KRISHNADEVI MALCHAND KAMATHIA & ORS.

*v.*

BOMBAY ENVIRONMENTAL ACTION GROUP & ORS.

I.A. No. 23 of 2010

In

Civil Appeal No. 4421 of 2010

JANUARY 31, 2011

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

*Contempt of Court – Allegation of damage to Mangroves and other vegetation of wet land in CRZ-I area, in willful disobedience of court order – Held: Under the garb of repairing the old bund, the appellants constructed a sort of pukka bund using boulders and debris alongwith a huge platform, violating the norms of environmental law and in flagrant violation and utter disregard of orders passed by the courts and the District Collector – The appellants knowingly and purposely damaged the mangroves and other vegetation, which could not have been disturbed – Mangrove forests are of great ecological importance and are also ecologically sensitive – No court can validate an action which is not lawful at its inception – Appellants directed to restore the height and width of the bund as it was existing prior to the order passed by the District Collector – Maharashtra Private Forest (Acquisition) Act, 1975 – s.21 – Forest (Conservation) Act, 1980 – Coastal Regulatory Zone Regulations, 1991.*

*Order – Void order – Effect of – Held: Even if an order is void, it is required to be so declared by a competent forum and it is not permissible for any person to ignore the same merely because in his opinion the order is void.*

**The High Court while disposing of a Writ Petition filed by the Bombay Environmental Action Group issued certain directions, in pursuance of which the Divisional**





**Commissioner issued a Notification dated 18.2.2009 on account of which the appellants were restrained from restarting manufacture of salt on the land in issue. Aggrieved, the appellants filed an appeal before this Court. During pendency of the appeal, the appellants also filed an application seeking permission to repair the damaged bund alongwith the land in issue. This Court disposed of the application granting liberty to the appellants to approach the District Collector for such relief. The appellants approached the District Collector, who after holding inquiry passed a speaking and reasoned order dated 27-1-2010, allowing the appellants to repair the bund subject to the condition that the appellants would repair the bund without destroying the mangroves/vegetation on the said land. This Court ultimately disposed of the appeal filed by the appellants vide order dated 7-5-2010. The parties in the appeal filed contempt applications alleging various violations of the orders passed by this Court, as well as by the District Collector.**

**The District Collector and the Action Group filed contempt applications making allegations that under the garb of repairing the bund, the appellants raised the height and expanded the width of the bund and thus destroyed the mangroves to a great extent.**

**The appellants, on the other hand, filed a Contempt application alleging that the Collector's order dated 27.1.2010 was being unnecessarily interfered with by the statutory authorities. The appellants submitted that in pursuance of the order of this Court dated 7.5.2010, they had instituted a civil suit before the High Court, wherein notices had been issued to the respondents/defendants and which is still pending consideration and further that the validity of the Notification dated 18.2.2009 is also under challenge therein to the extent that the said**

**Notification is void *ab initio* for the reason that the procedure prescribed in law was not followed.**

**Disposing of the applications, the Court**

**HELD:1. Even if an order is void, it requires to be so declared by a competent forum and it is not permissible for any person to ignore the same merely because in his opinion the order is void. Even if the order/ notification is void/voidable, the party aggrieved by the same cannot decide that the said order/notification is not binding upon it. It has to approach the court for seeking such a declaration. The order may be hypothetically a nullity and even if its invalidity is challenged before the court in a given circumstance, the court may refuse to quash the same on various grounds including the standing of the petitioner or on the ground of delay or due to the doctrine of waiver or any other legal reason. The order may be void for one purpose or for one person, it may not be so for another purpose or another person. In any event, the matter regarding validity of the Notification dated 18.2.2009 is still pending consideration in a suit before the High Court on its original side and thus it is not desirable on the part of this Court to consider any submission in regard thereto. [Paras 17, 21] [303-G; 305-A-C]**

*State of Kerala v. M.K. Kunhikannan Nambiar Manjeri Manikoth Naduvil (dead) & Ors.*, **AIR 1996 SC 906;** *Tayabbhai M. Bagasarwalla & Anr. v. Hind Rubber Industries Pvt. Ltd. etc*, **AIR 1997 SC 1240;** *M. Meenakshi & Ors. v. Metadin Agarwal (dead) by L.Rs. & Ors.* **(2006) 7 SCC 470;** *Sneh Gupta v. Devi Sarup & Ors.*, **(2009) 6 SCC 194;** *State of Punjab & Ors. v. Gurdev Singh, Ashok Kumar*, **AIR 1991 SC 2219 and** *Sultan Sadik v. Sanjay Raj Subba & Ors.*, **AIR 2004 SC 1377 – relied on.**

*Smith v. East Ellore Rural District Council*, **1956 1 All ER 855 – referred to.**



**2. The Coastal Regulatory Zone Regulations, 1991 allow for salt harvesting by solar evaporation of sea water in CRZ-I areas only where such area is not ecologically sensitive and important. Mangroves fall squarely within the ambit of CRZ-I. In the instant case, it has been established that mangrove forests are of great ecological importance and are also ecologically sensitive. Thus, salt harvesting by solar evaporation of sea water cannot be permitted in an area that is home to mangrove forests. [Para 29] [312-G-H; 313-A]**

**3. The following conclusions are inescapable in the instant case:**

**(1) The land in dispute has not been used for manufacturing of salt for more than two decades.**

**(2) The land in dispute stands notified as a reserve forest, though it may be a private land and requires to be protected.**

**(3) The direction issued by the High Court while disposing of the writ petition filed by the Action Group has issued several directions including the direction to identify mangrove area and declare/notify it as a forest.**

**(4) The Central Regulatory Zone Regulations 1991 impose certain restrictions on the land in dispute.**

**(5) The District Collector while deciding the application of the applicants for according permission to repair the bund has explicitly incorporated the conditions that the appellants would only repair the old bund without raising its height and ensure full protection of the mangroves.**

**(6) This Court while disposing of the appeal filed by the appellants has directed to ensure compliance of**

**the order of the District Collector and in case of any kind of violation to bring the matter to the notice of the court.**

**(7) In respect of the repairing of the bund, a large number of complaints had been made to the authorities concerned, by the public, representatives of the people and various officials and statutory authorities alleging that the appellants have violated the conditional order passed by the District Collector for permitting the appellants to repair the bund.**

**(8) Various reports submitted to the authorities concerned make it clear that there have been flagrant violations of the conditional order and that included:**

**(i) Closing the natural flow of water which has an adverse effect on existing mangroves;**

**(ii) A large number of mangroves had been cut/ destroyed while repairing the bund and a large number of mangroves were found cut manually;**

**(iii) Height and width of the bund had been increased to an unwarranted extent. The reports reveal that width of the bund had been extended by 12 ft. to 15 ft. while the old bund was not beyond 6 ft width.**

**(iv) Instead of mud, big boulders, concrete, debris had been used. Several platforms of 25 to 30 mtrs with the width of 16 to 20 mtrs. have been constructed;**

**(v) Debris was being dumped beyond the area of platform in the land in dispute making an**



**attempt to increase the width of the platform;**

**(vi) The cut mangroves have been used to increase the height of the bund;**

**(vii) Breathing roots and branches of mangroves were found stucking out of the muddy area of the bund; and**

**(viii) A large number of mangroves died because of removal of mud and stagnation of water. [Para 30] [313-B-H; 314-A-G]**

**4. In view of the above, it is clear that the appellants are guilty of willful defiance of the orders passed by this Court as well as by the District Collector and they have filed the contempt petitions using it as a legal thumb screw to enforce their claims though, totally unwarranted and unfounded on facts. It is a crystal clear case of contumacious conduct, as the conduct of the appellants is not explainable otherwise, for the reason that disobedience is deliberate. The appellants cannot be permitted to make allegations against the authorities and drag them to the court alleging disobedience of the orders of this court without realising that contempt proceedings are quasi-criminal in nature. They have knowingly and purposely damaged the mangroves and other vegetation of the wet land of the CRZ-I area, which could not have been disturbed. Under the garb of repairing the old bund, a sort of pukka bund using boulders, and debris has been constructed along with a huge platform, violating the norms of environmental law and in flagrant violation and utter disregard of orders passed by the courts and the District Collector. No court can validate an action which is not lawful at its inception. [Para 31] [314-H; 315-A-D]**

**5. The contempt proceedings filed by the District**

**Collector and the Action Group are allowed and the contempt petition filed by the appellants is hereby dismissed with directions. The appellants are directed to restore the height and width of the bund as it was existing prior to the order passed by the District Collector dated 27.1.2010 within a period of 60 days by removing all debris, *grit,* boulders etc., dismantling of platforms and reducing the height and width of the bund. All culverts, drains which existed prior to 27.1.2010 which could facilitate the natural flow of sea water into the land, shall be restored. In case the appellants fail to carry out the aforesaid directions within the stipulated period, the District Collector, shall carry out the aforesaid directions and recover the cost from the appellants as arrears of land revenue and shall ensure in future that the appellants would not act in a manner detrimental to the ecology of the area and ensure the preservation of mangroves and other vegetation. [Para 32] [315-E-H; 316-A-B]**

**Case Law Reference:**

| | | |
|---|---|---|
| **AIR 1996 SC 906** | **relied on** | **Para 18** |
| **AIR 1997 SC 1240** | **relied on** | **Para 18** |
| **(2006) 7 SCC 470** | **relied on** | **Para 18** |
| **(2009) 6 SCC 194** | **relied on** | **Para 18** |
| **AIR 1991 SC 2219** | **relied on** | **Para 19** |
| **1956 1 All ER 855** | **referred to** | **Para 19** |
| **AIR 2004 SC 1377** | **relied on** | **Para 20** |

CIVIL APPELLATE JURISDICTION : I.A. No. 23 of 2010.

IN

Civil Appeal No. 4421 of 2010



From the Judgment & Order dated 6.10.2005 of the High Court of Judicature at Bombay in Writ Petition (Lodging) No. 3246 of 2004.

WITH

Cont.P.(C) No. 169 of 2010 in 4421 of 2010

Cont.P.(C) No. 266 of 2010 in 4421 of 2010

Ram Jethmalani, Pramod Swarup, Dushyant A. Dave, A.Y. Chitale, Shekhar Naphade, Parena Swarup, Vijay Kumar, Abhindra Maheshwari, Vishwajit Singh, Madhvi Divan, D. Bharat Kumar, M. Indrani, Abhijit Sengupta, Sunaina Dutta, Snigdha Pandey, Suchitra Atul Chitale, Nishantha Kumar, Sanjay V. Kharde, Asha Gopalan Nair, Anagha S. Desai, Ahmade Abadi, Sangeeta Kumar for the appearing parties.

The Judgment of the Court was delivered by

**DR. B. S. CHAUHAN, J.** 1. Civil Appeal No. 4421 of 2010 was disposed of by this Court vide judgment and order dated 7.5.2010 giving liberty to the appellants therein to approach the Bombay High Court to seek appropriate relief. During the pendency of the appeal, the appellants were given liberty to approach the District Collector concerned to seek permission to repair the bund. The Collector allowed the appellants to repair the bund subject to certain conditions. The parties in the appeal have filed three applications alleging various violations of the orders passed by this Court, as well as by the District Collector.

**I.A.No. 23/2010**

2. This application has been filed by the District Collector, Mumbai Suburban District, to initiate the contempt proceedings against the appellants Krishnadevi Malchand Kamathia & Ors. for violating the order of this court dated 7.5.2010 in Civil Appeal No.4421 of 2010 and his own order dated 27.1.2010

in respect of Survey No. 344 CTS No. 1 of Village Dahisar, Taluka Borivali, Mumbai Suburban District and, to issue directions to remove the newly constructed bund and allow sea water to come in so as to save the mangrove forest. Further direction has been sought against the appellants to remove the debris, soil, stones which were used to construct the bund, from the said survey No.344 to outside the area, within the stipulated period and further to restore the bund to its original position as seen in the Maharashtra Remote Sensing Application Centre map (hereinafter called MRSAC) and further to restrain the appellants from indulging in any activity which may result in the destruction of mangrove forest henceforth.

**Cont. Pet. No. 169 of 2010**

3. This contempt petition has been filed by the appellants to initiate contempt proceedings against the statutory authorities i.e. District Collector of Mumbai Suburban District for passing the order dated 20.5.2010 appointing the Committee to examine whether the appellants had violated the conditional order dated 27.1.2010 permitting the appellants to repair the bund in such a way that the mangroves may not die and order dated 26.5.2010 to ensure the compliance of the order dated 27.1.2010 and to remove the debris and reduce the height of the bund etc., being in violation of orders passed by this Court in the appeal.

**Cont. Pet. No. 266 of 2010**

4. This contempt petition has been filed by the original writ petitioner before the Bombay High Court i.e. Bombay Environmental Action Group and Anr., (hereinafter called 'Action Group') to initiate contempt proceedings against the appellants for willful dis-obedience of the order of this Court dated 22.3.2010 passed in SLP (C) No. 29031/2009 and order dated 7.5.2010 passed in Civil Appeal No.4421 of 2010 and further to recall the permission granted by this Court vide order dated 22.3.2010 in the said case and order dated 7.5.2010 in



Civil Appeal No. 4421 of 2010. Further, to give directions to open the culverts, closed channels of water and to ensure removal of debris on the subject site at the cost of the appellants i.e. contemnors Nos. 1 to 10.

5. As all the aforesaid three applications have been filed alleging violation of the same orders, the applications were heard together and all being disposed of by the common order.

**FACTS**:

6. The Bombay High Court while disposing of the Writ Petition filed by the Action Group vide order dated 6.10.2005 issued several directions including:

> "XI. From the list of "Mangrove Areas" so identified Government owned lands will automatically be declared/ notified as "Protected Forest". Likewise, privately owned lands from the list of Mangrove Areas so identified, the same will be declared/notified as "Forest".

7. In pursuance of the aforesaid direction issued by the High Court, the Divisional Commissioner, issued Notification being No. RB/Desk-II/Forest/CR-2211/Pvt./A-1 dated 18.2.2009, which included the land of the appellants Krishnadevi Malchand Kamathia and Ors. In view of the said Notification, the appellants could not restart the salt manufacturing, though the appellants had been manufacturing salt on the said land since 1959. It continued upto 1990 and their license for manufacturing salt was valid upto 1993. The Coastal Area Classification and Development Regulations, 1991 (hereinafter called CRZ Regulations) came which provide for classification of coastal regulatory zone, according to which it did not prohibit the manufacturing of salt.

8. Being aggrieved, appellants filed Special Leave Petition along with an application for condonation of delay of 1368 days challenging the Bombay High Court Judgment and order dated

6.10.2005. However, in view of the fact that the appellants had not been heard by the High Court at the time of passing the order in pursuance of which the Notification has been issued, the delay was condoned and the petition was entertained.

9. An application was filed by the appellants on 15.12.2009 seeking permission to repair the damaged bund along with the land in issue. The application was opposed by the respondents. However, this Court disposed of the said application vide order dated 5.2.2010 permitting the appellants to approach the District Collector for the said relief. It was clarified that pendency of the proceedings before this Court or any interim order passed therein would not stand in the way of the District Collector to pass an appropriate order so far as the repair of the bund was concerned.

10. In pursuance of the said directions the appellants approached the District Collector, who after holding inquiry passed a speaking and reasoned order dated 27.1.2010 giving full details and the case history of the dispute over the title of the land between the appellants and the Government, and the application of the provisions of Coastal Regulatory Zone Regulations 1991; and the Indian Forest Act 1927; and Forest (Conservation) Act, 1980. According to the order, the appellants would repair the bund without destroying the mangroves or vegetation on the said land.

11. This Court disposed of the appeal vide order dated 7.5.2010 wherein the parties were given liberty to agitate the issue before the High Court raising all factual and legal issues. So far as the repair of Bund was concerned, this Court directed as under:

> "By an interim order passed by this court on 22.3.2010, permitted the petitioners to repair the Bund. This interim order is made absolute and petitioners are permitted to maintain and upkeep the Bund till final adjudication regarding Notifications dated 18.2.2009 and 15.6.2009 is made and violation of these orders by parties or other authorities could be brought to the notice of this Court for appropriate directions."



12. The contempt petitions have been filed by the District Collector and the Action Group making allegations that under the garb of repairing the bund, the appellants have raised the height and expanded the width of the bund in such a manner that mangrove would die a natural death without any attempt on the part of the appellants, and further that appellants have destroyed the mangroves to the great extent. Appellants filed a Contempt Petition alleging that Collector's order dated 27.1.2010 is being unnecessarily interfered with by the statutory authorities.

13. We have heard Shri Ram Jethmalani, Shri Sekhar Naphade, Shri Dushyant Dave, Shri Atul Yashwant Chitale, learned senior counsel appearing for the parties and perused the record.

14. It may be pertinent to mention here that all the learned counsel appearing for the parties have suggested that the applications be heard without giving strict adherence to the procedure for contempt proceedings i.e. framing of charges etc., as pleadings are complete and parties are fully aware as what is the case against which of the parties. More so, all the documentary evidence, required to decide the case is on record.

15. Shri Ram Jethmalani, learned senior counsel appearing for the appellants, submitted that in pursuance of the order of this Court dated 7.5.2010, the appellants have instituted a civil suit before the Bombay High Court, wherein notices had been issued to the respondents/defendants and which is still pending consideration of all factual and legal issues had been raised therein. The validity of the Notification dated 18.2.2009 is also under challenge therein to the extent that the said

Notification is void *ab initio* for the reason that the procedure prescribed in law has not been followed. More so, the Notification does not disclose what are the statutory provisions which conferred the power/competence to issue the said Notification.

16. Shri Sekhar Naphade, and Shri Dushyant Dave, learned senior counsel, submitted that undoubtedly, the Notification does not disclose the source of power/competence under which it has been issued, however, the Notification does not become invalid merely for want of such a statement. Further, it cannot be urged that the Authority was denude of power to issue such notification as such powers are available under Section 21 of the Maharashtra Private Forest (Acquisition) Act, 1975. The said provisions provide that whenever it appears to the State Government that any tract of land not being the property of Government, contains trees and shrubs, pasture lands and any other land whatsoever, and that it should be declared, in public interest and for furtherance of the objects of the said Act, to be a private forest. The State Government would publish a Notification in the Official Gazette to declare that it was a forest land after following the procedure prescribed therein. In fact records of the Statutory Authority reveal that the said Notification has been published in view of the order passed by this Court on 12.12.1996 in *T.N. Godavarman,* wherein it has been held that Forest (Conservation) Act, 1980, would apply to lands being forests, irrespective of who owned the land. For that purpose, Shri Naphade, has drawn our attention to para 4.2 of the Report of the Committee, dated 19.5.2010 (Annexure R-5A) to I.A. No. 23 of 2010.

17. It is settled legal proposition that even if an order is void, it requires to be so declared by a competent forum and it is not permissible for any person to ignore the same merely because in his opinion the order is void.

18. In *State of Kerala v. M.K. Kunhikannan Nambiar Manjeri Manikoth Naduvil (dead) & Ors.,* AIR 1996 SC 906**;** *Tayabbhai M. Bagasarwalla & Anr. v. Hind Rubber Industries Pvt. Ltd. etc,* AIR 1997 SC 1240**;** *M. Meenakshi & Ors. v. Metadin Agarwal (dead) by L.Rs. & Ors.* (2006) 7 SCC 470; and *Sneh Gupta v. Devi Sarup & Ors.,* (2009) 6 SCC 194, this Court held that whether an order is valid or void, cannot be determined by the parties. For setting aside such an order, even if void, the party has to approach the appropriate forum.



19. In *State of Punjab & Ors. v. Gurdev Singh, Ashok Kumar,* AIR 1991 SC 2219, this Court held that a party aggrieved by the invalidity of an order has to approach the court for relief of declaration that the order against him is inoperative and therefore, not binding upon him. While deciding the said case, this Court placed reliance upon the judgment in *Smith v. East Ellore Rural District Council,* [1956] 1 All ER 855 wherein *Lord Radcliffe* observed:-

> "An order, even if not made in good faith is still an act capable of legal consequences. It bears no brand of invalidity on its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

20. In *Sultan Sadik v. Sanjay Raj Subba & Ors.,* AIR 2004 SC 1377, this Court took a similar view observing that once an order is declared *non-est* by the Court only then the judgment of nullity would operate *erga omnes* i.e. for and against everyone concerned. Such a declaration is permissible if the court comes to the conclusion that the author of the order lacks inherent jurisdiction/competence and therefore, it comes to the conclusion that the order suffers from patent and latent invalidity.

21. Thus, from the above it emerges that even if the order/notification is void/voidable, the party aggrieved by the same cannot decide that the said order/notification is not binding upon it. It has to approach the court for seeking such declaration.

The order may be hypothetically a nullity and even if its invalidity is challenged before the court in a given circumstance, the court may refuse to quash the same on various grounds including the standing of the petitioner or on the ground of delay or on the doctrine of waiver or any other legal reason. The order may be void for one purpose or for one person, it may not be so for another purpose or another person.

22. Be, that as it may, the matter regarding the validity of the said Notification is still pending consideration in a suit before the Bombay High Court on its original side, it is not desirable on our part to consider the said submission raised on behalf of the appellants.

23. The relevant part of the conditional order of the District Collector dated 27.1.2010 provides as under:

(i) The Applicants will only carry out the repairs of the Bund and shall not carry out any other construction activities on the said land.

(ii) The Applicants will not destroy mangroves and/or vegetation on the said land.

(iii) The Applicants shall not raise the height of the Bund above as in existence at present.

On receiving numerous complaints from the public at large and officials, the District Collector passed the order dated 20.5.2010:

"xx xx xx

The earlier order passed by this authority giving permission to repair the bund is hereby stayed and all the concerned parties should maintain status quo.

xx xx xx



This committee will visit and check minutely the following important points in the matter:-

(a) The permission given by the District Collector for the repair of the bund No.C/Desk-21 Mangrove/ WS-610/2009 dated 27.1.2010, which was rendered by the Supreme court in its orders dated 22.3.2010 and 7.5.2010 whether terms and conditions mentioned in the Collectors order are followed by the Applicant land owner or not?

(b) Whether the Applicant has committed any violation?

(c) Whether the land owner has kept water culverts open or not? If the committee finds that the water is stopped which may ultimately cause destroying of mangroves, the committee i.e. Area Officers should make the owner to open the culverts immediately.

The committee should make detailed enquiry and the consolidated report should be sent to the District Collector within 15 days."

After receiving the report from the Committee duly constituted by the District Collector on 20.5.2010, the District Collector passed the order on 26.5.2010 directing the appellants as under:

(1) All the material used for filling to increase the height be removed, maintain the earlier position of the bund as expected in the permission order dated 27.1.2010.

(2) Remove the rubble dumped in the open land in question.

(3) Remove the rubble and filling and let the natural flow

of sea water, which is at present obstructed, entering inside the S.No. in question.

(4) Remove filling used for increasing the height of bund to the height as expected in the permission order dated 27.1.2010.

24. The aforesaid order has been passed by the Collector after considering various reports of experts/officers.

(A) The report submitted by the Sub Divisional Officer, Mumbai Suburban District dated 18.5.2010 (Annexure A-20 of Con. Pet. 266/2010) makes it clear that the Tahsildar Borivali and Additional Chitnis had visited the spot and found that a new bund had been made having the width of 10 ft. and height of bund 4 ft. and running to 1 to 1½ KMs. There had been culverts in the old bund which were filled up. The natural flow of water existing earlier had been closed. The closure of the water supply had adverse effect on the existing mangroves. The direction issued by the District Collector in his order permitting the construction of bund that adequate arrangement to ensure that mangroves are not damaged, has not been complied with and there has been a breach of the said condition.

(B) Report dated 19.5.2010 from the Committee appointed for inspection reveal that after having inspection of the site, the Committee reached the conclusion that the appellants have grossly violated the conditions incorporated in the order of the District Collector dated 27.1.2010, permitting them to repair the bund. They have not only raised height of the bund but widened it so as to obstruct the flow of water in the creek which may cause damage to mangroves. There has been a violation of the order of the Collector; the order of the Bombay High Court, and the order of this Court. The mangroves at places were destroyed during the construction of the new roads and the new bunds. Debris, garbage, mud and stones have been dumped along the new road. Large quantities of mud have been excavated from the site itself and



used for construction of the bund. The Committee made the following recommendations:

(1) That all illegal work should be immediately stopped by the revenue authority.

(2) The Bund and the Road that have blocked the smaller creeks should be immediately removed to prevent the destruction of the mangroves.

(3) Proper action as per the law may be taken by the revenue authority. It is brought to the notice that in writ petition no. 3246 of 2004 the Maharashtra Govt. vide circular dated 21.10.2005 clarified that the Collector should take care of the mangroves of the private land and Government lands till the area is handed over to forest department.

(C) There is another report of the Tahsildar Borivali Mumbai, Suburban district dated 22.5.2010 which reveals that earlier some culverts were in existence, the same had been closed and a new mud bund erected thereon. By making a huge filling, the width of the bund had been expanded by 12 to 15 ft. At the end of bund again filling of debris had been done. Branches of the adjacent mangroves had been cut. The report further reveals that a crime had been registered on 22.5.2010 in MHB Police Station under Section 15(i)(ii) of Environment Protection Act, 1986 against the owner of the land on account of the cutting of branches of mangroves, causing damage to mangroves and stoppage of the natural water flow of nalla.

(D) Another report dated 14.6.2010 of a Committee consisting of six State officials is on record. According to it, there have been flagrant violations of the order passed by the District Collector and the courts. The relevant part reads as under:

CONCLUSIONS:

| | Conditions in order dated 27.1.2010 | Factual position observed by the Committee on the spot |
|---|---|---|
| i) | The applicants will only carry out the repairs of the Bund and shall not carry out any other construction activities on the said land. | No structural construction activities carried out on the site, but it is observed that the permission holder has done massive filling work by dumping debris and garbage on the said land. Bund has been widened by mud and debris filling. Now the permission holder converted existing bund into new road. The permission was only to repair the existing bund. But the land holder has constructed a new bund. |
| ii) | The applicants will not destroy mangroves and/ or vegetation on the said land. | Destruction of mangroves and vegetation done in a large scale. |
| iii) | The Applicants shall not raise the height of the Bund above as in existence at present. | Permission holder has raised height of the existing bund by 1.5 Mtrs. as well as width of the bund. |
| iv) | Upon completion of the repairs, the Applicant shall file a Completion Report in the office of the Collector. | Compliance report of work has been submitted by the applicant. Despite that work still going on the site. |



| | | |
|---|---|---|
| v) | The Applicant will abide by the final orders that may be passed by the Hon'ble Supreme Court in the SLP to Appeal No.29031 of 2009 in respect of the user of the land. | Applicant violated the conditions of the order dated 22.3.2010 passed by the Hon. Supreme Court in S.L.P. No.29031 of 2009. |

25. The issue has been agitated from time to time before this Court and there have been various claims and counter claims in respect of the activities of the appellants. This Court vide order dated 24.11.2010 requested the learned Principal Judge, City Civil Court, Mumbai to inspect the area i.e. the bund in the lands i.e. SL. No.344 measuring 175 Hectares, situated in village Dahisar and submit a report to this Court about the status and present position. It was further requested that he would ascertain and report whether any damage has been caused to mangroves/vegetation that existed on the said land.

26. In pursuance of the said order, the learned Principal Judge, City Civil Court submitted the report dated 10.12.2010 along with a large number of photographs to substantiate the contents of the report. Relevant part thereof reads as under:

> "At the outset it may be briefly stated that during the course of visit it was noticed that the debris and boulders including big broken pieces of RCC slabs were found lying at various places on the bund. The debris and boulders were found used for pitching or reinforcement of the bund because of the dumping of debris and boulders on a large scale….Apart from dumping of debris and boulders in large quantities, what was noticed was that there were about 12 to 13 places where big platforms were found made of debris and boulders. The length of those platforms was something between 25 to 35 metres each and width

was on an average 16 to 20 metres each…..That debris was being dumped beyond the area of the platform in property survey No.344 and there was an attempt to increase the width of the platforms. In the process the mangroves obviously were being destroyed.

..... the mangroves were destroyed at a considerable length from the bund in survey no.344….. the destruction was at considerably a large scale.

….a large number of mangroves were found cut manually. It was possible that the mangroves were cut to increase width of the bund. The cut mangroves were found to have been used in increasing the height of the bund. Breathing roots and branches of mangroves were found stuck in the muddy area of the bund.

….. The said bund appeared to have been erected after excavation of mud from both sides of the bund….. Mangroves were found cut at many places. The mangroves were found to have died because of removal of mud and stagnation of water…..

*…. There were 3-4 patches where mangroves appeared to have been destroyed manually."*(Emphasis added)

27. The CRZ Regulations define for regulating developmental activities, coastal stretches within 500 metres of the landward side of the High Tide Line into 4 categories. Category I (CRZ-I) is defined as under:

*"(i) Areas that are ecologically sensitive and important, such as, national parks/marine parks, sanctuaries,* ***reserved forests****, wildlife habitats,* ***mangroves****, corals/ coral reefs, areas closed to breeding and spawning grounds of fish and other marine life, areas of outstanding natural beauty/historical/heritage areas,*



*areas rich in genetic diversity, areas likely to be inundated due to rise in sea level consequent upon global warming and other such areas as may be declared by the Central Government or the concerned authorities at the State/Union Territory level from time to time."* (emphasis added)

28. The regulation of *development or construction* activities in CRZ-I areas is to be in accordance with the following norms:

"CRZ-I

x x x x x

*Between LTL and HTL in areas which are not ecologically sensitive and important, the following may be permitted : (a) Exploration and extraction of Natural Gas; (b) activities as specified under proviso of sub-paragraph (i) and (ii) of paragraph 2; (c) Construction of dispensaries, schools, public rain shelters, community toilets bridges, roads, jetties, water supply, drainage, sewerage which are required for traditional inhabitants of the Sunderbans Biosphere Reserve area, West Bengal, on a case to case basis, by the West Bengal State Coastal Zone Management Authority; (d) salt harvesting by solar evaporation of sea water; (e) desalination plants; (f) storage of non-hazardous cargo such as edible oil, fertilizers and food grain within notified ports; (g) construction of trans-harbour sea links."*

(emphasis added)

29. From the above, it is evident that mangroves fall squarely within the ambit of CRZ-I. The regulations allow for salt harvesting by solar evaporation of sea water in CRZ-I areas **only** where such area is not ecologically sensitive and important. In the instant case it has been established that

mangrove forests are of great ecological importance and are also ecologically sensitive. Thus, salt harvesting by solar evaporation of sea water cannot be permitted in an area that is home to mangrove forests.

30. In view of the aforesaid discussion, we reach the following inescapable conclusions:

(1) The land in dispute has not been used for manufacturing of salt for more than two decades.

(2) The land in dispute stands notified as a reserve forest, though it may be a private land and requires to be protected.

(3) The direction issued by the High Court while disposing of the writ petition filed by the Action Group has issued several directions including the direction to identify mangrove area and declare/notify it as a forest.

(4) The Central Regulatory Zone Regulations 1991 imposes certain restrictions on the land in dispute.

(5) The District Collector while deciding the application of the applicants for according permission to repair the bund has explicitly incorporated the conditions that the appellants would only repair the old bund without raising its height and ensure full protection of mangroves.

(6) This Court while disposing of the appeal filed by the appellants has directed to ensure compliance of the order of the District Collector and in case of any kind of violation to bring the matter to the notice of the court.

(7) In respect of the repairing of the bund, a large number of complaints had been made to the authorities concerned, by the public, representatives of the people and various officials and statutory authorities alleging that the appellants have violated the conditional order passed by



the District Collector for permitting the appellants to repair the bund.

(8) Various reports submitted to the authorities concerned make it clear that there have been flagrant violations of the conditional order and that included :

(i) Closing the natural flow of water which has adverse effect on existing mangroves;

(ii) A large number of mangroves had been cut/ destroyed while repairing the bund and a large number of mangroves were found cut manually;

(iii) Height and width of the bund had been increased to an unwarranted extent. The reports reveal that width of the bund had been extended by 12 ft. to 15 ft. while the old bund was not beyond 6 ft width.

(iv) Instead of mud, big boulders, concrete, debris had been used. Several platforms of 25 to 30 mtrs with the width of 16 to 20 mtrs. have been constructed;

(v) Debris was being dumped beyond the area of platform in the land in dispute making an attempt to increase the width of the platform;

(vi) The cut mangroves have been used to increase the height of the bund;

(vii) Breathing roots and branches of mangroves were found stucking out of the muddy area of the bund; and

(viii) A large number of mangroves died because of removal of mud and stagnation of water.

31. In view of the above, we have no hesitation to hold that the appellants are guilty of willful defiance of the orders passed by this Court as well as by the District Collector and they have

filed the contempt petitions using it as a legal thumb screw to enforce their claims though, totally unwarranted and unfounded on facts. It is a crystal clear case of contumacious conduct, as the conduct of the appellants not explainable otherwise, for the reason that disobedience is deliberate. The appellants cannot be permitted to make allegations against the authorities and drag them to the court alleging disobedience of the orders of this court without realising that contempt proceedings are quasi criminal in nature. They have knowingly and purposely damaged the mangroves and other vegetation of the wet land of the CRZ-I area, which could not have been disturbed. Under the garb of repairing the old bund, a sort of pukka bund using boulders, and debris has been constructed along with a huge platform, violating the norms of environmental law and in flagrant violation and utter disregard of orders passed by the courts and the District Collector. No court can validate an action which is not lawful at its inception.

It is often re-iterated that justice is only blind or blindfolded to the extent necessary to hold its scales evenly. It is not, and must never be allowed, to become blind to the reality of the situation, lamentable though that situation may be.

32. In view of the above, the contempt proceedings filed by the District Collector and the Action Group are allowed and the contempt petition filed by the appellants i.e. Cont. Pet. 169/2010 is hereby dismissed with the following directions:

(1) The appellants are directed to restore the height and width of the bund as it was existing prior to the order passed by the District Collector dated 27.1.2010 within a period of 60 days from today by removing all debris, *grit,* boulders etc., dismantling of platforms and reducing the height and width of the bund.

(2) All culverts, drains which existed prior to 27.1.2010 which could facilitate the natural flow of sea water into the land, shall be restored



(3) In case the appellants fail to carry out the aforesaid directions within the stipulated period, the District Collector, Suburban District shall carry out the aforesaid directions and recover the cost from the appellants as arrears of land revenue and shall ensure in future that the appellants would not act in a manner detrimental to the ecology of the area and ensure the preservation of mangroves and other vegetation.

33. In the facts and circumstances of the case, we request the Bombay High Court to expedite the trial of the suit filed by the appellants. In view of the above, the contempt petitions and interlocutory application stand disposed of.

B.B.B. Applications disposed of.

SESA INDUSTRIES LTD.
*v.*
KRISHNA H. BAJAJ AND ORS.
(Civil Appeal Nos.1430-1431 of 2011)

FEBRUARY 7, 2011

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

*Companies Act, 1956:*

*ss.391 and 394 – Amalgamation of companies – Amalgamation/merger scheme put up for sanction of Court – Obligation and jurisdiction of the Court – Held: The Court would not act as a court of appeal and sit in judgment over the informed view of the concerned parties to the scheme, as the same is best left to the corporate and commercial wisdom of the parties concerned, yet the Court is not expected to put its seal of approval on the scheme merely because majority of the shareholders have voted in favour of the scheme – Before according its sanction to a scheme of amalgamation, the Court has to see that the provisions of the Act have been duly complied with; the statutory majority has been acting bona fide and in good faith and are not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purport to represent and the scheme as a whole is just, fair and reasonable from the point of view of a prudent and reasonable businessman taking a commercial decision.*

*ss.391 and 394 – Amalgamation of companies – Scheme of amalgamation between appellant company and another company – Single Judge of High Court sanctioned the scheme – Division Bench, however, revoked the sanction – On appeal, held: The Official Liquidator, though aware of the inspection report under s.209A containing adverse comments on the affairs of both the companies, relied only on the report*





*of the auditors, which admittedly was not even verified – The findings in the report under s.209A were nonetheless placed before the Single Judge, and he had considered the same while sanctioning the scheme of amalgamation – Therefore, the Single Judge had, before him, all material facts which had a direct bearing on the sanction of the amalgamation scheme, despite the aforestated lapse on the part of the Official Liquidator – In this view of the matter, the Single Judge, having examined all material facts, was justified in sanctioning the scheme of amalgamation.*

*s.391(2), proviso and ss.209A, 235 and 237 – Amalgamation of companies – Amalgamation/merger scheme put up for sanction of Court – Requirement of disclosing material facts relating to the companies – Whether existence of inspection proceedings under s.209A must be disclosed in terms of the proviso to s.391(2) – Held, Yes – Though inspection under s.209A, strictly speaking, may not be in the nature of an investigation, but at the same time it cannot be construed as an innocuous exercise for record, inasmuch as if anything objectionable or fraudulent in the conduct of the affairs of the company is detected during the course of inspection, it may lay the foundation for the purpose of investigations under ss.235 and 237.*

*s.394(1), second proviso – Amalgamation of companies – Amalgamation/ merger scheme put up for sanction of Court – Duty of the Official Liquidator – Held: An Official Liquidator acts as a watchdog of the Company Court – His duty is to satisfy the Court that the affairs of the company, being dissolved, have not been carried out in a manner prejudicial to the interests of its members and the interest of the public at large – Only upon consideration of the amalgamation scheme, together with the report of the Official Liquidator, that the Court can arrive at a final conclusion.*

*s.394(1), second proviso – Amalgamation of companies – Amalgamation/ merger scheme put up for sanction of Court*

*– Effect of misdemeanour on the part of the Official liquidator – Whether sanction of a scheme of amalgamation can be held up merely because the conduct of an Official Liquidator is found to be blameworthy – Held: It is neither proper nor feasible to lay down absolute parameters in this behalf – The effect of misdemeanour on the part of the Official Liquidator on the scheme as such would depend on the facts obtaining in each case and ordinarily the Company Judge should be the final arbiter on that issue.*

*Words and Phrases – Expression "public policy" – Meaning of – Held: The expression is incapable of precise definition – It connotes some matter which concerns the public good and the public interest.*

**The appellant-company viz. Sesa Industries Ltd. (SIL) was a subsidiary of Sesa Goa Limited (SGL), a public company. A resolution was passed by the Board of Directors of SIL to amalgamate SIL with SGL. In pursuance thereof, SIL and SGL filed respective company petitions in the High Court seeking the Court's permission to convene a general body meeting. Respondent No.1, holder of 0.29% of the shares in SIL, filed an affidavit intervening in the afore-mentioned company petitions. Subsequently, respondent No.1 also filed a letter issued by the Director of Inspection and Investigation, Ministry of Company Affairs, Government of India, respondent No.3 , addressed to the Regional Director, respondent No.2, together with a copy of the inspection report under Section 209A of the Companies Act, 1956. Ignoring the objections raised by respondent No.1, the High Court, allowed SIL and SGL to convene meetings for seeking approval of shareholders for the said amalgamation. The shareholders of SIL and SGL, by 99% majority, approved the scheme of amalgamation, and respondent No.1 was the sole shareholder who objected to the said scheme. SIL and SGL both filed petitions in**



**the High Court for according approval to the amalgamation scheme. The Single Judge of High Court sanctioned the scheme of amalgamation between SGL and SIL. Aggrieved, respondent No.1 preferred intra-court appeal before the Division Bench which set aside the order of the Single Judge and revoked the sanction to the amalgamation scheme. Hence the instant appeals by SIL.**

**Allowing the appeals, the Court**

**HELD:1.1. Section 391 of the Companies Act, 1956, clothes the Court with the power to sanction a compromise or arrangements made by a company with its creditors and members. Section 394 of the Act, lays down the procedure for facilitating reconstruction and amalgamation of companies. It is plain from the said provisions that when a scheme of amalgamation/merger of a company is placed before the Court for its sanction, in the first instance the Court has to direct holding of meetings in the manner stipulated in Section 391 of the Act. Thereafter before sanctioning such a scheme, even though approved by a majority of the concerned members or creditors, the Court has to be satisfied that the company or any other person moving such an application for sanction under sub-section (2) of Section 391 has disclosed all the relevant matters mentioned in the proviso to the said sub-section. First proviso to Section 394 of the Act stipulates that no scheme of amalgamation of a company, which is being wound up, with any other company, shall be sanctioned by the Court unless the Court has received a report from the Company Law Board or the Registrar to the effect that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest. Similarly, second proviso to the said Section provides that no order for the dissolution of any**

**transferor company under clause (iv) of sub-section (1) of Section 394 of the Act shall be made unless the official liquidator has, on scrutiny of the books and papers of the company, made a report to the Court that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest. Thus, Section 394 of the Act casts an obligation on the Court to be satisfied that the scheme of amalgamation or merger is not prejudicial to the interest of its members or to public interest. [Paras 32, 33] [342-G-H; 344-B; 346-A-F]**

**1.2. While it is trite to say that the court called upon to sanction a scheme of amalgamation would not act as a court of appeal and sit in judgment over the informed view of the concerned parties to the scheme, as the same is best left to the corporate and commercial wisdom of the parties concerned, yet it is clearly discernible from a conjoint reading of the aforesaid provisions that the Court before whom the scheme is placed, is not expected to put its seal of approval on the scheme merely because the majority of the shareholders have voted in favour of the scheme. Since the scheme which gets sanctioned by the court would be binding on the dissenting minority shareholders or creditors, the court is obliged to examine the scheme in its proper perspective together with its various manifestations and ramifications with a view to finding out whether the scheme is fair, just and reasonable to the concerned members and is not contrary to any law or public policy. The expression "public policy" is not defined in the Act. The expression is incapable of precise definition. It connotes some matter which concerns the public good and the public interest. [Para 34] [346-G-H; 347-A-C]**

**1.3. It is manifest that before according its sanction to a scheme of amalgamation, the Court has to see that**



**the provisions of the Act have been duly complied with; the statutory majority has been acting bona fide and in good faith and are not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purport to represent and the scheme as a whole is just, fair and reasonable from the point of view of a prudent and reasonable businessman taking a commercial decision. [Para 36] [349-C-D]**

**1.4. The proviso to Section 391 (2) requires a company to "disclose pendency of any investigation in relation to the company under Sections 235 to 351, and the like". Though it is true that inspection under Section 209A of the Act, strictly speaking, may not be in the nature of an investigation, but at the same time it cannot be construed as an innocuous exercise for record, in as much as if anything objectionable or fraudulent in the conduct of the affairs of the company is detected during the course of inspection, it may lay the foundation for the purpose of investigations under Sections 235 and 237 of the Act, as is the case here. Therefore, existence of proceedings under Section 209A must be disclosed in terms of the proviso to Section 391(2). In any event, since the said issue is a question of fact, based on appreciation of evidence, and both the Courts below have held that the information supplied (by the appellant and SGL to the shareholders so as to enable them to arrive at an informed decision) was sufficient, particularly in light of the order passed by the Single Judge, this Court is not inclined to disturb the said concurrent finding of the Courts below, particularly when it is not shown that the said finding suffers from any demonstrable perversity. [Para 37] [349-E-H; 350-A-B]**

**1.5. As regards the issue as to whether the Division Bench was correct in holding that the affidavit filed by the**

**Official Liquidator was vitiated on account of non-disclosure of all material facts, from a bare perusal of the affidavit, it is manifest, *ex facie,* that before filing the affidavit, the said official had not examined and applied its mind to the findings contained in the inspection report under Section 209A of the Act. While it is true that it was not within the domain of the Official Liquidator to determine the relevancy or otherwise of the said report, yet he was obliged to incorporate in his affidavit the contents of the inspection report. Clearly, the official liquidator had failed to discharge the statutory burden placed on him under the second proviso to Section 394(1) of the Act. [Para 38] [350-B-D]**

**1.6. An Official Liquidator acts as a watchdog of the Company Court, reposed with the duty of satisfying the Court that the affairs of the company, being dissolved, have not been carried out in a manner prejudicial to the interests of its members and the interest of the public at large. In essence, the Official Liquidator assists the Court in appreciating the other side of the picture before it, and it is only upon consideration of the amalgamation scheme, together with the report of the Official Liquidator, that the Court can arrive at a final conclusion that the scheme is in keeping with the mandate of the Act and that of public interest in general. It, therefore, follows that for examining the questions as to why the transferor-company came into existence; for what purpose it was set up; who were its promoters; who were controlling it; what object was sought to be achieved by dissolving it and merging with another company, by way of a scheme of amalgamation, the report of an official liquidator is of seminal importance and in fact facilitates the Company Judge to record its satisfaction as to whether or not the affairs of the transferor company had been carried on in a manner prejudicial to the interest of the minority and to the public interest. [Para39] [350-E-G; 351-A-B]**



**1.7. In the present case, one is unable to appreciate why the Official Liquidator, who was aware of the inspection report under Section 209A containing adverse comments on the affairs of both the companies, relied only on the report of the auditors, which admittedly was not even verified. One can only lament the conduct of the official liquidator. [Para 40] [351-C]**

**1.8. As regards the further issue as to whether sanction of a scheme of amalgamation can be held up merely because the conduct of an Official Liquidator is found to be blameworthy, this Court is of the view that it will neither be proper nor feasible to lay down absolute parameters in this behalf. The effect of misdemeanour on the part of the official liquidator on the scheme as such would depend on the facts obtaining in each case and ordinarily the Company Judge should be the final arbiter on that issue. In the instant case, indubitably, the findings in the report under Section 209A of the Act were placed before the Company Judge (i.e. the Single Judge of the High Court), and he had considered the same while sanctioning the scheme of amalgamation. Therefore, in the facts and circumstances of the present case, the Company Judge had, before him, all material facts which had a direct bearing on the sanction of the amalgamation scheme, despite the aforestated lapse on the part of the Official Liquidator. In this view of the matter, this Court is of the considered opinion that the Company Judge, having examined all material facts, was justified in sanctioning the scheme of amalgamation, particularly when the current investigation under Section 235 of the Act was initiated pursuant to a complaint filed by respondent No.1 subsequent to the order of the Company Judge sanctioning the scheme. [Para 41] [351-D-H; 352-A]**

**1.9. The order passed by the Company Judge (i.e. the**

**Single Judge of the High Court) sanctioning the scheme of amalgamation is restored. However, it is made clear that the scheme of amalgamation will not come in the way of any civil or criminal proceedings which may arise pursuant to the action initiated under Sections 209A or 235 of the Act, or any criminal proceedings filed by respondent No.1. [Para 42] [352-B-C]**

*Hindustan Lever Employees Union v. Hindustan Lever Ltd. & Ors.* **1995 Supp (1) SCC 499;** *Central Inland Water Transport Corporation Limited & Anr. v. Brojo Nath Ganguly & Anr.* **(1986) 3 SCC 156;** *Miheer H. Mafatlal v. Mafatlal Industries Ltd.* **(1997) 1 SCC 579;** *Firm Sriniwas Ram Kumar v. Mahabir Prasad & Ors.* **1951 SCR 277;** *Ganga Bishnu Swaika v. Calcutta Pinjrapole Society* **AIR 1968 SC 615 – relied on.**

*Reliance Petroleum Ltd., In re* **(2003) 46 SCL 38 (Guj);** *Programme Asia Trading Company Limited, In re* **(2005) 125 Comp Cas 297 (Bom);** *Core Health Care Ltd., In re* **(2007) 138 Comp Cas 204 (Guj);** *Regional Director, Company Law Board, Government of India Vs. Mysore Galvanising Co. Pvt. Ltd. & Ors.* **(1976) 46 Comp Cas 639 (Kar);** *Sugarcane Growers & Sakthi Sugars Shareholders' Association Vs. Sakthi Sugars Ltd.* **(1998) 93 Comp Cas 646 (Mad);** *Marybong and Kyel Tea Estate Ltd., In re* **(1977) 47 Comp Cas 802 (Cal);** *Mathew Philip & Ors. Vs. Malayalam Plantations (India) Ltd. & Anr.* **(1994) 81 Comp Cas 38 (Ker);** *Ranjitsing Brahmajeetsing Sharma Vs. State of Maharashtra & Anr.* **(2005) 5 SCC 294;** *Search Chem Industries Ltd., In re* **(2006) 129 Comp Cas 471 (Guj);** *Banaras Beads Ltd., In re* **(2006) 132 Comp Cas 548 (All);** *Life Insurance Corporation of India Vs. Escorts Ltd. & Ors.* **(1986) 1 SCC 264;** *Wood Polymer Limited, In re* **(1977) 47 Comp Cas 597;** *Bedrock Ltd., In re* **(2000) 101 Comp Cas 343 (Bom);** *T. Mathew Vs. Smt. Saroj G. Poddar* **(1996) 22 CLA 200 (Bom);** *Securities and Exchange Board of India Vs. Sterlite Industries*



*(India) Ltd.* **(2003) 113 Comp Cas 273;** *Modus Analysis and Information P. Ltd. & Ors. In re* **(2008) 142 Comp Cas 410 (Cal);** *Larsen and Toubro Limited, In re* **(2004) 121 Comp Cas 523;** *Carona Ltd. Vs. Parvathy Swaminathan & Sons* **(2007) 8 SCC 559;** *J. S. Javar and Anr. v. Dr. Shankar Vishnu Marathe and Ors.* **AIR 1967 Bom. 456;** *Calcutta Industrial Bank Ltd., In re* **(1948) 18 Comp Cas 144;** *Travancore National & Quilon Bank Ltd., In re* **A.I.R. 1940 Mad 139 – referred to.**

**Case Law Reference:**

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| **(2003) 46 SCL 38 (Guj)** | **referred to** | **Para 16** |
| **(2005) 125 Comp Cas 297 (Bom)** | **referred to** | **Para 16** |
| **(2007) 138 Comp Cas 204 (Guj)** | **referred to** | **Para 16** |
| **(1976) 46 Comp Cas 639 (Kar)** | **referred to** | **Para 17** |
| **(1998) 93 Comp Cas 646 (Mad)** | **referred to** | **Para 17** |
| **(1977) 47 Comp Cas 802 (Cal)** | **referred to** | **Para 17** |
| **(1994) 81 Comp Cas 38 (Ker)** | **referred to** | **Para 17** |
| **(2005) 5 SCC 294** | **referred to** | **Para 18** |
| **(2006) 129 Comp Cas 471 (Guj)** | **referred to** | **Para 19** |
| **(2006) 132 Comp Cas 548 (All)** | **referred to** | **Para 19** |
| **(1986) 1 SCC 264** | **referred to** | **Para 22** |
| **(1977) 47 Comp Cas 597** | **referred to** | **Para 23** |
| **(1997) 1 SCC 579** | **relied on** | **Para 25** |
| **(2000) 101 Comp Cas 343 (Bom)** | **referred to** | **Para 26** |
| **(1996) 22 CLA 200 (Bom)** | **referred to** | **Para 26** |
| **(2003) 113 Comp Cas 273** | **referred to** | **Para 27** |

| | | |
|---|---|---|
| **(2008) 142 Comp Cas 410 (Cal)** | **referred to** | **Para 27** |
| **(2004) 121 Comp Cas 523** | **referred to** | **Para 27** |
| **AIR 1967 Bom. 456** | **referred to** | **Para 29** |
| **(2007) 8 SCC 559** | **referred to** | **Para 27** |
| **(1948) 18 Comp Cas 144** | **referred to** | **Para 29** |
| **A.I.R. 1940 Mad 139** | **referred to** | **Para 29** |
| **1995 Supp (1) SCC 499** | **relied on** | **Para 34** |
| **(1986) 3 SCC 156** | **relied on** | **Para 34** |
| **1951 SCR 277** | **relied on** | **Para 38** |
| **AIR 1968 SC 615** | **relied on** | **Para 38** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1430-1431 of 2011.

From the Judgment & Order dated 21.2.2009 of the High Court of Bombay at Goa Bench in Company Appeal No. 4 of 2008 with Application No. 48 of 2008.

H.P. Rawal, ASG, K.K. Venugopal, Riaz Chagla, B. Vijayalakshmi Menon, Ravi Gandhi, Ekta Kapil, Anish Kapur, Ankur Talwar, A.K. Srivastava, Aman Ahluwalia, Anirudh Sharma, Sushma Suri, Varun Sarin, Amar Dave, Gaurav Goel, Mahesh Agarwal, Rishi Agrawala, E.C. Agrawla for the appearing parties.

