ARUNA RAMCHANDRA SHANBAUG
v.
UNION OF INDIA AND ORS.
(Writ Petition (Crl.) No.115 of 2009)

JANUARY 24, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Euthanasia/mercy killing: Plea for – Writ petition u/Article 32 of the Constitution on behalf of the petitioner by a next friend – Allegation in the writ petition was that the 60 years old petitioner, who was being looked after by the KEM hospital staff, was in a persistent vegetative state for last 36 years due to brain injury – Prayer for mercy killing on the ground that there was not a slightest possibility of any improvement in her condition and, therefore, the respondents should be directed to stop feeding the petitioner and allow her to die peacefully – Affidavit by the Head of the hospital to the effect that the petitioner has been able to take food in normal course and has been responding by facial expression – Variance between the allegations in the writ petition and the affidavit of the Head of the hospital – In the circumstances, a team of three very distinguished doctors of Mumbai appointed to examine the petitioner thoroughly and to submit a report about her physical and mental condition – The authorities, doctors and staff in the KEM hospital directed to give all assistance and cooperation to this team – The Chief Justice of Bombay High Court also requested to extend all help and cooperation to the team – State Government also directed to provide all facilities to the team of doctors – Constitution of India, 1950 – Article 32.

CRIMINAL APPELLATE JURISDICTION : Writ Petition (Crl.) No. 115 of 2009.

Under Article 32 of the Constitution of India.

Shekhar Nahphade, Shubhangi Tuli, Vimal Chandra S. Dave for the Petitioner.

Atul Y. Chitale, Suchitra Atul Chitale, Snigdha Pandey, Nishtha Kumar, Sunaina Dutta, Chinmoy Khaldkar, Asha Gopalan Nair for the Respondents.

The following Order of the Court was delivered

O R D E R

Heard learned counsel for the parties.

Euthanasia is one of the most perplexing issues which the courts and legislatures all over the world are facing today. This Court, in this case, is facing the same issue, and we feel like a ship in an unchartered sea, seeking some guidance by the light thrown by the legislations and judicial precedents of foreign countries.

The case before us is a writ petition under Article 32 of the Constitution, and has been filed on behalf of the petitioner Aruna Ramachandra Shanbaug by one Ms. Pinki Virani of Mumbai, as a next friend.

It is stated in the writ petition that the petitioner Aruna Ramachandra Shanbaug was a staff Nurse working in King Edward Memorial Hospital, Parel, Mumbai. On the evening of 27th November, 1973 she was attacked by a sweeper in the hospital who wrapped a dog chain around her neck and yanked her back with it. He tried to rape her but finding that she was menstruating, he sodomized her. To immobilize her during this act he twisted the chain around her neck. The next day on 28th November, 1973 at 7.45 a.m. a cleaner found her lying on the floor with blood all over in an unconscious condition. It is alleged that due to strangulation by the dog chain the supply of oxygen to the brain stopped and the brain got damaged. It is alleged that the Neurologist in the Hospital found that she had planters' extensor, which means damage to the cortex or some other part of the brain. She also had brain stem contusion injury with

associated cervical cord injury.

It is alleged at page 11 of the petition that 36 years have expired since the incident and now Aruna Ramachandra Shanbaug is about 60 years of age. She is featherweight, and her brittle bones could break if her hand or leg are awkwardly caught, even accidentally, under her lighter body. She has stopped menstruating and her skin is now like papier mache' stretched over a skeleton. She is prone to bed sores. Her wrists are twisted inwards. Her teeth had decayed causing her immense pain. She can only be given mashed food, on which she survives.

It is alleged that Aruna Ramachandra Shanbaug is in a persistent vegetative State and virtually a dead person and has no state of awareness, and her brain is virtually dead. She can neither see, nor hear anything nor can she express herself or communicate, in any manner whatsoever. Mashed food is put in her mouth, she is not able to chew or taste any food. She is not even aware that food has been put in her mouth. She is not able to swallow any liquid food, which shows that the food goes down on its own and not because of any effort on her part. The process of digestion goes on in this way as the mashed food passes through her system. However, Aruna is virtually a skeleton. Her excreta and the urine is discharged on the bed itself. Once in a while she is cleaned up but in a short while again she goes back into the same sub-human condition. Judged by any parameter, Aruna cannot be said to be a living person and it is only on account of mashed food which is put into her mouth there is a façade of life which is totally devoid of any human element. There is not the slightest possibility of any improvement in her condition and her body lies on the bed in the KEM Hospital, Mumbai like a dead animal, and this has been the position for the last 36 years.

The prayer of the petitioner is that the respondents be directed to stop feeding Aruna, and let her die peacefully.

Although, notice had been issued by this Court on

16.12.2009 to all the respondents in this petition, the only counter affidavit which has been filed is that on behalf of the respondent no.3 and 4, the Mumbai Municipal Corporation and the Dean, KEM Hospital. That affidavit, of Dr. Amar Ramaji Pazare, Professor and Head in the said hospital, states in paragraph 6 that Aruna accepts the food in normal course and responds by facial expressions. She responds to commands intermittently by making sounds. She makes sounds when she has to pass stool and urine which the nursing staff identifies and attends to by leading her to the toilet.

Thus, there is some variance between the allegations in the writ petition and the counter affidavit of Dr. Pazare.

In the circumstances we are of the opinion that a team of three doctors should be appointed to examine Aruna Ramachandra Shanbaug thoroughly and give a report to us about her physical and mental condition. For this purpose we are appointing a team of following three doctors :

1. Dr. J.V. Divatia, Professor and Head, Department of Anesthesia, Critical Care and Pain at Tata Memorial Hospital, Mumbai, whose mobile number is 09869077435 and e-mail address is jdivatia@yahoo.com

2. Dr. Roop Gursahani, Consultant Neurologist at P.D. Hinduja Hospital, Mumbai, whose mobile number is 09821087597 and e-mail address is roop_gursahani@hotmail.com

3. Dr. Nilesh Shah, Professor and Head, Department of Psychiatry at Lokmanya Tilak Municipal Corporation Medical College and General Hospital, whose mobile number is 09821788658 and e-mail address is drnilshah@hotmail.com.

The above team of doctors is requested to examine the petitioner Aruna Ramachandra Shanbaug at the KEM Hospital thoroughly and submit us a detailed report about her physical and

mental condition so as to enable us to get the correct facts. The team of above mentioned three doctors should preferably submit to us a joint report. They can take the help of any hospital or doctor in Mumbai or elsewhere for the purpose assigned to them by this order. All hospitals/doctors in Mumbai and elsewhere are directed to give all assistance and cooperation to this team of doctors appointed by us, including carrying out any investigation they require. In particular the authorities and doctors and staff in KEM Hospital Mumbai will give all assistance and cooperation to this team so that they may do the work assigned to them by this order, effectively.

The Chief Justice of the Bombay High Court is also requested to kindly extend all help and cooperation to the above mentioned team in any manner they desire. The State Government of Maharashtra will provide all facilities to this team of doctors in any manner they desire including arrangements for their transport, any funds they require for performing their duties under this order, etc.

Issue notice to the learned Attorney General of India who is requested to assist us at the time of the final hearing of this case which is fixed for 22.02.2011, as the first case on the list. Counter afidavits may be filed by that date by the respondents who have not as yet filed them. Mr. T.R. Andhyarujina, learned Sr. Advocate is requested to assist us as amicus curiae in this matter.

The question of *locus standi* of the next friend of the petitioner to move this petition shall also be considered on the date fixed.

Let copies of this order as well as copies of the writ petition and the counter affidavit of Dr. Pazare be sent forthwith to the team of doctors nominated by us. Copies of the same shall also be given to the learned Attorney General of India as well as Mr. T.R. Andhyarujina, Sr. Adv. Copies of this order will also be sent to the doctors appointed by us today to their e-mail address mentioned above.

D.G. Writ Petition adjourned.

THE COMMISSIONER OF CENTRAL EXCISE, VISAKHAPATNAM

v.

M/S. MEHTA & CO.

(Civil Appeal No. 1090 of 2009)

FEBRUARY 10, 2011

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

Central Excise Act, 1944 – s.11A, proviso – Assessee engaged in business of interior decoration and providing composite services including woodwork, furniture items etc. at the premises of customer – Show cause notice issued alleging that the assessee manufactured articles of wood, furniture, etc. in the premises of a hotel and removed the same without payment of excise duty – Demand by Commissioner – Whether the demand for payment of duty was barred by limitation and whether the items like chairs, beds, tables, desks, etc., affixed to the ground could be said to be immoveable assets and not liable to excise duty – Held: S.11A of the Act empowers the Authority to demand excise duty – In the instant case, there was apparent intention on the part of respondent to evade excise duty and contravene provisions of the Act – Therefore, proviso of s.11A(i) of the Act would get attracted – The cause of action, i.e., date of knowledge could be attributed to the appellant in the year 1997 when in compliance of the memo issued by the appellant and also the summons issued, the hotel furnished its reply setting out the details of the work done by the assessee – Show cause notice having been issued in the year 2000, the demand made was clearly within the period of limitation as prescribed, which is five years – Ordinarily furniture refers to moveable items such as desk, tables, chairs required for use or ornamentation in a house or office – Therefore, the furniture could not said to be immoveable property (as held by the

Tribunal) – The Commissioner had listed out various items as furniture after proper scrutiny – Tribunal was not justified in rejecting the said findings – Order passed by the Commissioner accordingly restored – Central Excise Tariff Act, 1985 – Chapter sub-heading Nos. 9401.00 & 9403.00, 4410.11, 8302.00 and 7610.90.

The respondents-assessees were engaged in the business of interior decoration and provided composite services including woodwork, furniture items etc. They entered into contracts with customers for doing these works as per their requirement and also carry out these works at their customer's premises.

On gathering specific intelligence that the assesses have undertaken the manufacture of articles of wood, furniture, etc. in the premises of Hotel Grand Bay, Vishakhapatnam and removed the same without payment of duty of excise, the officers of Head Quarters Preventive unit inquired and investigated the matter. It was found that the assessee, *inter alia*, manufactured and cleared furniture, falling under chapter sub-heading Nos. 9401.00 & 9403.00, 4410.11, 8302.00 and 7610.90 respectively, of the Schedule to the Central Excise Tariff Act, 1985 without payment of proper duty of excise with an intention to evade payment of duty.

A show cause notice under the Central Excise Act, 1944 was issued to the respondent – assessee. The respondent-assessee and M/s. Grand Bay Hotel submitted their respective replies. The Commissioner of Central Excise confirmed the demand of Rs. 43,59,710/- out of the proposed demand of Rs. 62,94,910/- under Rule 9(2) along with penalty of equal amount i.e. Rs. 43,59,710/- and directed the redemption of the confiscated goods after the payment of a fine of Rs. 1,00,000/- plus the duty and penalty adjudged. Aggrieved, the respondent filed

appeal before the CESTAT which allowed the appeal and remanded the matter to the adjudicating authority concerned to examine the matter afresh. Thereupon, the Commissioner, Central Excise & Customs, Visakhapatnam confirmed the demand of Rs. 14,94,656/- with penalty of Rs. 7,47,328/- with interest as per Section 11 AB of the Central Excise Act, 1944 and also imposed a penalty of Rs. 5,00,000/- under Rule 173Q.

Aggrieved thereby the respondent filed an appeal before the Customs, Excise & Service Tax Appellate Tribunal (CESTAT) which set aside the order of the Commissioner, Central Excise & Customs, Visakhapatnam. The Tribunal held that the items fabricated by the respondent were permanently fixed to the walls and ground of the room and the same could not be removed from one place to another without causing much damage to them and without cannibalizations and consequently the said items cannot be considered as furniture in the light of the decision of this Court in the case of *Craft Interiors's* case. It was further held that in any case the entire demand was also hit by time bar as there was no justification for invocation of the longer period.

In the instant appeal, two primary issues fell for consideration- 1) whether or not the demand for payment of duty was barred by limitation and 2) whether the items like chairs, beds, tables, desks, etc., affixed to the ground could be said to be immoveable assets and not liable to excise duty.

Allowing the appeal, the Court

HELD:1.1. Section 11A of the Central Excise Act, 1944 empowers the Authority to demand excise duty in terms of the conditions laid down in the said provision as and

when the pre-conditions mentioned therein are satisfied. [Para 16] [884-C]

1.2. The issuance of a notice for invoking the provisions of Section 11A of the Act is a condition precedent for a demand to be made under Section 11A of the Act. However, in the present case, a show cause notice was issued to the respondent making it a specific case that the respondent manufactured excisable goods as mentioned in the notice and covered under different chapter headings at the site of the customer and removed the same without payment of duty of excise with an intention to evade payment of duty. It was also mentioned that such conscious action on the part of the contractor has clearly established the intention to evade payment of duty of excise and consequently proviso to Section 11A of the Act could be invoked in the present case. The hotel furnished the details of work done by the respondent and that the Central Excise Department was informed that the work order was to carry out job on the turn key basis and not for any furniture as such. [Paras 17, 18] [884-D-H; 885-A]

1.3. After the order of remand was passed by the Tribunal, the Commissioner considered the issue with regard to the liability of payment of excise duty at length and held that the respondent is liable to pay central excise duty for the items as specifically mentioned in the said order passed. A perusal of the said order would also indicate that no issue with regard to the demand raised by the appellant as time barred was either raised or discussed by the Commissioner. [Paras 19, 20] [885-B-C]

1.4. The specific case of the appellant is that the respondent having manufactured the excisable goods covered under different chapter headings, removed them without payment of proper duty of excise and that from

the aforesaid action it is explicit that there was an intention on the part of the respondent to evade payment of duty. Although, the respondent has pleaded that it was done out of ignorance, but in the considered opinion of this Court, there appears to be an intention to evade excise duty and contravention of the provisions of the Act. Therefore, proviso of Section 11A (i) of the Act would get attracted to the facts and circumstances of the present case. [Paras 22, 23] [885-G-H; 886-A-B]

1.5. The cause of action, i.e., date of knowledge could be attributed to the appellant in the year 1997 when in compliance of the memo issued by the appellant and also the summons issued, the hotel furnished its reply setting out the details of the work done by the assessee. A bare perusal of the records shows that the aforesaid reply was sent on receipt of a letter issued by the Commissioner of Central Excise on 27.2.1997. If the period of limitation of five years is computed from the aforesaid date, the show cause notice having been issued on 15.5.2000, the demand made was clearly within the period of limitation as prescribed, which is five years. [Para 24] [886-C-D-E]

2.1. The decision in *Craft Interiors* has clearly laid down that ordinarily furniture refers to moveable items such as desk, tables, chairs required for use or ornamentation in a house or office. So, therefore, the furniture could not have been held to be immoveable property. [Para 26] [886-G]

2.2. A perusal of the records would also indicate that the Commissioner in his order has listed out various items which were held as furniture and while doing so, he has scrutinized the records to determine the immovability or movability of the items. A bare perusal of the said order would also indicate that he has given deductions for the items held as immovable. He has

prepared Annexures 1,2, 3 and 4 and the items mentioned in Annexures 1 and 2 have been held as 'furniture' after proper examination of the records whereas he has held items in Annexures 3 and 4 as immovable and has allowed deduction. So far as the items such as chairs, tables etc. listed in Annexure 5 is concerned, the same admitted to be furniture by the assessee himself. The Commissioner having considered the aforesaid issue carefully and after proper scrutiny, the Tribunal was not justified in rejecting the said findings by mere conclusion and without trying to meet the findings recorded by the Commissioner. [Paras 27, 28] 887-A-B-C-D]

Craft Interiors Pvt. Ltd. v. CCE, Bangalore, **2006 (203) ELT 529 (SC) – relied on.**

3. The order passed by the Tribunal is accordingly set aside and the order passed by the Commissioner is restored. [Para 29]

Case Law Reference:

2006 (203) ELT 529 (SC) relied on Para 21

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1090 of 2009.

From the Judgment & Order dated 28.7.2008 of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, FKCCI-WTC Building, K.G. Road, Bangalore in Appeal No. E/132/2005.

Rohit Sharma, Anil Katiyar for the Appellant.

S. Sukumaran, R. Dakshina Murthy, Anand Sukumar, Bhupesh Kumar Pathak, Meera Mathur for the Respondent.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. Delay condoned.

2. The present appeal filed by the appellant Commissioner of Central Excise, Visakhapatnam arises out of an order dated 28.07.2008 passed by the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench at Bangalore (hereinafter referred to as 'the Tribunal') in appeal No. E/132/2005.

3. Two primary issues fall for consideration in this appeal. The first issue is, as to whether or not the demand for payment of duty is barred by limitation, whereas the second issue is whether the items like chairs, beds, tables, desks, etc., affixed to the ground could be said to be immoveable assets and not liable to excise duty. The aforesaid two issues have arisen in the light of the rival submissions made on the basic facts of this appeal which are hereinafter being set out.

4. M/s. Mehta & Company, Mumbai (the "assessee") are engaged in the business of interior decoration. The assessee provides composite services including woodwork, furniture items etc. They entered into contracts with customers for doing these works as per their requirement and also carry out these works at their customer's premises.

5. On gathering specific intelligence that the assesses have undertaken the manufacture of articles of wood, furniture, etc. in the premises of Hotel Grand Bay, Vishakhapatnam and removed the same without payment of duty of excise, the officers of Head Quarters Preventive unit inquired and investigated the matter.

6. It was found that the assessee along with M/s Chandrasekhar Architects Pvt. Ltd., Mumbai entered into an agreement with M/s. Adyar Gate Hotel Ltd., Chennai (now M/s Welcome Group) on 30.08.1995 for carrying out the renovation of the existing structure in their hotel at Nowroji Road, Maharanipeta, Visakhapatnam. The scope of this agreement

was further modified by another agreement dated 18.10.1995. As seen by the final bills dated 31.03.1997, raised by the assessee on Hotel Grand Bay, it was observed that the assessee, inter alia, manufactured and cleared furniture, falling under chapter sub- heading Nos. 9401.00 & 9403.00, 4410.11, 8302.00 and 7610.90 respectively, of the Schedule to the Central Excise Tariff Act, 1985. As per the agreement the assessee quoted prices which included sales tax, excise duty, octroi etc.

7. It appears that the assessee manufactured goods covered under different chapter headings at the customer's site and removed them without payment of proper duty of excise with an intention to evade payment of duty. The contract between the assessee and M/s Adyar Gate Hotel Ltd., clearly mentions that the assessee has quoted rates which include the excise duty and it had been made in the contract that the contractor would not have any claim subsequently after execution of the work for excise duty, sales tax etc. from M/s. Adyar Gate Hotels Limited.

8. A show cause notice under the Central Excise Act, 1944 [for short "the Act"] dated 15.05.2000 was issued to the respondent - M/s. Mehta & Company to show cause as to why: -

(i) Duty of excise amounting to Rs. 62,94,910/- should not be demanded from them on the goods manufactured and cleared under Rule 9(2) of the Rules read with the proviso to section 11A (1) of the Act;

(ii) The amount of Rs. 10,00,000/- already paid under protest towards the duty of excise should not be adjusted towards the payment of duty demanded in (i) above;

(iii) Penalty should not be imposed on them under Rule 9(2), Rule 52A and Rule 173Q of the Rules;

(iv) Penalty equal to the duty demanded in (i) above should not be imposed on them under Section 11AC of the Act;

(v) Interest @ 24% p.a. from the first day of the month succeeding the month in which the duty ought to have been paid, till the date of payment of such duty should not be demanded from them under section 11 AB of the Act; and

(vi) The goods involved should not be confiscated under Rule 173Q (1) of the Rules.

9. M/s. Grand Bay Hotel, Beach Road, Visakhapatnam was also asked to show cause as to why penalty should not be imposed under Rule 209A of the Rules for purchase and possession of the excisable goods on which duty of excise had not been paid.

10. The respondent - M/s. Mehta & Co. and M/s. Grand Bay Hotel submitted their respective replies. The Commissioner of Central Excise vide order dated 31.12.2002 confirmed the demand of Rs. 43,59,710/- out of the proposed demand of Rs. 62,94,910/- under Rule 9(2) along with penalty of equal amount i.e. Rs. 43,59,710/- and directed the redemption of the confiscated goods after the payment of a fine of Rs. 1,00,000/- plus the duty and penalty adjudged.

11. Aggrieved thereby, the respondent filed an appeal before the CESTAT, Bangalore, which allowed the appeal and remanded the matter to the concerned adjudicating authority to examine the matter afresh and to pass an appropriate order in accordance with law by providing an effective hearing to the parties. Thereupon, the Commissioner, Central Excise & Customs, Visakhapatnam vide order dated 22.10.2003

confirmed the demand of Rs. 14,94,656/- with penalty of Rs. 7,47,328/- with interest as per Section 11 AB of the Central Excise Act, 1944 (for short "the Act") and also imposed a penalty of Rs. 5,00,000/- under Rule 173Q. Aggrieved thereby the respondent filed an appeal before the Tribunal and vide order dt. 28.7.2008 the Tribunal allowed the appeal and set aside the order of the Commissioner, Central Excise & Customs, Visakhapatnam under the impugned judgment and order as against which the present appeal was filed.

12. We heard the learned counsel appearing for the parties at length who had taken us through all the orders which gave rise to the aforesaid two issues which fall for our consideration in the present appeal.

13. The learned counsel appearing for the appellant submitted before us that so far as the issue with regard to the limitation is concerned, the same was not urged before the Commissioner when he was hearing the matter after the order of remand by the Tribunal and in that view of the matter, the Tribunal could not have decided the said issue against the appellant. It was further submitted that in any case proviso to Section 11A of the Act is attracted to the facts and circumstances of the present case, and therefore, the show cause notice was issued by the appellant within the period of limitation as prescribed under the proviso to Section 11A of the Act and that the Tribunal was wrong in holding that the demand was beyond the period of limitation. It was further submitted that the Tribunal erred in holding that all the items manufactured by the assessee are exempted from demand of excise duty.

14. Per contra, the learned counsel appearing for the respondent, however, refuted the aforesaid submissions and submitted that the appellant never had any intention to evade excise duty and there is no finding to that effect and therefore no such duty is leviable particularly when it is barred by limitation. It was also submitted that the pre-conditions for

attracting the provisions of proviso is not satisfied in the present case, and therefore, it cannot be submitted that the demand is not barred by limitation.

15. We have considered the aforesaid submissions of the learned counsel appearing for the parties in the light of the records placed before us. So far as the issue with regard to limitation is concerned, since that goes to the root of the demand made, it is appropriate to deal with the same before we go into the second issue.

16. Section 11A of the Act empowers the Authority to demand excise duty in terms of the conditions laid down in the said provision as and when the pre-conditions mentioned therein are satisfied.

17. There is no dispute with regard to the fact that issuance of a notice for invoking the provisions of Section 11A of the Act is a condition precedent for a demand to be made under Section 11A of the Act. However, in the present case, a show cause notice was issued to the respondent herein making it a specific case that the respondent manufactured excisable goods as mentioned in the notice and covered under different chapter headings at the site of the customer and removed the same without payment of duty of excise with an intention to evade payment of duty when the contract clause between the respondent and M/s. Adyar Gate Hotel Ltd. clearly mentioned that the contractors quoted rate shall also include the excise duty. It was also mentioned that such conscious action on the part of the contractor has clearly established the intention to evade payment of duty of excise and consequently proviso to Section 11A of the Act could be invoked in the present case.

18. In the reply submitted by the respondent, it was stated that a proforma was enclosed to the show cause notice and also the summons. The hotel furnished the details of work done by the respondent and that the Central Excise Department was

informed that the work order was to carry out job on the turn key basis and not for any furniture as such.

19. As stated hereinbefore, after the order of remand was passed by the Tribunal, the Commissioner considered the issue with regard to the liability of payment of excise duty at length and held that the respondent is liable to pay central excise duty for the items as specifically mentioned in the said order passed.

20. A perusal of the said order would also indicate that no issue with regard to the demand raised by the appellant as time barred was either raised or discussed by the Commissioner.

21. Being aggrieved by the aforesaid order passed by the Commissioner, an appeal was filed before the Tribunal. The Tribunal, however, held that the items fabricated by the respondent herein are permanently fixed to the walls and ground of the room and the same could not be removed from one place to another without causing much damage to them and without cannibalizations and consequently the said items cannot be considered as furniture in the light of the decision of this Court in the case of *Craft Interiors Pvt. Ltd. vs. CCE, Bangalore* reported in (2006 (203) ELT 529 (SC)]. It was, however, held that the case of the appellant is weak not only on merits, but also in any case the entire demand is also hit by time bar as there is no justification for invocation of the longer period. Thus, findings which are recorded appear to be abrupt and without recording any reasons.

22. Consequently, we propose to look into the first issue in the light of the background facts as stated hereinbefore. The specific case of the appellant is that the respondent having manufactured the excisable goods covered under different chapter headings, removed them without payment of proper duty of excise and that from the aforesaid action it is explicit that there was an intention on the part of the respondent to evade payment of duty particularly when the contract clause

between the respondent and M/s. Adyar Gate Hotel Ltd. clearly mentioned that the contractors quoted rate would also include excise duty.

23. Although, the respondent has pleaded that it was done out of ignorance, but in our considered opinion there appears to be an intention to evade excise duty and contravention of the provisions of the Act. Therefore, proviso of Section 11A (i) of the Act would get attracted to the facts and circumstances of the present case.

24. The cause of action, i.e., date of knowledge could be attributed to the appellant in the year 1997 when in compliance of the memo issued by the appellant and also the summons issued, the hotel furnished its reply setting out the details of the work done by the appellant amounting to Rs. 991.66 lakhs and at that stage only the department came to know that the work order was to carry out the job for furniture also. A bare perusal of the records shows that the aforesaid reply was sent by the respondent on receipt of a letter issued by the Commissioner of Central Excise on 27.2.1997. If the period of limitation of five years is computed from the aforesaid date, the show cause notice having been issued on 15.5.2000, the demand made was clearly within the period of limitation as prescribed, which is five years.

25. So far as the second issue is concerned, we fail to appreciate as to how the Tribunal could come to a finding, as recorded in the impugned judgment and order in view of the proposition of law already settled by this Court in the decision of *Craft Interiors* (supra).

26. The decision in Craft Interiors (supra) has clearly laid down that ordinarily furniture refers to moveable items such as desk, tables, chairs required for use or ornamentation in a house or office. So, therefore, the furniture could not have been held to be immoveable property.

27. A perusal of the records would also indicate that the Commissioner in his order has listed out various items which were held as furniture and while doing so, he has scrutinized the records to determine the immovability or movability of the items. A bare perusal of the said order would also indicate that he has given deductions for the items held as immovable. He has prepared Annexures 1,2, 3 and 4 and the items mentioned in Annexures 1 and 2 have been held as 'furniture' after proper examination of the records whereas he has held items in Annexures 3 and 4 as immovable and has allowed deduction.

28. So far as the items such as chairs, tables etc. listed in Annexure 5 is concerned, the same admitted to be furniture by the assessee himself. The Commissioner having considered the aforesaid issue carefully and after proper scrutiny, the Tribunal was not justified in rejecting the said findings by mere conclusion and without trying to meet the findings recorded by the Commissioner.

29. Accordingly, we allow this appeal and set aside the order passed by the Tribunal and restore the order passed by the Commissioner. However, there shall be no order as to costs.

B.B.B. Appeal allowed.

JARNAIL SINGH
v.
STATE OF PUNJAB
(Criminal Appeal No. 1960 of 2009)

FEBRUARY 11, 2011

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

Narcotic Drugs and Psychotropic Substances Act, 1985:

s.50 – Scope, ambit and applicability of – Held: S.50 can be invoked only in cases where the drug/narcotic is recovered as a consequence of body search of the accused – In case, the recovery of the narcotic is made from a container being carried by an individual, the provisions of s.50 would not be attracted.

Opium seized from accused – Gap of 12 days between the seizure and the sending of opium sample to the Chemical examiner – Held: On facts, the delay in sending the samples was not fatal to the prosecution case – There was no infirmity in the link evidence – Mere delay in sending the sample to the Chemical Examiner not sufficient to conclude that the sample was tampered with – Report of the Chemical Examiner indicated that the seals were intact when the sample was received and tallied with the sample impression of the seal – Code of Criminal Procedure, 1973 – s.293.

Evidence Act, 1872:

s.25 – Offence under the NDPS Act – Accused apprehended by police party – Consent statement made by accused expressing his confidence to be searched in presence of Police Inspector – Whether inadmissible u/s.25 – Held: The consent statement signed by the accused was

not used as a confession, therefore, the bar under s.25 was not applicable – No confession was made in this case through the consent given by the accused with regard to any of the ingredients of the offence with which he was subsequently charged.

Independent witness – Non-examination of – Effect – Held: Merely because the prosecution did not examine any independent witness, would not necessarily lead to the conclusion that the accused had been falsely implicated – On facts, the prosecution offered a plausible explanation with regard to the non-joining of independent witnesses.

Constitution of India, 1950 – Article 136 – Jurisdiction and power of Supreme Court under – Held: An appeal under Article 136 of the Constitution cannot be converted into a third appeal on facts – Though the jurisdiction and the powers of the Supreme Court under Article 136 are very wide, even then, interference with concurrent findings of fact would be an exception and not the rule.

The appellant was apprehended when he displayed hesitation on seeing a police party and tried to run away. 1.75 Kgs of contraband (opium) was recovered from a bag (*thaili*) being carried by the appellant. The appellant could not produce any valid licence or permit for possession of the said opium.

The trial court convicted the appellant under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) and sentenced him to undergo rigorous imprisonment for ten years. The conviction and sentence was affirmed by the High Court.

In the present appeal, the appellant challenged his conviction on various grounds, viz. (1) that there were so many independent witnesses and yet only police officials were examined as prosecution witnesses; (2) that the

Court below did not consider the statement of the appellant as recorded under Section 313 CrPC; (3) that the mandatory provision in Section 50 of the NDPS Act was not followed; the appellant was never given any option nor taken to the nearest Gazetted officer or Magistrate for his search and (4) that there was delay of twelve days in sending the contraband sample for Chemical Examination for which no reasonable justification was given by the prosecution.

Dismissing the appeal, the Court

HELD:1. An appeal under Article 136 of the Constitution cannot be converted into a third appeal on facts. Though the jurisdiction and the powers of this court under Article 136 are very wide, even then, interference with concurrent findings of fact would be an exception and not the rule. In the instant case, the trial Court as also the High Court meticulously examined and re-examined the entire evidence. On such close scrutiny, both the courts concurrently found that the prosecution had proved its case beyond reasonable doubt. [Para 8] [898-G]

Ganga Kumar Srivastava v. State of Bihar **(2005) 6 SCC 211 – referred to.**

2.1. Merely because the prosecution did not examine any independent witness, would not necessarily lead to the conclusion that the appellant was falsely implicated. It was clearly a case where police personnel had noticed the odd behavior of the appellant when he was walking towards them on a path which led to the village. It was the display of hesitation by the appellant on sighting the police party that PW5 (ASI) became suspicious. On seeing the police personnel, the appellant tried to run away from the scene. It was not a case where the prosecution claimed that the appellant was apprehended

on the basis of any earlier information having been given by any secret informer. It was also not a case of trap. In such circumstances, it would not be possible to hold that the appellant was falsely implicated. [Para 9] [900-A-D]

2.2. The prosecution has offered a plausible explanation with regard to non-joining of the independent witnesses. It was clearly stated by PW5 that the path on which the appellant was apprehended was not frequently used by the public. In fact, efforts were made to bring a member of Panchayat or Sarpanch of the village. However, the Head Constable who had been sent, reported that none of the villagers were prepared to join as independent witnesses. This reluctance on the part of the villagers is neither strange nor unbelievable. Generally, people belonging to the same village would not unnecessarily want to create bad relations/enmity with another villager. Especially when such a person would be feeling insecure, having been accused of committing a crime. [Para 10] [900-E-F]

3. It cannot be said that the courts below ignored the plea of the appellant under Section 313 CrPC without any basis. According to the appellant the police had dug up his house and the courtyard and nothing incriminating was found. This was sought to be supported by the evidence given by DW1, the Ex–Sarpanch of the village. Both the courts below correctly concluded that such evidence cannot be believed as DW1 apparently appeared for the first time as a witness in court five years after the incident. Prior to the appearance in court, DW1 did not make any complaint in writing either to the police authorities or to the civil administration. Being the Ex-Sarpanch of the village, he can be expected to act with responsibility. There is no material to show that he made any efforts to complain about the high handed behaviour of the police. Both the courts below rightly discarded the

evidence of DW1. [Para 11] [900-G-H; 901-A-B-C]

4.1. PW4 (Inspector) clearly stated that the option (of search in the presence of a Gazetted Officer or a Magistrate) was duly given to the appellant. The appellant had, in fact, signed on the consent statement expressing his confidence to be searched in presence of the aforesaid witness. Similarly, PW5 also stated that before effecting the search, the accused/appellant was given the necessary option as to whether he wanted to be searched before a Gazetted Officer or a Magistrate. This witness also stated that the appellant reposed his confidence in Inspector PW4. In such circumstances, it cannot be held that there was non-compliance with Section 50 of the NDPS Act. [Para 12.1] [901-D-E-F-G]

4.2. This apart, it is accepted that the narcotic/opium was recovered from the bag (thaili) which was being carried by the appellant. In such circumstances, Section 50 would not be applicable. The aforesaid Section can be invoked only in cases where the drug/narcotic/NDPS substance is recovered as a consequence of the body search of the accused. In case, the recovery of the narcotic is made from a container being carried by the individual, the provisions of Section 50 would not be attracted. It has come in evidence that although the body search of the appellant was conducted but no recovery of any narcotic was made. The body search only led to the recovery of Rs.25/-from his pocket. [Para 12.2] [901-H; 904-B-C; 902-A]

Kalema Tumba v. State of Maharastra **(1999) 8 SCC 257:** *Megh Singh v. State of Punjab* **(2003) 8 SCC 666:** *Himachal Pradesh v. Pawan Kumar* **(2005) 4 SCC 350 – relied on.**

5. The submission made by the appellant that the consent statement made by him was inadmissible under

Section 25 of the Indian Evidence Act, 1872, cannot be accepted. The consent statement signed by the appellant was not used as a confession, therefore, the bar under Section 25 would not be applicable. A statement in order to be treated as a confession must either admit in terms of an offence, or at any rate substantially all the facts which constitute the offence. No confession was made in this case through the consent given by the appellant with regard to any of the ingredients of the offence with which he was subsequently charged. [Para 13] [904-D-E]

6.1. The trial court as well as the High Court, on examination of the entire material, concluded that there was sufficient independent evidence produced by the prosecution regarding the completion of link evidence. Therefore, the delay of 12 days in sending the sample parcel to the office of Chemical Examiner pales into insignificance. Mere delay in sending the sample of the narcotic to the office of the Chemical Examiner would not be sufficient to conclude that the sample has been tampered with. In the instant case, there is sufficient evidence to indicate that the delay, if any, was wholly unintentional. [Para 14] [904-F-G-H; 905-A]

6.2. The trial court as well as the High Court, on examination of the evidence on record, concluded that the case property was handed over by PW4, Investigating Officer to the SHO Inspector (PW3). This witness checked the case property and affixed his own seal bearing impression 'RS' on the case property as also on the sample impression of the seal. The case property was deposited with MHC on the same day who appeared as PW1 in court and tendered his affidavit to the effect that the case property including the sample parcel and the specimen impression of the seal, duly sealed and intact was deposited with him by PW4. He also stated that he handed over the sample parcel, duly sealed and sample

impression of seal to a Constable for depositing the same in the office of Chemical Examiner. It was further stated that none had tampered with the aforesaid case property and the seal which remained in his custody. He ultimately deposited the case property in the office of Chemical Examiner on the same day and tendered receipt. This apart, there is a report of the Chemical Examiner which indicates that the seals were intact when the sample was received and tallied with the sample impression of the seal. Such a report of the Chemical Examiner would be admissible under Section 293 of the CrPC. Considering the aforesaid clear evidence, it cannot be said that there was any infirmity in the link evidence merely because there was a delay of few days in sending the sample to the office of the Chemical Examiner. [Para 14] [905-D-H; 906-A-B]

Balbir Kaur v. State of Punjab **(2009) 15 SCC 795 – relied on.**

7. On consideration of the entire material on the record, it is clear that the trial court as well as the High Court concurrently found the appellant guilty. There is no perversity or any miscarriage of justice in the findings so recorded. [Para 15] [906-C]

Case Law Reference:

(2005) 6 SCC 211	**referred to**	**Para 8**
(1999) 8 SCC 257	**relied on**	**Para 12**
(2003) 8 SCC 666	**relied on**	**Para 12**
(2005) 4 SCC 350	**relied on**	**Para 12**
(2009) 15 SCC 795	**relied on**	**Para 14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1960 of 2009.

From the Judgment & Order dated 12.05.2008 of the High Court of Punjab & Haryana at Chandigarh in Crl. Appeal No. 590-SB of 1999.

Ujjal Singh, J.P. Singh, R.C. Kaushik for the Appellant.

H.M. Singh, Kaushal Yadav, Kuldip Singh for the Respondent.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. This appeal is directed against the final Order of the High Court of Punjab and Haryana at Chandigarh dated 12th May, 2008 passed in Criminal Appeal No. 590 – SB of 1999, whereby the High Court upheld the order of conviction passed against the appellant herein under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "NDPS Act"), and sentenced him to undergo rigorous imprisonment for ten years and to pay a fine of Rs. one lac and in default of payment of the same, to undergo rigorous imprisonment for another two years, for having been found in possession of 1 kg and 750 grams of opium without any permit or licence.

2. The prosecution story is that on 23rd September, 1994 at around 2.30 PM, Inspector Ram Pal Singh (PW4) along with SI Gurdeep Singh, ASI Satpal Singh (PW5) and other officials were on duty and coming from village Hassanpur to village Mirsapur. After reaching near the bridge of canal minor while going on kacha path, the police party noticed the appellant coming from the bank of canal. On seeing the police party, the appellant tried to run away but on suspicion he was apprehended. On enquiry, he informed the police about his name, parentage, address etc. At that time, he was carrying a bag (thaili) in his right hand. PW4 suspected that that the appellant was carrying some incriminating articles in his bag. The search was conducted and the police party recovered 1 Kg and 750 gram opium from his custody.

3. Ten grams of opium was put into a tin container as a sample. It was duly sealed. The entire case property was taken into possession vide memo Ex. PD attested by SI Gurdeep Singh and ASI Satpal Singh. The seal after use was handed over to ASI Satpal Singh (PW5). The appellant could not produce any valid license or permit for possession of the said opium. On personal search, currency notes amounting to Rs. 25 /- was also recovered from the accused and the same was taken into possession vide memo Ex. P1, signed by the appellant. Ruqa Ex. PF was sent to the police station and subsequently the FIR was registered. Inspector, Ram Pal (PW4) recorded the statements of the witnesses and arrested the appellant.

4. Inspector, Ram Pal (PW4) then produced the appellant along with the case property and witnesses before Satpal Singh (PW5) on the same day of the alleged crime. PW4 enquired about the alleged incident from other witnesses and checked the case property and also affixed his own seal bearing impression 'RP' on the case property and on samples of seal Ex. PD/1. Thereafter, PW3 at 7.30 PM deposited the sealed case property with MHC Shudh Singh. The investigation was duly completed and challan against the appellant was prepared by S.I. Bagh Singh. The prosecution in support of its case, examined Sudh Singh (Head Constable) (PW1), Chet Ram (PW2), Rachpal Singh (Inspector) (PW3), Ram Pal Singh (PW4) and Satpal Singh (PW5).

5. The Addl. Sessions Judge vide its final order and judgment dated 19th May, 1999 convicted and sentenced the appellant under section 18 of the NDPS Act, as noticed above. The High Court, in an appeal, vide judgment dated 12th May, 2008 affirmed the findings of the Sessions Court and dismissed the appeal filed by the appellant. Hence the appeal before this Court.

6. We have heard the counsel for both parties. Mr. Ujjal Singh, counsel for the appellant submits as follows:

i. The whole incident happened in a densely populated area and there were so many independent witnesses but only the police have been made the prosecution witnesses. The appellant has been falsely implicated.

ii. The courts below have not considered the appellant's version as recorded under Section 313 Cr.P.C. The appellant was apprehended from his village on 10th September, 1994 by the police party. Another police party dug up his house and courtyard looking for illicit arms. But nothing incriminating was found. The Ex-Sarpanch, Narang Singh asked them the reason for the digging. The police told him that they were searching for opium and illicit arms, and that he had relations with terrorists. Thereafter, the police took the appellant to CIA staff. He was tortured by using third degree methods. Then he was falsely implicated in this case. The Courts below have also disregarded the deposition of DW-1, Sarpanch Narang Singh for no valid grounds.

iii. Section 50 of the NDPS Act is a mandatory provision but the same was never followed in the present case. The appellant was never given any option nor taken to the nearest Gazetted Officer or Magistrate for his search.

iv. There is a delay of twelve days in sending the sample for the chemical examination. The prosecution has not been able to give any reasonable justification for such delay.

v. The consent statement made by the appellant is inadmissible under section 25 of the Indian Evidence Act, 1872.

vi. There are vital lapses in the present case. The version deposed by PW -3 is inconsistent with the deposition of PW -4.

vii. The prosecution has not been able to prove as to from where they got weighing scale, tin dabba and dabhi. The police also could not give any valid reason as to why they had gone to the spot. This shows that they were pre - prepared and have falsely implicated the appellant.

7. On the other hand, Mr. H.M. Singh, counsel for the respondent submits as follows:

i. The appellant is rightly been convicted under section 18 of the NDPS Act. There are numerous witnesses and evidences to prove his guilt.

ii. The appellant was apprehended with contraband by the policy party and he was arrested after the registration of his case vide Ruqa Ex. PF.

iii. The deposition of DW-1, Sarpanch Narang Singh is baseless. The appellant was arrested on 23rd September, 1994 but DW -1 appeared for the first time before the Sessions Court on 13th May, 1999, i.e. after five long years.

iv. Delay of 11 – 12 days in sending the sample for chemical examination is not enough to demolish the case of the prosecution. There is nothing on record to show that the sample parcel was tampered by the prosecution at any stage.

8. The trial court as also the High Court have meticulously examined and re-examined the entire evidence. On such close scrutiny, both the courts have concurrently found that the prosecution has proved its case beyond reasonable doubt. Undoubtedly the jurisdiction and the powers of this Court under

Article 136 are very wide. Even then, interference with concurrent findings of fact would be an exception and not the rule. On numerous occasions, this Court has emphasised that an appeal under Article 136 cannot be converted into a third appeal on facts. This Court in the case of *Ganga Kumar Srivastava Vs. State of Bihar*[1] discussed at length, the circumstances in which this Court may interfere with the concurrent finding of facts; which are as follows:

> "From the aforesaid series of decisions of this Court on the exercise of power of the Supreme Court under Article 136 of the Constitution following principles emerge:
>
> (i) The powers of this Court under Article 136 of the Constitution are very wide but in criminal appeals this Court does not interfere with the concurrent findings of fact save in exceptional circumstances.
>
> (ii) It is open to this Court to interfere with the findings of fact given by the High Court, if the High Court has acted perversely or otherwise improperly.
>
> (iii) It is open to this Court to invoke the power under Article 136 only in very exceptional circumstances as and when a question of law of general public importance arises or a decision shocks the conscience of the Court.
>
> (iv) When the evidence adduced by the prosecution fell short of the test of reliability and acceptability and as such it is highly unsafe to act upon it.
>
> (v) Where the appreciation of evidence and finding is vitiated by any error of law of procedure or found contrary to the principles of natural justice, errors of record and misreading of the evidence, or where the conclusions of the High Court are manifestly perverse and unsupportable from the evidence on record."

1. (2005) 6 SCC 211.

9. The first submission of Mr. Ujjal Singh, learned counsel, is that the appellant has been falsely implicated. We are unable to accept this submission. Merely because the prosecution has not examined any independent witness, would not necessarily lead to the conclusion that the appellant has been falsely implicated. It was clearly a case where the police personnel had noticed the odd behaviour of the appellant when he was walking towards them on a path which led to village Mirzapur. It was the display of hesitation by the appellant on sighting the police party that Satpal Singh (PW5) became suspicious. On seeing the police personnel, the appellant tried to run away from the scene. It was not a case where the prosecution has claimed that the appellant was apprehended on the basis of any earlier information having been given by any secret informer. It was also not a case of trap. In such circumstances, it would not be possible to hold that the appellant has been falsely implicated.

10. The prosecution has offered a plausible explanation with regard to non-joining of the independent witnesses. It was clearly stated by PW5 that the path on which the appellant was apprehended was not frequently used by the public. In fact, efforts were made to bring a member of Panchayat or Sarpanch of the village. However, the Head Constable Baldev Singh who had been sent, reported that none of the villagers were prepared to join as independent witnesses. This reluctance on the part of the villagers is neither strange nor unbelievable. Generally, people belonging to the same village would not unnecessarily want to create bad relations/enmity with any other villager. Especially when such a person would be feeling insecure, having been accused of committing a crime.

11. We also do not find any substance in the submission of Mr. Ujjal Singh that both the courts have ignored the plea of the appellant under Section 313 of the Cr.P.C. without any basis. The evidence of DW1, Narang Singh, upon which the appellant placed heavy reliance would not be of much assistance to the appellant. It is note worthy that even according

to the appellant the police had dug up his house and the courtyard on 10th September, 1994. According to the appellant, nothing incriminating was found. This was sought to be supported by the evidence given by DW1, the Ex–Sarpanch, Narang Singh. Both the courts below, in our opinion, have correctly concluded that such evidence cannot be believed as the witness DW1 seems to have appeared for the first time as a witness in court on 13th May, 1999. Prior to the appearance in court, this Ex- Sarpanch did not make any complaint in writing either to the police authorities or to the civil administration. Being the Ex- Sarpanch of the village, he can be expected to act with responsibility. There is no material to show that he made any efforts to complain about the high handed behaviour of the police. In our opinion, both the courts below have rightly discarded the evidence of DW1.

12.1. The next submission made by Mr. Ujjal Singh is that there has been non compliance of Section 50 of the NDPS Act, in that requisite option was not given to the appellant, as to, whether he wanted to be searched in the presence of a Gazetted Officer or a Magistrate. We are unable to accept the aforesaid submission. Inspector Ram Pal (PW4) has clearly stated that the option was duly given to the appellant. The appellant had, in fact, signed on the consent statement expressing his confidence to be searched in presence of the aforesaid witness. Similarly, Satpal Singh PW5 has also stated that before affecting the search, the accused/appellant was given the necessary option as to whether he wanted to be searched before a Gazetted Officer or a Magistrate. This witness also stated that the appellant reposed his confidence in Inspector Rampal. In such circumstances, it cannot be held that there was non compliance with Section 50 of the NDPS Act.

12.2. This apart, it is accepted that the narcotic/opium, i.e., 1 kg. and 750 grams was recovered from the bag (thaili) which was being carried by the appellant. In such

circumstances, Section 50 would not be applicable. The aforesaid Section can be invoked only in cases where the drug/narcotic/NDPS substance is recovered as a consequence of the body search of the accused. In case, the recovery of the narcotic is made from a container being carried by the individual, the provisions of Section 50 would not be attracted. This Court in the case of *Kalema Tumba Vs. State of Maharastra*[2] discussed the provisions pertaining to 'personal search' under Section 50 of the NDPS Act and held as follows;

> "……. if a person is carrying a bag or some other article with him and narcotic drug or psychotropic substance is found from it, it cannot be said that it was found from his person."

Similarly, in the case of *Megh Singh Vs. State of Punjab*[3], this Court observed that;

> "A bare reading of section 50 shows that it applies in case of personal search of a person. It does not extend to a search of a vehicle or container or a bag or premises."

The scope and ambit of Section 50 was also examined by this Court in the case of State of *Himachal Pradesh Vs. Pawan Kumar*[4]. In paragraphs 10 and 11, this Court observed as follows:-

> **"10.** We are not concerned here with the wide definition of the word "person", which in the legal world includes corporations, associations or body of individuals as factually in these type of cases search of their premises can be done and not of their person. Having regard to the scheme of the Act and the context in which it has been used in the section it naturally means a human being or a living individual unit and not an artificial person. The word

2. (1999) 8 SCC 257.
3. (2003) 8 SCC 666.
4. (2005) 4 SCC 350.

has to be understood in a broad common-sense manner and, therefore, not a naked or nude body of a human being but the manner in which a normal human being will move about in a civilised society. Therefore, the most appropriate meaning of the word "person" appears to be — "the body of a human being as presented to public view usually with its appropriate coverings and clothing". In a civilised society appropriate coverings and clothings are considered absolutely essential and no sane human being comes in the gaze of others without appropriate coverings and clothings. The appropriate coverings will include footwear also as normally it is considered an essential article to be worn while moving outside one's home. Such appropriate coverings or clothings or footwear, after being worn, move along with the human body without any appreciable or extra effort. Once worn, they would not normally get detached from the body of the human being unless some specific effort in that direction is made. For interpreting the provision, rare cases of some religious monks and sages, who, according to the tenets of their religious belief do not cover their body with clothings, are not to be taken notice of. Therefore, the word "person" would mean a human being with appropriate coverings and clothings and also footwear.

11. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on

the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act."

It has come in evidence that although the body search of the appellant was conducted but no recovery of any narcotic was made. The body search only led to the recovery of Rs.25/-from his pocket.

13. Mr. Ujjal Singh then submitted that the consent statement made by the appellant is inadmissible under Section 25 of the Indian Evidence Act, 1872. We are unable to accept this submission. The consent statement signed by the appellant has not been used as a confession, therefore, the bar under Section 25 would not be applicable. A statement in order to be treated as a confession must either admit in terms of an offence, or at any rate substantially all the facts which constitute the offence. No confession has been made in this case through the consent given by the appellant with regard to any of the ingredients of the offence with which he was subsequently charged.

14. Mr. Ujjal Singh then submitted that there was a delay of twelve days in sending the sample of narcotic for chemical examination. This submission, in our opinion, is without any factual basis. The trial court as well as the High Court, on examination of the entire material, concluded that there was sufficient independent evidence produced by the prosecution regarding the completion of link evidence. Therefore, the delay in sending the sample parcel to the office of Chemical Examiner pales into insignificance. We are of the considered opinion that mere delay in sending the sample of the narcotic to the office of the Chemical Examiner would not be sufficient to conclude that the sample has been tampered with. There is sufficient evidence to indicate that the delay, if any, was wholly

unintentional. This Court had occasion to deal with a similar issue, in the case of *Balbir Kaur Vs. State of Punjab*[5]. The Court made the following observations:

> "As far as delay in sending the samples is concerned, we find the said contention untenable in law. Reference in this regard may be made to the decision of this Court in Hardip Singh case[6] wherein there was a gap of 40 days between seizure and sending the sample to the chemical examiner. Despite the said fact the Court held that in view of cogent evidence that opium was seized from the appellant and the seals put on the sample were intact till it was handed over to the chemical examiner, delay itself is not fatal to the prosecution case."

The trial court as well as the High Court, on examination of the evidence on record, concluded that the case property was handed over by Ram Pal (PW4), Investigating Officer to the SHO Inspector Rachhpal Singh (PW3). This witness checked the case property and affixed his own seal bearing impression 'RS' on the case property as also on the sample impression of the seal. The case property was deposited with MHC Sudh Singh on the same day. Sudh Singh appeared as PW1 in court and tendered his affidavit Ex. PA to the effect that the case property including the sample parcel and the specimen impression of the seal, duly sealed and intact was deposited with him by Ram Pal, PW4, on 23rd September, 1994. He also stated that he handed over the sample parcel, duly sealed and sample impression of seal to Constable Chet Ram on 4th October, 1994 for depositing the same in the office of Chemical Examiner. It was further stated that none had tampered with the aforesaid case property and the seal which remained in his custody. He ultimately deposited the case property in the office of Chemical Examiner on the same day and tendered receipt. This apart, there is a report of the Chemical Examiner (Ex. PJ) which indicates that the seals were intact when the sample was

5. (2009) 15 SCC 795.

received and tallied with the sample impression of the seal. It is note worthy that such a report of the Chemical Examiner would be admissible under Section 293 of the Cr.P.C. Considering the aforesaid clear evidence, it cannot be said that there is any infirmity in the link evidence merely because there was a delay of few days in sending the sample to the office of the Chemical Examiner.

15. Having considered the entire material on the record, the trial court as well as the High Court have concurrently found the appellant guilty. We are unable to find any perversity or any miscarriage of justice in the findings so recorded. Finding no merit, we dismiss the appeal.

B.B.B. Appeal dismissed.

NEHA ARUN JUGADAR & ANR.

v.

KUMARI PALAK DIWAN JI

(Transfer Petition (Civil.) No(s). 182 of 2011

FEBRUARY 14, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Code of Civil Procedure, 1908:

Transfer petition – Plea for transfer of motor accident claim case pending before MACT Court, UP to competent court at Pune on the ground that the U.P. Court has no jurisdiction in the matter – Held: An order of transfer of a case can be passed where both the courts, namely, the transferor court as well as the transferee court, have jurisdiction to hear the case and the party seeking transfer of the case alleges that the transferee court would be more convenient because the witnesses are available there or for some other reason it will be convenient for the parties to have the case heard by the transferee court – In a case where a party alleges that the court where the case is pending has no jurisdiction, he should apply to that court for dismissing it on this ground – There is no question of transfer of such a case – Therefore, the petitioners may apply to the MACT Court, U.P. for dismissal of the case pending before it on the ground that there is no jurisdiction in the court to hear the case, and if they do so, the court concerned to decide the application as a preliminary ground before proceeding to hear the case on merits – Jurisdiction.

CIVIL ORIGINAL JURISDICTION : Transfer Petition (Civil) No. 182 of 2011.

Under Section 25 of the Code of Civil Procedure, 1908.

Vishwajit Singh, Vijay Kumar, Maheshwari, Pankay Singh

Bisht for the petitioners.

The following order of the Court was delivered

ORDER

Heard learned counsel for the petitioners.

This Transfer Petition has been filed to transfer case being MACT No. 138 of 2009 pending at the District Judge (MACT Court, Gautam Budh Nagar, U.P.) to the competent Court at Pune, Maharashtra. The petitioners allege in the petition that the MACT Court, Gautam Budh Nagar, U.P. has no jurisdiction in the matter.

An order of transfer of a case can be passed where both the courts, namely, the transferor court as well as the transferee court, have jurisdiction to hear the case and the party seeking transfer of the case alleges that the transferee court would be more convenient because the witnesses are available there or for some other reason it will be convenient for the parties to have the case heard by the transferee court. There is no question of transfer of a case which has been filed in a court which has no jurisdiction at all to hear it.

