimate for surge shaft was Rs. 74 lakhs and it was awarded for Rs.1,42,94,901/- . The evidence of PW-7, the Chief Engineer of the Board, and PW-156, the Investigating Officer, and the materials produced would show that the contract was awarded to A-4 at excessive rates. [para 15-16] [796-A-D; 797-A-D]

4.2. The evidence of PWs-46 and 122 and the statement made by A-1 to both of them clearly show that A-4 was the contractor chosen in advance by A-1 and other accused who were also interested in him. The evidence indicates the conspiracy to award the work to A-4 at exorbitant rates originated even prior to the submission of tenders by A-4 and other tenderers. The contrary conclusion arrived at by the High Court justifying the award at higher rate to A-4 cannot be legally sustained. [para-17] [798-D-E]

4.3. The Board is empowered with the authority to award contracts and has discretion to accept tenders, but, being an authority constituted under the Statute and a Pubic Undertaking, it is not expected to accept tenders at exorbitant rates with financial implications causing loss to the Board. The Board is always expected to protect its financial interests while awarding contracts. The Board mainly relied on the labour problem that was prevailing at the relevant time. In this regard, it is relevant to point out that the tenders for the Idamalayar work were invited in March, 1982 and four contractors submitted tenders as indicated by Exts. P78 series dated 21.03.1982. It is true that the tunnel workers went on strike on 20.04.1981 and the contractors submitted their tenders when there was labour unrest. However, the reason

attributed for the delay cannot be accepted. There were procedural irregularities and omissions by the Board authorities in the manner of dealing with tenders submitted by A-4 and PW 64, which ultimately eliminated PW 64 from the scene, keeping A-4 as the sole tenderer, qualified by pre-qualification Committee of the Board; and hasty steps were taken by the Board in awarding contract in favour of A-4 in the meeting held on 19.11.1982. All these facts lead to the conclusion that the award of contract in favour of A-4 was an exorbitant one. It is relevant to point out that the Special Judge, by adverting to Ext 550(a) expressed that the reasons stated by the Board in awarding contract in favour of A-4 at exorbitant rates are not acceptable. [para 17] [798-F-H; 799-A-C]

5. No serious discussion by the Board:

There was no serious discussion in the Board meeting held on 19.11.1982 and the minutes of the Meeting were prepared as dictated by A7, the then Chairman of the Board. It is the responsibility of the members, more particularly, full time members of the Board, who were responsible for the scrutiny of the deviations and conditions suggested by the contractor, which involved huge financial implications, to see that all transactions are beneficial to the Board and within the permissible limit. It is relevant to point out that the decision ultimately taken for awarding the contract with special conditions, as suggested by the contractor, involved huge financial implications at the risk and loss of the Board. Though the High Court has concluded that the part-time members who were signatory to Ex550(a) had, subsequently, approved the minutes, the Special Court made a distinction between the responsibility of full-time members and that of part-time members in the matters of awarding of contract. It is true that all the

members present subscribed their signatures in the minutes in awarding contract to A-4. It was highlighted in evidence that A-8, the Financial Adviser to the Board, in his report has stated that the rates awarded to the contractor are very high. The then Law Secretary also conveyed his opinion during the meeting of the Board that the rates were exorbitant. These aspects were taken note of by the Special Court while considering the culpability of the accused. The then Deputy Secretary of the Board (PW-140) also admitted this aspect and stated that there was no serious discussion in the meeting held on 19.11.1982. He explained that Ex.550(a) minutes of the meeting is a reproduction of the dictation given by the Chairman of the Board (A-7). The Special Court has rightly concluded that there was no serious discussion in the Board Meeting dated 19.11.1982 when the question of award of contract was taken up and the minutes of the meeting were prepared as dictated by A-7, the then Chairman of the Board. [para 18] [799-E-H; 800-A-G]

6. Award of contract to A-4:

6.1. Pursuant to the decision that Full Board meeting should be held on 19.11.1982 to decide the question of award of Idamalayar contract, PW-7 was directed to issue notice to all the tenderers. The materials relied on by the prosecution show that on 18.11.1982, though notices were issued to the contractors, only A-4 was present on 19.11.1982. Without verifying the fact that whether all the other tenderers were ready, a decision was taken on 19.11.1982 itself by accepting the offer of A-4 with special conditions. The Board being a statutory authority, ought to have waited for a reply from the other tenderers to ascertain whether they actually received notices and reason for their inability to attend. It was demonstrated that it was a pre-planned attempt to award the work to A-4 alone and the notices issued to other tenderers were

in the form of an ultimatum. It was also pointed out that for the negotiation on 04.11.1982, i.e. prior to 19.11.1982, held by PW-7, with the tenderers, in the office of the Board only A-4 and P.W.4 were present. The pre-qualification Committee, headed by A-7, gave chances to A-4 to correct the errors and mistakes in the tender form submitted by him for the impugned works, on the other hand, such concession was not afforded to the other tenderers. [para 20] [802-F-H; 803-A-C-E]

6.2. It is significant to note the conduct of A-1 with regard to settlement of labour dispute. The evidence shows that there was labour strike in the tunnel area which started in April, 1981 and continued from the time of inviting tenders on 05.06.1981 till the time of award of contract. It was highlighted that there was no effort on the part of A-1 to settle the labour dispute before tendering process was initiated. The labourers submitted the Memorandum to A-1 on several occasions requesting for settlement of labour problems. It was not settled and the matter was kept alive till the tender was fixed in the name of A-4 on 19.11.1982. It was only after the award of the contract, that A-1 took initiative to settle the labour dispute, more particularly, when he came to know that A-1 cannot enter the site because of the obstruction of the workers to begin the contract work. It is relevant to point out that PW-7 informed A-1 and A-6 more than once that in case the labour dispute could be settled in advance, the contract could be awarded at a reasonable rate. The evidence of PW-7 clearly shows that his request was not accepted by A-1 and A-6. [para 21] [804-C-F]

6.3. The evidence shows that the rate quoted by PW-4 by his evidence in court, was 135% above PAC, which was less than 188% above PAC, quoted by A-4 and approved by the Board. The High Court failed to take note of the importance of evidence of PW-4 and justified

the action of the Board in not pursuing the tender submitted by PW-4 with a lesser rate on the ground that his tender was liable to be rejected since he wanted an arbitration clause in the agreement. Further, though PW-4 has quoted lesser rate than A-1, in his evidence, he has highlighted that he was not given an opportunity to consider the reasonableness of the rate quoted by him i.e. 135% above PAC. The High Court has not only ignored his assertion but found that the rate quoted by him for the surge shaft work is not a lesser rate when compared to one quoted by A-4 i.e., 188% above PAC. Though the Special Court has correctly found that PW-4 quoted less than the rate quoted byA-4, the High Court, on erroneous assumption found fault with the finding of the Special Court which correctly appreciated the prosecution case. [para 22] [804-G; 805-A-B]

7.Acceptance of Special Conditions & Concessions:

With regard to the case of the prosecution that certain Special Conditions were accepted by the Board (Ex. P588) involving huge financial commitments favourable to the accused-contractor causing loss to the Board, it is relevant to mention that one of the special conditions, is condition No. 4 relating to tools and plants sold to the contractor in violation of the General Conditions of the contract, which provide that the Board is bound to make available to the contractors only such tools and plants as are listed in the Schedule attached thereto, that too subject to availability. Such items of tools and plants which are listed in Ext. P52 agreement marked as Ext. P52(d) show 8 items of tools and plants which can only be hired out to the contractors if requested on the specified rates. In Ext. P58, deviations and conditions submitted by the contractor as Item No 4, stated that such tools and plants listed in Ext. P52(d) shall be sold to him on outright sale at book value deducting depreciation and the cost may be recovered on pro rata basis from his

bills. The full Board, in its decision dated 19.11.1982, accepted the special condition of the contractor to sell those items of tools and plants which includes very costly foreign imported materials. The official examined on the side of the prosecution pointed out that there is no provision in the general conditions of the contract enabling the Board to effect sale of those tools and plants to the contractor. These important aspects have been duly considered by the Special Court but, have been overlooked by the High Court while upsetting the decision of the Special Court. As correctly found by the Special Court, special condition No.4 relating to sale of tools and plants is a favour done by the Board to the contractor for obtaining financial gains at the risk of Board's loss. [para 23 and 26] [805-D-H; 806-A-B; 808-E]

8. Return of empty cement bags by the Contractor:

8.1. Another special condition sanctioned by the Board in favour of the contractor A-4 relates to the return of empty cement bags. This special condition provided that the contractor shall return only 50% of empty cement bags in good condition. According to the Auditor, because of the special condition, the Board had sustained a loss of Rs.1,08,879.75. The Special Court has substantiated its finding on the point based on evidence furnished by the auditors. However, the High Court relying on Ext D-28 which provided for recovery of balance 50% of empty cement bags not returned or returned in damaged condition and recovery will be effected as stipulated in the tender condition, erroneously concluded that no loss could be sustained to the Board. The conclusion arrived at by the High Court is contrary to the special condition No.10 regarding the return of empty cement bags, according to which the Board is not entitled to recover the value of balance 50% of unreturned cement bags. [para 25-26] [807-F-G; 808-F-H; 809-A]

9. Fixation of security and retention:

Yet another special condition involving financial implications sanctioned to the Contractor is with regard to the fixation of security and retention amount. In the case on hand, keeping in view the PAC contract works, the security amount and retention amount due from the contractor would come to Rs.12 lakhs. However, the retention amount and the security both were restricted to Rs. 5 Lakhs and Rs. 1 Lakh for both the works, which is a benefit shown to the Contractor. A perusal of Kerala State Electricity Board Tender Regulations show that the reduction of security deposit is permissible only in the case of established firm/Company and that the security deposit of a new contractor shall not be reduced. The course adopted by the Board is contrary to the condition contained in Regulation No.25(c) of the Board's Regulations. [para 27] [809-C-H; 810-A-B-F]

10. Criminal Conspiracy

10.1. On this aspect, the Special Court has analyzed the evidence of witnesses and considered the documents produced and marked by the prosecution and has rightly concluded that there is sufficient evidence that a criminal conspiracy was hatched out at the instance of A-1, the then Minister for Electricity and A-3, who was a close associate and political ally of A-1. This was strengthened by the evidence of PW-21,the Assistant Engineer, Quality Control, Idamalayar project and other witnesses. Nobody has challenged the relationship between A-1 and A-3. It is the case of the prosecution that a conspiracy was hatched out at the instance of A1 and others with the illegal object of getting the Idamalayar project fixed on one among themselves at exorbitant rates and make illegal profits. It is also the definite case of the prosecution that though the work was awarded in the name of A-4, it was actually executed by A-3 and

another accused A-22(deceased). It has come in evidence that the amount of work was invested and payments were made by A-22 and A-3. As rightly observed by the Special Court, the relationship between A-1 and A-3 is a relevant factor in arriving at the circumstances leading to the formation of the conspiracy. The evidence led in normally show that A-3 was an intimate friend of A-1 and very closely moving with him during the relevant period. This has been established by the evidence of PW-3, who was a watchman of the Inspection Bungalow at Idamalayar, PWs-6, 7 and 8 who were Engineers at the relevant time at Idamalayar worksite and supervising execution of the works, PW-24, the workers (PWs 25 and 26), and PW-19, the receptionist of a Tourist home, where A-3 was occupying a room on rent on or about the time of finalization of the contract in favour of A-4. The Special Court noted the significance of his stay during the above period at Thiruvananthapuram. Under s. 16 of the Electricity (Supply) Act, 1948, the Constituting Authority is the State Government. The evidence led in by the prosecution shows that A-1 took initiative to include the name of A-3 in the list of nominees for constituting the Consultative Council. The evidence of PWs 18, 27 and 51 and Ext.180(c) established the case of the prosecution. The evidence further shows that the mandatory requirements contemplated u/s 16 of the Act regarding the constitution of Consultative Council was not adhered to by A-1 who wanted to include A-3 in the panel inasmuch as usually the representatives of State Level Organisers representing various interests alone were nominated after consultation by the Government with such bodies, but A-3 was not representing any such State Level Organisation. This is evident from the evidence of PWs 31 and 16. [paras 28, 29 and 34] [811-B-F; 812-D-F-H; 813-A; 815-D-F]

10.2. The prosecution has established the

relationship of A1 and A-4 even before awarding of contract. Even prior to awarding of the contract to A-4, A-1 had chosen A-4 as prospective contractor for execution of the work which fact is spoken to by PW-122 and also by PW-46. Their evidence shows that on 29.06.1981 when they met A-1 requesting for the award of the tunnel driving work to the workers at Idamalayar, A-1 told them that the execution of the Idamalayar work was proposed to be given to A-4. [para 30] [813-C-D]

10.3. The role played by A-3 in fixing the contract to A-4 is also relevant to infer the formation of agreement between himself and A-1. In addition to the same, the prosecution has adduced acceptable evidence that a company by name Hydro Power Construction Company was registered as a partnership firm with A-4 as Managing Partner and A3 and A-22 (deceased) as Working Partners. Further, close relatives of A-4, A3 and A-22 were parties to the partnership deed. The object of the partnership was to execute the Idamalayar tunnel work and also the surge shaft work in the name of the firm which was an assessee under the income tax Act as is evident from Ex. P245, the income-tax assessment of the firm in the year 1984-85 and 1985-86 and the evidence of PW-123, an Income-tax practitioner. In addition to the same, when A-3 was questioned u/s 313 Cr.P.C., he admitted that he invested good amount for the work and visited the site to watch the progress of the work. The fact that A-1, while as a Minister for Electricity, interfered with the award of the contracts of the Board were spoken to by PW-64, PW-66, PW-138 and PW-146. It is also clear that A-1 was awaiting for a probable contractor of his choice to undertake the Idamalayar works at exorbitant rates. [para 31] [813-F-H; 814-A-C]

10.4. Further, there was labour agitation prevailing at Idamalayar work site. It is in evidence that after execution

of the agreement of the Idamalayar work by A-4, A-1 interfered and settled the labour dispute by awarding a compensation of Rs. 11 lakhs to the striking workers and the worksite was made free of any labour unrest. It is the prosecution case that this was done to help the contractor, a party to the conspiracy for execution of the work and to make illegal profit therefrom. The evidence of PW-7, Chief Engineer and other witnesses stated that the awarding of Idamalayar work at exorbitant rates could have been avoided in case the labour issue was settled earlier. The prosecution has also highlighted labour unrest at Idamalayar which was kept pending at the instance of A-1 and other interested parties so as to make it appear that no contractor will come forward to undertake the contract, so much so that there is possibility of choosing a contractor of their choice for the execution of the work at exorbitant rates. [para 32] [814-D-H; 815-A]

10.5. The prosecution has also highlighted that to achieve the illegal object of finding the contract in the name of A-4 at exorbitant rates, the pre-qualification system was introduced by the Board by order Ext. P576 dated 24.09.1981. This was after tendering process had started for the Idamalayar work. PW-138, explained before the court that pre-qualification bid system was misused by the Board to safeguard vested interest by choosing contractors of their choice. [para 33] [815-B]

10.6. The Special Court, after analysing the evidence in detail found that A-3 is the man behind the manuring for getting the contract awarded to A-4, who, however, was only a benamidar and A-3 and A-22 were the beneficiaries though the work was awarded in the name of A-4. The role played by A-6 in the matter of hatching out the conspiracy and the fulfillment of the unlawful object is proved by evidence, particularly, from the evidence of PW-7. [para 34] [816-C-D]

10.7. From the materials on record, it is clear that a criminal conspiracy among A-1, A-3 and A-6 can be inferred. A-1, as Minister for Electricity is all in all dealing with the efforts of the Board including the awarding or cancellation of the contracts. The officers and the Board members were under his pressure and fear which is clearly seen from the statements of prosecution witnesses, namely, PWs 8, 36, 60, 62, 138, 140, 64, 66 etc. From the materials on record, as rightly concluded by the Special Court, it leads to a conclusion that several out of way methods were adopted by the Board at the instance of A-1 for achieving the object of conspiracy. [para 34] [816-E-F; 817-A]

10.8. The High Court failed to consider various instances and materials placed by the prosecution in respect of charge relating to conspiracy. Before this Court it was demonstrated that several material aspects have not been considered by the High Court. PW-7, former Chief Engineer, a most reliable witness was examined in the presence of A-3 on 04.11.1982 in the Board's office. There is no necessity to corroborate or further material in addition to the oral evidence of PW-7. As rightly analysed and concluded by the Special Court, there is no infirmity in the evidence of PW-7 merely because there is no documentary evidence in respect of the presence of A-3 at the Board's meeting, the evidence of PW-7 cannot be ignored. [para 35] [817-D; 818-B-C]

10.9. The High Court very much accepted the stand of the accused that it was a collective decision of the Board for awarding contract in favour of A-4 at exorbitant rates, though the reasons relied on by the Board expose the omission and negligence on its part in fixing the contract with other contractors, namely, PW-146, P.W. 64 or PW-4, who quoted lower rates then A-4. Even before this Court it was reiterated that it was a collective decision of the members of the Board to award the contract in

favour of A-4, but it has been established, as has been held by the Special Court, that the contract was awarded at exorbitant rates, with special conditions. In the instant case, all the ingredients of criminal conspiracy are satisfied for convicting A-1, A-3 and A-6 for the offence charged against them. [para 36] [818-D-G]

11. Special mention about PW-7, retired Chief Engineer of the Board & PW-46:

11.1. The prosecution heavily relied on the evidence of PW 7, a retired Chief Engineer of the Board. By his rich experience and having worked as a Chief Engineer at the relevant time, namely, when Idamalayar project was commissioned, he furnished all the details with reference to various documents such as his report, opinion, minutes of the meeting of the Board with reference to Idamalayar project He retired from service on March 1985, and was first examined on the side of the prosecution on 28.03.1996 and at that time he was 66 years old. He was called upon to give evidence only in March 1996 nearly after 15 years of the commissioning of the Idamalayar project. In this view of the matter, there is no reason to reject his entire evidence for alleged inconsistencies as claimed by the respondents/accused. In his evidence, he has mentioned that on the submission of tender by A-4, it was noted that he quoted 189% above PAC. It is also seen from the evidence of PW-7 that after noting that the rate quoted by A-4 is higher rate, he forwarded the said information for remarks of FA and CAO. He also asserted that A-6 told him that A-1, the Minister, was very much particular to award both the works to A-4. He inspected the site on 23.09.1983 and due to slow progress in the works, he castigated A-22, who conducted the works. After few days, A-3 and A-22 came to his house and warned him and then on 13.10.1983, he was transferred and appointed as an Advisor of Electricity Board in respect of Hydroelectric Projects, though such a Post

was not there. [para 37 and 38] [819-A-C; 820-A-B; 822-B-C-E]

11.2. As regards the decision of the Board and the role of PW-7, he has stated that the Chief Engineer has no right to question the Board's decision. However, he clarified that when he was asked to give his opinion or report, he was bound by the said direction. Though, several reports and minutes of the Board meeting were pressed into service by the respondents/accused in order to strengthen their case that all important decisions accepting the contract in favour of A-4 including several special conditions etc., were taken by the Board on the notes/reports of PW-7, it is clear that due to the pressure of A-6, the then Member of the Board, who was close to A-1, as well as the desire of A-1 in awarding the contract in favour of A-4 with higher rates, PW-7 had no other option except to execute the directions of A-6 and A-1. The analysis of the evidence of PW-7 coupled with the other prosecution witnesses and other notes and report prepared for the Board clearly indicate that though he reminded that certain things were not permissible, because of the fact that the beneficiaries of the contract are known to A-1 and A-6, he had no other option except to prepare notes in such a way and, ultimately, the Board accepted the same. [paras 37, 38, 39 and 41] [821-G-H; 822-A-G-H; 823-C-D]

11.3. The evidence of PW-46, a member of RSP, a political party was led by the prosecution to establish that A-1 decided and determined to award the contract to A-4. PW-46 stated that at the relevant time he was the President of the workers Union. A memorandum was submitted to A-1 and he was requested to give work to labourers at least on piece rate basis, but A-1 told them that the contract had been given to A-4. [para-42] [823-E-H]