The Judgment of the Court was delivered by

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

2. These appeals, by special leave, are directed against the judgment dated 21st February, 2009 delivered by a Division Bench of the High Court of Bombay at Goa whereby the Division Bench has set aside the judgment of the learned Single Judge



dated 18th December, 2008, sanctioning a scheme of amalgamation between the appellant company and Sesa Goa Limited (for short "SGL"), the Transferee Company.

3. Shorn of unnecessary details, the facts material for the adjudication of these appeals may be stated thus:

SGL was incorporated on 25th June, 1965 as a private limited company, and thereafter, on 16th April, 1991 became a public company. The appellant company viz. Sesa Industries Ltd. (for short "SIL") was incorporated on 17th May, 1993 as a subsidiary of SGL with the latter holding 88.85% of the shares in the former.

4. on 26th July, 2005, a resolution was passed by the Board of Directors of SIL to amalgamate SIL with SGL, effective from 1st April, 2005. In pursuance thereof, on 12th January, 2006, SIL and SGL filed respective company applications in the Bombay High Court seeking the Court's permission to convene a general body meeting.

5. Respondent No. 1 herein, holder of 0.29% of the shares in SIL, filed an affidavit on 18th January, 2006 intervening in the afore-mentioned company petitions. Subsequently, on 6th March, 2006, respondent No. 1 also filed a letter dated 17th February, 2006 issued by the Director of Inspection and Investigation, Ministry of Company Affairs, Government of India, respondent No.3 herein, addressed to the Regional Director, respondent No.2 in these appeals, together with a copy of the inspection report under Section 209A of the Companies Act, 1956 (for short "the Act"). At this juncture, it would be useful to extract relevant portion of the said report, which reads as follows:

> "It will be apparent from the various findings of the Inspection Report that the entire control of the day to day working of the company is being managed by Mitsui & Co. Ltd., Japan whereby huge turnover and profits are

being siphoned away through systematic under invoicing of international financial transactions and over invoicing of import of coal. As regards inter-se transactions between SGL & SIL, systematic efforts have been made by SGL to put SIL into weal financial position by siphoning of the funds from SIL to SGL by over invoicing the price of iron ore and coke. In the process the minority shareholders of SIL have been deprived of their reasonable return in the forms of dividend or gains out of fair price of its shares. The minority shareholders of (sic) SIL have been cheated through the systematically siphoning the funds by SGL to the ultimate holding company i.e. M/s Mitsui & Co. Ltd., Japan. The I.O. has suggested for redressal of grievances of SIL by SGL in rescinding (sic.) the contract of purchase of shares at under value price of Rs. 30/- per share."

6. Ignoring the objections raised by respondent No.1, vide order dated 18th March, 2006, the High Court, allowed SIL and SGL to convene meetings for seeking approval of shareholders for the said amalgamation, and directed the companies to disclose, as part of the Explanatory Statement to be sent with individual notices, the following observations from the inspection report:

"The Central Government has issued a letter dated 17th February, 2006 to various governmental agencies including the Regional Director (Western Region) enclosing a copy of the inspection report and recording that during the course of the inspection the inspecting officer has pointed out contraventions of Section 269 read with Section 198/309, contravention of Section 289 read with Article no. 111 and 140 of the Articles, contravention of Section 260 and 313, contravention of Section 268 read with Section 256 and contravention of Section 628 of the Act. The Investigating Officer has suggested invoking the provisions of Section 397 and 398 read with Section 388B,



401, 402 and 406 of the Act including that of Section 542 of the Act. The Inspection report has also pointed out financial irregularities and also examined the complaints of Mrs. Kalpana Bhandari and Mrs. Krishna H. Bajaj which have been reported in Part "A" of the Inspection Report. Contravention of Section 297 of the Act has been reported in Part "B" of the Inspection Report. It has also been suggested Part "D" of the Inspection Report for references to be made to the Ministry of Finance and SEBI. Accordingly, the Central Government has requested the addressees to examine the report and take appropriate action."

7. Thereafter, on 8th May, 2006, the shareholders of SIL and SGL, by 99% majority, approved the scheme of amalgamation, and respondent No.1 was the sole shareholder who objected to the said scheme. SIL and SGL both filed petitions in the High Court for according approval to the amalgamation scheme.

8. On 10th August, 2006, the Registrar of Companies, Goa filed an affidavit as the delegate of the Regional Director stating that SIL and SGL were inspected under Section 209A of the Act by the Inspecting Officers of the Ministry of Company Affairs during the year 2005 and "any violation which may be noticed during the course of inspection, there will be no dilution for initiating legal action under the Act and that will not in any way affect the amalgamation". The Registrar stated save and except the observations in para 4 of the affidavit, which included forwarding of two complaints received from respondent No.1, he had no objection to the scheme of amalgamation.

9. On the same day, Official Liquidator, respondent No.1 in these appeals, also filed a report in the High Court, inter alia, stating that in light of the Auditor's report dated 2nd August 2006, according to him the affairs of the transferor company have not been conducted in a manner prejudicial to the interest

of its members or the public. Respondent No.1 filed an affidavit objecting to the sanctioning of the scheme.

10. On 24th August, 2006 respondent No. 1 filed Application No. 56 of 2006 praying for production and/or inspection of some documents, including joint valuation report submitted by M/s. N.M. Raiji and M/s. Hairbhakti & Co.; the aforementioned Inspection Report relating to SGL and SIL, and issuance of notice to the Bombay Stock Exchange and the National Stock Exchange; the Ministry of Company Affairs and the Central Government. On 9th February, 2009, while partly allowing the said application the Company Court directed SGL and SIL to place on record the joint valuation reports, the proxy register alongwith relevant proxies held on 8th May, 2006. However, as regards other prayers, the application was dismissed. Being aggrieved, respondent No.1 preferred an appeal before the Division Bench. Vide order dated 25th April, 2007, the Division Bench dismissed the appeal preferred by respondent No.1, observing that:

> "We have gone through the two reports. We are of the opinion that the learned Company Judge should take into consideration the said reports before passing any final orders in the matter of approving the scheme of amalgamation of the two companies for considering the purpose of it relevancy, in order to grant approval."

11. Thereafter, respondent No.1 filed yet another Company Application No. 24 of 2007, praying that the reports dated 17th February, 2006 and 20th March, 2006 sent to the Regional Director by the Ministry of Company Affairs be furnished to her. Vide order dated 13th July, 2007, the Single Judge allowed the application. Being aggrieved, SIL preferred an appeal before the Division Bench. Admitting the appeal, vide order dated 23rd August, 2007, the Division Bench granted interim stay of the order dated 13th July, 2007. The order reads:



> "Perusal of the impugned order, however, nowhere discloses consideration of the said aspect of the relevancy of the document for the purpose of deciding the issue relating to amalgamation of the company. We, however, make it clear that the process regarding amalgamation shall proceed further in accordance with the provisions of law and in terms of direction in order dated 25.4.07 regarding relevancy of the said report."

12. Finally, vide judgment dated 18th December, 2008, the learned Company Judge sanctioned the scheme of amalgamation between SGL and SIL, inter alia, observing that: (i) since inspection proceedings under Section 209A of the Act are different from an investigation carried out in terms of Section 235 of the Act, they are not required to be disclosed under the proviso to Section 391 of the Act; (ii) in any event, SIL and SGL have not suppressed any material facts as the letter dated 17th February, 2006 was made part of the individual notices sent to the shareholders; (iii) inspections carried out under Section 209A of the Act cannot come in the way of sanctioning of amalgamation, as they can only result in criminal prosecution of those responsible for contravention of various Sections of the Act; (iv) three years have elapsed since the inspections but the Central Government has not taken any further actions in terms of the inspection reports, which shows that investigations or action in terms of Section 401 of the Act was not in the offing; (v) the Central Government has, through the Regional Director, clarified that the merger would not come in the way of any action to be taken pursuant to the two inspection reports, (vi) non-disclosure of pending criminal complaints is also not fatal to sanctioning of the scheme as the Objector did not raise this contention earlier; pendency of criminal complaints cannot be equated to "material facts" in terms of the proviso to Section 391 of the Act and the merger will have no effect on the criminal complaints; (vii) merely because the Registrar has failed to perform his duties, it cannot be said that the scheme of amalgamation, which has been approved by a majority of the

shareholders, should be rejected; (viii) the onus is on the Objector to prove that a scheme is contrary to public interest and is not just, fair and reasonable, and in the instant case, the Objector has not discharged the burden cast on her; (ix) the objection in relation to the share valuation was not well-founded in as much as the Objector has not placed any material to show that the valuation was unfair, especially when an overwhelming majority of shareholders have approved the share valuation; (x) violation of Section 73 of the Act is not sufficient to stall an amalgamation as the persons responsible for the violation can be effectively dealt with even after the merger and (xi) the objection that the proposed scheme is unconscionable deserves to be rejected, as the scheme has been approved by majority of the shareholders, as also the Central Government. The learned Judge also clarified that the sanctioning of the scheme will not come in the way of either civil or criminal proceedings which may be initiated pursuant to the inspection reports as well as further progress of criminal complaints filed by the objector.

13. Aggrieved, respondent No.1 preferred an intra-court appeal before a Division Bench of the Court. The Division Bench has, vide the impugned judgment, set aside the order of the learned Single Judge and revoked the sanction to the amalgamation scheme. The division bench has, inter-alia, observed that: (i) when serious irregularities have been found in the inspection report and when the proceedings on the basis of the said inspection report are still pending and no further decision has been taken in this behalf and the Registrar as a delegate of the Regional Director who was in possession of such inspection report, should not have filed affidavits both, as the Official Liquidator as well as the Registrar as the delegate of the Regional Director; (ii) once it is found that the report/affidavit on behalf of the Registrar/Regional Director is not in conformity with the statutory provisions, this Court mechanically cannot sanction the scheme simply because the majority of the shareholders have approved the scheme and the majority



shareholders in their wisdom have accepted the valuation regarding exchange ratio; (iii) as per the provisions of Section 393, the Registrar as well as the Liquidator, both are required to submit their separate reports and both are, therefore, functioning in a different capacity. It is surprising as to how the Official Liquidator who was the incharge of the Registrar could have filed the affidavits one in the capacity as a delegate of the Regional Director and the other in the capacity as the Official Liquidator; (iv) the Affidavit of the Registrar is absolutely noncommittal. In the affidavit of the Official Liquidator, he has mentioned that the affairs of the company are not being conducted in a manner prejudicial to the interests of its members or to public interest. But when the same person filed affidavit as Registrar, this aspect is clearly omitted in his reply and (v) the learned Company Judge himself has found that from the stand taken by the Registrar, he has failed in his duty and it cannot be said that the requirement of Section 394 has been complied with. In fact, two contradictory affidavits have been filed by the same gentleman, one in his capacity as the delegate of the Regional Director and the other in his capacity as the Official Liquidator. When the law requires that there should be two independent reports, it is clear that the statutory provision has not been complied with.

14. Hence these appeals by SIL.

15. We heard Mr. K.K. Venugopal, Senior Advocate for the appellant, Mr. H.P. Raval, learned Additional Solicitor General of India on behalf of respondent Nos.2 to 4 and Mr. Amar Dave, learned Advocate on behalf of respondent No.1 at considerable length.

16. Mr. K.K. Venugopal, learned senior counsel strenuously urged that once a scheme of amalgamation has been approved by a majority of the shareholders after sufficient disclosure in the explanatory statement regarding the pendency of an inspection under Section 209A of the Act, it is neither expedient nor desirable for Courts to sit in judgment over a commercial

decision of the shareholders. Relying on the decisions in *Reliance Petroleum Ltd., In re*[1]*, Programme Asia Trading Company Limited, In re*[2] *and Core Health Care Ltd., In re*[3]*,* learned counsel contended that it is settled that pendency of an inspection under Section 209A or under Section 235 of the Act should not stall a scheme of amalgamation.

17. Learned counsel submitted that the Division Bench erred in rejecting the scheme of amalgamation on the sole ground that the requirement of the first proviso to Section 394(1) of the Act has not been complied with, as it is settled that the said proviso only applies to the amalgamation of a company which is being wound up. Learned counsel stressed that in the instant case, the prayer in the amalgamation petition was for "dissolution without winding up" and hence only the second proviso to Section 394(1) was applicable. Relying on the decisions of this Court in *Regional Director, Company Law Board, Government of India Vs. Mysore Galvanising Co. Pvt. Ltd. & Ors.*[4]*, Sugarcane Growers & Sakthi Sugars Shareholders' Association Vs. Sakthi Sugars Ltd.*[5]*, Marybong and Kyel Tea Estate Ltd., In re*[6] *and Mathew Philip & Ors. Vs. Malayalam Plantations (India) Ltd. & Anr.*[7]*,* learned counsel contended that the use of the word "further" in the second proviso to Section 394(1) of the Act does not indicate that the said proviso is an additional provision in relation to the situation contemplated under the first proviso.

18. While pointing out that the current investigation under Section 235 of the Act was initiated in July, 2009, after the impugned judgment was delivered and was based on a fresh complaint by respondent No.1, learned counsel urged that these investigations are at a preliminary stage of mere allegations and the final report/accusation, if any, the trial, its outcome and appeals etc., would all be a long drawn process, which cannot hold up the amalgamation, as was opined by the Company Judge. Learned counsel argued that the said finding of the Company Judge having not been disturbed by the appellate bench, the same has attained finality. Drawing an analogy with cases under the Election laws, learned counsel pleaded that unless a person is convicted, no adverse inference can be drawn against him. In support of the proposition, reliance was placed on the decision of this Court in *Ranjitsing Brahmajeetsing Sharma Vs. State of Maharashtra & Anr.*[8]*.*

19. Reliance was placed on the decisions in *Search Chem Industries Ltd., In re*[9] and *Banaras Beads Ltd., In re*[10] to contend that the pendency of the investigation cannot come in the way of amalgamation in as much as even if the allegations are found to be true, the same will lead only to a report under Section 241 of the Act and ultimately a prosecution under Section 242 of the Act against the Directors/Principal officers of the company, which would not dilute or affect the scheme of amalgamation.

20. Highlighting the advantages of the amalgamation, learned counsel submitted that SIL being a subsidiary of SGL, the amalgamation between both the said companies would entail several benefits for both the companies, including consolidation of the management, control and operation of both companies thereby resulting in considerable savings by elimination of duplication of administrative expenses etc. Moreover, according to the learned counsel, the shareholders of SIL, including the appellant, will also stand to gain

1. [2003] 46 SCL 38 (Guj).
2. [2005] 125 Comp Cas 297 (Bom).
3. [2007] 138 Comp Cas 204 (Guj).
4. [1976] 46 Comp Cas 639 (Kar).
5. [1998] 93 Comp Cas 646 (Mad).
6. [1977] 47 Comp Cas 802 (Cal).
7. [1994] 81 Comp Cas 38 (Ker).
8. (2005) 5 SCC 294.
9. [2006] 129 Comp Cas 471 (Guj).
10. [2006] 132 Comp Cas 548 (All).

tremendously by allotment of shares of SGL, a very healthy company. As per the amalgamation scheme, the shareholders of SIL will get one share of SGL against five shares held by them in SIL. Learned counsel submitted that 99.68% of the shareholders of both the appellants, viz. SIL and SGL having approved the scheme, allowing a scheme of amalgamation to be stalled due to the pendency of an investigation or inspection would lead to a situation whereby any scheme for amalgamation can be held to ransom by a minority shareholder, like in the instant case, where the first respondent/complainant had voluntarily offloaded 5,31,950 shares pursuant to a voluntary offer made by SGL out of total 5,89,400/- shares held by him in SIL.

21. Assailing the observation of the appellate Bench that the same person viz. the Registrar of Companies ought not to have filed both Affidavits himself as delegate of Regional Director as well as the Official Liquidator, learned counsel urged that as Section 448(1)(a) of the Act contemplates the possibility of part time Official Liquidators, there was nothing improper in the approach of the Registrar in as much as the Registrar had filed both the affidavits on 10th August, 2006, and the same had to be read together, which disclosed all relevant materials. Additionally, it was urged that the Single Judge had rightly concluded that a scheme of amalgamation, which is just and fair, cannot be rejected merely because the Official Liquidator had failed in his duty in placing the correct position before the Court.

22. Learned counsel then submitted that in *Life Insurance Corporation of India Vs. Escorts Ltd. & Ors.*[11], this Court had held that the functioning of a company was akin to that of a parliamentary democracy wherein the overall control is exercised by the majority of the shareholders. In the instant case, majority of the shareholders had approved the scheme of amalgamation despite having full knowledge of the

11. (1986) 1 SCC 264.



proceedings against the Companies and the prima facie findings. Moreover, Section 395 of the Act provides the power to acquire shares of the shareholders dissenting from the scheme if the said scheme has been approved by the holders of not less than nine-tenth in value of the shares of whose transfer is involved.

23. Mr. Raval, the learned Additional Solicitor General, on the other hand, relying on a decision of the Gujarat High Court in *Wood Polymer Limited, In re,*[12] submitted that since the sanctioning of a scheme of amalgamation has the effect of imposing it on dissenting members, before exercising the power conferred on it by Section 391(2) of the Act, the Court needs to examine the scheme in its proper perspective. Learned counsel urged that it cannot be argued that merely because statutory formalities are duly carried out, the Court has no option but to sanction the scheme. Learned counsel also submitted that since inspection reports had been received by the Registrar of Companies and Official Liquidator, respectively on 19th October, 2006 and 15th November, 2006, i.e. after the filing of affidavit by them on 10th August, 2006, under Section 394 of the Act, no fault can be found with their affidavits. It was asserted that since serious irregularities had been found in the affairs of both SGL and SIL, cheating the minority shareholders of SIL, the order sanctioning amalgamation of the said companies cannot be permitted to be used for thwarting the investigations. Thus, the learned Additional Solicitor General supported the impugned order.

24. Mr. Amar Dave, learned counsel appearing for respondent No.1, contended that the provisions of Chapter V of Part VI of the Act were intended to introduce a system of checks and balances to promote the interests of shareholders, creditors and society at large so as to promote a healthy corporate governance culture, and the Courts should adopt an interpretation that advances this object.

12. [1977] 47 Comp Cas 597.

25. Learned counsel urged that in the instant case the provisions of Section 393(1)(a) of the Act had not been complied with in as much as all material facts were not placed before the shareholders, in particular the preliminary letters of findings addressed to the Managing Director of SIL by the Inspector pursuant to the inspection under Section 209A of the Act on 28th September, 2005. According to the learned counsel, a mere enclosure of an extract of covering letter dated 17th February, 2006 cannot be construed as sufficient compliance with the mandate of Section 393(1)(a), as the said letter did not disclose the details of the findings to the effect that the affairs of the company had been conducted in a manner which was prejudicial to the interests of its members. Relying on the decision of this Court in *Miheer H. Mafatlal Vs. Mafatlal Industries Ltd.,*[13] learned counsel contended that sufficient information had not been disclosed to the shareholders so as to enable them to take an informed decision.

26. Learned counsel contended that in light of the dictum laid down in *Miheer H. Mafatlal* (supra); *Bedrock Ltd., In re*[14] and *T. Mathew Vs. Smt. Saroj G. Poddar*[15], the companies had violated the provisions of the proviso to Section 391(2) of the Act in as much as SIL and SGL had not disclosed the pendency of the criminal proceedings against the companies and its directors, and of proceedings under Section 209A of the Act. Learned counsel submitted that proceedings under Section 209A of the Act would fall under the category "and of the like" as mentioned in the proviso to Section 391(2) of the Act, as every material fact which could affect the Company Court's discretion has to be disclosed. Moreover, both the Companies had not disclosed the final inspection reports under Section 209A of the Act, and the same was brought on record by respondent No.1. Learned counsel further submitted that the petitioner has failed to disclose even before this Court, that the

13. (1997) 1 SCC 579.

14. [2000] 101 Comp Cas 343 (Bom).

15. [1996] 22 CLA 200 (Bom).



Serious Fraud Investigation Office (SFIO) was conducting an investigation into the affairs of the company under the provisions of Section 235 of the Act, and even though the said investigation proceedings arose later, the obligation under the proviso of Section 391(2) is a continuing obligation and, therefore, the appellant was obliged to disclose the same before this Court as well.

27. Learned counsel strenuously urged that the reports submitted by the Registrar as delegate of the Regional Director and as Official Liquidator were clearly in violation of the mandate of the proviso to Section 394(1) of the Act, in as much as despite being in possession of the inspection reports prepared by the Inspecting Officer of the Ministry of Company Affairs, the Official Liquidator filed a misleading affidavit before the Company Court, reporting "that the affairs of the transferor Company were not being conducted in a manner prejudicial to the interests of its members or to the public interest". It was alleged that the affidavit submitted by the Official Liquidator was solely based on the report of one M/s S.R. Kenkre & Associates, Chartered Accountants, who in turn had based their entire report on the information supplied by the Company, without any independent verification. Relying on the decisions in *Securities and Exchange Board of India Vs. Sterlite Industries (India) Ltd.*[16]**;** *Modus Analysis and Information P. Ltd. & Ors, In re*[17]*; Miheer H. Mafatlal* (supra); *Larsen and Toubro Limited, In re*[18]*; Wood Polymer* (supra) and *T. Mathew* (supra), learned counsel argued that the Division Bench had rightly concluded that the mandate of Section 394 had not been complied with thereby raising a statutory embargo on the approval of the scheme of amalgamation. Further, the disclosure of all material information to the shareholders, which included the pendency of criminal proceedings; inspection proceedings under Section 209A of the Act, and proceedings

16. (2003) 113 Comp Cas 273.

17. (2008) 142 Comp Cas 410 (Cal).

18. (2004) 121 Comp Cas 523.

under Section 235 of the Act in the report of the Official Liquidator under Section 394(1) of the Act constitute jurisdictional requirements, and unless all of them were satisfied, the Company Court had no jurisdiction to sanction the scheme. In support, reliance was placed on the decision of this Court in *Carona Ltd. Vs. Parvathy Swaminathan & Sons*[19].

28. Learned counsel then contended that the fact of huge siphoning off the funds from the transferor company (SIL) to the transferee company (SGL) being within the knowledge of the Company Court, it should not have sanctioned the scheme, as the distinction between the wrongdoer and the beneficiary gets effaced due to sanctions of law. Learned counsel also argued that under the attending circumstances the swap ratio of 1 share of the transferee company for 5 shares of the transferor company was also unfair, especially when the valuers did not have an opportunity to examine the inspection reports under Section 209A of the Act.

29. Reliance was placed on the decisions in *J.S. Davar & Anr. Vs. Dr. Shankar Vishnu Marathe & Ors.*[20]; *T. Mathew* (supra); *Calcutta Industrial Bank Ltd., In re*[21] and *Travancore National & Quilon Bank Ltd., In re*[22], to contend that the proposed scheme was a ruse to stifle further inquiry into the affairs of the transferor and transferee company and their managements which have been initiated by the Ministry of Company Affairs, as also criminal and civil proceedings that may arise thereafter because after the amalgamation, it may not be possible to initiate any proceedings against the transferor company as it would cease to exist. Moreover, the proceedings under Sections 244, 397, 398, 401, 402, 406 and 542 of the Act against the transferor company cannot be initiated against the transferee company even if the transferee

19. (2007) 8 SCC 559.

20. A.I.R. 1967 Bom. 456.

21. [1948] 18 Comp Cas 144.

22. A.I.R. 1940 Mad 139.



company has undertaken to take over all the future liabilities of the transferor company. Learned counsel thus, asserted that in light of the serious findings in the inspection report under Section 209A of the Act, sanction of the scheme would be detrimental to public interest, more so when on sanction of the scheme of amalgamation, the transferor company would cease to exist, losing its entity and in the process its functionaries will go scot free.

30. Relying on *Miheer H. Mafatlal* (supra), learned counsel contended that the proposed scheme of amalgamation was unconscionable, in as much as the minority shareholders of the transferor company have been oppressed, and in fact the "exit option" offered by the transferee company to the minority shareholders of transferor company on 5th June 2003, at an extremely undervalued price of ` 30 per share was in violation of Section 395 of the Act.

31. Lastly, learned counsel urged that though the decision of the majority of the shareholders, while sanctioning the scheme, is of paramount importance, but in the instant case, since 99.80% of the votes of the transferor company were those of the transferee company itself, the significance of the majority decision was of no relevance and, therefore, under these circumstances the Company Court was required to ensure that the rights of the minority were not trammeled upon, as observed in *Miheer H. Mafatlal* (supra); *Bedrock Ltd.* (supra); *T. Mathew* (supra); *J.S. Davar* (supra) and *Calcutta Industrial Bank Ltd.* (supra).

32. Before addressing the issues raised, it will be useful to survey the relevant provisions contained in Chapter V of Part VI of the Act, which deal with "Arbitrations, compromises, arrangements and reconstructions". Section 391 of the Act, clothes the Court with the power to sanction a compromise or arrangements made by a company with its creditors and members. It reads as follows:-

*"S.391.Power to compromise or make arrangements with creditors and members*.—(1) Where a compromise or arrangement is proposed—

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them;

the Court may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs.

(2) If a majority in number representing three-fourths in value of the creditors, or class of creditors, or members, or class of members as the case may be, present and voting either in person or, where proxies are allowed under the rules made under Section 643, by proxy, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors, all the creditors of the class, all the members, or all the members of the class, as the case may be, and also on the company, or, in the case of a company which is being wound up, on the liquidator and contributories of the company:

Provided that no order sanctioning any compromise or arrangement shall be made by the Court unless the Court is satisfied that the company or any other person by whom an application has been made under sub-section (1) has disclosed to the Court, by affidavit or otherwise, all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the company under Sections 235 to 251, and the like."

Section 394 of the Act, lays down the procedure for facilitating reconstruction and amalgamation of companies. It reads as under:

*"S.394. Provisions for facilitating reconstruction and amalgamation of companies.*—(1) Where an application is made to the Court under Section 391 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Court—

(a) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of any company or companies, or the amalgamation of any two or more companies; and

(b) that under the scheme the whole or any part of the undertaking, property or liabilities of any company concerned in the scheme (in this section referred to as a 'transferor company') is to be transferred to another company (in this section referred to as 'the transferee company');

the Court may, either by the order sanctioning the compromise or arrangement or by a subsequent order, make provision for all or any of the following matters:—

(i) the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of any transferor company;

(ii) the allotment or appropriation by the transferee company of any shares, debentures, policies or other like interests in that company which, under the

compromise or arrangement, are to be allotted or appropriated by that company to or for any person;

(iii) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

(iv) the dissolution, without winding up, of any transferor company;

(v) the provision to be made for any persons who, within such time and in such manner as the Court directs, dissent from the compromise on arrangement; and

(vi) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out:

Provided that no compromise or arrangement proposed for the purposes of, or in connection with, a scheme for the amalgamation of a company, which is being wound up, with any other company or companies, shall be sanctioned by the Court unless the Court has received a report from the Company Law Board or the Registrar that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest:

Provided further that no order for the dissolution of any transferor company under clause (iv) shall be made by the Court unless the Official Liquidator has, on scrutiny of the books and papers of the company, made a report to the Court that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest.

……."



33. It is plain from the afore-extracted provisions that when a scheme of amalgamation/merger of a company is placed before the Court for its sanction, in the first instance the Court has to direct holding of meetings in the manner stipulated in Section 391 of the Act. Thereafter before sanctioning such a scheme, even though approved by a majority of the concerned members or creditors, the Court has to be satisfied that the company or any other person moving such an application for sanction under sub-section (2) of Section 391 has disclosed all the relevant matters mentioned in the proviso to the said sub-section. First proviso to Section 394 of the Act stipulates that no scheme of amalgamation of a company, which is being wound up, with any other company, shall be sanctioned by the Court unless the Court has received a report from the Company Law Board or the Registrar to the effect that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest. Similarly, second proviso to the said Section provides that no order for the dissolution of any transferor company under clause (iv) of sub-section (1) of Section 394 of the Act shall be made unless the official liquidator has, on scrutiny of the books and papers of the company, made a report to the Court that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest. Thus, Section 394 of the Act casts an obligation on the Court to be satisfied that the scheme of amalgamation or merger is not prejudicial to the interest of its members or to public interest.

34. Therefore, while it is trite to say that the court called upon to sanction a scheme of amalgamation would not act as a court of appeal and sit in judgment over the informed view of the concerned parties to the scheme, as the same is best left to the corporate and commercial wisdom of the parties concerned, yet it is clearly discernible from a conjoint reading of the aforesaid provisions that the Court before whom the scheme is placed, is not expected to put its seal of approval on the scheme merely because the majority of the shareholders

have voted in favour of the scheme. Since the scheme which gets sanctioned by the court would be binding on the dissenting minority shareholders or creditors, the court is obliged to examine the scheme in its proper perspective together with its various manifestations and ramifications with a view to finding out whether the scheme is fair, just and reasonable to the concerned members and is not contrary to any law or public policy. (See: *Hindustan Lever Employees Union Vs. Hindustan Lever Ltd. & Ors.*[23]). The expression "public policy" is not defined in the Act. The expression is incapable of precise definition. It connotes some matter which concerns the public good and the public interest. (See: *Central Inland Water Transport Corporation Limited & Anr. Vs. Brojo Nath Ganguly & Anr.*[24].)

35. In *Miheer H. Mafatlal* (supra), this Court had, while examining the scope and ambit of jurisdiction of the Company Court, culled out the following broad contours of such jurisdiction:

> "1. The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held.
>
> 2. That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391 sub-section (2).
>
> 3. That the meetings concerned of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.

23. 1995 Supp (1) SCC 499.

24. (1986) 3 SCC 156.



> 4. That all necessary material indicated by Section 393(1)(a) is placed before the voters at the meetings concerned as contemplated by Section 391 sub-section (1).
>
> 5. That all the requisite material contemplated by the proviso of sub-section (2) of Section 391 of the Act is placed before the Court by the applicant concerned seeking sanction for such a scheme and the Court gets satisfied about the same.
>
> 6. That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously X-ray the same.
>
> 7. That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purported to represent.
>
> 8. That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.
>
> 9. Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in

the view of the Court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction."

36. It is manifest that before according its sanction to a scheme of amalgamation, the Court has to see that the provisions of the Act have been duly complied with; the statutory majority has been acting bona fide and in good faith and are not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purport to represent and the scheme as a whole is just, fair and reasonable from the point of view of a prudent and reasonable businessman taking a commercial decision.

37. Thus, the first question is as to whether the appellant and SGL had disclosed sufficient information to the shareholders so as to enable them to arrive at an informed decision? The proviso to Section 391 (2) requires a company to "disclose pendency of any investigation in relation to the company under Sections 235 to 351, and the like". Though it is true that inspection under Section 209A of the Act, strictly speaking, may not be in the nature of an investigation, but at the same time it cannot be construed as an innocuous exercise for record, in as much as if anything objectionable or fraudulent in the conduct of the affairs of the company is detected during the course of inspection, it may lay the foundation for the purpose of investigations under Sections 235 and 237 of the Act, as is the case here. Therefore, existence of proceedings under Section 209A must be disclosed in terms of the proviso to Section 391(2). In any event, we are of the opinion that since the said issue is a question of fact, based on appreciation of evidence, and both the Courts below have held that the information supplied was sufficient, particularly in light of the order passed by the Single Judge on 18th March, 2006, we are not inclined to disturb the said concurrent finding of the Courts below, particularly when it is not shown that the said finding suffers from any demonstrable perversity. (See: *Firm Sriniwas Ram Kumar Vs. Mahabir Prasad & Ors.*[25] and *Ganga Bishnu Swaika Vs. Calcutta Pinjrapole Society.*[26])

38. The next issue that arises for our determination is whether the Division Bench was correct in holding that the affidavit filed by the Official Liquidator was vitiated on account of non-disclosure of all material facts. From a bare perusal of the affidavit dated 10th February, 2006, it is manifest, ex facie, that before filing the affidavit, the said official had not examined and applied its mind to the findings contained in the inspection report under Section 209A of the Act. While it is true that it was not within the domain of the Official Liquidator to determine the relvency or otherwise of the said report, yet he was obliged to incorporate in his affidavit the contents of the inspection report. We are convinced that the official liquidator had failed to discharge the statutory burden placed on him under the second proviso to Section 394(1) of the Act.

39. An Official Liquidator acts as a watchdog of the Company Court, reposed with the duty of satisfying the Court that the affairs of the company, being dissolved, have not been carried out in a manner prejudicial to the interests of its members and the interest of the public at large. In essence, the Official Liquidator assists the Court in appreciating the other side of the picture before it, and it is only upon consideration of the amalgamation scheme, together with the report of the Official Liquidator, that the Court can arrive at a final conclusion that the scheme is in keeping with the mandate of the Act and that of public interest in general. It, therefore, follows that for examining the questions as to why the transferor-company came into existence; for what purpose it was set up; who were its promoters; who were controlling it; what object was sought

25. 1951 SCR 277.

26. AIR 1968 SC 615.

to be achieved by dissolving it and merging with another company, by way of a scheme of amalgamation, the report of an official liquidator is of seminal importance and in fact facilitates the Company Judge to record its satisfaction as to whether or not the affairs of the transferor company had been carried on in a manner prejudicial to the interest of the minority and to the public interest.

40. In the present case, we are unable to appreciate why the Official Liquidator, who was aware of the inspection report dated 17th February, 2006 under Section 209A containing adverse comments on the affairs of both the companies, relied only on the report of the auditors, which admittedly was not even verified. We can only lament the conduct of the official liquidator.

41. Having held that the Official Liquidator had failed to discharge the duty cast on him in terms of the second proviso to Section 394(1) of the Act, the next issue that requires consideration is whether sanction of a scheme of amalgamation can be held up merely because the conduct of an Official Liquidator is found to be blameworthy? We are of the view that it will neither be proper nor feasible to lay down absolute parameters in this behalf. The effect of misdemeanour on the part of the official liquidator on the scheme as such would depend on the facts obtaining in each case and ordinarily the Company Judge should be the final arbiter on that issue. In the instant case, indubitably, the findings in the report under Section 209A of the Act were placed before the Company Judge, and he had considered the same while sanctioning the scheme of amalgamation. Therefore, in the facts and circumstances of the present case, the Company Judge had, before him, all material facts which had a direct bearing on the sanction of the amalgamation scheme, despite the aforestated lapse on the part of the Official Liquidator. In this view of the matter, we are of the considered opinion that the Company Judge, having examined all material facts, was justified in sanctioning the



scheme of amalgamation, particularly when the current investigation under Section 235 of the Act was initiated pursuant to a complaint filed by respondent No.1 subsequent to the order of the Company Judge sanctioning the scheme.

42. For the foregoing reasons, the appeals are allowed; and the impugned judgment is set aside. Consequently, the order passed by the Company Judge sanctioning the scheme of amalgamation is restored. However, it is made clear that the scheme of amalgamation will not come in the way of any civil or criminal proceedings which may arise pursuant to the action initiated under Sections 209A or 235 of the Act, or any criminal proceedings filed by respondent No. 1.

43. In the facts and circumstances of the case, there will be no order as to costs.

B.B.B. Appeals allowed.

M/S. MUSTAN TAHERBHAI
*v.*
COMMNR. OF CENTRAL EXCISE AND CUSTOMS
(Civil Appeal No. 3788 of 2003)

FEBRUARY 28, 2011

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

*Customs Act, 1962: Notification nos. 113/83-Cus and 133/87-Cus – Indian built ship brought in India for breaking purpose – Leviability of customs duty – Vessel manufactured in a Customs Bonded Warehouse using certain imported items – When vessel ceased to ply and was grounded, it was auctioned and purchased by the appellant for breaking purpose – Demand of customs duty – Tribunal held that Notification no.133/87-Cus was applicable, and, therefore, the appellant was liable to pay customs duty on the vessel at the time of breaking of ship – Appeal before Supreme Court – Supreme Court remanded the matter to the Tribunal directing it to first appreciate the facts of the case and then determine the question of leviability of import duty on an Indian built ship sold for breaking – It directed the Tribunal to take note of a particular judgment of Bombay High Court, special leave petitions whereagainst were summarily dismissed – Tribunal reconsidered the matter and by impugned order dismissed the appeal holding that on the date of clearance, notification in force was 113/83-Cus and the duty would be payable in terms of the said notification and, therefore, question of applicability of judgment of Bombay High Court did not arise – On appeal, held: While deciding the case, the Tribunal ignored the specific directions issued by the Supreme Court – Therefore, the decision of the Tribunal was not sustainable – Matter remitted to Tribunal for consideration afresh.*

*Judicial discipline: While remanding the matter to the*





*Tribunal, Supreme Court gave specific directions to Tribunal to examine the entire legal issue after ascertaining the foundational facts, regardless of its earlier view in the matter – The Tribunal, while deciding the case, ignored the specific directions issued by the Supreme Court – Held: Tribunal erred in ignoring the specific directions of the Supreme Court – Judicial discipline obligated the Tribunal to appreciate the factual matrix as directed.*

**A vessel was manufactured in a Customs Bonded Warehouse using certain imported items. When the vessel ceased to ply and was grounded, it was auctioned. The appellant, the highest bidder purchased the vessel. The Department levied customs duty on the same. The Commissioner (appeal) confirmed the demand. The appellant filed appeal before the Tribunal. The Tribunal held that Notification no.133/87-Cus was applicable in the instant case, and, therefore, the appellant was liable to pay customs duty on the vessel at the time of breaking of ship. The appellant filed appeal before the Supreme Court. By order dated 30th August, 2001, the Supreme Court remanded the matter to the Tribunal, observing that the Tribunal did not consider the fact that the vessel was built in India and excise duty was paid thereon at the time of its clearance and, thereby directed it to first appreciate the facts of the case and then determine the question of leviability of import duty on an Indian built ship sold for breaking. The Court also directed the Tribunal to take note of the judgment of Bombay High Court, special leave petitions whereagainst were summarily dismissed. The Tribunal reconsidered the matter and dismissed the appeal holding that on the date of clearance, the notification in force was 113/83-Cus, the provisions thereof would apply and the duty would be payable in terms of the conditions in the said notification and in the light of this finding, the question of applicability of judgment of Bombay High Court did not arise and the**

**plea that the ship was manufactured in India and it attracted excise duty did not require consideration at all. The instant appeal was filed challenging the order of the Tribunal.**

**Disposing of the appeal and remitting the matter to Tribunal for consideration afresh, the Court**

**HELD: 1. While deciding the case, the Tribunal ignored the specific directions issued by this Court by order dated 30th August 2001. It is evident from the impugned order that the Tribunal did not appreciate the facts in their correct perspective, which resulted in vitiating its decision on the question of leviability of import duty. Although, from the impugned order, it is evident that the Tribunal was conscious of the direction of this Court by order dated 30th August 2001 that it was required to first record the correct facts and then in the factual perspective locate and apply the relevant law, yet it proceeded to hold that when it is accepted that Notification No. 118/59-Cus. did not exist at the time of clearance of the vessel from the ship yard, the persistent plea that the ship was manufactured in a warehouse located in India and therefore, it attracted excise duty alone need not be considered at all. In light of the decision and directions of this Court passed on 30th August, 2001, judicial discipline obligated the Tribunal to examine the entire legal issue after ascertaining the foundational facts, regardless of its earlier view in the matter. Therefore, the decision of the Tribunal cannot be sustained. [Para 17] [364-F-G; 365-A-D]**

*Union of India & Ors. v. M/s. Jalyan Udyog & Anr.* **(1994) 1 SCC 318;** *Union of India v. Baijnath Melaram* **1998 (97) ELT 27 (SC);** *The State of Tamil Nadu v. M.K. Kandaswami & Ors.* **(1975) 4 SCC 745;** *In Re. Sea Customs Act,* **1878 S. 20 (1964) 3 SCR 787;** *M/s. Baijnath Melaram v. Union of India & Ors.* **(W.P. 1478 of 1983);** *Hyderabad Industries Ltd. & Anr. v. Union of India & Ors.* **(1999) 5 SCC 15;** *D.C.M. & Anr. v. Union of India & Anr.* **1995 Supp (3) SCC 223;** *Hansraj Gordhandas v. H.H. Dave, Assistant Collector of Central Excise & Customs, Surat & Ors.* **(1969) 2 SCR 253;** *Novopan India Ltd., Hyderabad v. Collector of Central Excise And Customs, Hyderabad* **1994 Supp (3) SCC 606;** *Commissioner of Central Excise and Customs, Indore v. Parenteral Drugs India Ltd.* **(2009) 14 SCC 342 – referred to.**



**Case Law Reference**

| | | |
|---|---|---|
| **(1994) 1 SCC 318** | **referred to** | **Para 6, 7,9, 10,16,** |
| **1998 (97) ELT 27 (SC)** | **referred to** | **Para 8** |
| **(1975) 4 SCC 745** | **referred to** | **Para 14** |
| **(1964) 3 SCR 787** | **referred to** | **Para 14** |
| **(W.P. 1478 of 1983)** | **referred to** | **Para 14** |
| **(1999) 5 SCC 15** | **referred to** | **Para 14** |
| **1995 Supp (3) SCC 223** | **referred to** | **Para 16** |
| **(1969) 2 SCR 253** | **referred to** | **Para 16** |
| **1994 Supp (3) SCC 606** | **referred to** | **Para 16** |
| **(2009) 14 SCC 342** | **referred to** | **Para 16** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3788 of 2003.

From the Judgment & Order dated 18.2.2003 of the Customs, Excise & Gold (Control) Appellate Tribunal, West Regional Bench at Mumbai in Appeal No. C/1783/94/B-2.

Joseph Vellapally, Raghvesh Singh, Ajay Sharma for the Appellant.

Harish Chander, B, Sunita Rao, Priya Bhatnagar, B.K. Prasad for the Respondent.

The Judgment of the Court was delivered by

**D.K. JAIN, J.** 1. This appeal, under Section 130E of the Customs Act, 1962 (for short "the Act"), is directed against order dated 18th February, 2003, passed by the Customs, Excise & Gold (Control) Appellate Tribunal, as it existed at the relevant time, (for short "the Tribunal"). By the impugned order the Tribunal has dismissed the appeal filed by the appellant herein and confirmed the levy of customs duty on the ocean going vessel, registered as M.V. Jagat Priya, purchased by them in a Court auction, for breaking/ scrapping purpose in terms of Notification No. 133/87-Cus.

2. M.V. Jagat Priya was manufactured by M/s. Hindustan Shipyard Ltd. in the year 1975 in a Customs Bonded Warehouse at Vishakapatanam, using certain imported items. The said vessel was cleared on 30th November, 1975, and was delivered to M/s. Dempo Steamship Ltd. for a consideration of Rs. 7,61,12,400/- and Central Excise duty at the rate of 1% was paid thereon. The vessel was registered as Indian vessel tonnage and flying an Indian flag. However, it ceased to ply and was grounded at Bedi Bunder, Jamnagar, in June 1986. On 16th October, 1992, an order was passed by the High Court of Judicature at Bombay in Admiralty suit at the instance of Union of India and the Shipping Credit and Investment Co. of India Ltd. for auction of the vessel on "as is where is" basis "free from all encumbrances and existing liens".

3.On 12th February, 1993, the vessel was auctioned and being the highest bidder, the appellant viz. M/s. Mustan Taherbhai purchased the vessel. The sale in favour of the appellant was confirmed by the High Court and in furtherance thereof, the possession of the ship was delivered on 4th March, 1993. Thereafter, on 10th May, 1993, on the direction of the Superintendent of Central Excise & Customs, the appellant



filed a bill of entry claiming that the ship was an Indian built ship, and therefore, no customs duty was payable. On 12th May, 1993, the Superintendent of Central Excise, Jamnagar passed a provisional assessment order demanding customs duty @ 5%, and an additional duty of Rs. 1000/- per LDT.

4. Being aggrieved, the appellant preferred Special Civil Application No. 4924 of 1993 before the High Court of Gujarat. The High Court, vide interim order dated 25th May, 1993, permitted the appellant to clear the materials obtained by breaking the ship in question without payment of provisional duty on the condition that the appellant will file a bond with security deposit. Vide order dated 23rd July, 1993, the High Court disposed of the said application, and directed the appellant to file an appeal before the Commissioner (Appeals). Accordingly, the appellant preferred an appeal before the Commissioner (Appeals).

5. The Commissioner (Appeals), vide order dated 29th April, 1994, dismissed the appeal and confirmed the order of provisional assessment dated 12th May, 1993.

6. Being aggrieved, the appellant preferred an appeal before the Tribunal. Vide order dated 10th July, 1998 the Tribunal dismissed the appeal. Relying on the decision of this Court in *Union of India & Ors. Vs. M/s. Jalyan Udyog & Anr.*[1], the Tribunal observed that Notification No. 133/87-Cus was applicable in the instant case, and therefore, the appellant was liable to pay customs duty on the vessel at the rate prevalent at the time of breaking of ship.

7. Being dissatisfied, the appellant preferred an application under Section 129(B)(2) of the Act praying for rectification of mistakes in the order, dated 10th July, 1998, on the ground that the Tribunal had erroneously concluded that: (i) the goods manufactured in a customs bonded warehouse were similar to goods imported under the Act; (ii) the issue for

1. (1994) 1 SCC 318.

determination before it was whether Notification No. 133/87-Cus was applicable or not, whereas the real issue for determination was whether the vessel was imported or indigenously manufactured; (iii) the customs duty under Notification No. 133/87-Cus was payable when Notification No. 118/59-Cus was applicable; (iv) since the vessel was subsequently being broken up, its clearance would be governed by Notification No. 262/58-Cus; and (v) the decision in Jalyan Udyog (supra) was applicable to the facts of the present case.

8. Vide order dated 13th April, 1999, the Tribunal dismissed the said application on the ground that it is a settled position that goods manufactured in a customs bonded warehouse are treated akin to goods manufactured in a foreign country, and when the vessel was taken out of the country for plying as foreign going vessel, and subsequently, the said vessel is brought back to India for breaking purposes, it amounts to re-import.

9. Aggrieved, the appellant preferred yet another application under Section 129(B)(2) of the Act for rectification of mistakes in the order of the Tribunal dated 13th April, 1999 on the ground that in *Union of India Vs. Baijnath Melaram*[2], this Court had affirmed the Bombay High Court's decision wherein it was held that no customs duty was payable on vessels which are subject to breaking, if the said vessels had been manufactured in India. Vide order dated 8th October, 1999, the Tribunal dismissed the said application as well, holding that it had correctly relied on the decision of this Court in *Jalyan Udyog* (supra).

10. Still aggrieved, the appellant preferred C.A. No. 1998 of 2000 before this Court. Vide order dated 30th August, 2001, this Court, while remanding the matter back to the Tribunal, observed thus:

"It appears from the judgment of the Tribunal that the matter

2. 1998 (97) ELT 27 (SC).



was argued without reference to facts which are now stated in the special leave petition, namely, that the vessel was built in India and excise duty was paid thereon at the time of its clearance. It was delivered to an Indian party. The contention on these facts is that this was not a transaction of export and import which would render the appellants liable to the payment of customs duty.

Reliance by the Tribunal upon the decision of this Court in the case of *Union of India & Ors. vs. Jalyan Udyog & Ors.* (1994 (1) S.C.C. 318) would be misplaced if these are, indeed, the facts for that was not a case that related to a vessel that was built in India and cleared for home consumption. We think it appropriate, in the circumstances, that the order under challenge should be set aside and the matter be remanded to the Tribunal to be considered afresh. In so doing, the Tribunal shall determine, first, the facts and then the law. The Tribunal may take note of the judgment of the Bombay High Court delivered on 5th February, 1992 in the case of M/s. Baijnath Melaram vs. Union of India & Ors. (Writ Petition No.1478 of 1983), special leave petitions whereagainst were summarily dismissed. It may be noted that we express no opinion on the merits of the case on either side."

It is plain from a bare reading of the said order that this Court had directed the Tribunal to first appreciate the facts of the case and then determine the question of leviability of import duty on an Indian built ship which was sold for breaking. It is evident from the afore-extracted paragraph that the Court had observed that reliance by the Tribunal on the decision of this Court in *Jalyan Udyog* (supra) would be misplaced.

11. Accordingly, the Tribunal re-considered the matter. As stated above, vide the impugned order, the Tribunal has dismissed the appeal, observing thus:

"The fact that Notification No. 118/59-Cus. was not in existence at the date on which the vessel was cleared by HSL having been superseded by Notification No. 163/65-Cus. came to light only on the submissions made by Shri Pundir. It would appear that at all times it was wrongly presumed that the earlier Notification was in existence. We do not see the revelation as bringing on record new facts. We see it as correction of the factual error, which had existed in the record at all times. We find no substance in the submissions of Shri Doiphode, that a new case is being made out by the Revenue at the present stage.

14. It has been held by the Hon'ble Supreme Court that as far as facts are concerned, the Tribunal is the final authority and the Court would go into only the questions of law at the appeal stage. Therefore, the Tribunal would first record the correct facts and then in the factual perspective would locate and apply the relevant law.

15. When the fact is accepted that Notification 118/59-Cus. did not exist at the time of clearance of the vessel from the Shipyard, the persistent plea that the ship was manufactured in the warehouse and that it was manufactured in India and that it attracted excise duty alone need not be considered at all. Since on the date of such clearance, the notification in force was 113/83-Cus., the provisions thereof would apply and the duty would be payable in terms of the conditions in the said notification.

16. Since we have so held the question of the applicability of the High Court judgment in the case of Baijnath Melaram does not arise."

12. Hence, the present appeal.

13. Mr. Joseph Vellapally, learned senior counsel appearing on behalf of the appellant, strenuously urged that in the instant case the imported goods lost their identity when they



were used in the manufacture of vessel along with domestically procured goods, and were cleared as such, and therefore, the revenue cannot claim on the one breath that the ship was "manufactured" in India and attracted excise duty at the time of clearance and on the other breath cannot contend that the ship was manufactured abroad and was exigible to levy of customs duty when it is to be cleared for breaking at an Indian coast. Learned counsel urged that once excise duty has been levied and paid on goods, there is no question of levy of customs duty under Section 3 of the Customs Tariff Act, 1975 as the latter is meant to neutralize the non-levy of excise duty.

14. Learned counsel contended that Section 21 of the erstwhile Sea Customs Act, 1878 provided that when any article liable to duty forms part or ingredient of a good, then such good would be liable to full duty as if it was entirely composed of such article. In the absence of such a charging provision in the Act, ships manufactured by Hindustan Shipyard in India cannot be subjected to customs duty at the time of clearance for home consumption. Relying on the decisions of this Court in *The State of Tamil Nadu Vs. M.K. Kandaswami & Ors.*[3] and *In Re. Sea Customs Act, 1878 S. 20.*[4], learned counsel submitted that no customs duty was chargeable in the instant case, in as much as the ship was not a "taxable good" as it was not imported as defined under Section 2(25) of the Act. Moreover, there was no "taxable event" as there was no import in the instant case, and the appellant being an auction-purchaser cannot be likened to an importer under the Act. Relying on the decision of this Court in *Baijnath Melaram* (supra), learned counsel urged that no customs duty can be levied on Indian built ships. Learned counsel asserted that the Tribunal had not complied with the order of this Court dated 30th August, 2001 in as much as it has failed to consider the judgment of the Bombay High Court in *M/s. Baijnath Melaram Vs. Union of*

3. (1975) 4 SCC 745.

4. (1964) 3 SCR 787.

*India & Ors.* (W.P. 1478 of 1983), nor has it determined the question of liability to import duty of an Indian built ship, after evaluating the factual background of the case as was specifically directed. Relying on the decision of this court in *Hyderabad Industries Ltd. & Anr. Vs. Union of India & Ors.*[5], learned counsel urged that even if it is held that customs duty is payable in the instant case, no additional customs duty is leviable as excise duty had already been paid.

15. Per contra, Mr. Hairsh Chander, learned senior counsel appearing on behalf of the Revenue, while supporting the impugned judgment, contended that at the time of clearance of the ship, Notification No. 118/59-Cus was not in force, as the same had been superseded by Notification No. 163/65-Cus. At the time the appellant presented the bill of entry, however, Notification No. 133/87-Cus was in force, as rightly concluded by the Tribunal.