In a case where a party alleges that the court where the case is pending has no jurisdiction, he should apply to that court for dismissing it on this ground. There is no question of transfer of such a case.

Hence, the petitioners herein may apply to the District Judge (MACT Court, Gautam Budh Nagar, U.P.) for dismissal of the case pending before it on the ground that there is no jurisdiction in the Court to hear the case, and if they do so, the Court concerned will decide the application as a preliminary ground before proceeding to hear the case on merits.

With these observations, the transfer petition is dismissed.

D.G. Transfer petiton dismissed.

S.K.M. HAIDER
v.
UNION OF INDIA & ORS.
(Civil Appeal No. 1630 of 2011)

FEBRUARY 14, 2011

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

SERVICE LAW :

INDIAN RAILWAY MEDICAL MANUAL.

Para 510, Annexure 1V –Categorisation of posts for the purpose of vision test –Post of Ticket Collector categorized as Class B-2 i.e. 'in the interest of employee himself for his fellow worker or both' –Held : There seems to be no rational basis in relation to the object set out in para 510 of categorizing post of Ticket Collector under Class B-2 – Categorisation of posts for the purpose of vision tests must have nexus with the object set out in Para 510 –Having regard to the objective of division of groups/classes for the purpose of vision test, the post of Ticket Collectors cannot be held to be covered by Class B-2, but rather will be covered by Class C-2 –Employee could not have been denied promotion to the post of Ticket Collector as he had passed written test and viva-voce and was provisionally selected for the post of Ticket Collector and had been declared medically fit in C-2 – Judgments and orders passed by High Court and the Tribunal are set aside –Employers would consider employee's claim for promotion to the post of Ticket Collector on the basis of medical fitness in Class C-2 –Constitution of India, 1950 – Articles 14 and 16.

The appellant joined the service in Northern Railway on a Group 'D' post of Luggage Porter in 1991. The next promotion from Luggage Porter was to the post of Ticket

Collector. The appellant qualified the written test and viva-voce and his name was placed on the list of candidates found suitable for the post of Ticket Collector. However, he was not declared medically fit in Class B-2. His representation before the Department, application before the Central Administrative Tribunal and the writ petition before the High Court were all dismissed.

In the instant appeal filed by the appellant, the question for consideration before the Court was : "whether the appellant has been rightly denied promotion to the post of Ticket Collector (TCR), Group 'C' post, on account of his having not been declared medically fit in Class B-2 under Para 510 of Indian Railway Medical Manual".

Allowing the appeal, the Court

HELD : 1.1 In Para 510 of Indian Railway Medical Manual, non-Gazetted Railway services have been divided into three broad groups, namely, groups 'A', 'B' and 'C' for the purpose of vision tests. This division appears to have been made keeping in mind the objective, viz; 'in the interest of public safety'; 'in the interest of the employee himself or his fellow workers or both' and 'in the interest of administration only'. The classification of different staff in various 'classes' is apparently founded to achieve the above objective. The post of Ticket Collector is categorized in Class B-2 under the head 'station supervisory and artisan staff'. [para 11] [916-H; 917-A-C]

1.2 Though post of Ticket Collector is categorised under Class B-2 in Annexure IV, but while doing so the underlying object of division of staff into three broad groups A, B and C for vision tests of candidates and of serving Railway employees in non-Gazetted Railway services seems to have been overlooked. Broadly, Class

B-2 covers a certain staff in workshops and engine rooms engaged on duties. It has been so done because failing eyesight may endanger themselves or other employees from moving parts of the machinery and crane drivers on open line. This is in consonance with the objective of group B viz; 'in the interest of the employee himself or his fellow workers or both'. [para 12] [917-D-E]

1.3 Insofar as Ticket Collectors are concerned, vision tests for them are not required 'in the interest of employee himself or his fellow workers or both' as contemplated in group B, but it is required 'in the interest of administration only' – the objective contemplated in group C. In this view of the matter, there seems to be no rational basis, in relation to the object set out in Para 510 of IRMM, of categorizing the post of Ticket Collectors under Class B-2 in Annexure IV. Having regard to the objective of division of groups/ classes for the purpose of vision tests under Para 510 of IRMM, the post of Ticket Collectors can not be held to be covered by Class B-2 but rather will be covered by Class C-2. [para 12] [917-F-G; 918-A]

1.4 However, it is for the respondents to have a fresh look insofar as categorisation of posts pertaining to non-Gazetted Railway services in Annexure IV is concerned. Suffice it to say that categorization of posts for the purpose of vision tests must have nexus with the object set out in Para 510. Any inconsistency in categorization of Railway posts in Annexure IV, must not operate against the appellant in getting promotion to the post of Ticket Collector. [para 12] [917-H; 918-B]

1.5 The appellant could not have been denied promotion to the post of Ticket Collector as he had passed written test and viva voce and was provisionally selected for the post of Ticket Collector and had been declared medically fit in Class C-2. [para 13] [918-C]

1.6 The judgment and order passed by the High Court and that of the Tribunal are set aside. The respondents shall consider the appellant's claim for promotion to the post of Ticket Collector on the basis of his medical fitness in Class C-2 and his empanelment in the provisional list. [para 14] [918-D-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1630 of 2011.

From the Judgment & Order dated 21.03.2009 of the High Court of Punjba & Haryana at Chandigarh in Civil Writ Petition No. 12114 of 2006.

P.S. Patwalia, Jagjit Chhabra, Aman Preet Singh Rahi, Tushar Bakshi for the Appellant.

A. Mariar Putham, Subhash Kaushik, Harish Bagchi, Arvind Kumar Sharma for the Respondents.

The Judgment of the Court was delivered by

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

2. A short question that arises for consideration in this appeal, by special leave, is as to whether the appellant has been rightly denied promotion to the post of Ticket Collector (TCR), Group 'C' post, on account of his having not been declared medically fit in Class B-2 under Para 510 of Indian Railway Medical Manual (for short, 'IRMM').

3. The appellant—S.K.M. Haider—joined the service in Northern Railway as Luggage Porter, Group 'D' post, on December 3, 1991. The next channel of promotion from Luggage Porter is to the post of Ticket Collector. Having acquired eligibility for promotion to the post of Ticket Collector, the appellant appeared in the written test held by the respondents on January 8, 2003. He was successful in the

written test and was called for viva-voce by the Interview Committee on February 25, 2003. On June 24, 2003, a provisional list of the candidates who were found suitable for the post of Ticket Collector on the basis of written test and viva voce was prepared in which the appellant's name was placed at Serial No. 25.

4. On July 3, 2003, the appellant appeared before the Medical Superintendent, Northern Railway, DRM Office, Ambala Cantt. (Respondent No. 3) for medical examination but he was not declared fit in Class B-2.

5. The appellant challenged the medical report dated July 3, 2003 by filing an appeal before the Chief Medical Director, Northern Railway. He was asked to appear before the Medical Board on September 15, 2004. The Medical Board found the appellant fit in Class C-2 with glasses. Based on the opinion of the Medical Board, the appeal preferred by the appellant challenging the medical report dated July 3, 2003 was rejected.

6. The appellant then got himself examined at All India Institute of Medical Sciences, New Delhi on November 3, 2004 and it is his case that he was found medically fit in Class B-2.

7. The appellant aggrieved by his non-promotion to the post of Ticket Collector approached the Central Administrative Tribunal, Chandigarh Bench (for short, 'the Tribunal'). The Tribunal, on February 8, 2006, after hearing the counsel for the appellant and the counsel for respondents, rejected the original application filed by the appellant.

8. Being not satisfied with the order of the Tribunal, the appellant moved the High Court of Punjab and Haryana for redressal of his grievance but there, too, he was unsuccessful and the writ petition filed by him was dismissed on March 21, 2009.

9. Para 510 in Chapter V of the IRMM deals with

classification of staff for the purpose of vision tests of candidates and of serving Railway employees. It reads as follows :

"510. Classification of staff:-

(1) for the purpose of visual acuity and general physical examination of candidates and of serving Railway employees, the non-Gazetted Railway services are divided into the following broad groups and classes. *The detailed categories of Railway posts under each of the classes/ groups mentioned below are given in Annexure IV to this chapter*:-

Groups		***Classes***	
A	Vision tests required in the interest of public safety	A-1	Foot plate staff, Rail car drivers and Navigating staff (For foot plate staff see para 520)
		A-2.	Other running staff, Other shunting staff, Point lockers, Station masters, and other staff in operative control of signals.
		A-3	Loco, signal and Transportation Inspectors, staff authroised to work trolleys, Yard supervisory staff, Road motor drivers and gate keepers on level crossings.
B.	Vision tests required in the interest of the employee himself or his	B-1	Such station and yard non supervisory, shed and other staff, excluding shed

fellow workers or both		man, as are engaged on duties where failing eye sight may endanger themselves or other employees from moving vehicles, Road Motor drivers, permanent Way Mistries, Gang mates, Keymen and staff of the Railway Protection Force.
	B-2	Certain staff in workshops and engine rooms engaged on duties when failing eye sight may endanger themselves or other employees from moving parts of the machinery and crane drivers on open line.
C Vision tests required in the interest of administration only	C-1	Other workshop and engine room staff, shed stockers and other staff in whom a higher standard of vision than is required in clerical room staff, shed stockers and kindred occupation is necessary for reasons of efficiency and others not coming in Group A or B
	C-2	Staff in clerical occupations not included in A, B and C-1

(2) As the foot-plate staff have to pay sustained attention, it is necessary to have separate standards for these staff. These are enumerated in para 520 below."

10. The standards of visual acuity requirements are set out in Para 512 of IRMM. The relevant extract of that provision is as follows:

"Class	Distant Vision		Near Vision	
A-1	x x	xx	xx	The combined vision with or without glasses should be the ability to read ordinary print. Where reading or close work is required, the combined near vision should be Sn. 0.6
A-2	x x	xx	xx	
A-3	x x	xx	xx	
B-1	6/12, 6/24 with or without glasses. Power of lenses not to exceed 8 D.			As above
B-2	As above			As above
C-1	6/18, nil or combined 6/18 with or without glasses.			Sn. 0.6 with or without glasses where reading or close work is required.
C-2	6/24, nil or 6/24 combined with or without glasses".			As above.

11. It would be seen from Para 510 of IRMM that non-Gazetted Railway services have been divided into three broad groups, namely, groups 'A', 'B' and 'C' for the purpose of vision tests. These three groups have been divided into different classes. Group A has been divided in Classes A-1, A-2 and

A-3 while groups B and C have been divided in two Classes each, viz; B-1, B-2 and C-1, C-2 respectively. The division of groups, A, B and C for vision tests appears to have been made keeping in mind the objective, viz; 'in the interest of public safety'; 'in the interest of the employee himself or his fellow workers or both' and 'in the interest of administration only'. The classification of different staff in various 'classes' is apparently founded to achieve the above objective. The detailed categories of Railway posts under each of the classes/groups are given in Annexure IV appended to Chapter V. Insofar as post of Ticket Collector is concerned, it is categorized in Class B-2 under the head 'station supervisory and artisan staff'.

12. Though post of Ticket Collector is categorised in Annexure IV in Class B-2 but while doing so the underlying object of division of staff into three broad groups A, B and C for vision tests of candidates and of serving Railway employees in non-Gazetted Railway services seems to have been overlooked. Broadly, Class B-2 covers a certain staff in workshops and engine rooms engaged on duties. It has been so done because failing eyesight may endanger themselves or other employees from moving parts of the machinery and crane drivers on open line. This is in consonance with the objective of group B viz; 'in the interest of the employee himself or his fellow workers or both'. Insofar as Ticket Collectors are concerned, vision tests for them are not required 'in the interest of employee himself or his fellow workers or both' as contemplated in group B but it is required in the interest of administration only – the objective contemplated in group C. In this view of the matter, there seems to be no rational basis, in relation to the object set out in Para 510 of IRMM, of categorizing the post of Ticket Collectors under Class B-2 in Annexure IV. However, it is for the respondents to have a fresh look insofar as categorisation of posts pertaining to non-Gazetted Railway services in Annexure IV is concerned. Suffice it to say that categorization of posts for the purpose of vision tests must have nexus with the object set out in Para 510.

Having regard to the objective of division of groups/ classes for the purpose of vision tests under Para 510 of IRMM, the post of Ticket Collectors can not be held to be covered by Class B-2 but rather will be covered by Class C-2. Any inconsistency in categorization of Railway posts in Annexure IV, in our view, must not operate against the appellant in getting promotion to the post of Ticket Collector.

13. We hold, as it must be held, that the appellant could not have been denied promotion to the post of Ticket Collector as he had passed written test and viva voce and was provisionally selected for the post of Ticket Collector and had been declared medically fit in Class C-2.

14. Consequently, appeal is allowed; judgment and order passed by the Punjab and Haryana High Court on March 21, 2009 and the order dated February 8, 2006 passed by the Central Administration Tribunal, Chandigarh are set aside. The respondents shall now consider the appellant's claim for promotion to the post of Ticket Collector on the basis of his medical fitness in Class C-2 and his empanelment in the provisional list dated June 24, 2003 and appropriate order in this regard will be issued within two months from today. The parties shall bear their own costs.

R.P. Appeal allowed.

SENIOR LAW MANAGER, INDIAN OIL CORPORATION LTD. AND ANR.
v.
GURU SHAKTI SINGH AND ANR.
(Civil Appeal No. 1649 of 2011)

FEBRUARY 14, 2011

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

Government contract: LPG dealership – Selection process – Propriety of – Grant of dealership to the first respondent by appellant-company – Second candidate in the list of eligible candidates filed complaint alleging illegalities and irregularities in awarding marks by the selection committee – Thereafter the complainant died – Complaint investigated by a committee of senior officers – The investigation revealed irregularities in the selection process – Cancellation of entire process and decision to re-interview the candidates – Writ petition by first respondent – Allowed by High Court – On appeal, held: High Court erroneously proceeded on the basis that even though the selection process was illegal in as much as, as the complainant had died, the irregularities were no longer relevant and the merit panel should be accepted – High Court failed to deal with the larger issue as to whether the Selection Committee had acted fairly and properly in awarding the marks and preparing the merit panel – If the finding was that the marks were wrongly assigned to the complainant and consequently, first respondent had benefited, it would not follow that on death of the complainant, the irregularity in assigning marks could be brushed aside or ignored – In such selection, any illegality or material irregularity in assigning marks in regard to any person with the intention of favouring some one or excluding some one, vitiates the entire selection process – Manner of assigning marks showed a clear intention to favour the first

respondent at the cost of the other applicants – High Court having recorded a finding that the appellant was satisfied about the illegality committed by the selection committee, ought to have rejected the writ petition, as the decision of the appellants to scrap the selection was reasonable and not arbitrary – Constitution of India, 1950 – Article 14.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1649 of 2011.

From the Judgment & Order dated 06.02.2007 of the High Court of Judicature at Allahabad Bench at Lucknow in WP No. 4491 of 2009.

H.K. Puri for the Appellants.

P.S. Narasimha and Arvind Verma, C.D. Singh Sunny Choudhary, Nishi and Arushi for the Respondents.

The Order of the Court was delivered by

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

2. The appellants (Indian Oil Corporation Ltd.), issued an advertisement inviting applications for grant of LPG distributorship for Sohawal, District Faizabad, Uttar Pradesh. The Dealer Selection Committee constituted by the appellants interviewed the eligible candidates and declared a panel of three candidates, on 30.3.2005, in the following order of merit: (1) Guru Shakti Singh (first respondent); (2) Sardar Mahinder Singh; and (3) Lal Rajendra Nath Singh. As per the said selection first respondent had to be granted the LPG distributorship.

2. The second candidate in the list (Sardar Mahinder Singh) filed a complaint with the appellants, alleging illegalities and irregularities in awarding marks by the Selection Committee, resulting in the first respondent being placed as the first in the merit panel. Shortly thereafter, the said Sardar

Mahinder Singh filed a writ petition challenging the selection process and the panel of candidates. The said writ petition filed on 4.5.2005, was withdrawn on 18.5.2005. Sometime thereafter the said Sardar Mahinder Singh died.

3. The appellants thereafter cancelled the entire selection process on 27.10.2005, and took a decision for re-interview the candidates. The first respondent filed a writ petition for quashing the said order dated 27.10.2005 and seeking a direction to the appellant to issue him the letter of intent for Distributorship as he was the first in the merit panel. The said writ petition was allowed by the impugned order dated 6.2.2007 holding that there should be no re-interviews and the appellant should proceed with the selection as already conducted in accordance with law. The effect of the order was that the first respondent should be granted the distributorship. The said order is challenged in this appeal by special leave.

4. It is not disputed by the first respondent that the mere fact of a merit panel being prepared with him in the first place does not entitle him to be appointed as a distributor. The case of the first respondent is that as the second respondent who challenged the selection as per the merit panel withdrew the writ petition and none else had questioned the merit panel, the said merit panel continued to be in force and was valid; and therefore, there was no need for re-interviews and he ought to have been granted the distributorship. But the issue is not whether there was a challenge, but whether there was any irregularity in the selection process, and as a consequence whether the decision of appellants to have fresh interviews is open to challenge.

5. Sardar Mahinder Singh filed a complaint alleging that he had been awarded lesser marks and first respondent had been awarded more marks. His grievances in regard to marks were as under :

(a) Though he owned a land and the respondent did not

own any land on the date of interview, yet, both were given equal 18 marks. He should have been awarded full marks of 25.

(b) He had not been given proper marks in respect of the parameter "capability to arrange finance". In spite of providing requisite financial details, he was awarded only 7 out of 35.

(c) He had been given lesser marks of 2 out of 5 under the parameter "business ability/acumen" though he was doing business for last 20 years, for which records were placed.

6. The appellant got the said complaint investigated by a committee of senior officers. The investigation revealed that under the evaluation parameter "capability to provide infrastructure" Sardar Mahinder Singh had been awarded only 18 marks whereas he ought to have been awarded 25 marks as per the company policy as he had submitted the documents in support of ownership of land, along with his application. It was also found that under the evaluation parameter "capability to provide finance : Banker's/Financial Institution's certificate for loan", Sardar Mahinder Singh had been awarded zero marks out of 7 marks even though he had submitted a certificate dated 20.2.2004 from Bank of Baroda for credit-worthiness along with his application and that he deserved marks under that head also.

7. In view of the said findings of the investigation, the second appellant (General Manager, IOC, UP State Office) took a decision that the selection process violated the guidelines and was vitiated. As a consequence, he directed that the merit panel prepared by the Selection Committee should be cancelled and ordered a re-interview. He also directed that disciplinary action should be taken against the Selection Committee Members. The above factual background leading to the direction for re-interview was completely overlooked by the High Court.

8. The High Court allowed the writ petition filed by the

respondents on a rather strange reasoning. We extract below the relevant portion of the impugned order :

> "As already observed, since the Indian Oil Corporation after being satisfied about the illegality committed by the Committee in awarding marks to a particular candidate (since deceased), decided to re-interview all the candidates, but before the said exercise could be started, the said person died as such no relief can now be granted to him. Rest of candidates have not raised any grievance about their failure in selection, therefore, there is no question for reconsidering their case."

The High Court appears to have proceeded on the basis that even though the selection process was illegal, as the complainant (Sardar Mahinder Singh), who had alleged the irregularities had died, the irregularities were no longer relevant and would no longer exist and the merit panel should be accepted. Unfortunately, the High Court failed to deal with the larger issue as to whether the Selection Committee had acted fairly and properly in awarding the marks and preparing the merit panel. If the finding was that the marks were wrongly assigned to the complainant and consequently, first respondent had benefited, it does not follow that when the complainant dies, the irregularity in assigning marks could be brushed aside or ignored. In such selections, any illegality or material irregularity in assigning marks in regard to any person with the intention of favouring some one or excluding some one, vitiates the entire selection process. Such a selection process cannot be saved by holding that the person in regard to whom lesser marks were given had died or failed to pursue his remedy. Once the appellants took cognizance of the illegality in the selection process, the withdrawal of writ petition on death of the aggrieved complainant lost significance. The issue, as already noticed, is whether the selection process was fair and proper and whether the appellant acted arbitrarily or unreasonably in taking a decision to scrap the selection

process and re-interview the candidates.

9. Assigning of lesser marks to Sardar Mahinder Singh not only denied him the first place in the panel, but also unjustly and undeservedly gave the first respondent, the first place in the panel. The manner of assigning marks showed a clear intention to favour the first respondent at the cost of the other applicants. It is this finding that persuaded the General Manager of IOC to scrap the selection. The High Court having recorded a finding that the appellant was satisfied about the illegality committed by the selection committee, ought to have rejected the writ petition, as the decision of the appellants to scrap the selection was reasonable and not arbitrary.

10. As a result, the appeal is allowed, the order of the High Court is set aside and the writ petition filed by the first respondent is dismissed. The appellants are permitted to deal with the LPG distributorship as per its policy. It can either re-interview the candidates or at liberty to deal with the matter in accordance with the existing policy.

D.G. Appeal allowed.

BUDHADEV KARMASKAR
v.
STATE OF WEST BENGAL
(Criminal Appeal No. 135 of 2010)

FEBRUARY 14, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Penal Code, 1860 – s. 302 – Brutal murder of a sex worker – Conviction and sentence u/s. 302, by the courts below – Justification of – Held: Justified – Injuries show brutality of the crime – Head of the deceased was battered again and again in a hideous and barbaric manner – Testimony of the eye-witnesses corroborates the medical evidence – Accused having committed murder in a brutal manner of a helpless woman, deserves no sympathy – Thus, order of conviction upheld – Crime against women.

Constitution of India, 1950 – Article 21 – Sex workers/ prostitutes – Right to live with dignity under Article 21 – Held: Sex workers/prostitutes are entitled to live with dignity under Article 21 – Since they are human beings, their problems need to be addressed – No one has right to assault or murder them – Direction to the Central and the State Governments to prepare schemes for giving technical/vocational training to sex workers and sexually abused women in all cities in India.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 135 of 2010.

From the Judgment & Order dated 25.7.2007 of the High Court at Calcutta in C.R.A. No. 487 of 2004.

Lajja Ram for the Appellant.

T.C. Sharma, Neelam Sharma for the Respondent.

The following Order of the Court was delivered

O R D E R

Heard learned counsel for the appellant.

This Appeal has been filed against the impugned judgment and order dated 25th July, 2007 passed by the High Court of Calcutta in C.R.A. No. 487 of 2004.

The facts have been set out in the impugned judgment and hence we are not repeating the same here except wherever necessary.

This is a case of brutal murder of a sex worker. Sex workers are also human beings and no one has a right to assault or murder them. A person becomes a prostitute not because she enjoys it but because of poverty. Society must have sympathy towards the sex workers and must not look down upon them. They are also entitled to a life of dignity in view of Article 21 of the Constitution.

In the novels and stories of the great Bengali Writer Sharat Chand Chattopadhyaya, many prostitutes have been shown to be women of very high character, e.g., Rajyalakshmi in 'Shrikant', Chandramukhi in 'Devdas' etc. The plight of prostitutes has been depicted by the great Urdu poet Sahil Ludhianvi in his poem 'Chakle' which has been sung in the Hindi film Pyasa "Jineh Naaz Hai Hind Per wo kahan hain" (simplified version of the verse 'Sana Khwan- e-taqdees-e-Mashrik Kahan Hain').

We may also refer to the character Sonya Marmelodov in Dostoyevsky's famous novel 'Crime and Punishment'. Sonya is depicted as a girl who sacrifices her body to earn some bread for her impoverished family.

Reference may also be made to Amrapali, who was a contemporary of Lord Buddha.

In the present case, the incident happened on 17th September, 1999 at about 9.15 p.m. The deceased Chayay Rani Pal alias Buri was living in a red light area and was aresident of Room No.8 of Premises No.19, Jogen Dutta Lane in Calcutta. She was evidently a sex worker. The appellant Budhadev kicked her with fists and legs, and she fell down on the floor. The appellant then caught her by her hair and banged her head against the floor and the wall several times which left the victim bleeding from her ear, nose and head. The incident was witnessed by four persons, Pw2-Abida, PW4- Maya, PW7-Asha and PW8-Parvati.

PW2-Abida has deposed that she saw the appellant-accused catching the victim by her hair and banging her head against the wall. The victim was profusely bleeding through her nose and mouth. On seeing this, Abida started shouting and then the accused pushed her and went down and fled away. PW8-Parvati saw the victim being mercilessly beaten by the accused-appellant, and the same is the evidence of PW7-Asha. In the post mortem, as many as 11 injuries on the body of the victim were found, eight of which were on various parts of the face and forehead.

The police was informed about the incident over the telephone as is evident from the testimony of PW2 Abida. After the police arrived on the spot, sample of the blood spilled from the body of the victim was collected and photographs taken. The victim was brought by Asha Khatoon and others to the hospital where she was found 'dead on arrival'. Blood was oozing out from her ear and nostril. There was swelling on the left eyeball and left eyebrow. Thus, the medical evidence corroborates the ocular testimony.

PW10-Dr. Amitava Das, the Medical Officer who held the post mortem examination of the dead body of deceased Chhaya Rani Pal found the following injuries on her person:

(1) Abrasion 1" x ½ " over the nose just below the nasal bridge.

(2) Abrasion 1 " x ½ " over left side forehead ½ " above left eyebrow 3" left to midline.

(3) Abrasion ½ " x ½ " over left side of forehead just over the left eye brow 2" left mid line.

(4) Bruise 2" x 1" over left upper eye lid.

(5) Bruise 2" x 1" over anterior aspect of mid part of nose.

(6) Abrasion ½ " x ¼ " over right side of forehead 1" above right eye brow 2" right to mid line.

(7) Abrasion 2" x 1" over right side of face just below the right eye and just right to outer canthus of right eye.

(8) Lacerated wound ½ " x ¼ " x scalp over left partial region 4 ½ " left to anterior mid line and 2" below left parietal eminence.

(9) Abrasion 3" x ½ " over posteriorateral aspect of right forehead 1" below right elbow.

(10) Abrasion 1" x ½ " over anterior medial aspect of lower part of right forearm 1" above right wrist.

(11) Abrasion 4" x 3" over upper part of posterior aspect of right thigh 7" above right knee joint.

On dissection, the Doctor found the following injuries:

(1) Heamatoma 3 ½ " x 2" in the scalp tissue over right frontal region.

(2) Heamatoma 3 ½ " x 2" in the scalp tissue over left frontal region.

(3) Haematoma 3 ½ " x ½ " in the scalp tissue over left partial region.

(4) Fissured fracture 3" long more or loss longitudinal over left parietal temporal bone.

(5) Haematoma 2" x 1" in the scalp tissue over right parietal region.

(6) Subdural hemorrhage present involving the right parietal and temporal lobe.

(7) Lacerated wound ½ " (half) x ¼ " x substance over right parietal lobe of brain substance. The abrasions were non-scabbed and red in colour. The bruises were dark red in colour. The margins of the lacerated wounds were irregular and red in colour. All the injuries showed signs of vital reactions. No other injury except those described could be detected even on careful dissection and examination.

PW10 Dr. Amitava Das, Medical Officer of Mauza Burdwan Medical College, opined that the death was due to the effect of the injuries as noted anti-mortem in nature; that all the injuries as noted in the post mortem examination report might be caused if a person pushed against the wall and it may be homicidal in nature."

The injuries above-mentioned show the brutality of the crime. The head of the deceased was battered again and again in a hideous and barbaric manner.

The trial Court has rightly convicted the appellant under Section 302 IPC and sentenced him to life imprisonment and the High Court has not committed any error in upholding the conviction and sentence imposed by the trial Court.

We find no reason to disbelieve the testimony of the eye

witnesses in this case, namely, PW2, PW7 and PW8 which corroborates the medical evidence. The appellant-accused has committed murder in a brutal manner of a helpless women and deserves no sympathy from this Court.

For the reasons given above, this appeal is dismissed.

Although we have dismissed this Appeal, we strongly feel that the Central and the State Governments through Social Welfare Boards should prepare schemes for rehabilitation all over the country for physically and sexually abused women commonly known as prostitutes as we are of the view that the prostitutes also have a right to live with dignity under Article 21 of the Constitution of India since they are also human beings and their problems also need to be addressed.

As already observed by us, a woman is compelled to indulge in prostitution not for pleasure but because of abject poverty. If such a woman is granted opportunity to avail some technical or vocational training, she would be able to earn her livelihood by such vocational training and skill instead of by selling her body.

Hence, we direct the Central and the State Governments to prepare schemes for giving technical/vocational training to sex workers and sexually abused women in all cities in India. The schemes should mention in detail who will give the technical/vocational training and in what manner they can be rehabilitated and settled by offering them employment. For instance, if a technical training is for some craft like sewing garments, etc. then some arrangements should also be made for providing a market for such garments, otherwise they will remain unsold and unused, and consequently the women will not be able to feed herself.

We propose to have the response of the Centre and the States in this regard and hence the case shall be listed before us again on 04.05.2011 to be taken up as first case on which

date the first compliance report indicating therein the first steps taken by the Central and the State Governments in this regard shall be submitted.

Issue notice to the Central Government and all the State Governments which will also file responses by the date fixed for hearing.

N.J. Appeal adjourned.

STATE OF HARYANA & OTHERS
v.
PRADUMAN SINGH (D) BY LRS
(CIVIL APPEAL NO. 356 OF 2007)

FEBRUARY 15, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

DISPLACED PERSONS (COMPENSATION AND REHABLITATION) ACT, 1954:

s.20(1) (c) – Allotment of land to persons displaced as a result of partition of the country – Letter dated 21.6.1996 by State Government putting a stop to such allotments – Writ petition before High Court challenging the letter and for a direction for allotment of land in lieu of that left in Pakistan – Direction by the High Court to allot 20 acres of land and deliver possession thereof to writ petitioner – Held: High Court could not have ordered for allotment of land without even directing an inquiry into the claim – Besides, the plea was a pure question of fact which could not have been entertained straightway by the High Court – Further, High Court could not have ordered allotment and possession of land without quashing and setting aside the letter dated 21.6.1996 and without giving reasons for the same – If the writ petitioner had already been allotted land in 1952, this aspect was also required to be examined before any order was passed in favour of writ petitioner – Order of High Court set aside – Constitution of India 1950 – Article 226.

A writ petition was filed before the High Court by the predecessor-in- interest of respondents, seeking to quash the letter dated 21.6.1996 issued by the Rehabilitation Department of the State Government containing a direction to stop allotment of land, and to direct the Tehsildar (Sales)-cum-Managing Officer to allot

him land in lieu of the land left by him in Pakistan. The High Court directed the State authorities to allot the writ-petitioner 20 standard acres of land and to deliver him possession of the same.

Allowing the appeal filed by the State Government, the Court

HELD: 1.1 The Division Bench of the High Court could not have ordered for allotment and delivery of possession of 20 standard acres of land in lieu of the land, which the respondents claimed by way of rehabilitation, without even directing an enquiry as to whether the predecessor-in-interest of the respondents in fact, had left 20 acres of land in Pakistan or not when they migrated to India. However, this plea was a pure question of fact which could not have been entertained straightway by the High Court, nevertheless, when the petitioner himself had filed a writ petition in the High Court for quashing of the letter of instructions dated 21.6.1996 issued by appellant No.2 by which the allotment of land for rehabilitation had been ordered to be stopped forthwith, the order for allotment and delivery of possession could not have been passed legally by the High Court without even quashing and setting aside the letter dated 21.6.1996. [Para 5] [936-E-H]

1.2 It may be that the letter issued either by the State Government or by the Central Government cannot be given effect to in case it is contrary to the provisions of a statute, yet, consequential relief could not have been granted by the High Court to the writ petitioner/ respondents without even quashing the impugned letter and recording a finding and giving out reasons as to why the letter should not have been given effect to. However, without doing so, the consequential relief of allotment of land and the delivery of possession has been ordered straightway which, smacks of arbitrariness. [para 7] [937-

C-E]

2.1 If, however, the respondents have any other alternative remedy or forum to claim allotment of the land, they obviously will have to first of all get the letter dated 21-6-996 quashed and set it aside. Unless the respondents succeed in doing so, no allotment of the land could have been made specially without any enquiry as to whether the predecessor-in-interest had left any land at all in Pakistan when he migrated to India. Besides, the Court has been informed that the writ petitioner, the predecessor-in-interest of the respondents, had already been allotted land under the rehabilitation scheme way back in the year 1952 and, therefore, claim for allotment for the second time should not have been allowed by the High Court contrary to the government instructions. This aspect was also required to be examined and enquired before any order was passed in favour of the respondents-claimants. [Para 7 and 8] [937-F-G-H; 938-A-B]

2.2 The impugned judgment of the High Court directing the State of Haryana to make allotment of the land in favour of the writ petitioner as also delivery of possession is set aside. [para 9] [938-C-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 356 of 2007.

From the Judgment & Order dated 13.07.2000 of the High Court of Punjab & Haryana at Chandigarh in C.W.P. No. 14050 of 1998.

Anoop G. Chaudhari, Manjit Singh, AAG, Harikesh Singh (for Kamal Mohan Gupta) for the Appellants.

Jasbir Singh Malik, Ekta Kadian, Devender Kumar Sharma (for S.K. Sabharwal) Meenakshi Grover, Sanjeeb Panigrahi, Siddhartha Chowdhury for the Respondents.

The Judgment of the Court was delivered by

GYAN SUDHA MISRA, J. 1. This Appeal has been preferred by the State of Haryana against the judgment and order dated 13th July, 2000 passed by a Division Bench of the High Court in Civil Writ Petition No. 14050 of 1998, whereby the writ petition filed by the predecessor-in-interest of the respondents herein was disposed of by directing the respondent-State-appellant herein, to allot land to the extent of 20 standard acres under the rehabilitation scheme for displaced persons who claim to have been displaced after the partition of this country in the year 1947.

2. The predecessor-in-interest of the respondents herein had filed a writ petition in the High Court of Punjab & Haryana at Chandigarh praying to issue a writ of certiorari for quashing the impugned letter dated 21.6.1996 (Annexure P/4 to the writ petition) issued by the respondent No.2/appellant herein, i.e.,Joint Secretary to Government of Haryana, Rehabilitation Department, Chandigarh which contained a decision/instruction of the State Government to the effect that the allotment of land for rehabilitation against such claim of land, should be stopped forthwith. The writ petitioner had further sought a writ of mandamus for a direction to the respondent No.3/appellant herein, i.e., Tehsildar (Sales)-cum-Managing Officer, Karnal to make allotment of land in lieu of the land left by the respondent-writ petitioner in Pakistan in exercise of his powers under Section 20 (1)) of the Displaced Persons (Compensation & Rehabilitation) Act, 1954 (for short 'the Act') and the rules made thereunder and to confer propriety rights upon the petitioner/ respondents herein in respect of the land.

3. The learned Judges of the Division Bench, after hearing the parties concerned, were pleased to practically allow the writ petition with costs of rupees five thousand, although the operative portion indicates that it was only disposed of, as the High Court directed the State authorities to allot land to the writ

petitioner to the extent of 20 standard acres within three months and a further direction was also issued to deliver possession of the land to the writ petitioner. Curiously, the learned Judges of the Division Bench did not consider appropriate even to quash the letter dated 21.6.1996 issued by the appellant No.2 herein and yet were pleased to direct not only the allotment of land as per his claim but also a direction for delivery of the possession within three months to the writ petitioner/ respondents herein. The respondents in the writ petition/the appellant-State of Haryana herein, therefore, has preferred this appeal which was heard by us at length.

4. Mr. Anoop G. Choudhari, learned counsel for the appellants-State of Haryana in substance contended that the High Court could not have issued a direction to the State to straightaway allot the land and at the most it could have directed the State authorities to consider the claim of the respondents herein for allotment of the land under the rehabilitation scheme.

5. While, we find sufficient force in the argument advanced, we are further of the view that the Division Bench of the High Court could not have ordered for allotment and delivery of possession of the land in lieu of the land which the respondents claimed by way of rehabilitation for 20 standard acres without even directing an enquiry as to whether the predecessor-in-interest of the respondents herein, in fact, had left 20 acres of land in Pakistan or not when they migrated to India. However, this plea was a pure question of fact which could not have been entertained straightway by the High Court, nevertheless, when the petitioner himself had filed a writ petition in the High Court for quashing of the letter of instructions dated 21.6.1996 issued by the appellant No.2 herein by which the allotment of land for rehabilitation had been ordered to be stopped forthwith, the order for allotment and delivery of possession could not have been passed legally by the High Court without even quashing and setting aside the letter dated 21.6.1996.

6. Learned counsel for the respondents, however, has sought to protect the interest of the respondents and hence submitted that the letter issued by the appellant No.2 herein stopping the allotment of rehabilitation land was contrary to the statute, which is Displaced Persons (Compensation & Rehabilitation) Act, 1954 and, therefore, the letter issued by the appellant No.2 herein being contrary to the provisions of the statute could not have been given effect to in order to negative the claim of the respondents herein.

7. Learned counsel for the respondents-claimants although may be correct in submitting to the extent that the letter issued either by the State Government or by the Central Government cannot be given effect to in case it is contrary to the provisions of a statute, yet, consequential relief could not have been granted by the High Court to the writ petitioner/respondents herein without even quashing the impugned letter by recording a finding and giving out reasons as to why the letter should not have been given effect to. However, when we perused the impugned judgment of the High Court, we did not find any reason even remotely in the impugned order for quashing and setting aside the letter dated 21.6.1996 issued by the appellant NO.2 herein, and yet the consequential relief of allotment of land and the delivery of possession has been ordered straightway which, in our opinion, smacks of arbitrariness.

8. It is, therefore, difficult for us to uphold the impugned judgment and order of the Division Bench of the High Court and hence we quash and set aside the same. If, however, the writ petitioner, respondents herein, has/have any other alternative remedy or forum to claim allotment of the land, they obviously will have to first of all get the letter of the State Government quashed and set aside which has ordered stopping the allotment of rehabilitation land forthwith. Unless the respondents succeed in doing so, no allotment of the land could have been made specially without any enquiry as to whether the predecessor-in-interest had left any land at all in Pakistan when

he migrated to India. Besides this, learned counsel for the appellants-State further informed that the writ petitioner, predecessor-in- interest of the respondents herein had already been allotted land under the rehabilitation scheme way back in the year 1952 and, therefore, claim for allotment for the second time should not have been allowed by the High Court contrary to the government instructions. We find force in this submission also, and, therefore, this aspect was required to be examined and enquired before any order was passed in favour of the respondents-claimants.

9. For the reasons given hereinabove, we allow this appeal and set aside the impugned judgment of the High Court directing the State of Haryana to make allotment of the land in favour of the writ petitioner/respondents herein as also delivery of possession with cost of Rupees five thousand. However, the parties herein are left to bear their own costs.

R.P. Appeal allowed.

SURENDRA KOLI
v.
STATE OF U.P. AND ORS.
(Criminal Appeal No.2227 of 2010)

FEBRUARY 15, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Penal Code, 1860 :

s.302 – Gruesome murder – Accused charged for murdering young girls and several other children – Allegation that accused used to lure young children inside the house where he would strangulate them and cut off their body parts and eat them – Conviction by courts below u/s. 302 and award of death sentence – Held: The accused had made a voluntary confession before the Magistrate u/s.164 Cr.P.C. – The confession u/s.164 was corroborated in material particulars – The accused volunteered to lead the police team to the specific spot where he had hidden the articles/body parts – On his pointing out, 15 skulls and bones were recovered and also a knife was recovered from a water tank – Some body parts, clothes and slippers thrown in the enclosed gallery behind the house were also recovered – DNA test of victim matched with that of her parents and brother – The entire chain of circumstances connected the accused with the crime and was established by the prosecution beyond reasonable doubt – The killings by the accused were horrifying and barbaric – Case fell within the category of rarest of rare case – Conviction and death sentence upheld.

Bachan Singh vs. State of Punjab, **1982 SCC 689;** *Atbir vs. Government of NCT of Delhi,* **2010 SCC (9) 1– relied on**

Case Law Reference:

1982 SCC 689	**Relied on**	**Para 14**
2010 SCC (9) 1	**Relied on**	**Para 14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2227 of 2010.

From the Judgment & Order dated 11.9.2009 of the High Court of Uttar Pradesh, judicature at Allahabad in Criminal (Capital) Appeal No. 1475 of 2009 & R. No. 3 of 2009.

WITH

SLP (Crl.) No. 608 of 2010.

Vivek K. Thanka, ASG, Ratnakar Dash, Shail Kr. Dwivedi, AAG, Dr. Sushil Balwada, AC, T.A. Khan, Pratul Shandilya, Sumeer Sodhi, Vaibhav Srivastava, Kumnan D., Arvind Kumar Sharma, Harsh, B.P. Singh Dhakray, Shakti Singh Dhakray, D.B. Vohra, Rajeev K. Dubay, Kamlendra Mishra, Manisha Bhadari, Omkar Shrivastava (for Madhu Moolchandani) for the appearing parties.

The following order of the Court was delivered

ORDER

1. Heard Dr. Sushil Balwada, learned counsel, who has appeared for the appellant Surendra Koli in Criminal Appeal No. 2227 of 2010.

2. The appellant Surendra Koli, accused no. 2 and Maninder Singh Pandher accused no. 1 were convicted under Section 302/364/376 IPC by the Special Sessions trial no. 611 of 2007 decided on 13.02.2009 by Additional Sessions Judge, Ghaziabad, U.P. By that judgment death sentence was imposed on both these accused.

3. In Appeal/Reference to the High Court accused Surendra Koli's death sentence was affirmed while the accused Maninder Singh Pandher was acquitted. Hence, Surendra Koli has filed this Appeal before us.

4. The facts of this case are gruesome and horrifying. It seems that several children had gone missing over 2 years from Sector 31, Nithari Village, Gautam Budh Nagar, Noida from 2005 onwards. Several of such children were alleged to have been killed by the appellant who is also alleged to have chopped and eaten the body parts after cooking them. Appellant Surendra Koli was the servant of accused no. 1 Moninder Singh, and they lived together at D-5, Sector 31, Noida.

5. The High Court in the impugned judgment dated 11.09.2009 has discussed the evidence in great detail and we have carefully perused the same. It is not necessary therefore to again repeat all the facts which have been set out in the judgment of the High Court except where necessary. We entirely agree with the findings, conclusion and sentence of the High Court so far as accused Surendra Koli is concerned.

6. Admittedly, there was a confession made by Surendra Koli before the Magistrate under Section 164 Cr.PC on 01.03.2007 and we are satisfied that it was a voluntary confession. The Magistrate repeatedly told the accused Surendra Koli that he was not bound to make the statement and it can be read against him. In our opinion the provisions of Section 164 CrPC have been fully complied with while recording the said statement.

7. In the aforesaid statement before the Magistrate appellant Surendra Koli has admitted in great detail how he used to kill the girls after luring them inside the House no. D-5, Sector 31, Noida by strangulating them, and he would then chop up and eat up their body parts after cooking them. Some body parts, clothes and slippers were thrown in the enclosed gallery

behind the house at D-5, Sector 31, Noida. He volunteered to lead the police team to the specific spot where he had kept the articles/body parts hidden. The police party reached that spot along with the appellant. On his pointing out, 15 skulls and bones were recovered, and also a knife was recovered from a water tank of a bath room in D-5, Sector 31. On 31.12.2006 during the scooping of the drain in front of D-5, bones and chappals were recovered.

8. He has given graphic description about the several murders he has committed. Surendra Koli was the servant of co-accused Maninder Singh Pandher as has been admitted by him. The confession under Section 164 has been corroborated in material particulars. The body parts of the killed girls have been found in the gallery behind the house and in the Nala beside the house.

9. Weapons like knife have also been recovered. The girls clothes have also been identified.

10. Two girls PW-27 namely Pratibha and PW-28 namely Purnima have stated before the trial Court that they were also attempted to be lured inside the House D-5 by Surendra Koli but they refused to enter the house. This was their sheer good luck, for if they would have entered the house then they might have met the same fate. Their evidence indicates the modus operandi of the appellant.

11. The parents of one Rimpa Haldar had filed a missing report at the police station on 20.07.2005 stating that their daughter Rimpa aged about 15 years had gone to do menial work in Sector 20 on 08.02.2005 but had not returned. Smt Doli Haldar came to know that in D-5, Sector 31 human skeleton and clothes had been found. Hence she went there and identified the chunni and bra of her daughter.

12. The appellant was charged for the murder of Rimpa (amongst others), and was found guilty by both the trial Court and High Court. Although it is a case of circumstantial evidence

we are of the opinion that the entire chain of circumstances connecting the accused Surendra Koli with the crime has been established by the prosecution beyond reasonable doubt.

13. The DNA test of Rimpa by CDFD, a pioneer institute in Hyderabad matched with that of blood of her parents and brother. The Doctors at AIIMS have put the parts of the deceased girls which have been recovered by the Doctors of AIIMS together. These bodies have been recovered in the presence of the Doctors of AIIMS at the pointing out by the accused Surendra Koli. Thus, recovery is admissible under Section 27 of the Evidence Act.

14. On the facts of the case we see no reason to interfere with the findings of the trial court and the High Court that the appellant Surendra Koli is guilty of murdering Rimpa Haldar. Both Courts have gone into the evidence in great detail and we have perused the same. The appellant appears to be a serial killer, and these cases in our opinion fall within the category of rarest of the rare cases as laid down in *Bachan singh Vs State of Punjab,* 1982 SCC 689 which has been subsequently followed in *Atbir Vs Government of NCT of Delhi,* 2010 SCC (9) 1.

15. The killings by the appellant Surendra Koli are horrifying and barbaric. He used a definite methodology in committing these murders. He would see small girls passing by the house, and taking advantage of their weakness lure them inside the house no. D-5, Sector 31, Nithari Village, Noida and there he would strangulate them and after killing them he tried to have sex with the body and would then cut off their body parts and eat them. Some parts of the body were disposed off by throwing them in the passage gallery and drain (nala) beside the house. House no. D-5, Sector 31 had become a virtual slaughter house, where innocent children were regularly butchered.

16. In our opinion, this case clearly falls within the category

of rarest of rare case and no mercy can be shown to the appellant Surendra Koli.

17. The appeal is, therefore, dismissed.

SPECIAL LEAVE PETITION (CRL.) 608 of 2010

18. Leave granted.

D.G. Appeal dismissed.

PRIYA DARSHNI DENTAL COLLEGE & HOSPITAL
v.
UNION OF INDIA & ORS.
(Writ Petition (Civil) No. 319 of 2010)

FEBRUARY 15, 2011

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

Dentists Act, 1948 – s. 10A – Renewal of permission for the BDS Course for the academic year – Ministry issuing order granting renewal of permission for the fourth year of the BDS Course for the academic year with a condition that Dental College should seek approval of its order from Supreme Court, so as to 'regularize' its order – Propriety of – Held: Is improper and irregular – Executive power of the Central Government to grant permission or renewal of permission u/s.10A, is not subject to control/supervision or confirmation/approval by Supreme Court – Such a requirement by the executive, amounts to attempting to make the judiciary a part of the decision making process by the executive – Power of judicial review is not intended to be exercised to grant `advance rulings of administrative approvals" to validate executive orders – It would not be proper for Supreme Court to 'approve' the Central Government's order granting renewal of permission as part of the 'decision making process' so as to 'regularize' the delay in making the order – Condition imposed by the Central Government requiring the dental colleges to secure appropriate orders from Supreme Court approving the renewals of permission quashed – However, renewal of permissions issued by Central Government to the petitioners for the academic year 2010-2011, are valid – Suggestion given for modification of time schedule for renewal of permission – Administrative law – Education/Educational institutions.

Education/Educational institutions: Applications for fresh permission and applications for renewal of permission for establishment of new dental colleges – Distinction between.

The petitioner-Dental college filed an application on 24.02.2010 for renewal of the permission for the fourth year of the BDS Course for the academic year 2010-2011 to the Dental Council of India (DCI) and the same was not granted. The petitioner filed a writ petition seeking quashing of the rejection order and sought a direction to the Central Government to permit the College to admit fresh students for BDS course for the academic year 2010-2011 and to grant renewal permission to conduct the fourth year of the BDS course for the academic year 2010-2011. The High Court by order dated 29.07.2010 remitted the petitioner's application for renewal of permission for 2010-2011, for re-consideration by the Central Government by giving a due hearing to the petitioner. In pursuance thereof, Committee gave a hearing to the petitioner college and recommended the renewal of permission for the fourth year of BDS Course for the academic year 2010-2011. The Central Government accepted the recommendation and sent a communication dated 17.08.2010 to the petitioner college granting renewal of permission subject to the Dental College obtaining an order from this Court, approving the grant of permission beyond 15th July 2010. The DCI also sent a communication to the petitioner requiring compliance with the communication dated 17.08.2010 sent by the Central Government. Thereafter, the petitioner college filed the instant writ petition, seeking a direction that the conditional permission granted to it by the Central Government on 17.08.2010 under Section 10A(4) of the Dentists Act, 1948 for the academic year 2010-2011, be made 'absolute' by declaring that such permission granted by the Central Government, did not violate the order of this Court in **Mridul Dhar's* case which according

to the Central Government directed that 15th July should be the last date for grant of such permission. Thereafter, this Court granted interim stay of the said condition.

Allowing the writ petitions, the Court

HELD: 1.1 The executive power of the Central Government to grant permission or renewal of permission under Section 10A of the Dentists Act, 1948, is not subject to the control or supervision of this Court, nor subject to confirmation or approval by this Court. The Central Government is bound to consider and pass orders granting or refusing permission in terms of Section 10A, taking note of the recommendations of DCI, by following the procedure prescribed by the Act and DCI regulations. Neither this Court, nor any other court, has any role to play in the decision making process relating to grant or refusal of permission under the Act, by the Central Government. [Para 10] [959-C-D]

1.2 A stipulation by an authority entrusted with the power to consider and grant permissions/recognitions, while granting such permission/recognition, that the applicant should seek and obtain an order from a court, approving the grant of such permission/recognition, as a condition precedent to give effect to such grant, would be improper and irregular. It amounts to failure to take responsibility or shirking the responsibility in exercising the power in accordance with the Act and the Regulations. Further, such a requirement by the executive, amounts to attempting to make the judiciary a part of the decision making process by the executive. Judiciary has no role to play under the Act or Rules in granting permission or renewal of permission. The power of judicial review is not intended to be exercised to grant 'advance rulings of administrative approvals" to validate executive orders. Neither Central Government, nor the DCI, can shift the onus of decision making to the courts,

blurring and obliterating the line of separation between the executive and the judiciary. Any attempt by the executive authority to provide itself a protective cover against challenges or criticism to its action, by 'passing the buck" to the Judiciary in regard to final decisions, should be resisted and avoided. The orders of the Central Government granting or refusing permission are subject to judicial review at the instance of any affected party, and the same cannot be pre-empted by making the Supreme Court a party to the decision making process of the executive. It was not proper for the Ministry of Health and Family Welfare (Dental Education Section), Government of India, to stipulate a condition while granting renewal of permission for the BDS Course, that the order is subject to the condition that the institute obtains the orders of Supreme Court to the effect that such permission would not violate the earlier order of the Hon'ble Supreme Court to the effect that 15th July would be last date for grant of such permission in the relevant academic year." Such a condition requiring approval of this Court is liable to be quashed. [Para 11] [959-E-H; 960-A-E]

2.1 The decision in *Mridul Dhar's* case referring to a time schedule stipulating 15th July as the last date for issue of letters of permission by Central Government does not relate to dental colleges nor to permissions/ renewal of permissions to dental colleges. The said time schedule is not even a direction of this Court, but is only an extract from the Medical Council of India Establishment of Medical College Regulations, 1999 applicable only to medical colleges. This Court in *Mridul Dhar's* case however, clearly directed that the Central Government should strictly adhere to the time schedule wherever provided for. In view of the directions in *Mridul Dhar's* case, DCI in consultation with the Central Government, provided a time schedule, while making the

Dental Colleges of India (Establishment of New Dental Colleges, Opening of New or Higher Course of Study or Training and Increase of Admission Capacity in Dental Colleges) Regulations, 2006. As per the DCI Regulations, the last date for grant of permissions and renewal of permissions by Central Government is 15th July. Regulation 11(2) clearly lays down a time schedule for the submission of applications for renewal of permission (six months prior to the expiry of the current academic session), for recommendation by DCI (15th June) and for issue of final orders by Central Government regarding renewal of permission (15th July). Though, the DCI Regulations provide that the last date for issue of letter of permission or renewal of permission by the Central Government is 15th July, having regard to the scheme relating to grant of renewal of permission and note (2) to the schedule, the Central Government has the discretion to modify the time schedule in appropriate cases, for reasons to be recorded, in respect of any class or category of applications. [Paras 12, 13 and 14] [961-A-F]

Mridul Dhar vs. *Union of India* **2005(2) SCC 65 – referred to.**

2.2 If the Central Government was of the view that a dental college deserved renewal of permission in accordance with the Act and Regulations, it should grant such permission. If it was of the view that the dental college did not deserve renewal of permission, it should refuse the permission. If the Central Government felt that the last date for granting renewal of permission was over and there was no justification for extending the time schedule, it could refuse the renewal of permission on that ground. On the other hand, if the Central Government was of the view that the applicant college had complied with the requirements and was not at fault, and it was not responsible in any manner for the delay in considering the application, and there were other applicants of similar

nature, it could have recorded those reasons in writing and extended the time schedule for that category of applicants and then granted the renewal of permission, provided the last date for admissions had not expired. Note (2) to the schedule to the DCI Regulations enables the Central Government to modify the time schedule, for reasons to be recorded in writing, in respect of any class or category of applications. Applicants for renewal of permission for the fourth or fifth year, where there is compliance with the requirements relating to infrastructure, equipment and faculty, could be such a class or category of applications. Similarly, applications where High Courts have directed consideration beyond 15th July in view of special circumstances, can also constitute a class or category of applicants. [Para 15] [965-C-D-E-F-G]

2.3 Though the prayer for 'approval' of the order of the Central Government, sought in the writ petition is rejected, the petitioner is entitled to a suitably moulded relief. The delay was beyond the control of DCI and the Central Government. The petitioner college was also not responsible for the delay in applying for renewal of permission. The last date for admissions had not yet expired. The order was passed on the direction of the High Court to reconsider the matter. There were several other similar cases pending before the Central Government. All those applications for renewal of permission, which were directed to be reconsidered by the High Court could be considered to be a special category of applications where the Central Government had modified the time schedule for grant of renewal of permissions under Note (2) to the schedule to the DCI Regulations. By so deeming, the order of the Central Government granting renewal of permissions in these cases can be considered as having been validly made. [Para 16] [965-H; 966-A-D]

2.4 In the connected cases, the Central Government passed similar conditional orders granting renewal of permission to other petitioner dental colleges, in regard to either fourth or fifth year of BDS course in September 2010and in one of the case it was passed on 23.07.2010. The petitioners are entitled to similar relief. In these cases, the petitioners, who were applicants for renewal were existing dental colleges, were functioning for three or four years and each college had admitted hundreds of students either directly or through State Government allotment. The colleges had the benefit of initial permission and several renewals of permission. Refusal of renewal of permission in such cases should not be abrupt nor for insignificant or technical violations. Nor should such applications be dealt in a casual manner, by either granting less than a week for setting right the 'deficiencies' or not granting an effective hearing before refusal. The entire process of verification and inspection relating to renewal of permission, should be done well in time so that such existing colleges have adequate and reasonable time to set right the deficiencies or offer explanations to the deficiencies. The object of providing for annual renewal of permissions for four years, is to ensure that the infrastructural and faculty requirements are fulfilled in a gradual manner, and not to cause disruption. [Paras 17 and 18] [966-E-H; 967-A-C]

2.5 The applications for fresh permissions and applications for renewal of permissions require distinct time schedules. The process of decision making under the Regulations, for grant of fresh or initial permission for establishment of new dental colleges is exhaustive and elaborate, when compared to the process of decision making in regard to grant of renewal of permission for the four subsequent years. Before grant of initial grant of permission, the DCI and Central Government are required to consider the following aspects: whether the institution

would be in a position to offer the minimum standards of dental education in conformity with the Act and the Regulations; whether the institution has adequate resources; whether the institution has provided or would provide within the time-limit specified in the scheme, necessary staff, equipment, accommodation, training and other facilities to ensure proper functioning of the institution; whether the institution has provided or would provide within the time-limit specified in the scheme, adequate hospital facilities; whether faculty having recognized dental qualifications and personnel in the field of practice of dentistry would be available to impart proper training for the students; and whether other factors prescribed by the Regulations have been complied. On the other hand, for the purpose of grant of renewal of permission, DCI has to make recommendations by considering only whether the prescribed faculty and infrastructure are available. [Para 19] [967-D-H; 968-A]

2.6 The need for renewal of permission emanates from the fact that a newly established college is not required to have in place, full complement of the teaching faculty and complete infrastructure in the first year itself. This is because, during the first year, the college will be catering only to a limited number of first year students. During the second, third and fourth and fifth years, the student strength would increase. Thereafter, the strength may remain constant. As the strength increases gradually every year, correspondingly the infrastructure and faculty would have to be increased. The DCI Regulations contemplate new dental colleges being established and started with limited infrastructure and faculty, and making "provision for expansion of teaching staff and infrastructure facilities in a phased manner as per Annexures III and IV to the regulations". [Para 20] [968-B-E]

2.7 In view of the fact that the inspection and verification in regard to renewal of permission for the second, third, fourth and fifth years would be restricted only to the consideration of the additional faculty and additional infrastructure, it may not be necessary to apply the lengthy time schedule prescribed for initial permission, to renewal of permissions during the next four years. The DCI Regulations presently contemplate almost similar time schedules in regard to applications for establishment of new dental colleges, for opening of higher courses of study, for increase of admission capacity, and for renewal of permissions, with 15th July being the last date both for grant of permission or renewal of permission. DCI and Central Government may consider amendment to the DCI Regulations suitably to provide for a shorter and distinct time schedule for renewal of permissions, so that the dental colleges could file applications till end of February and the process of grant or refusal of renewal is completed by 15th of June. [Para 21] [969-E-G]

2.8 The condition imposed by the Central Government (requiring the dental colleges to secure appropriate orders from this Court approving the renewals of permission) in the letters of renewal of permission issued to the petitioners in July/August/ September, 2010, is quashed. It is however, declared that the renewal of permissions issued by Central Government to the petitioners for the academic year 2010-2011, are valid. **[Para 22] [970-B-C]**

Case law reference:

2005(2) SCC 65 Referred to Para 8

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 319 of 2010.

