SUKHBIR SINGH AND ANR.
v.
STATE OF PUNJAB
(Criminal Appeal No. 1198 of 2007)

JANUARY 27, 2011

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

Penal Code, 1860: s.302 r.w. s.149 and s.120-B – Murder – Dispute over school land between the victim-deceased and his son on one hand and the accused on the other – Deceased was the village sarpanch – FIR described that two sikh youths aged 25/30 wearing kurta pajamas came to the house of deceased carrying rifles and asked him to settle the dispute over school land – Deceased was taken from his house by them – The lambardar and the member of panchayat were also taken – Son of the deceased followed them – The two sikh youths in the presence of other accused fired at the deceased resulting in his death – FIR recorded after 8 hours – Appellants arrested after 6 months of incident and identified for the first time in court by son of the deceased as those two sikh youths – Conviction of appellants u/s.302 r.w. s.120-B – High Court upheld the conviction – On appeal, held: The physical description of the appellants given in FIR would fit millions of youth in Punjab and could not by itself pin the murder on them – Prosecution did not come out how the investigation led to their identification as the primary assailants – The sub-inspector who arrested the appellants was not examined – There was substantial improvement in the statement made by son of deceased in court vis-à-vis statement made before the police – No threat was ever received by the deceased from appellants prior to the incident – Statement of lambardar was uncertain and he also made very substantial improvements in his evidence – The

appellants were not properly identified and, therefore, their involvement is ruled out.

Dana Yadav v. State of Bihar **(2002) 7 SCC 295;** *Ramesh v. State of Karnataka* **2009 (15) SCC 35 – relied on.**

Malkhansingh and Ors. v. State of M.P. **2003 (5) SCC 746 – distinguished.**

Case Law Reference:

(2002) 7 SCC 295	**relied on**	**Para 5**
2009 (15) SCC 35	**relied on**	**Para 5**
2003 (5) SCC 746	**distinguished**	**Paras 5, 6**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1198 of 2007.

From the Judgment & Order dated 12.1.2007 of the High Court of Punjab and Haryana at Chandigarh at Criminal Appeal Nos. 584 and 610-DB of 1997.

WITH

Criminal Appeal Nos. 770 of 2011.

P.S. Patwalia, Jagjit Singh Chhabra, Ashok Kr. Saini, Rajesh Sharma, Shalu Sharma and Kuldip Singh for the appearing parties.

The following order of the Court was delivered

O R D E R

1. This judgment will dispose of Criminal Appeal No. 1198 of 2007 and Criminal appeal No.770/2011 @ Special Leave Petition (Crl.) No. 5580 of 2008. The facts have been taken from Criminal Appeal No. 1198 of 2007.

2. At about 9 p.m. on the 26th December 1991 Naranjan Singh PW-2 son of Jaswant Singh deceased a resident of village Vinjwan was in his house along with his father when there was a knock at the door. Naranjan Singh and his father, who happened to be the Sarpanch of the village, thereupon opened the door. Two Sikh youth, who were subsequently identified as the appellants herein, Sukhbir Singh and Dilbagh Singh, were standing outside carrying AK-47 rifles. They told Jaswant Singh that he was raising an unnecessary dispute with regard to the school land, part of which under the possession of Mohanjit Singh, Amir Singh and Bhupender Singh sons of Harbans Singh (all accused). Jaswant Singh answered that he alone was not the deciding factor and the other members of the Panchayat and the Lambardar be also called. Jaswant Singh was then taken towards the house of Mohinder Singh Lambardar, by the two appellants followed by Naranjan Singh. Mohinder Singh too was called out of his house and the entire group then went on to the house of Hardev Singh, Member Panchayat. Hardev Singh too was called out and the appellants told them that the dispute should be settled then and there. They also took Jaswant Singh, Lambardar Mohinder Singh and Member, Panchayat Hardev Singh towards the side of the school outside the village again followed by Naranjan Singh. The three were thereafter told to sit on the ground whereupon one of the appellants went to call Harbans Singh appellant. He returned about 5/6 minutes later accompanied by Harbans Singh and directed Jaswant Singh to stand up and after telling him that he alone was not permitting Harbans Singh and his family to live peacefully and that he was attempting to construct a school building over his land, they fired a burst each from their rifles killing Jaswant Singh on the spot. Naranjan Singh then ran away but returned after some time and seeing his father's dead body, left for the police station. He, however, came across a police party at about 4.45 a.m. on the canal bridge near village Taragarh and made a statement to Inspector Jarnail Singh PW-8 and on its basis an FIR was registered at Police Station, Sadar Batala. The Special Report was delivered to the

Magistrate in Batala itself at 6.30 a.m. In the FIR, Naranjan Singh stated that two Sikh youth who had killed his father were militants 25-30 years of age, of medium build, wearing kurta pajamas and that he could identify them, if confronted. He further stated that he suspected that Harbans Singh and his sons Mohanjit Singh, Amir Singh and Bhupender Singh had entered into a conspiracy along with the appellants to commit the murder. Harbans Singh and his three sons were arrested soon after the incident but Sukhbir Singh and Dilbagh Singh were arrested on the 21st May 1992 by Sub-Inspector Pyara Singh. On the completion of the investigation, all the accused were brought to trial for offences punishable under section 302 read with Section 149 and 120-B of the IPC.

3. The prosecution in support of its case placed reliance on the evidence of Sukhdip Singh PW-1, the doctor who had carried out the post-mortem on the dead body, Naranjan Singh PW-2, Mohinder Singh Lambardar PW-3 who too supported the prosecution story and further stated that he had seen Harbans Singh and his sons talking to one of the appellants, and PW-8 Sub-Inspector Jarnail Singh who had recorded the statement of Naranjan Singh near the canal minor bridge and which had led to the registration of the formal FIR.

4. The trial court relying on the aforesaid evidence convicted all the accused for offences punishable under Section 120-B of the IPC and sentenced them to RI of 7 years and to fine, Sukhbir Singh and Dilbagh Singh appellants under Section 302 of the IPC and sentenced them to life imprisonment along with fine and Harbans Singh, Mohanjit Singh, Amir Singh and Bhupender Singh under Section 302/149 of the IPC also to serve a life sentence. The matter was thereafter taken in appeal to the High Court and during the pendency of the appeal Harbans Singh passed away. The appeal against him has dismissed as having abated. The High Court observed that there was no delay in the lodging of the FIR in which the names of Harbans Singh, Mohanjit Singh, Amir Singh and Bhupender

Singh alias Shastri had been mentioned, and although the two main accused (the appellants herein) had not been named, but they fitted the description given in the FIR and that further support with regard to the occurrence was to be found from the statements of Naranjan Singh and Mohinder Singh PWs. as to the manner in which the entire incident happened which clearly revealed that the two sets of accused had entered into a conspiracy to eliminate Jaswant Singh as he was an impediment in the efforts of Harbans Singh and others to take over the school land. The High Court observed that the two primary assailants Sukhbir Singh and Dilbagh Singh had opened fire on Jaswant Singh only after getting a green signal from Harbans Singh and his sons. The Court also observed that the identification of the appellants in Court for the first time fully satisfied the test of proper identification notwithstanding the fact that they had been arrested long after the incident on the 21st May 1992 by Sub-Inspector Pyara Singh who had not been produced as a witness. The High Court also observed that as PW-3 Mohinder Singh was an independent witness, there was no reason whatsoever to disbelieve his testimony. Two appeals have been filed against the judgment of the High Court. Criminal Appeal No. 1198 of 2007 by Sukhbir Singh and Dilbagh Singh and Special Leave Petition (Crl) No. 558 of 2008 by Amir Singh, Mohanjit Singh and Bhupender Singh. We grant leave in this Special Leave Petition as well. As already indicated above, the facts have been taken from Criminal Appeal No. 1198 of 2007.

5. Mr. Patwalia, the learned senior counsel for the appellants has raised one primary argument during the course of hearing of the appeals. He has pointed out that there was absolutely no evidence with regard to the identification of the appellants and their identification for the first time in Court during the course of the trial would not be sufficient to record a conviction in the absence of any other evidence. In this connection, the learned counsel has placed reliance on *Dana Yadav vs. State of Bihar* 2002 (7) SCC 295 and *Ramesh vs.*

State of Karnataka 2009(15) SCC 35. Mr. Kuldip Singh, the learned counsel has, however, placed reliance on *Malkhansingh & Ors. vs. State of M.P.* 2003(5) SCC 746 to contend that there was no inflexible rule that an identification made in Court for first time could not be taken as a good piece of evidence and as in the present matter the description of the appellants had been given in the FIR that itself was a corroborative circumstance to the prosecution story. Mr. Patwalia has also urged that once it was held that the appellants, the main accused were not involved in the incident as their identification was suspect, the involvement of the others with the aid of Section 120-B or 149 of the IPC too could not be spelt out.

6. We have considered the arguments advanced by the learned counsel for the parties. It will be seen that the incident happened at about 9 p.m. on the 26th December 1991. In the FIR recorded about 8 hours later, the appellants had been described as two Sikh youth 25/30 years of age wearing kurta pajamas. The appellants were arrested on the 21st May 1992 by Sub-Inspector Pyara Singh, (who was not examined as a witness) and they were identified for the first time in Court by Naranjan Singh on the 21st September 1993. We are of the opinion that the physical description of the appellants given in the FIR would fit millions of youth in Punjab, and could not by itself pin the murder on them. The prosecution has also not come out with the steps in the investigation which had led to their identification as the primary assailants. It was, in this background, obligatory on the part of the prosecution to have produced Sub-Inspector Pyara Singh who could have testified to the steps in the investigation made by him which had enabled him to identify the appellants as the killers. This was not done. In this view of the matter, the judgments cited by Mr. Patwalia fully apply to the facts of the case. There is absolutely no evidence other than in the identification in court made by Naranjan Singh long after the incident. It is true that there is no inflexible rule that an identification made for the first time in

Court has to be always ruled out of consideration but the broad principle is that in the background there is no other evidence against an accused on identification in Court made long after the event is clearly not acceptable. The judgment cited by Mr. Kuldip Singh of Malkhansingh's case (supra) is on the facts of that particular case, as a prosecutrix, who was the victim of a gang rape, had identified some of the accused for the first time in Court on which this Court opined that the identification was acceptable as a good piece of evidence.

7. We now consider the case of the appellants in the connected matter. The suggestion made by the prosecution is that Sukhbir Singh and Dilbagh Singh had been engaged by the other appellants to settle scores with Jaswant Singh as he was apparently an obstacle in their way with respect to the school land. We have, in this connection, gone through the evidence of Naranjan Singh PW-2 and Mohinder Singh PW-3, in the background of these facts. We are of the opinion that the involvement of Sukhbir Singh and Dilbagh Singh has to be ruled out as they were not properly identified and the charge qua them under Section 302 read with Section 120-B of the IPC must fail. It is the prosecution story that a dispute regarding the school land existed between Jaswant Singh and Naranjan Singh on the one side and Harbans Singh and his sons Amir Singh, Mohanjit Singh and Bhupender Singh appellants on the other. It is also clear that in this dispute PW-3 Mohinder Singh, the Lambardar was siding with Jaswant Singh. We have gone through the evidence of PW-2 and PW-3 very carefully. We see very substantial improvements in the statements made by PW-2 in Court vis-a-vis his statement made to the Police. Confronted with these statements, he could not give any cogent explanation for making them. It is also clear that except for his ipse-dixit with regard to the dispute, there is no other evidence that any dispute did exist. It has come in the evidence that no threat had ever been received by Jaswant Singh from militants prior to the incident. We are, therefore, of the opinion that the statement of this witness cannot be relied upon. The statement

of PW-3 is equally uncertain. PW-3 made very substantial improvements in his evidence as well. The story that after seeing the murder, he had not made any attempt to meet Naranjan Singh, and his plea that after the incident he had returned home and had gone to sleep is difficult to swallow as it would be contrary to normal human behaviour. He also stated that a grant of Rs.1,00,000/- had been received for the school about 12 days prior to the incident and that the Qanungo had demarcated the school land which was legitimately in possession of Harbans Singh. No cogent evidence to this effect has been produced by the prosecution. We are, therefore, of the opinion that the evidence of this witness cannot also be believed.

8. We therefore have no option but to allow Criminal Appeal No. 1198 of 2007 as well as Criminal Appeal No……./2011 arising out of SLP (Crl.) No. 5580 of 2008 filed by Amir Singh and others. The judgment of the trial court dated 7th August 1997 and that of the High Court dated 12th January 2007 are set aside.

D.G. Appeals allowed.

STATE BANK OF BIKANER & JAIPUR
v.
NEMI CHAND NALWAYA
(Civil Appeal No. 5861 of 2007)

MARCH 01, 2011

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

Service law:

Dismissal – On ground of willful dereliction of duty – Departmental enquiry against bank employee on the allegation that he allowed fraudulent withdrawal of certain amount by a person impersonating as account holder, resulting in loss to the bank – Dismissal from service – However, employee acquitted in a criminal case in regard to the allegations which were the subject matter of the departmental enquiry on the ground that the charges were not proved beyond doubt – Order of dismissal challenged on the ground of acquittal in the criminal case – High Court set aside the order of dismissal and issued direction for re-instatement with full backwages and consequential benefits – On appeal, held: Order passed by the High Court not justified – Loss of confidence in an employee is an important and relevant factor – Bank is justified in contending that not only employees who are dishonest, but those who are guilty of gross negligence, are not fit to continue in its service – High Court interfered with the said finding without expressly holding that the said finding of guilt was erroneous – It proceeded as if it was sitting in appeal over the departmental inquiry and interfered with the finding on a vague assumption – Order of acquittal passed by the criminal court by giving the employee the benefit of doubt, would not in any way render a completed disciplinary proceedings invalid nor affect the validity of the finding of guilt or consequential punishment – Standard of proof required in criminal proceedings and the departmental enquiries are

different – Thus, order of the High Court is set aside – Finding of guilt recorded by the disciplinary authority is upheld, however, the punishment is modified from 'dismissal' to 'compulsory retirement'.

Departmental enquiries – Interference with – Held: Courts will not interfere with findings of fact recorded in departmental enquiries, except where such findings are based on no evidence or where they are clearly perverse – Test to find out perversity is to see whether a tribunal acting reasonably could have arrived at such conclusion or finding, on the material on record – Courts would interfere if principles of natural justice or statutory regulations have been violated or if the order is found to be arbitrary, capricious, mala fide or based on extraneous considerations.

B. C. Chaturvedi vs. Union of India **1995 (6) SCC 749;** *Union of India vs. G. Gunayuthan* **1997 (7) SCC 463;** *Bank of India vs. Degala Suryanarayana* **1999 (5) SCC 762;** *High Court of Judicature at Bombay vs. Shahsi Kant S Patil* **2001 (1) SCC 416 – relied on.**

Case Law Reference:

1995 (6) SCC 749	**Relied on.**	**Para 6**
1997 (7) SCC 463	**Relied on.**	**Para 6**
1999 (5) SCC 762	**Relied on.**	**Para 6**
2001 (1) SCC 416	**Relied on.**	**Para 6**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5861 of 2007.

From the Judgment & Order dated 4.4.2006 of the High Court of Judicature for Rajasthan at Jodhpur in D.B. Civil Special Appeal No. 439 of 1998.

Anil Kumar Sangal, Sneha Kalita, D.P. Mohanty for the Appellant.

P.S. Patwalia, Priyanka Mathur Sardana, A. Sumathi for the Respondent.

The following Order of the Court was delivered

O R D E R

R. V. RAVEENDRAN J. The respondent was employed as a clerk in the Kalindri branch of the appellant Bank. He was issued a charge-sheet dated 30.8.1988. The two charges against him are extracted below :

> (i) On 14.10.1987, you disclosed the balance of SB Account No.1025 of Shri Dharamchand Nathaji lying in in-operative account to an unidentified person posing himself as the said account holder though the person was not having even Pass Book of that account. This disclosure of secrecy led a fraudulent withdrawal of Rs.6,000/- from the said account thereby putting the bank into loss.
>
> (ii) On 14.10.1987, you have advised Shri I.M. Rawal, the counter clerk handling Savings Banks ledgers to transfer the balance lying in account number 1025 in the name of Shri Dharam Chand Nathaji from in-operative Savings Bank ledger to that of operative ledgers without first obtaining the permission of the Branch Manager which is a pre-requirement in all such cases. It is further alleged that you have collected the withdrawal form purported to have been signed by the depositor, handed over the same to Shri I.M. Rawal, the counter clerk, obtained token and after it was passed for payment by the Branch Manager, obtained payment from paying cashier Shri S.R. Meghwal The real depositor has subsequently complained that the signature on withdrawal form was forged and the matter is now under police investigation."

The charge-sheet followed a preliminary enquiry by one H. S. Sharma, an officer of the appellant bank, in which the

respondent broadly admitted the facts constituting the subject matter of the two charges.

2. A joint inquiry was held in respect of the charges against the respondent and two others namely I.M. Rawal and S.R. Meghwal. Several witnesses were examined. The Inquiry Officer submitted a report dated 12.6.1989 holding that both the charges against the respondent were proved. He also held that the charges against I.M. Rawal and S.R. Meghwal were also proved. The disciplinary authority considered the inquiry report. He was of the view that on the material placed in the inquiry, the respondent was not guilty of the first charge. He, however, concurred with Inquiry Officer in regard to the finding of guilt recorded in respect of the second charge. He, therefore, issued a show cause notice dated 23.6.1990 proposing to impose the punishment of dismissal in regard to the second charge. After considering the respondents' reply, the disciplinary authority, by order dated 1.8.1990, imposed the punishment of dismissal. The matter rested there for several years.

3. In the meanwhile, on the basis of a complaint by the Branch Manager, a charge-sheet was filed before the Chief Judicial Magistrate, Sirohi, in regard to the allegations which were the subject matter of the departmental enquiry. The criminal court acquitted the respondent by judgment dated 7.7.1994, holding that charges were not proved beyond doubt. Thereafter, he filed a writ petition (WP No.5761/1994) challenging his dismissal, on the ground that he was acquitted in the criminal case. The said writ petition was disposed of by a brief order dated 26.5.1997 observing that he may avail the remedy of appeal and the appellate authority may consider the explanation for delay in submitting the appeal.

4. The respondent filed an appeal before the Appellate Authority, with an application for condonation of delay. The appellate authority, by order dated 7.10.1997, dismissed the application for condonation of delay and consequently dismissed the appeal.

5. The respondent challenged the order of the appellate authority in WP No.450/1998. A leaned Single Judge of the Rajasthan High Court dismissed the writ petition on the ground that the appellate authority had not committed any error in dismissing the appeal on the ground of delay. The respondent filed a special appeal and the division bench of the High Court allowed the appeal by the impugned judgment dated 4.4.2006. The pendency of the criminal case was accepted as sufficient explanation regarding delay. The division bench held that the non-filing of the appeal by the respondent in time was due to a bona fide impression that he could do so after the disposal of the criminal proceedings. With reference to merits, the division bench held that no wilful or fraudulent conduct with intention to cause loss to the appellant Bank, nor misappropriation by the respondent, was made out. The division bench was of the view that the case was not one where respondent had acted in wilful dereliction of duty; and that in an increasing customer-friendly atmosphere in the Bank, the respondent had acted bona fide and allowed the person considered by him to be a valued customer to operate on the account not realising that such person was impersonating the account holder. The High Court was of the view that in such circumstances, the question of loss of confidence would not arise and the punishment of dismissal was grossly disproportionate to the misconduct. Therefore, it set aside the order of dismissal and directed reinstatement with full backwages and consequential benefits. The said order is challenged in this appeal by special leave.

6. It is now well settled that the courts will not act as an appellate court and reassess the evidence led in the domestic enquiry, nor interfere on the ground that another view is possible on the material on record. If the enquiry has been fairly and properly held and the findings are based on evidence, the question of adequacy of the evidence or the reliable nature of the evidence will not be grounds for interfering with the findings in departmental enquiries. Therefore, courts will not interfere with findings of fact recorded in departmental enquiries, except

where such findings are based on no evidence or where they are clearly perverse. The test to find out perversity is to see whether a tribunal acting reasonably could have arrived at such conclusion or finding, on the material on record. Courts will however interfere with the findings in disciplinary matters, if principles of natural justice or statutory regulations have been violated or if the order is found to be arbitrary, capricious, mala fide or based on extraneous considerations. (vide *B. C. Chaturvedi vs. Union of India* – 1995 (6) SCC 749, *Union of India vs. G. Gunayuthan* – 1997 (7) SCC 463, and *Bank of India vs. Degala Suryanarayana* – 1999 (5) SCC 762, *High Court of Judicature at Bombay vs. Shahsi Kant S Patil* – 2001 (1) SCC 416).

7. When a court is considering whether punishment of 'termination from service' imposed upon a bank employee is shockingly excessive or disproportionate to the gravity of the proved misconduct, the loss of confidence in the employee will be an important and relevant factor. When an unknown person comes to the bank and claims to be the account-holder of a long inoperative account, and a bank employee, who does not know such person, instructs his colleague to transfer the account from "dormant" to "operative" category (contrary to instructions regulating dormant accounts) without any kind of verification, and accepts the money withdrawal form from such person, gets a token and collects the amount on behalf of such person for the purpose of handing it over to such person, he in effect enables such unknown person to withdraw the amount contrary to the banking procedures; and ultimately, if it transpires that the person who claimed to be account holder was an imposter, the bank can not be found fault with if it says that it has lost confidence in the employee concerned. A Bank is justified in contending that not only employees who are dishonest, but those who are guilty of gross negligence, are not fit to continue in its service.

8. Several witnesses were examined to prove the charge.

One of them was H.S. Sharma who conducted the preliminary inquiry and to whom the respondent had made a statement broadly admitting the facts which constituted the subject matter of the second charge. I.M. Rawal, who was the cashier and I.C. Ojha, the officiating Branch Manager were also examined. Based upon their evidence, the Inquiry Officer found the respondent to be guilty of the second charge and that has been accepted by the disciplinary authority. The High Court has interfered with the said finding without expressly holding that the said finding of guilt was erroneous. The High Court has proceeded as if it was sitting in appeal over the departmental inquiry and interfered with the finding on a vague assumption that the respondent must have acted bonafide in an "increasing customer friendly atmosphere". There was no justification for the division bench to interfere with the finding of guilt.

9. The fact that the criminal court subsequently acquitted the respondent by giving him the benefit of doubt, will not in any way render a completed disciplinary proceedings invalid nor affect the validity of the finding of guilt or consequential punishment. The standard of proof required in criminal proceedings being different from the standard of proof required in departmental enquiries, the same charges and evidence may lead to different results in the two proceedings, that is, finding of guilt in departmental proceedings and an acquittal by giving benefit of doubt in the criminal proceedings. This is more so when the departmental proceedings are more proximate to the incident, in point of time, when compared to the criminal proceedings. The findings by the criminal court will have no effect on previously concluded domestic enquiry. An employee who allows the findings in the enquiry and the punishment by the disciplinary authority to attain finality by non-challenge, cannot after several years, challenge the decision on the ground that subsequently, the criminal court has acquitted him.

10. We are, therefore, of the view that the High Court was not justified in quashing the punishment and directing

reinstatement with backwages and consequential benefits. In fact, the order of the High Court directing back wages amounts to rewarding a person who has been found guilty of a misconduct.

11. However having regard to the fact that the proven charge did not involve either misappropriation or fraudulent conduct and the other circumstances of the case, we are of the view that the punishment of dismissal should be substituted by compulsory retirement, which does not involve reinstatement.

12. We, accordingly, allow the appeal and set aside the judgment of the High Court. We uphold the finding of guilt recorded by the disciplinary authority, but modify the punishment from 'dismissal' to 'compulsory retirement'. There is therefore no question of grant of any back-wages.

N.J. Appeal allowed.

ASHOK KUMAR TODI
v.
KISHWAR JAHAN & ORS.
(Criminal Appeal No. 602 of 2011)

MARCH 01, 2011

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

Penal Code, 1860 – ss. 120-B read with ss. 306 and 506 – Inter-religious marriage – Unnatural death of husband – Investigation by the State Criminal Investigation Department (CID) – Writ petition by the mother and the brother of the deceased seeking transfer of investigation from CID to CBI on ground of alleged nexus between the police and father-in-law of deceased– Single Judge of the High Court appointing CBI to enquire into the unnatural death of the husband and giving liberty to the CBI to proceed in accordance with law for filing charge-sheet before the competent court u/s. 173(2) Cr.P.C. and to make further investigation if necessary before it actually files the charge-sheet – Division Bench setting aside the order of the Single Judge, directing the CBI to start investigation afresh by treating the complaint of the deceased's brother as FIR and register a case of murder – Held: Order passed by the Division Bench not sustainable – When the Single Judge on satisfying himself based on the materials, particularly, the conduct of the State Police and the apprehension of the mother and brother of the deceased about getting fair justice at the hands of the State CID directed investigation by the CBI, there cannot be any parallel investigation by the State CID – Also merely because no injunction was passed against the CID from continuing with the investigation in the matter or no order was passed directing the CID to handover all the papers relating to investigation conducted by them to the CBI, does not mean that CID was free to continue with their investigation – It cannot

be said that CBI was appointed as 'Special Officer' to investigate – CBI was justified in recording FIR in terms of the order passed by the Single Judge – Once an FIR had been registered lawfully and investigation had been conducted leading to filing of charge sheet before the competent court of law for the trial of accused persons, absolutely, there was no justifiable reason for the Division Bench to direct re-registration of the same by lodging another FIR after three years – Fresh investigation into the same allegation would be a futile exercise and would serve no purpose, more particularly, when there is no adverse comment on the investigation carried out by the CBI – Thus, order passed by the Single Judge of the High Court is sustainable and that of the Division Bench is set aside – Code of Criminal Procedure, 1973 – s. 173(2).

Social justice: Inter-caste or inter-religious marriage – Duty of the administration/police authorities – Held: Is to see that if any boy or girl who is major undergoes inter-caste or inter-religious marriage, their marital life should not be disturbed or harassed – If anyone gives such threat or commits acts of violence or instigates, it is the responsibility of the officers concerned to take stern action against such persons as provided by law – On facts, the Single Judge of the High Court rightly held that the police officials were not justified in interfering with the married life of the parties.

According to the prosecution, 'RZ' fell in love with 'P', the daughter of the appellant. The parties were major and they got married under the Special Marriage Act, 1954 on their own will. The marriage was duly registered before the notified authority. Thereafter, 'P' left her father's house and started living in her husband's house within the jurisdiction of Police Station at place 'K'. She informed her father about their marriage and also informed the police officials of the Police Station at place

'K' and the Police Station at place 'B'. The brother of the appellant filed a complaint in police station at place 'K' alleging that 'P' was taken away by the deceased by deceitful means with intent to marry her. 'P' and 'RZ' were summoned. The custody of 'P' was handed over to her maternal uncle with condition that she would return to her husband after one week. Thereafter, the dead body of 'RZ' was found on the railway tracks between 'D' and 'B' Road Stations with injuries and his head smashed. 'RK'- brother of the deceased filed a complaint with the police station at place 'K' against the appellant. The case was taken over by the State Criminal Investigation Department. The CID carried out the investigation. The mother and the brother of the deceased filed a writ petition seeking transfer of the case from CID to CBI since they were doubtful about fair investigation under CID. The Single Judge of the High Court passed an interim order dated 16.10.2007 directing the CBI to investigate into the cause of the death of the deceased and to file a report in a sealed cover before the Court within two months. In terms thereof, CBI registered an FIR on 19.10.2007 u/s. 120-B read with ss. 306 and 506 IPC. Thereafter, CBI filed a report and sought permission to file charge sheet against the appellant, his brother and other relatives u/s. 120-B read with ss. 306 and 506 IPC. The Single Judge passed a final order granting liberty to proceed in accordance with law for filing charge sheet before a competent court u/s. 173(2) Cr.P.C. and also granted liberty to conduct further investigation if necessary, before it actually files the charge sheet. Pursuant thereto, CBI continued with the investigation and filed a charge sheet u/s. 120-B read with ss. 306 and 506 IPC against the appellant and others. The appellant and others filed appeals. The Division Bench of the High Court directed the CBI to start investigation in accordance with law treating the complaint dated 21.09.2007 filed by 'RK', the brother of 'RZ'-deceased as FIR and to register a case of

murder. Therefore, the cross appeals were filed.

Disposing of the appeals, the Court

HELD: 1.1. On the legality of the order of the Single Judge of the High Court in directing CBI to investigate and submit a report instead of the State CID, the Single Judge assigned acceptable reasons. In spite of Sections 154(3) and 156(1) of the Code of Criminal Procedure and the Police Regulations of Calcutta, the authorities, particularly, the Deputy Commissioner of Police, Detective Department was interested in protraction of the case and was not taking any interest in its investigation. The Deputy Commissioner of Police, Detective Department, and Addl. Dy. Commissioner, Headquarters had unauthorisedly intervened in the matter. Since there was no allegation of abduction against the deceased, the said officers made several attempts to mediate between the deceased and his in-laws. Relevant materials were shown that the officer-in-charge of the Police Station at place 'K' had visited the residence of the deceased, the intervention by Deputy Commissioner of Police, Detective Department, in the conjugal life of the deceased was uncalled for. Without taking into account the earlier decisions of this Court directing the administration/ authorities to see that spouses of inter-religious marriages are not harassed or subjected to threats, the Commissioner of Police had made comments, widely reported, that the reaction of the parents to the marriage was natural and death was due to suicide. There was an unholy nexus between the top brass of the Police with father-in-law of the deceased. By placing such acceptable materials, the writ petitioners expressed doubt about fair investigation under the CID and demonstrated that investigation by the CBI under the orders of the court is necessary, since justice should not only be done but seen to be done. Inasmuch as the grievance of the

mother and brother of the deceased are acceptable, the Single Judge, by interim order directed the CBI to investigate into the cause of unnatural death of 'RZ' and file a report before it. [Para 16] [621-B-H; 622-A]

1.2. Everyone associated with enforcement of law is expected to follow the directions and failure should be seriously viewed and drastically dealt with. The directions of this Court are not intended to be brushed aside and overlooked or ignored. Meticulous compliance is the only way to respond to directions of this Court. In the light of the direction in *Lata Singh's* case, it is the duty of all persons in the administration/police authorities throughout the country that if any boy or girl who is major undergoes inter-caste or inter-religious marriage, their marital life should not be disturbed or harassed and if anyone gives such threat or commits acts of violence or instigates, it is the responsibility of the officers concerned to take stern action against such persons as provided by law. [Para 17] [623-G-H; 624-A-B]

Lata Singh vs. State of U.P. and Anr. **(2006) 5 SCC 475 – Relied on.**

1.3. In the instant case, the police officials have no role in the conjugal affairs of 'RZ' and 'P' and the law enforcing authorities have no right to interfere with their married life and, in fact, they are duty bound to prevent others who interfere in their married life. The Single Judge rightly held that the officers of the Police Department were not justified in interfering with the married life of 'RZ' and 'P'. [Paras 18 and 19] [624-C-E]

1.4. While answering the issues whether it had been established from the materials on record that there was genuine apprehension in the mind of the writ petitioners that there might not be fair investigation at the instance of the CID in respect of the unnatural death of 'RZ'

because of the alleged involvement of the high police officials of the Police at place 'C' in the post marital dispute between the appellant and the deceased on the one hand and with his wife on the other, justifying investigation by the CBI, the Division Bench of the High Court committed several infirmities. When the Single Judge on satisfying himself based on the materials, particularly, the conduct of the State Police and the apprehension of the mother and brother of the deceased about getting fair justice at the hands of the State CID directed investigation by the CBI, there cannot be any parallel investigation by the State CID. The conclusion of the Division Bench that the Single Judge simply appointed the CBI as His Lordships "Special Officer" to investigate into the cause of unnatural death of the deceased and to submit a report in a sealed cover, cannot be accepted. The order dated 16.10.2007 of the Single Judge does not mention that the CBI was being appointed as "Special Officer" of the Court. Neither the Code authorizes the appointment of CBI officers as 'Special Officer' nor the prayers made in the writ petition prayed for appointment of the CBI to act as 'Special Officer' of the Court. In the interim order, the Single Judge decided the question whether investigation by the CID was just, fair and proper or whether such investigation should be conducted by the CBI. Merely because no injunction was passed against the CID from continuing with the investigation in the matter or no order was passed directing the CID to handover all the papers relating to investigation conducted by them to the CBI, does not mean that CID was free to continue with their investigation. On the other hand, the order dated 16.10.2007 passed by the Single Judge makes it clear that the Single Judge was *prima facie* satisfied that the case in question necessitated investigation by the CBI. Thus, the finding of the Division Bench that the Single

Judge appointed CBI as its "Special Officer" is patently against all canons of justice, equity and fair play in action. [Paras 20 and 21] [624-F-H; 625-B-D-H; 626-A-C]

1.5. The Division Bench of the High Court also erred in holding the order appointing CBI to investigate for the purpose of submitting report to the Single Judge and not to investigate for the alleged offence in accordance with law in place of State CID and thus, conclusion of such investigation by the CBI cannot form the basis of charge-sheet in the criminal trial. The Division Bench did not consider the judgment passed by the Single Judge in terms whereof, the Court permitted the CBI to proceed in accordance with law for filing charge sheet before the competent Court under Section 173(2) of the Code and was also granted liberty to conduct further investigation before it actually files the charge sheet at any point it may consider necessary in the interest of justice. CBI at interim order stage was directed to investigate the case and at the final order stage was directed to submit charge sheet after making further investigation. [Para 22] [626-D-F-G]

1.6. When the final report is laid after conclusion of the investigation, the court has the power to consider the same and issue notice to the complainant to be heard in case the conclusions in the final report are not in concurrence with the allegations made by them. Though the investigation was conducted by the CBI, the provisions under Chapter XII of the Code would apply to such investigation. The police referred to in the Chapter, for the purpose of investigation, would apply to the officer/officers of the Delhi Police Establishment Act. On completion of the investigation, the report has to be filed by the CBI in the manner provided in Section 173(2) Cr.P.C. [Para 24] [628-B-D]

H.N. Rishbud and Anr. v. State of Delhi **AIR 1955 SC**

196; *State of M. P. v. Mubarak Ali* **AIR 1959 SC 707;** *Navinchandra N. Majithia vs. State of Meghalaya and Ors.* **(2000) 8 SCC 323;** *Hemant Dhasmana vs. Central Bureau of Investigation and Another*, **(2001) 7 SCC 536 – relied on**

1.7. The Division Bench failed to appreciate the order dated 16.10.2007 passed by the Single Judge directing the CBI to investigate into cause of unnatural death of 'RZ'. As per Section 2(h) of the Code investigation includes all the proceedings under this Code for collection of evidence conducted by a police officer. The direction to conduct investigation requires registration of an FIR preceding investigation and, therefore, had to be treated as casting an obligation on the CBI to first register an FIR and thereafter, proceed to find out the cause of death, whether suicidal or homicidal. In order to find out whether the death of 'RZ' was suicidal or homicidal, investigation could have been done only after registration of an FIR. Therefore, CBI was justified in recording FIR on 19.10.2007 in terms of the order dated 16.10.2007 passed by the Single Judge. [Para 25] [628-E-G]

1.8. The inquiry/investigation under Section 174 read with Section 175 of the Code may continue till the outcome of the cause of the death. Depending upon the cause of death, police has to either close the matter or register an FIR. In the case on hand, as per the post mortem report, the cause of death of 'RZ' was due to the effect of ten injuries on the body and which were *anti mortem* in nature. In such circumstances, the proceedings under Section 174 of the Code were not permissible beyond 22.09.2007 and registration of an FIR was natural outcome to ascertain whether the death was homicidal or suicidal. Accordingly, in terms of order dated 16.10.2007, CBI registered an FIR on 19.10.2007 under Section 120-B read with Sections 302 and 506 IPC. The

contrary observations made about the orders of the Single Judge cannot be sustained. The Division Bench erred in directing the CBI to start investigation afresh in accordance with law by treating the complaint of 'RK' brother of the deceased dated 21.09.2007 as FIR and to register a case of murder. All this had already been done by CBI three years back. There is no need to register another FIR when in respect of the same offence an FIR had already been registered. Once an FIR had been registered lawfully and investigation had been conducted leading to filing of charge sheet before the competent court of law for the trial of accused persons, absolutely, there was no justifiable reason for the Division Bench to direct re-registration of the same by lodging another FIR after three years and proceed with the investigation which had already been concluded by the CBI. [Para 26] [628-H; 629-A-C-D-G]

1.9. The Division Bench of the High Court failed to note that the fresh investigation into the same allegation would be a futile exercise and no purpose would be served by investigating the case afresh, more particularly, when there is no adverse comment on the investigation carried out by the CBI. The *de novo* investigation by lodging another FIR would result in delay of justice since the Division Bench has ordered to conduct the same investigation under the same sections started three years back by the same agency, namely, the CBI. The reasonings of the Division Bench for a fresh investigation by the CBI cannot be sustained. [Para 27] [629-H; 630-A-B]

1.10. With regard to the directions passed by the High Court about the conduct of the officers and taking action against them on the departmental side, it is clarified that the concerned department is free to take appropriate action in accordance with the statute/rules/

various orders applicable to them, after affording reasonable opportunity of hearing. It should not be taken as neither the High Court nor this Court concluded the issue about the allegations made against them. However, the observation of the Single Judge in respect of the conduct of the officers in interfering with the conjugal affairs of the couple even without any formal complaint against any one of them is accepted. [Para 28] [630-C-D]

1.11. The Single Judge of the High Court is fully justified in passing interim order on 16.10.2007 appointing the CBI to investigate into the unnatural death of 'RZ' and submit a report; and that the Single Judge's final order dated 14.08.2008 accepting the report and granting opportunity to the CBI to proceed in accordance with law for filing charge sheet before the Competent Court under Section 173(2) of the Code is accepted. All the reasonings recorded by the Division Bench of the High Court in the order dated 18.05.2010 are unacceptable and are set aside. Pursuant to the orders of the Single Judge, after investigation, CBI has filed charge sheet on 20.09.2008 under Section 120-B read with Sections 306 and 506 IPC. In view of the same, the appellant was in custody for 45 days and on the orders of this Court, he was ordered to be released and also of the fact that all other accused were enlarged, no further custody is required. However, it is made clear that CBI is free to move an application before the court concerned for appropriate direction, if their presence is required. Any action against the officers of the State Police Department, as suggested by the Single Judge, shall be in accordance with law and service conditions applicable to them and after affording opportunity to them. [Para 29] [630-E-H; 631-A-D]

State of West Bengal and Others vs. Committee for Protection of Democratic Rights, West Bengal and Others **(2010) 3 SCC 571 – Referred to.**

Case Law Reference:

(2010) 3 SCC 571	**Referred to.**	**Para 14**
(2006) 5 SCC 475	**Relied on.**	**Para 17**
AIR 1955 SC 196	**Relied on.**	**Para 23**
AIR 1959 SC 707	**Relied on.**	**Para 23**
(2000) 8 SCC 323	**Relied on.**	**Para 23**
(2001) 7 SCC 536	**Relied on**	**Para 24**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 602 of 2011 etc.

From the Judgment & Order dated 18.5.2010 of the High Court at Calcutta in MAT No. 703 of 2008.

WITH

C.A. No. 2204-2209 of 2011 & Crl. A. No. 603-608 of 2011.

Gopal Subramanium, SG, H.P. Raval, ASG, U.U. Lalit, Kalyan Bandopadhyay, P.P. Rao, D. Roy Choudhary, V.A. Mohta, Sudhir Nandrajaog, P.K. Dey, Rajeev Nanda, Shweta Verma, Harsh, A.K. Sharma, Amit Basu, Rana Mukherjee, D.N. Mitra, Ayen Chakrabotry (for M/s. Victor Moses & Associates), Abhijit Sengupta, M. Indrani, B.P. Yadav, K. Datta, Atul Singh, Abhay Kumar, Kishore Dutta, Suchit Mohanty, Mangaljit Mukherjee, Anupam Lal Das, P. Roy Choudhary, Anjan Chakraborty, A. Chakraborty, Indranil Ghosh, Goodwill Indeevar, Deepak Bhatcharya, S.J. Amith, Kiran Suri, Ashok Kr. Mukherjee, Soumya Chakraborty, Krishnendu Bhattacharya, Dharma Raj Vohra, Atul, Abhay Kumar, Tenzing Tsering, Taran Chandra Sharma, Neelam, Sharma, Manish Srivastava, Praveen Agarwal for the appearing parties.

The Judgment of the Court was delivered by

P.SATHASIVAM, J. 1. Leave granted.

2. These appeals are directed against the common judgment and final order dated 18.05.2010 passed by the Division Bench of the High Court of Calcutta in M.A.T. Nos. 703, 895, 704, 713, 714 and 744 of 2008 whereby the CBI was directed to start investigation afresh in accordance with law treating the complaint dated 21.09.2007 filed by Rukbanur Rahman, brother of Rizwanur Rahman - the deceased, as F.I.R. and to register a case of murder.

3. Brief facts:

(a) One Rizwanur Rahman-the deceased, a Computer Graphics Engineer fell in love with a girl, namely, Priyanka Todi, daughter of Ashok Kumar Todi. On 18.08.2007, Rizwanur Rahman married Priyanka Todi under the Special Marriage Act, 1954 in the marriage registration office. On 31.08.2007, Priyanka Todi left her father's house and started living in her husband's home at Tiljala within the jurisdiction of Karaya Police Station, Kolkata. The couple informed the Police Commissioner, Deputy Commissioner of Police(South), the Superintendent of Police, 24 Parganas (S), the Officer-in-charge, Karaya Police Station and the Officer-in-charge, Bidhan Nagar Police Station about their marriage by a letter dated 31.08.2007 along with a copy of the Marriage Registration Certificate. On the same day, Priyanka Todi informed her father about her marriage with the deceased and also of the fact of her residing with her husband in her in-law's house. On the very same day, in the evening, around 6.30 p.m., Ashok Kumar Todi-Priyanka Todi's father, Anil Saraogi - maternal uncle of Priyanka Todi and Pradip Todi - brother of Ashok Kumar Todi went to the house of the deceased and persuaded him and his family members to send Priyanka Todi back to their house but Priyanka Todi did not agree to their request. On the same night, Ashok Kumar Todi lodged a complaint at Karaya Police Station and consequently two police officers went to the residence of the deceased to create mental

pressure on him. On 01.09.2007, early in the morning, Ashok Kumar Todi and Anil Saraogi threatened the deceased that if Priyanka Todi did not return back to her parents' house, they would face the dire consequences. On the same day, Pradip Todi lodged a complaint with Deputy Commissioner of Police (Detective Department) alleging that Priyanka Todi has been taken away by the deceased by deceitful means with intent to marry her. On various dates, the Deputy Commissioner of Police (DD) called Priyanka Todi and her husband at his office and asked Priyanka Todi to go back to her parents' house, but she refused to accept the proposal. On 08.09.2007, Pradip Todi made another application to police that Priyanka Todi has been detained forcibly by the deceased. On the action of the complaint, the sub-Inspector went to the residence of the deceased and summoned the couple to Police Headquarter, Lal Bazar, Kolkata and the custody of Priyanka Todi was handed over to her uncle Anil Saraogi with condition that she will return to her husband's house after one week.

(b) On 21.09.2007, the dead body of Rizwanur Rahman was found on the railway tracks between Dum Dum and Bidhan Nagar Road Stations with injuries and the head smashed. On the same day, Rukbanur Rahman-the brother of the deceased, lodged a written complaint with Karaya Police Station suspecting the hands of Ashok Kumar Todi behind the unnatural death of his brother and the same was registered as UD Case No. 183 of 2007. The body of the deceased was sent for post mortem. The post mortem report revealed that the death was due to 10 injuries on the body and consistent with the injuries caused by train running at moderate speed. On 24.09.2007, the case was taken over by the Criminal Investigation Department (in short "the CID"). The CID carried out investigation and examined various witnesses including Ashok Kumar Todi and his family members.

(c) The mother and brother of the deceased filed Writ Petition No. 21563(W) of 2007 before the Calcutta High Court.

The learned single Judge of the High Court, after hearing the parties, by an interim order dated 16.10.2007 directed the CBI to investigate into the cause of death of the deceased and to file a report in a sealed cover before the Court within two months. Pursuant to the abovesaid direction, the CBI registered case bearing No. RC.8(S)/2007-SIU-I/CBI/SCR.1/New Delhi under Section 120-B read with Sections 302 and 506 of the Indian Penal Code (in short "the IPC") against Ashok Kumar Todi and others. On 08.01.2008, the CBI filed report before the learned single Judge which indicates that the deceased committed suicide by laying before the train and sought permission to file charge sheet against Ashok Kumar Todi, his brother Pradeep Todi, Anil Sarogi, S.M. Mohiuddin @ Pappu, Ajoy Kumar, Sukanti Chakraborty and Krishnendu Das under Section 120-B read with Sections 306 and 506 IPC.

(d) After considering the case, the learned single Judge of the High Court, by final order dated 14.08.2008, granted liberty to the CBI to proceed in accordance with law for filing charge sheet before a competent court under Section 173(2) of the Code of Criminal Procedure (hereinafter referred to as "the Code"). Liberty was also reserved to the CBI to conduct further investigation before it actually files the charge sheet. Pursuant to that order, CBI continued with the investigation and filed a charge sheet being No. 07/08 dated 20.09.2008 under Section 120-B read with Sections 306 and 506 IPC in the court of Chief Metropolitan Magistrate, Bank Shell Court, Kolkata. In the said charge sheet, Ashok Kumar Todi, Pradeep Todi, Anil Saraogi, Sukanti Chakraborti and Krishnendu Das, S.M. Mohiuddin @ Pappu, Ajoy Kumar were arrayed as accused. Subsequent to the filing of the charge sheet, all the accused persons surrendered before the Court of Metropolitan Magistrate and were taken into custody, and subsequently, all the accused persons were released on bail on different dates.

(e) Aggrieved by the judgment and order dated 14.08.2008 passed by the learned single Judge, Ashok Kumar Todi and

others filed their respective appeals before the Division Bench of the High Court of Calcutta. The Division Bench of the High Court heard all the appeals together and by impugned judgment and order dated 18.05.2010 set aside the judgment and order dated 14.08.2008 passed by the learned single Judge and directed the CBI to start investigation afresh in accordance with law by treating the complaint dated 21.09.2007 filed by the brother of the deceased as F.I.R. and to register a case of murder and further directed to complete the investigation preferably within a period of four months from the date of the order. Aggrieved by the impugned judgment and order dated 18.05.2010, Ashok Kumar Todi filed S.L.P.(Crl.) No. 5005 of 2010, the mother and brother of the deceased filed S.L.P.(C) Nos. 29951-29956 of 2010 and the C.B.I. filed S.L.P.(Crl.) Nos. 7008-7013 of 2010 before this Court. Hence these appeals by special leave.

3. Heard Mr. Gopal Subramanium, learned Solicitor General for the CBI, Mr. U.U. Lalit, learned senior counsel for Ashok Kumar Todi, Mr. Kalyan Bandopadhyay, learned senior counsel for mother and brother of Rizwanur Rahman – the deceased and Mr. Tara Chand Sharma, learned counsel for the State of West Bengal. In addition, we also heard other counsel in respect of certain directions/observations about the departmental action to be initiated against the State Police Officers by the State Government.

4. Mrs. Kiswar Jahan and Rukbanur Rahman-mother and borther of the deceased filed Writ Petition No. 21563 of 2007 before the High Court at Calcutta praying for directions against the State of West Bengal and their officers that the investigation in connection with the unnatural death of Rizwanur Rahman being UD Case No. 183 of 2007 be handed over to CBI and that the CBI should submit a report on such investigation before the High Court and upon such investigation appropriate orders be passed. Apart from the above relief, they also prayed for certain directions for taking action against the officers of the State Police Department. Before considering the final order in

the said writ petition, it is useful to refer to the interim direction of the learned single Judge dated 16.10.2007. By pointing out mandates of Sections 154(3) and 156(1) of the Code and the Police Regulations of Calcutta, it was submitted before the learned single Judge that the authorities, particularly, the Deputy Commissioner of Police, Detective Department was interested in protraction of the case and not in its investigation. It was also highlighted that several other officers had unauthorisedly intervened in the matter. It was the grievance of the writ petitioners that in spite of the fact that Rizwanur Rahman and Priyanka Todi married voluntarily and by their free will on 18.08.2007, under the Special Marriage Act, 1954, in the Marriage Registration Office, because of the influence of Ashok Kumar Todi-father of Priyanka Todi, higher authorities in the police department without following the judgment of this Court which directs the administration/authorities to see that spouses of inter-religious marriages are not harassed or subjected to threats, instead of allowing investigation to take its course in accordance with the provisions of law, the Commissioner of Police had made comments, widely reported, that the reaction of the parents to the marriage was natural and death was due to suicide. It was also projected before the learned single Judge that the police authorities were beneficiaries of undue favours at the instance of Ashok Kumar Todi. It was asserted that no fair investigation by the CID is possible in a manner where the allegation is against the highest brass of the Calcutta Police. In those circumstances and by placing reliance on various materials/instances about the interference by the police authorities on various occasions in the marital life of Rizwanur Rahman and Priyanka Todi, the writ petitioners prayed for a fair investigation by the CBI under the directions of the High Court.