12. About maintainability of the appeal by the appellant:

In the instant case, certain special features exist. Though the State has not filed any appeal against the impugned order of acquittal by the High Court but supported the ultimate conviction and sentence imposed by the Special Judge and informed this Court that if permitted, it was ready to file an appeal with an application for condonation of delay. Though the Court is not inclined to entertain such a request at this stage, however, the fact remains that taking note of the importance of the issue, allegations against the Minister and higher officials of the Board in respect of award of contract with the ulterior motive, the appellant approached this Court on earlier occasion when the State wanted to close the prosecution against all the accused including the Minister, based on the order of the High Court in respect of A-5. Further when the very same appellant filed special leave petition before this Court and later leave was granted by this Court neither of these respondents raised any objection as to the maintainability of the petition. On the other hand, a Bench of three Judges* accepted the appellant's claim and set aside the order of the High Court based on which the Special Judge proceeded further and, ultimately, convicted and sentenced A-1, A-3 and A-6. In view of these factual details, the respondents-accused were not serious in projecting the issue relating to maintainability as their first objection. In view of the special circumstances highlighted in the case on hand, the instant appeal by the appellant against the order of acquittal by the High Court is maintainable. [para 45] [825-F; 826-H; 827-A-F]

****V.S. Achuthanandan* vs. *R. Balakrishna Pillai & Ors.*, 1994 (1) Suppl. SCR 95 = (1994) 4 SCC 299] – referred to.**

National Commission for Women vs. *State of Delhi and Another* **2010 11 Scale 17; and** *K. Anbazhagan* vs. *Superintendent of Police and Others* **2003 (5) Suppl. SCR 610 = (2004) 3 SCC 767- relied on**

Lalu Prasad Yadav & Anr. Vs. State of Bihar & Anr., **2010 (4) SCR 334 = (2010) 5 SCC 1 held in-applicable**

13. Conclusion

13.1. The prosecution has established the following aspects insofar as accused A-1, A-3 and A-6 are concerned: (a) the contract was awarded for both the works of Idamalayar at a very high and exorbitant rate with special conditions having heavy financial implications; (b) the contractor was allowed to return only fifty per cent of the empty cement bags; and (c) the contract was awarded by reducing the retention and security amount. [para 47] [828-D-E]

13.2. The High Court failed to appreciate in the proper perspective the materials placed by the prosecution and brushed aside several important items of evidence adduced by the prosecution. Equally, the conclusion of the High Court that the proved circumstances are not sufficient to hold that there was conspiracy, as alleged by the prosecution, cannot be accepted. On the other hand, the Special Court, after framing various points for consideration and after thorough discussion, has rightly accepted the case of the prosecution and rightly convicted the accused. The High Court committed a grave error in acquitting the accused without adverting to the reliable and acceptable evidence adduced by the prosecution. The judgment of the High Court is set aside and the conviction of all the three accusedas recorded by the trial court is upheld. [para 47] [828-F-H; 829-A-B]

13.3. Now, coming to the sentence part, it is relevant to note that the contract was awarded to A-4 (since deceased) as early as on 19.11.1982. After various

agitations, discussions in the Assembly, appointment of a Commission by the Government and based on the report of the Commission, the State Government initiated the prosecution and the trial prolonged upto November 19, 1999. Thereafter, the matter remained pending before the High Court till October 2003, when the High Court pronounced its order acquitting all the accused. The matter was then taken up to this Court by the appellant. The accused have undergone agony of these proceedings for nearly two decades, therefore, ends of justice would be met by awarding rigorous imprisonment for one year with fine of Rs. 10,000/- each. Ordered accordingly. [para 48] [829-C-E]

14. It is pertinent to point out that in all the cases in which charges relating to corruption by public servants are involved, normally, it takes longer time to reach its finality. Although, the Government of India, Department of Law & Justice is making all efforts for expeditious disposal of cases of this nature by constituting Special Courts, however, the fact remains that it takes longer time to reach its destination. When a matter of this nature is entrusted to a Special Court or a regular court, it is but proper on the part of the court concerned to give priority to the same and conclude the trial within a reasonable time. The High Court, having overall control and supervisory jurisdiction under Article 227 of the Constitution of India is expected to monitor and even call for a quarterly report from the court concerned for speedy disposal. Inasmuch as the accused is entitled to speedy justice, it is the duty of all in charge of dispensation of justice to see that the issue reaches its end as early as possible. [para 49] [829-G; 830-C-E]

Case Law Reference:

1994 (1) Suppl. SCR 95referred to para 2

2010 11 Scale 17	**relied on**	**para 43**
2010 (4) SCR 334	**held inapplicable**	**para 46**
2003 (5) Suppl. SCR 610	**relied on**	**para 46**

CRIMINAL APPELLATE JURSDICTION : Criminal Appeal No. 350 of 2006.

From the Judgment & Order dated 31.10.2003 of the High Court of Kerala at Ernakulam in Crl. Appeal Nos. 823, 824 of 1999 and 822 of 1999 (B).

Shanti Bhushan, A. Sharan, U.U. Lalit, S. Gopakumaran Nair, R.S. Sodhi, Malini Poduval, Rovin V.S., Deepak Prakash, Biju P. Raman, Usha Nandini, Babita Sant, Vishnu B. Saharya, Geroge Mathew, Saharya & Co., E.M.S. Anam, Fazlin Anam, James Koshy, Vinod Kumar, T.G. Narayan Nair, K.N. Mahusoodhanan, P.V. Dinesh, Jojo Jose, Sindhu T.P., P.V. Vinod for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. The challenge in this appeal, by special leave, is to the legality of the order dated 31.10.2003 passed by the High Court of Kerala at Ernakulam allowing Criminal Appeal Nos. 822, 823 & 824 of 1999 filed by the accused setting aside the order dated 10.11.1999 passed by the Special Judge Idamalayar Investigations, Ernakulam in C.C. No. 1 of 1991 convicting all the accused for the offences punishable under Sections 120-B and 409 of the Indian Penal Code (in short 'IPC') and Sections 5(1)(c) and 5(2) of the Prevention of Corruption Act, 1947 (Act 2 of 1947) (hereinafter referred to as 'the P.C. Act') and sentencing them to undergo rigorous imprisonment.

2. **Brief Facts:-**

(a) Idamalayar Hydro Electric Power Project, a multi-purpose power project in Kerala was conceived and completed

in the year 1985. The project report was approved by the Central Water and Power Commission in 1973.

(b) After the completion of the Dam, the remaining construction work relating to the power tunnel and surge shaft, which are integral part of the water conductor system of the project, was awarded on contract basis to one K.P. Poulose (A4), as per the decision of the Kerala State Electricity Board (hereinafter referred to as the "Board"), on 19.11.1982. The work relating to power tunnel was awarded at 188% above the Probable Amount of Contract (PAC) and the work relating to surge shaft and allied works at 162% above the estimated amount with many special conditions, as requested by the contractor, involving heavy financial implications/advantages to him at the expense of the Board. Further, there was inordinate delay in completion of the work.

(c) During the trial run, on 15.07.1985, several leaks and cracks were noticed in the tunnel lining which was a matter of great public concern and caused considerable anxiety and fear among the public and State as well. Discussions and debates were held in this regard in the State Legislative Assembly. There was a public outcry for a judicial probe in this matter. Extensive rectification work to remedy the defects in the tunnel lining and surge shaft was undertaken at a considerable cost which was to the tune of Rs. 1.75 crore.

(d) On 02.08.1985, the Public Undertaking Committee of the State Legislature inspected the site and submitted its report recommending a judicial probe. The State Government appointed a sitting Judge of the Kerala High Court as Commissioner of Inquiry to conduct the probe. The Commission recorded its enquiry, collected considerable evidence and submitted its report in June, 1988. The Commission came to the conclusion that materials placed before it *prima facie* disclosed commission of offences punishable under I.P.C. and P.C Act against persons responsible for the same and recommended for investigation into these offences. The State

Government accepted the recommendations and constituted a special team, headed by Superintendent of Police for Investigation. The report of the special squad was filed in the Court of Special Judge on 14.12.1990 in Crime No. C.C. No. 1 of 1991.

(e) During pendency of the case, an application for withdrawal of the prosecution against accused No. 5 - G. Gopalakrishna Pillai, who was the Secretary to the Kerala Government, Irrigation and Power Department was made by the then Special Public Prosecutor on 24.08.1992 under Section 321 of the Code of Criminal Procedure (in short 'Cr.P.C.') on the ground of absence of any material to sustain a successful prosecution of offences alleged against him. At this stage, the appellant herein - V.S. Achuthanandan, the then Opposition leader in the Assembly, in public interest, filed statement of objections against the move for withdrawal of the case against G. Gopalakrishna Pillai (A5). After full fledged enquiry, the application filed by the Special Public Prosecutor was dismissed by the Special Judge on 16.10.1992.

(f) On 03.02.1993, Criminal Revision Petition No. 762 of 1992, filed by the State against the order of Special Judge was allowed by the High Court. On the strength of the observations made in the order of the Kerala High Court, the State Government took the decision to withdraw the criminal case against all other accused.

(g) The appellant challenged the above order of the High Court in Criminal Appeal No. 122 of 1994 before this Court which set aside the order of the High Court and restored the order of the Special Judge declining consent for withdrawal [vide *V.S. Achuthanandan vs. R. Balakrishna Pillai & Ors.,* (1994) 4 SCC 299]. Subsequently, the matter was further proceeded in the Court of Special Judge.

(h) During trial, Accused No. 22, Paul Mundakkal became insane and the case against him was allowed to split, Accused

No.4 - K.P. Poulose, Contractor, died, Accused nos. 11 and 14 to 21 were discharged by the Court of Special Judge in the final report holding that there was no *prima facie* case made against them.

(i) On 14.12.1995, charges were framed against other accused for various offences under Sections 120-B, 409, 430 and 201 IPC and Section 5(2) read with Section 5(1)(c) and (d) of the P.C. Act. This order of the Special Judge was confirmed by the High Court, but found that the charge under the P.C. Act is not sustainable against A5 and A8 for want of proper sanction as per the orders passed in Criminal Revision Petitions filed by the accused in the High Court. Charge was amended accordingly and the accused were rearranged as A1 to A11. In the meantime, A7 died.

(j) The Special Court, after analyzing the oral and documentary evidence on record, vide its judgment and order dated 10.11.1999 found R. Balakrishna Pillai (A1), P.K. Sajeev (A3) and Ramabhadran Nair (A6) guilty of the offences punishable under Section 120-B and 409 IPC and Sections 5(1)(c) and 5(2) of the P.C. Act read with Section 120-B of IPC. They were sentenced to undergo rigorous imprisonment for a period of five years for the offence punishable under Section 120-B of IPC and to undergo rigorous imprisonment for a period of four years each under Section 409 IPC and Section 5(2) of the P.C. Act read with Section 120-B IPC and to pay a fine of Rs.10,000/- each, in default, to undergo simple imprisonment for one year each. However, A1, A3 and A6 were acquitted of the charges under Sections 161, 201 and 430 IPC read with Section 5(1)(d) of the P.C. Act. It was also directed that the sentences shall run concurrently. Accused Nos. 2,4,5,8,9,10 and 11 were found not guilty of the offences and they were acquitted of all the offences with which they were charged.

(k) Aggrieved by the order of conviction and sentence, all the three accused i.e. (A1), (A3) and (A6) filed separate

appeals before the High Court of Kerala at Ernakulam. By the common impugned judgment dated 31.10.2003, the High Court set aside the conviction and sentence of all the three accused and acquitted them from all the charges levelled against them.

(l) Questioning the order of acquittal, the appellant - V.S. Achuthanandan, filed special leave petition against the common impugned judgment and, this Court, by order dated 27.03.2006, granted leave to appeal.

3. Heard Mr. Shanti Bhushan, learned senior counsel for the appellant, Mr. U.U. Lalit, learned senior counsel for R.Balakrishna Pillai (A1), Mr. Amarendra Sharan, learned senior counsel for P.K. Sajeev (A3), Mr. S. Gopakumaran Nair, learned senior counsel for Ramabhadran Nair (A6) and Mr. R.S. Sodhi, learned senior counsel for the State of Kerala.

Submissions:

4. Mr. Shanti Bhushan, learned senior counsel for the appellant after taking us through the entire materials relied on by the prosecution, stand taken by the defence, elaborate reasonings of the trial Court in convicting the accused and the reasonings of the High Court in acquitting them, raised the following submissions:-

(i) There was enough material to show that (A1) was very much interested in favour of (A3) and with the connivance/ assistance of the Board officials, more particularly through (A6) Member of the Board, made the Board to accept the tender offered by K.P. Poulose (A4) at an exorbitant rate with various special conditions.

(ii) The criminal breach of trust has been committed by the accused in the following ways:-

(a) By awarding both the works of Idamalayar at a very high and exorbitant rate with special conditions having heavy financial implications.

(b) By reducing the retention and security amount.

(c) By allowing the contractor to return only fifty per cent of the empty cement bags.

(d) By accepting the special condition for the sale of T & P items (tools & plants) which could not be sold as per the general conditions of the contract

(iii) Contrary to the norms and circulars/procedures of the Board, in order to favour K.P. Poulose (A4), who was a friend of (A1), the Board has accepted all the conditions just to favour (A1) and (A3).

5. Mr. U. U. Lalit, Mr. Amarendra Sharan and Mr. S. Gopakumaran Nair, learned senior counsel appearing for (A1), (A3) and (A6) respectively supporting the ultimate decision of the High Court submitted that:

(i) The outcome of the contract in favour of K.P. Poulose (A4) was based on a "collective decision" by the Board and there was no external pressure from anyone including (A1).

(ii) All the decisions taken were in terms of rules/norms applicable to the contract including accepting special conditions.

(iii) Mere acceptance of higher rate would not amount to criminality.

(iv) There is no allegation that by awarding contract in favour of K.P. Poulose (A4), (A1) was monetarily benefited.

(v) No material to show that there is any wrongful loss to the Board.

(vi) Inasmuch as the High Court acquitted all the accused in respect of all the charges on appreciation of oral and documentary evidence, interference by this Court is very limited. In the absence of perversity in such conclusion, normally, this

Court would not interfere with the order of acquittal.

(vii) In any event, inasmuch as the State has not challenged the order of acquittal, the present appellant being neither a complainant or heir nor a party to any of the proceedings is not entitled to pursue the present appeal. Accordingly, the appeal is not maintainable and on this ground liable to be dismissed without going into the merits of the claim.

6. We have carefully analysed the materials placed by the prosecution, the defence, the decision and reasonings of the trial Court and High Court and considered the rival contentions.

Interference by this Court in an order of acquittal

7. Learned senior counsel for the respondents by drawing our attention to the reasoning of the High Court and in respect of all the charges leveled against acquitting them submitted that in the absence of perversity in the said decision, interference by this Court exercising extraordinary jurisdiction is not warranted. It is settled principle that an Appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded. The Code of Criminal Procedure (in short 'Cr.P.C') puts no limitation, restriction or condition on exercise of such power and an Appellate Court is free to arrive at such conclusion, both on questions of fact and of law. An Appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. The presumption of innocence is available to a person and in the criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. It is also settled law that if two reasonable conclusions are possible on the basis of the evidence on record, the Appellate Court should not disturb the finding of acquittal recorded by the trial Court. Keeping the above principles in mind, let us discuss the charges leveled, materials placed by the prosecution in support of those charges, reasoning of the Special Court

convicting the accused and impugned order of the High Court acquitting all the three accused in respect of the said charges.

Statutory Provisions

8. The Electricity (Supply) Act, 1948 (in short 'the Act') was in force at the relevant time. Section 5 of the Act mandates each State to constitute State Electricity Board for the management and supply of electricity. As per Section 78A, which was inserted by Act 101 of 1956 and came into force w.e.f. 30.12.1956, in discharge of its functions, the Board shall be guided by such directions and questions of policy as may be given to it by the State Government. As rightly pointed out by Mr. Shanti Bhushan, learned senior counsel for the appellant that except on policy matters, the State Government has no role in the affairs of the Board. In view of the charges levelled against A1 who was the Minister for Electricity, Government of Kerala, we adverted to these statutory provisions.

A1's interference in the affairs of the Board:

9. It is the case of the prosecution that A1 while he was holding office of the Minister for Electricity, Government of Kerala was interfering in the day-to-day affairs of the Board including transfers, promotions, appointment of employees, granting electric connection to consumers by giving directions to the Board officers. It is also alleged that A1 used to interfere even in awarding of contracts of the Board during his period as Minister for Electricity. One of the main charges leveled against A1 and others is that he, in his capacity, as Minister for Electricity intended to settle contracts of the Board in the name of his favourites or persons of his choice at exorbitant rates with the ulterior object of making illegal profit either to himself or to his favourites. With regard to the above claim, the prosecution has produced evidence through Kuriakose Chennakkadan (PW-64), Jagannad Prasad (PW-66), Managing Partner, C.S. Company, Kottayam, Alexander Vellappally (PW-138), Managing Director, Asian Tech and

Kamalasanan (PW-146), Managing Director of M/s We-Build. According to Kamalasanan (PW-146), though he was one of the tenderers for surge shaft work, quoted acceptable rates, could not get the contract work because of the interference of A1. He deposed that, the then Chief Engineer, late Bharathan recommended his work for acceptance by the Board, but he was further told by Shri Bharathan that he should meet A6 and also to give 5% of PAC as procuring expenses and if the said amount is not given, the work could not be awarded, hence he met A6 who told him that the rate quoted by him is very low and advised him to settle whether it is workable or not. He further deposed that at the time when A1 was the Minister, A6 was a Member of the Board who was very powerful having influence over the Minister. According to him, the voice of A1 is reflected through A6 with regard to the affairs of the Board.

10. Shri Alexander Vellappally (PW-138), Managing Director of Asian Tech, in his evidence deposed that he was asked by A1 to quote for the Lower Periyar Project Headrace Power Terminal in 1980-81 when the pre-qualification system was introduced in the Board. The tender of Shri Alexander Vellappally was qualified and the lowest when it was evaluated. However, he was informed that further steps for negotiation and discussion regarding the acceptance of the tender would take place only with the concurrence of the Minister. He further deposed that he met A1 several times and also sent letters to him and one letter sent by him to A1 is marked as Ext. P-544. According to him, though he was the lowest tenderer, the work was not awarded to him, but given to HCC. He also explained that pre-qualification bid system was misused by the Board officers, more particularly, in the case of Lower Periyar Works.

11. The next witness who highlighted the above issue is Kuriakose Chennakkadan (PW-64). According to him, the Minister used to interfere in the award of contracts and when he met A6, he was asked to meet A1. He also deposed that A1 was interested for one K.P.Poulose (A4). His work was

terminated and it was re-tendered and awarded to K.P.Poulose (A4).

12. Jagannad Prasad (PW-66), Managing Partner of M/s C.S. Company deposed before the Court that while he was doing the contract work of a tunnel for Kakkad Hydro Electric Project, he approached the Chief Engineer Bharathan, who told him that the work could be awarded only as per the directions of the Minister (A1). He further deposed that he had executed a promissory note for Rs.5,30,000/- in favour of one Yackochan, who acted as a middle man for the commission payment. He informed the Court that this contract was terminated by the Board.