Under Article 32 of the Constitution of India.

With

W.P. (C) Nos. 322, 223, 324, 330, 332, 333, 334, 337, 339, 345 of 2010.

S. Uday Kumar Sagar, Bina Madhawan, Karan Kanwal, Lawyer's Knit & Co., Ashish Mohan, T. Meikandan, K.K. Mohan for the Petitioner.

H.P. Rawal, ASG T.S. Doabia, Raj Kumar Tanwar, Rashmi Malhotra, Shailinder Saini, D.S. Mahra, T. Harish Kumar, Abhinav Mukerji, R. Chandrachud, V. Prabakar, C. Thiruppathi for the Respondents.

The Judgment of the Court was delivered by

R.V. RAVEENDRAN J. 1. Issue *rule nisi*. Heard finally by consent. As these cases involve a similar issue, they are disposed of by this common order. For convenience we will refer to the facts from the lead matter [W.P.(C)No.319 of 2010].

2. The Central Government, by order dated 12.7.2007, granted permission to the petitioner college, under Section 10A(4) of the Dentists Act, 1948 ('Act' for short) for establishing a new Dental College with an intake of 100 students, commencing from the academic year 2007-08. Thereafter, by orders dated 18.8.2008 and 23.6.2009, the Central Government granted renewal of permission for the academic years 2008-09 and 2009-10.

3. For the academic year 2010-2011, the petitioner made an application for fourth year renewal permission, to the Dental Council of India ('DCI' for short) on 24.2.2010 enclosing therewith a form containing the particulars of teaching staff, infrastructure etc. as also a demand draft for Rupees one lakh towards the inspection fees. In pursuance of it, the DCI Inspectors carried out an inspection on 26.4.2010 and

submitted a Joint Inspection Report to DCI. Based on the said report, the DCI by communication dated 17.5.2010 informed the petitioner college about the deficiencies in faculty, equipments/instruments and library, with reference to the DCI Norms, and called upon the college to rectify the deficiencies and furnish a compliance report within five days.

4. The petitioner college sent a Compliance Report dated 19.5.2010 to DCI informing them about the action taken to rectify the deficiencies and also giving certain clarifications to show that some of the deficiencies pointed out were not deficiencies at all. DCI considered the said reply of the petitioner College and made a recommendation dated 12.6.2010 to the Central Government not to renew the permission for the fourth year of the BDS Course for the academic year 2010-2011, in view of the deficiencies noted therein.

5. The central government, sent a general circular dated 21.6.2010 to all Dental Colleges in whose cases the DCI had recommended that permission should not be renewed, including the petitioner college, informing that a three-member Committee under the Chairmanship of the Director General of Health Services will give a personal hearing to them, as required under the first proviso to Section 10A (4) of the Act to consider the proposal for renewal of permission for the BDS Course for the academic year 2010-2011, on 23rd, 24th and 25th June, 2010. The said letter was dispatched on 22.6.2010 and reached the petitioner college on 25.6.2010, making it impossible for the petitioner college situated at Chennai (Tamil Nadu) to send its Principal/Representative for the personal hearing. In the circumstances, the petitioner college by letter dated 25.6.2010, requested for such hearing. However, such hearing was not granted. By communication dated 15.7.2010, the Central Government communicated its decision not to grant renewal permission to the Dental College for the academic year 2010-11. A consequential direction was issued to the

college not to admit students for the academic year 2010-11.

6. Feeling aggrieved, the petitioner approached the Madras High Court by filing a writ petition on 19.7.2010 praying that the order of rejection dated 15.7.2010 be quashed and seeking a direction to the Central Government to permit the College to admit fresh students for BDS course for the academic year 2010-11 and also seeking a direction to the Central Government to grant renewal permission to conduct the fourth year of the BDS course during the academic year 2010-11. The said writ petition was allowed by the Madras High Court by order dated 29.7.2010. The High court held that dispatch of the letter dated 21.6.2010 on 22.6.2010 fixing the personal hearing on 23rd, 24th and 25th June, 2010, did not amount to grant of a hearing at all, if the letter reached the College on 25.6.2010, after the time fixed for hearing. It, therefore, held that the mandatory requirement of reasonable opportunity of being heard, required under the proviso to Section 10A (4) of the Act was not complied with. As a consequence, the High Court remitted the petitioner's application for renewal of permission for 2010-2011, for re-consideration by the Central Government, by giving a due hearing to the petitioner. The High Court also directed the three-member Committee constituted by the Central Government to hear the petitioner on 6.8.2010, consider the documents furnished by it and pass final orders. It also reserved liberty to DCI, if necessary, to make further inspection to verify the correctness of the compliance report submitted by the petitioner college and send a further report so as to reach the three-member Committee of the Central Government before 6.8.2010.

7. In pursuance of the said order, the three-member Committee gave a hearing to the petitioner college on 6.8.2010. Thereafter, the Committee recommended the renewal of permission for the fourth year of BDS Course for the academic year 2010-11. Accepting the recommendation,

the Central Government sent a communication dated 17.8.2010 to the petitioner college granting renewal of permission subject to a condition. We extract below the relevant portion of the said order:

> "The Central Government has accepted the above recommendation of the Committee and the permission of the Central Government is granted to Priyadarshini Dental College and Hospital, Thiruvallur Taluk & Dist. Tamil Nadu, for admission of 100 students in the 4th year of BDS course for the academic year 2010-11. However, since the last date of grant of such permission has already expired on 15.7.2010, *the above Central Government permission to the institute is subject to the condition that the institute obtains the orders of Supreme Court to the effect that such permission would not violate the earlier order of the Hon'ble Supreme Court to the effect that 15th July would be last date for grant such permission in the relevant academic year*." (emphasis supplied)

The DCI also sent a communication dated 23.8.2010 to the petitioner requiring compliance with the communication dated 17.8.2010 sent by the Central Government.

8. In compliance with the direction of the Central Government, the petitioner college has approached this Court by filing this writ petition, seeking a direction that the conditional permission granted to it by the Central Government on 17.8.2010 under Section 10A(4) of the Act for the academic year 2010-11, be made "absolute" by declaring that such permission granted by the Central Government, did not violate the order of this court in *Mridul Dhar* vs. *Union of India* — 2005(2) SCC 65 (which according to the Central Government, directed that 15th July should be the last date for grant of such permission). While issuing notice on the writ petition, this Court granted interim stay of the said condition requiring the 'approval' of this Court.

9. Learned Additional Solicitor General appearing for the Central Government and the learned counsel appearing for DCI submitted that the High Court, in a writ petition filed by the petitioner, had held that there was a violation of the first proviso to Section 10A(4) of the Act by the Central Government failing to provide a hearing to the petitioner before refusing to renew the permission; that as a consequence, the High Court directed the Central Government to give a fresh opportunity of hearing to the petitioner college; that such a direction was issued on 29.7.2010, after the last date (15th July) for grant of permissions had expired; that the Central Government gave a hearing as directed by the High Court and being satisfied that the petitioner had complied with the requirements, promptly took a decision reversing the earlier decision and granted the renewal of permission; and that as the Central Government felt that its order granting permission in August may violate the requirement in *Mridul Dhar* that the last date for issue of permission should be 15th July, the Central Government imposed the condition that its permission was subject to the Dental College obtaining an order from this Court, approving the grant of permission beyond 15th July. It was submitted by the Central Government in its counter affidavit dated 10.12.2010 filed in this writ petition that as the Ministry did not want to violate the order of this Court in *Mridul Dhar*, by granting any permission after 15th July, it had "incorporated the condition in the letters of permissions issued after 15.7.2010 but before 30.9.2010". It was submitted that the delay was not attributable either to the petitioner college or DCI or the Central Government; and that on the facts and circumstances of the case, the Central Government and the DCI have no objection for grant of the relief prayed by the petitioner.

Issue of Propriety

10. But the question that arises for consideration is, whether on such concession, or by mutual consent, the relief sought in the petition should be granted. The matter involves

issues of propriety and violation of the constitutional scheme relating to separation of powers and independence of judiciary. First is whether it was proper for the Ministry to issue an order granting renewal of permission with a condition that petitioner should seek approval of its order from this Court, so as to 'regularize' its order. Second is whether it would be proper for this court to 'approve' the Central Government's order granting renewal of permission, as a part of the 'decision making process' so as to 'regularize' the delay in making the order. The executive power of the Central Government to grant permission or renewal of permission under section 10A of the Act, is not subject to the control or supervision of this Court, nor subject to confirmation or approval by this Court. The Central Government is bound to consider and pass orders granting or refusing permission in terms of section 10A of the Act, taking note of the recommendations of DCI, by following the procedure prescribed by the Act and DCI regulations. Neither this court, nor any other court, has any role to play in the decision making process relating to grant or refusal of permission under the Act, by the Central Government.

11. A stipulation by an authority entrusted with the power to consider and grant permissions/recognitions, while granting such permission/recognition, that the applicant should seek and obtain an order from a court, approving the grant of such permission/recognition, as a condition precedent to give effect to such grant, would be improper and irregular. It amounts to failure to take responsibility or shirking the responsibility in exercising the power in accordance with the Act and the Regulations. Further, such a requirement by the executive, amounts to attempting to make the judiciary a part of the decision making process by the executive. Judiciary has no role to play under the Act or Rules in granting permission or renewal of permission. The power of judicial review is not intended to be exercised to grant 'advance rulings of administrative approvals' to validate executive orders. Neither Central

Government, nor the DCI, can shift the onus of decision making to the courts, blurring and obliterating the line of separation between the executive and the judiciary. Any attempt by the executive authority to provide itself a protective cover against challenges or criticism to its action, by 'passing the buck' to the Judiciary in regard to final decisions, should be resisted and avoided. The orders of the Central Government granting or refusing permission are subject to judicial review at the instance of any affected party, and the same cannot be pre-empted by making the Supreme Court a party to the decision making process of the executive. We are therefore of the view that it was not proper for the Ministry of Health and Family Welfare (Dental Education Section), Government of India, (for short 'the Ministry') to stipulate a condition while granting renewal of permission for the BDS Course, that the "*order is subject to the condition that the institute obtains the orders of Supreme Court to the effect that such permission would not violate the earlier order of the Hon'ble Supreme Court to the effect that 15th July would be last date for grant of such permission in the relevant academic year*." Such a condition requiring approval of this Court is liable to be quashed.

On merits

12. It is necessary to refer to certain aspects of grant of permissions to avoid confusion, unnecessary delays and litigation. In *Mridul Dhar,* this Court primarily dealt with the time schedule for completion of admission process for medical and dental colleges. *Mridul Dhar* did not provide any time schedule, much less 15th July as the last date, for issue of letters of permissions or renewal of permissions by Central Government to Dental Colleges. Para 28 of the decision in *Mridul Dhar* referring to a time schedule stipulating 15th July as the last date for issue of letters of permission by Central Government does not relate to dental colleges nor to permissions/renewal of permissions to dental colleges. The said time schedule is not even a direction of this Court, but is only an extract from the

Medical Council of India Establishment of Medical College Regulations, 1999 applicable only to medical colleges. This Court in *Mridul Dhar* however clearly directed that the Central Government should strictly adhere to the time schedule *wherever provided for.* This Court stated :

> "Having regard to the professional courses, it deserves to be emphasized that all concerned including Governments, State and Central both, MCI/DCI, colleges – new or old, students, Boards, universities, examining authorities, etc., *are required to strictly adhere to the time schedule wherever provided for*; there should not be midstream admissions; admissions should not be in excess of sanctioned intake capacity or in excess of quota of anyone, whether State or management. The carrying forward of any unfilled seats of one academic year to next academic year is also no permissible."
>
> [emphasis supplied]

13. In view of the directions in *Mridul Dhar*, DCI in consultation with the Central Government, provided a time schedule, while making the *Dental Colleges of India* (*Establishment of New Dental Colleges, Opening of New or Higher Course of Study or Training and Increase of Admission Capacity in Dental Colleges) Regulations, 2006* (for short 'DCI Regulations'). As per the DCI Regulations, the last date for grant of permissions and renewal of permissions by Central Government is 15th July. We may refer to relevant provisions of the DCI Regulations.

13.1 Regulation 4 of DCI Regulations relates to submission of proposals/schemes for establishing new dental colleges and it is extracted below:

> *"4. Proposals or schemes for establishing a new dental college, or opening a new or higher course of study or training or increasing the admission capacity, in the dental college:-*
>
> (1) The proposals or schemes for establishing a new dental college, or opening a new or higher course of study or training or increasing the admission capacity, in the dental college, as the case may be, shall be made or submitted to the Central Government for obtaining its permission under the Act in the Form. I, Form 2 and Form 3, respectively, annexed to these regulations.
>
> (2) *The scheme or the proposal under sub-regulation (1) and, processing thereof shall be submitted within the time- schedule as provided in the Schedule annexed to these regulations."*

The schedule annexed to the regulations, referred to in Regulation 4(2) prescribing the time schedule for grant of permissions, is extracted below:

SCHEDULE

[(see regulation 4(2)]

Schedule for Receipt of Applications for Establishment of New Dental Colleges, Opening of Higher Courses of Study & Increase of admission capacity in the recognized Dental Colleges and processing of the applications by the Central Government and the Dental Council of India.

S. No.	**Stage of Processing**	**Time Schedule for BDS**	**Time Schedule for MDS**
1	Receipt of applications by the Central Govt	From 1st Aug. to 30th September (both days inclusive) of any year	From 1st May to 30th June (both days inclusive) of any year
2	Forwarding of applications by the	Upto 31st December	Upto 31st July

	Central Government to the Dental Council of India for technical scrutiny		
3	Recommendation of DCI to the Central Government	Upto 15th June	Upto 28th February
4	Issue of Letter of Permission by Central Government	Upto 15th July	Upto 31st March

Note: (1) : If any clarification is sought by the Central Government on the recommendation of the Council, the same will be furnished by the Council forthwith, if necessary, after conducting inspection.

(2) The time–schedule indicated above may be modified by the Central Government, for reasons to be recorded in writing, in respect of any class or category of applications."

13.2. Rule 10 relating to grant of permission to establish a dental college and Rule 11 relating to renewal of permission to a dental college, are extracted below :

"10. Grant of Permission to establish a dental college:

(1) The Central Government may, after considering the scheme submitted under regulation 7 in terms of Section 10A of the Act and the recommendations of the Council thereon, issue a Letter of Intent to grant permission to establish a dental college subject to such conditions or modifications in the original proposal as it may consider necessary. The formal permission will be granted by the Central Government after the conditions stipulated and the modifications suggested are accepted by the applicant and a performance bank guarantee from a Scheduled Commercial bank valid for the entire duration of the course in favour of the Council is furnished as follows x x x x x

(3) The formal permission will include conditions for fulfillment of a time bound programme and achieving of annual targets commensurate with the initial intake of students for the establishment of a dental college.

(4) The permission under sub-regulation (1) to establish a new dental college will be granted for a period of one year and *will be renewed on yearly basis subject to verification of the achievement of annual targets* and revalidation, if necessary, of the performance bank guarantee."

11. Renewal of Permission

(1) Admissions of the next batches shall not be made by the dental college unless the permission granted under regulation 10 has been renewed by the Central Government.

(2) The application for renewal of permission shall be submitted to the Council, with a copy to the Central Government, six months prior to the expiry of the current academic session. The recommendation of the Council in all cases of renewal *shall be made by 15th June and the Central Government shall issue final orders regarding renewal of permission by 15th July of each* year.

Provided that the process of renewal of permission will not be applicable after the completion of phased expansion of the infrastructure facilities and teaching *faculty as per norms laid down by the Council and the* first batch of students take the final year examinations."

(emphasis supplied)

14. Regulation 11(2) clearly lays down a time schedule for the submission of applications for renewal of permission (six months prior to the expiry of the current academic session), for recommendation by DCI (15th June) and for issue of final orders by Central Government regarding renewal of permission

(15th July). Though, the DCI Regulations provide that the last date for issue of letter of permission or renewal of permission by the Central Government is 15th July, having regard to the scheme relating to grant of renewal of permission and note (2) to the schedule, the Central Government has the discretion to modify the time schedule in appropriate cases, for reasons to be recorded, in respect of any class or category of applications.

15. If the Central Government was of the view that a dental college deserved renewal of permission in accordance with the Act and Regulations, it should grant such permission. If it was of the view that the dental college did not deserve renewal of permission, it should refuse the permission. If the Central Government felt that the last date for granting renewal of permission was over and there was no justification for extending the time schedule, it could refuse the renewal of permission on that ground. On the other hand, if the Central Government was of the view that the applicant college had complied with the requirements and was not at fault, and it was not responsible in any manner for the delay in considering the application, and there were other applicants of similar nature, it could have recorded those reasons in writing and extended the time schedule for that category of applicants and then granted the renewal of permission, provided the last date for admissions had not expired. Note (2) to the schedule to the DCI Regulations enables the Central Government to modify the time schedule, for reasons to be recorded in writing, in respect of any class or category of applications. Applicants for renewal of permission for the fourth or fifth year, where there is compliance with the requirements relating to infrastructure, equipment and faculty, could be such a class or category of applications. Similarly, applications where High Courts have directed consideration beyond 15th July in view of special circumstances, can also constitute a class or category of applicants.

16. Though we have rejected the prayer for 'approval' of

the order of the Central Government, sought in the writ petition, we are of the view that the petitioner is entitled to a suitably moulded relief. As noticed above, the delay was beyond the control of DCI and the Central Government. The petitioner college was also not responsible for the delay in applying for renewal of permission. The last date for admissions had not yet expired. The order was passed on the direction of the High Court to reconsider the matter. There were several other similar cases pending before the Central Government. All those applications for renewal of permission, which were directed to be reconsidered by the High Court could be considered to be a special category of applications where the Central Government had modified the time schedule for grant of renewal of permissions under Note (2) to the schedule to the DCI Regulations. By so deeming, the order of the Central Government dated 17.8.2010 granting renewal of permissions in this case and other similar cases can be considered as having been validly made.

The connected cases

17. In the connected cases, the Central Government has passed similar conditional orders granting renewal of permission to other petitioner dental colleges, in regard to either fourth or fifth year of BDS course. The conditional renewals of permission were granted in September 2010, except in WP(C) No.334 of 2010 where it was passed on 23.7.2010. The petitioners therein are entitled to similar relief as in the first matter.

A suggestion for modification of time schedule

18. In all these cases, the petitioners, who were applicants for renewal were existing dental colleges, were functioning for three or four years and each college had admitted hundreds of students either directly or through State Government allotment. The colleges had the benefit of initial permission and several renewals of permission. Refusal of renewal of

permission in such cases should not be abrupt nor for insignificant or technical violations. Nor should such applications be dealt in a casual manner, by either granting less than a week for setting right the 'deficiencies' or not granting an effective hearing before refusal. The entire process of verification and inspection relating to renewal of permission, should be done well in time so that such existing colleges have adequate and reasonable time to set right the deficiencies or offer explanations to the deficiencies. The object of providing for annual renewal of permissions for four years, is to ensure that the infrastructural and faculty requirements are fulfilled in a gradual manner, and not to cause disruption.

19. In the context of what has happened in these cases, it is necessary to emphasize the distinction between the applications for fresh permissions and applications for renewal of permissions. They require distinct time schedules. The process of decision making under the Regulations, for grant of fresh or initial permission for establishment of new dental colleges is exhaustive and elaborate, when compared to the process of decision making in regard to grant of renewal of permission for the four subsequent years. Before grant of initial grant of permission, the DCI and Central Government are required to consider the following aspects : whether the institution would be in a position to offer the minimum standards of dental education in conformity with the Act and the Regulations; whether the institution has adequate resources; whether the institution has provided or will provide within the time-limit specified in the scheme, necessary staff, equipment, accommodation, training and other facilities to ensure proper functioning of the institution; whether the institution has provided or would provide within the time-limit specified in the scheme, adequate hospital facilities; whether faculty having recognized dental qualifications and personnel in the field of practice of dentistry will be available to impart proper training for the students; and whether other factors prescribed by the Regulations have been complied. On the other hand, for the

purpose of grant of renewal of permission, DCI has to make recommendations by considering only whether the prescribed faculty and infrastructure are available.

20. The need for renewal of permission emanates from the fact that a newly established college is not required to have in place, full complement of the teaching faculty and complete infrastructure in the first year itself. This is because, during the first year, the college will be catering only to a limited number of first year students. During the second, third and fourth and fifth years, the student strength will increase. If the permitted intake is 100, usually there will be 100 students in the first year, 200 students in the second year, 300 students in the third year, 400 students in the fourth year and 500 students in the fifth year. Thereafter, the strength may remain constant. As the strength increases gradually every year, correspondingly the infrastructure and faculty will have to be increased. The DCI Regulations contemplate new dental colleges being established and started with limited infrastructure and faculty, and making "provision for expansion of teaching staff and infrastructure facilities in a phased manner as per Annexures III and IV to the regulations" [vide Regulation 6(j)]. For example, the dental chairs required in a college will be as under [vide Regulation 6(k)] :

Year	Intake (50)	Intake (100)
First Year	20	25
Second Year	50	100
Third Year	100	200
Fourth Year & Internship	125	250

Similarly, the college is required to increase the faculty strength gradually over the second and third years so as to achieve the required dental faculty strength by the third year as under [vide Annexure-III to the DCI Regulations] :

Year	Total posts required					
	Professors		Readers		Lecturers	
	100	50	100	50	100	50
First year	intake 2	intake 2	intake 3	intake 2	intake 16	intake 10
Second year	4	3	5	4	30	20
Third year	6	6	13	11	40	30

21. In view of the fact that the inspection and verification in regard to renewal of permission for the second, third, fourth and fifth years will be restricted only to the consideration of the additional faculty and additional infrastructure, it may not be necessary to apply the lengthy time schedule prescribed for initial permission, to renewal of permissions during the next four years. The DCI Regulations presently contemplate almost similar time schedules in regard to applications for establishment of new dental colleges, for opening of higher courses of study, for increase of admission capacity, and for renewal of permissions, with 15th July being the last date both for grant of permission or renewal of permission. DCI and Central Government may consider amendment to the DCI Regulations suitably to provide for a shorter and distinct time schedule for renewal of permissions, so that the dental colleges could file applications till end of February and the process of grant or refusal of renewal is completed by 15th of June.

Conclusion

22. In view of the above, these writ petitions are allowed as follows :

(a) The condition imposed by the Central Government (requiring the dental colleges to secure appropriate orders from this court approving the renewals of permission) in the letters of renewal of permission issued to the petitioners in July/August/September, 2010, is quashed;

(b) It is however declared that the renewal of permissions issued by Central Government to the petitioners for the academic year 2010-2011, are valid.

N.J. Writ Petitions allowed.

ELECTRONICS CORPORATION OF INDIA LTD.

v.

UNION OF INDIA & ORS.

(Civil Appeal No. 1883 of 2011)

FEBRUARY 17, 2011

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

***Committees**: Inter se litigation between entities of the State – Resolution by Committees – Dispute between Public Sector Undertaking of Central Government and Union of India – Committees set up by Supreme Court by orders dated 11.10.1991, 7.1.1994, 20.7.2007 – Prayer for recalling these orders on the ground that the mechanism set up by Supreme Court in its orders had outlived their utility and in view of changed scenario – Held: The idea behind setting up of the Committees, initially called "High Powered Committee", then "Committee of Secretaries" and finally "Committee on Disputes" (CoD) was to ensure that resources of the State are not frittered away in inter se litigations between entities of the State, which could be best resolved, by an empowered CoD – The mechanism contemplated was only to ensure that no litigation comes to court without the parties having had an opportunity of conciliation before an in-house Committee – However, despite best efforts of the CoD, the mechanism could not achieve the results, for which it was constituted, and had in fact led to delay in litigation causing loss of revenue – Since the mechanism has outlived its utility, the directions contained in order dated 11.10.1991, 7.1.1994, 20.7.2007 are recalled.*

ONGC v. CCE **1995 Suppl.(4) SCC 541;** *ONGC v. CCE* **2004 (6) SCC 437;** *ONGC v. City & Industrial Development*

Corpn. **2007 (7) SCC 39;** *ONGC and Anr. v. CCE* **1992 Supp (2) SCC 432; 1995 Supp (4) SCC 541 dated 11.10.1991; (2004) 6 SCC 437; (2007) 7 SCC 39 – referred to.**

Case law reference:

1995 Suppl.(4) SCC 541	**Referred to**	**Paras 5, 9**
2004 (6) SCC 437	**Referred to**	**Paras 5, 9**
2007 (7) SCC 39	**Referred to**	**Paras 5, 9**
1992 Supp (2) SCC 432	**Referred to**	**Para 6**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1883 of 2011.

From the Judgment & Order dated 13.12.2008 of the High Court of Andhra Pradesh at Hyderabad in Writ Petition No. 26573 of 2008.

WITH

C.A. No. 1903 of 2008.

Goolam E. Vahanvati, AG, P.P. Tripathy, ASG, Arijit Prasad, Kumal Bahri, D.D. Kamath, Rohit Sharma, Amey Nargolkar, B.V. Balaram Das, Anil Katiyar, Rupesh Kumar, Parijat Sinha, Reshmi Rea Sinha, Anil Kumar Mishra, Vikram, Ganguly, S.C. Ghosh, B. Krishna Prasad, E.C. Agrawala for the appearing parties.

The Order of the Court was delivered by

O R D E R

S.H. KAPADIA, CJI. 1. Leave granted.

2. Electronics Corporation of India Ltd. ("assessee" for short) is a Central Government Public Sector Undertaking ("PSU"). It is registered as a Government Company under the

Companies Act, 1956. It is under the control of Department of Atomic Energy, Government of India. A dispute had been raised by the Central Government (Ministry of Finance) by issuing show cause notices to the assessee alleging that the Corporation was not entitled to avail/utilize Modvat/Cenvat Credit in respect of inputs whose values stood written off. Accordingly it was proposed in the show cause notices that the credit taken on inputs was liable to be reversed. Thus, the short point which arose for determination in the present case was whether the Central Government was right in insisting on reversal of credit taken by the assessee on inputs whose values stood written off.

3. The adjudicating authority held that there was no substance in the contention of the assessee that the write off was made in terms of AS-2. The case of the assessee before the Commissioner of Central Excise (adjudicating authority) was that it was a financial requirement as prescribed in AS-2; that an inventory more than three years old had to be written off/derated in value; that such derating in value did not mean that the inputs were unfunctionable; that the inputs were still lying in the factory and they were useful for production and therefore they were entitled to Modvat/Cenvat credit. As stated above, this argument was rejected by the adjudicating authority and the demand against the assessee stood confirmed. Against the order of the adjudicating authority, the assessee decided to challenge the same by filing an appeal before CESTAT. Accordingly, the assessee applied before the Committee on Disputes (CoD). However, the CoD vide its decision dated 2.11.2006 refused to grant clearance though in an identical case the CoD granted clearance to Bharat Heavy Electricals Ltd. ("BHEL"). Accordingly, the assessee herein filed Writ Petition No. 26573 of 2008 in the Andhra Pradesh High Court. By the impugned decision, the writ petition filed by the assessee stood dismissed. Against the order of the Andhra Pradesh High Court the assessee has moved this Court by way of a special leave petition.

4. In a conjunct matter, Civil Appeal No. 1903 of 2008, the facts were as follows.

Bharat Petroleum Corporation Ltd. ("assessee" for short) cleared the goods for sale at the outlets owned and operated by themselves known as Company Owned and Company Operated Outlets. The assessee cleared the goods for sale at such outlets by determining the value of the goods cleared during the period February, 2000 to November, 2001 on the basis of the price at which such goods were sold from their warehouses to independent dealers, instead of determining it on the basis of the normal price and normal transaction value as per Section 4(4)(b)(iii) of Central Excise Act, 1944 ("1944 Act" for short) read with Rule 7 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. In short, the price adopted by the assessee which is a PSU in terms of Administered Pricing Mechanism ("APM") formulated by Government of India stood rejected. The Tribunal came to the conclusion that the APM adopted by the assessee was in terms of the price fixed by the Ministry of Petroleum and Natural Gas; that it was not possible for the assessee to adopt the price in terms of Section 4(1)(a) of the 1944 Act; and that it was not possible to arrive at the transaction value in terms of the said section. Accordingly, the Tribunal allowed the appeal of the assessee. Aggrieved by the decision of the Tribunal, CCE has come to this Court by way of Civil Appeal No. 1903 of 2008 in which the assessee has preferred I.A. No. 4 of 2009 requesting the Court to dismiss the above Civil Appeal No. 1903 of 2008 filed by the Department on the ground that CoD has declined permission to the Department to pursue the said appeal.

5. The above two instances are given only to highlight the fact that the mechanism set up by this Court in its Orders reported in (i) 1995 Suppl.(4) SCC 541 (*ONGC v. CCE*) dated 11.10.1991; (ii) 2004 (6) SCC 437 (*ONGC v. CCE*) dated 7.1.1994; and (iii) 2007 (7) SCC 39 (*ONGC v. City & Industrial Development Corpn.*) dated 20.7.2007 needs to be revisited.

6. Learned Attorney General has submitted that the above Orders have outlived their utility and in view of the changed scenario, as indicated hereinafter, the aforestated Orders are required to be recalled. We find merit in the submission made by the Attorney General of India on behalf of the Union of India for the following reasons. By Order dated 11.9.1991, reported in 1992 Supp (2) SCC 432 (*ONGC and Anr. v. CCE*), this Court noted that "Public Sector Undertakings of Central Government and the Union of India should not fight their litigations in Court". Consequently, the Cabinet Secretary, Government of India was "called upon to handle the matter personally".

7. This was followed by the order dated 11.10.1991 in *ONGC-II* case (supra) where this Court directed the Government of India "to set up a Committee consisting of representatives from the Ministry of Industry, Bureau of Public Enterprises and Ministry of Law, to monitor disputes between Ministry and Ministry of Government of India, Ministry and public sector undertakings of the Government of India and public sector undertakings between themselves, to ensure that no litigation comes to Court or to a Tribunal without the matter having been first examined by the Committee and its clearance for litigation".

8. Thereafter, in *ONGC-III* case (supra), this Court directed that in the absence of clearance from the "Committee of Secretaries" (CoS), any legal proceeding will not be proceeded with. This was subject to the rider that appeals and petitions filed without such clearance could be filed to save limitation. It was, however, directed that the needful should be done within one month from such filing, failing which the matter would not be proceeded with. By another order dated 20.7.2007 **(ONGC-IVth case)** this Court extended the concept of Dispute Resolution by High-Powered Committee to amicably resolve the disputes involving the State Governments and their Instrumentalities.

9. The idea behind setting up of this Committee, initially, called a "High-Powered Committee" (HPC), later on called as "Committee of Secretaries" (CoS) and finally termed as "Committee on Disputes" (CoD) was to ensure that resources of the State are not frittered away in *inter se* litigations between entities of the State, which could be best resolved, by an empowered CoD. The machinery contemplated was only to ensure that no litigation comes to Court without the parties having had an opportunity of conciliation before an in-house committee. [see : para 3 of the order dated 7.1.1994 (supra)] Whilst the principle and the object behind the aforestated Orders is unexceptionable and laudatory, experience has shown that despite best efforts of the CoD, the mechanism has not achieved the results for which it was constituted and has in fact led to delays in litigation. We have already given two examples hereinabove. They indicate that on same set of facts, clearance is given in one case and refused in the other. This has led a PSU to institute a SLP in this Court on the ground of discrimination. We need not multiply such illustrations. The mechanism was set up with a laudatory object. However, the mechanism has led to delay in filing of civil appeals causing loss of revenue. For example, in many cases of exemptions, the Industry Department gives exemption, while the same is denied by the Revenue Department. Similarly, with the enactment of regulatory laws in several cases there could be overlapping of jurisdictions between, let us say, SEBI and insurance regulators. Civil appeals lie to this Court. Stakes in such cases are huge. One cannot possibly expect timely clearance by CoD. In such cases, grant of clearance to one and not to the other may result in generation of more and more litigation. The mechanism has outlived its utility. In the changed scenario indicated above, we are of the view that time has come under the above circumstances to recall the directions of this Court in its various Orders reported as (i) 1995 Supp (4) SCC 541 dated 11.10.1991, (ii) (2004) 6 SCC 437 dated 7.1.1994 and (iii) (2007) 7 SCC 39 dated 20.7.2007.

10. In the circumstances, we hereby recall the following Orders reported in:

(i) 1995 Supp (4) SCC 541 dated 11.10.1991

(ii) (2004) 6 SCC 437 dated 7.1.1994

(iii) (2007) 7 SCC 39 dated 20.7.2007

11. For the aforestated reasons, I.A. No. 4 filed by the assessee in Civil Appeal No. 1903/2008 is dismissed.

D.G. Appeal pending.

UNION OF INDIA ETC.

v.

GIANI

(Civil Appeal No. 1884 of 2011)

FEBRUARY 17, 2011

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

DELAY/LACHES :

Application for condonation of delay in filing appeal – Held: the averments in the application do constitute sufficient cause for not preferring the appeals within time –There is a strong arguable case on behalf of the appellants, therefore, Court would decide the matter or merits by giving the expression 'sufficient cause' a pragmatic justice oriented approach – Delay condoned – Constitution of India, 1950 – Article 136.

LAND ACQUISITION ACT, 1894:

Section 23 (1-A) as inserted by amendment Act 68 of 1984 – Compensation under – Held : Sub - s. (1-A) was made applicable to proceedings pending on or after 30.04.1982 – In the instant case, land owners would not be entitled to get the benefit under Sub – s. (1-A) as the proceedings had culminated in passing the award by the Collector on 09.07.1980 i.e. before 30.04.1982, the date from which the amendment was made applicable to pending and subsequent proceedings.

The Union of India filed the instant appeals, though after considerable delay, contending that the respondent land-owners were not entitled to receive compensation u/s. 23 (1-A) of the Land Acquisition Act, 1897, which was granted in their favour by the High Court.

Partly allowing the appeals the Court,

HELD : 1.1. The application for condonation of delay in preferring the appeals must be allowed as the statements in the applications for condonation of delay, do constitute sufficient cause in not preferring the appeals within the period of limitation. There is a strong arguable case on behalf of the appellants and, therefore, it is felt necessary that the Court should decide the matter on merit by giving the expression 'sufficient cause' a pragmatic justice oriented approach. Therefore, delay in all the appeals is condoned. [para 3] [981-A-C]

2. Section 23 (1-A) was inserted in the Land Acquisition Act, 1894 w.e.f., 24.9.1984 by way of amendment to the Act by Act 68 of 1984, which was made applicable to proceedings pending on or after 30.04.1982. The said sub-s.(1A) provides that in addition to the market value of the land, the Court would 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 u/s. 4(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. In sub-s.(2) of s. 23 of the Act, the words "thirty per centum" replaced the words "fifteen per centum", w.e.f., 24.09.1984 and it was also made applicable to certain awards made and order passed after 30.04.1982. [para 6] [981-G-H; 982-A-B]

K.S. Paripoornan v. State of Kerala and others **1994 (3) Suppl. SCR 405 = (1994) 5 SCC 593 and** *Pralhad and Others v. State of Maharashtra and another* **2010 (11) SCR 916 = (2010) 10 SCC 458 – relied on.**

2.2. In the instant case, the acquisition proceeding commenced with the notification u/s. 4 issued on 06.03.1965 and it culminated in passing of the award by

the Collector on 09.07.1980, i.e., before 30.04.1982, the date from which the amending Act 68 of 1984 was made applicable to the pending and subsequent proceedings. Therefore, in terms of the law laid down by the Constitution Bench of this Court in the case of *K.S. Paripoornan,* **the respondents are not entitled to the benefit of s. 23(1A). [para 8] [983-H; 984-A-B]**

Case Law Reference:

1994 (3) Suppl. SCR 405	**relied on**	**para 6**
2010 (11) SCR 916	**relied on**	**para 7**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1884 of 2011.

From the Judgment & Order dated 31.5.2002 of the High Court of Delhi at New Delhi in RFA No. 465 of 1986.

WITH

C.A. Nos. 1887, 1885, 1886 of 2011.

P.P. Malhotra, ASG, Brijender Chahar, Rekha Pandey, M. P.S. Tomar, Anil Katiyar for the Appellant.

K.L. Janjani, Raj Singh Rana, Pankaj Kumar Singh, A. Jain, Dr. Vinod Tewari, P.P. Singh for the Respondent.

The Judgment of the Court was delivered by

Dr. MUKUNDAKAM SHARMA, J. 1. Leave granted in all the petitions.

2. We propose to dispose of all these appeals by this common judgment and order. In all these appeals not only the issues arising for our consideration on merit are identical but also all these appeals were filed by the appellants herein after considerable delay.

3. Having examined the averments made in the applications for condonation of delay in filing all the appeals and after hearing the learned counsel for the parties, we are satisfied that the application for condonation of delay in preferring the appeals must be allowed as the statements in the applications for condonation of delay, in our view, do constitute sufficient cause in not preferring the appeals within the period of limitation. We, therefore, condone delay in all the appeals. We have taken such a view in this matter as we feel that there is a strong arguable case on behalf of the appellants and, therefore, it is felt necessary that the court should decide the matter on merit by giving the expression sufficient cause a pragmatic justice oriented approach.

4. In all these appeals counsel appearing for the appellant has raised just one issue, namely, that the respondent in each of the appeals is not entitled to receive compensation under Section 23 (1A) of the Land Acquisition Act, 1894 [for short "the Act"] which has been granted in their favour by the orders of the High Court.

5. On 06.03.1995 by issuing notification under Section 4 of the Act, land situated in village-Ziauddinpur, Delhi was sought to be acquired for public purpose, namely, planned development of Delhi. The aforesaid notification was followed by issuance of a declaration under Section 6 of the Act which was issued on 07.01.1969. The Collector passed the award on 09.07.1980 vide his award No. 39/80-81.

6. Section 23 (1A) of the Land Acquisition Act, 1894 was inserted, w.e.f., 24.9.1984, by way of amendment to the Act which was made applicable to proceedings pending on or after 30.04.1982. The said sub-section (1A) provides that in additional to the market value of the land, the Court would 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. In sub-section 2 of Section 23 of the Act the words "thirty per centum" replaced the words "fifteen per centum", w.e.f., 24.09.1984 and it was also made applicable to certain awards made and order passed after 30.04.1982. The specific and the only issue which was agitated by the counsel appearing for the appellant before us, during the course of hearing was that, since the aforesaid amendment by Act No. 68 of 1984 inserted a new provision in the nature of sub-section (1A), which was inserted, w.e.f., 24.09.1984 [and was made applicable to proceedings pending on or after 30.04.1982] sub-section (1A) would not be applicable in the present case. In support of the said contention reference was made to the decision of the Constitutional Bench of this Court in *K.S. Paripoornan v. State of Kerala and others* reported in (1994) 5 SCC 593 in which this Court upon a combined reading of Section 23(1A) and Section 30(1) of the Act held as follows: -

> "74. ……. A perusal of sub-section (1) of Section 30 of the amending Act shows that it divides the proceedings for acquisition of land which had commenced prior to the date of the commencement of the amending Act into two categories, proceedings which had commenced prior to 30-4-1982 and proceedings which had commenced after 30-4-1982. While clause (a) of Section 30(1) deals with proceedings which had commenced prior to 30-4-1982, clause (b) deals with proceedings which commenced after 30-4-1982. By virtue of clause (a), Section 23(1-A) has been made applicable to proceedings which had commenced prior to 30-4-1982 if no award had been made by the Collector in those proceedings before 30-4-1982. It covers (i) proceedings which were pending before the Collector on 30-4-1982 wherein award was made after 30-4-1982 but before the date of the commencement of the amending Act, and (ii) such proceedings wherein award was made by the Collector after the date of the

commencement of the amending Act. Similarly Section 30(1)(b) covers (i) proceedings which had commenced after 30-4-1982 wherein award was made prior to the commencement of the amending Act, and (ii) such proceedings wherein award was made after the commencement of the amending Act. It would thus appear that both the clauses (a) and (b) of sub-section (1) of Section 30 cover proceedings for acquisition which were pending on the date of the commencement of the amending Act and to which the provisions of Section 23(1-A) have been made applicable by virtue of Section 30(1). If Section 23(1-A), independently of Section 30(1), is applicable to all proceedings which were pending on the date of the commencement of the amending Act, clauses (a) and (b) of Section 30(1) would have been confined to proceedings which had commenced prior to the commencement of the amending Act and had concluded before such commencement because by virtue of Section 15 the provisions of Section 23(1-A) would have been applicable to proceedings pending before the Collector on the date of commencement of the amending Act. There was no need to so phrase Section 30(1) as to apply the provisions of Section 23(1-A) to proceedings which were pending before the Collector on the date of the commencement of the amending Act. This only indicates that but for the provisions contained in Section 30(1) Section 23(1-A) would not have been applicable to proceedings pending before the Collector on the date of commencement of the amending Act."

7.A similar issue again came up for consideration before this Court in *Pralhad and Others v. State of Maharashtra and another* reported in (2010) 10 SCC 458 wherein reference was made and reliance was placed in the decision of *K.S. Paripoornan* (supra).

8. In the present case the acquisition proceeding

commenced with the notification under Section 4 issued on 06.03.1965 and it culminated in passing of the award by the Collector on 09.07.1980, i.e., before 30.04.1982, the date from which the amending Act 68 of 1984 was made applicable to the pending and subsequent proceedings. Therefore, in terms of the law laid down by the Constitution Bench decision of this Court in the case of *K.S. Paripoornan* (supra) the respondents are not entitled to the benefit of Section 23(1A).

9. All the appeals, therefore, are partly allowed to the aforesaid extent and disposed of leaving the parties to bear their own costs.

R.P. Appeals partly allowed.

PRAGATI MAHILA MANDAL, NANDED

v.

MUNICIPAL COUNCIL, NANDED AND ORS.

(Civil Appeal No.2619 of 2002)

FEBRUARY 18, 2011

[DALVEER BHANDARI AND DEEPAK VERMA, JJ.]

***Municipalities**: Allotment of land – Plot shown and included in development plan for public and semi public purpose – Appellant-charitable trust allotted a plot of land on 60 years lease for starting a school for providing education especially for girls – However, for want of money and financial crunch, the school for which the land was initially acquired by the appellant could not be started and the appellant started hostel for girls and working women – Writ petition in the nature of pro bono publico challenging the allotment of land to the appellant – High Court set aside the allotment of land – On appeal, held: It is a matter of common knowledge that girls and women face lot of problems and difficulties in finding a suitable and safe accommodation when they go out of their own cities, to their respective schools or colleges or work-place – If a hostel is constructed for girls and working women, then it is definitely for public or semi public purpose and it cannot be said that there is any deviation from the purposes for which the said plot was earmarked and allotted to the appellant – Appellant was running the hostel on no profit-no loss basis and had taken the initiative of introducing progressive elements (through the establishment of counselling centres), in its efforts to alleviate some primary concerns of most working women – Thus, order passed by the High Court was not sustainable – Maharashtra Municipalities (Transfer of Immovable property) Rules, 1983 – r.21.*

Public Interest Litigation:

Death of sole petitioner – Effect on continuance of PIL – Held: Although a matter cannot be allowed to be prosecuted for and on behalf of a dead person or against a dead party but a Public Interest Litigation, which generally raises an issue of general public importance, should not be allowed to be withdrawn or dismissed on technical grounds, if cognizance thereof has already been taken by the court.

Concept of, and importance of – Held: The concept of Public Interest Litigation was introduced to help a person or class of persons whose legal and constitutional rights are violated – It means a legal action initiated in court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected – A person or the society could espouse a common grievance by filing a petition under Article 226 of the Constitution in the High Court or under Article 32 of the Constitution in the Supreme Court – Constitution of India, 1950 – Articles 226, 32.

Procedure to be adopted while entertaining PIL – Held: Courts entertaining PIL enjoy a degree of flexibility unknown to the trial of traditional court litigation but the procedure to be adopted by it should be known to the judicial tenets and adhere to established principles of a judicial procedure employed in every judicial proceedings which constitute the basic infrastructure along whose channels flows the power of the court in the process of adjudication – However, minor deviations are permissible in order to do complete justice between the parties.

Constitution of India, 1950:

Article 226 – Applicability of provisions of CPC to petitions filed u/Article 226 – Held: s.141, CPC creates a bar of applicability of the provisions of the CPC to petitions filed under Article 226 of the Constitution – Explanation to s.141,

CPC which has been added in the CPC with effect from 1.2.1977 makes it clear that the provisions of CPC do not specifically apply to the proceedings under Article 226 – Code of Civil Procedure, 1908 – s.141

Article 226 – PIL – Death of sole petitioner – Right to pursue the remedy in the absence of any person on record representing the deceased writ petitioner – Various options that can be exercised by the court in such situation – Discussed.

The appellant was a charitable trust. It made a request to respondent no.1-muncipal council for allotment of a plot for starting a school for providing education especially for girls. The request was allowed and allotment was made to the appellant on 60 years lease and possession was given. A writ petition in the nature of pro bono publico was filed challenging the allotment. During the pendency of writ petition, the sole petitioner 'ATK' expired. There was no application to bring on record the legal representatives of the deceased petitioner. Thereafter, the High Court appointed the counsel of the deceased writ petitioner as Amicus Curiae and directed him to continue to prosecute the said petition. By impugned order, the High Court set aside the allotment of a piece of land in favour of the appellant.

The questions which arose for consideration in the instant appeal were whether the High Court was justified in setting aside the allotment and whether on the death of the sole petitioner in Public Interest Litigation, the petition would stand abated or can be allowed to be continued without bringing anyone else in place of the deceased petitioner.

Allowing the appeal, the Court

HELD: 1.1. It is well settled that no matter can be

allowed to be prosecuted for and on behalf of a dead person or against a dead party but it is also, no doubt, true that a Public Interest Litigation, which generally raises an issue of general public importance, should not be allowed to be withdrawn or dismissed on technical grounds, if cognizance thereof has already been taken by the court. The concept of Public Interest Litigation was introduced in Indian Legal System to help a person or a class of persons whose legal and Constitutional Rights are violated and where such person or class of persons as the case may be, owing to their disadvantaged position such as poverty, exploitation, socially and economic backwardness and other forms of disablement etc. is unable to approach the courts. Under these circumstances, a person or the society could espouse a common grievance by filing a petition under Article 226 of the Constitution of India in the High Court or under Article 32 of the Constitution of India in the Supreme Court. [Paras 9, 10] [998-B-C; 998-E-F]

1.2. Public Interest Litigation means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected. It is also well settled that laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose an adjudication on merits of substantial rights of citizens under personal, property or other laws. Though, the courts entertaining PIL enjoy a degree of flexibility unknown to the trial of traditional court litigation but the procedure to be adopted by it should be known to the judicial tenets and adhere to established principles of a judicial procedure employed in every judicial proceedings which constitute the basic infrastructure along whose channels flows the power of the court in the process of

adjudication. It would thus clearly mean that the courts have to, in the normal course of business, follow traditional procedural law. However, minor deviations are permissible here and there in order to do complete justice between the parties. [Paras 11-13] [998-G-H; 999-A-D]

Black's Law Dictionary **– referred to.**

2.1. Section 141, CPC creates a bar of applicability of the provisions of the CPC to petitions filed under Article 226 of the Constitution. Explanation to Section 141, CPC which has been added in the CPC with effect from 1.2.1977 makes it clear that the provisions of CPC do not specifically apply to the proceedings under Article 226 of the Constitution of India. The necessary corollary thereof shall be that it shall be open to the courts to apply the procedure provided in CPC to any proceeding in any court of civil jurisdiction except to the proceedings under Article 226 of the Constitution of India. [Para 15] [999-G; 1000-B-C]

2.2. Order 22, rule 4A, CPC prescribes the procedure where there is no legal representatives. Even if it is held that Order 22, CPC which relates to the subject of 'abatement of suits', is not applicable to writ proceedings, it does not mean that death of the petitioner can be totally ignored. Looking to the nature of the writ proceedings, as initiated by the deceased petitioner, the question was whether the right to pursue the remedy would have survived despite the absence of any person on record representing the deceased. Under such circumstances, the following options can be exercised by the court. As soon as the information is received that a sole petitioner to the writ petition in the nature of a PIL filed *pro bono publico*, is dead, the court can issue a notice through newspapers or electronic media inviting public spirited bodies or persons to file applications to take up the position of the petitioner. If such an application is filed,

the court can examine the antecedents of the person so applying and find out if allowing him to be impleaded as petitioner could meet the ends of justice. If the matter is already pending and the court is of the opinion that the relief sought could be granted in the PIL, without having to take recourse to adversarial-style of proceedings, then it can proceed further as if it had taken suo moto cognizance of the matter. The court can still examine and explore the possibility if any of the non-contesting respondents of the writ petition could be transposed as petitioner as ultimately the relief would be granted to the said party only. The court in a suitable case can ask any lawyer or any other individual or an organisation to assist the court in place of the person who had earlier filed the petition. However, the fact situation of the instant case would show that after the death of the original petitioner 'ATK', respondent no.1-municipal council could have stepped into the shoes of the petitioner, albeit on a limited scale. This is because, while the deceased writ petitioner had challenged the initial allotment of land in favour of the appellant-charitable organization on the ground that it was made in contravention of the purpose envisaged in the master plan, respondent No.1 had emphasized on the subsequent unauthorized change in user of land by the appellant. Respondent no. 12 in the writ petition 'SMS' could also have been transposed as a petitioner because he too, had a similar grievance against the respondent Municipal Council as that of the original deceased petitioner. 'SMS' also had passed away during the pendency of the writ proceedings – however, in his own second appeal, he had been represented through his Legal Representative. So, the impleadment of that legal representative as the petitioner in this PIL would have been sufficient for continuance of proceedings since the main relief sought was the same, i.e. quashing of the allotment order in favour of the appellant. [Paras 17 to 22] [1001-C-H; 1002-A-G]

2.3. Where the main writ petitioner has passed away and any other person (not being a representative of the deceased) is brought on record, either from the opposite side or from a third party, the court may, after having received an application requesting for permission for the same, grant opportunity to the newly added petitioners to amend the petition, if they so desire. In such circumstances, court can taken *suo moto* cognizance of the averments made in the petition, despite death of original petitioner, by assigning reasons and can continue to bring it to a logical end, so as to meet the ends of justice. In this view of the matter, reasoning of the court in this regard cannot be legally upheld as the same would lead to an anomalous situation not akin to law. [Paras 23-25] [1002-H; 1003-A-C]

3. As regards merits of the matter, 'SMS' had filed a civil suit for cancellation of the lease granted in favour of the appellant. The suit was dismissed. Ultimately, matter was carried up to the Supreme Court. An SLP filed before the Supreme Court was dismissed as withdrawn. Thus, in any case, the question of legality of the allotment of the subject piece of land in favour of the appellant, had attained finality at the High Court stage, even though at the instance of some other person. In the suit filed by 'SMS', who was the plaintiff therein, the Municipal Council was arrayed as defendant no.2 in which it had filed its written statement giving reasons for allotment of piece of plot in favour of the appellant. It was categorically mentioned in the same that Divisional Commissioner had accorded sanction to the said transfer of plot. Accordingly, the appellant had started the construction of its building to be used for the hostel for girls and working women. Similarly, all other respondents fully supported the allotment of plot in favour of the appellant. In the writ petition by 'ATK', respondent no. 1 has submitted that the reservations of the land for the

establishment of a primary school near the open space in the revised layout was not under the master plan. It was development plan submitted by the owner of these two lands under Section 44 of the Maharashtra Regional and Town Planning Act of 1966 and those two reservations were as per the tentative development plan formulated by the Municipal Council as a planning authority. This plan was sanctioned before 1972. The owner of the land was not in a position to finance the construction of a primary school. In this background, appellant-Trust came forward with the offer to establish primary school as per the revised development plan with the consent of the owner. In the affidavit of Collector, Nanded in the writ petition, it was categorically averred that the said plot was reserved to be allotted on the lease basis for 60 years and the main object of the appellant-trust was to conduct educational activities for girls. Assistant Director of Town Planning had also issued no objection certificate for the allotment of plot. He also referred to Rule 21 of the Maharashtra Municipalities (Transfer of Immovable property) Rules, 1983 under which the Municipal Council is bestowed with the powers of sanction of government grant of the land on the basis of lease for promotion of educational, medical, religious, social and charitable purposes to the registered institutions on payment of such concessional premium as the council may, in its discretion, determine. The Chief Officer of Nanded Municipal Council, Nanded also submitted his affidavit in reply to the writ petition and assigned various valid and cogent reasons for allotment of plot to the appellant. In the reply affidavit of the then Commissioner of the Municipal Corporation, it was categorically stated that on 3.1.1978, the first development plan of Nanded city was sanctioned by the Government in which the said plot was shown and included in the Development plan for public and semi public purposes and was not shown or included as land reserved

exclusively for primary school. Thus, only after land user was changed, admittedly the appellant was using it for the said purposes i.e. Public and semi public use, which fact was not denied by respondents. However, for want of money and financial crunch, the school for which the land was initially acquired by the appellant could not be started. So, it constructed a hostel for working women and girls taking higher education. There was one auditorium also which was used as family counselling centre. It was neither disputed nor anything could be brought on record to show that appellant was running the said hostel for any gains or profit. In fact, it was run on no profit-no loss basis. The accounts of the appellant were duly audited and reflected absolute transparency. There was no reason to doubt the correctness thereof. It is a matter of common knowledge that girls and women face lot of problems and difficulties in finding a suitable and safe accommodation when they go out of their own cities, to their respective schools or colleges or work-place. If a hostel has been constructed for girls and working women, then it would definitely be for public or semi public purpose and it cannot be said that there has been any deviation from the purposes for which the said plot was earmarked and allotted to the appellant. It is commendable that the appellant has taken the initiative of introducing progressive elements (through the establishment of counselling centres), in its efforts to alleviate some primary concerns of most working women. It would be nothing short of a cruel twist of justice, if they are prevented from continuing to do so by a PIL, which is motivated by ulterior motives. The provisions of Memorandum of Association of the appellant clearly stated that one of the objectives of the appellant was to provide Hostel facilities for girls and working women. This further fortified the stand of the appellant that it was public or at least semi-public purpose. Thus, looking to the matter from all angles, the

impugned judgment and order passed by the High Court cannot be sustained in law. [Paras 26 to 37] [1003-E-H; 1004-A-H; 1005-A-G; 1006-A-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2619 of 2002.