5. Learned Advocate General who appeared for the State of West Bengal before the High Court resisted the prayer in the writ petition and contended that the writ petition is not maintainable and further argued that mere allegations of threat is not a cognizable offence and there was no complaint before

the police except the letter dated 18.09.2007 by one Sadiq Hussain which did not mature. It was further argued that the provisions of Section 154(1) of the Code are not attracted. It was pointed out by learned Advocate General that the appropriate remedy under the statute would have been a complaint before the Magistrate and not a petition under Article 226 of the Constitution before the High Court since the petitioners must demonstrate that they have legal and personal right which has been violated. Moreover, it was pointed out that the CID is carrying on an enquiry though not an investigation into the cause of unnatural death. Further, there is no violation of fundamental rights of the writ petitioners under Articles 19 and 21 of the Constitution.

6. After recording the finding that the deceased can no longer seek redressal for any injury caused to him and it is only his near relatives, who are mother and brother, can make a prayer by filing the petition under Article 226 of the Constitution, after adverting to the marriage on 18.08.2007 and various instances on which the police officers intervened in their personal life, threatened them and after satisfying that prima facie the investigation carried out by the State CID is not in accordance with the provisions of the Code, the learned single Judge of the High Court passed an interim order directing the CBI to investigate into the cause of unnatural death of Rizwanur Rahman and to file a report in a sealed cover within a period of two months from the date of service of the copy of the said order.

7. Pursuant to the interim direction dated 16.10.2007, an FIR was registered on 19.10.2007. In the said FIR, apart from the required details, various directions given in the order of the High Court dated 16.10.2007 were incorporated. The Superintendent of Police, CBI after finding that the facts stated in the complaint coupled with the directions of the High Court vide its order dated 16.10.2007, prima facie disclosed commission of offence punishable under Section 120-B IPC

read with Sections 302 and 506 IPC and substantive offences thereof against Ashok Kumar Todi and others, registered a regular case and started investigation.

8. Pursuant to the interim direction of the High Court, the CBI filed its report and prayed for leave of the Court to file charge-sheet before the competent Court having jurisdiction. Based on the said report as well as the leave sought for in the writ petition, after hearing the arguments of either side, the learned single Judge framed the following issues for determination:

(i) Should the writ petition fail owing to the petitioners not taking recourse to efficacious alternative remedy provided by the Code?

(ii) Should the writ petition fail because it does not disclose any cause of action, because adjudication of the issues would involve resolving hotly disputed facts and because of defective verification of pleadings, as contended by Mr. Pal?

(iii) Whether 'Kolkata Police's inaction' vis-à-vis the complaint lodged by the couple and 'Kolkata Police in action' vis-à-vis complaints of Pradeep Todi impugned herein justified? Is respondent no. 3 responsible in any manner?

(iv) Did any of the city police officers (respondent Nos. 5,7,8 & 9) act ultra vires in discharge of official duties?

(v) Whether investigation conducted by the State Police agencies was in accordance with law?

(vi) Whether the facts and circumstances presented before the Court called for entrusting the CBI with investigation of cause of death of Rizwanur Rahman?

(vii) *Whether the CBI acted* ultra vires *in registering an*

FIR for alleged offence of murder and conducted investigation on the basis thereof in a manner not authorized by law?

(viii) Are the parties entitled to have a copy of the report of the CBI filed in Court?

(ix) Is the CBI justified in expressing views in relation to recommending to the State initiation of disciplinary proceedings for major penalty against some of the respondents.

(x) Whether the CBI should be allowed to proceed further on the basis of materials collected by it in course of investigation?

(xi) To what relief, if any, are the petitioners entitled?

9. After analysis and having full-fledged hearing, the learned single Judge arrived at the following conclusion:

(i) When an individual perceives a threat to his life and limb and seeks enforcement of his right to life, interference of the writ court may be more intrusive but to lay down as a matter of rule that a writ petition must be entertained whenever right guaranteed by Article 21 is sought to be enforced despite availability of an alternative remedy would itself result in impinging on exercise of judicial description by the writ court.

(ii) A man is born free and has the right to stay free unless he indulges in unlawful activities which, if proved, may result in penal consequences depriving him of such right. The Constitution guaranteed this right to Rizwanur Rahman. By marrying Priyanka Todi, he did not commit any crime. Evidence on record is considered sufficient to demolish the allegation leveled against him by

Pradeep Todi. He had, therefore, the absolute right to live a life which is decent, complete, fulfilling and worth living. The objection that hotly disputed facts are involved which necessarily cannot be adjudicated by the Writ Court is equally unmeritorious.

(iii) The third respondent therein – Commissioner of Police, Kolkata, acted irresponsibly and instead of diffusing tension, he added fuel to fire.

(iv) By summoning Rizwanur Rahman without registering any cognizable case against him on the basis of the complaints of Pradeep Todi and/or by invading Rizwanur's previous right to life despite being well and truly aware that Priyanka Todi had married him on her own without pressure exerted from any quarter, respondents 5, 7, 8 and 9 therein jointly and severally are guilty of exceeding police powers conferred on them and thereby have acted ultra vires the Constitution.

(v) (vi) While passing the interim order on 16.10.2007, the learned single Judge duly considered the materials presented and on finding that the investigation by the State CID was not proper, therefore, the CBI was directed to investigate the cause of death of Rizwanur Rahman.

(vii) In the facts and circumstances which fall for consideration on 16.10.2007, the Court is of the considered view that entrusting the CBI with investigation of cause of unnatural death of Rizwanur Rahman cannot be said to be improper or unwarranted and the Court was justified in directing CBI investigation. The CBI was justified in recording an FIR before it proceeded to conduct investigation.

(viii) So long as the investigation is not closed by way of filing of a Final report under Section 173(2) of the Code, persons who might be shown as accused in the FIR have no right to claim copy of the report containing materials which have been collected against them and, particularly, in view of the fact that report filed before the High Court is not a final report but is one in aid of the final report.

(ix) On the basis of the materials collected, it was beyond the jurisdiction of the CBI to make a recommendation for initiation of major penalty proceedings against some of the police officers without obtaining leave from the Court.

(x) There is no reason as to why CBI should not be allowed to proceed further.

(xi) Interest of justice would be best served if liberty is reserved unto the State to proceed in accordance with law. Accordingly, it is observed that the State may initiate such action as it deems fit and proper against any of or all the respondents in accordance with law.

10. The abovesaid order of the learned single Judge was taken up by way of appeal before the Division Bench by Ashok Kumar Todi, Pradip Todi, Anil Saraogi, Kishwar Jahan and others and State of West Bengal. The Division Bench, after going through the order of the learned single Judge as well as the rival contentions of all the parties, determined the following questions namely, :

(a) Whether, the learned single Judge was justified in passing the order impugned?

(b) Whether in addition to the order impugned, the Court should have passed direction for indicting the

two police officers in the criminal proceedings on the basis of the allegations made in the writ application?

11. The Division Bench, after finding that a direction for investigation by the CBI should not be granted on mere asking for, in the absence of any prohibitory or injunction order, preventing the State CID from further investigation commented on the conduct of the State police in not perusing the investigation, concluded that:

(i) Interim order dated 16.10.2007 of the learned single Judge did not authorize the CBI to investigate in terms of Chapter XII of the Code in place of the State CID.

(ii) The order of the learned single Judge directing investigation and, consequently, the report submitted by the CBI and permitting the CBI to submit such report in the form of charge-sheet in the Court are quashed.

(iii) The investigation conducted by the CBI cannot be treated to be an investigation within the meaning of the Code. Recommendation of the CBI to take disciplinary measures against the Police Officers by virtue of the interim order of the learned single Judge are quashed.

(iv) For violation of Article 21, a writ Court cannot conclusively decide, whether violation amounts to penal laws, ignoring the provisions of the Code for trial of such offences. The Court can give special protection to the accused in such trial and the procedure of such trial is different from the one provided for the disposal of a writ application. In view of the same, the aggrieved person is not entitled to file an application under Article 226 of the Constitution asking the High Court to decide the issue.

12. After observing and arriving at such conclusion, ultimately, the Division Bench, by the impugned order, set aside

the order of the learned single Judge and on the basis of its own finding recorded that it is a fit case for investigation by the CBI, directed the CBI to start investigation afresh in accordance with law treating the complaint dated 21.09.2007 filed by writ petitioner No. 2 (Rukbanur Rahman) as an FIR and to register a case of murder.

13. On analysis of the orders of the learned single Judge and the Division Bench as well as the issues raised and various contentions by the counsel for either side, following points arose for determination in these appeals:

(i) whether the order of the learned single Judge appointing CBI to enquire into the unnatural death of Rizwanur Rahman and further direction giving liberty to the CBI to proceed in accordance with law for filing charge sheet before the competent court under Section 173(2) of the Code and to take further investigation before it actually files the charge-sheet on any point it may consider necessary in the interest of justice is acceptable and sustainable? or;

(ii) whether the decision of the Division Bench, setting aside the order of the learned single Judge, directing the CBI to start investigation afresh by treating the complaint of the writ petitioner No. 2 therein-Rukbanur Rahman dated 21.09.2007 as FIR and to register a case of murder is sustainable?

14. Since the mother and brother of the deceased-Rizwanur Rahman had a doubt about his unnatural death and they were not satisfied with the investigation by the State CID as well as due to mounting pressure by higher officials of the State Police Department, they prayed for an appropriate direction at the hands of the High Court for investigation by the CBI. In *State of West Bengal and Others vs. Committee for Protection of Democratic Rights, West Bengal and Others* (2010) 3 SCC 571, the issue which was referred for the opinion of the Constitution Bench was whether the High Court, in exercise of its jurisdiction under Article 226 of the Constitution

of India, can direct the CBI established under the Delhi Special Police Establishment Act, 1946 (for short "the Special Police Act") to investigate a cognizable offence, which is alleged to have taken place within the territorial jurisdiction of a State, without the consent of the State Government. The Constitution Bench, after adverting to the required factual details, rival contentions and the relevant constitutional provisions has concluded:-

> **"69.** In the final analysis, our answer to the question referred is that a direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, to CBI to investigate a cognizable offence alleged to have been committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be valid in law. Being the protectors of civil liberties of the citizens, this Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly."

After saying so, the Constitution Bench has clarified that this extraordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instill confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights.

15. In view of the above judgment, it is unnecessary to delve into the issue further about appointment of special agency like CBI for investigation under the orders of the High Court. In fact, in view of the above decision, almost all the counsel appearing on either side have no quarrel about the issue and their present grievance is whether the order of the learned

single Judge is to be implemented or the impugned order of the Division Bench is to be applied?

16. On the legality of the order of the learned single Judge in directing CBI to investigate and submit a report instead of the State CID, we are of the view that the learned single Judge assigned acceptable reasons. It was highlighted by learned senior counsel for the mother and brother of the deceased that in spite of Sections 154(3) and 156(1) of the Code and the Police Regulations of Calcutta, the authorities, particularly, the Deputy Commissioner of Police, Detective Department was interested in protraction of the case and was not taking any interest in its investigation. The Deputy Commissioner of Police, Detective Department, and Addl. Dy. Commissioner, Headquarters had unauthorisedly intervened in the matter. Since there was no allegation of abduction against the deceased, the said officers made several attempts to mediate between the deceased and his in-laws. Relevant materials were shown that the officer-in-charge of the Karaya Police Station had visited the residence of the deceased, the intervention by Deputy Commissioner of Police, Detective Department, in the conjugal life of the deceased was uncalled for. It was also highlighted that without taking into account the earlier decisions of this Court directing the administration/authorities to see that spouses of inter-religious marriages are not harassed or subjected to threats, the Commissioner of Police had made comments, widely reported, that the reaction of the parents to the marriage was natural and death was due to suicide. The learned senior counsel has also highlighted unholy nexus between the top brass of the Police with father-in-law of the deceased. By placing such acceptable materials, the writ petitioners expressed doubt about fair investigation under the CID and demonstrated that investigation by the CBI under the orders of the court is necessary, since justice should not only be done but seen to be done. Inasmuch as the grievance of the mother and brother of the deceased are acceptable, the learned single Judge, by interim order dated 16.10.2007, directed the

CBI to investigate into the cause of unnatural death of Rizwanur Rahman and file a report before it.

Interference by the police in conjugal life

17. In the earlier paragraphs, we have already adverted to certain factual details about the marriage of Rizwanur Rahman with Priyanka Todi. They themselves highlighted how they married and informed the same to the authorities concerned. The materials placed show that Rizwanur Rahman fell in love with Priyanka Todi, the daughter of Ashok Kumar Todi, and married her on 18.08.2007 under the Special Marriage Act, 1954. They also registered their marriage before the notified authority and obtained the certificate for the same. Pursuant to the same, Priyanka Todi left her father's house on 31.08.2007 and went to live in her husband's house at Tijala Lane within the jurisdiction of Karaya Police Station, Kolkata. She informed her father about their marriage and also informed the Police Commissioner as well as Dy. Commissioner of Police (South), Superintendent of Police, 24 Parganas (S), the Officer–in-charge, Karaya Police Station and the Officer-in-charge, Bidhan Nagar Police Station. On a complaint made by Pradip Todi, Priyanka Todi and Rizwanur Rahman were summoned to Police HQ., Lalbazar, Kolkata on 08.09.2007 and the custody of Priyanka Todi was handed over to Anil Saraogi - her maternal uncle with condition that she will return to her husband after one week. Thereafter, the dead body of Rizwanur Rahman was found on 21.09.2007 on the railway tracks between Dum Dum and Bidhan Nagar Road Stations with injuries and his head smashed. We have also noted the details furnished by the mother and brother of the deceased about the interference by the various police officers in their marital efforts. In this regard, it is useful to refer to the law laid down by this Court in practice and procedure in a matter involving freedom of conscience and expression in terms of right to marry person of one's choice outside one's caste. The following observation and direction in *Lata Singh vs. State of U.P. & Anr.,* (2006) 5 SCC 475 is relevant:

"17. The caste system is a curse on the nation and the sooner it is destroyed the better. In fact, it is dividing the nation at a time when we have to be united to face the challenges before the nation unitedly. Hence, inter-caste marriages are in fact in the national interest as they will result in destroying the caste system. However, disturbing news are coming from several parts of the country that young men and women who undergo inter-caste marriage, are threatened with violence, or violence is actually committed on them. In our opinion, such acts of violence or threats or harassment are wholly illegal and those who commit them must be severely punished. This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut-off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage. We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple is not harassed by anyone nor subjected to threats or acts of violence, and anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law. "

Even as early as in 1990, this Court has held that everyone associated with enforcement of law is expected to follow the directions and failure shall be seriously viewed and drastically dealt with. We also reiterate that the directions of this Court are not intended to be brushed aside and overlooked or ignored. Meticulous compliance is the only way to respond to directions

of this Court. In the light of the direction in *Lata Singh's* case (supra), it is the duty of all persons in the administration/police authorities throughout the country that if any boy or girl who is major undergoes inter-caste or inter-religious marriage, their marital life should not be disturbed or harassed and if anyone gives such threat or commits acts of violence or instigates, it is the responsibility of the officers concerned to take stern action against such persons as provided by law.

18. In the light of the directions of this Court, it is unfortunate and of the fact that both Rizwanur Rahman and Priyanka Todi married on their own will, who were majors, and the marriage was duly registered under the notified authority, the police officials have no role in their conjugal affairs and the law enforcing authorities have no right to interfere with their married life and, in fact, they are duty bound to prevent others who interfere in their married life.

19. As rightly observed by the learned Single Judge, the officers of the Police Department were not justified in interfering with the married life of Rizwanur Rahman and Priyanka Todi. The learned single Judge, by giving adequate reasons, directed the investigation by the CBI which we concur.

The reasonings of the Division Bench

20. The Division Bench, after analyzing the case has correctly determined the following question for consideration:

> The question involved in the writ application was whether it had been established from the materials on record that there was genuine apprehension in the mind of the writ petitioners that there might not be fair investigation at the instance of the CID in respect of the unnatural death of Rizwanur Rahman because of the alleged involvement of the high police officials of the Kolkata Police in the post marital dispute between Todis and the deceased on the

one hand and with his wife on the other, justifying investigation by the CBI.

21. While answering those issues, the Division Bench of the High Court committed several infirmities which we point out hereunder. With regard to the interim order dated 16.10.2007 passed by the learned single Judge appointing the CBI to investigate and report, the Division Bench has observed that the learned single Judge has not injuncted or restrained the State CID from proceeding with the investigation in accordance with the Code. The Division Bench has also commented that in the absence of any direction by the learned single Judge for handing over the papers relating to the investigation done so far by the CID to the CBI, the CID ought to have completed the investigation on its own. We are unable to accept this conclusion. When the learned single Judge on satisfying himself based on the materials, particularly, the conduct of the State Police and the apprehension of the mother and brother of the deceased about getting fair justice at the hands of the State CID directed investigation by the CBI, there cannot be any parallel investigation by the State CID. In the same way, we are unable to accept the conclusion of the Division Bench that the learned single Judge simply appointed the CBI as His Lordships "Special Officer" to investigate into the cause of unnatural death of the deceased and to submit a report in a sealed cover. The said finding of the High Court is not borne out of the records of the case including the order dated 16.10.2007 passed by the learned single Judge. Neither the Code authorizes the appointment of CBI officers as "Special Officer" nor the prayers made in the writ petition prayed for appointment of the CBI to act as "Special Officer" of the Court. As a matter of fact, the order dated 16.10.2007 of the learned single Judge does not mention that the CBI was being appointed as "Special Officer" of the Court. In the interim order, the learned single Judge decided the question whether investigation by the CID was just, fair and proper or whether such investigation should be conducted by the CBI. Merely

because no injunction was passed against the CID from continuing with the investigation in the matter or no order was passed directing the CID to handover all the papers relating to investigation conducted by them to the CBI, does not mean that CID was free to continue with their investigation. On the other hand, the order dated 16.10.2007 makes it clear that the learned single Judge was prima facie satisfied that the case in question necessitated investigation by the CBI. Thus, the finding of the Division Bench that the learned single Judge appointed CBI as its "Special Officer" is patently against all canons of justice, equity and fair play in action.

22. The Division Bench of the High Court also committed an error in holding the order appointing CBI to investigate for the purpose of submitting report to the learned single Judge and not to investigate for the alleged offence in accordance with law in place of State CID and hence conclusion of such investigation by the CBI cannot form the basis of charge-sheet in the criminal trial. The Division Bench has also not considered the judgment dated 14.08.2008 passed by the learned single Judge in terms whereof, the Court permitted the CBI to proceed in accordance with law for filing charge sheet before the competent Court under Section 173(2) of the Code and was also granted liberty to conduct further investigation before it actually files the charge sheet at any point it may consider necessary in the interest of justice. Neither the learned single Judge directed the CBI to submit the report as charge sheet, as has been held erroneously by the learned Division Bench nor the CBI was stopped from conducting further investigation in the matter before it actually filed the charge sheet at any point it may consider necessary in the interest of justice. It is evident that CBI at interim order stage was directed to investigate the case and at the final order stage was directed to submit charge sheet after making further investigation.

23. Section 2(h) of the Code defines investigation which reads as under:

"(h) "investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf"

Under the scheme of the Code, investigation commences with lodgment of information relating to the commission of an offence. If it is a cognizable offence, the officer-in-charge of the police station, to whom the information is supplied orally has a statutory duty to reduce it to writing and get the signature of the informant. He shall enter the substance of the information, whether given in writing or reduced to writing as aforesaid, in a book prescribed by the State in that behalf. The officer-in-charge has no escape from doing so if the offence mentioned therein is a cognizable offence and whether or not such offence was committed within the limits of that police station. But when the offence is non-cognizable, the officer-in-charge of the police station has no obligation to record it if the offence was not committed within the limits of his police station. Investigation thereafter would commence and the investigating officer has to go step by step. The Code contemplates the following steps to be carried out during such investigation:

(1) Proceeding to the spot; (2) ascertainment of the facts and circumstances of the case; (3) discovery and arrest of the suspected offender; (4) collection of evidence relating to the commission of the offence which may consist of — (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial; and (5) formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and, if so, to take necessary steps for the same by the filing of a charge-sheet under Section 173. [Vide *H.N. Rishbud & Anr. v. State of Delhi,* AIR 1955 SC 196, *State of M.P. v. Mubarak Ali,* AIR 1959 SC 707 and *Navinchandra N. Majithia vs. State of Meghalaya and Ors.,* (2000) 8 SCC 323)]

24. When the final report is laid after conclusion of the investigation, the Court has the power to consider the same and issue notice to the complainant to be heard in case the conclusions in the final report are not in concurrence with the allegations made by them. Though the investigation was conducted by the CBI, the provisions under Chapter XII of the Code would apply to such investigation. The police referred to in the Chapter, for the purpose of investigation, would apply to the officer/officers of the Delhi Police Establishment Act. On completion of the investigation, the report has to be filed by the CBI in the manner provided in Section 173(2) of the Code. [Vide *Hemant Dhasmana vs. Central Bureau of Investigation and Another,* (2001) 7 SCC 536]

25. In view of the same, the Division Bench failed to appreciate the order dated 16.10.2007 passed by the learned single Judge directing the CBI to investigate into cause of unnatural death of Rizwanur Rehman. We have already noted that as per Section 2(h) of the Code investigation includes all the proceedings under this Code for collection of evidence conducted by a police officer. The direction to conduct investigation requires registration of an FIR preceding investigation and, therefore had to be treated as casting an obligation on the CBI to first register an FIR and thereafter proceed to find out the cause of death, whether suicidal or homicidal. In order to find out whether the death of Rizwanur Rahman was suicidal or homicidal, investigation could have been done only after registration of an FIR. Therefore, CBI was justified in recording FIR on 19.10.2007 in terms of the order dated 16.10.2007 passed by the learned Single Judge.

26. The inquiry/investigation under Section 174 read with Section 175 of the Code may continue till the outcome of the

cause of the death. Depending upon the cause of death, police has to either close the matter or register an FIR. In the case on hand, as per the post mortem report dated 22.09.2007, the cause of death of Rizwanur Rahman was due to the effect of ten injuries on the body and which were anti mortem in nature. In such circumstances, the proceedings under Section 174 of the Code were not permissible beyond 22.09.2007 and registration of an FIR was natural outcome to ascertain whether the death was homicidal or suicidal. Accordingly, in terms of order dated 16.10.2007, CBI registered an FIR on 19.10.2007 under Section 120-B read with Sections 302 and 506 IPC. The contrary observations made about the orders of the learned single Judge cannot be sustained. Inasmuch as the direction of the learned single Judge is in accordance with law and the CBI investigated the case in terms of the said order and submitted report based on which it was permitted to file a report before an appropriate Court and also adduced liberty to reinvestigate the issue if not arise, the Division Bench has erred in directing the CBI to start investigation afresh in accordance with law by treating the complaint of Rukbanur Rahman-brother of the deceased dated 21.09.2007 as FIR and to register a case of murder. As rightly pointed out by the learned Solicitor General, all this had already been done by CBI three years back. There is no need to register another FIR when in respect of the same offence an FIR had already been registered. Once an FIR had been registered lawfully and investigation had been conducted leading to filing of charge sheet before the competent court of law for the trial of accused persons, absolutely, there was no justifiable reason for the Division Bench to direct re-registration of the same by lodging another FIR after three years and proceed with the investigation which had already been concluded by the CBI.

27. The Division Bench of the High Court has failed to note that the fresh investigation into the same allegation would be a futile exercise and no purpose would be served by investigating the case afresh, more particularly, when there is no adverse

comment on the investigation carried out by the CBI. The de novo investigation by lodging another FIR would result in delay of justice since the Division Bench has ordered to conduct the same investigation under the same sections started three years back by the same agency, namely, the CBI. For all these reasons, we are unable to sustain the reasonings of the Division Bench for a fresh investigation by the CBI.

28. Coming to the directions passed by the High Court about the conduct of the officers and taking action against them on the departmental side, we clarify that the concerned department is free to take appropriate action in accordance with the statute/rules/various orders applicable to them, after affording reasonable opportunity of hearing. It should not be taken as neither the High Court nor this Court concluded the issue about the allegations made against them. However, we agree with the observation of the learned single Judge in respect of the conduct of the officers in interfering with the conjugal affairs of the couple even without any formal complaint against any one of them.

29. In the light of the above discussion, we conclude:

(i) The learned single Judge of the High Court is fully justified in passing interim order on 16.10.2007 appointing the CBI to investigate into the unnatural death of Rizwanur Rahman and submit a report;

(ii) The learned single Judge's final order dated 14.08.2008 accepting the report and granting opportunity to the CBI to proceed in accordance with law for filing charge sheet before the Competent Court under Section 173(2) of the Code is accepted.

(iii) All the reasonings recorded by the Division Bench of the High Court in the order dated 18.05.2010 are unacceptable and hereby set aside;

(iv) Pursuant to the orders of the learned single Judge, after investigation, CBI has filed charge sheet on 20.09.2008 under Section 120-B read with Sections 306 and 506 IPC. In view of the same and as per the statement of Mr. Lalit, Ashok Kumar Todi was in custody for 45 days and on the orders of this Court, he was ordered to be released and also of the fact that all other accused were enlarged, no further custody is required. However, we make it clear that CBI is free to move an application before the court concerned for appropriate direction, if their presence is required;

(v) Any action against the officers of the State Police Department, as suggested by the learned single Judge, shall be in accordance with law and service conditions applicable to them and after affording opportunity to them.

30. All the appeals are disposed of on the above terms.

N.J. Appeals disposed of.

BHARAT PETROLEUM CORPORATION LTD.
v.
CHEMBUR SERVICE STATION
(Civil Appeal No(s). 2276 of 2011)

MARCH 02, 2011

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

Public Premises (Eviction of Unauthorised Occupant) Act, 1971 – Appellant, PSU, in the year 1972, entering into a dealership agreement with the respondent, appointing it as dealer to sell appellant's petroleum products at appellant's premises at the price specified by the appellant – Breach of trust by the respondent – Show cause notice by the appellant as to why dealership agreement be not terminated – Suit before the Single Judge of Court of Small Causes – Interim order directing the appellant to maintain status quo to the effect that the respondent shall remain in possession of the petrol pump and that the appellant shall continue to supply petrol and petroleum products to the petrol pump at the suit premises – On appeal, the Division Bench of the Court of Small Causes vacated the direction to continue supply of petrol and petroleum products but maintained the order of status quo with respect to possession of the respondent – Cross-writ petitions – High Court upheld the order which vacated the direction to the appellant to continue supply of petrol and petroleum products – High Court also clarified that the said order of status quo did not preclude the appellant from taking recourse to recovery of possession of the suit property from the respondent by following due process of law including by resorting to action under the provisions of the Public Premises Act, if permissible – Meanwhile, termination of the dealership agreement – On appeal, held: Difference of opinion on issues as to nature of licence granted to the respondent by the appellant under the Agreement; whether

the High Court was justified in upholding the grant of interim order of status quo and directing the appellant to secure possession from the respondent of the petrol pump premises by resorting to proceedings under the 1971 Act; and whether the respondent had become a deemed tenant in 1972 – Matter referred to Larger Bench – Bombay Rents, Hotel and Lodging Houses, Rates Control Act, 1947 – ss. 15A and 5(4A).

In the year 1972, the appellant Company-PSU engaged in refining, distributing and selling petroleum products, entered into a Dispensing Pump and Selling Licence Agreement with the respondent, appointing it as the dealer for selling the petroleum products of the appellant from its Retail Petroleum Outlet (RPO) at the price specified by the appellant. In the year 1995, a fresh dealership agreement was executed between the parties. The respondent allegedly manipulated/altered the original chip in the dispensing unit with a view to make illegal gain by cheating the customers of the company. The appellant issued a show cause notice to the respondent to show cause as to why his dealership agreement should not be terminated. The respondent then filed a suit in the Court of Small Causes for a declaration that the respondent was a tenant of the appellant company in respect of the structures, and sub-tenant of the appellant in regard to the land on which RPO was situated; that the supply of petrol and petroleum products by the appellant at the suit premises was an essential supply under Section 29 of the Maharashtra Rent Control Act, 1999; and that the show cause notice was illegal and the appellant had no sufficient cause for withholding the essential supply of petrol and petroleum products. The respondent also filed an interim application to restrain the appellants from dispossessing them from the premises and also from withholding supply of petrol and petroleum products. The Single Judge of the Court of Small Causes

granted an interim order of staus quo directing the appellant not to dispossess the respondent from the petrol pump and to continue the supply of petrol and petroleum products to the petrol pump in the suit premises to the respondent. On appeal, the Division Bench of the Court of Small Causes set aside the direction to continue the supply of petrol and petroleum products in the suit premises to respondent but maintained the order of status quo with respect to the possession of the respondent.

In the writ petition filed by the respondent, the order vacating the direction to continue to supply petrol and petroleum products was upheld. In the writ petition challenging permission granted to the respondent to remain in possession of the suit premises was disposed of by clarifying the order of status quo that the said order shall not preclude the appellant from taking recourse to recovery of possession of the suit property from the respondent by following due process of law including by resorting to action under the provisions of the Public Premises Act, if permissible. Meanwhile, the respondent filed another suit seeking a direction that the appellant should continue to supply the petroleum products. Subsequently, the appellant terminated the dealership agreement and stopped the supplies of petroleum products to RPO. Thereafter, the respondent filed a third suit seeking declaration that the termination was illegal and unenforceable. Therefore, the appellant filed the instant appeal.

The questions which arose for consideration in this appeal are what is the nature of a licence that is granted to the respondent by the appellant under the DPSL agreement; whether the High Court was justified in upholding the grant of an interim order of status quo directing the appellant not to interfere with the

respondent's 'possession' of the petrol pump premises and requiring the appellant to resort to appropriate legal action to secure possession from the respondent; and whether the licence to use the petrol pump premises for the purpose of sale of the petroleum products of the appellant granted to respondent on 1.4.1972 could be construed as a licence as defined in Section 5(4A) of the Bombay Rents, Hotel and Lodging Houses, Rates Control Act, 1947 so as to attract Section 15A of the said Act which provided that any person who was in occupation of any premises as a licensee as on 1.2.1973 shall on that date be deemed to have become a tenant of the landlord in respect of the premises in his occupation.

Referring the matter to larger Bench, the Court

HELD: PER RAVEENDRAN J:

1.1. The definition of licence under the Easements Act, 1882 makes it clear that a licence granted by the owner enables a licensee a right to do or continue to do certain specified things in or upon an immovable property. Licences can be of different kinds. Some licences with reference to use of immovable property may be very wide, virtually bordering upon leases. Some licences can be very very narrow, giving a mere right enabling a person to visit a premises. In between are the licences of different hues and degrees. All licences can not be treated on the same footing. [Paras 18 and 20] [656-G-H; 657-B-C; 659-C]

Associated Hotels of India Ltd. v. R.N. Kapoor **AIR 1959 SC 1262;** *C.M. Beena vs P.N. Ramachandra Rao* **2004 (3) SCC 595 – referred to.**

1.2. Where an employer or principal permits the use of its premises, by its employee or agent, such use, whether loosely referred to as 'possession' or 'occupation' or 'use' by the employee or the agent, is on

behalf of the employer/ principal. In other words, the employer/principal continues to be in possession and occupation and the employee/agent is merely a licensee who is permitted to enter the premises for the limited purpose of selling the goods of the employer/principle. The employee/agent cannot claim any 'possession and occupation or 'right to use' independent of the employer/ principal who is the licensor. This is because licence that is granted to the employee/agent is a limited licence to enter upon and use the premises, *not for his own purposes or his own business*, but for the purposes of the employer/principal, to sell its goods in the manner prescribed by the employer/principal and subject to the terms and conditions stipulated in the contract of employment/agency in regard to the manner of sales, the prices at which the goods are to be sold or the services to be rendered to the customers. In such cases, when the employment or agency is terminated and the employer/principal informs the employee/ agent that his services are no longer required and he is no longer the employee/agent, the licence granted to such employee or agent to enter the retail outlet stands revoked and the ex-employee/ex-agent ceases to have any right to enter the premises. On the other hand, the employer/principal who continues to have possession will be entitled to enter the premises, or appoint another employee or agent, or legitimately prevent the ex-employee/ ex-agent from entering upon the premises or using the premises. In such cases, there is no need for the licensor (that is the employer or the principal) to file a suit for eviction or injunction against the ex-employee or ex-agent. The licensor can protect or defend its possession and physically prevent the licensee (employee/agent) from entering the outlet. [Para 21] [662-D-H; 663-A-D]

Southern Roadways Ltd. Madurai v. SM Krishnan **(1989) 4 SCC 603 – referred to**

1.3. In the instant case, the DPSL Agreement clearly demonstrated that licence granted by the appellant enabled the licensee-respondent to enter upon the outlet premises only for the limited purpose of using the facilities for purposes of sale of appellant's Motor Spirit, HSD, Motor oils, Greases or other motor accessories as a licensee of the appellant at the prices specified by the appellant. The respondent could not sell any other goods or the products of any one else. It could not charge a price different from what was stipulated by the appellant. The respondent could not enter the outlet premises if the licence granted to the respondent to sell the appellant's petrol and petroleum products was terminated. The respondent-licensee had no licence to enter the petrol pump premises or use the 'facilities', if it could not sell the products of the appellant. The courts below completely lost sight of the same. [Para 23] [666-A-D-E]

1.4. If the respondent could not sell these petroleum products on account of suspension/ termination, there is no occasion or need for the respondent to enter upon the outlet premises as it cannot sell any other goods or use the outlet for any other purpose. Therefore, the licence to enter and use the outlet premises also comes to an end when the licence is terminated or supply of appellant's products is stopped. Clause 15 of the DPSL Agreement specifically provides that on revocation or termination of the licence for any cause whatsoever, the licensee shall cease to have any right to enter or remain in the premises or use the facilities. As the licence is only to enter the appellant's outlet premises to use the facilities for sale of appellant's petroleum products, if the licence to use the appellant's facilities for sale of appellant's products comes to an end and supply of appellant's product for sale by the respondent is stopped, there is no question of the licensee entering the outlet premises at all or remaining in the outlet premises or

using the outlet premises. [Para 24] [666-G-H; 667-A-C]

1.5. The licence to enter the premises and the licence to use the facilities/equipment is incidental to the licence to sell the products of the appellant as a licensed dealer, distributor or agent. In the instant case, the premises is a land held on leasehold by the appellant wherein it has constructed/erected certain structures and housed certain facilities/equipment. The premises is known as appellant's company owned retail outlet'. The goods/ products sold belong to the appellant. If the appellant decides to stop the supply of its goods for sale in the said outlet, automatically the licence granted to the respondent to enter premises and use the facilities become redundant, invalid and infructuous. *There is no licence in favour of the licensee to use the premises or* use the facilities independent of the licence to sell the goods of the appellant. Further, the agreement makes it clear that the agreement does not create any tenancy rights in the premises; that it is terminable by 90 days notice on either side and it is terminable by the appellant even without giving such notice in the event of breach. Therefore, there cannot be an injunction restraining the appellant from entering upon its outlet premises or using the outlet for its business or inducting any new dealer or agent. [Para 25] [667-E-H; 668-A]

1.6. Where the licence in favour of the licensee is only to use the retail outlet premises or use the equipments/ facilities installed therein, exclusively in connection with the sale of the goods of the licensor, the licensee does not have the right to use the premises for dealing or selling any other goods. When the licensee cannot use the premises for any purpose on account of the stoppage of supply of licensor's goods for sale, it will be wholly unreasonable to require the licensor the sue the licensee for 'possession' of such company controlled retail outlet

premises. This is not a case where the licensee has alleged that any amount is due to it from the licensor by way of commission or remuneration for services, or that on account of non-payment thereof it is entitled to retain the retail outlet premises and facilities of the licensor by claiming a lien over them under Section 221 of the Contract Act, 1872. In regard to a licence governed by a commercial contract, it may be inappropriate to apply the principles of Administrative Law, even if the licensor may answer the definition of 'State' under Article 12 of the Constitution. [Para 26] [668-B-E]

1.7. It is made clear that this decision applies only to licences where the licensor is the owner/lessee of the premise and the equipment (in this case dispensing pumps and other equipment) and where the licensee is engaged merely for sale of the products of the licensor. In other words, this decision would apply to petrol stations which are known as CCRO. (Company Controlled Retail Outlets'). If the licensee is himself the owner/lessee of the premises where the petroleum products outlet is situated or where the exclusive right to use the premises is given to the licensee for carrying on any business or dealing with any goods unconnected with the licensor, this decision may not apply and it may be necessary for the licensor to have recourse either to a Civil Court for a mandatory injunction to give up the premises, or the Estate Officer under the Public Premises Act for 'eviction' as the case may be, depending upon the nature of licence and the status and relationship of the parties. [Para 27] [668-G-H; 669-A-C]

1.8. In the instant case, in pursuance of a routine inspection certain serious irregularities were viewed and as a consequence supply of its products was stopped, suspended and a show cause notice was issued calling upon respondent to show cause why action should not

be taken including termination of the dealership. Therefore, when such a notice is issued as a precursor to termination, the respondent license ceases to have right to sell the goods in the outlet premises and does not get the cause of action either to seek continuance of the supply of the products or remain in and use the premises. The show cause notice was followed by a termination of the licence of dealership on 19.3.2009. Even if the termination or non-supply amounts to breach of contract, the remedy of the agent-licensee at best is to seek damages, if it is established that the dealership was wrongly determined or supply was wrongly stopped. Thus, the licensee does not have any right to use the premises nor any right to enter upon the premises after the termination of the agency. [Para 28] [669-C-F]

2.1. The occupation by the respondent was not occupation on its own account, but occupation on behalf of the appellant. Therefore, the respondent was not in 'occupation' of the outlet in its own right for its own proposes, but was using the outlet and facilities in the possession and occupation of the appellant, to sell the appellant's products in the manner provided in the DPSL Agreement. In such a situation, the agent who is called as the licensee does not become a deemed tenant. The condition for deemed tenancy is not the description of the person as 'licensee', but the person being in occupation of a premises as licensee as on 1.2.1973. Every person who holds any type of 'licence' does not become a tenant. The deemed tenancy under Section 15A of the Bombay Rents, Hotel and Lodging Houses, Rates Control Act, 1947 refers to a person who held a licence to use a premises for his own use as on 1.2.1973. [Para 32] [673-C-F]

2.2. Section 5(4A) of the 1947 Act defined a licensee in respect of any premises or any part thereof, as

referring to the person who is in occupation of the premises or such part under a subsisting agreement for licence given for a licence fee or charge. It makes clear that a *person in the service or employment of the licensor, or a person conducting a running business belonging to the licensor* is not a 'licensee' where the appellant has a retail outlet in a premises either owned or taken on lease by it, where it has installed its specialized equipment/ facilities for sale of its products and the outlet is exclusively used for the sale of the products of the appellant, the unit is running business of the appellant. An agent licensed to run RPO of the appellant, which is a running business belonging to the appellant is not therefore, a 'licensee' either under the 1947 Act nor under the Maharashtra Rent Control Act, 1999. Therefore, the respondent did not become a tenant under the appellant nor became entitled to protection against eviction. [Para 33] [673-G-H; 674-A-C]

2.3. As a person conducting a running business on behalf of the owner of such business is not a 'licensee' as defined under the Rent Act, even if the person concerned was using premises on 1.2.1973, he will not become a deemed tenant. Consequently, the respondent could not claim that he became a deemed tenant. Therefore, the respondent could not claim the protection of any rent control law as a tenant. If the respondent had become a deemed tenant in 1972, it would not have entered into an agreement on 1.7.1995 reiterating that it continue to be a licensee and that it does not have any leasehold or tenancy rights in the premises. Thus, the submission that even if the respondent had become a deemed tenant in pursuance of the agreement dated 1.4.1972, such a tenancy came to an end and the appellant again became licensee pure and simple from 1.12.1995 when the fresh agreement was entered, does not require to be considered. [Para 34] [674-D-G]

2.4. The order of the High Court and the order of the courts below, directing status quo are set aside. The appellant is entitled to continue in possession of the petrol pump premises and use it for its business. The appellant is also entitled to lawfully prevent the respondent from entering upon the premises. The trial court is directed to dispose of the suit expeditiously, on the basis of the evidence, in accordance with law. [Para 35] [675-A-B]

Case Law Reference:

AIR 1959 SC 1262	**Referred to**	**Para 19**
2004 (3) SCC 595	**Referred to**	**Para 19**
1989 (4) SCC 603	**Referred to**	**Para 22**

PER GOKHALE J.:

1.1. In the facts of the instant case, there is no conflict between the two orders passed by the two Single Judges. The writ petition was filed by the respondent to challenge the order of the Appellate Bench of the Court of Small Causes that the respondent could not seek a direction for the petroleum supply in their proceeding in the Court of Small Causes. The grievance of the respondent in that writ petition was only with respect to that part of the order, and therefore, when the Single Judge held that there was no reason to interfere with that order, the order would have to be read as confined to the grievance of the respondent raised before the Judge. The part of the order of the Appellate Bench of the Court of Small Causes protecting the possession of the respondent was not under consideration in that Writ Petition which was filed by the respondent. Any observation by the Single Judge in that order cannot be read as a determination on the correctness or otherwise

of this part of the order which was not in challenge in that proceeding. As far as the other part of the Appellate Bench, protecting the possession of the respondent was concerned, the same was in challenge only before the other Single Judge in the Writ Petition at the instance of the appellant. In that petition the Single Judge has held that the pendency of the proceeding in the Civil Court would not preclude the appellant from taking steps in accordance with due process of law, which according to the Single Judge was taking steps under the Public Premises Act, if permissible. [Paras 25 and 26] [668-C-H; 689-A]

1.2. Even if the respondent is an agent of the appellant, the fact remains that he is in occupation of the concerned premises consisting of the rooms and the structures of the RPO situated on the particular plot of land since 1.4.1972. The appellant has authorized the respondent to be in occupation of this RPO by virtue of the dealership agreement between the parties. The respondent is not a trespasser. [Para 27] [689-B-C]

1.3. No fault can be found with the impugned order passed by the Single Judge viz. that it would be open to the respondent to take steps in accordance with the Public Premises Act which would be the due process of law, and not by any force. The termination of the dealership agreement by the appellant would render the occupation of the premises by the respondent to be unauthorised one and it would be open to the respondent to take further steps to take possession thereof though only in accordance with the due process of law. This much minimum protection has to be read into the relationship created between the parties under the clauses of the agreement. Besides, an opportunity of being heard in a situation which affects the civil rights of an individual has to be implied from the nature of the

functions to be performed by the public authority which has the power to take punitive or the damaging actions. [Para 29] [690-H; 691-A-C]

1.4. By no stretch of imagination the respondent can be called a trespasser into the concerned premises. The respondents have been permitted to occupy the premises under the dealership agreement and have been so occupying it under the agreement with the appellant since 1st April 1972. A submission coming from a public authority in this fashion is totally unacceptable and deserves to be rejected. [Para 30] [692-B-C]

1.5. In the instant case, the respondents are occupying the premises, may be as an agent of the appellant, right from the 1st April 1972. The respondent has moved the Court of Small Causes for the declaration and has obtained an order of status-quo. That order presently survives and is not set aside though the Single Judge has observed in the impugned order that the order of status-quo would operate only till the competent authority passes the order of eviction. The respondents have not challenged this order either by filing a Special Leave Petition or by filing any cross objections in the instant appeal, and therefore, it binds them. In the circumstances of the instant case, the Single Judge permitted the appellant to proceed against the respondent under the Public Premises Act on the footing that after the termination of the dealership agreement the occupation would be unauthorized. He has rightly observed that the pendency of the proceeding in the Civil Court cannot preclude the appellant from taking recourse to recovery of the possession of the suit premises by following due process of law including by resorting to action under the provisions of Public Premises Act, if permissible. However, it is made clear that in any case possession cannot be obtained by force. There is no

reason for this Court to take any different view. The respondent has to be afforded an opportunity of being heard, may be in the forum of the appellant, and only after obtaining an order from the competent authority the respondent can be evicted. [Para 34] [694-B-G]

1.6. In the facts of the instant case, amongst others the respondent had raised the issue with respect to the nature of his licence to remain on the premises, and had also sought the protection which was available to the licencee in occupation of the premises prior to 1.2.1973. Whether the respondent was right in that contention or not is not for this Court to determine. It is for the appropriate authority to decide. That is the minimum opportunity which would be required to be provided to the respondent in the facts of the instant case, when he is in occupation of the concerned premises for nearly 40 years. Even on the footing of being an agent, apart from the right to receive the compensation in a situation which could be placed under Section 205 of the Contract Act, the agent also has the right to remain on the property of the principal under Section 221 of the Contract Act, for the reliefs which are available under that Section if he makes out such a case. Furthermore, the respondent has placed his case on a higher pedestal, but even on the basis that he is a mere agent, he does have certain rights under Sections 205 and 221 of the Contract Act. Thus, it cannot be said that the respondent does not deserve even an opportunity of being heard. What are the relevant terms of the agreement between the parties, what is their true connotation and what order could be obtained by the appellant against the respondent, or what relief at the highest the respondent would be entitled to, would have to be considered and decided before an appropriate forum. [Para 35] [695-C-H]

1.7. All throughout the respondent contended that

they have been in exclusive possession of the premises concerned, and all the employees on the premises are that of the respondent. In the third suit filed in the City Civil Court, the respondent has specifically pleaded that the termination of the licence was without any reasons and was contrary to public policy, and was violative of Article 14 of the Constitution of India. The respondent has specifically submitted that a technical fault in the machine cannot amount to manipulation and that apart it was not a case of adulteration. All these submissions of the respondent require a determination. An opportunity of being heard is something minimum in the circumstances. The proceedings before the authority under the Public Premises Act are an expeditious proceeding and that is something minimum in the circumstances. A Public Corporation, from which a higher standard is expected, cannot refuse to follow this much minimum due process of law. [Para 36] [696-A-C-F]

1.8. There is no reason to interfere with the order passed by the Single Judge. However, the observations made are for the purpose of deciding the correctness or otherwise of the impugned order passed by the Single Judge and not on the merit of the rival claims. In the event, the appellant takes the steps under the Public Premises Act, it would be open to the respondent to plead their case before the competent authority on all counts, though it would also be open to the concerned competent authority to take its own decision on the merits of the rival contention on facts as well as on law. [Para 37] [696-G-H; 697-A]

Southern Roadways Ltd. vs. S.M. Krishnan **1989(4) SCC 603;** *Amritsar Gas v. Indian Oil Corporation* **1991 (1) SCC 533;** *Maneka Gandhi v. Union of India* **1978 (1) SCC 248;** *Bishna Alias Bhiswadeb Mahato and Ors. vs. State of West*

Bengal **2005(12) SCC 657;** *Olga Tallis vs. Bombay Municipal Corporation* **AIR 1986 SC 180 – referred to.**

Case Law Reference:

1989(4) SCC 603	**Referred to.**	**Para 16**
1991 (1) SCC 533	**Referred to.**	**Para 18**
1978 (1) SCC 248	**Referred to.**	**Para 29**
2005(12) SCC 657	**Referred to.**	**Para 30**
AIR 1986 SC 180	**Referred to.**	**Para 33**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2276 of 2011.

From the Judgment & Order dated 29.1.2009 of the High Court at Bombay in Writ Petition No. 8130 of 2008.

C.A. Sundaram, Parijat Sinha, Reshmi Rea Sinha, S.C. Ghosh, Vikram Ganguly, Rohini Musa, Abhishek Gupta for the Appellant.

R.P. Gupta, Suman Gupta, Mehul Milind Gupta, Omika Dubey, Sushendra K. Chauhan for the Respondent.

The Judgment of the Court was delivered by

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

2. The appellant - Bharat Petroleum Corporation Ltd. (also referred to as BPCL) is a Public Sector Undertaking under the administrative control of the Ministry of Petroleum & Natural Gas, Union of India, engaged in refining, distributing and selling petroleum products, such as Motor Spirit (MS/Petrol), High Speed Diesel (HSD), Kerosene, Liquefied Petroleum Gas (LPG), etc. all over the country. It is the successor-in-title of Burmah-Shell Oil Storage and Distributing Company of India Ltd. (for short 'Burmah Shell').