13. It was highlighted on the side of the appellant that it was during that period, when A1 was Minister for Electricity, the tender process of Idamalayar Tunnel and its concrete lining and surge shaft work was started. It is relevant to note that R. Balakrishna Pillai (A1) was the Minister for Electricity from 27.01.1980 to 21.10.1981, 26.05.1982 to 05.06.1985 and 25.05.1986 to 25.03.1987. The tender for surge shaft was invited and awarded to one E.M. Varkey at 21% below estimated rate. The estimated rate was Rs 74 lakhs for surge shaft. However, the work was abandoned on 28.03.1981 due to labour strike. Thereafter, tenders were invited again for the surge shaft and four persons submitted their offers for tenders. The lowest rate was quoted by M/s We-Build Pvt. Ltd. and the next lowest rate was by E.M. Varkey at 57% above PAC. It is pointed out that though the work was recommended to be awarded, the Board decided to re-tender the work. Accordingly, the tenders were invited again and E. M. Varkey alone quoted for the work. His tender was not accepted since he quoted exorbitant rate. In the meanwhile, pre-qualification bid system was introduced in the Board which is evident from Ext. P-576 dated 24.09.1981, which was made applicable to Idamalayar contract works. Thereafter, tender for both the works were invited by Shri Bharathan, the then Chief Engineer which is

evident from Ext. P-46 dated 05.06.1981. However, the tender was cancelled by him which is also clear from Ext P-47 dated 22.10.1981. The Chief Engineer extended the validity of the tender upto 29.04.1982 and after his demise, the then Chief Engineer (PW-7) extended the validity upto 30.06.1982. During that time, two tenders were received, one by K.P.Poulose and other by Kuriakose Chennakkadan (PW-64), quoting special conditions. The cover containing the conditions and deviations was opened on 30.06.1982, when K.P.Poulose was present in the Board's Office. However, Kuriakose, the other tenderer was not informed and later on 09.09.1982, K.P.Poulose was pre-qualified and Kuriakose was disqualified which, according to him, was without notice. The contract for the balance power tunnel and concrete lining work of Idamalayar works was ultimately awarded to K.P.Poulose at 188% of the above estimated rate and the surge shaft work was also awarded to him at 162% above the estimated rate.

14. It is clear from the above materials that the process of tendering of Idamalayar works was interrupted on several occasions mainly by the Board by cancelling the tenders and ordering re-tender and by extending the period of validity of tenders more than once. It was on the last date of extension of the validity of the tender i.e. on 30.06.1982, K.P.Poulose appeared and submitted his tender with special conditions which was later accepted in the Board's meeting dated 19.11.1982. The Special Judge, basing reliance on Board's resolution (Ex. P550(a)), has rightly concluded that there was inordinate delay in awarding the work which reasoning was not accepted by the High Court. The materials placed clearly show that it was nearly three years to take a decision. It is also clear from the evidence of PWs 64, 66, 138 and 146 which clingingly established the circumstances under which A1 conceived the idea for fixing contract of the Board at exorbitant rate in order to derive monetary benefits. From the above, the contrary conclusion arrived by the High Court, according to us, is not in terms of the evidence led in by the prosecution.

Whether Idamalayar contract was awarded at exorbitant rate causing loss to the Board

15. The basic stand of the prosecution is that A1 entered into criminal conspiracy to award the disputed contract involving heavy financial gain to K.P.Poulose (A4) and the conspiracy and abuse of power by certain officials enabled the conspirators to earn a pecuniary advantage of Rs.2,39,64,253/-, in addition to the financial loss caused to the Board. It is the specific case of the prosecution that rate awarded in both the contracts is exorbitant. It is not in dispute that the contract was awarded at 188% above PAC in the case of tunnel work and 162% above PAC for the surge shaft work. Verification of Ext. P-52(b) shows that the sanctioned estimate for the tunnel work was Rs.1,17,20,633.90. On the other hand, the accepted tender amount as per the award of contract was Rs.2,45,80,796/- which is clear from Ext P 52. It is further seen as per Ext P-68 agreement, the sanctioned estimate for surge shaft was Rs. 74 lakhs and it was awarded for Rs.1,42,94,901/- The estimate for floor concreting was Rs.479.5 per M3 and the estimated rate for sides and arches was Rs.476.20 per M3. All the above details were highlighted in the evidence by PW-151 a competent Engineer. Likewise, the rate for floor concreting awarded to K.P.Poulose was Rs.825.47 per M3. In fact, the calculations made by PW-151 were not seriously disputed by the defence.

16. In order to appreciate the stand that the estimated rate and the tender quoted by K.P.Poulose was exorbitant was demonstrated by Mr. Shanti Bhushan by taking us through the estimated cost of the work awarded to skilled workers brought from Kulamavu and Moolamattom, who were awarded the tunnel driving work on piece rate basis. It is seen that the tunnel driving work was awarded to them at the rate of Rs. 1,250/- per M3 which was enhanced later, and finally, at the time, when the workers stopped the work, the rate was Rs. 1,900/- per M3. This is clear from the settlement memorandum Ext. P-212

signed between the labourers and the Board. This fact was highlighted in the oral evidence of PW-7, Chief Engineer of the Board. In his evidence, he explained that the rate awarded to workers will be Rs. 2,500/- per M3 including cost of materials. PW-156, the Investigating Officer, also gave evidence on the basis of records collected during his investigation. Ext.P-52 agreement shows that the estimated rate for driving one meter tunnel was Rs. 4,090/-. Ext. P-19/Contract Certificate of the Power tunnel shows that the amount paid to the contractor for 24 meters tunnel driving was Rs. 2,39,961/-. It was highlighted that when the total work was done by the labourers at piece rate basis, they were given Rs. 2,500/- only per M3. The remuneration for 24 meters driving tunnel would come to only Rs.60,000/- the difference i.e. Rs.1,79,961 (2,39,961-60,000) would show that the tunnel driving work was given to K.P.Poulose (A4) at an excessive rate.

17. It is pointed out that there is enough material to show that the labourers, who did the tunnel work, were prepared to carryout the balance work of the tunnel at the estimated rate of Rs. 4,090/-. At the relevant time, the representatives of the workers made a representation to the then Minister for Electricity, namely, R Balakrishna Pillai (A1) informing him that they are prepared to do the tunnel work and allied works at the estimated rate. Divakaran Kutty (PW-24), Vadayattupara Radhakrishnan (PW-33), Sasidharan Nair (PW-34) and Muraleedharan Pillai (PW-46) have given evidence that they represented before the Minister as well as the officials of the Board and informed their preparedness to do the work at the estimated rate and also requested for absorption in the Board's service. In this regard, Mr. Shanti Bhushan, learned senior counsel appearing for the appellant heavily relied on the evidence of PW-46 who had gone to meet A1 along with (late) N Sreekantan Nair and submitted a Memorandum Ext.P-287 dated 01.06.1982. It is relevant to note the response of the Minister (A1) for the above said request. PW-46 stated that A1 told them that there is no question of giving the works to the

workers and he wants to give the work to K.P.Poulose. This instance pointed out that A1 had personal interest in K.P.Poulose and had decided to entrust the contract to him, though at that time, the said K.P.Poulose did not submit the tender for the work. We have already noted that K.P. Poulose submitted his tender only on 30.06.1982 i.e. a month after the memorandum dated 01.06.1982 submitted by PW-46. In support of the same, the evidence of PW-122, T.M. Prabha, the then President of the Kerala Construction Labour Union that he met A1 and gave representations and requested for award of work to the workers at estimated rate and also absorption of the workers in the Board's service on permanent basis is also relevant. Here again, it is relevant to note that PW-122 was also informed that there is no question of awarding work to workers, but the work had to be given to K.P.Poulose. The evidence of PWs-46 and 122 and the statement made by A1 to both of them clearly show that K.P. Poulose was the contractor chosen in advance by A1 and other accused who were also interested in him. As rightly pointed out by Mr. Shanti Bhushan, this evidence should be connected with the conspiracy to award the work to K.P.Poulose at exorbitant rate originated even prior to the submission of tenders to the work by K.P.Poulose and other tenderers. The contrary conclusion arrived at by the High Court justifying the award at higher rate to K.P.Poulose cannot be legally sustained. The Board is empowered with the authority to award contracts and has discretion to accept and being an authority constituted under the Statute and a Pubic Undertaking is not expected to accept tenders at exorbitant rates with financial implications causing loss to the Board. The Board is always expected to protect its financial interest while awarding contracts. The Board mainly relied on the labour problem that was prevailing at the relevant time. In this regard, it is relevant to point out that the tender for the Idamalayar work was invited in March, 1982 and four persons, namely, Kamalasanan (PW-146), Managing Director, We-Build, C.K. Verghese, E.M.Varkey and V.A. Thankachan submitted tenders vide Exts. P78 series dated 21.03.1982. It

is true that the tunnel workers went on strike on 20.04.1981 and the contractors submitted their tenders when there was labour unrest. However, the reason attributed for the delay cannot be accepted. As rightly pointed out, there were procedural irregularities and omissions by the Board authorities in the manner of dealing with tenders submitted by K.P.Poulose and Kuriakose, which ultimately eliminated Kuriakose from the scene, keeping K.P.Poulose as the sole tenderer, qualified by pre-qualification Committee of the Board and hasty steps were taken by the Board in awarding contract in favour of K.P.Poulose in the meeting held on 19.11.1982 lead to the conclusion that the award of contract in favour of K.P.Poulose was an exorbitant one. It is relevant to point out that the Special Judge, by adverting to Ext 550(a) expressed that the reasons stated by the Board in awarding contract in favour of K.P. Poulose at exorbitant rates are not acceptable.

No serious discussion by the Board

18. It is pointed out and in fact taken us through evidence that there was no serious discussion in the Board meeting held on 19.11.1982 and the minutes of the Meeting were prepared as dictated by A7, the then Chairman of the Board. It is the responsibility of the members, more particularly, full time members of the Board, who were responsible for the scrutiny of the deviations and conditions suggested by the contractor which involved huge financial implications to see that all transactions are beneficial to the Board and within the permissible limit. Mr. Lalit and Mr. Sharan, learned senior counsel appearing for A1 and A3 respectively heavily contended that it was a collective decision of the Board and there was no external pressure from anyone including A1. It is relevant to point out that the decision ultimately taken for awarding the contract with special conditions, which we will discuss in the later paras, as suggested by the contractor, involved huge financial implications at the risk and loss of the Board. Though the High Court has concluded that the part-time

members who were signatory to Ex550(a) had approved the minutes, subsequently, the Special Court made a distinction between the responsibility of full-time members and that of part-time members in the matters of awarding of contract. It is true that all the members present subscribed their signature in the minutes in awarding contract to K.P.Poulose. It was highlighted that in evidence, A8, the Financial Adviser to the Board, in his report has stated that the rates awarded to the contractor are very high. The letters sent by A8 were marked as Exs. P-415 and 416. It is also relevant to point out that the then Law Secretary, Shri Viswanathan Nair also conveyed his opinion during the meeting of the Board that the rates are exorbitant. These aspects were taken note of by the Special Court while considering the culpability of the accused and the High Court was not serious about their views. In other words, the High Court has concluded that the award of contract to K.P.Poulose was a collective decision of the Members of the Board. The High Court also pointed out which was again highlighted by the learned senior counsel appearing for the accused that majority of the Members of the Board were highly qualified and responsible officers and it cannot be said that they were only mute witnesses to the decision of the Board. In this regard, it is relevant to point out that the Special Court has rightly concluded that there was no serious discussion in the Board Meeting dated 19.11.1982 when the question of award of contract was taken up and the minutes of the meeting were prepared as dictated by A7, the then Chairman of the Board. The then Deputy Secretary of the Board, R. Sankaran was examined as PW-140, also admitted this aspect and stated that there was no serious discussion in the meeting held on 19.11.1982. He explained that Ex.550(a) minutes of the meeting is a reproduction of the dictation given by the Chairman of the Board (A7).

19. The High Court has pointed out that the prosecution has not produced any contemporaneous agreement for proving the rates prevalent during the relevant period of award of the

contract. The High Court found that the contract was awarded at 188% above PAC for the tunnel work and 162% above PAC for the surge shaft work. It was pointed out from the side of the Board that the estimate rate was prepared taking into account the prevalent PWD rates for similar items of work like tunnel driving, concrete lining, earth work, cost of materials, labour charges, transportation charges of materials to worksite etc. It is not in dispute that the contractor was also given opportunity to conduct site inspection and decide other aspects connected with the execution of the works for submitting his tender rate. Though contractor can also quote special conditions involving financial implications and other conditions in the contract, which is usually settled by negotiations, but the general conditions of contract shall not be superseded while accepting special conditions to the detriment of the Board. The Special Judge had noted that the rate quoted by N.K.Kuriakose (PW-30) for tunnel driving and surge shaft work was below 21.75% of the estimated rate and there was much difference in the rate quoted by K.P.Poulose and Kuriakose. It is further seen that the work was awarded to Kuriakose at the rate of Rs. 1,092.3 per M3 for sides and arches. The work awarded to Kuriakose was abandoned by him since the Board did not provide him with necessary materials for proceeding with the work as per the agreement. He adduced evidence for the said abandonment and also suffered loss in that regard for which Board was subsequently held liable and he was paid compensation as per the Court orders. The work was awarded to N.K. Kuriakose in 1979. The Special Court has pointed out that even though there was an increase of 25% of the actual rate awarded to Kuriakose, still there was wide difference between the rates at which the two works were awarded and on this ground also, the Special Court held that the works for floor concreting and for sides and arches were awarded to K.P.Poulose at a higher rate. However, the High Court disagreed with the conclusion of the Special Court. In this regard, it is useful to refer Ext.P174(2), which is a report with regard to the rate of award of Idamalayar contract. It was stated in the report that the

estimate was prepared with the scheduled rate of 1980 which had been enhanced by 25% on labour to obtain 1982 schedule and the work was awarded after the enhancement of the scheduled rates. It is further seen that the estimate was prepared with the scheduled rate of 1980 for the purpose of obtaining the rate of 1982 i.e. increase of 25% in the rate was given in 1980. The High Court has justified the increase of 25% by pointing out the increase mentioned in Ext.P299 which relates to contractor's profit of 10%, overhead charges of 10% and 5% for labour benefits. Though the High Court has agreed with the 25% increase in the rate of 1980-82, no acceptable evidence was adduced over-riding the documentary evidence furnished by Ext.P-299 and P174(2).

Award of contract to K.P. Poulose (A4)

20. It is the argument of Mr. Shanti Bhushan, learned senior counsel for the appellant that the tendering process adopted by the Board was with a view to eliminate other tenderers and to choose the tenderer of their choice, namely, K.P.Poulose. This was elaborated by pointing out that Kuriakose was disqualified without giving him adequate opportunity to present before the pre-qualification Committee and ultimately K.P.Poulose was declared as qualified. In the said meeting, only A6 and A7 were present and A8, and another member of the pre-qualificaton Committee was not present. Pursuant to the decision that Full Board meeting should be held on 19.11.1982 to decide the question of award of Idamalayar contract, PW-7 was directed to issue notice to all the tenderers. The materials relied on by the prosecution shows that on 18.11.1982, notices were issued to HCC, E.M.Varkey, Sunny K. Peter and K.P.Poulose. It is seen that only K.P.Poulose was present on 19.11.1982. Sunny K. Peter PW-4 sent a telegram on 19.11.1982 stating that he is not physically well. HCC conveyed their inability to the Board by their letter which was received in the office of the Chief Engineer on 22.11.1982 stating that there was no sufficient time given to attend the Board Meeting on

19.11.1982. Without verifying the fact that whether all the other tenderers were ready, a decision was taken on 19.11.1982 itself by accepting the offer of K.P.Poulose with special conditions. As rightly pointed out, the Board being a statutory authority, ought to have waited for a reply from the other tenderers to ascertain whether they actually received notices and reason for their inability to attend. It was demonstrated that it was a pre-planned attempt to award the work to K.P.Poulose alone and the notices issued to other tenderers were in the form of an ultimatum. It was also pointed out that for the negotiation on 04.11.1982, i.e. prior to 19.11.1982, held by PW-7, with the tenderers, in the office of the Board only K.P.Poulose and Sunny K. Peter were present. It is further seen that E.M. Varkey and HCC were not invited. The fact remains that PW-7 did not invite E.M.Varkey who quoted less rate and HCC, a reputed construction company for the second negotiation. Though a telegram was sent on behalf of E.M.Varkey, one of the tenderers that since he was away and request was made to fix another date, it was recorded that the tenderer had already lost his opportunity offered. This has been demonstrated by the appellant that the Board was not prepared to allow the request of E.M. Varkey for a discussion. It is useful to refer here that the pre-qualification Committee, headed by A7, gave chances to K.P.Poulose to correct the errors and mistakes in the tender form submitted by him for the impugned works, on the other hand, such concession was not afforded to the other tenderers, more particularly, E.M. Varkey. Both Sunny K. Peter and Kuriakose were examined as PWs-4 and 22 respectively. The evidence of Kuriakose shows that he was an experienced contractor, quoted 124% above PAC for the work and submitted his tender on 30.06.1982. According to him, he was not invited for any discussion. He was disqualified on 09.09.1982 and was not invited for being present for opening his deviations and conditions in the tender. In the same way, the evidence of Sunny K. Peter PW-4 also highlighted how he was discriminated, though he has quoted only 135% above PAC, he was not given opportunity to consider the

reasonableness of the rates quoted by him. According to him, he received notice only at 2.40 p.m. on 18.11.1982 and because of his illness, he could not attend the meeting on 19.11.1982. The fact remains, the Board has not considered his request and finalised the contract on 19.11.1982 in favour of K.P.Poulose.

21. Another aspect highlighted by the learned counsel for the appellant relates to the conduct of A1 with regard to settlement of labour dispute. The evidence shows that there was labour strike in the tunnel area which started in April, 1981 and continued from the time of inviting tenders on 05.06.1981 till the time of award of contract. It was highlighted that there was no effort on the part of A1 to settle the labour dispute before tendering process was initiated. We have highlighted the Memorandum submitted by the labourers to A1 on several occasions requesting for settlement of labour problems. It was not settled and the matter was kept alive till the tender was fixed in the name of K.P.Poulose on 19.11.1982. It was only after the award of the contract, A1 took initiative to settle the labour dispute, more particularly, when he came to know that K.P.Poulose cannot enter the site because of the obstruction of the workers to begin the contract work. It is relevant to point out that PW-7 informed A1 and A6 more than once that in case the labour dispute could be settled in advance, the contract could be awarded at a reasonable rate. The evidence of PW-7 clearly shows that his request was not accepted by A1 and A6.

22. The evidence discussed above show that the rate quoted by Sunny K. Peter (PW-4) vide his evidence in Court, was 135% above PAC, which was less than 188% above PAC, quoted by K.P. Poulose and approved by the Board. The High Court failed to take note of the importance of evidence of PW-4 and justified the action of the Board in not pursuing the tender submitted by Sunny K Peter (PW-4) with a lesser rate on the ground that his tender is liable to be rejected since he wanted an arbitration clause in the agreement. Further, though PW-4

has quoted lesser rate than K.P. Poulose, in his evidence, he has highlighted that he was not given an opportunity to consider the reasonableness of the rate quoted by him i.e. 135% above PAC. The High Court has not only ignored his assertion but found that the rate quoted by him for the surge shaft work is not a lesser rate when compared to one quoted by K.P. Poulose i.e., 188% above PAC. Though the Special Court has correctly found that Sunny K. Peter quoted less than the rate quoted by K.P. Poulose, the High Court, on erroneous assumption found fault with the finding of the Special Court which correctly appreciated prosecution case.