16. Learned counsel urged that when a ship is manufactured in a bonded warehouse, for all purposes, it is deemed to be manufactured in a foreign country, and by virtue of Notification No. 133/87-Cus, a legal fiction is created whereby when the ship manufactured in a bonded warehouse is brought to India for breaking purposes, it is deemed to be manufactured in a foreign country and appropriate duty has to be paid for clearance for ship breaking. Learned counsel contended that the said Notification is clear, and admits of no ambiguity, and it is settled that when a fiction is created by law, the Courts must give full effect to the fiction. Learned counsel urged that in terms of the Notification and as was observed by this Court in *Jalyan Udyog* (supra), the date relevant for determining the value and rate of the customs duty chargeable is the date on which the ship is broken up, which should be reckoned as the date on which permission for breaking up is accorded by the Director General of Shipping. Learned counsel submitted that the fact that the appellant was an auction-

5. (1999) 5 SCC 15.



purchaser is inconsequential in as much as Notification No. 133/87-Cus was a conditional notification, viz. when the ship is broken, customs duty as prevalent on the date of breaking will have to be paid, and therefore, customs duty was required to be paid in terms of Sections 12 and 15 read with Section 68 of the Act. Learned counsel also argued that Section 68 of the Act makes it clear that when the importer of any warehoused goods intends to clear them for home consumption, then a bill of entry for home consumption has be to be filed, and the import duty leviable on such goods has to be paid by the importer, as was held in *D.C.M. & Anr. Vs. Union of India & Anr.*[6] . Learned counsel submitted that Section 9 of the Act makes it clear that clearance from a Bonded warehouse is to be treated as an import into India. It was also stressed that clearance of vessel was in terms of the exemption notification, which stipulated payment of appropriate customs duty prevalent at the time of its breaking. Reliance was placed on the decisions of this Court in *Hansraj Gordhandas Vs. H.H. Dave, Assistant Collector of Central Excise & Customs, Surat & Ors*[7].; *Novopan India Ltd., Hyderabad Vs. Collector of Central Excise And Customs, Hyderabad*[8] and *Commissioner of Central Excise and Customs, Indore Vs. Parenteral Drugs India Ltd*[9]. to contend that the terms of an exemption notification have to be construed strictly.

17. Having bestowed our anxious consideration, we are constrained to hold that the impugned judgment deserves to be set aside on the short ground that while deciding the case, the Tribunal has ignored the specific directions issued by this Court, vide order dated 30th August, 2001. It is evident from the impugned order, in particular from paras 15 and 16 that the Tribunal has not appreciated the facts obtaining in the present

6. 1995 Supp (3) SCC 223.
7. (1969) 2 SCR 253.
8. 1994 Supp (3) SCC 606.
9. (2009) 14 SCC 342.

case in their correct perspective, which has resulted in vitiating its decision on the question of leviability of import duty. Although, from para 14 of the impugned order it is evident that the Tribunal was conscious of the direction of this Court that it was required to first record the correct facts and then in the factual perspective locate and apply the relevant law, yet in the very next paragraph it proceeds to hold that when it is accepted that Notification No. 118/59-Cus. did not exist at the time of clearance of the vessel from the ship yard, the persistent plea that the ship was manufactured in a warehouse located in India and therefore, it attracted excise duty alone need not be considered at all. In our opinion, in light of the decision and directions of this Court in C.A. 1998 of 2000, judicial discipline obliged the Tribunal to examine the entire legal issue after ascertaining the foundational facts, regardless of its earlier view in the matter. Therefore, the decision of the Tribunal cannot be sustained.

18. We are thus, convinced that it is a fit case which should be remanded back to the Tribunal for fresh adjudication and determination of the question of leviability of import duty on an Indian-built ship brought into India for breaking purpose. For the view we have taken, we deem it unnecessary to deal with other contentions urged by the learned counsel.

19. Resultantly, the appeal is allowed; the impugned order is set aside, and the matter is remanded back to the Tribunal for fresh consideration, in accordance with law, bearing in mind the observations of this Court in C.A. No. 1998 of 2000. There will, however, be no order as to costs.

D.G. Appeal disposed of.



GVK INDS. LTD. & ANR.
*v.*
THE INCOME TAX OFFICER & ANR.
(Civil Appeal No. 7796 of 1997)

MARCH 1, 2011

**[S.H. KAPADIA CJI., B. SUDERSHAN REDDY, K. S. RADHAKRISHNAN, SURINDER SINGH NIJJAR, AND SWATANTER KUMAR, JJ.]**

*CONSTITUTION OF INDIA, 1950:*

*Articles 245(1) and 245(2) read with Articles 51, 246, 248, 249, 250, 253 and 262 – Seventh Schedule Lists I and III – Power of Parliament to legislate in respect of extra-territorial aspects or causes – Held : Parliament has been constituted, and empowered to, and that its core role would be to enact laws to protect the interests, welfare and security of India – Therefore, even those extra-territorial aspects or causes, provided they have nexus with India, should be deemed to be within the domain of legislative competence of Parliament except to the extent the Constitution itself specifies otherwise – Parliament may exercise its legislative powers with respect to extra-territorial aspects or causes – events, things, phenomena (howsoever commonplace they may be), resources, actions or transactions, and the like – that occur, arise or exist or may be expected to do so, naturally or on account of some human agency, in the social, political, economic, cultural, biological, environmental or physical spheres outside the territory of India, and seek to control, modulate, mitigate or transform the effects of such extra-territorial aspects or causes, or in appropriate cases, eliminate or engender such extra-territorial aspects or causes, only when such extra-territorial aspects or causes have, or are expected to have, some impact on, or effect in, or*

*consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians – Consequently, Parliament's power to enact legislation, pursuant to clause (1) of Article 245 may not extend to those extra-territorial aspects or causes that have no impact on or nexus with India –Any laws enacted by Parliament with respect to extra-territorial aspects or causes that have no impact on or nexus with India, would be ultra vires, and would be laws made for a foreign territory – Income Tax Act, 1961 – ss.9(1)(1) and 9(1)(vii)(4).*

*Article 245(1) –Expression "for" "the whole or any part of the territory of India" – Connotation of – Explained.*

*Article 245(2) – Judicial review of an enactment – The subject of Clause (2) of Article 245 is the law made by Parliament, pursuant to Clause (1) of Article 245, and the object, or purpose, of Clause (2) of Article 245 is to specify that a law so made by Parliament, for the whole or any part of territory of India, should not be held to be invalid solely on the ground that such laws require extra-territorial operation – Clause (2) of Article 245 acts as an exception, of a particular and a limited kind, to the inherent power of the judiciary to invalidate, if ultra-vires, any of the laws made by any organ of the State – Clause (2) of Article 245 carves out a specific exception that a law made by Parliament, pursuant to Clause (1) of Article 245, for the whole or any part of the territory of India may not be invalidated on the ground that such a law may need to be operated extraterritorially – Nothing more – The power of the judiciary to invalidate laws that are ultra-vires flows from its essential functions, constitutional structure, values and scheme, and indeed to ensure that the powers vested in the organs of the State are not being transgressed, and that they are being used to realise a public purpose that subserves the general welfare of the people – It is one of the essential defences of the people in a constitutional democracy.*



*INTERPRETATION OF CONSTITUTION :*

*Constitutional provision – Interpretation of – Held : In interpreting any law, including the Constitution, the text of the provision under consideration would be the primary source for discerning the meanings that inhere in the enactment – However, in the light of the serious issues it would always be prudent, as a matter of constitutional necessity, to widen the search for the true meaning, purport and ambit of the provision under consideration – No provision, and indeed no word or expression, of the Constitution exists in isolation – They are necessarily related to, transforming and in turn being transformed by, other provisions, words and phrases in the Constitution – Our Constitution is both long and also an intricate matrix of meanings, purposes and structures – It is only by locating a particular constitutional provision under consideration within that constitutional matrix could one hope to be able to discern its true meaning, purport and ambit – When something is specified in an Article of the Constitution, it is to be taken, as a matter of initial assessment, as nothing more was intended – Further, it is well known dicutum of statutory and constitutional interpretation that when the same words or phrases are used in different parts of the Constitution, the same meaning should be ascribed, unless the context demands otherwise.*

*INTERPRETATION OF STATUTES :*

*Interpretation of a statutory provision – Held : A construction of provisions in a manner that renders words or phrases therein to the status of mere surplussage ought to be avoided.*

*MAXIM :*

*'Expressio unius est exclusion alterius' – Applicability of.*

*WORDS AND PHRASES:*

*Expressions "aspects" and "causes", "object" and "provocation", "extraterritorial aspects or causes", "extraterritorial law", "extraterritorial operation", "nexus with India" – Connotation of in the context of article 245 of Constitution of India.*

**The appellant filed a writ petition before the High Court challenging an order of the respondents whereby the appellant was held liable for withholding a certain portion of monies being paid to a foreign company under either of ss. 9(1)(i) or 9(1)(vii)(b) of the Income Tax Act, 1961. The appellant also challenged the vires of s. 9(1)(vii)(b) of the Income Tax Act, 1961 for want of legislative competence and violation of Article 14 of the Constitution of India. The High Court held that s. 9(1)(vii)(b) and not s. 9(1)(i) applied to the facts of the case and also upheld constitutional validity of the said provision. The High Court mainly relied on the ratio of the judgment of a three-Judge Bench of the Supreme Court in ECIL[1]. The appeal challenging the said judgment was listed before a two Judge Bench of the Supreme Court. Keeping, in view that the far reaching issues of great constitutional purport and the fact that such issues had been previously raised in ECIL, the matter, ultimately, was referred to the Constitution Bench.**

**The questions for consideration before the Court were : (1) "Is the Parliament constitutionally restricted from enacting legislation with respect to extra-territorial aspects or causes that do not have, nor expected to have any, direct or indirect, tangible or intangible impact(s) on, or effect(s) in, or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians?" 2) "Does the Parliament have the powers to legislate "for" any territory, other than the territory of India or any part of it?"**



**Answering the reference, the Court**

**HELD : 1.1 Our Constitution charges the various organs of the State with affirmative responsibilities of protecting the interests of, the welfare of and the security of the nation. Legislative powers are granted to enable the accomplishment of the goals of the nation. The powers of judicial review are granted in order to ensure that legislative and executive powers are used within the bounds specified in the Constitution. Consequently, it is imperative that the powers so granted to various organs of the state are not restricted impermissibly by judicial fiat such that it leads to inabilities of the organs of the State in discharging their constitutional responsibilities. Powers that have been granted, and implied by, and borne by the Constitutional text have to be perforce admitted. Nevertheless, the very essence of constitutionalism is also that no organ of the state may arrogate to itself powers beyond what is specified in the Constitution. [para 27] [405-A-D]**

**1.2 It is the Constitution that is supreme, with true sovereignty vesting in the people. In as much as that true sovereign has vested some of their collective powers in the various organs of the state, including Parliament, there cannot be the legal capacity to exercise that power in a manner that is not related to their interests, benefits, welfare and security. [para 49] [417-A-B]**

*The Changing Constitution, Ed. Jowell & Oliver* **2nd Edn. Clarendon Press, Oxford (1989) by A.W. Bradley; and** *Studies in Constitutional Law by Colin R. Munro,* **2nd Ed. Butterworths, OUP (2005) –referred to.**

**1.3 Under our Constitution, while some features are capable of being amended by Parliament, pursuant to the**

**amending power granted by Article 368, the essential features – the basic structure – of the Constitution is beyond such powers of Parliament. The power to make changes to the basic structure of the Constitution vests only in the people sitting, as a nation, through its representatives in a Constituent Assembly. One of the foundational elements of the concept of basic structure is it would give the stability of purpose, and machinery of government to be able to pursue the constitutional vision in to the indeterminate and unforeseeable future. [para 26] [404-F-G; 405-A]**

*Keshavanadna Bharati v. State of Kerala* **1973 Suppl. SCR 1 = (1973) 4 SCC 225 and** *I.R. Coelho v. State of Tamil Nadu* **2007 (1 ) SCR 706 = (2007) 2 SCC 1 – relied on**

**1.4 In interpreting any law, including the Constitution, the text of the provision under consideration would be the primary source for discerning the meanings that inhere in the enactment. However, in the light of the serious issues it would always be prudent, as a matter of constitutional necessity, to widen the search for the true meaning, purport and ambit of the provision under consideration. No provision, and indeed no word or expression, of the Constitution exists in isolation – they are necessarily related to, transforming and in turn being transformed by, other provisions, words and phrases in the Constitution. Our Constitution is both long and also an intricate matrix of meanings, purposes and structures. It is only by locating a particular constitutional provision under consideration within that constitutional matrix could one hope to be able to discern its true meaning, purport and ambit. [para 28] [405-F-H; 406-A]**

**1.5 A construction of provisions in a manner that**



**renders words or phrases therein to the status of mere surplussage ought to be avoided. [para 31] [407-F]**

**2.1 The text of Clause (2) of Article 245, when read together with Clause (1) of Article 245 of the Constitution of India makes it sufficiently clear that the laws made by Parliament relating to aspects or causes that occur, arise or exist or may be expected to occur, arise or come into existence within the territory of India may not be invalidated on the ground that such laws require to be operated outside the territory of India. [para 10] [394-D-E]**

**2.2 The implication of the nexus requirement is that a law that is enacted by Parliament, whose "objects" or "provocations" do not arise within the territory of India, would be unconstitutional. The words "object" and "provocation", and their plural forms, may be conceived as having been used in ECIL as synonyms for the words "aspect" and "cause", and their plural forms, as used in this judgment. In ECIL, the Court while interpreting Clauses (1) and (2) of Article 245, drew a distinction between the phrases "make laws" and "extraterritorial operation" – i.e., the acts and functions of making laws versus the acts and functions of effectuating a law already made. In drawing the distinction, two analytically separable, albeit related issues were considered. They relate to the potential conflict between the fact that, in the international context, the "principle of Sovereignty of States" (i.e., nation-states) would normally be "that the laws made by one State can have no operation in another State" (i.e., they may not be enforceable), and the prohibition in Clauses (2) of Article 245 that laws made by Parliament may not be invalidated on the ground that they may need to be or are being operated extra-territorially. [para 11-12] [394-H; A-F]**

*Electronics Corporation of India Ltd., v. Commissioner of Income Tax & Anr.* **(1989) 2 SCC 642 -referred to.**

*British Columbia Railway Company Limited v. King* **[1946] A.C. 527-referred to.**

**2.3 The subject in focus in the first part of Clause (1) of Article 245 is "the whole or any part of the territory of India", and the object is to specify that it is Parliament which is empowered to make laws in respect of the same. [para 32] [407-G]**

**2.4 The word that links the subject, "the whole or any part of the territory of India" with the phrase that grants legislative powers to Parliament, is "for". It is used as a preposition. The word "for", when ordinarily used as a preposition, can signify a range of meanings between the subject, that it is a preposition for, and that which preceded it. [para 33] [408-A-B]**

**2.5 Consequently, the range of senses in which the word "for" is ordinarily used would suggest that, pursuant to Clause (1) of Article 245, Parliament is empowered to enact those laws that are in the interest of, to the benefit of, in defence of, in support or favour of, suitable or appropriate to, in respect of or with reference to "the whole or any part of the territory of India". [para 34] [408-D]**

**2.6 In as much as many extra-territorial aspects or causes may have an impact on or nexus with the nation-state, they would legitimately, and indeed necessarily, be within the domain of legislative competence of the national parliament, so long as the purpose or object of such legislation is to benefit the people of that nation state. [para 35] [408-F-G]**

**2.7 Because of interdependencies and the fact that**



**many extra-territorial aspects or causes have an impact on or nexus with the territory of the nation-state, it would be impossible to conceive legislative powers and competence of national parliaments as being limited only to aspects or causes that arise, occur or exist or may be expected to do so, within the territory of its own nation-state. Our Constitution has to be necessarily understood as imposing affirmative obligations on all the organs of the State to protect the interests, welfare and security of India. Consequently, it has to be understood that Parliament has been constituted, and empowered to, and that its core role would be to, enact laws that serve such purposes. Therefore, even those extra-territorial aspects or causes, provided they have a nexus with India, should be deemed to be within the domain of legislative competence of Parliament, except to the extent the Constitution itself specifies otherwise. [para 41] [412-D-E]**

**3.1 In order to discern as to whether Parliament is empowered to enact laws in respect of extra-territorial aspects or causes that have no nexus with India, and furthermore could such laws be bereft of any benefit to India, the word "for" again provides the clue. 'To legislate for a territory' implies being responsible for the welfare of the people inhabiting that territory, deriving the powers to legislate from the same people, and acting in a capacity of trust. In that sense, Parliament belongs only to India; and its chief and sole responsibility is to act as Parliament of India and of no other territory, nation or people. There are two related limitations that flow from this. The first one is with regard to the necessity, and the absolute base line condition, that all powers vested in any organ of the State, including Parliament, may only be exercised for the benefit of India. All of its energies and focus ought to be directed only to that end. It may be the**

**case that an external aspect or cause, or welfare of the people elsewhere may also benefit the people of India. The laws enacted by Parliament may enhance the welfare of people in other territories too; nevertheless, the fundamental condition - the benefit to or of India – remains the central and primary purpose. That being the case, the logical corollary and, therefore, the second limitation that flows thereof, would be that an exercise of legislative powers by Parliament with regard to extra-territorial aspects or causes that do not have, or may be expected not to have any nexus with India, would transgress the first condition. Consequently, Parliament's powers to enact legislation, pursuant to Clause (1) of Article 245 may not extend to those extra-territorial aspects or causes that have no impact on or nexus with India. The word "for", that connects the territory of India to the legislative powers of Parliament in Clause (1) of Article 245, when viewed from the perspective of the people of India, implies that it is "our" Parliament, a jealously possessive construct that may not be tinkered with in any manner or form. [para 43-44] [412-H; 413-A-H]**

**3.2 The grant of the power to Parliament, in Clause (1) of Article 245, to legislate, comes with a limitation that arises out of the very purpose for which it has been constituted. That purpose is to continuously, and forever be acting in the interests of the people of India. It is a primordial condition and limitation. [para 45] [414-D]**

**3.3 No organ of the Indian State can be the repository of the collective powers of the people of India, unless that power is being used exclusively for the welfare of India. Incidentally, the said power may be used to protect, or enhance, the welfare of some other people, also; however, even that goal has to relate to, and be justified**



**by, the fact that such an exercise of power ultimately results in a benefit – either moral, material, spiritual or in some other tangible or intangible manner – to the people who constitute India. [para 45] [414-E-G]**

**3.4 The conclusion that Parliament may not legislate for territories beyond India also derives interpretational support from Article 51, a Directive Principle of State Policy, though not enforceable, nevertheless, fundamental in the governance of the country. To enact legislation with respect to extra-territorial aspects or causes, without any nexus to India, would in many measures be an abdication of the responsibility that has been cast upon Parliament under Article 51. International peace and security has been recognised as being vital for the interests of India. This is to be achieved by India maintaining just and honourable relations, by fostering respect for international and treaty obligations etc., as recognized in Article 51. It is one matter to say that because certain extra-territorial aspects or causes have an impact on or nexus with India, Parliament may enact laws with respect to such aspects or causes. That is clearly a role that has been set forth in the Constitution, and a power that the people of India can claim. How those laws are to be effectuated, and with what degree of force or diplomacy, may very well lie in the domain of pragmatic, and indeed ethical, statecraft that may, though not necessarily always, be left to the discretion of the Executive by Parliament. Nevertheless, that position is very different from claiming that India has the power to interfere in matters that have no nexus with India at all. To claim such powers, would be to make such powers available. Invariably available powers are used, and in this case with a direct impact on the moral force of India, and its interests, welfare and security, by shattering the very concepts that under-gird peace between nations. By**

**recognizing international peace to be sine qua non for India's welfare and security, the framers have charged the State, and all of its organs, with responsibility to endeavour to achieve the goals set forth in Article 51. To claim the power to legislate for some other territories, even though aspects or causes arising, occurring or existing there have no connection to India, would be to demolish the very basis on which international peace and security can be premised. [paras 46-47] [414-H; 415-A-D-H; 416-A-B]**

**3.5 If one were to read Clause (2) of Article 245 as an independent source of legislative power of Parliament to enact laws for territories beyond India wherein, neither the aspects or causes of such laws have a nexus with India, nor the purposes of such laws are for the benefit of India, it would immediately call into question as to why Clause (1) of Article 245 specifies that it is the territory of India or a part thereof "for" which Parliament may make laws. If the power to enact laws for any territory, including a foreign territory, were to be read into Clause (2) of Article 245, the phrase "for the whole or any part of the territory of India" in Clause (1) of Article 245 would become a mere surplassage. When something is specified in an Article of the Constitution it is to be taken, as a matter of initial assessment, as nothing more was intended. In this case it is the territory of India that is specified by the phrase "for the whole or any part of the territory of India." "Expressio unius est exclusio alterius"- the express mention of one thing implies the exclusion of another. In this case, Parliament has been granted powers to make laws "for" a specific territory – and that is India or any part thereof; by implication, one may not read that Parliament has been granted powers to make laws "for" territories beyond India. [para 54] [419-F-H; 420-A-C]**

**3.6 It would be pertinent to note, that List I – Union**



**List of the Seventh Schedule clearly lists out many matters that could be deemed to implicate aspects or causes that arise beyond the territory of India. In particular, but not limited to, note may be made of Entries 9 through 21 thereof. Combining the fact that Parliament has been granted residuary legislative powers and competence with respect to matters that are not enumerated in Concurrent and State Lists, [Article 248], the fact that Parliament has been granted legislative powers and competence over various matters, as listed in List I of the Seventh Schedule, many of which may clearly be seen to be falling in the class of extra-territorial aspects or causes, [Article 246], and the powers to make laws "for the whole or any part of the territory of India", [Article 245], it must be concluded that, contrary to the rigid reading of the ratio in ECIL, Parliament's legislative powers and competence with respect to extra-territorial aspects or causes that have a nexus with India was considered and provided for by the framers of the Constitution. Further, in as much as Article 245, and by implication Articles 246 and 248, specify that it is "for the whole or any part of the territory of India" that such legislative powers have been given to Parliament, it logically follows that Parliament is not empowered to legislate with respect to extra-territorial aspects or causes that have no nexus whatsoever with India. [para 59] [422-D-H; 423-A]**

**3.7 When one looks at Articles 249 (conditions under which Parliament may legislate with respect to matters in List II of Seventh Schedule, wherein the Council of States has deemed it to be in national interest to do so) and 250 (ambit of Parliamentary powers as inclusive of competence to legislate with respect to matters in the State List while a Proclamation of Emergency is in operation), one finds that legislative powers of Parliament**

**are spoken of, in the said articles also, only in terms of as being "for the whole or any part of the territory of India". Article 253 deals with legislation that may be needed to give effect to various international agreements, and again the powers are specified only in terms of making laws "for the whole or any part of the territory of India." It is a well known dictum of statutory and constitutional interpretation that when the same words or phrases are used in different parts of the Constitution, the same meaning should be ascribed, unless the context demands otherwise. In this case, there do not seem to be contextual reasons that would require reading a different meaning into the expression "for the whole or any part of the territory" in the context of Articles 249, 250 or 253, than what has been gathered from the text of Article 245. [para 60] [423-C-G]**

**3.8 Article 260, in Chapter II of Part XI is arguably the only provision in the Constitution that explicitly deals with the jurisdiction of the Union in relation to territories outside India, with respect to all three functions of governance – legislative, executive and judicial. On closer examination, Article 260 appears to further support the conclusions arrived at by this Court with respect to Article 245. [para 61]. [424-A-B]**

**3.9 It is clear from the text of Article 260 that it is the Government of India which may exercise legislative, executive, and judicial functions with respect of certain specified foreign territories, the Governments of which, and in whom such powers have been vested, have entered into an agreement with Government of India asking it do the same. Indeed, from Article 260, it is clear that Parliament may enact laws, whereby it specifies the conditions under which the Government of India may enter into such agreements, and how such agreements are actually implemented. [para 62] [424-E-F]**



**3.10 Nevertheless, the fact, even in the sole instance in the Constitution where it is conceived that India may exercise full jurisdiction – i.e., executive, legislative and judicial – over a foreign territory, is that such a jurisdiction can be exercised only upon an agreement with the foreign government (thereby comporting with international laws and principles such as "comity of nations" and respect for "territorial sovereignty" of other nation-states), and the manner of entering into such agreements, and the manner of effectuating such an agreement has to be in conformity with a law specifically enacted by Parliament (whereby the control of the people of India over the actions of the Government of India, even extra-territorially is retained), implies that it is only "for" India that Parliament may make laws. In this regard support can also be drawn from the text of Articles 1 and 2. Consequently, the positive affirmation, in the phrase in Clause (1) of Article 245, that Parliament "may make laws for the whole or any part of the territory of India" has to be understood as meaning that unless a territory is a part of the territory of India, Parliament may not exercise its legislative powers in respect of such a territory. In the constitutional scheme it is clear that Parliament may not make laws for a territory, as a first order condition, unless that territory is a part of India. [para 63, 64] [424-G-H; 425-A-B-E; 426-A-B]**

*Berubari Union and Exchange of Enclaves,* **Re AIR 1960 SC 845 - referred to.**

**3.11 Clearly, the statements that under our Constitution, Parliament has been given absolute powers and, therefore, it can enact extra-territorial laws, are not in comport with present day constitutional jurisprudence in India that the powers of every organ of the State are as provided for in the Constitution and not absolute. [para 67] [428-F]**

**3.12 Indeed, it may be necessary for the State to possess some extraordinary powers, and exert considerable force to tackle situation with regard to foreign affairs or situations, both within and outside the territory, in which the government claims the existence of serious security risks or law and order problems. Nevertheless, all such powers, competence, and extent of force have to be locatable, either explicitly or implicitly, within the Constitution, and exercised within the four corners of constitutional permissibility, values and scheme. [para 68]**

**3.13 In granting Parliament the powers to legislate "for" India, and consequently also with respect to extra-territorial aspects or causes, the framers of our Constitution certainly intended that there be limits as to the manner in which, and the extent to which, the organs of the State, including Parliament, may take cognizance of extra-territorial aspects or causes, and exert the State powers (which are the powers of the collective) on such aspects or causes. The working of the principles of public trust, the requirement that all legislation by Parliament with respect to extra-territorial aspects or causes be imbued with the purpose of protecting the interests of, the welfare of and the security of India, along with Article 51, a Directive Principle of State Policy, though not enforceable in a court of law, nevertheless fundamental to governance, lends unambiguous support to the conclusion that Parliament may not enact laws with respect to extra-territorial aspects or causes, wherein such aspects or causes have no nexus whatsoever with India. [para 73] [432-G; 433-A-D]**

**3.14 Thus, Parliament is constitutionally restricted from enacting legislation with respect to extra-territorial aspects or causes that do not have, nor expected to have**



**any, direct or indirect, tangible or intangible impact(s) on or effect(s) in or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians. However, Parliament may exercise its legislative powers with respect to extra-territorial aspects or causes, – events, things, phenomena (howsoever commonplace they may be), resources, actions or transactions, and the like – that occur, arise or exist or may be expected to do so, naturally or on account of some human agency, in the social, political, economic, cultural, biological, environmental or physical spheres outside the territory of India, and seek to control, modulate, mitigate or transform the effects of such extra-territorial aspects or causes, or in appropriate cases, eliminate or engender such extra-territorial aspects or causes, only when such extra-territorial aspects or causes have, or are expected to have, some impact on, or effect in, or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians. [para 76] [435-A-F]**

**3.15 It is important to state and hold that the powers of legislation of Parliament with regard to all aspects or causes that are within the purview of its competence, including with respect to extra-territorial aspects or causes as delineated above, and as specified by the Constitution, or implied by its essential role in the constitutional scheme, ought not to be subjected to some a-priori quantitative tests, such as "sufficiency" or "significance" or in any other manner requiring a pre-determined degree of strength. All that would be required would be that the connection to India be real or expected to be real, and not illusory or fanciful. Whether a particular law enacted by Parliament does show such a real connection, or expected real connection, between the**

**extra-territorial aspect or cause and something in India or related to India and Indians, in terms of impact, effect or consequence, would be a mixed matter of fact and of law. Obviously, where Parliament itself posits a degree of such relationship, beyond the constitutional requirement that it be real and not fanciful, then the courts would have to enforce such a requirement in the operation of the law as a matter of that law itself, and not of the Constitution. [para 76] [435-G-H; 436-A-C]**

*Governor General in Council v. Raleigh Investment Co. Ltd.* **[1944] 12 ITR 265,** *Wallace Brothers and Co. v. Commissioner of Income Tax, Bombay* **[1948] 16 ITR 240 and** *State v. Narayandas Mangilal Dayame* **AIR 1958 Bom 68 – referred to.**

*Emmanuel Mortensen v. David Peters [1906] 8 F (J.) 93, Croft v. Dunphy* **[1933] A.C. 156 - referred to.**

**4.1 The distinction drawn in ECIL between "make laws" and "operation" of law is a valid one, and leads to a correct assessment of the relationship between Clauses (1) and (2) of Article 245. [para 16] [397-E-F]**

**4.2 It is important to draw a clear distinction between the acts & functions of making laws and the acts & functions of operating the laws. Making laws implies the acts of changing and enacting laws. The phrase operation of law, in its ordinary sense, means the effectuation or implementation of the laws. The acts and functions of implementing the laws, made by the legislature, fall within the domain of the executive. Moreover, the essential nature of the act of invalidating a law is different from both the act of making a law, and the act of operating a law. Invalidation of laws falls exclusively within the functions of the judiciary, and occurs after examination of the vires of a particular law.**



**While there may be some overlap of functions, the essential cores of the functions delineated by the meanings of the phrases "make laws" "operation of laws" and "invalidate laws" are ordinarily and essentially associated with separate organs of the state – the legislature, the executive and the judiciary respectively, unless the context or specific text, in the Constitution, unambiguously points to some other association. [para 51] [417-F-H; 418-A-B]**

**4.3 In Article 245 the words and phrases "make laws" "extra-territorial operation", and "invalidate" have been used in a manner that clearly suggests that the addressees implicated are the legislature, the executive and the judiciary respectively. While Clause (1) uses the verb "make" with respect to laws, thereby signifying the grant of powers, Clause (2) uses the past tense of make, "made", signifying laws that have already been enacted by Parliament. The subject of Clause (2) of Article 245 is the law made by Parliament, pursuant to Clause (1) of Article 245, and the object, or purpose, of Clause (2) of Article 245 is to specify that a law so made by Parliament, for the whole or any part of territory of India, should not be held to be invalid solely on the ground that such laws require extra-territorial operation. The only organ of the state which may invalidate laws is the judiciary. [para 52] [418-C-E]**

**4.4 Consequently, the text of Clause (2) of Article 245 should be read to mean that it reduces the general and inherent powers of the judiciary to declare a law ultra-vires only to the extent of that one ground of invalidation. However, it must be noted, as regards the judiciary's jurisdiction, that an a-priori, and a strained inference that is unsupported by the plain meaning of the text may not be made that the powers of the legislature to make laws**

**beyond the pale of judicial scrutiny have been expanded over and above that which has been specified. [para 52] [418-E-G]**

**4.5 Clause (2) of Article 245 acts as an exception, of a particular and a limited kind, to the inherent power of the judiciary to invalidate, if ultra-vires, any of the laws made by any organ of the State. It carves out a specific exception that a law made by Parliament, pursuant to Clause (1) of Article 245, for the whole or any part of the territory of India may not be invalidated on the ground that such a law may need to be operated extraterritorially. Nothing more. The power of the judiciary to invalidate laws that are ultra-vires flows from its essential functions, Constitutional structure, values and scheme, and indeed to ensure that the powers vested in the organs of the State are not being transgressed, and that they are being used to realise a public purpose that subserves the general welfare of the people. It is one of the essential defences of the people in a constitutional democracy. [para 53] [419-B-E]**

**4.6 Courts should always be very careful when vast powers are being claimed, especially when those claims are cast in terms of enactment and implementation of laws that are completely beyond the pale of judicial scrutiny and which the Constitutional text does not unambiguously support. To readily accede to demands for a reading of such powers in the constitutional matrix might inevitably lead to a destruction of the complex matrix that our Constitution is. A thorough textual analysis, combined with wider analysis of constitutional topology, structure, values and scheme has revealed a much more intricately provisioned set of powers to Parliament. Indeed, all the powers necessary for an organ of the State to perform its role completely and to**



**effectuate the Constitutional mandate, can be gathered from the text of the Constitution, properly analysed and understood in the wider context in which it is located. To give in to such demands, would be to run the risk of importing meanings and possibilities unsupportable by the entire text and structure of the Constitution. In the cases dealing with external affairs, or with some claimed grave danger or a serious law and order problem, external or internal, to or in India, it is even more important that courts be extra careful. [para 74] [433-D-H; 434-A-B]**

*Woods v. Cloyd W. Miller Co.,* **333 U.S. 138- referred to.**

**4.7 The point is about how much care should be exercised in interpreting the provisions of the Constitution. Very often, what the text of the Constitution says, when interpreted in light of the plain meaning, constitutional topology, structure, values and scheme, reveals the presence of all the necessary powers to conduct the affairs of the State even in circumstances that are fraught with grave danger. [para 75] [434-G-H; 435-A]**

**4.8 Parliament has no powers to legislate "for" any territory, other than the territory of India, or any part of it. It is obvious that Parliament is empowered to make laws with respect to aspects or causes that occur, arise or exist, or may be expected to do so, within the territory of India, and also with respect to extra-territorial aspects or causes that have an impact on or nexus with India. Such laws would fall within the meaning, purport and ambit of the grant of powers to Parliament to make laws "for the whole or any part of the territory of India", and they may not be invalidated on the ground that they may require extra-territorial operation. Any laws enacted by Parliament with respect to extra-territorial aspects or**

**causes that have no impact on or nexus with India would be ultra-vires and would be laws made "for" a foreign territory. [para 76] [435-D-G]**

*A.H. Wadia v. Commissioner of Income Tax, Bombay* **[1949] 17 ITR 63** *Rao Shiv Bahadur v. State of Vindhya Pradesh* **AIR 1953 SC 394,** *Clark v. Oceanic Contractors Inc.,* **[1983] A.C. 130** *Shrikant Bhalchandra v. State of Gujarat* **1994 ( 1 ) Suppl. SCR 569 = (1994) 5 SCC 459, and** *State of A.P. v. N.T.P.C.* **2002 ( 3 ) SCR 278 = (2002) 5 SCC 203 – cited**

*Ashbury v. Ellis* **[1893] A.C. 339 – cited.**

**Case Law Reference:**

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|---|---|---|
| **(1989) 2 SCC 642** | **referred to** | **para 3** |
| **[1946] A.C. 527** | **referred to** | **para 13** |
| **[1944] 12 ITR 265** | **referred to** | **para 24** |
| **[1948] 16 ITR 240** | **referred to** | **para 24** |
| **[1906] 8 F (J.) 93** | **referred to** | **para 24** |
| **[1933] A.C. 156** | **referred to** | **para 24** |
| **AIR 1958 Bom 68** | **referred to** | **para 24** |
| **[1949] 17 ITR 63** | **cited** | **para 24** |
| **AIR 1953 SC 394** | **cited** | **para 24** |
| **[1983] A.C. 130** | **cited** | **para 24** |
| **1994 (1) Suppl. SCR 569** | **cited** | **para 24** |
| **2002 (3) SCR 278** | **cited** | **para 24** |
| **[1893] A.C. 339** | **cited** | **para 24** |
| **1973 Suppl. SCR 1** | **relied on** | **para 26** |
| **2007 (1) SCR 706** | **relied on** | **para 26** |
| **AIR 1960 SC 845** | **referred to** | **para 64** |
| **333 U.S. 138** | **referred to** | **para 74** |



CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7796 of 1997.

From the Judgment & Order dated 02.05.1997 of the High Court of Andra Pradesh at Hyderabad in Writ Petition No. 6866 of 1995.

S. Ganesh, U.A. Rana, Mrinal Majumdar, Devina Seghal (for Gagrat & Co.) for the Appellants.

Goolam E. Vahanvati, AG, Rupesh Kumar, Arijit Prasad, D.D. Kamat, Rohit Sharma, Mihir Chatterjee, Nishanth Patil, Naila Jung, Anoopam Prasad, B.V. Balaram Das, Sushma Suri for the Respondents.

The Judgment of the Court was delivered by

**B.SUDERSHAN REDDY,J:** 1. In any federal or quasi federal nation-state, legislative powers are distributed territorially, and legislative competence is often delineated in terms of matters or fields. The latter may be thought of as comprising of aspects or causes that exist independently in the world, such as events, things, phenomena (howsoever commonplace they may be), resources, actions or transactions, and the like, that occur, arise or exist or may be expected to do so, naturally or on account of some human agency, in the social, political, economic, cultural, biological, environmental or physical spheres. The purpose of legislation would be to seek the exertion of the State power to control, modulate, transform, eliminate or engender such aspects or causes or the effects or consequences of such aspects or causes. While the purpose of legislation could be seen narrowly or purely in terms of intended effects on such aspects or causes, obviously the powers have to be exercised in order to enhance or protect the

interests of, the welfare of, the well-being of, or the security of the territory, and the inhabitants therein, for which the legislature has been charged with the responsibility of making laws. Paraphrasing President Abraham Lincoln, we can say that State and its government, though of the people, and constituted by the people, has to always function "for" the people, indicating that the mere fact that the state is organized as a democracy does not necessarily mean that its government would always act "for" the people. Many instances of, and vast potentialities for, the flouting of that norm can be easily visualized. In Constitutions that establish nation-states as sovereign democratic republics, those expectations are also transformed into limitations as to how, in what manner, and for what purposes the collective powers of the people are to be used.

2. The central constitutional themes before us relate to whether the Parliament's powers to legislate, pursuant to Article 245, include legislative competence with respect to aspects or causes that occur, arise or exist or may be expected to do so, outside the territory of India. It is obvious that legislative powers of the Parliament incorporate legislative competence to enact laws with respect to aspects or causes that occur, arise or exist, or may be expected to do so, within India, subject to the division of legislative powers as set forth in the Constitution. It is also equally obvious and accepted that only Parliament may have the legislative competence, and not the state legislatures, to enact laws with respect to matters that implicate the use of state power to effectuate some impact or effect on aspects or causes that occur, arise or exist or may be expected to do so, outside the territory of India.

3. Two divergent, and dichotomous, views present themselves before us. The first one arises from a rigid reading of the ratio in *Electronics Corporation of India Ltd., v. Commissioner of Income Tax & An'r.,*[1] ("ECIL") and suggests that Parliaments powers to legislate incorporate only a

1. (1989) (2) SCC 642-646.



competence to enact laws with respect to aspects or causes that occur, arise or exist, or may be expected to do so, solely within India. A slightly weaker form of the foregoing strict territorial nexus restriction would be that the Parliament's competence to legislate with respect to extra-territorial aspects or causes would be constitutionally permissible if and only if they have or are expected to have significant or sufficient impact on or effect in or consequence for India. An even weaker form of the territorial nexus restriction would be that as long as some impact or nexus with India is established or expected, then the Parliament would be empowered to enact legislation with respect to such extra-territorial aspects or causes. The polar opposite of the territorial nexus theory, which emerges also as a logical consequence of the propositions of the learned Attorney General, specifies that the Parliament has inherent powers to legislate "for" any territory, including territories beyond India, and that no court in India may question or invalidate such laws on the ground that they are extra-territorial laws. Such a position incorporates the views that Parliament may enact legislation even with respect to extra-territorial aspects or causes that have no impact on, effect in or consequence for India, any part of it, its inhabitants or Indians, their interests, welfare, or security, and further that the purpose of such legislation need not in any manner or form be intended to benefit India.

4. Juxtaposing the two divergent views outlined above, we have framed the following questions:

(1) Is the Parliament constitutionally restricted from enacting legislation with respect to extra-territorial aspects or causes that do not have, nor expected to have any, direct or indirect, tangible or intangible impact(s) on, or effect(s) in, or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians?

(2) Does the Parliament have the powers to legislate "for"

any territory, other than the territory of India or any part of it?

5. It is necessary to note the text of Article 245 and Article 1 at this stage itself:

> **"Article 245. Extent of laws made by Parliament and by the Legislatures of States –** (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.
>
> (2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation."
>
> **"Article 1. Name and territory of the Union** – (1) India, that is Bharat, shall be a Union of States. (2) The States and the territories thereof shall be as specified in the First Schedule. (3) The territory of India shall comprise –
>
> (a) The territories of the States;
>
> (b) the Union territories specified in the First Schedule; and
>
> (c) such other territories as may be acquired."

**II**

Meanings of some phrases and expressions used hereinafter:

6. Many expressions and phrases, that are used contextually in the flow of language, involving words such as "interest", "benefit", "welfare", "security" and the like in order to specify the purposes of laws, and their consequences can, have a range of meanings. In as much as some of those expressions will be used in this judgment, we are setting forth below a range of meanings that may be ascribable to such expressions and phrases:



"aspects or causes" "aspects and causes":

> events, things, phenomena (howsoever commonplace they may be), resources, actions or transactions, and the like, in the social, political, economic, cultural, biological, environmental or physical spheres, that occur, arise, exist or may be expected to do so, naturally or on account of some human agency.

"extra-territorial aspects or causes":

> aspects or causes that occur, arise, or exist, or may be expected to do so, outside the territory of India.

"nexus with India", "impact on India", "effect in India", "effect on India", "consequence for India" or "impact on or nexus with India"

> any impact(s)on, or effect(s) in, or consequences for, or expected impact(s) on, or effect(s) in, or consequence(s) for: (a) the territory of India, or any part of India; or (b)the interests of, welfare of, wellbeing of or security of inhabitants of India, and Indians in general, that arise on account of aspects or causes.

"benefit to India" or "for the benefit of India", "to the benefit of India", "in the benefit of India" or " to benefit India" or "the interests of India", "welfare of India", "well-being of India" etc.:

> protection of and/or enhancement of the interests of, welfare of, well-being of, or the security of India (i.e., the whole territory of India), or any part of it, its inhabitants and Indians.

**III**

Factual Background as to how the matter arose before us.

7. The Appellant by way of a writ petition filed in Andhra Pradesh High Court had challenged an order of the

Respondents which decided that the Appellant was liable to withhold a certain portion of monies being paid to a foreign company, under either one of Sections 9(1)(i) or 9(1)(vii)(b) of the Income Tax Act (1961). The Appellant had also challenged the vires of Section 9(1)(vii)(b) of the Income Tax Act (1961) for want of legislative competence and violation of Article 14 of the Constitution. The High Court having upheld that Section 9(1)(i) did not apply in the circumstances of the facts of the case, nevertheless upheld the applicability of Section 9(1)(vii)(b) on the facts and also upheld the constitutional validity of the said provision. The High Court mainly relied on the ratio of the judgment by a three judge bench of this court in ECIL. Hence, the appeal.

8. The matter came up for consideration before a two judge bench of this Court. In light of the far reaching issues of great constitutional purport raised in this matter, the fact that such issues had been raised previously in ECIL, the referencing of some of those issues by the three judge bench in ECIL to a constitutional bench, and the fact that the civil appeals in the ECIL case had also been withdrawn, a two judge bench of this Court vide its order dated November 28, 2000, also referred the instant matter to a constitutional bench. On July 13, 2010, the matter again came up for consideration before another three judge bench of this court, and vide its order of the same date, this matter came to be placed before us.

9. It is necessary for purposes of clarity that a brief recounting be undertaken at this stage itself as to what was conclusively decided in ECIL, and what was referred to a constitutional bench. After conclusively determining that Clauses (1) and (2) of Article 245, read together, impose a requirement that the laws made by the Parliament should bear a nexus with India, the three judge bench in ECIL asked that a constitutional bench be constituted to consider whether the ingredients of the impugned provision, i.e., Section 9(1)(vii) of the Income Tax Act (1961) indicate such a nexus. In the proceedings before us, the



appellant withdrew its challenge of the constitutional validity of Section 9(1)(vii)(b) of the Income Tax Act (1961), and elected to proceed only on the factual matrix as to the applicability of the said section. Nevertheless, the learned Attorney General appearing for the Respondent pressed upon this Constitutional Bench to reconsider the decision of the three judge bench in the ECIL case. In light of the constitutional importance of the issues we agreed to consider the validity of the requirement of a relationship to or nexus with the territory of India as a limitation on the powers of the Parliament to enact laws pursuant to Clause (1) of Article 245 of the Constitution.

10. A further clarification needs to be made before we proceed. The issue of whether laws that deal entirely with aspects or causes that occur, arise or exist, or may be expected to do so, within India, and yet require to be operated outside the territory of India could be invalidated on the grounds of such extra-territorial operation is not before us. The text of Clause (2) of Article 245, when read together with Clause (1) of Article 245 makes it sufficiently clear that the laws made by the Parliament relating to aspects or causes that occur, arise or exist or may be expected to occur, arise or come into existence within the territory of India may not be invalidated on the ground that such laws require to be operated outside the territory of India. We will of course deal with this aspect to the extent that it is required for a proper appreciation of Clause (1) of Article 245, and to the extent the permissibility of such extra-territorial operation has been sought to be, by the learned Attorney General, extrapolated into a power to make any extra-territorial laws.

## IV

The ratio in ECIL:

11. The requirement of a nexus with the territory of India was first explicitly articulated in the decision by a three judge Bench of this court in ECIL. The implication of the nexus

requirement is that a law that is enacted by the Parliament, whose "objects" or "provocations" do not arise within the territory of India, would be unconstitutional. The words "object" and "provocation", and their plural forms, may be conceived as having been used in ECIL as synonyms for the words "aspect" and "cause", and their plural forms, as used in this judgment.

12. The issue under consideration in ECIL was whether Section 9(1)(vii)(b) of the Income Tax Act (1961) was unconstitutional on the ground that it constitutes a law with respect to objects or provocations outside the territory of India, thereby being ultra-vires the powers granted by Clause (1) of Article 245. Interpreting Clauses (1) and (2) of Article 245, Chief Justice Pathak (as he then was) drew a distinction between the phrases "make laws" and "extraterritorial operation" – i.e., the acts and functions of making laws versus the acts and functions of effectuating a law already made.

In drawing the distinction as described above, the decision in ECIL considered two analytically separable, albeit related, issues. They relate to the potential conflict between the fact that, in the international context, the "principle of Sovereignty of States" (i.e., nation-states) would normally be "that the laws made by one State can have no operation in another State" (i.e., they may not be enforceable), and the prohibition in Clause (2) of Article 245 that laws made by the Parliament may not be invalidated on the ground that they may need to be or are being operated extra-territorially.

13. The above is of course a well recognized problem that has been grappled with by courts across many jurisdictions in the world; and in fact, many of the cases cited by the learned Attorney General attest to the same. Relying on the ratio of *British Columbia Railway Company Limited v. King,*[2] the principle that was enunciated in ECIL was that the problems of inability to enforce the laws outside the territory of a nation state cannot be grounds to hold such laws invalid. It was further held that the courts in the territory of the nation-state, whose legislature enacted the law, ought to nevertheless order that a law requiring extra-territorial operation be implemented to the extent possible with the machinery available. It can of course be clearly appreciated that the said principle falls within the ambit of the prohibition of Clause (2) of Article 245. The same was stated by Chief Justice Pathak (as he then was) thus:

> "Now it is perfectly clear that it is envisaged under our constitutional scheme that *Parliament in India may make laws which operate extra-territorially.* Art. 245(1) of the Constitution *prescribes the extent of laws made by the Parliament.* They may be *made for the whole or any part of the territory of India.* Article 245(2) declares that *no law made by the Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.* Therefore, a Parliamentary statute having extra-territorial operation cannot be ruled out from contemplation. The operation of the law can extend to persons, things and acts outside the territory of India"[3] (emph. added).

14. However, the principle enunciated above does not address the question as to whether the Parliament may enact a law "for" a territory outside the boundaries of India. To enact laws "for" a foreign territory could be conceived of in two forms. The first form would be, where the laws so enacted, would deal with or be in respect of extra-territorial aspects or causes, and the laws would seek to control, modulate or transform or in some manner direct the executive of the legislating State to act upon such extra-territorial aspects or causes because: (a) such extra-territorial aspects or causes have some impact on or nexus with or to India; and (b) such laws are intended to benefit India. The second form would be when the extra-territorial aspects do not have, and neither are expected to have, any nexus whatsoever

2. [1946] A.C. 527.

3. Supra Note 1.

with India, and the purpose of such legislation would serve no purpose or goal that would be beneficial to India.

15. It was concluded in ECIL that the Parliament does not have the powers to make laws that bear no relationship to or nexus with India. The obvious question that springs to mind is: "what kind of nexus?" Chief Justice Pathak's words in ECIL are instructive in this regard, both as to the principle and also the reasoning:

> "But the question is whether *a nexus with something in India is necessary.* It seems to us that *unless such nexus exists Parliament will have no competence to make the law.* It will be noted that Article 245(1) empowers Parliament to enact laws *for the whole or any part of the territory of India. The provocation for the law must be found within India itself. Such a law may have extra-territorial operation in order to subserve the object, and that object must be related to something in India.* It is inconceivable that a law should be made by parliament which has no relationship with anything in India."[4] (emphasis added).

16. We are of the opinion that the distinction drawn in ECIL between "make laws" and "operation" of law is a valid one, and leads to a correct assessment of the relationship between Clauses (1) and (2) of Article 245. We will have more to say about this, when we turn our attention to the propositions of the learned Attorney General.

17. We are, in this matter, concerned with what the implications might be, due to use of words "provocation", "object", "in" and "within" in connection with Parliament's legislative powers regarding "the whole or any part of the territory of India", on the understanding as to what aspects and/or causes that the Parliament may legitimately take into consideration in exercise of its legislative powers. A particularly

4. Supra note 1.



narrow reading or understanding of the words used could lead to a strict territorial nexus requirement wherein the Parliament may only make laws with respect to objects or provocations – or alternately, in terms of the words we have used "aspects and causes" – that occur, arise or exist or may be expected to occur, arise or exist, solely within the territory of India, notwithstanding the fact that many extra-territorial objects or provocations may have an impact or nexus with India. Two other forms of the foregoing territorial nexus theory, with weaker nexus requirements, but differing as to the applicable tests for a finding of nexus, have been noted earlier.

## V

The Propositions of the learned Attorney General:

18. It appeared that the learned Attorney General was concerned by the fact that the narrow reading of Article 245, pace the ratio in ECIL, could significantly incapacitate the one legislative body, the Parliament, charged with the responsibility of legislating for the entire nation, in dealing with extra-territorial aspects or causes that have an impact on or nexus with India. India has a parliamentary system of governance, wherein the Executive, notwithstanding its own domain of exclusive operation, is a part of, and answerable to, the Parliament. Further, given that the Executive's powers are co-extensive with that of the Parliament's law making powers, such a narrow reading of Article 245 could significantly reduce the national capacity to make laws in dealing with extra-territorial aspects that have an impact on or nexus with India. Clearly, that would be an anomalous construction.

19. In attacking such a construction, the learned Attorney General appeared to have moved to another extreme. The written propositions of the learned Attorney General, with respect to the meaning, purport and ambit of Article 245, quoted verbatim, were the following:

1. "There is clear distinction between a Sovereign

Legislature and a Subordinate Legislature.

2. It cannot be disputed that a Sovereign Legislature has full power to make extra-territorial laws.

3. The fact that it may not do so or that it will exercise restraint in this behalf arises not from a Constitutional limitation on its powers but from a consideration of applicability.

4. This does not detract from its inherent rights to make extra-territorial laws.

5. In any case, the domestic Courts of the country cannot set aside the legislation passed by a Sovereign Legislature on the ground that it has extra-territorial effect or that it would offend some principle of international law.

6. The theory of nexus was evolved essentially from Australia to rebut a challenge to Income Tax laws on the ground of extra-territoriality.

7. The principle of nexus was urged as a matter of construction to show that the law in fact was not extra-territorial because it had a nexus with the territory of the legislating State.

8. The theory of nexus and the necessity to show the nexus arose with regard to State Legislature under the Constitution since the power to make extra-territorial laws is reserved only for the Parliament".

21. In as much as the issues with regard to operation of laws enacted by the various state legislatures are not before us, we decline to express our opinion with respect to historical antecedents of nexus theory in the context of division of powers between a federation and the federal provinces. Given the fact that the learned Attorney General has not further refined or



explicated the propositions as set forth above, we are compelled to assume that he intended us to take it that the Parliament should be deemed to have the powers and competence as set forth below, which arise out of a rigorous analysis of his propositions, and consequently examine them in light of the text of Article 245.