3. On 2.9.1971, Burmah Shell took on lease a piece and parcel of land admeasuring about 680 sq.yds. bearing CTS Nos. 339 and 339/1 situated at V.N. Purav Marg, Chembur, Mumbai, for the purpose of a Storage Depot or Service Station with the right to erect and maintain all manner of equipment, plant, machinery, tanks, pumps and structures. In the said plot, Burmah Shell erected and installed the Dispensing pumps together with underground tanks and other equipment, fittings and facilities for storage of petrol, High Speed Diesel (HSD) and other products and constructed some structures for carrying on the business of sale and supply of such products. The said service station is also referred to as a Retail Petroleum Outlet (for short 'the RPO'). On 1.4.1972, the appellant entered into a Dispensing Pump and Selling Licence agreement (for short 'DPSL Agreement') with the respondent, appointing it as the dealer for selling the petroleum products of the appellant from the said RPO.

4. The undertaking of Burmah Shell was taken over by the Central Government and subsequently vested in Bharat Petroleum Corporation Ltd., appellant herein, in accordance with the provisions of the Burmah Shell (Acquisition of Undertakings in India) Act, 1976 on 24.1.1976.

5. The respondent had originally two partners, Dharma Vir Joshi and Mahesh Mangtani and on the death of Dharma Vir Joshi, a fresh dealership agreement described as 'Dispensing Pump and Selling Licence' was executed between the appellant and respondent on 1.12.1995. In terms of the said agreement, the respondent was functioning as a dealer of the appellant.

6. During a surprise inspection on 9.3.2007 carried out by the Quality Control Cell of the appellant in the presence of the Manager of the respondent, it was noticed that one of the dispensing units (No.OIC 3633) was giving a short delivery of 20 ml. of HSD (that is, when tested for accuracy against a five litre calibrated measure, the display showed 5.02 litres). When the Dispensing Unit was checked on flash mode 55555 twice,

it gave short delivery of 210 ml. (that is as against 5 litres, the display showed 5.21 litres). Therefore, the Electronic Register Assembly (ERA) of the said dispensing unit was removed from the Unit and was sent for inspection to MIDCO - the manufacturer of the dispensing Unit. MIDCO gave a report on 27.3.2007 stating that there was a deviation in the counting ERA and the Microcontroller chip hardware in the ERA was not the original component supplied by them with the Dispensing Unit. The appellant, therefore, issued a show cause notice to the respondent on12.6.2007 alleging that the respondent had manipulated/altered the original chip with a view to making illegal gain by cheating the customers of the company, thereby causing breach of trust, and calling upon the respondent to show cause within 15 days, as to why action should not be taken including termination of the dealership. The respondent sent a reply dated 10.7.2007 denying the allegations in the show cause notice.

7. The respondent filed a suit (Suit No.913/2008) in the Court of Small Causes, Bombay for the following reliefs : (a) for a declaration that it is the tenant of the appellant in respect of the structures and equipment and sub-tenant of the appellant in regard to the land comprised in the suit premises (CTS Nos. 339 and 339/1, V.N. Purav Marg, Chembur, Mumbai, measuring 6118 sq. ft.); (b) for a declaration that the supply of petrol and petroleum products by the appellant at the suit premises was an essential supply under section 29 of the Maharashtra Rent Control Act, 1999; (c) for a declaration that the show cause notice dated 12.6.2007 was illegal and did not constitute a just and sufficient cause for cutting off or withholding the essential supply of petrol and petroleum products; (d) for a permanent injunction restraining the appellant from forcibly dispossessing respondent from suit premises or in any manner interfering with the possession of the respondent in regard to the suit premises; and (e) restraining the appellant from withholding or cutting off the supply of petrol and petroleum products from the suit premises.

An application for temporary injunction was also filed to restrain the appellant from forcibly dispossessing the respondent from the premises or interfering with its possession of the suit premises and from withholding or cutting off of any supply of petrol and petroleum products.

8. The appellant resisted the suit and the application for temporary injunction by contending that the respondent was neither a tenant, nor a sub-tenant, nor a deemed tenant. The Court of Small Causes by interim order dated 13.5.2008 directed the appellant to maintain status quo as on that date, that is, the respondent "shall remain in possession of the suit premises" and the appellant shall "continue to supply petrol and petroleum products to the petrol pump in the suit premises", till the preliminary issue regarding jurisdiction to entertain the suit was framed and a decision was rendered thereon.

9. Feeling aggrieved, the appellant filed an appeal. A Division Bench of the Small Causes Court, by order dated 26.8.2008, partly allowed the appeal. It set aside the order of the trial court in so far as it directed the appellant to continue the supply of petrol and petroleum products in the suit premises to respondent. The direction that the appellant shall maintain status quo by permitting the respondent to continue with the possession of the suit premises was not disturbed. The appellate bench held that the respondent had prima facie established its induction in the suit premises as a licensee in the light of the agreements dated 1.4.1972 and 1.12.1995. The said order dated 26.8.2008 of the appellate bench of the Small Causes Court was challenged by the respondent by filing W.P. No.6689/2008, to the extent it reversed the direction for supply of petroleum products. The said order was also challenged by the appellant in W.P.No.8130/2008 to the extent that it permitted the respondent to remain in possession of the suit premises.

10. The respondent's writ petition (WP No.6689/2008) was dismissed by a learned Single Judge by judgment dated 1.10.2008. The writ petition filed by the appellant (W.P.

No.8130/2008) was disposed of by a brief order dated 29.1.2009, observing that "Instead of getting embroiled with the larger issues raised in the present petition, in my opinion, interest of justice would be subserved if the petition is disposed of, by clarifying the order of status quo granted by the Lower Court to mean that the said order of status quo shall not preclude the petitioner (BPCL) from taking recourse to recovery of possession of the suit property from the respondent (plaintiff) by following due process of law including by resorting to action under the provisions of the Public Premises Act, if permissible." The said order is challenged in this appeal by special leave.

Subsequent events

11. Certain subsequent events require to be noticed. The respondent filed a second suit (Suit No.2557/2008) in the City Civil Court, Mumbai, praying for the following reliefs: (a) a declaration that supply of petrol and petroleum products in the suit premises to respondent by the appellant is an essential supply under the Essential Commodities Act, 1955; (b) for a declaration that the notice dated 12.6.2007 is illegal and a further declaration that the appellant is not entitled to terminate/ set aside the dealership under the agreement dated 1.12.1995; and (c) for an injunction restraining the appellant from stopping the supply of petrol and petroleum products or acting upon the notice dated 12.6.2007.

12. On 19.3.2009, the appellant terminated the dealership agreement and informed the respondent that it shall have no right to use the retail outlet premises for any purpose whatsoever and the facilities (Motor Spirit and/or High Speed Diesel pumps, storage tanks, pipes and fittings and all other facilities erected and provided by the company at the retail outlets) or to sell any petroleum products lying in the retail outlets. Supply of petroleum products to the said Retail Petroleum Outlet was also stopped. The said termination however made it clear that the order was without interfering with or disturbing the order of status quo in regard to the possession

passed on 30.5.2008 and affirmed the orders dated 26.8.2008 and 29.1.2009 passed by the appellate bench and the High Court respectively.

13. The respondent filed a third suit (Suit No.706/2009 in the City Civil Court, Bombay) for the following reliefs : (a) a declaration that the termination notice dated 19.3.2009 was illegal and unenforceable and that the dealership agreement dated 1.12.1995 continues to subsist; (b) for a permanent injunction restraining the appellant or giving effect to the termination notice dated 19.3.2009; and (c) for an order restraining the appellant from discontinuing or withholding supply of petrol and petroleum products and CNG to the petrol pump premises and declare that the supply of petrol and petroleum products to the said premises is an essential supply.

Contentions of appellant

14. The appellant has urged the following contentions : (a) The dealership granted by the appellant in favour of the respondent was in the nature of an agency for sale of the petroleum products supplied by the appellant, in the appellant's property, under the appellant's emblem (BPCL Petrol Pump or Service Station). The respondent as the dealer/agent uses the petrol pump premises and the equipments therein as an agent of the appellant. The respondent does not have any right, title or interest in the premises. (b) A person appointed by the appellant, as its dealer to sell the petroleum products supplied by the appellant through the company retail outlet premises under the terms of a Dispensing Pump and Selling Licence (DPSL) agreement, on termination of the selling agreement - cessation of supplies ceases to be a dealer. Consequently he can neither sell any petroleum products in the retail outlet premises, nor use the appellant's retail outlet premises or facilities for any other purpose, nor create any obstruction to the running of the retail outlet by the appellant directly or through another dealer - regular or ad hoc. (c) Even if the termination of the dealership is invalid, the only relief that could be claimed

by the ex- dealer/agent is award of compensation. A court could not therefore grant temporary injunction requiring the appellant to maintain status quo, thereby permitting the respondent to hold on to the petrol pump premises and prevent the use thereof by the appellant in the manner it deems fit.

Contention of Respondent

15. The respondent contended as follows: (a) The DPSL agreement executed on 1.4.1972 appointing the respondent as a dealer, granted an exclusive licence to the respondent to use the petrol pump premises for a period of 15 years; that as the licensee is in lawful occupation of the premises, he could not be dispossessed forcibly from the premises but could only be evicted in a manner known to law. (b) As it was in possession of the premises as a licensee as on 1.2.1973, it became a deemed tenant by virtue of Section 15A of the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 (for short 'the old Bombay Rent Act'); and consequently it became entitled to the protection against eviction under that Act. When the said Act was repealed and replaced by the Maharashtra Rent Control Act, 1999 (for short 'the MRC Act'); the protection against eviction continued to be available to it under the MRC Act. (c) There was no error or defect in the Dispensing Unit and the decision to suspend the supplies and terminate the licence were illegal and unwarranted.

Questions arising for consideration

16. On the contentions raised, the questions that arise for our consideration are :

(i) What is the nature of a licence that is granted to the respondent by the appellant under the DPSL agreement ?

(ii) Whether the High court was justified in upholding the grant of an interim order of status quo directing the

appellant not to interfere with the respondent's 'possession' of the petrol pump premises and requiring the appellant to resort to appropriate legal action to secure possession from the respondent ?

(iii) Whether the licence to use the petrol pump premises for the purpose of sale of the petroleum products of the appellant granted to respondent on 1.4.1972 could be construed as a licence as defined in Section 5(4A) of the old Bombay Rent Act so as to attract section 15A of the said Act which provided that any person who was in occupation of any premises as a licensee as on 1.2.1973 shall on that date be deemed to have become a tenant of the landlord in respect of the premises in his occupation ?

The contract

17. Both parties agreed and submitted that the rights and obligations of parties are governed by the terms of the DPSL agreement dated 1.12.1995. We may therefore refer to the relevant provisions thereof :

"WHEREAS the Company has at the request of the Licensees agreed to permit the Licensees to enter upon the Company's premises described in the Schedule and shown on the blueprint attached hereto (hereinafter referred to as "the said premises") as the Licensees of the Company for the purposes, and upon the terms and subject to the conditions hereinafter mentioned. ..."

NOW THESE PRESENT WITNESS AND IT IS HEREBY AGREED AND DECLARED AS FOLLOWS :

"1. Subject to the conditions contained hereinafter the Company hereby grants Licence unto the Licensees for a period of 15 (fifteen) years and during the continuance of this Licence to enter upon the said premises and to use the Motor Spirit and/or H.S.D. Pumps, Storage Tanks,

Pipes and Fittings and all other facilities erected and provided by the Company upon the said premises, and also any additional facilities at any time during the continuance of this Licence provided by the Company upon the said premises (all of which are hereinafter for brevity referred to as "the said facilities") for the purpose of the sale of Motor Spirit and/or H.S.D., Motor Oils, Greases and other Motor accessories, as the Licensees of the Company. The Company expressly reserves to itself the right to take back the whole or any portion of the said premises or the said facilities or alter them at any time during the continuance of this Licence at its sole discretion.

x x x x

4. The said premises and the said facilities shall at all times during the continuance of this Licence remain the absolute property and in sole possession of the Company and no part of the said facilities shall be removed by the Licensees nor shall the position of any constituent part thereof or of the said premises be changed or altered without the previous written consent of the Company.

5. The premises and the said facilities hereby licensed to the Licensees shall only be used for stocking and selling/ dispensing the Petroleum Products of the Company and shall not be used for any other purpose except as may be permitted in writing by the Company.

x x x x

9. Neither the Licensees nor the Licensees' servants or agents shall interfere in any way with the working parts of the pumps or other equipment provided by the Company.

x x x x

12. This Licence may be terminated without assigning any reason whatsoever by either party giving to the other not

less than ninety days notice in writing to expire at any time of its intention to terminate it and upon the expiration of any such notice this Licence shall stand cancelled and revoked. The requisite period of notice may be reduced or waved by mutual consent.

x x x x

15. Upon the revocation or termination of this Licence for any cause whatsoever the Licensees shall cease to have any rights whatsoever to enter or remain on the premises or to use the said facilities and shall be deemed to be trespassers if they continue to do so. Upon such termination or revocation either under Clause 12 or Clause 13 hereof, if the Licensees or their servants and/or agents remain on the premise, the Company shall be at liberty to evict them by using such means as may be necessary and prevent them from entering upon the licensed premises.

x x x x

18. The Licensees hereby expressly agree and declare that nothing herein contained shall be construed to create any right other than the revocable permission granted by the Company in favour of the Licensees in respect of the Licensed premises/facilities strictly in accordance with the terms hereof. In particular nothing herein contained shall be construed to create any tenancy or other right of occupation whatsoever in favour of the Licensees."

(emphasis supplied)

Re : Questions (i) and (ii)

18. Licence is defined in section 52 of the Indian Easements Act, 1882 as under :

"52. `License' defined :

> Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license."

The definition of licence makes it clear that a licence granted by the owner enables a licensee a right to do or continue to do certain specified things in or upon an immovable property.

19. In *Associated Hotels of India Ltd. v. R.N. Kapoor* (AIR 1959 SC 1262) this Court referred to the difference between a lease and licence.:

> "There is a marked distinction between a lease and a licence. Section 105 of the Transfer of Property Act defines a lease of immovable property as a transfer of a right to enjoy such property made for a certain time in consideration for a price paid or promised. Under Section 108 of the said Act, the lessee is entitled to be put in possession of the property. A lease is therefore a transfer of an interest in land. The interest transferred is called the leasehold interest. The lessor parts with his right to enjoy the property during the term of the lease, and it follows from it that the lessee gets that right to the exclusion of the lessor....."

After referring to the definition of licence in Section 52 of the Easement Act, this court held:

> "Under the aforesaid section, if a document gives only a right to use the property in a particular way or under certain terms while it remains in possession and control of the owner thereof, it will be a licence. The legal possession, therefore, continues to be with the owner of the property, but the licensee is permitted to make use of the premises for a particular purpose. But for the permission, his

> occupation would be unlawful. It does not create in his favour any estate or interest in the property. There is, therefore, clear distinction between the two concepts. The dividing line is clear though sometimes it becomes very thin or even blurred. At one time it was thought that the test of exclusive possession was infallible and if a person was given exclusive possession of a premises, it would conclusively establish that he was a lessee. But there was a change and the recent trend of judicial opinion is reflected in *Errington v. Errington* [1952] 1 All E.R. 149, wherein Lord Denning reviewing the case law on the subject summarizes the result of his discussion thus at p. 155 :
>
> "The result of all these cases is that, although a person who is let into exclusive possession is, prima facie, to be considered to be tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy."
>
> "...The following propositions may, therefore, be taken as well-established : (1) To ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form; (2) the real test is the intention of the parties - whether they intended to create a lease or a licence; (3) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and (4) if under the document a party gets exclusive possession of the property, prima facie, he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease..."

In *C.M. Beena vs. P.N. Ramachandra Rao* - 2004 (3) SCC 595, this Court explained a Licence thus :

> "Only a right to use the property in a particular way or under

certain terms given to the occupant while the owner retains the control or possession over the premises results in a licence being created; for the owner retains legal possession while all that the licensee gets is a permission to use the premises for a particular purpose or in a particular manner and but for the permission so given the occupation would have been unlawful."

20. Licences can be of different kinds. Some licences with reference to use of immovable property may be very wide, virtually bordering upon leases. Some licences can be very very narrow, giving a mere right enabling a person to visit a premises - say a museum or a lecture hall or an exhibition. In between are the licences of different hues and degrees. All licences can not be treated on the same footing. We may refer to some illustrations to highlight the difference.

Illustration (A):

An owner of a property enters into a lease thereof, but to avoid the rigours of Rent Control legislation, calls it as a licence agreement. Though such a lease is captioned as a 'licence agreement', the terms thereof show that it is in essence, a lease. Such a licence agreement which puts the licensee in exclusive possession of the premises, untrammeled by any control, and free from any directions from the licensor (instead of conferring only a bare personal privilege to use the premises) will be a lease, even if described as licence. For example, if the exclusive possession of an apartment or a flat or a shop is delivered by the owner for a monthly consideration without retaining any manner of control, it will be a lease irrespective of whether the arrangement is called by the owner as a 'lease', or 'licence'. As far as the person who is let into exclusive possession, the quality and nature of his rights in respect of the premises will be that of a lease or a tenant and not that of a licensee. Obviously such a 'licensee' cannot be 'evicted' or 'dispossessed' or prevented from using the premises without initiating legal action in accordance with law.

Illustration (B):

The owner of a land constructs a shopping mall with hundred shops. The owner of the mall earmarks different shops for different purposes, that is sale of different types of goods/ merchandise, that is shops for exclusive clothing for men, shops for exclusive clothing for women, shops for hosieries, shops for watches, shops for cameras, shops for shoes, shops for cosmetics and perfumes, shops for watches, shops for sports goods, shops for electronic goods, shops for books, shops for snacks and drinks etc. The mall owner grants licences in regard to individual shops to licensees to carry on the identified or earmarked business. The licensor controls the hours of business, regulates the maintenance, manner of display, cleanliness in the shops. The ingress and egress to the shop licensed to the licensee is through the corridors in the mall leading from three or four common access points/entrances which are under the control of the licensor. The licensee is however entitled to stock the shop with brands of his choice though he does not have the right to change the earmarked purpose, entertain any clientale or customers of his choice and fix the prices/terms for his goods. He can also lock the shop at the end of the business hours and open it whenever he wants. No one else can trade in that shop. In such a case, in spite of the restrictions, controls and directions of the licensor, and in spite of the grant being described as licence, the transaction will be a lease or tenancy and the licensee cannot be dispossessed or evicted except by recourse of law.

Illustration (C):

In a shopping complex or in a mall the owner gives a licence to a person to use a counter to sell his goods in consideration of a fee. The access is controlled by the licensor and there is no exclusive use of any specific space by the licensee. At the end of the day, the licensee can close the counter. The space around the counter is visited and used by

customers to the mall and not exclusively by the customers of the licensee. In such a case, if the licence is terminated, the licensor can effectively prevent the licensee from entering upon his premises and the licensee will have no right to use the counter except to remove his belongings. In such a licence it may not be necessary for the licensor to sue the licensee for 'possession' or 'eviction'.

Illustration (D):

A much narrower version of a licence is where an exhibitor of cinematograph films, or a theatre owner permits a 'customer' or 'guest' to visit an entertainment hall to view and enjoy a movie or a show for the price of a ticket. The licensee is permitted to occupy a seat in the theatre exclusively for the period of the show. Or a cloakroom with toilet facilities in a public building permits a visitor to use the toilet/closet facilities on payment of a fee. The licensee is permitted to use the toilet/closet exclusively to relieve himself. In such cases, the licence is for a specific purpose and for a specific period. The licensee has no other right to enter the premises, nor the right to continue to occupy the seat in the theatre or use the toilet/closet continuously. Such a licensee can be forcibly removed by the licensor if the licensee overstays or continues to occupy the seat beyond the show, or refuses to leave the cloakroom. It is not necessary for the licensor to sue the licensee.

Illustration (E):

A reputed manufacturer of textiles owns several retail outlets in different parts of the country. The outlets are housed in premises owned by the manufacturer or premises taken by it on lease. The manufacturer employs a sales manager on salary for each outlet to manage the outlet and sell its products and entrust him with the keys of the premises, so that he can open the outlet for business and close the outlet at the end of the day. Or the manufacturer, instead of engaging a sales manager, appoints an agent who is permitted to sell only the

products of the manufacturer in the retail outlet, and receive a commission on the turnover of sales. The manufacturer stipulates the manner of sale, and the terms of sale including the prices at which the goods are sold. The manufacturer also checks the products sold periodically to ensure that only its products (and not fakes) are sold. The manufacturer also reserves the right to terminate the services of the sales manager/agent. In such cases on termination of the services of the employee/agent, the manufacturer can physically prevent the sales manager/agent from entering the retail outlet and make alternative arrangements for running the outlet. There is no need to approach a court to 'evict' the sales manager/agent.

21. Where an employer or principal permits the use of its premises, by its employee or agent, such use, whether loosely referred to as 'possession' or 'occupation' or 'use' by the employee or the agent, is on behalf of the employer/principal. In other words, the employer/principal continues to be in possession and occupation and the employee/agent is merely a licensee who is permitted to enter the premises for the limited purpose of selling the goods of the employer/principle. The employee/agent cannot claim any 'possession' or 'occupation' or 'right to use' independent of the employer/principal who is the licensor. In such cases if the employee is terminated from service, he cannot obviously contend that he is in "occupation" of the premises and that he can be evicted or dispossessed only by initiating action in a court of law. Similarly the agent who is permitted to enter the premises every day to sell the goods cannot, on termination of the agency, contend that he continues to be in exclusive occupation of the premises and unless evicted through a court of law entitled to continue in occupation. This is because licence that is granted to the employee/agent is a limited licence to enter upon and use the premises, not for his own purposes or his own business, but for the purposes of the employer/principal, to sell its goods in the manner prescribed by the employer/principal and subject to the terms and conditions stipulated in the contract of employment/agency

in regard to the manner of sales, the prices at which the goods are to be sold or the services to be rendered to the customers. In such cases, when the employment or agency is terminated and the employer/principal informs the employee/agent that his services are no longer required and he is no longer the employee/agent, the licence granted to such employee/agent to enter the retail outlet stands revoked and the ex- employee/ ex-agent ceases to have any right to enter the premises. On the other hand, the employer/principal who continues to have possession will be entitled to enter the premises, or appoint another employee or agent, or legitimately prevent the ex-employee/ex-agent from entering upon the premises or using the premises. In such cases, there is no need for the licensor (that is the employer or the principal) to file a suit for eviction or injunction against the ex-employee or ex-agent. The licensor can protect or defend its possession and physically prevent the licensee (employee/agent) from entering the outlet.

22. In this behalf we may refer to the decision of this court in *Southern Roadways Ltd. Madurai v. SM Krishnan* (1989) 4 SCC 603. In that case, Southern Roadways appointed the respondent as its commission agent for carrying on its business in Madras city. Southern Roadways took on lease a godown and put it in the possession of the respondent for the purpose of carrying on the agency business. The agreement between the parties provided that Southern Roadways could remove the agent at any time without notice and upon removal, it could occupy the godown and also use the services of the employees engaged by the agent. In the course of audit, mismanagement and misappropriation by the agent was discovered and as a result Southern Roadways terminated the agency and took possession of the godown and appointed another person as agent. The respondent prevented the new agent and the appellant from carrying on the business in the godown premises. Therefore the appellant filed a suit for injunction against the respondent. A learned Single Judge granted a temporary injunction. On an appeal by the ex-agent, the division

bench of the Madras High Court vacated the injunction which was challenged before this court by Southern Roadways. This Court allowed the appeal. This court held:

> "At the outset, we may state that we are not so much concerned with the rival claims relating to actual possession of the suit premises. Indeed, that is quite irrelevant for the purpose of determining the rights of the company to carry on its business. Mr. Venugopal, learned Counsel for the appellant also discreetly did not advert to that controversy. He, however, rested his case on certain facts which are proved or agreed. They may be stated as follows : The company was and is the tenant of the suit premises and has been paying rent to the owner. The lease in respect of the premises has been renewed up to November 22, 1993. It was the company which has executed the lease and not the respondent. The respondent as agent was allowed to remain in possession of the premises. It was only for the purpose of carrying on company's business. His agency has been terminated and his authority to act for the company has been put an end to. These facts are indeed not disputed. On these facts the contention of counsel is that when the agency has been terminated, the respondent has no legal right to remain in the premises or to interfere with the business activities of the company.
>
> The principal has right to carry on business as usual after the removal of his agent. The Courts are rarely willing to imply a term fettering such freedom of the principal unless there is some agreement to the contrary. The agreement between the parties in this case does not confer right on the respondent to continue in possession of the suit premises even after termination of agency. Nor does it preserve right for him to interfere with the company's business. On the contrary, it provides that the respondent could be removed at any time without notice and after

removal the company could carry on its business as usual. The company under the terms of the agreement is, therefore, entitled to assert and exercise its right which cannot be disputed or denied by the respondent.

...under law, revocation of agency by the principal immediately terminates the agent's actual authority to act for the principal unless the agent's authority is coupled with an interest as envisaged under Section 202 of the Indian Contract Act. When agency is revoked, the agent could claim compensation if his case falls under Section 205 or could exercise a lien on the principal's property under Section 221. The agent's lien on principal's property recognised under Section 221 could be exercised only when there is no agreement inconsistent with the lien. In the present case the terms of the agreement by which the respondent was appointed as agent, expressly authorises the company to occupy the godown upon revocation of agency. Secondly, the lien in any event, in our opinion, cannot be utilised or taken advantage of to interfere with principal's business activities.

The crux of the matter is that an agent holds the principal's property only on behalf of the principal. He acquires no interest for himself in such property. He cannot deny principal's title to property. Nor he can convert it into any other kind or use. His possession is the possession of the principal for all purposes.

In this case, the respondents' possession of the suit premises was on behalf of the company and not on his own right.

It is, therefore, unnecessary for the company to file a suit for recovery of possession. The respondent has no right to remain in possession of the suit premises after termination of his agency. He has also no right to interfere with the company's business."

23. In this case, the DPSL Agreement clearly demonstrated that licence granted by the appellant enabled the licensee (respondent) to enter upon the retail outlet premises only for the limited purpose of using the facilities (that is Motor Spirit/HSD Pumps, storage tanks etc.) for purposes of sale of appellant's Motor Spirit, HSD, Motor oils, Greases or other motor accessories (together referred to as 'Products of the appellant') as a licensee of the appellant at the prices specified by the appellant. The respondent could not sell any other goods or the products of any one else. It could not charge a price different from what was stipulated by the appellant. The respondent could not enter the outlet premises if the licence granted to the respondent to sell the appellant's petrol and petroleum products was terminated. In other words, the respondent- licensee had no licence to enter the petrol pump premises or use the 'facilities', if it could not sell the products of the appellant. The relevant terms of the DPSL agreement extracted in para 17 above show that the licence was given to the licensee to enter the appellant's outlet premises and use the equipment/facilities provided by the appellant for the exclusive purpose of sale of the products of the appellant. This has been completely lost sight of by the courts below.

24. It should be noted that the appellant has installed specialized equipments (that is HSD/Petrol/oil dispensers/ pumps attached to storage tanks through pipes/fittings) and the licence given to the respondent was to enter upon the premises to use the said equipment/facilities provided by the appellant for the purpose of sale of the appellant's products (that is motor spirit, HSD, motor oil, grease etc.) at the rates/prices fixed by the appellant. If the respondent could not sell these petroleum products on account of suspension/termination, there is no occasion or need for the respondent to enter upon the outlet premises as it cannot sell any other goods or use the outlet for any other purpose. Therefore the licence to enter and use the outlet premises also comes to an end when the licence is terminated or supply of appellant's products is stopped. Clause

15 of the DPSL Agreement specifically provides that on revocation or termination of the licence for any cause whatsoever, the licensee shall cease to have any right to enter or remain in the premises or use the facilities. As the licence is only to enter the appellant's outlet premises to use the facilities for sale of appellant's petroleum products, if the licence to use the appellant's facilities for sale of appellant's products comes to an end and supply of appellant's products for sale by the respondent is stopped, there is no question of the licensee entering the outlet premises at all or remaining in the outlet premises or using the outlet premises.

25. To reiterate, the permission granted to the respondent by the appellant to enter the outlet premises is for the purposes of using the equipments/facilities belonging to the appellant installed in the outlet, to sell the products of the appellant. Under the licence (DPSL) agreement, the respondent cannot enter the premises for any purpose other than for using the facilities or equipment installed by the appellant or for any purpose other than selling the petroleum products of the appellant. Therefore the licence to enter the premises and the licence to use the facilities/equipment is incidental to the licence to sell the products of the appellant as a licensed dealer, distributor or agent. In this case the premises is a land held on leasehold by the appellant wherein it has constructed/erected certain structures and housed certain facilities/ equipment. The premises is known as appellant's 'company owned retail outlet'. The goods/products sold belong to the appellant. If the appellant decides to stop the supply of its goods for sale in the said outlet, automatically the licence granted to the respondent to enter premises and use the facilities become redundant, invalid and infructuous. There is no licence in favour of the licensee to use the premises or use the facilities independent of the licence to sell the goods of the appellant. Further the agreement makes it clear that the agreement does not create any tenancy rights in the premises; that it is terminable by 90 days notice on either side and it is terminable by the appellant even without giving

such notice in the event of breach. Therefore there cannot be an injunction restraining the appellant from entering upon its outlet premises or using the outlet for its business or inducting any new dealer or agent.

26. Where the licence in favour of the licensee is only to use the retail outlet premises or use the equipments/facilities installed therein, exclusively in connection with the sale of the goods of the licensor, the licensee does not have the right to use the premises for dealing or selling any other goods. When the licensee cannot use the premises for any purpose on account of the stoppage of supply of licensor's goods for sale, it will be wholly unreasonable to require the licensor to sue the licensee for 'possession' of such company controlled retail outlet premises. This is not a case where the licensee has alleged that any amount is due to it from the licensor by way of commission or remuneration for services, or that on account of non-payment thereof it is entitled to retain the retail outlet premises and facilities of the licensor by claiming a lien over them under section 221 of the Indian Contract Act, 1872. In regard to a licence governed by a commercial contract, it may be inappropriate to apply the principles of Administrative Law, even if the licensor may answer the definition of 'State' under Article 12 of the Constitution of India. In view of the above, it is unnecessary to examine whether appellant is a 'state' within the meaning of that expression under Article 12 of the Constitution of India, nor necessary to keep in view the requirement that if the licensor answers the definition of 'state', a duty to act fairly and reasonably without any arbitrariness or discrimination is also implied. Be that as it may.

27. It is made clear that this decision applies only to licences where the licensor is the owner/ lessee of the premises and the equipment (in this case dispensing pumps and other equipment) and where the licensee is engaged merely for sale of the products of the licensor. In other words, this decision would apply to petrol stations which are known as CCROs

('Company Controlled Retail Outlets'). If the licensee is himself the owner/lessee of the premises where the petroleum products outlet is situated or where the exclusive right to use the premises is given to the licensee for carrying on any business or dealing with any goods unconnected with the licensor, this decision may not apply and it may be necessary for the licensor to have recourse either to a Civil Court for a mandatory injunction to give up the premises, or the Estate Officer under the Public Premises Act for 'eviction' as the case may be, depending upon the nature of licence and the status and relationship of the parties.

28. In this case in pursuance of a routine inspection certain serious irregularities were viewed and as a consequence supply of its products was stopped, suspended and a show cause notice was issued calling upon respondent to show cause why action should not be taken including termination of the dealership for the reasons stated therein. Therefore when such a notice is issued as a precursor to termination, the respondent licensee ceases to have right to sell the goods in the outlet premises and does not get the cause of action either to seek continuance of the supply of the products or remain in and use the premises. The show cause notice was followed by a termination of the licence of dealership on 19.3.2009. Even if the termination or non-supply amounts to breach of contract, the remedy of the agent-licensee at best is to seek damages, if it is established that the dealership was wrongly determined or supply was wrongly stopped. Consequently, the licensee does not have any right to use the premises nor any right to enter upon the premises after the termination of the agency.

Re: Question No.(iii)

29. The contention of the respondent is that as it was a licensee from 1.4.1972, it become a deemed tenant under section 15A of the old Bombay Rent Act (which provided that any person in occupation of a premises as a licensee as on 1.2.1973, became a deemed tenant) and consequently can be

evicted only by filing a petition for eviction under the Rent Act.

30. To appreciate the said contention of the respondent, it is necessary to refer to the relevant provisions of the relevant rent law. We may first refer to the definitions of 'tenant' and 'licensee' under the old Bombay Rent Act and MRC Act.

Section 7(15)(a) of the MRC Act reads as follows :-	Section 5(11) of the Old Bombay Rent Act
(15) "tenant" means any person by whom or on whose account rent is payable for any premises and includes,- (a) such person,- (i) who is a tenant, or (ii) *who is a deemed tenant, or* (iii) who is a sub-tenant as permitted under a contract or by the permission or consent of the landlord, or (iv) who has derived title under a tenant, or (v) to whom interest in premises has been assigned or transferred as permitted, by virtue of, or under the provisions of, any of the repealed Acts; (b) a person who is deemed to be a tenant under section 25;	"Tenant" means any person by by whom or on whose account rent is payable for any premises and includes,- (a) Such sub-tenants and other persons as have derived title under a tenant (before the 1st day of February, 1973; (aa) any person to whom interest in premises has been assigned or transferred as permitted or deemed to be permitted, under section 15; x x x x x x x (bb) such licensees as are deemed to be tenants for the purposes of this Act by section 15A; x x x x x x x

(c) a person to whom interest in premises has been assigned or transferred as permitted under section 26; x x x x x x x	
Section 7(5) of the MRC Act	Section 5(4A) of the old Bombay Rent Act
(5) 'Licensee', *in respect of any premises or any part thereof, means the person who is in occupation of the who is in occupation of the premises or such part, as premises or such part, as the case may be, under s subsisting agreement for licence given for a licence free or charge;* and includes any person in such occupation of any premises or part thereof in a building vesting in or in or leased to a co-operative housing society registered or deemed to be registered under the Maharashtra Co-operative Societies Act, 1960 (Mah. XXIV of 1961) *but does not include* a paying guest, a member of a family residing together, a person the service or employment of the licensor,	(4A) 'licensee', *in respect of any premises or any part thereof, means the person the case may be, under a subsisting agreement for licence given for a licence fee or charge;* and includes any person in such occupation of any premises or part in a thereof building vesting co-leased to a operative housing society registered or deemed to be registered under the Maharashtra Co-operative Societies Act, 1960; *but does not include* a paying guest, a member of a family residing together, a person in in the service or employment of the licensor, **or a person conducting a running business belonging to the (**for a person having any

or a person conducting a running business belonging to the licensor, or a person having any accommodation for rendering or carrying on medical or paramedical services or activities in or near a nursing home, hospital, or sanatorium or a person having any accommodation in a hotel, lodging house, hostel, guest house, club, nursing home, hospital, sanatorium, dharmashala, home for widows, orphans or like premises, marriage or public hall or like premises....."	accommodation for rendering para-medical activities in or near a services or nursing home, hospital or or carrying on medical or sanatorium, dharmashala, home for widows, orphans or like premises, marriage or public hall or like premises....."

(emphasis supplied)

31. The old Bombay Rent Act recognised such licensees as 'deemed tenants' under section 15A and they are covered under the definition of a tenant under section 7(15)(a) of the MRC Act. Section 15A of the old Bombay Rent Act read as follows : -

"15A. Certain licensees in occupation on 1st February 1973 to become tenants-

(1) Notwithstanding anything contained elsewhere in this Act or anything contrary to in any other law for the time being in force, or in any contract where any person is on the 1st day of February 1973 in occupation of any premises, or any part thereof which is not less than a room, as a licensee he shall on that date be deemed to have become, for the

purpose of this Act, the tenant of the landlord, in respect of the premises or part thereof, in his occupation.

(2) The provisions of sub-section (1) shall not affect in any manner the operation of sub- section (1) of section 15 after the date aforesaid." Significantly there is no provision either in the old Bombay Rent Act or under the MRC Act, enabling or treating any person who became a licensee after 1.2.1973 as a deemed tenant.

32. The occupation by the respondent was not occupation on its own account, but occupation on behalf of the appellant. Therefore the respondent was not in 'occupation' of the outlet in its own right for its own proposes, but was using the outlet and facilities in the possession and occupation of the appellant, to sell the appellant's products in the manner provided in the DPSL Agreement. In such a situation, the agent who is called as the licensee does not become a deemed tenant. The condition for deemed tenancy is not the description of the person as 'licensee', but the person being in occupation of a premises as licensee as on 1.2.1973. A person who obtains a licence from the government to sell liquor is a 'licensee'. A person who obtains a licence from the municipal corporation to construct a building is also a 'licensee'. A person authorized to drive a motor vehicle is also a 'licensee'. Every person who holds any type of 'licence' does not become a tenant. The deemed tenancy under Section 15A of old Bombay Rent Act refers to a person who held a licence to use a premises for his own use as on 1.2.1973.

33. Section 5(4A) of the old Bombay Rent Act defined a licensee in respect of any premises or any part thereof, as referring to the person who is in occupation of the premises or such part under a subsisting agreement for licence given for a licence fee or charge. The definition makes it clear, a person in the service or employment of the licensor, or a person

conducting a running business belonging to the licensor is not a 'licensee' where the appellant has a retail outlet in a premises either owned or taken on lease by it, where it has installed its specialized equipment/facilities for sale of its products and the outlet is exclusively used for the sale of the products of the appellant, the unit is running business of the appellant. An agent licensed to run the Retail Petroleum outlet of the appellant, which is a running business belonging to the appellant is not therefore a 'licensee' either under the old Bombay Rent Act (nor under the new MRC Act). Therefore the respondent did not become a tenant under the appellant nor became entitled to protection against eviction.

34. Only those persons who held a licence to occupy any premises as on 1.2.1973 could become deemed tenants under Section 15(A) of the old Bombay Rent Act. As a person conducting a running business on behalf of the owner of such business is not a 'licensee' as defined under the Rent Act, even if the person concerned was using premises on 1.2.1973, he will not become a deemed tenant. Consequently the respondent could not claim that he became a deemed tenant. Therefore the respondent could not claim the protection of any rent control law as a tenant. One more aspects may be noticed here. If the respondent had become a deemed tenant in 1972, it would not have entered into an agreement on 1.7.1995 reiterating that it continue to be a licensee and that it does not have any leasehold or tenancy rights in the premises. In view of the above, it is not necessary to consider the alternative contention of the appellant that even if the respondent had become a deemed tenant in pursuance of the agreement dated 1.4.1972, such a tenancy come to an end and the appellant again become licensee pure and simple from 1.12.1995 when the fresh agreement was entered, does not require to be considered.

Conclusion

35. In view of the above, this appeal is allowed. The order

of the High Court and the order of the courts below, directing status quo are set aside. Consequently, the appellant is entitled to continue in possession of the petrol pump premises and use it for its business. The appellant is also entitled to lawfully prevent the respondent from entering upon the premises. The trial court is directed to dispose of the suit expeditiously, on the basis of the evidence, in accordance with law, keeping in view the legal position explained above.

GOKHALE J. 1. Leave Granted.

2. This appeal seeks to challenge the order passed by a Single Judge of the Bombay High Court dated 29th January, 2009 disposing of the Writ Petition No. 8130 of 2008 filed by the appellant herein with certain observations. The appellant intends to regain the possession of a Retail Petroleum Outlet concerning which, the High Court has observed that it will be open to the appellant to proceed in respect of the concerned premises, if they are public premises, by following due process of law and not by force. According to the appellant however, issuing a show cause notice, and terminating the dealership after considering the reply of the respondent, is the required due process of law and nothing more.

3. Short facts leading to this appeal are as follows:- The appellant is the successor to the erstwhile Burmah-Shell Oil Storage and Distributing Company of India Ltd. (hereinafter referred to as Burmah Shell). On 2.9.1971, Burmah Shell took on lease a piece / parcel of land admeasuring about 680 sq.yds. bearing CTS Nos. 339 and 339/1 situated at V.N. Purav Marg, Chembur, Mumbai. This was for the purpose of erecting one or more petrol pumps together with underground tanks and other fittings and facilities for storage of petrol and High Speed Diesel (HSD) Oil, for carrying on the business of sale & supply of such products. Burmah Shell constructed the necessary structures and erected the petrol pumps and other structures, fittings and facilities which are jointly referred to hereafter as Retail Petroleum Outlet (RPO). A few rooms were also put up

on that land for facilitating the working of the RPO. On 1.4.1972, the appellant entered into an agreement with the respondent, whereby the respondent were appointed as the dealers for selling the petroleum products of the appellant from the said RPO.

4. The Burmah Shell Company was taken over by the Government of India under the Burmah Shell (Acquisition of Undertakings in India) Act, 1976, and later the name of the Company was changed to Bharat Petroleum Corporation Ltd. (BPCL), the appellant herein. By a subsequent notification issued under Section 7 of the said Act of 1976, the rights and liabilities of Burmah-Shell in relation to its undertakings in India, stood transferred to be appellant. Accordingly, upon the aforesaid vesting by virtue of the provisions of this Act, the appellant Company became the lessee in respect of the said RPO at Chembur, Mumbai.

5. Subsequently, on the death of one of the partners of the respondent, a fresh dealership agreement was executed between the appellant and the respondent on 1.12.1995, and we are concerned with the rights and liabilities of the parties under this agreement.

6. It so transpired that during a surprise inspection carried out by the Quality Control Cell of the appellant in the presence of the manager of the respondent, it was noticed that one dispensing unit was making a short delivery of 20 ml. of HSD per 5 litres. It was checked twice thereafter, when it gave short delivery of 210 ml. per 5 litres measure. Therefore, the Electronic Register Assembly (ERA) of the said dispensing unit was removed therefrom and was sent for inspection to the manufacturer MIDCO. MIDCO gave a report on 27.3.2007 stating amongst others, that there was a deviation in the ERA, but the Microcontroller chip hardware in the ERA was not the original as supplied by them. The appellant, therefore, issued a show cause notice to the respondent on 12.6.2007 under the relevant provisions of the agreement between the parties

stating therein that the respondent had manipulated / altered the original chip with a view of making illegal gain by cheating the customers of the Company, thereby causing breach of trust, and calling upon the respondent to show cause within 15 days, as to why action should not be taken including termination of the dealership.

7. Respondent denied all these allegations by their reply dated 10.7.2007, but before the appellant could take any decision on the show cause notice, the respondent instituted a suit in the Court of Small Cause at Mumbai (being RAD suit No. 913/2008) for a declaration that the respondent was a tenant of the appellant company in respect of the structures, and a sub-tenant of the appellant in respect of the land on which the RPO was situated. The respondent made a further submission that the supply of petrol and petroleum products was an essential supply under Section 29 of the Maharashtra Rent Control Act (hereinafter referred to as the MRC Act). The show cause notice, therefore, was illegal, and that the appellant had no sufficient cause for withholding the essential supply of petrol and petroleum products. The respondent moved an interim application to restrain the appellants from dispossessing them from the said RPO and also from withholding supply of petrol and petroleum products.

8.The appellant filed a reply to the injunction application and stated amongst others that the respondent was neither a tenant, nor a sub-tenant, nor a deemed tenant in respect of the suit premises. In para 3 (b) it was stated as follows:-

> "(b) The defendant is a Government company wherein the Govt. of India has more than 51% shares. The defendant is a lessee of land. The alleged suit premises are public premises within the meaning of Public Premises Eviction Act, 1971. The plaintiff who claims through the defendant possession of the suit premises is covered under the said Act."

It was further stated that the respondent was only a dealer, and the open piece of land under the agreement was not covered in the definition of the 'premises' under the MRC Act, and that the MRC Act was not applicable.

9. A learned Single Judge of the Court of Small Causes initially granted an interim injunction as prayed by the respondent herein. Since the appellant wanted the issue regarding jurisdiction to be decided as a preliminary issue, the learned Judge directed that until the framing of preliminary issue regarding jurisdiction to entertain and try the suit, and decision thereon, the appellant will not dispossess the respondent from the petrol pump, and shall continue to supply the petroleum products, though the appellant will have the right to inspect the petrol pump and equipments for the purpose of checking smooth working of the same.

10. Being aggrieved by this order the appellant filed an appeal before the Division Bench of Small Causes Court at Mumbai (being Appeal No. 401 of 2008). The Division Bench by its order dated 26.8.2008 allowed this appeal in part deleting the direction to continue to supply petrol and petroleum products, but maintained the order of status-quo with respect to the possession of the respondent.

11. Being aggrieved by the part of that order which vacated the direction to supply petrol and petroleum products, the respondent filed a Writ Petition (bearing W.P. 6689 of 2008) in the Bombay High Court. A Learned Single Judge by his order dated 1.10.2008 dismissed the said Writ Petition. The Learned Single Judge noted that the respondent herein was claiming a tenant-landlord relationship on the basis of the dealership agreement between them, and then seeking a direction to supply petrol and petroleum products as an essential supply to be enjoyed by the tenant under Section 29 of the MRC Act. The Learned Judge held that it had to be first decided as to whether the relationship between them was that

of tenant and landlord. Until then, such a mandatory order could not be passed. He further held that:-

> 'any dispute or cause of action pertaining to the breach of terms and conditions of the such dealership agreement cannot be gone into by Court under MRC Act. The remedy is elsewhere.'

The Learned Judge held that the order of the lower appellate court was reasoned and correct one.

12. The appellant also filed another Writ Petition being Writ Petition No. 8130 of 2008 and challenged the other part of the order dated 26.8.2008 to the extent it was against the appellant viz. the direction to maintain the status quo with respect to the possession of the RPO. Another Learned Single Judge heard the petition and by his order dated 29th January, 2009 held that:-

> "Interest of justice would be subserved if the Petition is disposed of by clarifying the order of status quo granted by the Lower Court to mean that the said order of status quo shall not preclude the Petitioner from taking recourse to recovery of possession of the suit property from the Respondent/plaintiff by following due process of law including by resorting to action under the provisions of Public Premises Act, if permissible"

He further held that:-

> "If the Competent Authority were to order eviction of the Respondent in the said proceedings, that order will naturally supersede the order of status quo passed by the Lower Court, if it were to be established that the property is public premises as it belongs to the Petitioner Corporation. In order words, order of status quo shall operate only till the Competent Authority and/ or the appropriate forum were to pass order of eviction against the Respondent in relation to the suit premises."

13. The Counsel for the respondent submitted before the Learned Single Judge that the observations in the order may influence the proceedings pending between the parties before the Civil Court. Thereon the Learned Single Judge observed that the Civil Court is bound to follow the mandate of law, if the suit premises are public premises, and the question of precluding the petitioner from taking recourse to the action under that act, if available, cannot be countenanced. He further held that in spite of pendency of the civil action, it will be open to the Petitioner Corporation to proceed in respect of suit premises if the same are public premises. Lastly he held that:-

> "in any case the possession of the premises cannot be obtained by the Petitioner by force, but by following due process of law which option is left to the Petitioner in terms of this order."

The petition was disposed of accordingly by the order dated 29th January, 2009. Being aggrieved by this order the present Petition for leave to Appeal has been filed on 4.4.2009.

14. It so transpired that the respondent on the other hand filed another suit being Short Cause Suit No. 2557 of 2008 in the City Civil Court of Mumbai, seeking a direction that the appellant should continue to supply the petroleum products. A summons / notice dated 3.2.2009 was served on the appellant. On 19.3.2009 the appellant has, by their letter dated 19.3.2009 terminated the dealership agreement and stopped the supplies of petroleum products to this RPO. The respondent has thereafter fled a third suit bearing No. 706 of 2009 in the City Civil Court at Mumbai for a declaration that the termination was illegal and unforceable, and for other consequential reliefs.

15. As stated earlier, the main submission of the appellant in the SLP is that they are not required to proceed under The Public Premises (Eviction of Unauthorised Occupant) Act,

1971, hereinafter referred to as the Public Premises Act. They have terminated the dealership agreement and stopped the supply of petroleum products. They contend that they should be entitled to take possession without re- course to the proceedings under the Public Premises Act. According to them the observations of the Learned Single Judge that the possession of the premises cannot be obtained by force was uncalled for.

16. It is submitted on behalf of the appellant that the relation between the appellant and the respondent is that of a principal and an agent, and as a dealer, the respondent cannot claim any kind of possessory right, interest or any title in the premises from where the business was being carried out on by virtue of the dealership agreement. The appellant relied upon the judgment of this Court in *Southern Roadways Ltd. vs. S.M. Krishnan* [1989 (4) SCC 603] in this behalf, and particularly paragraphs 12 to 22 there of. It is submitted that the respondent only pays the electricity charges for the activities carried on at the RPO. He does not pay anything for the premises. He is not in any independent occupation.