Acceptance of Special Conditions & Concessions

23. With regard to allegation of the prosecution that certain Special Conditions were accepted by the Board (Ex. P588) involving huge financial commitments favourable to the contractor causing loss to the Board, it is relevant to mention that one of the special conditions, is condition No. 4 which relates to tools and plants sold to the contractor in violation of the General Conditions of the contract. These special conditions along with other conditions were accepted by the Board superseding corresponding agreement provisions. Ex P52 (c) is the general conditions of contract and instructions to the contractors issued by the Board. Among various clauses, Clause E1-091 in Ex. P52(c) deals with tools and plants issued to the contractors. This clause provides that the Board is bound to make available to the contractors only such tools and plants listed in the Schedule attached thereto, that too subject to availability. Such items of tools and plants which are listed in Ex. P52 agreement marked as Ex. P52(d) shows 8 items of tools and plants which can be hired out to the contractors if requested on the specified rates. In Ex. P58, deviations and conditions submitted by the contractor as Item No 4, stated that such tools and plants listed in Ex. P52(d) shall be sold to him on outright sale at book value deducting depreciation and the cost may be recovered on prorata basis from his bills. The full Board, in its decision dated 19.11.1982, had accepted the

above special condition of the contractor. It is relevant to point out that these items includes tipper wagons loco, louder, existing truck lines and pipes, items which can only be hired to the contractor as per clause E1-091 of the General Conditions of the contract. It is the case of the prosecution that it was the decision of the Board to sell those items of tools and plants which includes very costly foreign imported materials. The official examined on the side of the prosecution pointed out that there is no provision in the general conditions of the contract enabling the Board to effect sale of those tools and plants to the contractor. However, certain materials belonging to the Board mentioned in Clause E1-093 and not covered by the list mentioned in Clause E1-091 could be sold to the contractors if available to the Board. The evidence led in clearly shows that the sale of materials listed in Clause E1-093 supersedes the general conditions of contract. In other words, it is clear from the evidence that those materials which were not mentioned in the Special Conditions were sold to the contractor on outright sale. In this regard, it is useful to refer the evidence of Udayabhanu Kandeth PW-136, Auditor attached to the Accountant General Office which shows that 126 items of tools and plants were sold to the contractor of which the cost of 117 items was Rs. 16.5 lakhs. The Auditor of the Board, who was examined as PW-130, also explained about the sale of tools and plants to the contractor, which was not provided in the agreement. It is clear from the evidence that the sale of tools and plants which could only be hired to the contractor as per the list in E1-091 was against the objections raised by A8, the Financial Advisor and Chief Accounts Officer of the Board during the relevant period. In his report, A8 had noted that the financial implications involved in the sale of items of tools and plants were not considered either by the Board or by the officers of the Board at the time when the full Board decided to sanction the above special condition No. 4 of the contract. These aspects have been duly considered by the Special Court, namely, that the tools and plants which are only to be hired as per Clause E1-091 to the contractor, however, the Board

permitted outright sale which is detrimental to the financial interest of the Board. These important aspects have been overlooked by the High Court while upsetting the decision of the Special Court.

24. In addition to the same, the prosecution has led in further evidence to show that the contractor was favored in several aspects. PW-128, V. Ramanarayanan, Superintending Engineer, in his evidence has stated that pental placer, an imported item not included in the list for issue on hire, was sold to the contractor, the sale value of which was Rs. 4 lakhs and according to him only lump sum recoveries were made from the CC bills of the contractor, instead of prorata recovery as provided in the agreement. This also caused loss of interest on the sale price of materials. He further deposed that 30 items of spares were issued to the contractor costing Rs. 6 lakhs and when he calculated the total value of spares and materials issued to the contractor it came around Rs. 36 lakhs, out of which, only a portion was recovered by the Board from the contractor vide Ex P517-P519. This witness has also pointed out that there were several items sold to the contractor without obtaining sanction of the Board.

Return of empty cement bags by the Contractor

25. Another special condition sanctioned by the Board in favour of the Contractor relates to the return of empty cement bags. This special condition provided that the Contractor shall return only 50% of empty cement bags in good condition. Ext. P-33, Audit Enquiry Report of Idamalayar Project Circle states that the Contractor had to return 65,100 empty cement bags, the value of which was calculated at more than Rs.1 lakh. According to the Auditor, because of the special condition, the Board had sustained a loss of Rs.1,08,879.75. The Financial Advisor and Chief Accounts Officer, who arrayed as A8, had stated in Ext. P-416 that without evaluating the exact financial implications, sanction was accorded by the Board to the special condition regarding return of empty cement bags to the

advantage of the Contractor for getting financial gain. Though it is stated that the condition only provides for return of 50% empty cement bags in good condition and for the remaining, the rate provided by the general conditions of contract could be realised from the Contractor, the fact remains, the special condition which we are concerned does not provide for the realisation of value of the remaining unreturned cement bags.

26. With regard to special conditions, the High Court has held that inasmuch as there is a provision in tender to enable the Contractor to get special conditions, it cannot be said that the special conditions and deviations of the Contractor should not be accepted. Here, the High Court has missed the real issue as to whether all special conditions as requested by the Contractor can be sanctioned by the Board in violation of general conditions of contract, which is the standing order of the Board applicable to all contracts and the policy adopted by the Board. Simply because there is a provision to enable the contractor to suggest special conditions advantageous to him, it does not mean that the Contractor can suggest any special condition which involved financial implication to the detriment of the Board. As correctly found by the Special Court, the special condition No.4 relating to sale of tools and plants is a favour done by the Board to the Contractor for obtaining financial gains at the risk of Board's loss. The Special Court has substantiated its finding on the point based on evidence furnished by the auditors. However, the High Court relying on Ext D-28 provided for recovery of balance 50% of empty cement bags not returned or returned in damaged condition and recovery will be effected as stipulated in the tender condition, erroneously concluded no loss could be sustained to the Board. It is relevant to point out that the special condition No.10 clearly states that the contractor is bound to return only 50% empty cement bags in good condition. To make it clear, this condition supersedes the corresponding general condition of the contract. Therefore, the Contractor is bound to return 50% of empty cement bags in good condition and there is no need to pay the

price of balance 50%. Accordingly, the Board can act only on the basis of the special condition No.10 regarding the return of empty cement bags and is not entitled to recover the value of balance 50% of unreturned cement bags. The contrary conclusion arrived at by the High Court relating to return of empty cement bags cannot be accepted.

Fixation of security and retention:

27. Yet another special condition involving financial implications sanctioned to the Contractor is with regard to the fixation of security and retention amount. Special Condition No.1 of Ext.P-588 deals with this subject. It is the prosecution case that restriction of security and retention amount is in violation of the provisions contained in the general conditions of the contract and it is a favour shown to the Contractor to make illegal gains at the expense of the Board. Clause E1-008 of Ext. P52(c) is the provision relating to security deposit of the Contractor which states that for major works where the cost of construction exceeds Rs.25 lakhs, the security deposit should be 2% of the PAC. In the case on hand, the PAC of Idamalayar contract works exceeds Rs.25 lakhs. There is no dispute for the same. The security for both works should be fixed at 2% of the PAC. Clause E1-011 of ExtP-52 is the general conditions of contract and instruction to the tenderers dealing with retention of the money from the bills payable to the Contractor. As per this clause, from each bill of the Contractor 10% should be deducted towards additional security. However, the retention was not to exceed 5% of the PAC where cost of work exceeds Rs.25 lakhs. Therefore, 5% of PAC is to be retained as retention amount for both these works. In this regard, it is relevant to refer the special condition. In the case of tunnel work, the retention and security is limited to Rs.5 lakhs which is clear from Ext.P-71. Likewise, in the case of surge shaft, security is limited to Rs.1 lakh as evidenced by Ext.P-69. This is also strengthened from the evidence of PW-8 who was the Executive Engineer in the Idamalayar project. He explained that the security amount and retention amount due from the

contractor would come to Rs.12 lakhs. Inasmuch as the PAC for both works would come to Rs.2,45,80,796/-, the retention amount in the case of surge shaft work would come to Rs.7.2 lakhs, which is 5% of the PAC. PW-8 has explained that the restriction of retention amount is a benefit shown to the Contractor. In Ext.P-65, report of PW-7, also calculated financial loss that will be sustained by the Board in limiting security and retention amount of the Contractor. In the same report, PW-7 also mentioned the loss of interest for the same. It is also pointed out that due to restricting the security and retention amount as per the special condition No.1, sanctioned to the Contractor, the liquidated damages payable by the contractor shall not exceed the whole amount of retention plus security deposit. The result of restriction of security and retention is that the liquidated damages payable by the Contractor is also automatically restricted accordingly. In that event, the Board is not entitled to recover any amount by way of liquidated damages even if the Contractor is guilty of negligence or default. All these aspects have been properly scrutinized by the Special Court. No doubt, the High Court relied on the evidence of Madhavan Potti (PW-5) that acceptance of special conditions in a contract is a normal procedure. In the same way, the High Court has also placed reliance on the evidence of Ramanarayanan (PW-21) that reduction of security and retention amount is also a normal procedure. A perusal of Kerala State Electricity Board Tender Regulations show that the reduction of security deposit is permissible only in the case of established firm/Company and that the security deposit of a new contractor shall not be reduced. The course adopted by the Board is contrary to the condition contained in Regulation No.25(c) of the Board's Regulations. Though the High Court has observed that in all major contracts, it is an accepted practice to put a ceiling on the security and retention amount and there is no acceptable evidence to support such a finding, we are unable to accept the observation of the High Court that *"for the success of execution of major contract works, small favours are inevitable"*. We conclude that the above observation of the

High Court is based on a general opinion not supported by any material or evidence on record.

Criminal Conspiracy

28. On this aspect, the Special Court has analysed the evidence of witnesses and considered the documents produced and marked by the prosecution and concluded that there is sufficient evidence for finding that a criminal conspiracy was hatched out at the instance of A1 (R.Balakrishna Pillai, the then Minister for Electricity) and P.K. Sajeev (A3) who was a close associate and political ally of A1. This was strengthened by the evidence of I.K. Prabhakaran, Assistant Engineer, Quality Control, Idamalayar project who was examined as PW-21 and other witnesses. Nobody has challenged the relationship between A1 and A3. It is the case of the prosecution that a conspiracy was hatched out at the instance of A1 and others with the illegal object of getting the Idamalayar project fixed on one among themselves at exorbitant rates and make illegal profits. It is also the definite case of the prosecution that though the work was awarded in the name of K.P.Poulouse, one of the accused, it was actually executed by A3 and another accused Paul Mundakkal (deceased). It has come in evidence that the amount of work was invested and payments were made by Paul Mundakkal and A3. As rightly observed by the Special Court, the relationship between A1 and A3 is a relevant factor in arriving at the circumstances leading to the formation of the conspiracy. The evidence led in normally show that A3 was an intimate friend of A1 and very closely moving with him who was the Minister for Electricity during the relevant period. PW-21, in his evidence, has stated that A3 was an active member and leader of Kerala Congress Party led by A1 at the time when works were allotted. PW-3, who was a watchman of the Inspection Bungalow at Idamalayar was examined on the side of the prosecution has stated that A1 and A3 used to come and stayed in the Inspection Bungalow. He further asserted that it was A3 and the deceased Paul Mundakkal, who were supervising the work at site. In addition to the evidence of PW-

3, the evidence of PWs 6, 7 and 8 who were Engineers at the relevant time at Idamalayar worksite and supervising execution of works corroborated the evidence of PW-3. PWs 24, 25 and 26 also supported the above claim of the prosecution. PW-25, one of the workers at Idamalayar also deposed that he was working with A6, who was managing Idamalayar works. PW-26, another worker also stated that when he went to the house of A3, he saw A1 in his house.

29. The prosecution has established the relationship and friendship between A1 and A3 by placing acceptable evidence. The nomination of A3 to Board's Consultative Council was made at the instance of A1. Under Section 16 of the Electricity (Supply) Act, 1948, the Constituting Authority is the State Government. The evidence led in by the prosecution shows that A1 took initiative to include the name of A3 in the list of nominees for constituting the Consultative Council. The evidence of PWs 18, 27 and 51 and Ext.180(c) establish the case of the prosecution. The evidence further shows that the mandatory requirements contemplated under Section 16 of the Act regarding the constitution of Consultative Council was not adhered to by A1 who wanted to include A3 in the panel which states that the State Government may constitute the Consultative Council considering all representatives of power generating companies and other persons in consultation with the representative bodies of various interests, namely, industry, commerce, agriculture, transport etc. It makes it clear that consultation with the representative bodies of various interests is a mandatory condition precedent for appointment of a Member by the Government in the Board's Consultative Committee. But in the case on hand, from the evidence, it is clear that there was no such consultation by the Government before making nomination of A3 who was the Secretary of Kothamangalam Bus Owners Association. It was pointed out that usually the representatives of State Level Organisers representing various interests alone were nominated after consultation by the Government with such bodies. Admittedly,

A3 was not representing any State Level Bus Owners Association. This is evident from the evidence of PWs 31 and 16. It has also come in evidence that on 30.07.1983, in a Conference held on Idamalayar Inspection Bungalow, attended by various officers of the Board and others connected with the execution of Idamalayar work, A1 declared in public that A3 was his bosom friend and requested everybody to cooperate with him for the successful completion of the project work.

30. The prosecution has established the relationship of A1 and K.P Poulose even before awarding of contract. In November 1982 itself, A1 had chosen K.P. Poulose as prospective contractor for execution of the work which fact is spoken to by T.M. Prabha (PW-122) and also by Muraleedharan Pillai (PW-46). We have already adverted to the evidence of PW-46 in detail in the earlier paragraphs. Their evidence shows that when they met A1 requesting for the award of the tunnel driving work to the workers at Idamalayar, who were brought from Idukki, Kulamavu etc, A1 told them that the execution of the Idamalayar work is proposed to be given to K.P. Poulose. This was on 29.06.1981 i.e. well prior to the execution of the contract, and indicate that there was prior contract between A1 and K.P. Poulose regarding the award of contract work at Idamalayer.

31. The role played by A3 in fixing the contract to K.P. Poulose is also relevant to infer the formation of agreement between himself and A1, the Minister for Electricity. In addition to the same, the prosecution has adduced acceptable evidence that a company by name Hydro Power Construction Company was registered as a partnership firm with K.P. Poulose as Managing Partner and A3 and Paul Mundakkal as Working Partners. Further, close relatives of K.P. Poulose, A3 and Paul Mundakkal were parties to the partnership deed. The object of the partnership was to execute the Idamalayar tunnel work and also the surge shaft work in the name of the Company. The said firm was an assessee under the income tax Act which

is evident from Ex. P245, the income-tax assessment of the firm in the year 1984-85 and 1985-86. K.P. Poulose, A3 and Paul Mundakkal were submitting income tax returns and this is evident from the evidence of PW-123, an Income-tax practitioner. In addition to the same, when A3 was questioned under Section 313 Cr.P.C., he admitted that he invested good amount for the work and visited the site to watch the progress of the work. The fact that A1, while as a Minister for Electricity, interfered with the award of the contracts of the Board were spoken to by PW-64, PW-66, PW-138 and PW-146 which we have already discussed in the earlier paragraphs. It is also clear that A1 was awaiting for a probable contractor of his choice to undertake the Idamalayar works at exorbitant rates.

32. There was labour agitation prevailing at Idamalayar work site. The workers brought from Moolamattom, Kulamavu etc. went on strike demanding execution of the work on piece rate basis and also for absorption in permanent service of the Board. At the time, when the tendering process of the work was started by the Chief Engineer, Bharathan, strike situation was pending at Idamalayar which continued till the work was awarded in 1982. It is in evidence that after execution of the agreement of the Idamalayar work by K.P. Poulose, there was obstruction from the striking workers preventing him from entering the worksite and consequently A1 interfered and settled the labour dispute by awarding a compensation of Rs. 11 lakhs to the striking workers and the worksite was made clear free of any labour unrest. It is the prosecution's case that this was done to help the contractor, a party to the conspiracy for execution of the work and make illegal profit therefrom. The evidence of PW-7, Chief Engineer and other witnesses stated that the awarding of Idamalayar work at exorbitant rate could have been avoided in case the labour issue was settled earlier. The prosecution has also highlighted labour unrest at Idamalayar which was kept pending at the instance of A1 and other interested parties so as to make it appear that no contractor will come forward to undertake the contract, so much so that

there is possibility of choosing a contractor of their choice for the execution of the work at exorbitant rate.

33. The prosecution has also highlighted that to achieve the illegal object of finding the contract in the name of K.P. Poulose at exorbitant rate, the pre-qualification system was introduced by the Board vide order Ex. P576 dated 24.09.1981. This was after tendering process has started for the Idamalayar work. One Alexander Vellappally, who was examined as PW-138, explained before the Court that pre-qualification bid system was misused by the Board to safeguard vested interest by choosing contractors of their choice. From the proceedings initiated by the Board on 19.11.1982, passing a resolution to award the work to K.P. Poulose, a scheme of pre-qualification bid was successfully operated by the Board authorities at the instance of A1 for paving the way clear to K.P. Poulose to get the work at a very high rate.

34. With regard to the relationship between A1 and A3, the prosecution has relied on the evidence of PW-19, receptionist of the Paramount Tourist Home who has stated that A3 was occupying a room on 17.11.1982 and 19.11.1982 on rent at Paramount Tourist Home. Exs. P185, 186 and 187 are registers maintained in the Tourist Home and relevant entries therein were marked and proved by PW-19. According to him, A3, took a room in the Tourist Home at 11:50 a.m. on 17.11.1982 and vacated the room on 5:00 p.m. on 19.11.1982. The Special Court noted the significance of his stay during the above period at Thiruvananthapuram. A3, in all probability, was at Thiruvananthapuram to meet A1 and also to meet PW-7, Chief Engineer, A6 and A7, to work out the scheme for getting the contract in favour of K.P. Poulose at a higher rate after avoiding other tenderers. It is further evident that A3 took the room on 17.11.1982 when the Full Board meeting was considering the tender of K.P. Poulose and left the room on 5:00 p.m. on 19.11.1982 after the tender was awarded to K.P. Poulose. The close intimacy of A3 with A1 is well known and his influence over A1 might have persuaded A6 and A7 to fix

the contract on K.P. Poulose. PW-7, Chief Engineer has deposed before the Court that A3 met him on 04.11.1982 and requested him to make a recommendation for awarding the contract to K.P. Poulose. A3 also told PW-7 that when A1 was talking over phone to PW-7, while in the office of the Chairman of the Board, the witness was present in the chamber of A1 and asked PW-7 what was the difficulty in recommending the contract even after A1 directed him to do so. The Special Court, after analysing the evidence in detail found that A3 is the man behind the manuring for getting the contract awarded to K.P. Poulose. K.P. Poulose, however, was only a benamidar and A3 and Paul Mundakkal were the beneficiaries though the work was awarded in the name of K.P. Poulose. The prosecution has also highlighted and proved that A1 was awaiting for a better contractor, who would quote higher rate, when PW-146 Kamalasanan, Managing Partner, We-Build was not willing to quote a higher rate as desired by A1. The role played by A6 in the matter of hatching out the conspiracy and the fulfillment of the unlawful object is proved by evidence, particularly, from the evidence of PW-7. From the above materials, it is clear that a criminal conspiracy among A1, A3 and A6 can be inferred. A1, as Minister for Electricity is all in all dealing with the efforts of the Board including the awarding or cancellation of the contracts. The officers and the Board members were under his pressure and fear which clearly seen from the statements of prosecution witnesses, namely, PWs 8, 36, 60, 62, 138, 140, 64, 66 etc. It is also relevant to point out that A6 and A7 avoided considering the request of PW-4 in his telegram sent to the Board. We have already adverted to the fact that it was Sunny K. Peter, PW-4, who quoted a lesser rate than K.P. Poulose. He quoted only 135% above PAC. By arranging the Board meeting on 19.11.1982, with short notice of less than 24 hours, the intention was to avoid other tenderers and to achieve the object of conspiracy to award the contract to K.P. Poulose who alone was present on 17.11.1982 and 19.11.1982. The request of E.M. Varkey for fixing another date for participating in the discussion for award of the contract was

also rejected. From these materials, as rightly concluded by the Special Court, it leads to a conclusion that several out of way methods were adopted by the Board at the instance of A1 for achieving the object of conspiracy.