22. The main propositions are that the Parliament is a "sovereign legislature", and that such a "sovereign legislature has full power to make extra-territorial laws." They can be analysed in the following two ways:

(i) As a matter of first level of assessment, the phrase "full power to make extra-territorial laws" would implicate the competence to legislate with respect to extra-territorial aspects or causes that have an impact on or nexus with India, wherein the State machinery is directed to achieve the goals of such legislation by exerting force on such extra-territorial aspects or causes to modulate, change, transform, eliminate or engender them or their effects. At the next level, such powers would also implicate legislative competence to make laws that direct the state machinery, in order to achieve the goals of such legislation, to exert force on extra-territorial aspects or causes that do not have any impact on or nexus with India to modulate, change, transform, eliminate or engender them or their effects. We take it that the learned Attorney General has proposed that both the forms outlined above are within the constitutionally permissible limits of legislative powers and competence of the Parliament.

(ii) The same proposition can also be viewed from the perspective of the goals that such "extra-territorial laws" seek to accomplish, and the relationship of such goals to the territory for which such laws are

intended to affect, as well as India. Modern jurisprudence, and not just international law or international ethics, does not support the view that legislative commands that are devoid of justice can be given the status of being "law". The extent of abuse of the theory of "rule of law", in its absolutist sense, in history, and particularly in the 20th Century, has effectively undermined the legitimacy of the notion that whatever the purpose that law seeks to achieve is justice. Consequently, we will assume that the learned Attorney General did not mean that Parliament would have powers to enact extra-territorial laws with respect to foreign territories that are devoid of justice i.e., they serve no benefits to the denizens of such foreign territories. Arguably India, as a nation-state, has not been established, nor has it developed, with an intent to be an expansionary or an imperialist power on the international stage; consequently we will also not be examining the proposition that the extra-territorial laws enacted the Parliament, and hence "for" that foreign territory, could be exploitative of the denizens of another territory, and yet be beneficial to India in its narrow sense. A valid argument can also be made that such an exploitative situation would be harmful to India's moral stature on the international plane, and also possibly deleterious to international peace, and consequently damaging to India's long run interests. To the extent that extra-territorial laws enacted have to be beneficial to the denizens of another territory, three implications arise. The first one is when such laws do benefit the foreign territory, and benefit India too. The second one is that they benefit the denizens of that foreign territory, but do not adversely affect India's interests. The third one would be when such extra-territorial laws benefit the denizens of the foreign territory, but



are damaging to the interests of India. We take it that the learned Attorney General has proposed that all three possibilities are within constitutionally permissible limits of legislative powers and competence of the Parliament.

23. The further proposition of the learned Attorney General, is that courts in India do not have the powers to declare the "extra-territorial laws" enacted by the Parliament invalid, on the ground that they have an "extra-territorial effect", notwithstanding the fact: (a) that such extra-territorial laws are with respect to extra-territorial aspects or causes that have no impact on or nexus with India; (b) that such extra-territorial laws do not in any manner or form work to, or intended to be or hew to the benefit of India; and (c) that such extra-territorial laws might even be detrimental to India. The word "extra-territorial-effect" is of a much wider purport than "extra-territorial operation", and would also be expected to include within itself all the meanings of "extra-territorial law" as explained above. The implication of the proposed disability is not merely that the judiciary, under our constitution, is limited from exercising the powers of judicial review, on specific grounds, over a clearly defined set of laws, with a limited number of enactments; rather, it would be that the judiciary would be so disabled with regard to an entire universe of laws, that are undefined, and unspecified. Further, the implication would also be that the judiciary has been stripped of its essential role even where such extra-territorial laws may be damaging to the interests of India.

24. In addition the learned Attorney General has also placed reliance on the fact that the Clause 179 of the Draft Constitution, was split up into two separate clauses, Clause 179(1) and Clause 179(2), by the Constitution Drafting Committee, and adopted as Clauses (1) and (2) of Article 245 in the Constitution. It seemed to us that the learned Attorney General was seeking to draw two inferences from this. The first one seemed to be that the Drafting Committee intended Clause 179(2), and hence Clause (2) of Article 245, to be an

independent, and a separate, source of legislative powers to the Parliament to make "extra-territorial laws". The second inference that we have been asked to make is that in as much as Parliament has been explicitly permitted to make laws having "extra-territorial operation", Parliament should be deemed to possess powers to make "extra-territorial laws", the implications of which have been more particularly explicated above. The learned Attorney General relied on the following case law in support his propositions and arguments: *Ashbury v. Ellis*[5], *Emmanuel Mortensen v. David Peters*[6], *Croft v. Dunphy*[7], *British Columbia Electric Railway Company Ltd. V. The King*[8], *Governor General in Council v. Raleigh Investment Co. Ltd.*[9], *Wallace Brothers and Co. v. Commissioner of Income Tax, Bombay*[10], *A.H. Wadia v. Commissioner of Income Tax, Bombay*[11] and *State v. Narayandas Mangilal Dayame,*[12] *Rao Shiv Bahadur v. State of Vindhya Pradesh,*[13] *Clark v. Oceanic Contractors Inc.,*[14] *Shrikant Bhalchandra v. State of Gujarat,*[15] and *State of A.P. v. N.T.P.C.*[16]

**VI**

Constitutional Interpretation:

25. We are acutely aware that what we are interpreting is a provision of the Constitution. Indeed the Constitution is law,

5. [1893] A.C. 339.
6. [1906] 8 F (J.) 93.
7. [1933] A.C. 156.
8. [1946] A.C. 527.
9. [1944] 12 ITR 265.
10. [1948] 16 ITR 240.
11. [1949] 17 ITR 63.
12. AIR 1958 Bom 68.
13. AIR 1953 394.
14. [1983] A.C. 130.
15. (1994) 5 SCC 459.
16. (2002) 5 SCC 203.



in its ordinary sense too; however, it is also a law made by the people as a nation, through its Constituent Assembly, in a foundational and a constitutive moment. Written constitutions seek to delineate the spheres of actions of, with more or less strictness, and the extent of powers exercisable therein by, various organs of the state. Such institutional arrangements, though political at the time they were made, are also legal once made. They are legal, inter-alia, in the sense that they are susceptible to judicial review with regard to determination of vires of any of the actions of the organs of the State constituted. The actions of such organs are also justiciable, in appropriate cases, where the values or the scheme of the Constitution may have been transgressed. Hence clarity is necessary with respect to the extent of powers granted and the limits on them, so that the organs of the State charged with the working of the mandate of the Constitution can proceed with some degree of certitude.

26. In such exercises we are of the opinion that a liberal and more extensive interpretative analysis be undertaken to ensure that the court does not, inadvertently and as a consequence of not considering as many relevant issues as possible, unnecessarily restrict the powers of another coordinate organ of the State. Moreover, the essential features of such arrangements, that give the Constitution its identity, cannot be changed by the amending powers of the very organs that are constituted by it. Under our Constitution, while some features are capable of being amended by Parliament, pursuant to the amending power granted by Article 368, the essential features – the basic structure – of the Constitution is beyond such powers of Parliament. The power to make changes to the basic structure of the Constitution vests only in the people sitting, as a nation, through its representatives in a Constituent Assembly. (See *Keshavanadna Bharati v. State of Kerala*[17] and *I.R. Coelho v. State of Tamil Nadu*[18]). One of

17. (1973) 4 SCC 225.
18. (2007) 2 SCC 1.

the foundational elements of the concept of basic structure is it would give the stability of purpose, and machinery of government to be able to pursue the constitutional vision in to the indeterminate and unforeseeable future.

27. Our Constitution charges the various organs of the state with affirmative responsibilities of protecting the interests of, the welfare of and the security of the nation. Legislative powers are granted to enable the accomplishment of the goals of the nation. The powers of judicial review are granted in order to ensure that legislative and executive powers are used within the bounds specified in the Constitution. Consequently, it is imperative that the powers so granted to various organs of the state are not restricted impermissibly by judicial fiat such that it leads to inabilities of the organs of the State in discharging their constitutional responsibilities. Powers that have been granted, and implied by, and borne by the Constitutional text have to be perforce admitted. Nevertheless, the very essence of constitutionalism is also that no organ of the state may arrogate to itself powers beyond what is specified in the Constitution. Walking on that razors edge is the duty of the judiciary. Judicial restraint is necessary in dealing with the powers of another coordinate branch of the government; but restraint cannot imply abdication of the responsibility of walking on that edge.

28. In interpreting any law, including the Constitution, the text of the provision under consideration would be the primary source for discerning the meanings that inhere in the enactment. However, in light of the serious issues it would always be prudent, as a matter of constitutional necessity, to widen the search for the true meaning, purport and ambit of the provision under consideration. No provision, and indeed no word or expression, of the Constitution exists in isolation – they are necessarily related to, transforming and in turn being transformed by, other provisions, words and phrases in the Constitution. Our Constitution is both long and also an intricate matrix of meanings, purposes and structures. It is only by



locating a particular constitutional provision under consideration within that constitutional matrix could one hope to be able to discern its true meaning, purport and ambit. As Prof. Laurence Tribe points out:

> "[T]o understand the Constitution as a legal text, it is essential to recognize the… sort of text it is: a constitutive text that purports, in the name of the people….., to bring into being a number of distinct but inter-related institutions and practices, at once legal and political, and to define the rules governing those institutions and practices." (See: Reflections on Free-Form Method in Constitutional Interpretation)[19]

29. It has been repeatedly appreciated by this Court that our Constitution is one of the most carefully drafted ones, where every situation conceivable, within the vast experience, expertise and knowledge of our framers, was considered, deliberated upon, and appropriate features and text chosen to enable the organs of the State in discharging their roles. While indeed dynamic interpretation is necessary, if the meaning necessary to fit the changed circumstances could be found in the text itself, we would always be better served by treading a path as close as possible to the text, by gathering the plain ordinary meaning, and by sweeping our vision and comprehension across the entire document to see whether that meaning is validated by constitutional values and scheme.

30. However, it can also be appreciated that given the complexity and the length of our Constitution, the above task would be gargantuan. One method that may be adopted would be to view the Constitution as composed of constitutional topological spaces. Each Part of the Constitution deals with certain core functions and purposes, though aspects outside such a core, which are contextually necessary to be included, also find place in such Parts. In the instant case Chapter 1, Part XI, in which Article 245 is located, is one such constitutional

19. 108 Harv. L. Rev. 1221, 1235 (1995).

topological space. Within such a constitutional topological space, one would expect each provision therein to be intimately related to, gathering meaning from, and in turn transforming the meaning of, other provisions therein. By locating the transformative effects within such constitutional topological space, we would then be able to gather what the core, and untransformed features are. However, this method needs to be carefully used – constitutional topological spaces are not to be taken as water tight compartments, which when studied in isolation would return necessarily unerring truths about the Constitution. The potential that a transformative, or even a confirmative, understanding can emerge directly from any other part of the Constitution is something that we must always be cognizant of. Nevertheless, to the extent that the Constitution has been arranged in a particular manner by our framers, thereby giving us some guide posts for navigation of the text and its implications for our socio-political lives, such constitutional topological spaces, when primarily used for validation of unambiguous textual meanings, would ease our epistemological burdens.

**VII**

Textual Analysis of Article 245:

31. Prior to embarking upon a textual analysis of Clauses (1) and (2) of Article 245, it is also imperative that we bear in mind that a construction of provisions in a manner that renders words or phrases therein to the status of mere surplussage ought to be avoided.

32. The subject in focus in the first part of Clause (1) of Article 245 is "the whole or any part of the territory of India", and the object is to specify that it is the Parliament which is empowered to make laws in respect of the same. The second part of Clause (1) of Article 245 deals with the legislative powers of State legislatures.



33. The word that links the subject, "the whole or any part of the territory of India" with the phrase that grants legislative powers to the Parliament, is "for". It is used as a preposition. The word "for", when ordinarily used as a preposition, can signify a range of meanings between the subject, that it is a preposition for, and that which preceded it:

> "-prep 1 in the interest or to the benefit of; intended to go to; 2 in defence, support or favour of 3 suitable or appropriate to 4 in respect of or with reference to 5 representing or in place of..... 14. conducive or conducively to; in order to achieve..." (See: Concise Oxford English Dictionary)[20]

34. Consequently, the range of senses in which the word "for" is ordinarily used would suggest that, pursuant to Clause (1) of Article 245, the Parliament is empowered to enact those laws that are in the interest of, to the benefit of, in defence of, in support or favour of, suitable or appropriate to, in respect of or with reference to "the whole or any part of the territory of India".

35. The above understanding comports with the contemporary understanding, that emerged in the 20th Century, after hundreds of years of struggle of humanity in general, and nearly a century long struggle for freedom in India, that the State is charged with the responsibility to always act in the interest of the people at large. In as much as many extra-territorial aspects or causes may have an impact on or nexus with the nation-state, they would legitimately, and indeed necessarily, be within the domain of legislative competence of the national parliament, so long as the purpose or object of such legislation is to benefit the people of that nation state.

36. The problem with the manner in which Article 245 has been explained in the ratio of ECIL relates to the use of the words "provocation", and "object" as the principal qualifiers of

20. 8th Ed., OUP (Oxford, 1990).

"laws," and then specifying that they need to arise "in" or "within" India. The word "provocation" generally implies a cause - i.e., an inciting or a motivating factor - for an action or a reaction that seeks to control, eliminate, mitigate, modulate or otherwise transform both the independently existing aspects in the world and also their effects which had provoked or provokes the action or reaction. "Provocation" may also be used, in a proactive sense, to signify the end or goal sought to be achieved rather than in the reactive sense – as a response to independently occurring aspects in the world. Similarly, the word "object" can mean any aspect that exists independently in the world, of which a human agency takes cognizance of, and then decides to take some action. In this sense the word "object" would carry the same meaning as "provocation" in the first sense of that word delineated above. The word "object" can also mean the end goal or purpose to be achieved by an action or a reaction to an independent aspect or cause in the world. In legal discourse, particularly in the task of interpreting statutes, and the law, the said words could be used in both the senses. The tools of "purposive interpretation" and the "mischief rule" ought to come to mind.

37. Consequently, the ratio of ECIL could wrongly be read to mean that both the "provocations" and "objects" – in terms of independent aspects or causes in the world - of the law enacted by Parliament, pursuant to Article 245, must arise solely "in" or "within" the territory of India. Such a narrowing of the ambit of Clause (1) of Article 245 would arise by substituting "in" or "within", as prepositions, in the place of "for" in the text of Article 245. The word "in", used as a preposition, has a much narrower meaning, expressing inclusion or position within limits of space, time or circumstance, than the word "for". The consequence of such a substitution would be that Parliament could be deemed to not have the powers to enact laws with respect to extra-territorial aspects or causes, even though such aspects or causes may be expected to have an impact on or nexus with India, and laws with respect to such aspects or causes would be beneficial to India.



38. The notion that a nation-state, including its organs of governance such as the national legislature, must be concerned only with respect to persons, property, things, phenomenon, acts or events within its own territory emerged in the context of development of nation-states in an era when external aspects and causes were thought to be only of marginal significance, if at all. This also relates to early versions of sovereignty that emerged along with early forms of nation-states, in which internal sovereignty was conceived of as being absolute and vested in one or some organs of governance, and external sovereignty was conceived of in terms of co-equal status and absolute non-interference with respect to aspects or causes that occur, arise or exist, or may be expected to do so, in other territories. Oppenheim's International Law[21] states as follows:

> "The concept of sovereignty was introduced and developed in political theory in the context of the power of the ruler of the state over everything within the state. Sovereignty was, in other words, primarily a matter of internal constitutional power…. The 20th century has seen the attempt, particularly through the emergence in some instances of extreme nationalism, to transpose this essentially internal concept of sovereignty on to the international plane. In its extreme forms such a transposition is inimical to the normal functioning and development of international law and organization. It is also inappropriate….. no state has supreme legal power and authority over other states in general, nor are states generally subservient to the legal power and authority of other states. Thus the relationship of states on the international plane is characterized by their equality, independence, and in fact, by their interdependence."

39. On account of scientific and technological developments the magnitude of cross border travel and transactions has increased tremendously. Moreover, existence

21. Vol 1, "PEACE" 9th ed., page 125, 9 (Longman Group, UK, 1992).

of economic, business, social and political organizations and forms, of more or less determinate structure, and both recognized and unrecognized, that operate across borders, implies that their activities, even though conducted in one territory may have an impact on or in another territory. Externalities arising from economic activities, including but not limited to large scale exploitation of natural resources, and consequent pressure on delicate global environmental balance, are being recognized to be global in scope and impact. Global criminal and terror networks are also examples of how events and activities in a territory outside one's own borders could affect the interests, welfare, well-being and security within. Many other examples could also be adduced. For instance, the enablement, by law, of participation of the State in many joint, multilateral or bilateral efforts at coordination of economic, fiscal, monetary, trade, social, law enforcement activities, reduction of carbon emissions, prevention or mitigation of war in another region or maintenance of peace and security, etc., may be cited as additional examples of such inter-territorial dependence.

40. Within international law, the principles of strict territorial jurisdiction have been relaxed, in light of greater interdependencies, and acknowledgement of the necessity of taking cognizance and acting upon extra-territorial aspects or causes, by principles such as subjective territorial principle, objective territorial principle, the effects doctrine that the United States uses, active personality principle, protective principle etc. However, one singular aspect of territoriality remains, and it was best stated by Justice H.V. Evatt: "The extent of extra-territorial jurisdiction permitted, or rather not forbidden, by international law cannot always be stated with precision. But certainly no State attempts to exercise jurisdiction over matters, persons, or things with which it has absolutely no concern." (See *Trustees Executors & Agency Co Ltd v. Federal Commissioner of Taxation*[22]). The reasons are not too far to

22. (1933) 49 CLR. 220 at 239.



grasp. To claim the power to legislate with respect to extra-territorial aspects or causes, that have no nexus with the territory for which the national legislature is responsible for, would be to claim dominion over such a foreign territory, and negation of the principle of self-determination of the people who are nationals of such foreign territory, peaceful co-existence of nations, and co-equal sovereignty of nation-states. Such claims have, and invariably lead to, shattering of international peace, and consequently detrimental to the interests, welfare and security of the very nation-state, and its people, that the national legislature is charged with the responsibility for.

41. Because of interdependencies and the fact that many extra-territorial aspects or causes have an impact on or nexus with the territory of the nation-state, it would be impossible to conceive legislative powers and competence of national parliaments as being limited only to aspects or causes that arise, occur or exist or may be expected to do so, within the territory of its own nation-state. Our Constitution has to be necessarily understood as imposing affirmative obligations on all the organs of the State to protect the interests, welfare and security of India. Consequently, we have to understand that the Parliament has been constituted, and empowered to, and that its core role would be to, enact laws that serve such purposes. Hence even those extra-territorial aspects or causes, provided they have a nexus with India, should be deemed to be within the domain of legislative competence of the Parliament, except to the extent the Constitution itself specifies otherwise.

42. A question still remains, in light of the extreme conclusions that may arise on account of the propositions made by the learned Attorney General. Is the Parliament empowered to enact laws in respect of extra-territorial aspects or causes that have no nexus with India, and furthermore could such laws be bereft of any benefit to India? The answer would have to be no.

43. The word "for" again provides the clue. To legislate for

a territory implies being responsible for the welfare of the people inhabiting that territory, deriving the powers to legislate from the same people, and acting in a capacity of trust. In that sense the Parliament belongs only to India; and its chief and sole responsibility is to act as the Parliament of India and of no other territory, nation or people. There are two related limitations that flow from this. The first one is with regard to the necessity, and the absolute base line condition, that all powers vested in any organ of the State, including Parliament, may only be exercised for the benefit of India. All of its energies and focus ought to only be directed to that end. It may be the case that an external aspect or cause, or welfare of the people elsewhere may also benefit the people of India. The laws enacted by Parliament may enhance the welfare of people in other territories too; nevertheless, the fundamental condition remains: that the benefit to or of India remain the central and primary purpose. That being the case, the logical corollary, and hence the second limitation that flows thereof, would be that an exercise of legislative powers by Parliament with regard to extra-territorial aspects or causes that do not have any, or may be expected to not have nexus with India, transgress the first condition. Consequently, we must hold that the Parliament's powers to enact legislation, pursuant to Clause (1) of Article 245 may not extend to those extra-territorial aspects or causes that have no impact on or nexus with India.

44. For a legislature to make laws for some other territory would be to act in a representative capacity of the people of such a territory. That would be an immediate transgression of the condition that the Parliament be a parliament for India. The word "for", that connects the territory of India to the legislative powers of the Parliament in Clause (1) of Article 245, when viewed from the perspective of the people of India, implies that it is "our" Parliament, a jealously possessive construct that may not be tinkered with in any manner or form. The formation of the State, and its organs, implies the vesting of the powers of the people in trust; and that trust demands, and its continued



existence is predicated upon the belief, that the institutions of the State shall always act completely, and only, on behalf of the people of India. While the people of India may repose, and continue to maintain their trust in the State, notwithstanding the abysmal conditions that many live in, and notwithstanding the differences the people may have with respect to socio-political choices being made within the country, the notion of the collective powers of the people of India being used for the benefit of some other people, including situations in which the interests of those other people may conflict with India's interests, is of an entirely different order. It is destructive of the very essence of the reason for which Parliament has been constituted: to act as the Parliament for, and only of, India.

45. The grant of the power to legislate, to the Parliament, in Clause (1) of Article 245 comes with a limitation that arises out of the very purpose for which it has been constituted. That purpose is to continuously, and forever be acting in the interests of the people of India. It is a primordial condition and limitation. Whatever else may be the merits or demerits of the Hobbesian notion of absolute sovereignty, even the Leviathan, within the scope of Hobbesian logic itself, sooner rather than later, has to realize that the legitimacy of his or her powers, and its actual continuance, is premised on such powers only being used for the welfare of the people. No organ of the Indian State can be the repository of the collective powers of the people of India, unless that power is being used exclusively for the welfare of India. Incidentally, the said power may be used to protect, or enhance, the welfare of some other people, also; however, even that goal has to relate to, and be justified by, the fact that such an exercise of power ultimately results in a benefit – either moral, material, spiritual or in some other tangible or intangible manner – to the people who constitute India.

46. We also derive interpretational support for our conclusion that Parliament may not legislate for territories beyond India from Article 51, a Directive Principle of State Policy, though not enforceable, nevertheless fundamental in the

governance of the country. It is specified therein that:

> **"Article 51. Promotion of international peace and security-**"State shall endeavour to –
>
> (a) to promote international peace and security;
>
> (b) maintain just and honourable relations between nations;
>
> (c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another; and
>
> (d) encourage settlement if international disputes by arbitration."

47. To enact legislation with respect to extra-territorial aspects or causes, without any nexus to India, would in many measures be an abdication of the responsibility that has been cast upon Parliament as above. International peace and security has been recognised as being vital for the interests of India. This is to be achieved by India maintaining just and honourable relations, by fostering respect for international and treaty obligations etc., as recognized in Article 51. It is one matter to say that because certain extra-territorial aspects or causes have an impact on or nexus with India, Parliament may enact laws with respect to such aspects or causes. That is clearly a role that has been set forth in the Constitution, and a power that the people of India can claim. How those laws are to be effectuated, and with what degree of force or diplomacy, may very well lie in the domain of pragmatic, and indeed ethical, statecraft that may, though not necessarily always, be left to the discretion of the Executive by Parliament. Nevertheless, that position is very different from claiming that India has the power to interfere in matters that have no nexus with India at all. To claim such powers, would be to make such powers available. Invariably available powers are used, and in this case with a direct impact on the moral force of India, and its interests,



welfare and security, by shattering the very concepts that undergird peace between nations. By recognizing international peace to be sine qua non for India's welfare and security, the framers have charged the State, and all of its organs, with responsibility to endeavour to achieve the goals set forth in Article 51. To claim the power to legislate for some other territories, even though aspects or causes arising, occurring or existing there have no connection, to India would be to demolish the very basis on which international peace and security can be premised.

48. For the aforesaid reasons we are unable to agree that Parliament, on account of an alleged absolute legislative sovereignty being vested in it, should be deemed to have the powers to enact any and all legislation, de hors the requirement that the purpose of such legislation be for the benefit of India. The absolute requirement is that all legislation of the Parliament has to be imbued with, and at the core only be filled with, the purpose of effectuating benefits to India. This is not just a matter of the structure of our Constitution; but the very foundation.

49. The arguments that India inherited the claimed absolute or illimitable powers of the British parliament are unacceptable. One need not go into a lengthy or academic debate about whether in fact the British parliament always did, or as a matter of absolute necessity needs to, possess such powers. There is a healthy debate about that, casting serious doubts about the legal efficacy of such arguments. (See Chapter 2: "The Sovereignty of Parliament – in Perpetuity?", by A.W. Bradley in The Changing Constitution, Ed. Jowell & Oliver[23] and Studies in Constitutional Law by Colin R. Munro[24]). It is now a well accepted part of our constitutional jurisprudence that by virtue of having a written constitution we have effectively severed our links with the Austinian notion that law as specified

23. 2nd Ed. Clarendon Press, Oxford (1989).

24. 2nd Ed. Butterworths, OUP (2005)

by a sovereign is necessarily just, and the Diceyan notion of parliamentary sovereignty. It is the Constitution that is supreme, with true sovereignty vesting in the people. In as much as that true sovereign has vested some of their collective powers in the various organs of the state, including the Parliament, there cannot be the legal capacity to exercise that power in a manner that is not related to their interests, benefits, welfare and security.

50. We now turn our attention to other arguments put forward by the learned Attorney General with regard to the implications of permissibility of making laws that may operate extra-territorially, pursuant to Clause (2) of Article 245. In the first measure, the learned Attorney General seems to be arguing that the act and function of making laws is the same as the act and function of "operating" the law. From that position, he also seems to be arguing that Clause (2) of Article 245 be seen as an independent source of power. Finally, the thread of that logic then seeks to draw the inference that in as much as Clause (2) prohibits the invalidation of laws on account of their extra-territorial operation, it should be deemed that the courts do not have the power to invalidate, - i.e., strike down as ultra vires -, those laws enacted by Parliament that relate to any extra-territorial aspects or causes, not withstanding the fact that many of such aspects or causes have no impact on or nexus with India.

51. It is important to draw a clear distinction between the acts & functions of making laws and the acts & functions of operating the laws. Making laws implies the acts of changing and enacting laws. The phrase operation of law, in its ordinary sense, means the effectuation or implementation of the laws. The acts and functions of implementing the laws, made by the legislature, fall within the domain of the executive. Moreover, the essential nature of the act of invalidating a law is different from both the act of making a law, and the act of operating a law. Invalidation of laws falls exclusively within the functions of



the judiciary, and occurs after examination of the vires of a particular law. While there may be some overlap of functions, the essential cores of the functions delineated by the meanings of the phrases "make laws" "operation of laws" and "invalidate laws" are ordinarily and essentially associated with separate organs of the state – the legislature, the executive and the judiciary respectively, unless the context or specific text, in the Constitution, unambiguously points to some other association.

52. In Article 245 we find that the words and phrases "make laws" "extra-territorial operation", and "invalidate" have been used in a manner that clearly suggests that the addressees implicated are the legislature, the executive and the judiciary respectively. While Clause (1) uses the verb "make" with respect to laws, thereby signifying the grant of powers, Clause (2) uses the past tense of make, "made", signifying laws that have already been enacted by the Parliament. The subject of Clause (2) of Article 245 is the law made by the Parliament, pursuant to Clause (1) of Article 245, and the object, or purpose, of Clause (2) of Article 245 is to specify that a law so made by the Parliament, for the whole or any part of territory of India, should not be held to be invalid solely on the ground that such laws require extra-territorial operation. The only organ of the state which may invalidate laws is the judiciary. Consequently, the text of Clause (2) of Article 245 should be read to mean that it reduces the general and inherent powers of the judiciary to declare a law ultra-vires only to the extent of that one ground of invalidation. One thing must be noted here. In as much as the judiciary's jurisdiction is in question here, an a-priori, and a strained, inference that is unsupported by the plain meaning of the text may not be made that the powers of the legislature to make laws beyond the pale of judicial scrutiny have been expanded over and above that which has been specified. The learned Attorney General is not only seeking an interpretation of Article 245 wherein the Parliament is empowered to make laws "for" a foreign territory, which we have seen above is impermissible, but also an interpretation that places those

vaguely defined laws, which by definition and implication can range over an indefinite, and possibly even an infinite number, of fields beyond judicial scrutiny, even in terms of the examination of their vires. That would be contrary to the basic structure of the Constitution.[25]

53. Clause (2) of Article 245 acts as an exception, of a particular and a limited kind, to the inherent power of the judiciary to invalidate, if ultra-vires, any of the laws made by any organ of the State. Generally, an exception can logically be read as only operating within the ambit of the clause to which it is an exception. It acts upon the main limb of the Article – the more general clause - but the more general clause in turn acts upon it. The relationship is mutually synergistic in engendering the meaning. In this case, Clause (2) of Article 245 carves out a specific exception that a law made by Parliament, pursuant to Clause (1) of Article 245, for the whole or any part of the territory of India may not be invalidated on the ground that such a law may need to be operated extraterritorially. Nothing more. The power of the judiciary to invalidate laws that are ultra-vires flows from its essential functions, Constitutional structure, values and scheme, and indeed to ensure that the powers vested in the organs of the State are not being transgressed, and that they are being used to realise a public purpose that subserves the general welfare of the people. It is one of the essential defences of the people in a constitutional democracy.

54. If one were to read Clause (2) of Article 245 as an independent source of legislative power of the Parliament to enact laws for territories beyond India wherein, neither the aspects or causes of such laws have a nexus with India, nor the purposes of such laws are for the benefit of India, it would immediately call into question as to why Clause (1) of Article 245 specifies that it is the territory of India or a part thereof "for" which the Parliament may make laws. If the power to enact laws for any territory, including a foreign territory, were to be read into Clause (2) of Article 245, the phrase "for the whole or any

25. Supra note 18.



part of the territory of India" in Clause (1) of Article 245 would become a mere surplassage. When something is specified in an Article of the Constitution it is to be taken, as a matter of initial assessment, as nothing more was intended. In this case it is the territory of India that is specified by the phrase "for the whole or any part of the territory of India." "Expressio unius est exclusio alterius"- the express mention of one thing implies the exclusion of another. In this case Parliament has been granted powers to make laws "for" a specific territory – and that is India or any part thereof; by implication, one may not read that the Parliament has been granted powers to make laws "for" territories beyond India.

55. The reliance placed by the learned Attorney General on the history of changes to the pre-cursors of Article 245, in the Draft Constitution, in support of his propositions is also inapposite. In fact one can clearly discern that the history of changes, to Clause 179 of the Draft Constitution (which became Article 245 in our Constitution), supports the conclusions we have arrived at as to the meaning, purport and ambit of Article 245. The first iteration of Clause 179 of the Draft Constitution read, in part, as follows: "Subject to the provisions of this Constitution, the Federal Parliament may make laws, including laws having extra-territorial operation, for the whole or any part of the territories of the Federation……" Clearly the foregoing iteration shows that what was under consideration were the entire class of laws that the Parliament was to be empowered to make "for the whole or any part of the territories of the Federation…..", and included within that class were the laws "having extra-territorial operation." Subsequently Clause 179 of the Draft Constitution was split into two separate clauses 179 (1) and 179(2). The learned Attorney General's arguments suggest that the conversion of Draft Clause 179 into two separate draft clauses, 179(1) and 179(2), should be interpreted to mean that the framers of the Constitution intended the two clauses to have a separate existence, independent of each other. We are not persuaded. The retention of the phrase

"extra-territorial operation" as opposed to the phrase "extra-territorial laws" implies that the drafters were acutely aware of the difference between the meaning of the phrase "operation of law" and the "making of law". Further, by beginning Clause (2) of Article 245 with the phrase "No law made by the Parliament…", it is clear that the drafting committee intended to retain the link with Clause (1) of Article 245. (See: The Framing of India's Constitution, by The Project Committee, Chairman B. Shiva Rao)[26] Thus we cannot view Clause (2) of Article 245 as an independent source of legislative powers on account of the history of various iterations of the pre-cursor to Article 245 in the Constituent Assembly.

**VIII**

Analysis of Constitutional Topological Space: Chapter 1, Part XI:

56. We now turn to Chapter 1 Part XI, in which Article 245 is located, to examine other provisions that may be expected to transform or be transformed by the meaning of Article 245 that we have discerned and explained above. In particular, the search is also for any support that may exist for the propositions of the learned Attorney General that the Parliament may make laws for any territory outside India.

57. As is well known, Article 246 provides for the division of legislative competence, as between the Parliament and the State legislatures, in terms of subjects or topics of legislation. Clauses (1), (2) and (3) of Article 246 do not mention the word territory. However, Clause (4) of Article 246 specifies that Parliament has the power to "make laws for any part of the territory of India not included in a State" with respect to any matter, notwithstanding that a particular matter is included in the State List. In as much as Clause (1) of Article 245 specifies that it is for "the whole or any part of the territory of India" with respect of which Parliament has been empowered to make

26. Vol. 3, Universal Law Publichsing Co.



laws, it is obvious that in Article 246 legislative powers, whether of Parliament or of State legislatures, are visualized as being "for" the territory of India or some part of it.

58. Article 248 provides for the residuary power of legislation. However, in this instance, the Constitution speaks of the powers of Parliament in terms of the subject matters or fields of legislative competence not enumerated in Concurrent and State lists in the Seventh Schedule, etc. Article 248 does not mention any specific territory. Nevertheless, in as much as it retains the link to Article 246, it can only be deemed that the original condition that all legislation be "for" the whole or some territory of India has been retained.

59. It would be pertinent to note, at this stage that List I – Union List of the Seventh Schedule clearly lists out many matters that could be deemed to implicate aspects or causes that arise beyond the territory of India. In particular, but not limited to, note may be made of Entries 9 through 21 thereof. Combining the fact that the Parliament has been granted residuary legislative powers and competence with respect to matters that are not enumerated in Concurrent and State Lists, vide Article 248, the fact that Parliament has been granted legislative powers and competence over various matters, as listed in List I of the Seventh Schedule, many of which may clearly be seen to be falling in the class of extra-territorial aspects or causes, vide Article 246, and the powers to make laws "for the whole or any part of the territory of India", vide Article 245, we must conclude that, contrary to the rigid reading of the ratio in ECIL, Parliament's legislative powers and competence with respect to extra-territorial aspects or causes that have a nexus with India was considered and provided for by the framers of the Constitution. Further, in as much as Article 245, and by implication Articles 246 and 248, specify that it is "for the whole or any part of the territory of India" that such legislative powers have been given to the Parliament, it logically follows that Parliament is not empowered to legislate with

respect to extra-territorial aspects or causes that have no nexus whatsoever with India. To the extent that some of the implications of learned Attorney General's propositions only reach such a limited reading of the legislative powers of the Parliament, which nevertheless are not as restricted as the narrow understanding of the ratio in ECIL may suggest, we are in partial agreement with the same.

60. When we look at Articles 249 (conditions under which Parliament may legislate with respect to matters in List II of Seventh Schedule, wherein the Council of States has deemed it to be in national interest to do so) and 250 (ambit of Parliamentary powers as inclusive of competence to legislate with respect to matters in the State List while a Proclamation of Emergency is in operation) we find that legislative powers of the Parliament are spoken of, in the said articles also, only in terms of as being "for the whole or any part of the territory of India". Article 253 deals with legislation that may be needed to give effect to various international agreements, and again the powers are specified only in terms of making laws "for the whole or any part of the territory of India." Nowhere within Chapter 1, Part XI do we find support for the propositions of the learned Attorney General that the Parliament may make laws "for" any territory other than the "whole or any part of the territory of India." To the contrary, we only find a repeated use of the expression "for the whole or any part of the territory of India." It is a well known dictum of statutory and constitutional interpretation that when the same words or phrases are used in different parts of the Constitution, the same meaning should be ascribed, unless the context demands otherwise. In this case, we do not see any contextual reasons that would require reading a different meaning into the expression "for the whole or any part of the territory" in the context of Articles 249, 250 or 253, than what we have gathered from the text of Article 245.

**IX**

Wider Structural Analysis:



61. Article 260, in Chapter II of Part XI is arguably the only provision in the Constitution that explicitly deals with the jurisdiction of the Union in relation to territories outside India, with respect to all three functions of governance – legislative, executive and judicial. Learned Attorney General did not point to this Article as lending particular support for his propositions. However, on closer examination, Article 260 appears to further support the conclusions we have arrived at with respect to Article 245. It provides as follows:

> **"Article 260. Jurisdiction of the Union in relation to territories outside India** – The Government of India may by agreement with the Government of any territory not being part of the territory of India undertake any executive, legislative or judicial functions vested in the Government of such territory, but every such agreement shall be subject to, and governed by, any law relating to the exercise of foreign jurisdiction for the time being in force."

62. It is clear from the above text of Article 260 that it is the Government of India which may exercise legislative, executive, and judicial functions with respect of certain specified foreign territories, the Governments of which, and in whom such powers have been vested, have entered into an agreement with Government of India asking it do the same. Indeed, from Article 260, it is clear that Parliament may enact laws, whereby it specifies the conditions under which the Government of India may enter into such agreements, and how such agreements are actually implemented.

63. Nevertheless, the fact even in the sole instance, in the Constitution, where it is conceived that India may exercise full jurisdiction – i.e., executive, legislative and judicial – over a foreign territory, that such a jurisdiction can be exercised only upon an agreement with the foreign government (thereby comporting with international laws and principles such as "comity of nations" and respect for "territorial sovereignty" of other nation-states), and the manner of entering into such

agreements, and the manner of effectuating such an agreement has to be in conformity with a law specifically enacted by the Parliament (whereby the control of the people of India over the actions of the Government of India, even extra-territorially is retained), implies that it is only "for" India that Parliament may make laws. The Parliament still remains ours, and exclusively ours. Though the Government of India, pursuant to Article 260, acts on behalf of a foreign territory, there is always the Parliament to make sure that the Government of India does not act in a manner that is contrary to the interests of, welfare of, well-being of, or the security of India. The foregoing is a very different state of affairs from a situation in which the Parliament itself acts on behalf of a foreign territory, as implicated by the expression "make extra-territorial laws". The former comports with the notions of parliamentary democracy in which the people ultimately control the Executive through their Parliament; while the latter indicates the loss of control of the people themselves over their elected representatives.

64. The text of Articles 1 and 2 leads us to an irresistible conclusion that the meaning, purport and ambit of Article 245 is as we have gathered above. Sub-clause (c) of Clause (3) of Article 1 provides that territories not a part of India may be acquired. The purport of said Sub-Clause (c) of Clause 3 of Article 1, pace *Berubari Union and Exchange of Enclaves, Re*[27]is that such acquired territory, automatically becomes a part of India. It was held in *Berubari,* that the mode of acquisition of such territory, and the specific time when such acquired territory becomes a part of the territory of India, are determined in accordance with international law. It is only upon such acquired territory becoming a part of the territory of India would the Parliament have the power, under Article 2, to admit such acquired territory in the Union or establish a new state. The crucial aspect is that it is only when the foreign territory becomes a part of the territory of India, by acquisition in terms of relevant international laws, is the Parliament empowered to

27. AIR 1960 SC 845.



make laws for such a hitherto foreign territory. Consequently, the positive affirmation, in the phrase in Clause (1) of Article 245, that the Parliament "may make laws for the whole or any part of the territory of India" has to be understood as meaning that unless a territory is a part of the territory of India, Parliament may not exercise its legislative powers in respect of such a territory. In the constitutional schema it is clear that the Parliament may not make laws for a territory, as a first order condition, unless that territory is a part of India.

**X**

Relevance of Case Law Cited by the learned Attorney General:

65. The learned Attorney General cited and relied on many decisions in support of his arguments. We find that none of the cases so cited have considered the issues of what the impact of constitutional text, wider constitutional topological and structural spaces, the representative capacity of a parliament and the like would be on the extent of powers of the parliament. Moreover, having gone through the cases, we do note that none stand for the proposition that the powers of a parliament are unfettered and that our Parliament possesses a capacity to make laws that have no connection whatsoever with India.

66. Nevertheless, we will address a few of the cases relied on by the learned Attorney General primarily for limited purpose of locating their rationale and reasoning. In *Governor General in Council v. Raleigh Investments*[28], the key issue was about extra-territorial operation of a law, and not whether the law as made was with respect to aspects or causes outside the territory of British India and bearing no nexus with it. In this regard the Privy Council's observations about the Appellant's contention are pertinent: "The appellant's arguments….. comprised two contentions. It was first argued that these provisions were not extra-territorial. It was also argued that even if they should be *found in any degree to operate extra-*

28. Supra note 9.

*territorially,* that would be no ground of holding them to be invalid, so far as municipal courts called upon to deal with them are concerned",[29] and finally "in our judgment therefore, the extent, if any, *of extra-territorial operation* which is to be found in the impugned provisions, is within the legislative powers given to the Indian Legislature by the Constitution Act."[30] It is clear that in the cited case, the Privy Council was dealing with the issue of extra-territorial operation of the law, and not extra-territorial law. In Wallace Brothers v. CIT, Bombay City and Bombay Suburban District[31] also the issue was with regard to sufficiency of territorial connection, and it was held that the principle – sufficient territorial connection – not the rule giving effect to that principle – residence – is implicit in the power conferred by the Government of India Act, 1935. In Emmanuel Mortenssen[32], the Court of Justiciary upheld the jurisdiction of the local Sheriff with respect to the owners and operator of a trawler boat used for fishing inside the estuary. However, jurisdiction was not extended on the basis of parliamentary supremacy or of powers to enact extra-territorial laws. Rather, the principle enunciated was that an estuary, under international law, falls within the territory of Scotland, and that the North Sea Fisheries Convention of 1883 did not derogate from the foregoing general principle of international law. Consequently in as much as the operator or owner of that fishing trawler engaged in acts that were prohibited within the territorial limits over which the legislature that enacted the applicable statute had jurisdiction, the local sheriff exercised proper jurisdiction. *Croft v. Dunphy*[33] was with regard to domestic laws operating beyond the territorial limits, and it was recognized that a law which protects the revenue of the states may necessarily have to be operated outside the territorial limits, but that such operation does not violate the principle that legislatures enact

29. Ibid, p. 273.

30. Ibid, p. 284.

31. Supra note 10.

32. Supra note 6.

33. Supra note 7.



laws with respect to aspects or causes that have a nexus with the territory for which the legislature has the law making responsibility for. The control of smuggling activities and revenue collection were seen necessarily as related to the territorial interests, and it was in furtherance of such territorial interests, was extra-territorial operation permissible. In *State v. Narayandas*[34] the issue considered by the Bombay High Court was with regard to the vires of a law enacted by a state legislature declaring a bigamous marriage contracted outside the territory of the state to be unlawful. The main issue was with regard to the power of a state to legislate beyond its territory, and Chief Justice Chagla held that it could not. One paragraph in that decision that could be deemed to be supportive of the learned Attorney General's propositions is:

> "Now under our present Constitution, Parliament has been given absolute powers. Therefore, today Parliament may enact an extra-territorial law. The only limitation on its powers is the practicability of the law. If an extra-territorial law cannot be enforced, then it is useless to enact it but no one can suggest today that a law is void or ultra-vires which is passed by the Parliament on the ground of its extra-territoriality".

67. Clearly, the statements that under our Constitution Parliament has been given absolute powers, and therefore it can enact extra-territorial laws, are not in comport with present day constitutional jurisprudence in India that the powers of every organ of the State are as provided for in the Constitution and not absolute. We discern that the second half of the excerpt cited above provides the clue to the fact that Chief Justice Chagla was concerned more with laws that require an operation outside India, and not in terms of laws that have no connection with India whatsoever. At best the comment reveals the concern of the learned jurist about the Parliament having the competence to enact laws with respect to objects and

34. Supra note 12.

provocations lying outside the territory, but whose effect is felt inside the territory. Hence, that broad statement does not derogate from the textual meaning, purport and ambit of Article 245 that we have expounded hereinabove.

**XI**

Conclusion:

68. There are some important concerns that we wish to share our thoughts on, before we proceed to answering the questions that we set out with. Very often arguments are made claiming supremacy or sovereignty for various organs to act in a manner that is essentially unchecked and uncontrolled. Invariably such claims are made with regard to foreign affairs or situations, both within and outside the territory, in which the government claims the existence of serious security risks or law and order problems. Indeed, it may be necessary for the State to possess some extraordinary powers, and exert considerable force to tackle such situations. Nevertheless, all such powers, competence, and extent of force have to be locatable, either explicitly or implicitly, within the Constitution, and exercised within the four corners of constitutional permissibility, values and scheme.

69. There are two aspects, of such extreme arguments claiming absolute powers, which are worrisome. The first one relates to a misconception of the concepts of sovereignty and of power, and a predilection to oust judicial scrutiny even at the minimal level, such as examination of the vires of legislation or other types of state action. The second one relates to predilections of counsel of asking for powers that are undefined, unspecified, vague and illimitable be read into the constitutional text, as matter of some principle of inherent design or implied necessity.

70. The modern concept of sovereignty emerged in a troubled era of civil wars within the territories of, and incessant conflict between, nation-states. At one end of the spectrum political philosophers such as Thomas Hobbes and Jean Bodin



postulated the necessity of absolute power within the territory, arguing that failure of order was inimical to the well being of the people, and further arguing that if the governments were to not have such absolute powers invariably leads to internal disorder. While it is generally and uncritically argued that Hobbes and Bodin stood for blind political absolutism, when viewed from a historical perspective, they can also be seen as the starting points of human beings quest for greater accountability of states and governments, which were to be increasingly viewed as the repositories of collective powers of the people. Hobbes specifically recognized that governments would become unstable and lose their legitimacy if they failed to protect the welfare of the subjects. For Bodin, the absolute sovereign was tempered by divine law (or "natural law"), and the customary laws of the community. Alan James states that "[f]rom this basis it could be argued that sovereignty lay not with the ruler but with the ruled. In this way the ultimate authority could be claimed for the people, with the government simply acting as their agent." (See: Sovereign Statehood – The Basis of International Society[35]). These seeds of accountability, carried within them the incipient forms of arguments that would inexorably lead to the modern notion of self-determination by the people: that each nation state, formed by the people, and answerable to the people through the organs of the State, would act in accordance with the wishes of the people – both in terms of ordinary moments of polity, and also in terms of constitutional moments, with the latter setting forth, in greater or lesser specificity, the acts that may or may not be done by the organs of the state.

71. The path to modern constitutionalism, with notions of divided and checked powers, fundamental rights and affirmative duties of the State to protect and enhance the interests of, welfare of, and security of the people, and a realization that "comity amongst nations" and international peace were sine qua non for the welfare of the people was

35. Allen & Unwin, London (1986).

neither straight forward, nor inevitable. It took much suffering, bloodshed, toil, tears and exploitation of the people by their own governments and by foreign governments, both in times of peace and in times of war, before humanity began to arrive at the conclusion that unchecked power would sooner, rather than later, turn tyrannical against the very people who have granted such power, and also harmful to the peaceful existence of other people in other territories. Imperial expansion, as a result of thirst for markets and resources that the underlying economy demanded, with colonial exploitation as the inevitable result of that competition, and two horrific world wars are but some of the more prominent markers along that pathway. The most tendentious use of the word sovereignty, wherein the principles of self-determination were accepted within a nation-state but not deemed to be available to others, was the rhetorical question raised by Adolf Hitler at the time of annexation of Austria in 1938: "What can words like 'independence' or 'sovereignty' mean for a state of only six million?"[36] We must recognize the fact that history is replete with instances of sovereigns who, while exercising authority on behalf of even those people who claimed to be masters of their own realm, contradictorily claimed the authority to exercise suzerain rights over another territory, its people and its resources, inviting ultimately the ruin of large swaths of humanity and also the very people such sovereigns, whether a despot or a representative organ, claimed to represent.

72. India's emergence as a free nation, through a non-violent struggle, presaged the emergence of a moral voice: that while we claim our right to self-determination, we claim it as a matter of our national genius, our status as human beings in the wider swath of humanity, with rights that are ascribable to us on account of our human dignity. Such a morality arguably does not brook the claims of absolute sovereignty to act in any manner or form, on the international stage or within the country.

36. De Smith, Stanley A. : "Microstates and Micronesia" (New York, NYU Press 1970), p. 19.



To make laws "for another territory" is to denigrate the principle of self-determination with respect to those people, and a denigration of the dignity of all human beings, including our own. The debates in the Constituent Assembly with regard to the wording of Article 51, which was cited earlier in this judgment, gives the true spirit with which we the people of this country have vested our collective powers in the organs of governance. This is so particularly because they were made in the aftermath of World War II, arguably the most brutal that mankind has ever fought, and the dawn of the atomic age. In particular the statements of Prof. Khardekar, are worth being quoted in extenso:

> "Mr. Austin, a great jurist, says that there is no such thing as international law at all – if there is anything it is only positive morality…. In saying that there may be positive morality I think even there he is wrong. If there were to be morality amongst nations, well we would not have all that has been going about. If there is a morality amongst nations today, it is the morality of robbers. If there is any law today it is the law of the jungle where might is right…… The part that India is to play is certainly very important because foundations of international morality have to be laid and only a country like India with its spiritual heritage can do it…… Therefore it is in keeping with our history, with our tradition, with our culture, that we are a nation of peace and we are going to see that peace prevails in the World."[37]

73. In granting the Parliament the powers to legislate "for" India, and consequently also with respect to extra-territorial aspects or causes, the framers of our Constitution certainly intended that there be limits as to the manner in which, and the extent to which, the organs of the State, including the Parliament, may take cognizance of extra-territorial aspects or

37. Constituent Assembly Debates Official Report, 1948-49, page 601 (Lok Sabha Secretariat, New Delhi).

causes, and exert the State powers (which are the powers of the collective) on such aspects or causes. Obviously, some of those limits were expected to work at the level of ideas and of morals, which can be inculcated by a proper appreciation of our own history, and the ideas of the framers of our constitution. They were also intended to have a legal effect. The working of the principles of public trust, the requirement that all legislation by the Parliament with respect to extra-territorial aspects or causes be imbued with the purpose of protecting the interests of, the welfare of and the security of India, along with Article 51, a Directive Principle of State Policy, though not enforceable in a court of law, nevertheless fundamental to governance, lends unambiguous support to the conclusion that Parliament may not enact laws with respect to extra-territorial aspects or causes, wherein such aspects or causes have no nexus whatsoever with India.

74. Courts should always be very careful when vast powers are being claimed, especially when those claims are cast in terms of enactment and implementation of laws that are completely beyond the pale of judicial scrutiny and which the Constitutional text does not unambiguously support. To readily accede to demands for a reading of such powers in the constitutional matrix might inevitably lead to a destruction of the complex matrix that our Constitution is. Take the instant case itself. It would appear that the concerns of learned Attorney General may have been more with whether the ratio in ECIL could lead to a reading down of the legislative powers granted to the Parliament by Article 245. A thorough textual analysis, combined with wider analysis of constitutional topology, structure, values and scheme has revealed a much more intricately provisioned set of powers to the Parliament. Indeed, when all the powers necessary for an organ of the State to perform its role completely and to effectuate the Constitutional mandate, can be gathered from the text of the Constitution, properly analysed and understood in the wider context in which it is located, why should such unnecessarily imprecise



arrogation of powers be claimed? To give in to such demands, would be to run the risk of importing meanings and possibilities unsupportable by the entire text and structure of the Constitution. Invariably such demands are made in seeking to deal with external affairs, or with some claimed grave danger or a serious law and order problem, external or internal, to or in India. In such circumstances, it is even more important that courts be extra careful. The words of Justice Jackson in *Woods v. Cloyd W. Miller Co.,*[38] in dealing with war powers, may be used as a constant reminder to be on guard:

> "I agree with the result in this case, but the arguments that have been addressed to us lead me to utter more explicit misgivings….. The Government asserts no constitutional basis for this legislation other than this vague, undefined and undefinable "war power."….. It usually is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is executed in a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by judges under the influence of the same passions and pressures. Always, as in this case, the Government urges hasty decisions to forestall some emergency or serve some purpose and pleads that paralysis will result if its claims to power are denied or their confirmation delayed. Particularly when the war power is invoked to do things to the liberties of the people,……. that only indirectly affect conduct of war and do not relate to the management of war itself, the constitutional basis should be scrutinized with care."

75. The point is not whether and how India's constitution grants war powers. The point is about how much care should be exercised in interpreting the provisions of the Constitution. Very often, what the text of the Constitution says, when interpreted in light of the plain meaning, constitutional topology, structure, values and scheme, reveals the presence of all the necessary powers to conduct the affairs of the State even in

38. 333 U.S. 138.

circumstances that are fraught with grave danger. We do not need to go looking for powers that the text of the Constitution, so analysed, does not reveal.