17. It is submitted that the respondent was an agent of the appellant and in that capacity he was handed over an open piece of land and a few structures thereon which cannot be called, in any manner, 'public premises', under the Public Premises Act. Since the respondent is not in an independent occupation of the premises, there was no question of taking any action against him as an unauthorized occupant under the said act. The respondent is simply an agent and the moment the agency is determined, he has to vacate the premises. Issuance of a show cause notice, considering the reply to the show cause notice, and thereafter determining the dealership was the sufficient compliance with the requirement of due process of law, and nothing further was required to be done by the appellant to get back the possession in the nature of filing of a suit or obtaining an order from a competent authority.

18. Relying upon the judgment in *Southern Roadways* (supra), it was submitted on behalf of the appellant that the possession of the premises which an agent is having, is basically the possession of the principal and he does not occupy the premises independently. It was submitted that though, in the agreement between the parties, the respondent is referred as a licensee, it is essentially an agreement of agency. Then, it was submitted that once the agreement of dealership was terminated, the only relief which could be sought by the dealer was to seek compensation for loss of earning, in the event the termination is held to be bad in law. There cannot be any order of restoration of the dealership or any obstruction in running of the RPO by the petroleum company even by way of an ad-hoc arrangement. Reliance was placed in this behalf on the judgment of this Court in *Amritsar Gas v. Indian Oil Corporation* [1991 (1) SCC 533].

19. Some of the clauses of the dealership agreement were pressed into service by the appellant, particularly the following clauses:-

"(i) In the preamble - ".... the Company has at the request of the Licensees agreed to permit the Licensees to enter upon the Company's premises..."

(ii) In Clause 1 - "... The company expressly reserves to itself the right to take back the whole or any portion of the said premises or the said facilities or alter them at any time during the continuance of this Licence at its sole discretion... ..."

(iii) In Clause 4 - "... The said premises and the said facilities shall at all times during the continuance of this Licence remain the absolute property and in sole possession of the Company and no part of the said facilities shall be removed by the Licensees nor shall the position of any constituent part thereof or of the said

premises be changed or altered without the previous written consent of the company. .....".

(iv) In Clause 8 - "... Neither the Licensee nor the Licensees' servants or agents shall interfere in any way with the working parts of the pumps or other equipment provided by the Company. .....".

(v) In Clause 12 - "This Licence may be terminated without assigning any reason whatsoever by either party giving to the other not less than ninety days notice in writing to expire at any time of its intention to terminate it and upon the expiration of any such notice this Licence shall stand cancelled and revoked. The requisite period of notice may be reduced or waived by mutual consent."

(vi) In Clause 13 (a) - " Notwithstanding anything to the contrary herein contained the Company shall be at liberty to terminate this Agreement forthwith upon or at any time on the happening of any of the events following:

.....

.....

(vii) - If the Licensees shall be guilty of a breach of any of the covenants and stipulations on their part contained in this agreement. .....".

(vii) In Clause 15 - "Upon the revocation or termination of this Licence for any cause whatsoever the Licensees shall cease to have any rights whatsoever to enter or remain on the premises or to use the said facilities and shall be deemed to be trespassers if they continue to do so. Upon such termination or revocation either under clause 12 or Clause 13 hereof, if the Licensees or their servants and/or agents remain on the premises, the Company shall be at liberty to evict them by using such means as may be necessary and prevent them from entering upon the

licensed premises.";

(viii) In Clause 18 - " The Licensees hereby expressly agree and declare that nothing herein contained shall be construed to create any right other than the revocable permission granted by the company in favour of the Licensees in respect of the licensed premises/facilities strictly in accordance with the terms hereof. In particular nothing herein contained shall be construed to create any tenancy or other right of occupation whatsoever in favour of the Licensees."

20. It was therefore, submitted on behalf of the appellant that both the suits filed by the respondent were mis-conceived. Firstly, the respondent has approached the Court of Small Causes under the MRC Act for a declaration that it is the tenant of the appellant in respect of the structures, and a sub-tenant in respect of the land. In that suit itself the respondent has prayed for an order that the supply of petroleum products should be continued as an essential supply under Section 29 of the MRC Act. The Appellate Bench of the Court of Small Causes is right in vacating the mandatory direction given by the Single Judge of that Court to supply the petroleum products. Such an order could not be granted in those proceedings, and the Learned Single Judge of the High Court who heard was also correct in not entertaining Writ Petition No. 6689 of 2008 filed by the respondent.

21. The case of the appellant, however was that the appellant were right in challenging the other part of the order of the Appellate Bench of the Court of Small Causes wherein the bench had maintained the part of the order of status-quo passed by a Single Judge at that Court with respect to the possession of the respondent. The appellant had, therefore, rightly filed the abovereferred Writ Petition No. 8130 of 2008. According to the appellant, they had not let out the premises to the respondent, but had allowed the respondent only to sell appellant's petroleum products at a price fixed by the Ministry

of Petroleum from time to time. The manipulation in the dispensing unit effected by the respondent had led to the issuance of the show cause notice. The respondent had rushed to the Court of Small Causes even before the reply of the respondent could be considered by the appellant. By seeking an injunction in the Court of Small Causes, the respondent had restrained the appellant from taking any decision on the show cause notice, which decision the appellant has now taken after the impugned order was passed by the Learned Single Judge in Writ Petition No. 8130 of 2008, who has held that the civil action initiated by the respondent could not prevent the appellant from taking action in accordance with due process of law. That is why now the appellant has determined the respondent's licence by their letter dated 19.3.2009 and according to them that is sufficient compliance of the requirement of due process of law. According to the appellant, with this determination of agency, the action in accordance with the due process of law is complete and they can take the possession of the RPO, if required forcibly. According to them the emphasis of the Learned Single Judge on following the due process under the Public Premises Act was erroneous.

22. As against this submission of the appellant, it was submitted on behalf of the respondent that the suit in the Court of Small Causes was perfectly justified. Firstly, it was pointed out that all throughout, the respondent was described in the dealership agreement as a licensee of the premises. According to them, the monthly licence fee as described in Clause 2 (a) of the agreement was nothing but the rent for the premises excluding the municipal and government charges. The respondent relies upon clause 2 (b) of the dealership agreement which reads as follows:-

> " (b) The Licensees further agree to pay and discharge all rates, taxes, cesses, duties and other impositions and outgoings levied or imposed by the Municipality, Government or any other public body upon or

> in respect of the said premises and/ or the said facilities, provided that the Company shall pay the actual licence Fees payable to the Government for any Motor Spirit/ HSD Storage licence or licences required in connection with the said facilities under the Petroleum Act, 1934 and the Rules thereunder."

23. According to the respondent, the respondent falls within the definition of a tenant under Section 7 (15) of the MRC Act. They point out that in any case, it is not disputed that the respondent is in possession of the concerned premises as a licensee since prior to 1.2.1973 when similar such licensees in occupation of premises came be protected under Section 15 A of the then applicable Bombay Rents, Hotel and Lodging Houses, Rates Control Act 1947 (shortly called as Bombay Rent Act), which act has been since repealed and replaced by MRC Act and which protection has been continued under the MRC Act. The Bombay Rent act recognized such licensees as 'deemed tenants' under Section 15 A and they are covered under the definition of a tenant under Section 7 (15) (a) of the MRC Act.

Section 15 A of the Bombay Rent Act reads as follows:-

> "15A. Certain licensees in occupation on 1st February 1973 to become tenants-
>
> (1) Notwithstanding anything contained elsewhere in this Act or anything contrary in any other law for the time being in force, or in any contract where any person is on the 1st day of February 1973 in occupation of any premises, or any part thereof which is not less than a room, as a licensee he shall on that date be deemed to have become, for the purpose of this Act, the tenant of the landlord, in respect of the premises or part thereof, in his occupation.

(2) The provisions of sub-section (1) shall not affect in any manner the operation of sub-section (1) of section 15 after the date aforesaid]."

Section 7 (15) (a) of the MRC Act reads as follows:-

(15) *"tenant"* means any person by whom or on whose account rent is payable for any premises and includes,-

(a) such person,-

(i) who is a tenant, or

(ii) who is a deemed tenant, or

(iii) who is a sub-tenant as permitted under a contract or by the permission or consent of the landlord, or

(iv) who has derived title under a tenant, or

(v) to whom interest in premises has been assigned or transferred as permitted,

By virtue of, or under the provisions of, any of the repealed Acts;"

24. The respondent submitted that the order passed by the Learned Single Judge in Writ Petition No. 6689 of 2008 had confirmed the order passed by the Appellate Court which meant that the injunction granted by the Ld. Single Judge of the Court of Small Causes was continued and approved by a Judge of the High Court. It was submitted that it is true that the Leaned Single Judge did hold in Writ Petition No. 6689 of 2008, that the respondent could not seek an order for supply of petroleum products in the Court of Small Causes under Section 29 of the MRC Act. For that purpose the respondent has filed another suit in the City Civil Court at Mumbai. It was submitted by the respondent that both these suits and injunction granted by the

Court of Small Causes would become infructuous, if the appellant was allowed to remove the respondent only on determination of the dealership agreement. In any case, there was nothing wrong in the Learned Single Judge observing in the impugned order that the appellant ought to have resorted to the remedy under the Public Premises Act, whereunder the respondent will at least get an opportunity to defend its position, though in a forum chosen by the appellant.

25. We have noted the submissions of both the counsel. At the outset we must note that in the facts of this case there is no conflict between the two orders passed by the two Learned Single Judges. The Writ Petition No. 6689 of 2008 was filed by the respondent to challenge the order of the Appellate Bench of the Court of Small Causes to the extent it was against the respondent viz. that the respondent could not seek a direction for the petroleum supply in their proceeding in the Court of Small Causes. The grievance of the respondent in that writ petition was only with respect to that part of the order, and therefore, when the Learned Single Judge held that there was no reason to interfere with that order, the order will have to be read as confined to the grievance of the respondent raised before the Learned Judge. The part of the order of the Appellate Bench of the Court of Small Causes protecting the possession of the respondent was not under consideration in that Writ Petition which was filed by the respondent. Any observation by the Learned Single Judge in that order cannot be read as a determination on the correctness or otherwise of this part of the order which was not in challenge in that proceeding.

26. As far as the other part of the order of the Appellate Bench, protecting the possession of the respondent was concerned, the same was in challenge only before the other Learned Single Judge in Writ Petition No. 8130 of 2008. That was at the instance of the appellant. In that petition the Learned Single Judge has held that the pendency of the proceeding in

the Civil Court will not preclude the appellant from taking steps in accordance with due process of law, which according to the Learned Single Judge was taking steps under the Public Premises Act, if permissible.

27. When we consider all these aspects, we have to note that, even if the respondent is an agent of the appellant, the fact remains that he is in occupation of the concerned premises consisting of the rooms and the structures of the RPO situated on the particular plot of land since 1.4.1972. The appellant has authorized the respondent to be in occupation of this RPO by virtue of the dealership agreement between the parties. The respondent is not a trespasser. The 'Public Premises' are defined under the Public Premises Act as follows:-

SC. "2(e) " public premises" means -

(1) any premises belonging to, or taken on lease or requisitioned by, or on behalf of the Central Government, and includes any such premises which have been placed by that Government, whether before or after the commencement of the Public Premises (Eviction of Unauthorised Occupants) Amendment Act, 1980 (61 of 1980), under the control of the Secretariat of either House of Parliament for providing residential accommodation to any member of the staff of that Secretariat;

(2) any premises belonging to, or taken on lease by, or on behalf of -

(i) any company as defined in section 3 of the Companies Act, 1956 (1 of 1956), in which not less than fifty-one per cent of the paid up share capital is held by the Central Government or any company which is a subsidiary (within the meaning of that Act) of the first-mentioned company.

Unauthorised Occupation is defined under this Act

as follows:-

SC.2 (g) "unauthorized occupation", in relation to any public premises, means the occupation by any person of the public premises without authority for such occupation, and includes the continuance in occupation by any person of the public premises after the authority (whether by way of grant or any other mode of transfer) under which he was allowed to occupy the premises has expired or has been determined for any reason whatsoever."

28. The respondent is in occupation/control/charge of the premises right from 1.4.1972 and is very much claiming in the suit filed by them in the Court of Small Causes to be a tenant or a deemed tenant under the MRC Act. It is in this suit that he has obtained an interim order. In a challenge to that interim order the Learned Single Judge has permitted the appellant to take steps in accordance with the Public Premises Act by observing that the proceedings in the Civil Court will not hinder the appellant from taking steps under the Public Premises Act, if permissible. Thus, in fact to that limited extent the order of the Learned Single Judge takes care of the submission of the appellant viz. that the respondent's suit under the MRC is mis-conceived. Not only that, but the Learned Single Judge has also observed that the "order of status quo would operate only till the Competent Authority were to pass order of eviction against the respondent in respect to the suit premises". In fact what is also material to note, as quoted earlier in para 3 (b) of their reply, the appellant themselves had contended before the Court of Small Causes that the concerned premises are Public Premises within the meaning of Public Premises (Eviction of Unauthorised Occupants) Act, 1971. In the present Special Leave Petition also the same is reiterated by them in the list of dates by stating that in May 2008, they filed the aforesaid reply to the interim application in the Court of Small Causes wherein they took the aforesaid legal position.

29. This being the position it is not possible for this Court

to find any fault with the impugned order passed by the Learned Single Judge viz. that it will be open to the respondent to take steps in accordance with the Public Premises Act which will be the due process of law, and not by any force. The termination of the dealership agreement by the appellant will render the occupation of the premises by the respondent to be unauthorised one and it will be open to the respondent to take further steps to take possession thereof though only in accordance with the due process of law. This much minimum protection has to be read into the relationship created between the parties under the clauses of the agreement noted earlier. Besides, an opportunity of being heard in a situation which affects the civil rights of an individual has to be implied from the nature of the functions to be performed by the public authority which has the power to take punitive or the damaging actions as held by a Constitution Bench of this Court in *Maneka Gandhi v. Union of India* reported in [1978 (1) SCC 248].

30. It was submitted on behalf of the appellant that in the event the respondent does not vacate the premises in spite of the termination of the agreement of dealership, the appellant will be entitled to use force to remove them, if necessary. The appellant relied upon the observations in para 85 of the judgment in Bishna Alias *Bhiswadeb Mahato and Others Vs. State of West Bengal* reported in [2005 (12) SCC 657]. It was a criminal case wherein among other submissions the accused had submitted that they had exercised the right of private defence as regards their property leading to the incidents. In this context, it was observed in the referred paragraph 85 as follows: -

> "85. Private defence can be used to ward off unlawful force, to prevent unlawful force, to avoid unlawful detention and to escape from such detention. So far as defence of land against the trespasser is concerned, a person is entitled to use necessary and moderate force both for preventing the trespass or to eject the trespasser.

> For the said purposes, the use of force must be the minimum necessary or reasonably believed to be necessary. A reasonable defence would mean a proportionate defence. Ordinarily, a trespasser would be first asked to leave and if the trespasser fights back, a reasonable force can be used."

To say the least, the submission based on this paragraph is totally untenable. By no stretch of imagination the respondent can be called a trespasser into the concerned premises. The respondents have been permitted to occupy the premises under the dealership agreement and have been so occupying it under the agreement with the appellant since 1st April 1972. A Submission coming from a public authority in this fashion is totally unacceptable and deserves to be rejected.

31. The appellant had relied upon the judgment in *Southern Roadways Ltd., Madurai Vs. S.M. Krishnan* (supra) to contend that the respondent can not claim any kind of possessory right in the premises wherein the respondent was working as an agent. There can not be much dispute with the proposition though what is material to be note is that in that case the appellant had taken a godown on lease and the respondent was put in possession for carrying on his agency business with the appellant. The appellant had terminated the agency on coming to know about the mismanagement of the business and wanted to take the possession of the godown. On being prevented, the appellant had filed a suit for a declaration of their right of carrying on business in the concerned premises and sought an injunction therein, initially in the Madras High Court and subsequently in the SLP in this Court. The appellant had not resorted to any use of force. While granting the injunction the aforesaid observations have been made.

32. In *Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others* (supra), the respondent was appointed as a distributing agent of the gas cylinders in Amritsar. On

receiving the complaints about the working of the distributorship, the appellant had terminated the agency. Thereupon the respondent had moved the Civil Court whereas the appellant had sought arbitration which was granted by this Court and it was in that context that this Court has observed that on termination of the agency the only relief which could have been granted was to seek compensation for loss of earning. The method of taking the possession was not involved in either of the two cases. In neither of the two cases the possession was sought to be taken by force.

33. It is instructive to note in this behalf that in *Olga Tallis Vs. Bombay Municipal Corporation* [AIR 1986 SC 180] the question was with respect to the eviction of the hutment dwellers from the footpaths of Mumbai. Section 314 of the Bombay Municipal Corporation Act provided that the Municipal Commissioner may, without notice, cause an encroachment to be removed. It was submitted on behalf of Municipal Corporation that the footpath dwellers can be removed by use of force and even without a notice. In the judgment of the Constitution Bench, this Court held that though the section did not specifically make it mandatory, issuance of a notice was a minimum requirement. It was submitted on behalf of Municipal Corporation that the hutment dwellers can not have any defence. The relevant observations of this Court in paragraph 47 of the judgment (as reported in AIR 1986 SC Page 180) based on authorities are as follows:-

> "The proposition that notice need not be given of a proposed action because, there can possibly be no answer to it, is contrary to the well-recognized understanding of the real import of the rule of hearing.——-
>
> ——Both the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome; these rights to interchange express the elementary idea that to be a person, rather than a thing, is at least to be consulted about what is done with

> one."

34. This was the approach of this Court where the notice was not mandatory in the case of occupiers of footpaths. This Court held that issuance of a notice and affording of an opportunity was a minimum requirement. In the present case as stated above, the respondents are occupying the premises, may be as an agent of the appellant, right from the 1st April 1972. According to the appellant the respondent have no authority to remain on the premises after the dealership agreement is terminated. As against that the respondent has contended that respondent is a tenant and in any case a 'deemed tenant' of the premises. The respondent has moved the Court of Small Causes for the declaration and has obtained an order of status-quo. That order presently survives and is not set aside though the Learned Single Judge has observed in the impugned order that the order of status-quo would operate only till the competent authority passes the order of eviction. The respondents have not challenged this order either by filing a Special Leave Petition or by filing any cross objections in the present appeal, and therefore it binds them. In the circumstances of the present case, the Learned Single Judge has permitted the appellant to proceed against the respondent under the Public Premises Act on the footing that after the termination of the dealership agreement the occupation would be unauthorised. He has rightly observed that the pendency of the proceeding in the Civil Court can not preclude the appellant from taking recourse to recovery of the possession of the suit premises by following due process of law including by resorting to action under the provisions of Public Premises Act, if permissible. He has, however, made it clear that in any case possession can not be obtained by force. In our view, there is no reason for this Court to take any different view. The respondent has to be afforded an opportunity of being heard, may be in the forum of the appellant, and only after obtaining an order from the competent authority the respondent can be evicted.

35. It is true that in *Southern Roadways Limited* (supra) this Court did observe in paragraph 22 that the possession of the respondent in that case was on behalf of the company and not on his own right. And therefore, it was not necessary for the company to file a suit for the recovery of possession. Those observations will have to be read as laying down the law in the fact situation which emerged in that case and would apply to similar situations. The issue with respect to the premises of a Public Corporation did not arise in that matter. Besides, in the facts of the case before us, amongst others the respondent had raised the issue with respect to the nature of his licence to remain on the premises, and had also sought the protection which was available to the licencee in occupation of the premises prior to 1.2.1973. Whether the respondent was right in that contention or not is not for this Court to determine. It is for the appropriate authority to decide. That is the minimum opportunity which will be required to be provided to the respondent in the facts of the present case, when he is in occupation of the concerned premises for nearly 40 years. It is also relevant to note that even on the footing of being an agent, apart from the right to receive the compensation in a situation which could be placed under Section 205 of the Contract Act, the agent also has the right to remain on the property of the principal under Section 221 of the Contract Act, for the reliefs which are available under that section if he makes out such a case. It is another matter that as stated above the respondent has placed his case on a higher pedestal, but even on the basis that he is a mere agent, he does have certain rights under Sections 205 and 221 of the Contract Act, and para 13 of *Southern Roadways Limited* (supra) specifically recognizes that. This being the position it cannot be said that the respondent does not deserve even an opportunity of being heard. What are the relevant terms of the agreement between the parties, what is their true connotation and what order could be obtained by the appellant against the respondent, or what relief at the highest the respondent would be entitled to, will have be considered and decided before an appropriate forum.

36. It is also relevant to note that all throughout the respondent has contended that respondent has been in exclusive possession of the premises concerned, and all the employees on the premises are that of the respondent. Even in the first suit filed in the court of small causes, respondent has pointed out that there was a problem with respect to the dispensing unit once in the past in year 2002, and in consultation with the petitioner the respondent took corrective measures. The reports all throughout thereafter have been satisfactory and the respondent has relied upon a voluminous correspondence in that behalf in paragraphs 33 to 60 of the plaint filed in the court of small causes. In the third suit bearing No. 706 of 2009 challenging the termination of the licence filed in the City Civil Court Mumbai, the respondent has specifically pleaded in paragraph 69 that the termination was without any reasons and was contrary to public policy, and was violative of Article 14 of the Constitution of India. In paragraph 77, respondent has specifically submitted that a technical fault in the machine cannot amount to manipulation and that apart it was not a case of adulteration. All these submissions of the respondent require a determination. An opportunity of being heard is something minimum in the circumstances. The proceedings before the authority under the Public Premises Act is an expeditious proceeding and that is something minimum in the circumstances. A Public Corporation from which a higher standard is expected, cannot refuse to follow this much minimum due process of law.

37. In the circumstances we have no reason to interfere with the order passed by the Learned Single Judge. We, however, make it clear that the observations made above are for the purposes of deciding the correctness or otherwise of the impugned order passed by the Learned Single Judge and not on the merit of the rival claims. We make it very clear that in the event the appellant takes the steps under the Public Premises Act, it will be open to the respondent to plead their case before the competent authority on all counts, though it will

also be open to the competent authority concerned to take its own decision on the merits of the rival contention on facts as well as on law.

38. This appeal is, therefore, dismissed though there will be no order as to costs.

O R D E R

Leave granted.

In view of the divergence in views, the Registry is directed to place the matter before the Hon'ble Chief Justice of India for placing the matter before a larger Bench.

N.J. Matter referred to larger Bench.

MILIND SHRIPAD CHANDURKAR
v.
KALIM M. KHAN & ANR.
(Criminal Appeal No. 643 of 2011)

MARCH 3, 2011

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

Negotiable Instruments Act, 1881 – ss.138 and 142 – Complaint u/s. 138 – Locus standi of the complainant – Respondent no.1 issued cheque in favour of proprietary firm towards discharge of a pre-existing legal liability – Cheque dishonoured – Appellant claimed to be proprietor of the said proprietary firm – He filed complaint against respondent no.1 u/s.138 – Both trial court and appellate court convicted respondent no.1 – High Court, however, set aside the conviction on the ground that appellant could not produce any evidence to establish that he was proprietor of the proprietary concern in question and, thus, he had no locus standi to file the complaint – Justification – Held: Justified – A person can maintain a complaint u/s.138, provided he is either a "payee" or "holder in due course" of the cheque – In a case of this nature, where the "payee" is a company or a sole proprietary concern, such issue cannot be adjudicated upon taking any guidance from s.142 but the case shall be governed by the general law i.e. the Companies Act 1956 or by civil law where an individual carries on business in the name or style other than his own name – In such a situation, he can sue in his own name and not in trading name, though others can sue him in the trading name – It is evident that the firm in question was the "payee" of the cheque and the appellant could not claim to be the "payee", nor could he be the "holder in due course", unless he established that the cheques had been issued to him or in his favour or that he was the sole proprietor of the firm and being so, he could also be payee himself and

thus, entitled to make the complaint – The appellant failed to produce any documentary evidence to connect himself with the said firm, nor made any attempt to adduce any additional evidence at the appellate stage, in spite of the fact that the respondent raised this issue from the initial stage.

The appellant claimed to be the sole proprietor of the Firm, namely, Vijaya Automobiles, which had the business of supplying fuel. The firm had supplied a huge quantity of diesel to respondent no.1. In order to meet the liability, respondent no.1 made payment vide Cheque in the name of the said proprietary Firm for an amount of Rs.7,00,000/-. The appellant deposited the said cheque in the bank account of the said Firm. The Bank returned the said cheque mentioning "unpaid" with a Memorandum "funds are insufficient". The appellant sent notice which stood served upon respondent no.1. The respondent no.1 neither replied to the notice, nor made payment within 15 days of receipt of the notice.

The appellant thereafter filed a complaint case before the Judicial Magistrate under section 138 of the Negotiable Instruments Act, 1881. The trial Court convicted respondent no.1 to suffer simple imprisonment till rising of the court and to pay compensation of Rs.7,10,000/- and in default of payment thereof, to suffer simple imprisonment for six months. Aggrieved, respondent no.1filed criminal appeal. The Sessions Judge reduced the amount of compensation from Rs.7,10,000/- to Rs.7,00,000/-. Still aggrieved, respondent no.1 preferred Criminal Revision application. The High Court allowed the application on the ground that the appellant could not produce any evidence to establish that he was the sole proprietor of the proprietary concern in question and, thus, he had no locus standi to file the complaint. Hence, the present appeal.

Dismissing the appeal, the Court

HELD:1.1. It is evident from the facts and circumstances of the case that the appellant/complainant could not produce any document to show that he was the proprietor of Vijaya Automobiles in spite of the fact that the issue had been agitated by the respondent no.1/ accused at every stage. It is also evident from the documents on record that in the list of witnesses, the complainant had mentioned the name of his banker as a witness, however, the said banker was not examined. Significantly, the appellant did not make any attempt to adduce additional evidence at the appellate stage also. No document was ever filed to substantiate his averment in this regard. [Paras 16, 17] [707-B-D]

1.2. A person can maintain a complaint under Section 138 of the Negotiable Instruments Act, 1881, provided he is either a "payee" or "holder in due course" of the cheque. Section 7 of the Act defines "Payee" as the person named in the instrument, to whom or to whose order the money is by the instrument directed to be paid. Section 8 defines "the holder of the cheque" as any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto. Section 9 defines "holder in due course" as any person who for consideration became the possessor of a cheque if payable to a bearer or the payee or endorsee thereof. In a case of this nature, where the "payee" is a company or a sole proprietary concern, such issue cannot be adjudicated upon taking any guidance from Section 142 of the Act (which provides for taking cognizance of the offence) but the case shall be governed by the general law i.e. the Companies Act 1956 or by civil law where an individual carries on business in the name or style other than his own name. In such a situation, he can sue in his own name and not in trading name, though others can sue him in the trading name. So far as Section 142 is concerned, a complaint shall be

maintainable in the name of the "payee", proprietary concern itself or in the name of the proprietor of the said concern. [Paras 22, 18, 20] [709-C; 707-D-E; 708-C-D]

1.3. In the instant case, it is evident that the firm, namely, Vijaya Automobiles, has been the payee and that the appellant cannot claim to be the payee of the cheque, nor can he be the holder in due course, unless he establishes that the cheques had been issued to him or in his favour or that he is the sole proprietor of the concern and being so, he could also be payee himself and thus, entitled to make the complaint. The appellant miserably failed to prove any nexus or connection by adducing any evidence, whatsoever, worth the name with the said firm, namely, Vijaya Automobiles. Mere statement in the affidavit in this regard, is not sufficient to meet the requirement of law. The appellant failed to produce any documentary evidence to connect himself with the said firm. It is evident that the firm had a substantial amount of business as in one month it sold the diesel to respondent no. 1 – a single party, for a sum of Rs. 7 lakhs. The appellant would, in addition, have also been carrying out business with other persons. Thus, a person with such a big business must have had transactions with the bank and must have been a payee of income tax, sales tax etc. Thus, in such a fact-situation, there would be no dearth of material which could have been produced by the appellant to show that he was the sole proprietor of the said firm. The appellant failed to adduce any evidence in this regard, nor made any attempt to adduce any additional evidence at the appellate stage, in spite of the fact that the respondent is raising this issue from the initiation of the proceedings. In view of the above, there is no cogent reason to interfere with the impugned judgment and order of the High Court. [Paras 23, 24] [709-D-H; 710-A-B]

Shankar Finance and Investments v. State of Andhra Pradesh &Ors. **(2008) 8 SCC 536;** *Janki Vashdeo Bhojwani v. Indusind Bank Ltd.* **(2005) 2 SCC 217;** *National small Industries Corporation Ltd. v. State (NCT of Delhi) & Ors.* **(2009) 1 SCC 407 – relied on.**

Case Law Reference:

(2008) 8 SCC 536	**relied on**	**Para 20**
(2005) 2 SCC 217	**relied on**	**Para 20**
(2009) 1 SCC 407	**relied on**	**Para 21**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 643 of 2011.

From the Judgment & Order dated 18.2.2008 of the High Court of Judicature at Bombay in Criminal Revision Application No. 656 of 2007.

WITH

SLP (Crl.) Nos. 3122 & 3124 of 2008.

Shekhar Nafade, Shankar Chillarge, AAG, Satyajit A. Desai, Prashant R. Dahat, Somanath Padhan, Anagha S. Desai, Viraj Kadam, Pinaki Addy, Suhas Kadam, D.M. Nargolkar, Asha Nair, Ravindra Keshavrao Adsure for the appearing parties.

The Judgment of the Court was delivered by

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

2. This appeal has arisen out of judgment and order dated 18.2.2008 passed by the High Court of Judicature at Bombay in Criminal Revision No.656 of 2007 by which the High Court has set aside the judgments and orders of the trial Court as well as of the Appellate Court convicting the respondent no.1

for the offences punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter called the Act 1881) and sentencing him for the period, till the rising of the Court and to pay compensation of a sum of Rs.7,00,000/-. Failing which, the respondent would serve simple imprisonment for a period of six months.

3. The facts and circumstances giving rise to this case are that the appellant/complainant claimed to be the sole proprietor of the Firm, namely, Vijaya Automobiles, which had the business of supplying fuel. The firm had supplied a huge quantity of diesel to respondent no.1 in the month of March 2005. In order to meet the liability, the Respondent no.1 made the payment vide Cheque No.490592 dated 28.4.2005 in the name of the said proprietary Firm drawn on Development Credit Bank, Kurla Branch, Bombay for an amount of Rs.7,00,000/- (Rupees seven lakhs only). The appellant/complainant deposited the said cheque in the account of the said Firm in Bank of India Uran Branch on 12.9.2005.

4. The Development Credit Bank returned the said cheque mentioning "unpaid" with a Memorandum "funds are insufficient". The appellant/complainant sent notice dated 11.10.2005 by Registered A.D. post as well as under certificate of posting. The respondent no.1/accused did not accept the notice sent by Registered A.D. post. However, the notice sent by certificate of posting stood served upon him as the respondent no.1 admitted the said fact in his statement under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter called Cr.P.C.). The respondent no.1/accused n ither replied to the notice, nor made the payment within 15 days of the receipt of the notice.

5. The appellant/complainant filed a complaint case no.545 of 2005 before the Judicial Magistrate, First Class, Uran under section 138 of the Act 1881 on 22.11.2005. The case was tried, however, the respondent no.1/accused did not enter the witness box and after considering the case, the trial Court vide

judgment and order dated 22.12.2006 concluded the trial convicting the respondent no.1 to suffer simple imprisonment till rising of the court and to pay compensation of Rs.7,10,000/- and in default of payment thereof, to suffer simple imprisonment for six months. It was directed that out of the aforesaid amount of compensation, a sum of Rs.10,000/- be credited to Raigad District Legal Aid Committee.

6. Being aggrieved of the aforesaid judgment and order, the respondent no.1/accused filed Criminal Appeal No.85 of 2006. The learned Sessions Judge vide judgment and order dated 18-19/9/2007 dismissed the said appeal, with the amount of compensation being reduced from Rs.7,10,000/- to Rs.7,00,000/-. Thus, the direction to credit the amount of Rs.10,000/- to Raigad District Legal Aid Committee was set aside.

7. Being aggrieved, respondent no.1 preferred Criminal Revision Application No.656 of 2007 before the High Court which has been allowed vide judgment and order dated 18.2.2008 (impugned) only on the ground that the appellant could not produce any evidence to establish that he was the sole proprietor of the proprietary concern in question. Hence, this appeal.

8. We have heard Shri Shekhar Naphade, learned senior counsel for the appellant, Shri Viraj Kadam, learned counsel for respondent no.1 and Shri Shankar Chillarge, Additional Advocate General for respondent no.2 and perused the record.

All the three courts below have dealt with the issues elaborately and recorded the following findings of fact:-

(i) The cheque had been issued by the respondent no.1 in favour of the Firm concerned towards discharge of pre-existing liability and not as security.

(ii) The substantive sentence of imprisonment in default of payment could be imposed.

So far as the findings on the aforesaid two issues are concerned, the same are not under challenge before us. Learned counsel appearing for the respondents have accepted the aforesaid findings.

9. The only issue involved herein is as to whether the appellant owns the said firm i.e., whether he is the proprietor of the said firm? The trial Court as well as the Appellate Court have held that a sole proprietary concern is no independent legal entity and its identity remains inseparable from its proprietor. But it merely remains a legal proposition. None of the said courts held that the appellant was the sole proprietor of the said firm.

10. The High Court has set aside the judgments of the trial Court as well as the Appellate Court in Revision only on the ground that as the appellant did not produce any evidence to show that he was the proprietor of the Firm, he had no locus standi to file the complaint.

11. The trial Court held that the complainant had deposed that he was proprietor of the Firm, namely, "Vijaya Automobiles" which had the business of supplying fuel etc. and the Firm had supplied the fuel on credit to respondent no.1/accused. The Court also took note of the pleadings taken by the respondent no.1/accused that he had given the cheque to the appellant for Vijaya Automobiles but it was as a security and not to meet any legal liability. Therefore, the respondent no.1/accused had admitted that the appellant had actual control over the said firm. The respondent no.1/accused admitted his signature on the cheque and execution of the cheque. Therefore, the presumptions under sections 118 and 139 of the Act 1881 were attracted.

12. Dealing with the issue involved herein, the Appellate Court has noted that perusal of the cross-examination indicated that the appellant did not produce any documentary evidence to show that he was the proprietor of Vijaya Automobiles.

Rather it was admitted by the appellant in the cross-examination that he did not have any documentary evidence to show that the complainant was the owner of the petrol pump.

13. In spite of making the aforesaid observations, the appeal was dismissed on the ground that admittedly diesel had been supplied to the respondent no.1/accused, and the said respondent had issued the cheque to meet the liability, which could not be encashed for want of funds. All other requirements in law, i.e., issuance of notice etc. also stood completed.

14. Relevant part of the affidavit filed by the appellant/complainant before the trial Court reads as under:

> "I, Shri Milind Shripad Chandurkar, Aged about 37 years, Indian Inhabitant, Occ. Business, Proprietor of M/s. Vijay Automobiles, having address at Sector-29, Dronagiri Node, Uran, Dist. Raigad, take oath and state on solemn affirmation as under…..
>
> I state that in due discharge of legal liability of the accused as mentioned in foregoing paras, the accused issued one cheque dtd. 28.4.2005 in my name i.e. in the Name M/s. Vijaya Automobilies which was drawn on Development Credit Bank, Kurla Branch, Mumbai-70 bearing Cheque No.490592, for Rs.7,00,000/- (Rupees Seven Lakhs only)."

Relevant part of his cross-examination reads as under:-

> "It is true that till today I had not produced any documentary evidence to show that I am owner of Vijaya Automobiles……Till today I had not produced any documentary evidence to support."

15. The complainant had also examined Shri S.K. Sharma, owner of M/s. Vikas Travels under whom the respondent no.1 had been working as a sub-contractor. In his cross-examination, Shri S.K. Sharma also stated as under:-

"I have no documentary evidence to show that complainant Milind Shripad Chandurkar owns the petrol pump."

16. Thus, from the above, it is evident that the appellant/complainant could not produce any document to show that he was the proprietor of Vijaya Automobiles in spite of the fact that the issue had been agitated by the respondent no.1/accused at every stage. It is also evident from the documents on record that in the list of witnesses the complainant had mentioned the name of his banker as a witness, however, the said banker was not examined.

17. It may also be pertinent to mention here that appellant did not make any attempt to adduce additional evidence at the appellate stage also. No document has ever been filed to substantiate his averment in this regard.

18. Section 7 of the Act 1881 defines "Payee" as the person named in the instrument, to whom or to whose order the money is by the instrument directed to be paid. Section 8 defines "the holder of the cheque" as any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto. Section 9 defines "holder in due course" as any person who for consideration became the possessor of a cheque if payable to a bearer or the payee or endorsee thereof.

Section 138 provides for penalties in case of dishonour of certain cheques for insufficiency of funds in the accounts. However, exception contained in clause (c) thereof reads as under:

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

19. Section 142 provides for taking cognizance of the

offence notwithstanding anything contained in Cr.P.C. which reads as under:

"(a) no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque." (Emphasis added)

20. This Court in *Shankar Finance and Investments v. State of Andhra Pradesh & Ors.,* (2008) 8 SCC 536, dealt with the issue involved herein elaborately and held that where the "payee" is a proprietary concern the complaint can be filed (i) by the proprietor of the proprietary concern describing himself as the sole proprietor of the "payee"; (ii) the proprietary concern describing itself as the sole proprietary concern represented by its proprietor; and (iii) the proprietor or the proprietary concern represented by the Attorney Holder under the power of attorney executed by the sole proprietor. However, it shall not be permissible for an Attorney Holder to file the complaint in his own name as if he was the complainant. He can initiate criminal proceedings on behalf of the principal.

In a case of this nature, where the "payee" is a company or a sole proprietary concern, such issue cannot be adjudicated upon taking any guidance from Section 142 of the Act 1881 but the case shall be governed by the general law i.e. the Companies Act 1956 or by civil law where an individual carries on business in the name or style other than his own name. In such a situation, he can sue in his own name and not in trading name, though others can sue him in the trading name. So far as Section 142 is concerned, a complaint shall be maintainable in the name of the "payee", proprietary concern itself or in the name of the proprietor of the said concern.

The Court placing reliance on earlier judgments, particularly, in *Janki Vashdeo Bhojwani v. Indusind Bank Ltd.,* (2005) 2 SCC 217, held that the general principles of company law or civil law would apply for maintaining the complaint under

Section 138 of the Act 1881.

21. In *National small Industries Corporation Ltd. v. State (NCT of Delhi) & Ors.,* (2009) 1 SCC 407, this Court held as under:

> "The term "complainant" is not defined under the Code. Section 142 of the NI Act requires a complaint under Section 138 of that Act to be made by the payee (or by the holder in due course)…"

22. Thus, in view of the above, the law stands crystallised to the effect that a person can maintain a complaint provided he is either a "payee" or "holder in due course" of the cheque.

23. In the instant case, it is evident that the firm, namely, Vijaya Automobiles, has been the payee and that the appellant cannot claim to be the payee of the cheque, nor can he be the holder in due course, unless he establishes that the cheques had been issued to him or in his favour or that he is the sole proprietor of the concern and being so, he could also be payee himself and thus, entitled to make the complaint. The appellant miserably failed to prove any nexus or connection by adducing any evidence, whatsoever, worth the name with the said firm, namely, Vijaya Automobiles. Mere statement in the affidavit in this regard, is not sufficient to meet the requirement of law. The appellant failed to produce any documentary evidence to connect himself with the said firm. It is evident that the firm had a substantial amount of business as in one month it sold the diesel to respondent no. 1 – a single party, for a sum of Rs. 7 lakhs. The appellant would, in addition, have also been carrying out business with other persons. Thus, a person with such a big business must have had transactions with the bank and must have been a payee of income tax, sales tax etc. Thus, in such a fact-situation, there would be no dearth of material which could have been produced by the appellant to show that he was the sole proprietor of the said firm. The appellant failed to adduce any evidence in this regard, nor made any attempt to

adduce any additional evidence at the appellate stage, in spite of the fact that the respondent is raising this issue from the initiation of the proceedings.

24. In view of the above, we do not see any cogent reason to interfere with the impugned judgment and order of the High Court. The appeal is devoid of any merit and, accordingly, dismissed.

B.B.B. Appeal dismissed.

OMNIA TECHNOLOGIES P. LTD.
v.
W.M.A. VAN LOOSBROEK
(Arbitration Petition No.10 of 2010)

MARCH 3, 2011

[T.S. THAKUR, J.]

ARBITRATION AND CONCILIATION ACT, 1996:

ss.11(6) and (9) – Petition for appointment of arbitrator – HELD: In view of consent of respondent, all disputes including existence of arbitrable disputes, referred to the sole arbitrator, nominated.

An agreement was entered into between the parties on 14.1.2008 whereby the petitioner, an Indian company, appointed the respondent, a Dutch citizen, as its marketing representative to promote sale of its products in European market. The agreement was terminated by the parties in terms of another agreement dated 29.2.2008. The Indian company filed the instant petition u/ss 11(6) and (9) of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator contending that the respondent committed violation of original agreement as the obligation cast upon him under clause 13 thereof was not discharged by him which gave rise to arbitrable disputes. The respondent filed counter affidavit. Ultimately, the respondent consented to the appointment of an arbitrator for adjudication of all issues including the existence of arbitrable disputes by the arbitrator so appointed.

Allowing the petition, the Court

HELD: All disputes between the parties relating to

and arising out of agreement dated 14-1-2008 and termination agreement dated 29-2-2008 including Clause 4 thereof are referred to the sole Arbitrator nominated. The parties are directed to appear before the Arbitrator on 2-4-2011. [para 7] [716-G-H]

CIVIL APPELLATE JURISDICITION : Arbitration Petition No.10 of 2010.

Under Section 11 (6) and (9) of the Arbitration & Conciliation Act, 1996.

Deepak Dhingra, (for Animesh K. Sinha), Nikhil Jain for the Petitioner.

U.U. Lalit, Ugen Tashi Bhuita, T. Sunder Ramanathan (for M. P. Devanath for the Respondent.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. The respondent is a Dutch citizen. He entered into an agreement dated 14th January, 2008 with the petitioner-company whereby the latter appointed him as its marketing representative to promote sale of RFID Tags and Components manufactured by the petitioner-company in European market. Clause (1) of the agreement executed between the parties stipulated the terms on which the respondent was to work as the petitioner's representative. It reads:

> "1. OMNIA does hereby appoint PIM as its Representative for Europe, and PIM hereby accepts the aforesaid appointment, upon the following terms:
>
> (a) PIM would market the Products manufactured by OMNIA, on an exclusive basis, to his clients in Europe, and would be responsible for obtaining the

business in the nature of contracts, for supply by OMNIA.

(b) PIM would be the front-end, dealing with the clients in Europe, and OMNIA would be introduced as the Indian Parent Company.

(c) In all situations, PIM would be required to introduce the two parties to this Agreement, as a single entity, responsible for managing clients/prospective clients in the whole of Europe.

(d) All proposals, documentation submitted, would be in the name of OMNIA as the Indian Parent Company, with PIM being reflected as Sole Representative in Europe."

2. The agreement in Clauses 2 and 3 thereof set out the obligations which the respondent was to discharge and those to be discharged by the petitioner. Other conditions like remuneration etc. were also stipulated by the agreement including obligations cast upon the parties after termination of the agreement. Clause 13 of the agreement relevant in this regard, reads:

"13. Obligations Upon Termination

(a) The termination of this agreement shall not affect any liability of either party to the other, accruing prior to the date of termination, or arising out of this agreement.

(b) Upon termination, PIM agrees to immediately discontinue the use of any trademarks or trade names in whole or in part belonging to OMNIA.

(c) After termination PIM shall not represent, and shall not continue any practices, which might take it, appear, that he is still an authorized OMNIA agent

and shall permanently discontinue any use of the word "OMNIA" thereform, all without any expenses to OMNIA.

(d) PIM shall return all manuals, informational materials, instruction booklets, and all data and information in printed form or stored in floppies, CD-ROMS, computer diskettes, or in any other version or medium that was given by OMNIA pursuant to this agreement, immediately on termination of this agreement. Electronic mail messages are excluded. PIM shall destroy or render unusable all other proprietary material and copies thereof, which for any reason cannot be delivered to OMNIA. In such event, PIM shall certify in writing to OMNIA that all proprietary material has been delivered to OMNIA or destroyed and that PIM has discontinued use of the same.

(e) Both the parties agree to fulfill all obligations to each other under all the work orders in force at the time of termination of this agreement until the completion of the services specified in the work orders."

3. It is common ground that the agreement in question was terminated by the parties in terms of another agreement dated 29th February, 2008 executed between the parties. This termination purported to be in conformity with the provisions of Clause 11 of the Original Agreement. The Petitioner-company's case in the present petition under Section 11(6) and (9) of the Arbitration and Conciliation Act, 1996 is that the respondent has committed a violation of the Original Agreement inasmuch as obligations cast upon the respondent under clause 13 of the agreement (supra) have not been discharged by the respondent thereby giving rise to disputes that are in terms of Clause 15 of the original agreement arbitrable. The petitioner-company appears to have invoked the arbitration clause and

asked for appointment of an Arbitrator but since the respondent refused to do the needful, the petitioner has filed the present petition and prayed for the appointment of an independent Arbitrator to adjudicate upon the said disputes.

4. Respondent has appeared and filed a counter-affidavit in which it was, inter alia, asserted that there is no subsisting 'arbitrable' disputes to call for the appointment of an Arbitrator. The respondent has in this regard relied upon Clause 4 of the termination agreement which reads as under:

> "4. Subject to the signing of this termination agreement by the parties, the parties hereby grant each other full and final discharge from all claims, rights and obligations arising out of or relating to the termination of the Representative Agreement. The parties acknowledge that thereafter no claims, rights or obligations will remain existing on whatever ground or whatever relation between the parties in respect of the issue at hand.
>
> This termination agreement constitutes the entire agreement and understanding between the parties."

5. When this petition came up for hearing before me on 15th November, 2010, it was pointed out to learned counsel for the respondent that in case this Court was to pronounce upon the effect of Clause 4 of the termination agreement finally and further in case this Court were to hold that Clause 4 did not prevent the petitioner from raising the disputes regarding post-termination obligations of the parties, the Arbitrator appointed by this Court shall have no option but to fall in line and accept that determination as final and binding on the parties. Learned counsel for the respondent was, therefore, asked to take instructions whether interpretation of Clause 4 which was by itself a disputed matter and requires to be adjudicated upon, could be left to be determined by the Arbitrator. Learned counsel for the respondent has, in response

filed a letter consenting to the appointment of an Arbitrator for adjudication of all issues including the existence of arbitrable disputes by the Arbitrator so appointed. The relevant portion of the letter filed on behalf of the respondent is as under:

> "In this connection, learned Senior Advocate Mr. U.U. Lalit had mentioned the subject arbitration petition on Friday February 4, 2011 before Hon'ble Justice T.S. Thakur in Court No.8 and informed the Hon'ble Court that the Respondent has consented to the appointment of the arbitrator by the Hon'ble Supreme Court of India and further consented to raising all issues including the existence of the arbitral dispute before the appointed arbitrator.
>
> As the power of attorney holder of the respondent is not in the country, I, the Advocate on Record of the Respondent after having taken instructions would like to place on record through this letter that
>
> (a) The Respondent has consented to the appointment of arbitrator
>
> (b) the Respondent has consented to raising all the issues including the existence of the arbitral dispute before the said arbitrator."

6. In the light of the above I see no reason why the present petition cannot be allowed and all disputes including the dispute regarding interpretation and effect of Clause 4 of the termination agreement referred for adjudication by arbitration.

7. I accordingly allow this petition and refer all disputes between the parties relating to and arising out of agreement dated 14th January, 2008 and termination agreement dated 29th February, 2008 including Clause 4 thereof to the sole Arbitration Mr. Justice Anil Dev Singh, former Chief Justice of Rajasthan High Court. The parties are directed to appear before the nominated Arbitrator on 2nd April, 2011. The

Arbitrator shall be free to fix his fee and charges and the ratio in which the same shall be paid by the parties. Registry shall forthwith forward a copy of this order along with a copy of the petition to the worthy Arbitrator for information and necessary action.

R.P. Arbitration Petition allowed.

M/S. KUMAON SEEDS COPRN. & ORS.

v.

KRISHI UTPADAN MANDI SAMITI, KASHIPUR & ORS.

(Civil Appeal No(s). 3630 of 2007)

MARCH 03, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964 – Certified seeds – Market fee – Levy of – Issuance of show cause notices by market Committee to dealer in certified seeds with regard to imposition of market fee on seeds – Suits filed challenging the show cause notices – Dismissed by High Court – On appeal, held: High Court while dealing only with the validity of the show cause notices made certain observations even on merits of the matter, which was not justified – After the High Court upheld the validity of the show cause notices, the Market Committee did not fix any date, time and place for the hearing of the dealers in response to the show cause notices but straightaway proceeded to issue notices directing the dealers to pay the market fee on certified seeds which was not justified – There was violation of the principles of natural justice – Thus, such notices set aside – Market Committees permitted to issue fresh notices to the dealers fixing the date, time and place for the hearing to the show cause notices and on that date they can file their response and any other material which they wish to produce and only thereafter, the Market Committees can decide the matter by a reasoned order – Principles of natural justice.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3630 of 2007 etc.