35. As rightly pointed out by the Special Court, the confirmation of Hydro Power Construction Company consisting of A3, A4 and Paul Mundakkal and their close associates and relations for execution of Idamalayar contract work, A3 supervising the execution of the contract work and the visit of A4 at the worksite only on rare occasions, the payment of wages to the labourers by A3 and Paul Mundakkal are all proved various circumstances that the conspiracy among the accused continued to operate even after the award of the contract. The High Court failed to consider various instances and materials placed by the prosecution in respect of charge relating to conspiracy. According to the High Court, *"the proved circumstances are not sufficient to hold that there was conspiracy as alleged by the prosecution or as found by the Special Court."* Before us, it was demonstrated that several material aspects have not been considered by the High Court, for example, the stay of A3 at Paramount Tourist Home, Thiruvananthapuram on the crucial dates i.e., on 17.11.1982 to 19.11.1982 has not been considered by the High Court in the correct perspective. As pointed out by the appellant, the High Court ought to have found that the evidence relating to A3 at Paramount Tourist Home is only to bring out one of the circumstances leading to the formation of criminal conspiracy hatched out by the accused. In fact, A3 has admitted his stay in his Section 313 Cr.P.C. statement at Thiruvananthapuram on those dates, hence, finding by the High Court on this aspect, faulting with the Special Court cannot be sustained. Even though, the High Court has admitted that A1 and A3 belonged to the same political party and close relationship exists between the two, the nomination of A3 in the Consultative Council of the Board as evidenced by Ex.P-180 was unfortunately not recognised by the High Court as a material

evidence proved by the prosecution. Insofar as claim of PW-3 that it was he who settled the bill in the inspection bungalow, the perusal of his entire oral evidence clearly supports the case pleaded by the prosecution insofar as the close association between A1 and A3 during their visit to the worksite. PW-7, former Chief Engineer, a most reliable witness was examined in the presence of A3 on 04.11.1982 in the Board's office. There is no necessity to corroborate or further material in addition to the oral evidence of PW-7. As rightly analysed and concluded by the Special Court, there is no infirmity in the evidence of PW-7 merely because there is no documentary evidence in respect of the presence of A3 at the Board's meeting. The evidence of PW-7 cannot be ignored.

36. The High Court very much accepted the stand of the accused that it was a collective decision of the Board, we have already discussed the reasons stated in Ex P-550(a) for awarding contract in favour of K.P. Poulose at exorbitant rate. The reasons relied on by the Board exposes the omission and negligence on its part in fixing the contract with PW-146 Kamalasanan or E.M. Varkey or with Kuriakose PW-22 or PW-4 Sunny K. Peter, who quoted lower rates then K.P. Poulose. Even before us, learned senior counsel appearing for the accused reiterated that it was a collective decision of the members of the Board to award the contract in favour of K.P. Poulose. We have already highlighted the reasoning of the Special Court relating to the important fact that contract was awarded at exorbitant rate, reduction in retention and security amount, return of 50% empty cement bags and also acceptance of special conditions for the sale of tools and plants. In the instant case, all the ingredients of criminal conspiracy are satisfied for convicting A1, A3 and A6 for the offence charged against them.

Special mention about PW-7, retired Chief Engineer of the Board & PW-46

37. The High Court as well as learned senior counsel

appearing for the accused commented the evidence of PW-7 by saying that there are inherent improbabilities and inconsistencies and his evidence is not cogent and convincing whereas among several witnesses examined, prosecution heavily relied on the statement of PW-7, a retired Chief Engineer. He retired from service on March 1985. He joined the service of the Board on July 1954 as Junior Engineer and prior to that he was in the Electricity Department. It has come in evidence that he gained vast experience since he worked in various projects such as Chakulam project, Neriyamangalam, Idukki, Kakakd and Idamalayar project. It is also seen from his evidence that he participated in four major projects. He first examined on the side of the prosecution on 28.03.1996 and at that time he was 66 years old. In this background, let us test his evidence as discussed in the earlier part of our order. The prosecution heavily relied on his evidence and, in fact, Mr Shanti Bhushan in support of his argument mainly relied on the evidence of PW-7. By his rich experience and worked as a Chief Engineer at the relevant time, namely, when Idamalayar project was commissioned, PW-7 furnished all the details with reference to various documents such as his report, opinion, minutes of the meeting of the Board with reference to Idamalayar project. No doubt, all the three senior counsel appearing for the accused A1, A3 and A6 severely criticized his conduct in not answering many of the questions in his cross examination. It is true that in chief-examination, PW-7 highlighted various aspects with reference to documents such as opinion, report and Board's proceedings and minutes thereon. From the perusal of his cross-examination, it cannot be concluded that he didn't answer or elaborate any of the question put by the counsel for accused. It is true that for certain questions he answered that he has to verify from the records and for certain questions he didn't answer or answered stating that *"he do not remember"*. It is relevant to point out that he retired from service in March 1985 and he was called upon to give evidence only in March 1996 nearly after 15 years of the commissioning of the Idamalayar project. If we consider all

these aspects, there is no reason to reject his entire evidence as claimed by the respondents/accused. In his evidence, he has mentioned that on the submission of tender by K.P. Poulose, it was noted that he quoted 189% above PAC. Agreement submitted by K.P. Poulose has been marked as Ex. P-52 and in that Paul Mundakkal was signed as witness. It is further seen that as Chief Engineer, he sent letters to K.P. Poulose and Kuriakose who was another persons submitting tenders on 28.07.1982. He made a note that the tender is not in proper form and it contains many mistakes and requested them to rectify the mistakes within a time schedule. In this regard, it is useful to refer his categorical statement which, he deposed before the Court that *"I considered it as a special case because the engineer member Mr. Ramabhadran Nair (A6) informed me that Mr. Balakrishna Pillai (A1) has a special interest to award this work to Mr. K.P. Poulose (A4), hence the mistakes happened in the tender should be rectified with K.P.Poulose himself and make a circumstance to award the work to K.P. Poulose…"* About the disqualification of tender offered by Kuriakose, PW-7 deposed the decision was taken by a committee because he could not rectify the mistakes as directed by him. In respect of a question put to PW-7 about the response of A6 and A7, he answered *"they stated that they are happy in disqualifying Mr. Kuriakose"*. It is also seen from his evidence that after noting that the rate quoted by K.P. Poulose is higher rate, he forwarded the said information for remarks of FA and CAO. He also asserted that A6 told him that A1-Minister Balakrishna Pillai is very much particular to award both the works to K.P. Poulose. It is further seen that he highlighted that without solving the problem of tunnel workers no contractor can do the work. According to him, because of this reason he informed A6 to take steps to solve the problem of workers and in fact PW-7 met A6 at his office on 04.11.1982 at 11:00 a.m. When the issue relating to labour problem was under discussion, according to PW-7, the P.A. of Board Chairman Sankaran Nair approched him and informed that Minister Balakrishna Pillai is willing to talk to me through

telephone of the Board's Chairman. In view of the same, according to PW-7, he suddenly entered into the cabin of Board's Chairman which is the next room and took the telephone. He introduced himself through the phone and according to PW-7 *"A1 asked him why you were not recommended the tenders of Idamalayar tunnel and surge shaft to the Board. I replied to A1 I am going to talk about it with the contractor today and I am having same problem in this matter. There is only one tender submitted by K.P. Poulose, the rate is very exorbitant, if the work is awarded without solving the problem of tunnel workers, K.P. Poulose cannot start the work. A1 replied that you don't look upon it, K.P. Poulose will purchase all these workers, we granted this higher rate for that also, hence you recommend the Board to award both the works to K.P. Poulose without any delay. Then the conversation was concluded. I immediately visited the room of A6. I told to A6 about the call of Minister and my reply and difficulties. At that time A6 told him that the Minister directly asked you, so you do it as he say."* The following statement is also relevant about the conduct of A1 and how much he was interested in awarding contract in favour of K.P. Paulose. PW-7 deposed *"the face of A1 shows much anger. He explained A1 that if tenders are invited after solving the problem of tunnel workers, rate will be reduced, that is profitable to the Board. A1 replied with higher anger that I know how to look after the Board, I do not want any advice from your people, are you approaching me with intimate talks, after this, I had no talk anything about it."* It is further seen that thereafter a note was sent by Sreedharan Pillai and Unnikrishnan to recommend for awarding both the works to K.P. Poulose. According to him, he received all the documents as per the direction of A1. Though, several reports and minutes of the Board meeting were pressed into service by the respondents/ accused in order to strengthen their case that all important decisions accepting the contract in favour of K.P. Poulose including several special conditions etc., it is clear that due to the pressure of A6, the then member of the Board, who was

close to A1, as well as the desire of A1 in awarding the contract in favour of K.P. Poulose with higher rate, PW-7 had no other option except to execute the directions of A6 and A1.

38. Another incident which is relevant about the performance of PW-7 and response from A1 and A6, in his evidence, he explained that since the progress of both the works were very slow, he inspected the site on 23.09.1983. Due to slow progress in the works, he castigated Paul Mundakkal who conducted the works. After few days, A3 and Paul Mundakkal came to his house and A3 told him that he is disturbing them without any reason by way of sending letters and reports, A3 further warned that if it continues, it will be harmful to them. He also informed him that the Minister agreed to avoid concrete lining works of surge shaft but only PW-7 opposed it. He also assured that if PW-7 gives his consent, they are ready to give anything. He further explained that he informed them that it is impossible for him because the technical design is his duty, being a Chief Engineer. After few days from this incident, on 13.10.1983, he was transferred and appointed as an Advisor of Electricity Board in respect of Hydroelectric Projects. He further explained that such a Post was not there and his transfer order was signed and taken on 13.10.1983 at 8.00 p.m. in a lodge where he was residing at Thiruvananthapuram. He highlighted that for the post of Advisor, except chair, table, no other facilities including telephone facility, official vehicle steno and typist were provided. After him, A2 was appointed as Idamalayar Chief Engineer. He also informed the Court that he believed that he was transferred due to the difference of opinion with P.K. Poulouse, A3 and Paul Mundakkal

39. As regards the decision of the Board and his role, he has stated that the Chief Engineer has no right to question the Board's decision. However, he clarified that when he was asked to give his opinion or report, he is bound by the said direction. ExP-65 is the note submitted by him in connection

with the work. P-64 is the note submitted by him in connection with the surge shaft work which is also dated 06.11.1982. Thereafter, in 1982, he was transferred

40. With regard to his financial and family position, he answered that he built two-storied building having built-up area of 2700 sq. ft. in 1965 after taking loan from the Board and he sold this building and property after his retirement. He is having six daughters. He constructed a shop room having 15 ft. length and 12 ft width.

41. The analysis of the evidence of PW-7 coupled with the other prosecution witnesses and other notes and report prepared for the Board clearly indicate that though he reminded that certain things are not permissible, because of the fact that the beneficiaries of the contract are known to A1 and A6, he has no other option except to prepare notes in such a way and ultimately the Board accepted the same.

42. We have already pointed out the statements of PW-46 who was a member of RSP, a political party. According to him, the workers of Idamalayar have a Union. The name of the said Union is Kerala Construction Labour Union and he was the General Secretary of that Union. In his evidence, he has informed the Court that the labourers who were doing tunnel work in Idamalayar became jobless from 10.04.1981. They were skilled labourers and had good experience from projects like Idukki, Kulanam etc. He, as the President and others decided to file a memorandum before the Minister Balakrishna Pillai. The memorandum was prepared in the letter pad of Kerala Construction Labour Union. PW-46 and Srikantan Nair signed the said memorandum. It has also come in his evidence that at the time of submission of his memorandum PW-46 and others requested the Minister to give work to the poor labourers at least on piece rate basis for which A1 replied *"no question of giving work to the labourers. It was given as contract to K.P. Poulouse…."* The prosecution has highlighted the above statement of PW-46 to the effect that A1 decided and

determined to award Idamalayar contract to group of persons headed by K.P.Poulouse and not to the workers who prepared to work on piece-rate basis.

About maintainability of the appeal by the present appellant:

43. Mr. Lalit and Mr. Saran at the end of their arguments submitted that the appellant being a third party unconnected with the Board or the State is not entitled to challenge the decision of the High Court acquitting the accused from all the charges levelled against them. In support of the above claim, they very much relied on the decision of this Court dated 23.07.2010 rendered in SLP Criminal No 2506 of 2009 – *National Commission for Women* vs. *State of Delhi and Another* 2010 11 Scale 17. In this case, one Sunita then aged 21 years, committed suicide by consuming Aluminium Phosphide tablets on 14.04.2003. She left behind a suicide note wherein it was stated that she had taken tuitions from the accused, Amit, at her residence in Rajgarh Colony and during that period she had developed a deep friendship with him leading to physical relations as well. The accused also held out a promise of marriage but later backed off. She also stated in her suicide note that not only the accused continued to have sexual relation with her but also compelled her to have sexual relation with others as well, which was the reason for committing the suicide. The trial Judge relied on the dying declaration, which was the suicide note, convicted the accused under Section 306 IPC and sentenced him to undergo rigorous imprisonment for 10 years with a fine of Rs.5000/- and also imprisonment for life under Section 376 IPC and a fine of Rs.5000/-. Questioning the above order of conviction and sentence, the accused preferred an appeal before the High Court. The High Court ultimately found that as the case under Section 306 was not made out confirmed the conviction under Section 376 IPC. Taking note that the accused had already undergone imprisonment for 5 years and 6 months and his entitlement for remission on

account of his conduct in jail, his term of imprisonment for life has been modified to one that of period already undergone. Neither the State nor the complainant or her relatives has chosen to file an appeal to this Court. However, National Commission for Women (in short 'NCW') filed a special leave petition against the order of the High Court reducing the term of life imprisonment to that of period already undergone in respect of the conviction and sentence awarded by the High court under Section 376. The question in that case was whether the NCW is competent or entitled to file an appeal in this Court against the conviction and sentence imposed by the High Court. This Court, after adverting to the relevant provisions namely, Section 377 Cr.PC and other decisions and finding that neither the State, which is the complainant, nor the heirs of the deceased have chosen to file a petition in the High Court or in this Court dismissed the SLP filed by NCW as not maintainable and revoked the permission to file SLP vide this Court's order dated 02.04.2009.

44. In the above referred NCW's case, admittedly the complainant was the State and neither the State nor the heirs of the deceased filed any appeal/petition before the High Court for enhancement of punishment or challenged the same by way of SLP before this Court.

45. In our case, certain special features exist. Though we discussed earlier, it is apt to quote once again. During the pendency of the trial before the special Judge, an application for withdrawal of the prosecution only against G. Gopalakrishna Pillai - accused No.5 was made by the Special Public Prosecutor on 24.08.1992 under Section 321 Cr.P.C. which was registered as Criminal Appeal No. 79 of 1992 in CC No. 1 of 1991. The main ground for such withdrawal was that with the available material successful prosecution against G. Gopalakrishna Pillai – accused No. 5 cannot be launched, hence, the trial against him will be unnecessary and the State also is of that opinion that the prosecution of A-5 may not be sustainable. With this information, the Special Public

Prosecutor requested that by virtue of provisions contained in Section 321 of the CrP.C, necessary consent may be granted to withdraw the prosecution against the 5th accused – G. Gopalkrishna Pillai and the said accused may be discharged. The Special Judge considered the issue at length and after analyzing the entire material and finding that there are enough materials to proceed against A-5 refused to give consent for withdrawal. This was taken up by way of revision before the High Court. The High Court set aside the aforesaid order passed by the Special Judge in the revision filed by the State of Kerala represented by the Superintendent of Police. The said order of the High Court was challenged by the present appellant namely, V.S. Achuthanandan, to this Court by way of special leave petition. After granting leave, the said special leave petition was converted into Criminal Appeal No. 122 of 1994. After adverting to the elaborate reasonings of the special Judge and the conclusion of the High Court, this Court concluded that "there was no ground available to the High Court to set aside the well reasoned and justified order of the learned Special Judge rejecting the application of the Special Public Prosecutor and declining to give consent for withdrawal of prosecution. We may also add that there is nothing in the impugned order of the High Court which provides any legal basis for interfering with the aforesaid order made by the Special Judge. The High Court's order must obviously be set aside." By setting aside the order of the High Court, this Court restored the order of the Special Judge and declined to give consent for withdrawal of the prosecution and permitted the Special Judge to proceed further. It is not in dispute that when the very same appellant, namely, V.S. Achuthanandan filed special leave petition and later leave was granted, the very same respondent-accused parties in the said appeal did not raise any objection as to the maintainability of the appeal at the instance of V.S. Achuthanandan. Further though the State has not filed any appeal against the impugned order of acquittal by the High Court being arrayed as one of the respondents reported by a senior counsel to highlight its stand, in fact, Mr. R.S. Sodhi,

learned senior counsel for the State highlighted and supported the ultimate conviction and sentence imposed by the Special Judge and informed this Court that if this Court permits, they are ready to file an appeal with an application for condonation of delay. While appreciating the prayer made by Mr. R.S. Sodhi, we are not inclined to entertain such request at this stage. However, the fact remains that taking note of the importance of the issue, allegations against the Minister and higher officials of the Board in respect of award of contract with the ulterior motive, the appellant approached this Court on earlier occasion when the State wanted to close the prosecution against all the accused including the Minister based on the order of the High Court in respect of G. Gopalakrishna Pillai, A-5. Further when the very same appellant filed special leave petition before this Court and later leave was granted by this Court neither of these respondents raised any objection as to the maintainability of the petition. On the other hand, a Bench of three Judges accepted the appellant's claim and set aside the order of the High Court based on which the Special Judge proceeded further and ultimately convicted and sentenced A-1, A-3 and A-6. In view of these factual details, learned senior counsel for the respondents-accused were not serious in projecting the issue relating to maintainability as their first objection. We hold that the decision in *NCW's case (supra)* which was disposed of at the special leave petition stage is not applicable to the case on hand.

46. For the same reasons, the decision of this Court in *Lalu Prasad Yadav & Anr. Vs. State of Bihar & Anr.,* (2010) 5 SCC 1 is also not applicable to the case on hand since in the said decision, the question was whether the State Government (of Bihar) has competence to file an appeal from the judgment dated 18.12.2006 passed by the Special Judge, CBI (AHD), Patna, acquitting the accused persons when the case has been investigated by the Delhi Special Police Establishment (CBI) and this Court held that the appeal at the instance of the State Government is not maintainable. In view of the special

circumstances highlighted in the case on hand, we reiterate that the present appeal by the appellant – V.S. Achuthanandan against the order of acquittal by the High Court is maintainable. Our view has been strengthened by a decision of this Court in *K. Anbazhagan vs. Superintendent of Police and Others* (2004) 3 SCC 767. Accordingly we reject the contention raised by the learned senior counsel for the respondents.

Conclusion

47. The analysis of the materials placed by the prosecution, the plea of defence by the accused, the decision of the Special Court and the reasoning of the High Court, we are satisfied that the prosecution has established the following aspects insofar as the accused (A1), (A3) and (A6) are concerned:-

(a) By awarding both the works of Idamalayar at a very high and exorbitant rate with special conditions having heavy financial implications.

(b) By reducing the retention and security amount.

(c) By allowing the contractor to return only fifty per cent of the empty cement bags.

Having arrived at such conclusion, we are of the view that the High Court failed to appreciate in its proper sense the materials placed by the prosecution and brushed aside several important items of evidence adduced by the prosecution. Equally, we are unable to accept the conclusion of the High Court, namely, *"the proved circumstances are not sufficient to hold that there was conspiracy as alleged by the prosecution".* On the other hand, we are satisfied that the Special Court after framing various points for consideration and after thorough discussion has accepted the case of the prosecution insofar as the work of driving the surge shaft, lining the surge shaft, balance driving the power tunnel and other allied works of Idamalayar Hydro Electric Power Project at a higher or exorbitant rates to the

contractor K.P. Poulose and the accused persons have abused their official positions. The Special Court has also accepted the prosecution case founding that A1 along with K.P. Poulose, Paul Mundakkal and other accused persons entered into criminal conspiracy and rightly convicted them. In our considered view, the High Court committed a grave error in acquitting the accused without adverting to the reliable and acceptable evidence adduced by the prosecution.

48. Now, coming to the sentence part, it is relevant to note that the contract was awarded to K.P. Poulose, (since deceased) the fourth accused, as early as on 19.11.1982. After various agitations, discussions in the Assembly, appointment of a Commission by the Government and based on the report of the Commission, the State Government initiated a prosecution which resulted in C.C. No. 01 of 1991 and trial prolonged upto November 19, 1999. Thereafter, the matter was kept pending at the High Court from 1999 to October 2003, when the High Court pronounced its order acquitting all the accused and the matter was taken up to this Court by the present appellant initially by way of special leave petition in 2005, leave was granted in 2006 and it was kept pending till this date, we feel that all the three accused have undergone agony of these proceedings for nearly two decades, we are of the opinion that ends of justice would be met by awarding rigorous imprisonment for one year with fine of Rs. 10,000/- each, and the same shall be paid within eight weeks, in default, to undergo simple imprisonment for one month each.