76. We now turn to answering the two questions that we set out with:

(1) Is the Parliament constitutionally restricted from enacting legislation with respect to extra-territorial aspects or causes that do not have, nor expected to have any, direct or indirect, tangible or intangible impact(s) on or effect(s) in or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians?

The answer to the above would be yes. However, the Parliament may exercise its legislative powers with respect to extra-territorial aspects or causes, – events, things, phenomena (howsoever commonplace they may be), resources, actions or transactions, and the like -, that occur, arise or exist or may be expected to do so, naturally or on account of some human agency, in the social, political, economic, cultural, biological, environmental or physical spheres outside the territory of India, and seek to control, modulate, mitigate or transform the effects of such extra-territorial aspects or causes, or in appropriate cases, eliminate or engender such extra-territorial aspects or causes, only when such extra-territorial aspects or causes have, or are expected to have, some impact on, or effect in, or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians.

It is important for us to state and hold here that the powers of legislation of the Parliament with regard to all aspects or causes that are within the purview of its competence, including with respect to extra-territorial aspects or causes as delineated above, and as specified by the Constitution, or implied by its essential role in the constitutional scheme, ought not to be



subjected to some a-priori quantitative tests, such as "sufficiency" or "significance" or in any other manner requiring a pre-determined degree of strength. All that would be required would be that the connection to India be real or expected to be real, and not illusory or fanciful. Whether a particular law enacted by Parliament does show such a real connection, or expected real connection, between the extra-territorial aspect or cause and something in India or related to India and Indians, in terms of impact, effect or consequence, would be a mixed matter of facts and of law. Obviously, where the Parliament itself posits a degree of such relationship, beyond the constitutional requirement that it be real and not fanciful, then the courts would have to enforce such a requirement in the operation of the law as a matter of that law itself, and not of the Constitution.

(2) Does the Parliament have the powers to legislate "for" any territory, other than the territory of India or any part of it?

The answer to the above would be no. It is obvious that Parliament is empowered to make laws with respect to aspects or causes that occur, arise or exist, or may be expected to do so, within the territory of India, and also with respect to extra-territorial aspects or causes that have an impact on or nexus with India as explained above in the answer to Question 1 above. Such laws would fall within the meaning, purport and ambit of the grant of powers to Parliament to make laws "for the whole or any part of the territory of India", and they may not be invalidated on the ground that they may require extra-territorial operation. Any laws enacted by Parliament with respect to extra-territorial aspects or causes that have no impact on or nexus with India would be ultra-vires, as answered in response to Question 1 above, and would be laws made "for" a foreign territory.

77. Let the appeal be listed before an appropriate bench for disposal. Ordered accordingly.

R.P. Reference answered.

M. MOHAN

*v.*

THE STATE REPRESENTED BY THE DEPUTY SUPERINTENDENT OF POLICE

(Criminal Appeal No. 611 of 2011)

MARCH 01, 2011

**[DALVEER BHANDARI AND SURINDER SINGH NIJJAR, JJ.]**

*Penal Code, 1860 – ss. 304-B, 498-A and 306 – Dowry death, cruelty by husband or relatives of husband and abetment of suicide – Allegation that the victim was prevented from using the car owned by her brother-in-law and his wife, and in this regard was also taunted by the latter – Victim committing suicide by hanging herself in her matrimonial house four days later – Victim's husband, brother-in-law's wife, and the appellants (two brothers-in-law and mother-in-law of the victim), charge sheeted u/ss. 304-B, 498-A and 306 – Petition u/s. 482 Cr.P.C. by the appellants – Charges u/ss. 498-A and 304-B quashed, however, charges u/s 306 upheld – On appeal, held: No proximate link between the incident when the deceased was denied permission to use the car with the factum of suicide which took place four days later – No instances of instigation or allegations against the appellants – Thus, no offence u/s. 306 made out against the appellants and their conviction u/s. 306 not sustainable – High Court not justified in rejecting the petition filed by the appellants u/s. 482 Cr.P.C. for quashing the charges u/s. 306 against them – Charges u/s. 306 against the appellants quashed – Order passed by the High Court set aside – Code of Criminal Procedure, 1973 – s. 482.*

**The prosecution case was that the victim and her husband (A-1) stayed in a joint family after their marriage. A-2 and A-4 are the brothers-in-law of the victim, while A-**





**5 is the mother-in-law of the victim. A-3 is the wife of A-2. A-2 and A-3 owned a car. On the fateful day, while the other members of the family visited the theme park in the said car, A-1 and the victim were prevented from traveling in the said car and were instead asked by A-3 to reach the destination by public bus. It is alleged that A-3 taunted the victim that if she wanted to travel in car she should bring a car from her parents. Four days later, the victim committed suicide by hanging herself in her matrimonial home. The said incident took place within three and a half years of her marriage. The father of the victim filed a complaint alleging that A-1 and A-3 were responsible for his daughter's suicide. A 1, A 3 and the appellants (A 2, A 4, A 5) were charge sheeted under Sections 304-B, 498-A and 306 IPC. The appellants filed a petition under Section 482 Cr.P.C. for quashing the proceeding against them. The High Court held that no case of dowry demand was made out against them and quashed the charges under Section 498-A and 304-B IPC against them but held that they have to face trial for the offence under Section 306 IPC. Therefore, the appellants filed the instant appeals.**

**Allowing the appeals, the Court**

**HELD: 1.1 Section 306 IPC deals with 'abetment of suicide'. The word 'suicide' in itself is nowhere defined in the Penal Code, 1860 however, its meaning and import is well known and requires no explanation. 'Sui' means 'self' and 'cide' means 'killing', thus, implying an act of self-killing. In short a person committing suicide must commit it by himself, irrespective of the means employed by him in achieving his object of killing himself. In India, while suicide itself is not an offence considering that the successful offender is beyond the reach of law, attempt to suicide is an offence under Section 309 IPC. [Paras 37, 38 and 39] [455-H; 456-B-D]**

**1.2 Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. [Para 45] [458-F-G]**

**1.3 In order to convict a person under Section 306 IPC, there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and this act must have been intended to push the deceased into such a position that he/she committed suicide. [Para 46] [458-G-H; 459-A]**

*Gangula Mohan Reddy v. State of Andhra Pradesh* **(2010) 1 SCC 750;** *Mahendra Singh and Anr. v. State of M.P.* **1995 Supp. (3) SCC 731;** *Ramesh Kumar v. State of Chhattisgarh* **(2001) 9 SCC 618;** *State of West Bengal v. Orilal Jaiswal and Anr.* **(1994) 1 SCC 73;** *Chitresh Kumar Chopra v. State (Govt. of NCT of Delhi)* **2009 (16) SCC 605;** *V.P. Shrivastava v. Indian Explosives Limited and Ors.* **(2010) 10 SCC 361;** *Madan Mohan Singh v. State of Gujarat and Anr.* **(2010) 8 SCC 628 – referred to.**

**2.1 All the facts clearly show that neither at the time of inquest nor during the R.D.O. enquiry or at the time of complaint by the complainant, who is also the father of the deceased, any allegation was attributed against the appellants and, on the contrary, it was the case of the complainant that allegedly A-3 alone was responsible for the suicide of the deceased and this formed the basis of the Single Judge of the High Court to come to the conclusion that Sections 304-B and 498-A IPC are not attracted. [Para 19] [451-A-B]**

**2.2 In the instant case, what to talk of existence of instances or illustrations of instigation, there are no**



**specific allegations levelled against the appellants. There is also no proximate link between the incident of 14.1.2005 when the deceased was denied permission to use the car with the factum of suicide which had taken place on 18.1.2005. On a careful perusal of the entire material on record, no offence under Section 306 IPC can be made out against the appellants, in view of the clear and definite finding that there is no material whatsoever against the appellants much less positive act on the part of them to instigate or aid in committing the suicide. The criminal proceedings against A-1 and A-3 are pending adjudication. [Paras 35, 49 and 51] [455-E; 459-D-E-H; 460-A-B]**

**2.3 The deceased had died because of hanging. The deceased was hyper-sensitive to ordinary petulance, discord and differences which happen in our day-to-day life. In a joint family, instances of this kind are not very uncommon. Human sensitivity of each individual differs from person to person. Each individual has his own idea of self-esteem and self-respect. Different people behave differently in the same situation. It is unfortunate that such an episode of suicide had taken place in the family. [Para 50] [459-E-G]**

**3. The High Court was not justified in rejecting the petition filed by the appellants under Section 482 Cr.P.C. for quashing the charges under Section 306 IPC against them. The High Court ought to have quashed the proceedings so that the appellants who were not remotely connected with the offence under Section 306 IPC should not have been compelled to face the rigmaroles of a criminal trial. As a result, the charges under Section 306 IPC against the appellants are quashed. The impugned judgment is set aside. [Paras 71 and 73] [469-H; 470-A, C]**

*R.P. Kapur v. State of Punjab* **AIR 1960 SC 866;** *Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi and Ors.* **(1976) 3 SCC 736;** *State of Karnataka v. L. Muniswamy and Ors.* **(1977) 2 SCC 699;** *Madhu Limaye v. The State of Maharashtra* **(1977) 4 SCC 551;** *Madhavrao Jiwajirao Scindia and Ors. v. Sambhajirao Chandrojirao Angre and Ors.* **(1988) 1 SCC 692;** *Janta Dal v. H.S. Chowdhary and Ors.* **(1992) 4 SCC 305;** *Emperor v. Khwaja Nazir Ahmad* **AIR 1945 PC 18;** *Lala Jairam Das v. Emperor* **AIR 1945 PC 94;** *Dr Raghubir Sharan v. State of Bihar* **(1964) 2 SCR 336;** *Connelly v. Director of Public Prosecutions* **1964 AC 1254;** *Kurukshetra University and Anr. v. State of Haryana and Anr.* **(1977) 4 SCC 451;** *State of Haryana and Ors. v. Bhajan Lal and Ors.* **(1992) Suppl.1 SCC 335;** *G. Sagar Suri and Anr. v. State of UP and Ors.* **(2000) 2 SCC 636;** *State of A.P. v. Golconda Linga Swamy and Anr.* **(2004) 6 SCC 522;** *Zandu Pharmaceutical Works Ltd. and Ors. v. Mohd. Sharaful Haque and Anr.* **(2005) 1 SCC 122;** *Devendra and Ors. v. State of Uttar Pradesh and Anr.* **(2009) 7 SCC 495;** *State of A.P. v. Gourishetty Mahesh and Ors.* **2010 (11) SCC 226 – referred to.**

**Case Law Reference:**

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| **(2010) 1 SCC 750** | **Referred to** | **Para 17** |
| **1995 Supp. (3) SCC 731** | **Referred to** | **Para 33** |
| **(2001) 9 SCC 618** | **Referred to** | **Para 41** |
| **(1994) 1 SCC 73** | **Referred to** | **Para 43** |
| **2009 (16) SCC 605** | **Referred to** | **Para 44** |
| **(2010) 10 SCC 361** | **Referred to** | **Para 47** |
| **(2010) 8 SCC 628** | **Referred to** | **Para 48** |
| **AIR 1960 SC 866** | **Relied on** | **Para 53** |
| **(1976) 3 SCC 736** | **Relied on** | **Para 54** |



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|---|---|---|
| **(1977) 2 SCC 699** | **Relied on** | **Para 55** |
| **(1977) 4 SCC 551** | **Relied on** | **Para 56** |
| **(1988) 1 SCC 692** | **Relied on** | **Para 57** |
| **(1992) 4 SCC 305** | **Relied on** | **Para 58** |
| **AIR 1945 PC 18** | **Relied on** | **Para 59** |
| **AIR 1945 PC 94** | **Relied on** | **Para 59** |
| **(1964) 2 SCR 336** | **Relied on** | **Para 60** |
| **1964 AC 1254** | **Referred to** | **Para 62** |
| **(1977) 4 SCC 451** | **Relied on** | **Para 63** |
| **(1992) Suppl.1 SCC 335** | **Relied on** | **Para 64** |
| **(2000) 2 SCC 636** | **Relied on** | **Para 66** |
| **(2004) 6 SCC 522** | **Relied on** | **Para 67** |
| **(2005) 1 SCC 122** | **Relied on** | **Para 68** |
| **(2009) 7 SCC 495** | **Relied on** | **Para 69** |
| **2010 (11) SCC 226** | **Relied on** | **Para 70** |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No 611 of 2011.

From the Judgment & Order dated 22.02.2010 of the High Court of Judicature at Madras, Madurai bench in Crl. Original Petition (MD) No. 10511 of 2005.

WITH

Crl. A. No. 612 of 2011.

R. Anand Padmanabha, Prithvi Raj B.N., Elato Aristotal, Pramod Dayal for the Appellant.

V. Kanakraj, S. Thananjayan, Vanita Giri for the

Respodent.

The Judgment of the Court was delivered by

**DALVEER BHANDARI, J.** 1. Leave granted in both the matters.

2. Since the facts of both the appeals are common, therefore, these appeals are decided by a common judgment.

CRIMINAL APPEAL NO. 612 OF 2011

(Arising out of SLP (Crl.) No.2687/2010)

3. We deem it proper to take the facts of Criminal Appeal arising out of SLP (Crl.)No.2687 of 2010 filed by Velmurugan, Accused No.4 and Anna Lakshmi, Accused No.5 (for short 'A-4 and A-5' respectively). This appeal emanates from the judgment and order dated 22.02.2010 delivered by the Madurai Bench of the High Court of Judicature at Madras in Criminal Original Petition (MD) No.94 of 2006.

4. Brief facts which are necessary to dispose of this appeal are recapitulated as under:

5. One Kamatchi (deceased), daughter of Duraipandi Nadar (complainant) was married to Anandraj (A-1), son of Mahalinga Nadar on 6.9.2001. Mahalinga Nadar and his wife Anna Lakshmi (A-5) had three sons whose names are shown as under :

Mahalinga Nadar

| Son(A-1) | Son(A-2) | Son(A-4) |
|---|---|---|
| \| | \| | \| |
| Anandraj Husband of deceased Kamatchi | M. Mohan married to Easwari (A-3) | Velmurugan |



Anandraj (A-1) even after marriage with Kamatchi (the deceased)stayed with his two brothers and parents in the joint family. Kamatchi delivered a female child on 7.1.2003. Accused Anandraj's elder brother, M. Mohan (A-2) and his wife Easwari (A-3) owned a Qualis car. On the date of Pongal, i.e., on 14.01.2005, Kamatchi's in-laws family planned a visit to the Theme Park at Madurai from Karaikudi. Deceased Kamatchi, her husband Anandraj (A-1) were denied the use of the said family car. Other members of the family had gone to the Theme Park in the family car whereas the deceased Kamatchi and her husband Anandraj (A-1) were told by Easwari (A-3) to reach the destination by public bus who is alleged to have said to Kamatchi that “if you want to go by a car, you have to bring a car from your family”.

6. Kamatchi along with her husband Anandraj and a child, took a public transport(bus) from Karaikudi to Madurai for reaching the said Theme Park and returned to her matrimonial home in a bus. Kamatchi was deeply hurt by the taunting statement of Easwari (A-3) regarding denial of the use of family car.

7. Immediately thereafter, Kamatchi demanded a car from her father for personal use and after four days, i.e., on 18.1.2005 at about 1.30 p.m. she committed suicide by hanging herself in her bedroom using her sari.

8. On receipt of the information, the father of the deceased Kamatchi reached Karaikudi and filed a complaint with the Karaikudi Police Station (South) at about 5.00 p.m. alleging that his son-in-law Anandraj (A-1) and his elder brother's wife Easwari (A-3) were responsible for his daughter's suicide. On receipt of the said complaint, the Sub-Inspector of Police, Karaikudi (South) Police Station registered a case under Section 174 of the Criminal Procedure Code (for short 'Cr.P.C.') by assigning Crime No.13/2005 on 18.01.2005.

9. The Sub Inspector of Police forwarded a copy of the First Information Report (for short 'F.I.R.') to the Revenue Divisional Officer (for short 'R.D.O.') to hold an inquest and also a copy to the Deputy Superintendent of Police (for short 'D.S.P.'), Karaikudi, for further investigation, who commenced inquiry on the same day as Kamatchi had committed suicide within three and a half years of her marriage.

10. The D.S.P., Karaikudi on receipt of the F.I.R. from the Karaikudi South Police Station, took up the complaint for investigation and filed an Alteration Report on 19.1.2005 before the Jurisdictional Magistrate, Karaikudi under Sections 498-A and 306 I.P.C. against Anandraj (A-1) and Easwari (A-3) respectively.

11. The R.D.O. commenced enquiry on 18.1.2005 and examined many witnesses and on 3rd February, 2005 a report was sent by him to the D.S.P. in which he had categorically stated that there was no dowry harassment in the suicide case, especially in view of the fact that even the parents of the deceased had not informed him about the harassment of dowry. The parents of the deceased had specifically stated before the R.D.O. that because of the taunts made by Easwari (A-3) their daughter had committed suicide. The D.S.P., in addition to the inquest held by the R.D.O., proceeded to investigate the case and filed a Charge Sheet on 29.4.2005 not only against Anandraj (A-1), the deceased's husband and M. Mohan (A-2), her brother-in-law and his wife, Easwari (A-3), but also against the appellants herein who are elder brother of the husband of the deceased and the mother of appellant No.1 respectively under Sections 304-B, 498-A and 306 of the Indian Penal Code (for short 'I.P.C.'). A copy of the charge sheet dated 29.4.2005 was filed before the learned Judicial Magistrate, Karaikudi.

12. The learned Magistrate, on perusing the final report, took the same on file by assigning P.R.C.No.11/2005 and summoned the accused to furnish copies before committing the case to the Court of Sessions for trial.



13. The appellants, aggrieved by the vexatious prosecution initiated at the behest of the respondent approached the High Court of Judicature at Madras for quashing the proceedings against them under Section 482 Cr.P.C. The learned Single Judge, while quashing the charges under Sections 498-A and 304-B I.P.C. against the appellants, partly allowed their petition and held that they have to face trial for the offence under Section 306 I.P.C. insofar as challenge to Section 306 I.P.C. was concerned.

14. The High Court in the impugned judgment observed that in the F.I.R. lodged by the complainant, no whisper of demand for dowry has been made against the appellants. A perusal of the F.I.R. would reveal that Anandraj (A-1) and Easwari, A-3 were torturing the deceased on some pretext or the other especially in connection with getting a car from her father. The deceased was denied use of the car for going to the Theme Park near Madurai on 14.01.2005. The deceased was also abused by Anandraj (A-1) in this regard. They had to go to the Theme Park at Madurai by bus. After returning, the deceased contacted her father on phone and narrated the entire incident and on 18.1.2005 at around 1.30 p.m., Kamatchi committed suicide by hanging herself. On registration of the case under Section 174 Cr.P.C., the complainant and his wife and others were examined. Even in the statement, the complainant had not made a whisper about the demand of dowry on the part of the appellants but harped upon the ill treatment to his daughter at the hands of Anandraj (A-1) and Easwari (A-3). Even at the inquest conducted by the R.D.O., the complainant has not even whispered with regard to the demand of dowry on the part of the appellants. The statement of witnesses including that of the complainant were recorded on 27.01.2005. The relevant portion of the exact version given in the F.I.R. reads as under :

> ".....My eldest daughter is aged about 21 years. She was given in marriage by me to one Anandaraj son of

Mahalinga Nadar of Karaikudi 3 years ago in the year 2002, and next daughter was given in marriage at Coimbatore and other two daughters are yet to be married. At the time of marriage of my daughter Kamatchi, to Anandraj, I gave them one Kilo of Gold, Diamonds and jewels, and other utensils and articles. They were living along with his elder brother Mohan as joint family. They possess one Qualis car of their own. The said car was purchased in the name of Easwari my son-in-law's brother's wife. My daughter felt very hurt when she was not allowed to use the said car and was taunted by my son-in-law Anandraj and Mohan's wife Easwari to get a car from her parental home if she wished to go by a car. When she disclosed this matter to me I was ready to give her a car. At this junction, during last Pongal festival, her family had gone to Madurai ('Athisayam') in the said Qualis car. They refused to take my daughter along with them in the said car, and they have also teased and insulted her and told her to come in the bus and also said 'do you want to use a car then why you did not get a car'. My daughter informed about this incident to me over the phone and before I could get a car ready for her today on 18.1.2005, at about 1.30 hours, my son-in-law, Anandraj, informed over phone that my daughter had hanged herself and is dead. My son-in-law Anandraj and Mohan's wife Easwari who were cause for my daughter's death....."

The above quoted portion of the F.I.R. also indicates that all allegations are confined to Anandraj (A-1), the husband of the deceased and his sister-in-law, Easwari (A-3). According to the appellants, from the entire material available on record, by no stretch of imagination, an offence under Section 306 I.P.C. was made out against the appellants and the impugned judgment of the High Court is contrary to the law as has been laid down by this court in a series of judgments.

15. According to the appellants, the High Court in the



impugned judgment has seriously erred in not quashing the charge under Section 306 I.P.C. despite the fact that there is absolutely no material on record to proceed against the appellants either for cruelty or for dowry harassment.

16. The appellants contended that the learned Single Judge, after examining the F.I.R., R.D.O. report and Statements of the Witnesses under Section 161 Cr.P.C. found that there were no allegations against the appellants herein from the inception either by the complainant or by the mother of the deceased and has further held that there was no element of dowry related harassment and/or any cruelty meted out to the deceased by her sister-in-law or for that matter by any of the accused. In view of the above categorical findings, the learned Single Judge quashed the charges under Sections 304-B and 498-A I.P.C. However, the learned Single Judge failed to appreciate that on the basis of the material available on record and in the absence of any allegation, if no offence is made out against the appellants under Sections 304-B and 498-A, then the appellants cannot be convicted under Section 306 I.P.C. It is stated that to attract the provisions of Section 306 I.P.C., the allegations as to the existence of cruelty, dowry harassment and abetment to suicide are all integrated. In absence of any allegations under Sections 498-A and 304-B I.P.C. provisions of Section 306 I.P.C. cannot be attracted.

17. The appellants submitted that this Court in the case of *Gangula Mohan Reddy V. State of Andhra Pradesh* one of us, Dalveer Bhandari, J. was the author of the judgment), reported in (2010)(1) SCC 750, while interpreting Section 306 I.P.C. held that abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing and without a positive act on the part of the accused to instigate or aid in committing suicide, there cannot be any conviction. It was further held that to attract Section 306 I.P.C. there has to be a clear mens rea to commit the offence. It is further stated that the present case is squarely covered by the

above decision as even if the case of the prosecution is taken to be true and the finding of the High Court that there are no elements of cruelty or dowry related harassment and that the witnesses have improved upon their earlier statements is ignored, then also Section 306 I.P.C.. is not attracted in the facts of the present case.

18. According to the appellants, the present case is a fit case wherein the charges under Section 306 I.P.C. are liable to be quashed for the following sequence of events and reasons:

"On 06.09.2002, Kamatchi, (the deceased in the case) got married to Anandaraj (A-1). After the marriage they lived with two other brothers of the AI and the parent in laws jointly. Deceased is stated to have had cordial relations with every member of the family.

On 7.1.2003, Anandaraj (A-1) and Kamatchi were blessed with one female child. The child was christened as Nithyasree.

On 14.1.2005, the entire family decided to go to 'Adisayam' a Theme park at Madurai to celebrate and enjoy the Pongal Holidays. Kamatchi was prevented from travelling in a Qualis car by Easwari (A-3) and is alleged to have taunted Kamatchi, "if you want to travel by a car please get a car from your parents". Thereafter, leaving Anandaraj, Kamatchi and their child, they proceeded to Madurai to visit the Theme Park 'Adisayam' by a Qualis car.

Anandaraj and his family also proceeded to Madurai to visit the Theme Park and after their visit they returned to their native Karaikudi. Both to and fro, the family traveled by bus.

On 18.01.2005 at about 1.30 p.m. Kamatchi committed



suicide at her matrimonial home, using her sari to hang herself.

At about 5.00 p.m. Mr.Duraipandi Nadar, the father of the deceased Kamatchi lodged a complaint before Karaikudi South Police Station. It is the specific allegation in the complaint that A1 and A3 alone are the cause of the suicide of his daughter.

The Sub Inspector of Police, Under Section 174 of Cr.P.C. Registered the said complaint by assigning Cr.No.13/ 2005.

At about 6.00 p.m. R.D.O. conducted an enqury and prepared and Mahazar and seized the diary of the deceased, a letter and the sari which was used by her commit suicide.

D.S.P. Karaikudi, examined S.V.Duraipandi, the father of the deceased (L.W.1) and recorded his statement.

D.S.P. Karaikudi examined Mrs.Tamil Selvi, the mother of the deceased (L.W.2).

On 19.01.2005 alteration report filed by the D.S.P. under Section 306 and 498 A IPC against A-1 and A-3 alone.

On 3.2.2005 RDO who commenced enquiry from the date of incident itself and examined the records and the statements of various witnesses. He filed a report with a recommendation from the D.S.P. to conduct further investigation to determine the real reasons for the suicide with a specific finding that the suicide death is not due to any dowry harassment. R.D.O. has also recorded the statement of the de facto complainant and the mother of the deceased to the effect that the deceased was having a very cordial relationship with every one in the family including the husband except the A-3 the second daughter in law".

19. All these facts would clearly show and demonstrate that neither at the time of inquest nor during the R.D.O. enquiry or at the time of the complaint by the complainant, who is also the father of the deceased, any allegation was attributed against the appellants and, on the contrary, it was the case of the complainant that allegedly Easwari (A-3) alone was responsible for the suicide of the deceased and this formed the basis of the learned Single Judge to come to the conclusion that Sections 304-B and 498-A-I.P.C. are not attracted.

20. The appellants submitted that there is no allegation against the appellants Velmurugan and Anna Lakshmi, who are arrayed as Accused 4 and 5 respectively in the final report either at the time of lodging of the complaint and registration of FIR or at the time of inquest enquiry or even in the statements before the R.D.O. On the contrary the complainant has alleged that it is only Easwari (A-3) who is the cause of the suicide. It may be relevant to extract certain portions of the F.I.R., R.D.O. Report and the Alteration Report filed by the respondent.

21. In the R.D.O. Report dated 3.2.2005, the following statement of the complainant is extracted :

> "My son-in-law Thiru M.Anandraj is running a provision shop at Karaikudi of his own. In that his brother Mohan is also having a share. *My son-in-law looked after my daughter in good manner. All of them in their house treated my daughter in a good way.* He informed that Smt.Eswari, wife of Mohan alone used to quarrel with my daughter often. Due to her torture alone my daughter might have hanged herself and committed suicide. In the death, apart from Smt.Eswari, he informed that no other is having any part. He has also stated that there is no dowry harassment in the death. (emphasis added)"

22. Again in the said Report the R.D.O. concludes as under :



> "From the inquest it can be found that the death did not happen due to dowry harassment. The reason is that even the father and mother of the deceased girl said the death has not happened due to dowry harassment. Therefore, I inform that the death is not caused due to dowry harassment. Further, the father and mother of the deceased girl said that the death is caused due to the torture of Smt.Easwari. Therefore, the police may take up the case for investigation and on proper investigation the cause for the death may be found out."

23. Again in the Alteration Report by 'D.S.P.', the following is recorded :

> "It is found that the deceased Kamatchi committed suicide only due to the harassment by her husband Anandaraj and his elder brother's wife Eswari often demanding car as dowry from her parents."

24. Again in the F.I.R. the only allegation is that:

> "My son-in-law Anandraj and Easwari, wife of Mohan have abetted my daughter Kamatchi to commit suicide. They are responsible for my daughter's death. Therefore, I request that action may be taken against Anandaraj and Easwari alone for the death of my daughter."

25. The appellants also submitted that the entire case of the prosecution does not reveal even remote connection of the appellants with the commission of an offence punishable under Section 306 I.P.C.

26. The case of the prosecution is that on 14th January,2005, the deceased wanted to use the family car to go to the Theme Park at Madurai from Karaikudi along with other family members but she was denied the permission to use the car. At that juncture Easwari (A-3) taunted the deceased that if she wanted to go around in a car, she has to get a car from her parents. These words deeply hurt the

deceased and she had committed suicide on 18th January,2005 at 1.30 p.m. at her matrimonial home.

27. The appellants submitted that even if the prosecution story that she was denied permission to use the car on 14th January, 2005 and the suicide had taken place on 18th January, 2005 is believed, it cannot be said that the suicide by the deceased was the direct result of the expressions exchanged between the deceased and Easwari (A-3) on 14th January, 2005. Viewed from the aforesaid circumstances independently, still the ingredients of the "abetment" are totally absent in the case at hand. In these facts and circumstances, to compel the appellants to face the rigmarole of a trial would be an abuse of law.

28. The appellants also submitted that there is no material on record to proceed against the appellants for an offence punishable under Section 306 I.P.C. No conviction can be recorded in absence of legal evidence. According to the appellants, any further proceeding in this case will be an abuse of the process. According to them, this is a fit case warranting interference by this Court.

29. The appellants contended that the genesis of the prosecution is on the basis of the complaint preferred by the father of the deceased Kamatchi. He had categorically stated that his daughter had committed suicide due to the taunts of Easwari (A-3). According to the complainant, his son-in-law, Anandraj (A-1) and the said Easwari (A-3) alone were responsible for the death of his daughter.

30. The appellants also contended that in pursuance to that complaint, the R.D.O. held an inquest by examining few witnesses including the father, the mother and the brother-in-law (sister's husband) of the deceased and others. In their statements, none of them had stated any dowry harassment against the accused or any other member of the family of the accused. On the contrary, they have categorically stated that



there was no dowry harassment suffered by the deceased in her in-law's house. Thus, the requirement to bring home the ingredient of the offence Under Section 304-B I.P.C., namely, the 'dowry' demand as found by the learned Single Judge was absent in the prosecution case. They contended that the High Court has held that no allegation of cruelty against the appellants were found from the very inception and the charge under Section 498-A was liable to be quashed. In this background, by no stretch of imagination, the appellants can ever be convicted under Section 306 IPC.

31. The appellants submitted that the summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of the allegations made in the complaint and the evidence, both oral and documentary, in support thereof and would that be sufficient for the complainant to succeed in bringing home the charge against the accused? It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before the summoning of the accused. The Magistrate has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to point out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.

32. The appellants submitted that the prosecution must produce evidence before the Court, which is capable of being converted into legal evidence after the charges are framed. In this case admittedly, there is no legal evidence connecting the appellants with any crime, much less the offences alleged, as the materials are not capable of being converted into legal

evidence. Hence, in the absence of any material which can be converted into legal evidence, the proceedings as against the appellants under Section 306 IPC are also liable to be quashed.

33. The appellants has placed reliance on a judgment of this Court in *Mahendra Singh & Another v. State of M.P.* 1995 Supp. (3) SCC 731. In this case the allegations levelled were as under:-

> "My mother-in-law and husband and sister-in-law (husband's elder brother's wife) harassed me. They beat me and abused me. My husband Mahendra wants to marry a second time. He has illicit connections with my sister-in-law. Because of these reasons and being harassed I want to die by burning."

34. This Court while acquitting the appellant observed that neither of the ingredients of abetment are attracted on the statement of the deceased.

35. In the instant case, what to talk of existence of instances or illustrations of instigation, there are no specific allegations levelled against the appellants. On a careful perusal of the entire material on record, no offence under Section 306 IPC can be made out against the appellants, in view of our clear and definite finding that there is no material whatsoever against the appellants much less positive act on the part of the appellants to instigate or aid in committing the suicide.

36. The main substantial questions of law which arise in this appeal are whether the conviction of the appellants under Section 306 I.P.C. is sustainable and whether in the facts and circumstances of this case, the High Court was justified in not quashing the proceedings against the appellants under its inherent powers.

37. We would like to deal with the concept of 'abetment'. Section 306 of the Code deals with 'abetment of suicide' which reads as under:



> "306. Abetment of suicide – If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extent to ten years, and shall also be liable to fine."

38. The word 'suicide' in itself is nowhere defined in the Indian Penal Code, however, its meaning and import is well known and requires no explanation. 'Sui' means 'self' and 'cide' means 'killing', thus implying an act of self-killing. In short a person committing suicide must commit it by himself, irrespective of the means employed by him in achieving his object of killing himself.

39. In our country, while suicide itself is not an offence considering that the successful offender is beyond the reach of law, attempt to suicide is an offence under section 309 of I.P.C.

40. 'Abetment of a thing' has been defined under section 107 of the Code. We deem it appropriate to reproduce section 107, which reads as under:

> "107. Abetment of a thing – A person abets the doing of a thing, who –
>
> First – Instigates any person to do that thing; or
>
> Secondly – Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes places in pursuance of that conspiracy, and in order to the doing of that thing; or
>
> Thirdly – Intentionally aides, by any act or illegal omission, the doing of that thing.

Explanation 2 which has been inserted along with section 107 reads as under:

"Explanation 2 – Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act."

41. Learned counsel also placed reliance on yet another judgment of this court in *Ramesh Kumar v. State of Chhattisgarh* (2001) 9 SCC 618, in which a three-Judge Bench of this court had an occasion to deal with the case of a similar nature. In a dispute between the husband and wife, the appellant husband uttered "you are free to do whatever you wish and go wherever you like". Thereafter, the wife of the appellant Ramesh Kumar committed suicide. This Court in paragraph 20 has examined different shades of the meaning of "instigation'. Para 20 reads as under:

"20. Instigation is to goad, urge forward, provoke, incite or encourage to do "an act". To satisfy the requirement of instigation though it is not necessary that actual words must be used to that effect. or what constitutes instigation must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. the present one is not a case where the accused had by his acts or omission or by a continued course of conduct created such circumstances that the deceased was left with no other option except to commit suicide in which case an instigation may have been inferred. A word uttered in the fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation."

42. In the said case this court came to the conclusion that there is no evidence and material available on record wherefrom an inference of the accused-appellant having abetted commission of suicide by Seema (appellant's wife therein) may necessarily be drawn.



43. In *State of West Bengal v. Orilal Jaiswal & Another* (1994) 1 SCC 73, this Court has cautioned that the Court should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trial for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end the life by committing suicide. If it appears to the Court that a victim committing suicide was hypersensitive to ordinary petulance, discord and difference in domestic life, quite common to the society, to which the victim belonged and such petulance, discord and difference were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the Court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty.

44. This court in *Chitresh Kumar Chopra v. State* (Govt. of NCT of Delhi) 2009 (16) SCC 605, had an occasion to deal with this aspect of abetment. The court dealt with the dictionary meaning of the word "instigation" and "goading". The court opined that there should be intention to provoke, incite or encourage the doing of an act by the latter. Each person's suicidability pattern is different from the others. Each person has his own idea of self-esteem and self-respect. Therefore, it is impossible to lay down any straight-jacket formula in dealing with such cases. Each case has to be decided on the basis of its own facts and circumstances.

45. Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained.

46. The intention of the Legislature and the ratio of the cases decided by this court are clear that in order to convict a person under section 306 IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option

and this act must have been intended to push the deceased into such a position that he/she committed suicide.

47. In *V.P. Shrivastava v. Indian Explosives Limited and Others* (2010) 10 SCC 361, this court has held that when prima facie no case is made out against the accused, then the High Court ought to have exercised the jurisdiction under section 482 of the Cr.P.C. and quashed the complaint.

48. In a recent judgment of this Court in the case of *Madan Mohan Singh v. State of Gujarat and Anr.* (2010 ) 8 SCC 628, this Court quashed the conviction under Section 306 IPC on the ground that the allegations were irrelevant and baseless and observed that the High Court was in error in not quashing the proceedings.

49. In the instant case, what to talk of instances of instigation, there are even no allegations against the appellants. There is also no proximate link between the incident of 14.1.2005 when the deceased was denied permission to use the Qualis car with the factum of suicide which had taken place on 18.1.2005.

50. Undoubtedly, the deceased had died because of hanging. The deceased was undoubtedly hyper-sensitive to ordinary petulance, discord and differences which happen in our day-to-day life. In a joint family, instances of this kind are not very uncommon. Human sensitivity of each individual differs from person to person. Each individual has his own idea of self-esteem and self-respect. Different people behave differently in the same situation. It is unfortunate that such an episode of suicide had taken place in the family. But the question remains to be answered is whether the appellants can be connected with that unfortunate incident in any manner?

51. On a careful perusal of the entire material on record and the law, which has been declared by this Court, we can safely arrive at the conclusion that the appellants are not even



remotely connected with the offence under Section 306 of the I.P.C.. It may be relevant to mention that criminal proceedings against husband of the deceased Anandraj (A-1) and Easwari (A-3) are pending adjudication.

52. Next question which arises in this case is that in view of the settled legal position whether the High Court ought to have quashed the proceedings under its inherent power under Section 482 of the Criminal Procedure Code in the facts and circumstances of this case?

53. This Court had an occasion to examine the legal position in a large number of cases. In R.P. Kapur v. State of Punjab AIR 1960 SC 866, this Court summarized some categories of cases where the High Court in its inherent power can and should exercise to quash the proceedings:

(i) where it manifestly appears that there is a legal bar against the institution or continuance of the proceedings;

(ii) where the allegations in the first information report or complaint taken at their face value and accepted in their entirety do not constitute the offence alleged;

(iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.

54. In *Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi and Others* (1976) 3 SCC 736, according to the court, the process against the accused can be quashed or set aside :

"(1) where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the

complaint does not disclose the essential ingredients of an offence which is alleged against the accused;

(2)where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;

(3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like".

55. This court in *State of Karnataka v. L. Muniswamy & Others* (1977) 2 SCC 699, observed that the wholesome power under section 482 Cr.P.C. entitles the High Court to quash a proceeding when it comes to the conclusion that allowing the proceedings to continue would be an abuse of the process of the court or that the ends of justice requires that the proceedings ought to be quashed. The High Courts have been invested with inherent powers, both in civil and criminal matters, to achieve a salutary public purpose. A Court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In this case, the court observed that ends of justice are higher than the ends of mere law though justice must be administered according to laws made by the Legislature. This case has been followed in a large number of subsequent cases of this court and other courts.

56. In *Madhu Limaye v. The State of Maharashtra* (1977) 4 SCC 551, a three-Judge Bench of this court held as under:-



"…..In case the impugned order clearly brings out a situation which is an abuse of the process of the court, or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained in Section 397(2) can limit or affect the exercise of the inherent power by the High Court. Such cases would necessarily be few and far between. One such case would be the desirability of the quashing of a criminal proceeding initiated illegally, vexatiously or as being without jurisdiction. The present case would undoubtedly fall for exercise of the power of the High Court in accordance with Section 482 of the 1973 Code, even assuming, that the invoking of the revisional power of the High Court is impermissible."

57. This court in *Madhavrao Jiwajirao Scindia & Others v. Sambhajirao Chandrojirao Angre & Others* (1988) 1 SCC 692, observed in para 7 as under:

"The legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilized for any oblique purpose and where in the opinion of the court chances of an ultimate conviction is bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage."

58. In *Janta Dal v. H.S. Chowdhary and Others* (1992) 4 SCC 305 the court observed as under :

"131. Section 482 which corresponds to Section 561-A of the old Code and to Section 151 of the Civil Procedure Code proceeds on the same principle and deals with the inherent powers of the High Court. The rule of inherent powers has its source in the maxim "Quadolex aliquid alicui concedit, concedere videtur id sine quo ipsa, ess uon potest" which means that when the law gives anything to anyone, it gives also all those things without which the thing itself could not exist.

132. The criminal courts are clothed with inherent power to make such orders as may be necessary for the ends of justice. Such power though unrestricted and undefined should not be capriciously or arbitrarily exercised, but should be exercised in appropriate cases, ex debito justitiae to do real and substantial justice for the administration of which alone the courts exist. The powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Courts must be careful to see that its decision in exercise of this power is based on sound principles."

59. In *Emperor v. Khwaja Nazir Ahmad* AIR 1945 PC 18 and *Lala Jairam Das v. Emperor* AIR 1945 PC 94 the Judicial Committee has taken the view that Section 561-A of the old Code which is equivalent to Section 482 of the Cr.P.C. gave no new powers but only provided that already inherently possessed should be preserved. This view holds the field till date.

60. In *Dr Raghubir Sharan v. State of Bihar* (1964) 2 SCR 336, this court observed as under

"... [E]very High Court as the highest court exercising criminal jurisdiction in a State has inherent power to make any order for the purpose of securing the ends of justice .... Being an extraordinary power it will, however, not be



pressed in aid except for remedying a flagrant abuse by a subordinate court of its powers ...."

61. In the said case, the court also observed that the inherent powers can be exercised under this section by the High Court (1) to give effect to any order passed under the Code; (2) to prevent abuse of the process of the court; (3) otherwise to secure the ends of justice.

62. In *Connelly v. Director of Public Prosecutions* 1964 AC 1254, Lord Ried at page 1296 expressed his view "there must always be a residual discretion to prevent anything which savours of abuse of process" with which view all the members of the House of Lords agreed but differed as to whether this entitled a Court to stay a lawful prosecution.

63. In *Kurukshetra University and Another v. State of Haryana and Another* (1977) 4 SCC 451, this court observed as under:

"Inherent powers do not confer an arbitrary jurisdiction on the High Court to act according to whim or caprice. That statutory power has to be exercised sparingly, with circumspection and in the rarest of rare cases. Thus, the High Court in exercise of inherent powers under Section 482, Criminal Procedure Code cannot quash a first information report more so when the police had not even commenced the investigation and no proceeding at all is pending in any Court in pursuance of the said FIR."

64. In *State of Haryana & Others v. Bhajan Lal & Others* reported in (1992) Suppl.1 SCC p.335, this court had an occasion to examine the scope of the inherent power of the High Court in interfering with the investigation of an offence by the police and laid down the following rule: [SCC pp. 364-65, para 60: SCC (Cri) p. 456, para 60].

"The sum and substance of the above deliberation results in a conclusion that the investigation of an offence is the

field exclusively reserved for the police officers whose powers in that field are unfettered so long as the power to investigate into the cognizable offences is legitimately exercised in strict compliance with the provisions falling under Chapter XII of the Code and the courts are not justified in obliterating the track of investigation when the investigating agencies are well within their legal bounds as aforementioned. Indeed, a noticeable feature of the scheme under Chapter XIV of the Code is that a Magistrate is kept in the picture at all stages of the police investigation but he is not authorised to interfere with the actual investigation or to direct the police how that investigation is to be conducted. But if a police officer transgresses the circumscribed limits and improperly and illegally exercises his investigatory powers in breach of any statutory provision causing serious prejudice to the personal liberty and also property of a citizen, then the court on being approached by the person aggrieved for the redress of any grievance, has to consider the nature and extent of the breach and pass appropriate orders as may be called for without leaving the citizens to the mercy of police echelons since human dignity is a dear value of our Constitution."

65. In *State of Haryana & Others v. Bhajan Lal & Others* (supra), this court in the backdrop of interpretation of various relevant provisions of the Code of Criminal Procedure under Chapter XIV and of the principles of law enunciated by this court in a series of decisions relating to the exercise of the extraordinary power under Article 226 of the Constitution of India or the inherent powers under Section 482 Cr.P.C., gave the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of the court or otherwise to secure the ends of justice. Thus, this court made it clear that it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an



exhaustive list to myriad kinds of cases wherein such power should be exercised:

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155 (2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, on investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient grounds for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceedings is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act,

providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

66. In *G. Sagar Suri & Another v. State of UP & Others* (2000) 2 SCC 636, this Court observed that it is the duty and obligation of the criminal court to exercise a great deal of caution in issuing the process particularly when matters are essentially of civil in nature.

67. In *State of A.P. v. Golconda Linga Swamy and Another* (2004) 6 SCC 522, this court observed as under:-

"Exercise of power under Section 482 of the Code in a case of this nature is the exception and not the rule. The section does not confer any new powers on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely: (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognizes and preserves inherent powers of the High Courts. All courts, whether civil or criminal, possess in the absence of any express provision, as inherent in their constitution, all such



powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle *quando lex aliquid alique concedit, conceditur et id sine quo res ipsa esse non potest* (when the law gives a person anything, it gives him that without which it cannot exist). While exercising powers under the section, the Court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent such abuse. It would be an abuse of the process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation or continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto.

68. This court in *Zandu Pharmaceutical Works Ltd. & Others v. Mohd. Sharaful Haque & Another* (2005) 1 SCC 122, observed thus:-

"It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers, court would be justified to quash any proceeding if it finds that initiation/

continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto."

69. In *Devendra and Others v. State of Uttar Pradesh and Another* (2009) 7 SCC 495, this court observed as under:-

"There is no dispute with regard to the aforementioned propositions of law. However, it is now well settled that the High Court ordinarily would exercise its jurisdiction under Section 482 of the Code of Criminal Procedure if the allegations made in the first information report, even if given face value and taken to be correct in their entirety, do not make out any offence. When the allegations made in the first information report or the evidences collected during investigation do not satisfy the ingredients of an offence, the superior courts would not encourage harassment of a person in a criminal court for nothing."

70. In *State of A.P. v. Gourishetty Mahesh and Others* 2010 (11) SCC 226, this court observed that the power under section 482 of the Code of Criminal Procedure is vide and they require care and caution in its exercise. The interference must be on sound principle and the inherent power should not be exercised to stifle the legitimate prosecution. The court further observed that if the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is up to the High Court to quash the same in exercise of its inherent power under section 482 of the Code.

71. In the light of the settled legal position, in our considered opinion, the High Court was not justified in rejecting the petition filed by the appellants under Section 482 of the



Cr.P.C. for quashing the charges under Section 306 I.P.C. against them. The High Court ought to have quashed the proceedings so that the appellants who were not remotely connected with the offence under Section 306 I.P.C. should not have been compelled to face the rigmaroles of a criminal trial.

72. As a result, the charges under Section 306 I.P.C. against the appellants are quashed.

73. Consequently, the impugned judgment is set aside and the appeal arising out of Special Leave Petition (Crl.)No.2687 of 2010 filed by the appellants is allowed and disposed of.

**Crl.Appeal No. 611 of 2011 (arising out of SLP Crl.) No.2550/2010)**

74. In view of the decision in Criminal Appeal arising out of Special Leave Petition (Crl.) No.2687 of 2010, this appeal is also allowed and disposed of.

N.J. Appeals allowed.

PRAHALAD PATEL
*v.*
STATE OF MADHYA PRADESH
(Criminal Appeal No. 1209 of 2007)

MARCH 2, 2011

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

*PENAL CODE, 1860:*

*s.302 – Murder – Conviction by trial court - Upheld by High Court – HELD: The prosecution has proved that on a petty issue, the accused had a grudge against the victim, and on the date of incident, in presence of the eye-witness caused fatal injuries by axe to the victim – The prosecution by way of medical evidence, the evidence of eye-witness and other witnesses, seizure of the axe at the instance of the accused, and the FSL report has proved its case against the accused beyond doubt – There is no ground for interference with the judgments of courts below – Constitution of India, 1950 - Article 136.*

*CONSTITUTION OF INDIA, 1950:*

*Article 136 – Appeal against judgment of High Court upholding conviction of accused as recorded by trial court – HELD: It is settled law that when the trial court and the appellate court, on appreciation of evidence, by relying on acceptable materials, arrived at a conclusion, in the absence of perversity in such a conclusion, interference by Supreme Court exercising jurisdiction under Article 136 is not warranted – Penal Code, 1860 – s.302.*

**The accused - appellant was prosecuted for causing the death of the brother of PWs.2 and 7. The prosecution case was that over a petty issue of forbearing the**





**accused from throwing grass on the path, he bore a grudge against the brother of PWs 2 and 7. On the date of incident when the victim was breaking stones in the mine, the accused went there with an axe and caused several axe injuries to the victim, who ultimately died in the hospital in an unconscious stage. The incident was witnessed by PW 1, the fellow worker in the mine, who informed victim's brother and also lodged the FIR. The trial court convicted the accused of the offence punishable u/s 302 IPC and sentenced him to imprisonment for life. The High Court upheld the conviction and the sentence. Aggrieved, the accused filed the appeal.**

**Dismissing the appeal, the Court**

**HELD: 1.1 The evidence of eye-witness PW-1 and his statement (Ext. P-1), the statement of the doctor (PW-16) and his report (Ext. P-21) clearly prove that the death of victim was homicidal. It is true that in the medical examination report (Ext. P-10), prepared by the doctor (PW-9), all the injuries mentioned in the autopsy report have not been noted. However, as rightly observed by the High Court, sometimes some injuries may not be visible after passage of time. This Court also verified both the reports and found that the said discrepancy is not material to the prosecution case. [para 4-5] [476-G; 477-F-H]**

**1.2 The prosecution mainly relied on the evidence of PW-1, the eye-witness to the incident, who also narrated the earlier incident about throwing bushes on the path-way and the altercation between the accused and the deceased and also the fact that he accompanied the deceased to the mine. There is no reason to disbelieve his version. Apart from this, it was PW-1 who took the injured to the hospital and made a complaint in the Police Station. Besides, the prosecution has also examined PW-**

**2 and PW-7-two brothers of the deceased. Both of them, in their evidence, have affirmed that PW-1 had come to their house and informed them that the accused assaulted their brother with an axe. They further narrated that the victim was rushed to the Hospital and on the way, PW-1 made a complaint to the police. Though, PWs 2 and 7 are brothers of the deceased, relationship is not a factor to affect credibility of a witness. Their evidence fully corroborates with the evidence of PW-1 about the manner of occurrence and he witnessed the same. [para 6] [478-A-E]**

*Israr vs. State of U.P.* **2004 (6) Suppl. SCR 695 = (2005) 9 SCC 616 and** *S. Sudershan Reddy vs. State of A.P.,* **(2006) 10 SCC 163 = AIR 2006 SC 2716 – relied on.**

**1.3 The doctor (PW-16) has observed that the death was due to the injuries sustained. The weapon of offence, namely, axe, was seized at the instance of the accused. The report from the Forensic Science Laboratory (Ext. P-17) shows that the blood found on the axe was human blood. [para 7] [478-F-G]**

**2. It is settled law that when the trial court and the appellate court, on proper appreciation of evidence by relying on acceptable materials, arrived at a conclusion, in the absence of perversity in such a conclusion, interference by this Court exercising jurisdiction under Article 136 of the Constitution is not warranted. Considering the evidence of PW-1 and additional testimony of PWs 2 and 7 coupled with doctors' evidence and seizure of the weapon and the FSL report, it is held that the prosecution has proved its case beyond doubt against the accused and the same was rightly considered by the Sessions Judge and affirmed by the Division Bench of the High Court. There is no legal ground for interference. [para 8] [478-H; 479-A-B]**



**Case Law Reference:**

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|---|---|---|
| **2004 (6) Suppl. SCR 695** | **relied on** | **para 6** |
| **(2006) 10 SCC 163** | **relied on** | **para 6** |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1209 of 2007.

From the Judgment & Order dated 14.03.2005 of the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No. 774 of 1996.

D.B. Goswami, Dr. Sushil Balwada for the Appellant.

Siddhartha Dave, Jemtiben A.O., Vibha Datta Mahija for the Respondent.

The Judgment of the Court was delivered by

**P. SATHASIVAM, J.** 1. This appeal is directed against the final judgment and order dated 14.03.2005 passed by the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No. 774 of 1996 whereby the Division Bench of the High Court upheld the judgment dated 26.02.1996 passed by the learned Sessions Judge, Sagar, in Sessions Case No. 196 of 1995 convicting the appellant herein under Section 302 of the Indian Penal Code (in short 'the IPC') and sentenced him to undergo imprisonment for life and fine of Rs.1,000/-, in default, to further undergo rigorous imprisonment for three months.