From the Judgment & Order dated 16/17.7.2001 of the High Court of Judicature of Bombay, Bench at Aurangabad in Writ Petition No. 925 of 1988.

Dr. A.M. Singhvi, V.A. Mohta, Ajay Majithia, Anubhav Singhvi, Abhimanyu Bhandari (for Yash Pal Dhingra) for the Appellant.

G.E. Vahanvati, AG, Parag Tripathi, ASG, Shivaji M. Jadhav, Shankar Chillarge, Asha Gopalan Nair for the Respondents.

The Judgment of the Court was delivered by

DEEPAK VERMA, J. 1. How far whip of Public Interest Litigation can be stretched and used is the moot and foremost question to be answered in this Appeal, arising out of judgment and order dated 16/17th July, 2001 passed by Division Bench of the High Court of Judicature of Bombay, Bench at Aurangabad in W.P. No. 925 of 1988 titled as *Anil Tryambakarao Kokil (since dead) Vs. Municipal Council, Nanded and others.*

2. Appellant herein - Pragati Mahila Mandal, Nanded is before us challenging the said judgment and order passed by Division Bench, whereby and whereunder allotment of a piece of plot bearing Survey No. 42 of Village Assadullabad (Maganpura), admeasuring 75'x 350' in its favour has been set aside and quashed as being illegal and void ab initio, with further direction to Respondent No. 1, Municipal Council, Nanded to take possession of the said plot together with

building appurtenant thereto, within a period of eight weeks from the date of impugned judgment.

Thumb nail sketch of the facts of the case is as under:

3. Appellant is a Charitable Trust duly registered under the provisions of Bombay Public Trust Act, 1950. On 14.10.1983, it made a request to Respondent No. 1 Municipal Council, Nanded (now Nanded Waghela City Municipal Corporation) for allotment of a plot, out of the lands belonging to it, for starting a school to provide education, especially for girls. Accordingly, in the year 1984, the Administrator, who was then holding the charge of the Municipal Council, vide Resolution dated 22.10.1984 allotted a plot admeasuring 75' x 350' bearing Survey No. 42 to the Appellant on a 60 years' lease.

4. It further contemplated that the applicable rental compensation shall be fixed on the basis of the rate to be worked out by the Assistant Town Planner, subject to compliance of the provisions of Section 92 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (for short 'The Act'). The Assistant Town Planner was also required to undertake the measurements and after fixing boundaries, the said piece of plot came to be handed over to the Appellant on 25.10.1984, after drawing a possession Panchanama. However, at that time, the nominal rental compensation could not be fixed as the State Government was yet to grant sanction for transfer of the land in favour of the Appellant, as contemplated under Section 92 of the Act.

5. Respondent No.1, the Municipal Council then in turn submitted a proposal to the Collector, seeking sanction of the State Government regarding allotment of the aforesaid plot in favour of the Appellant. The Assistant Town Planner by his communication dated 5.6.1986 informed Respondent No.1 that rental compensation for the subject plot for giving it on long lease of 60 years, would work out at Rs. 6,816/- per annum. A representation was made by the Appellant for reduction of the

rental to a reasonable sum, owing to it being a Charitable Trust, working mainly for the benefit of girls and women and it had no source of income to pay such rental compensation. On reconsideration of the matter, the rental was fixed at Rs. 11 per annum by the Divisional Commissioner, vide his order dated 12.11.1986, wherein sanction was granted under Section 92 of the Act, for allotment of the subject plot to the Appellant on a lease for 60 years. Thus, it was an *ex-post facto* sanction granted in favour of the Appellant, after the possession of the plot was already handed over to the Appellant. It was this allotment of land in favour of the Appellant and also other allotments made by Respondent No.1 in favour of other allottees together with certain donations made by Respondent No.1, Municipal Council that were the subject matter of challenge in a consolidated writ petition filed by Anil Tryambakarao Kokil (since dead) in the nature of *pro bono publico*.

6. However, it appears that during pendency of this Writ Petition, the sole petitioner Anil Tryambakarao Kokil expired. It is to be noted here that, following his demise, no application to bring the Legal Representatives of the deceased Petitioner on record was preferred, before the hearing of the writ petition could commence. Thereafter, instead of directing the petition to have abated or to have made some alternative arrangements (since his legal representatives were not brought on record) to ensure that some other public spirited person to be brought in as petitioner to prosecute the petition, in place of deceased Anil Tryambakarao Kokil, the counsel Mr. S.C. Bora, who probably was already appearing for deceased Writ Petitioner, was appointed as Amicus Curiae and was directed to continue to prosecute the said petition in that capacity of Amicus Curiae. Thus for all practical purposes, the petition continued to be prosecuted and heard even when admittedly the sole Petitioner Anil Tryambakarao Kokil had expired long time back.

7. Thus, apart from examining the correctness, legality and

propriety of the impugned order passed by Division Bench, it is also necessary to examine the effect of death of the sole petitioner in a Public Interest Litigation, viz., whether the same would stand abated or can be allowed to be continued without bringing anyone else in place of the deceased petitioner.

8. The Division Bench had, vide its interim order dated 16.1.2001, considered the question of the effect of the death of the sole petitioner Anil Tryambakrao Kokil on the Writ Petition, and whether anyone else is required to be brought in his place. After due deliberation, the Division Bench then appointed counsel for the petitioner who was already appearing as Amicus Curiae, with further direction to allow him to continue the petition. Thus, there was change of status of the counsel for deceased petitioner. The said Order dated 16.1.2001 reads as under:

> "This is a public interest litigation pertaining to the allotment of plots and shops in the Nanded City; by the Municipal Council, Nanded. However, the petitioner has expired long back. Nobody has come forward to agitate the cause of this petition further. After having gone through the petition, this Court would like to hear the parties to find out whether there is any substance in the petition.
>
> Shri S.C. Bora, learned Advocate, who has made the statement that the petitioner has expired, has stated that this Vakilpatra ceases to be effective. However, in our opinion, it is necessary to appoint Amicus Curiae so as to assist this Court to understand the facts of the case and to find out if any decision is required to be given in the matter. Shri Bora is, therefore, appointed as Amicus Curiae in the matter.
>
> Shri M.V. Deshpande, learned Advocate for the Municipal Council, states that he was under the impression that since the petitioner has expired, the matter will not be heard today. The learned Advocates for other respondents also state that they require more time for getting themselves prepared in the matter.
>
> S.O. to 6.2.2001."

9. Perusal thereof does not, in fact, reflect or show as to for what reasons and under what circumstances the Amicus Curiae was allowed to be relegated to the position of the petitioner, who had admittedly died long time back. It is too well settled that no matter can be allowed to be prosecuted for and on behalf of a dead person or against a dead party but it is also no doubt true that a Public Interest Litigation, which generally raises an issue of general public importance, should not be allowed to be withdrawn or dismissed on technical grounds, if cognizance thereof has already been taken by the Court. But an important issue would still arise whether in case of death of a sole petitioner in a Public Interest Litigation, without bringing anyone else in his place, if the petition could still be allowed to be prosecuted or continued?

10. The concept of Public Interest Litigation was introduced in Indian Legal System to help a person or a class of persons whose legal and Constitutional Rights are violated and where such person or class of persons as the case may be, owing to their disadvantaged position such as poverty, exploitation, socially and economic backwardness and other forms of disablement etc. is unable to approach the courts. Under the aforesaid circumstances, a person or the society could espouse a common grievance by filing a petition under Article 226 of the Constitution of India in the High Court or under Article 32 of the Constitution of India in the Supreme Court.

11. According to Black's Law Dictionary - "Public Interest Litigation means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected."

12. It is also well settled that laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose an adjudication on merits of substantial rights of citizens under personal, property or other laws.

13. Though, the courts entertaining PIL enjoy a degree of flexibility unknown to the trial of traditional court litigation but the procedure to be adopted by it should be known to the judicial tenets and adhere to established principles of a judicial procedure employed in every judicial proceedings which constitute the basic infrastructure along whose channels flows the power of the court in the process of adjudication. It would thus clearly mean that the courts have to, in the normal course of business, follow traditional procedural law. However, minor deviations are permissible here and there in order to do complete justice between the parties.

14. Even though, we made fervent search to find out a suitable answer to the questions posed hereinabove, from earlier precedents of this Court but it appears to be a unique case. Therefore, in our wisdom, we thought it appropriate to provide answer to the said question.

15. Before proceeding to decide the said issue, it is necessary to take into consideration some of the provisions of the Code of Civil Procedure, 1908 (hereinafter shall be referred to as Code for short).

Section 141 of the Code, which creates a bar of applicability of the provisions of the Code to petitions filed under Article 226 of the Constitution reads as under:

> "141. Miscellaneous proceedings- The procedure provided in this Code in regard to suit shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

> [Explanation – In this section, the expression "proceedings" includes proceedings under Order IX, but does not include any proceeding under article 226 of the Constitution.]"

Explanation which has been added in the Code with effect from 1.2.1977 makes it clear that the provisions of the Code do not specifically apply to the proceedings under Article 226 of the Constitution of India.

The necessary corollary thereof shall be that it shall be open to the Courts to apply the procedure provided in the Code to any proceeding in any Court of civil jurisdiction except to the proceedings under Article 226 of the Constitution of India.

16. Order XXII, Rule 4A of the Code prescribes the procedure where there is no legal representative, reads thus:

> "Order XXII Rule 4A. Procedure where there is no legal representative–
>
> If, in any suit, it shall appear to the Court that any party who has died during the pendency of the suit has no legal representative, the Court may, on the application of any party to the suit, proceed in the absence of a person representing the estate of the deceased person, or may by order appoint the Administrator-General, or an officer of the Court or such other person as it thinks fit to represent the estate of the deceased person for the purpose of the suit; and any judgment or order subsequently given or made in the suit shall bind the estate of the deceased person to the same extent as he would have been bound if a personal representative of the deceased person has been a party to the suit.
>
> (2) Before making an order under this Rule, the Court –
>
> (a) may require notice of the application for the order to be given to such (if any) of the persons having an interest

in the estate of the deceased person as it thinks fit; and

(b) shall ascertain that the person proposed to be appointed to represent the estate of the deceased person is willing to be so appointed and has no interest adverse to that of the deceased person."

17. Thus, even if it is held that Order 22 of the Code, which relates to the subject of 'abatement of suits', is not applicable to writ proceedings, it does not mean that death of the petitioner can be totally ignored. Looking to the nature of the writ proceedings, as initiated by the deceased petitioner, the question is whether the right to pursue the remedy would have survived despite the absence of any person on record representing the deceased.

18. Under these circumstances, what would have been the best option open to the court, is to be seen. In our considered opinion, the following options could have been exercised by the Court.

19. As soon as the information is received that a sole petitioner to the writ petition in the nature of a PIL filed *pro bono publico*, is dead, the Court can issue a notice through newspapers or electronic media inviting public spirited bodies or persons to file applications to take up the position of the petitioner. If such an application is filed, the court can examine the antecedents of the person so applying and find out if allowing him to be impleaded as petitioner could meet the ends of justice.

20. If the matter is already pending and the court is of the opinion that the relief sought could be granted in the PIL, without having to take recourse to adversarial-style of proceedings, then it can proceed further as if it had taken suo moto cognizance of the matter.

21. The court can still examine and explore the possibility,

if any of the non-contesting Respondents of the Writ Petition could be transposed as petitioner as ultimately the relief would be granted to the said party only. The court in a suitable case can ask any lawyer or any other individual or an organisation to assist the court in place of the person who had earlier filed the petition.

22. However, the fact situation of this case would show that after the death of the original petitioner Anil Tryambakarao Kokil, Respondent No.1 Municipal Council could have stepped into the shoes of the petitioner, albeit on a limited scale. This is because, while the Writ Petitioner had challenged the initial allotment of land in favour of the Appellant charitable organization on the ground that it was made in contravention of the purpose envisaged in the Master Plan, Respondent No.1 Nanded Municipal Council had emphasized on the subsequent unauthorized change in user of land by the Appellant. If we were to cast our net wider, Sitaram Maganlal Shukla, (who was Respondent No. 12 in the Writ Petition), could also have been transposed as a Petitioner because he too, had a similar grievance against the Respondent Municipal Council as that of the original deceased petitioner. It has been brought to our notice that the said Sitaram Maganlal Shukla also had passed away during the pendency of the Writ Proceedings – however, in his own Second Appeal No. 30 of 2000, he had been represented through his Legal Representative. So, the impleadment of that Legal Representative as the Petitioner in this PIL would have been sufficient for continuance of proceedings. Since the petition before the High Court was in the nature of a PIL, it is immaterial that the respective causes of action urged by the Writ Petitioner and Respondent No. 12 have their foundations in different sets of legal argument, as the main relief sought is the same, i.e. quashing of the allotment order in favour of the Appellant.

23. At any rate, in cases like the above, where the main Writ Petitioner has passed away and any other person (not

being a representative of the deceased) is brought on record, either from the opposite side or from a third party, the court may, after having received an application requesting for permission for the same, grant opportunity to the newly added petitioners to amend the petition, if they so desire.

24. In these circumstances, Court could have taken a suo moto cognizance of the averments made in the petition, despite death of original petitioner, by asigning reasons and could have continued to bring it to a logical end, so as to meet the ends of justice.

25. In this view of the matter, reasoning of the Court in this regard cannot be legally upheld nor we can put a seal of approval to such a procedure as the same would lead to an anomalous situation not akin to law.

26. Now, coming to the merits of the matter, few facts material for deciding have already been mentioned hereinabove but we have to decide whether the Division Bench in the impugned judgment was justified in quashing the allotment made in favour of the Appellant or not.

27. It is pertinent to point out here that the aforementioned Sitaram Maganlal Shukla had filed a civil suit for cancellation of the lease granted in favour of the Appellant. Ultimately, matter was carried up to this Court. The said suit was dismissed. An SLP (c) No.16517/2007 against the judgment and order dated 15.6.2007 passed in Second Appeal No. 30 of 2000 of the High Court of Bombay, Bench at Aurangabad was filed before this Court. However, on 21.9.2007 the said SLP was dismissed as withdrawn. Thus, in any case, the question of legality of the allotment of the subject piece of land in favour of the Appellant, had attained finality at the High Court stage, even though at the instance of some other person.

28. In the aforesaid suit filed by Sitaram Maganlal Shukla, who was the plaintiff therein, the Municipal Council was arrayed

as defendant No.2 in which it had filed its written statement giving reasons for allotment of piece of plot in favour of the Appellant. It was categorically mentioned in the same that Divisional Commissioner had accorded sanction to the said transfer of plot by its letter dated 12.11.1986. Accordingly, the Appellant had started the construction of its building to be used for the hostel for girls and working women. Similarly, all other Respondents had fully supported the allotment of plot in favour of the Appellant.

29. In the Writ Petition No. 925 of 1988, Respondent No. 1 has submitted that the reservations of the land in survey No. 42 and Survey No. 29 for the establishment of a primary school near the open space in the revised layout was not under the master plan. It was development plan submitted by the owner of these two lands under Section 44 of the Maharashtra Regional and Town Planning Act of 1966 and those two reservations are as per the tentative development plan formulated by the Municipal Council as a planning authority. This plan was sanctioned before 1972. The owner of the land was not in a position to finance the construction of a primary school. In this background, Appellant - Trust came forward with the offer to establish primary school as per the revised development plan with the consent of the owner.

30. It is pertinent to point out the affidavit of Collector, Nanded in the Writ Petition. He has categorically averred that the said plot was reserved to be allotted on the lease basis for 60 years and the main object of the Appellant, Pragati Mahila Mandal, Nanded is to conduct educational activities for girls. Assistant Director of Town Planning had also issued no objection certificate for the allotment of plot to the above institution. He has also referred to Rule 21 of the Maharashtra Municipalities (Transfer of Immovable property) Rules, 1983 under which the Municipal Council is bestowed with the powers of sanction of government grant of the land on the basis of lease for promotion of educational, medical, religious, social and

charitable purposes to the registered institutions on payment of such concessional premium as the council may, in its discretion, determine.

31. The Chief Officer of Nanded Municipal Council, Nanded had also submitted his affidavit in reply to the Writ Petition and assigned various valid and cogent reasons for allotment of plot to the Appellant.

32. In the reply affidavit of Kiran Kurundkar dated 30.6.2001, the then Commissioner of the Nanded - Waghela Municipal Corporation, it has categorically been stated that on 3.1.1978, the first development plan of Nanded city was sanctioned by the Government in which the said plot was shown and included in the Development plan for public and semi public purposes and was not shown or included as land reserved exclusively for primary school. Thus, only after land user was changed, admittedly the Appellant is using it for the said purposes ie. Public and semi public use, which fact has not been denied by Respondents.

33. However, as has been mentioned earlier, for want of money and financial crunch, the school for which the land was initially acquired by the Appellant could not be started. So, it constructed a hostel for working women and girls taking higher education. There is one auditorium also which is being used as family counselling centre.

34. It has neither been disputed before us nor anything could be brought on record to show that Appellant is running the said hostel for any gains or profit. In fact, it is run on no profit-no loss basis. This is manifest from the details of the list of students who have been pursuing various courses for higher education since the year 1991 to the year 2000. It largely discloses the names of the students, the courses for which they had opted and the colleges of enrolment. It also shows that initially room rent was only Rs. 150/- which was enhanced to Rs. 400/- in the year 2000. Most of the inmates were students

and only handful of them were working women. We have been given to understand that as of today, it is charging only Rs. 750/- per month from each of the students occupying the room. The accounts of the Appellant are duly audited and reflect absolute transparency. There is no reason to doubt the correctness thereof.

35. It is a matter of common knowledge that girls and women face lot of problems and difficulties in finding a suitable and safe accommodation when they go out of their own cities, to their respective schools or colleges or work-place. If a hostel has been constructed for girls and working women, then it would definitely be for public or semi public purpose and it cannot be said that there has been any deviation from the purposes for which the said plot was earmarked and allotted to the Appellant. It is commendable that the Appellant has taken the initiative of introducing progressive elements (through the establishment of counselling centres), in its efforts to alleviate some primary concerns of most working women. It would be nothing short of a cruel twist of justice, if they are prevented from continuing to do so by a PIL, which is motivated by ulterior motives.

36. In this regard, it is further necessary to mention that the provisions of Memorandum of Association of the Appellant clearly state that one of the objectives of the Appellant is to provide Hostel facilities for girls and working women. This further fortifies the stand of the Appellant that it is public or at least semi-public purpose.

37. Thus, looking to the matter from all angles, we are of the considered opinion that impugned judgment and order passed by the Division Bench cannot be sustained in law. It deserves to be set aside and quashed. We accordingly do so. The appeal is accordingly hereby allowed.

Parties are directed to bear their own respective costs.

D.G. Appeal allowed.

VISVESWARAYA TECHNOLOGICAL UNIVERSITY AND ANR.

v.

KRISHNENDU HALDER AND ORS.

(Civil Appeal No. 1947 of 2011)

FEBRUARY 18, 2011

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

Education/Educational Institutions*: Rules and Regulations of State and University prescribing minimum higher educational qualification for admission to Engineering courses are valid and binding – University and State are always entitled to prescribe higher standards than what is suggested by the central body (AICTE) so as to maintain the excellence in higher education – The fact that there are unfilled seats in a particular year, would not mean that in that year, the eligibility criteria fixed by the State/University would cease to apply or that the minimum eligibility criteria suggested by AICTE alone would apply – Unless and until the State or the University chooses to modify the eligibility criteria fixed by them, they would continue to apply in spite of the fact that there are vacancies or unfilled seats in any year – The main object of prescribing eligibility criteria is not to ensure that all seats are in colleges are filled, but to ensure that excellence in standards of higher education is maintained – Also, higher minimum marks prescribed by State Government cannot be said to be adverse to the standard fixed by AICTE .*

The question involved in these appeals was whether the eligibility criteria for admission to the Engineering courses stipulated under the Statutory Rules and Regulations of the State Government/University could be relaxed or ignored, and candidates who do not meet with such eligibility criteria can be given admission, on the

ground that a large number of seats have remained unfilled in professional colleges, if such candidates possess the minimum eligibility prescribed under the norms of the central body (AICTE).

Allowing the appeals, the Court

Held: 1.1. The object of the State or University fixing eligibility criteria higher than those fixed by AICTE, is two fold. The first and foremost is to maintain excellence in higher education and ensure that there is no deterioration in the quality of candidates participating in professional Engineering courses. The second is to enable the State to shortlist the applicants for admission in an effective manner, when there are more applicants than available seats. Once the power of the State and the Examining Body, to fix higher qualifications is recognized, the rules and regulations made by them prescribing qualifications higher than the minimum suggested by AICTE, will be binding and will be applicable in the respective State, unless the AICTE itself subsequently modifies its norms by increasing the eligibility criteria beyond those fixed by the University and the State. In the instant case, the eligibility criteria fixed by the State and the University increased the standards only marginally, that is 5% over the percentage fixed by AICTE. It cannot be said that the higher standards fixed by the State or University are abnormally high or unattainable by normal students, so as to require a downward revision, when there are unfilled seats. [Para 9] [1021-D-G]

State of Tamil Nadu v. S.V. Bratheep **(2004) 4 SCC 513;** *Dr Preeti Srivastava and Anr. v. State of M.P. and Ors.* **(1999) 7 SCC 120;** *State of Tamil Nadu. v. S.V. Bratheep* **(2004) 4 SCC 513 – referred to.**

1.2. While prescribing the eligibility criteria for

admission to institutions of higher education, the State/ University cannot adversely affect the standards laid down by the Central Body/AICTE. The term 'adversely affect the standards' refers to lowering of the norms laid down by Central Body/AICTE. Prescribing higher standards for admission by laying down qualifications in addition to or higher than those prescribed by AICTE, consistent with the object of promoting higher standards and excellence in higher education, will not be considered as adversely affecting the standards laid down by the Central Body/AICTE. [Para 10(i)] [1022-D-E]

1.3. The observation in para 41(vi) of ****Adhiyaman* **to the effect that where seats remain unfilled, the state authorities cannot deny admission to any student satisfying the minimum standards laid down by AICTE, even though he is not qualified according to its standards, was not good law. The fact that there are unfilled seats in a particular year, does not mean that in that year, the eligibility criteria fixed by the State/ University would cease to apply or that the minimum eligibility criteria suggested by AICTE alone would apply. Unless and until the State or the University chooses to modify the eligibility criteria fixed by them, they will continue to apply in spite of the fact that there are vacancies or unfilled seats in any year. The main object of prescribing eligibility criteria is not to ensure that all seats are in colleges are filled, but to ensure that excellence in standards of higher education is maintained. [Paras 10(ii), 10(iii)] [1022-F-H; 1023-A]

State of Tamil Nadu v. Adhiyaman Educational & Research Institute* **(1995) 4 SCC 104 – referred to.

1.4. The State/University (as also AICTE) should periodically (at such intervals as they deem fit) review the prescription of eligibility criteria for admissions, keeping

in balance, the need to maintain excellence and high standard in higher education on the one hand, and the need to maintain a healthy ratio between the total number of seats available in the State and the number of students seeking admission, on the other. If necessary, they may revise the eligibility criteria so as to continue excellence in education and at the same time being realistic about the attainable standards of marks in the qualifying examinations. [Para 10(iv)] [1023-B-D]

2.1. The primary reason for seats remaining vacant in a State, is the mushrooming of private institutions in higher education. This is so in several states in regard to teachers training institutions, dental colleges or engineering colleges. The second reason is certain disciplines going out of favour with students because they are considered to be no longer promising or attractive for future career prospects. The third reason is the bad reputation acquired by some institutions due to lack of infrastructure, bad faculty and indifferent teaching. Fixing of higher standards, marginally higher than the minimum, is seldom the reason for seats in some colleges remaining vacant or unfilled during a particular year. Therefore, it is not correct to state a student whose marks fall short of the eligibility criteria fixed by the State/ University, or any college is admitted directly under the management quota, therefore, the admission of students found qualified under the criteria fixed by AICTE, should be approved even if they do not fulfil the higher eligibility criteria fixed by the State/University. [Para 11] [1023-E-H]

2.2. The proliferating unaided private colleges, may need a full complement of students for their comfortable sustenance (meeting the cost of running the college and paying the staff etc.). But that cannot be at the risk of quality of education. Reducing the standards to 'fill the seats' will be a dangerous trend which will destroy the

quality of education. If there are large number of vacancies, the remedy lies in (a) not permitting new colleges; (b) reducing the intake in existing colleges; (c) improving the infrastructure and quality of the institution to attract more students. Be that as it may. The need to fill the seats cannot be permitted to override the need to maintain quality of education. Creeping commercialization of education in the last few years should be a matter of concern for the central bodies, states and universities. [Para 12] [1024-A-D]

2.3. No student or college, in the teeth of the existing and prevalent rules of the State and the University can say that such rules should be ignored, whenever there are unfilled vacancies in colleges. In fact, the State/ University, may, in spite of vacancies, continue with the higher eligibility criteria to maintain better standards of higher education in the State or in the colleges affiliated to the University. Determination of such standards, being part of the academic policy of the University, are beyond the purview of judicial review, unless it is established that such standards are arbitrary or 'adversely affect' the standards if any fixed by the Central Body under a Central enactment. [Para 13] [1024-E-G]

3. Two students-writ petitioners by virtue of interim orders continued their studies and would be completing the course in few months On the facts and circumstances, to do complete justice, their admission is not disturbed, but regularized and they are permitted to take the examinations. [Para 14] [1025-A-B]

Case law reference:

(2004) 4 SCC 513	**referred to**	**Para 6**
(1995) 4 SCC 104	**referred to**	**Para 6**
(1999) 7 SCC 120	**referred to**	**Para 8.1**
(2004) 4 SCC 513	**referred to**	**Para 8.2**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1947 of 2011.

From the Judgment & Order dated 26.2.2010 of the High Court of Karnataka at Bangalore, in W.A. No. 1086 of 2008.

WITH

C.A. No. 1948 of 2011.

Basava Prabhu S. Patil, B. Subrahmanya Prasad, Ajay Kumar M., R.D. Upadhyay for the Appellants.

Haripriya Padmanabhan, Garvesh Kabra, Nikita Kabra, Pooja Kabra Jaju, S. Nanda Kumar, R. Satish Kumar, Anjali Chauhan, V.N. Raghupathy for the Respondents.

The Order of the Court was delivered by

O R D E R

R.V. RAVEENDRAN J. 1. Leave granted. Heard. The question involved in these appeals is whether the eligibility criteria for admission to the Engineering courses stipulated under the Statutory Rules and Regulations of the State Government/University could be relaxed or ignored, and candidates who do not meet with such eligibility criteria can be given admission, on the ground that a large number of seats have remained unfilled in professional colleges, if such candidates possess the minimum eligibility prescribed under the norms of the central body (AICTE).

2. All India Council for Technical Education ('AICTE' for short) is the council established under the All India Council for Technical Education Act, 1987 ('AICTE Act' for short) for proper planning and co-ordinated development of technical education throughout the country. AICTE is entrusted the function of laying down the norms and standards for courses, curricula, quality

instructions, assessment and examinations. As per the norms fixed by AICTE, the minimum eligibility for admission to engineering courses, during the academic year 2007-2008 was 35% in the qualifying examinations in Physics, Chemistry and Mathematics for candidates belonging to schedule castes and schedule tribes and 40% for all other candidates.

3. The appellant - Visveswaraya Technological University (for short 'the University') is the examining body and affiliating authority for Technical Educational Institutions in the State of Karnataka established under the Visveswaraya Technological University Act,1994 ('VTU Act' for short). Section 20(1) of the VTU Act empowers the Executive Council of the University to make regulations regarding admission of students and conduct of examinations. The Executive Council, on the recommendation of the Academic Senate resolved to recommend the fixing of minimum eligibility for admissions to B.E./B.Tech courses as 45% for general category and 40% for reserved category in the qualifying examination, from the academic year 2006-07, on the following reasoning :

> "The eligibility for the students for admission to B.E.course was 50% in the qualifying examination up to the academic year 2002-03. As the admission are through the Common Entrance Test of the Government or a Common Management Admission Test, the AICTE relaxed the eligibility criteria to 35% from the year 2003-04 onwards. Many colleges represented to the University that the lowering of the eligibility criteria gave scope for less meritorious students to get into the professional courses leading to deterioration in first and second year examination results. Many of the students were finding it difficult even to obtain the eligibility for the third semester. In view of it, in order to improve the standards of engineering degree course by providing admission to such of the students who can withstand the stress of the professional courses, it is necessary to fix the minimum

> eligibility as 45% in the qualifying examination for general category candidates and 40% in the qualifying examination for reserved category candidates, from the academic year 2006-07."

Consequently the University Regulations governing BE/ B.Tech degree courses were amended and the amended Regulations are extracted below:

> "O.B.2.1 Admission to first year, first semester bachelor degree in Engineering/Technology shall be open for the candidates who have passed the second year Pre-University or XII Standard or equivalent examination recognized by the University.
>
> O.B.2.2 In addition to OB 2.1, the candidate shall have secured not less than forty five percent (45%) marks in the aggregate with Physics and Mathematics as compulsory subjects, along with one of the following subjects: Chemistry, Bio-Technology, Computer Science, Biology and Electronics.
>
> Provided that, the minimum marks for the purpose of eligibility shall be forty percent (40%) in optional subjects in case of candidates belonging to SC/ST and OBC.
>
> Provided that, the candidate shall have studied and passed English as one of the subjects."

Thus the University fixed a marginally higher eligibility criteria, that is 40% for candidates belonging to schedule castes and schedule tribes and 45% for others, as against 35% and 40% respectively suggested by the AICTE norms.

4. The Karnataka Selection of Candidates for Admission to Government Seats in Professional Educational Institution Rules, 2006, published by the State Government, vide notification dated 28.2.2006, which was applicable to the selection of candidates for admission to professional

educational courses including Bachelor of Engineering/ Technology (filled by the Common Entrance Cell) also prescribed similar academic eligibility for admissions during 2007-2008. Relevant portions of Rule 3 thereof are extracted below:

"3. **Academic Eligibility** (1) No candidate shall be eligible for admission to any of the full time degree courses specified in sub-rule (3) of Rule 1 other than the degree course in Architecture unless he :-

(a) has appeared for the Common Entrance Test conducted by the Common Entrance Test cell.

(b) has passed the second year pre-University or XII standard or equivalent examinations held preceding the Entrance test—-

xxx xxx xxx

(iii) with Physics and Mathematics as compulsory subjects, along with one of the following subjects:- Chemistry, Bio-Technology, Computer Science, Biology and Electronics and has secured not less than *forty five percent* of the aggregate marks in optional subjects with English as one of the languages for admission to Engineering, and technology courses.

xxx xxx xxx

Provided further that, the minimum marks for the purpose of eligibility shall be *forty percent* of aggregate in optional subjects in case of candidates belonging to the Scheduled Caste, Scheduled Tribes and other Backward Classes specified in the relevant Government order for the purpose of reservation in respect of Indian system of Medicine and Homeopathy, Engineering and Technology courses."

The above eligibility criteria prescribed for admission to 'Government seats' under Rule 3 of the Admission Rules did not however apply to candidates admitted directly by the managements of colleges.

5. The respective first respondent in these two appeals secured marks which were more than what was prescribed by AICTE norms, but less than what was prescribed by the University Regulations. They were admitted to the Bachelor of Engineering Course during the academic year 2007-2008 by second respondent college in C.A.No.1947/2011 and third respondent college in C.A.No.1948/2011 under the management quota. When the list of admissions were submitted by the said colleges to the University for approval of admissions, the University refused to approve their admissions on the ground that they had secured less than the minimum percentage required for being eligible to admissions. Feeling aggrieved, the two students filed writ petitions before the High Court for quashing the communications of the University refusing to approve their admission, to treat them as eligible for prosecuting the B.E course and to approve their admission and permit them to participate in the examinations conducted by the University. They also sought a declaration that AICTE norms prescribing eligibility criteria alone would govern admissions to B.E. course and the Rules and Regulations of the State and the University, in so far as they were contrary to AICTE Regulations were unconstitutional, unenforceable and inapplicable.

6. A learned single judge of the High Court, following the decision of this Court in *State of Tamil Nadu v. S.V. Bratheep* — (2004) 4 SCC 513, dismissed the writ petition filed by the first respondent in the first matter, by order dated 24.6.2008. The writ appeal filed by the said student, as also the writ petition filed by the first respondent in the second matter were allowed by the Division Bench of the High Court by judgments dated 26.2.2010 purporting to follow the principles laid down by this Court in *State of Tamil Nadu v. Adhiyaman Educational &*

Research Institute — (1995) 4 SCC 104 (extracted below) *:*

> "41. [v] *When there are more applicants than the available situations/seats, the State authority is not prevented from laying down higher standards or qualifications than those laid down by the center or the Central authority to short-list the applicants.* When the State authority does so, it does not encroach upon Entry 66 of the Union List or make a law which is repugnant to the Central law.
>
> 41. [vi] *However, when the situations/ seats are available and the State authorities deny an applicant the same on the ground that the applicant is not qualified according to its standards or qualifications, as the case may be, although the applicant satisfies the standards or qualifications laid down by the Central law, they act unconstitutionally*.
>
> (emphasis supplied)

The Division Bench directed that every year, the University should take into consideration, the standards it has fixed as also the standards fixed by AICTE in regard to eligibility criteria, and keeping in view the number of seats that may remain unfilled/ vacant during that year, extend benefit to the students who fulfill the conditions mentioned in para 41(v) and (vi) of the decision in *Adhiyaman*, by voluntarily relaxing/lowering its standards without driving the students to approach the courts for getting reliefs in terms of *Adhiyaman.* The Division Bench also held that having regard to the decision in *Adhiyaman,* students who are similarly situated to the writ petitioners, should also be given benefit by approval of their admissions without driving them to court. The Division Bench directed the University to approve the admissions of the two writ petitions as they fulfilled eligibility criteria fixed by AICTE.

7. Feeling aggrieved, University has filed these appeals by special leave contending that the University and the State

are always entitled to prescribe higher standards than what is suggested by the AICTE norms so as to maintain the excellence in higher education; that the rules and regulations of the State and University prescribing minimum higher educational qualifications for admission to Engineering Courses, were valid and binding; and that neither any constituent college nor any candidate could support or defend an illegal and irregular admission by the college, by contending that the rules and regulations of the State and the University were invalid and not binding, or that the University should not apply them, as there are more seats than applicants.

8. We may in this context refer to two subsequent decisions which have the effect of clarifying the decision in *Adhiyaman*.

8.1) In *Dr Preeti Srivastava and Anr. Vs. State of M.P. and Ors.* (1999) 7 SCC 120, a constitution bench of this court held:

> "Both the Union as well as the States have the power to legislate on education including medical education, subject, inter alia, to Entry 66 of List-I which deals with laying down standards in institutions for higher education or research and scientific and technical institutions as also coordination of such standards. A State has, therefore, the right to control education including medical education so long as the field is not occupied by any Union Legislation. Secondly, the State cannot, while controlling education in the State, impinge on standards in institutions for higher education. Because this is exclusively within the purview of the Union Government. Therefore, while prescribing the criteria for admission to the institutions for higher education including higher medical education, *the State cannot adversely affect the standards laid down by the Union of India* under Entry 66 of List-I. Secondly, while considering the cases on the subject it is also necessary to remember

that from 1977, education including, inter alia, medical and university education, is now in the Concurrent List so that the Union can legislate on admission criteria also. If it does so, the State will not be able to legislate in this field, except as provided in Article 254……..

It would not be correct to say that the norms for admission have no connection with the standard of education, or that the rules for admission are covered only by Entry 25 of List III. *Norms of admission can have a direct impact on the standards of education*. *Of course, there can be rules for admission which are consistent with or do not affect adversely the standards of education prescribed by the Union in exercise of powers under Entry 66 of List I. For example, a State may, for admission to the postgraduate medical courses, lay down qualifications in addition to those prescribed under Entry 66 of List I. This would be consistent with promoting higher standards for admission to the higher educational courses. But any lowering of the norms laid down can and does have an adverse effect on the standards of education in the institutes of higher education."*

(emphasis supplied)

8.2. In *State of Tamil Nadu. Vs. S.V. Bratheep* (2004) 4 SCC 513 wherein, a three Judge Bench of this Court followed *Dr.Preeti Srivastava* and explained *Adhiyaman* thus:

"*If higher minimum is prescribed by the State Government than what had been prescribed by the AICTE, can it be said that it is in any manner adverse to the standards fixed by the AICTE or reduces the standard fixed by it? In our opinion, it does not*……...The manner in which the High Court has proceeded is that what has been prescribed by AICTE is inexorable and that that minimum alone should be taken into consideration and no other standard could be fixed even higher as stated by this

Court in *Dr. Preeti Srivastava's case*. It is no doubt true, as noticed by this Court in *Adhiyaman's case* that there may be situations when a large number of seats may fall vacant on account of the higher standards fixed. *The standards fixed should always be realistic which are attainable and are within the reach of the candidates. It cannot be said that the prescriptions by the State Government in addition to those of AICTE in the present case are such which are not attainable or which are not within the reach of the candidates who seek admission for engineering colleges…..* Excellence in higher education is always insisted upon by series of decisions of this Court including *Dr. Preeti Srivastava's case. If higher minimum marks have been prescribed, it would certainly add to the excellence in the matter of admission of the students in higher education.*

Argument advanced on behalf of the respondents is that the purpose of fixing norms by the AICTE is to ensure uniformity with extended access of educational opportunity and such norms should not be tinkered with by the State in any manner. We are afraid, this argument ignores the view taken by this Court in several decisions including *Dr. Preeti Srivastava case that the State can always fix a further qualification or additional qualification to what has been prescribed by the AICTE and that proposition is indisputable*. *The mere fact that there are vacancies in the colleges would not be a matter, which would go into the question of fixing the standard of education*. *Therefore, it is difficult to subscribe to the view that once they are qualified under the criteria fixed by AICTE they should be admitted even if they fall short of the criteria prescribed by the State*.

One other argument is further advanced before us that the criteria fixed by the AICTE were to be adopted by the respective colleges and once such prescription had been

made, it was not open to the Government to prescribe further standards particularly when they had established the institutions in exercise of their fundamental rights guaranteed under Article 19 of the Constitution. However, we do not think this argument can be sustained in any manner. *Prescription of standards in education is always accepted to be an appropriate exercise of power by the bodies recognising the colleges or granting affiliation, like AICTE or the University.* If in exercise of such power the prescription had been made, it cannot be said that the whole matter has been foreclosed.

(emphasis supplied)

9. The object of the State or University fixing eligibility criteria higher than those fixed by AICTE, is two fold. The first and foremost is to maintain excellence in higher education and ensure that there is no deterioration in the quality of candidates participating in professional Engineering courses. The second is to enable the State to shortlist the applicants for admission in an effective manner, when there are more applicants than available seats. Once the power of the State and the Examining Body, to fix higher qualifications is recognized, the rules and regulations made by them prescribing qualifications higher than the minimum suggested by AICTE, will be binding and will be applicable in the respective state, unless the AICTE itself subsequently modifies its norms by increasing the eligibility criteria beyond those fixed by the University and the State. It should be noted that the eligibility criteria fixed by the State and the University increased the standards only marginally, that is 5% over the percentage fixed by AICTE. It cannot be said that the higher standards fixed by the State or University are abnormally high or unattainable by normal students, so as to require a downward revision, when there are unfilled seats. During the hearing it was mentioned that AICTE itself has revised the eligibility criteria. Be that as it may.

10. The respondents (colleges and the students) submitted

that in that particular year (2007-2008) nearly 5000 engineering seats remained unfilled. They contended that whenever a large number of seats remained unfilled, on account of non-availability of adequate candidates, para 41(v) and (vi) of *Adhiyaman* would come into play and automatically the lower minimum standards prescribed by AICTE alone would apply. This contention is liable to be rejected in view of the principles laid down in the Constitution Bench decision in *Dr. Preeti Srivastava* and the decision of the larger Bench in *S.V. Bratheep* which explains the observations in *Adhiyaman* in the correct perspective. We summarise below the position, emerging from these decisions:

(i) While prescribing the eligibility criteria for admission to institutions of higher education, the State/University cannot adversely affect the standards laid down by the Central Body/AICTE. The term 'adversely affect the standards' refers to lowering of the norms laid down by Central Body/ AICTE. Prescribing higher standards for admission by laying down qualifications in addition to or higher than those prescribed by AICTE, consistent with the object of promoting higher standards and excellence in higher education, will not be considered as adversely affecting the standards laid down by the Central Body/AICTE.

(ii) The observation in para 41(vi) of *Adhiyaman* to the effect that where seats remain unfilled, the state authorities cannot deny admission to any student satisfying the minimum standards laid down by AICTE, even though he is not qualified according to its standards, is not good law.

(iii) The fact that there are unfilled seats in a particular year, does not mean that in that year, the eligibility criteria fixed by the State/University would cease to apply or that the minimum eligibility criteria suggested by AICTE alone would apply. Unless and until the State or the University chooses to modify the eligibility criteria fixed by them, they

will continue to apply in spite of the fact that there are vacancies or unfilled seats in any year. The main object of prescribing eligibility criteria is not to ensure that all seats are in colleges are filled, but to ensure that excellence in standards of higher education is maintained.

(iv) The State/University (as also AICTE) should periodically (at such intervals as they deem fit) review the prescription of eligibility criteria for admissions, keeping in balance, the need to maintain excellence and high standard in higher education on the one hand, and the need to maintain a healthy ratio between the total number of seats available in the state and the number of students seeking admission, on the other. If necessary, they may revise the eligibility criteria so as to continue excellence in education and at the same time being realistic about the attainable standards of marks in the qualifying examinations.

11. The primary reason for seats remaining vacant in a state, is the mushrooming of private institutions in higher education. This is so in several states in regard to teachers training institutions, dental colleges or engineering colleges. The second reason is certain disciplines going out of favour with students because they are considered to be no longer promising or attractive for future career prospects. The third reason is the bad reputation acquired by some institutions due to lack of infrastructure, bad faculty and indifferent teaching. Fixing of higher standards, marginally higher than the minimum, is seldom the reason for seats in some colleges remaining vacant or unfilled during a particular year. Therefore, a student whose marks fall short of the eligibility criteria fixed by the State/University, or any college which admits such students directly under the management quota, cannot contend that the admission of students found qualified under the criteria fixed by AICTE, should be approved even if they do not fulfil the higher eligibility criteria fixed by the State/University.

12. The proliferating unaided private colleges, may need a full complement of students for their comfortable sustenance (meeting the cost of running the college and paying the staff etc.). But that cannot be at the risk of quality of education. To give an example, if 35% is the minimum passing marks in a qualifying examination, can it be argued by colleges that the minimum passing marks in the qualifying examination should be reduced to only 25 or 20 instead of 35 on the ground that the number of students/candidates who pass the examination are not sufficient to fill their seats? Reducing the standards to 'fill the seats' will be a dangerous trend which will destroy the quality of education. If there are large number of vacancies, the remedy lies in (a) not permitting new colleges; (b) reducing the intake in existing colleges; (c) improving the infrastructure and quality of the institution to attract more students. Be that as it may. The need to fill the seats cannot be permitted to override the need to maintain quality of education. Creeping commercialization of education in the last few years should be a matter of concern for the central bodies, states and universities.

13. No student or college, in the teeth of the existing and prevalent rules of the State and the University can say that such rules should be ignored, whenever there are unfilled vacancies in colleges. In fact the State/University, may, in spite of vacancies, continue with the higher eligibility criteria to maintain better standards of higher education in the State or in the colleges affiliated to the University. Determination of such standards, being part of the academic policy of the University, are beyond the purview of judicial review, unless it is established that such standards are arbitrary or 'adversely affect' the standards if any fixed by the Central Body under a Central enactment. The order of the Division Bench is therefore unsustainable.

14. We, therefore, allow these appeals, set aside the orders of the Division Bench and uphold the dismissal of the

writ petitions by the learned Single Judge. Insofar as the two students (first respondent in each of the two appeals) are concerned, we find that they were admitted in the year 2007-2008 and by virtue of the interim orders, continued their studies and are completing the course in a few months. On the facts and circumstances, to do complete justice, we are of the view that their admissions should not be disturbed, but regularized and they should be permitted to take the examinations.

D.G. Appeals allowed.

UNITED INDIA INSURANCE CO. LTD.

v.

K.M. POONAM & ORS.

(Civil Appeal No. 1928 of 2011)

FEBRUARY 18, 2011

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Motor Vehicles Act, 1988 – ss. 147 and 149 – Motor accident – Compensation – Liability of insurer – Insurance policy taken by the owner of the vehicle covering six passengers including the driver – Vehicle while driven by father of the owner, met with an accident – Passengers in excess of the number covered by the insurance policy, travelling in the vehicle at the time of accident – Death/injury to the passengers – Claim petitions – Liability of the insurer – Held: Is confined to the number of persons covered by the insurance policy only and liability to pay the other passengers is that of the owner of the vehicle – Persons travelling in the vehicle in excess of the permitted number of six passengers, though entitled to be compensated by the owner of the vehicle, would still be entitled to receive the compensation amount from the insurer, who could recover it from the insured owner of the vehicle – There can be no pick and choose method to identify the five passengers, excluding the driver, in respect of whom compensation would be payable by the Insurance Company – In the interest of justice, Insurance Company directed to deposit the total amount of compensation awarded to the claimants which would be disbursed to the claimants – Insurance Company would be entitled to recover the amounts paid by it, in excess of its liability, from the owner of the vehicle, by putting the decree into execution.

Respondent No. 5-owner of the vehicle obtained an insurance policy insuring his jeep with a sitting capacity

of six persons including the driver, for a certain period. During the said period, the father of respondent No. 5, drove the insured vehicle carrying fifteen passengers. The vehicle fell into the ditch resulting in the death of the respondent's father and the death of the majority of the passengers while causing serious injuries to the remaining passengers. The legal representatives of the deceased filed a claim petition. The Tribunal awarded compensation in favour of the claimants holding that carrying a larger number of passengers than was permitted in terms of the Insurance policy, did not amount to breach of the terms and conditions of the Policy and the Insurance Company would still be liable since the vehicle was legally insured. The High Court upheld the order passed by the Tribunal, but enhanced the amount of compensation. Therefore, the appellants filed the instant appeals.

Disposing of the appeals, the Court

HELD: 1.1 In order to fix the liability of the insurer, the provisions of Section 147 have to be read with Section 149 of the Motor Vehicles Act, 1988 which deals with the duty of the insurer to satisfy judgments and awards against persons insured in respect of third party risks. The third party risk in the instant case involves purported breach of the conditions contained in the insurance agreement executed by and between the insurer and the insured. [Paras 20 and 22] [1041-E-F; 1040-F]

1.2. The liability of the insurer is confined to the number of persons covered by the insurance policy and not beyond the same. In the instant case, since the insurance policy of the owner of the vehicle covered six occupants of the vehicle in question, including the driver, the liability of the insurer would be confined to six

persons only, notwithstanding the larger number of persons carried in the vehicle. Such excess number of persons would have to be treated as third parties, but since no premium had been paid in the policy for them, the insurer would not be liable to make payment of the compensation amount as far as they are concerned. However, the liability of the Insurance Company to make payment even in respect of persons not covered by the insurance policy continues under the provisions of sub-section (1) of Section 149 of the Act, as it would be entitled to recover the same if it could prove that one of the conditions of the policy had been breached by the owner of the vehicle. In the instant case, any of the persons travelling in the vehicle in excess of the permitted number of six passengers, though entitled to be compensated by the owner of the vehicle, would still be entitled to receive the compensation amount from the insurer, who could then recover it from the insured owner of the vehicle. [Para 24] [1042-D-G]

1.3. In the instant case, the insurance policy taken out by the owner of the vehicle was in respect of six passengers, including the driver, travelling in the vehicle. The liability of the Insurance Company to pay compensation was limited to six persons travelling inside the vehicle only the liability for payment of the other passengers in excess of six passengers would be that of the owner of the vehicle who would be required to compensate the injured or the family of the deceased to the extent of compensation awarded by the Tribunal. [Paras 25 and 26] [1042-H; 1043-A-B]

1.4. The number of persons to be compensated being in excess of the number of persons who could validly be carried in the vehicle, the question which arises is one of apportionment of the amounts to be paid. Since there can be no pick and choose method to identify the five

passengers, excluding the driver, in respect of whom compensation would be payable by the Insurance Company, to meet the ends of justice the procedure adopted in **Baljit Kaur's* case is applied. The Insurance Company is directed to deposit with the Tribunal, the total amount of compensation awarded to all the claimants within the stipulated period and the amounts so deposited be disbursed to the claimants in respect to their claims. The Insurance Company would be entitled to recover the amounts paid by it, in excess of its liability, from the owner of the vehicle, by putting the decree into execution. For the said purpose, the total amount of the six Awards which are the highest would be construed as the liability of the Insurance Company. After deducting the said amount from the total amount of all the Awards deposited in terms of this order, the Insurance Company would be entitled to recover the balance amount from the owner of the vehicle as if it is an amount decreed by the Tribunal in favour of the Insurance Company. The Insurance Company would not be required to file a separate suit in this regard in order to recover the amounts paid in excess of its liability from the owner of the vehicle. [Paras 26 and 27] [1043-D-H; 1044-A-C]

National Insurance Co. Ltd. vs. Baljit Kaur* **(2004) 2 SCC 1 – relied on.

National Insurance Co. Ltd. vs. Anjana Shyam and Ors. **(2007) 7 SCC 445;** *National Insurance Co. Ltd. vs. Challa Bharathamma and Ors.* **2004 AIR SCW 5301;** *New India Assurance Co. Ltd. vs. Satpal Singh and Ors.* **(2000) 1 SCC 237;** *New India Assurance Co. Ltd. vs. Asha Rani and Ors.* **(2003) 2 SCC 223;** *National Insurance Company Ltd. vs. Nicolletta Rohtagi* **(2002) 7 SCC 456;** *Mallawwa and Ors. vs. Oriental Insurance Co. Ltd. and Ors.* **(1999) 1 SCC 403;** *National Insurance Co. Ltd. vs. Swaran Singh* **(2004) 3 SCC 297 – referred to.**

Case Law Reference:

(2007) 7 SCC 445	**Referred to**	**Para 11**
2004 AIR SCW 5301	**Referred to**	**Para 12**
(2003) 2 SCC 223	**Referred to**	**Para 12, 16, 17**
(2002) 7 SCC 456	**Referred to**	**Para 12**
(2000) 1 SCC 237	**Referred to**	**Para 12, 14, 16, 17**
(1999) 1 SCC 403	**Referred to**	**Para 16, 17**
(2004) 3 SCC 297	**Referred to**	**Para 18**
(2004) 2 SCC 1	**Relied on**	**Para 26**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1928 of 2011.