49. Before winding up, it is our duty to point out in all the cases in which charges relating to corruption by public servants are involved, normally, take longer time to reach its finality. The facts and figures, in the case on hand, which we have already mentioned clearly show that the contract relates to the year 1982 and the State Government initiated prosecution in 1991, however, the trial prolonged for nearly nine years and the Special Court passed an order convicting the accused only on 19.11.1999. When the matter was taken up by way of appeal

by the accused to the High Court even in 1999 itself, the decision was rendered by the High Court acquitting all the accused only in 2003. In the same manner, though the appellant challenged the order of the High Court acquitting all the accused before this Court even in 2005, it has reached its finality only in 2011 by the present order. Though the issue was handled by a Special Court constituted for the sole purpose of finding out the truth or otherwise of the prosecution case, the fact remains it had taken nearly two decades to reach its finality. We are conscious of the fact that the Government of India, Department of Law & Justice is making all efforts for expeditious disposal of cases of this nature by constituting Special courts, however, the fact remains that it takes longer time to reach its destination. We are of the view that when a matter of this nature is entrusted to a Special Court or a regular Court, it is but proper on the part of the court concerned to give priority to the same and conclude the trial within a reasonable time. The High Court, having overall control and supervisory jurisdiction under Article 227 of the Constitution of India is expected to monitor and even call for a quarterly report from the court concerned for speedy disposal. Inasmuch as the accused is entitled to speedy justice, it is the duty of all in charge of dispensation of justice to see that the issue reaches its end as early as possible.

50. Considering all the materials and in the light of the above discussion, we agree with the conclusion arrived at by the Special Court and hold that the High Court has committed an error in acquitting the accused persons. Accordingly, R. Balakrishna Pillai (A1), P.K. Sajeev (A3) and Ramabhadran Nair (A6) are awarded rigorous imprisonment for one year with fine of Rs. 10,000/- each, and the same shall be paid within eight weeks, in default, to undergo simple imprisonment for one month each. All the three accused are entitled remission for the period already undergone, if any, by them. The criminal appeal is allowed to the extent indicated above.

R.P. Appeal allowed.

PAWAN PRATAP SINGH & ORS.
v.
REEVAN SINGH & ORS.
(Civil Appeal No.9906 of 2003)

FEBRUARY 10, 2011

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

Uttar Pradesh Government Servants Seniority Rules, 1991: rr.5, 8 – Determination of seniority between two groups of direct recruits to the posts of Deputy Jailor, one appointed in 1991 through the selection made by Selection Commission and the other in 1994 by UPPSC – Selection process for the appointments made in 1991 had commenced in 1987 while selection process for the appointments made in 1994 had commenced in 1990 – High Court holding that 1994 appointee would rank senior to the 1991 appointee, observing that the candidates who were selected in the selection process that commenced in 1987 should rank senior to those selected in the selection process commencing much later in 1990 – Correctness of – Held: Not correct – 1991 appointees cannot be made junior to 1994 appointees – Per R.M. Lodha, J.: Rule 8 of the 1991 Rules would govern the controversy and in view thereof for determination of inter se seniority between the two groups (1991 and 1994 appointees by direct recruitment) date of the order of their substantive appointment is relevant – Since the substantive appointment of 1991 appointees was much prior in point of time, they would rank senior to the 1994 appointees – Per Aftab Alam, J: The seniority dispute in instant case has to be determined outside the 1991 Rules – Basic principles for determination of seniority has to be applied – Seniority cannot relate back to a period prior to the date of the incumbent's birth in the service/cadre, and in facts of this case, the issue of seniority between the 1991 appointee and the 1994 appointee

must be decided on that basis – By this way, the 1991 appointee would rank senior to the 1994 appointee – Uttar Pradesh Subordinate Service Selection (Commission) Act, 1988 – Service law – Seniority.

Service law: Seniority – Legal position with regard to determination of seniority in service – Discussed.

For the period prior to November 25, 1989, the statutory agency to make the selection for appointment to the post of Deputy Jailer was the Uttar Pradesh Public Service Commission (UPPSC). On December 26, 1987, the UPPSC issued an advertisement for filling up 144 vacancies for the post of Deputy Jailer. The main examination was held in 1991 and the result was declared on July 27, 1993. On the basis of the list received from the UPPSC, the State Government issued appointments letters to the selected candidates on April 26, 1994. The private first respondent was one of them. The selection process commenced by UPPSC took long time, meanwhile the State Legislature enacted the Uttar Pradesh Subordinate Service Selection (Commission) Act, 1988 to establish a Subordinate Service Selection Commission for direct recruitment to all Group 'C' posts in the State of U.P. On October 27, 1990, the Selection Commission issued an advertisement for filling up of 60 posts of Deputy Jailor. The examination was held and the Selection Commission sent a select list to the State Government in 1991 for issuance of appointment letters. On November 23, 1991, the State Government issued appointment letters to the selected candidates. The appellants were amongst those who were appointed pursuant to the selection made by the Selection Commission.

On August 29, 1995, a tentative seniority list of Deputy Jailors was notified. In that list, the candidates

appointed in 1991 were shown senior to the candidates appointed in 1994. The first respondent filed a writ petition challenging the list. The High Court on application of the second proviso to rule 5 of Uttar Pradesh Government Servants Seniority Rules, 1991 held that first respondent would rank senior to the appellants, observing that the candidates who were selected in the selection process that commenced in 1987 should rank senior to those selected in the selection process commencing much later in 1990. The High Court made distinction between 'selection' and 'appointment' and held that under the proviso to rule 5 what was determinative was not appointment but selection and therefore, the appellants were appointed earlier than first respondent who was appointed later, nevertheless, they would rank junior to him because they were appointed on the result of subsequent selection.

The question which arose for consideration in these appeals filed, one by the State of Uttar Pradesh and the other two by the 1991 appointees related to determination of seniority between two groups of direct recruits to the posts of Deputy Jailor (Group 'C' post), one appointed in 1991 through the selection made by Selection Commission and the other in 1994 by UPPSC.

Allowing the appeals, the Court

HELD:

PER R.M. LODHA, J.:

1. The recruitment to the posts of Deputy Jailor in the State of Uttar Pradesh is governed by the Uttar Pradesh Jail Executive Subordinate (Non-Gazetted) Service Rules, 1980 which were framed by the Governor in exercise of the powers conferred by the proviso to Article 309 of the Constitution. The 1980 Rules provided for cadre of

service, procedure for recruitment to the post of Deputy Jailor, reservation, academic qualifications, determination of vacancies, appointment, probation, confirmation and *inter se* seniority of persons appointed to the service. However, by subsequent Rules, namely, Uttar Pradesh Government Servants Seniority Rules, 1991 which too were made by the Governor under the proviso to Article 309 of the Constitution, comprehensive provisions were made for the determination of seniority of all government servants in the State of Uttar Pradesh. Rule 2 of the 1991 Rules stated that these rules would apply to all government servants in respect of whose recruitment and conditions of service, rules may be or have been made by the Governor under the proviso to Article 309 of the Constitution and rule 3 gives to the 1991 Rules overriding effect notwithstanding anything to the contrary contained in earlier service rules. [Para 18] [852-C-G]

Jagdish Ch. Patnaik & Ors. v. *State of Orissa & Ors.* **(1998) 4 SCC 456;** *Ajit Kumar Rath* v. *State of Orissa & Ors.* **(1999) 9 SCC 596;** *Uttaranchal Forest Rangers' Assn. (Direct Recruit) & Ors.* v. *State of U.P. & Ors.* **(2006) 10 SCC 346** *State of Uttaranchal & Anr.* v. *Dinesh Kumar Sharma* **(2007) 1 SCC 683;** *Chandra Kumar* v. *Union of India & Ors.* **(1997) 3 SCC 261;** *A.P. Public Service Commission, Hyderabad & Anr.* v. *B. Sarat Chandra & Ors.* **(1990) 2 SCC 669** *State of U.P.* v. *Rafiquddin & Ors.* **1987 (Suppl.) SCC 401** *Surendra Narain Singh & Ors.* v. *State of Bihar & Ors.* **(1998) 5 SCC 246** *Balwant Singh Narwal & Ors.* v. *State of Haryana & Ors.* **(2008) 7 SCC 728 – referred to.**

2. Insofar as 1991 Rules were concerned, the said Rules provided for determination of seniority in relation to different categories. Rule 5 made provision for determination of seniority in cases where according to service rules, appointments were made only by the direct

recruitment. 1980 Rules were the relevant service rules for appointment to the posts of Deputy Jailor. As per rule 5 of the 1980 Rules, there were two sources of recruitment to the post of Deputy Jailor; one, by direct recruitment and the other, by promotion from amongst the permanent Assistant Jailors in ratio of 50% each. The word 'only' in rule 5 of the 1991 Rules is of significance and it becomes clear therefrom that rule 5 of the 1991 Rules has no application at all for determination of *inter se* seniority of the 1991 and 1994 appointees because 1980 Rules provide for appointment to the posts of Deputy Jailor by direct recruitment as well as by promotion. It is only where service rules in the State of U.P. provide for appointments by direct recruitment alone that rule 5 of 1991 Rules comes into play for determination of seniority and not otherwise. The reliance placed by the High Court upon second proviso to rule 5 of the 1991 Rules for determination of *inter se* seniority amongst 1991 and 1994 appointees is, thus, misplaced. The High Court fell into grave error in not appreciating that rule 5 of the 1991 Rules operated where service rules provide for appointments by direct recruitment only. Rule 6 and rule 7 of the 1991 Rules also have no application as these rules provide for determination of seniority where appointments are made by promotion only from a single feeding cadre or only from several feeding cadres. Rule 8 of the 1991 Rules made a provision for determination of seniority where according to service rules appointments were made both by promotion and by direct recruitment. The marginal note of rule 8 'seniority where appointments by promotion and direct recruitment' and the body of sub-rule (1) of rule 8 that provides, 'where according to the service rules appointments are made both by promotion and by direct recruitment', leave no manner of doubt that rule 8 of the 1991 Rules would govern the controversy in the instant case since 1980 Rules clearly provided for appointments to the posts of

Deputy Jailor by two sources i.e., by direct recruitment as well as by promotion. The controversy in hand related to determination of seniority between two groups of direct recruits to the posts of Deputy Jailor, one appointed in 1991 through the selection made by the Selection Commission and the other in 1994 by the UPPSC and the controversy did not relate to determination of *inter se* seniority between direct recruitees and the promotees, but that would not take away the applicability of rule 8 of the 1991 Rules. It is so because in the 1991 Rules, the basis of categorization for the purpose of determination of seniority is the method and manner for appointments in the service rules. It is in this view of the matter that rules 5, 6, 7 and 8 of 1991 Rules provided for determination of seniority amongst different categories of appointments made under the service rules. Once it is held that rule 8 is applicable for determination of *inter se* seniority amongst 1991 and 1994 recruitees to the posts of Deputy Jailor, it is clear that their seniority has to be determined on the basis of their substantive appointments. Sub-rule (1) of rule 8 in unambiguous terms states that the seniority of persons, subject to the provisions of the sub-rules (2) and (3), shall be determined from the date of the order of their substantive appointments. Rule 4(h) defines 'substantive appointment' as an appointment, not being an *ad-hoc* appointment, on a post in the cadre of service, made after selection in accordance with the service rules relating to that service. It, thus, becomes abundantly clear that for determination of *inter se* seniority between the two rival groups (1991 and 1994 appointees by direct recruitment) what is relevant is the date of the order of their substantive appointment and since the substantive appointment of 1991 appointees is much prior in point of time, they must rank senior to the 1994 appointees. [Para 19] [853-B-H; 854-A-H; 855-A-C]

Ram Janam Singh v. State of U.P. **(1994) 2 SCC 622;** *State of Bihar and Ors. v. Akhouri Sachindra Nath and Ors.* **(1991) Supp (1) SCC 334;** *Direct Recruit Class II Engineering Officers' Association* v. *State of Maharashtra & Ors.* **(1990) 2 SCC 715– relied on.**

3. The legal position with regard to determination of seniority in service is summarized as follows: (i) The effective date of selection has to be understood in the context of the service rules under which the appointment is made. It may mean the date on which the process of selection started with the issuance of advertisement or the factum of preparation of the select list, as the case may be; (ii) *Inter se* seniority in a particular service has to be determined as per the service rules. The date of entry in a particular service or the date of substantive appointment is the safest criterion for fixing seniority *inter se* between one officer or the other or between one group of officers and the other recruited from the different sources. Any departure therefrom in the statutory rules, executive instructions or otherwise must be consistent with the requirements of Articles 14 and 16 of the Constitution; (iii)Ordinarily, notional seniority may not be granted from the back date and if it is done, it must be based on objective considerations and on a valid classification and must be traceable to the statutory rules; (iv)The seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively unless it is so expressly provided by the relevant service rules. It is so because seniority cannot be given on retrospective basis when an employee has not even born in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the mean time.In light of the legal position and rule 8 of the 1991 Rules, it is plain that 1991 appointees who were selected and appointed in accordance with the service rules cannot be made junior to 1994 appointees

even if it is assumed that the selection and appointment of 1994 appointees was for earlier vacancies. The 1991 appointees having been appointed substantively much prior in point of time, they are entitled to rank senior to 1994 appointees. Rule 5 of the 1991 Rules has no application for determination of *inter se* seniority of the Deputy Jailors appointed by direct recruitment in 1991 and 1994. The consideration of the matter by the High Court is apparently flawed and cannot be sustained. In the present fact situation, it must be held that 1994 appointees cannot legitimately claim their seniority over 1991 appointees. [Paras 30, 31] [860-C-H; 861-A-D]

PER AFTAB ALAM, J:

HELD: 1. In service law it is not unknown (especially in cases where recruitments are made regularly and the selection process is not inordinately prolonged) that even while a select list is alive and it is yet to be completely exhausted another select list on the basis of the next selection comes into being and appointments are made from that list. In such a situation certain vacancies relatable to the previous selection may still be filled up from the waiting list/unexhausted previous list and in those cases even though the appointment might take place later, by virtue of the proviso in question, the candidate from the previous list would rank senior to the candidate appointed from the third list. The proviso relied upon by the High Court has no application to the facts of this case where the two appointments, based on selections made by two different agencies, are separated by a gap of two and a half years. [Para 34] [863-C-F]

2. The facts of the instant case were extraordinary and seemed to fall completely outside the provisions of the 1991 Rules. An attempt to fit those facts into any of the provisions of the 1991 Rules would amount to doing

violence to the rules. The 1991 Rules were not made exclusively for the Jail Executive Subordinate Service (to which the post of Deputy Jailer belongs) but those rules apply to all government servants for whose recruitments rules were framed under the proviso to Article 309 of the Constitution. In making rules of general application it is not possible to take into account a situation that is way out of the normal. [Para 36] [864-B-D]

3. The situation arising from the two sets of appointments and the resultant dispute of seniority was highly anomalous. It should be accepted as such instead of trying to fit the facts into any of the rules of the 1991 Rules. The 1991 Rules were not designed to resolve a dispute of seniority arising from such facts. In case the seniority between the appellants and the first respondent is to be determined outside the 1991 Rules, one has to go to the basic principles for determination of seniority. One cardinal principle for determination of seniority is that unless provided for in the rules, seniority can not relate back to a period prior to the date of the incumbent's birth in the service/cadre. In the facts of this case, the issue of seniority between the appellants and the first respondent must be decided on the basis of the said principle and there is no need to refer to rule 8 of the 1991 Rules. By this way, the first respondent cannot claim seniority over the appellants and the appellants would rank senior to the first respondent. [Paras 8, 9, 12] [866-C-E; 868-D-E]

Ram Janam Singh v. *State of U.P. and Anr.* **(1994) 2 SCC 622;***Uttaranchal Foresh Rangers' Association (Direct Recruit) and Ors.* **(2006) 10 SCC 346;** *State of Bihar & Ors*. v. *Akhouri Sachindra Nath & Ors. Jagdish Ch. Patnaik* **(1991) (suppl.) 1 SCC 334;** *Suraj Parkash Gupta v. State of J & K* **(2000) 7 SCC 561 – relied on.**

Case Law Reference:

Per R.M. Lodha, J.:

(1998) 4 SCC 456	**referred to**	**Paras 15, 23**
(1999) 9 SCC 596	**referred to**	**Paras 15, 25**
(2006) 10 SCC 346	**referred to**	**Para 15, 26**
(2007) 1 SCC 683	**referred to**	**Para 15, 27**
(1997) 3 SCC 261	**referred to**	**Para 16**
(1990) 2 SCC 669	**referred to**	**Paras 17, 21**
1987 (Suppl.) SCC 401	**referred to**	**Paras 17, 20**
(2008) 7 SCC 728	**referred to**	**Para 17, 28**
(1998) 5 SCC 246	**referred to**	**Paras 17, 24, 28**
(1994) 2 SCC 622	**referred to**	**Para 22**
(1991)Supp (1)SCC 334	**referred to**	**Para 26**
(1990) 2 SCC 715	**referred to**	**Para 29**

Per Aftab Alam, J:

(1994) 2 SCC 622	**relied on**	**Para 10**
(2006) 10 SCC 346	**relied on**	**Para 10**
(1991)Supp (1)SCC 334	**relied on**	**Para 10**
(2000) 7 SCC 561	**relied on**	**Para 11**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9906 of 2003.

From the Judgment & Order dated 02.12.2002 of the High Court of Judicature at Allahabad in Civil Writ Petition No. 22919 of 2001.

WITH

C.A. Nos. 9907 & 9908 of 2003.

P.N. Mishra, Vijay Hansaria, Pramod Swaroop, T.N. Singh, Amit Singh, Kamlendra Mishra, Vibhakar Mishra, K.L. Janjani, Abhisth Kumar, Yatish Mohan, Vinita Y. Mohan, Akshay Kumar, Viswajit Singh, Ravi Prakash Mehrotra, Neeru Vaid for the appearing parties.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. In this group of three appeals, by special leave, the question presented for consideration before this Court relates to determination of seniority between two groups of direct recruits to the posts of Deputy Jailor (Group 'C' post), one appointed in 1991 through the selection made by Uttar Pradesh Subordinate Services Selection Commission (for short, 'Selection Commission') and the other in 1994 by Uttar Pradesh Public Service Commission (for short, 'UPPSC').

2. The Uttar Pradesh Jail Executive Subordinate (Non-Gazetted) Service Rules, 1980 (for short, '1980 Rules') were framed by the Governor of the State in exercise of the powers conferred by the proviso to Article 309 of the Constitution which were published in U.P. Gazette, Extraordinary on June 9, 1980. Rule 5 of the 1980 Rules deals with the recruitment to the posts of Deputy Jailor and Assistant Jailor in the service. The recruitment to the posts of Deputy Jailor is by two sources: (i) by direct recruitment and (ii) by promotion from amongst the permanent Assistant Jailors. Rule 15 provides for procedure for direct recruitment to the posts of Deputy Jailor and Assistant Jailor. It reads thus :

> "15. Procedure for direct recruitment to the posts of Deputy Jailor, Assistant Jailor.—(1) Applications for permission to appear in the competitive examination shall be called by the Commission in the prescribed form, which may be obtained from the Secretary to the Commission on payment.

> (2) No candidate shall be admitted to the examination unless he holds a certificate of admission issued by the Commission.
>
> (3) After the results of the written examination have been received and tabulated, the Commission shall having regard to the need for securing due representation of the candidates belonging to the Scheduled Castes, Scheduled Tribes and others under Rule 6, summon for interview such number of candidates as, on the result of the written examination, have come up to the standard fixed by the Commission in this respect. The marks awarded to each candidate at the interview shall be added to the marks obtained by him in the written examination.
>
> (4) The Commission shall prepare a list of candidates in order of their proficiency as disclosed by the aggregate of marks obtained by each candidate at the written examination and interview and recommend such number of candidates as they consider fit for appointment. If two or more candidates obtain equal marks in the aggregate, the name of the candidate obtaining higher mark in the written examination shall be placed higher in the list. The number of names in the list shall be larger, but not larger by more than 25 per cent of the number of vacancies. The Commission shall forward the list to the appointing authority."