2. Brief Facts:

(a) In Village Chandpur, the accused Prahalad Patel, while cultivating his land had thrown bushes on the path. Daulat-the deceased objected to it and told the accused not to throw the bushes on the path, because of this, there was an altercation between the deceased and the accused. Due to this incident, the accused developed a grudge against the deceased. On

01.02.1995, at around 12 hours, when the deceased was breaking stones in the mine and one Nanhebhai (PW-1) was collecting it nearby, at that time, accused Prahalad Patel came there with an axe and inflicted several injuries to the deceased by hitting him at his right leg, left hand, left shoulder and on back of his head, due to which, he fell down on the earth and blood started oozing out. One Gudda-brother of the accused was also present in the mine but, out of fear, Nanhebhai (PW-1) and Gudda did not try to save the deceased. Thereafter, Nanhebhai (PW-1) rushed to the house of Daulat and narrated the whole incident to his brother and mother. They went to the mine and brought Daulat. He was taken to Police Station Rahli but by that time he became unconscious. The report of the incident (Ex. P-1) was lodged by Nanhebhai (PW-1) in the Police Station. Thereafter, Daulat was sent for medical examination to the hospital at Rahli. Dr. Gupta (PW-9) examined him and issued a report (Ex.P-10) mentioning various injuries. On the advise of the doctor, in an unconscious condition, he was taken to Medical College Hospital at Jabalpur for further treatment. During treatment, he succumbed to injuries. The dead body was sent for post-mortem and Dr. A.K.Jain (PW-16) conducted the post-mortem and prepared a report (Ex. P-21). According to him, the cause of death was due to cut and other injuries.

(b) During investigation, police prepared a spot map and seized the blood stained sand and simple sand from the place of incident. The accused was taken into custody and the axe was recovered at his instance. On completion of investigation, charge sheet was filed against the accused under Section 302 IPC.

(c) The accused denied having committed any offence and stated that he had enmity with Nanhebhai (PW-1) because there is a case pending against the brother of Nanhebhai for causing injuries to his father and, therefore, he falsely implicated him.

(d) The Sessions Judge, on consideration of the materials,



by judgment dated 26.02.1996, accepted the prosecution's case and found the accused guilty for the offence punishable under Section 302 IPC and sentenced him to undergo imprisonment for life and a fine of Rs.1,000/-.

(e) Being aggrieved by the order of the Sessions Judge, the accused preferred an appeal before the High Court of Madhya Pradesh at Jabalpur. The Division Bench of the High Court, by its impugned judgment dated 14.03.2005, upheld the conclusion arrived at by the Sessions Judge and confirmed the conviction and sentence of the accused.

(f) Questioning the same, the accused had filed the above appeal before this Court after obtaining special leave

3. Heard Mr. D.B. Goswami, learned counsel for the accused/appellant and Mr. Siddhartha Dave, learned counsel for the respondent-State.

4. There is no dispute that there was an altercation between the accused and the deceased on a petty issue and the accused nurtured grudge against the deceased. On 01.02.1995, when the deceased was working in the mine, the accused inflicted several injuries to the deceased with an axe. Immediately after the occurrence, Nanhebhai (PW-1), who was working in the same mine informed his family members about the incident and they took the injured to the Police Station and (PW-1) made a statement about the incident which has been marked as (Ex. P-1). When the deceased was taken to Medical College Hospital at Jabalpur, Dr. A.K. Jain (PW-16) certified that he succumbed to his injuries. The evidence of eye-witness (PW-1) and his report (Ex. P-1), the statement of Dr. A.K. Jain (PW-16) and his report (Ex. P-21) clearly prove that the death of Daulat was homicidal.

5. Learned counsel appearing for the appellant contended that there was discrepancy in the number of injuries as recorded by Dr. Gupta (PW-9) and by Dr. A.K. Jain (PW-16). It is true

that the doctor who conducted the autopsy found as many as eight injuries which are as follows:-

"(i) Repaired wound present over back of right shoulder top 4" long.

(ii) Incised wound back of neck at the level of C7 T1 1x½x½.

(iii) Repaired wound over the back of skull left side of occiput 1" long transversely.

(iv) Repaired wound present over the Cervico-temporal region left side vertical 3" long.

(v) Chop wound present over left eye brow region cutting the skin muscle and underlying bone 2"x1"x1".

(vi) Chop wound on the upper part left to forearm near elbow cutting the ulna and lower part of humerus bone 4" x2" x bone deep.

(vii) Repaired wound present over the right knee and

(viii) Multiple small abrasion present over the face below the left eye and chin."

It is equally true that in (Ex. P-10), medical examination report prepared by Dr. Gupta (PW-9), all the above-mentioned injuries have not been noted. However, as rightly observed by the High Court, sometimes some injuries may not be visible after passage of time. In fact, this suggestion was not put to the doctors concerned. Whatever may be, as analyzed and concluded by the High Court, cause of death in this case was cranio cerebral injuries which have been found by both the doctors insofar as fatal injuries are concerned and, for this, there is no discrepancy between the two reports. We also verified both the reports and we are satisfied that the said discrepancy is not material to the prosecution case.



6. The prosecution mainly relied on the evidence of (PW-1), eye-witness to the incident. (PW-1) also narrated the earlier incident about throwing bushes on the path-way to the agricultural field and the altercation between the accused and the deceased and also of the fact that he accompanied the deceased to the mine, there is no reason to disbelieve his version. Apart from this, it was (PW-1) who took the injured to the hospital and made a complaint in the Police Station. In addition to the same, the prosecution has also examined Kallu (PW-2)-brother of the deceased and (PW-7)-another brother of the deceased. Both of them, in their evidence, have affirmed that (PW-1) had come to their house and informed them that Prahalad Patel-the accused assaulted Daulat with an axe. They further narrated that Daulat was rushed to the Hospital and on the way, (PW-1) made a complaint to the police. The evidence of (PW-1) and the corroborative statements of PWs 2 and 7 support the prosecution case. Though, PWs 2 and 7 are brothers of the deceased, relationship is not a factor to affect credibility of a witness. In a series of decisions, this court has accepted the above principle [vide *Israr vs. State of U.P.* (2005) 9 SCC 616 and *S. Sudershan Reddy vs. State of A.P. ,* (2006) 10 SCC 163 = AIR 2006 SC 2716]. Their evidence fully corroborates with the evidence of (PW-1) about the manner of occurrence and he witnessed the same.

7. We have already noted that Dr. A.K. Jain (PW-16) has observed that the death was due to the injuries sustained. The weapon of offence, namely, axe was seized at the instance of the accused. The report from the Forensic Science Laboratory (Ex. P-17) shows that the blood found on the axe was human blood.

8. It is settled law that when the trial Court and the appellate Court, on proper appreciation of evidence by relying on acceptable materials, arrived at a conclusion, in the absence of perversity in such a conclusion, interference by this Court exercising jurisdiction under Article 136 of the Constitution is

not warranted. Considering the evidence of (PW-1) and additional testimony of PWs 2 and 7 coupled with doctors' evidence and seizure of the weapon and the FSL report, we hold that the prosecution has proved its case beyond doubt against the accused and the same was rightly considered by the Sessions Judge and affirmed by the Division Bench of the High Court. We do not find any legal ground for interference.

9. Consequently, the appeal fails and the same is dismissed.

R.P. Appeal dismissed.



KUSUM LATA & ORS.
*v.*
SATBIR & ORS.
(Civil Appeal No. 2269 of 2011)

MARCH 02, 2011

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

*MOTOR VEHICLES ACT, 1988:*

*s.166 – Fatal motor accident – Claim petition – Appreciation of evidence – Claim disallowed by Tribunal as also by High Court on the ground that in the FIR the number of offending vehicle and the name of the driver were not mentioned – HELD: In motor accident claims, claimants are not required to prove the case like in a criminal trial – Courts must keep this distinction in mind – In the instant case, the incident was witnessed by the brother of the deceased and a co-villager – The brother of victim rushed him to hospital while the co-villager chased the offending vehicle and caught the driver – He gave the name of the driver and number of the vehicle to police the following day – There is no reason why Tribunal and High court would ignore such an evidence – Further, even though the age of the victim was determined to be 29 years, the Tribunal erred in applying multiplier of 16 instead of 17 – Accordingly, compensation amount would come to Rs.3,93,428/- apart from funeral expenses and loss of consortium – However, exercising power under Article 142 of the Constitution and considering the number of claimants which include a widow, two minor daughters and one minor son, and the deceased being the sole bread earner, an amount of Rs. 6 lakh including funeral expenses and loss of consortium, is allowed with 7% interest from date of application till payment – Constitution of India, 1950 – Articles 136 and 142 –Evidence.*

**A 29 year old villager while walking on foot was hit by a tempo. His brother rushed him to hospital where he succumbed to his injuries. The claim petition of the dependants filed u/s 166 of the Motor Vehicles Act, 1980 was disallowed by the Motor Accident Claims Tribunal as also by the High Court mainly for the reason that the number of the offending vehicle and the name of its driver were not mentioned in the FIR.**

**Allowing the appeal filed by the dependants of the deceased, the Court**

**HELD: 1.1 It is well known that in a case relating to motor accident claims, the claimants are not required to prove the case as it is required to be done in a criminal trial. Courts must keep this distinction in mind. [para 9] [487-A-B]**

**1.2 In the instant case, evidence has come on record from the deposition of one `DK' who clearly proved the number of the vehicle. His statement is that he was going along with one `AK' on a scooter to know the condition of one of their relative in the Hospital. As they reached near the place of incident, a tempo bearing No. HR-34-8010 of white colour being driven in a rash and negligent manner came from behind and overtook their scooter. The witness saw that the tempo hit the victim, as a result of which he fell down but the tempo did not stop; they followed the same and caught the driver. On their asking, the driver disclosed his name. Thereafter, they went to the Hospital and on the following day when they were returning, they found police and other persons were present at the spot. The witness told the name of the driver and gave the number of the tempo to the police. This witness claims to have seen the incident with his own eyes. When he was cross-examined, he stated that the deceased was not related to him nor was he his neighbour. He was his co-villager. He also told that he**



**knows the driver of the vehicle bearing No. HR-34-8010. There is no reason why the Tribunal and the High Court would ignore the otherwise reliable evidence of the witness. In fact, no cogent reason has been assigned either by the Tribunal or by the High Court for discarding the evidence of the witness. The so-called reason that as his name was not mentioned in the FIR, so it was not possible for him to see the incident, is not a proper assessment of the fact-situation in this case. [Para 7 and 9] [485-F-H; 486-A-D; 486-G-H; 427-A-B]**

*Bimla Devi and others v. Himachal Road Transport Corporation and others.* **2009 (6) SCR 362 = (2009) 13 SCC 530 - relied on.**

**1.3 When a person sees that his brother, being knocked down by a speeding vehicle is suffering in pain and is in need of immediate medical attention, that person is obviously under a traumatic condition. His first attempt will be to take his brother to a hospital or to a doctor. It is but natural for such a person not to be conscious of the presence of any person in the vicinity especially when the witness did not stop at the spot after the accident and gave a chase to the offending vehicle. Under such mental strain if the brother of the victim forgot to take down the number of the offending vehicle it was also not unnatural. [para 8] [486-E-G]**

**2.1 In respect of the finding reached by the Tribunal on the assessment of compensation, this Court finds that the Tribunal has used the multiplier of 16, even though the age of the deceased has been determined to be 29. The Tribunal erred by applying the multiplier of 16. However, considering the age of the victim, the multiplier of 17 should be applied. It is not in dispute that in the instant case, the claim for compensation has been filed u/s 166 of the Motor Vehicles Act. If the multiplier of 17 is applied then the amount comes to Rs.3,93,428.45 apart**

**from the amount of funeral expenses and the amount granted for loss of consortium. Taking all these together, the amount comes to a little more than four lacs of rupees. [para 11] [487-E-H]**

*Sarla Verma (Smt) and others v. Delhi Transport Corporation and another* **2009 (5) SCR 1098 = (2009) 6 SCC 121 - relied on.**

**2.2 The Court, however, in exercise of its power under Article 142 of the Constitution of India and considering the fact that the victim was the sole wage earner in the family and he left behind three minor children and a widow, is of the opinion that for doing complete justice in the case and by taking a broad and comprehensive view of the matter, an amount of Rs.6 lacs including the amounts of consortium and funeral expenses would meet the ends of justice. The Court, therefore, grants a compensation of Rs.6 lacs along with interest @ 7% from the date of presentation of the claim petition till the date of actual payment. [para 12] [488-A-C]**

**2.3 In respect of the dispute about licence, the Tribunal has rightly held that the insurance company has to pay and then may recover it from the owner of the vehicle. The insurance company is to pay the aforesaid amount in the form of a bank draft in the name of appellant no.1 with interest and deposit the same in the Tribunal. This direction should be strictly complied with by the Insurance Company. The judgments of the Tribunal and the High Court are set aside. [para 13-14] [488-D-E]**

*National Insurance Company Limited v. Swaran Singh and others* **2004 (1) SCR 180= (2004) 3 SCC 297 - relied on.**

**Case Law Reference:**

| | | |
|---|---|---|
| **2009 (5) SCR 1098** | **relied on** | **para 10** |



| | | |
|---|---|---|
| **2009 (6) SCR 362** | **relied on** | **para 11** |
| **2004 (1) SCR 180** | **relied on** | **para 13** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2269 of 2011.

From the Judgment & Order dated 21.05.2010 of the High Court of Punjab and Haryana at Chandigarh in F.A.O. No. 4047 of 2006.

Vikas K. Sangwan for the Appellants.

Sunil Mund, M.K. Dua for the Respondents.

The Judgment of the Court was delivered by

**GANGULY, J.** 1. Leave granted.

2. Heard learned counsel for the claimant, learned counsel for the insurance company and also the learned counsel for respondent nos.1 and 2, the driver and the owner of the offending vehicle.

3. In this case the claim for compensation filed by the appellants was concurrently denied both by the Motor Accident Claims Tribunal (for short, 'the Tribunal') as also by the High Court.

4. The material facts of the case are that on 12th January, 2005 while Surender Kumar, the victim, was going on foot, he was hit by a vehicle from behind as the vehicle was driven rashly and negligently and was also in a high speed. The victim sustained several injuries and was rushed to the hospital and was declared dead. After the said incident the appellants, namely, Kusum Lata, wife of the victim and three of his children, two are minor daughters and one is a minor son, filed a claim petition.

5. When the matter came up before the Tribunal, the Tribunal in its award dated 14.6.2006 framed three issues for

adjudication. Of those three issues, since the Tribunal came to a finding against the appellants on the first issue, the other findings of the Tribunal in the second and third issue were, according to Tribunal, of no avail to the appellants. On the first issue the Tribunal came to a finding that the involvement of the offending vehicle being tempo No.HR-34-8010 has not been proved and since on this issue the Tribunal's finding went against the appellants, no compensation was awarded. On an appeal filed against the said award, the High Court by the impugned judgment dated 21.5.2010 also affirmed the finding of the Tribunal.

6. The main reason why both the Tribunal and the High Court reached their respective findings that vehicle No.HR-34-8010 was not involved in the accident are primarily because of the fact that in the FIR which was lodged by one Ashok Kumar, brother of the victim, neither the number of the vehicle nor the name of the driver was mentioned.

7. Admittedly, the facts were that the brother of the deceased, Ashok Kumar while walking on the road heard some noise and then saw that a white colour tempo had hit his brother and sped away. Immediately, he found that his brother, being seriously injured, was in an urgent need of medical aid and he took him to the hospital. Under such circumstances it may be natural for him not to note the number of the offending vehicle. That may be perfectly consistent with normal human conduct. Therefore, that by itself cannot justify the findings reached by the Tribunal and which have been affirmed by the High Court. In the present case, evidence has come on record from the deposition of one Dheeraj Kumar, who clearly proved the number of the vehicle. The evidence of Dheeraj Kumar is that he was going along with one Ashok Kumar on a scooter to know the condition of one of their relative in Mahendergarh Hospital. As they reached at turning at Mahendergarh road a tempo bearing No. HR-34-8010 of white colour being driven in a rash and negligent manner came from behind and overtook their scooter. Dheeraj Kumar was not driving the scooter.



Dheeraj Kumar saw that the tempo hit Surender, the victim, as a result of which he fell down but the tempo did not stop after the accident. However, the evidence of Dheeraj Kumar is that they followed the same and caught the driver. On their asking, the driver disclosed his name as Satbir son of Shri Ram Avtar. Thereafter, they went to Mahendergarh Hospital and on the next day when they were returning, they found police and other persons were present at the spot. Dheeraj Kumar told the name of the driver and gave the number of the tempo to the police. Dheeraj Kumar claims to have seen the incident with his own eyes. When Dheeraj Kumar was cross-examined, he stated that the deceased Surender is not related to him nor was he his neighbour. He was his co-villager. Dheeraj Kumar also told that he knows the driver of the vehicle bearing No. HR-34-8010. He denied all suggestions that he was giving his evidence to help the victim. Both the Tribunal and the High Court have refused to accept the presence of Dheeraj Kumar as his name was not disclosed in the FIR by the brother of the victim.

8. This Court is unable to appreciate the aforesaid approach of the Tribunal and the High Court. This Court is of the opinion that when a person is seeing that his brother, being knocked down by a speeding vehicle, was suffering in pain and was in need of immediate medical attention, that person is obviously under a traumatic condition. His first attempt will be to take his brother to a hospital or to a doctor. It is but natural for such a person not to be conscious of the presence of any person in the vicinity especially when Dheeraj did not stop at the spot after the accident and gave a chase to the offending vehicle. Under such mental strain if the brother of the victim forgot to take down the number of the offending vehicle it was also not unnatural.

9. There is no reason why the Tribunal and the High Court would ignore the otherwise reliable evidence of Dheeraj Kumar. In fact, no cogent reason has been assigned either by the Tribunal or by the High Court for discarding the evidence of Dheeraj Kumar. The so-called reason that as the name of

Dheeraj Kumar was not mentioned in the FIR, so it was not possible for Dheeraj Kumar to see the incident, is not a proper assessment of the fact-situation in this case. It is well known that in a case relating to motor accident claims, the claimants are not required to prove the case as it is required to be done in a criminal trial. The Court must keep this distinction in mind.

10. Reference in this connection may be made to the decision of this Court in *Bimla Devi and others v. Himachal Road Transport Corporation and others* [(2009) 13 SCC 530], in which the relevant observation on this point has been made and which is very pertinent and is quoted below:-

> "In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied."

11. In respect of the finding reached by the Tribunal on the assessment of compensation, this Court finds that the Tribunal has used the multiplier of 16, even though the age of the deceased has been determined to be 29. We find that the Tribunal erred by applying the multiplier of 16. However, considering the age of the victim, the multiplier of 17 should be applied in view of the decision of this Court in *Sarla Verma (Smt) and others v. Delhi Transport Corporation and another* reported in (2009) 6 SCC 121, and the chart at page 139. It is not in dispute that in the instant case the claim for compensation has been filed under Section 166 of the Motor Vehicles Act. This Court finds that if the multiplier of 17 is applied then the amount comes to Rs.3,93,428.45 apart from the amount of funeral expenses and the amount granted for loss of consortium. Taking all these together the amount comes to a little more than four lacs of rupees.



12. The Court, however, in exercise of its power under Article 142 and considering the number of claimants, of which three are minor children, is of the opinion that for doing complete justice in the case and by taking a broad and comprehensive view of the matter, an amount of Rs.6 lacs including the amounts of consortium and funeral expenses would meet the ends of justice. The Court, therefore, grants a compensation of Rs.6 lacs considering the fact that the victim was the sole wage earner in the family and he left behind three minor children and a widow. The said amount is to be paid along with interest @ 7% from the date of presentation of the claim petition till the date of actual payment.

13. In respect of the dispute about licence, the Tribunal has held and, in our view rightly, that the insurance company has to pay and then may recover it from the owner of the vehicle. This Court is affirming that direction in view of the principles laid down by a three-Judge Bench of this Court in the case of *National Insurance Company Limited v. Swaran Singh and others* reported in (2004) 3 SCC 297.

14. The appeal is, therefore, allowed. The judgments of the Tribunal and the High Court are set aside. The insurance company is to pay the aforesaid amount in the form of a bank draft in the name of appellant no.1 with interest as aforesaid within a period of six weeks from date and deposit the same in the Tribunal. This direction should be strictly complied with by the Insurance Company.

15. This Court directs the Tribunal to take steps for opening a bank account in the name of the appellant no.1 in a Nationalised Bank and deposit the demand draft in that account. If, however, there is any bank account in the name of the appellant no.1, the demand draft is to be deposited in that bank account.

16. No costs.

R.P. Appeal allowed.

STATE OF RAJASTHAN
*v.*
MAHESH KUMAR SHARMA
(Civil Appeal No. 2278 of 2011)

MARCH 2, 2011

**[J.M. PANCHAL AND H.L. GOKHALE, JJ.]**

*Rajasthan Civil Services (Medical Attendance) Rules, 1970: rr.6 and 7 – Employee of Rajasthan District Court got operated for heart surgery in Escorts Heart Institute, New Delhi – Claim for re-imbursement of medical expenses – Held: He is entitled to medical expenses to a limited extent permissible in the rules – High Court erred in granting full re-imbursement by relying upon r.7 since it cannot be said that treatment for heart surgery was not available in State of Rajasthan.*

**The respondent was an employee in the District Court at Balotra, Rajasthan. He had gone to Uttaranchal on leave where he suffered a heart ailment. On his way back to Balotra, he got admitted in the Escort Heart Institute in New Delhi and was operated for by-pass surgery. He claimed reimbursement of the full medical expenses from the State of Rajasthan. The State Government accepted his request to a limited extent and granted him reimbursement upto an amount of Rs. 50,000/- which was permissible as per the Rajasthan Civil Services (Medical Attendance) Rules, 1970. Aggrieved, the respondent filed a writ petition which was allowed by the High Court and full re-imbursement was granted.**

**In the instant appeal, it was contended for the appellant that the High Court had erred in relying upon Rule 7 as against Rule 6 thereof; Rule 6 applies to a situation where an employee goes outside the State and falls sick; and Rule 7 deals with a situation where a**





**Government servant is not in a position to obtain the necessary medical treatment for the disease in the State of Rajasthan which is a different situation and in which case he is permitted the treatment in the hospitals mentioned in Appendix-11 of the Rules.**

**Allowing the appeal, the Court**

**HELD: Rule 7 of the Rajasthan Civil Services (Medical Attendance) Rules, 1970 deals with treatment of a disease for which treatment is not available in the State of Rajasthan. Certainly it cannot be contended and it is not so contended by the respondent that treatment for heart surgery is not available in the State of Rajasthan. Rule 7(1) itself points out that such institute can be approached for surgery but only for which treatment is not available in Rajasthan. The High Court erred in relying upon Rule 7(1) and in granting full reimbursement of the expenses which were incurred by the employee concerned while taking treatment in the Escorts Heart Institute, Delhi. The Government has formulated necessary rules permitting the reimbursement of medical expenses in certain situations and upto a certain limit. The Government has been reimbursing the necessary expenditure as permitted by the rules uniformly. It will, therefore, not be proper for a Government employee or for his relatives to claim reimbursement of medical expenses otherwise than what was provided in the Rules. However, the respondent has already been paid the amount which was directed under the judgment of Single Judge of the High Court and that the respondent has subsequently retired from the service. The reimbursement was done in view of the then prevalent interpretation of the relevant rules in *Shankarilal's case. In the facts and circumstances of the case, the appellant**

**government will not recover the amount which has been paid to the respondent, nor will the government recover any amount which has been similarly paid to other employees seeking such medical reimbursement under *Shankarial's judgment which was prevalent so far. [Paras 7, 8 and 10] [493-E-G; 494-F-G; 495-B-D]**

*Shankarial v. State of Rajasthan* **2000 3 WLC (Raj.) 585 – overruled.**

*State of Punjab and Others v. Ram Lubhaya Bagga and Others* **(1998) 4 SCC 117 – referred to.**

**Case Law Reference:**

| | | |
|---|---|---|
| **2000 3 WLC (Raj.) 585** | **overruled** | **Para 5** |
| **(1998) 4 SCC 117** | **referred to** | **Para 8** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2278 of 2011.

From the Judgment & Order dated 05.09.2007 of the High Court of Judicature for Rajastha at Jodhpur in D.B. Civil Special Appeal No. 749 of 2007.

Dr. Manish Singhvi, D.K. Devesh, Milind Kumar for the Appellant.

Anupam Mishra, Jenis V. Fancis, V.J. Francis for the Respondent.

The Judgment of the Court was delivered by

**GOKHALE, J.** 1. Leave granted.

2. This appeal by special leave by the State of Rajasthan is preferred against the judgment dated 5th September, 2007 of a Division Bench of the High Court of Judicature for Rajasthan at Jodhpur in D.B. Civil Special Appeal No. 749 of



2007 dismissing the appeal filed by the appellant against the judgment and order passed by a learned Single Judge of that Court dated 12th September, 2006 in Civil Writ Petition No. 2611 of 2006.

3. The facts giving rise to the present appeal are thus:-

The respondent was an employee working in the District & Sessions Court at Balotra, Rajasthan. He had gone to Uttaranchal on leave where he suffered a heart ailment. On his way back to Balotra, he suddenly fell ill and got admitted in the Escort Heart Institute in New Delhi and was operated for by-pass surgery. He claimed the reimbursement of the full medical expenses from the State of Rajasthan. The State Government accepted his request to a limited extent and granted him reimbursement upto an amount of Rs. 50,000/- which was permissible as per the Rules.

4. The respondent felt aggrieved and hence filed a writ petition which was allowed by the learned Single Judge and the appeal therefrom was dismissed by the Division Bench and hence this appeal by special leave by the State of Rajasthan.

5. The Division Bench as well as the Single Judge have relied upon a judgment of a Division Bench of the Rajasthan High Court viz Shankarial Vs. State of Rajasthan reported in 2000 3 WLC (Raj.) 585. What had happened in that case was that the wife of the appellant had similarly gone along with him outside Rajasthan where she had suffered a heart problem. She was taken to Escort Heart Institute in New Delhi where she was operated. The reimbursement of the expenditure of her surgery was declined by the Government. She filed a writ petition which was allowed by the Division Bench.

6. The learned counsel for the appellant points out that the Division Bench of the High Court had erred in relying upon Rule 7 of the Rajasthan Civil Services (Medical Attendance) Rules, 1970 as against Rule 6 thereof. He points out that the Rule 6

of those rules is the relevant rule which applies to a situation where an employee goes outside the state and falls sick. Rule 7 deals with a situation where a Government servant is not in a position to obtain the necessary medical treatment for the desease in the State of Rajasthan which is a different situation and in which case he is permitted the treatment in the hospitals which are mentioned in Appendix-11 of the Rules. Rule 6(1), according to him, is the relevant rule which reads as under:-

**6. Medical attendance and treatment outside Rajasthan:-**

(1) A Government servant including members of his family posted to a station or sent on duty or spending leave or otherwise at a station outside Rajasthan in India and who falls ill shall be entitled to free medical attendance and treatment as an indoor and outdoor patient in a hospital maintained by the Central Government or other State Government on the scale and conditions which would be admissible to him under these rules, had he been on duty or on leave in Rajasthan.

7. As stated above, Rule 7 deals with the treatment of a desease for which treatment is not available in the State of Rajasthan. Certainly it cannot be contended and it is not so contended by the respondent that treatment for a heart surgery is not available in the State of Rajasthan. The learned counsel for the respondent contended that the Escort Heart Institute, New Delhi has been included in the Appendix 11 by the office memorandum dated 25th August, 1989 and has been approved and recognized by State of Rajasthan. Rule 7(1) itself points out that such institute can be approached for surgery but only for which treatment is not available in Rajasthan. Rule 7(1) reads as under:

**7. Treatment of a disease for which treatment is not available in the State :-**



(1) A Government servant and the members of his family suffering from a disease for which treatment is not available in any Government Hospital in the State shall be entitled to medical attendance and treatment to the extent indicated in sub rule (2) of this rule in a Hospital/Institution outside the State recognised by the Government, provided that it is certified by the Principal of a Medical College/ Director of Medical & Health Services on the basis of opinion of the Authorised Medical Attendant to the effect that the treatment of a particular disease from which the patient is suffering is not available in any Government hospital in the State and it is considered absolutely essential for the recovery of the patient to have treatment at a hospital outside the State.

This being the position, in our view, the learned Single Judge as well as the Division Bench and the earlier Division Bench which decided *Shankarial's* case (supra) erred in relying upon Rule 7(1) and granting full reimbursement of the expenses which were incurred by the employee concerned while taking treatment in the Escort Heart Institute, Delhi.

8. In this connection it will be profitable to refer to the judgment of a Bench of three Judges of this Court in *State of Punjab and Others Vs. Ram Lubhaya Bagga and Others* reported in (1998) 4 SCC 117 where the Bench has laid down that the Government would be justified in limiting the medical facilities to the extent it is permitted by its financial resources. In the instant case, the Government has formulated necessary rules permitting the reimbursement of medical expenses in certain situations and upto a certain limit. The Government has been reimbursing the necessary expenditure as permitted by the rules uniformly. It will, therefore, not be proper for a Government employee or for his relatives to claim reimbursement of medical expenses otherwise than what was provided in the Rules.

9. In the circumstances, we allow this appeal and set aside

the Judgment rendered by the Division Bench as well as by the Single Judge. The writ petition filed by the respondent will stand dismissed.

10. Although, this appeal is being allowed, we are informed that the respondent has already been paid the amount which was directed under the Judgment dated 12.9.2006 of the Single Judge in January, 2008 and that the respondent has subsequently retired from the service. It is clear that the reimbursement was done in view of the then prevent interpretation of the relevant rules in *Shankarilal's* case (supra). This being the position, in the facts and circumstances of the case, the appellant government will not recover the amount which has been paid to the respondent, nor will the government recover any amount which has been similarly paid to other employees seeking such medical reimbursement under Shankarial's judgment which was prevalent so far. However, it is now made clear that the judgment in Shankarial's case does not lay down the correct law, and stands over-ruled. The legal position as explained herein above shall apply hereafter.

11. The appeal is allowed and disposed of accordingly. However, there shall be no order as to the costs.

D.G. Appeal allowed.



PESARA PUSHPAMALA REDDY

*v.*

G. VEERA SWAMY AND ORS.

(Civil Appeal No. 2313 of 2011)

MARCH 04, 2011

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

*Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 – ss.7-A and 8 – Powers of Special Tribunals or Special Courts – Calling for a report of Mandal Revenue Officer u/r. 6 before taking cognizance of a case under the Act and publication of a Notification in the Andhra Pradesh Gazette notifying the fact of cognizance of a case under the Act – Requirement of – Held: Under s. 7-A or s. 8-A of the Act or r. 6 of the Rules, it is not mandatory for the Special Tribunal or the Special Court to call for a report of the Mandal Revenue Officer – However, on the facts of a particular case, the Special Tribunal or the Special Court may refer the application to the Mandal Revenue Officer to verify the truth of the statements made in the application and decide the case in a just and reasonable manner – In view of the object of ss. 7A and 8, the publication of a Notification in the Andhra Pradesh Gazette notifying the fact of cognizance of a case under the Act, is mandatory – It is made mandatory not in the public interest but in the interest of persons who may claim title, ownership or lawful possession of such land – If such person is a party in the proceedings u/s. 7-A or 8 in the Special Tribunal or the Special Court and has notice of the same and had opportunity to participate in the proceedings to assert his title, he cannot challenge the proceeding on the ground that no notification or notice was published in the Andhra Pradesh Gazette – On facts, land grabbers had notice of the application u/s. 7-A before the Special Tribunal, they filed their replies to the application and got the opportunity to*

*adduce evidence in support of their case and did not suffer any prejudice for non-compliance of the provisions – Thus, the High Court was not right in quashing the proceedings before the Special Tribunal on the ground that a notification or notice in terms of r. 7(2) had not been issued after taking the cognizance of the case – Orders of the High Court set aside and matter is remitted to the High Court to consider whether reference to the Mandal Revenue Officer was necessary – Andhra Pradesh Land Grabbing (Prohibition) Rules, 1988 – rr. 6,7.*

**The respondent in the instant appeals, were declared as land grabbers by the Special Tribunal in the separate matters. The Special Tribunal directed the Revenue Officer to evict the respondents from the land and put appellants in the possession of the land. He respondent filed an appeal. The Special Court dismissed the same. The respondent filed a writ petition. The High Court allowed the same on the grounds that the Special Tribunal had not called for a report of the Mandal Revenue Officer under Rule 6 of the Andhra Pradesh Land Grabbing (Prohibition) Rules, 1988 and had not issued a Notification under Rule 7 of the Rules in the Andhra Pradesh Gazette after taking cognizance of the case. Therefore, the appellants filed the instant appeals.**

**Allowing the appeals, the Court**

**HELD: 1.1 A reading of the provisions of Sections 7-A and 8 of the Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 would show that neither of the two Sections requires the Special Tribunal or the Special Court to refer any application or a case for local inspection or verification or both by the Mandal Revenue Officer having jurisdiction over the area. Sub-rule (1) of Rule 6 of the Andhra Pradesh Land Grabbing (Prohibition) Rules,1988 however, provides that every application filed**



**under sub-section (1) of Section 8 of the Act or every case taken cognizance of suo motu by the Special Court or an application filed under sub-section (1) of Section 7-A of the Act, before the Special Tribunal, 'may' be referred for local inspection or verification or both by the Mandal Revenue Officer having jurisdiction over the area or by any other Officer of the Government authorized by the Court in this behalf. The word 'may' is capable of meaning 'must' or 'shall' in the light of the context in which the word is used and where a discretion is conferred upon a public authority coupled with an obligation, the word 'may' should be construed to mean a command. [Para 11] [519-G-H; 520-A-C]**

*State of Uttar Pradesh v. Jogendra Singh* **(1963) 2 SCR 197 – relied on.**

**1.2 A reading of Rule 6 of the Rules and, in particular, sub-rules (1) and (2) thereof, indicates that the object of referring the application under sub-section (1) of Section 7-A or sub-section (1) of Section 8 of the Act to the Mandal Revenue Officer is to get full and complete report from the Mandal Revenue Officer after local inspection or verification on the correctness of the statements made in the application and the facts relating to ownership, actual possession and use of the land concerned and such other particulars and information as would be useful to the court to arrive at a correct decision on the claims made in the application. Sub-rule (3) of Rule 6 of the Rules further indicates the nature of the report the Mandal Revenue Officer is required to submit and it states that the Mandal Revenue Officer or the other Officer to whom the application has been referred under sub-rule (1) shall also furnish along with his report copies of the extracts of the Government records to show the survey number and sub-division number and proof of possession,**

**ownership and use of the land and the payment of dues to the Government. Therefore, the report of the Mandal Revenue Officer is to be based on Government records and on proof of possession, ownership and use of the land and the payment of dues to the Government and/or local inspection. Where an applicant before the Special Tribunal or the Special Court furnishes certified copies of Government records to show proof of possession, ownership and use of the land and also payment of dues to the Government, in support of the statements made in the application and the Special Tribunal or the Special Court is satisfied about the truth of the statements made in the application, it may not be necessary for the Special Tribunal or the Special Court to refer the application to the Mandal Revenue Officer for inspection or verification. Moreover, the Special Tribunal or the Special Court can ascertain the truth or otherwise of the statements made in the application made under Sections 7(1) or 8(1) of the Act on the basis of oral and documentary evidence adduced before it. [Para 12] [520-F-H; 521-A-E]**

**1.3 The provisions of the Code of Civil Procedure, 1908 and the Code of Criminal Procedure, 1973 relating to trials, such as examination and cross-examination of witnesses and production and acceptance of documents are also available to the Special Court for ascertaining the truth or otherwise of the statements made in the application. [Para 12] [522-A-B]**

**1.4 The object of Rule 6 of the Rules is to assist the Special Tribunal or the Special Court to arrive at a correct decision on the claims and allegations made in the application under sub-section (1) of Section 7-A and sub-section (1) of Section 8 of the Act to the Special Tribunal or the Special Court and if this very object can be achieved without referring the application of the case to**



**the Mandal Revenue Officer, it may not be necessary for the Special Tribunal or the Special Court to make a reference to the Mandal Revenue Officer and, therefore, there is no compelling duty on the Special Tribunal or the Special Court to refer the application under Section 7-A (1) or under Section 8 to the Mandal Revenue Officer. In other words, under the Act and the Rules, it is not mandatory for the Special Tribunal or the Special Court to call for a report of the Mandal Revenue Officer. However, it is made clear that while there is nothing in the statutory provisions in Section 7-A or Section 8-A of the Act or Rule 6 of the Rules to indicate that the power vested in the Special Tribunal or the Special Court is coupled with a duty to refer the application filed before it to the Mandal Revenue Officer, the facts of a particular case before the Special Tribunal or the Special Court may cast a judicial duty on the Special Tribunal or the Special Court to refer the application filed before it to the Mandal Revenue Officer for the purpose of verifying the truth of the statements made in the application and deciding the land grabbing case before it in a just and reasonable manner. [Para 13] [572-C-G]**

*The Official Liquidator v. Dharti Dhan (P) Ltd.* **(1977) 2 SCC 166 – referred to.**

**2.1 The proviso to sub-section (4) of Section 7-A and the proviso to sub-section (6) of Section 8 of the Act provide that the Special Tribunal and the Special Court shall by notification specify the fact of taking cognizance of the case under the Act. Similarly, sub-rules (1) and (2) of Rule 7 of the Rules provide that the Special Court and the Special Tribunal shall after taking cognizance of the case under the Act give notice in Form II-A/II-B by publishing it in the Andhra Pradesh Gazette. The word 'shall' used in the proviso to sub-section (4) of Section**

**7-A and the proviso to sub-section (6) of Section 8 of the Act as well as in sub-rules (1) and (2) of Rule 7 of the Rules indicates that compliance with requirement of notification or publication of the notice in the Andhra Pradesh Gazette of the case after the Special Tribunal or the Special Court takes cognizance is mandatory. The use of the word 'shall' in these provisions, however, is not conclusive of the mandatory nature of the provisions. [Para 14] [523-C-G]**

*Principles of Statutory Interpretation by Justice G.P. Singh* **12th Edition 2010 – referred to.**

**2.2 The object of the proviso to sub-section (4) of Section 7-A would be clear from the main provision which states that every judgment of the Special Tribunal with regard to the determination of title and ownership to, or lawful possession of, any land grabbed shall be binding on all persons having interest in such land. Similarly, the object of the proviso to sub-section (6) of Section 8 would be clear from the main provision which states that every judgment of the Special Court with regard to the determination of title and ownership to, or lawful possession of, any land grabbed would be binding on all persons having interest in such land. Thus, all persons who may not have been impleaded as a party in the applications filed under sub-section (1) of Section 7-A or sub-section (1) of Section 8 of the Act are sought to be given notice by a notification in the Andhra Pradesh Gazette of the fact of the Special Tribunal or the Special Court taking cognizance of a case to enable them to appear before the Special Tribunal or the Special Court and protect their interest in the land, if any. Considering this object of Sections 7-A and 8 of the Act, the notification or the publication of the notice of the fact that cognizance of a case has been taken in the Andhra Pradesh Gazette as required by the proviso to sub-**



**section (4) of Section 7-A and the proviso to sub-section (6) of Section 8 and sub-rules (1) and (2) of Rule 7 is mandatory and cannot be dispensed with by the Special Tribunal and the Special Court. [Para 14] [524-C-G]**

**2.3 The requirement of a notification or publication of notice in the Andhra Pradesh Gazette of the fact that cognizance of a case has been taken by the Special Tribunal or the Special Court has been made mandatory by the Act and the Rules not in the public interest but in the interest of persons who may claim title, ownership or lawful possession of the land which is the subject-matter of the proceedings under Section 7-A or Section 8 of the Act before the Special Tribunal or the Special Court. If, therefore, a person who claims title, ownership or lawful possession of any such land is already a party in the proceedings under Sections 7-A or 8 of the Act in the Special Tribunal or the Special Court and he has notice of such proceedings and has had due opportunity to participate in the said proceedings and assert his title, ownership or lawful possession over the land, he cannot challenge the proceedings of the Special Tribunal or the Special Court on the ground that the notification or the publication of the notice has not been made in accordance with the Act and Rules. [Para 15] [524-H; 525-A-D]**

*State Bank of Patiala and Ors. v. S. K. Sharma* **(1996) 3 SCC 364;** *Dhirendra Nath Gorai v. Sudhir Chandra Ghosh* **AIR 1964 SC 1300 – referred to.**

**2.4 The provisions of the Act and Rules mandatorily requiring notification or publication of the notice of the case after the Special Tribunal or the Special Court takes cognizance are procedural provisions. The violation of such procedural provisions would not vitiate the proceedings unless prejudice is caused to the party**

**complaining of the violation. [Para 16] [526-B-D]**

**3. In the instant cases, the respondents not only had notice of the application under Section 7-A of the Act before the Special Tribunal but also filed their replies to the application and got the opportunity to adduce evidence in support of their case and had not suffered any prejudice for non-compliance of the provisions of the proviso to sub-section (4) of Section 7-A of the Act or Rule 7 of the Rules. Therefore, the High Court was not right in quashing the proceedings before the Special Tribunal in the instant case on the ground that a notification or notice in terms of Rule 7(2) of the Rules had not been issued after the case was taking cognizance of by the Special Tribunal. Thus, the impugned orders of the High Court are set aside and matter is remanded to the High Court for consideration whether in the facts of the two cases reference to the Mandal Revenue Officer was at all necessary to ascertain the truth of the statements made in the applications and to arrive at a just decision and for consideration of the Writ Petitions on merits. [Paras 16 and 17] [526-C-G]**

*Mohd. Siddiq Ali Khan and Ors. v. Shahsun Finance Ltd. Chennai and Anr.* **2005 (2) ALD 675 (FB);** *Vonkela Subramanyam and Ors. v. Special Court under A.P. Land Grabbing (Prohibition) Act Hyderabad and Ors.* **2007 (5) ALD 184 (DB);** *P.T. Rajan v. T.P.M. Sahir and Ors.* **(2003) 8 SCC 498;** *Vidyawati Gupta and Ors. v. Bhakti Hari Nayak and Ors.* **(2006) 2 SCC 777;** *State of Uttar Pradesh v Jogendra Singh* **1963 (2) SCR 197;** *Govindlal Chhaganlal Patel v. The Agricultural Produce Market Committee, Godhra and Ors.* **(1975) 2 SCC 482;** *V. Laxminarasamma v. A. Yadaiah (Dead) and Ors.* **(2009) 5 SCC 478;** *Sekharamahanti Nagabhushanarao (died) per L.R. v. Andhra University, rep. by its Registrar and Ors.* **2009 (2) ALT 260;** *Graphite India Ltd. and Anr. v. Durgapur Projects Ltd. and Ors.* **(1999) 7 SCC 645 – referred to.**



**Case Law Reference:**

| | | |
|---|---|---|
| **2005 (2) ALD 675 (FB)** | **Referred to** | **Para 6** |
| **2007 (5) ALD 184 (FB)** | **Referred to** | **Para 6** |
| **(2003) 8 SCC 498** | **Referred to** | **Para 7** |
| **(2006) 2 SCC 777** | **Referred to** | **Para 7** |
| **(1975) 2 SCC 482** | **Referred to** | **Para 8** |
| **(2009) 5 SCC 478** | **Referred to** | **Para 8** |
| **2009 (2) ALT 260** | **Referred to** | **Para 8** |
| **(1999) 7 SCC 645** | **Referred to** | **Para 9** |
| **1963 (2) SCR 197** | **Relied on** | **Para 11** |
| **(1977) 2 SCC 166** | **Referred to** | **Para 13** |
| **AIR 1964 SC 1300** | **Referred to** | **Para 15** |
| **(1996) 3 SCC 364** | **Relied on** | **Para 16** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2313 of 2011 etc.

From the Judgment & Order dated 04.06.2007 of the High Court of andhra Pradesh at Hyderabad in Writ Petition No. 8613 of 2002.

WITH

C.A. No. 2314 of 2011.

P. Vishwanatha Shetty, P. Venkay Reddy, B. Ramana Murray, Anil Kumar Tandale, M. Srinivas R. Rao, Abid Ali Beeran P., K. Parameshwar, Sudha Gupta for the Appellant.

G. Ramakrishna Prasad, B. Suyodhan, Bharat J. Joshi, Mohd. Wasay Khan, Annam D.N. Rao, for the Respondents.

The Judgment of the Court was delivered by

**A. K. PATNAIK, J.** 1. Delay in filing of SLP (C) No.23821 of 2008 is condoned.

2. Leave granted.

3. These appeals are against two separate orders dated 04.06.2007 and 05.06.2007 passed by the Division Bench of the High Court of Andhra Pradesh in Writ Petition No.8613 of 2002 and Writ Petition No.18642 of 2004 respectively and raise two common questions of law whether it is mandatory for the Special Tribunal or the Special Court to call for a report of the Mandal Revenue Officer before taking cognizance of a case under the Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 (for short 'the Act') and whether it is mandatory for the Special Tribunal or the Special Court to publish a notification in the Gazette notifying the fact of cognizance of a case under the Act.

4. The facts in Civil Appeal arising out of SLP (C) No.23821 of 2008 are that the appellant R.S. Murthy filed L.G.O.P. No.570 of 1992 before the Special Tribunal, Ranga Reddy District, alleging that the respondents German Reddy and Tresa German Reddy had demolished the compound wall of the appellant constructed over his land measuring 606 sq. yards in Plot No.439 in Survey No. 33 of Guttalabegumpet Village in Ranga Reddy District, with a view to grab the same and was raising structures thereon and prayed inter alia that the appellant be declared as the owner of the land and be given possession of the land and the respondents be declared as land grabbers and punished under the Act. Respondents filed a counter affidavit and denied the allegations made by the appellant. The Special Tribunal framed issues and commenced the trial. The Special Tribunal appointed an Advocate



Commissioner to demarcate the property of the appellant and the Advocate Commissioner submitted a report dated 28.12.1996 which revealed that the respondents had encroached upon the property of the appellant. By order dated 18.04.1996, the Special Tribunal declared the respondents as land grabbers and directed delivery of possession of the land to the appellant and also directed prosecution of the respondents. Respondents filed an appeal along with an application for condonation of delay of 221 days before the Special Court. By order dated 13.03.1997, the Special Court refused to condone the delay and dismissed the appeal. Aggrieved, the respondents filed Writ Petition No.12610 of 1997 in the High Court of Andhra Pradesh and the High Court allowed the Writ Petition and condoned the delay in filing the appeal by the respondents before the Special Court. The Special Court then heard the appeal of the respondents on merits and dismissed the same. The respondents filed Writ Petition No.27848 of 1998 and by an order dated 13.10.2001 the High Court remanded the matter to the Special Court again and the Special Court remitted the matter to the Special Tribunal to give an opportunity to the respondents to file objections to the Advocate Commissioner's report and to adduce evidence. The Special Tribunal again passed orders on 18.09.2002 declaring the respondents as land grabbers. The respondents filed appeal before the Special Court and by order dated 16.08.2004 the Special Court dismissed the appeal. Aggrieved, the respondents filed Writ Petition No.18642 of 2004 and by the impugned order, the High Court allowed the Writ Petition on the grounds that the Special Tribunal had not called for a report of the Mandal Revenue Officer under Rule 6 of the Andhra Pradesh Land Grabbing (Prohibition) Rules, 1988 (for short 'the Rules') and had also not issued a notification under Rule 7 of the Rules in the Andhra Pradesh Gazette after taking cognizance of the case.

5. The facts of Civil Appeal arising out of SLP (C)

No.21828 of 2007 are that the appellant Pesara Pushpamala Reddy filed Land Grabbing Case No.5 of 1990 under the Act against the respondents G. Veera Swamy and others before the Special Tribunal, Warangal, alleging that the respondents G. Veera Swami and others illegally grabbed and occupied his land measuring 0.23 guntas in Survey No.568 (old) and 579 (new) situated at Waddepalli village on the P.W.D. Main Road from Hanamkonda to Hyderabad. The Respondents G. Veera Swamy and others filed their counter affidavits in the said case denying the allegations of land grabbing. The parties produced their oral and documentary evidence and by order dated 03.07.1996, the Special Tribunal allowed the land grabbing case and directed the Revenue Officer, Warangal, to evict the respondents from the land and put the appellant in possession of the land. Aggrieved, the respondents filed appeal before the Special Court at Hyderabad and the Special Court dismissed the appeal on 29.10.1997. The respondents then challenged the orders passed by the Special Tribunal in Writ Petition No.8613 of 2002 in the High Court. The High Court after holding that no report had been called for from the Mandal Revenue Officer under Rule 6 of the Rules and no Gazette notification had been published under Rule 7 of the Rules by the Special Tribunal allowed the Writ Petition by the impugned order dated 04.06.2007 and set aside the impugned orders of the Special Court and the Special Tribunal and remitted the matter to the Special Tribunal, Warangal, for a fresh disposal on merits.

6. Mr. P.S. Narasimha, learned counsel for the appellant in Civil Appeal arising out of SLP (C) No.23821 of 2008, and Mr. P. Vishwanatha Shetty, learned counsel for the appellant in Civil Appeal arising out of SLP (C) No.21828 of 2007, submitted that Section 7-A of the Act deals with the powers and procedure of the Special Tribunal and Section 8 of the Act deals with the procedure and powers of the Special Court and there is nothing in these two sections to show that before taking cognizance, the Special Tribunal or the Special Court has to call for a report of the Mandal Revenue Officer. They submitted



that sub-rule (1) of Rule 6 of the Rules, however, provides that the Special Court or the Special Tribunal may refer the applications filed before the Special Court or the Special Tribunal for local inspection or verification or both by the Mandal Revenue Officer having jurisdiction over the area and sub-rule (2) of Rule 6 of the Rules further provides that such Mandal Revenue Officer to whom the application has been referred under sub-rule (1) shall make or cause to be made an inspection or verification or both, as soon as may be practicable, and shall submit a full and complete report within two weeks from the date of receipt of order with reference to Revenue Records and facts on ground as to the matters enumerated in sub-rule (2). They submitted that the word 'may' in sub-rule (1) of Rule 6 indicates that it is not mandatory for the Special Court or the Special Tribunal to refer the application to the Mandal Revenue Officer and call for his report. They submitted that the High Court has erroneously held that calling for report from the Mandal Revenue Officer was mandatory for the Special Court or the Special Tribunal before taking cognizance because of the Full Bench judgment of the High Court of Andhra Pradesh in *Mohd. Siddiq Ali Khan & Others v. Shahsun Finance Ltd., Chennai & Another* [2005 (2) ALD 675 (FB)] holding that reference of every application under sub-section (1) of Section 8 of the Act or under sub-section (1) of Section 7-A of the Act for local inspection or verification or both by the Mandal Revenue Officer before the Special Court or the Special Tribunal taking cognizance is a mandatory requirement. They relied on a Division Bench judgment of the Andhra Pradesh High Court in *Vonkela Subramanyam and Others v. Special Court under A.P. Land Grabbing (Prohibition) Act, Hyderabad and Others* [2007 (5) ALD 184 (DB)] holding that Rule 6 of the Rules does not contain a mandate to refer the application to the Mandal Revenue Officer and failure to refer the application to the Mandal Revenue Officer for verification and calling for his report would not have any impact on the facts of that case and would not vitiate the entire proceedings.

7. Mr. Narasimha and Mr. Shetty next submitted that the proviso to sub-Section (4) of Section 7-A of the Act states that the Special Tribunal shall by notification specify the fact of taking cognizance of the case under the Act and accordingly Rule 7 of the Rules provides that the Special Court or the Special Tribunal shall after taking cognizance of the case under the Act give notice in Form II-A or Form II-B by publishing it in the Andhra Pradesh Gazette, but the use of the word 'shall' in the proviso to Section 7 of the Act or in Rule 7 of the Rules does not make the requirement of publication of the case in the Gazette after the Special Court or Special Tribunal takes cognizance of the case mandatory. They cited the decisions of this Court in *P.T. Rajan v. T.P.M. Sahir & Ors.* [(2003) 8 SCC 498] and *Vidyawati Gupta & Ors. v. Bhakti Hari Nayak & Ors.* [(2006) 2 SCC 777] in support of their argument that the word 'shall' in the proviso to Section 7 of the Act or in Rule 7 of the Rules does not make the requirement of notification or publication of notice in the Gazette of a case after the Special Court or the Special Tribunal takes cognizance mandatory. Mr. Narasimha and Mr. Shetty submitted that the respondents in this case had been impleaded as parties in the application filed under sub-section 1 of Section 7-A before the Special Tribunal and had filed their replies before the Special Tribunal and had also participated in the proceedings before the Special Tribunal and at the instance of the respondents, therefore, the High Court should not have held that the proceedings before the Special Tribunal were vitiated because no notification or notice of the case was published in the Andhra Pradesh Gazette under the proviso to Section 7 of the Act or Rule 7 of the Rules after the Special Tribunal took cognizance of the case.