From the Judgment & Order dated 25.09.2007 of the High Court of Uttarkhand at Nainital, in A.O. No. 311 of 2006.

WITH

C.A. Nos. 1929, 1930, 1931, 1932, 1933, 1934 & 1935 of 2011.

A.K. De, Keshab Upadhyay, Debasis Misra for the Appellant.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Despite service of notice, none of the respondents in these Special Leave Petitions have entered appearance or are represented today to contest the same. All these Special Leave Petitions involve a common question of law as to whether an Insurance Company can be held to be liable for payment of compensation to passengers travelling in a public transport in breach of the conditions of the

permit granted to the owner of the vehicle for operating the same. They are, therefore, taken up for consideration together. Delay, if any, in filing the Special Leave Petitions is condoned.

2. Leave granted.

3. Since the facts in all these appeals are the same, the facts in SLP(C)No.24188 of 2008, *United Insurance Company Ltd. Vs. K.M. Poonam & Ors.,* are referred to in this judgment.

4. The Respondent No.5, Shri Surdeep Gusain, obtained an insurance policy insuring his Jeep No. UP-06-6244 with a sitting capacity of six persons, including the driver, for the period covering 23rd July, 2004 to 22nd July, 2005. In other words, besides the driver, the vehicle was entitled to carry a maximum number of five passengers.

5. On 18th August, 2004, the aforesaid vehicle carrying fifteen passengers from Village Nansu to Dharkot Thapli, while being driven by Bharat Singh Rawat, the father of the respondents herein, fell into a ditch resulting in his death and the death of the majority of the passengers while causing serious injuries to the remaining passengers. The Respondent Nos.1 to 4 as the legal representatives of the deceased filed an application for compensation before the Motor Accident Claims Tribunal, Pauri. On the basis of the pleadings filed by the parties, the following issues were framed :-

(1) Whether on 18.8.2004 the deceased Bharat Singh was driving the vehicle No.UP.-06/6244 on Jakheti-Nansu Road and due to the mechanical fault in the vehicle the jeep met an accident due to which Bharat Singh died ?

(2) Whether the aforesaid accident occurred due to the negligence of the deceased?

(3) Whether on the date of accident the alleged vehicle was being plied according to the conditions of

insurance policy and permit?

(4) Whether the complainants are entitled for any relief? If yes, how much and from whom?

6. In order to support their claim, the claimants filed the First Information Report, which was lodged by the owner of the jeep, Shri Surdeep Singh, on 19th August, 2004, at Patti Patwari Kafolsue, wherein it was stated that he had given the vehicle to Bharat Singh and that it had met with an accident which killed seven persons on the spot and caused injuries to the others. The jeep was badly damaged, but the cause of the accident was not known. On the basis of the said report, a case was lodged against Bharat Singh under Sections 279, 304-A, 337 and 338 Indian Penal Code. The witness of the Insurance Company, who was examined as OPW.1, deposed that fifteen persons were travelling in the jeep at the time of the accident, but there was no negligence on the part of the driver.

7. The claimants also filed the driving licence of the deceased, Bharat Singh, which showed that the licence was valid till 12.3.2007. The photocopy of the registration certificate of the vehicle was also filed by the owner of the vehicle which established the fact that it was valid on the date of the accident and that taxes had been paid upto date and the fitness of the vehicle was valid from 13.8.2004 to 12.8.2005. In addition, a photocopy of the Insurance Cover Note was also filed to indicate that the vehicle was duly insured from 23.7.2004 to 22.7.2005. Accordingly, on the date of the accident, all the papers of the vehicle were valid, the vehicle was legally insured and was being driven by Bharat Singh holding a valid and effective driving licence. However, on behalf of the Insurance Company, the Appellant herein, it was stated that on the date of the accident, passengers in excess of the number covered by the insurance policy were being carried in the vehicle.

8. On the basis of the aforesaid evidence, the Motor Accident Claims Tribunal held that even if a larger number of

passengers than was permitted under the terms of the insurance policy were being carried in the vehicle, it could not be said that the Appellant Insurance Company would stand exonerated from its liability because the vehicle was insured for third party coverage for unlimited liability. The learned Tribunal, accordingly, answered Issue Nos.1 to 3 in favour of the claimants observing that carrying a larger number of passengers than was permitted in terms of the Insurance Policy, did not amount to breach of the terms and conditions of the Policy and the Insurance Company would still be liable since the vehicle was legally insured.

9. As far as the fourth issue is concerned, the first Respondent, Kumari Poonam, stated on oath that both her parents had died in the same accident and that her father as driver was earning Rs.4,000/- per month. Although, the claimants did not file the income certificate of the deceased, the Tribunal initially assessed his annual income at Rs.25,000/- and applying the multiplier of 16 arrived at a figure of Rs.4,03,200/- payable as compensation. After deductions, the total amount of compensation was assessed as Rs.1,86,200/-, along with interest @9% per annum. On the claimants' cross-appeal being allowed, the Tribunal assessed his income to be Rs.36,000/- per annum and since the age of the deceased was taken as 43 years at the time of the accident, applying the multiplier of 15 indicated in the Table of Section 163A of the Motor Vehicles Act, 1980, the total compensation was re-assessed as Rs.5,40,000/-. After deducting one-third of the amount on account of personal expenses of the deceased from the amount of the compensation, a balance amount of Rs.3,60,000/- was arrived at, from which a further one-third was deducted so that the amount of compensation to which the claimants were entitled was finally settled at Rs.2,40,000/-. Certain other claims were also included so that the total amount of compensation was assessed as Rs.2,47,000/-. In keeping with its decision on the first three issues, the Tribunal held that since the vehicle was insured with the Appellant Insurance

Company, it was liable to make payment of the said compensation. The Tribunal directed the Appellant Insurance Company to pay the aforesaid amount to the claimants within two months, failing which they would also be entitled to interest at the rate of 9% per annum from the date of the claim petition.

10. The Insurance Company preferred different appeals against the aforesaid judgment and awards dated 28.1.2006 of the Motor Accident Claims Tribunal, Pauri, which were taken up for consideration together and were dismissed by the High Court by a common judgment and order dated 25th September, 2007. Endorsing the views expressed by the Motor Accident Claims Tribunal, the High Court chose not to interfere with the impugned judgment and awards and confirmed the same. However, while doing so, the High Court held that the claimants would be entitled to a sum of Rs.2,75,800/- towards compensation in place of Rs.1,86,200/- and the rate of interest was reduced from 9% per annum to 7.5% per annum. The other parts of the impugned judgment and award were confirmed by the High Court. Aggrieved thereby, the Insurance Company has filed these several appeals.

11. Learned counsel appearing for the appellant submitted that having regard to the provisions of Section 149 of the Motor Vehicles Act, 1988, the liability, if any, of the Insurance Company for payment of compensation would have to be limited to the number of passengers validly permitted to be carried in the vehicle covered by the insurance policy and did not extend to the number of passengers carried in excess of the permitted number. Learned counsel submitted that the said question had been considered by a two-Judge Bench of this Court in *National Insurance Co. Ltd. Vs. Anjana Shyam & Ors.* [(2007) 7 SCC 445] decided on 20th August, 2007. While considering the provisions of Section 147(1)(b)(ii) and (2) and Section 149(1)(2) and (5) of the 1988 Act in relation to an insurer's liability, their Lordships came to the conclusion that the insurer's liability was limited by the insurance taken out for

the number of permitted passengers and did not extend to paying amounts decreed in respect of other passengers. Taking recourse to a harmonious construction of the relevant provisions, their Lordships held that the total amount of compensation payable should be deposited by the Insurance Company which could be proportionately distributed to all the claimants, who could recover the balance of the compensation amounts awarded to them from the owner of the vehicle.

12. Reliance was also placed on another two-Judge Bench decision of this Court in *National Insurance Co. Ltd. Vs. Challa Bharathamma & Ors.,* 2004 AIR SCW 5301, in which, while taking note of the earlier decisions rendered by a two-Judge Bench of this Court in *New India Assurance Company Vs. Satpal Singh & Ors.* [(2000) 1 SCC 237] and a three-Judge Bench in *New India Assurance Co. Ltd. Vs. Asha Rani & Ors.,* [(2003) 2 SCC 223], and also the decision of another two-Judge Bench of this Court in *National Insurance Company Ltd. Vs. Nicolletta Rohtagi,* [(2002) 7 SCC 456], Their Lordships held that when an insurer proved not to be liable to pay compensation in terms of Section 149(2) of the 1988 Act, it could not be made liable for payment of the compensation awarded. However, their Lordships also observed that having regard to the beneficial object of the Act, it would be proper for the insurer to satisfy the award and to recover the amount from the owner, without taking recourse to a separate suit, from the Executing Court itself.

13. Learned counsel for the Insurance Company submitted that having regard to the aforesaid decisions of this Court, the liability of making payment of compensation would be to the extent of six passengers only, though it could be directed to pay the balance amount of the total compensation awarded, with liberty to recover the balance amount from the owner of the vehicle.

14. The law relating to the insurer's liability for payment of compensation to gratuitous passengers in a vehicle after the

enactment of the Motor Vehicles Act, 1988, which replaced the Motor Vehicles Act, 1939, initially came up for consideration in *Satpal Singh's* case (supra) wherein this Court was called upon to consider the change in the provisions relating to third party risk, as was contained in Section 95 of the 1939 Act as against the provisions of Section 147 of the 1988 Act. Their Lordships held that as per the proviso to Section 95(1) when read with its Clause (ii), it would be clear that the policy of insurance was not required to cover the liability in respect of the death of or bodily injury to persons who were gratuitous passengers of that vehicle. In contrast, under Section 147 of the 1988 Act, the insurance policy was required to insure the person or classes of persons specified in the policy to the extent specified in Sub-section (2) against any liability which may be incurred by him in respect of the death of or bodily injury to any person, including owner of the goods or his authorized representative carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place and also against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place.

15. On an interpretation of the aforesaid provisions of Section 147 of the 1988 Act, it was held that under Sub-section (2) there is no upper limit for the insurer regarding the amount of compensation awarded in respect of death or bodily injury of a victim of the accident. It was, therefore, apparent that the limit contained in the old Act having been removed the policy should insure the liability incurred and cover injury to any person, including the owner of the goods or his authorized representative, carried in the vehicle. Their Lordships concluded that as a result of the provisions of the new Act, the earlier decisions rendered under the 1939 Act were no longer relevant and an insurance policy covering third party risk was not required to exclude gratuitous passengers in a vehicle, no matter that the vehicle was of any type or class.

16. The said view which had followed an earlier three-Judge Bench decision of this Court in *Mallawwa & Ors. Vs. Oriental Insurance Co. Ltd. & Ors.* [(1999) 1 SCC 403], came up for consideration once again in a batch of appeals filed by different insurance companies, including the present Appellant Company, in the decision of this Court reported in [(2001) 6 SCC 724] under the lead case of *New India Assurance Co. Ltd. Vs. Asha Rani & Ors.* Upon considering the various decisions which had preceded the judgment in *Satpal Singh's* case (supra) the two-Judge Bench was of the view that some of the striking features of the new Act had not been brought to the notice of the Court which could have a bearing on the conclusion arrived at in *Satpal Singh's* case, i.e., that on account of the definition of "goods vehicle" and "goods carriage" under the new Act, goods carriages were no longer used to carry any passenger. Their Lordships were also of the view that the defence available to the Insurance Company under Section 149(2) of the 1988 Act would stand obliterated on account of the law as declared in *Satpal Singh's* case. Their Lordships felt that under the new Act, it would be a breach of condition in case the vehicle was used for a purpose other than for which permit had been issued. Apart from the above, the effect of the deletion of Clause (ii) to the Proviso to Section 95(1)(b) in the new Act also required reconsideration. The matter was, therefore, referred to the Hon'ble Chief Justice to have the various issues reconsidered by a larger Bench.

17. The aforesaid questions were, thereafter, gone into by a Bench of three-Judges, where the issues decided in *Satpal Singh's* case were revisited. In the decision reported in *New India Assurance Co. Ltd. Vs. Asha Rani & Ors.* [(2003) 2 SCC 223] the three-Judge Bench considered the provisions of Section 95 of the 1939 Act and Section 147 of the 1988 Act in detail and also the amendments effected to Section 147(1)(b)(i) by the Amendment Act 54 of 1994 and came to the conclusion that in *Satpal Singh's* case (supra), this Court had proceeded on the assumption that the provisions of Section

95(1) of the Motor Vehicles Act, 1939, were identical to the provisions of Section 147(1) of the Motor Vehicles Act, 1988 as it stood before its amendment. It was held that Section 147 of the new Act deals with the requirements of the policy and limits of liability incurred to third party risks, but the Proviso thereto makes an exception to the main provision, which reads as follows :

> "Provided that a policy shall not be required—
>
> (i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923), in respect of the death of, or bodily injury to, any such employee—
>
> (a) engaged in driving the vehicle, or
>
> (b) if it is a public service vehicle engaged as conductor of the vehicle or in examining tickets on the vehicle, or
>
> (c) if it is a goods carriage, being carried in the vehicle, or
>
> (ii) to cover any contractual liability."

It was also noticed that as far as employees of the owner of the motor vehicle were concerned, an insurance policy was not required to be taken in relation to their liability, other than arising in terms of the provisions of the Workmen's Compensation Act, 1923. On the other hand, Proviso (ii), included under Section 95 of the 1939 Act, imposed a liability upon the owner of the vehicle to take out an insurance policy to cover the liability in respect of a person who was travelling in a vehicle pursuant to a contract of employment. The same

was consciously omitted from the provisions of the 1988 Act. It was further held that the applicability of the decision in *Mallawwa's* case (supra) to the facts of the case before Their Lordships would have to be considered keeping that aspect of the matter in view. Proceeding further, their Lordships observed that Section 2(35) of the 1988 Act does not include passengers in goods carriages whereas Section 2(25) of the 1939 Act did, since even passengers could be carried in a goods vehicle. Noting the difference in the definitions of "goods vehicle" in the 1939 Act and "goods carriage" in the 1988 Act, Their Lordships held that carrying of passengers in a goods carriage was not contemplated under the 1988 Act. On the basis of the aforesaid findings, the three-Judge Bench over-ruled the decision of this Court in *Satpal Singh's* case, holding that the law had not been laid down correctly therein.

18. The aforesaid issue once again surfaced in the case of *National Insurance Co. Ltd. Vs. Swaran Singh* [(2004) 3 SCC 297], where the provisions of Section 149 and also Section 147 fell for consideration. While considering the liability cast upon an insurer under Section 149(1) and the limited grounds of liability in the insurance contract and third party claims as envisaged in the Proviso to Section 149(4), this Court also had occasion to refer to Section 147 relating to the statutory liability and any contractual liability under the insurance contract and whether the contractual exclusion of liability in respect of third party claim was permissible. The three-Judge Bench held that such a condition in the insurance policy, whereby the right of the third party is taken away would be void and that except under the situation provided for by Section 149(2)(b), the insurer would not be entitled to avoid its statutory liability, since its rights of recovery were preserved against the insured under the Proviso to Section 149(4) of the 1988 Act.

19. While the aforesaid judgment was delivered on 5th January, 2004, on the very next day, another three-Judge Bench of this Court rendered a decision in *National Insurance Co.*

Ltd. Vs. Baljit Kaur [(2004) 2 SCC 1], in the context of the provisions of Section 147(1)(b) of the 1988 Act after its amendment in 1994. While referring to the earlier decision in the reference decided in *Asha Rani's* case (supra), their Lordships held that inspite of the amendment effected to Section 147(1)(b) in 1994, the position remained the same in respect of persons other than the owner of the goods and his authorized representative being carried in the goods vehicle. It was held that it was not the intention of the legislature to provide for the liability of the insurer with respect to passengers, especially gratuitous passengers who were neither contemplated at the time the contract of insurance was entered into, nor was any premium paid to the extent of the benefit of insurance to such category of people. It was, therefore, felt that the interest of justice would be subserved if the Insurance Company satisfied the awarded amount and recovered the same from the owner of the vehicle and for the said purpose it would not be necessary for the Insurance Company to file a separate suit, but to initiate a proceeding before the executing Court as if the dispute between insurer and the owner was the subject matter of the determination before the Tribunal which had decided in favour of the insurer and against the owner of the vehicle.

20. The law as regards the liability of insurers towards third parties killed or injured in accidents involving different types of motor vehicles, has been crystallized in the several decisions of this court referred to hereinabove. The kind of third party risk that we are concerned with in this case involves purported breach of the conditions contained in the insurance agreement executed by and between the insurer and the insured.

21. From the decision in *Baljit Kaur's* case (supra), which was later also articulated in *Anjana Shyam's* case (supra) what emerges is that a policy of insurance, in order to be valid, would have to comply with the requirements of Chapter XI of the Motor Vehicles Act, 1988, which deals with insurance of motor

vehicles against third party risks. Section 146 of the Act stipulates that no person shall use, except as a passenger, or cause or allow any other person to use, a motor vehicle in a public place, unless there is a valid policy of insurance in relation to the use of the vehicle complying with the requirements of the said Chapter. Section 147 of the Act is an extension of the provisions of Section 146 and sets out the requirements of policies and the limit of their liability. Section 147(1)(a) provides that a policy of insurance must be issued by a person who is an authorized insurer. Section 147(1)(b) provides that a policy of insurance must be a policy which insures the person or class of persons specified in the policy to the extent specified in sub-section (2). Sub-section (2) of Section 147 indicates that subject to the proviso to sub-section (1) which excludes the liability of the insurer in certain specific cases, a policy of insurance referred to therein must cover any liability incurred in respect of any accident, inter alia, for the amount of liability incurred.

22. However, in order to fix the liability of the insurer, the provisions of Section 147 have to be read with Section 149 of the Act which deals with the duty of the insurer to satisfy judgments and awards against persons insured in respect of third party risks. Although, on behalf of the Insurance Company it has been sought to be contended that no third party risks were involved in the accident and that the persons travelling in the ill-fated vehicle were gratuitous passengers, the Insurance Company cannot get away from the fact that the vehicle was insured for carrying six persons and the liability of the Insurance Company was to pay compensation to the extent of at least six of the occupants of the vehicle, including the driver.

23. Sub-section (1) of Section 149 of the Motor Vehicles Act, 1988, makes it amply clear that once a certificate of insurance is issued under sub-section (3) of Section 147, then notwithstanding that the insurer may be entitled to avoid or cancel the policy, it shall pay to the person entitled to the benefit

of the decree any sum not exceeding the sum assured, payable thereunder, as if he was the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments. Sub-section (2), however, places a fetter on the payment of any sum by the insurer under sub-section (1) in respect of any judgment or award unless, the insurer had notice of the proceedings in which the said judgment or award is given and an insurer to whom such notice is given shall be entitled to be made a party thereto and to defend the action on the grounds enumerated therein involving a breach of a specified condition of the policy.

24. The liability of the insurer, therefore, is confined to the number of persons covered by the insurance policy and not beyond the same. In other words, as in the present case, since the insurance policy of the owner of the vehicle covered six occupants of the vehicle in question, including the driver, the liability of the insurer would be confined to six persons only, notwithstanding the larger number of persons carried in the vehicle. Such excess number of persons would have to be treated as third parties, but since no premium had been paid in the policy for them, the insurer would not be liable to make payment of the compensation amount as far as they are concerned. However, the liability of the Insurance Company to make payment even in respect of persons not covered by the insurance policy continues under the provisions of sub-section (1) of Section 149 of the Act, as it would be entitled to recover the same if it could prove that one of the conditions of the policy had been breached by the owner of the vehicle. In the instant case, any of the persons travelling in the vehicle in excess of the permitted number of six passengers, though entitled to be compensated by the owner of the vehicle, would still be entitled to receive the compensation amount from the insurer, who could then recover it from the insured owner of the vehicle.

25. As mentioned hereinbefore, in the instant case, the

insurance policy taken out by the owner of the vehicle was in respect of six passengers, including the driver, travelling in the vehicle in question. The liability for payment of the other passengers in excess of six passengers would be that of the owner of the vehicle who would be required to compensate the injured or the family of the deceased to the extent of compensation awarded by the Tribunal.

26. Having arrived at the conclusion that the liability of the Insurance Company to pay compensation was limited to six persons travelling inside the vehicle only and that the liability to pay the others was that of the owner, we, in this case, are faced with the same problem as had surfaced in *Anjana Shyam's* case (supra). The number of persons to be compensated being in excess of the number of persons who could validly be carried in the vehicle, the question which arises is one of apportionment of the amounts to be paid. Since there can be no pick and choose method to identify the five passengers, excluding the driver, in respect of whom compensation would be payable by the Insurance Company, to meet the ends of justice we may apply the procedure adopted in *Baljit Kaur's* case (supra) and direct that the Insurance Company should deposit the total amount of compensation awarded to all the claimants and the amounts so deposited be disbursed to the claimants in respect to their claims, with liberty to the Insurance Company to recover the amounts paid by it over and above the compensation amounts payable in respect of the persons covered by the Insurance Policy from the owner of the vehicle, as was directed in *Baljit Kaur's* case.

27. In other words, the Appellant Insurance Company shall deposit with the Tribunal the total amount of the amounts awarded in favour of the awardees within two months from the date of this order and the same is to be utilized to satisfy the claims of those claimants not covered by the Insurance Policy along with the persons so covered. The Insurance Company will

be entitled to recover the amounts paid by it, in excess of its liability, from the owner of the vehicle, by putting the decree into execution. For the aforesaid purpose, the total amount of the six Awards which are the highest shall be construed as the liability of the Insurance Company. After deducting the said amount from the total amount of all the Awards deposited in terms of this order, the Insurance Company will be entitled to recover the balance amount from the owner of the vehicle as if it is an amount decreed by the Tribunal in favour of the Insurance Company. The Insurance Company will not be required to file a separate suit in this regard in order to recover the amounts paid in excess of its liability from the owner of the vehicle.

28. The Appeals are, accordingly, disposed of. Having regard to the nature of the case, the parties shall bear their own costs.

N.J. Appeals disposed of.

COMMISSIONER OF CUSTOMS.

v.

SAYED ALI & ANR.

(CIVIL APPEAL NOS. 4294-4295 of 2002)

FEBRUARY 18, 2011

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

CUSTOMS ACT, 1962:

Section 2(34) and 28 read with s. 111 (d) – "Proper officer"—Notice for payment of duty, interest etc. – Issued by Collector of Customs (Preventive) – Propriety of – HELD: Only such a Customs Officer who has been assigned the specific functions of assessment and re-assessment of duty in jurisdictional area, where the import concerned has been affected, by either the Board or the Commissioner of Customs in terms of s.2(34), is competent to issue notice u/s 28 – Specific entrustment of function by either the Board or the Commissioner of Customs is, therefore, the governing test to determine whether an "officer of customs" is the "proper officer"– In the instant cases, the import manifest and the bill of entry having been filed before the Collectorate of Customs (Imports) Mumbai, the same having been assessed and clearance for home consumption having been allowed by the proper officer on importers executing bond, undertaking the obligation of export, the Collector of Customs (Preventive), not being a "proper officer" within the meaning of s. 2(34) of the Act, was not competent to issue show cause notice for re-assessment u/s.28 of the Act – Notifications No. 250- Cus and 251-Cus dated 27.8.1983.

Civil Appeal Nos. 4294-4295 of 2001 arose out of the notice issued to assessee-respondent No.2, a partnership firm engaged in the business of carpet

manufacture, by Collector of Customs (Preventive) on 16.4.1994 asking the assessee to show cause as to why goods under seizure be not confiscated and customs duty be not levied in terms of s. 28 (1) of the Customs Act, 1962 by invoking extended period of limitation. When the matter reached the Customs Excise and Gold (Control) Appellate Tribunal, it held that the Commissioner of Customs (Preventive) did not have jurisdiction to issue the show cause notice. When on similar facts appeals giving rise to CA Nos. 4603-4604 of 2005, came before CESTAT, it upheld the issuance of show cause notice by the Collector of Customs(Preventive), u/s 20 of the Act.

Allowing CA Nos. 4603-4604 of 2005 and dismissing CA Nos. 42304-4295 of 2002, the Court

HELD: 1.1 It is evident that the notice u/s 28 of the Customs Act, 1962 has to be issued by the "proper officer". Section 2(34) which defines the term "proper officer" makes it clear that only such officers of customs who have been assigned specific functions would be "proper officers" in terms of s.2(34). Specific entrustment of function by either the Board or the Commissioner of Customs is, therefore, the governing test to determine whether an "officer of customs" is the "proper officer". [para 12-13] [1057-D-G]

1.2 From a conjoint reading of s.2(34) and s.28 of the Act, it is manifest that only such a customs officer who has been assigned the specific functions of assessment and re-assessment of duty in the jurisdictional area where the import concerned has been affected, by either the Board or the Commissioner of Customs, in terms of s. 2(34) of the Act is competent to issue notice u/s 28 of the Act. Any other reading of s. 28 would render the provisions of s. 2(34) of the Act otiose in as much as the test contemplated u/s 2(34) of the Act is that of specific

conferment of such functions. [para 14] [1057-H; 1058-A-B]

1.3 It cannot be said that once territorial jurisdiction is conferred, the Collector of Customs (Preventive) becomes a "proper officer" in terms of s.28 of the Act, as it would lead to a situation of utter chaos and confusion, in as much as all officers of customs, in a particular area be it under the Collectorate of Customs (Imports) or the Preventive Collectorate, would be "proper officers". Therefore, it is only the officers of customs, who are assigned the functions of assessment, which of course, would include re-assessment, working under the jurisdictional Collectorate within whose jurisdiction the bills of entry or baggage declarations had been filed and the consignments had been cleared for home consumption, will have the jurisdiction to issue notice u/s. 28 of the Act. [para 14] [1058-B-E]

1.4 In the instant cases, the import manifest and the bill of entry having been filed before the Collectorate of Customs (Imports) Mumbai, the same having been assessed and clearance for home consumption having been allowed by the proper officer on importers executing bond, undertaking the obligation of export, the Collector of Customs (Preventive), not being a "proper officer" within the meaning of s. 2(34) of the Act, was not competent to issue show cause notice for re-assessment u/s.28 of the Act. Nothing has been brought on record to show that the Collector of Customs (Preventive), who had issued the show cause notices was assigned the functions u/s.28 of the Act as "proper officer" either by the Board or the Collector/Commissioner of Customs. [para 16] [1058-H; 1059-A-C]

1.5 Notifications No. 250-Cus and 251-Cus., both dated 27.8.1983, issued by the Central Government in

exercise of the powers conferred by sub-s. (1) of the s.4 of the Act, appointing Collector of Customs (Preventive) etc. to be the Collector of Customs for Bombay, Thane and Kolaba Districts in the State of Maharashtra did not *ipso facto* confer jurisdiction on him to exercise power entrusted to the "proper officers" for the purpose of s.28 of the Act. [para 16] [1059-E-F]

1.6 It cannot, therefore, be said that the source of power to act as a "proper officer" is ss. 4 and 5 of the Act and not sub-s.(34) of s.2 of the Act. The said sections merely authorize the Board to appoint officers of customs and confer on them the powers and duties to be exercised/discharged by them, but for the purpose of s.28 of the Act, an officer of customs has to be designated as "proper officer" by assigning the function of levy and collection of duty, by the Board or the Commissioner of Customs. [para 16] [1059-D-F]

Union of India & Ors. Vs. Ram Narain Bishwanath & Ors. **(1998) 9 SCC 285 – held inapplicable.**

1.8 This judgment shall not preclude the Revenue from initiating any proceedings against the importers for recovery of duty and other charges payable in respect of the subject goods, if permissible under the Act. [para 17] [1060-C-D]

Konia Trading Co. Vs. Commissioner of Customs, Jaipur **2004(170) ELT 51 (Tri.-LB);** *Manohar Bros. (Capacitors) Vs. Collector of Customs II, Bombay*, **1998 (98) ELT 821 (Tri);** *Collector vs. Manohar Bros. (Capacitors)* **2004(166) ELT A152(SC);** *Devilog Vs. System India Vs. Collector of Customs, Bangalore* **1995 (76) ELT 520 (Kar.);** *Orient Arts & Crafts Vs. Commissioner of Customs (prev.) Mumbai* **2003(155) ELT 168 (Tri-Mum);** *and Informatika Software (P) Ltd. & Ors. Vs. Commissioner of Customs (P.) Calcutta.***1997**

(73) ECR 348 ((Tri. Kolkata); *The Commissioner, Sales Tax, U.P. vs. M/s. Suraj Prasad Gouri Shankar* **(1974) 3 SCC 230; and** *Sharad Himatlal Daftry vs. Collector of Customs* **1988 (36) ELT 468 (Cal.) – cited.**

Case Law Reference:

2004(170) ELT 51 (Tri.-LB)	**cited**	**para 7**
(1998) 9 SCC 285	**held inapplicable**	**para 9**
1998 (98) ELT 821 (Tri)	**cited**	**para 9**
2004(166) ELT A152(SC)	**cited**	**para 9**
1995 (76) ELT 520 (Kar.)	**cited**	**para 10**
2003(155) ELT 168 (Tri-Mum)	**cited**	**para 10**
1997 (73) ECR 348 ((Tri. Kolkata)	**cited**	**para 10**
(1974) 3 SCC 230	**cited**	**para 10**
1988 (36) ELT 468 (Cal.)	**cited**	**para 11**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4294-4295 of 2002.

From the Judgment & Order dated 01.02.2002 of the Customs, Excise & Gold (Control) Appellate Tribunal (CEGAT) Mumbai in final order No. CII/342-43/WZB/2002 in Appeal Nos. C/660-661/96-Bom.

WITH

Civil Appeal No. 4603-4604 of 2005.

V. Shekhar, Harish Chander, Joseph Vellapally, Amey Nargolokar, T.A. Khan Zangpo Sherpa, B. Krishna Prasad, R. Nedumaran, Vipin Jain, Reena Khair, S.R. Setia, Ragvesh Singh, Neha S. Verma for the appearing parties.

The Judgment of the Court was delivered by

D.K. JAIN, J.: 1. Challenge in these civil appeals, filed under Section 130E of the Customs Act, 1962 (for short "the Act"), is to the orders dated 1st October, 2001 and 4th January, 2005 passed by the Customs, Excise & Gold (Control) Appellate Tribunal (for short "the CEGAT") and the Customs, Excise & Service Tax Appellate Tribunal (for short "the CESTAT") respectively. In the first set of appeals (Nos. 4294-4295 of 2002), the CEGAT has held that the Commissioner of Customs (Preventive), Mumbai, not being a "proper officer" as defined in Section 2(34) of the Act, did not have jurisdiction to issue show cause notice in terms of Section 28 of the Act. However, in the second set of appeals (Nos. 4603-4604 of 2005), the CESTAT has, to the contrary, held that the Commissioner of Customs (Preventive), Mumbai had jurisdiction to issue notice under Section 28 of the Act.

2. Since the question of law arising in all the appeals is similar, these are being disposed of by this common judgment. However, to appreciate the controversy, facts in C.A. Nos. 4294-4295 of 2002 are adverted to. These are:

Respondent No. 1 is a partner in respondent No. 2 firm viz. M/s. Handloom Carpet, which is engaged in the business of carpet manufacture/export. Respondent No. 2 was charged with misusing the Export Pass Book scheme by selling goods cleared duty free in the open market or selling the pass book on premium in violation of the ITC restriction imposed on such sale. Investigations in the matter were conducted by the Marine and Preventive Wing of the Customs. On 28th August, 1991, the Assistant Collector of Customs (Preventive), Mumbai, issued to the respondents a show cause notice, alleging violation of the provisions of Section 111(d) of the Act. On 3rd February, 1993, the same officer adjudicated upon the said show cause notice, confirming the demands raised in the show cause notice

3. Being aggrieved, the respondents preferred an appeal before the Collector of Customs (Appeals), who vide order dated 14th December, 1993, allowed the appeal holding that since the matter involved demand of duty beyond a period of six months, the show cause notice was required to be issued by the Collector, and not by the Assistant Collector. Nevertheless, the Collector (Appeals) granted liberty to the department to re-adjudicate the case by issuing a proper show cause notice.

4. Accordingly, the Collector of Customs (Preventive) issued show cause notice dated 16th April, 1994 asking the respondents to show cause as to why the goods under seizure valued at Rs.1,04,118.52/- should not be confiscated, and customs duty amounting to Rs.5,07,274/- be not levied in terms of Section 28(1) of the Act, by invoking the extended period of limitation. Penalties under Sections 112(a) and (b)(i) and (ii) of the Act were also proposed.

5. In reply to the show cause notice, the jurisdiction of the Collector of Customs (Preventive) was questioned on the ground that the jurisdiction of a Commissioner by virtue of Notification No. 251/83 being more specific and limited in nature, the said notification will prevail over Notification No.250/83. Vide order dated 19th August, 1996, the Collector of Customs (Preventive) rejected the objections regarding his jurisdiction, holding thus:

> "It is not disputed by the parties that by virtue of notification No. 250/83 the commissioner of customs (preventive) Mumbai is appointed as Commissioner of Customs in the areas comprising Districts of Mumbai, Thane and Kolaba and a concurrent jurisdiction is thus vested in respect of Mumbai port also. What is being contended is that the jurisdiction of commissioner of customs, Mumbai under Notification No. 251/83 is more specific and limited. In this regard it is relevant to refer to the definition of smuggling under the provisions of customs Act, 1962. Under the Act

> Smuggling is defined as any act or omission which renders the goods to confiscation under the provisions of the Act. In this case M/s handloom carpet manufacturer (sic) are charged with trafficking of the goods imported and cleared only free in violation of the provisions of notification No. 117/88 dated 30-3-1988 and fabrication of documents to show receipt and consumption of the same in their factory. The goods imported and cleared duty free were thus rendered liable for confiscation under the provisions of the customs Act, 1962 and the customs (preventive) Commisionerate created for the purpose of prevention of smuggling and detention of cases of smuggling including commercial frauds is thus (sic) competent to investigate and adjudicate the case."

The Collector confirmed the demand of duty of Rs. 5,07,274/- under Section 28(1) of the Act. He also ordered confiscation of two consignments of dyes sulphur blue and sulphur blue green valued at Rs. 1,34,118.52/-, and imposed a redemption fine of Rs. 1,50,000/-.

6. Aggrieved, the respondents preferred appeals before the CEGAT. As afore-mentioned, accepting the preliminary objection of the respondents regarding jurisdiction of the Collector (Preventive), the CEGAT has, vide the impugned order, allowed the appeals, observing that:

> "it is very clear that the Commissioner of Customs (Preventive) does not have jurisdiction to issue the impugned show cause notice and in view thereof he could not have the jurisdiction to adjudicate the matter when imports have taken place at Bombay Customs House."

7. At the sake of repetition, it may be noted that although the facts obtaining in C.A. Nos. 4603-4604 of 2005 were similar to those in C.A. Nos. 4294-4295 of 2002, but, in the former case, following the decision of its larger bench in *Konia*

Trading Co. Vs. Commissioner of Customs, Jaipur[1], the CESTAT while upholding the issue of show cause notice by the Collector of Customs (Preventive) under Section 28 of the Act, set aside the order of adjudication passed by the said officer with a direction that the issues be determined afresh by the jurisdictional Collector of Customs who had earlier assessed the bill of entry in question at Bombay Port.

8. Hence, the present cross appeals by the revenue and the importers. At the very outset, we may clarify that these appeals are confined only to the question of validity of the demands raised by virtue of re-assessment orders passed by the Collector of Customs (Preventive) Mumbai, pursuant to the issue of show cause notices under Section 28 of the Act. For the sake of convenience, hereinafter, both the CESTAT and CEGAT are referred to as "the Tribunal".

9. Mr. Harish Chander, learned senior counsel appearing on behalf of the Revenue in one set of appeals, contended that once the Commissioner (Preventive) had been appointed as Collector of Customs (Preventive), Bombay by virtue of the Notification Nos. 250/83 and 251/83, issued by the Central Government under Section 4 of the Act, the former became "proper officer" in terms of Section 2(34) of the Act, and was competent to issue notice under Section 28 of the Act as the goods were cleared for home consumption in Bombay. In support of the proposition that an officer of Customs who has been assigned certain functions, which are to be performed under the Act is a "proper officer" and such assignment can be done by the Board or the Commissioner of Customs, reliance was placed on the decision of this court in *Union of India & Ors. Vs. Ram Narain Bishwanath & Ors.*[2] as also on a larger bench decision of the Tribunal in *Konia Trading Co.* (supra) and another decision of the Tribunal in *Manohar Bros. (Capacitors)*

1. 2004 (170) E.L.T. (Tri.-LB).
2. (1998) 9 SCC 285.

Vs. Collector of Customs-II, Bombay[3], the latter having attained finality on the dismissal of revenue's appeal by this Court (See : *Collector Vs. Manohar Bros. (Capacitors)*[4]).

10. *Per contra,* Mr. Joseph Vellapally, learned senior counsel appearing on behalf of the respondents in C.A. Nos. 4294-4295 of 2002, contended that the statutory powers conferred under Section 28 of the Act must be exercised by an officer of Customs, who has been assigned those functions either by the Central Board of Excise and Customs or by the jurisdictional Commissioner of Customs (Imports). As the Commissioner (Preventive) has not been appointed as a "proper officer" for the purposes of assessment or re-assessment, nor assigned any functions under Section 28 of the Act or under any other Section related to assessment of goods entered for home consumption, he was not competent to issue notice under Section 28 of the Act, argued the learned counsel. It was also urged that mere appointment of a person as an officer of Customs with territorial jurisdiction over the Mumbai port under Section 4 of the Act, does not *ipso facto* confer authority on him to exercise the statutory powers entrusted to proper officers, as under the Act, while all proper officers must be 'officers of Customs', all 'officers of Customs' are not "proper officers". In support of the proposition, learned counsel heavily relied on a decision of the Karnataka High Court in *Devilog Systems India Vs. Collector of Customs, Bangalore*[5] and orders of the Tribunal in *Orient Arts & Crafts Vs. Commissioner of Customs (Prev.), Mumbai*[6] and *Informatika Software (P) Ltd. & Anr. Vs. Commissioner of Customs (P), Calcutta*[7]. Learned counsel submitted that the use of the expression "proper officer" in contradistinction to

3. 1998 (98) E.L.T. 821 (Tri)
4. 2004 (166) E.L.T. A152 (S.C.)
5. 1995 (76) E.L.T. 520 (Kar.)
6. 2003 (155) E.L.T. 168 (Tri-Mum)
7. 1997 (73) ECR 348 (Tri-Kolkata)

"officer of customs" in certain Sections in the Act makes it clear that the two expressions cannot be used interchangeably. Learned counsel contended that if the Revenue's contention that all "officers of customs" are "proper officers" is accepted, it would render Section 2(34) otiose, and would amount to re-writing the Act, leading to administrative anarchy. In support, reliance was placed on the decision of this Court in *The Commissioner, Sales Tax, U.P. Vs. M/s. Suraj Prasad Gouri Shankar*[8].

11. Explaining the procedure for clearance of imported goods for home consumption, learned counsel submitted that the Act clearly delineates the functions to be performed by the Commissioner of Customs (Imports) and the Commissioner (Preventive). According to the learned counsel under Section 30 of the Act, the owner of a vessel, on arrival or prior to arrival, is required to file an Import General Manifest ("IGM") with the proper officer i.e. the Commissioner of Customs (Imports), the Rummaging and Intelligence Wing of the Preventive Division checks the conveyance to ensure that all goods in the vessel are mentioned in the IGM; then, in terms of Section 31 of the Act, an order allowing "entry inwards" is granted by the proper officer, i.e. Commissioner of Customs (Imports); the goods are unloaded under the supervision of the Preventive Officer in terms of Section 34; and then, the importer files a bill of entry, which is assessed by the "proper officer" i.e. Commissioner (Imports) who, on payment of all duties by the importer, issues an order allowing clearance of goods for home consumption under Section 47 of the Act. It was thus, asserted that once goods are manifested, the jurisdiction to pass any order of assessment or re-assessment vests in the Collector of Customs (Imports) and not in the Collector of Customs (Preventive). To bring home the point, reference was made to a decision of the Calcutta High Court in *Sharad Himatlal Daftary Vs. Collector of Customs*[9]. It was submitted that in the instant case, the import

8. (1974) 3 SCC 230.

9. 1988 (36) E.L.T. 468 (Cal.)

manifest and the bill of entry were filed before the Additional Collector of Customs (Imports) Mumbai; the bill of entry was duly assessed, and the benefit of the exemption was extended, subject to execution of a bond by the importer which was duly executed, undertaking the obligation of export. Learned counsel argued that the function of the preventive staff is confined to goods which are not manifested as in respect of manifested goods, where the bills of entry are to be filed, the entire function of assessment, clearance etc. is carried out by the appraising officers functioning under the Commissioner of Customs (Imports).

12. Before adverting to the rival submissions, it would be expedient to survey the relevant provisions of the Act. Section 28 of the Act, which is relevant for our purpose, provides for issue of notice for payment of duty that has not been paid, or has been short-levied or erroneously refunded, and provides that:

> **"28. Notice for payment of duties, interest etc.** — (1)When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may, -
>
> (a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year;
>
> (b) in any other case, within six months,
>
> from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been so short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

Provided that where any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words "one year" and "six months", the words "five years" were substituted.

It is plain from the provision that the "proper officer" being subjectively satisfied on the basis of the material that may be with him that customs duty has not been levied or short levied or erroneously refunded on an import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year and in all other cases within six months from the relevant date, may cause service of notice on the person chargeable, requiring him to show cause why he should not pay the amount specified in the notice. It is evident that the notice under the said provision has to be issued by the "proper officer".

13. Section 2(34) of the Act defines a "proper officer", thus:

"**2. Definitions.-**……

(34)"proper officer", in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Commissioner of Customs;

It is clear from a mere look at the provision that only such officers of customs who have been assigned specific functions would be "proper officers" in terms of Section 2(34) of the Act. Specific entrustment of function by either the Board or the Commissioner of Customs is therefore, the governing test to determine whether an "officer of customs" is the "proper officer".

14. From a conjoint reading of Sections 2(34) and 28 of

the Act, it is manifest that only such a customs officer who has been assigned the specific functions of assessment and re-assessment of duty in the jurisdictional area where the import concerned has been affected, by either the Board or the Commissioner of Customs, in terms of Section 2(34) of the Act is competent to issue notice under Section 28 of the Act. Any other reading of Section 28 would render the provisions of Section 2(34) of the Act otiose in as much as the test contemplated under Section 2(34) of the Act is that of specific conferment of such functions. Moreover, if the Revenue's contention that once territorial jurisdiction is conferred, the Collector of Customs (Preventive) becomes a "proper officer" in terms of Section 28 of the Act is accepted, it would lead to a situation of utter chaos and confusion, in as much as all officers of customs, in a particular area be it under the Collectorate of Customs (Imports) or the Preventive Collectorate, would be "proper officers". In our view therefore, it is only the officers of customs, who are assigned the functions of assessment, which of course, would include re-assessment, working under the jurisdictional Collectorate within whose jurisdiction the bills of entry or baggage declarations had been filed and the consignments had been cleared for home consumption, will have the jurisdiction to issue notice under Section 28 of the Act.

15. In this behalf, our attention was also invited by Mr. Joseph Vellapally to standing order No. 35/89 dated 12th July, 1989, issued by a Collector of Customs, holding dual charges of Collector of Customs, Calcutta and Collector of Customs (Preventive) as also to certain notifications issued by the Board under Section 2 (34) of the Act clearly defining the functions of the Customs House and the Preventive Collectorate.

16. In the present cases, the import manifest and the bill of entry having been filed before the Collectorate of Customs (Imports) Mumbai, the same having been assessed and clearance for home consumption having been allowed by the

proper officer on importers executing bond, undertaking the obligation of export, in our opinion, the Collector of Customs (Preventive), not being a "proper officer" within the meaning of Section 2(34) of the Act, was not competent to issue show cause notice for re-assessment under Section 28 of the Act. Nothing has been brought on record to show that the Collector of Customs (Preventive), who had issued the show cause notices was assigned the functions under Section 28 of the Act as "proper officer" either by the Board or the Collector/ Commissioner of Customs. We are convinced that Notifications No. 250-Cus and 251-Cus., both dated 27th August, 1983, issued by the Central Government in exercise of the powers conferred by sub-section (1) of the Section 4 of the Act, appointing Collector of Customs (Preventive) etc. to be the Collector of Customs for Bombay, Thane and Kolaba Districts in the State of Maharashtra did not *ipso facto* confer jurisdiction on him to exercise power entrusted to the "proper officers" for the purpose of Section 28 of the Act. In that view of the matter, we do not find any substance in the contention of Mr. V. Shekhar, learned Senior Counsel, appearing for the revenue in the second set of appeals, that the source of power to act as a "proper officer" is Sections 4 and 5 of the Act and not sub-section 34 of Section 2 of the Act. The said sections merely authorize the Board to appoint officers of Customs and confer on them the powers and duties to be exercised/ discharged by them, but for the purpose of Section 28 of the Act, an officer of customs has to be designated as "proper officer" by assigning the function of levy and collection of duty, by the Board or the Commissioner of Customs. The argument is rejected accordingly. Similarly, revenue's reliance on the decision of this court in *Ram Narain Bishwanath & Ors.* (supra) is clearly misplaced. In that case the issue for determination was that when goods imported and cleared at Paradip Port (Orissa State) were seized by the Customs authorities in West Bengal on the allegation that these had been imported on the strength of fictitious licences, whether the customs authorities at Paradip or West Bengal will have the jurisdiction to initiate

adjudication proceedings. By a short order it was held that it was for the customs authorities at Paradip to initiate proceedings against the importer. Apart from the fact that none of the statutory provisions were considered in that case, the issue arising for consideration in the present appeals was not the subject matter therein. Thus, the said decision is of no avail to the revenue.

17. For the aforegoing reasons, we do not find any merit in the stand of the revenue. Resultantly, C.A. Nos. 4294-4295 of 2002, being devoid of any merit, are dismissed, while C.A. Nos. 4603-4604 of 2005 are allowed. Before parting with the cases, we once again clarify that this judgment shall not preclude the revenue from initiating any proceedings against the importers for recovery of duty and other charges payable in respect of the subject goods, if permissible under the Act.

18. However, in the facts and circumstances of these cases, there shall be no order as to cost.

R.P. Appeals disposed of.

SRI K.R. MADHUSUDHAN & ORS.
v.
THE ADMINISTRATIVE OFFICER & ANR.
(Civil Appeal No.1923-1924 of 2011)

FEBRUARY 18, 2011

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

Motor Vehicles Act, 1988 – s.166 – Fatal accident – Deceased aged 53 years of age and working as a Senior Assistant in the State Electricity Board – Claim petition by his three sons and paternal grand-mother – Tribunal applied a multiplier of 11 and awarded total compensation of Rs.14,27,496/- with interest @ 9% p.a. – High Court, however, reduced the compensation by adopting a split multiplier of 6 – On appeal, held: High Court introduced the concept of split multiplier and departed from the multiplier used by the Tribunal without disclosing any reason therefor – It also did not consider the clear and corroborative evidence about the prospect of future increment of the deceased – Judgment of High Court deserves to be set aside for it was perverse and clearly contrary to the evidence on record – Respondents directed to pay compensation of Rs.18,00,000/- with the rate of interest as granted by the Tribunal.

PW1's father was crossing the road, when a Maruti Van (owned by the first respondent) came at a high speed and dashed against him, causing severe injuries to him which ultimately led to his death. The deceased was 53 years of age and was survived by his wife and three sons, the appellants. They filed a claim petition under Section 166 of the Motor Vehicles Act, 1988 claiming Rs.20,00,000/- as compensation. The Motor Accident Claims Tribunal (MACT) found that the death of PW1's father was due to the rash and negligent driving of the van driver (the second respondent).

The deceased was working as Senior Assistant in Karnataka Electricity Board (KEB) and his last drawn gross monthly salary was Rs.15,642/- i.e. Rs.1,87,704/- annually. The Tribunal applied a multiplier of 11 and awarded total compensation of Rs.14,27,496/- along with interest of 9% p.a. The High Court reduced the compensation to Rs.11,82,000/- by adopting a split multiplier of 6.

In the instant appeals, the appellants contended that while awarding compensation, the High Court erred in not considering the future prospects of the deceased and the revision in his salary and that it further erred in adopting a split multiplier.

Allowing the appeals, the Court

HELD: 1.1. The law regarding addition in income for future prospects has been clearly laid down in *Sarla Varma case*. In the said case, the Court held that there should be no addition to income for future prospects where the age of the deceased is more than 50 years. The Bench called it a rule of thumb and it was developed so as to avoid uncertainties in the outcomes of litigation. However, the Bench held that a departure can be made in rare and exceptional cases involving special circumstances. The rule of thumb evolved in *Sarla Verma* is to be applied to those cases where there is no concrete evidence on record of definite rise in income due to future prospects. The said rule was based on assumption and to avoid uncertainties and inconsistencies in the interpretation of different courts, and to overcome the same. [Paras 8, 9] [1067-C; 1068-A-C]

1.2. In the present case there is clear and incontrovertible evidence on record that the deceased was entitled and in fact bound to get a rise in income in

the future, a fact which was corroborated by evidence on record. Thus, the present case comes within the 'exceptional circumstances' and not within the purview of rule of thumb laid down by the *Sarla Verma* judgment. Hence, even though the deceased was above 50 years of age, he was entitled to increase in income due to future prospects. [Para 10] [1068-D-E]

Sarla Varma (Smt.) & Others v. Delhi Transport Corporation & Another **(2009) 6 SCC 121 – referred to.**

2. The evidence of PW.1 is that there are four claimants, three of them are the sons of the deceased and the other claimant is paternal grand-mother. Therein, he stated that the deceased was the only bread earner of the family. It was stated by PW.1 that if his father, the deceased, would have been alive he could have got promotion and could have received a salary of Rs.20,000/- per month. PW.3, a Senior Assistant in KEB, in his evidence also stated that the deceased was 52 years of age at the time of his death and he was having six years of service left; that his annual increment was Rs.350/- and that in the year 2003 (which would have been year of retirement), the basic pay of the deceased would have been around Rs.16,000/- and in all he would have obtained gross salary of Rs.20,000/- per month. PW.3 deposed that as per the Board Agreement for every five years their pay revision is compulsory. Both the witnesses were cross-examined before the Tribunal but the evidence leading to pay revision was not assailed. Therefore, the consistent evidence before the Tribunal was that if the deceased would have been alive he would have reached the gross salary of Rs.20,000/- per month. [Paras 11 to 13] [1068-F-H; 1069-A]

3. In view of this evidence, the Tribunal should have considered the prospect of future income while

computing compensation but the Tribunal has not done that. In the appeal, which was filed by the appellants before the High Court, the High Court instead of maintaining the amount of compensation, granted by the Tribunal, reduced the same. In doing so, the High Court had not given any reason. The High Court introduced the concept of split multiplier and departed from the multiplier used by the Tribunal without disclosing any reason therefor. The High Court also did not consider the clear and corroborative evidence about the prospect of future increment of the deceased. When the age of the deceased is between 51 and 55 years the multiplier is 11, which is specified in the II Column in the II Schedule in the Motor Vehicles Act, and the Tribunal had not committed any error by accepting the said multiplier. This Court also fails to appreciate why the High Court chose to apply the multiplier of 6. Thus, the judgment of the High Court deserves to be set aside for it is perverse and clearly contrary to the evidence on record, for having not considered the future prospects of the deceased and also for adopting a split multiplier method. [Paras 14, 15] [1069-C-G]

4. The income of the deceased will be taken to be Rs.20,000/- p.m. which amounts to Rs.2,40,000/- p.a. After deduction of 1/3rd amount for personal expenses, the loss of notional income will be Rs.1,60,000/-. The multiplier of 11 will be applied, from which the loss of dependency will amount to Rs.17,60,000/-. Besides, award Rs.10,000/- for funeral and transport expenses, Rs.6,000/- for medical expenses prior to death and Rs.25,000/- for loss of love and affection is also awarded. Thus, the total compensation awarded amounts to Rs.18,01,000/- which is round off to Rs.18,00,000/-. The amount of compensation would thus be Rs.18,00,000/- with the rate of interest as granted by the Tribunal. [Paras 16, 17] [1069-H; 1070-A-C]

Case Law Reference:

(2009) 6 SCC 121 referred to Para 8

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1923-1924 of 2011.

From the Judgment & Order dated 12.01.2009 of the High Court of Karnataka at Bangalore in MFA No. 6476/2002(MV) C/w M.F.A. No. 5596 of 2002.

G.V. Chandrashekar for the Appellants.

The Judgment of the Court was delivered by

GANGULY, J. 1. Delay condoned.

2. Leave granted.

3. On 4.10.1998, at about 8.55 a.m., V. Rajagopalaiah was crossing the road near Ashraya Hotel, B.M. Road, Channapatna, when a Maruti Van (owned by the first respondent) bearing registration No. KA-05-A-2535 came at a high speed and dashed against the deceased, causing severe injuries. He was taken to hospital, but he succumbed to his injuries.

4. The deceased was of 53 years of age and was survived by his wife and three sons, the present appellants. They filed a claim petition under Section 166 of the Motor Vehicles Act, 1988 claiming Rs.20,00,000/- as compensation. It was contested by the respondents.

5. Motor Accident Claims Tribunal (hereinafter "MACT") found that the death of V. Rajagopalaiah was due to the rash and negligent driving of the van driver (the second respondent). The deceased was working as Senior Assistant in Karnataka Electricity Board (hereinafter "KEB") and his last drawn gross monthly salary was Rs.15,642/- i.e. Rs.1,87,704/- annually. 1/3rd was deducted for personal expenses, after which the

amount came to Rs.1,25,136/-. As deceased was 53 years of age, a multiplier of 11 was applied. The Tribunal also awarded funeral and transport expenses amounting to Rs.10,000/-, medical expenses prior to death was Rs.6,000 and compensation for loss and affection at Rs.25,000/-. Accordingly, total compensation awarded was Rs.14,27,496/- along with interest of 9% p.a.