From the Judgment & Order dated 07.07.2005 of the High Court of Judicature of Utaranchal, at Nainital, in First Appeal No. 1073 of 2001.

WITH

Civil Appeal No. 3631 of 2007.

P.S. Patwalia, Vibha Datta Makhija for the Appellants.

Sudhir Chandra, Rachana Srivastava for the Respondents.

The following order of the Court was delivered

O R D E R

Heard learned counsel for the appearing parties.

These Appeals have been filed against the impugned common judgment of the High Court of Uttarachal (Now, the High Court of Uttarakhand) dated 07.07.2005 passed in First Appeal No. 1072 of 2001 and First Appeal No. 1073 of 2001.

The appellants claim to be dealing in certified seeds. Seeking to impose market fee on those seeds under the Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964, the respondents issued show cause notices to the appellants. The appellants filed civil suits challenging the said show cause notices and the matter went upto the High Court which dismissed the suits by the impugned judgment.

In our opinion, the High Court should not have gone into the merits of the matter because it was only dealing with the validity of the show cause notices in question and not deciding the matter on merits. However, it appears that certain observations have been made even on the merits of the case by the High Court in the impugned judgment, which, in our opinion, was not justified.

After the High Court upheld the validity of the show cause notices, the concerned Market Committees should then have issued notices to the appellants fixing a date, time and place for the hearing of the appellants in response to that show cause notices, and in that hearing, the appellants should have been

allowed to appear either in-person or through their representatives and permitted to file their objections and any other material which they wished to produce and only thereafter should the matter have been decided, one way or the other, by the Market Committees concerned, by a reasoned order after considering the response of the appellants as well as the other material.

It appears that the above procedure was not followed and, hence, in our opinion, there was violation of the principles of natural justice.

After the impugned judgment of the High Court, the concerned Market Committees never fixed any date, time and place for the hearing of the appellants in response to the show cause notices but straightaway it proceeded to issue notices dated 27.07.2005 directing the appellants to pay the market fee on certified seeds which, in our opinion, was not justified. Hence, we set aside the notices dated 27.07.2005 but we permit the Market Committees concerned to issue fresh notices to the appellants fixing therein the date, time and place for the hearing of the appellants to the show cause notices, and on that date the appellants can file their response and also produce any other material which they wish to produce and only thereafter the Market Committees concerned can proceed to decide the matter by a reasoned order uninfluenced by any observations made by the High Court in the impugned judgment.

We make it clear that we are not making any comment on the merits of the controversy. We leave it open to the concerned authorities to decide the matter after hearing the appellants as directed above.

The Appeals are disposed of accordingly. No costs.

N.J. Appeals disposed of.

SANT SINGH
v.
SUKHDEV SINGH AND ORS.
(Civil Appeal No. 2882 of 2011)

MARCH 4, 2011

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

Motor Vehicles Act, 1988:

ss.163A and 166; Second Schedule – Claim petition under s.166 – Determination of compensation – Structured formula as provided for under the Second Schedule including the multiplier – Applicability of – Held: Even if a claim is made under s.166, the principles for determining compensation as per s.163A can be used as a guide – The Second Schedule can be used as a reference for determining compensation in a claim u/s.166 – In the present case, the claimant-appellant (who suffered multiple injuries on his leg in a motor accident) was earning Rs.4,000/- p.m. which amounts to Rs.48,000/- per year – After deduction of 1/3rd for personal expenses, his annual income came to Rs.32,000/- — As per the Second Schedule to the Motor Vehicles Act, as the appellant was aged 48 years, a multiplier of 13 is to be applied and accordingly, the appellant is entitled to compensation of Rs.4,16,000/- — Further amount of Rs.5,000/- awarded as compensation for hospitalization, special diet, attendant and transportation and Rs.22,209/- for cost incurred in purchase of medicines – Thus, total compensation amounts to Rs.4,43,209/-, which is rounded off to Rs.4,43,000/- — Compensation to be paid to appellant alongwith interest @ 9% by all the respondents jointly and severally.

The appellant-claimant was sitting as a pillion-rider on a scooter, when the first respondent driving a four

wheeler came from the other side in a rash and negligent manner and struck the scooter. The appellant fractured his left leg below the knee and both the bones of his right leg. The appellant filed a claim petition before the Motor Accident Claims Tribunal under Section 166 of the Motor Vehicles Act, 1988. The appellant was 48 years of age on the date of the accident and claimed to be working as a Work Munshi and earning Rs.4000/- p.m. Considering the injuries suffered and treatment received by the appellant, the Tribunal awarded a total compensation of Rs.1,47,209/- with interest @ 7.5%.. Aggrieved, the appellant appealed to the High Court for enhancement of compensation and interest. The High Court enhanced the compensation amount by an amount of Rs.15,000/-. Still dissatisfied with the compensation awarded by the High Court, the appellant filed the present appeal.

The appellant contended that the Tribunal had completely failed to compensate him for loss of future earnings for which multiplier method was required to be applied as per the Second Schedule to s.163A of the Motor Vehicles Act, 1988 and further that he was entitled to interest @ 9%.

Allowing the appeal, the Court

HELD:1. Though the present claim is made under section 166 of the Motor Vehicles Act, 1988, the principles for determining compensation as per Section 163A can be used as a guide. The Second Schedule can be used as a reference for determining compensation in a claim under Section 166 of the Act. [Para 11] [726-G-H; 727-A]

United India Insurance Co. Ltd. etc. etc., v. Patricia Jean Mahajan and others etc. etc. **AIR 2002 SC 2607;** *Smt. Supe Dei and Ors. v. National Insurance Co. Ltd. and Anr.* **(2002) ACJ 1166 (SC);** *Abati Bezbaruah v. Dy. Director General,*

Geological Survey of India and another **AIR 2003 SC 1817 – relied on.**

Piara Singh & Ors. v. Satpal Kumar & Ors. **Vol. CZCVI-2 (2007-2) PLR 143 (P&H) – referred to.**

2.1. Applications made under Section 166 of the Act are to be determined based on the principles laid down in Section 168 of the Act, whereby, the Tribunal must award compensation that is just. Hence, in the present case, compensation should be awarded on the basis of the principles contained in the Second Schedule to the Act and thus, the Tribunal and the High Court erred in not considering the same. The award of the High Court is thus set aside. [Paras 12, 13] [727-B-D]

2.2. The appellant was earning Rs.4,000/- p.m. which amounts to Rs.48,000/- per year. After deduction of 1/3rd for personal expenses, the annual income of the appellant would be Rs.32,000/-. As per the Second Schedule to the Motor Vehicles Act, as the appellant was aged 48 years, a multiplier of 13 is to be applied. Accordingly, appellant is entitled to compensation of Rs.4,16,000/-. A further amount of Rs.5,000/- is awarded as compensation for hospitalization, special diet, attendant and transportation and Rs.22,209/- for cost incurred in purchase of medicines. Thus, total compensation amounts to Rs.4,43,209/-, which is rounded off to Rs.4,43,000/-. The compensation shall be payable to the appellant along with interest at the rate of 9% by all the respondents jointly and severally. [Para 14] [727-D-F]

Case Law Reference:

Vol. CZCVI-2 (2007-2) PLR 143 (P&H) referred to Para 4

AIR 2002 SC 2607 relied on Para 8

(2002) ACJ 1166 (SC) relied on Para 9

AIR 2003 SC 1817 relied on Para 10

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2882 of 2011.

From the Judgment & Order dated 20.7.2009 of the High Court of Punjab & Haryana at Chandigarh in FAO No. 150 of 2009.

K.G. Bhagat for the Appellant.

Amrita Gupta, Parmanand Gaur for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J.1. Leave granted.

2. The appellant-claimant, Sant Singh, on 8.11.2004, was going to Dera Bassi from Chandigarh as a pillion-rider on the scooter (No. CH-01-P-7028) driven by one Nahar Singh, at about 1.30 PM, when the first respondent (driving Tata 709 No. PB-03-E-4525) came from the Dera Bassi side in a rash and negligent manner and struck the scooter. As a result of the collision, Nahar Singh and the appellant fell down and sustained multiple injuries. The appellant fractured his left leg below the knee and both the bones of his right leg. The appellant was admitted in Civil Hospital, Dera Bassi and thereafter was referred to PGI Chandigarh, where he was hospitalized for 11 days.

3. The appellant filed a claim petition before the MACT under section 166 of the Motor Vehicles Act, 1988 claiming Rs.5 lacs as compensation along with 24% interest. The appellant was 48 years of age on the date of the accident and claimed to be working as a Work Munshi and earning Rs.4000/- p.m.

4. The MACT awarded total compensation of Rs.1,47,209/

-. MACT awarded Rs.5,000/- as compensation for hospitalization, special diet, attendant and transportation. As permanent disability of the limb had been assessed at 60%, it awarded Rs.1,20,000/- as compensation for permanent disability based on the reasoning in *Piara Singh & Ors. v. Satpal Kumar & Ors.* [Vol. CZCVI-2 (2007-2) PLR 143 (P&H)]. It also awarded Rs.22,209/- for cost incurred in purchase of medicines. Thus, the total compensation came to Rs.1,47,209/- with interest at 7.5%. MACT held all the respondents to be jointly and severally liable to pay the said amount to the petitioner.

5. Aggrieved with the award of the Tribunal, the appellant appealed to the High Court of Punjab and Haryana for enhancement of compensation and interest. Keeping in view the facts and circumstances of the case, the High Court was of the opinion that the amount of compensation awarded was not sufficient under the different heads for the injuries suffered and treatment received by the appellant. Thus, it awarded an overall enhancement of Rs.15,000/-, which it felt would make the compensation just and reasonable.

6. Still dissatisfied with the compensation awarded by the High Court, the appellant filed the present appeal before this Court. The appellant contended that the Tribunal had completely failed to compensate him for loss of future earnings for which multiplier method was to have been applied as per the Second Schedule to section 163A of the Motor Vehicles Act. Further, the appellant contended that he was entitled to interest @ 9%.

7. Having heard the parties and on perusal of evidence on record, we are of the opinion that the appeal of the appellant deserves to be allowed.

8. In the case of *United India Insurance Co. Ltd. etc. etc., v. Patricia Jean Mahajan and others etc. etc.,* [AIR 2002 SC 2607], the Court observed that:

> "We therefore, hold that ordinarily while awarding compensation, the provisions contained in the second schedule may be taken as a guide including the multiplier, but there may arise some cases, as one in hand, which may fall in the category having special feature or facts calling for deviation from the multiplier usually applicable."

9. In the case of *Smt. Supe Dei and Ors. v. National Insurance Co. Ltd. and Anr.* [(2002) ACJ 1166 (SC)], the Supreme Court observed as follows:

> "…It is not disputed that though the second schedule to the Act in terms does not apply in the case since the claim is not made under Section 163A of the Act, it serves as a guideline for the purpose of determination of compensation under Section 166 of the Act."

10. In *Abati Bezbaruah v. Dy. Director General, Geological Survey of India and another, [AIR 2003 SC 1817],* this Court has observed:

> **"**It is now a well settled principle of law that the payment of compensation on the basis of structured formula as provided for under the Second Schedule should not ordinarily be deviated from. Section 168 of the Motor Vehicles Act lays down the guidelines for determination of the amount of compensation in terms of Section 166 thereof. Deviation of the structured formula, however, as has been held by this Court, may be resorted to in exceptional cases. Furthermore, the amount of com pensation should be just and fair in the facts and circumstances of each case."

11. Thus, though the present claim is made under section 166 of the Motor Vehicles Act, the principles for determining compensation as per Section 163A can be used as a guide. Thus, the Second Schedule can be used as a reference for

determining compensation in a claim under Section 166 of the Act.

12. Applications made under Section 166 are to be determined based on the principles laid down in Section 168 of the Act, whereby, the Tribunal must award compensation that is just.

13. Hence, we are of the view that in the present case, compensation should be awarded on the basis of the principles contained in the Second Schedule to the Act and thus, the Tribunal and the High Court erred in not considering the same. The award of the High Court is thus set aside.

14. The appellant was earning Rs.4,000/- p.m. which amounts to Rs.48,000/- per year. After deduction of 1/3rd for personal expenses, the annual income of the appellant would be Rs.32,000/-. As per the Second Schedule to the Motor Vehicles Act, as the appellant was aged 48 years, a multiplier of 13 is to be applied. Accordingly, appellant is entitled to compensation of Rs.4,16,000/-. We also award Rs.5,000/- as compensation for hospitalization, special diet, attendant and transportation and Rs.22,209/- for cost incurred in purchase of medicines. Thus, total compensation amounts to Rs.4,43,209/-, which is rounded off to Rs.4,43,000/-. The compensation shall be payable to the appellant along with interest at the rate of 9% by all the respondents jointly and severally.

15. Accordingly, the appeal is allowed.

B.B.B. Appeal allowed.

DEV SHARAN & ORS.
v.
STATE OF U.P. & ORS.
(Civil Appeal No. 2334 of 2011 etc.)

MARCH 7, 2011

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

LAND ACQUISITION ACT, 1897:

Section.5-A, 4, 17 and 6 – Acquisition of land for construction of district jail – Invoking of s.17(4) and dispensing with s.5-A inquiry – HELD: There being more than 11 months gap between ss.4 and 17 notification and s.6 declaration, this tself indicates that there was no urgency for invoking pro isions of s.17(4) and denying the land owners their right u/s 5-A – Notification u/s 4 and declaration u/s 6 are quashed so far as they relate to appellants – Possession of appellants over their lands not to be interfered with except in accordance with law.

Section 3(f) read with ss. 5-A and 17(4) – Public purpose – HELD : Construction of a district jail is public purpose – The concept of public purpose in land acquisition has to be viewed from an angle which is consistent with the concept of a welfare State – Even though the concept of public purpose was introduced by pre-Constitutional legislation, its application must be consistent with the constitutional ethos and especially the chapter under Fundamental Rights and also the Directive Principles – In construing the concept of public purpose, the mandate of Article 13 of the Constitution that any pre-constitutional law cannot in any way take away or abridge rights conferred under Part–III must be kept in mind – If public purpose can be satisfied by not rendering common man homeless and by exploring other avenues of acquisition, the courts, before sanctioning an acquisition, must in exercise of

its power of judicial review, focus its attention on the concept of social and economic justice – Concept of public purpose must also be read into provisions of emergency power u/s 17 with consequential dispensation of right of hearing u/s. 5-A – Constitution of India, 1950 – Article 13 – Parts III and IV – Social and economic justice.

Sections 5-A and 17(4)— Hearing of objections – HELD: The Act is a drastic law being expropriatory in nature as it confers on the State a power which affects person's property right and, therefore, has to be construed very strictly – It is reiterated that the right conferred u/s 5-A has to be read considering the provisions of Article 300-A of the Constitution and so construed the right u/s 5-A should be interpreted as being akin to a Fundamental Right and, therefore, the procedures which have been laid down for depriving a person of the said right must be complied with—Constitution of India, 1950—Article 300-A—Interpretation of Statutes.

The State Government, in order to construct a district jail, issued a notification u/ss 4 and 17 of the Land Acquisition Act on 21.8.2008. The provisions of s.5-A were dispensed with on the ground that it was done with the pressing urgency in the matter of construction of the jails. The writ petition of the land-owners was dismissed by the High Court.

In the appeals filed by the land-owners the question for consideration before the Court was: whether in the admitted facts of the case, invoking the urgency clause u/s 17(4) of the Land Acquisition Act, 1894 was justified.

Allowing the appeals, the Court

HELD: 1.1 Admittedly, the Land Acquisition Act, 1897, a pre-Constitutional legislation of colonial vintage, is a drastic law, being expropriatory in nature as it

confers on the State a power which affects person's property right and, therefore, has to be construed strictly. [Para 15 and 20] [737-C-D; 739-D-E]

DLF Qutab Enclave Complex Educational Charitable Trust vs. State of Haryana and Ors. **2003 (2) SCR 1 = (2003) 5 SCC 622,** *State of Maharashtra and Anr. vs. B.E. Billimoria and Ors.* **– 2003 (2) Suppl. SCR 603 = (2003) 7 SCC 336,** *Chairman, Indore Vikas Pradhikaran vs. Pure Industrial Coke and Chemicals Ltd. and Ors.* **–2008 (10) SCR 190 = (2007) SCC 705—relied on.**

1.2 This Court is of the opinion that the concept of public purpose in land acquisition has to be viewed from an angle which is consistent with the concept of a welfare State. Even though the concept of public purpose was introduced by pre-Constitutional legislation, its application must be consistent with the constitutional ethos and especially the chapter under Fundamental Rights and also the Directive Principles. In construing the concept of public purpose, the mandate of Article 13 of the Constitution that any pre-constitutional law cannot in any way take away or abridge rights conferred under Part–III must be kept in mind. By judicial interpretation the contents of these Part III rights are constantly expanded. The meaning of public purpose in acquisition of land must be judged on the touchstone of this expanded view of Part-III rights. The open-ended nature of our Constitution needs a harmonious reconciliation between various competing principles and the overhanging shadows of socio-economic reality in this country. [Para 15-17] [737-E-H; 738-A-C]

1.3 Therefore, the concept of public purpose must also be read into the provisions of emergency power u/s 17 with the consequential dispensation of right of hearing u/s 5A of the said Act. The Courts must examine

these questions very carefully when little Indians lose their small property in the name of mindless acquisition at the instance of the State. If public purpose can be satisfied by not rendering common man homeless and by exploring other avenues of acquisition, the courts, before sanctioning an acquisition, must in exercise of its power of judicial review, focus its attention on the concept of social and economic justice. While examining these questions of public importance, the courts, especially the higher Courts, cannot afford to act as mere umpires. [Para 18] [738-D-F]

Authorised Officer, Thanjavur and another vs. S. Naganatha Ayyar and others **1979 (3) SCR 1121 = (1979) 3 SCC 466 – relied on.**

2.1 In *Hindustan Petroleum Corporation's case* this Court has held that the right which is conferred u/s 5A has to be read considering the provisions of Article 300-A of the Constitution and, so construed, the right u/s 5A should be interpreted as being akin to a Fundamental Right and the procedures which have been laid down for depriving a person of the said right must be strictly complied with. Further, in the case of *Essco Fabs,* it has been held that once a case is covered under sub-s. (1) or (2) of s. 17, sub-s. (4) of s. 17 would not necessarily apply. [Para 33-35] [742-C-D-G-H]

Hindustan Petroleum Corporation Limited Vs. Darius Shahpur Chennai and Ors., **2005 (3) Suppl. SCR 388 = (2005) 7 SCC 627;** *Essco Fabs Private Limited and another vs. State of Haryana and another* **2008 (15) SCR 779 = (2009) 2 SCC 377.** *Nandeshwar Prasad and Ors. vs. U.P. Government and Ors.* **Etc. 1964 SCR 425 = AIR 1964 SC 1217,** *Munshi Singh and Ors. vs. Union of India* **1973 (1) SCR 973 = (1973) 2 SCC 337.** *Union of India vs. Mukesh Hans* **(2004) 8 SCC 14—relied on.**

J.E.D. Ezra vs. The Secretary of State for India and ors. **7 C.W.N. 249 – referred to.**

2.2 In the instant case, in the writ petition before the High Court, the petitioners have given the details of the land holdings, and it has also been stated that the entire holdings of petitioners 2, 5, 7, 9, 10, 11 and 13 have been acquired, and as a result of such acquisition, the petitioners have become landless. [Para 37] [743-D-E]

2.3 The construction of jail is certainly in public interest and for such construction land may be acquired. But such acquisition can be made only by strictly following the mandate of the Act. In the facts of the instant case, such acquisition cannot be made by invoking emergency provisions of s.17. The time which elapsed between publication of s.4(1) and s.17 notifications, and s.6 declaration, in the local newspapers is of 11 months and 23 days, i.e. almost one year. This slow pace at which the government machinery had functioned in processing the acquisition, clearly evinces that there was no urgency for acquiring the land so as to warrant invoking s. 17(4) of the Act and deny the petitioners their valuable right u/s 5A. The State Government was not justified, in the facts of the instant case, to invoke the emergency provision of s.17(4) of the Act. The impugned notifications u/ss 4 and 6 of the Act, in so far as they relate to the appellants' land, are quashed. The possession of the appellants in respect of their land cannot be interfered with except in accordance with law. If so advised, Government can initiate acquisition proceeding by following the provision of s.5-A of the Act and in accordance with law. [Para 38-41] [744-E-H; 745-A-B]

Case Law Reference:

2008 (15) SCR 779	**relied on**	**para 10**
1979 (3) SCR 1121	**relied on**	**para 18**

7 C.W.N. 249	**referred to**	**para 28**
1964 SCR 425	**relied on**	**para 31**
1973 (1) SCR 973	**relied on**	**para 32**
2005 (3) Suppl. SCR 388	**relied on**	**para 33**
2004 (8) SCC 14	**relied on**	**para 36**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2334 of 2011.

From the Judgment & Order dated 25.11.2009 of the High Court of Allahabad in Writ Petition (C) No. 46457 of 2009.

WITH

Civil Appeal No. 2335 of 2011.

Shiv Kumar Suri for the Appellants.

S.R. Singh, Ardhendumauli K. Prasad, Manoj Dwivedi, Gunnam Venkateswara Rao for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. Leave granted.

2. These appeals have been preferred from the judgment and order of the High Court dated 25.11.2009 in Writ Petitions (Civil) No.46457/2009.

3. The appellants challenge the acquisition of their agricultural lands by the State of Uttar Pradesh for the construction of the district jail of Shahjahanpur. The appellants themselves are bhumidar with transferable rights and are residents of village Murchha, tehsil Puwayan in the district of Shahjahanpur, Uttar Pradesh.

4. The State of Uttar Pradesh vide its office memorandum

dated 25.10.2004 constituted a committee under the Chairmanship of the Hon'ble Minister of Revenue to suggest its recommendations for transfer of prisons situated in the congested areas of various districts. After conducting its second and final meeting on 10th January, 2005, the said committee recommended to the State Government the shifting of the district jails from congested areas to outside the city limits within the district. As per the schedule, this shifting was to be done in two phases:

1st phase

1. District Jail, Shahjahanpur;

2. District Jail, Azamgarh;

3. District Jail, Jaunpur; and

4. District Jail, Moradabad.

2nd phase

1. District Jail, Badaun;

2. District Jail, Varanasi;

3. District Jail, Barielly; and

4. District Jail, Muzaffarnagar.

5. The existing district jail of Shahjahanpur, constructed in 1870, was one of the oldest and required shifting to a new premises. The Government case is that the district jail is located in a densely populated area of the city and is overcrowded, housing as many as 1869 prisoners, while having a capacity of only 511.

6. Thereafter, the State Government constituted a committee under the Chairmanship of Chief Secretary, Government of U.P. vide office memorandum dated 12.9.2007

to evaluate and consider the shifting of prisons identified to be shifted in the first phase. Prisons in the districts of Lucknow, Moradabad were added to the list. This committee was also to evaluate and recommend the means for modernisation of existing old prisons. In its meeting dated 10.10.2007 the committee recommended that a Detailed Project Report (DPR) be prepared by the Rajkiya Nirman Nigam, and that acquisition of lands for shifting of the prisons be done on a priority basis.

7. These recommendations were accepted by the State Government vide the approval of the cabinet dated 7.12.2007. Following this decision, the Director General of Prisons (Administration and Reforms), Uttar Pradesh, vide letter dated 04.06.2008, requested the District Magistrate, Shahjahanpur to send all the relevant records to the State Government for publication of notification under Sections 4(1) and 17 of the Land Acquisition Act, 1894 (hereinafter 'the Act'). The land suggested for such acquisition by the Divisional Land Utility Committee was one admeasuring 25.89 hectares (63.93 acres) in village Morchha, tehsil Puwayan in the district of Shahjahanpur.

8. Thereafter, the District Magistrate, Shahjahanpur forwarded the proposal to the Commissioner and Director, Directorate of Land Acquisition (Revenue Board, Uttar Pradesh), for the issuance of notifications under Sections 4(1) and 17 of the Act, which in turn approved of it and further forwarded the recommendation to the State Government, vide letter dated 2.07.2008.

9. Thus, the State Government issued notifications under Sections 4(1) and 17 on 21.08.2008. However, the provisions of Section 5A inquiry were dispensed with. The State Government explained that this was done in view of the pressing urgency in the matter of construction of the jails.

10. Being aggrieved by the aforesaid notifications, the appellants moved a writ petition before the High Court under

Article 226 of the Constitution of India. The High Court in its decision dated 25.11.2009 refused to interfere with the selection of the site for the construction of the jail premises on the ground that it was not required to do so unless it found the selection of the site was wholly arbitrary. The High Court also approved the invoking of emergency provisions under Section 17 of the Act as per the guidelines given in *Essco Fabs Private Limited and another vs. State of Haryana and another* (2009) 2 SCC 377. Having thus stated, the High Court dismissed the writ petition.

11. Before this Court the appellants broadly raised the following arguments:

1. Whether or not the State Government was justified in acquiring the said pieces of fertile agricultural land, when there were alternative sites of unfertile banjar land available?

2. Whether or not the State Government was justified in dispensing with the inquiry which is mandated to be conducted under Section 5A of the Act, especially when one year elapsed between the notifications under Section 4 and the one under Section 6. They further stated that the High Court had erred insofar as it upheld the factum of urgency in the absence of a categorical finding, that an enquiry under Section 5A would have been detrimental to public interest.

12. It was urged that it was clear from the counter of the respondent that the contemplation of a new prison was under consideration of the State Government for several years. Committee was formed, matter was discussed at a leisurely pace at various levels and there is no material fact to justify the abridgement of the appellants' right of raising an objection to acquisition and of a hearing under Section 5A of the Act.

13. This Court finds a lot of substance in the contentions of the appellants.

14. In connection with land acquisition proceeding whenever the provision of Section 17 and its various sub-sections including Section 17(4) are used in the name of taking urgent or emergent action and the right of hearing of the land holder under Section 5A is dispensed with, the Court is called upon to consider a few fundamentals in the exercise of such powers.

15. Admittedly, the Land Acquisition Act, a pre-Constitutional legislation of colonial vintage is a drastic law, being expropriatory in nature as it confers on the State a power which affects person's property right. Even though right to property is no longer fundamental and was never a natural right, and is acquired on a concession by the State, it has to be accepted that without right to some property, other rights become illusory. This Court is considering these questions, especially, in the context of some recent trends in land acquisition. This Court is of the opinion that the concept of public purpose in land acquisition has to be viewed from an angle which is consistent with the concept of a welfare State.

16. The concept of public purpose cannot remain static for all time to come. The concept, even though sought to be defined under Section 3(f) of the Act, is not capable of any precise definition. The said definition, having suffered several amendments, has assumed the character of an inclusive one. It must be accepted that in construing public purpose, a broad and overall view has to be taken and the focus must be on ensuring maximum benefit to the largest number of people. Any attempt by the State to acquire land by promoting a public purpose to benefit a particular group of people or to serve any particular interest at the cost of the interest of a large section of people, especially of the common people, defeats the very concept of public purpose. Even though the concept of public purpose was introduced by pre-Constitutional legislation, its

application must be consistent with the constitutional ethos and especially the chapter under Fundamental Rights and also the Directive Principles.

17. In construing the concept of public purpose, the mandate of Article 13 of the Constitution that any pre-constitutional law cannot in any way take away or abridge rights conferred under Part–III must be kept in mind. By judicial interpretation the contents of these Part III rights are constantly expanded. The meaning of public purpose in acquisition of land must be judged on the touchstone of this expanded view of Part-III rights. The open-ended nature of our Constitution needs a harmonious reconciliation between various competing principles and the overhanging shadows of socio-economic reality in this country.

18. Therefore, the concept of public purpose on this broad horizon must also be read into the provisions of emergency power under Section 17 with the consequential dispensation of right of hearing under Section 5A of the said Act. The Courts must examine these questions very carefully when little Indians lose their small property in the name of mindless acquisition at the instance of the State. If public purpose can be satisfied by not rendering common man homeless and by exploring other avenues of acquisition, the Courts, before sanctioning an acquisition, must in exercise of its power of judicial review, focus its attention on the concept of social and economic justice. While examining these questions of public importance, the Courts, especially the Higher Courts, cannot afford to act as mere umpires. In this context we reiterate the principle laid down by this Court in *Authorised Officer, Thanjavur and another vs. S. Naganatha Ayyar and others* reported in (1979) 3 SCC 466, wherein this Court held:

> "……It is true that Judges are constitutional invigilators and statutory interpreters; but they are also responsive and responsible to Part IV of the Constitution being one of the

trinity of the nation's appointed instrumentalities in the transformation of the socio-economic order. The judiciary, in its sphere, shares the revolutionary purpose of the constitutional order, and when called upon to decode social legislation must be animated by a goal-oriented approach. This is part of the dynamics of statutory interpretation in the developing countries so that courts are not converted into rescue shelters for those who seek to defeat agrarian justice by cute transactions of many manifestations now so familiar in the country and illustrated by the several cases under appeal. This caveat has become necessary because the judiciary is not a mere umpire, as some assume, but an activist catalyst in the constitutional scheme."

19. In other words public purpose must be viewed through the prism of Constitutional values as stated above.

20. The aforesaid principles in our jurisprudence compel this Court to construe any expropriartory legislation like the Land Acquisition Act very strictly.

21. The judicial pronouncements on this aspect are numerous, only a few of them may be noted here.

22. In *DLF Qutab Enclave Complex Educational Charitable Trust vs. State of Haryana and Ors.* – (2003) 5 SCC 622, this Court construed the statute on Town Planning Law and held "Expropriatory statute, as is well known, must be strictly construed." (See para 41 page 635).

23. The same principle has been reiterated subsequently by a three-Judge Bench of this Court in *State of Maharashtra and Anr. vs. B.E. Billimoria and Ors.* – (2003) 7 SCC 336 in the context of ceiling law. (See para 22 at page 347 of the report).

24. These principles again found support in the decision

of this Court in *Chairman, Indore Vikas Pradhikaran vs. Pure Industrial Coke and Chemicals Ltd. and Ors.* – (2007) 8 SCC 705, wherein this Court construed the status of a person's right to property after deletion of Article 19(1)(f) from Part III. By referring to various international covenants, namely, the Declaration of Human and Civic Rights, this Court held that even though right to property has ceased to be a fundamental right but it would however be given an express recognition as a legal right and also as a human right.

25. While discussing the ambit and extent of property right, this Court reiterated that expropriatory legislation must be given strict construction. (See para 53 to 57 at pages 731 to 732 of the report)

26. In the background of the aforesaid discussion, this Court proceeds to examine the scope of a person's right under Section 5A of the Act.

27. Initially, Section 5A was not there in the Land Acquisition Act, 1894 but the same was inserted long ago by the Land Acquisition (Amendment) Act, 1923 vide Section 3 of Act 38 of 1923.

28. The history behind insertion of Section 5A, in the Act of 1894 seems to be the basis of a decision of the Division Bench of Calcutta High Court in *J.E.D. Ezra vs. The Secretary of State for India and ors* reported in 7 C. W. N. 249. In that case, the properties of Ezra were sought to be acquired under the pre amended provision of the Act for expansion of the offices of the Bank of Bengal. In challenging the said acquisition, it was argued that the person whose property is going to be taken away should be allowed a hearing on the principles of natural justice. However the judges found that there was no such provision in the Act. (see p. 269)

29. In order to remedy this shortcoming in the Act of 1894, an amendment by way of incorporation of Section 5A was

introduced on 11th July, 1923. The Statement of Objects and Reasons for the said Amendment is as follows:

> "The Land Acquisition Act I of 1894 does not provide that persons having an interest in land which it is proposed to acquire, shall have the right of objecting to such acquisition; nor is Government bound to enquire into and consider any objections that may reach them. The object of this Bill is to provide that a Local Government shall not declare, under section 6 of the Act, that any land is needed for a public purpose unless time has been allowed after the notification under section 4 for persons interested in the land to put in objections and for such objections to be considered by the Local Government."
>
> (Gazette of India, Pt. V, dated 14th July, 1923, page 260)

30. The said amendment was assented to by the Governor General on 5th August, 1923 and came into force on 1st January, 1924.

31. The importance and scheme of Section 5A was construed by this Court in several cases. As early as in 1964, this Court in *Nandeshwar Prasad and Ors. vs. U.P. Government and Ors. Etc.* – AIR 1964 SC 1217 speaking through Justice K.N. Wanchoo (as His Lordship then was) held "…The right to file objections under Section 5A is a substantial right when a person's property is being threatened with acquisition and we cannot accept that that right can be taken away as if by a side-wind….." In that case the Court was considering the importance of rights under Section 5A vis-à-vis Section 17(1) and Section 17(1)(A) of the Act. (See para 13 at page 1222 of the report).

32. The same view has been reiterated by another three-Judge Bench decision of this Court in *Munshi Singh and Ors. vs. Union of India* – (1973) 2 SCC 337. In para 7 of the report this Court held that Section 5A embodies a very just and

wholesome principle of giving proper and reasonable opportunity to a land loser of persuading the authorities that his property should not be acquired. This Court made it clear that declaration under Section 6 has to be made only after the appropriate Government is satisfied on a consideration of the report made by the Collector under Section 5A. The Court, however, made it clear that only in a case of real urgency the provision of Section 5A can be dispensed with (See para 7 page 342 of the report).

33. In *Hindustan Petroleum Corporation Limited vs. Darius Shahpur Chennai and ors.,* (2005) 7 SCC 627, this Court held that the right which is conferred under Section 5A has to be read considering the provisions of Article 300-A of the Constitution and, so construed, the right under Section 5A should be interpreted as being akin to a Fundamental Right. This Court held that the same being the legal position, the procedures which have been laid down for depriving a person of the said right must be strictly complied with.

34. In a recent judgment of this Court in *Essco Fabs* (supra), (2009) 2 SCC 377, this Court, after considering previous judgments as also the provisions of Section 17 of the Act held:

> "41. Whereas sub-section (1) of Section 17 deals with cases of "urgency", sub-section (2) of the said section covers cases of "sudden change in the channel of any navigable river or other unforeseen emergency". But even in such cases i.e. cases of "urgency" or "unforeseen emergency", enquiry contemplated by Section 5-A cannot ipso facto be dispensed with which is clear from sub-section (4) of Section 17 of the Act."

35. This Court, therefore, held that once a case is covered under sub-section (1) or (2) of Section 17, sub-section (4) of Section 17 would not necessarily apply.

"54. In our opinion, therefore, the contention of learned counsel for the respondent authorities is not well founded and cannot be upheld that once a case is covered by sub-sections (1) or (2) of Section 17 of the Act, sub-section (4) of Section 17 would necessarily apply and there is no question of holding inquiry or hearing objections under Section 5-A of the Act. Acceptance of such contention or upholding of this argument will make sub-section (4) of Section 17 totally otiose, redundant and nugatory."

36. This Court also held that in view of the ratio in *Union of India vs. Mukesh Hans,* (2004) 8 SCC 14, sub-section (4) of Section 17 cannot be pressed into service by officers who are negligent and lethargic in initiating acquisition proceedings.

37. The question is whether in the admitted facts of this case, invoking the urgency clause under Section 17 (4) is justified. In the writ petition before the High Court, the petitioners have given the details of the land holding, and it has also been stated that the entire holding of petitioners 2, 5, 7, 9, 10, 11 and 13 have been acquired, and as a result of such acquisition, the petitioners have become landless. From the various facts disclosed in the said affidavit it appears that the matter was initiated by the Government's letter dated 4th of June, 2008 for issuance of Section 4(1) and Section 17 notifications. A meeting for selection of the suitable site for construction was held on 27th June, 2008, and the proposal for such acquisition and construction was sent to the Director, Land Acquisition on 2nd of July, 2008. This was in turn forwarded to the State Government by the Director on 22nd of July, 2008. After due consideration of the forwarded proposal and documents, the State Government issued the Section 4 notification, along with Section 17 notification on 21st of August, 2008. These notifications were published in local newspapers on 24th of September, 2008. Thereafter, over a period of 9 months, the State Government deposited 10% of compensation payable to

the landowners, along with 10% of acquisition expenses and 70% of cost of acquisition was deposited, and the proposal for issuance of Section 6 declaration was sent to the Director, Land Acquisition on 19th of June, 2009. The Director in turn forwarded all these to the State Government on 17th July, 2009, and the State Government finally issued the Section 6 declaration on 10th of August, 2009. This declaration was published in the local dailies on 17th of August, 2009.

38. Thus the time which elapsed between publication of Section 4(1) and Section 17 notifications, and Section 6 declaration, in the local newspapers is 11 months and 23 days, i.e. almost one year. This slow pace at which the government machinery had functioned in processing the acquisition, clearly evinces that there was no urgency for acquiring the land so as to warrant invoking Section 17 (4) of the Act.

39. In paragraph 15 of the writ petition, it has been clearly stated that there was a time gap of more than 11 months between Section 4 and Section 6 notifications, which demonstrates that there was no urgency in the State action which could deny the petitioners their right under Section 5A. In the counter which was filed in this case by the State before the High Court, it was not disputed that the time gap between Section 4 notification read with Section 17, and Section 6 notification was about 11 months.

40. The construction of jail is certainly in public interest and for such construction land may be acquired. But such acquisition can be made only by strictly following the mandate of the said Act. In the facts of this case, such acquisition cannot be made by invoking emergency provisions of Section 17. If so advised, Government can initiate acquisition proceeding by following the provision of Section 5A of the Act and in accordance with law.

41. For the reasons aforesaid, we hold that the State Government was not justified, in the facts of this case, to invoke

the emergency provision of Section 17(4) of the Act. The valuable right of the appellants under Section 5A of the Act cannot flattened and steamrolled on the 'ipsi dixit' of the executive authority. The impugned notifications under Sections 4 and 6 of the Act in so far as they relate to the appellants' land are quashed. The possession of the appellants in respect of their land cannot be interfered with except in accordance with law.

42. The appeals are allowed. No order as to costs.

R.P. Appeals allowed.

GANGADHARA PALO

v.

THE REVENUE DIVISIONAL OFFICER & ANOTHER

(Civil Appeal No. 5280 of 2006)

MARCH 08, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Review petition – Maintainability of – Writ petition by the appellant – Dismissed by High Court – SLP thereagainst also dismissed – Review petition filed by the appellant before the High Court alongwith an application for condonation of delay in filing the review petition – Dismissed by the High Court – Appeal before this Court – Plea of respondent that review petition was not maintainable because against the main judgment of the High Court dismissing the writ petition of the appellant, the appellant filed SLP which was dismissed – Held: There was a delay of 71 days in filing the revie petition – High Court should have taken a liberal view and condoned the delay – Thus, the delay in filing the review petition before the High Court is condoned – As regards the maintainability of the review petition, it would make no difference whether the review petition was filed in the High Court before or after the dismissal of SLP – It is important whether the judgment of the High Court has merged into the judgment of Supreme Court by the doctrine of merger or not – Where SLP is dismissed by giving some reasons, however, meager (it can be even of just one sentence), there would be a merger of the judgment of the High Court into the judgment of Supreme Court and after merger there is no judgment of the High Court – Thus, there can be no review of a judgment which does not even exist – When SLP is dismissed without giving any reasons, there is no merger of the judgment of the High Court with the order of Supreme Court – The judgment of the High Court can be reviewed since it continues to exist,

though the scope of the review petition is limited to errors apparent on the face of the record – In the instant case, SLP was dismissed without giving any reasons, thus, there was no merger of the judgment of the High Court with the order of Supreme Court – The judgment of the High Court could be reviewed – Matter therefore, remitted to the High Court to decide review petition on merits – Doctrine of merger – Delay/ Laches – Limitation.

Kunhay Ammed and Ors vs. State of Kerala and Anr **(2002) 6 SCC 359;** *S. Shanmugavel Nadar vs. State of Tamil Nadu and Anr.* **JT 2002 (7) SCC 568;** *State of Manipur vs. Thingujam Brojen Meetei* **AIR 1996 SC 2124;** *U.P. State Road Transport Corporation vs. Omaditya Verma and Ors.* **AIR 2005 SC 2250 – Relied on.**

K. Ajamouli vs. A.V.K.N Swamy **(2001) 5 SCC 37 – Referred to.**

Review – Power of – Held: Cannot be taken away by a judicial order as that has been conferred by the statute or the Constitution – By judicial order, the statute or the Constitution cannot be amended.

Doctrines – Doctrine of merger – Held: By the doctrine of merger, the judgment of the lower court merges into the judgment of the higher court.

Precedent – A precedent is a decision which lays down some principle of law – Mere stray observation by Supreme Court would not amount to a precedent – Constitution of India, 1950 – Article 141.

Case Law Reference:

(2001) 5 SCC 37	**Referred to**	**Para 6**
(2002) 6 SCC 359	**Relied on**	**Para 9**
JT 2002 (7) SCC 568	**Relied on**	**Para 9**

AIR 1996 SC 2124	**Relied on**	**Para 9**
AIR 2005 SC 2250	**Relied on**	**Para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5280 of 2006.

From the Judgment & Order dated 28.01.2005 of the High Court of Judicature, Andhra Pradesh at Hyderabad, W.P.M.P. No. 29346 of 2004 in Review W.P.M.P. SR. 108493 of 2001 and Review WPMP. SR. 108493 of 2001 in W.P. No. 18933 of 1988.

P.S. Mishra, Tathagat H. Vardhan, Dhruv Kumar Jha, Ritu Raj Chaudhary (for Manu Shankar Mishra) for the Appellant.

Sanjay Kapur, Abhishek Kumar, A. Nanda, V. Pattabhiram (for G.N. Reddy) for the Respondents.

The following order of the Court was delivered

ORDER

Heard learned counsel for the parties.

This Appeal has been filed against the impugned judgment/order dated 28th January, 2005 passed by the High Court of Andhra Pradesh at Hyderabad.

By that order, the review petition as well as the application for condonation of delay in filing the review petition have been dismissed.

The delay was only of 71 days and, in our opinion, a liberal view should have been taken by the High Court and delay of 71 days in filing the review petition should have been condoned and the review petition should have been decided on merits. Hence, we condone the delay of 71 days in filing the review petition before the High Court.

As regards the maintainability of the review petition, Mr. Sanjay Kapur, learned counsel for the respondent submitted that it was not maintainable because against the main judgment of the High Court dated 19 th June, 2001 dismissing the writ petition of the appellant herein, the appellant herein filed a special leave petition in this Court which was dismissed on 17th September, 2001.

The aforesaid order of this Court dismissing the special leave petition simply states "The Special Leave Petition is dismissed". Thus, this order gives no reasons. In support of his submission, learned counsel for the respondent has relied upon a decision of this Court in the case of *K. Ajamouli vs. A.V.K.N. Swamy* (2001) 5 SCC 37 and has submitted that there is a distinction between a case where the review petition was filed in the High Court before the dismissal of the special leave petition by this Court, and a case where the review petition was filed after the dismissal of the special leave petition by this Court.

We regret, we cannot agree. In our opinion, it will make no difference whether the review petition was filed in the High Court before the dismissal of the special leave petition or after the dismissal of the special leave petition. The important question really is whether the judgment of the High Court has merged into the judgment of this Court by the doctrine of merger or not.

When this Court dismisses a special leave petition by giving some reasons, however meagre (it can be even of just one sentence), there will be a merger of the judgment of the High Court into the order of the Supreme Court dismissing the special leave petition. According to the doctrine of merger, the judgment of the lower court merges into the judgment of the higher court. Hence, if some reasons, however meagre, are given by this Court while dismissing the special leave petition, then by the doctrine of merger, the judgment of the High Court merges into the judgment of this Court and after merger there

is no judgment of the High Court. Hence, obviously, there can be no review of a judgment which does not even exist.

The situation is totally different where a special leave petition is dismissed without giving any reasons whatsoever. It is well settled that special leave under Article 136 of the Constitution of India is a discretionary remedy, and hence a special leave petition can be dismissed for a variety of reasons and not necessarily on merits. We cannot say what was in the mind of the Court while dismissing the special leave petition without giving any reasons. Hence, when a special leave petition is dismissed without giving any reasons, there is no merger of the judgment of the High Court with the order of this Court. Hence, the judgment of the High Court can be reviewed since it continues to exist, though the scope of the review petition is limited to errors apparent on the face of the record. If, on the other hand, a special leave petition is dismissed with reasons, however meagre (it can be even of just one sentence), there is a merger of the judgment of the High Court in the order of the Supreme Court. (See the decisions of this Court in the cases of *Kunhay Ammed & Others vs. State of Kerala & Another* (2000) 6 SCC 359; *S.Shanmugavel Nadar vs. State of Tamil Nadu & Another* JT 2002 (7) SCC 568; *State of Manipur vs. Thingujam Brojen Meetei* AIR 1996 SC 2124; and *U.P.State Road Transport Corporation vs. Omaditya Verma and others* AIR 2005 SC 2250).

A judgment which continues to exist can obviously be reviewed, though of course the scope of the review is limited to errors apparent on the face of the record but it cannot be said that the review petition is not maintainable at all.

Learned counsel for the respondent Mr. Sanjay Kapur has, however, invited our attention to paragraph 4 of the judgment of this Court in the case of K.Rajamouli (supra), wherein it was observed:

"Following the decision in the case of *Kunhayammed*

(2000) 6 SCC 359, we are of the view that the dismissal of the special leave petition against the main judgment of the High Court would not constitute res judicata when a special leave petition is filed against the order passed in the review petition provided the review petition was filed prior to filing of special leave petition against the main judgment of the High Court. The position would be different where after dismissal of the special leave petition against the main judgment a party files a review petition after a long delay on the ground that the party was prosecuting remedy by way of special leave petition. In such a situation the filing of review would be an abuse of the process of the law. We are in agreement with the view taken in Abbai Maligai Partnership Firm (1998) 7 SCC 386 that if the High Court allows the review petition filed after the special leave petition was dismissed after condoning the delay, it would betreated as an affront to the order of the Supreme Court. But this is not the case here. In the present case, the review petition was filed well within time and since the review petition was not being decided by the High Court, the appellant filed the special leave petition against the main judgment of the High Court. We, therefore, overrule the preliminary objection of the counsel for the respondent and hold that this appeal arising out of special leave petition is maintainable."

We have carefully perused paragraph 4 of the aforesaid judgment. What has been observed therein is that if the review petition is filed in the High Court after the dismissal of the special leave petition, 'it would be treated as an affront to the order of the Supreme Court'.

In our opinion, the above observations cannot be treated as a precedent at all. We are not afraid of affronts. What has to be seen is whether a legal principle is laid down or not. It is totally irrelevant whether we have been affronted or not.

A precedent is a decision which lays down some principle

of law. In our view, the observations made in para 4 of the aforesaid judgment, quoted above, that "if a review petition is filed after the dismissal of the special leave petition, it would be treated as an affront to the order of the Supreme Court" is not a precedent at all. A mere stray observation of this Court, in our opinion, would not amount to a precedent. The above observation of this Court is, in our opinion, a mere stray observation and hence not a precedent.

By a judicial order, the power of review cannot be taken away as that has been conferred by the statute or the Constitution. This Court by judicial orders cannot amend the statute or the Constitution.

For the reasons given above, we allow this appeal, set aside the impugned order of the High Court, condone the delay in filing the review petition before the High Court and remand the matter to the High Court to decide the review petition on merits in accordance with law expeditiously after hearing the parties concerned.

N.J. Appeal allowed.

RAYMOND LTD. & ANOTHER
v.
TUKARAM TANAJI MANDHARE & ANOTHER
(Civil Appeal No. 5077 of 2006)

MARCH 09, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, l971 – s.3(5) and s.28 r/w items 1(a), (b), (d) and (f) of Schedule IV – Complaint before Industrial Court/ Labour Court – Maintainability of – Disputed employee-employer relationship – Three questions referred to High Court – 1) Whether a person who is employed by a contractor who undertakes contracts for the execution of the whole of the work or any part of the work which is ordinarily work of the undertaking is an employee within the meaning of s.3(5) of the MRTU and PULP Act; 2) Whether a complaint filed under the MRTU and PULP Act by an employee as defined under s.3(13) of the BIR Act, is maintainable although no direct relationship of employer employee exists between him and the principal employer and 3) Whether a complaint filed under the MRTU and PULP Act by employees under s.3(13) of the BIR Act can be dismissed if the employer claims that they are not his direct employees but are employed through a contractor – High Court answered question numbers 1 and 2 in the affirmative, and question number 3 in the negative provided the contractors' workmen were employed to do the work of the whole or part of the undertaking – On appeal, held: In view of the difference of opinion in some of the cited decisions and the importance of the controversy involved and its application particularly in the State of Maharashtra, an authoritative decision is required by a larger bench on the aforesaid questions – Matter, therefore, referred to larger bench – Bombay Industrial Relations Act, l946 – s.3(13).