8. Mr. Bharat J. Joshi, learned counsel appearing for the respondents, in reply, submitted that under sub-section (1) of Section 7 of the Act, the Government has been empowered to make rules and in exercise of this power the Government of Andhra Pradesh has made the rules providing in sub-rule (1)



of Rule 6 that every application filed under sub-section (1) of Section 8 of the Act or every case taken cognizance of suo motu by the Special Court or an application filed under sub-section (1) of Section 7-A of the Act before the Special Tribunal, may be referred for local inspection or verification or both by the Mandal Revenue Officer having jurisdiction over the area. He argued that the word 'may' used in sub-rule (1) of Rule 6 actually means 'shall' relying on the decision in *State of Uttar Pradesh v. Jogendra Singh* [1963 (2) SCR 197] in which this Court has held that the word 'may' is capable of meaning 'must' or 'shall' in the light of the context in which the word is used and where a discretion is conferred upon a public authority coupled with an obligation, the word 'may' which denotes discretion should be construed to mean a command. He submitted that this Court has further held in the case of *Jogendra Singh* (supra) that the legislature uses the word 'may' out of deference to the high status of the authority on whom the power and obligation are intended to be conferred and imposed. He also relied on *Govindlal Chhaganlal Patel v. The Agricultural Produce Market Committee, Godhra and Others* [(1975) 2 SCC 482] wherein this Court has held that the question as to whether a statue is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed and, therefore, the use of the word 'shall' or 'may' is not conclusive on the question where the particular requirement of law is mandatory or directory. He cited the decision of this Court in *V. Laxminarasamma v. A. Yadaiah (Dead) and Others* [(2009) 5 SCC 478] holding that a report of the Revenue Officer who is the man on the spot is required to be obtained by the Special Court or by the Special Tribunal under the Act. He submitted that the view taken by the Full Bench of the Andhra Pradesh High Court in *Mohd. Siddiq Ali Khan v. Shahsun finance Ltd.* (supra) that reference of every application under sub-section (1) of Section 8 of the Act or under sub-section (1) of Section 7-A of the Act for local inspection or verification or

both by the Mandal Revenue Officer before the Special Court or the Special Tribunal taking cognizance is a mandatory requirement, is therefore correct. He submitted that this view has also been taken by a Division Bench of the Andhra Pradesh High Court in *Sekharamahanti Nagabhushanarao (died) per L.R. v. Andhra University, rep. by its Registrar and Others* [2009 (2) ALT 260].

9. Regarding publication of notice in the Andhra Pradesh Gazette after taking cognizance by the Special Court or by the Special Tribunal, he submitted that in sub-section (4) of Section 7-A of the Act and Rule 7 of the Rules it is clear that the Special Tribunal 'shall' after taking cognizance of the case publish a notice in the prescribed form in the Andhra Pradesh Gazette. He submitted that this provision has been made in the public interest and cannot be waived. He cited the decision of this Court in *Graphite India Ltd. and Another v. Durgapur Projects Ltd. and Others* [(1999) 7 SCC 645] that where a statutory provision is made in the interest of public, it cannot be waived by a party. He submitted that even though the respondents have filed their replies denying the allegations made in the application filed under Section 7(1) of the Act before the Special Tribunal by the appellant, they can raise the objection that the mandatory requirement of notification or publication of a notice in the Andhra Pradesh Gazette as provided in sub-section (4) of Section 7 of the Act and sub-rule (1) of Rule 7 of the Rules has not been followed after the cognizance of the case by the Special Tribunal and therefore the entire proceedings before the Special Tribunal stand vitiated.

10. Sections 7-A, 8 and 9 of the Act and Rules 6 and 7 of the Rules, which are relevant to decide the two questions of law in this case, are extracted hereinbelow:

> **"Section 7-A. Special Tribunals and its powers, etc.:**—(1) Every Special Tribunal shall have power to try all cases not taken cognizance of by the Special Court relating to any alleged act of land grabbing, or with respect



> to the ownership and title to, or lawful possession of the land grabbed whether before or after the commencement of the Andhra Pradesh Land Grabbing (Prohibition) (Amendment) Act, 1987 and brought before it and pass such orders (including orders by way of interim directions) as it deems fit:
>
> Provided that if, in the opinion of the Special Tribunal, any case brought before it is prima facie frivolous or vexatious it shall reject the same without any further enquiry:
>
> Provided further that if in the opinion of the Special Tribunal any case brought before it is a fit case to be tried by the Special Court it may for reasons to be recorded by it transfer the case to the Special Court for its decision in the matter.
>
> (2) Save as otherwise provided in this Act, a Special Tribunal shall, in the trial of cases before it, follow the procedure prescribed in the Code of Civil Procedure, 1908 (Central Act 5 of 1908).
>
> (3) An appeal shall lie, from any judgment or order not being interlocutory order of the Special Tribunal, to the Special Court on any question of law or of fact. Every appeal under this sub section shall be preferred within a period of sixty days from the date of Judgment or order of the Special Tribunal;
>
> Provided that the Special Court may entertain an appeal after the expiry of the said period of sixty days, if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of sixty days.
>
> (4) Every finding of the Special Tribunal with regard to any alleged act of land grabbing shall be conclusive proof of the fact of land grabbing, and of the persons who committed such land grabbing and every judgment of the Special Tribunal with regard to the determination of the title

and ownership to, or lawful possession of, any land grabbed shall be binding on all persons having interest in such land:

Provided that the Special Tribunal shall by notification specify the fact of taking cognizance of the case under this Act. Such notification shall state that any objection which may be received by the Special Tribunal from any person including the custodian of evacuee property within the period specified therein will be considered by it:

Provided further that where the custodian of evacuee property objects to the Special Tribunal taking cognizance of the case, the Special Tribunal shall not proceed further with the case in regard to such property:

Provided also that the Special Tribunal shall cause a notice of taking cognizance of the case under the Act served on any person known or believed to be interested in the land, after a summary enquiry to satisfy itself about the persons likely to be interested in the land.

(5) It shall be lawful for the Special Tribunal to pass an order in any case decided by it, awarding compensation in terms of money for wrongful possession, which shall not be less than an amount equivalent to the market value of the land grabbed as on the date of the order and profits accrued from the land payable by the land grabber to the owner of the grabbed land and may direct the redelivery of the grabbed land to its rightful owner. The amount of compensation and profits so awarded and cost of redelivery, if any, shall be recovered as an arrear of land revenue if the Government are the owner and as a decree of a Civil Court, in any other case:

Provided that the Special Tribunal shall, before passing an order under this sub-section, give to the land grabber an opportunity of making his representation or of adducing



evidence, if any, in this regard and consider every such representation and evidence.

(6) Any case, pending before any Court or other authority immediately before the commencement of the Andhra Pradesh Land Grabbing (Prohibition) (Amendment) Act, 1987 as would have been within the jurisdiction of a Special Tribunal, shall stand transferred to the Special Tribunal, having jurisdiction, as if the cause of action on which such suit or proceeding is based had arisen after such commencement.

(7) Every case brought before the Special Tribunal shall be disposed of finally by the Special Tribunal, as far as possible, within a period of six months from the date of its having been brought before it.

(8) The Special Tribunal shall have all the powers of a Civil Court for purposes of review.

**Section 8. Procedure and powers of the Special Courts:**— (1) The Special Court may, either suo motu or on application made by any person, officer or authority take cognizance of and try every case arising out of any alleged act of land grabbing or with respect to the ownership and title to, or lawful possession of, the land grabbed, whether before or after the commencement of this Act, and pass such orders (including orders by way of interim directions) as it deems fit;

(1-A) The Special Court shall, for the purpose of taking cognizance of the case, consider the location or extent or value of the land alleged to have been grabbed or of the substantial nature of the evil involved or in the interest of justice required or any other relevant matter:

Provided that the Special Court shall not take cognizance of any such case without hearing the petitioner.

(2) Notwithstanding anything in the Code of Civil Procedure, 1908 [the Code of Criminal Procedure, 1973] or in the Andhra Pradesh Civil Courts Act, 1972, (Act 9 of 1972) any case in respect of an alleged act of land grabbing or the determination of question of title and ownership to, or lawful possession of any land grabbed under this Act, [shall, subject to the provisions of this Act, be triable in the Special Court] and the decision of Special Court shall be final.

(2-A) If the Special Court is of the opinion that any case brought before it, is not a fit case to be taken cognizance of, it may return the same for presentation before the Special Tribunal: Provided that if, in the opinion of the Special Court, any application filed before it is prima facie frivolous or vexatious, it shall reject the same without any further enquiry:

Provided further that if on an application from an interested person to withdraw and try a case pending before any Special Tribunal the Special Court is of the opinion that it is a fit case to be withdrawn and tried by it, it may for reasons to be recorded in writing withdraw any such case from such Special Tribunal and shall deal with it as if the case was originally instituted before the Special Court.

(2-B) Notwithstanding anything in the Code of Criminal Procedure, 1973, it shall be lawful for the Special Court to try all offences punishable under this Act.

(2-C) The Special Court shall determine the order in which the civil and criminal liability against a land grabber be initiated. It shall be within the discretion of the Special Court whether or not to deliver its decision or order until both civil and criminal proceedings are completed. The evidence admitted during the criminal proceeding may be made use of while trying the civil liability. But additional evidence, if any, adduced in the civil proceedings shall not



be considered by the Special Court while determining the criminal liability. Any person accused of land grabbing or the abetment thereof before the Special Court shall be a competent witness for the defence and may give evidence or oath in disproof of the charge made against him or any person charged together with him in the criminal proceeding:

Provided that he shall not be called as a witness except on his own request in writing or his failure to give evidence shall be made the subject of any comment by any of the parties or the special court or give rise to any presumption against himself or any person charged together with him at the same proceeding.]

(3) [* * * Omitted]

(4) Every case under sub-section (1) shall be disposed of finally by the Special Court, as far as possible, within a period of six months from the date of institution of the case before it.

(5) [* * *Omitted]

(6) Every finding of the Special Court with regard to any alleged act of land grabbing shall be conclusive proof of the fact of land grabbing and of the persons who committed such land grabbing, and every judgment of the Special Court with regard to the determination of title and ownership to, or lawful possession of, any land grabbed shall be binding on all persons having interest in such land

[* * * Omitted]

[Provided that the Special Court shall, by notification specify the fact of taking cognizance of the case under this Act. Such notification shall state that any objection which may be received by the Special Court from any person

including the custodian of evacuee property within the period specified therein will be considered by it;

Provided further that where the custodian of evacuee property objects to the Special Court taking cognizance of the case, the Special Court shall not proceed further with the case in regard to such property;

Provided also that the Special Court shall cause a notice of taking cognizance of the case under the Act, served on any person known or believed to be interested in the land, after a summary enquiry to satisfy itself about the persons likely to be interested in the land.

(7) It shall be lawful for the Special Court to pass such order as it may deem fit to advance the cause of justice. It may award compensation in terms of money for wrongful possession of the land grabbed which shall not be less than an amount equivalent to the market value of the land grabbed as on the date of the order and profits accrued from the land payable by the land grabber to the owner of the grabbed land and may direct re-delivery of the grabbed land to its rightful owner. The amount of compensation and profits, so awarded and costs of re-delivery, if any, shall be recovered as an arrear of land revenue in case the Government is the owner, or as a decree of a civil Court, in any other case to be executed by the Special Court:

Provided that the Special Court shall, before passing an order under this subsection, give to the land grabber an opportunity of making his representation or of adducing evidence, if any, in this regard, and consider such representation and evidence.]

(8) Any case, pending before any court or other authority immediately before the constitution of a Special Court, as would have been within the jurisdiction of such Special Court, shall stand transferred to the Special Court [omitted]



as if the cause of action on which such suit or proceeding is based had arisen after the constitution of the Special Court.

**Section 9. Special Court to have the powers of the Civil Court and the Court of Sessions:**— Save as expressly provided in this Act, the provisions of the Code of Civil Procedure, 1908, (Central Act 5 of 1908), the Andhra Pradesh Civil Courts Act, 1972 (Act 19 of 1972) and the Code of Criminal Procedure, 1973 (Central Act 2 of 1974), insofar as they are not inconsistent with the provisions of this Act, shall apply to the proceedings before the Special Court and for the purpose of the provisions of the said enactments, Special Court shall be deemed to be a Civil Court, or as the case may be, a Court of Session and shall have all the powers of a Civil Court and a Court of Session and the person conducting a prosecution before the Special Court shall be deemed to be a Public Prosecutor.

**Rule 6. Verification of Application:**- (1) Every application filed under sub-section (1) of Section 8 of the Act or every case taken cognizance of suo motu by the Special Court or an application filed under sub-sect.(1) of Section 7-A of the Act, before the Special Tribunal, may be referred for local inspection or verification or both by the Mandal Revenue Officer having jurisdiction over the area or by any other Officer of the Government authorized by the Court in this behalf.

(2) The Mandal Revenue Officer or the other Officer to whom the application has been referred under sub-rule (1) shall make or cause to be made an inspection or verification or both, as soon as may be practicable and shall submit a full and complete report within two weeks from the date of receipt of order with reference to Revenue Records and facts on ground as to the following:-

(i) the correctness of the statements made in the application with regard to columns 1 to 15 and 19 in Forum-1;

(ii) the facts relating to ownership, actual possession and use of the land concerned; and

(iii) such other particulars and information as would be useful to the Court to arrive at a correct decision on the claims made in the application.

(3) The Mandal Revenue Officer or the other Officer to whom the application has been referred under sub-rule (1) shall also furnish copies of the extracts of the Government records to show the survey number and sub-division number and proof of possession, ownership and use of the land and the payment of dues to the Government.

(4) A copy of the report referred to in sub-rule (2) may be furnished to the applicant, to the respondents and other persons, if any having interest in the land on payment of copying charges.

**Rule 7. Notice of taking cognizance of a case:-** (1) The Special Court shall after taking cognizance of the case under the Act give notice in Form II-A by publishing it in the Andhra Pradesh Gazette.

(2) The Special Tribunal shall after taking cognizance of the case under the Act give notice in Form-II-B by publishing it in the Andhra Pradesh Gazette."

11. A reading of the provisions of Sections 7-A and 8 of the Act would show that neither of the two Sections requires the Special Tribunal or the Special Court to refer any application or a case for local inspection or verification or both by the Mandal Revenue Officer having jurisdiction over the area. Sub-rule (1) of Rule 6 of the Rules, however, provides that every application filed under sub-section (1) of Section 8 of the Act



or every case taken cognizance of suo motu by the Special Court or an application filed under sub-section (1) of Section 7-A of the Act, before the Special Tribunal, 'may' be referred for local inspection or verification or both by the Mandal Revenue Officer having jurisdiction over the area or by any other Officer of the Government authorized by the Court in this behalf. This Court has held in *State of Uttar Pradesh v. Jogendra Singh* (supra) that the word 'may' is capable of meaning 'must' or 'shall' in the light of the context in which the word is used and where a discretion is conferred upon a public authority coupled with an obligation, the word 'may' should be construed to mean a command. Hence, we are called upon to decide whether the word 'may' used in sub-rule (1) of Rule 6 of the Rules confers only a discretion upon the Special Tribunal or the Special Court to refer an application filed before it or a case to the Mandal Revenue Officer or whether this discretion of the Special Tribunal or the Special Court is coupled also with a duty or an obligation to refer the application filed before it or the case to the Mandal Revenue Officer and we have to decide this question by examining the context in which the word 'may' has been used and the context would mean Rule 6 of the Rules and Sections 7-A and 8 of the Act and the object of these statutory provisions.

12. A reading of Rule 6 of the Rules and, in particular, sub-rules (1) and (2) thereof, indicates that the object of referring the application under sub-section (1) of Section 7-A or sub-section (1) of Section 8 of the Act to the Mandal Revenue Officer is to get full and complete report from the Mandal Revenue Officer after local inspection or verification on the correctness of the statements made in the application and the facts relating to ownership, actual possession and use of the land concerned and such other particulars and information as would be useful to the Court to arrive at a correct decision on the claims made in the application. Sub-rule (3) of Rule 6 of the Rules further indicates the nature of the report the Mandal Revenue Officer is required to submit and it states that the

Mandal Revenue Officer or the other Officer to whom the application has been referred under sub-rule (1) shall also furnish along with his report copies of the extracts of the Government records to show the survey number and sub-division number and proof of possession, ownership and use of the land and the payment of dues to the Government. The report of the Mandal Revenue Officer, therefore, is to be based on Government records and on proof of possession, ownership and use of the land and the payment of dues to the Government and/or local inspection. Where an applicant before the Special Tribunal or the Special Court furnishes certified copies of Government records to show proof of possession, ownership and use of the land and also payment of dues to the Government, in support of the statements made in the application and the Special Tribunal or the Special Court is satisfied about the truth of the statements made in the application, it may not be necessary for the Special Tribunal or the Special Court to refer the application to the Mandal Revenue Officer for inspection or verification. Moreover, the Special Tribunal or the Special Court can ascertain the truth or otherwise of the statements made in the application made under Sections 7(1) or 8(1) of the Act on the basis of oral and documentary evidence adduced before it. Sub-section (2) of Section 7-A provides that save as otherwise provided in the Act, a Special Tribunal shall, in the trial of cases before it, follow the procedure prescribed in the Code of Civil Procedure, 1908. Hence, all the provisions of the Code of Civil Procedure, 1908 relating to trial including examination and cross-examination of witnesses and production and acceptance of documentary evidence are available to the Special Tribunal to be followed for the purpose of ascertaining the truth or otherwise of the statements made in the application under sub-section (1) of Section 7-A of the Act. Similarly, Section 9 of the Act provides that save as expressly provided in the Act, the provisions of the Code of Civil Procedure, 1908 and the Code of Criminal Procedure, 1973 insofar as they are not inconsistent with the provisions of the Act, shall apply to the proceedings before the



Special Court. The provisions of the Code of Civil Procedure, 1908 and the Code of Criminal Procedure, 1973 relating to trials, such as examination and cross-examination of witnesses and production and acceptance of documents are also available to the Special Court for ascertaining the truth or otherwise of the statements made in the application.

13. We are thus of the considered opinion that the object of Rule 6 of the Rules is to assist the Special Tribunal or the Special Court to arrive at a correct decision on the claims and allegations made in the application under sub-section (1) of Section 7-A and sub-section (1) of Section 8 of the Act to the Special Tribunal or the Special Court and if this very object can be achieved without referring the application of the case to the Mandal Revenue Officer, it may not be necessary for the Special Tribunal or the Special Court to make a reference to the Mandal Revenue Officer and therefore there is no compelling duty on the Special Tribunal or the Special Court to refer the application under Section 7-A (1) or under Section 8 to the Mandal Revenue Officer. In other words, under the Act and the Rules, it is not mandatory for the Special Tribunal or the Special Court to call for a report of the Mandal Revenue Officer. We, however, hasten to make it clear that while there is nothing in the statutory provisions in Section 7-A or Section 8-A of the Act or Rule 6 of the Rules to indicate that the power vested in the Special Tribunal or the Special Court is coupled with a duty to refer the application filed before it to the Mandal Revenue Officer, the facts of a particular case before the Special Tribunal or the Special Court may cast a judicial duty on the Special Tribunal or the Special Court to refer the application filed before it to the Mandal Revenue Officer for the purpose of verifying the truth of the statements made in the application and deciding the land grabbing case before it in a just and reasonable manner. In The *Official Liquidator v. Dharti Dhan (P) Ltd.* [(1977) 2 SCC 166], this Court referring to the word 'may' used in Sections 442 and 446 of the Companies Act, 1956 held:

"If the applicant can make out, on facts, that the objects of the power conferred by Sections 442 and 446 of the Act, can only be carried out by a stay order, it could perhaps be urged that an obligation to do so has become annexed to it by proof of those facts. That would be the position not because the word "may" itself must be equated with "shall" but because judicial power has necessarily to be exercised justly, properly, and reasonably to enforce the principle that rights created must be enforced."

14. The next question, which we are called upon to decide in this case, is whether it was mandatory for the Special Tribunal or the Special Court to issue notification specifying the fact of taking cognizance of the case under the Act in accordance with the proviso to sub-section (4) of Section 7 or sub-section (6) of Section 8 of the Act and Rule 7 of the Rules. The proviso to sub-section (4) of Section 7-A and the proviso to sub-section (6) of Section 8 of the Act provide that the Special Tribunal and the Special Court shall by notification specify the fact of taking cognizance of the case under the Act. Similarly, sub-rules (1) and (2) of Rule 7 of the Rules provide that the Special Court and the Special Tribunal shall after taking cognizance of the case under the Act give notice in Form II-A/ II-B by publishing it in the Andhra Pradesh Gazette. The word 'shall' used in the proviso to sub-section (4) of Section 7-A and the proviso to sub-section (6) of Section 8 of the Act as well as in sub-rules (1) and (2) of Rule 7 of the Rules indicates that compliance with requirement of notification or publication of the notice in the Andhra Pradesh Gazette of the case after the Special Tribunal or the Special Court takes cognizance is mandatory. The use of the word "shall" in these provisions, however, is not conclusive of the mandatory nature of the provisions and we must look at the main provisions of sub-section (4) of Section 7-A and sub-section (6) of Section 8 of the Act to find out the purposes for which such notification or publication of notice is to be made. As has been explained by



Justice G.P. Singh in Principles of Statutory Interpretation, 12th Edition 2010 at page 406-407:

"The use of word 'shall' raises a presumption that the particular provision is imperative; but this prima facie inference may be rebutted by other considerations such as object and scope of the enactment and the consequences flowing from such construction."

The object of the proviso to sub-section (4) of Section 7-A will be clear from the main provision which states that every judgment of the Special Tribunal with regard to the determination of title and ownership to, or lawful possession of, any land grabbed shall be binding on all persons having interest in such land. Similarly, the object of the proviso to sub-section (6) of Section 8 will be clear from the main provision which states that every judgment of the Special Court with regard to the determination of title and ownership to, or lawful possession of, any land grabbed shall be binding on all persons having interest in such land. Hence, all persons who may not have been impleaded as a party in the applications filed under sub-section (1) of Section 7-A or sub-section (1) of Section 8 of the Act are sought to be given notice by a notification in the Andhra Pradesh Gazette of the fact of the Special Tribunal or the Special Court taking cognizance of a case to enable them to appear before the Special Tribunal or the Special Court and protect their interest in the land, if any. Considering this object of Sections 7-A and 8 of the Act, we are of the opinion that the notification or the publication of the notice of the fact that cognizance of a case has been taken in the Andhra Pradesh Gazette as required by the proviso to sub-section (4) of Section 7-A and the proviso to sub-section (6) of Section 8 and sub-rules (1) and (2) of Rule 7 is mandatory and cannot be dispensed with by the Special Tribunal and the Special Court.

15. This requirement of a notification or publication of notice in the Andhra Pradesh Gazette of the fact that cognizance of a case has been taken by the Special Tribunal or the Special

Court has been made mandatory by the Act and the Rules not in the public interest but in the interest of persons who may claim title, ownership or lawful possession of the land which is the subject-matter of the proceedings under Section 7-A or Section 8 of the Act before the Special Tribunal or the Special Court. If, therefore, a person who claims title, ownership or lawful possession of any such land is already a party in the proceedings under Sections 7-A or 8 of the Act in the Special Tribunal or the Special Court and he has notice of such proceedings and has had due opportunity to participate in the said proceedings and assert his title, ownership or lawful possession over the land, he cannot challenge the proceedings of the Special Tribunal or the Special Court on the ground that the notification or the publication of the notice has not been made in accordance with the Act and Rules. In *State Bank of Patiala & Ors. v. S. K. Sharma* [(1996) 3 SCC 364] this Court relying on *Dhirendra Nath Gorai v. Sudhir Chandra Ghosh* [AIR 1964 SC 1300] has held in para 29 at page 387:

> "But then even a mandatory requirement can be waived by the person concerned if such mandatory provision is conceived in his interest and not in public interest."

In the aforesaid case at para 33 at page 389, this Court has further held:

> "33. ……..
>
> (1) …….
>
> (2) …….
>
> (3) In the case of violation of a procedural provision, the position is this: procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases falling under – "no notice", "no opportunity" and "no hearing" categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice."



16. The provisions of the Act and Rules mandatorily requiring notification or publication of the notice of the case after the Special Tribunal or the Special Court takes cognizance are procedural provisions and the law laid down by this Court in *State Bank of Patiala & Ors. v. S. K. Sharma* (supra) is that violation of such procedural provisions will not vitiate the proceedings unless prejudice is caused to the party complaining of the violation. The respondents in the two cases before us not only had notice of the application under Section 7-A of the Act before the Special Tribunal but also filed their replies to the application and got the opportunity to adduce evidence in support of their case and had not suffered any prejudice for non-compliance of the provisions of the proviso to sub-section (4) of Section 7-A of the Act or Rule 7 of the Rules. The High Court was, therefore, not right in quashing the proceedings before the Special Tribunal in the present case on the ground that a notification or notice in terms of Rule 7(2) of the Rules had not been issued after the case was taking cognizance of by the Special Tribunal.

17. In the result, we allow these appeals, set aside the impugned orders of the High Court and remand the matter to the High Court for consideration whether in the facts of the two cases reference to the Mandal Revenue Officer was at all necessary to ascertain the truth of the statements made in the applications and to arrive at a just decision and for consideration of the Writ Petitions on merits. There will be no order as to costs.

N.J. Appeals allowed.

K.K. BASKARAN

*v.*

STATE REP. BY ITS SECRETARY, TAMIL NADU & ORS.

(Civil Appeal No. 2341 of 2011)

MARCH 04, 2011

**[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]**

*Tamil Nadu Protection of Interests of Depositors (in Financial Establishments) Act, 1997 – Constitutional Validity of – Held: Is constitutionally valid – The Act does not concentrate on the transaction of banking or acceptance of deposits – It has been enacted to provide a speedy remedy to depositors who were deceived by fraudulent financial establishments – Activities of these financial companies do not come within the term 'banking' as defined in the Banking Regulation Act, 1949 or Reserve Bank of India Act, 1934 – Reserve Bank of India Act, Banking Regulation Act and Companies Act which are the legislations of the Parliament do not occupy the field occupied by the Tamil Nadu Act, though the latter may incidentally trench upon the former – Thus, the Act is in pith and substance relatable to Entries 1, 30 and 32 of the State List (List II ) of the Seventh Schedule – It empowers the State Government to attach and sell the properties of the fraudulent establishments to recover the money of the depositors – There is no violation of Articles 14, 19(1)(g) or 21 – Constitution of India, 1950 – Seventh Schedule List I and List II; Articles 14, 19(1)(g) and 21.*

*Doctrines/Principles – Doctrine of pith and substance – Application of – Held: Doctrine of pith and substance is applied when a legislation overlaps both List I as well as List II of the Seventh Schedule in the Constitution – Constitution of India, 1950 – Seventh Schedule List I and List II.*

**The respondents filed a writ petition challenging the**





**constitutional validity of the Tamil Nadu Protection of Interest of Depositors (in Financial Establishments) Act, 1977. The High Court upheld the constitutional validity of the Act. Therefore, the appellant filed the instant appeal.**

**The appellant contended that the Tamil Nadu Act is beyond the legislative competence of the State Legislature as it falls within entries 43, 44 and 45 of List I of the Seventh Schedule to the Constitution; that the Act is liable to be struck down as the field of legislation is already occupied by legislation of Parliament being the Reserve Bank of India Act, 1934, Banking Regulation Act, 1949, Companies Act, 1956 and the Criminal Law Amendment Ordinance, 1944; and that the Tamil Nadu Act was arbitrary, unreasonable and violative of Articles 14, 19(1)(g) and 21 of the Constitution.**

**Dismissing the appeal, the Court**

**HELD: 1.1 There is no merit in the petition. The Tamil Nadu Protection of Interests of Depositors (in Financial Establishments) Act, 1997 is constitutionally valid. The Act was not focused on the transaction of banking or acceptance of deposits, but it is designed to protect the public from fraudulent financial establishments who defraud the public by offering lucrative returns on deposits and then disappear with the depositors' money or refuse to return the same with interest. The words found in the Statement of Objects and Reasons, viz., 'in the public interest, in order to regulate the activities of such Financial Establishments', would mean that the Tamil Nadu Act has been enacted to protect the interests of depositors. The Tamil Nadu Act is in pith and substance relatable to Entries 1, 30 and 32 of the State List (List II ) of the Seventh Schedule and not Entries 43, 44 and 45 of List I of the Seventh Schedule to the Constitution though there may be some overlapping.**

**[Paras 12, 14, 22, 23 and 44] [536-C-D; 540-B-D; 537-C; 545-E]**

*Vijay C. Punjal vs. State of Maharashtra* **(2005) 4 CTC 705 – disapproved.**

**2.1 It often happens that a legislation overlaps both Lists I as well as List II of the Seventh Schedule. In such circumstances, the doctrine of pith and substance is applied. The doctrine of pith and substance means that an enactment which substantially falls within the powers expressly conferred by the Constitution upon a Legislature which enacted it cannot be held to be invalid merely because it incidentally encroaches on matters assigned to another legislature. The Court must consider what constitutes in pith and substance the true subject matter of the legislation. If on such examination it is found that the legislation is in substance one on a matter assigned to the legislature then it must be held to be valid even though it incidentally trenches on matters beyond its legislative competence. For applying the doctrine of pith and substance regard is to be had to the enactment as a whole, its main objects and the scope and effect of its provisions. The language of the Entries in the Seventh Schedule should be given the widest scope of which the meaning is fairly capable. There is a presumption that the legislature does not exceed its constitutional limits. [Paras 23, 26, 27 and 28] [540-D; 541-A-E]**

*Union of India vs. Shah Goverdhan L. Kabra Teachers' College* **(2002) 8 SCC 228;** *Bharat Hydro Power Corporation vs. State of Assam* **(2004) 4 SCC 489;** *State of West Bengal vs. Kesoram Industries Ltd.* **(2004) 10 SCC 201;** *Union of India vs. Shah Goverdhan Kabra Teachers College* **(2002) 8 SCC 228;** *ITC Ltd. vs. State of Karnataka* **1985 (Supp) SCC 476 – relied on.**



**2.2 The court should interpret the constitutional provisions against the social setting of the county and not in the abstract. The court must take into consideration the economic realities and aspirations of the people and must further the social interest which is the purpose of legislation, Thus, the courts cannot function in a vacuum. It is for this reason that courts presume in favour of constitutionality of the statute because there is always a presumption that the legislature understands and correctly appreciates the needs of its own people [Para 38] [543-F-H; 544-A]**

*Govt. of Andhra Pradesh vs. P. Laxmi Devi* **(2008) 4 SCC 720 – relied on.**

**3.1 By the amendment brought to the Tamil Nadu Act by the Protection of Interests of Depositors (In Financial Establishments) Amendment Act, 2003, Tamil Nadu Act 30 of 2003, the companies registered under the Companies Act, 1956 and the non-banking financial companies, were also brought within the purview of the Act. [Paras 15 and 17] [537-D; 539-C]**

**3.2 It cannot be said that the subject-matter of the Tamil Nadu Act being banking, falls within the legislative competence of Parliament under Entry 45 of List I. Admittedly, none of the financial companies in question obtained any license from the Reserve Bank of India. Thus, they are not governed by the Reserve Bank of India Act or the Banking Regulation Act. The activities of these financial companies do not come within the meaning of the term 'banking' as defined in the Banking Regulation Act, 1949 or the Reserve Bank of India Act, 1934. [Para 29] [541-E-G]**

**3.3 The impugned Tamil Nadu Act was intended to deal with neither the banks which do the business or**

**banking and are governed by the Reserve Bank of India Act and Banking Regulation Act, nor the non-banking financial companies enacted under the Companies Act, 1956. The Reserve Bank of India Act, the Banking Regulation Act and the Companies Act do not occupy the field which the Tamil Nadu Act occupies, though the latter may incidentally trench upon the former. [Paras 34 and 35] [542-G-H; 543-A-B]**

**3.4 The main object of the Tamil Nadu Act is to provide a solution to wipe out the tears of several lakhs of depositors to realize their dues effectively and speedily from the fraudulent financial establishments which duped them or their vendees, without dragging them in a legal battle from pillar to post. These financial institutions/ establishments did not come either under the Reserve Bank of India Act or the Banking Regulation Act, and thus, they escaped from public control. [Paras 30] [541-H; 542-A-B]**

**3.5 The offences dealt with in the impugned Act were unique and have been enacted to deal with the economic and social disorder in society, caused by the fraudulent activities of such financial establishments. In the case of the Tamil Nadu Act, the attachment of properties is intended to provide an effective and speedy remedy to the aggrieved depositors for the realization of their dues. Under Section 3 and 4 of the Tamil Nadu Act, certain properties can be attached, and there is also provision for interim orders for attachment after which a post decisional hearing is provided for. This is valid in view of the prevailing realities. The Act also provides for the sale of such properties and for distribution of the sale proceeds amongst the innocent depositors. Thus, the doctrine of occupied field or repugnancy has no application in the instant case. [Paras 31, 36 and 37] [542-C; 543-D-F]**



**3.6 There is no violation of Article 14, 19(1) (g) or 21 of the Constitution. The Act is a salutary measure to remedy a great social evil. A systematic conspiracy was effected by certain fraudulent financial establishments which not only committed fraud on the depositor, but also siphoned off or diverted the depositor's funds mala fide. The act of the financers in exploiting the depositors is a notorious abuse of faith of the depositors who innocently deposited their money with the former for higher rate of interest. These depositors were often given a small pass book as a token of acknowledgment of their deposit, which they considered as a passport of their children for higher education or wedding of their daughters or as a policy of medical insurance in the case of most of the aged depositors, but in reality in all cases it was an unsecured promise executed on a waste paper. The senior citizens above 80 years, senior citizens between 60 and 80 years, widows, handicapped, driven out by wards, retired government servants and pensioners, and persons living below the poverty line constituted the bulk of the depositors. Without the aid of the impugned Act, it would have been impossible to recover their deposits and interest thereon. [Para 39] [544-A-E]**

**3.7 The conventional legal proceedings incurring huge expenses of court fees, advocates' fees, apart from other inconveniences involved and the long delay in disposal of cases due to docket explosion in courts, would not have made it possible for the depositors to recover their money, leave alone the interest thereon. Thus, the impugned Act has rightly been enacted to enable the depositors to recover their money speedily by taking strong steps in this connection. [Para 40] [545-F-G]**

**3.8 The State being the custodian of the welfare of the citizens as parens patriae cannot be a silent spectator without finding a solution for this malady. The financial swindlers, who are nothing but cheats and charlatans having no social responsibility, but only a lust for easy money by making false promise of attractive returns for the gullible investors, had to be dealt with strongly. [Para 41] [544-G-H; 545-A]**

*Delhi Cloth Mills Ltd vs. Union of India* **(1983) 4 SCC 166;** *T. Velayndhan Achari vs. Unoin of India* **(1993) 2 SCC 582 – referred to.**

**Case Law Reference:**

| | | |
|---|---|---|
| **(2005) 4 CTC 705** | **Disapproved** | **Para 7, 18, 19** |
| **(1983) 4 SCC 166** | **Referred to** | **Para 21** |
| **(1993) 2 SCC 582** | **Referred to** | **Para 21** |
| **(2004) 10 SCC 201** | **Relied on** | **Para 24, 28** |
| **1985 (Supp) SCC 476** | **Relied on** | **Para 24, 28** |
| **(2002) 8 SCC 228** | **Relied on** | **Para 26, 28** |
| **(2004) 4 SCC 489** | **Relied on** | **Para 27** |
| **(2008) 4 SCC 720** | **Relied on** | **Para 38** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2341 of 2011 etc.

From the Judgment & Order dated 02.03.2007 of the High Court of Judicature at Madras in Writ Petition No. 26108 of 2005.

Basava Prabhu S. Patil, Sabarish Subramaniam, Prabu Ramasubramaniam, S. Ramamani for the Appellant.

The Judgment of the Court was delivered by



J U D G M E N T

1. Delay condoned. Leave granted.

2. Heard learned counsel for the appellant.

3. Financial swindling and duping of gullible investors/depositors is not unique to India. It has been referred to in Charles Dicken's novel 'Little Dorrit', in which Mr. Merdle sets up a Ponzi scheme resulting in loss of the savings of thousands of depositors including the Dorrits and Arthur Clennam. In recent times there have been many such scandals e.g. the get-rich-quick scheme of the scamster Bernard Madoff in which the estimated losses of investors were estimated to be 21 billion dollars.

4. The present case illustrates what has been going on in India for quite some time. Non-banking financial companies have duped thousands of innocent and gullible depositors of their hard earned money by promising high rates of interest on these deposits, and then done the moonlight flit, often disappearing into another State or even foreign countries leaving the depositors as well as the State police high and dry.

5. This appeal has been filed against the impugned judgment and order of the Full Bench of the Madras dated 02.03.2007 in writ petition No. 26108/2005.

6. By means of the aforesaid writ petition, the petitioner and others challenged the constitutional validity of the Tamil Nadu Protection of Interests of Depositors (in Financial Establishments) Act, 1997 (for short the Tamil Nadu Act). By the impugned judgment the Full Bench of the Madras High Court has held the aforesaid Act to be constitutional. Hence, this appeal.

7. Learned counsel for the appellant has relied on the Full Bench decision of the Bombay High Court in *Vijay C. Punjal*

*vs. State of Maharashtra* (2005) 4 CTC 705 by which a similar Act of Maharashtra , being the Maharashtra Protection of Interests of Depositors (in Financial Establishments) Act, 1999 was held to be unconstitutional. We are of the opinion that the impugned judgment of the Full Bench of the Madras High Court is correct, while the judgment of the Full Bench of the Bombay High Court in *Vijay's* case (supra) is not correct.

8. The main submission of the learned counsel for the appellant in challenging the Tamil Nadu Act, which was also the main submission in challenging the Maharashtra Act, 1999, was that the said Act is beyond the legislative competence of the State Legislature as it falls within entries 43, 44 and 45 of List I of the Seventh Schedule to the Constitution. It was also submitted that the impugned Act is liable to be struck down as the field of legislation is already occupied by legislation of Parliament being the Reserve Bank of India Act, 1934, Banking Regulation Act, 1949, the Indian Companies Act, 1956 and the Criminal Law Amendment Ordinance, 1944 as made applicable by Criminal Law (Tamil Nadu Amendment) Act, 1977. It was also contended that the Tamil Nadu Act was arbitrary, unreasonable and violative of Articles 14, 19(1)(g) and 21 of the Constitution.

9. We are of the opinion that none of these submissions have any merit.

10. A perusal of the Statement of Objects as well as the relevant provisions of the Tamil Nadu Act shows that its object was to ameliorate the situation of thousands of depositors from the clutches of financial establishments who had duped the investor public by offering high rates of interest on deposits and committed deliberate fraud in repayment of the principal and interest after maturity of such deposits. The Act provides for measures for attachment of the properties of the financial establishments as well as mala fide transferees and to bring these properties for sale for realization of the dues payable to the depositors speedily.



11. As per the statistics of July 2002, about Rs. 1945 crores were collected from over 19 lakhs of depositors. These depositors were either poor or middle class persons, retired government servants and pensioners and their dependants, senior citizens or economically backward sections of society etc. The deposits were either siphoned off or diverted mala fide by these fraudulent financial establishments. The commission and omission of these financial establishments was well-organized, and constitute an organized systematic white color crime which jeopardizes the safety and interest of the public.

12. As noted in the impugned judgment, the Tamil Nadu Act was not focused on the transaction of banking or acceptance of deposits, but it is designed to protect the public from fraudulent financial establishments who defraud the public by offering lucrative returns on deposits and then disappear with the depositors' money or refuse to return the same with interst. In our opinion, the impugned Tamil Nadu Act is in pith and substance relatable to Entries 1, 30 and 32 of the State List (List II) of The Seventh Schedule.

13. The Statement of Objects And Reasons of the Tamil Nadu Act states :

> "There is mushroom growth of Financial Establishments not covered by the Reserve Bank of India Act, 1934 (Central Act II of 1934) in the State in the recent past with the sole object of grabbing money received as deposits from the public, mostly middle class and poor, on the promise of unprecedented high rates of interest and without any obligation to refund the deposits to the investors on maturity. Many of these Financial Establishments have defaulted to return the deposits on maturity to the public running to crores of rupees and thereby inviting the public resentment, which created law and order problems in the State. The Government has, therefore, decided to undertake suitable legislation , in the public interest, in order to regulate the activities of such Financial

Establishments, other than those covered by the Reserve Bank of India Act, 1934 (Central Act II of 1934).

2. The Bill seeks to give effect to the above decision."

14. A reading of the Statement of Objects and Reasons of the Tamil Nadu Act would go to show that it does not concentrate on incorporation, regulation or winding up of banking corporations but, on the other hand, is basically concerned with returning money of the gullible depositors who had been defrauded. The words found in the Statement of Objects and Reasons, viz., "in the public interest, in order to regulate the activities of such Financial Establishments" would mean that the Tamil Nadu Act has been enacted to protect the interests of depositors.

15. An amendment was brought to the Tamil Nadu Act by the Protection of Interests of Depositors (In Financial Establishments) Amendment Act, 2003, Tamil Nadu Act 30 of 2003, the object being:

"The Tamil Nadu Protection of Interest of Depositors (in financial establishments) Act, 1977 (Tamil Nadu Act 44 of 1997) was enacted by the Government of Tamil Nadu to protect the interest of the depositors who have lost their hard earned money with the financial institutions. At present, there is no provision in the said Act for attaching the properties of the persons who borrowed money from the financial establishments and for the sale of attached property in public action and for the equitable distribution of the sale proceeds to the depositors. In order to overcome the shortcomings and to make the said Tamil Nadu Act 44 of 1997 more effective, the Government have decided to amend the said Act so as to-

(1) bring a company registered under the Companies Act, 1956 (Central Act 1 of 1956) and non-banking financial company within the purview of the Act;



(2) make the non-payment of interest and failure to render service for which deposit has been made, as offences under the Act;

(3) attach the properties of the person who has borrowed money from the financial establishments and failed to return the money;

(4) appoint more than one competent authority under the Act;

(5) constitute Special Courts for different areas and for different cases and to appoint Special Public Prosecutors for each of the Special Courts;

(6) specify the time limit within which the Special Court shall pass the final order;

(7) compound the offences punishable under the Act; and

(8) to sell the attached properties in public auction and to distribute the sale proceeds among the depositors.

2. The Bill seeks to give effect to the above decision."

16. By section 2 of the Tamil Nadu Act 30 of 2003, the definitions of "deposit" and "financial establishments" were amended as follows:

(1).....

(2) " deposit means the deposit of money either in one lump sum or by installments made with financial establishments for a fixed period, for interest or for return in any kind or for any service;

(3)"financial establishment" means an individual, an association of individuals, a firm or a company registered

under the Companies Act, 1956 (Central Act 1 of 1956) carrying on the business of receiving deposits under any scheme or arrangement or in any other manner but does not include a corporation or a co-operative society owned or controlled by any State Government or the Central Government or a banking company as defined in Section 5 (c) of the Banking Regulation Act, 1949 (Central Act X of 1949)"

17. Thus, by the Amendment Act 30 of 2003, the companies registered under the Companies Act, 1956 and the non banking financial companies, were also brought within the purview of the Act.

18. Learned counsel for the appellant relied on the Full Bench decision of the Bombay High Court in *Vijay C. Punjal's* case (supra) in support of his contention that the Tamil Nadu Act, like the Maharasthra Act, was unconstitutional being beyond the legislative competence of the State Legislature. We do not agree.

19. We have carefully perused the judgment of the Full Bench of the Bombay High Court in *Vijay's* case (supra) and we respectfully disagree with the view taken by the Bombay High Court.

20. It may be noted that though there are some differences between the Tamil Nadu Act and the Maharashtra Act, they are minor differences, and hence the view we are taking herein will also apply in relation to the Maharashtra Act.

21. The Bombay High Court has taken the view that the Maharashtra Act transgressed into the field reserved for Parliament. We do not agree. It is true that Section 58A of the Companies Act has been upheld by this Court in *Delhi Cloth Mills Ltd vs. Union of India* (1983) 4 SCC 166 and the provisions of Chapter IIIC of the Reserve Bank of India Act, 1934 was upheld by this Court in *T. Velayndhan Achari vs.*



*Union of India* (1993) 2 SCC 582. However, we are not in agreement with the Full Bench decision of the Bombay High Court that the subject matter covered by the said Act falls squarely within the subject matter of Section 58A and 58AA of the Companies Act.

22. We are of the opinion that the impugned Tamil Nadu Act enacted by the State Legislature is not in pith and substance referable to the legislative heads contained in List I of the Seventh Schedule to the Constitution though there may be some overlapping. In our opinion, in pith and substance the said Act comes under the entries in List II (the State List) of the Seventh Schedule.

23. It often happens that a legislation overlaps both Lists I as well as List II of the Seventh Schedule. In such circumstances, the doctrine of pith and substance is applied. We are of the opinion that in pith and substance the impugned State Act is referable to Entries 1, 30 and 31 of List II of the Seventh Schedule and not Entries 43, 44 and 45 of List I of the Seventh Schedule.

24. It is well-settled that incidental trenching in exercise of ancillary powers into a forbidden legislative territory is permissible vide Constitution Bench decision of this court in *State of West Bengal etc. vs. Kesoram Industries Ltd & Ors etc.* (2004) 10 SCC 201 (vide paras 31(4), (5) and (6) and 129 (5). Sharp and distinct lines of demarcation are not always possible and it is often impossible to prevent a certain amount of overlapping vide *ITC Ltd. vs. State of Karnataka,* 1985 (Supp) SCC 476 (para 17). We have to look at the legislation as a whole and there is a presumption that the legislature does not exceed its constitutional limits.

25. The 'financial companies' in the present case had not obtained any licence from the Reserve Bank of India. Hence they are not governed by the Reserve Bank of India Act nor the Banking Regulation Act, 1949.

26. The doctrine of pith and substance means that an enactment which substantially falls within the powers expressly conferred by the Constitution upon a Legislature which enacted it cannot be held to be invalid merely because it incidentally encroaches on matters assigned to another legislature. The Court must consider what constitutes in pith and substance the true subject matter of the legislation. If on such examination it is found that the legislation is in substance one on a matter assigned to the legislature then it must be held to be valid even though it incidentally trenches on matters beyond its legislative competence vide *Union of India vs. Shah Goverdhan L. Kabra Teachers' College* (2002) 8 SCC 228 (vide para 7).

27. For applying the doctrine of pith and substance regard is to be had to the enactment as a whole, its main objects and the scope and effect of its provisions vide *Bharat Hydro Power Corporation vs. State of Assam* (2004) 4 SCC 489 (vide para 15).

28. For this purpose the language of the Entries in the Seventh Schedule should be given the widest scope of which the meaning is fairly capable vide *State of West Bengal vs. Kesoram Industries Ltd* (supra) (para 31(4), *Union of India vs. Shah Goverdhan Kabra Teachers College* (supra) (para 6), *ITC Ltd. vs. State of Karnataka* (supra) (para 17).

29. Learned counsel for the appellant submitted that the subject-matter of the Tamil Nadu Act being banking, falls within the legislative competence of Parliament under Entry 45 of List I. We do not agree. Admittedly, none of the financial companies in question obtained any licence from the Reserve Bank of India. Hence they are not governed by the Reserve Bank of India Act or the Banking Regulation Act. The activities of these financial companies do not, in our opinion, come within the meaning of the term 'banking' as defined in the Banking Regulation Act, 1949 or the Reserve Bank of India Act, 1934.

30. The Tamil Nadu Act was enacted to find out a solution



for the problem of the depositors who were deceived on a large scale by the fraudulent activities of certain financial establishments. There was a disastrous consequence both in the economic as well as social life of such depositors who were exploited by false promise of high return of interest. These financial institutions/establishments did not come either under the Reserve Bank of India Act or the Banking Regulation act, and hence they escaped from public control.

31. By the impugned Act the State not only proposed to attach the properties of such fraudulent establishments and the mala fide transferees, but also provided for the sale of such properties and for distribution of the sale proceeds amongst the innocent depositors. Hence, in our opinion, the doctrine of occupied field or repugnancy, has no application in the present case.

32. The object of the Tamil Nadu Act was to give a speedy remedy to the innocent depositors who were vulnerable to the temptation of earning high rates of interest and were victimized by the financial establishments fraudulently.

33. As regards Section 58A of the Companies Act, this prescribes the conditions under which the deposits may be invited or accepted by the companies. On the other hand, the aim and object of the Tamil Nadu Act is totally different.

34. The Tamil Nadu Act was enacted to ameliorate the conditions of thousands of depositors who had fallen into the clutches of fraudulent financial establishments who had raised hopes of high rate of interest and thus duped the depositors. Thus the Tamil Nadu Act is not focused on the transaction of banking or the acceptance of deposit, but is focused on remedying the situation of the depositors who were deceived by the fraudulent financial establishments. The impugned Tamil Nadu Act was intended to deal with neither the banks which do the business or banking and are governed by the Reserve Bank of India Act and Banking Regulation Act, nor the non-

banking financial companies enacted under the Companies Act, 1956.

35. The Reserve Bank of India Act, the Banking Regulation Act and the Companies Act do not occupy the field which the impugned Tamil Nadu Act occupies, though the latter may incidentally trench upon the former. The main object of the Tamil Nadu Act is to provide a solution to wipe out the tears of several lakhs of depositors to realize their dues effectively and speedily from the fraudulent financial establishments which duped them or their vendees, without dragging them in a legal battle from pillar to post. Hence, the decision of this Court in *Delhi Cloth Mills* (supra) has no bearing on the constitutional validity of the Tamil Nadu Act.

36. In the case of the Tamil Nadu Act, the attachment of properties is intended to provide an effective and speedy remedy to the aggrieved depositors for the realization of their dues. The offences dealt with in the impugned Act are unique and have been enacted to deal with the economic and social disorder in society, caused by the fraudulent activities of such financial establishments.

37. Under Section 3 & 4 of the Tamil Nadu Act, certain properties can be attached, and there is also provision for interim orders for attachment after which a post decisional hearing is provided for. In our opinion this is valid in view of the prevailing realities.

38. The Court should interpret the constitutional provisions against the social setting of the country and not in the abstract. The Court must take into consideration the economic realities and aspirations of the people and must further the social interest which is the purpose of legislation, as held by Justices Holmes, Brandeis and Frankfurter of the U.S. Supreme Court in a series of decisions. Hence the Courts cannot function in a vacuum. It is for this reason that Courts presume in favour of constitutionality of the statute because there is always a



presumption that the legislature understands and correctly appreciates the needs of its own people, vide *Govt. of Andhra Pradesh vs. P. Laxmi Devi* (2008) 4 SCC 720.

39. We fail to see how there is any violation of Article 14, 19(1)(g) or 21 of the Constitution. The Act is a salutary measure to remedy a great social evil. A systematic conspiracy was effected by certain fraudulent financial establishments which not only committed fraud on the depositor, but also siphoned off or diverted the depositor's funds mala fide. We are of the opinion that the act of the financers in exploiting the depositors is a notorious abuse of faith of the depositors who innocently deposited their money with the former for higher rate of interest. These depositors were often given a small pass book as a token of acknowledgment of their deposit, which they considered as a passport of their children for higher education or wedding of their daughters or as a policy of medical insurance in the case of most of the aged depositors, but in reality in all cases it was an unsecured promise executed on a waste paper. The senior citizens above 80 years, senior citizens between 60 and 80 years, widows, handicapped, driven out by wards, retired government servants and pensioners, and persons living below the poverty line constituted the bulk of the depositors. Without the aid of the impugned Act, it would have been impossible to recover their deposits and interest thereon.

40. The conventional legal proceedings incurring huge expenses of court fees, advocates' fees, apart from other inconveniences involved and the long delay in disposal of cases due to docket explosion in Courts, would not have made it possible for the depositors to recover their money, leave alone the interest thereon. Hence, in our opinion the impugned Act has rightly been enacted to enable the depositors to recover their money speedily by taking strong steps in this connection.

41. The State being the custodian of the welfare of the citizens as parens patriae cannot be a silent spectator without

finding a solution for this malady. The financial swindlers, who are nothing but cheats and charlatans having no social responsibility, but only a lust for easy money by making false promise of attractive returns for the gullible investors, had to be dealt with strongly.

42. The small amounts collected from a substantial number of individual depositors culminated into huge amounts of money. These collections were diverted in the name of third parties and finally one day the fraudulent financers closed their financial establishments leaving the innocent depositors in the lurch.