6. The appellants and the respondents both appealed against the award of the Tribunal to the High Court of Karnataka. The appellants appeared for enhancement and the respondents for reduction of the amount awarded. The High Court, in its impugned judgment, reduced the compensation awarded by the Tribunal to the appellants to Rs.11,82,000/-. The relevant portion of High Court order reads as follows:

> "The deceased was working as Senior Assistant in KEB getting a salary of Rs.15,642/-. After effecting deductions towards income tax, the net salary of the deceased would be Rs.14,000/-. The mother and sons of the deceased have filed claim petition. 1/5 is to be deducted towards personal expenses. Rs.11,200/- would enure to the benefit of the dependants. The deceased was aged about 52 years. The deceased would have retired by 58 years. After superannuation, the deceased would get pensionary income in a sum of Rs.6000/-. 1/5 is to be deducted towards personal expenses. Rs.4800/- would enure to the benefit of the dependants. Split multiplier would apply. After superannuation, multiplier 6 would apply. Therefore, the total loss of dependency before superannuation would be Rs.8,06,400/- (Rs.11200 (income) X 12 (months) X 6 (multiplier). The total loss of dependency from the pensionary income would be Rs.3,45,600/- (Rs.4800/- (income) X 12 (months) X 6 (multiplier). The total loss of dependency would be Rs.11,52,000/- The petitioners are entitled for a sum of Rs.25,000/- towards loss of expectancy and Rs.10,000/- towards funeral expenses. In

all the petitioners are entitled for a total sum of Rs.11,82,000/- as against Rs.14,27,496/- awarded by the Tribunal. The petitioners are entitled for interest at 6% p.a."

7. Assailing the same, the appellants contend that the future prospects of the deceased and revision in salary were not taken into consideration by the High Court and a split multiplier should not have been adopted.

8. The law regarding addition in income for future prospects has been clearly laid down in *Sarla Varma (Smt.) & Others v. Delhi Transport Corporation & Another* [(2009) 6 SCC 121] and the relevant portion reads as follows:

"In *Susamma Thomas* this Court increased the income by nearly 100%, in Sarla Dixit the income was increased only by 50% and in *Abati Bezbaruah* the income was increased by a mere 7%. In view of the imponderables and uncertainties, we are in favour of adopting as a rule of thumb, an addition of 50% of actual salary to the actual salary income of the deceased towards future prospects, where the deceased had a permanent job and was below 40 years. [Where the annual income is in the taxable range, the words "actual salary" should be read as "actual salary less tax"]. The addition should be only 30% if the age of the deceased was 40 to 50 years. There should be no addition, where the age of deceased is more than 50 years. Though the evidence may indicate a different percentage of increase, it is necessary to standardize the addition to avoid different yardsticks being applied or different methods of calculation being adopted. Where the deceased was self-employed or was on a fixed salary (without provision for annual increments etc.), the courts will usually take only the actual income at the time of death. A departure therefrom should be made only in rare and exceptional cases involving special circumstances."

9. In the *Sarla Verma* (supra) judgment the Court has held

that there should be no addition to income for future prospects where the age of the deceased is more than 50 years. The learned Bench called it a rule of thumb and it was developed so as to avoid uncertainties in the outcomes of litigation. However, the Bench held that a departure can be made in rare and exceptional cases involving special circumstances. We are of the opinion that the rule of thumb evolved in *Sarla Verma* (supra) is to be applied to those cases where there was no concrete evidence on record of definite rise in income due to future prospects. Obviously, the said rule was based on assumption and to avoid uncertainties and inconsistencies in the interpretation of different courts, and to overcome the same.

10. The present case stands on different factual basis where there is clear and incontrovertible evidence on record that the deceased was entitled and in fact bound to get a rise in income in the future, a fact which was corroborated by evidence on record. Thus, we are of the view that the present case comes within the 'exceptional circumstances' and not within the purview of rule of thumb laid down by the *Sarla Verma* (supra) judgment. Hence, even though the deceased was above 50 years of age, he shall be entitled to increase in income due to future prospects.

11. We base our conclusion on our findings from the records of the case. The evidence of PW.1, the son of the deceased, is that there are four claimants, three of them are the sons of the deceased and the other claimant is paternal grand-mother. Therein, he stated that the deceased was the only bread earner of the family. It was stated by PW.1 that if his father, the deceased, would have been alive he could have got promotion and could have received the salary of Rs.20,000/- per month.

12. PW.3, who was the Senior Assistant in KEB, in his evidence also stated that the deceased was 52 years of age at the time of his death and he was having six years of service left. The annual increment is Rs.350/-. In the year 2003 (which

would have been year of retirement), the basic pay of the deceased would have been around Rs.16,000/- and in all he would have obtained gross salary of Rs.20,000/- per month. PW.3 deposed that as per the Board Agreement for every five years their pay revision is compulsory. Both the witnesses were cross-examined before the Tribunal but the evidence leading to pay revision was not assailed.

13. Therefore, the consistent evidence before the Tribunal was that if the deceased would have been alive he would have reached the gross salary of Rs.20,000/- per month.

14. In view of this evidence the Tribunal should have considered the prospect of future income while computing compensation but the Tribunal has not done that. In the appeal, which was filed by the appellants before the High Court, the High Court instead of maintaining the amount of compensation, granted by the Tribunal, reduced the same. In doing so, the High Court had not given any reason. The High Court introduced the concept of split multiplier and departed from the multiplier used by the Tribunal without disclosing any reason therefore. The High Court has also not considered the clear and corroborative evidence about the prospect of future increment of the deceased. When the age of the deceased is between 51 and 55 years the multiplier is 11, which is specified in the II Column in the II Schedule in the Motor Vehicles Act, and the Tribunal has not committed any error by accepting the said multiplier. This Court also fails to appreciate why the High Court chose to apply the multiplier of 6.

15. We are, thus, of the opinion that the judgment of the High Court deserves to be set aside for it is perverse and clearly contrary to the evidence on record, for having not considered the future prospects of the deceased and also for adopting a split multiplier method.

16. The income of the deceased will be taken to be Rs.20,000/- p.m. which amounts to Rs.2,40,000/- p.a. After

deduction of 1/3rd amount for personal expenses, the loss of notional income will be Rs.1,60,000/-. The multiplier of 11 will be applied, from which the loss of dependency will amount to Rs.17,60,000/-. We also award Rs.10,000/- for funeral and transport expenses, Rs.6,000/- for medical expenses prior to death and Rs.25,000/- for loss of love and affection. Thus, the total compensation awarded amounts to Rs.18,01,000/- which we round off to Rs.18,00,000/-.

17. The amount of compensation would thus be Rs.18,00,000/- with the rate of interest as granted by the Tribunal. The amount is to be deposited with the Tribunal within six weeks from date after deducting any amount, if already deposited.

18. The appeals are, thus, allowed. No costs.

B.B.B. Appeals allowed.

CHOWDHURY NAVIN HEMABHAI & ORS.
v.
THE STATE OF GUJARAT & ORS.
(Civil Appeal No. 1925 of 2011)

FEBRUARY 18, 2011

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

Education/ Educational Institutions:

Gujarat Professional Medical Educational Colleges or Institutions (Regulation of Admission and Payment of Fees) Rules, 2008 – rr. 5 and 12 – Admission – Candidates belonging to the SC, ST and OBC, securing less than 40% marks in Physics, Chemistry and Biology in the common entrance test to MBBS Course for 2008-2009 – Admission of students to MBBS Course on basis of their merit – Communication of Medical Council of India to discharge students from MBBS course since they were not eligible for admission in the MBBS course as per MCI Regulations – Cancellation of admission – However, students allowed to appear in the exam subject to final decision of MCI – Writ petition – High Court refusing to quash the communication of MCI – On appeal held: MCI Regulations require the candidates belonging to the SC, ST and OBC to secure in the competitive entrance examination for admission 40% marks in the Physics, Chemistry and Biology taken together whereas the State Rules, 2008 had prescribed a qualification standard which was less than that of MCI – Qualification requirements prescribed by the State cannot be lower than those prescribed by the MCI – Admissions of the candidates took place due to the fault of the rule-making authority in not making the State Rules, 2008 in conformity of the MCI Regulations –Candidates cannot to be blamed for having secured admission in the MBBS course – They were selected on basis of their merit and admitted into the MBBS course in

accordance with the State Rules, 2008 and have pursued their studies for a year – In the interest of justice, the admissions of the appellants to the MBBS course in the college for 2008-2009 not to be disturbed – Regulations on Graduate Medical Education, 1997 – Clause 5(ii).

The appellants belong to Scheduled Castes, Scheduled Tribes and Socially and Educationally Backward Classes. They secured 40% marks in the qualifying examination in Physics, Chemistry and Biology. The appellants appeared in the common entrance test for admission to MBBS course conducted for Gujarat for 2008-2009, but secured less than 40% marks in Physics, Chemistry and Biology in the common entrance test. On basis of their merit, they were admitted to the MBBS course. The MCI sent a communication to the Colleges to discharge the appellants and as they had secured less than 40% marks in Physics, Chemistry and Biology in the common entrance test and were not eligible for admission in the MBBS course as per the MCI Regulations. Thereafter, the admission of the appellants was cancelled. However, on the request of the appellants, they were permitted to appear in the preliminary examination for First MBBS subject to the final decision of the MCI. The appellants filed a writ petition. The Division Bench of the High Court dismissed the writ petition, refusing to quash the communication of the Medical Council of India for discharging them from the MBBS course to which they had been admitted. Therefore, the appellants filed the instant appeal.

Disposing of the appeal, the Court

HELD: 1.1 On a comparison of the minimum criteria for admission to the MBBS course laid down in the Regulations on Graduate Medical Education, 1977 and the Gujarat Professional Medical Educational Colleges or

Institutions (Regulation of Admission and Payment of Fees) Rules, 2008, it is found that both the MCI Regulations and State Rules, 2008 insist that a candidate must have obtained 40% marks in the Physics, Chemistry and Biology in the qualifying examination. The only difference between the MCI Regulations and the State Rules, 2008 is that while the MCI Regulations require the candidates belonging to the Scheduled Castes, Scheduled Tribes and Other Backward Classes to secure in the competitive entrance examination for admission 40% marks in the Physics, Chemistry and Biology taken together, the State Rules, 2008 do not contain such a requirement. Under the State Rules, 2008 candidates belonging to the Scheduled Castes, Scheduled Tribes and Socially and Educationally Backward Classes (excluding Creamy Layer) eligible for admission to the MBBS course were required to have 40% marks in the qualifying examination in Physics, Chemistry and Biology and must have appeared in the competitive entrance examination conducted in the current academic year. As the State Rules had prescribed a qualification standard which was less than that of MCI, the seven appellants, who took the Gujarat common entrance test for the academic year 2008-2009, got selected on the basis of their merit for the seats in the MBBS course reserved for the Scheduled Castes, Scheduled Tribes and Other Backward Classes and got admitted in the college even though they had not secured 40% marks in Physics, Chemistry and Biology in the Gujarat common entrance test. The qualification requirements prescribed by the State cannot be lower than those prescribed by the MCI. Therefore, in law, the order of the High Court is right. However, this is a clear case where the admissions of the seven appellants took place due to the fault of the rule-making authority in not making the State Rules, 2008 in conformity of the MCI Regulations. For this fault of the rule-making authority if the appellants are discharged

from the MBBS course, they would suffer grave injustice. On the peculiar facts of the case, thus, it is a fit case where this Court should exercise its power under Article 142 of the Constitution to do complete justice between parties. [Paras 10, 11 and 12] [1084-B-H]

1.2 It is found that the appellants were not to be blamed for having secured admission in the MBBS course and the fault was entirely of the rule-making authority in making the 2008 Rules and the appellants have gone through the pains of appearing in the common entrance test and have been selected on the basis of their merit and admitted into the MBBS course in the college in accordance with the State Rules, 2008 and have pursued their studies for a year. Thus, even though under the MCI Regulations, the appellants were not eligible for admission to the MBBS course in the academic year 2008-2009, for the purpose of doing complete justice in the matter, it is directed that the admissions of the appellants to the MBBS course in the college during the academic year 2008-2009 would not be disturbed. However, the said direction would not be treated as a precedent. [Para 14] [1086-B-E]

Rajendra Prasad Mathur v. Karnataka University and Anr. **1986 (Supp) SCC 740;** *A. Sudha v. University of Mysore* **(1987) 4 SCC 537;** *Ashok Chand Singhvi v. University of Jodhpur and Ors.* **(1989) 1 SCC 399;** *M.A. Salam (II) v. Principal Secretary, Government of A.P. and Ors.* **(2005) 13 SCC 677;** *Medical Council of India v. State of Karnataka and Ors.* **(1998) 6 SCC 131;** *Delhi Judicial Service Association, Tis Hazari Court, Delhi v. State of Gujarat and Ors.* **(1991) 4 SCC 406;** *Sandeep Subhash Parate v. State of Maharashtra* **(2006) 7 SCC 501 – referred to.**

Case Law Reference:

1986 (Supp) SCC 740	**Referred to**	**Para 6**

(1987) 4 SCC 537	**Referred to**	**Para 6**
(1989) 1 SCC 399	**Referred to**	**Para 6**
(2005) 13 SCC 677	**Referred to**	**Para 6**
(1998) 6 SCC 131	**Referred to**	**Para 7**
(1991) 4 SCC 406	**Referred to**	**Para 12**
(2006) 7 SCC 501	**Referred to**	**Para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1925 of 2011.

From the Judgment & Order dated 09.10.2009 of the High Court of Gujarat in Special Civil Application No. 9526 of 2009.

K.V. Vishwanathan, D. Verma, Neha S. Verma, A. Venayagam Balan for the Appellants.

Amarendra Sharan, Amit Kumar, Ritesh Ratnam, Maulik Nanavati, Hemantika Wahi, Renuka Sahu, Nikhil Goel, Naveen Goel, Marsook Bafaki, Dr. Vipin Gupta for the Respondents.

The Judgment of the Court was delivered by

A. K. PATNAIK, J. 1. Leave granted.

2. The appellants belong to Scheduled Castes, Scheduled Tribes and Socially and Educationally Backward Classes and they have in this Civil Appeal challenged the judgment of the Division Bench of the High Court of Gujarat in Special Civil Application No. 9526 of 2009, refusing to quash the communication of the Medical Council of India for discharging them from the MBBS course to which they had been admitted.

3. The facts briefly are that the Medical Council of India (for short "the MCI") prescribed *inter alia* in its regulations called "The Regulations on Graduate Medical Education, 1997" (for short "the MCI Regulations") that candidates belonging to

Scheduled Castes, Scheduled Tribes and Other Backward Classes must have obtained a minimum of 40% marks together in Physics, Chemistry and Biology at the qualifying examination and, in addition, 40% marks in Physics, Chemistry and Biology taken together in the competitive examination for admission to the MBBS course. The State Government of Gujarat also made rules under the Gujarat Professional Medical Educational Colleges or Institutions (Regulation of Admission and Fixation of Fees) Act, 2007 called "The Gujarat Professional Medical Educational Colleges or Institutions (Regulation of Admission and Payment of Fees) Rules, 2008" (for short "the State Rules, 2008"). Rule 5 (1) (iv) of the State Rules, 2008 provided that for admission to a professional college, a candidate must have passed the qualifying examination and must have appeared in the common entrance test of Gujarat. A notification was issued by the State Government under Rule 12 of the State Rules, 2008 prescribing the minimum marks in the qualifying examination for admission to MBBS course for Scheduled Castes, Scheduled Tribes and Socially and Educationally Backward Classes (excluding Creamy layer) candidates as 40% in Physics, Chemistry and Biology.

4. The appellants had secured 40% marks in the qualifying examination in Physics, Chemistry and Biology as prescribed in the notification issued under Section 12 of the State Rules, 2008. The appellants also appeared in the common entrance test conducted for Gujarat for 2008-2009, but secured less than 40% marks in Physics, Chemistry and Biology in the common entrance test. As the appellants were placed in the merit list in the common entrance test, they were admitted to the MBBS course in Pramukhswami Medical College, Karamsad (for short "the College"). After collecting information from the College, the MCI sent a communication dated 10.02.2009 to the College to discharge the seven appellants and one more student as they had secured less than 40% marks in Physics, Chemistry and Biology in the common entrance test and were not eligible for admission in the MBBS course as per the MCI Regulations.

The College entered into some correspondence with the MCI and the Admission Committee of the State Government and on 01.07.2009 cancelled the admission of the appellants on the insistence of the MCI in its letter dated 27.03.2009. The State Government addressed a communication to the MCI saying that the students were admitted in accordance with the State Rules, 2008 as per their merit and they may be allowed to pursue the medical education as they were not at fault. On the request of the appellants, the College permitted the appellants to appear in the preliminary examination for First MBBS in July 2009 subject to the final decision of the MCI.

5. The appellants then moved the High Court under Article 226 of the Constitution in Special Civil Application No.9526 of 2009 and by the impugned judgment, the Division Bench of the High Court dismissed the Writ Petition. The High Court held that Clause 5.5 (ii) of the MCI Regulations specifically stipulated that candidates belonging to Scheduled Castes, Scheduled Tribes or Other Backward Classes must have obtained a minimum of 40% marks in Physics, Chemistry and Biology taken together in the qualifying examination and, in addition, must have come in the merit list prepared as a result of the competitive entrance examination by securing not less than 40% marks in Physics, Chemistry and Biology in the competitive entrance test and as the appellants have not satisfied this mandatory stipulation under clause 5.5 (ii) of the MCI Regulations, there was no illegality in the directions given by the MCI to discharge the appellants from the college. The High Court also struck down Rule 5(1)(iv) of the State Rules, 2008 which provided that a candidate who appeared in the Gujarat common entrance test was eligible for admission to the MBBS course even if he obtained less than 40% marks in Physics, Chemistry and Biology taken together in the common entrance test.

6. Mr. K.V. Vishwanathan, learned Senior Counsel for the appellants, submitted that the High Court erred in upholding the

directions of the MCI to discharge the appellants who had been validly admitted under the State Rules, 2008 and the validity of the State Rules, 2008 was not under challenge before the High Court. He submitted that rule 5 (1) (iv) of the State Rules, 2008 had been framed by the State Government of Gujarat in exercise of its powers under Section 20(1) read with Section (4) of the Gujarat Professional Medical Educational Colleges or Institutions (Regulation of Admission and Fixation of Fees) Act, 2007 and it clearly provides that a candidate who had passed the qualifying examination and appeared in the Gujarat common entrance test conducted in the current academic year was eligible for admission to the MBBS course. He submitted that as the appellants had not only passed the qualifying examination, but also appeared in the common entrance test for the academic year 2008-2009 they were clearly eligible for admission to the college for the MBBS course. He submitted that although rule 5 (1) (iv) of the State Rules, 2008 was not under challenge, the High Court struck down the rule as invalid in the impugned judgment merely because the clause 5.5 (ii) of the MCI Regulations prescribed that a candidate has to obtain 40% marks in Physics, Chemistry and Biology taken together in the competitive entrance examination on the basis of which the candidates were to be admitted and the appellants have not secured such 40% marks in the competitive entrance examination. He submitted that the mistake in making the State Rules, 2008 consistent with the MCI Regulations was of the State Government and not of the candidates, who have been admitted to the MBBS course in accordance with the State Rules, 2008 and therefore the appellants should not be made to suffer for such mistake of the rule making authority. He submitted that this Court had adopted a sympathetic approach in similar situations where admissions of students were in jeopardy for none of their fault in *Rajendra Prasad Mathur v. Karnataka University and Anr.* [1986 (Supp) SCC 740], *A. Sudha v. University of Mysore* [(1987) 4 SCC 537], *Ashok Chand Singhvi v. University of Jodhpur and others* [(1989) 1 SCC 399] and *M.A. Salam (II) v. Principal Secretary,*

Government of A.P. and others [(2005) 13 SCC 677].

7. Mr. Amrendra Sharan, learned Senior Counsel appearing for the MCI, on the other hand, supported the impugned judgment of the High Court and submitted that for achieving the purposes of the "Indian Medical Council Act, 1956", the MCI has made the MCI Regulations which are statutory in nature and unless the State Government and the Universities cooperate with the MCI in enforcing these statutory regulations, the MCI will not be able to discharge its statutory obligations under the Act. He submitted that regulation 5.5 of the MCI Regulations lays down the procedure for selection to the MBBS course and clause 5.5 (ii) of these Regulations clearly provides that in case of admission on the basis of competitive entrance examination, a candidate belonging to the Scheduled Castes, Scheduled Tribes and Other Backward Classes must have secured a minimum of 40% marks taken together in Physics, Chemistry and Biology of the qualifying examination and, in addition, must have secured 40% marks in these subjects in the competitive entrance examination. He referred to the marks of the seven appellants and one more student admitted to the college to show that none of them fulfilled the eligibility criteria as mentioned in clause 5.5(ii) of the MCI Regulations. He submitted that the MCI, therefore, wrote to the Dean of the college in its letters dated 10.02.2009 and 27.03.2009 to discharge these eight students. He submitted that this Court had repeatedly held that the regulations made by the MCI are statutory, mandatory and binding in character and admissions to medical courses could not be made in violation of the MCI regulations. He cited the decision in *Medical Council of India v. State of Karnataka and others* [(1998) 6 SCC 131] in which this Court has held that the Indian Medical Council Act is relatable to Entry 66 of List I (Union List) of the Seventh Schedule of the Constitution and prevails over any State enactment to the extent that the State enactment is repugnant to the provisions of the Act. He submitted that the MCI Regulations will therefore prevail upon the State Rules,

2008 and the contention on behalf of the appellants that the appellants were admitted in accordance with the State Rules, 2008 and their admissions are valid, even though contrary to the MCI Regulations, has no force.

8. Mr. Maulik Nanavati, appearing for the State of Gujarat, submitted that while making the State Rules, 2008, clause 5.5(ii) of the MCI Regulations was lost sight of and as a result admissions in the academic year 2008-2009 to the MBBS course in different colleges in the State of Gujarat were made only in accordance with the State Rules, 2008 and some candidates who did not fulfill the eligibility criteria mentioned in clause 5.5 (ii) of the MCI Regulations got admitted to the MBBS course during the year 2008-2009. He submitted that for the subsequent years, i.e. 2009-2010 onwards, the State Government has provided in the Rules that students belonging to the Scheduled Castes, Scheduled Tribes and Other Backward Classes must obtain 40% marks in Physics, Chemistry and Biology in the qualifying examination as well as in the common entrance test for admission into the MBBS course as prescribed in the MCI Regulations.

9. Clause 5.5(ii) of the MCI Regulations, which prescribes the procedure for selection and admission to the MBBS course on the basis of competitive entrance examination, reads as under:

"(5) Procedure for selection to MBBS course be as follows:-

(ii) In case of admission on the basis of competitive entrance examination under clause (2) to (4) of this regulation, a candidate must have passed in the subjects of Physics, Chemistry, Biology and English individually and must have obtained a minimum of 50% marks taken together in Physics, Chemistry and Biology at the qualifying examination as mentioned in clause (2) of regulation 4 in addition

must have come in the merit list prepared as a result of such competitive entrance examination by securing not less than 50% marks in Physics, Chemistry and Biology taken together in the competitive examination. In respect of candidates belonging to Schedule Castes, Schedule Tribes, or Other Backward Classes the marks obtained in Physics, Chemistry and Biology taken together in qualifying examination and competitive entrance examination be 40% instead of 50% as stated above:

Provided that a candidate who has appeared in the qualifying examination the result of which has not been declared, he may be provisionally permitted to take up the competitive entrance examination and in case of selection for admission to the MBBS course, he shall not be admitted to the course until he fulfills the eligibility criteria under regulation 4."

It will be clear from a careful reading of this clause of the MCI Regulations that candidates belonging to the Scheduled Castes, Scheduled Tribes and Other Backward Classes must have secured 40% marks in Physics, Chemistry and Biology taken together in both the qualifying examination and must also secure 40% marks in the competitive entrance examination on the basis of which admission to the MBBS course is being made in a State.

10. The relevant provisions of Rule 5 and Rule 12 of the State Rules, 2008 are quoted herein below**:**

"5. Eligibility for Admission: (1) For the purpose of admission, a candidate shall have passed with "B-group" or "AB-group" the qualifying examination from, -

(i) the Gujarat Board; or

(ii) the Central Board of Secondary Education Board provided that the school in which the candidate has studied, should have been located in the State of Gujarat; or

(iii) the Council of Indian School Certificate Examinations, New Delhi Board provided that the school in which the candidate has studied should have been located in the State of Gujarat; and

(iv) appeared in the Gujarat Common Entrance Test conducted in the current academic year.

12. Minimum qualifying standard for admission: (1) No student shall be admitted in the professional medical education course unless he/she fulfills the eligibility criteria, including the minimum qualifying marks (standard).

(2) The minimum qualifying standard for admission shall be notified by the State Government by order in the *Official Gazette* from time to time."

The notification issued by the State Government under rule 12 (2) notifying the minimum qualifying standards for admission is extracted herein below:

"ORDER

Health and Family Welfare Department,
Sachivalaya, Gandhinagar,
Dated the 2nd June, 2008

Gujarat Professional Medical Educational Colleges or Institutions (Regulation of Admission and Payment of Fees) Rules, 2008	No. MCG-1008-931-J: In pursuance to the power conferred by the sub rule (2) of rule 12 of the Institutions the Government of Gujarat here by notifies following minimum qualifying standard for admission to the

first year of professional medical educational courses namely:-

Minimum aggregate marks of external evaluation in theory subjects in qualifying examination (Physics, Chemistry and Biology)

1. Medical and Dental Courses:
   (a) for General Category Candidates 70%
   (b) for Schedule Castes, Scheduled Tribes, Socially & Educational Backward Classes (Excluding Creamy layer) Candidates 40%

2. For Ayurved/ Nursing/ Homeopathy/ Physiotherapy/ Optometry/ Naturopathy/ Orthotics/ Occupational Therapy Courses.

   (a) for General Category Candidates 50%

   (b) for Schedule Castes, Scheduled Tribes, Socially & Educational Backward Classes (Excluding Creamy layer) Candidates 40%

By the order and in the name of the Governor of Gujarat.

Sd/-
(A.K. Bhatt)
Joint Secretary to the Government."

On a careful reading of the provisions of Rules 5 and 12 of the State Rules, 2008 and the notification dated 02.06.2008 of the State Government under Rule 12 (2) of the State Rules, 2008, it will be clear that under the State Rules, 2008 candidates belonging to the Scheduled Castes, Scheduled Tribes and Socially and Educationally Backward Classes (excluding Creamy Layer) eligible for admission to the MBBS course was required to have 40% marks in the qualifying examination in

Physics, Chemistry and Biology and must have appeared in the competitive entrance examination conducted in the current academic year.

11. On a comparison of the minimum criteria for admission to the MBBS course laid down in the MCI Regulations and the State Rules 2008, we find that both the MCI Regulations and State Rules, 2008 insist that a candidate must have obtained 40% marks in the Physics, Chemistry and Biology in the qualifying examination. The only difference between the MCI Regulations and the State Rules, 2008 is that while the MCI Regulations require the candidates belonging to the Scheduled Castes, Scheduled Tribes and Other Backward Classes to secure in the competitive entrance examination for admission 40% marks in the Physics, Chemistry and Biology taken together, the State Rules, 2008 do not contain such a requirement. But as the State Rules had prescribed a qualification standard which was less than that of MCI, the seven appellants, who took the Gujarat common entrance test for the academic year 2008-2009, got selected on the basis of their merit for the seats in the MBBS course reserved for the Scheduled Castes, Scheduled Tribes and Other Backward Classes and got admitted in the college even though they had not secured 40% marks in Physics, Chemistry and Biology in the Gujarat common entrance test. The qualification requirements prescribed by the State cannot be lower than those prescribed by the MCI. Therefore, in law, the order of the High Court is right.

12. This is, however, a clear case where the admissions of the seven appellants took place due to the fault of the rule-making authority in not making the State Rules, 2008 in conformity of the MCI Regulations. For this fault of the rule-making authority if the appellants are discharged from the MBBS course, they will suffer grave injustice. On the peculiar facts of the case, we are thus of the view that this is a fit case where this Court should exercise its power under Article 142

of the Constitution to do complete justice between parties. In *Delhi Judicial Service Association, Tis Hazari Court, Delhi v. State of Gujarat and Others.* [(1991) 4 SCC 406] after examining the width of this power under Article 142 of the Constitution, this Court held:

> "No enactment made by Central or State legislature can limit or restrict the power of this Court under Article 142 of the Constitution, though while exercising power under Article 142 of the Constitution, the court must take into consideration the statutory provisions regulating the matter in dispute. What would be the need of "complete justice" in a cause or matter would depend upon the facts and circumstances of each case and while exercising that power the Court would take into consideration the express provisions of a substantive statute. Once this Court has taken seisin of a case, cause or matter, it has power to pass any order or issue direction as may be necessary to do complete justice in the matter. This has been the consistent view of this Court as would appear from the decisions of this Court in *State of U.P. v. Poosu* [(1976) 3 SCC 1], *Ganga Bishan v. Jai Narain* [(1986) 1 SCC 75], *Navnit R. Kamani v. R.R. Kamani* [(1988) 4 SCC 387], *B.N. Nagarajan v. State of Mysore* [(1966) 3 SCR 682], *Special Reference No. 1 of 1964* [(1965) 1 SCR 413, 499] and *Harbans Singh v. State of U.P.* [(1982) 2 SCC 101]. "

13. In *Sandeep Subhash Parate v. State of Maharashtra* [(2006) 7 SCC 501], this Court has also held that while exercising its discretion and jurisdiction and to do complete justice in terms of Article 142 of the Constitution, the Court must consider all relevant aspects of the matter including the decisions of this Court. In that case, the Court found that the Sandeep Subhash Parate did not lack *bona fides* in getting admission in the course of Bachelor of Engineering, Pune University, in a seat reserved for Scheduled Castes, and

exercising its constitutional power under Article 142 of the Constitution the Court held that his studies in the professional course should not be disturbed as he might not be entirely responsible for the admission in a reserved seat.

14. In the facts of the present case, we have found that the appellants were not to be blamed for having secured admission in the MBBS course and the fault was entirely of the rule-making authority in making the 2008 Rules and the appellants have gone through the pains of appearing in the common entrance test and have been selected on the basis of their merit and admitted into the MBBS course in the college in accordance with the State Rules, 2008 and have pursued their studies for a year. Hence, even though under the MCI Regulations the appellants were not eligible for admission to the MBBS course in the academic year 2008-2009, for the purpose of doing complete justice in the matter before us, we direct that the admissions of the appellants to the MBBS course in the college during the academic year 2008-2009 will not be disturbed. This direction shall not, however, be treated as a precedent. The appeal is disposed of accordingly with no order as to costs.

N.J. Appeal disposed of.

UNION OF INDIA & ORS.

v.

M/S. IND-SWIFT LABORATORIES LTD.

(Civil Appeal No. 1976 of 2011)

FEBRUARY 21, 2011

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

CENVAT CREDIT RULES, 2004:

Rule.14- Interest on CENVAT credit wrongly availed – Held: Interest would be payable from the date of availment of CENVAT credit and not from the date of utilization – High Court wrongly proceeded by reading down the provisions of Rule 14 to mean that where CENVAT credit has been taken 'and' utilized wrongly, interest should be payable from the date the credit has been utilized wrongly – If the provision is read as a whole, there is no reason to read the word "or" in between the expressions 'taken' or 'utilized wrongly' or 'has been erroneously refunded' as the word "and" – On the happening of any of the three events, CENVAT credit becomes recoverable with interest – Interpretation of Statutes –Rule of reading down – Central Excise Act,1944—s. 11-AB.

Central Excise Act, 1944:

s.32-M read with s.32-F(7) – Order passed by Settlement Commission- Finality of—Held:- An order passed by the Settlement Commission could be interfered with only if the said order is found to be contrary to any provisions of the Act—So far as findings of fact recorded by the Commission or questions of fact are concerned, the same is not open for examination either by High Court or by Supreme Court—Judgments/orders.

INTERPRETATION OF STATUTES :

Tax statutes – Held: Must be interpreted in the light of what is clearly expressed – It is not permissible to import provisions in a tax statute so as to supply any assumed deficiency – Rule of reading down – Explained.

The Revenue filed the instant appeal challenging the order of the High Court whereby it interfered with the order dated 31-05-2007 passed by the Settlement Commission on an application for clarification of its final order dated 19-01-2007 directing the assessee to pay interest on the CENVAT credit availed by it wrongly, from the date of availment of CENVAT credit and not from the date of utilization of a part of balance of such credit, and held that provisions of Rule 14 of the CENVAT Credit Rules, 2004 would be read down to mean that where CENVAT credit was taken and/or utilized wrongly, interest would be payable on CENVAT credit from the date the said credit had been utilized wrongly. The High Court further held that on a conjoint reading of s.11-AB of the Central Excise Tariff Act, 1944 and Rules 3 and 4 of the Credit Rules, interest could not be claimed from the date of wrong availment of CENVAT credit but would be payable from the date CENVAT credit was wrongly utilized.

Allowing the appeal, the Court

HELD:

1.1 A bare perusal of the order of the Settlement Commission would indicate that it imposed the liability of payment of simple interest only @ 10 per cent per annum on CENVAT credit wrongly availed, from the date the duty became payable. Incidentally, imposition of such simple interest at 10 per cent per annum was the minimum, whereas levy of interest at 36 per annum was the highest

in terms of the s.11-AB of the Central Excise Act,1944. Besides, the allegations made in the show cause notice were admitted by the respondent which, therefore, establishes that the respondent had taken wrongful CENVAT credit from the year 2001 to 31.03.2006 and the payment was made only on 22.02.2006 and on five different dates in March, 2006 and on 20.11.2006, which indicates that the respondents had the benefit of availing the large amount of CENVAT credit to which they were otherwise not entitled. [Para 12] [1098-B-D]

1.2 The order of the Settlement Commission also indicates that full immunities were granted to the respondent from penalty and prosecution. The order was not challenged by the respondent in any forum and, therefore, it became final and conclusive in terms of s.32M of the Act, which states that every order of settlement passed under sub-s. (7) of s.32F would be conclusive as to the matters stated therein subject to the condition that when a settlement order is obtained by fraud or misrepresentation of fact, such an order would be void. According to the said provisions, no matter covered by such order could be reopened in any proceeding under the Central Excise Act or under any other law for the time being in force. [Para 13] [1098-E-G]

1.3 A bare reading of Rule 14 of the CENVAT Credit Rules, 2004 would indicate that the manufacturer or the provider of the output service becomes liable to pay interest along with the duty where CENVAT credit has been taken 'or' utilized wrongly 'or' has been erroneously refunded and that in the case of such a nature the provision of s.11-AB would apply for effecting such recovery. The High Court proceeded by reading it down to mean that where CENVAT credit has been taken 'and' utilized wrongly, interest should be payable from the date the CENVAT credit has been utilized wrongly for,

according to the High Court, interest cannot be claimed simply for the reason that the CENVAT credit has been wrongly taken as such availment by itself does not create any liability of payment of excise duty. [Para 16-17] [1099-F-H; 1100-A-B]

1.4 The High Court misread and misinterpreted Rule 14 and wrongly read it down without properly appreciating the scope and limitation thereof. A statutory provision is generally read down in order to save the said provision from being declared unconstitutional or illegal. Rule 14 specifically provides that where CENVAT credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest would be recovered from the manufacturer or the provider of the output service. If Rule 14 is read as a whole there is no reason to read the word "or" in between the expressions 'taken' or 'utilized wrongly' or 'has been erroneously refunded' as the word "and". On the happening of any of the three aforesaid circumstances such credit becomes recoverable along with interest. No other harmonious construction is required to be given to the aforesaid expression/provision which is clear and unambiguous as it exists all by itself. [Para 17-18] [1100-B-F]

1.5 So far as s.11-AB is concerned, the same becomes relevant and applicable for the purpose of making recovery of the amount due and payable. Therefore, the High Court erroneously held that interest cannot be claimed from the date of wrong availment of CENVAT credit and that it should only be payable from the date when CENVAT credit is wrongly utilized. [Para 18] [1100-F-G]

2.1 Besides, the rule of reading down is in itself a rule of harmonious construction in a different name. It is generally utilized to straighten the crudities or ironing out

the creases to make a statute workable. This Court has repeatedly laid down that in the garb of reading down a provision it is not open to read words and expressions not found in the provision/statute and, thus, venture into a kind of judicial legislation. It is also held by this Court that the rule of reading down is to be used for the limited purpose of making a particular provision workable and to bring it in harmony with other provisions of the statute. Therefore, the attempt of the High Court to read down the provision by way of substituting the word "or" by an "and" so as to give relief to the assessee is found to be erroneous. Once the credit is taken the beneficiary is at liberty to utilize the same, immediately thereafter, subject to the Credit rules. [Para 18 and 20] [1100-G-H; 1101-A-B; 1102-H; 1103-A]

Calcutta Gujarati Education Society and Another v. Calcutta Municipal Corporation and Others **2003 (2) Suppl. SCR 915 = (2003) 10 SCC 533 *and*** *B.R. Enterprises v. State of U.P. and Others* **1999 (2) SCR 1111 = (1999) 9 SCC 700 - relied on.**

2.2 A taxing statute must be interpreted in the light of what is clearly expressed. It is not permissible to import provisions in a taxing statute so as to supply any assumed deficiency. [Para 19] [1102-D]

Commissioner of Sales Tax, U.P. v. Modi Sugar Mills Ltd. **(1961) 2 SCR 189 - relied on.**

3.1 An order passed by the Settlement Commission could be interfered with only if the said order is found to be contrary to any provisions of the Act. So far as findings of fact recorded by the Commission or questions of fact are concerned, the same is not open for examination either by the High Court or by the Supreme Court. In the instant case, the order of the Settlement Commission clearly indicates that its order, particularly,

with regard to the imposition of simple interest @ 10 per cent per annum was passed in accordance with the provisions of Rule 14 but the High Court wrongly interpreted the said Rule and thereby arrived at an erroneous finding. The order passed by the High Court is set aside and the order of the Settlement Commission restored. [Para 21 and 23] [1103-B-D, F]

Case Law Reference:

2003 (2) Suppl. SCR 915	**relied on**	**para 18**
1999 (2) SCR 1111	**relied on**	**para 18**
(1961) 2 SCR 189	**relied on**	**para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1976 of 2011.

From the Judgment & Order dated 03.07.2009 of the High Court of Punjab and Haryana at Chandigarh in Writ Petition No. 13860 of 2007.

Biswajeet Bhattacharya, ASG, Shipra Ghose, B. Krishna Prasad for the Appellants.

Balbir Singh, Rupendra Sinhmar, Abhishek Singh Beghel, Rajesh Kumar for the Respondent.

The Judgment of the Court was delivered by

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

2. The present appeal is directed against the judgment and order dated 03.07.2009 in Civil Writ Petition No. 13860 of 2007 passed by the Punjab & Haryana High Court, whereby the High Court while interfering with the order of the Settlement Commission regarding payment of interest on the CENVAT credit, has held that the appellants herein have wrongly claimed interest on the CENVAT credit, from the date when such credit was wrongly availed instead of the date when such credit was actually utilized. The High Court has further held that the

appellants are not entitled to claim interest on the amount of Rs. 50 lacs up to 31.01.2007 as the said amount already stood deposited on 08.03.2006.

3. The respondent herein, viz., M/s. Ind-Swift Laboratories Ltd., is a manufacturer of bulk drugs, falling under Chapter 30 of the First Schedule to the Central Excise Tariff Act, 1985. The company received inputs and capital goods from various manufacturers / dealers and availed CENVAT credit on the duty paid on such materials. On the basis of intelligence report, the factory premises of the respondent as also its group companies at different places were searched on 08.03.2006. Searches were also conducted at the offices of large number of firms in Ghaziabad and Noida which had allegedly issued invoices without any accompanying goods to the respondent and its group companies. At the same time the residential premises of Mr. R.P. Jain and Mr. J.P. Singh, the Brokers, were also searched and particularly during the course of search of the residence of Mr. R.P. Jain *kachha* ledgers / notebooks / files and cheques issued by the Swift group to the parties from whom invoices without material were being received, were recovered. It also appears that the appellant conducted investigations which indicated that the respondent had taken CENVAT credit on fake invoices. Consequently, a show cause notice dated 08.12.2006 was issued to the respondent, to which a reply was also submitted by the respondent. The respondent company also filed applications for settlement of the proceedings and consequently the entire matter was placed before the Settlement Commission.

4. Before the Settlement Commission, it was an admitted position that the case pertained to the period from 27.10.2001 to 31.03.2006. The respondent company also admitted all the allegations and duty liability as per the show cause notice dated 08.12.2006. The respondent also deposited the entire duty of Rs. 5,71,47,148/-. Since conditions/parameters for the admission of a case prescribed under Section 32E(1) of the

Central Excise Act, 1944 [for short "the Act"] were fulfilled and complied with, the application of the respondent for settlement was entertained and the same was proceeded with in terms of Section 32F(1) of the Act. After considering the records and hearing the parties the Commission came to the findings that while the wrongful CENVAT credit was taken from the year 2001 to 31.03.2006, the payments refunds have been made on 22.02.2006 and on five different dates in March, 2006 and on 20.11.2006 and, therefore, the respondent had the benefit of availing the large amount of CENVAT credit to which they were not entitled. Considering the said fact, the Commission felt and was of the view that the appropriate interest liability has to be borne by the respondent on such wrongful availment of CENVAT credit. Accordingly, the applications of the respondent were settled under Section 32F(7) of the Act subject to the following terms and conditions: -

"(a) The amount of duty relating to wrongful availment of CENVAT credit is settled at Rs. 5,71,47,148/-. As the entire amount has already been paid by the applicant, no further duty remains payable. The Bench directs that the said amount of deposit by the applicant shall be appropriated against the amount of duty settled in this Order. Besides the above, the inadmissible CENVAT credit of Rs. 78,97,255/-, as mentioned in para 23(a)(ii) of the show cause notice is disallowed.

(b) Immunity from interest in excess of 10% simple interest per annum is granted. Accordingly, the applicant shall pay simple interest @ 10 % per annum on CENVAT credit wrongly availed (i.e., Rs. 5,71,47,148/-) from the dates the duty became payable as per Section 11AB of the Act, till the dates of payment. Revenue is directed to calculate the amount of interest as per this order and intimate the same to the applicant within 15 days of the receipt of this order. Thereafter, the applicant shall pay the amount of interest within 15 days of the receipt of the said intimation and

report compliance both to the Bench and to Revenue."

5. The said order also specifically recorded that full immunity be granted to the respondent from penalty and prosecution. Subsequent to the passing of the said order, the respondent herein filed a miscellaneous application seeking for clarification contending *inter alia* that the respondent had deposited whole amount of duty during investigation without protest and that, following the final order, the Revenue has calculated interest liability of the respondent at Rs. 1,47,90,065/- and that the Revenue has calculated the said interest up to the date of the appropriation of the deposited amount and not up to the date of payment. It was further contended that the interest has to be calculated from the date of actual utilization and not from the date of availment. Consequently, it was prayed in the said application that the Settlement Commission may clarify the actual amount of interest liability of the respondent and extend the period of payment of interest in the interest of justice and equity.

6. The said application was taken up for consideration and after hearing the parties the application was dismissed. While rejecting the said application the Bench noted that the final order sets out in very clear terms that the respondent shall pay simple interest @ 10 per cent per annum on CENVAT credit wrongfully availed from the date the duty became payable as per Section 11AB of the Act, till the date of payment and that the application is misconceived and that no case of any clarification is made out because interest has to be calculated till the date of the payment of the duty. It was also held that the interest is also payable with reference to the date of availment of CENVAT credit and not from the date of utilization of a part of the balance of such credit. The Commission held that such an issue was never raised before the Settlement Commission at any earlier stage. The Commission while rejecting the application held as follows: -

"The said show cause notice vide Para 23 thereof

proposes to demand the CENVAT credit availed fraudulently by the applicant and not the amount of CENVAT utilized by the applicant. As such, it naturally follows that the interest is also payable with reference to the date of availment of CENVAT credit and not from the date of utilization of a part of balance of such credit. In any case, this issue was not raised in the application of settlement or at the time of settlement. In a query from the Bench, Id. Advocate also not raising this issue during settlement proceedings. As such, the Bench finds no justification to go into the practice adopted by the Revenue in this regard. In any case, it is a new point that did not arise for decision in the Final Order and on which the applicant is not seeking a decision in the garb of seeking a clarification. The Commission has already decided the issues which were brought before it through the Settlement Application. Section 32M of the Central Excise Act, 1944 bars the Commission from re-opening its final order. Hence, the final order already passed in the matter was conclusive as to the matters stated therein and the same cannot be re-opened for the purpose of deciding the said point raised subsequently."

7. The respondent, however, did not pay the entire amount in terms of the liability fixed. Consequently, a letter was issued on 16.08.2007 from the office of the appellant directing the appellant to pay the balance amount in terms of the order dated 19.01.2007.

8. The records disclose that immediately on receipt of the aforesaid letter the respondent filed a Writ Petition in the High Court of Punjab & Haryana which was registered as Civil Writ Petition No. 13860 of 2007, praying for quashing the order dated 31.05.2007 which was passed by the Settlement Commission on the applications seeking clarifications and the letter dated 16.08.2007 by which the office of the appellant

requested the respondent to deposit the balance amount in terms of the order dated 19.01.2007.

9. The High Court issued notice and heard the parties on the said Writ Petition. By its judgment and order dated 03.07.2009 the said Writ Petition was allowed by the High Court holding that Rule 14 of the CENVAT Credit Rules, 2004 [for short "Credit Rules"] has to be read down to mean that where CENVAT credit has been taken and/or utilized wrongly, interest should be payable on the CENVAT credit from the date the said credit had been utilized wrongly and that interest cannot be claimed simply for the reason that the CENVAT credit has been wrongly taken, as such availment by itself does not create any liability of payment of excise duty. The High Court further held that on a conjoint reading of Section 11AB of the Tariff Act and that of Rules 3 & 4 of the Credit Rules, interest cannot be claimed from the date of wrong availment of CENVAT credit and that the interest would be payable from the date CENVAT credit was wrongfully utilized.

10. Being aggrieved by the aforesaid judgment and order passed by the High Court the present appeal was filed by the appellant, which was entertained and notice was issued to the respondent, on receipt of which, they have entered appearance. Counsel appearing for the parties were heard at length when the matter was listed for final arguments. By the present judgment and order we now proceed to dispose the said appeal by recording our reasons.

11. The facts delineated hereinabove make it crystal clear that the respondent accepted all the allegations raised in the show cause notice and also the duty liability under the said show cause notice dated 08.12.2006. They also deposited the entire duty of Rs. 5,71,47,148/- prior to the issuance of the show cause notice and, therefore, they requested for settlement of the proceedings in terms of Section 32E read with Section 32F of the Act. The said settlement proceedings were conducted in accordance with law and was finalized by the order dated

19.01.2007 on the terms and conditions which have already been extracted hereinbefore.

12. A bare perusal of the said order would indicate that the Settlement commission has imposed the liability of payment of simple interest only @ 10 per cent per annum on CENVAT credit wrongly availed, that is, Rs. 5,71,47,148/- from the date the duty became payable. Incidentally, imposition of such simple interest at 10 per cent per annum was the minimum, whereas levy of interest at 36 per cent per annum was the highest in terms of the Section11 AB of the Act. Besides, the allegations made in the show cause notice were admitted by the respondent which, therefore, establishes that the respondent had taken wrongful CENVAT credit from the year 2001 to 31.03.2006 and the payment has been made only on 22.02.2006 and on five different dates in March, 2006 and on 20.11.2006, which indicates that the respondent had the benefit of availing the large amount of CENVAT credit to which they were otherwise not entitled to.

13. The order of the Settlement Commission also indicates that full immunities were granted to the respondent from penalty and prosecution. The aforesaid order was not challenged by the respondent in any forum and, therefore, it became final and conclusive in terms of Section 32M of the Act, which states that every order of settlement passed under sub-Section 7 of Section 32F would be conclusive as to the matters stated therein subject to the condition that when a settlement order is obtained by fraud or misrepresentation of fact, such an order would be void. According to the said provisions, no matter covered by such order could be reopened in any proceeding under the Central Excise Act or under any other law for the time being in force.

14. Although, subsequently, an application by way of clarification was filed by the respondent, the said application was, however, not entertained. It was held that the said application is misconceived, particularly, in view of the fact that

no such issue was raised before the Commission. Since, however, a Writ Petition was filed by the respondent challenging only the second order of the Settlement Commission and the subsequent letter issued from the office of the appellant, on the basis of which, High Court even proceeded to interfere with the first order passed by the Settlement Commission, we heard the counsel appearing for the parties on the issue decided by the High Court also.

15. In order to appreciate the findings recorded by the High Court by way of reading down the provision of Rule 14, we deem it appropriate to extract the said Rule at this stage which is as follows:

> "Rule 14. Recovery of CENVAT credit wrongly taken or erroneously refunded: - Where the CENVAT credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest shall be recovered from the manufacturer or the provider of the output service and the provisions of Sections 11A and 11AB of the Excise Act or Sections 73 and 75 of the Finance Act, shall apply mutatis mutandis for effecting such recoveries."

16. A bare reading of the said Rule would indicate that the manufacturer or the provider of the output service becomes liable to pay interest along with the duty where CENVAT credit has been taken or utilized wrongly or has been erroneously refunded and that in the case of the aforesaid nature the provision of Section 11AB would apply for effecting such recovery.

17. We have very carefully read the impugned judgment and order of the High Court. The High Court proceeded by reading it down to mean that where CENVAT credit has been taken and utilized wrongly, interest should be payable from the date the CENVAT credit has been utilized wrongly for according to the High Court interest cannot be claimed simply for the reason that the CENVAT credit has been wrongly taken as such

availment by itself does not create any liability of payment of excise duty. Therefore, High Court on a conjoint reading of Section 11AB of the Act and Rules 3 & 4 of the Credit Rules proceeded to hold that interest cannot be claimed from the date of wrong availment of CENVAT credit and that the interest would be payable from the date CENVAT credit is wrongly utilized. In our considered opinion, the High Court misread and misinterpreted the aforesaid Rule 14 and wrongly read it down without properly appreciating the scope and limitation thereof. A statutory provision is generally read down in order to save the said provision from being declared unconstitutional or illegal. Rule 14 specifically provides that where CENVAT credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest would be recovered from the manufacturer or the provider of the output service. The issue is as to whether the aforesaid word "OR" appearing in Rule 14, twice, could be read as "AND" by way of reading it down as has been done by the High Court. If the aforesaid provision is read as a whole we find no reason to read the word "OR" in between the expressions 'taken' or 'utilized wrongly' or 'has been erroneously refunded' as the word "AND". On the happening of any of the three aforesaid circumstances such credit becomes recoverable along with interest.

18. We do not feel that any other harmonious construction is required to be given to the aforesaid expression/provision which is clear and unambiguous as it exists all by itself. So far as Section 11AB is concerned, the same becomes relevant and applicable for the purpose of making recovery of the amount due and payable. Therefore, the High Court erroneously held that interest cannot be claimed from the date of wrong availment of CENVAT credit and that it should only be payable from the date when CENVAT credit is wrongly utilized. Besides, the rule of reading down is in itself a rule of harmonious construction in a different name. It is generally utilized to straighten the crudities or ironing out the creases to make a statute workable. This Court has repeatedly laid down that in the garb of reading down

a provision it is not open to read words and expressions not found in the provision/statute and thus venture into a kind of judicial legislation. It is also held by this Court that the Rule of reading down is to be used for the limited purpose of making a particular provision workable and to bring it in harmony with other provisions of the statute. In this connection we may appropriately refer to the decision of this Court in *Calcutta Gujarati Education Society and Another v. Calcutta Municipal Corporation and Others* reported in (2003) 10 SCC 533 in which reference was made at Para 35 to the following observations of this Court in the case of *B.R. Enterprises v. State of U.P. and Others* reported in (1999) 9 SCC 700: -

> *"81. …………. It is also well settled that first attempt should be made by the courts to uphold the charged provision and not to invalidate it merely because one of the possible interpretations leads to such a result, howsoever attractive it may be. Thus, where there are two possible interpretations, one invalidating the law and the other upholding, the latter should be adopted. For this, the courts have been endeavouring, sometimes to give restrictive or expansive meaning keeping in view the nature of legislation, maybe beneficial, penal or fiscal etc. Cumulatively it is to subserve the object of the legislation. Old golden rule is of respecting the wisdom of legislature that they are aware of the law and would never have intended for an invalid legislation. This also keeps courts within their track and checks individual zeal of going wayward. Yet in spite of this, if the impugned legislation cannot be saved the courts shall not hesitate to strike it down. Similarly, for upholding any provision, if it could be saved by reading it down, it should be done, unless plain words are so clear to be in defiance of the Constitution. These interpretations spring out because of concern of the courts to salvage a legislation to achieve its objective and not to let it fall merely because of a possible ingenious interpretation. The words are not static but*

> *dynamic. This infuses fertility in the field of interpretation. This equally helps to save an Act but also the cause of attack on the Act. Here the courts have to play a cautious role of weeding out the wild from the crop, of course, without infringing the Constitution. For doing this, the courts have taken help from the preamble, Objects, the scheme of the Act, its historical background, the purpose for enacting such a provision, the mischief, if any which existed, which is sought to be eliminated… … … … … … … … … … … … … . . .*
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> *……………………………………………………………………….*
>
> *This principle of reading down, however, will not be available where the plain and literal meaning from a bare reading of any impugned provisions clearly shows that it confers arbitrary, uncanalised or unbridled power." (emphasis supplied)"*

19. A taxing statute must be interpreted in the light of what is clearly expressed. It is not permissible to import provisions in a taxing statute so as to supply any assumed deficiency. In support of the same we may refer to the decision of this Court in *Commissioner of Sales Tax, U.P. v. Modi Sugar Mills Ltd.* reported in (1961) 2 SCR 189 wherein this Court at Para 10 has observed as follows: -

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

20. Therefore, the attempt of the High Court to read down the provision by way of substituting the word "OR" by an "AND" so as to give relief to the assessee is found to be erroneous.

In that regard the submission of the counsel for the appellant is well-founded that once the said credit is taken the beneficiary is at liberty to utilize the same, immediately thereafter, subject to the Credit rules.

21. An order passed by the Settlement Commission could be interfered with only if the said order is found to be contrary to any provisions of the Act. So far findings of the fact recorded by Commission or question of facts are concerned, the same is not open for examination either by the High Court or by the Supreme Court. In the present case the order of the Settlement Commission clearly indicates that the said order, particularly, with regard to the imposition of simple interest @ 10 per cent per annum was passed in accordance with the provisions of Rule 14 but the High Court wrongly interpreted the said Rule and thereby arrived at an erroneous finding.