Three questions were referred to the High Court, namely, l) Whether a person who is employed by a contractor who undertakes contracts for the execution of the whole of the work or any part of the work which is ordinarily work of the undertaking is an employee within the meaning of section 3(5) of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, l971 (MRTU and PULP Act); 2) Whether a complaint filed under the MRTU and PULP Act by an employee as defined under section 3(l3) of the Bombay Industrial Relations Act, is maintainable although no direct relationship of employer employee exists between him and the principal employer and 3) Whether a complaint filed under the MRTU and PULP Act by employees under section 3(l3) of the BIR Act can be dismissed if the employer claims that they are not his direct employees but are employed through a contractor.

The High Court answered the question numbers 1 and 2 in the affirmative, and question number 3 in the negative provided the contractors workmen were employed to do the work of the whole or part of the undertaking. This decision was challenged in the instant appeal.

Referring the matter to larger bench, the Court

HELD: A large numbers of decisions were cited before this Court. In view of the difference of opinion in some of these decisions and the importance of the controversy involved and its application particularly in the State of Maharashtra, an authoritative decision is required by a larger bench on the issues involved. Hence, the matter is referred to a larger bench on the issues referred to above. [Paras 9, 10, 11] [759-C-F-G]

Vividh Kamgar Sabha vs. Kalyani Steel Ltd, **(200l) 2**

SCC 38l; *Cipla Ltd. vs. Maharashtra General Kamgar Union*, **(200l) 3 SCC l0l;** *Sarva Shramik Sangh vs. Indian Smelting and Refining Co Ltd*, **(2003) l0 SCC 455;** *Dattatraya Kashinath and others vs. Chhatrapati Sahakari Sakhar Karkhana Ltd and others*, **l996 ll LLJ l69 and** *Sakhar Kamgar Union vs. Shri Chhatrapati Rajaram Sahakari Sakhar Karkhana Ltd and others*, **l996 ll CLR 67;** *Nagraj Gowda and others vs. Tata Hydro Electric Power Supply Co Ltd, Bombay and others*, **2003 lll CLR 358 ;** *Hindustan Coca Cola Bottling Pvt Ltd. vs. Bharatiya Kamgar Sena*, **200l lll CLR l025 ;** *Vividha Kamgar Sabha vs. Kalyani Steel Ltd. & another* **(2001) 2 SCC 381,** *Cipla vs. MGK Union* **(2001) 3 SCC 101,** *Sarva Shramik Sangh vs. Indian Smelting & Refining Company Limited* **(2003) 10 SCC 455,** *M/s Hindustan Lever Limited vs. Ashok Vishnu Kate* **(1995) 6 SCC 326,** *NTPC vs. Badri Singh Thakur and others.* **(2008) 9 SCC 377,** *Hindalco Industries vs. Association of Engineering Workers* **(2008) 13 SCC 441,** *Ahmadabad Mfg. and Calico Ptg. Co. Ltd. vs. Ram Tehel Ramnand* **(1972) 1 SCC 898,** *Saraspur Mill Co. Ltd. vs. Ramanlal Chimanlal* **(1974) 3 SCC 66,** *Shramik Uttakarsh Sabha vs. Raymond Woolen Mills Ltd. & others,* **(1995) 3 SCC 78 – referred to.**

Case Law Reference:

(200l) 2 SCC 38l	**referred to**	**Paras 3, 9**
(200l) 3 SCC l0l	**referred to**	**Paras 3, 9**
(2003) l0 SCC 455	**referred to**	**Paras 4, 9**
l996 ll LLJ l69	**referred to**	**Para 5**
l996 ll CLR 67	**referred to**	**Para 5**
2003 lll CLR 358	**referred to**	**Para 5**
200l lll CLR l025	**referred to**	**Para 5**
(1995) 6 SCC 326	**referred to**	**Para 9**
(2008) 9 SCC 377	**referred to**	**Para 9**
(2008) 13 SCC 441	**referred to**	**Para 9**
(1972) 1 SCC 898	**referred to**	**Para 9**
(1974) 3 SCC 66	**referred to**	**Para 9**
(1995) 3 SCC 78	**referred to**	**Para 9**

CIVIL APPEALLATE JURISDICTION : Civil Appeal No. 5077 of 2006.

From the Judgment & Order dated 6.6.2005 of the High Court of Judicature at Bombay in Writ Petition No. 1204, 7673 & 9449 of 2003.

R.F. Nariman, Meena Doshi, Jayashree Wad, Ashish Wad, Tamali Wad, Sameer Abhyankar, Dipti (for J.S. Wad & Co.) for the Appellants.

Vinay Navare, Yogendra Pendse (for Naresh Kumar) for the Respondents.

The Judgment of the Court was delivered by

MARKANDEY KATJU, J. 1. This appeal has been filed against the impugned judgment of the Full Bench of the High Court of Judicature at Bombay in Writ Petition Nos. Nos. 1204/2003, 7673/2003 and 9449/2003.

2. Heard learned counsel for the parties.

3. The facts of the case are that the petitioners filed complaints under section 28 read with items l (a)(b), (d) and (f) of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, l97l (hereinafter referred to as the MRTU and PULP Act), before the Industrial Court/Labour Court for certain reliefs claiming that they are employees of the respondent company. The respondent company in all these writ petitions has disputed the

status of the employees and has contended in its written statement that there is no relationship of employer employee with any of the petitioners. The company has contended that the complainants were employed through the contractors and that the issue regarding maintainability of the complaints would have to be decided by the court. During the pendency of these complaints, the judgments in the case of *Vividh Kamgar Sabha vs. Kalyani Steel Ltd,* (200l) 2 SCC 38l and in the case of *Cipla Ltd. vs. Maharashtra General Kamgar Union,* (200l) 3 SCC l0l were pronounced by the this Court, and relying upon these decisions, an application was made by the respondent company before the court that the complaints were liable to be dismissed as there was no employer employee relationship between it and the complainants. The Industrial Court/Labour Court upheld the preliminary objection raised by the respondent company by holding that the judgments in *Kalyani Steel Ltd and Cipla Ltd* (supra) were applicable to the facts involved in the complaints and, therefore, the complaints deserve to be dismissed. The complaints were accordingly dismissed.

4. Thereafter the petitioners filed the present writ petitions challenging the dismissal of the complaints. In the meantime by its judgment in *Sarva Shramik Sangh vs. Indian Smelting and Refining Co Ltd,* (2003) l0 SCC 455 this Court has reiterated the view taken in *Kalyani Steel Ltd.* (supra) and *Cipla Ltd.* (supra).

5. The learned single Judge before whom the writ petitions came up for hearing noted that all these cases decided by the this Court were in respect of industries governed by the Industrial Disputes Act, l947, whereas the present petition relates to an industry covered by the provisions of the Bombay Industrial Relations Act, l946 (hereinafter referred to as the BIR Act). The learned single Judge noted that in the case of *Dattatraya Kashinath and others vs. Chhatrapati Sahakari Sakhar Karkhana Ltd and others,* l996 II LLJ l69 and in *Sakhar Kamgar Union vs. Shri Chhatrapati Rajaram Sahakari Sakhar Karkhana Ltd and others,* l996 II CLR 67 Srikrishna J., as he

then was, had held that a conjoint reading of section 3(5) of the MRTU and PULP Act and sections 3(l3) and 3 (l4) of the BIR Act would indicate that even a person employed through a contractor in an industry governed by the BIR Act is regarded as an employee under the MRTU and PULP Act and the complaint filed by such an employee is maintainable under the MRTU and PULP Act. The learned single Judge however, felt that another learned single Judge of this Court (Khandeparkar J.) in *Nagraj Gowda and others vs. Tata Hydro Electric Power Supply Co Ltd, Bombay and others,* 2003 III CLR 358 had expressed a contrary view considering the judgments of the this Court in *Kalyani Steel Ltd, Cipla Ltd* (supra) and *Sarva Shramik Sangh* (supra) as also the judgment of the Division Bench of this Court in the case of *Hindustan Coca Cola Bottling Pvt Ltd. vs. Bharatiya Kamgar Sena,* 200l III CLR l025. The learned single Judge therefore decided to make a reference to a larger Bench in view of the conflicting decisions of the learned single Judges of the High Court.

6. The questions, which were referred to the Full Bench of the High Court were:-

(l) Whether a person who is employed by a contractor who undertakes contracts for the execution of any of the whole of the work or any part of the work which is ordinarily work of the undertaking is an employee within the meaning of section 3(5) of the MRTU and PULP Act?

(2) Whether a complaint filed under the MRTU and PULP Act by an employee as defined under section 3(l3) of the Bombay Industrial Relations Act, is maintainable although no direct relationship of employer employee exists between him and the principal employer?

(3) Whether a complaint filed under the MRTU and PULP Act by employees under section 3(l3) of the BIR Act can be dismissed if the employer claims that they are not his direct employees but are employed through a contractor,

in view of the judgments of the Supreme Court in *Cipla* (supra), *Kalyani Steels Ltd* (supra) and *Sarva Shramik Sangh vs Indian Smelting and Refining Co Ltd* (supra)?

7. The Full Bench of the Bombay High Court answered the question numbers 1 and 2 referred to it in the affirmative, and question number 3 in the negative provided the contractors workmen were employed to do the work of the whole or part of the undertaking.

8. It is this decision which has been challenged before us.

9. A large numbers of decisions have been cited before us. e.g. *Vividha Kamgar Sabha vs. Kalyani Steel Ltd. & another* (2001) 2 SCC 381**,** *Cipla vs. MGK Union* (2001) 3 SCC 101, *Sarva Shramik Sangh vs. Indian Smelting & Refining Company Limited* (2003) 10 SCC 455, *M/s Hindustan Lever Limited vs. Ashok Vishnu Kate* (1995) 6 SCC 326**,** *NTPC vs. Badri Singh Thakur and others.* (2008) 9 SCC 377, *Hindalco Industries vs. Association of Engineering Workers* (2008) 13 SCC 441, *Ahmadabad Mfg. and Calico Ptg. Co. Ltd. vs. Ram Tehel Ramnand* (1972) 1 SCC 898, *Saraspur Mill Co. Ltd. vs. Ramanlal Chimanlal* (1974) 3 SCC 66, *Shramik Uttakarsh Sabha vs. Raymond Woolen Mills Ltd. & others* (1995) 3 SCC 78.

10.In our opinion, in view of the difference of opinion in some of these decisions and the importance of the controversy involved and its application particularly in the State of Maharashtra, an authoritative decision is required by a larger bench on the issues involved.

11. Hence, we refer the matter to a larger bench on the issues referred to above.

12. Let the papers of this case be placed before Hon'ble the Chief Justice of India for constituting a larger bench.

B.B.B. Matter referred to larger Bench.

R.S. SINGH

v.

U.P. MALARIA NIRIKSHAK SANGH & ORS.

(Civil Appeal No. 5600 Of 2006)

MARCH 09, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Summons – Summoning of senior officials by the High Court – Interim order passed by the High Court directing two Senior Government Officials to appear personally for non-compliance of its judgment – Challenge to – On appeal, held: If there is non-compliance of the order, the High Court should first see whether the order can be complied with, without summoning any official – Government counsels can be asked to communicate to the official concerned regarding the non-compliance of the order – Senior officials can be summoned to give explanation only in some extreme cases where the High Court is convinced that deliberately the order of the court was ignored in a spirit of defiance – There should be mutual respect between the judiciary and the executive, otherwise the system would collapse – In the instant case, the High Court was not justified in summoning the said two Senior Government Officials – Direction of the High Court summoning the two high officials set aside – Copy of the order to be circulated to the Judges of all the High Courts and the Cabinet Secretaries, Union of India and State/Union Territories.

State of Gujarat vs. Turabali Gulamhussain Hirani **AIR 2008 SC 86;***State of U.P. and Ors. vs. Jasvir Singh and Ors.* **JT 2011 (1) SC 446 – Relied on.**

Case Law Reference:

AIR 2008 SC 86	**Relied on.**	**Para 13**

2011 (1) SC 446 Relied on. Para 13

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5600 of 2006.

From the Judgment & Order dated 13.11.2003 and 18.12.2003 of the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow in Crl. Misc. Case No. 1457 (C) of 1992.

S.R. Singh, Niranjana Singh for the Appellant.

Subramonium Prasad for the Respondent.

The following order of the Court was delivered

O R D E R

Heard learned counsel for the parties.

This appeal has been filed against the impugned interim orders dated 13th November, 2003 and 18th December, 2003 passed by the High Court of Judicature at Allahabad, Bench at Lucknow.

We have perused the said orders.

A direction has been given in the said orders that the Principal Secretary, Finance along with the Principal Secretary, Medical & Health, U.P. Government shall appear personally before the High Court on the next date for non-compliance of the judgment of the High Court dated 15.11.1 89/13.12.1989.ıThis Court has been repeatedly observing th t the High Courts ordinarily should not summon the senior officials of the government and that sh uld only be done in very rare and exceptional cases when there are compelling circumstances to do so.

In *State of Gujarat vs. Turabali Gulamhussain Hirani,* AIR 2008 SC 86, this Court observed:

"6. A large number of cases have come up before this Court where we find that learned Judges of various High Courts have been summoning the Chief Secretary, Secretaries to the government (Central and State), Director Generals of Police, Director, CBI or BSF or other senior officials of the government.

7. There is no doubt that the High Court has power to summon these officials, but in our opinion that should be done in very rare and exceptional cases when there are compelling circumstances to do so. Such summoning orders should not be passed lightly or as a routine or at the drop of a hat.

8. Judges should have modesty and humility. They should realize that summoning a senior official, except in some very rare and exceptional situation, and that too for compelling reasons, is counter productive and may also involve heavy expenses and valuable time of the official concerned.

9. The judiciary must have respect for the executive and the legislature. Judges should realize that officials like the Chief Secretary, Secretary to the government, Commissioners, District Magistrates, senior police officials etc. are extremely busy persons who are often working from morning till night. No doubt, the ministers lay down the policy, but the actual implementation of the policy and day to day running of the government has to be done by the bureaucrats, and hence the bureaucrats are often working round the clock. If they are summoned by the Court they will, of course, appear before the Court, but then a lot of public money and time may be unnecessarily wasted. Sometimes High Court Judges summon high officials in far off places like Director, CBI or Home Secretary to the Government of India not realizing that it entails heavy expenditure like arranging of a BSF aircraft, coupled with

public money and valuable time which would have been otherwise spent on public welfare.

10. Hence, frequent, casual and lackadaisical summoning of high officials by the Court cannot be appreciated. We are constrained to make these observations because we are coming across a large number of cases where such orders summoning of high officials are being passed by the High Courts and often it is nothing but for the ego satisfaction of the learned Judge.

11. We do not mean to say that in no circumstances and on no occasion should an official be summoned by the Court. In some extreme and compelling situation that may be done, but on such occasions also the senior official must be given proper respect by the Court and he should not be humiliated. Such senior officials need not be made to stand all the time when the hearing is going on, and they can be offered a chair by the Court to sit. They need to stand only when answering or making a statement in the Court. The senior officials too have their self-respect, and if the Court gives them respect they in turn will respect the Court. Respect begets respect.

12. It sometimes happens that a senior official may not even know about the order of the High Court. For example, if the High Court stays the order of the Collector of suspension of a class- III or class IV employee in a government department, and certified copy of that order is left with the Clerk in the office of the Collector, it often happens that the Collector is not even aware of the order as he has gone on tour and he may come to know about it only after a few days. In the meantime a contempt of court notice is issued against him by the Court summoning him to be personally present in Court. In our opinion, this should not be readily done, because there is no reason why the Collector would not obey the order of the High Court. In such circumstances, the Court should only request

the government counsel to inform the concerned Collector about the earlier order of the Court which may not have been brought to the notice of the Collector concerned, and the High Court can again list the case after a week or two. Almost invariably it will be found that as soon as the Collector comes to know about the stay order of the High Court, he orders compliance of it.

13. In the present case, we find no occasion or reason for the learned Judge to summon the Chief Secretary or the Law Secretary by the impugned order. If the learned Judge was concerned about the lack of enough Stenographers in the office of the Public Prosecutor he could have called the Advocate General or Govt. Advocate to his chamber and have asked him to convey the Court's displeasure to the government, but where was the need to summon the Chief Secretary or Law Secretary ? Hence, we set aside the impugned interim order dated 11.4.2007 and condone the delay of 25 days in filing the appeal before the High Court. The High Court may now proceed to hear the Criminal Appeal in accordance with law. The appeal is allowed."

Following the above decision, this Court in *State of U.P. & Ors. vs. Jasvir Singh & Ors,* JT 2011(1) SC 446, observed :

"7. It is a matter of concern that there is a growing trend among a few Judges of the High Court to routinely and frequently require the presence, in court, of senior officers of the government and local and other authorities, including officers of the level of Secretaries, for perceived non-compliance with its suggestions or to seek insignificant clarifications. The power of the High Court under Article 226 is no doubt very wide. It can issue to any person or authority or government, directions, orders, writs for enforcement of fundamental rights or for any other purpose. The High Court has the power to summon or require the

personal presence of any officer, to assist the court to render justice or arrive at a proper decision. But there are well settled norms and procedures for exercise of such power.

8. This court has repeatedly noticed that the real power of courts is not in passing decrees and orders, nor in punishing offenders and contemnors, nor in summoning the presence of senior officers, but in the trust, faith and confidence of the common man in the judiciary. Such trust and confidence should not be frittered away by unnecessary and unwarranted show or exercise of power. Greater the power, greater should be the responsibility in exercising such power. The normal procedure in writ petitions is to hear the parties through their counsel who are instructed in the matter, and decide them by examining the pleadings/affidavit/evidence/documents/material. Where the court seeks any information about the compliance with any of its directions, it is furnished by affidavits or reports supported by relevant documents. Requiring the presence of the senior officers of the government in court should be as a last resort, in rare and exceptional cases, where such presence is absolutely necessary, as for example, where it is necessary to seek assistance in explaining complex policy or technical issues, which the counsel is not able to explain properly. The court may also require personal attendance of the officers, where it finds that any officer is deliberately or with ulterior motives withholding any specific information required by the court which he is legally bound to provide or has misrepresented or suppressed the correct position.

9. Where the State has a definite policy or taken a specific stand and that has been clearly explained by way of affidavit, the court should not attempt to impose a contrary view by way of suggestions or proposals for settlement. A court can of course express its views and

issue directions through its reasoned orders, subject to limitations in regard to interference in matters of policy. But it should not, and in fact, it cannot attempt to impose its views by asking an unwilling party to settle on the terms suggested by it. At all events the courts should avoid directing the senior officers to be present in court to settle the grievances of individual litigants for whom the court may have sympathy. The court should realize that the state has its own priorities, policies and compulsions which may result in a particular stand. Merely because the court does not like such a stand, it cannot summon or call the senior officers time and again to court or issue threatening show cause notices. The senior officers of the government are in-charge of the administration of the State, have their own busy schedules. The court should desist from calling them for all and sundry matters, as that would amount to abuse of judicial power. Courts should guard against such transgressions in the exercise of power.".....

(emphasis supplied)

We are pained to observe that despite our decision in *State of Gujarat vs. Turabali Gulamhussain Hirani* (supra) many High Courts are persisting in summoning executive officials where it was not absolutely necessary to summon them. It is possible that our judgment in the aforesaid decision has not been brought to the notice of the Hon'ble Judges in many of the High Courts and it may also be that the subsequent decision of this Court in *State of U.P. vs. Jasvir Singh* (supra) has not been brought to their notice. Consequently we are coming across many orders where High Court Judges are summoning executive officials routinely, casually, and sometimes even at the drop of a hat. This is most improper.

We are constrained to make these observations because we are repeatedly coming across a large number of cases where such orders summoning high officials are being passed

by the High Courts and often it is only for the ego satisfaction of the learned Judge. Judges should not have any ego problems. In particular, members of the higher judiciary (High Court and Supreme Court) should have great modesty and humility. This is because the higher one moves in the hierarchy the greater become his powers. Hence, unless one has modesty and humility, he may play havoc. High Court Judges have tremendous powers, but the beauty lies in not exercising those powers except where absolutely necessary. Flaunting these powers unnecessarily only brings the judiciary into disrepute. Some of the greatest Judges have been the most modest, e.g., Justice Holmes, Judge Learned Hand, Justice Brandeis, Justice Cardozo, Lord Atkins, Lord Denning, Justice Venkatachaliah, etc.

At the same time, we make it clear that we have also come across cases where orders of the Courts are deliberately ignored by government officials which is not proper. Democracy and the rule of law requires that the orders of the Courts should be complied with by the executive authorities promptly and with due diligence. If the executive authorities are dissatisfied with a High Court order, they may appeal against that order to the Supreme court but it is not proper to ignore such orders.

In our opinion, if the High Court finds that its order has not been complied with, it shall first see whether the order can be complied with without summoning any official and for that purpose it can ask the Advocate General, Additional Advocate General or Chief Standing Counsel or some other counsel of the State to communicate to the concerned official that there is some order of the Court which has not been complied with. Ordinarily, this will suffice because we see no reason as to why the executive authorities will not comply with the orders of the court. It is only in some extreme case where the High Court is convinced that deliberately the order of the court has been ignored in a spirit of defiance that it may summon the official

to explain why the order of the court has not been complied with.

The system functions on mutual respect between the judiciary and the executive. While the judiciary must respect the executive, at the same time, the executive must also respect the judiciary. If we do not respect each other, the system will collapse.

In the present case, we are of the opinion that the High Court was not justified in summoning the aforementioned officials.

Following the decision in Turabali's case(supra) and Jasvir Singh's case (supra), this appeal is allowed and consequently the direction of the High Court summoning Principal Secretary, Finance along with Principal Secretary, Medical & health is set aside. The Contempt Petition shall be decided on its own merits, in accordance with law, expeditiously.

A copy of this order will be sent to the Registrar Generals/ Registrars of all the High Courts, who shall circulate copies to the learned Judges of the High Courts. The Chief Justices of the High Courts, in particular, shall bring this judgment to the notice of all Hon'ble Judges of the Court, with the request that they follow this decision, in letter and spirit.

A copy of this order will also be sent to the Cabinet Secretary, Union of India, New Delhi as well as to all the Chief Secretaries of all States/Union Territories.

N.J. Appeal allowed.

HARICHARAN & ANR.
v.
STATE OF MADHYA PRADESH & ORS.
(Criminal Appeal No. 581 of 2003)

MARCH 9 , 2011

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

Custodial death: Allegation of custodial death against the accused-police officials on the ground that detenu-deceased was kept in illegal custody and subjected to third degree torture for extracting confession that the deceased was guilty of the offence of theft – Conviction u/ ss.304 (Part-II), 330 – On appeal, Held: The fact that deceased was tortured and subjected to electric shock whilst in police custody was well established by medical evidence – Prosecution proved beyond reasonable doubt that deceased was taken to the police station and upon his release, the police personnel terrorized the entire family – This was evident from the fact that widow, son and brother of the deceased all turned hostile – However, evidence on the record clearly showed that death of the deceased was a direct consequence of the inexcusable and inhuman torture by the police – No reason to interfere with the order of conviction – Penal Code, 1860 – ss.304 (Part-II), 330.

Appeal: Appeal against acquittal – Acquittal by trial court – Power of appellate court to interfere with the order of acquittal – Held: Appellate court would not interfere with the order of acquittal, unless the conclusion recorded by the lower court is held to be perverse and has resulted in miscarriage of justice – Appellate court should also not interfere with an order of acquittal if two reasonable conclusions are possible.

Criminal law: Suspicion, no matter how strong cannot be

the basis of conviction – Even in cases of custodial death, it is for the prosecution to establish beyond reasonable doubt a proper link between the accused and the commission of crime.

Constitution of India, 1950: Articles 21 and 22 (1) – Held: The expression "Life or Personal Liberty" in Article 21 includes right to live with human dignity – Therefore, it includes within itself guarantee against the torture and assault by the States or his functionaries – Custodial death.

The prosecution case was that the victim-deceased was taken into custody and subjected to torture with a view of obtain confession from him for the alleged theft committed by him. After two days, the deceased was released. The condition of the deceased deteriorated and he died. The case was registered against the accused-police officers for the offence of custodial death.

The trial court acquitted the accused. The High Court convicted the accused under Section 304 Part II IPC and sentenced them to five years R.I. and fine and further convicted them under section 330 IPC and sentenced them to three years R.I. The instant appeals were filed challenging the order of the High Court.

Dismissing the appeals, the Court

HELD: 1. The appellate court would not interfere with the order of acquittal, unless the conclusion recorded by the lower court is held to be perverse and has resulted in miscarriage of justice. The appellate court should also not interfere with an order of acquittal if two reasonable conclusions are possible. [Para 20] [786-E-F]

2. Suspicion, no matter how strong cannot form the basis of a conviction. Even in cases of custodial death, it is for the prosecution to establish beyond reasonable doubt a proper link between the accused and the

commission of crime. Custodial death is perhaps one of the worst crimes in a civilized society governed by rule of law. It is aggravated by the fact that crimes in custody are committed by persons, who are charged with the solemn responsibility to protect the fundamental rights of all the citizens. These crimes are committed under the shield of uniform and authority within the four walls of police station or lock up, the victim being totally helpless. The fundamental rights under Articles 21 and 22 (1) of the Constitution are required to be zealously and scrupulously protected. The expression "Life or Personal Liberty" in Article 21 includes right to live with human dignity. Therefore, it also includes within itself, guarantee against the torture and assault by the States or his functionaries. In ****D.K. Basu case*, the Supreme Court, as the custodian and protector of the fundamental and the basic human rights of the citizens, viewed with deep concern allegation made against the police officials about custodial crimes. Using any form of torture for extracting any kind of information, from a suspect was declared to be "neither right, nor just, nor fair." It was specifically laid down that though a crime suspect must be interrogated - indeed subjected to sustain and scientific interrogation - determined in accordance with the provisions of law, he cannot, however, be tortured or subjected to third degree methods or eliminated with a view to elicit information or extract a confession. Rarely in cases of police torture or custodial death, direct ocular evidence of the complicity of the police personnel would be available. Generally speaking, it would be police officials alone who can explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that the police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues, and the instant case is an apt illustration, as to how one after the other police witnesses feigned ignorance about the whole**

matter. [Paras 21, 24, 25 & 26] [784-G; 785-A-E-H; 786-A-B-F-H]

D.K. Basu v. State of West Bengal* (1997) 1 SCC 416 – relied on**

State of Uttar Pradesh v. Nandu Vishwakarama and Ors. **(2009) 14 SCC 501;** *Chandrappa v. State of Karnataka* **(2007) 4 SCC 415;** *M.C. Ali & Anr. v. State of Kerala* **(2010) 4 SCC 573;** *Allarakha K. Mansuri v. State of Gujarat* **(2002) 3 SCC 57;** *Raghunath v. State of Haryana & Anr.* **(2003) 1 SCC 398;** *Sadashio Mundaji Bhalerao v. State of Maharashtra* **(2007) 15 SCC 421;** *State of M.P. v. Shyamsunder Trivedi & Ors.* **(1995) 4 SCC 262** *Sahadevan Alias Sagadevan v. State Represented By Inspector of Police,* Chennai **(2003) 1 SCC 534;** *Munshi Singh Gautam (Dead) & Ors. v. State of Madhya Pradesh* **(2005) 9 SCC 631 – Referred to.**

3.1. The High Court had correctly concluded that there was sufficient evidence on record to prove that the deceased was taken into an illegal custody. This fact was adverted to by PW6. When this witness appeared in court, he was absolutely terror stricken. Upon being given the assurance by the court, the witness proceeded to state that the deceased was his uncle's son. He stated that appellant no.3, had taken the deceased with him to the police station. He was kept in the police station for about two days. PW1 and PW16 had brought the deceased from the police station. He had talked to the deceased when he came back from the police station. The deceased told him that appellant no.3 had given him severe beatings. This statement clearly showed that the deceased was kept in illegal custody, as claimed by the prosecution. Apart from PW6, the other witnesses were also under constant pressure, not to depose against the police. This was evident from the fact that virtually all the witnesses turned hostile and failed to support the prosecution case. PW3, the brother of the deceased, his widow and his son

did not support the prosecution version. The terror of the police was such that even the family members of the deceased refrained from speaking the truth. PW1, the brother of the deceased, had plucked up enough courage to state that the police had called the deceased to the police station. He, however, stated that the deceased came back in the morning. This witness had also stated that the police had beaten up his brother and he was rendered unconscious. He had been taken to the hospital from the Shivpuri Kotwali. He had also lodged a complaint with the Superintendent of Police, PW28, as the condition of the deceased was serious. [paras 28 to 30] [788-F-H; 789-A-H]

3.2. The fact that the deceased had been tortured and subjected to electric shock whilst in police custody was well established by the medical evidence given by PW23, and PW24. In accepting the evidence of PW6 and the medical evidence of PW23 and PW24, the High Court did not commit any error. The evidence on the record clearly showed that death of the deceased was a direct consequence of the inexcusable and inhuman torture by the police. The prosecution has proved beyond reasonable doubt that the deceased was taken to the police station. Whilst at the police station, he was subjected to third degree torture. He was given electric shocks in the scrotum. Such torture was inflicted on the deceased merely for the purpose of extracting a confession that he was guilty of the offence of theft. Upon his release, the police personnel terrorized the entire family. This was evident from the fact that the widow, the son and the brother of the deceased all turned hostile. However, there was sufficient evidence on the record given by PW6, PW23 and PW24 to prove beyond reasonable doubt that the deceased died due to the inhuman torture inflicted upon him by the appellants. [Paras 31, 32] [790-A-H; 791-A-C]

Case Law Reference:

2009 14 SCC 501	**referred to**	**Para 9**
2007 4 SCC 415	**referred to**	**Para 9**
2010 4 SCC 573	**referred to**	**Para 9**
2002 3 SCC 57	**referred to**	**Para 10**
2003 1 SCC 398	**referred to**	**Para 10**
2007 15 SCC 421	**referred to**	**Para 12**
1997 1 SCC 416	**referred to**	**Para 19**
1995 4 SCC 262	**referred to**	**Para 19**
2003 1 SCC 534	**referred to**	**Para 19**
2005 9 SCC 631b	**referred to**	**Para 19**
1997 1 SCC 416	**referred to**	**Para 23**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 581 of 2003.

From the Judgment & Order dated 1.8.2002 of the High Court of Judicature of Madhya Pradesh, Jabalpur Bench at Gwalior in Criminal Appeal No. 79 of 1990.

WITH

Crl. A.Nos. 582, 583 & 584 of 2003.

Mahabir Singh, Nagendra Rai, K.T.S. Tulsi, Nikhil Jain, Gangandeep Sharma, Ajay Pal, Amita Gupta, Rahat Bansal, Vikas Upadhyaya, Niraj Sharma, Atul Sharma, Rekha Palli, Ravinder Singh, Maheen Pradhan, Prem Malhotra, Vibha Datta Makhija for the appearing parties.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. These appeals have been filed against the judgment of the High Court of Judicature of Madhya Pradesh in Criminal Appeal No. 79 of 1990 whereby the High Court accepted the appeal of the State of Madhya Pradesh and convicted the appellants herein for an offence under Section 304 Part II and sentenced them to five years R.I. and fine of Rs.5,000/- each and further convicted the appellants under Section 330 IPC and sentenced them to three years R.I. In so doing, the High Court reversed the judgment of the trial court in Sessions Case No. 8 of 1988 dated 7th March, 1989 whereby the appellants were acquitted of all the offences under Section, 343, 330 and 304 Part II IPC.

2. At that relevant time, all the appellants were police officers and posted at Police Station Indar, District Shivpuri. Anil Kumar Kushwaha, appellant in Criminal Appeal No. 584 of 2003 was posted as the Station House Officer of the aforesaid Police Station. Ram Ujagar, appellant in Criminal Appeal No. 583 of 2003 was posted as Head Constable. Nathuram, appellant in Criminal Appeal No. 582 of 2003 was also posted as Head Constable. Haricharan and Mazid Hussain, appellants in Criminal Appeal No. 581 of 2003 were posted as Constables.

3. Briefly stated the prosecution case, as noticed by the High Court is that Mathura was called to the Police Station through Head Constable Ram Ujagar with regard to the investigation of Crime Case No. 57 of 1983 for offence punishable under Section 457 and 380 IPC. He was interrogated at the Police Station and was confined in the lock up. While he was confined in the lock up, he was subjected to third degree torture. He was given electric shock on his scrotum with the intention to extort the confession for the crime of the alleged theft. As due to the torture and electric shocks, condition of Mathura deteriorated, he was released on 11th October, 1983. According to the prosecution, Mathura was unlawfully detained in the Police Station from 8th October, 1983

till 11th October, 1983. The police had neither made any entry about his detention in the police records nor about his discharge.

4. Mathura was handed over to Takhat Singh, PW1 and Parmal Singh, PW16, who took Mathura to his house. He was looked after by the family members. However, the condition of Mathura worsened on 13th October, 1983. Takhat Singh, PW1 alongwith his brother Amrit Lal sent a private doctor Jagdish Prasad Soni, PW18 for his treatment. On seeing that Mathura was unconscious, Jagdish Prasad Soni advised that he should be immediately taken to hospital at Shivpuri. Takhat Singh, PW1 brought him to Shivpuri by bus. He also intimated Superintendent of Police about the ill-treatment and torture of Mathura by the police personnel at Police Station Indar. He requested the Superintendent of Police to ensure that proper medical treatment is given to Mathura. He also made a request for an enquiry against the police officers at the aforesaid police station. Accepting the request made by Takhat Singh, Superintendent of Police, R.K. Tripathi, PW28 directed Town Inspector, Shivpuri to get the injured Mathura medically examined and to submit his report.

5. PW34, R.P. Upadhyay took Mathura to the District Hospital at Shivpuri. He was first examined by Dr. L.D. Vaswani, PW24. Dr. Vaswani found that Mathura was unconscious but his pulse and breathing was normal. He admitted Mathura in hospital and kept him under observation. On 13th October, 1983 at about 6.10 p.m., condition of Mathura further deteriorated. At that stage, Dr. C.M. Tripathi, PW23, who was on casualty duty also examined Mathura and found Mathura was on the verge of death. He had, therefore, given artificial respiration, oxygen and extra massage to Mathura. In spite of following the aforesaid procedures for about ten minutes, Dr. Tripathi could not revive the heartbeats of Mathura. He was declared dead at 6.20 p.m. in the evening.

6. The Town Inspector was given intimation of the death

vide Ex.P7 and a request was made for a postmortem of the dead body. The dead body of Mathura was examined in the presence of PW1, Takhat Singh and PW37, Laxminarayan Kulshreshtha, Sub-Divisional Magistrate. Panchnama of the dead body (Ex.P3) was duly prepared. Thereafter, a direction was issued for performing the postmortem. On 14th October, 1983 at about 11.50 a.m., the postmortem was performed by Dr. L.D. Vaswani. He found one oval shaped charring wound on each side of the anterior of the scrotum. A black charring wound oval in shape 2.5 cm x 3 cm on the right side and a black charring oval in shape 2 cm x 1.5 cm on the left side. According to this postmortem, no other external injuries were found. On internal examination, it was found that arachnoid membrane of the brain was congested. He also found sub arachnoid Hemorrhage at the base of the near circle of Willis. The vessels of the circle were diluted and ruptured. Haematoma in the substance of the brain at the middle portion of the brain near base. According to the report Haematoma was 4 cm. in diameter. Dr. Vaswani found that the cause of death was coma caused by intracranial Hemorrhage, which might be due to hyper tension.

7. After the death of Mathura, FIR was duly registered against all the appellants. Upon completion of the investigation, the appellants were put on trial. The trial court vide its judgment dated 7th March, 1989 acquitted all the appellants of all the charges. Feeling aggrieved against the judgment of the trial court, the State of Madhya Pradesh challenged the same by way of an appeal. The High Court by its judgment dated 1st August, 2002 allowed the appeal and reversed the findings of acquittal recorded by the trial court. All the appellants were convicted and sentenced as noticed above. Aggrieved by the aforesaid judgment, the appellants have filed the present four appeals.

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

9. Mr. K.T.S. Tulsi, learned senior counsel, appearing in

Criminal Appeal No. 582 of 2003 on behalf of Head Constable, Nathuram submitted that the High Court committed a grave error in reversing the well reasoned judgment of the trial court. He relied on a judgment of this Court in the case of *State of Uttar Pradesh Vs. Nandu Vishwakarama and Ors.,*[1] to point out that in reversing the judgment of the trial court, the High Court has disregarded the principles within which the High Court was to exercise its appellate powers. In the aforesaid judgment, this Court notices and reiterates the principles laid down in the case of *Chandrappa Vs. State of Karnataka*[2]*,* which are as follows:-

> "42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:
>
> (1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.
>
> (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.
>
> (3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to

1. (2009) 14 SCC 501.
2. (2007) 4 SCC 415.

review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

The same principles were laid down in the case of *M.C. Ali & Anr. Vs. State of Kerala*[3].

10. Mr. Tulsi submitted that the High Court would have been justified in interfering with the order of acquittal only in case, the High Court had recorded a conclusion that the findings recorded by the trial court were perverse and resulted in miscarriage of justice. It was not in the domain of the High Court to interfere with the findings of the facts recorded by the trial court, upon due appreciation of evidence and recording plausible conclusions. He further submitted that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and other to his innocence, the view which is favorable to the accused should be adopted. In support of the submissions, learned counsel relied on *Allarakha K. Mansuri Vs. State of Gujarat*[4], and *Raghunath Vs. State of*

3. (2010) 4 SCC.

4. (2002) 3 SCC 57.

Haryana & Anr.[5].

11. Mr. Tulsi further submitted that there were discrepancies between the charges as laid by the prosecution and medical evidence. According to the postmortem, injury had been caused within two days. This, according to Mr. Tulsi, would clearly rule out the case of torture. Even according to the prosecution, Mathura had been taken into the custody on 8th October, 1983 and had been released on 11th October, 1983. The postmortem was conducted on 14th October, 1983 at around 11.50 a.m.

12. Mr. Tulsi then submitted that the discrepancies between the oral evidence of the prosecution witnesses and the medical evidence would clearly show that the prosecution has failed to prove the case beyond reasonable doubt. The appellants have been convicted by the High Court merely on the basis of assumption and presumptions based on suspicion. He relied on the observations made by this Court in Paragraph 31 of the judgment in the case of *Sadashio Mundaji Bhalerao Vs. State of Maharashtra*[6], which are as follows:-

"We are conscious that there is a rise in incidents of custodial deaths but we cannot completely dehors the evidence and its admissibility according to law convict the accused. We cannot act on presumption merely on a strong suspicion or assumption and presumption. We can only draw presumption which is permissible under the law and we cannot rush to the conclusion just because the deceased has died in the police custody without there being any proper link with the commission of the crime."

13. Mr. Mahabir Singh, learned senior counsel appearing for appellants in Criminal Appeal No. 581 of 2003, submitted that the appellant Majid Hussain was a mere constable and he had no role to play in the illegal custody of Mathura. He has not

5. (2003) 1 SCC 398.

6. (2007) 15 SCC 421.

been named in the FIR. No specific role has been attributed to him. He has only been implicated because he was posted in the police station at that relevant time. He further submitted that appellant Haricharan similarly had only been involved in the entire episode because he was posted as a guard outside the police station. He submits that no role is attributed to this appellant inside the police station. The High Court failed to notice any of the circumstances, which would clearly show that these two appellants were innocent victims of the fortuitous circumstance of having been posted at the police station at the relevant time.

14. Mr. Nagendra Rai, learned senior counsel appearing for the appellant in Criminal appeal No. 584 of 2003 submitted that even though the appellant was posted as the Station House Officer at the relevant time, he has been convicted without any direct evidence of his involvement in the illegal custody or alleged torture of Mathura. He submits that no specific role has been attributed to him. In fact, PW6, Kamal Singh, who had stated that "Mathura told him that Nathuram has caused him severe beatings. At that time, the condition of Mathura was very serious but he was speaking. I did not see any injury on his person and even he also did not show him any injury." In spite of such statement of PW6, the High Court without any justification reversed the findings recorded by the trial court. Learned counsel then submits that the trial court on examination of the evidence of PW6, Kamal Singh discarded the same, concluding that he was a manufactured witness and could not be relied upon.

15. According to Mr. Nagendra Rai, the High court ignored the settled principle of law that the findings of fact recorded by the trial court can not be ignored unless the conclusions have led to a miscarriage of justice. Learned senior counsel further submitted that there is no evidence on record to show that Mathura was kept in custody from 8th October, 1983 to 11th October, 1983. In fact, PW6 clearly stated that "then Mathura

was kept in the police station for about two days". According to Mr. Nagendra Rai, learned senior counsel that the custody of Mathura being doubtful, the appellant can not be connected with the crime of alleged torture. He then pointed out to a communication addressed by Dr. K.L. Singh, Chief Medical and Health Officer, District Shivpuri, Madhya Pradesh to the concerned Inspector dated 29th October, 1983. This communication was in the context of a query regarding the postmortem report of deceased Mathura, which had been addressed by the concerned Inspector on 20th October, 1983. It was stated in this communication that on passing electric current on scrotum, intracranial hemorrhage is not possible. The postmortem report dated 14th October, 1983 clearly stated that "the cause of death in the case is due to coma caused by intracranial Hemorrhage, which might be due to hyper tension". It is submitted by Mr. Nagendra Rai that the two aforesaid facts would clearly raise the doubt as to whether the injuries were sustained by Mathura on account of electric shock. Learned senior counsel pointed out that there is evidence on the record to show that Mathura was a habitual drunkard. He was also suffering from some dangerous disease. He was being treated by Dr. Jagdish Prasad Soni, PW18 for a number of years.

16. Learned senior counsel further submitted that the cumulative affect of all the evidence raises a reasonable doubt about the events as projected by the prosecution. Learned senior counsel submitted that the reasoning adopted by the trial court in Paragraph 20 of the judgment can not be said to be either perverse or based on no evidence. The conclusions drawn by the trial court being plausible conclusions could not have been reversed by the Appellate Court. Learned senior counsel also reiterated the observations made by this Court in the case of *Sadashio Mundaji Bhalerao* (supra) that suspicion, however, strong can not take the place of legal proof, even in cases of custodial death.

17. On the other hand, Ms. Vibha Datta Makhija, learned

counsel submits that the judgment of the High Court does not call for any interference. It is well within the findings of the appellate jurisdiction of the High Court. On merits, she submits that in this case, the prosecution has presented systematic evidence, in four stages to connect the accused appellants with the crime. She submits that there is evidence that :-

(i) Mathura was taken to the Police Station.

(ii) That he was given electric shocks and he was taken to the hospital.

(iii) The postmortem report clearly shows that the injuries suffered by Mathura had been caused as he had been subjected to electric shock.

(iv) That the death was the direct result of the torture inflicted on Mathura.

18. According to the learned counsel, in this case, the medical evidence is the crucial link. She has made detailed reference to the evidence given by PW23, Dr. C.M. Tripathi and PW24, Dr. L.D. Vaswani. Learned counsel submits that the evidence of these witnesses have been carefully scrutinized by the High Court. The High Court has also demonstrated the implausibility of the conclusions recorded at the trial court. Learned counsel emphasized that there is clear evidence that Mathura was called to the police station. He was kept there for two days. Injuries were caused during that period. Injuries were torturous in nature. All these facts are adverted to by PW6. The trial court wrongly discarded the evidence of this witness. Learned counsel then submitted that the High Court rightly relied on the evidence of DW1, Suresh Singh Sikarwar, who had clearly stated that Mathura had been called to the police station and that he had been illegally confined.

19. Learned counsel further submitted that the trial court has not given sufficient attention to the evidence of the brother

PW1, Takhat Singh. It can not be said that he did not support the prosecution, merely because he stated that he had no knowledge about the torture. This witness had not stated that Mathura was not taken to the police station. Once it was established that Mathura had been taken to the police station, it was for the police to explain the injuries suffered by Mathura. Finally, learned counsel submitted that in case of custodial death, normal rules with regard to appreciation of evidence can not always be made applicable. In support of her statement, the learned counsel relied on judgment of this Court in the case of *D.K. Basu Vs. State of West Bengal*[7]. According to the learned counsel, the guidelines laid down in this judgment have been flouted by the police totally. She relied on the judgments of this Court, i.e., *State of M.P. Vs. Shyamsunder Trivedi & Ors.*[8] and *Sahadevan Alias Sagadevan Vs. State Represented by Inspector of Police, Chennai,*[9] in support of the submission with regard to the manner in which the evidence has to be appreciated in cases relating to custodial death. Learned counsel also relied on *Munshi Singh Gautam (Dead) & Ors. Vs. State of Madhya Pradesh*[10].

20. We have considered the submissions made by learned counsel for the parties. In principle, as a pure statement of law, Mr. Tulsi is entirely correct in the submission that the Appellate Court would not interfere with the order of acquittal, unless the conclusion recorded by the lower court is held to be perverse and has resulted in miscarriage of justice. The Appellate Court would also not interfere with an order of acquittal if two reasonable conclusions are possible.

21. We also find much substance in the submissions of Mr. Tulsi, again as a pure statement of law, that suspicion, no matter how strong cannot form the basis of a conviction. Even

7. (1997) 1 SCC 416.
8. (1995) 4 SCC 262.
9. (2003) 1 SCC 534.
10. (2005) 9 SCC 631.

in cases of custodial death, it is for the prosecution to establish beyond reasonable doubt a proper link between the accused and the commission of crime.

22. Similarly, the submissions made by senior advocates, i.e., Mr. Nagendra Rai, and Mr. Mahabir Singh cannot be said to be without merit as legal propositions.

23. We are, however, unable to agree that any of the appellants could take advantage of any of the legal submissions made by the learned counsel in the facts and circumstances of this case. It has become necessary to remind ourselves of the principles laid down by this Court in the case of *D.K. Basu Vs. State of West Bengal*[11]. In the aforesaid landmark judgment, this Court declared that custodial violence, including rape, torture and death in the lock up, strikes a blow to the rule of law.

24. It was emphasised that custodial death is perhaps one of the worst crimes in a civilized society governed by rule of law. It is aggravated by the fact that crimes in custody are committed by persons, who are charged with the solemn responsibility to protect the fundamental rights of all the citizens. These crimes are committed under the shield of uniform and authority within the four walls of police station or lock up, the victim being totally helpless. The Judgment further declared that the fundamental rights under Articles 21 and 22 (1) of the Constitution required to be jealously and scrupulously protected. It reiterated the principle that the expression "Life or Personal Liberty in Article 21 includes right to live with human dignity. Therefore, it also includes within itself guarantee against the torture and assault by the States or his functionaries."

25. The Supreme Court, as the custodian and protector of the fundamental and the basic human rights of the citizens, would view with deep concern any allegation made against the police officials about custodial crimes. In the present case, we

11. (1997) 1 SCC 416.

are dealing with the torture of detenue, resulting in death. Using any form of torture for extracting any kind of information, from a suspect was declared to be "neither right, nor just, nor fair." It was specifically laid down that though a crime suspect must be interrogated —— indeed subjected to sustain and scientific interrogation — determined in accordance with the provisions of law, he cannot, however, be tortured or subjected to third degree methods or eliminated with a view to elicit information or extract a confession. The aforesaid observations of this Court, in our opinion, have been totally disregarded in the present case.

26. Mr. Nagendra Rai had submitted that there is no direct evidence of the involvement of Anil Kumar Singh Kushwaha in the legal custody and alleged torture of Mathura. He also submitted that no specific role had been attributed to him. In our opinion, both the submissions are without any merit. This submission of Mr. Nagendra Rai is completely answered by the observations made by this Court in the case of State of M.P. Vs. Shyamsunder Trivedi & Ors. (supra). We may notice here the observations made in Paragraph 16 and 17 of the aforesaid judgment:-

> **16**……..The High Court erroneously overlooked the ground reality that rarely in cases of police torture or custodial death, direct ocular evidence of the complicity of the police personnel would be available, when it observed that 'direct' evidence about the complicity of these respondents was not available. Generally speaking, it would be police officials alone who can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that the police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues, and the present case is an apt illustration, as to how one after the other police witnesses feigned ignorance about the whole matter.