3. Part-VI of the 1980 Rules deals with appointment, probation, confirmation and seniority. For the purposes of these appeals, rule 22 of the 1980 Rules needs to be referred which is as follows:

> "22. Seniority.—Seniority in any category of posts in the service shall be determined from the date of substantive appointment and if two or more persons are appointed together, from the order in which their names are arranged in the appointment order :

Provided that—

(1) the inter se seniority of persons directly appointed to the service shall be the same as determined at the time of selection.

(2) the inter se seniority of persons appointed to the posts of Deputy Jailor by probation shall be the same as it was in the substantive post held by them at the time of promotion; and

……."

4. On December 26, 1987, the UPPSC published an advertisement (No. A-5/E-4/87-88) for holding the Combined Lower Subordinate Services Examination, 1987. It was mentioned in the advertisement that the number of vacancies to be filled on the result of the examination is expected to be approximately 600 which included the vacancies in the cadre of Deputy Jailor. There is dispute of fact about actual number of vacancies in the cadre of Deputy Jailor notified by the UPPSC in the above advertisement but the stand of the first respondent that 114 vacancies of Deputy Jailors were notified may be assumed as fact for the purpose of these appeals.

5. The Uttar Pradesh Subordinate Services Selection (Commission) Act, 1988 (for short, '1988 Act') was enacted by the U.P. Legislature to establish a Subordinate Services Selection Commission for direct recruitment to all Group 'C' posts in the State of U.P. The 1988 Act came into force on February 15, 1988.

6. On November 25, 1989, a notification was issued by the Governor of Uttar Pradesh clarifying that the vacancies already referred to the UPPSC shall be filled on the recommendation of the UPPSC alone.

7. Pursuant to the advertisement (No. A-5/E-4/87-88) dated December 26, 1987, the UPPSC conducted the preliminary examinations on September 24, 1989.

8. On October 27, 1990, the Selection Commission advertised and notified that for filling 60 posts of Deputy Jailor, a competitive examination, 'U.P. Karapal (Deputy Jailor) Examination, 1990' shall be held. The examination was held on due date and after holding oral interview, the Selection Commission sent a select list to the State Government in 1991 for issuance of appointment letters.

9. On November 23, 1991, the State Government issued appointment letters to the candidates selected by the Selection Commission. The present appellants in Civil Appeal No. 9906 of 2003 and Civil Appeal No. 9908 of 2003 were amongst those who were appointed by the State Government pursuant to the selection made by the Selection Commission.

10. In 1991, the UPPSC also conducted the main examination for filling up different posts of Group 'C' including the posts of direct recruitment of Deputy Jailor. The result thereof was declared on July 27, 1993. The UPPSC, then, sent the select list to the State Government. The State Government issued appointment letters to the selected candidates on April 26, 1994. The private first respondent was one of them.

11. The Uttar Pradesh Government Servants Seniority Rules, 1991 (for short, '1991 Rules') were framed under the proviso to Article 309 of the Constitution effective from March 20, 1991. The 1991 Rules were made applicable to all government servants in respect of whose recruitment and conditions of service, rules may be or have been made by the Governor under the proviso to Article 309 of the Constitution and had overriding effect to other service rules. Rule 5 and rule 8 of the 1991 Rules which are relevant for the purposes of these appeals read as under:

"5. Seniority where appointments by direct recruitment only.—Where according to the service rules appointments are to be made only by the direct recruitment the seniority *inter se* of the persons appointed on the result of any one

selection, shall be the same as it is shown in the merit list prepared by the Commission or the Committee, as the case may be:

Provided that a candidate recruited directly may lose his seniority, if he fails to join without valid reasons when vacancy is offered to him, the decision of the appointing authority as to the validity of reasons, shall be final:

Provided further that the persons appointed on the result of a subsequent selection shall be junior to the persons appointed on the result of a previous selection.

Explanation.—Where in the same year separate selections for regular and emergency recruitment are made, the selection for regular recruitment shall be deemed to be the previous selection.

……"

8. Seniority where appointments by promotion and direct recruitment.—(1) Where according to the service rules appointments are made both by promotion and by direct recruitment, the seniority of persons appointed shall, subject to the provisions of the following sub-rules, be determined from the date of the order of their substantive appointments, and if two or more persons are appointed together, in the order in which their names are arranged in the appointment order :

Provided that if the appointment order specifies a particular back date, with effect from which a person is substantively appointed, that date will be deemed to be the date of order of substantive appointment and, in other cases, it will mean the date of issuance of the order:

Provided further that a candidate recruited directly may lose his seniority if he fails to join without valid reasons, when vacancy is offered to him the decision of the appointing

authority as to the validity of reasons, shall be final.

(2) The seniority *inter se* of persons appointed on the result of any one selection,—

(a) through direct recruitment, shall be the same as it is shown in the merit list prepared by the Commission or by the Committee, as the case may be;

(b) by promotion, shall be as determined in accordance with the principles laid down in Rule 6 or Rule 7, as the case may be, according as the promotion are to be made from a single feeding cadre or several feeding cadres.

(3) Where appointments are made both by promotion and direct recruitment on the result of any one selection the seniority of promotees vis-à-vis direct recruits shall be determined in a cyclic order (the first being a promotee) so far as may be, in accordance with the quota prescribed for the two sources.

Illustrations.—(1) Where the quota of promotes and direct recruits is in the proportion of 1 : 1 the seniority shall be in the following order :

First .. .. .. Promotee

Second .. .. .. Direct Recruits

and so on

(2) Where the said quota is in the proportion of 1 : 3 the seniority shall be in the following order :

First .. .. .. Promotee

Second to fourth .. .. Direct Recruits

Fifth .. .. .. Promotee

Sixth to eight .. .. Direct recruits

and so on

Provided that :

(i) where appointment from any source are made in excess of the prescribed quota, the persons appointed in excess of quota shall be pushed down, for seniority, to subsequent year or years in which there are vacancies in accordance with the quota;

(ii) where appointment from any source fall short of the prescribed quota and appointment against such unfilled vacancies are made in subsequent year or years, the persons so appointed shall not get seniority of any earlier year but shall get the seniority of the year in which their appointments are made, so however, that their names shall be placed at the top followed by the names, in the cyclic order of the other appointees;

(iii) where in accordance with the service rules the unfilled vacancies from any source could, in the circumstances mentioned in the relevant service rules be filled from the other source and appointment in excess of quota are so made, the persons so appointed shall get the seniority of that very year as if they are appointed against the vacancies of their quota."

The parties are in agreement that 1991 Rules were in existence when the appointments were made to the posts of Deputy Jailor in 1991 and 1994.

12. On August 29, 1995, a tentative seniority list of Deputy Jailors was notified by the Inspector General (Prisons) – the appointing authority – and objections were called for from the

concerned officers. In that list, the candidates appointed in 1991 were shown senior to the candidates appointed in 1994. The litigation between the two groups started with this list. The tentative seniority list dated August 29, 1995 came to be challenged before Allahabad High Court in three writ petitions; one by Bholanath Mishra (Writ Petition No. 26560 of 1996), the other by Samar Bahadur Singh (Writ Petition No. 13138/2000) and the third by the first respondent herein Reevan Singh (Writ Petition No. 22919/2001). The writ petition filed by Samar Bahadur Singh was dismissed by the High Court on the ground of availability of alternative remedy before the State Service Tribunal. The writ petition filed by the first respondent herein was allowed on December 2, 2002 and the High Court directed the State of Uttar Pradesh and the Director General (Prisons), Lucknow to treat the appointees of 1994 senior to 1991 appointees. The contention raised by the writ petitioner (first respondent herein) before the High Court was that in view of the second proviso to rule 5 of 1991 Rules, the Deputy Jailors who were selected in the selection which commenced in 1987 must be treated senior to those selected pursuant to the selection that commenced in 1990. The Division Bench agreed with this contention and held as follows:

> "……In our opinion the correct interpretation of the proviso to Rule 5 of the U.P. Govt. Servant Rules, 1991 is that persons like the petitioner who were selected in the selection process which commenced in 1987 should be treated as senior to there (*sic*) selected in selection process which commenced in 1990."

While construing the words 'appointed on the result of a subsequent selection' in second proviso to rule 5 of the 1991 Rules, the High Court held as under :

> "It may be noted from the language used in the proviso to Rule 5 that a distinction has been made between appointment and selection. The words "appointed on the result of a subsequent selection" clearly indicate that for

the purpose of the proviso appointment is different from selection. Hence even if persons selected on the basis of the selection which commenced in 1990 were given appointment before giving appointment to the petitioner and others similarly situate the latter will be senior to the former because proviso to Rule 5 treats selection different from appointment. Had that not been so the language of the provision would have been different?

The High Court went on to observe further as under :

"There is no dispute that the process of selection of the petitioner and others similarly situate had begun in 1987 whereas selection in which the newly amended (sic) respondent nos. 3 and 4 and others situated similar to them had begun in 1990. Thus the selection process of the petitioner and others similarly situate had begun three years prior to the beginning of the selection of respondent nos. 3 and 4 and others similarly situate. It was no fault of the petitioner and others similarly situate that their selection was prolonged far as much as six years, whereas the selection of respondent no. 3 and 4 and others similarly situate was completed in just one year."

The High Court held that 1991 Rules will prevail over 1980 Rules, if there is any conflict between the two Rules. It held :

"…….In the present case the proviso to Rule 5 of the 1991 Rules makes it clear that appointment is not to be treated as part of the selection because the words used in the provision are "appointed on the result of a subsequent selection". The petitioner and others similarly situate were appointed against the vacancy which existed in 1987 while the selection of respondent nos. 3 and 4 and others similarly situate by the U.P. Subordinate Selection Commission were made against vacancies which existed in 1990. In our opinion the petitioner and others similarly situate should not suffer, for no fault of theirs."

13. Being not satisfied with the judgment of the High Court dated December 2, 2002, three appeals, by special leave, have been filed, one by the State of Uttar Pradesh and the other two by 1991 appointees.

14. We have heard M/s. P.N. Mishra, Vijay Hansaria and Subodh Markandey, senior counsel for the appellants and Shri Pramod Swaroop, senior counsel for Respondent No. 1. On behalf of the appellants, it is urged that rule 5 of the 1991 Rules has no application as it is applicable where the service rules provide for appointment by direct recruitment only. Since the posts of Deputy Jailor, as per 1980 Rules, are to be filled by direct recruitment as well as by promotion, the mode and manner of determination of seniority provided in rule 5 cannot be applied and instead rule 8 of the 1991 Rules would be applicable for the purposes of determination of seniority.

15. Learned senior counsel for the appellants submitted in the alternative that even if rule 5 of the 1991 Rules is held to be applicable, second proviso appended to rule 5 does not contemplate that the persons appointed pursuant to the result of a subsequent selection (although their date of substantive appointment is earlier in point of time) shall rank junior to the persons appointed later because their process of selection was initiated earlier. It was submitted that the word 'result' in second proviso of rule 5 of the 1991 Rules is not without significance. Our attention was drawn to rule 4 (h) of the 1991 Rules that defines the expression 'substantive appointment' and rule 9 which provides for preparation of seniority list and it was submitted that the private appellants were substantively appointed in 1991 in the cadre of Deputy Jailors by following the procedure and in accordance with the 1980 Rules much before the 1994 appointees. It was argued on behalf of the appellants that the year of vacancy against which a particular person is appointed is wholly irrelevant for the purpose of determination of seniority and seniority cannot relate back to the date of vacancy. In this regard, reliance was placed upon

the decisions of this Court in : (i) *Jagdish Ch. Patnaik & Ors.* v. *State of Orissa & Ors.*[1]; (ii) *Ajit Kumar Rath* v. *State of Orissa & Ors.*[2]; (iii) *Uttaranchal Forest Rangers' Assn. (Direct Recruit) & Ors.* v. *State of U.P. & Ors.*[3] and (iv) *State of Uttaranchal & Anr.* v. *Dinesh Kumar Sharma*[4].

16. Learned senior counsel for the appellants also contended that the High Court erred in invoking Article 226 of the Constitution in the matter when the writ petition filed by Samar Bahadur Singh (Writ Petition No. 13138/2000) was dismissed on the ground of alternative remedy. In this regard, the Constitution Bench decision of this Court in *L. Chandra Kumar* v. *Union of India & Ors.*[5] was referred.

17. On the other hand, Mr. Pramod Swaroop, learned senior counsel for the contesting first respondent stoutly defended the judgment of the High Court. He argued that the High Court was justified in relying upon second proviso to rule 5 of the 1991 Rules and holding that the candidates appointed on the basis of result of earlier selection process must rank senior to the candidates who were appointed on the basis of the result of subsequent selection. He would submit that the UPPSC started selection process for filling 114 posts of Deputy Jailor in 1987; it was in this process of selection that the contesting private respondent was selected and appointed (although in the year 1994) and insofar as the 1991 appointees are concerned they underwent the subsequent selection process which started in the year 1990. Mr. Pramod Swaroop contended that 1991 Rules have the overriding effect and the seniority amongst 1991 and 1994 appointees has to be determined with reference to rule 5 of 1991 Rules. According to him, the expression 'selection' in second proviso to rule 5

1. (1998) 4 SCC 456.
2. (1999) 9 SCC 596.
3. (2006) 10 SCC 346.
4. (2007) 1 SCC 683.
5. (1997) 3 SCC 261.

cannot be construed to mean only the 'final selection' and since the process of selection involves several steps which begins with the issuance of the advertisement and ends with the preparation of select list, the expression 'result of selection' means the result of entire selection process. In this regard, heavy reliance was placed by him on few decisions of this Court, namely, (i) *A.P. Public Service Commission, Hyderabad & Anr.* v. *B. Sarat Chandra & Ors.*[6] (ii) *State of U.P.* v. *Rafiquddin & Ors.*[7]; (iii) *Surendra Narain Singh & Ors.* v. *State of Bihar & Ors.*[8] and (iv) *Balwant Singh Narwal & Ors.* v. *State of Haryana & Ors.*[9].

18. It must be stated immediately that the recruitment to the posts of Deputy Jailor in the State of Uttar Pradesh is governed by the 1980 Rules which have been framed by the Governor in exercise of the powers conferred by the proviso to Article 309 of the Constitution. 1980 Rules provide for cadre of service, procedure for recruitment to the post of Deputy Jailor, reservation, academic qualifications, determination of vacancies, appointment, probation, confirmation and *inter se* seniority of persons appointed to the service. However, by subsequent Rules, namely, 1991 Rules which too were made by the Governor under the proviso to Article 309 of the Constitution, comprehensive provisions have been made for the determination of seniority of all government servants in the State of Uttar Pradesh. Rule 2 of the 1991 Rules says that these rules shall apply to all government servants in respect of whose recruitment and conditions of service, rules may be or have been made by the Governor under the proviso to Article 309 of the Constitution and rule 3 gives to the 1991 Rules overriding effect notwithstanding anything to the contrary contained in earlier service rules. In this view of the matter, *inter se* seniority amongst 1991 and 1994 appointees by direct recruitment has

6. (1990) 2 SCC 669.
7. 1987 (Suppl.) SCC 401.
8. (1998) 5 SCC 246.
9. (2008) 7 SCC 728.

to be determined under the 1991 Rules and rule 22 of the 1980 Rules has to give way to the 1991 Rules.

19. Now, insofar as 1991 Rules are concerned, the said Rules provide for determination of seniority in relation to different categories. Rule 5 makes provision for determination of seniority in cases where according to service rules, appointments are made only by the direct recruitment. It would be seen that 1980 Rules are the relevant service rules for appointment to the posts of Deputy Jailor. As per rule 5 of the 1980 Rules, there are two sources of recruitment to the post of Deputy Jailor; one, by direct recruitment and the other, by promotion from amongst the permanent Assistant Jailors in ratio of 50% each. The word 'only' in rule 5 of the 1991 Rules is of significance and it becomes clear therefrom that rule 5 of the 1991 Rules has no application at all for determination of *inter se* seniority of the 1991 and 1994 appointees because 1980 Rules provide for appointment to the posts of Deputy Jailor by direct recruitment as well as by promotion. It is only where service rules in the State of U.P. provide for appointments by direct recruitment alone that rule 5 of 1991 Rules comes into play for determination of seniority and not otherwise. The reliance placed by the High Court upon second proviso to rule 5 of the 1991 Rules for determination of *inter se* seniority amongst 1991 and 1994 appointees is, thus, misplaced. The High Court fell into grave error in not appreciating that rule 5 of the 1991 Rules operates where service rules provide for appointments by direct recruitment only. Rule 6 and rule 7 of the 1991 Rules also have no application as these rules provide for determination of seniority where appointments are made by promotion only from a single feeding cadre or only from several feeding cadres. These appeals are not concerned with the determination of *inter se* seniority between the promotees. Rule 8 of the 1991 Rules makes a provision for determination of seniority where according to service rules appointments are made both by promotion and by direct recruitment. The marginal note of rule

8 'seniority where appointments by promotion and direct recruitment' and the body of sub-rule (1) of rule 8 that provides, 'where according to the service rules appointments are made both by promotion and by direct recruitment', leave no manner of doubt that rule 8 of the 1991 Rules would govern the controversy in the present case since 1980 Rules clearly provide for appointments to the posts of Deputy Jailor by two sources i.e., by direct recruitment as well as by promotion. It is true that the controversy in hand relates to determination of seniority between two groups of direct recruits to the posts of Deputy Jailor, one appointed in 1991 through the selection made by the Selection Commission and the other in 1994 by the UPPSC and the controversy does not relate to determination of *inter se* seniority between direct recruitees and the promotees, but that does not take away the applicability of rule 8 of the 1991 Rules. It is so because in the 1991 Rules, the basis of categorization for the purpose of determination of seniority is the method and manner for appointments in the service rules. It is in this view of the matter that rule 5, rule 6, rule 7 and rule 8 of the 1991 Rules provide for determination of seniority amongst different categories of appointments made under the service rules. Once it is held that rule 8 is applicable for determination of *inter se* seniority amongst 1991 and 1994 recruitees to the posts of Deputy Jailor, it is clear that their seniority has to be determined on the basis of their substantive appointments. Insofar as the present controversy is concerned, none of the provisos to sub-rule (1) is attracted since the appointment orders of 1994 appointees do not specify the back date nor these appeals are concerned with a situation where 1991 appointees failed to join on time. These appeals are also not concerned with seniority inter se of persons appointed on the result of one selection through direct recruitment or through direct recruitment and promotion in one selection and, therefore, provisions of sub-rules (2) and (3) of rule 8 are also not attracted. Sub-rule (1) of rule 8 in unambiguous terms states that the seniority of persons, subject to the provisions of the sub-rules (2) and (3), shall be

determined from the date of the order of their substantive appointments. Rule 4(h) defines 'substantive appointment' as an appointment, not being an *ad-hoc* appointment, on a post in the cadre of service, made after selection in accordance with the service rules relating to that service. It, thus, becomes abundantly clear that for determination of *inter se* seniority between the two rival groups (1991 and 1994 appointees by direct recruitment) what is relevant is the date of the order of their substantive appointment and since the substantive appointment of 1991 appointees is much prior in point of time, they must rank senior to the 1994 appointees.

20. It is now appropriate to consider the authorities cited at the Bar and a couple of other decisions. In *Rafiquddin*[7], this Court in the context of U.P. Civil Service (Judicial Branch) Rules, 1951 made general observations that seniority in the service is determined on the basis of the year of the competitive examination irrespective of the date of appointment and *inter se* seniority of candidates recruited to the service is determined on the basis of their ranking in the merit list.