22. So far as the second issue with respect to interest on Rs. 50 lacs is concerned, the same being a factual issue should not have been gone into by the High Court exercising the writ jurisdiction and the High Court should not have substituted its own opinion against the opinion of the Settlement Commission when the same was not challenged on merits.

23. In that view of the matter, we set aside the order passed by the Punjab & Haryana High Court by the impugned judgment and order and restore the order of the Settlement Commission leaving the parties to bear their own costs.

R.P. Appeal allowed.

RAM NARAYAN TIWARI
v.
UNION OF INDIA & ORS.
(Civil Appeal No. 1978 of 2011)

FEBRUARY 21, 2011

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

AIR FORCE ACT, 1950 :

s.73 – Punishments awardable by Court-Martial – Corporal in Air Force – Charged with sexual abuse against a boy of 9 years – Punishment of reduction in rank and confinement awarded by District Court-Martial commuted by Confirming Authority to dismissal from service – Held: The scale of punishment provided in s.3 clearly confirms the position that dismissal from service is a lesser punishment than that of detention – Since punishment is itself of dismissal from service, there is no question of reduction in rank at all, therefore, it cannot be said that two punishments have been awarded – Besides, the charge leveled against the delinquent was serious and was proved justifying punishment of dismissal.

The appellant, a Corporal in Indian Air Force, was awarded by the District Court Martial the punishment of detention for three months and reduction in rank, for committing sexual abuse against a boy of nine years. The Confirming Authority confirmed the findings of the District Court Martial, but commuted the punishment of detention for three months to dismissal from service. The High Court declined to interfere.

It was contended for the appellant that keeping in view s.73 of the Air Force Act, 1950, dismissal from

service was a more severe punishment than order of reduction in rank and the short term confinement; and that awarding two punishments in respect of one offence was illegal.

Dismissing the appeal, the Court

HELD: 1.1. Section 73 of the Air Force Act, 1950 provides for scale of punishment, according to which, the most severe punishment under the said provision is considered to be the punishment of death and, therefore, the same has been put on the top followed by imprisonment, detention, cashiering, dismissal from service and then other lesser punishments. The scale of punishment provided in s.73 of the Act clearly confirms the position that dismissal from service is a lesser punishment than that of detention in prison. By commuting the punishment of three months detention and imposing the punishment of dismissal, the Confirming Authority has strictly followed the scale of punishment provided for in s.73 of the Act. Since, the punishment itself is of dismissal from service, there is no question of reduction of rank at all. Therefore, it cannot be said that two punishments have been awarded to the appellant for one single offence. [Para 13, 17] [1111-B-C-D; 1112-E-F]

Union of India and Ors. Vs. R.K. Sharma **2001 (3) Suppl. SCR 664 = (2001) 9 SCC 592 – relied on.**

2. The appellant belongs to Air Force, which is a disciplined service. The allegations made against the appellant were serious. The charge number (2) against him stood proved. The said charge is also serious and for an offence of the said nature the authority was justified in awarding him the punishment of dismissal from service. There is no justification for any interference with the nature of punishment awarded to the appellant.

There was no violation of the provisions of s.73 of the Act. [Para 16, 17,18] [1112-C-D-F-G]

Case Law Reference:

2001 (3) Suppl. SCR 664	**Relied on**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1978 of 2011.

From the Judgment & Order dated 06.04.2007 of the High Court of Judicature at Allahabad in Special Appeal No. 569 of 2000.

Manoj Prasad for the Appellant.

P.P. Tripathi, ASG, Shadan Farasat, R. Balasubramanian, D.S. Mahra for the Respondents.

The Judgment of the Court was delivered by

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

2. The present appeal is directed against the judgment and order dated 06.04.2007 passed by the Division Bench of the Allahabad High Court dismissing the appeal filed by the appellant herein and confirming the judgment and order passed by the learned single Judge in the Writ Petitioner No. 2341 of 1990.

3. In order to appreciate the contentions raised before us it will be necessary to set out the brief facts of the case. The appellant while serving as Corporal in the Indian Air Force – Police Wing was served with a chargesheet dated 20.03.1980 containing three charges which were in the following manner: -

1. *Committed carnal intercourse against the order of nature with Sanjay Kumar minor on 15.03.1980;*

2. Consumed 'Ganja' while on duty on the same date; and

3. Left his place of duty for half an hour and the room remained unattended.

4. However, subsequently, another amended chargesheet was served upon him wherein the charges, namely, "*consuming Ganja while on duty*" and "*remaining absent from duty*" were dropped. The first charge of the first chargesheet was retained and another charge to the effect as shown was included therein, namely, "he placed his penis in the region of the exposed buttock of master Sanjay Kumar aged about 9 years".

5. Thereafter the appellant was tried in the District Court Martial. Witnesses were examined and after conclusion of the trial, the District Court Martial found charge No. 1 as not proved but held that the charge No. 2 stood proved. Consequent to the findings so recorded, punishment of three months detention and reduction in rank was awarded to the appellant. As per the provisions of the Air Force Act, 1950 the aforesaid findings as well as the punishment were subject to confirmation by the Confirming Authority, consequently, the records were placed before the Confirming Authority which confirmed the said findings but commuted the punishment of detention for three months to dismissal from service vide order dated 07.08.1980.

6. Being aggrieved by the aforesaid order, the appellant filed Writ Petition No. 8251 of 1980 before the Allahabad High Court challenging the order dated 07.08.1980. The said Writ Petition was dismissed by the High Court vide judgment and order dated 21.02.1985. However, the said judgment and order was challenged before this Court which was registered as Criminal Appeal No. 421 of 1989. This Court by its order dated 10.07.1989 remanded the case back to the Confirming Authority with the following observations: -

"In view of the facts and the circumstances of the case, the

order dated the 7th August, 1980 confirming the findings and sentence by the Court Martial is set aside. The matter should go back to the Confirming Authority for reconsideration and confirmation, in accordance with the law."

7. In view of the aforesaid findings and directions recorded by this Court the matter was once again placed before the Confirming Authority which reconsidered the matter. Upon such reconsideration a revised confirmation order was passed by the Confirming Authority on 30.10.1989 by which the finding as well as the sentence awarded by the District Court Martial was confirmed. However, the Confirming Authority commuted the punishment of the detention for three months to dismissal from service. The said order was challenged by the appellant by filing Writ Petition No. 2341 of 1990 before the learned single Judge, Allahabad High Court which was dismissed by order dated 26.07.2000.

8. Being aggrieved by the aforesaid judgment and order a special appeal was filed before the Division Bench of the Allahabad High Court which was registered as Special Appeal No. 569 of 2000. Before the Division Bench the counsel appearing for the appellant contended that the appellant is not aggrieved by the findings recorded by the District Court Martial or by the Confirming Authority at all and the sole contention that was raised by the counsel, apparently on instructions from the appellant, was that in exercise of powers under Section 157 of the Air Force Act [for short "the Act"], the Confirming Authority could mitigate, remit or commute the sentence but could not enhance the punishment. Therefore, in a nutshell what was submitted was that the punishment of dismissal from the service was more severe and harsher than serving three months' detention and, therefore, the order passed by the Confirming Authority altering the punishment given by the District Court Martial was not permissible.

9. In support of the said contention reference was made

and reliance was placed on Section 73 of the Act which reads as follows: -

"73. Punishments awardable by courts-martial – Punishments may be inflicted in respect of offence committed by persons subject to this Act and convicted by courts-martial according to the scale following, that is to say –

(a) death;

(b) transportation for life or for any period not less than seven years, in respect of civil offences;

(c) imprisonment, either rigorous or simple, for any period not exceeding fourteen years;

(d) detention for a term not exceeding two years in the case of airmen;

(e) cashiering, in the case of officers;

(f) dismissal from service;

(g) reduction to the ranks or to a lower rank or classification, in the case of warrant officers and non-commissioned officers;

Provided that a warrant officer reduced to the ranks shall not be required to serve in the ranks as an airman;

(h) forfeiture of seniority of rank, in the case of officers, warrant officers and non-commissioned officers, and forfeiture of all or any part of their service for the purpose of promotion, in the case of any of them whose promotion depends upon length of service;

(i) forfeiture of service for the purpose of increased pay, pension or any other prescribed purpose;

(j) severe reprimand or reprimand, in the case of officers, warrant officer and non-commissioned officers;

(k) forfeiture of pay and allowances for a period not exceeding three months for an offence committed on active service;

(l) forfeiture in the case of a person sentenced to cashiering or dismissal from the service, of all arrears of pay and allowances and other public money due to him at the time of such cashiering or dismissal;

(m) stoppage of pay and allowances until any proved loss or damage occasioned by the offence of which he is convicted is made good."

10. The Division Bench of the High Court, however, held that the aforesaid provision of the Act provides for a scale according to the severity of the punishment and that detention has been placed higher than the dismissal from service in the said scale and, therefore, it is difficult to hold that by commuting the punishment of three months detention and imposing the punishment of dismissal, the Confirming Authority has imposed a harsher punishment. Having held thus, the appeal filed by the appellant was dismissed. No other issue was either raised or discussed by the Division Bench of the High Court and, therefore, the present appeal is also restricted and confined only to the aforesaid issue.

11. Counsel appearing for the appellant placed reliance on Section 73 of the Act and submitted that the order of dismissal is a more severe punishment than the order of reduction in rank and short-term confinement. Counsel also submitted that awarding two sentences in respect of one offence is manifestly illegal.

12. Counsel appearing for the respondent, however, refuted the aforesaid submission and submitted that detention

under the aforesaid Section 73 of the Act is considered to be a harsher punishment than the dismissal from service and, therefore, the order of punishment awarded against the appellant is legal and valid.

13. We considered the aforesaid submission in the light of the records of the case. Section 73 of the Act provides for scale of punishment. According to the said scale, the most severe punishment under the said provision is considered to be the punishment of death and, therefore, the same has been put on the top followed by imprisonment, detention, cashiering, dismissal from service and then other lesser punishments. The Confirming Authority has commuted the punishment of three months detention and imposed the punishment of dismissal and, since, the punishment itself is of dismissal from service there is no question of his reduction to the ranks at all. Therefore, it cannot be said that, in fact, two punishments have been awarded to the appellant for one single offence.

14. With regard to the issue of awarding of punishment by the Confirming Authority, almost a similar issue came up for consideration before this Court in the case of *Union of India and others v. R.K. Sharma* reported in (2001) 9 SCC 592 which was a case relating to the provisions of the Army Act, 1950, viz., Sections 71 & 72, which are practically *pari materia* with the Air Force Act.

15. We have considered the said decision in the light of said sections of the Army Act. On going through the said decision we find that Section 71 of the Army Act, 1950 is *pari materia* with Section 73 of the Air Force Act, 1950. In the said decision this Court held that Section 72 of the Army Act merely provides that the Court Martial may, on convicting a person, award either the punishment which is provided for the offence or any of the lesser punishments set out in the scale in Section 71. It was also held that Section 71 does not set out that in all the cases a lesser punishment must be awarded and, therefore, merely because a lesser punishment is not granted it would not

mean that the punishment was violative of Section 72 of the Act. It was further held that dismissal from service provided in item (e) of Section 71 of the Army Act, 1950 as one of the punishments according to scale is a lesser punishment than imprisonment as contemplated under Section 57 and 63 of the Army Act. In our considered opinion the ratio of the aforesaid decision squarely applies to the facts of the present case.

16. Counsel appearing for the appellant also submitted that the punishment awarded to the appellant was too severe and harsh considering the nature and the degree of the offences established. The appellant belongs to Air Force, which is a disciplined service. The allegations made against the appellant were serious. The charge number (2) against him stood proved. The said charge is also serious and we are of the considered opinion that for an offence of the aforesaid nature the authority was justified in awarding him the punishment of dismissal from service.

17. The scale of punishment provided in Section 73 of the Act clearly confirms the position that dismissal from service is a lesser punishment than that of detention in prison. By commuting the punishment of three months detention and imposing the punishment of dismissal, the Confirming Authority has strictly followed the scale of punishment provided for in Section 73 of the Act and, therefore, there is no justification for any interference with the nature of punishment awarded to the appellant.

18. We, therefore, hold that there was no violation of the provisions of Section 73 of the Air Force Act, 1950. The appeal, therefore, has not merit and is dismissed accordingly, but without costs.

R.P. Appeal dismissed.

M/S. UTTAM INDUSTRIES
v.
COMMNR. OF CENTRAL EXCISE, HARYANA
(Civil Appeal Nos.3727-3728 of 2005)

FEBRUARY 21, 2011

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

Central Excise Act, 1944:

Notification no. 180/88-CE dated 13.5.1988 as amended by the Notification no. 135/94-CE dated 27.10.1994 and Notification no. 1/39 dated 28.02.1993 – Entitlement to exemption under – Held: Not available if assessee availed the Modvat Credit of duty paid on the inputs – In the instant case, the assessee was availing modvat credit in respect of inputs used in the manufacture of the aluminum circles – Consequently, assessee was not entitled to avail the benefit of the said Notification – Interpretation of statutes.

Interpretation of statutes: Exemption notification – Held: Has to be construed strictly and there has to be strict interpretation of the same by reading the same literally.

The appellants-assessee was engaged in the manufacture of aluminium circles and utensils. It claimed benefit of exemption under Notification no.180/88-CE as amended by Notification no.135/94-CE. The department denied the benefit of Exemption Notification on the ground that the assessee did not fulfil conditions of the Notification. The appellate authority and the Tribunal held that the assessee was availing MODVAT credit and, therefore, not entitled to the exemption Notification. The instant appeals were filed challenging the decision of the Tribunal.

Dismissing the appeals, the Court

HELD: 1.1 The order-in-original, the orders passed by the appellate authority and as also by the Tribunal concurrently held that admittedly the assessee-appellants were availing Modvat Credit in respect of inputs used in the manufacture of the aluminum circles. Consequently, the appellants were not entitled to avail the benefit of Notification granting exemption inasmuch as for availing such benefit under the said notification the pre-condition was that the aluminum circles were to be cleared for intended use in the manufacture of utensils and no credit of duty paid on inputs has been taken in respect of the inputs used in the manufacture of the aluminum circles. Such finding having become final, it was not open to the appellants to challenge the same. The appellants failed to bring any evidence on record that the appellants were not availing of Modvat Credit on the same goods in respect of which they were also claiming benefit of exemption under Notification. [Para 8] [1117-C-F]

1.2 It is by now a settled law that the exemption notification has to be construed strictly and there has to be strict interpretation of the same by reading the same literally. The finding recorded by the Tribunal and the two authorities below were findings of fact and such findings in absence of evidence on record to the contrary is not subject to interference. In order to get benefit of such notification granting exemption the claimant has to show that he satisfies the eligibility criteria. Since the Tribunal and the authorities below categorically held that the appellants did not satisfy the eligibility criteria on the basis of the evidence on record, therefore, the said exemption Notification is not applicable to the case of the assessees. [Para 10] [1117-G; 1118-A-C]

Collector of Customs (Preventive), Amritsar vs. Malwa

Industries Limited **(2009) 12 SCC 735;** *Kartar Rolling Mills vs. Commissioner of Central Excise, New Delhi* **(2006) 4 SCC 772 – relied on.**

Case Law Reference:

(2009) 12 SCC 735	**relied on**	**Para 10**
(2006) 4 SCC 772	**relied on**	**Para 10**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3727-3728 of 2005.

Form the Judgment & Order dated 10.03.2004 of the Customs, Excise and Service Tax Appellate Tribunal, New Delhi in Appeal No. E/1537-38/03-NBC.

S. Sunil, Neeru Vaid for the Appellant.

Harish Chandra, T.A. Khan, B. Krishna Prasad for the Respondent.

The Judgment of the Court was delivered by

Dr. MUKUNDAKAM SHARMA, J. 1. The issue that falls for consideration in these appeals is to the entitlement or otherwise of the appellants to the benefit of Notification No. 180/88 CE dated 13.05.1988 as amended by notification No. 135/94-CE dated 27.10.1994 whereunder exemption available was made conditional to the non-availment of Modvat Credit of the duty paid on the inputs.

2. In order to record a definite finding on the aforesaid issue it would be necessary to set out certain facts leading to filing of the present appeals.

3. The appellants are engaged in the manufacture of aluminum circles and utensils. The appellants filed classification list with effect from 27.10.1994 whereby the appellants claimed benefit of Notification No. 1/93 dated 28.02.1993 as well as

benefit of Notification No. 135/94-CE dated 27.10.1994. A show cause notice was issued to the appellants on 18.01.1995 contending inter alia that the benefit of Notification dated 27.10.1994 was not available to the appellants. Subsequent to the same a demand of Rs. 5,18,652/- was confirmed by way of denial of the aforesaid benefits of Notifications vide order passed on 01.11.1995.

4. Being aggrieved by the aforesaid order passed in the order-in-original dated 01.11.1995, the appellants filed an appeal before the Commissioner Central Excise (Appeals) contending inter alia that the appellants fulfilled conditions of both the Notifications, namely, the one issued on 13.05.1988 as amended by notification dated 27.10.1994 and also of the Notification dated 28.02.1993 and since both the aforesaid notifications are independent it cannot be said that benefits under both the notifications cannot be availed by the appellants and that rather one can avail both the benefits simultaneously.

5. The Commissioner Central Excise, who was the appellate authority held that the appellants had not fulfilled the stipulated conditions laid down in Notification dated 13.05.1988, as amended as the appellants availed Modvat Credit and therefore they are not entitled to the benefit of the said Notification. It was also held by the appellate authority that the appellants did not place any material on record to show that they had fulfilled conditions of the Notifications for availing benefit of Modvat Credit.

6. Being aggrieved by the aforesaid order passed on 31.03.2003 the appellants filed an appeal before the Customs, Excise and Service Tax Appellate Tribunal. By Judgment and Order dated 10.03.2004 the aforesaid appeal filed by the appellants was also dismissed holding inter alia that in this case it is not disputed by the appellants that they were availing the credit in respect of the inputs used in the manufacture of the aluminum circles and therefore they are not entitled to the benefit of the Notification granting exemption.

7. Still aggrieved the appellants filed the present appeals on which we heard learned counsel appearing for the parties, who had taken us through various orders passed by the different authorities and also through other connected records.

8. On going through the records it is clearly established that the appellants are availing Modvat Credit in respect of inputs used in the manufacture of aluminum circles. The order-in-original, the orders passed by the appellate authority and as also by the Tribunal concurrently held that admittedly the appellants are availing such Modvat Credit in respect inputs used in the manufacture of the aluminum circles. Consequently, the appellants are not entitled to avail the benefit of Notification granting exemption inasmuch as for availing such benefit under the said notification the pre-condition is that the aluminum circles are to be cleared for intended use in the manufacture of utensils and no credit of duty paid on inputs has been taken in respect of the inputs used in the manufacture of the aluminum circles. All the aforesaid three authorities below having held concurrently in the same manner as stated hereinabove. Such finding has become final and it is not open to the appellants to challenge the same. We also hold that the appellants failed to bring any evidence on record that the appellants were not availing of Modvat Credit on the same goods in respect of which they were also claiming benefit of exemption under Notification.

9. That being the position we are not inclined to interfere with the aforesaid finding of fact recorded by the Tribunal and the authorities below on the aforesaid issue.

10. It is by now a settled law that the exemption notification has to be construed strictly and there has to be strict interpretation of the same by reading the same literally. In this connection reference can be made to the decision of this Court in *Collector of Customs (Preventive), Amritsar vs. Malwa Industries Limited* reported at (2009) 12 SCC 735 as also to the decision in *Kartar Rolling Mills vs. Commissioner of*

Central Excise, New Delhi reported at (2006) 4 SCC 772 wherein also it was held by this Court that finding recorded by the Tribunal and the two authorities below are findings of fact and such findings in absence of evidence on record to the contrary is not subject to interference. In order to get benefit of such notification granting exemption the claimant has to show that he satisfies the eligibility criteria. Since the Tribunal and the authorities below have categorically held that the appellant does not satisfy the eligibility criteria on the basis of the evidence on record, therefore, we hold that the said exemption Notification is not applicable to the case of the appellants.

11. We do not find any merit in these appeals, therefore, we dismiss the same but leaving the parties to bear their own costs.

D.G. Appeals dismissed.

SUDHIR KUMAR CONSUL
v.
ALLAHABAD BANK
(Civil Appeal No. 1982-83 of 2011)

FEBRUARY 21, 2011

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

Allahabad Bank Officers Service Regulations, 1979:

Object of the Act – Discussed.

Regulation 46 – Pension under Old Pension Scheme – Appellant working as clerk as on 1.7.1979 and promoted as an officer in 1983 – Claim for pension under the Old Pension Scheme – Held: By virtue of Regulation 46 (1), pension in lieu of gratuity was available only to the officers appointed prior to or on 01.07.1979 and not to officers appointed, recruited or promoted thereafter – Therefore, appellant was not eligible to claim any benefit under the Old Pension Scheme – Service law – Pension.

Constitution of India, 1950:

Article 14 – Fixing of cut-off date for granting retirement benefits such as gratuity or pension – By virtue of Regulation 46(1) of Allahabad Bank Officers Service Regulations, 1979, benefit of pension in lieu of gratuity available only to the officers appointed prior to or on 01.07.1979 and not to officers appointed, recruited or promoted thereafter – Reasonableness of such differentiation – Held: Fixing of cut-off date, thereby, creating two distinct and separate classes of employees is reasonable and not offend Article 14 – Allahabad Bank Officers Service Regulations, 1979 – Regulation 46(1).

Administrative law:

Subordinate legislation – Legality of – Held: Can be challenged on the ground that it is arbitrary, unreasonable and offends Article 14 of the Constitution – Constitution of India, 1950 – Article 14.

The appellant was appointed as a clerk in respondent bank on 21.02.1976. He was promoted to the post of JMG scale I Officer Grade on 02.05.1983. The services of the appellant, after promotion were governed by the Allahabad Bank Officers Service Regulations, 1979. The appellant applied for the voluntary retirement pursuant to the Allahabad Bank Employees Voluntary Retirement Scheme, 2000 which was accepted on 12.04.2001 and the appellant stood relieved from the services of the Bank on 30.04.2001. After retirement, the appellant was offered gratuity under the Payment of Gratuity Act, 1972 by the respondent which the appellant declined to accept. The appellant made a request to the competent authority for sanction of pension in lieu of gratuity, but his request was rejected as not maintainable on the ground that an officer employed or appointed after 01.07.1079 was ineligible for pension under the Old Pension Scheme in view of Regulation 46 of the 1979 Regulations. The appellant filed writ petition before the High Court. The High Court partly allowed the appeal and directed the respondent to pay gratuity to the appellant as per Regulation 46(2) of the 1979 Regulations after adjusting the amount of gratuity already paid to the appellant. The instant appeals were filed challenging the order of the High Court.

Dismissing the appeals, the court

HELD : 1. The appellant is not entitled to claim pensionary benefit in view of Regulation 46(1) of the Allahabad Bank Officers Service Regulations, 1979. Regulation 46(1) provides pensionary benefit under

existing supplementary pension Scheme in lieu of gratuity only to those officers who were officers on the appointed date i.e. the officers who were appointed on or before 01.07.1979. Moreover, Provision 3 of the Old Pension Scheme stipulates that the officers who are recruited or promoted after 01.07.1979, i.e. the date of implementation of the 1979 Regulations, are not entitled for pension as per the said Regulations. It is an admitted fact that the appellant was working with the respondent as a Clerk on 01.07.1979 and was promoted as an officer only in 1983. Therefore, the appellant is not eligible to claim any benefit under the Old Pension Scheme. [Para 8] [1128-B-E]

2. It is well settled law that the vires of any subordinate legislation can be challenged on the ground that it is arbitrary, unreasonable and offends Article 14 of the Constitution of India. The 1979 Regulations were introduced with a view to standardize and provide comprehensive and compact set of rules in respect of wages and perquisites of the officers of the Bank. In furtherance of this object, Regulation 46 (1) of the 1979 Regulations provides pension in lieu of gratuity only to the officers appointed prior to or on 01.07.1979 and not to officers appointed, recruited or promoted thereafter. In this view, the said Regulation 46 (1) lays down a reasonable criteria for differentiation between the officers appointed prior to or on 01.07.1979 and not to officers appointed, recruited or promoted thereafter. Hence the said Regulation 46(1) is in consonance with the Article 14 of the constitution of India. Moreover, the fixing of the cut-off date for granting retirement benefits such as gratuity or pension under the different schemes incorporated in the subordinate legislation, thereby, creating two distinct and separate classes of employees is well within the ambit of Article 14 of the Constitution. The differential treatment of two sets of officers appointed prior to the

notified date would not offend Article 14 of the Constitution. The cut off date may be justified on the ground that additional outlay as involved or the fact that under the terms of appointment, the employee was not entitled to the benefit of pension or retirement. [Para 9] [1128-F-H; 1129-A-C]

Union of India v. P.N. Menon, **(1994) 4 SCC 68;** *State Government Pensioners' Association v. State of A.P.* **(1986) 3 SCC 501;** *Action Committee South Eastern Railway Pensioners v. Union of India*, **1991 Supp (2) SCC 544;** *All India Reserve bank Retired Officers' Association v. Union of India* **1992 Supp (1) SCC 664;** *University Grants Commission v. Sadhana Chaudhary* **(1996) 10 SCC 536;** *T.N. Electricity Board v. R. Veera samy* **(1999) 3 SCC 414;** *State of Punjab v. Boota Singh* **(2000) 3 SCC 733;** *State of Punjab v. J. L. Gupta* **(2000) 3 SCC 736;** *Ramrao v. All India Backward Class Bank Employees Welfare Assn.* **(2004) 2 SCC 76;** *State of Punjab v. Amar Nath Goyal* **(2005) 6 SCC 754;** *State of Bihar v. Bihar Pensioners Samaj* **(2006) 5 SCC 65 – relied on.**

3. In a society governed by Rule of law, sympathies cannot override the Rules and Regulations. However, liberty is granted to the appellant, if he so desires, to exercise his option to join the 1995 Regulations within 30 days. If such an option is exercised by the appellant, the respondents are directed to consider the same sympathetically within 60 days from the date of the option. [Para 21] [1135-C-D-G]

Life Insurance Corporation of India v. Asha Ramachhandra Ambekar and Anr. **(1994) 2 SCC 718 – relied on.**

Case Law Reference:

(1994) 4 SCC 68	**referred to**	**Para 4**

(1986) 3 SCC 501	**referred to**	**Para 11**
1991 Supp (2) SCC 544	**referred to**	**Para 12**
1992 Supp (1) SCC 664	**referred to**	**Para 13**
(1996) 10 SCC 536	**referred to**	**Para 14**
(1999) 3 SCC 414	**referred to**	**Para 15**
(2000) 3 SCC 733	**referred to**	**Para 16**
(2000) 3 SCC 736	**referred to**	**Para 17**
(2004) 2 SCC 76	**referred to**	**Para 18**
(2005) 6 SCC 754	**referred to**	**Para 19**
(2006) 5 SCC 65	**referred to**	**Para 20**
(1994) 2 SCC 718	**referred to**	**Para 20**

CIVIL APPEALATE JURISDICTION : Civil Appeal No. 1982-1983 of 2011.

From the Judgment & Order dated 25.02.2009 of the High Court of Uttarakhand at Nainital in Writ Petition No. 69 (S/B) of 2007.

Sudhir Kumar Consul, In-Person.

Yashaj Singh Deora, Sarwa Mitter (for Mitter & Mitter Co.) for the Respondent.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. Leave granted.

2. These appeals, by special leave, are directed against the Judgment and Order dated 25.02.2009 of the High Court of Uttarakhand in Writ Petition No. 69 of 2007. By the impugned order, the Court has rejected the Writ Petition filed by the appellant for granting certain reliefs which would include

claim for pensionary benefits under the New Pension Scheme, known as Allahabad Bank Employees (Pension) Regulations, 1995 [hereinafter referred to as, "the 1995 Regulations"].

3. The issue involved in the present appeals for our consideration is: Whether the appellant is eligible and entitled for the pensionary benefits under the Allahabad Bank Employees Pension Scheme, 1890 [hereinafter referred to as "Old Pension Scheme"] in terms of the Allahabad Bank Officers Service Regulations, 1979 [hereinafter referred to as "the 1979 Regulations"].

4. The factual matrix in brief is as under :

The appellant was appointed as a Clerk in the Nainital Branch of the Allahabad Bank, the respondent herein, on 21.02.1976. Subsequently, the appellant was promoted to the post of JMG-Scale-I Officer Grade on 02.05.1983. The services of the appellant, after promotion, were governed by the 1979 Regulations. The Regulation 46 of 1979 Regulations provides retirees an option of gratuity or pension in lieu thereof, and further, the pension benefits for the retirees opting for pension are available under the Old Pension Scheme. Pursuant to the Tripartite Memorandum of Settlement [hereinafter referred to as "the Tripartite Settlement"], among the management, workers and officers of the various banks dated 29.10.1993, the respondent formulated a draft/proposed Allahabad Bank Employees (Pension) Regulation 1993 [hereinafter referred to as "the draft/proposed 1993 Regulations"] *vide* Instruction Circular no. 3904 dated 06.09.1994. The draft/proposed 1993 Regulations provided the option to the employees, who were on the rolls of the Bank as on 31.10.1993, to opt for pension as per the Old Pension Scheme plus Contributory Provident Fund [hereinafter referred to as "the CPF"]. Accordingly, the appellant claimed pension under the Old Pension Scheme in terms of the draft/proposed 1993 Regulations on 30.11.1994. Subsequently, on 29.09.1995, the respondent formally adopted

the 1995 Regulations pursuant to the Tripartite Settlement. The 1995 Regulations superseded the draft/proposed 1993 Regulations *vide* Circular No. 4318 dated 16.11.1995 by further extending the benefit under the draft/proposed 1993 Regulations to the employees who were on the rolls of Bank as on 29.09.1995 to opt for pension as per the Old Pension Scheme plus CPF. Further, the 1995 Regulations, in express terms, have validated the earlier options exercised by the employees in accordance with the draft/proposed 1993 Regulations. The appellant applied for the voluntary retirement pursuant to the Allahabad Bank Employees Voluntary Retirement Scheme, 2000 [hereinafter referred to as "the VRS-2000"], which was accepted on 12.04.2001 and the appellant stood relieved from the services of the Bank on 30.04.2001. After retirement, the appellant was offered gratuity under the Payment of Gratuity Act, 1972 by the respondent *vide* letter dated 01.09.2001, which the appellant declined to accept. Subsequently, on 09.10.2001, the appellant made a request to the competent authority for sanction of pension in lieu of gratuity, but his request was rejected by the General Manager (Personnel Administration), *vide* letter dated 13.11.2001 as not maintainable on the ground that an officer employed or appointed after 01.07.1079 is ineligible for pension under the Old Pension Scheme in view of Regulation 46 of the 1979 Regulations. In this backdrop, the appellant alternatively requested the General Manager (Personnel Administration) *vide* letter dated 05.03.2002 to accept his option for Pension under the 1995 Regulations and further intimated his provisional acceptance of the said gratuity of Rs. 2,36,449/- under protest, which was not replied to by the respondent. Eventually, the respondent *vide* Instruction Circular no. 7331 dated 04.06.2002, lowered down the eligibility criteria from 25 years to 15 years for sanction of proportionate pension under Old Pension Scheme to retirees under the VRS-2000. In view of this, the appellant again requested *vide* letter dated 06.08.2002 to the competent authority for the grant of pension under the

Old Pension Scheme and the same was rejected in terms of Regulation 46 of the 1979 Regulations. The appellant further made representations before the Chairman and Managing Director of the respondent *vide* letters dated 16.08.2006 and 19.03.2007, which were rejected by the Assistant General Manager *vide* letter dated 05.04.2007 on the ground that the appellant was not eligible to claim pension under the Old Pension Scheme in terms of the 1979 Regulations. Being aggrieved, the appellant approached the High Court of Uttarakhand by filing a writ petition under Article 226 of the Constitution of India and the same was partly allowed by the judgment and order dated 25.02.2009, wherein the High Court directed the respondent to pay gratuity to the appellant as per Regulation 46(2) of the 1979 Regulations after adjusting the amount of gratuity already paid to the appellant in terms of Payment of Gratuity Act, 1972. The appellant, aggrieved by the Judgment and Order of the High Court in Writ Petition, filed a Review Application, which was rejected *vide* Order dated 31.03.2009. Aggrieved by these Orders, the appellant is before us in these appeals.

5. We have heard Shri Sudhir Kumar Consul, the appellant, who has appeared in person, and Shri Yashraj Singh Deora, learned counsel for the respondent - Bank.

6. The appellant contends that he is entitled to claim the benefit of pension under the existing Old Pension Scheme in addition to CPF in view of exercise of his option in terms of the draft/proposed 1993 Regulations. The appellant submits that he is an officer governed by the 1979 Regulations and duly eligible for pension under the existing Old Pension Scheme in terms of the Regulation 46(1) of the 1979 Regulations. In other words, the appellant argued that he was the employee of the respondent on the appointed date as per the said Regulation 46 (1). He further submits that the respondent has wrongly deprived him of his pensionary benefits under the Old Pension Scheme by misinterpreting Regulation 46 (1). In a*rguendo*, the

appellant challenged the *vires* of Regulation 46 of 1979 Regulations, as being beyond the Scope of Section 12 (2) of the Banking Companies (Acquisition and Transfer of Undertaking) Act, 1970 [hereinafter referred to as "the Banking Act"] and in violation of the guarantee of equality before law and equal protection of laws enshrined in Article 14 of the Constitution of India. The appellant submits that Section 12 (2) of the Banking Act duly protects the existing pensionary and other rights of the employee and the introduction of Regulation 46 (1) of 1979 Regulations unjustifiably deprives the appellant of his existing pensionary right under the Old Pension Scheme. The appellant further submits that the said Regulation 46 (1) creates an arbitrary and unreasonable distinction between the same class of officers of the respondent, merely on account of their date of appointment as employee with the respondent. In other words, the appellant argued that the said Regulation 46 discriminates the officers appointed on and before 01.07.1979 from those officers who are appointed, recruited or promoted after the said date.

7. Shri Yashraj Singh Deora, learned counsel for respondent, submits that the appellant is not eligible to claim any pension under the Old Pension Scheme in terms of Regulation 46 (1) of the 1979 Regulations as the appellant had admittedly become officer after 01.07.1979 on his promotion on 02.05.1983. It is also submitted that the appellant, prior to his promotion, was a Clerk with the respondent on the appointed date in terms of the said Regulation 46 (1). Hence, the appellant cannot claim any pensionary benefit under the Old Pension Scheme. In response to appellant's alternative submissions, the learned counsel for the respondent submits that Section 12 (2) of the Banking Act was introduced in 1970 after nationalization of the Banks. Section 12 (2) of the Banking Act cannot be invoked by appellant as Regulation 46 of the 1979 Regulations was introduced on 01.07.1979 only for officers whereas the appellant became officer only in 1983 by way of promotion. In other words, the appellant, being a Clerk at the relevant time

when the said Regulation 46 was introduced as applicable to officers, cannot challenge its *vires* on the touchstone of Section 12 (2) of the Banking Act. The learned counsel further submits that the Regulation 46 (1) of 1979 Regulations is in harmony with Article 14 of the Constitution of India.

8. We have carefully considered the rival submissions of the appellant in person and the learned counsel for the respondent-Bank. In our opinion, the appellant is not entitled to claim pensionary benefit in view of Regulation 46 (1) of the 1979 Regulations. The said Regulation 46 (1) provides pensionary benefit under existing supplementary pension Scheme in lieu of gratuity only to those officers who were officers on the appointed date i.e. the officers who were appointed on or before 01.07.1979. Moreover, Provision 3 of the Old Pension Scheme stipulates that the officers who are recruited or promoted after 01.07.1979, i.e. the date of implementation of the 1979 Regulations, are not entitled for pension as per the said Regulations. It is an admitted fact that the appellant was working with the respondent as a Clerk on 01.07.1979 and was promoted as an officer only in 1983. Therefore, the appellant is not eligible to claim any benefit under the Old Pension Scheme.

9. It is well settled law that the *vires* of any subordinate legislation can be challenged on the ground that it is arbitrary, unreasonable and offends Article 14 of the Constitution of India. The 1979 Regulations were introduced with a view to standardize and provide comprehensive and compact set of rules in respect of wages and perquisites of the officers of the Bank. In furtherance of this object, Regulation 46 (1) of the 1979 Regulations provides pension in lieu of gratuity only to the officers appointed prior to or on 01.07.1979 and not to officers appointed, recruited or promoted thereafter. In this view, we are of the opinion that the said Regulation 46 (1) lays down a reasonable criteria for differentiation between the officers appointed prior to or on 01.07.1979 and after the said date.

Hence the said Regulation 46 (1) is in consonance with the Article 14 of the Constitution of India. Moreover, the fixing of the cut-off date for granting retirement benefits such as gratuity or pension under the different schemes incorporated in the subordinate legislation, thereby, creating two distinct and separate classes of employees is well within the ambit of Article 14 of the Constitution. The differential treatment of two sets of officers appointed prior to the notified date would not offend Article 14 of the Constitution. The cut off date may be justified on the ground that additional outlay as involved or the fact that under the terms of appointment, the employee was not entitled to the benefit of pension or retirement.

10. This Court, in *Union of India v. P.N. Menon, (1994) 4 SCC 68*, has held:

> "*8. Whenever the Government or an authority, which can be held to be a State within the meaning of Article 12 of the Constitution, frames a scheme for persons who have superannuated from service, due to many constraints, it is not always possible to extend the same benefits to one and all, irrespective of the dates of superannuation. As such any revised scheme in respect of post-retirement benefits, if implemented with a cut-off date, which can be held to be reasonable and rational in the light of Article 14 of the Constitution, need not be held to be invalid. It shall not amount to "picking out a date from the hat", as was said by this Court in the case of D.R. Nim v. Union of India, (1967) 2 SCR 325, in connection with fixation of seniority. Whenever a revision takes place, a cut-off date becomes imperative because the benefit has to be allowed within the financial resources available with the Government."*

The Court further observed:

> *"14…No scheme can be held to be foolproof, so as to cover and keep in view all persons who were at one time*

> *in active service. As such the concern of the court should only be, while examining any such grievance, to see, as to whether a particular date for extending a particular benefit or scheme, has been fixed, on objective and rational considerations*."

11. In *State Government Pensioners' Association* v. *State of A.P.,* (1986) 3 SCC 501, the Order in question provided that retirement gratuity may be one-third of the pay drawn at the time of retirement for every six-monthly service, subject to maximum of 20 months' pay limited to '30,000. This Order was made effective from 01.04.1978. The petitioners, who were government employees and had retired before 01.4.1978, contended that the gratuity, being a part and parcel of the pensionary benefits, they were also entitled to the same retrospectively. On behalf of the State, it was pointed out that the gratuity which had accrued to the petitioners prior to 01.4.1978, was calculated on the then existing rules and pay, and such petitioners formed a distinct class, for the purpose of payment of gratuity, from others who retired after 01.04.1978, the date from which the revised pension rules were made applicable by the Government. This Court held that the upward revision of gratuity which took effect from a specified date i.e. 1-4-1978 with prospective effect, was legal and not violative of Article 14 of the Constitution.

12. In *Action Committee South Eastern Railway Pensioners* v. *Union of India,* 1991 Supp (2) SCC 544, this Court has examined the concept of 'dearness pay', including the two options for retirement benefits given to the employees which had been framed fixing a cut-off date. This Court held:

> *"12. ... Learned counsel for the petitioners only submitted that if the formula adopted in the case of employees having retired after March 31, 1985 vide circular dated May 17, 1985 is applied in the case of the petitioners then it would make substantial difference in*

the calculation of the amount of gratuity and commuted value of pension. As already discussed above no such claim can be allowed nor the same can be permissible on any principle of equality enshrined under Article 14 of the Constitution inasmuch as the petitioners form a different class from those who were continuing in service on or after March 31, 1985. The petitioners of their own accord had opted for the choice given to them and the principle enunciated in D.S. Nakara case (1983) 1 SCC 305 *cannot be applied in the case of the petitioners."*

13. In *All India Reserve Bank Retired Officers' Association* v. *Union of India,* 1992 Supp (1) SCC 664, the Retired Officers' Association of the Reserve Bank of India questioned the validity of introduction of pension scheme in lieu of Contributory Provident Fund Scheme. The bank employees, who retired prior to 01.01.1986, had not been given benefit of the said Pension Scheme. This Court held that the said cut-off date was neither arbitrary nor artificial or whimsical. It was further observed:

"10. … The underlying principle is that when the State decides to revise and liberalise an existing pension scheme with a view to augmenting the social security cover granted to pensioners, it cannot ordinarily grant the benefit to a Section of the pensioners and deny the same to others by drawing an artificial cut-off line which cannot be justified on rational grounds and is wholly unconnected with the object intended to be achieved. *But when an employer introduces an entirely new scheme which has no connection with the existing scheme, different considerations enter the decision making process. One such consideration may be the financial implications of the scheme and the extent of capacity of the employer to bear the burden. Keeping in view its capacity to absorb the financial burden that the scheme would throw, the employer would have to decide upon the extent of*

applicability of the scheme."

(Emphasis added)

14. In *University Grants Commission* v. *Sadhana Chaudhary*, (1996) 10 SCC 536, this Court has observed:

"*21. ... It is settled law that the choice of a date as a basis for classification cannot always be dubbed as arbitrary even if no particular reason is forthcoming for the choice unless it is shown to be capricious or whimsical in the circumstances. When it is seen that a line or a point there must be and there is no mathematical or logical way of fixing it precisely, the decision of the legislature or its delegate must be accepted unless it can be said that it is very wide off the reasonable mark.*"

15. In *T.N. Electricity Board v. R. Veerasamy,* (1999) 3 SCC 414, the pension scheme was applied differently to persons who had retired from service before 01.07.1986, and those who were in employment on the said date. This Court held:

"*15. … We are of the view that the retired employees (respondents), who had retired from service before 1-7-1986 and those who were in employment on the said date, cannot be treated alike as they do not belong to one class. The workmen, who had retired after receiving all the benefits available under the Contributory Provident Fund Scheme, cease to be employees of the appellant-Board w.e.f. the date of their retirement. They form a separate class.*"

16. In *State of Punjab v. Boota Singh case,* (2000) 3 SCC 733, this Court has held that the benefit conferred by the notification dated 9-7-1985 can be claimed by those who retire after the date stipulated in the notification and those who have retired prior to the stipulated date in the notification are governed by different rules. They are governed by the old rules,

i.e., the rules prevalent at the time when they retire. The two categories of persons are governed by different sets of rules. They cannot be equated. The grant of additional benefit has financial implications and the specific date for the conferment of additional benefits cannot be considered arbitrary. This Court held:

> "In the case of *Indian Ex-Services League v. Union of India* (1991) 2 SCC 104 this Court distinguished the decision in *Nakara case* (1983) 1 SCC 305 and held that the ambit of that decision cannot be enlarged to cover all claim by retirees or a demand for an identical amount of pension to every retiree, irrespective of the date of retirement even though the emoluments for the purpose of computation of pension be different. We need not cite other subsequent decisions which have also distinguished *Nakara case* (1983) 1 SCC 305. The latest decision is in the case of *K.L. Rathee v. Union of India* (1997) 6 SCC 7 where this Court, after referring to various judgments of this Court, has held that *Nakara case* (1983) 1 SCC 305 cannot be interpreted to mean that emoluments of persons who retired after a notified date holding the same status, must be treated to be the same. The respondents are not entitled to claim benefits which became available at a much later date to retiring employees by reason of changes in the rules relating to pensionary benefits."

17. In *State of Punjab v. J.L. Gupta,* (2000) 3 SCC 736, this Court reiterating the views expressed in *Boota Singh* (*supra*), held:

> "*5. The controversy involved in the present appeal and connected appeals is squarely covered by the aforesaid decision. The respondents are thus not entitled to claim benefits under the notification dated 9-7-1985 since the said benefits became available on a much later date to the retiring employees by reason of change in the rules relating to pensionary benefits. In this view, the judgment*

> *of the High Court cannot be sustained."*

18. In *Ramrao v. All India Backward Class Bank Employees Welfare Assn.,* (2004) 2 SCC 76, this Court has held that, even for the purpose of effecting promotion, fixing of a cut-off date was neither arbitrary, unreasonable nor did it offend Article 14 of the Constitution. This Court further observed:

> "*32. If a cut-off date can be fixed, indisputably those who fall within the purview thereof would form a separate class. Such a classification has a reasonable nexus with the object which the decision of the Bank to promote its employees seeks to achieve. Such classifications would neither fall within the category of creating a class within a class or an artificial classification so as to offend Article 14 of the Constitution of India.*
>
> *33. Whenever such a cut-off date is fixed, a question may arise as to why a person would suffer only because he comes within the wrong side of the cut-off date, but, the fact that some persons or a Section of society would face hardship, by itself cannot be a ground for holding that the cut-off date so fixed is ultra vires Article 14 of the Constitution.*"

19. In *State of Punjab v. Amar Nath Goyal,* (2005) 6 SCC 754, this Court held:

> "37. In the instant case before us, the cut-off date has been fixed as 1-4-1995 on a very valid ground, namely, that of financial constraints. Consequently, we reject the contention that fixing of the cut-off date was arbitrary, irrational or had no rational basis or that it offends Article 14."

20. In *State of Bihar v. Bihar Pensioners Samaj, (2006) 5 SCC 65*, this Court held:

> "*17. We think that the contention is well founded. The only*

ground on which Article 14 has been put forward by the learned counsel for the respondent is that the fixation of the cut-off date for payment of the revised benefits under the two notifications concerned was arbitrary and it resulted in denying arrears of payments to certain Sections of the employees. This argument is no longer res integra. It has been held in a catena of judgments that fixing of a cut-off date for granting of benefits is well within the powers of the Government as long as the reasons therefor are not arbitrary and are based on some rational consideration."

21. We have sympathies for the appellant but, in a society governed by Rule of law, sympathies cannot override the Rules and Regulations. We may recall the observations made by this Court while considering the issue of compassionate appointment in public service. In *Life Insurance Corporation of India v. Asha Ramachhandra Ambekar and Anr.* (1994) 2 SCC 718, wherein the Court observed: "*The High Courts and the Administrative Tribunals cannot confer benediction impelled by sympathetic consideration.... Yielding to instinct will tend to ignore the cold logic of law. It should be remembered that "law is the embodiment of all wisdom". Justice according to law is a principle as old as the hills. The Courts are to administer law as they find it, however, inconvenient it may be."*

22. In view of the above discussion, the appeals fail and are, accordingly, dismissed. However, we grant liberty to the appellant, if he so desires, to exercise his option to join the 1995 Regulations in terms of instruction Circular No. 11143/PA/2010-11/27 dated 15.09.2010 within 30 days from today. If such an option is exercised by the appellant, the respondents are directed to consider the same sympathetically within 60 days from the date of the option. Parties are directed to bear their own costs.

D.G. Appeals dismissed.

DAYAL DAS
v.
STATE OF RAJASTHAN
(Criminal Appeal No. 526 of 2011)

FEBRUARY 22, 2011

[DALVEER BHANDARI AND DEEPAK VERMA, JJ.]

PENAL CODE, 1860:

ss.304 (part-II) and 328, and s.54-A of Rajasthan Excise Act – Conviction by trial court and High Court, of accused on the statement that the person who died of consuming illicit liquor was seen drinking in the soda-lemon shop of the accused – HELD: The statement of the witness which led to conviction of the accused does not indicate that the deceased had purchased the illicit liquor from the shop of the accused –Moreover, the liquor consumed by deceased from shop of accused was not sent for chemical examination – Consequently, accused cannot be connected with the crime on the basis of such evidence – Judgments of trial court and High Court are set aside – Accused is acquitted – Rajasthan Excise Act.

On the basis of 'Parcha Bayan' of PW12, the police registered an FIR against the accused, to the effect that PW12 alongwith two others consumed liquor in the soda lemon shop of the accused; at that time he saw one `LC' also drinking in the shop of the accused. PW12 stated that he became unconscious and when he gained consciousness the following morning, he found himself in the hospital and learnt that `LC' had died because of consuming illicit liquor. The trial court convicted the accused of the offences punishable u/ss 304 (Part –II) and 328 IPC, and s.54-A of the Rajasthan Excise Act and sentenced him to imprisonment for 10 years. The High

Court upheld the conviction and the sentence.

In the appeal filed by the accused, it was contended for the appellant that the statement of PW12 nowhere mentioned that the victim died of the illicit liquor purchased from the shop of the accused and, as such, the evidence did not connect the accused with the crime.

Allowing the appeal, the Court

HELD: 1.1 It could not be found from the original statement of PW-12 that the deceased had purchased illicit liquor from the shop of the appellant. This part is totally missing from the original statement of PW-12, though his testimony has led to the conviction of the appellant. Consequently, the appellant cannot be connected with the crime on the basis of the statement of PW-12. [Para 11] [1140-C-D]

1.2 It may be pertinent to mention here that the other two witnesses, namely, PW-9 and PW-13 had turned hostile during the trial. It may also be pertinent to mention that the liquor consumed by the deceased at the shop of the appellant, was not sent for chemical examination. Only on the basis of the statement made by PW-12, that the deceased was drinking at the shop of the deceased, it is difficult to sustain the conviction of the appellant u/s 304 (Part-II) IPC. Thus, both the Court of Session and the High Court have erroneously read and comprehended the statement of PW-12, and, unfortunately, that has led to the conviction of the appellant. The judgments of the High Court and the trial court are set aside. Consequently, the conviction of the appellant is set aside and he is directed to be released. [Para 12, 14 and 15] [1140-E-F, H; 1141-A-B]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 526 of 2011.

From the Judgment & Order dated 25.05.2006 of the High Court of Rajasthan at Jaipur in S.B. Crl. Appeal No. 356 of 1984.

D.N. Goburdhan, Prabal Bagchi, Anirudh Anand for the Appellant.

Abhishek Gupta, R. Gopalakrishnan for the Respondent.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. Delay condoned. Leave granted.

2. We have heard the learned counsel for the parties at length.

3. This appeal emanates from the judgment and order dated 25th May, 2006 passed by the High Court of Judicature at Rajasthan, Jaipur Bench, in Criminal Appeal No.356 of 1984 by which the High Court has affirmed the order of conviction and sentence passed by the Trial Court.

4. Brief facts which are relevant to dispose of this appeal are recapitulated as under:

On 26.8.1979 at 11.30 a.m., the Station House Officer, Police Station, Clock Tower, Ajmer recorded the Parcha Bayan (Ext.34) of Bheru Lal, PW-12 in Jawahar Lal Nehru Hospital, Ajmer. According to the Parcha Bayan, on 23.8.1979 at about 8.45 p.m., while he was standing outside the New Majestic Cinema, Hari Singh, Band Master and Ram Niwas came out from the shop of Soda Lemon belonging to Dayal Das Sindhi appellant herein. Both were known to him (Bheru Lal). All these persons consumed liquor at the shop of the said Dayal Das Sindhi. While they were consuming liquor at the shop of Dayal Das Sindhi, one Lal Chand Thelewala was also seen drinking liquor in the said shop.

5. Bheru Lal became unconscious and when he regained consciousness on the next morning, he found himself in the hospital and there he learnt that Lal Chand had died because of consuming of illicit liquor.

6. On the basis of the Parcha Bayan, the Police Officer registered the First Information Report ("FIR" for short) and started investigation. After investigation it was found that seven persons, namely, Lal Chand, Arjun, Bhagwan, Chaman Das, Dhanna, Jethanand and Suresh Rawat lost their lives due to consuming of illicit liquor.

7. The Additional Sessions Judge, Ajmer, after trial of this case delivered the judgment on 7.8.1984 in Sessions Case No.3/1980 convicting the appellant Dayal Das under Section 304 Part-II and Section 328 of the Indian Penal (IPC) Code and Section 54-A of the Rajasthan Excise Act. He was sentenced to undergo rigorous imprisonment for ten years and a fine of Rs.4,000/- under Section 304 Part-II of the IPC and he was further convicted and sentenced to simple imprisonment for three years and imposed a fine of Rs.3000/- under Section 54-A of the Rajasthan Excise Act. However, both the sentences were directed to run concurrently.

8. The appellant aggrieved by the said judgment of the Additional Sessions Judge, preferred an appeal before the Rajasthan High Court. The High Court in the impugned judgment has upheld the judgment of the Trial Court.

9. The Trial Court and the High Court concurrently held that the deceased Lal Chand had purchased illicit liquor from the shop of the appellant Dayal Das Sindhi and drinking of that illicit liquor at the shop of the appellant was the cause of death of Lal Chand.

10. Mr. D.N. Goburdhan, learned counsel appearing for the appellant as amicus curiae made threshold submission that both the judgments of the Trial Court and the High Court are

perverse because the evidence of Bheru Lal, PW-12 has not been correctly read and appreciated by both the Courts below. According to Mr. Goburdhan, in the entire evidence of PW-12, it is nowhere mentioned that illicit liquor was purchased by the deceased Lal Chand from the shop of Dayal Das Sindhi. All what is mentioned in the statement is that he saw Lal Chand drinking in the shop of Dayal Das Sindhi. It is difficult to connect the accused with the crime only on the evidence that Lal Chand was seen drinking at the shop of Dayal Das Sindhi.

11. We have ourselves read the original statement of Bheru Lal, PW-12 but could not find from the statement that the deceased Lal Chand had purchased illicit liquor from the shop of the appellant. This part of the testimony of Bherulal has led to the conviction of the appellant but the same is totally missing from the original statement of Bheru Lal, PW-12. Consequently, the appellant cannot be connected with the crime on the basis of the statement of PW-12.

12. It may be pertinent to mention here that the other two witnesses, namely, Hari Singh, PW-9 and Ram Niwas, PW-13 had turned hostile during the trial of this case. It may also be pertinent to mention that the liquor consumed by Lal Chand at the shop of the appellant Dayal Das, was not sent for chemical examination. Only on the basis of the statement made by Bheru Lal, PW-12, that the deceased Lal Chand was drinking at the shop of Dayal Das Sindhi, it is difficult to sustain the conviction of the appellant under Section 304 Part-II of the IPC.

13. Learned counsel appearing for the State of Rajasthan fairly submitted that in the entire evidence of Bheru Lal, PW-12, he had nowhere stated that the deceased Lal Chand purchased illicit liquor from the shop of Dayal Das Sindhi.

14. On a careful reading of the original statement of Bheru Lal, PW-12, we have no hesitation in arriving at the conclusion that both the Sessions Court and the High Court have erroneously read and comprehended the statement of Bheru

Lal, PW-12 and unfortunately that has led to the conviction of the appellant.