43. Learned counsel for the appellant submitted that the appellant was only a bona fide purchaser of some plots of land from one Arun Kumar and Smt. Sulochana, and not from any financial establishment. We are not going into this question as it can be raised in appropriate proceedings. In this case we are only concerned with the constitutional validity of the Tamil Nadu Act.

44. We are of the opinion that there is no merit in this petition. The impugned Tamil Nadu Act is constitutionally valid. In fact, it is a salutary measure which was long overdue to deal with these scamsters who have been thriving like locusts in the country.

45. The Appeal is, therefore, dismissed. No costs.

N.J. Appeal dismissed.



M/S HYDERABAD ENGINEERING INDUSTRIES
*v.*
STATE OF ANDHRA PRADESH
(Civil Appeal No. 3781 of 2003)

MARCH 04, 2011

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

*Central Sales Tax Act, 1956:*

*s.3(a) – Inter-State trade – Sales agreement between assessee and the purchaser – Movement of goods from one State to another State – Whether the sale can be regarded as sales in the course of inter-State trade, and, chargeable to tax under the Act – Held: For a sale to be in the course of inter-State trade or commerce u/s.3(a), there must be sale of goods and such sale should occasion the movement of the goods from one State to another – A sale would be deemed to have occasioned the movement of the goods from one State to another within the meaning of clause (a) of s.3 when the movement of those goods is the result of a covenant or incidence of the contract of sale, even though the property in the goods passes in either State – Mere transfer of goods from a head office to a branch office or an inter-branch transfer of goods cannot be regarded as sales in the course of inter-State trade – In the instant case, there were prior contracts between the purchaser and the assessee and in pursuance of those contracts, the goods moved from the assessee's factory at Hyderabad to its Branch offices to be delivered to the purchaser/their nominees – In pursuance to sales agreement, the purchaser placed monthly indents on the assessee with instructions to dispatch the goods of given size and quantity to the named destination – Pursuant to such indents, the assessee dispatched the goods to its State godowns and the person-in-charge of the godowns to the purchaser division office by raising sales invoice – Therefore,*

*the transaction between the assessee with its branch offices was a clear case of inter-State sales within the meaning of s.3(a) and not branch transfers as claimed by assessee.*

*s.2(g) – Sale of goods – Held: Includes agreement of sale of goods.*

*Contract: Sale and agreement of sale – Distinction between.*

**The assessee, manufacturer of electrical fans and accessories, has its manufacturing units in different parts of the country including in Hyderabad, Andhra Pradesh. Outside the State of Andhra Pradesh, the assessee has its godown in different States. UIL-company has 16 divisional offices at various places in the country wherever the assessee's godowns are located. The assessee and UIL entered into sales agreement for a period of five years. Under the said agreement, the main function of UIL was to organize the sale and distribution of the products of the assessee and to arrange for sale promotion measures of the products and to provide after sales service. The agreement also envisaged that UIL would purchase the said products as an independent principal and maintain adequate stocks and sell the same as such.**

**For the assessment year 1981-82, the assessee filed its annual returns under the Central Sales Tax Act. The assessee claimed exemption on a turnover of Rs. 8,87,75,643.00 towards goods transported to out-of-state depots on the ground that these transactions were not sales in the course of inter-State trade, and, therefore, not chargeable to tax under the Central Act. This contention of the assessee was negatived by the assessing authority, which view was confirmed by the Tribunal and the High Court.**



**The question which arose for consideration in the instant appeal was whether in the facts and circumstances of the case, the sale or purchase of goods could be said to have taken place in the course of inter-State trade or commerce and thereby exigible to tax under the Central Sales Tax Act, 1956. It was contended for the assessee that the movement of the goods from the assessee's factory to its godowns situated outside the State was not in pursuance of the agreement between the assessee and UIL; that there was no firm commitment between the assessee and UIL at the time of movement of the goods from the factory to the godowns; that the only communication between the assessee and UIL were in the nature of forecasts; and the completion of the sale to the UIL did not take place at the factory place and the appropriation of the goods were done at the godowns and it was open to the assessee till then to allot the goods to any purchasers and, therefore, the findings and conclusions reached by the statutory authorities under the Central Act were perverse.**

**Dismissing the appeal, the Court**

**HELD: 1.1 To make a sale as one in the course of inter-State trade or commerce, there must be an obligation, whether of the seller or the buyer to transport the goods outside the State and it may arise by reason of statute, contract between the parties or from mutual understanding or agreement between them or even from the nature of the transaction which linked the sale to such transportation such an obligation may be imposed expressly under the contract itself or impliedly by a mutual understanding. It is not necessary that in cases, there must be pieces of direct evidence showing such obligation in a written contract or oral agreement. Such**

**obligations may be inferable from circumstantial evidence. [Para 16] [563-H; 564-A-B]**

*Tata Engineering and Locomotive Co. Ltd. v. Assistant Commissioner of Commercial Taxes* **[1970] 26 STC 354;** *Tata Iron and Steel Co. Ltd. Vs. S.R. Sarkar* **(1960) 11 STC 655 (SC) – relied on.**

**1.2. For a sale to be in the course of inter-State trade or commerce under Section 3(a) of the Central Sales Tax Act, 1956, two conditions must be fulfilled. There must be sale of goods. Such sale should occasion the movement of the goods from one State to another. A sale would be deemed to have occasioned the movement of the goods from one State to another within the meaning of clause (a) of Section 3 of the Act when the movement of those goods is the result of a covenant or incidence of the contract of sale, even though the property in the goods passes in either State. With a view to find out whether a particular transaction is an inter-State sale or not, it is essential to see whether there was movement of the goods from one State to another as a result of prior contract of sale or purchase. Section 6A of the Central Act provides that if any dealer claims that he is not liable to pay tax under the Central Act in respect of any goods, on the ground that the movement of such goods from one State to another was occasioned by reason of transfer of such goods by him to any other place of his business or to his agent or principal and not by reason of sale, then the burden of proving that the movement of goods was so occasioned shall be on the dealer. Where the department takes advantage of the presumption under Section 3(a) and/or to show that there has been a sale or purchase of goods in the course of inter-State trade or commerce and if the assessee disputes the same, then the assessee can rebut the presumption by**



**filing declaration in form 'F' under Section 6A of the Central Act to prove that the movement of goods was occasioned not by reason of sale but otherwise than by way of sale. When the department does not take advantage of the presumption under Section 3(a) of the Central Act, but shows a positive case of inter-State sale in the course of inter-State trade or commerce to make it liable to tax under Section 6, the declaration in Form 'F' under section 6A would be of no avail. It is an accepted position in law that a mere transfer of goods from a head office to a branch office or an inter-branch transfer of goods, which are broadly brought under the phrase 'Branch transfers' cannot be regarded as sales in the course of inter-State trade, for the simple reason that a head office or branch cannot be treated as having traded with itself or sold articles to itself by means of these stock transfers. [Paras 17, 18 and 19] [565-A-H; 566-A-B]**

**1.3 In the instant case, the assessing authority and the Tribunal recorded a finding of fact that there were prior contracts between UIL and the assessee and in pursuance of those contracts, the goods moved from the assessee's factory at Hyderabad to its Branch offices to be delivered to UIL or their nominees. Clause (1) of the sale agreement between the assessee and purchaser/UIL mentioned the products that the assessee was required to supply to the purchaser. Clause (2) spoke of the territory in which UIL was permitted to sell the products supplied by the assessee. Clause (3) spoke of the obligations of UIL in organizing the sale and distribution of the products supplied by the assessee. It also provided that UIL would keep the adequate stocks in its godowns in different regions and also arrange sales promotions as may be required from time to time. Clause (4) specifically provided that the UIL would make all**

**purchases of the agreed products as an independent principal and sell the same as such. Clause (5) which is a clause where price was fixed by the assessee and that price was the maximum price and UIL was permitted to sell at prices lower than the maximum price fixed by the assessee. Clause (6) spoke of sales that may be made by the assessee to the third parties. Clause (7) spoke of the time limit within which payments for the supply of goods to be made by UIL to the assessee. Clause (8) specifically stated that the sales/deliveries should be made to UIL/ their nominees at any of the assessee's factories, region, godowns at the option of the company. The said clauses would make it clear that the assessee firstly undertook to sell and supply its manufactured products to UIL and the UIL would have the entire country, except West Bengal and Andaman and Nicobar Islands, as its distribution/selling zone. From these clauses in the agreement, it can be inferred that the assessee had undertaken to supply their manufactured products to UIL or to its nominees at the agreed price at any of the assessee's godowns at the option of UIL. A contract of sale of goods would be effective when a seller agrees to transfer the property in goods to the buyer for a price and that such a contract may be either absolute or conditional. If the transfer is in presenti, it is called a 'sale'; but if the transfer is to take place at a future time and subject to some conditions to be fulfilled subsequently, the contract is called "an agreement to sell". When the time in the agreement to sell lapses or the conditions therein subject to which the property in goods is to be transferred are fulfilled, the "agreement to sell" becomes a 'sale'. [Paras 21, 22, 23] [566-E-F; 569-B-H; 570-A-C]**

*Oil India Ltd. v. The Superintendent of Taxes and Others* **[1975] 35 STC 445 (SC);** *English Electric Company of India*



*Ltd. v. The Deputy Commercial Tax officer and Others* **[1976] 38 STC 475 (SC);** *South India Viscose Ltd. vs. State of Tamil Nadu* **[1981] 48 STC 232 (SC);** *Union of India & Anr. v. K.G. Khosla and Co. Ltd.* **[1979] 43 STC 457;** *State of Bihar v Tata Engineering and Locomotives Ltd.* **[1971] 27 STC 127(SC);** *Sahney Steel and Press Works Ltd. v. Commercial Tax Officer* **[1985] 60 STC 301 (SC) – relied on.**

**1.4 When the sale or agreement for sale causes or has the effect of occasioning the movement of goods from one State to another, irrespective of whether the movement of goods is provided for in the contract of sale or not, or when the order is placed with any branch office or the head office which resulted in the movement of goods, irrespective of whether the property in the goods passed in one State or the other, if the effect of such a sale is to have the movement of goods from one State to another, an inter-State sale would ensue and would result in exigibility of tax under Section 3(a) of the Central Act on the turn over of such transaction. [Para 32] [573-D-F]**

**1.5. The inter-State movement must be the result of a sale or an incident of the contract. It is not necessary that the sale must precede the inter-State movement in order that the sale may be deemed to have occasioned at such movement. It is also not necessary for a sale to be deemed to have taken place in the course of inter-State trade or commerce, that the covenant regarding inter-State movement must be specified in the contract itself. It would be enough if the movement was in pursuance of and incidental to the contract of sale. The words 'Sale of goods' used in Section 2(g) of Central Act includes 'an agreement of sale' as such an agreement is an element of sale and is also an essential ingredient thereof, in terms of Section 4(1) of the Sales of Goods Act, that is, it is sufficient if the agreement of sale**

**contemplates an inter-State movement of the goods though the sale itself may take place, at the destination or in the course of the movement of the goods. Even if there is no specific stipulation or direction in the agreement for an inter-State movement of goods, if such movement is an incident of that agreement, or if the facts and circumstances of the case denote it, the conditions of Section 3(a) would be satisfied. In the instant case, in pursuance to the sales agreement, UIL placed monthly indents on the assessee with instructions to dispatch the goods of given size and quantity to the named destination. Pursuant to such indents, the assessee dispatched the goods to its godowns to the given destination and sent goods dispatch intimation directly to the concerned UIL divisional office at the destination furnishing size and quantity dispatched. The assessee, on receipt of the request for supply of goods dispatched the same to its State godowns and the person-in-charge of the godowns to the UIL division office by raising sales invoice. The contention that there was no firm order placed by UIL with the assessee and accordingly, it would not come within the purport of Section 3(a) of the Central Act and they are mere branch transfers, cannot be accepted. It does not matter how much goods were delivered to the branch office which just acted as a conduit pipe before it ultimately reached the purchaser's hands. All that matters is that movement of the goods is in pursuance of the contract of sale or as necessary incident to the sale itself. Further, the sales agreement is for a period of five years. If there is short supply of the goods than what was indented for, then the same could be adjusted in the subsequent dispatch. The assessing officer, while considering this stand of the assessee, had made reference to several correspondence for the period from April, 1981 to March, 1982 and had come to the conclusion though both the assessee and UIL term those**



**correspondence as mere letter of allocations, they are infact in the nature of indents placed by UIL with the assessee for the supply of a particular model of fans, particular quantity and the destinations of delivery. This finding of fact was confirmed by the final fact finding authority namely, the State Tax Tribunal. This finding of fact does not appear to be perverse, which would call for interference. The Tribunal, after reappreciating the entire documents available on the record and also the modus operandi adopted by the assessee in its well considered order, has concluded that the so called 'forecasts' were nothing but request made by UIL for supply of goods to meet the requirements of the consumers in various parts of the country. Though, the said communication was termed as 'forecasts', according to the Tribunal, they were nothing but firm orders placed by the UIL with the assessee for supply of particular type of goods and particular quantity pursuant to their understanding reflected in the 'sales agrement', which is continuing one for the continuous supply of goods during the period of agreement which stretches over a period of 5 years, it cannot be said that the 'sales agreement' was only for the purpose of purchasing of their goods and selling in different parts of the country by UIL which has its offices wherever the assessee has its godowns of branch offices and that there was no movement of goods pursuant to their 'letter of allocations', which the assessee would contend that it is not a firm commitment or firm order for the supply of goods. A perusal of the letters of allocations, showed that an order was placed by UIL is a composite form to supply of goods through their branch offices and the movement of the goods thereto from the assessee's factory to the assessee's godown was to fulfill the demand made pursuant to the 'letters of allocation' which the assessee claims that the same is in the nature of forecast. The movement of the**

**goods from the assessee's factory to its various godowns situated in different parts of the country was pursuant to 'sales agreement' coupled with 'forecasts' which are nothing but 'indents' or firm orders. Therefore, the transaction between the assessee with its branch offices was a clear case of inter-State sales and not branch transfers, as claimed by the assessee. [Paras 33, 38, 40, 41, 42] [574-B-D; 576-C-F; 575-D-G; 577-D-G; 578-D-H; 579-A-C]**

*Balabahagas Hulsachand v. State of Orissa* **(1976) 37 STC 207;** *Union of India v. K.G. Khosla and Co.* **(1979) 43 STC 457 – relied on.**

**1.6. Merely because the branch office could also effect supplies directly to some of the bulk consumers, it cannot be said that all supplies that are made to branch offices are not pursuant to the Sales Agreement and letter of allocation of UIL. The assessing authority, in the instant case, after carefully considering the relevant clauses in the sales agreement and the voluminous correspondence between the assessee and the UIL, gave its finding that the transaction in question was pure and simple inter-State sales and fell within the purview of Section 3(a) of the Central Act. [Paras 43 and 44] [579-E-F; G-H; 580-A-B]**

**Case Law Reference:**

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|---|---|---|
| **[1970] 26 STC 354** | **Relied on** | **Para 12** |
| **(1960) 11 STC 655 (SC)** | **Relied on** | **Para 15** |
| **[1975] 35 STC 445(SC)** | **Relied on** | **Para 26** |
| **[1976] 38 STC 475 (SC)** | **Relied on** | **Para 27** |
| **[1981] 48 STC 232 (SC)** | **Relied on** | **Para 28** |
| **[1979] 43 STC 457** | **Relied on** | **Para 29** |



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| **[1971] 27 STC 127(SC)** | **Relied on** | **Para 30** |
| **[1985] 60 STC 301 (SC)** | **Relied on** | **Para 31** |
| **(1976) 37 STC 207** | **Relied on** | **Para 40** |
| **(1979) 43 STC 457** | **Relied on** | **Para 40** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3781 of 2003.

From the Judgment & Order dated 21.06.2002 of the High Court of Judicature of Andhra Pradesh at Hyderabad in Tax Revision Case No. 54 of 1991.

S.K. Bagaria, Ramesh Singh, Adarsh Priyadarshi (for O.P. Khaitan & Co.) for the Appellant.

C.K. Sucharita, Nirada Das for the Respondent.

The Judgment of the Court was delivered by

**H.L. DATTU, J.** 1. This appeal is directed against the judgment and order dated 21.06.2002, passed by the Division Bench of the High Court of Judicature of Andhra Pradesh at Hyderabad in Tax Revision Case No. 54 of 1991. By the impugned judgment and order, the High Court has dismissed the Revision Petition filed by the assessee, inter-alia, holding that the disputed transactions constitute inter-State sales, as contemplated under Section 3(a) of the Central Sales Tax Act, 1956.

2. The issue that we are called upon to decide in the case is, whether in the facts and circumstances of the case, the sale or purchase of goods can be said to have taken place in the course of inter-State trade or commerce and thereby exigible to tax under the Central Sales Tax Act, 1956 (hereinafter referred to as, "the Central Act").

3. M/s Jay Engineering Works Ltd. is a Public Limited

Company, registered under the Companies Act, 1956. It has its Head Office-cum-Registered Office at 23, Kasturba Gandhi Marg, New Delhi. In the State of Andhra Pradesh, the Company has registered itself in the name and style of M/s Hyderabad Engineering Industries (Prop. - The Jay Engineering Works Ltd.). It is registered as a dealer under the Andhra Pradesh General Sales Tax Act, 1957 as well as Central Sales Tax Act, 1956.

4. The Company is engaged in the manufacture and sale of electrical fans, sewing machines, fuel injection parts and accessories etc. The Company has its manufacturing units in different parts of the country including Hyderabad, Andhra Pradesh. In addition to the factory and office in Hyderabad, the company has its branch office at Vijayawada in the State of Andhra Pradesh. Outside the State of Andhra Pradesh, the company has its godowns in different States including Delhi. In Kolkata, the company has its own office in the name of Eastern India Usha Corporation.

5. M/s. Usha Sales Ltd. (subsequently known as Usha International Ltd.) (hereinafter referred to as "UIL") is a company registered under the Indian Companies Act, with its registered office at 19, Kasturba Gandhi Marg, New Delhi. It has 16 divisional offices at various places in the country with different names at every place wherever the assessee's godowns are located. The assessee and UIL had entered into a sales agreement dated 01.05.1979. It was for a period of five years. Under the said agreement, the main function of UIL was to organize the sale and distribution of the products of the assessee and to arrange for sale promotion measures of the products and to provide after sales service and such other services as might be required in the interest of sale of the said products. The agreement also envisaged that UIL would purchase the said products as an independent principal and maintain adequate stocks and sell the same as such. We will refer to these clauses in the agreement while discussing the



issues raised by the learned counsel for the parties at the time of hearing of the appeal.

6. The Company has been an assessee on the rolls of the Commercial Tax Officer, Company Circle-II, Nampalli, Hyderabad. For the assessment year 1981-82, the assessee company filed its annual returns under the Central Act in the prescribed form.

7. The assessee company claimed exemption on a turnover of Rs.8,87,75,643.00 towards goods transported to out-of-state depots otherwise than as a result of direct sale which would attract tax under Section 6 of the Central Act.

8. The assessee's case before the assessing authority, Sales Tax Appellate Tribunal and the High Court was that the transactions on which exemptions claimed cannot be regarded as sales in the course of inter-State trade, chargeable to tax under the Central Act. This contention of the assessee is negatived by the assessing authority, which view is confirmed by the Tribunal and the High Court.

9. The findings of the assessing authority with respect to the nature of the transactions with its various branches, except in the case of Calcutta Depot, may be set out in his own words :-

> "The assessee company in Hyderabad is engaged in the manufacture of different types of fans and fuel injection parts. In pursuance of the said sales agreement, M/s Usha Sales Limited, Delhi (now Usha International Limited, Delhi) placed monthly indent on HEI Hyderabad for the supply of the goods to its offices in various stages. This indent is sent either by telex or Telephone or through written communication. This indent shows the model wise quantity required in each of the regions and the destinations to which the goods are to be sent are clearly mentioned at Madras, Patna, Agra. At times even based on such indents

received from M/s. Usha Sales Ltd. Delhi the assessee company is effecting the movement of goods from its factory in Hyderabad to its own depots in the destination given by the Usha Sales Ltd. Alongwith the goods the assessee is sending gate pass (GPO) Cum Challan proforma invoice, way bill and lorry receipt, which are in the name of its own depot or godown. Simultaneously HEI also sends a direct communication to the "constituent" and further requesting the "constitutent" of the UIL to take delivery. At times, the unit of USL also informs the HEI that it has taken delivery of goods.

In pursuance of the monthly allocation made by the UIL head office New Delhi, the various constituents or units of USL directly correspond with HEI for the dispatch of the goods, such constituents issue telegrams and telex message to HEI for urgent dispatch of the goods.

On receipt of the goods in the out of state depot, the depot incharge prepares invoice in favour of the constituent of M/s Usha Sales Limited such as Nalanda Sales Corporation, Western Sales Corporation, United Sales Corporation etc., generally the names of these purchasing units owned by M/s Usha Sales Ltd. are printed on the invoices issued by the assesses depots, which shown that there cannot be any other purchases.

Depot wise stock register is maintained in Hyderabad Factory showing modelwise quantitative particulars of the goods sent to the depot goods sold by the depot and the goods available with the depot as stock at the end of prescribed period.

The Hyderabad factory did not receive only orders or indents from any of its depots. The indent is always placed by M/s Usha Sales Ltd. But for the said indent, neither the Hyderabad factory nor any depot known the model or quantity of goods to be sent or to be received.



Neither there is any communication sent by the Marketing Deptt. of the assessee company as they were never received.

On receipt of goods in the out-state depot, an invoice is prepared in favour of the respective unit of M/s. Usha Sales Ltd. (such as Nalanda Sales Corporation etc.) and all the invoices are sent without fail to the Hyderabad factory. In the books of account of the factory, the account of USL is debited for the invoice value and the sales tax collection is credited to the account of the respective State.

The invoice is discounted by the HEI with Canara Bank, Secunderabad and the full amount is received by drawing Hundi on M/s Usha Sales Ltd. Delhi for 10 days on the due date. USL makes payment to Canara Bank, Delhi and on receipt of such intimation the account of USL is credited in the factory of Hyderabad.

There were no transfers from one depot to another depot. The depot has no option to chose its purchase. No open sales were conducted from the depots. All the sales were affected to different units of USL whose names are printed in the respective invoices as buyers."

The assessing officer has further observed :-

"Thus intimate nexus and conceivable link between the assessee and the purchaser are manifest. The receipt of incident from USL HO the follow up and pressure for supply from the USL divisions, the periodical fixation of price to hold goods for the specified future months, the confirmation of receipt of goods by the UFL division proceeded by direct dispatch intimations to the purchasers supply of goods at "current prices" and complaints direct from USL divisions for non delivery or short delivery all in pursuance of sale agreement make me conclude that the sales from HEI to USL occasioned the movement of goods. The

delivery and raising of invoice by the State godown are immaterial."

10. The assessing officer has concluded that *"from a factual description of the mode of transactions, it is evident that the inter-State sales effected by the assessee to UIL have been camouflaged as branch transfers with a view to evade tax legitimation (sic) due to the State on these transactions".* It is not necessary to refer to the tax and the penalties levied by the assessing officer under the Central Act, for the issue involved in the case is legal.

11. The sole question that arises for our consideration is whether the turn-over under dispute for the assessment year 1981-82, is an inter-State sale or a branch transfer.

12. Shri S.K. Bagaria, learned senior counsel for the assessee, submitted that while the goods certainly moved from the factory at Hyderabad to the branch office of the assessee, such movement cannot be regarded as having any connection with any particular order or orders placed by M/s Usha Sales Ltd. Therefore, it is submitted that the goods moved from Hyderabad to Delhi on what were described as 'stock transfers' and such stock transfers cannot be brought within the charging provisions of the Central Act, since they cannot be regarded as sales in the course of inter-State trade and commerce. It is further submitted by referring to clauses in the sales agreement and relying on the decision of this Court that the transaction in question is merely 'branch transfers' and not 'inter-State sales'. It is submitted that the findings of the assessing authority that the movement of goods from the assessee's factory to their godowns was in pursuance of the agreement of sale between the assessee and UIL is not based on any material and, therefore, on mere presumption and assumptions the assessing authority could not have treated the branch transfers as inter-State sales. It is further submitted that there was no firm commitment between the assessee and UIL at the time of movement of goods from assessee's manufacturing unit to their



godowns situated at different places in the country. It is further submitted that the assessing authority was not justified in relying on the letters of allocation issued by UIL as a contract of firm commitment for purchase of goods manufactured by the assessee. According to Shri Bagaria, the letters of allocation issued by UIL cannot be construed to be a contract of firm commitment to purchase the goods manufactured by the assessee and those letters of allocation were mere forecast of UIL's estimate of their requirements. It is further contended that there was no firm commitment on the part of UIL to purchase specific number of specified varieties of fans and for that matter the assessee had not allotted any specific number of specified varieties of fans in favour of UIL at the time the goods manufactured by the assessee were being transferred from their factory to their godowns. It is contended that the assessing authority is bound to examine each individual transaction and decide whether it constitutes an inter-State sale. Reliance is placed on the observations made by this Court in *Tata Engineering and Locomotive Co. Ltd. v. Assistant Commissioner of Commercial Taxes* [1970] 26 STC 354 at page 381 (SC). In conclusion, it is submitted that the assessing authority and the High Court were not justified in relying on the decision of this Court in the case of S*ahney Steel and Press Works Ltd. and English Electric Company of India Ltd*.

13. We did not have the advantage of hearing the learned counsel for the Revenue. However, with the permission of the Court, they have filed their written submissions which, to say the least, does not touch upon any of the submissions made by learned senior counsel for the assessee. Their written submissions are just the repetition and reiteration of the findings and conclusions reached by the assessing authority.

14. To resolve the controversy raised in this appeal, Section 3(a) of the Central Act requires to be noticed.The Section reads as under :-

"A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase--

(a) occasions the movement of goods from one State to another; or

(b) is effected by a transfer of documents of title to the goods during their movement from one State to another.

Explanation 1---Where goods are delivered to a carrier or other bailee for transmission, the movement of the goods shall, for the purposes of clause (b), be deemed to commence at the time of such delivery and terminate at the time when delivery is taken from such carrier or bailee.

Explanation 2--Where the movement of goods commences and terminates in the same State it shall not be deemed to be a movement of goods from one State to another by reason merely of the fact that in the course of such movement the goods pass through the territory of any other State."

15. The purport of Section 3(a) is explained by this Court in *Tata Iron and Steel Co. Ltd. Vs. S.R. Sarkar* (1960) 11 STC 655 (SC), wherein it is stated *"in our view, therefore, within Clause (b) of Section 3 are included sales in which property in the goods passes during the movement of the goods from one State to another by transfer of documents of title thereto: clause (a) of Section 3 covers sales, other than those included in clause (b), in which the movement of goods from one State to another is the result of a covenant or incident of the contract of sale, and property in the goods passes in either State".*

16. To make a sale as one in the course of inter-State trade or commerce, there must be an obligation, whether of the seller or the buyer to transport the goods outside the State and it may arise by reason of statute, contract between the parties or from



mutual understanding or agreement between them or even from the nature of the transaction which linked the sale to such transportation such an obligation may be imposed expressly under the contract itself or impliedly by a mutual understanding. It is not necessary that in cases, there must be pieces of direct evidence showing such obligation in a written contract or oral agreement. Such obligations are inferable from circumstantial evidence.

17. Section 6 of the Central Act which is the charging Section, levies tax under the Central Act on all inter-State sales, determined as such under Section 3 of the Central Act. Section 9 of the Central Act provides that the tax payable by any dealer under the Central Act on the sale of goods effected by him in the course of inter-State trade or commerce, whether such sale falls within Clause (a) or Clause (b) of Section 3, shall be levied by the Govt. of India and shall be collected by that Govt. in accordance with the provisions of sub-Section (2) of that Section, in the State from which the movement of the goods commenced. The proviso enumerates an exception, but we do not consider it necessary to refer to it for the purpose of this case. Section 3 of the Act deals with inter-State sales and details the circumstances as to when a sale or purchase of goods can be said to take place in the course of inter-State trade or commerce. A perusal of Section 3 of the Central Act shows that it raises a presumption of law and that is, a sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce, if the sale or purchase (a) occasions the movement of goods from one State to another or (b) is effected by transfer of documents of title to the goods during their movement from one State to another. For purposes of clause (b) of Section 3, Explanation I says that where the goods are delivered to a carrier or other bailee for transmission, the movement of the goods shall be deemed to commence at the time of such delivery and terminate at the time when delivery is taken from such carrier or bailee. Explanation II clarifies that when the movement of goods commences and

terminates in the same State, the movement of goods will not be deemed to be from one State to another merely because of the fact that in the course of such movement, the goods pass through the territory of any other State. For a sale to be in the course of inter-State trade or commerce under Section 3(a), the two conditions must be fulfilled. There must be sale of goods. Such sale should occasion the movement of the goods from one State to another. A sale would be deemed to have occasioned the movement of the goods from one State to another within the meaning of clause (a) of Section 3 of the Act when the movement of those goods is the result of a covenant or incidence of the contract of sale, even though the property in the goods passes in either State. With a view to find out whether a particular transaction is an inter-State sale or not, it is essential to see whether there was movement of the goods from one State to another as a result of prior contract of sale or purchase. Section 6A of the Central Act provides that if any dealer claims that he is not liable to pay tax under the Central Act in respect of any goods, on the ground that the movement of such goods from one State to another was occasioned by reason of transfer of such goods by him to any other place of his business or to his agent or principal and not by reason of sale, then the burden of proving that the movement of goods was so occasioned shall be on the dealer. It also provides the mode of discharge of that burden of proof.

18. What follows from a conjoint reading of these provisions is that every dealer is liable to pay tax under the Central Act on the sale of goods effected by him in the course of inter-State trade or commerce during the year of assessment. Where the department takes advantage of the presumption under Section 3(a) and/or to show that there has been a sale or purchase of goods in the course of inter-State trade or commerce and if the assessee disputes that there has been a sale or purchase of goods in the course of inter-State trade or commerce, then the assessee can rebut the presumption by filing declaration in form 'F' under Section 6A of the Central Act to prove that



the movement of goods was occasioned not by reason of sale but otherwise than by way of sale. When the department does not take advantage of the presumption under Section 3(a) of the Central Act, but shows a positive case of inter-State sale in the course of inter-State trade or commerce to make it liable to tax under Section 6, the declaration in Form 'F' under section 6A would be of no avail.

19. It is an accepted position in law that a mere transfer of goods from a head office to a branch office or an inter-branch transfer of goods, which are broadly brought under the phrase 'Branch transfers' cannot be regarded as sales in the course of inter-State trade, for the simple reason that a head office or branch cannot be treated as having traded with itself or sold articles to itself by means of these stock transfers.

20. In the instant case, the case of the Revenue is not only based on the agreement of sale but also on the presumption under Section 3(a) of the Central Act.

21. In the instant case, the assessing authority and the Tribunal have recorded a finding of fact that there were prior contracts between Usha Sales Ltd. and the assessee and in pursuance of those contracts, the goods moved from the assessee's factory at Hyderabad to its Branch offices to be delivered to Usha Sales Ltd. or their nominees. In order to appreciate the contention canvassed, it is necessary to set out certain clauses from the sales agreement. The sales agreement dated 01.05.1979 contained, inter alia, the following:-

"Clause 1 The agreement products shall comprise sewing machines fan, their component parts/ accessories, and such other products as may be mutually agreed upon from time to time.

Clause 2 The territory covered by the agreement shall comprise of all states of India excluding West

Bengal/Andaman & Nicobar.

Claues 3 USL shall undertake to organize sale and distribution of agreement products in the market. Maintain adequate stocks at all times in its godowns in different regions.

Arrange for sales promotion measures as may be necessary from time to time on mutually agreed basis.

Provide after sales service.

Provide such other services as may be required in the interest of sales, a mutually agreed basis from time to time.

Clause 4 USL shall make all purchases of agreement products as an independent principal and sell the same as such.

Price (5)(a)JE's selling prices to Usha sales shall be intimated by JE from time to time. The prices at which Usha Sales shall sell the agreement products to their agents/dealers shall be determined by them so however that Usha sales make up on their purchases price shall not exceed:-

| | |
|---|---|
| Sewing Machines/Accessories | 10.00 |
| | Rs 5/- (per top) |
| Fans | 7.35% |
| Component parts | 13.35% |

The price so computed shall be maximum price and Usha sales shall be free to sell at prices lower than the said maximum.



(b) Consumer prices (except for hire purchase) sales shall not exceed the maximum authorized by JE from time to time. However, Usha sales/their dealers/agents shall be free to charge prices lower than the said maximum.

(c) Any sales tax/other tax payable may be charged additionally by Usha Sales.

Freight/handling charges shall be reimbursed on an agreed basis.

(d) In the event of any reduction prices by JE corresponding rebate shall be allowed on unsold stocks held by Usha sales/their dealers/agents.

Sales to Third Parties

In case it is considered expedient by JE to supply/bill the goods directly to any of the USHA sales dealers agents against orders procured by Usha Sales make JE shall pay to Usha sales the difference between JE's subsisting selling prices and the invoiced value exclusive of sale tax and other local taxes.

Payment

(a) Payment for all purchases shall be made to JE within 75 days of the date of the bill failing which Usha sales shall pay interest at JE's Maximum borrowing rates from their bankers at that time.

(b) Usha sales shall be liable to make payment in respect of supplies invoiced by JE on its nominees in case of default by the letter.

Sales Deliveries

Sales/deliveries shall be made to Usha Sales their

nominees at any of JE's factories region godowns at the company's option."

22. Clause (1) of the agreement speaks of the products that the assessee is required to supply to the purchaser. Clause (2) speaks of the territory in which the purchaser is permitted to sell the products supplied by the assessee. Clause (3) speaks of the obligations of the purchaser in organizing the sale and distribution of the products supplied by the assessee. It also provides that the purchaser shall keep the adequate stocks in its godowns in different regions and also arrange sales promotions as may be required from time to time. Purchaser is also required to provide after sales service to the products supplied. Clause (4) specifically provides that the purchaser/UIL shall make all purchases of the agreed products as an independent principal and sell the same as such. Clause (5) which is a clause where price is fixed by the assessee and that price is the maximum price and UIL – purchaser is permitted to sell at prices lower than the maximum price fixed by the assessee. Clause (6) speaks of sales that may be made by the assessee to the third parties. Clause (7) speaks of the time limit within which payments for the supply of goods to be made by UIL to the assessee. Clause (8) is an important clause in the sales agreement. It specifically says that the sales/deliveries shall be made to UIL/their nominees at any of the assessee's factories, region, godowns at the option of the company. It is clear from the aforesaid clauses set out herein above, that the assessee firstly undertakes to sell and supply its manufactured products to UIL and the UIL will have the entire country, except West Bengal and Andaman and Nicobar Islands, as its distribution/selling zone. The agreement also provides that UIL will purchase the products agreed under Clause (1) and sell the same as an independent principal. Clause (8) is very relevant for the purpose of this case. It obligates the assessee to make delivery of the products manufactured either to the UIL's nominees or in any one of the godowns of the assessee at the option of UIL.



23. From the above Clauses in the agreement, what can be inferred is that the assessee has undertaken to supply their manufactured products to UIL or to its nominees at the agreed price at any of the assessee's godowns at the option of UIL. A contract of sale of goods would be effective when a seller agrees to transfer the property in goods to the buyer for a price and that such a contract may be either absolute or conditional. If the transfer is in presenti, it is called a 'sale'; but if the transfer is to take place at a future time and subject to some conditions to be fulfilled subsequently, the contract is called "an agreement to sell". When the time in the agreement to sell lapses or the conditions therein subject to which the property in goods is to be transferred are fulfilled, the "agreement to sell" becomes a 'sale'.

24. Before we deal with the issues raised in the appeal, we will first notice some of the decisions of this Court on interpretation of Section 3(a) of the Act.

25. In *Tata Iron and Steel Co. Ltd. v. S.R. Sarkar & Others* (supra), the majority view of this Court was that where the goods are moved from one State to another as a result of a covenant in the contract of sale, that would be clearly a sale in the course of inter-State trade. The Court further proceeded to hold that even a movement of goods from one State to another, which is merely incidental to, and which is not part of, the contract of sale, is also brought within the fold of Section 3(a) of the Central Act.

26. In *Oil India Ltd. v. The Superintendent of Taxes and Others* [1975] 35 STC 445 (SC), this Court held *"No matter in which State the property in the goods passes, a sale which occasions "movement of goods from one State to another is a sale in the course of inter-State trade". The inter state movement must be the result of a covenant, express or implied, in the contract of sale or an incident of the contract. It is not necessary that the sale must precede the inter State movement in order that the sale may be deemed to have occasioned such movement. It is also not necessary for a sale to be deemed to have taken place in the course of inter state trade or commerce,*

*that the covenant regarding inter-State movement must be specified in the contract itself. It would be enough if the movement was in pursuance of and incidental to the contract of sale."*

27. In *English Electric Company of India Ltd. v. The Deputy Commercial Tax officer and Others* [1976] 38 STC 475 (SC), this Court observed, that *"when a branch of a company forwards a buyer's order to the principal factory of the company and instructs them to dispatch the goods direct to the buyer and the goods are sent to the buyer under those instructions it would not be sale between the factory and its branch. If there is a conceivable link between the movement of the goods and the buyer's contract, and if in the course of inter-State movement the goods move only to reach the buyer in satisfaction of his contract of purchase and such a nexus is otherwise inexplicable, then the sale or purchase of the specific or ascertained goods ought to be deemed to have taken place in the course of inter State trade or commerce as such a sale or purchase occasioned the movement of goods from one State to another. The presence of an intermediary, such as the seller's own representative or branch office, who initiated the contract may not make the matter different. Such an interception by a known person on behalf of the seller is the delivery State and such person's activities prior to or after the implementation of the contract may not alter the position."*

28. In *South India Viscose Ltd. vs. State of Tamil Nadu* [1981] 48 STC 232 (SC), this Court observed that if there is a conceivable link between a contract of sale and the movement of goods from one State to another in order to discharge the obligation under the contract of sale, it must be held to be an inter-State sale and that character will not be changed on account of an interposition of an agent of the seller who may temporarily intercept the movement.

29. In *Union of India & Anr. v. K.G. Khosla and Co. Ltd.* [1979] 43 STC 457, this Court reiterated and approved the



decision in *Oil India Ltd.'s* case (supra) and held that if a contract of sale contains stipulation for the movement of the goods from one State to another, the sale would certainly be an inter-State sale. But for the purposes of Section 3(a) of the Act, it is not necessary that the contract of sale must itself provide for and cause the movement of goods or that the movement of goods must be occasioned specifically in accordance with the terms of the contract of sale.

30. In *State of Bihar v Tata Engineering and Locomotives Ltd.* [1971] 27 STC 127(SC), it is observed "if a contract of sale contains a stipulation for such movement, the sale would, of course, be an inter state sale. But it can also be an inter state sale, even if the contract of sale does not itself provide for the movement of goods from one State to another but such movement is the result of a covenant in the contract of sale or is an incident of that contract."

31. In *Bharat Electricals Ltd. v. State of Andhra Pradesh* [1996] 102 STC 345 (AP.), it is observed that *"In the light of the settled legal position, it cannot be and it has not been seriously disputed that the movement of goods from the Hyderabad Unit of the petitioner-company direct to the customer's site in the other State are inter-State sales pursuant to the contracts entered into by BHEL with the customers/ purchasers. The fact that the contracts were entered into with the head office or the unit having overall responsibility for execution is a different one or that the executing unit itself raises the invoices and realizes the price from the customers does not in any way detract from the position that the inter-State movement of goods from Hyderabad is pursuant to and a necessary consequence of the contract of sale. In the instant case, the goods are tailor-made, manufactured according to certain specification and designs and the components/ equipment which go into the plant are directly dispatched by the Hyderabad unit to the customer in the other State and the goods are received from the common carrier by the*

*customer's representative. The movement of such goods from Andhra Pradesh to other States cannot but be ascribed to contracts of sale entered into by the head office of the petitioner-company of which the petitioner is part and parcel. The fact that the contract was not entered into with Hyderabad unit or that the inter-State movement had taken place at the instance of another unit of the same company does not make material difference. It is to be noted that for the value of the goods dispatched, the debit note is sent by Hyderabad unit to the executing unit. It may be that the customer does not pay the amount direct to the Hyderabad unit which manufactures and dispatches the goods. But in the light of the settled propositions that the branches and head office constitute one single legal entity, it does not matter by whom the billing is done or to whom the payment is made by the customer."*

32. From the above decisions, the principle which emerges is – when the sale or agreement for sale causes or has the effect of occasioning the movement of goods from one State to another, irrespective of whether the movement of goods is provided for in the contract of sale or not, or when the order is placed with any branch office or the head office which resulted in the movement of goods, irrespective of whether the property in the goods passed in one State or the other, if the effect of such a sale is to have the movement of goods from one State to another, an inter-State sale would ensue and would result in exigibility of tax under Section 3(a) of the Central Act on the turn over of such transaction. It is only when the turnover relates to sale or purchase of goods during the course of inter-State trade or commerce that it would be taxable under the Central Act.

33. The learned counsel Shri Bagaria mainly contends that there is nothing in the sales agreement, express or implied, which may be regarded as specific covenant under which the assessee's manufacturing unit was obliged to move the specific goods from its manufacturing unit at Hyderabad to its branch



offices for delivery of the goods to UIL. The learned counsel submitted that a sale can be regarded as having occurred in the course of inter-State trade, if the concerned contract of sale itself includes a covenant either express or implied, to the effect that the goods must move from one State to another for the purpose of implementing the 'sales agreement'. We cannot agree with the submission of learned counsel Shri Bagaria. We say so for the reason that the inter-State movement must be the result of a sale or an incident of the contract. It is not necessary that the sale must precede the inter-State movement in order that the sale may be deemed to have occasioned at such movement. It is also not necessary for a sale to be deemed to have taken place in the course of inter-State trade or commerce, that the covenant regarding inter-State movement must be specified in the contract itself. It would be enough if the movement was in pursuance of and incidental to the contract of sale [See *Oil India Ltd.* (supra)].

34. We now turn to the facts of the present case to determine whether the transaction in question is inter-State trade or commerce or mere stock transfers to branch offices.

35. Shri Bagaria, learned senior counsel, submits that the movement of the goods from the assessee's factory to its godowns situated outside the State was not in pursuance of the agreement between the assessee and UIL; that there was no firm commitment between the assessee and UIL at the time of movement of the goods from the factory to the godowns; that the only communication between the assessee and UIL were in the nature of forecasts; and the completion of the sale to the UIL did not take place at the factory place and the appropriation of the goods were done at the godowns and it was open to the assessee till then to allot the goods to any purchasers. Therefore, the learned senior counsel contends that the findings and conclusions reached by the statutory authorities under the Central Act are perverse. In our considered view, though the submission of the learned senior counsel is attractive, but on a deeper consideration, it lacks merit.

36. The assessee, for the assessment year 1981-82 under Central Act, claimed exemption on a turnover of Rs. 7,88,13,639/- towards stock transfer of USHA brand electric fans. The same was disallowed by the assessing officer and assessed to tax @10% in the absence of 'C' declaration forms by classifying the transactions falling under Section 3(a) of the Central Act.

37. It is not in dispute that there is "sales agreement" between the parties which was entered into sometime in the year 1979 and the same was to expire sometime in the year 1984. Under this agreement, UIL had agreed to purchase the products manufactured by the assessee and sell it as an independent principal. The assessee has its godown in every State including Delhi. The UIL has also its divisional office in different names at every place wherever the assessee's godown is located.

38. In pursuance to the sales agreement, UIL placed monthly indents on the assessee with instructions to dispatch the goods of given size and quantity to the named destination. Pursuance to such indents, the assessee dispatched the goods to its godowns to the given destination and sent goods dispatch intimation directly to the concerned UIL divisional office at the destination furnishing size and quantity dispatched with L.R.No. and name of the transport company. The statutory authorities, from the correspondence between UIL and the assessee noticed in their order that UIL divisional offices correspondent directly with the assessee for the supply of stocks and also informs them about the receipt or non-receipt of the stocks. The assessee, on receipt of the request for supply of goods dispatches the same to its state godowns and the person-in-charge of the godowns to the UIL division office by raising sales invoice.

39. We have already noticed the relevant clauses in the 'sales agreement'. A close reading of the clauses would clearly indicate that the parties have agreed to discharge certain obligations cast on them under the agreement. The agreement provides for the products to be supplied, sales zone, to organize



sales and service for UIL to make purchases an sell products as an independent principal, selling prices to be informed from time to time, payments against purchases to be made within a particular time and the goods to be delivered to UIL either at the assessee's factory or at its regional godowns. Clause 8 of the agreement, if it is read with other clauses, makes it clear that there is stipulation for the movement of the goods from the factory to the godowns situated in different places to be delivered to UIL. It is because of these covenants, the assessee is obliged to move the goods from its factory to the godown situated in other States to fulfill its part of the contract.

40. Section 2(g) of the Central Act defines the meaning of the expression 'sale'. This expression was explained by this Court in *Balabahagas Hulsachand Vs. State of Orissa* (1976) 37 STC 207 at page 213. This Court stated that the words 'Sale of goods' used in this Section includes 'an agreement of sale' as such an agreement is an element of sale and is also an essential ingredient thereof, in terms of Section 4(1) of the Sales of Goods Act, that is, it is sufficient if the agreement of sale contemplates an inter-State movement of the goods though the sale itself may take place, at the destination or in the course of the movement of the goods. This view was reiterated and further explained by this Court in *Union of India Vs. K.G. Khosla and Co.* (1979) 43 STC 457. The consistent view of this Court appears to be that even if there is no specific stipulation or direction in the agreement for an inter-State movement of goods, if such movement is an incident of that agreement, or if the facts and circumstances of the case denote it, the conditions of Section 3(a) would be satisfied.

41. Shri Bagaria contends that the assessee has received only 'allocations' in the nature of market or distribution forecasts and such allocations are neither in the nature of indents nor orders and the assessee never accepted such allocations letter sent by UIL. It is further submitted that except in few instances,

the actual dispatches of the goods to its godowns never tallied with the allocations letter sent by UIL. Therefore, such allocations letter cannot be construed as "firm orders". Therefore, the transactions cannot be brought within the purview of inter-State trade or commerce to attract charging provisions under the Central Act. In our view, though the ultimate purchaser UIL placed orders for a particular quantity of goods to be supplied, the assessee did not supply the actual quantity indented for. We do not, however, think that this makes any difference to the application of Section 3(a) of the Central Act. In our view, it does not matter how much goods were delivered to the branch office which just acted as a conduit pipe before it ultimately reached the purchaser's hands. All that matters is that movement of the goods is in pursuance of the contract of sale or as necessary incident to the sale itself. Further, the sales agreement is for a period of five years. If there is short supply of the goods than what was indented for, then the same could be adjusted in the subsequent dispatch. Therefore, to contend that there was no firm order placed by UIL with the assessee and accordingly, it would not come within the purport of Section 3(a) of the Central Act and they are mere branch transfers, cannot be accepted. We may also note that the assessing officer, while considering this stand of the assessee, has made reference to several correspondence for the period from April, 1981 to March, 1982 and has come to the conclusion though both the assessee and UIL terms those correspondence as mere letter of allocations, they are infact in the nature of indents placed by UIL with the assessee for the supply of a particular model of fans, particular quantity and the destinations of delivery. This finding of fact is confirmed by the final fact finding authority namely, the State Tax Tribunal. To us, this finding of fact does not appear to be perverse, which would call for our interference.

42. Shri Bagaria, learned senior counsel for the assessee, laid much stress on the issue that in the instant case, there is no firm order placed by UIL on the assessee for the supply of particular type or quantity of goods and the only communication



that they had placed only a 'forecasts' which only depicts the requirement in a particular State and therefore, those forecasts cannot be even remotely considered as either purchase orders or indents for supply of goods. It is also contended that the "sales agreement" is only an understanding between the parties for the supply of manufactured goods by the assessee to UIL and the agreement is not binding on the parties, since it does not provide for any claim for damages, if there is any breach of any of the conditions stipulated therein by any one of the parties. It is stressed by the learned senior counsel that the assessee company, since it has branches in various parts of the country, its manufactured products are stocked in those branches and the branches in turn, have effected sales of those goods to consumers which would include UIL also. This argument is also noticed by the final fact finding authority, namely the Sales Tax Appellate Tribunal and has negatived the same by assigning cogent reasons. The Tribunal, after reappreciating the entire documents available on the record and also the modus operandi adopted by the assessee in its well considered order, has concluded that the so called 'forecasts' are nothing but request made by UIL for supply of goods to meet the requirements of the consumers in various parts of the country. Though, the said communication is termed as 'forecasts', according to the Tribunal, they are nothing but firm orders placed by the UIL with the assessee for supply of particular type of goods and particular quantity pursuant to their understanding reflected in the 'sales agrement', which is continuing one for the continuous supply of goods during the period of agreement which stretches over a period of 5 years, it is difficult to accept the submission of the learned senior counsel that the 'sales agreement' is only for the purpose of purchasing of their goods and selling in different parts of the country by UIL which has its offices wherever the assessee has its godowns of branch offices and also difficult to accept that there was no movement of goods pursuant to their 'letter of allocations', which the assessee would contend that it is not a firm commitment or firm order for the supply of goods. To be fair

to the learned senior counsel, we also perused number of 'letters of allocations' sent by UIL to the assessee from time to time and the response thereof of the assessee. On a perusal of the same, it is clear that an order was placed by UIL is a composite form to supply of goods through their branch offices and the movement of the goods thereto from the assessee's factory to the assessee's godown was to fulfill the demand made pursuant to the 'letters of allocation' which the assessee claims that the same is in the nature of forecast. In our view, the movement of the goods from the assessee's factory to its various godowns situated in different parts of the country was pursuant to 'sales agreement' coupled with 'forecasts' which are nothing but 'indents' or firm orders. Therefore, in our opinion, the transaction between the assessee with its branch offices is a clear case of inter-State sales and not branch transfers, as claimed by the assessee.

43. Shri Bagaria, learned senior counsel, submitted that the branch offices of the assessee would also effect sales of products supplied by the assessee to other customers including State and Central Govt. Therefore, it is contended that the branch offices of the assessee had full discretion to sell the goods to any person of their choice. In our view, merely because the branch office could also effect supplies directly to some of the bulk consumers, it cannot be said that all supplies that are made to branch offices are not pursuant to the Sales Agreement and letter of allocation of UIL. Since the assessee could not furnish the exact figure insofar as such sales the assessing authority has granted exemption on a turnover of Rs. 87,57,071/-, being 10% of the total value of the claim towards stock transfer.

44. The learned senior counsel Shri Bagaria contended that the case law on which reliance placed by the High Court and other Statutory authorities are distinguishable and none of those decisions support the case of the Revenue. This contention of the learned senior counsel need not detain us for long, since the assessing authority, in the instant case, after carefully considering the relevant clauses in the sales agreement and the



voluminous correspondence between the assessee and the UIL, has given its finding that the transaction in question is pure and simple inter-State sales and falls within the purview of Section 3(a) of the Central Act. This finding of fact has received the approval of the First Appellate Authority and the Sales Tax Appellate Tribunal which is the last fact finding authority in the appeals filed by the assessee.

45. The learned senior counsel also contended that the assessing officer is expected to look into each transaction in order to find out whether a completed sale had taken place which could be brought to tax under Section 3(a) of the Central Act. Reliance is placed on the Constitution Bench decision of this Court in the case of *Tata Engineering and Locomotive Co. Ltd.* (supra). We are bound by the view expressed by the Constitution Bench decision of this Court. However, in the present case, the assessing officer has not just picked up a stray transaction to hold that the entire transaction for the entire period of assessment is inter-State sales, which would attract the charging provision. In our considered view, the assessing officer, in his detailed and well considered order, has looked into nearly 378 documents and voluminous correspondence between the assessee and UIL and has discussed and co-related the documents to prove on facts that the disputed transaction is inter-State sales though the assessee claims that it is a mere stock transfer. Therefore, we cannot accept the submission of the learned senior counsel in this regard. Bearing in mind the provisions of Section 3(a) of the Central Sales Tax Act, 1956 and on the facts of the case, the transactions in question were inter-State sales taxable under the Central Act.

46. As a result of our above discussion, we do not find any merit in this appeal and the same is accordingly dismissed. No order as to costs.

D.G. Appeal dismissed.