17. From our independent analysis of the materials on the record, we are satisfied that Respondents 1 and 3 to 5 were definitely present at the police station and were directly or indirectly involved in the torture of Nathu Banjara and his subsequent death while in the police custody as also in making attempts to screen the offence to enable the guilty to escape punishment. The trial court and the High Court, if we may say so with respect, exhibited a total lack of sensitivity and a "could not care less" attitude in appreciating the evidence on the record and thereby condoning the barbarous third degree methods which are still being used at some police stations, despite being illegal. The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt, by the prosecution, ignoring the ground realities, the fact-situations and the peculiar circumstances of a given case, as in the present case, often results in miscarriage of justice and makes the justice delivery system a suspect. In the ultimate analysis the society suffers and a criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach of the courts because it reinforces the belief in the mind of the police that no harm would come to them, if an odd prisoner dies in the lock-up, because there would hardly be any evidence available to the prosecution to directly implicate them with the torture. The courts must not lose sight of the fact that death in police custody is perhaps one of the worst kind of crimes in a civilised society, governed by the rule of law and poses a serious threat to an orderly civilised society. Torture in custody flouts the basic rights of the citizens recognised by the Indian Constitution and is an affront to human dignity. Police excesses and the maltreatment of detainees/undertrial prisoners or suspects tarnishes the image of any civilised nation and encourages the men in 'Khaki' to consider themselves to be above the law and sometimes even to become law unto themselves. Unless

stern measures are taken to check the malady, the foundations of the criminal justice delivery system would be shaken and the civilization itself would risk the consequence of heading towards perishing. The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may lose faith in the judiciary itself, which will be a sad day.

27. Keeping in view the aforesaid salutary observations, we may now examine the question as to whether the High Court committed an error in reversing the judgment of acquittal as recorded by the trial Court. It was the case of the prosecution that Mathura was suspected of having committed theft. He was, therefore, picked up for interrogation on 8th October, 1983, with regard to a case registered under Sections 457 and 380 IPC, i.e. lurking house trespass and theft respectively. He was kept in custody till 11th October, 1983 at the police station. The objective of keeping him in custody was to get a confession from him of having committed the offence of house trespass and theft. At the relevant time, Anil Kumar Singh Kushwaha, appellant in Criminal Appeal No. 584 of 2003 was Station House Officer of the Police Station Indar. Ram Ujaagar, appellant in Criminal Appeal No. 583 of 2003 and Nathu Ram, appellant in Criminal Appeal No. 582 of 2003 were both working as Head Constables.

28. In our opinion, the High Court has correctly concluded that there is sufficient evidence on record to prove that Mathura had been taken into an illegal custody. This fact has been adverted to by PW6, Kamal Singh. When this witness appeared in Court, he was absolutely terror stricken. He categorically stated as follows:-

"I will give statement in favour of the accused persons because if I speak against them then I will be beaten up in the police station. I am a poor person. That is why I am so frightened that if I give the statement against the

accused persons then they will cause loss to me in the police station. None of the accused persons came to me asking for giving such a statement. I feared because my nephew Lalji has been murdered and we have not been heard anywhere. (The witness was told that he would get full protection as per his requirement. Hence tell all this truth to the Court)."

29. Upon being given the assurance by the Court, as noticed above, the witness proceeded to state that Mathura was his uncle's son. He stated that Nathuram, appellant No.3, had taken Mathura with him to the police station. He was kept in the police station for about two days. Takhat Singh, PW1 and Parmal Singh, PW16 had brought Mathura from the police station. He had talked to Mathura when he came back from the police station. Mathura told him that Nathuram had given him severe beatings. This statement clearly shows that Mathura was kept in illegal custody, as claimed by the prosecution.

30. Apart from Kamal Singh (PW6), it appears that the other witnesses were also under constant pressure, not to depose against the police. This is evident from the fact that virtually all the witnesses turned hostile and failed to support the prosecution case. It is noteworthy that Shrikrishna, PW3, Mathura's brother, his widow and his son did not support the prosecution version. The terror of the police was such that even the family members of the deceased refrained from speaking the truth. Takhat Singh, PW1, the brother of the deceased Mathura, had plucked up enough courage to state that the police had called Mathura to the police station. He, however, stated that Mathura came back in the morning. This witness had also stated that the police had beaten up his brother and he was rendered unconscious. He had been taken to the hospital from the Shivpuri Kotwali. He had also lodged a complaint with the Superintendent of Police, R.K. Tripathi, PW28, as the condition of Mathura was serious.

31. The fact that Mathura had been tortured and subjected to electric shock whilst in police custody is well established by the medical evidence given by PW23, Dr. C.M. Tripathi and PW24, Dr. L.D. Vaswani. Dr. Tripathi had clearly stated that he had found two burn injuries on the scrotum. The injury on the right side was 2.5 cm x 3 cm. There was oval shape charring of the skin, which had become irony. Similar wound was found on the left side of the scrotum, which was also oval shape and 2 cm x 1.5 cm in dimensions. It was the positive opinion of Dr. Tripathi that the wounds had been caused by electric shock. This witness further stated that as the result of the electric shock, the brain was found to be congested in aragonite membrane. He stated that Mathura had died of Hemorrhage of the vessels of the brain. This witness, in cross-examination, totally ruled out the possibility that the injuries could have been caused with hot metal. He has clearly stated that- "It can be ascertained as to how the burn injuries could have been caused. When the body is burnt with a hot object blisters are caused and if the blisters are absent then the skin at that place squeezes and below the skin on the raptor and on the muscles becomes red. Whereas the marks formed by electric current are black and hard. (The meaning of word orne is hard). The skin also becomes hard due to post mortem burns." During the cross examination, he further clarified that " when low voltage shocks are given to anyone, as a result of it Brenticoolar Fredania is caused due to which the heart beats are increased very much and the speed of the heart increases. It is wrong to suggest that Intracranial hemorrhage is not possible due to electric shocks". This witness also clarified that due to the impact of electric shocks the blood pressure of Mathura was increased. In view of the aforesaid, we are unable to accept any of the submissions made by the learned counsel for the parties that Mathura was not subjected to electric shock.

32. We are of the considered opinion that in accepting the evidence of PW6 and the medical evidence of PW23 and PW24, the High Court has not committed any error. The

evidence on the record clearly shows that death of Mathura was a direct consequence of the inexcusable and inhuman torture by the police. The prosecution has proved beyond reasonable doubt that Mathura was taken to the police station. Whilst at the police station, he was subjected to third degree torture. He was given electric shocks in the scrotum. Such torture was inflicted on Mathura merely for the purpose of extracting a confession that he was guilty of the offence of theft. Upon his release, the police personnel terrorized the entire family. This is evident from the fact that the widow, the son and the brother of the deceased Mathura, all turned hostile. However, there is sufficient evidence on the record given by PW6, PW23 and PW24 to prove beyond reasonable doubt that Mathura died due to the inhuman torture inflicted upon him by the appellants.

33. We see no reason to differ with the findings recorded by the High Court. The appeals are dismissed.

D.G. Appeals dismissed.

NILESH DINKAR PARADKAR

v.

STATE OF MAHARASHTRA

(Criminal Appeal No. 537 of 2009)

MARCH 09, 2011

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

Maharashtra Control of Organized Crime Act, 1999 – s. 3 – Accused entering into a conspiracy on phone to eliminate prominent businessman – Conviction and sentence under the relevant provisions of the MCOCA Act and Penal Code – Acquittal of A1 to A4 of all the charges leveled against them by the High Court – However, the conviction and sentence of the appellant-A5 upheld – On appeal, held: High Court having disbelieved the prosecution version against A1 to A4, committed a grave error in upholding the conviction of the appellant only on the evidence of voice identification – Having disbelieved the voice identification in the case of accused Nos. 1 and 2, there was no reason to adopt a different yardstick in the case of the appellant – Voice identification was conducted without taking any precautions similar to the precautions which are normally taken in visual identification of suspects by witnesses – There is no evidence on record to connect the absconding accused with the mobile number allegedly used by him nor to indicate that the appellant was having or using any of the given mobile numbers – There was no seizure of any mobile phone or even SIM card at the behest of the appellant – Also, the High Court erroneously overlooked the infirmities in the evidence with regard to the authenticity of the tape recording produced in the court – Veracity of the voice identification would not improve merely because a recording has been made after receiving official approval – Crucial identification was of the voice of the person

talking on the tape – The revolver allegedly recovered from an open space, at the back of the house, did not even belong to the appellant, and therefore, could be of little assistance to the prosecution – More so, order of acquittal of the appellant for the offences u/s. 3/5 of the Arms Act has become final – Thus, appellant entitled to the benefit of doubt as the prosecution failed to prove its case beyond reasonable doubt – Appellant acquitted of all the charges leveled against him – Penal Code, 1860 – Arms Act, 1959.

Evidence – Evidence of voice identification – Reliability of – Held: Evidence of voice identification is at best suspect, if not, wholly unreliable – Accurate voice identification is much more difficult than visual identification – It is prone to such extensive and sophisticated tampering, doctoring and editing that the reality can be completely replaced by fiction – Thus the courts have to be extremely cautious in basing a conviction purely on the evidence of voice identification – Identification.

Accused Nos. 1, 2, 3 and 5 are active members of the organized crime syndicate of a gangster. Accused No. 4 and accused Nos. 1, 2, 3 and 5 entered into a conspiracy to eliminate a prominent businessman 'BS'. To successfully carry out the assassination, movements of 'BS' were kept under close watch. 'BN' communicated the office timings of the businessman to the accused through his telephone. D.C.P. (Detection)-PW-42 received information about the conspiracy. P.S.I.-PW-17 intercepted the telephone number and recorded a conversation on the telephone number between the absconding accused 'BN' and accused Nos. 1, 2 and 5 regarding the conspiracy. Thereafter, on receiving information that members of gangster were staying at place 'G', raid was duly conducted and the four accused persons were apprehended. The search was carried out. Certain articles were recovered. The voice test

identification was conducted. The identification parade was held in respect of the appellant. The trial court convicted all the five accused for the commission of offences under the Maharashtra Control of Organized Crime Act, 1999 and Penal Code, 1860. However, acquitted them of the charges under Section 3 read with Section 25 of the Arms Act. On appeal, the accused Nos. 1, 2, 3 and 4 were acquitted of all the charges leveled against them. However, the conviction and sentence of the appellant-A 5 was upheld. The acquittal of the appellant under Section 3 read with Section 25 of the Arms Act became final and binding. Therefore, the appellant filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1 The conclusions recorded by the High Court have destroyed the entire substratum of the prosecution case. Having disbelieved the entire prosecution version, the High Court proceeds to distinguish the case of the appellant. The only additional circumstance relied upon by the High Court against the appellant is that his voice was identified by the officer PW-19, who had taken him in custody. The voice of 'BN' was also identified by PW-18, A.C.P. Thus, the approach adopted by the High Court was wholly erroneous. Having disbelieved the voice identification in the case of accused Nos. 1 and 2, there was no reason to adopt a different yardstick in the case of the appellant. The High Court discarded the evidence of PW-36, A.P.I. and PW-38, A.P.I. mainly on the ground that they were accompanying the raiding party on 8th November, 2004 and had not heard the voice of accused Nos. 1 and 2 prior thereto. Another reason given by the High Court is that these officers being members of the investigating team were interested in successful completion of the investigation. But the same yardstick was not applied to the voice identification

of absconding accused 'BN' by PW-18. He was also attached to DCP, CID when the present offence was registered. Therefore, he would also be equally interested in successful completion of the investigation. Similarly, voice identification of the appellant by PW-19 would also suffer from the same weakness as he was also attached to the office of DCP, CID. The High Court also ignored the fact that the witnesses were being asked to identify the voice of 'BN', which they had last heard in the year 1997. Similarly, PW-19 had only heard the voice of appellant in the year 2002. The evidence of voice identification is at best suspect, if not, wholly unreliable. Accurate voice identification is much more difficult than visual identification. It is prone to such extensive and sophisticated tampering, doctoring and editing that the reality can be completely replaced by fiction. Therefore, the courts have to be extremely cautious in basing a conviction purely on the evidence of voice identification. [Paras 27, 28, 29, 30] [812-C-H; 813-A-C]

Ziyauddin Burhanuddin Bukhari vs. Brijmohan Ramdass Mehra and Ors. **(1976) 2 SCC 17;** *Ram Singh and Ors. vs. Col. Ram Singh* **1985 (Supp) SC 611;** *Mahabir Prasad Verma vs. Dr. Surinder Kaur* **(1982) 2 SCC 258;** *People's Union for Civil Liberties (PUCL) vs. Union of India and Ors*. **1997 (1) SCC 301 – referred to.**

R. vs. Maqsud Ali **(1965) 2 AER 464;** *R. vs. Robson* **(1972) 2 AER 699;** *R. vs. Chenia* **[2003] 2 Cr.App.R.6;** *R. vs. Flynn and St. John* **[2008] 2 Cr. App. R. 20 – referred to.**

Archbold Criminal Pleading, Evidence and Practice **2010 edn. p 1590-912 – referred to.**

1.2. The High Court has failed to take into consideration any of the said precautions in accepting the evidence of PW-18 and PW-19 with regard to the

identification of 'BN' and the appellant. The High Court has given a wholly erroneous justification by holding that the voice of both the accused are distinctive, clear and identifiable. The conversation between the two accused is not a short conversation as in the case of accused Nos. 1 and 2. The High Court was also influenced by the fact that accused 'BN' was in the custody of PW-18 for a period of two weeks. Similarly, appellant was in the custody of PW-19 for a substantial period of time. Therefore, their voice identification was held to be reliable. This reasoning of the High Court is a mere repetition of the reasons given by the trial court. There is hardly any distinction in the evidence with regard to the voice identification of accused Nos. 1 and 2 on the one hand and 'BN' and the appellant on the other hand. [Paras 33, 34] [818-G-H; 819-A-C]

1.3. The voice test identification by PW-19 is even otherwise unreliable. The voice identification was conducted without taking any precautions similar to the precautions which are normally taken in visual identification of suspects by witnesses. PW-19 was informed in advance that he had to identify the voice of the appellant. Similarly, PW-18 was informed that he had to identify the voice of 'BN'. No attempt was made even to mix the voices of 'BN' and the appellant with some other unidentified voices. In such circumstances, the voice identification evidence would have little value. It appears that the exercise was performed only for the record. [Para 35] [819-D-E]

1.4. There is no evidence on record to indicate that the mobile No. 0060133402008 was that of the absconding accused 'BN'. There is also no evidence to indicate that he was using said number except voice identification by PW-18. There is no other material on the record to connect the absconding accused 'BN' with the number allegedly used by him. Similarly, there is nothing

on the record to indicate that the appellant was having or using any of the given mobile numbers. [Para 36] [819-F-H]

1.5. There is no seizure of any mobile phone or even sim card at the behest of the appellant. The prosecution has failed to produce any evidence from the operators with regard to the registration of the said phone numbers. In fact, the Investigating Officer, specifically stated in his evidence that he could not get those four subscription forms and the documents of the company though enquiry was done. It is true that till today it is not known as to who are the subscribers of those cell phones. [Para 37] [820-B-C]

1.6. The High Court erroneously overlooked the infirmities in the evidence with regard to the authenticity of the tape recording produced in Court. The conversation between the appellant and 'BN' was said to have been recorded on 28th October, 2004 by PW-17, P.S.I. According to him, although, he had been monitoring the Malaysian number of 'BN' from 1st October, 2004 till 27th October, 2004, he had heard no incoming or outgoing calls. The incriminating conversation was said to have been recorded on 28th October, 2004. This conversation was relayed to a police telephone and recorded. He put a slip on the recorded cassette indicating the date and time of the conversation as recorded. He then handed the tape over to the D.C.P. He heard the tape on the same day. Even though the conversation revealed a conspiracy for commission of a serious offence, like murder of an influential personality in the city, he took no further action. He just sealed the tape and kept it in his personal custody. Even when the accused A1 to A4 were arrested on 8th November, 2004 the cassette was not produced before the Investigating Officer. It was kept by DCP-'DK till 17th January, 2005,

when he instructed P.S.I.-'VD' to hand over the tape to the Inspector of Police. The tape was received by the Investigating Officer on 18th January, 2005. Even the trial court referred to the inaction on the part of the D.C.P 'DK' as shocking. However, the High Court held that even such lapses cannot ensure to the benefit of the appellant. The High Court believed the recording as it had been made upon prior approval by the Home Secretary given on 20th October, 2004. [Para 38 and 40] [820-D-H; 821-A-E]

1.7. The veracity of the voice identification would not improve merely because a recording has been made after receiving official approval. The crucial identification was of the voice of the person talking on the tape. The High Court committed a grave error in confirming the conviction of the appellant as recorded by the trial court only on the evidence of voice identification. Other circumstance relied upon by the High Court in convicting the appellant is the recovery of the alleged revolver from the house of the cousin of the appellant. The recovery from an open space, at the back of the house, which did not even belong to the appellant, could be of little assistance to the prosecution. Even otherwise it needs to be remembered that the trial court had in fact, acquitted the appellant for the offences under Section 3 read with Section 5 of the Arms Act. This acquittal was never challenged by the prosecution in appeal. Therefore, it was wholly inappropriate by the High Court to reverse the findings of the trial court in the absence of an appeal by the State. In view, thereof the appellant was entitled to the benefit of doubt as the prosecution failed to prove its case beyond reasonable doubt. The appellant is acquitted of all the charges levelled against him. The conviction and sentence imposed by the trial court and confirmed by the High Court are quashed and set aside. [Paras 41, 42 and 43] [821-E-H; A-D]

Case Law Reference

1982 (2) SCC 258	**Referred to**	**Para 24**
1985 (Supp.) SCC 611	**Referred to**	**Para 24**
1997 (1) SCC 301	**Referred to**	**Para 24**
(1976) 2 SCC 17	**Referred to**	**Para 30**
1985 (Supp) SCC 611	**Referred to**	**Para30**
(1965) 2 AER 464	**Referred to**	**Para 30**
(1972) 2 AER 699	**Referred to**	**Para 30**
(1982) 2 SCC 258	**Referred to**	**Para 32**
(2003) 2 Cr. App. R. 6 CA	**Referred to**	**Para 32**
(2008) 2 Cr.App.R. 20. CA	**Referred to**	**Para 32**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 537 of 2009.

From the Judgment & Order dated 21.8.2008 of the High Court of Judicature at Bombay in Criminal Appeal No. 1044 of 2006.

Sushil Karanjkar, K.N. Rai for the Appellant.

Uday B. Dubey, Sanjay V. Kharde, Asha Gopalan Nair for the Respondent.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. This appeal is directed against the judgment and order of the Bombay High Court dated 21st August, 2008 passed in Criminal Appeal No. 1044 of 2006 whereby the High Court dismissed the appeal by confirming the conviction and sentence imposed on the appellant (A5) by the Special Judge of the Maharashtra Control

of Organized Crime Act, 1999 (hereinafter referred to as "MCOC Act") in Special Case No. 3 of 2005.

2. The aforesaid appeal came up for hearing along with Criminal Appeal No. 1040 of 2006 filed by original accused No. 1, Vinod Sitaram Yadav @ Bapu and the original accused No.3, Jagdish Bhaskar Shetty @ Raghu. Criminal Appeal No. 1048 of 2006 has been filed by original accused No.4, Amit Suryakant Dalvi and Criminal Appeal No. 1049 of 2006 has been filed by original accused No.2, Vishwanath Atmaram Jadhav.

PROSECUTION CASE

3. According to the prosecution, accused Nos. 1, 2, 3 and 5 are active members of the organized crime syndicate of Chhota Rajan. Accused No. 4 has aided, abetted and conspired with accused Nos. 1, 2, 3 and 5 in commission of various offences punishable under the MCOC Act. It had come to the notice of the police that there was a conspiracy to eliminate a prominent businessman of Mumbai, namely Bharat Shah. The plan was to kill him at the pan shop near 'Mehta Bhuvan'. The office of Bharat Shah is situated at 'Mehta Bhuvan', Charni Road, Mumbai. In order to successfully carry out the assassination, movements of Bharat Shah were kept under close watch. His office timings were communicated to these accused through telephone no. 0060133402008 by Bharat Nepali. The information about the conspiracy was received on or before 14th October, 2004 by D.C.P. (Detection), Mr. Dhananjay Dattatraya Kamlakar, PW-42 from his sources. He was informed that gangster Chhota Rajan, his gang members, and Bharat Nepali were communicating with the associates and other members of their syndicate on the aforesaid telephone number. According to the information of PW-42, the telephone number was of Malaysian origin. Although, the aforesaid telephone number was under surveillance of P.S.I. Vijay Dalvi (PW-17) since 1st October,

2004, on receipt of the definite information with regard to the conspiracy, a request was put up to the Additional Chief Secretary (Home) seeking permission to intercept the aforesaid telephone number. The request was made on 14th October, 2004 and it was approved on 20th October, 2004.

4. Although the tapping of the aforesaid telephone had been officially approved since 20th October, 2004, P.S.I. Dalvi (PW-17) did not hear any worthwhile conversation till 28th October, 2004. On that day, he intercepted and recorded a conversation on the aforesaid telephone number. According to the prosecution, this was a conversation between the absconding accused Bharat Nepali on one hand and the accused Nos. 1, 2 and 5 on the other hand. The duration of the conversation recorded was of 9.16 minutes. The recorded conversation revealed a conspiracy to spread terror in the Dawood group in Mumbai. The conversation was also about the nature of the weapons to be used; the manner in which the assassination was to be carried out; behaviour of the assassin in the completion of the alleged crime; use of the weapons, i.e., one being .45 revolver and the other three being .38 bore revolver. The conversation on the telephone having been recorded, PW-17 noted the date and time of the cassette. He took the cassette to the senior officer, D.C.P. Kamlakar, PW-42. On receipt of cassette, D.C.P. Kamlakar played the cassette and heard the details about the conspiracy.

5. It is further the case of the prosecution that five accused and Bharat Nepali have contacted each other on their respective cell phones. The entire conspiracy was hatched on the cell phones. The police had, therefore, obtained printouts of the cell phones of the accused from the concerned telephone companies. The numbers of those cell phones of the accused were as follows:-

Accused No.1	9819861417
Accused No.2	9819240297, 38096524
Accused No.3	9890299354
Accused No.4	38950501
Accused No.5	9892849523, 9892367596, 9892296496, 9892295687
Bharat Nepali (absconding accused)	0060133402008

6. It appears that Amit Dalvi, accused No. 4 had rented a flat on Leave and Licence basis, on the first floor of a building known as 'Ambika Niwas', Girgaum (Mumbai). The room had been taken in the name of Sachin Patil. The Leave and Licence agreement was signed on 17th October, 2004. All the accused were regularly using the aforesaid premises.

7. On 7th November, 2004, P.I. Nagesh Lohar received some reliable information at about 5.00 p.m. that members of Chhota Rajan gang were staying in Girgaum area. He was also informed that they had planned to kill a prominent businessman in the locality (Bharat Shah) on the directions of Bharat Nepali, who was the henchman of Chhota Rajan. The Police Inspector Lohar communicated this information to his staff and asked them to assemble at 5.30 a.m. on the next day morning as the informant had told him that he was working on the information and will confirm the same only next morning. On 8th November, 2004, the informant again arrived at the office of P.I. Lohar at about 5.00 a.m. and supplied further information. He stated that about five members of the Chhota Rajan gang were residing in Girgaum and they were in possession of lethal weapons. Name of one of the members was Mr. Bapu, accused No. 1.

8. Police Inspector, Lohar called the officers and staff, who were present in the office and told them that they would have to act upon the information. He told one of the Constable Gaikwad, to go and bring two respectable Panchas. Consequently, PW-1, Hiro Khatri was joined as a Panch

witness. He was introduced to the police party as well as the informant. He was told the purpose of raid and why the police party has assembled. On 8th November, 2004, raid was duly conducted at the rented premises. They reached first floor and found the door of the flat was half open. Standing next to the door, P.S.I. Jadhav listened to the conversation within the flat. He had heard one male voice saying the following words:-

> "As the game was not hot, Nana and Bharat Nepali were frustrated. That man is going to the office. Nilesh Paradkar (A5) had called us to the spot at 10.00 a.m. He was going to come along with Ajay. So we must finish him today." He heard another male voice saying that "we will finish him today. You cause him to fall down by firing four bullets in his chest and he will fire four five shots in his head."

9. In the mean time, P.I. Lohar also reached the first floor and on signal being given, they entered the room. All the four accused persons were sitting on the mat. They were immediately apprehended. P.I., Lohar disclosed his identity and asked for explanation about their presence in the room. They could not give any satisfactory explanation. Each of the four persons were then searched.

10. Accused No.1 was searched by A.P.I. Pasalwar, PW-38. The search of accused No.1 revealed that he was in possession of one pistol of .45 bore of Colt make which was tucked on the right side waist portion of his pant. On opening its magazine, the pistol was found to contain seven live cartridges. A cell phone was also recovered from the shirt pocket of A1. On being asked, he disclosed his telephone number as 9819862417. A.P.I. Pasalwar opened the cell phone and removed the sim card. On further search of this accused, 13 live cartridges with inscription of .45 were found from the trouser pocket of this accused. The pocket also contained a chit with some mobile phone numbers. The accused was also having two colour photocopies of the photographs of an individual. On the reverse side of the photocopies, some

numbers and words BMW *Neela* (blue), Lexus 25, 123 *Kala* (black) were written. Search was also conducted of A2, which led to the recovery of .38 bore revolver of Smith and Wesson Company. It had six chambers of the pistol loaded with six live cartridges. One blue colour cell phone of Nokia company model 2100 was recovered from the shirt pocket. His leather wallet also contained a chit with mobile numbers. He was also carrying color photocopies of photograph of same person. In this photocopy, face of the person was encircled. On the reverse side of the said photographs, words were written in *Devnagari* script "Charni road station javal, Mehta Bhuvan". He also disclosed his cell phone number as 9819240297. Similar search of accused No.3 produced .38 bore revolver kept into left side of his pant waist. The revolver was of Smith and Wesson make. It had five chambers loaded with five live cartridges. He was also carrying a silver colour cell phone of Nokia company. This accused disclosed his mobile number as 9890299354. This accused was also carrying a chit with names and phone numbers of Bharat Nepali, Balu Dhokare, Visha and Bapu. He was also carrying photocopies of the colour photograph of the same person as the one found with accused Nos. 1 and 2. Under the photocopy car No. BMW MH01 T125 was written. It also carried the same words 'Mehta Bhuvan', Opera House. The search of accused No.4 similarly produced a cell phone and photograph and the chit. Number of other articles were also recovered lying in the rented room. The four accused were arrested and brought to the police station.

11. Thereafter formalities of registration of crime under DCB CID were completed. CR No. 258 of 2004 was registered with V.P. Road Police Station, Mumbai for offences punishable under Sections 302, 115, 120 (B) of IPC and under Section 3, 7, and 25 of the Arms Act. Thereafter, approval was also granted on 20th November, 2004 to apply the provisions of MCOC Act.

12. On 25th November, 2004, accused No.2, Vishwanath

Jadhav and accused No.4, Amit Dalvi voluntarily made statements before the I.O. Valishetty indicating their willingness to make confession statements. It appears that first part of the confession of accused No.4 was recorded on 29th November, 2004 and the second part on 1st December, 2004. Similarly, the confessional statement of accused No. 2, Vishwanath Jadhav was recorded on 30th November, 2004 and on 1st December, 2004. On 7th December, 2004 the identification parade was held in so far as the accused Nos. 1, 2, 3 and 4 were concerned, PW-2 and PW-12 identified accused No. 4 as the person, who had been seen by them during the time of grant of lease and licence in respect of the rented room in 'Ambika Niwas' belonging to mother of PW-2. Both the confession statements were denied by A2 and A4 on 17th December, 2004 on the ground that it had been obtained under duress and threats that their family members would be falsely involved as accused in the crime.

13. On verification of the sim cards of the accused, it was found that only the sim cards of accused No. 4 stood in his own name. The sim cards allegedly belonging to accused No.2 Vishwanath stood in the name of one Sandeep Mhatre and Ayub Bakar. The names of sim card holders in the cell phones recovered from accused Nos. 3 and 5 were not brought on record. The record also indicates that the print out in respect of telephone No. 9892367596 allegedly used by the appellant, i.e., accused No.5 was received by the police on or about 14th January, 2005. The print out indicates that at about 5.55 p.m., there was a call of about 9.16 minutes on the telephone. The number was allegedly used by absconding accused Bharat Nepali. The print out of Cell No. 0060133402008 was forwarded to the police by the BSNL by letter dated 18th January, 2005(Ex.71). This print out also confirms that there was a telephone conversation at 5.55 p.m. on 28th January, 2004 of about 9.15 minutes. The number mentioned there was that of the appellant.

14. We may now briefly notice the further facts as brought on record by the prosecution. On 15th January, 2005, PW-41, A.C.P. Vinayak Kadam asked PW-42, D.C.P. (Detection), Mr. Kamlakar as to whether he had intercepted any communication on telephone number 0060133402008. On 17th January, 2005, Mr. Kamlakar, D.C.P. (Detection), PW-42 asked P.S.I. Dalvi, PW-17 to handover the sealed cassette to A.C.P. Kadam on 18th January, 2005. The sealed cassettes were duly handed over to A.C.P. Kadam on 18th January, 2005. A.C.P Kadam was aware that A.C.P. Tejasingh Chavan, PW-18 had arrested absconding accused Bharat Nepali on 11th February, 1997. He was also aware that Jagdish Kulkarni, PW-19 had earlier arrested the appellant on 2nd March, 2002. The Cassette was, therefore, duly played in the presence of Panchas and the aforesaid police officers. In this manner, the voice test identification was stated to have been conducted. The voice was also said to have been identified as belonging to the appellant and to absconding accused Bharat Nepali by PW-18, ACP Tejasingh Chavan and PW-19, Jagdish Kulkarni. It is

so the case of the prosecution that A.P.I. Raut, who was Investigating Officer, identified the voice of A2, Vishwanath Jadhav. A.P.I. Pasalwar, PW-38, is stated to have identif ed the voice of accused Vinod (A1). The Panchnama was duly prepared. Transcript of the conversation incorporated in the Panchnama (Ex.45) was proved through Panch Anil Shukla, PW-11.

15. It is further the case of the prosecution that the appellant was arrested on 30th March, 2005 in connection with another case registered at Nerul Police Station. His custody was duly transferred to the present case on 12th April, 2005. After obtaining the custody, a further identification parade was held on 16th April, 2005 in respect of the appellant. It is a matter of record that Vithal Saliyan, PW-7 was the only witness, who was put up as an identification witness. This witness duly identified the appellant as the person who used to visit 'Zunka Bhakar'

Stall, situated near the office of the victim, Mr. Bharat Shah. It is however, noteworthy that this witness could not identify the appellant in Court.

16. It is further the case of the prosecution that on 13th May, 2005, the appellant made a voluntary statement to the effect that he had concealed the revolver in Sawantwadi Town in District Sindhudurga. According to the prosecution, the appellant led the police to the house where his cousin sister Afroza was staying. Behind the south side of the house, he dug out a weapon which was kept in a plastic bag and buried in the soil. The revolver so discovered was a .38 bore revolver. It was seized and wrapped in a plastic cover sealed by the police. On completion of the investigation, the Commissioner of Police granted sanction for prosecution of appellant on 6th July, 2005. On receipt of the sanction, additional charge sheet was filed against the appellant on 7th July, 2005.

17. In due course, charges were framed against all the accused on 8th December, 2005 under relevant provisions of MCOC Act, IPC, and Arms Act. Since all the accused had pleaded not guilty, they were all put on trial.

18. The Trial Court convicted all the five accused as under:-

"(1) Charge head firstly is not considered as it is repetition in charge heads secondly, thirdly and fifthly.

(2). Accused Nos. 1 to 5 are held guilty for the offence punishable under Section 3(1)(iii) r/w Sec. 3(2) of the MCOC Act, 1999 and are sentenced to suffer RI for 5 (five) years and to pay a fine of Rs.5,00,000/- (Five lacs), each, in default, to suffer further RI for 1 (One) year.

(3) Accused Nos. 1, 2, 3 and 5 are held guilty for the offence punishable under Section 3(4) of the MCOC Act, 1999 and are sentenced to suffer RI for

7 (seven) years and to pay a fine of Rs.5,00,000/- (Five lacs), each, in default, to suffer further RI for 1 (one) year . Accused No.4 is not held guilty U/ Sec.3(4) of the MCOC Act and is acquitted from the said charge.

(4) Accused Nos. 4 and 5 are held guilty for the offence punishable under Section 3(5) of the MCOC Act, 1999 and are sentenced to suffer RI for 3(three) years and to pay a fine of Rs.2,00,000/-(two lacs), each in default, to suffer further RI for 6(six) months. Accused Nos. 1, 2 and 3 are not held guilty U/ Sec.3(5) of the MCOC Act, 1999 and are acquitted from the said charge.

(5) Accused Nos. 1, 2, 3, 4 and 5 are held guilty for the offence punishable under Section 120-B r/w Sec.302 r/w Sec.115 of IPC are sentenced to suffer RI for 3 (three) years and to pay a fine of Rs.10,000/ -(ten thousand), each. In default, to suffer further RI for 6 (six) months.

(6) Accused Nos. 4 and 5 are held guilty for the offence punishable under Section 419 r/w Sec.120-B of IPC and are sentenced to suffer RI for 1 (one) year. Accused Nos. 1, 2 and 3 are not held guilty U/ Sec.419 r/w Sec.120-B of IPC and are acquitted from the said charge.

(7) Accused Nos. 1, 2 and 3 are held guilty for the offence punishable under Sec.3 r/w Sec. 25 of the Indian Arms Act, 1959 and are sentenced to suffer RI for 3 (three) years and to pay fine of Rs.5,000/- (five thousand) each, in default, to suffer further RI for 6(six) months. Accused No.4, is not held guilty U/Sec. 3 r/w 25 of the Indian Arms Act and is acquitted from the said charge.

(8) Accused No.5 is not held guilty for the offence punishable under Sec.3 r/w Sec.25 of the Indian Arms Act, 1959 and is acquitted from the said charge.

(9) Accused No.4 is held guilty for the offence punishable under Sec.36 r/w Sec.30 of the Indian Arms Act, 1959 and is sentenced to suffer RI for 6 (six) months.

(10) All the substantive sentences to run concurrently.

(11) Accused are entitled to set off for the period already undergone in custody."

19. From the above, it is evident that the trial court acquitted the appellant, herein of charges under Section 3 read with Section 25 of the Indian Arms Act.

20. The aforesaid judgment and order of conviction and sentence was challenged by the accused Nos. 1 and 3 in Criminal Appeal No. 1040 of 2006, by accused No.5 (appellant herein) in Criminal Appeal No. 1044 of 2006, by accused No.4 in Criminal Appeal No. 1048 of 2006 and by accused No.2 in Criminal Appeal No. 1049 of 2006.

21. All the appeals were heard together and disposed off by a common judgment dated 21st August, 2008. The High Court was pleased to allow the appeals of original accused Nos. 1, 2, 3 and 4. They were acquitted of all the charges leveled against them. However, the appeal filed by the appellant was dismissed by confirming the conviction and sentence awarded by the Special Court. It may also be noteworthy here that the acquittal of appellant under Section 3 read with Section 25 of the Arms Act was not challenged by the prosecution/ State. Therefore, the findings and acquittal regarding the same have become final and binding.

22. Aggrieved by the judgment of the High Court in

Criminal Appeal No. 1044 of 2006, the appellant has filed the present special leave petition.

23. We have heard the learned counsel for parties.

24. Mr. Shekhar Naphade submitted that the High Court disbelieved the prosecution version in so far as the accused A1 to A4 are concerned. Having disbelieved the prosecution version against A1 to A4, the High Court committed a grave error in upholding the conviction of the appellant. He submits that the evidence against A1 to A4 and the appellant is identical. The High Court has made a distinction in the case of appellant only on the basis of the voice identification evidence. Learned counsel further submitted that the High Court has committed a grave error in treating the voice identification evidence as substantive evidence. Such evidence could at best be used as corroboration of the other independent evidence. In support of the submission, learned counsel relied on the judgments in *Mahabir Prasad Verma Vs. Dr. Surinder kaur*[1], *Ram Singh And Ors. Vs. Col. Ram Singh*[2] and *People's Union for Civil Liberties (PUCL) Vs. Union of India & Ors*[3].

25. We are of the considered opinion that there is much merit in the submissions made by Mr. Naphade. While acquitting accused Nos. 1 to 4, the High Court recorded that the defence had succeeded in creating a grave doubt about the veracity of search and seizure alleged to have taken place on 8th November, 2004. This conclusion has been reached by the High Court on appreciation of the evidence on the record. The High Court disbelieved the prosecution version with regard to the entire sequence of events leading to the raid. The High Court observed as follows:-

"Thus, in my view the defence have succeeded in creating a reasonable doubt about the prosecution case that

1. 1982 (2) SCC 258.
2. 1985 (Supp.) SCC 611.
3. 1997 (1) SCC 301.

accused Nos. 1 to 4 were spotted and apprehended at Ambika Niwas building on 8.11.2004. The defence case that the accused were in fact picked up on 3.11.2004 by the police appears to be very probable. Unfortunately, if the defence version is found to be probable, then the entire case of the prosecution regarding the finding of various incriminating articles from the persons of the accused for the first time on 8.11.2004 and the seizure of three loaded revolvers, live cartridges, four zerox copies of the photographs of the victim, four mobiles and four slips are rendered suspect and must also be therefore, disbelieved. It would have been far better for the prosecution if the investigation would have recorded the true and correct facts. It may be mentioned that as regards the search and seizure said to have been carried out on 8.11.2004, not a single independent witness has been examined. Admittedly, there were several neighbours and the statements of some of these persons were alleged to have been recorded but none of these persons were produced as witnesses in the trial. The accused Nos. 1, 2, 3 and 4 herein must therefore, get benefit of doubt as regards the circumstance of finding incriminating articles during the search and seizure of articles said to have been seized by the police on 8.11.2004."

26. The trial court had discarded the voice identification of accused Nos. 1 and 2. The High Court did not see any reason to differ with the aforesaid finding. The High Court even after personally hearing the conversation between the Bharat Nepali on the one hand and accused Nos. 1 and 2 on the other hand, disbelieved the voice identification. It was held to be not established beyond reasonable doubt. Similarly, with regard to the alleged confession made by accused Nos. 2 to 4, the High Court observes that "Both these confessions make clear reference to the evidence of search and seizure which according to the prosecution took place on 8th November, 2004 and which does not appear to be true". Both the confessions

were rejected as a whole. The High Court even disbelieved the story of the prosecution with regard to accused No.4 taking room at 'Ambika Niwas' on Leave and Licence basis. As a consequence of the aforesaid facts, accused Nos. 1, 2, 3 and 4 were acquitted.

27. In our opinion, these conclusions recorded by the High Court have destroyed the entire substratum of the prosecution case. Having disbelieved the entire prosecution version, the High Court proceeds to distinguish the case of the appellant. The only additional circumstance relied upon by the High Court against the appellant is that his voice was identified by the officer Jagdish Kulkarni, PW-19, who had taken him in custody. The voice of Bharat Nepali was also identified by PW-18, A.C.P. Tejasingh Chavan.

28. We are of the considered opinion that the approach adopted by the High Court was wholly erroneous. Having disbelieved the voice identification in the case of accused Nos. 1 and 2, there was no reason to adopt a different yardstick in the case of the appellant herein. The High Court discarded the evidence of PW-36, A.P.I. Dilip Raut and PW-38, A.P.I. Pasalkar mainly on the ground that they were accompanying the raiding party on 8th November, 2004 and had not heard the voice of accused Nos. 1 and 2 prior thereto. Another reason given by the High Court is that these officers being members of the investigating team were interested in successful completion of the investigation. But the same yardstick was not applied to the voice identification of absconding accused Bharat Nepali by Tejasingh Chavan, PW-18. He was also attached to DCP CID when the present offence was registered. He would, therefore, also be equally interested in successful completion of the investigation.

29. Similarly, voice identification of the appellant by Jagdish Kulkarni, PW-19 would also suffer from the same weakness as he was also attached to the office of DCP CID.

The High Court also ignored the fact that the witnesses were being asked to identify the voice of Bharat Nepali, which they had last heard in the year 1997. Similarly, PW-19, Jagdish Kularni had only heard the voice of appellant in the year 2002.

30. In our opinion, the evidence of voice identification is at best suspect, if not, wholly unreliable. Accurate voice identification is much more difficult than visual identification. It is prone to such extensive and sophisticated tampering, doctoring and editing that the reality can be completely replaced by fiction. Therefore, the Courts have to be extremely cautious in basing a conviction purely on the evidence of voice identification. This Court, in a number of judgments emphasised the importance of the precautions, which are necessary to be taken in placing any reliance on the evidence of voice identification. In the case of *Ziyauddin Burhanuddin Bukhari Vs. Brijmohan Ramdass Mehra & Ors.*[4], this Court made following observations:-

> "We think that the High Court was quite right in holding that the tape-records of speeches were "documents", as defined by Section 3 of the Evidence Act, which stood on no different footing than photographs, and that they were admissible in evidence on satisfying the following conditions:
>
> "(a) The voice of the person alleged to be speaking must be duly identified by the maker of the record or by others who know it.
>
> (b) Accuracy of what was actually recorded had to be proved by the maker of the record and satisfactory evidence, direct or circumstantial, had to be there so as to rule out possibilities of tampering with the record.

4. (1976) 2 SCC 17.

> (c) The subject-matter recorded had to be shown to be relevant according to rules of relevancy found in the Evidence Act."

In the case of *Ram Singh & Ors. Vs. Col. Ram Singh*[5], again this Court stated some of the conditions necessary for admissibility of tape recorded statements, as follows:-

> "(1) The voice of the speaker must be duly identified by the maker of the record or by others who recognise his voice. In other words, it manifestly follows as a logical corollary that the first condition for the admissibility of such a statement is to identify the voice of the speaker. Where the voice has been denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker.
>
> (2) The accuracy of the tape-recorded statement has to be proved by the maker of the record by satisfactory evidence — direct or circumstantial.
>
> (3) Every possibility of tampering with or erasure of a part of a tape-recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.
>
> (4) The statement must be relevant according to the rules of Evidence Act.
>
> (5) The recorded cassette must be carefully sealed and kept in safe or official custody.
>
> (6) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances."

5. 1985 (Supp) SCC 611.

In *Ram Singh's* case (supra), this Court also notices with approval the observations made by the Court of Appeal in England in the case *of R. Vs. Maqsud Ali*[6]. In the aforesaid case, Marshall, J. observed thus:-

> "We can see no difference in principle between a tape-recording and a photograph. In saying this we must not be taken as saying that such recordings are admissible whatever the circumstances, but it does appear to this Court wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved and the voices recorded properly identified; provided also that the evidence is relevant and otherwise admissible, we are satisfied that a tape-recording is admissible in evidence. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. There can be no question of laying down any exhaustive set of rules by which the admissibility of such evidence should be judged."

To the same effect is the judgment in the case of *R. Vs. Robson*[7], which has also been approved by this Court in *Ram Singh's* case (supra). In this judgment, Shaw, J. delivering the judgment of the Central Criminal Court observed as follows:-

> "The determination of the question is rendered more difficult because tape-recordings may be altered by the transposition, excision and insertion of words or phrases and such alterations may escape detection and even elude it on examination by technical experts.

31. Chapter 14 of *Archbold Criminal Pleading, Evidence and Practice*[8] discuss the law in England with regard to

6. (1965) 2 AER 464.

7. (1972) 2 AER 699.

8. 2010 edition at pg. 1590-91.

Evidence of Identification. Section 1 of this Chapter deals with Visual Identification and Section II relates to Voice Identification. Here again, it is emphasised that voice identification is more difficult than visual identification. Therefore, the precautions to be observed should be even more stringent than the precautions which ought to be taken in relation to visual identification. Speaking of lay listeners (including police officers), it enumerates the factors which would be relevant to judge the ability of such lay listener to correctly identify the voices. These factors include:-

> "(a) the quality of the recording of the disputed voice,
>
> (b) the gap in time between the listener hearing the known voice and his attempt to recognize the disputed voice,
>
> (c) the ability of the individual to identify voices in general (research showing that this varies from person to person),
>
> (d) the nature and duration of the speech which is sought to be identified and
>
> (e) the familiarity of the listener with the known voice; and even a confident recognition of a familiar voice by a way listener may nevertheless be wrong."

The Court of Appeal in England in *R Vs. Chenia*[9] and *R. Vs. Flynn and St. John*[10] has reiterated the minimum safeguards which are required to be observed before a Court can place any reliance on the voice identification evidence, as follows:-

> "(a) the voice recognition exercise should be carried out by someone other than the officer investigating the offence;

9. [2003] 2 Cr. App. R. 6 CA.

10. [2008] 2 Cr. APP. R. 20, CA.

(b) proper records should be kept of the amount of time spent in contact with the suspect by any officer giving voice recognition evidence, of the date and time spent by any such officer in compiling any transcript of a covert recording, and of any annotations on a transcript made by a listening officer as to his views as to the identify of a speaker; and

(c) any officer attempting a voice recognition exercise should not be provided with a transcript bearing the annotations of any other officer."

In America, similar safeguards have been evolved through a series of judgments of different Courts. The principles evolved have been summed up in American Jurisprudence 2d (Vol. 29) in regard to the admissibility of tape recorded statements, which are stated as under:-

"The cases are in general agreement as to what constitutes a proper foundation for the admission of a sound recording, and indicate a reasonably strict adherence to the rules prescribed for testing the admissibility of recordings, which have been outlined as follows:

(1) a showing that the recording device was capable of taking testimony;

(2) a showing that the operator of the device was competent;

(3) establishment of the authenticity and correctness of the recording;

(4) a showing that changes, additions, or deletions have not been made;

(5) a showing of the manner of the preservation

of the recording;

(6) identification of the speakers; and

(7) a showing that the testimony elicited was voluntarily made without any kind of inducement.

... However, the recording may be rejected if it is so inaudible and indistinct that the jury must speculate as to what was said.

32. This apart, in the case of *Mahabir Prasad Verma Vs. Dr. Surinder Kaur*[11], this Court has laid down that tape recorded evidence can only be used as corroboration evidence in paragraph 22, it is observed as follows:-

"Tape-recorded conversation can only be relied upon as corroborative evidence of conversation deposed by any of the parties to the conversation and in the absence of evidence of any such conversation, the tape-recorded conversation is indeed no proper evidence and cannot be relied upon. In the instant case, there was no evidence of any such conversation between the tenant and the husband of the landlady; and in the absence of any such conversation, the tape-recorded conversation could be no proper evidence."

33. In our opinion, the High Court has failed to take into consideration any of the precautions indicated above in accepting the evidence of Tejasingh Chavan, PW-18 and Jagdish Kulkarni, PW-19 with regard to the identification of Bharat Nepali and the appellant. The High Court, in our opinion, has given a wholly erroneous justification by holding that the voice of both the accused are distinctive, clear and identifiable. It is further observed that the conversation between the two accused is not a short conversation as in the case of accused

11. (1982) 2 SCC 258.

Nos. 1 and 2. The High Court was also influenced by the fact that accused Bharat Nepali was in the custody of Tejasingh Chavan, PW-18 for a period of two weeks. Similarly, appellant was in the custody of Jagdish Kulkarni, PW-19 for a substantial period of time. Therefore, their voice identification was held to be reliable. This reasoning of the High Court is a mere repetition of the reasons given by the trial court.

34. We are of the considered opinion that there is hardly any distinction in the evidence with regard to the voice identification of accused Nos. 1 and 2 on the one hand and Bharat Nepali and the appellant on the other hand.

35. In our opinion, the voice test identification by PW-19, Jagdish Kulkarni is even otherwise unreliable. The voice identification was conducted without taking any precautions similar to the precautions which are normally taken in visual identification of suspects by witnesses. It is a matter of fact that PW-19, Jagdish Kulkarni was informed in advance that he had to identify the voice of the appellant. Similarly, PW-18 was informed that he had to identify the voice of Bharat Nepali. No attempt was made even to mix the voices of Bharat Nepali and the appellant with some other unidentified voices. In such circumstances, the voice identification evidence would have little value. It appears that the exercise was performed only for the record.

36. This apart, there is no evidence on record to indicate that the mobile No. 0060133402008 was that of the absconding accused Bharat Nepali. There is also no evidence to indicate that he was using said number except voice identification by Tejasingh Chavan, PW-18. There is no other material on the record to connect the absconding accused Bharat Nepali with the number allegedly used by him. Similarly, there is nothing on the record to indicate that the appellant was having or using any of the following mobile number:-

9892849523, 9892367596, 9892296496 and 9892295687.

37. There is no seizure of any mobile phone or even sim card at the behest of the appellant. The prosecution has failed to produce any evidence from the operators with regard to the registration of the aforesaid phone numbers. In fact, the Investigating Officer, Nagesh Lohar specifically stated in his evidence that "we could not get those four subscription forms and the documents of the company though we enquire. It is true that till today we do not know who are the subscribers of those cell phones".