21. In *A.P. Public Service Commission*[6], this Court was concerned with the Andhra Pradesh Police Service Rules, 1966. While dealing with the word 'selection' in rule 5(A)(i) of the said Rules, this Court observed as follows :

> "If the word 'selection' is understood in a sense meaning thereby only the final act of selecting candidates with preparation of the list for appointment, then the conclusion of the Tribunal may not be unjustified. But round phrases cannot give square answers. Before accepting that meaning, we must see the consequences, anomalies and uncertainties that it may lead to. The Tribunal in fact does not dispute that the process of selection begins with the issuance of advertisement and ends with the preparation of select list for appointment. Indeed, it consists of various steps like inviting applications, scrutiny of applications, rejection of defective applications or elimination of ineligible candidates, conducting examinations, calling for interview or viva voce and preparation of list of successful candidates for appointment. Rule 3 of the Rules of Procedure of the Public Service Commission is also indicative of all these steps. When such are the different steps in the process of selection, the minimum or maximum age for suitability of a candidate for appointment cannot be allowed to depend upon any fluctuating or uncertain date. If the final stage of selection is delayed and more often it happens for various reasons, the candidates who are eligible on the date of application may find themselves eliminated at the final stage for no fault of theirs. The date to attain the minimum or maximum age must, therefore, be specific, and determinate as on a particular date for candidates to apply and for recruiting agency to scrutinise applications. It would be, therefore, unreasonable to construe the word selection only as the factum of preparation of the select list. Nothing so bad would have been intended by the rule making authority."

Pertinently, the aforesaid observations of this Court with regard to the word 'selection' are in the context of the age eligibility as the provision under consideration read, 'has completed the age of 21 years and had not completed the age of 26 years on the first day of July of the year in which the selection is made'. The aforesaid observations, therefore, have to be read in the context of the provision under consideration before this Court.

22. In *Ram Janam Singh* v. *State of U.P. and Anr.*[10], this Court reiterated that the date of entry into a service is the safest rule to follow while determining the *inter se* seniority between one officer or the other or between one group of officers and the other recruited from the different sources. It was observed that this is consistent with the requirement of Articles 14 and

10. (1994) 2 SCC 622.

16 of the Constitution. It was, however, observed that if the circumstances so require, a group of persons can be treated a class separate from the rest for any preferential or beneficial treatment while fixing their seniority, but, normally such classification should be by statutory rule or rules framed under Article 309.

23. A two-Judge Bench of this Court in *Jagdish Ch. Patnaik1,* while construing the word 'recruited' occurring in Orissa Service of Engineers Rules, 1941, held that a direct recruit is recruited when formal appointment order is issued and not when recruitment process is initiated. This is what this Court said :

> **"34.** The only other contention which requires consideration is the one raised by Mr Raju Ramachandran, learned Senior Counsel appearing for the intervenors, to the effect that the expressions "recruitment" and "appointment" have two different concepts in the service jurisprudence and, therefore, when Rule 26 uses the expression "recruited" it must be a stage earlier to the issuance of appointment letter and logically should mean when the selection process started and that appears to be the intendment of the rule-makers in Rule 26. We are, however, not persuaded to accept this contention since under the scheme of Rules a person can be said to be recruited into service only on being appointed to the rank of Assistant Engineer, as would appear from Rule 5 and Rule 6. Then again in case of direct recruits though the process of recruitment starts when the Public Service Commission invites applications under Rule 10 but until and unless the Government makes the final selection under Rule 15 and issues appropriate orders after the selected candidates are examined by the Medical Board, it cannot be said that a person has been recruited to the service. That being the position it is difficult for us to hold that in the seniority rule the expression "recruited" should be

> interpreted to mean when the selection process really started. That apart the said expression "recruited" applies not only to the direct recruits but also to the promotees. In case of direct recruits the process of recruitment starts with the invitation of application by the Commission and in case of promotees it starts with the nomination made by the Chief Engineer under Rule 16. But both in the case of direct recruits as well as in the case of promotees the final selection vests with the State Government under Rules 15 and 18 respectively and until such final selection is made and appropriate orders passed thereon no person can be said to have been recruited to the service. In this view of the matter the only appropriate and logical construction that can be made of Rule 26 is the date of the order under which the persons are appointed to the post of Assistant Engineer, is the crucial date for determination of seniority under the said Rule……."

24. While dealing with the dispute relating to *inter se* seniority of Munsifs—one set of Munsif recruited on the basis of 15th examination held by the Public Service Commission under the Bihar Judicial Service (Recruitment) Rules, 1955 and another set of Munsifs appointed under the Bihar Civil Service (Judicial Branch) *Ad hoc* Recruitment Rules, 1974, in *Surendra Narain Singh*[8], this Court held that candidates recruited against earlier vacancies shall rank senior to those recruited against the later vacancies.

25. In *Ajit Kumar Rath*[2], this Court followed *Jagdish Ch. Patnaik*[1] and did not accept the contention that those who were appointed against the vacancies of the earlier years although, appointed later in point of time, must rank senior to the appointees of the vacancies of the subsequent years though appointed in prior point of time.

26. This Court emphasized in the case of *Uttaranchal Forest Rangers' Association*[3] that no retrospective promotion can be granted nor any seniority can be given on retrospective

basis from a date when an employee has not even born in the cadre. In this regard, the Court relied upon earlier decisions of this Court in *State of Bihar & Ors*. v. *Akhouri Sachindra Nath & Ors.*[11] *and Jagdish Ch. Patnaik*[1].

27. In the case of *Dinesh Kumar Sharma*[4], this Court was concerned with U.P. Agriculture Group 'B' Service Rules, 1995 and the 1991 Rules. With reference to rule 8 of the 1991 Rules, this Court held that seniority cannot be reckoned from the date of occurrence of the vacancy and should be reckoned only from the date of substantive appointment to the vacant post under the Rules and not retrospectively from the date of occurrence of vacancy.

28. The dispute in *Balwant Singh Narwal*[9] related to seniority of the Principals, some of whom were appointed between 1995 and 2000 and others on May 26, 2000. The Principals who were appointed on May 26, 2000 were given seniority with retrospective effect from June 2, 1994. This Court while relying upon a decision in *Surendra Narain Singh8* held as under :

> "**9.** There is no dispute about these general principles. But the question here is in regard to seniority of Respondents 4 to 16 selected on 1-10-1993 against certain vacancies of 1992-1993 who were not appointed due to litigation, and those who were selected against subsequent vacancies. All others from the same merit list declared on 1-10-1993 were appointed on 2-6-1994. Considering a similar situation, this Court, in *Surendra Narain Singh* v. *State of Bihar* held that candidates who were selected against earlier vacancies but who could not be appointed along with others of the same batch due to certain technical difficulties, when appointed subsequently, will have to be placed above those who were appointed against subsequent vacancies."

11. (1991 (suppl.) 1 SCC 334.

29. The Constitution Bench of this Court in *Direct Recruit Class II Engineering Officers' Association* v. *State of Maharashtra & Ors.*[12] stated the legal position with regard to *inter se* seniority of direct recruits and promotees and while doing so, inter alia, it was stated that once an incumbent is appointed to a post according to rules, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.

30. From the above, the legal position with regard to determination of seniority in service can be summarized as follows :

(i) The effective date of selection has to be understood in the context of the service rules under which the appointment is made. It may mean the date on which the process of selection starts with the issuance of advertisement or the factum of preparation of the select list, as the case may be.

(ii) *Inter se* seniority in a particular service has to be determined as per the service rules. The date of entry in a particular service or the date of substantive appointment is the safest criterion for fixing seniority *inter se* between one officer or the other or between one group of officers and the other recruited from the different sources. Any departure therefrom in the statutory rules, executive instructions or otherwise must be consistent with the requirements of Articles 14 and 16 of the Constitution.

(iii) Ordinarily, notional seniority may not be granted from the back date and if it is done, it must be based on objective considerations and on a valid classification and must be traceable to the statutory rules.

(iv) The seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively unless it is so expressly provided by the relevant service rules.

12. (1990) 2 SCC 715.

It is so because seniority cannot be given on retrospective basis when an employee has not even born in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the mean time.

31. In light of the legal position summed up above and rule 8 of the 1991 Rules, it is plain that 1991 appointees who were selected and appointed in accordance with the service rules cannot be made junior to 1994 appointees even if it is assumed that the selection and appointment of 1994 appointees was for earlier vacancies. The 1991 appointees having been appointed substantively much prior in point of time, they are entitled to rank senior to 1994 appointees. As already noticed above, rule 5 of the 1991 Rules has no application for determination of *inter se* seniority of the Deputy Jailors appointed by direct recruitment in 1991 and 1994. The consideration of the matter by the High Court is apparently flawed and cannot be sustained. In the present fact situation, it must be held that 1994 appointees cannot legitimately claim their seniority over 1991 appointees.

32. In view of the above, it is not necessary to deal with the objection raised by the appellants about maintainability of writ petition filed by contesting private respondent directly before the High Court bypassing the remedy before the State Service Tribunal.

33. For the foregoing reasons, these appeals are allowed; the judgment and order dated December 2, 2002 passed by the Allahabad High Court is set aside. The seniority of the two groups of direct recruits to the posts of Deputy Jailor, one appointed through the selection made by the Uttar Pradesh Subordinate Services Selection Commission in 1991 and the other by Uttar Pradesh Public Service Commission in 1994 shall be now determined as indicated above, if not determined in the manner stated above, so far. The parties shall bear their own costs.

AFTAB ALAM, J.

1. I have had the benefit of going through the judgment prepared by my brother Lodha J. The judgment deals with all the relevant facts and the statutory provisions and by application of rule 8 of the Uttar Pradesh Government Servants Seniority Rules, 1991 (the 1991 Rules) concludes that the appellants who were appointed as Deputy Jailers in 1993 (on the basis of the selection process that commenced on October 27, 1990) would rank senior to the first respondent who was appointed in 1994, even though in his case the selection process had commenced much earlier on December 26, 1987. I too reach the same conclusion but by a different way and for slightly different reasons.

2. The Uttar Pradesh Jail Executive Subordinate (Non-Gazetted) Service Rules, 1980 (the 1980 Rules) under which the appellants and the first respondent were appointed as Deputy Jailers had, in rule 22, the provision for determination of seniority in any category of posts in the service. But rule 22 of the 1980 Rules was superseded by the 1991 Rules framed under Article 309 of the Constitution and coming into force with effect from March 20, 1991. The 1991 Rules were made applicable to all government servants whose recruitments were governed by rules framed under Article 309 of the Constitution and were given overriding effect over all other service rules. Both the appellants and respondent no. 1 were appointed after the 1991 Rules came into force. Hence, both sides agreed that the question of their *inter se* seniority can be determined only under the provisions of the 1991 Rules.

3. The High Court on application of the (second) proviso to rule 5 of the 1991 Rules held that respondent no.1 would rank senior to the appellants, observing that the candidates who were selected in the selection process that commenced in 1987 should rank senior to those selected in the selection process commencing much later in 1990. By a process of semantic reasoning, the High Court tried to make a distinction between

'selection' and 'appointment' and held that under the proviso to rule 5 what was determinative was not appointment but selection. Proceeding on that basis the High Court held that though the appellants were appointed earlier (in 1991) than respondent no.1 who was appointed later (in 1994), nevertheless they would rank junior to him because they were appointed "on the result of a *subsequent* selection".

4. I am completely unable to see how the facts of this case can be squeezed to fit into the proviso to rule 5 of the 1991 Rules. An indication of the kind of cases to which the proviso would apply is given in the explanation to it. Further, in service law it is not unknown (especially in cases where recruitments are made regularly and the selection process is not inordinately prolonged) that even while a select list is alive and it is yet to be completely exhausted another select list on the basis of the next selection comes into being and appointments are made from that list. In such a situation certain vacancies relatable to the previous selection may still be filled up from the waiting list/ unexhausted previous list and in those cases even though the appointment might take place later, by virtue of the proviso in question, the candidate from the previous list would rank senior to the candidate appointed from the third list. To my mind, the proviso relied upon by the High Court has no application to the facts of this case where the two appointments, based on selections made by two different agencies, are separated by a gap of two and a half years.

5. In my brother's judgment, rule 5 is discarded in preference to rule 8 of the 1991 Rules because the post of Deputy Jailer is open to two modes of recruitment, one direct and the other by promotion from amongst the permanent Assistant Jailers (vide rule 5 of the 1980 Rules). It is pointed out that rule 5 of the 1991 Rules begins by expressly stating, "Where according to the service rules appointments are to be made *only* by the direct recruitment…." On the other hand rule 8 begins by saying, "Where according to the service rules appointments are made *both* by promotion and by direct

recruitment…." And under rule 8, seniority is to be determined on the basis of the date of the order of the substantive appointment. Applying the date of substantive appointment as the basis to determine seniority the appellants would indeed rank senior to respondent no.1.

6. With full respect, however, I am unable to persuade myself in regard to the application of rule 8 of the 1991 Rules to the facts of the case. The facts of the case are extraordinary and they seem to me, to fall completely outside the provisions of the 1991 Rules. An attempt to fit those facts into any of the provisions of the 1991 Rules would, to my mind, amount to doing violence to the rules. The 1991 Rules were not made exclusively for the Jail Executive Subordinate Service (to which the post of Deputy Jailer belongs) but those rules apply to all government servants for whose recruitments rules are framed under the proviso to Article 309 of the Constitution. In making rules of general application it is not possible to take into account a situation that is way out of the normal.

7. In the main judgment, the facts of the case are taken note of in detail but it would be useful to briefly recapitulate them here. Before November 25, 1989, the statutory agency to make the selection for appointment to the post of Deputy Jailer was the Uttar Pradesh Public Service Commission (hereinafter "UPPSC"). On December 26, 1987 the UPPSC issued an advertisement for filling up a large number of vacancies in different posts, including 144 vacancies in the post of Deputy Jailers. It held the main examination of the candidates applying in response to the advertisement in 1991 and finally declared the result on July 27, 1993. On the basis of the list received from the UPPSC, the State Government issued appointment letters to the selected candidates (one of them being respondent no. 1) on April, 26 1994. In short, the selection process started by the UPPSC was completed and materialized in appointments of the selected candidates in seven years. In the meanwhile, it seems, the State Legislature,

having regard to the long delays in the completion of selection by the UPPSC, decided to lighten its burden by taking away from it the recruitments on all group 'C' posts in the State. The State Legislature, accordingly, passed the Uttar Pradesh Subordinate Services Selection (Commission), Act, 1988 to establish a Subordinate Services Selection Commission for direct recruitment to all group 'C' posts in the State. The Act came into force with effect from February 15, 1988. After coming into force of this Act, a notification had to be issued by the Governor on November 25, 1989, clarifying that the vacancies for which requisition had earlier been made to the UPPSC would be filled up on the recommendation of the UPPSC alone and that is how the UPPSC continued to have seisin over the vacancies advertised by it on December 26, 1987. The newly formed Selection Commission issued an advertisement on October 27, 1990, for filling up 60 posts of Deputy Jailer. It completed the selection process and sent the select list to the State Government in 1991 and on that basis the appellants were appointed vide appointment letter dated November 23, 1991 issued by the State Government. At this stage, it is important to note that in terms of the advertisement issued by the Selection Commission on October 27, 1990, there was nothing to prevent those (including respondent no.1) who might have applied in response to the earlier advertisement by the UPPSC to also apply for the 60 vacancies under the later advertisement by the Selection Commission. When this aspect of the matter was pointed out, it was stated on behalf of the respondents that by the time the later advertisement by the Selection Commission was issued on October 27, 1990 some of the applicants before the UPPSC had become overage and were no longer eligible to apply. There are no details available as to how many of the 144 candidates appointed from the select list of the UPPSC had become overage by the time the advertisement of the Selection Commission came on October 27, 1990; even in the case of respondent no. 1 it is not stated clearly and definitely that he was unable to apply in response to the advertisement of

October 27, 1990, issued by the Selection Commission because by that time he had become over age. Be that as it may, this aspect of the matter is only incidental and it is recalled simply to point out that it is not open to the respondents to contend that the position in which they are placed is the result of circumstances over which they had no control and to make an appeal in the name of equity.

8. The purpose in recapitulating the facts of the case is to show that the situation arising from the two sets of appointments and the resultant dispute of seniority is highly anomalous. It should be accepted as such instead of trying to fit the facts into any of the rules of the 1991 Rules. The 1991 Rules were not designed to resolve a dispute of seniority arising from such facts. If I put on the cap of the rule maker I cannot imagine myself conceiving of a fact situation of this kind and making a provision to meet the contingency.

9. Now, in case the seniority between the appellants and the first respondent is to be determined outside the 1991 Rules, one has to go to the basic principles for determination of seniority. One cardinal principle for determination of seniority is that unless provided for in the rules, seniority can not relate back to a period prior to the date of the incumbent's birth in the service/cadre.

10. As a matter of fact this principle is fully dealt with in the main judgment in which reference is made to the decisions of this Court in *Ram Janam Singh* v. *State of UP*, (1994) 2 SCC 622; *Uttaranchal Forest Rangers' Association (Direct Recruit) & Ors.* v. *State of UP & Ors.*, (2006) 10 SCC 346; *State of Bihar & Ors.* v. *Akhouri Sachindra Nath & Ors*., 1991 Supp (1) SCC 334 and the principle is summarized in sub-paragraphs (2) & (4) of paragraph 30 of the judgment.

11. To the decisions referred to on this point in the main judgment I may add just one more in *Suraj Parkash Gupta* v. *State of J & K*, (2000) 7 SCC 561. The decision relates to a

dispute of seniority between direct recruits and promotees but in that case the Court considered the question of ante-dating the date of recruitment on the ground that the vacancy against which the appointment was made had arisen long ago. In paragraph 18 of the decision (at page 578 of the SCC) the Court framed one of the points arising for consideration in the case as follows:

> "(4) Whether the direct recruits could claim a retrospective date of recruitment from the date on which the post in direct recruitment was available, even though the direct recruit was not appointed by that date and was appointed long thereafter? "

This Court answered the question in the following terms:

> "Point 4:
>
> *Direct recruits cannot claim appointment from date of vacancy in quota before their selection*
>
> We have next to refer to one other contention raised by the respondent-direct recruits. They claimed that the direct recruitment appointment can be ante-dated from the date of occurrence of a vacancy in the direct recruitment quota, even if on that date the said person was not directly recruited. It was submitted that if the promotees occupied the quota belonging to direct recruits they had to be pushed down, whenever direct recruitment was made. Once they were so pushed down, even if the direct recruit came later, he should be put in the direct recruit slot from the date on which such a slot was available under the direct recruitment quota.
>
> This contention, in our view, cannot be accepted. The reason as to why this argument is wrong is that in service jurisprudence, a direct recruit can claim seniority only from the date of his regular appointment. He cannot claim seniority from a date when he was not borne in the service.

> This principle is well settled. In *N.K.Chauhan* v. *State of Gujarat*, Krishna Iyer, J. stated:
>
> Later direct recruit cannot claim deemed dates of appointment for seniority with effect from the time when direct recruitment vacancy arose. Seniority will depend upon length of service.
>
> Again, in *A. Janardhana* v. *Union of India*, it was held that a later direct recruit cannot claim seniority from a date before his birth in the service or when he was in school or college. Similarly it was pointed out in *A.N. Pathak* v. *Secretary to the Government* that slots cannot be kept reserved for the direct recruits for retrospective appointments."

12. In conclusion I would say that in the facts of this case the issue of seniority between the appellants and respondent no. 1 must be decided on the basis of the aforesaid principle and there is no need to refer to rule 8 of the 1991 Rules. By this way I also hold that respondent no.1 cannot claim seniority over the appellants and the appellants would rank senior to respondent no.1.

13. In the result, the appeals are allowed. The judgment of the High Court is set aside and the writ petition filed by respondent no. 1 in the High Court is directed to be dismissed.

There shall be no order as to costs.

ORDER

In view of the two separate judgments (which are concurrent in nature) pronounced by us in these appeals today, the appeals are allowed.

There shall be no order as to costs.

D.G. Appeals allowed.