15. In this view of the matter, we are left with no option but to set aside the impugned judgment of the High Court as also the judgment of the Trial Court. Consequently, the conviction of the appellant is set aside and he is directed to be released from jail forthwith unless required in connection with any other case.

16. The appeal filed by the appellant is allowed and disposed of accordingly.

17. The appellant was not represented by any counsel and this Court had to appoint amicus curiae in this matter. Therefore, we direct that copies of this Judgment/order be sent to all concerned authorities forthwith for compliance of the order.

18. Before parting with this case, we would like to place on record our appreciation for very able assistance provided to us by the learned amicus curiae Mr. D.N. Goburdhan, Advocate.

R.P. Appeal allowed.

IVO AGNELO SANTIMANO FERNANDES & ORS.
v.
GOVERNMENT OF GOA & ANR.
(CIVIL APPEAL NO.7245 OF 2003)

FEBRUARY 23, 2011

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

LAND ACQUIASITION ACT, 1894:

s. 34 read with ss. 28 and 53 – Interest on compensation for land acquired – Amount not collected by land-owners and deposited in Revenue account of State and utilized – HELD: The Act requires that the amount be deposited in court – Even if the amount is not collected by the claimants, State cannot keep it with itself and utilize the same – In such a case, after a reasonable period the amount should be deposited in court – Interest will be payable to parties as per order of District Judge – Code of Civil Procedure, 1908 – O. 21.r 1.

In a land acquisition case, the amount of compensation as awarded by the reference court was to be paid to four land owners. The cheques prepared in the name of two land owners were not collected as one of them had died in the meanwhile. The amount of the uncollected cheques was deposited in the revenue account of the State and utilized by the State Government. In the execution application filed for recovery of the balance amount along with the interest accrued thereon, a dispute as to apportionment of compensation within the meaning of s. 31(2) of the Land Acquisition Act, 1897 arose. The District Judge by order dated 29.10.1999 directed that the amount of uncollected cheques be paid to appellants 1 and 3 leaving the question of interest to be determined subsequently. On

23.3.2000, fresh cheques were deposited in court. The District Judge, by order dated 18.8.2000, held that as per the judgment in *Prem Nath Kapur's* case*, the liability of the respondents to pay interest subsisted till they had not deposited the amount in court. Since the respondents had deposited the amount in their Revenue account and had utilized the same, they were liable to pay interest @ 15% on compensation. However, the High Court, in revision, set aside the judgment of the District Judge holding that the amount was paid to the appellants but they did not collect the same. Aggrieved, the land-owners and their heirs filed the appeal.

Allowing the appeal, the Court

HELD: 1.1 The Land Acquisition Act, 1897 requires that the interest be deposited in court, and the same has been upheld in the case of *Prem Nath Kapur*.* **This Court also held that by operation of s. 53 of the Act, Order 21, r. 1 CPC, being inconsistent with the express provisions contained in ss. 34 and 28 of the Act, stood excluded. [para 18-19] [1150-B]**

Prem Nath Kapur & Anr. v. National Fertilizers Corporation of India Ltd. & Ors.* **1995 (5) Suppl. SCR 790 = *(1996) 2 SCC 71* – relied on

1.2 In the instant case, the respondents did not deposit the amount in court, but in their Revenue account and utilized the same. Even if the respondent State does pay the compensation to the claimants directly, and the same is not collected, it cannot then keep the said money with itself and utilize the same. In such cases, after a reasonable period, if the claimants do not come forward to collect compensation, then it should be deposited in court by the State. Allowing the State to keep the compensation with itself and utilizing it cannot

possibly be permitted being contrary to the provisions of the Act and the law laid down in *Prem Nath Kapur*. The judgment of the High Court is clearly erroneous and is set side. Accordingly, interest will be payable to the parties as per the order of the District Judge dated 18.8.2000. [para 19-20] [1150-C-F]

Case Law Reference:

1995 (5) Suppl. SCR 790 relied on para 9

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7245 of 2003.

From the Judgment & Order dated 16.08.2002 of the High Court of Bombay at Goa in Civil Revision Application No. 44 of 2001.

M.S. Ganesh, Nikhil Nayyar, K. Seshachary, Swarpnil Verma, T.V.S. Raghzavendra Sreyas for the Appellants.

Niranjana Singh, Prema Singh for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. Heard counsel for the parties.

2. A notification dated 6.09.1984 under Section 4 of the Land Acquisition Act, 1894 (hereinafter, 'the Act'), was issued for acquisition of land at Sanguem, Goa, for the construction of a sports complex. The concerned dispute relates to land in Survey Nos. 111/1 and 111/2. The Land Acquisition Collector (hereinafter, 'LAC') awarded compensation at Rs.45/- per sq. meter.

3. Aggrieved, landowners-appellants 1 to 3 and one Ana Conceicao Antonieta Santimano filed reference petitions against the order of the LAC under Section 18 of the Act. The District Judge, South Goa, passed an award dated 19.08.1992,

wherein the rate of Rs.45/- per sq. meter given by the LAC was upheld. Additionally, they were held entitled to severance charges @ 20% p.a. of Rs.45/- per sq. meter in respect of the non-acquired portion of 37,731 sq. meters. They were also granted compensation in respect of a boundary wall amounting to Rs.31,720/-, and other statutory benefits. The total sum thus awarded to them was Rs.8,80,372/-.

4. On 7.3.1996, an order was issued by the Director of Sports and Youth Affairs, releasing funds to the extent of Rs.8,80,372/-, placing the same at the disposal of Addl. Dy. Collector, L.A., South, Margoa, Goa, towards payment of the decretal order of the District Judge, South Goa, Margoa in the said land acquisition matter.

5. On 11.3.1996, Ana Conceicao Antonieta Santimano expired leaving behind a Will dated 19.4.1995 bequeathing the additional compensation payable by the government, to her son Herbert Santimano Fernandes (appellant No. 2). The appellants 4, 5 and 6 are the other legal representatives of the deceased Ana Conceicao Antonieta Santimano.

6. The death of Ana Conceicao Antonieta Santimano was not intimated to the government. Accordingly, pursuant to the award, the respondents prepared two cheques each in the sum of Rs.2,06,436/- (after deduction of taxes) in favour of the deceased Ana Conceicao Antonieta Santimano and appellant 1, and two cheques each in the sum of Rs.2,06,437/- (after deduction of taxes) in the names of appellants 2 and 3. The Government addressed a letter dated 1.4.1996 to the deceased Ana Conceicao Antonieta Santimano and appellants 1 to 3, requesting them to collect their cheques on 8.4.1996. The appellants 2 and 4 collected their cheques on 9.4.1996. However, the other two cheques were not collected by the respective claimants. On 13.9.1996, the respondents thus deposited the uncollected cheques in their Revenue Deposit by way of challan and utilized the same.

7. The appellants filed an execution application (No. 3/98) for the recovery of the balance amount along with interest accrued thereon. In the said execution application, the appellants raised a dispute as to apportionment of compensation within the meaning of Section 31(2) of the Act, contending that Ana Conceicao Antonieta Santimano was entitled to Rs.2,83,159.67/- and Ivo Agnelo Santimano Fernandes was entitled to Rs.2,83,159.67/- as per Survey No.111/1; and Ana Conceicao Antonieta Santimano was entitled to Rs.1,57,026.20/- and Herbert Santimano Fernandes was entitled to Rs.1,57,026.20/- as per Survey No. 111/2. It was contended that appellant 3 (Nancy Fernnades Viviera Menezes) was not entitled to receive any sums as no enhancement was awarded with respect to the area belonging to her. The interested party, Ivo Agnelo Santimano Fernandes, was thus entitled to receive a difference of Rs.58,952/-.

8. The District Judge, South Goa, by order dated 29.10.1999, directed that the amount of Rs.2,06,436/- each for which the cheques had been drawn, be paid to the appellants 1 and 3, leaving the question of interest to be determined subsequently. Thus, on 23.3.2000, fresh cheques for an amount of Rs.60,000/- in the name of Ivo Agnelo Santimano Fernandes and for Rs.3,52,873/- in the name of Herbert Santimano Fernandes were issued by the respondents and deposited in court.

9. The District Judge, South Goa, by way of order dated 18.8.2000, held that there was a dispute as to apportionment of compensation, and in light of the judgment in the case of *Prem Nath Kapur & Anr. v. National Fertilizers Corporation of India Ltd. & Ors.,* reported in (1996) 2 SCC 71, held that the liability of the respondents to pay interest subsisted till the respondents had not deposited the amount in the court. Since, the respondents had deposited the amount of compensation in their Revenue account and had utilized the same instead of depositing it in Court, the respondents were liable to pay

interest @ 15% p.a. on compensation. The relevant portion of that determination reads as follows:

> "The decree holders have not contested the figures mentioned in the reply Exh. 20 dated 15.7.2000 filed by the judgment debtors, which show that an amount of Rs.8,80,372/- was due and payable to them upto 31.3.1996. Decree holders nos. 1 and 2 would be therefore, entitled to receive further interest at the rate of 15% from 1.4.1996 to 8.4.1996 on the said sums of Rs.2,06,436/- and Rs.2,06,437/- respectively. Likewise, decree holder no. 1 would also be entitled to receive further interest at the rate of 15% on Rs.60,000/- from 1.4.1996 to 7.1.2000 and decree holder no. 2 would also be entitled to receive further interest at the rate of 15% on Rs.3,52,872/- from 1.4.1996 to 7.1.2000. Judgment debtors are hereby directed to pay the same to the said decree holders nos. 1 and 2 respectively."

10. Aggrieved by that order of the District Judge, South Goa passed in the execution proceeding, the respondents preferred a revision before the High Court of Bombay at Goa.

11. Before the High Court it was contended by counsel for the respondents that a bare perusal of Sections 28 and 34 of the Act read with Order XXI Rule I of the CPC would clearly indicate that the State was not liable to pay any additional interest except for the period from 1.4.1996 to 8.4.1996. The respondents further contended that as far as the State was concerned, they had actually tendered and paid the money to the original claimants by drawing four cheques for the amount mentioned therein with regard to the four original claimants by cheques dated 29.3.1996 and also by communicating a letter dated 1.4.1996 that the claimants ought to come and collect their respective amounts payable under the cheques on 8.4.1996; and once the State prepared the cheques and kept them ready to be collected, there was no duty cast on the State

to deposit the same in court unless and until the State was informed that Ana Conceicao Antonieta Santimano could not claim the amount and she had bequeathed her amount to Herbert. The respondents contended that an ex facie reading of Sections 28 and 34 of the Act and Order XXI Rule 1 of CPC make it clear that the claimants could not insist on the State depositing the amount only in court and it cannot be contended that State was not entitled to pay the said amount directly to the claimants.

12. On the other hand, the counsel for the appellants urged that Sections 28 and 34 of the Act make it abundantly clear that the interest could be paid only in Court, otherwise liability on the State to pay interest would continue. As per Section 53 of the Act, the provisions of Order XXI Rule 1 of CPC could not come in the way of the contention of the appellants in as much as the said provision was inconsistent with the provisions of the Act and thus, the bar with regard to grant of interest as provided under Order XXI Rule 1 of CPC would not apply in the instant case. Learned counsel for the appellants relied on, inter alia, on the decision of this Court in the case of *Prem Nath Kapur* (supra).

13. The High Court opined that acceptance of such an argument may lead to absurdity in the sense that the claimant could very well collect the excess amount directly from the State and after a few years may turn around and say that the amount was not deposited in the Reference Court and claim interest thereon. Further, with respect to the contention of the appellants regarding prohibition in Section 53 of the Act in invoking Order XXI Rule 1 of CPC, it was rejected on the ground that there was no inconsistency between the proviso to Order XXI Rule 1 of CPC and Sections 28 and 34 of the Act. Accordingly, the High Court held that the amount was duly paid to the appellants but they did not come to collect the same. Therefore, in the aforesaid facts and circumstances, the judgment of the District Court dated 18.8.2000 could not be sustained and was set

aside by way of impugned judgment of the High Court dated 16.8.2002.

14. Aggrieved by the said order of the High Court, the appellants filed the present appeal.

15. During the pendency of the appeal, the wife of Ivo Agnelo Santimano Fernandes by the name of Celina de Conceicao Socorro Josefina Barbosa Fernandes alias Celina Barbosa Fernandes (appellant 5) passed away on 6.11.2003. An application was filed for substitution for bringing on record the legal representatives of appellant 5 and the same was allowed by an order dated 12.7.2004. Accordingly, the legal heirs of appellant 5 were brought on record.

16. We have heard the parties and perused the materials on record as well as the relevant provisions of the Act.

17. In the case of *Prem Nath Kapur* (supra), a three-Judge Bench of this Court considered the question as to when the liability of the State to pay interest ceases. The relevant portion of the judgment reads as follows:

> "**13.** Thus we hold that the liability to pay interest on the amount of compensation determined under section 23(1) continues to subsist until it is paid to the owner or interested person or deposited into court under section 34 read with section 31. *Equally, the liability to pay interest on the excess amount of compensation determined by the Civil Court under section 26 over and above the compensation determined by the Collector/Land Acquisition Officer under section 11 subsists until it is deposited into court.* Proprio vigore in case of further enhancement of the compensation on appeal under section 54 to the extent of the said enhanced excess amount or part thereof, the liability subsists until it is deposited into court. The liability to pay interest ceases on the date on which the deposit into court is made with the

> amount of compensation so deposited."
>
> (Emphasis added)

18. This Court also held that by operation of Section 53 of the Act, Order XXI Rule 1 of CPC, being inconsistent with the express provisions contained in Sections 34 and 28 of the Act, stood excluded.

19. In the light of the abovesaid principle, we are of the view that the contentions of the respondents cannot be accepted. The Act requires that the interest be deposited in court, and the same has been upheld in the case of *Prem Nath Kapur* (supra). In the present case, the respondents did not deposit the amount in court, but in their Revenue account and utilized the same. Even if the respondent State does pay the compensation to the claimants directly, and the same is not collected, the respondent State cannot then keep the said money with itself and utilize it. In such cases, after a reasonable period, if the claimants do not come forward to collect compensation, then it should be deposited in court by the State. Allowing the State to keep the compensation with itself and utilizing it cannot possibly be permitted being contrary to the provisions of the Act and the law laid down in *Prem Nath Kapur* (supra). Hence, the judgment of the High Court is clearly erroneous and deserves to be set side.

20. Accordingly, the appeal is allowed and interest will be payable to the parties as per the order of the District Judge dated 18.8.2000. Such payment be released within a period of six weeks from date.

21. No order as to costs.

R.P. Appeal allowed.

HARYANA STATE WAREHOUSING CORPORATION

v.

JAGAT RAM & ANR.

(Special Leave Petition (Civil) No.2659 of 2011)

FEBRUARY 23, 2011

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

HARYANA WAREHOUSING CORPORATION (OFFICERS AND STAFF) REGULATIONS, 1994 :

Regulations 6 and 8(2) – Appendix B – Clause 19 – Promotion to the post of Assistant Manager (Administration) – Criterion being seniority-cum-merit – Promotion made on the basis of comparative assessment of two officers and the officer with better service record, though junior to the other, promoted – Held: In applying the principle of granting promotion on the basis of seniority-cum-merit, what is important is that the inter se seniority of all candidates who are eligible for consideration for promotion should be identified on the basis of length of service or on the basis of the seniority list as prepared, inasmuch as, it is such seniority which gives a candidate the right to be considered for promotion on the basis of seniority-cum-merit – The candidate has had to be fit to discharge the duties of the higher post and if performance was assessed not to meet such a requirement, he could be passed over and those junior to him could be promoted despite his seniority in the seniority list - The concept of "seniority-cum-merit" postulates the requirement of certain minimum merit or satisfying a benchmark previously fixed and, subject to fulfilling the said requirement, promotion is based on seniority – There is no further assessment of the comparative merits of those who fulfil such requirement of minimum merit or satisfy the benchmark previously fixed – In the instant case, there is nothing on record to indicate that the respondent was not

capable of discharging his functions in the promotional post of Assistant Manager (Administration) – Since both fulfilled the requirement of minimum merit and were found suitable for promotion and since the respondent was senior to the petitioner, former was entitled to be promoted on the basis of seniority-cum-merit – Consequently, the promotion of the petitioner was liable to be set aside as was rightly done by the Division Bench of the High Court.

SERVICE LAW:

Promotion – Concepts of 'seniority-cum-merit' and merit-cum-seniority' – connotation of.

Respondent no. 1 in both the special leave petitions, filed a writ petition before the High Court challenging the promotion of the petitioner (in SLP No. 451 of 2011) to the post of Assistant Manager (Administration) in the State Warhousing Corporation. The Single Judge of the High Court dismissed the writ petition holding that the service record of the petitioner was superior to that of the respondent and the Corporation did not commit any error in promoting the petitioner. However, the Division Bench allowed the Letters Patent Appeal of the respondent holding that since the criterion for promotion to the post of Assistant Manager (Administration) was seniority-cum-merit and not merit-cum-seniority, the promotion given to the petitioner was not sustainable as it was made predominantly on the principle of merit in contravention of the provisions of the Haryana Warehousing Corporation (Officers and Staff) Regulations, 1994. Aggrieved, the State Warehousing Corporation and the promoted employee filed the special leave petitions.

Dismissing the petitions, the Court

HELD:

PER ALTAMAS KABIR, J.

1.1 In applying the principle of granting promotion on the basis of seniority-cum-merit, what is important is that the *inter se* seniority of all candidates who are eligible for consideration for promotion should be identified on the basis of length of service or on the basis of the seniority list as prepared, inasmuch as, it is such seniority which gives a candidate a right to be considered for promotion on the basis of seniority-cum-merit. Where the promotion is based on seniority-cum-merit, the officer cannot as a matter of right claim promotion by virtue of his seniority alone, which principle is also reflected in Regulation 8(2) of the Haryana Warehousing Corporation (Officers and Staff) Regulations, 1994. Consequently, the candidate had to be fit to discharge the duties of the higher post and if performance was assessed not to meet such a requirement, he could be passed over and those junior to him could be promoted despite his seniority in the seniority list. [Para 11] [1163-C-E]

State of Mysore vs. Syed Mahmood **1968 SCR 363 = AIR 1968 SC 1113*;*** *B.V. Sivaiah & Ors. Vs. K. Addanki Babu & Ors.* **1998 (3) SCR 782 = (1998) 6 SCC 720*;*** *K. Samantaray vs. National Insurance Co. Ltd*. **(2004) 9 SCC 286*;*** *Sant Ram Sharma vs. State of Rajasthan* **1968 SCR 111 = AIR 1967 SC 1910 *and*** *Harigovind Yadav vs. Rewa Sidhi Gramin* Bank **2006 (2) Suppl. SCR 116 = (2006) 6 SCC 145 – relied on.**

Jagathigowda, C.N. & Others v. Chairman, Cauvery Gramina Bank & Others **1996 (4) Suppl. SCR 190 = *(*1996) 9 SCC 677- cited.**

1.2 In the instant case, the only feature which weighed with the Corporation in granting promotion to the petitioner was a comparative assessment between his performance and that of the respondent. While the respondent had got only one "outstanding" remark in 10 years, the petitioner had obtained "outstanding" remark in all the 10 years. Accordingly, the petitioner was preferred to the respondent, whose qualifications were inferior to that of the petitioner by comparison. But, as has been rightly held by the Division Bench of the High Court, in cases of seniority-cum-merit, the comparative assessment is not contemplated and is not required to be made. [Para 12] [1163-F-H]

1.3. There is nothing on record to indicate that the respondent was not capable of discharging his functions in the promoted post of Assistant Manager (Administration). He was denied promotion only on the ground of the superior assessment that had been made in favour of the petitioner, which, runs contrary to the concept of seniority-cum-merit. There is, therefore, no reason to differ with the views of the Division Bench of the High Court. [Para 13-14] [1164-A-C]

PER CYRIAC JOSEPH, J. (CONCURRING)

1.1. According to Regulation 6 of the Haryana Warehousing Corporation (Officers and Staff) Regulations, 1994, no person shall be appointed to any post in the service unless he is in possession of qualification and experience specified in Appendix-B to the Regulations. As per clause 19 of Appendix-B to the Regulations, for promotion to the post of Assistant Manager (Administration) 5 years' experience as Establishment Assistant is required. Thus, it is not in dispute that as per the Regulations the vacancy in the cadre of Assistant Managers (Administration) was to be filled by promotion on the basis of seniority-cum-merit from among Establishment Assistants having the required experience of 5 years. [Para 7] [1165-E-F; 1166-A-B]

1.2. In the instant case, the vacancy of Assistant Manager (Administration) arose on 1.8.2009. As on that date, the petitioner did not have 5 years' experience as Establishment Assistant, as he was promoted to the post of Establishment Assistant only on 10.11.2004. However, the respondent had more than 5 years' experience as he was promoted to the post of Establishment Assistant on 16.5.1996 and was admittedly senior to the petitioner. However, the Division Bench of the High Court did not consider the question whether eligibility of the candidates should have been considered with reference to the date of occurrence of the vacancy. [Para 8 and 11] [1166-C-E; 1168-B-C]

2.1 As rightly held by the Division Bench of the High Court, the words "seniority alone shall not confer any right to such promotions" only clarify the earlier part of Regulation 8(2), which stipulates that "all promotions, unless otherwise provided, shall be made on the seniority-cum-merit basis". The clear mandate of Regulation 8(2) is that promotions shall be made on seniority-cum-merit basis and not on the basis of seniority alone or merit alone. To emphasise that promotion cannot be claimed as a matter of right on the basis of seniority and that along with seniority, merit also will be considered, it is clarified in the Regulation itself that "seniority alone shall not confer any right to such promotions". The quoted words do not in any way dilute or vary the principle that promotions shall be made on seniority-cum-merit basis. They only clarify the meaning or implication of the expression "seniority-cum-merit". [Para 13] [1168-E-H; 1169-A]

2.2 It is the settled position that the criterion of seniority-cum-merit is different from the criterion of merit and also the criterion of merit-cum-seniority. Where the promotion is based on seniority-cum-merit, the officer cannot claim promotion as a matter of right by virtue of

his seniority alone. If he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted. The concept of "seniority-cum-merit" postulates the requirement of certain minimum merit or satisfying a benchmark previously fixed and, subject to fulfilling the said requirement, promotion is based on seniority. There is no further assessment of the comparative merits of those who fulfil such requirement of minimum merit or satisfy the benchmark previously fixed. On the other hand, the principle of "merit-cum-seniority" puts greater emphasis on merit and ability and seniority plays a less significant role. Seniority is given weightage only when merit and ability are more or less equal among the candidates considered for promotion. [Para 22] [1173-C-H; 1174-A-B]

State of Mysore and another v. Syed Mahmood and others **(AIR 1968 SC 1113;** *State of Kerala and another v. N.M. Thomas and others* **[(1976) 2 SCC 310;** *B.V. Sivaiah and others v. K. Addanki Babu and others* **(1998) 6 SCC 720;** *Union of India and others v. Lt. Gen. Rajendra Singh Kadyan and another* **(2000) 6 SCC 698;,** *Harigovind Yadav v. Rewa Sidhi Gramin Bank and others* **(2006) 6 SCC 145;** *Rajendra Kumar Srivastava and others v. Samyut Kshetriya Gramin Bank and others* **(2010) 1 SCC 335;** *Rupa Rani Rakshit and others v. Jharkhand Gramin Bank and others* **(2010) 1 SCC 345 - relied on.**

Jagathigowda, C.N. & Others v. Chairman, Cauvery Gramina Bank & Others **(1996) 9 SCC 677 - referred to.**

2.3 In the instant case, it is clear that the impugned promotion of the petitioner was not on the basis of seniority-cum-merit but was on the basis of merit. The written statement filed by the Corporation in L.P.A. No. 490 of 2010 reveals that while considering the candidates for promotion, both the respondent and the petitioner

were found suitable for promotion and that even though the respondent was senior to the petitioner, latter was given promotion on the ground that he had better merits. This was obviously in violation of the principle of seniority-cum-merit. Since both fulfilled the requirement of minimum merit and were found suitable for promotion and since the respondent was senior to the petitioner, former was entitled to be promoted on the basis of seniority-cum-merit. Consequently, the promotion of the petitioner was liable to be set aside as was rightly done by the Division Bench of the High Court. [Para 23] [1174-B-D; 1175-A-C]

Case Law Reference:

1996 (4) Suppl. SCR 190	**cited**	**para 6**
1968 SCR 363	**Relied on**	**Para 9 and 13**
1968 SCR 111	**relied on**	**para 10**
2006 (2) Suppl. SCR 116	**Relied on**	**Para 10 and 18**
1998 (3) SCR 782	**Relied on**	**Para 10 and 16**
(2004) 9 SCC 286	**relied on**	**para 10**
(1976) 2 SCC 310	**Relied on**	**Para 15**
(2000) 6 SCC 698	**Relied on**	**Para 17**
(2010) 1 SCC 335	**Relied on**	**Para 19**
(2010) 1 SCC 345	**Relied on**	**Para 20**
(1996) 9 SCC 677	**Referred to**	**Para 21**

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 2659 of 2011.

From the Judgment & Order dated 11.10.2010 of the High Court of Punjab & Haryana at Cnahdigarh in Letters Patent Appeal No. 490 of 2010 (O & M).

WITH

SLP (C) No. 451 of 2011.

Alok Sangwan, Devashish Bharuka, D.P. Mukherjee, Nandini Sen for the Petitioners.

Kawaljit Kochar, Ashok K. Sharma, Kusum Chaudhary for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Two Special Leave Petitions have been filed against the judgment and order dated 11th October, 2010, passed by the Division Bench of the Punjab & Haryana High Court in L.P.A. No.490 of 2010, setting aside the promotion granted to the Petitioner in Special Leave Petition (Civil) No.451 of 2011. While Special Leave Petition (Civil) No.451 of 2011 has been filed by Ram Kumar, the Respondent No.3 before the High Court, setting aside his promotion to the post of Assistant Manager (Administration) in the Haryana State Warehousing Corporation, Special Leave Petition (Civil) No.2659 of 2011 has been filed by the Warehousing Corporation challenging the same order.

2. The facts briefly stated disclose that the Haryana State Warehousing Corporation, hereinafter referred to as "the Corporation", framed its Rules and Regulations known as the Haryana Warehousing Corporation (Officers & Staff) Regulations, 1994, hereinafter referred to as "the 1994 Regulations" in exercise of the powers conferred by Section 42 of the Housing Corporation Act, 1962, with the previous sanction of the State Government. Regulation 8 of the 1994 Regulations deals with promotions in the Corporation. Regulation 8(2) of the 1994 Regulations provides as follows :-

"8(2). All promotions unless otherwise provided, shall be made on seniority-cum- merit basis and seniority alone shall not confer any right to such promotions."

3. The Respondent No.3, Ram Kumar, was promoted to the post of Assistant Manager (Administration) in the Corporation on account of his excellent service record in comparison to that of Jagat Ram, who is Respondent No.1 in both the Special Leave Petitions. Challenging the said decision, Jagat Ram filed a Writ Petition before the Punjab & Haryana High Court on 17.11.2009. The learned Single Judge dismissed the Writ Petition filed by Jagat Ram after taking into consideration the service records of both Jagat Ram and Ram Kumar and upon holding that the service record of Ram Kumar was superior to that of Jagat Ram and that the Corporation had not committed any error in granting promotion to Ram Kumar.

4. Against the order of the learned Single Judge, Jagat Ram filed a Letters Patent Appeal, being 490 of 2010, before the Division Bench of the Punjab & Haryana High Court, which was allowed. The Division Bench while allowing the Letters Patent Appeal filed by Jagat Ram held that although promotion to the post of Assistant Manager (Administration) is to be effected on the basis of seniority-cum-merit and not seniority alone, the promotion given to Ram Kumar was based on his gradings and on a comparative assessment of his merit as against the merit of the Respondent No.1, Jagat Ram. The Division Bench further held that since the criterion for promotion to the post of Assistant Manager (Administration) was seniority-cum-merit and not merit-cum-seniority, the promotion given to Ram Kumar was not sustainable since such promotion had been made predominantly on the principle of merit, in contravention of the provisions of the Regulations. The Division Bench directed the concerned Respondents to redo the exercise for promotion to the post of Assistant Manager in accordance with the provisions of the Regulations in force.

5. Appearing for the Special Leave Petitioner in Special

Leave Petition (Civil) No.451 of 2011, Mr. D.P. Mukherjee, learned Advocate, contended that the Division Bench of the High Court had misunderstood and consequently misapplied the regulation governing appointments on the ground of seniority-cum-merit, particularly, since it provided that seniority alone could not confer right to promotions on the basis of seniority-cum-merit. Mr. Mukherjee submitted that if it was only a question of seniority-cum-merit, then the reasoning of the Division Bench may have been acceptable. However, such not being the case and a stipulation having been made that seniority alone would not govern promotions on the basis of seniority-cum-merit, the Division Bench of the High Court had erred in giving emphasis to seniority when the Petitioner, Ram Kumar, possesses far superior qualifications than the Respondent No.1, Jagat Ram.

6. Mr. Mukherjee urged that on account of the addition of the expression "seniority alone would not confer right to promotion", it must be understood that merit would also require consideration for the purpose of granting promotion, even on the basis of seniority-cum-merit. Mr. Mukherjee urged that since Ram Kumar had been assessed as "outstanding" over 10 years, while Jagat Ram had been assessed "outstanding" only for one year, it was in keeping with Regulation 8 of the 1994 Regulations that Ram Kumar had been preferred to Jagat Ram. In support of his submissions, Mr. Mukherjee referred to the decision of this Court in *Jagathigowda C.N. & Ors. Vs. Chairman, Cauvery Gramina Bank & Ors.* [(1996) 9 SCC 677], in which this Court held that while granting promotion on the basis of seniority-cum-merit, the totality of the service record of the eligible candidates had to be considered and consequently since Ram Kumar had superior credentials in comparison to Jagat Ram, he had been rightly promoted to the post of Assistant Manager and the judgment and order of the Division Bench was erroneous and was liable to be set aside and that of the learned Single Judge was liable to be sustained.

7. The same stand was taken on behalf of the Corporation in Special Leave Petition (Civil) No.2659 of 2011 and it was urged by Mr. Alok Sangwan, learned Advocate, appearing for the Corporation, that the promotion of Ram Kumar had been effected in accordance with Regulation 8(2) of the 1994 Regulations and while considering the seniority of the eligible candidates, the Corporation had given effect to the second part of the Regulation which categorically indicated that seniority alone would not be the criteria for promotion. Mr. Sangwan also urged that the order of the Division Bench of the High Court was liable to be set aside.

8. The submissions made by Mr. D.P. Mukherjee and Mr. Alok Sangwan were opposed on behalf of the Respondent No.1 in both the Special Leave Petitions, Jagat Ram, and it was urged by Mrs. Kanwaljit Kochar, learned Advocate, that the Division Bench had rightly interpreted the principle in relation to promotions made on the basis of seniority-cum-merit. Mrs. Kochar submitted that if merit was to play a larger role than seniority in effecting such promotions, then the procedure to be adopted would have been merit-cum-seniority and not seniority-cum-merit. According to her, the decision in *Jagathigowda C.N.'s* case (supra) does not really help the case of the Petitioners since this Court had merely indicated in the facts of that case, based on the NABARD Circular dated 7.4.1986, that the selection of the eligible candidates should be based on performance of the respective candidates in the Bank. It was further observed that the instructions of NABARD being in the nature of guidelines, the promotions made by the Bank could not be set aside unless the same were arbitrary and unfair.

9. The law relating to promotions to be granted on the basis of seniority-cum-merit has been settled by this Court in various decisions, including the case of the *State of Mysore vs. Syed Mahmood* [AIR 1968 SC 1113], wherein it was observed that when promotion is to be made by selection on the basis of seniority-cum-merit i.e. seniority subject to the

fitness of the candidates to discharge the duties of the post from amongst any person eligible for promotion, the State Government had erred in promoting juniors ranking below the candidates in order of seniority and that such promotions were irregular. Of course, the question posed in these Special Leave Petitions gives rise to another question regarding the latter part of Regulation 8(2) of the 1994 Regulations which indicates that seniority alone would not confer any right to be promoted. In that regard, this Court held in the above-mentioned case that where the promotion is based on seniority-cum-merit, the officer cannot claim promotion as a matter of right by virtue of his seniority alone. If he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted.

10. That principle has been followed ever since and was reiterated by a Three-Judge Bench of this Court in the case of *B.V. Sivaiah & Ors. Vs. K. Addanki Babu & Ors.* [(1998) 6 SCC 720], wherein the criterion for promotion on the basis of seniority-cum-merit fell for consideration with regard to the same-day appointees. It was held that seniority-cum-merit in the matter of promotion contemplates that given the minimum necessary merit requisite for efficiency of administration, a senior candidate, even though less meritorious, would have priority and a comparative assessment of merit is not required to be made. The said view was again repeated in the case of *K. Samantaray vs. National Insurance Co. Ltd.* [(2004) 9 SCC 286]. While considering the concepts relating to promotion on the basis of seniority-cum-merit and merit-cum-seniority, reference was made to an earlier decision of this Court in *Sant Ram Sharma vs. State of Rajasthan* [AIR 1967 SC 1910], in which it was observed that the principles of seniority-cum-merit and merit-cum-seniority are completely different. For the former, greater emphasis is laid on seniority though it is not the determinative factor while in the latter merit is the determining factor. A third mode described as "hybrid mode of promotion" contemplates a third category of cases where seniority is duly

respected and at the same time merit is also appropriately recognized. In yet another decision in the case of *Harigovind Yadav vs. Rewa Sidhi Gramin Bank* [(2006) 6 SCC 145], this Court reiterated the principles explained in *B.V. Sivaiah's* case (supra) holding that where procedure adopted does not provide the minimum standard for promotion, but only the minimum standard for interview and does selection with reference to comparative marks, it is contrary to the rule of "seniority-cum-merit".

11. In applying the principle of granting promotion on the basis of seniority-cum-merit, what is important is that the *inter se* seniority of all candidates who are eligible for consideration for promotion should be identified on the basis of length of service or on the basis of the seniority list as prepared, inasmuch as, it is such seniority which gives a candidate a right to be considered for promotion on the basis of seniority-cum-merit. As was indicated in *Syed Mahmood's* case (supra) where the promotion is based on seniority-cum-merit, the officer cannot as a matter of right claim promotion by virtue of his seniority alone, which principle is also reflected in Regulation 8(2) of the 1994 Regulations. Consequently, the candidate had to be fit to discharge the duties of the higher post and if his performance was assessed not to meet such a requirement, he could be passed over and those junior to him could be promoted despite his seniority in the seniority list.

12. In the instant case, the only feature which weighed with the Corporation in granting promotion to Ram Kumar was a comparative assessment between his performance and that of Jagat Ram. While Jagat Ram had got only one "outstanding" remark in 10 years, Ram Kumar had obtained "outstanding" remark in all the 10 years. Accordingly, he was preferred to Jagat Ram, whose qualifications were inferior to that of Ram Kumar by comparison. But, as has been rightly held by the Division Bench of the High Court, in cases of seniority-cum-merit, the comparative assessment is not contemplated and is not required to be made.

13. There is nothing on record to indicate that Jagat Ram was not capable of discharging his functions in the promoted post of Assistant Manager (Administration). He was denied promotion only on the ground of the superior assessment that had been made in favour of Ram Kumar, which, in our view, runs contrary to the concept of seniority-cum-merit.

14. There is, therefore, no reason to differ with the views of the Division Bench of the High Court and both the Special Leave Petitions, filed by Ram Kumar and the Corporation, are accordingly dismissed.

15. There will, however, be no order as to costs.

CYRIAC JOSEPH, J. 1. I had the benefit of reading the judgment of my learned brother Altamas Kabir, J. I respectfully agree with the decision to dismiss the Special Leave Petitions. However, I wish to support and supplement the decision through this separate but concurring judgment.

2. The dispute in these Special Leave Petitions relates to the claim of Jagat Ram [Respondent No.1 in S.L.P. (C) No. 2659 of 2011] for appointment to the post of Assistant Manager (Administration) in Haryana State Warehousing Corporation [Petitioner No.1 in S.L.P. (C) No.2659 of 2011].

3. Jagat Ram had filed Civil Writ Petition No.18891 of 2009 in the High Court of Punjab and Haryana, challenging the appointment of Ram Kumar [Petitioner in S.L.P. (C) No.451 of 2011 and respondent No.2 in S.L.P. (C) No.2659 of 2011] as Assistant Manager (Administration) and seeking a direction to Haryana State Warehousing Corporation (hereinafter referred to as "the Corporation") to promote Jagat Ram as Assistant Manager (Administration) w.e.f. 1.8.2009. The said Writ Petition was dismissed by a Single Bench of the High Court on 9.12.2009. Thereupon, Jagat Ram filed Letters Patent Appeal No.490 of 2010 before a Division Bench of the High Court and vide judgment dated 11.10.2010, the Division Bench

allowed the L.P.A. and set aside the promotion of Ram Kumar, with a direction to the Corporation to redo the exercise and complete the same as expeditiously as possible. Aggrieved by the judgment of the Division Bench, the Corporation and Ram Kumar have filed these Special Leave Petitions.

4. Jagat Ram was first appointed as Godown Attendant-cum-Watchman in the Corporation and he joined the service on 25.4.1979. He was promoted as Clerk-cum-Typist on 23.12.1981. He was further promoted as Establishment Assistant on 16.5.1996.

5. Ram Kumar was first appointed in the Corporation as Junior Scale Stenographer and he was promoted as Establishment Assistant on 10.11.2004.

6. Thus, admittedly, Jagat Ram was senior to Ram Kumar in the cadre of Establishment Assistant.

7. A vacancy of Assistant Manager (Administration) arose on 1.8.2009 due to the retirement of one V.K. Chakarvarty, Assistant Manager (Administration) on 31.7.2009. Appointment to the post of Assistant Manager (Administration) is governed by the provisions of Haryana State Warehousing Corporation (Officers and Staff) Regulations, 1994 (hereinafter referred to as "the Regulations"). According to Regulation 8(1) of the Regulations, the method of recruitment to the post of Assistant Manager (Administration) is by promotion from amongst Establishment Assistants. Regulation 8(2) of the Regulations provides as follows :

> "All promotions, unless otherwise provided, shall be made on seniority-cum-merit basis and seniority alone shall not confer any right to such promotions."

According to Regulation 6 of the Regulations, no person shall be appointed to any post in the service unless he is in possession of qualification and experience specified in

Appendix-B to the Regulations. As per clause 19 of Appendix-B to the Regulations, for promotion to the post of Assistant Manager (Administration) 5 years' experience as Establishment Assistant is required. Thus, it is not in dispute that as per the Regulations the vacancy in the cadre of Assistant Managers (Administration) was to be filled by promotion on the basis of seniority-cum-merit from among Establishment Assistants having the required experience of 5 years.

8. As already indicated, a vacancy of Assistant Manager (Administration) arose on 1.8.2009. As on that date Ram Kumar did not have 5 years' experience as Establishment Assistant, as he was promoted to the post of Establishment Assistant only on 10.11.2004. However, Jagat Ram had more than 5 years' experience as he was promoted to the post of Establishment Assistant on 16.5.1996. The vacancy of Assistant Manager (Administration) which arose on 1.8.2009 was filled up only on 17.11.2009 by promoting Ram Kumar as Assistant Manager (Administration). By 17.11.2009, Ram Kumar also had acquired experience of 5 years in the cadre of Establishment Assistants. But Jagat Ram was admittedly senior to Ram Kumar.

9. In the Writ Petition filed by Jagat Ram, he had contended that the promotion of Ram Kumar to the cadre of Assistant Managers (Administration) was illegal as he did not possess the required experience of 5 years on the date of occurrence of the vacancy i.e. 1.8.2009. It was alleged that the vacancy which arose on 1.8.2009 was deliberately kept vacant for more than 3 months and that the filling up of the vacancy was purposefully delayed to enable Ram Kumar to acquire the minimum required experience of 5 years as Establishment Assistant. It was also alleged that since Ram Kumar was working as Junior Scale Stenographer-cum-Personal Assistant to the Managing Director of the Corporation, the action of the respondents in delaying the filling up of the vacancy of Assistant

Manager (Administration) was mala fide. Jagat Ram also claimed that being the senior-most and meritorious amongst the Establishment Assistants, he was the only eligible candidate for promotion to the post of Assistant Manager (Administration) when it fell vacant on 1.8.2009.

10. The Writ Petition filed by Jagat Ram was dismissed on 9.12.2009 by a Single Bench of the High Court apparently even without issuing notice to the respondents. In the judgment dated 9.12.2009, the learned Single Judge held that Ram Kumar was eligible for promotion on the date when the case for promotion was considered. It was also observed that the service records placed on record by the petitioner (Jagat Ram) clearly showed that the record of Ram Kumar was much better than that of Jagat Ram. The learned Single Judge rejected the contention that undue favour was shown to Ram Kumar by the Managing Director. Aggrieved by the judgment of the learned Single Judge, Jagat Ram filed L.P.A. No. 490 of 2010 which was allowed by the Division Bench of the High Court.

11. In the impugned judgment dated 11.10.2010 in L.P.A. No.490 of 2010, the Division Bench of the High Court held that as per the Regulations governing promotion to the post of Assistant Manager (Administration), the criterion for promotion is seniority-cum-merit, but Ram Kumar was wrongly and illegally given promotion following the criterion of merit or even merit-cum-seniority. Relying on the judgment of this Court in *State of Mysore and another* v. *Syed Mahmood and others* (AIR 1968 SC 1113), the Division Bench pointed out that when promotion is to be made on the basis of seniority-cum-merit, a senior can be overlooked only when he is found unfit for the higher post. The Division Bench rejected the contention of the Corporation that the words "seniority alone shall not confer any right to such promotions" appearing in Regulation 8(2) of the Regulations indicated that a junior can be preferred to a senior on the basis of merit. According to the Division Bench, the words quoted above only clarify and fortify that promotion is required to be

made by applying the criterion of seniority-cum-merit. The Division Bench found that the selection and promotion of Ram Kumar was predominantly on the principle of merit and hence it was in contravention of the provisions contained in the Regulations. Accordingly, the promotion of Ram Kumar was set aside and the Corporation was directed to redo the exercise and complete the same as expeditiously as possible but strictly in accordance with the Regulation in force. It may be observed that the Division Bench did not consider the question whether eligibility of the candidates should have been considered with reference to the date of occurrence of the vacancy.

12. The first issue that arises for consideration in these Special Leave Petitions is the effect of the words "seniority alone shall not confer any right to such promotions" appearing in Regulation 8(2) of the Regulations.

13. The learned counsel for the petitioners in the Special Leave Petitions contended that those words gave freedom or right to the Corporation to prefer a junior to his senior on the basis of better merit. It was contended that in view of those words, quoted above, seniority should yield to merit. The contention of the learned counsel for the petitioners is devoid of merit. As rightly held by the Division Bench of the High Court, the words "seniority alone shall not confer any right to such promotions" only clarify the earlier part of Regulation 8(2), which stipulates that "all promotions, unless otherwise provided, shall be made on the seniority-cum-merit basis". The clear mandate of Regulation 8(2) is that promotions shall be made on seniority-cum-merit basis and not on the basis of seniority alone or merit alone. To emphasise that promotion cannot be claimed as a matter of right on the basis of seniority and that along with seniority, merit also will be considered, it is clarified in the Regulation itself that "seniority alone shall not confer any right to such promotions". The above quoted words do not in any way dilute or vary the principle that promotions shall be made on seniority-cum-merit basis. They only clarify the meaning or

implication of the expression "seniority-cum-merit". In this context, it may be pointed out that in *State of Mysore and another* v. *Syed Mahmood and others* (AIR 1968 SC 1113), this Court has held as follows:

> "(**4**) ….. *Where the promotion is based on seniority-cum-merit, the officer cannot claim promotion as a matter of right by virtue of his seniority alone*. If he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted."

14. The next issue that arises for consideration is whether the impugned promotion of Ram Kumar was on the basis of seniority-cum-merit as required by Regulation 8(2) of the Regulations. For deciding the said issue, it is necessary to understand the meaning of the expression "seniority-cum-merit".

15. In *State of Kerala and another* v. *N.M. Thomas* and others [(1976) 2 SCC 310], this Court held that seniority-cum-merit means that given the minimum necessary merit requisite for efficiency of administration, the senior though less meritorious shall have priority.

16. In *B.V. Sivaiah and others* v. *K. Addanki Babu and others* [(1998) 6 SCC 720], a three Judges' Bench of this Court considered the question "what is meant by seniority-cum-merit?" and held as follows :

> "**18.** We thus arrive at the conclusion that the criterion of "seniority-cum-merit" in the matter of promotion postulates that given the minimum necessary merit requisite for efficiency of administration, the senior, even though less meritorious, shall have priority and a comparative assessment of merit is not required to be made. For assessing the minimum necessary merit, the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employee who is eligible for consideration for promotion. Such assessment can be made by assigning marks on the basis of appraisal of performance on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be promoted on the basis of seniority-cum-merit."

17. In *Union of India and others* v. *Lt. Gen. Rajendra Singh Kadyan and another* [(2000) 6 SCC 698], this Court held that "seniority-cum-merit" postulates the requirement of certain minimum merit or satisfying a benchmark previously fixed, and subject to fulfilling the said requirement, the promotion is based on seniority. It was also held that the requirement of assessment of comparative merit was absent in the case of "seniority-cum-merit".

18. Following the decision in *B.V. Sivaiah* (*supra*), this Court in *Harigovind Yadav* v. *Rewa Sidhi Gramin Bank and others* [(2006) 6 SCC 145] held that where the procedure adopted did not provide the minimum standard for promotion, but only the minimum standard for interview, and did the selection with reference to comparative marks, it was contrary to the rule of "seniority-cum-merit". This Court in that case found that the procedure was not one of ascertaining the minimum necessary merit and then promoting the candidates with the minimum merit in accordance with seniority, but assessing the comparative merit by drawing up a merit list, the assessment being with reference to marks secured for seniority, performance, postings at rural/difficult places and interview.

19. In *Rajendra Kumar Srivastava and others* v. *Samyut Kshetriya Gramin Bank and others* [(2010) 1 SCC 335], while considering the question "whether minimum qualifying marks could be prescribed for assessment of past performance and interview, where the promotions are to be made on the principle of seniority-cum-merit?", this Court observed as follows :

> "**11**. It is also well settled that the principle of seniority-cum-merit, for promotion, is different from the principle of

"seniority" and the principle of "merit-cum-seniority". Where promotion is on the basis of seniority alone, merit will not play any part at all. But where promotion is on the principle of seniority-cum-merit, promotion is not automatic with reference to seniority alone. Merit will also play a significant role. The standard method of seniority-cum-merit is to subject all the eligible candidates in the feeder grade (possessing the prescribed educational qualification and period of service) to a process of assessment of a specified minimum necessary merit and then promote the candidates who are found to possess the minimum necessary merit strictly in the order of seniority. The minimum merit necessary for the post may be assessed either by subjecting the candidates to a written examination or an interview or by assessment of their work performance during the previous years, or by a combination of either two or all the three of the aforesaid methods. There is no hard-and-fast rule as to how the minimum merit is to be ascertained. So long as the ultimate promotions are based on seniority, any process for ascertaining the minimum necessary merit, as a basic requirement, will not militate against the principle of seniority-cum-merit.

12. xxx xxx xxx

13. Thus it is clear that a process whereby eligible candidates possessing the minimum necessary merit in the feeder posts is first ascertained and thereafter, promotions are made strictly in accordance with seniority, from among those who possess the minimum necessary merit is recognised and accepted as complying with the principle of "seniority-cum-merit". What would offend the rule of seniority-cum-merit is a process where after assessing the minimum necessary merit, promotions are made on the basis of merit (instead of seniority) from among the candidates possessing the minimum necessary

merit. If the criteria adopted for assessment of minimum necessary merit is bona fide and not unreasonable, it is not open to challenge, as being opposed to the principle of seniority-cum-merit. We accordingly hold that prescribing minimum qualifying marks to ascertain the minimum merit necessary for discharging the functions of the higher post, is not violative of the concept of promotion by seniority-cum-merit."

20. In *Rupa Rani Rakshit and others* v. *Jharkhand Gramin Bank and others* [(2010) 1 SCC 345], the Bank did not subject eligible candidates to any process of assessment to ascertain any specified minimum merit, for the purpose of promoting candidates who possessed the minimum merit, on the basis of seniority. On the other hand, the Bank proceeded to assess their *inter se* merit with reference to four criteria (period of service, educational qualification, performance during three years and interview) by allocating respectively maximum marks of 40, 6, 24 and 30 and thus proceeded to promote those who had secured higher marks in the order of merit. This Court held that such promotions were not on seniority-cum-merit basis.

21. Though learned counsel for the petitioners relied on the decision of this Court in *Jagathigowda, C.N. & Others v. Chairman, Cauvery Gramina Bank & Others* [(1996) 9 SCC 677], the said decision cannot support the case of the petitioners, because, in the said case the guidelines applicable to the promotions had specifically provided that "the selection of the eligible candidates should be based on performance of the respective candidates in the Bank". However, learned counsel invited our attention to the following observation in paragraph 8 of the judgment:

> "… It is settled proposition of law that even while making promotions on the basis of seniority-cum-merit, the totality of the service record of the officer concerned has to be taken into consideration. …"

The above observation only means that, for the purpose of considering whether the officer fulfils the requirement of minimum merit or satisfies the benchmark previously fixed, the totality of his service record has to be taken into consideration. It does not mean that a further assessment of comparative merit on the basis of the service record is warranted even after the officers are found to fulfil the requirement of minimum merit and satisfy the benchmark previously fixed.

22. Thus it is the settled position that the criterion of seniority-cum-merit is different from the criterion of merit and also the criterion of merit-cum-seniority. Where the promotion is based on seniority-cum-merit, the officer cannot claim promotion as a matter of right by virtue of his seniority alone. If he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted. Seniority-cum-merit means that, given the minimum necessary merit required for efficiency of administration, the senior, though less meritorious, shall have priority in the matter of promotion and there is no question of a further comparative assessment of the merit of those who were found to have the minimum necessary merit required for efficiency of administration. For assessing the minimum necessary merit, the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employees. Such assessment can be made by assigning marks on the basis of appraisal of performance on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be considered for promotion on the basis of seniority-cum-merit. The concept of "seniority-cum-merit" postulates the requirement of certain minimum merit or satisfying a benchmark previously fixed and, subject to fulfilling the said requirement, promotion is based on seniority. There is no further assessment of the comparative merits of those who fulfil such requirement of minimum merit or satisfy the benchmark previously fixed. On the other hand, the principle of "merit-cum-seniority" puts greater emphasis on

merit and ability and seniority plays a less significant role. Seniority is given weightage only when merit and ability are more or less equal among the candidates considered for promotion.

23. In the light of the above legal position with regard to the principle of "seniority-cum-merit", it is clear that the impugned promotion of Ram Kumar was not on the basis of seniority-cum-merit but was on the basis of merit. The written statement filed by the Corporation in L.P.A. No. 490 of 2010 reveals that while considering the candidates for promotion, both Jagat Ram and Ram Kumar were found suitable for promotion and that even though Jagat Ram was senior to Ram Kumar, Ram Kumar was given promotion on the ground that he had better merits. Justifying the promotion of Ram Kumar in preference to the appellant Jagat Ram, it was stated in the written statement as follows :

"2. xxx xxx xxx

As is evident from a perusal of Annexure P-4, all the Assistants who were eligible for promotion to the rank of Assistant Manager (Administration) having completed 5 years of service as Assistant were considered on the basis of seniority-cum-merit by the competent authority. The senior most candidate i.e. Shri R.K. Nayyar had bad service record in as much as there were three charge-sheets pending under Rule-7 against him besides penalty imposed upon him. The second candidate in seniority was the petitioner Shri Jagat Ram, whose ACR dossier for the last 10 years contained one grading as Very Good and 9 were good. The third candidate, Smt. Pushpa Devi again has 8 very good, ½ outstanding, one good and ½ average grading in her ACR resume. Penalty of stoppage of one increment without cumulative effect was imposed upon her on 18.12.2008. She was also issued a warning on 04.12.2008. The respondent No.3, Shri Ram Kumar, had

all the 10 Annual Confidential Reports as Outstanding and there were no departmental proceedings pending or concluded against him and thus on the basis of seniority-cum-merit as provided in the Regulations, the candidature of respondent No.3 was found to be most suitable and accordingly the competent authority, vide detailed and reasoned orders, promoted the respondent No.3 to the rank of Assistant Manager (Administration). …"

In reply to Jagat Ram's contention that selection had to be made from a panel of three suitable officials and that Ram Kumar could not have been considered as he was at serial No.4, the Corporation stated in the written statement as follows :

"3. …The contention is totally devoid of merits. The Chief Secretary Punjab vide Notification dated 28.06.1961, copy of which is attached as Annexure R-1/1 had clarified the issue and has ordered that in the first instance, list of eligible officers/officials, who fulfil the prescribed experience etc. for promotion is to be drawn up and then out of this list, such officers/officials as are considered unsuitable for promotion are to be weeded out and a list of only those who are suitable for promotion has to be drawn up. Selection thereafter is to be confined to three suitable officers/officials of the list. … *Selection for every vacancy has, therefore, to be made from the slab of three officers/officials, who are considered fit for promotion and unless a junior among them happens to be of exceptional merit and suitability, the senior-most will be selected.*

In the present case, in the Corporation there were only four Establishment Assistants who were eligible and the candidature of all the four was considered. Out of four, two were found unsuitable and out of the remaining two suitable officials, the respondent No.3 being most suitable and meritorious was selected and promoted to the post of Assistant Manager (Administration)."

Therefore, it is clear that even according to the Corporation, both Jagat Ram and Ram Kumar fulfilled the requirement of minimum merit and were suitable for promotion but Ram Kumar, though junior, was preferred as he was found to be more meritorious. This was obviously in violation of the principle of seniority-cum-merit. Since both Jagat Ram and Ram Kumar fulfilled the requirement of minimum merit and were found suitable for promotion and since Jagat Ram was senior to Ram Kumar, Jagat Ram was entitled to be promoted on the basis of seniority-cum-merit. Consequently, the promotion of Ram Kumar was liable to be set aside as was rightly done by the Division Bench of the High Court.

24. In the light of the discussion above, the Special Leave Petitions are devoid of merit and hence they are dismissed.

25. There will, however, be no order as to costs.

R.P. Special Leave Petitions dismissed.