38. This apart, the High Court erroneously overlooked the infirmities in the evidence with regard to the authenticity of the tape recording produced in Court. The conversation between the appellant and Bharat Nepali was said to have been recorded on 28th October, 2004 by PW-17, P.S.I. Vijay Dalvi. According to him, although, he had been monitoring the Malaysian number of Bharat Nepali from 1st October, 2004 till 27th October, 2004, he had heard no incoming or outgoing calls. The incriminating conversation was said to have been recorded on 28th October, 2004. This conversation was relayed to a police telephone and recorded. He put a slip on the recorded cassette indicating the date and time of the conversation as recorded. He then handed the tape over to the D.C.P., Dhananjay Kamlakar. He heard the tape on the same day. Even though the conversation revealed a conspiracy for commission of a serious offence, like murder of an influential personality in Mumbai city, he took no further action. He just sealed the tape and kept it in his personal custody.

39. Even when the accused A1 to A4 were arrested on 8th November, 2004 the cassette was not produced before the Investigating Officer. It was kept by Kamlakar till 17th January, 2005, when he instructed P.S.I. Vijay Dalvi to hand over the tape to the Inspector of Police. It is a matter of record that the tape was received by the Investigating Officer on 18th January, 2005.

Even the trial court refers to the inaction on the part of the D.C.P. Dhananjay Kamlakar as shocking. Thereafter, the High Court observed as follows:-

> "The evidence of DCP Dhananjay Kamlakar suggest that he had forgotten about the existence of the tape and only when Investigating Officer asked about the tape he remembered, checked his record and then informed the investigating officer that he had such tape in his custody. It is not easy to believe this story given by DCP Dhananjay Kamlakar as he was a highly trained and a Senior IPS Officer. The least which he could had done was to find out from the telephone companies as to who was the recipient of this call from the number under surveillance. He made no efforts to find out as to who had received this call. The conduct of this officer leads me to believe that this tape was suppressed for some reasons which best known to DCP Kamlakar."

40. Having concluded as such, the High Court, however, proceeds to hold that even such lapses cannot enure to the benefit of the appellant. The High Court believed the recording as it had been made upon prior approval by the Home Secretary given on 20th October, 2004.

41. In our opinion, the veracity of the voice identification would not improve merely because a recording has been made after receiving official approval. The crucial identification was of the voice of the person talking on the tape. We are of the considered opinion that the High Court has committed a grave error in confirming the conviction of the appellant as recorded by the trial court only on the evidence of voice identification.

42. Other circumstance relied upon by the High Court in convicting the appellant is the recovery of the alleged revolver from the house of the cousin of the appellant. In our opinion, the recovery from an open space, at the back of the house, which did not even belong to the appellant, could be of little

assistance to the prosecution. Even otherwise it needs to be remembered that the trial court had in fact, acquitted the appellant for the offences under Section 3 read with Section 5 of the Arms Act. This acquittal was never challenged by the prosecution in appeal. Therefore, it was wholly inappropriate by the High Court to reverse the findings of the trial court in the absence of an appeal by the State.

43. In view of the above, we are of the considered opinion that the appellant was entitled to the benefit of doubt as the prosecution has failed to prove its case beyond reasonable doubt. Consequently, the appeal is allowed. The appellant is acquitted of all the charges levelled against him. The conviction and sentence imposed by the trial court and confirmed by the High Court are quashed and set aside. The appellant shall be set at liberty forthwith unless wanted in any other case.

N.J. Appeal allowed.

RAJESH KUMAR SRIVASTAVA
v.
STATE OF JHARKHAND & ORS.
(Civil Appeal No. 2419 Of 2011)

MARCH 10, 2011

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

SERVICE LAW:

Judicial Officer – Probationer Munsif – Discharged from service – Held: A person is placed on probation so as to enable the employer to adjudge his suitability for continuation and confirmation in the service – While taking a decision in this regard neither any notice is required to be given to the Probationer nor is he required to be given any opportunity of hearing – In the instant case, the order of termination was a fall out of the unsatisfactory service of the incumbent adjudged on the basis of his overall performance and the manner in which he conducted himself – This is a case of termination of service simpliciter and not a case of stigmatic termination – Natural Justice.

A complaint was made against the appellant, a Probationer Munsif, that while functioning as Judicial Magistrate I Class, he discharged all the accused in a case involving offences punishable u/ss 406, 408, 420, and 120-B IPC despite rejection of revision application by High Court earlier. The matter was referred to the Standing Committee of the High Court and was, ultimately, considered by the Full Court, which resolved that continuation of the service of the appellant was no longer required and that he should be discharged. Consequently, the State Government issued order stating that the services of the appellant were no longer required

in public interest and, therefore, he stood discharged with effect from 31-7-2003. The writ petition of the appellant was dismissed by the High Court.

In the instant appeal it was contended for the appellant that the order challenged, being an order of removal passed without holding an inquiry, was not only in violation of principle of natural justice but it also amounted to casting a stigma on the career of the appellant and, as such, the order passed by the High Court was liable to be set aside.

Dismissing the appeal, the Court

HELD: 1.1. A person is placed on probation so as to enable the employer to adjudge his suitability for continuation in the service and also for confirmation in service. There are various criteria for adjudging suitability of a person to hold the post on permanent basis and by way of confirmation. At that stage and during the period of probation the action and activities of the probationer are generally under scrutiny and on the basis of his overall performance a decision is generally taken as to whether his services should be continued and that he should be confirmed, or he should be released from service. [Para 10] [828-B-D]

1.2. In the instant case, the order of termination of services of the appellant is a fall out of his unsatisfactory service adjudged on the basis of his overall performance and the manner in which he conducted himself. In the course of adjudging such suitability it was found by the respondents that the performance of the appellant was not satisfactory and, therefore, he was not suitable for the job. The decision to release him from service was taken by the respondents considering his overall performance, conduct and suitability for the job. While taking a

decision in this regard neither any notice is required to be given to the probationer nor is he required to be given any opportunity of hearing. Strictly speaking, it is not a case of removal on grounds of indiscipline or misconduct as sought to be made out by the appellant. Such decision cannot be said to be stigmatic or punitive. This is a case of termination of service simpliciter and not a case of stigmatic termination and, therefore, there is no infirmity in the impugned judgment and order passed by the High Court. [Para 10 and 12] [828-D-G; 829-A-D]

Rajesh Kohli vs. High Court of J & K & Anr. **2010 (11) SCR 699 = (2010) 12 SCC 783: 2010 (10) JT 276 – relied on.**

Case Law Reference:

2010 (11) SCR 699	**relied on**	**Para 11**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2419 of 2011.

From the Judgment & Order dated 4.4.2008 of the High Court of Jharkhand at Ranchi in W.P. (S) No. 5213 of 2003.

S.R. Singh, Pramod Dayal, Nikunj Dayal, Sahdev Singh for the Appellant.

Ratan Kumar Choudhuri, Akshay Shukla, Krishnanand Pandeya for the Respondents.

The Judgment of the Court was delivered by

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

2. The appellant herein submitted his application offering himself as a candidate for the post of Munsif to be recruited by the respondents for which an advertisement was also issued. Pursuant to the aforesaid application filed by the appellant, he was called to appear in the various tests held, including the

interview conducted by the High Court. He successfully completed his tests and consequently was declared successful in the year 2001.

3. After completing his training period, a notification was issued on 21.05.2002, appointing him as a Probationer Munsif. The said notification was issued by the Government of Jharkhand. He was posted at Dhanbad by a notification issued by the High Court. On 04.06.2002, he assumed the charge as Probationer Munsif at Dhanbad. On 15.07.2002, he was conferred with the power of Judicial Magistrate 1st Class. While he was discharging his duties as such, he passed an order on 06.01.2003, discharging all the accused under Section 239 Cr.P.C. in G.R. No. 4698 of 1995 under Sections 406, 408, 420, 120-B IPC.

4. A complaint from one Ram Kumar was received by the High Court on 04.03.2003, wherein it was alleged that the appellant had discharged the said accused persons, despite rejection of revision application by the High Court earlier. It was also alleged that the aforesaid order discharging the accused was passed for extraneous consideration. The High Court on receipt of the aforesaid complaint called for a report from the District & Sessions Judge, Dhanbad. On receipt of the said communication, the District & Sessions Judge, Dhanbad, sent a letter to the appellant directing him to offer his remarks which were submitted by the appellant. The said remarks and report along with confidential report of the appellant were submitted by the District & Sessions Judge, Dhanbad, before the High Court. On 28.04.2003, the concerned Zonal Judge referred the matter to the Standing Committee for further action. In terms of the decision of the Zonal Judge, the then Chief Justice of the High Court also referred the matter to the Standing Committee by way of recording an order on 01.05.2003. The matter was considered in the meeting of the Standing Committee held on 08.07.2003.

5. After considering the performance and the suitability of

the appellant, it was resolved that the matter be referred to the Full Court for consideration, and a decision as to whether or not the continuation of the service of the appellant was required. Consequent thereupon the matter was placed before the Full Court meeting held on 18.07.2003, wherein it was resolved by the Full Court that the continuation of the service of the appellant was no longer required and that he should be discharged. Consequent thereupon the resolution of the Full Court was sent to the Government. The Government of Jharkhand issued an order dated 31.07.2003, stating that the services of the appellant are no longer required in public interest, and therefore, the appellant stands discharged from service with effect from 31.07.2003.

6. Challenging the said order passed by the State Government, the appellant filed a Writ Petition before the High Court which was dismissed by the Division Bench of the High Court by a detailed order giving reasons for its decision dated 04.04.2008.

7. The appellant being aggrieved by the aforesaid order passed by the High Court filed the present appeal in this Court, on which we heard learned counsel appearing for the parties, who had also taken us painstakingly through the records of the case. Having considered the same, we proceed to dispose of the present appeal by recording our reasons for our conclusion.

8. The counsel appearing for the appellant submitted that the order challenged by way of the Writ Petition was an order of removal and the same having been passed without holding an enquiry amounts to, not only violation of principles of natural justice but also amounts to casting a stigma in the career of the appellant and, therefore, the order passed by the High Court is illegal and liable to be set aside.

9. The Counsel appearing for the respondents, however, refuted the aforesaid submissions. He submitted that the appellant was on probation when a notification removing him

from the service in public interest was issued and that the order passed was just and proper. He denied that the impugned order is stigmatic or in any way punitive or that there was any violation of the principles of natural justice.

10. The records placed before us disclose that at the time when the impugned order was passed, the appellant was working as a Probationer Munsif. A person is placed on probation so as to enable the employer to adjudge his suitability for continuation in the service and also for confirmation in service. There are various criteria for adjudging suitability of a person to hold the post on permanent basis and by way of confirmation. At that stage and during the period of probation the action and activities of the appellant are generally under scrutiny and on the basis of his overall performance a decision is generally taken as to whether his services should be continued and that he should be confirmed, or he should be released from service. In the present case, in the course of adjudging such suitability it was found by the respondents that the performance of the appellant was not satisfactory and therefore he was not suitable for the job. The aforesaid decision to release him from service was taken by the respondents considering his overall performance, conduct and suitability for the job. While taking a decision in this regard neither any notice is required to be given to the appellant nor he is required to be given any opportunity of hearing. Strictly speaking, it is not a case of removal as sought to be made out by the appellant, but was a case of simple discharge from service. It is, therefore, only a termination simpliciter and not removal from service on the grounds of indiscipline or misconduct. While adjudging his performance, conduct and overall suitability, his performance record as also the report from the higher authorities were called for and they were looked into before any decision was taken as to whether the officer concerned should be continued in service or not.

11. In a recent decision of this Court in *Rajesh Kohli vs.*

High Court of J & K & Anr. reported at (2010) 12 SCC 783: 2010 (10) JT 276, almost a similar issue cropped up for consideration, in which this Court has held that the High Court has a solemn duty to consider and appreciate the service of a judicial officer before confirming him in service and for this not only judicial performance but also probity as to how one has conducted himself is relevant and important. It was also held in the same decision that upright and honest judicial officers are needed in the district judiciary, which is the bedrock of our judicial system.

12. The order of termination passed in the present case is a fall out of his unsatisfactory service adjudged on the basis of his overall performance and the manner in which he conducted himself. Such decision cannot be said to be stigmatic or punitive. This is a case of termination of service simpliciter and not a case of stigmatic termination and therefore there is no infirmity in the impugned judgment and order passed by the High Court.

13. We do not find any merit in this appeal, therefore, we dismiss the same, but leaving the parties to bear their own costs.

R.P. Appeal dismissed.

AJIT KUMAR

v.

STATE OF JHARKHAND & ORS.

(Civil Appeal No. 2420 of 2011)

MARCH 10, 2011

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

CONSTITUTION OF INDIA, 1950:

Articles 310, 311(2)(b) – Sub-Judge – Removal from service invoking provisions of Article 311 (2)(b) – Held: In the facts and circumstances of the case, the High Court rightly held that it was not possible to hold an inquiry – Service Law.

Article 311(2)(b) read with Articles 233, 234 to 236 – Sub-Judge – Removed from service with the recommendation of High Court without holding an inquiry – Held: A Subordinate Judge is also a judge within the meaning of provision of Article 233 read with Articles 235 and 236 – High Court is vested with the power to take decision for appointments of subordinate judiciary under Articles 234-236 – Power could be exercised by High Court to dispense with an inquiry for a reason to be recorded in writing and such dispensation of inquiry for valid reasons when recommended to the Governor, it is within the competence of the Governor to issue such orders in terms of the recommendation of the High Court in exercise of power under Article 311(2)(b) – Independence of Judiciary – Separation of powers—Service Law.

An order was issued by the Governor on 31.7.2003 for removing the appellant, a Subordinate Judge, from service on the basis of a resolution of the Full Court of the High Court. The appellant filed a writ petition before the High Court contending, inter alia, that the High Court

did not have any power to dispense with an enquiry as envisaged for the purpose of removal of a judicial officer like the appellant and, therefore, the impugned order was illegal and without jurisdiction. It was also submitted that there was no evidence on record to show that the appellant was guilty of any misconduct; that no notice was issued to the appellant before his removal from service, thereby violating the principles of natural justice. The High Court dismissed the writ petition. Aggrieved, the writ petitioner filed the appeal.

Dismissing the appeal, the Court

Held: 1.1. Under the doctrine of pleasure, which has been recognized under our Constitutional framework, all civil posts under the Government are held at the pleasure of the Government and are terminable at its will. The said power received the constitutional sanction in the light of Article 310 of the Constitution of India, and is subject to other provisions of the Constitution which include the restrictions imposed by Article 310 (2) and Articles 311(1) and (2). Although there is a pleasure doctrine, however, the same cannot be said to be absolute and the same is subject to the conditions that when a government servant is to be dismissed or removed from service or he is reduced in rank, a departmental enquiry is required to be conducted to enquire into his misconduct and only after holding such an enquiry, if he is found guilty then only a person can be removed or dismissed from service or reduced in rank. Therefore, under the Indian constitutional framework, dismissal of civil servants must comply with the procedure laid down in Article 311, and Article 310(1) cannot be invoked independently with the object of justifying a contravention of Article 311(2). There is an exception provided by way of incorporation of Article 311 (2) with sub-clauses (a), (b) and (c). Clause (a) relates to a case where upon a conviction of a person

by a criminal court on certain charges he could be removed from service without holding an enquiry. Similarly, under clause (c) an enquiry to be held against the government employee could be dispensed with if it is not possible to hold such an enquiry in the interest of the security of the State. Sub-clause (b), on the other hand, provides that such an enquiry could be dispensed with by the authority concerned, after recording reasons, for which it is not practicable to hold an enquiry. The said power is an absolute power of the disciplinary authority who after following the procedure laid down therein could resort to such extra ordinary power provided it follows the pre-conditions laid down therein meaningfully and effectively. [Para 10] [837-C-H; 838-A-F]

1.2. In the case in hand, the officer concerned was working as Sub-ordinate Judge and during the course of inspection by the Inspecting Judge it was found that he did not use to prepare judgments on his own, he used to get it prepared through some body else. Undisputedly, the Inspecting Judge submitted his report to the Chief Justice of the High Court. The High Court considered the said report and thereafter was of the opinion that it is not possible to hold an enquiry in the case of the appellant and that holding of such enquiry should be dispensed with in view of the fact that if an enquiry is held the same may lead to the question of validity of several judgments rendered by the appellant. The reason recorded by the High Court was a legal and valid ground for not holding an enquiry. There was, therefore, also no necessity of giving him any opportunity of hearing as the scope of holding an enquiry and giving him an opportunity of hearing was specifically dispensed with. Therefore, the High Court recommended the removal of the appellant from service. Consequently, the Governor decided to invoke the provisions of Article 311(2) (b) of the

Constitution. The procedure and the pre-conditions laid down for invoking the extra-ordinary power under Article 311(2) (b) having been complied with and properly exercised within the parameters of the provisions, the order passed by the competent authority removing the appellant from service cannot be held to be without jurisdiction and power. [Para 11 and 12] [838-G-H; 839-A-D]

2.1It cannot be said that the power under Article 311(2) (b) of the Constitution could not have been invoked by the High Court. A Sub-ordinate judge is also a judge within the meaning of the provision of Article 233 read with the provisions of Articles 235 and 236 of the Constitution. Article 233 clearly lays down that appointments and promotions of district judges in any State is to be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State. The said provisions, like Articles 234 - 236, have been incorporated in the Constitution inter alia to secure the independence of judiciary from the executive and the same deals with the scope of separation of powers of the three wings of the State. It cannot be disputed that the power under these Articles is to be exercised by the Governor in consultation with the High Court. [Para13, 14 and 15] [839-E-H; 840-A]

2.2. Under the scheme of the Constitution the High Court is vested with the power to take decision for appointments of the Sub-ordinate judiciary under Articles 234 to 236 of the Constitution. The High Court is also vested with the power to see that the high traditions and standards of the judiciary are maintained by selection of proper persons to run the district judiciary. If a person is found not worthy to be a member of the judicial service or if it is found that he has committed a misconduct, he

could be removed from the service by following the procedure laid. Power could also be exercised for such dismissal or removal by following the pre-conditions as laid down under Article 311(2) (b) of the Constitution. Even for imposing a punishment of dismissal or removal or reduction in rank, the High Court can hold disciplinary proceedings and recommend such punishments. Similarly, such a power could be exercised by the High Court to dispense with an enquiry for a reason to be recorded in writing and such dispensation of an enquiry for valid reasons when recommended to the Governor, it is within the competence of the Governor to issue such orders in terms of the recommendation of the High Court in exercise of power under Article 311(2) (b) of the Constitution of India. [Para 15] [840-B-F]

2.3. Therefore, there is no reason to interfere with the action taken against the appellant nor is there any infirmity in the impugned judgment and order of the High Court. [Para 16] [840-F-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2420 of 2011.

From the Judgment & Order dated 2.11.2007 of the High Court of Jharkhand at Ranchi in W.P. (S) No. 4582 of 2003.

N.S. Gahlot, Vijay Pratap Singh, K.S. Rana for the Appellant.

Ratan Kumar Chaudhuri, Krishnanand Pandeya for the Respondents.

The Judgment of the Court was delivered by

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

2. This appeal is directed against the judgment and order dated 02.11.2007 passed by the Jharkhand High Court dismissing the writ petition filed by the appellant.

3. The appellant herein was working as sub-ordinate Judge in Garhwa, Jharkhand when an order was issued by the Governor of Jharkhand removing him from service by an order issued on 31.07.2003 on the basis of a resolution of the Full Court of the High Court of Jharkhand recommending his removal from service.

4. The appellant herein challenged the legality of the aforesaid order before the Jharkhand High Court by filing a writ petition contending inter alia that the High Court does not have any power to dispense with an enquiry as envisaged for the purpose of removal of a judicial officer like the appellant and therefore, the impugned order was illegal and without jurisdiction. It was also submitted that there was no evidence on record to show that the appellant was guilty of any misconduct and therefore the order of removal was illegal and particularly also because of the fact that no notice was issued to the appellant before his removal from service thereby violating the principles of natural justice. It was also submitted that there was a total non-application of mind in passing the impugned order of removal by exercise of power under proviso (b) to Article 311(2) of the Constitution of India.

5. The aforesaid submissions were considered by the High Court in the light of the material available on record. The High Court found that the appellant was promoted as sub-ordinate Judge, Garhwa and that on 05.05.2003, the then Inspecting Judge inspected the Garhwa Civil Court and inspected the records relating to the appellant and submitted his confidential report to the then Chief Justice of the Jharkhand High Court against the appellant stating that the appellant did not use to prepare judgments on his own, rather he used to get it prepared through some body else before delivering the judgments. It was also found that the then Chief Justice, after going through the report, referred the matter to the Full Court for considering the appropriate action. On 18.06.2003, the Full Court, after considering the confidential report and the report

of the Inspecting Judge, resolved that the appellant can be recommended for removal from the service, without any enquiry as it was felt that it was not practicable in the interest of the institution to hold an inquiry since it may lead to the question of validity of several judgments rendered by him.

6. Consequently the Full Court recommended for invocation of the proviso (b) to Article 311(2) of the Constitution of India to dispense with the inquiry as against the appellant to remove him from service, following which the Governor while exercising his power issued the impugned order of removal of the appellant from the service which was under challenge in the writ petition before the High Court. The High Court upheld the order of removal passed by the Governor holding that the order was passed on the recommendation of the resolution of the Full Court by invoking the proviso (b) to Article 311(2) of the Constitution of India which permits the dispensation of an enquiry on the grounds that it is not reasonably practical to hold an enquiry. The High Court also held that the aforesaid exercise of power under Article 311(2) (b) of the Constitution of India is permissible and therefore the action taken removing the appellant from service was legal and justified.

7. Being aggrieved by the aforesaid order the present appeal was filed on which we have heard learned counsel appearing for the parties.

8. Within the scheme of the Constitution of India, provisions relating to public service may be found in Articles 309, 310 and 311. It is important to note that these provisions (namely Arts. 310 and 311) afford protection to public servants from being dismissed, removed or reduced in rank without holding a proper inquiry or giving a hearing.

9. Article 311 provides for the protection to public servant against punitive action being taken against them by an authority subordinate to one who appointed him. Exceptions to Article 311 has been provided in clause (a), (b) and (c) to clause (2)

of Article 311 itself, which provide that the said Article shall not apply to such employees who have been punished for conviction in a criminal case, where inquiry is not practicable to be held for reasons to be recorded in writing or where the President or the Governor as the case may be is satisfied that such an inquiry is not to be held in the interest of the security of the State.

10. In order to appreciate the power to be exercised under Article 311 of the Constitution of India it would be appropriate to look at Article 310 of the Constitution of India. Under the doctrine of pleasure, which has been recognized under our Constitutional framework, all civil posts under the Government are held at the pleasure of the Government under which they are held and are terminable at its will. The aforesaid power is what the doctrine of pleasure defines, which was recognized in the United Kingdom and also received the constitutional sanction under our Constitution in the light of Article 310 of the Constitution of India. However, it is to be noticed that in India the same is subject to other provisions of the Constitution which include the restrictions imposed by Article 310 (2) and Article 311(1) (2). Therefore, under the Indian constitutional framework, dismissal of civil servants must comply with the procedure laid down in Article 311 and Article 310(1) cannot be invoked independently with the object of justifying a contravention of Article 311(2). There is an exception provided by way of incorporation of Article 311 (2) with sub-clauses (a), (b) and (c). No such enquiry is required to be conducted for the purposes of dismissal, removal or reduction in rank of persons when the same related to dismissal on the ground of conviction or where it is not practicable to hold an enquiry for the reasons to be recorded in writing by that authority empowered to dismiss or removed a person or reduce him in rank or it is not practicable to hold an enquiry for the security of the State. These three exceptions are well recognized for dispensing with an enquiry, which is required to be conducted under Article 311 of the Constitution of India when the authority takes a decision for

dismissal or removal or reduction in rank in writing. In other words, although there is a pleasure doctrine, however, the same cannot be said to be absolute and the same is subject to the conditions that when a government servant is to be dismissed or removed from service or he is reduced in rank, a departmental enquiry is required to be conducted to enquire into his misconduct and only after holding such an enquiry and in the course of such enquiry if he is found guilty then only a person can be removed or dismissed from service or reduced in rank. As stated herein such constitutional provision for holding an enquiry as set out under Article 311 of the Constitution of India could also be dispensed with under the exceptions provided to Article 311(2) of the constitution where clause (a) relates to a case where upon a conviction of a person by a criminal court on certain charges he could be removed from service without holding an enquiry. Similarly, under clause (c) an enquiry to be held against the government employee could be dispensed with if it is not possible to hold such an enquiry in the interest of the security of the State. Sub-clause (b) on the other hand provides that such an enquiry could be dispensed with by the concerned authority, after recording reasons, for which it is not practicable to hold an enquiry. The aforesaid power is an absolute power of the disciplinary authority who after following the procedure laid down therein could resort to such extra ordinary power provided it follows the pre-conditions laid down therein meaningfully and effectively.

11. In the case in hand, the officer concerned was working as sub-ordinate Judge and during the course of inspection by the Inspecting Judge it was found that he did not use to prepare judgments on his own, he used to get it prepared through some body else before delivering the judgments. Undisputedly, the inspecting Judge submitted his report to the Chief Justice of the High Court. The High Court considered the said report and thereafter was of the opinion that it is not possible to hold an enquiry in the case of the appellant and that holding of such enquiry should be dispensed with in view of the fact that if an

enquiry is held the same may lead to the question of validity of several judgments rendered by the appellant. The aforesaid reason recorded by the High Court was a legal and valid ground for not holding an enquiry. There was therefore also no necessity of giving him any opportunity of hearing as the scope of holding an enquiry and giving him an opportunity of hearing was specifically dispensed with.

12. Consequently, the High Court recommended the removal of the appellant from service. Subsequent to that, the Governor decided to invoke the provisions of Article 311(2) (b) of the Constitution of India as holding of enquiry may lead to question of the validity of several judgments delivered by the appellant. The procedure and the pre-conditions laid down for invoking the extra-ordinary power under Article 311(2) (b) having been complied with and properly exercised within the parameters of the provisions, the order passed by the competent authority removing the appellant from the services cannot be held to be without jurisdiction and power.

13. The next contention raised by the appellant was that the aforesaid power under Article 311(2) (b) of the Constitution could not have been invoked by the High Court. The aforesaid submission also cannot be accepted in view of the fact that a sub-ordinate judge is also a judge within the meaning of the provision of Article 233 of the Constitution of India read with the provisions of Articles 235 and 236 of the Constitution of India.

14. Article 233 clearly lays down that appointments and promotions of district judges in any State is to be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State. The aforesaid provision, like Articles 234 - 236, have been incorporated in the Constitution of India inter alia to secure the independence of judiciary from the executive and the same deals with the scope of separation of power of the three wings of the State.

15. It cannot be disputed that the power under the aforesaid Articles is to be exercised by the Governor in consultation with the High Court. Under the scheme of the Indian Constitution the High Court is vested with the power to take decision for appointment of the sub-ordinate judiciary under Articles 234 to 236 of the Constitution. The High Court is also vested with the power to see that the high traditions and standards of the judiciary are maintained by the selection of proper persons to run the district judiciary. If a person is found not worthy to be a member of the judicial service or it is found that he has committed a misconduct he could be removed from the service by following the procedure laid. Power could also be exercised for such dismissal or removal by following the pre-conditions as laid down under Article 311(2) (b) of the Constitution of India. Even for imposing a punishment of dismissal or removal or reduction in rank, the High Court can hold disciplinary proceedings and recommend such punishments. The Governor, alone is competent to impose such punishment upon persons coming under Articles 233 - 235 read with Article 311(2) of the Constitution of India. Similarly, such a power could be exercised by the High Court to dispense with an enquiry for a reason to be recorded in writing and such dispensation of an enquiry for valid reasons when recommended to the Governor, it is within the competence of the Governor to issue such orders in terms of the recommendation of the High Court in exercise of power under Article 311(2) (b) of the Constitution of India.

16. Therefore, we find no reason to interfere with the action taken against the appellant nor we find any infirmity in the impugned judgment and order of the High Court. All the contentions raised are found to be without merit.

17. Accordingly, we do not find any merit in this appeal and we dismiss the same but leaving the parties to bear their own costs.

R.P. Appeal dismissed.

M/S HANS STEEL ROLLING MILL.

v.

COMMNR. OF CENTRAL EXCISE, CHANDIGARH

(Civil Appeal No. 2715 of 2003)

MARCH 10, 2011

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

HOT RE-ROLLING STEEL MILLS ANNUAL CAPACITY DETERMINATION RULES, 1997 :

Rule 96ZP read with s. 3A of Central Excise Act-Compound Levy Scheme-Applicability of s.11-A –Held : Compound levy scheme for collection of duty based on annual capacity production u/s 3 and Capacity Determination Rules is a separate scheme from the normal scheme for collection of central excise duty –It is a comprehensive scheme in itself and general provisions in the Act and Rules are excluded –The time limit prescribed for one scheme would be completely unwarranted for another scheme and the time limit prescribed u/s 11A of the Act is no exception.

The appellants were engaged in the manufacture of iron and steel products falling under Chapters 72 and 73 of the Central Excise Tariff Act, 1985. During the period ranging from 1.9.1997 to 31.3.2000, the goods manufactured by the appellants 1997 to 31.3.2000, the goods manufactured by the appellants were chargeable to Central Excise Duty in terms of s. 3A of the Act, and the payment of duty was to be under Rule 96ZP of the Central Excise Rules, 1944. The Hot-Re-rolling Steel Mills Annual Capacity Determination Rules, 1997 were introduced by notification no. 32/97-CE (NT) dated 01.08.1997, wherein the manner and procedure for determination of annual capacity of rolling mill was

provided. The Commissioner of Central Excise determined the Annual Capacity to be 3355 MT. A show cause notice was issued to the appellants on 3.11.1998, contending that the demand of the duty has to be based on the capacity determination of 3355MT, for which the recovery of duty u/s. 11A of the Act amounting to Rs 2,19,750.00 was to be made. Subsequently, the appellants changed the parameters of their re-rolling mill and applied for the re-determination of the annual capacity for fresh declaration in terms of Capacity Determination Rules. On 31.5.1999, the Commissioner passed an order stating the Capacity Determination Rules as 1890MT. The appellants filed an appeal before the Tribunal. The larger Bench of the Tribunal, held that in case of the manufacturer operating under Compound Levy Scheme in terms of s. 3A of the Act, and Rule 96ZP of the Central Excise Rules, recovery mechanism provided in terms of s. 11A of the Act was not to be followed and hence the matter was to be remanded back to the Commissioner for re-determination. In the instant appeal filed by the assessee, the question for consideration before the Court was whether the provisions of time limit contained in Section 11A of the Central Excise Act, 1944 would be applicable to the recovery of amounts due under the compound levy scheme for Hot-Re-rolling mills, under the Annual Capacity determination Rules 1997.

Dismissing the appeal, the Court

HELD : 1.1. It is clearly established that the appellants are availing the facilities under the Compound Levy Scheme, which they themselves, opted for and filed declarations furnishing details about annual capacity of production and duty payable on such capacity of production. It has to be taken into consideration that the compounded levy scheme for collection of duty based on annual capacity of production u/s. 3 of the Act and Hot

Re-rolling Steel Mills Annual Capacity Determination Rules, 1997 is a separate scheme from the normal scheme for collection of central excise duty on goods manufactured in the country. Under the same, Rule 96P of the Rules stipulate the method of payment and Rule 96P contains detailed provision regarding time and manner of payment and it also contains provisions relating to payment of interest and penalty in event of delay in payment or non-payment of dues. Thus, this is a comprehensive scheme in itself and general provisions in the Act and Rules are excluded. [Para 12] [847-C-E]

Commissioner of C. EX & Customs v. Venus Castings (P) Ltd **2000 (117) ELT 273 (SC);** *Union of India v. Supreme Steels and General Mills* **2001 (133) ELT 513 (SC) and** *Collector of Central Excise, Jaipur V. Raghuvar (India) Ltd* **2000 (118) ELT 311 (SC) –relied on**

1.2. The Tribunal has rightly held that the importing of elements of one scheme of tax administration to a different scheme of tax administration would be wholly inappropriate as it would disturb the smooth functioning of that unique scheme. The time limit prescribed for one scheme could be completely unwarranted for another scheme and time limit prescribed u/s. 11A of the Act is no exception. [Para 15] [848-C-D]

Case Law Reference:

2000 (117) ELT 273 (SC)	**relied on**	**para 13**
2001 (133) ELT 513 (SC)	**relied on**	**para 13**
2000 (118) ELT 311 (SC)	**relied on**	**para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2715 of 2003 ect.

From the Judgment & Order dated 8.4.2002 of the

Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi in Appeal No. E/765/01-NB (DB).

WITH

C.A. No. 2717 & 3988 of 2003.

Balbir Singh, Rajesh Kumar, Sangeeta Chaudhary, Rupender Sinhmar, Deepak, Abhishek Singh Baghel, V. Shekhra S., H.R. Rao, Arijit Prasad, Jatin Rajput, B.V. Balaram Das, B. Krishna Prasad for the appearing parties.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. The issue that falls for consideration in these appeals is, as to whether the provisions of time limit that are contained in Section 11A of the Central Excise Act, 1944 (in short 'the Act') are applicable to the recovery of amounts due under the compound levy scheme for Hot-Re-rolling mills, under the Annual Capacity determination Rules 1997 because otherwise, it is a separate scheme for the collection of Central Excise Duty for the goods manufactured in the country.

2. In order to record a definite finding on the aforesaid issue it would be necessary to set out certain facts leading to filing of the present appeals.

3. The appellants are engaged in the manufacture of iron and steel products falling under Chapter 72 and 73 of the Central Excise Tariff Act, 1985. During the period ranging from 01.09.1997 to 31.3.2000, the goods manufactured by the appellants were chargeable to Central Excise Duty in terms of Section 3A of the Act. As per the Act, the duty was suppose to be paid on the annual production capacity of the plant, irrespective of the actual production. Under the scheme of Section 3A, the payment of duty to be under Rule 96ZP of the Central Excise Rules. The Hot-Re-rolling Steel Mills Annual

Capacity Determination Rules, 1997 were introduced by notification no. 32/97-CE (NT) dated 01.08.1997, wherein the manner and procedure for determination of annual capacity of rolling mill was provided. On 27.04.1998, the Commissioner of Central Excise determined the Annual Capacity to be 3355 MT.

4. Being aggrieved by the determination made, the appellants filed an appeal before the Customs, Excise & Gold (Control) Appellate Tribunal, (in short 'the Tribunal') New Delhi, whereby and whereunder the Tribunal remanded the matter back to the Commissioner for the re-determination of the value.

5. A show cause notice was issued to the appellants on 03.11.1998, contending that the demand of the duty has to be based on the capacity determination of 3355MT, for which the recovery of duty under Section 11A of the Act amounting to Rs 2,19,750.00 was to be made.

6. On 11.12.1998, the appellants changed the parameters of their re-rolling mill and applied for the re-determination of the annual capacity for fresh declaration in terms of Capacity Determination Rules. On 31.05.1999, the Commissioner passed an order based on Rule 5 of the Capacity Determination Rules stating the capacity as 1890MT. During the pendency of the final re-determination, the Central Excise Department issued a demand notice under Section 11 of the Act, for recovery of duty. Aggrieved by the same, the appellants filed a writ petition before the Punjab and Haryana High Court, whereby and whereunder the High Court set aside the demand notice and directed the revenue to re-determine the annual capacity.

7. On 04.01.2001, the Commissioner of Central Excise re-adjudicated the matter and determined the annual capacity of the period 1.09.97 to 31.3.2000 to be 1890MT. The appellant filed an appeal before the Tribunal against the same. On 08.04.2002, the larger bench of the Tribunal, held that in case of the manufacturer operating under Compound Levy Scheme

in terms of Section 3A of the Act, and Rule 96ZP of the Central Excise Rules, recovery mechanism provided in terms of Section 11A of the Act is not to be followed and hence the matter was to be remanded back to the Commissioner for re-determination.

8. Still aggrieved the appellants filed the present appeals on which we heard the learned counsel appearing for the parties, who have taken us through various orders passed by the different authorities and also through other connected records. Having considered the same, we proceed to dispose of the present appeal by recording our reasons for our conclusion.

9. It was submitted by the counsel appearing for the appellants that the provisions of Section 11A of the Act are mandatory for recovery of any duty short levied and short paid. The learned counsel for the petitioner further contended that the Section 11A of the Act stipulates the procedure to be followed invariably and without exception for recovery of any duty which has not been levied or not paid or short paid or erroneously refunded. The counsel referred to sub Section (2) of Section 11A of the Act which stipulated that the determination of amount of duty short levied etc, from a person is to be made after considering his representation in the matter. In this case since the recovery proceedings have been initiated under Section 11 of the Act, the procedural requirements for issuing notice, determining the amount etc, have not been satisfied at all. The counsel further submitted that there is no exception in the Central Excise Act or Rules regarding the procedure of recovery.

10. The aforesaid submissions of the counsel appearing for the appellants were however refuted by the counsel appearing for the respondent. The learned counsel for the respondent has pointed out that under the Compound Levy Scheme, the appellants opted for the payment of duty at

compounded rates and filed declarations furnishing details about annual capacity of production and duty payable on such capacity of production. Once the commissioner approved such applications, payments are to be made in terms of Rule 96ZP of the Rules.

11. We have already set out the issue which falls for our consideration in these present appeals.

12. On going through the records it is clearly established that the appellants are availing the facilities under the Compound Levy Scheme, which they themselves, opted for and filed declarations furnishing details about annual capacity of production and duty payable on such capacity of production. It has to be taken into consideration that the compounded levy scheme for collection of duty based on annual capacity of production under Section 3 of the Act and Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1997 is a separate scheme from the normal scheme for collection of central excise duty on goods manufactured in the country. Under the same, Rule 96P of the Rules stipulate the method of payment and Rule 96P contains detailed provision regarding time and manner of payment and it also contains provisions relating to payment of interest and penalty in event of delay in payment or non-payment of dues. Thus, this is a comprehensive scheme in itself and general provisions in the Act and Rules are excluded.

13. The judgments of this court in the cases of *Commissioner of C. EX & Customs v. Venus Castings (P) Ltd* as reported in 2000 (117) ELT 273 (SC) and, *Union of India v. Supreme Steels and General Mills as reported in 2001* (133) ELT 513 (SC), has clearly laid down the principle that the, compound levy scheme is a separate scheme altogether and an assessee opting for the scheme is bound by the terms of that particular scheme. It is settled matter now that Section 11A of the Act has no application for recovery under different schemes.

14. In the case of *Collector of Central Excise, Jaipur V. Raghuvar (India) Ltd* as reported in 2000 (118) ELT 311 (SC), this court has categorically stated that Section 11A of the Act is not an omnibus provision which stipulates limitation for every kind of action to be taken under the Act or Rules. An example can be drawn with the Modvat Scheme, because even in that particular scheme, Section 11A of the Act had no application with regard to time limit in the administration of that scheme.

15. We are in agreement with the finding and decision arrived at by the Tribunal that the importing of elements of one scheme of tax administration to a different scheme of tax administration would be wholly inappropriate as it would disturb the smooth functioning of that unique scheme. The time limit prescribed for one scheme could be completely unwarranted for another scheme and time limit prescribed under Section 11A of the Act is no exception.

16. Accordingly, in view of the above, we find no merit in these appeals which are dismissed herewith but without costs.

R.P. Appeals dismissed.

DELHI PRADESH REGD. MED. PRT. ASSN.

v.

UNION OF INDIA & ORS.

Review Petition (Civil) No. 2279 of 2010

In

Civil Appeal No. 4757 of 2010

MARCH 11, 2011

[DR. B.S. CHAUHAN AND SWATANTER KUMAR, JJ.]

Review petition: Maintainability of – Petitioner seeking review of impugned judgment on the ground that when the matter was heard, petitioner's counsel was not present and therefore judgment rendered against the petitioner was in flagrant violation of principles of natural justice – Held: Review petition cannot be argued merely on technicalities – On facts, entertaining the review petition was not only a futile exercise but sheer wastage of judicial time – Petitioner did not disclose anywhere as to whether any grievance was ever raised by it against the counsel who remained negligent and did not render any service to it – Courts are over burdened and no litigant should misuse the forum of the court merely because litigation is a luxury for him – The review petition was filed on frivolous grounds as neither in the petition, nor during the course of hearing, the error/mistake in the judgment either on law or on facts was pointed out – Review application was filed without any sense of responsibility – Such a practice adopted by the litigants and the members of the Bar is deprecated – Review petition accordingly dismissed.

Dr. Buddhi Kota Subbarao v. K. Parasaran & Ors. **AIR 1996 SC 2687 – relied on.**

Rajasthan Pradesh V.S. Sardarshahar & Anr. v. Union of India & Ors. **AIR 2010 SC 2221;** *R.D. Saxena v. Balram Prasad Sharma* **(2000) 7 SCC 264;** *C.S. Venkatasubramanian v.*

State Bank of India **(1997) 1 SCC 254 – referred to.**

CASE LAW REFERENCE:

AIR 2010 SC 2221	**Referred to**	**Para 3**
(2000) 7 SCC 264	**Referred to**	**Para 5**
(1997) 1 SCC 254	**Referred to**	**Para 5**
AIR 1996 SC 2687	**Relied on**	**Para 10**

CIVIL APPELLATE JURISDICTION : Review Petition (C) No. 2279 of 2010.

IN

Civil Appeal No. 4757 of 2010 etc.

From the Judgment & Order dated 19.11.2008 of the High Court of Delhi at New Delhi in WP (C) No. 1999 of 1998

Fakhruddin, Raj Kishore Choudhary, Bharat Bhushan, Shamant Ahuja, Meenu Sharma, Neeru Sharma Chitranjali Negi, Gulshan Jahan, Shivam Sharma, T. Mahipal for the appearing parties.

The following Order of the Court was delivered

O R D E R

1. This Review Petition has been preferred by the applicant on the ground that when the matter was heard, its counsel was not present and therefore, the judgment has been rendered against the applicant in flagrant violation of the principles of natural justice and this Court must entertain the Review Petition recalling its judgment and order impugned herein and decide the matter afresh after giving an opportunity of hearing to the applicant.

2. In fact, this case has arisen out of the judgment and

order dated 19.11.2008 passed by Delhi High Court dismissing the Writ Petition No.1999 of 1998 rejecting the claim of the applicant and its members that they are entitled to practice in the field of Medical Sciences on the basis of the qualification of Ayurveda Rattan & Vaid Visharad awarded by the Hindi Sahitya Sammellan, Allahabad.

3. The appeal of the applicant came for hearing alongwith a bunch of matters, i.e., Civil Appeal Nos.5324 of 2007; 5325 of 2007; 4758 of 2010; and 4759 of 2010, wherein the similar issues were involved. The matter had been argued at length by a large number of advocates in the other appeals and all the appeals were dismissed by an elaborate impugned judgment and order dated 1.6.2010, i.e. *Rajasthan Pradesh V.S. Sardarshahar & Anr. v. Union of India & Ors.,* AIR 2010 SC 2221, wherein this Court reached the following conclusions:-

(i) Hindi Sahitya Sammelan is neither a University/ Deemed University nor an Educational Board.

(ii) It is a Society registered under the Societies Registration Act.

(iii) It is not an educational institution imparting education in any subject inasmuch as the Ayurveda or any other branch of medical science.

(iv) No school/college imparting education in any subject is affiliated to it. Nor is the Hindi Sahitya Sammelan affiliated to any University/Board.

(v) Hindi Sahitya Sammelan has got no recognition from the Statutory Authority after 1967. No attempt has ever been made by the Society to get recognition as required under Section 14 of the Act, 1970, and further did not seek modification of entry No.105 in II Schedule to the Act, 1970.

(vi) Hindi Sahitya Sammelan only conducts examinations without verifying as to whether the candidate has some elementary/basic education or has attended classes in Ayurveda in any recognized college.

(vii) After commencement of Act, 1970, a person not possessing the qualification prescribed in Schedule II, III & IV to the Act, 1970 is not entitled to practice.

(viii) Mere inclusion of name of a person in the State Register maintained under the State Act is not enough to make him eligible to practice.

(ix) The right to practice under Article 19(1)(g) of the Constitution is not absolute, and thus, is subject to reasonable restrictions as provided under Article 19(6) of the Constitution.

(x) Restriction on the right to practice without possessing the requisite qualification prescribed in Schedule II, III & IV to the Act, 1970 is not violative of Article 14 or ultra vires to any of the provisions of the State Act.

4. When the Review Petition of the applicant came before the Court by circulation on 27.1.2011, the Court passed the following order:-

"It may be desirable that before we entertain/ consider the review petition, the learned counsel for the applicant may explain as to whether the advocate, other than the Advocate-on-Record at the time of the disposal of the case, can file a review petition in the light of the judgment reported in *Tamil Nadu Electricity Board & Anr. vs. N. Raju Reddiar & Anr.,* AIR 1997 SC 1005; and further when the Court has heard a bunch of petitions, and disposed them all by a common judgment, whether review

by the parties in one of the case can be filed on the ground that its lawyer could not make submissions.

List after two weeks."

5. The applicant filed a reply to the same contending that the aforesaid judgment referred to by this Court in *Tamil Nadu Electricity Board & Anr.* (supra) has no application in this case for the reason that litigant is free to change his advocate when he feels that the advocate retained cannot espouse his cause efficiently or for any other reason and to substantiate its case, the applicant relied upon the judgments of this Court in *R.D. Saxena v. Balram Prasad Sharma,* (2000) 7 SCC 264; and *C.S. Venkatasubramanian v. State Bank of India,* (1997) 1 SCC 254. It has further been submitted that a party is free to retain any advocate if it feels that its erstwhile advocate has not contested the case efficiently and effectively, and it was wrong to dismiss the petition in absence of its counsel. It has further been submitted in response to our earlier order as under:-

"That it is respectfully submitted that the review petitions were filed in all the appeals which were disposed of on 21.10.2010 by this Hon'ble Court passed in Review Petition (C) No.1741/2010, Review Petition (C) No.1742/2010, Review Petition (C) No.1743/2010 & Review Petition (C) No.1744/2010"

6. In view of the submissions made herein we thought it proper to hear the learned counsel of the applicant in open Court and thus, the matter came today for hearing.

7. Shri Fakhruddin, learned Senior Advocate appearing for the applicant was explained that though the counsel for the applicant was not present when other connected appeals were heard and decided, he may point out as what is the material in his possession to show that any of the findings recorded by us and quoted hereinabove is factually incorrect. Shri Fakhruddin

could not point out any material on the basis of which any of the findings so recorded can be held to be worth reconsideration. Not a single member of the applicant's Association has filed any document to show as what was the minimum qualification to join the course; what was its duration; where such members have completed their course and training; and when they passed the examination and what were the marks secured by them.

8. In fact, as nothing has been argued before us today in support of the review petition and it has been submitted by Shri Fakhruddin, learned senior counsel appearing for the applicant that as the matter stands squarely covered by the judgment of this Court in *Rajasthan Pradesh V.S. Sardarshahar* (supra), he has nothing to add. The review petition cannot be argued merely on technicalities that applicant's counsel remained absent on the day the connected matters involving same questions of fact and law had been argued and decided. Thus, Shri Fakhruddin has fairly conceded that the review petition is nothing, but purely an academic exercise as nothing can be argued against the impugned judgment dated 1.6.2010.

9. As is evident from the above that entertaining the review petition is proved not only a futile exercise but sheer wastage of judicial time. Applicant has not disclosed anywhere as to whether any grievance has ever been raised by it against the counsel who remained negligent and did not render any service to it. Reply to our first order dated 27.1.2011 has been filed urging that Court is bound to give way to the entitlements of litigants. We are of the considered opinion that such conduct of the litigant has not only been reprehensible but is tantamount to abuse of the process of the court. We are not able to appreciate as to whether the petition was filed to satisfy the ego of the litigant or the litigant was ill-advised by the members of the Bar just for petty pecuniary gain. The petition has been filed without realizing that the courts are over burdened and no litigant should mis-use the forum of the court merely because

litigation is a luxury for him. The review application has been filed on frivolous grounds as neither in the petition, nor during the course of hearing could the error/mistake in the judgment either on law or on facts be pointed out.

10. In *Dr. Buddhi Kota Subbarao v. K. Parasaran & Ors.,* AIR 1996 SC 2687, this Court has observed as under:

> "No litigant has a right to unlimited drought on the Court time and public money in order to get his affairs settled in the manner he wishes. However, access to justice should not be misused as a license to file misconceived and frivolous petitions."

11. In view of the above, we are of the view that the review application has been filed without any sense of responsibility. We do not find appropriate words to deprecate such a practice adopted by the litigants and the members of the Bar. Grounds taken in the application are preposterous. The review petition hopelessly lacks merit and is accordingly dismissed.

D.G. Review Petition dimissed.

GOPAL DASS THRU. BROTHER ANAND VIR
v.
UNION OF INDIA AND ANR.
(Writ Petition (Criminal) No. 16 of 2008)

MARCH 14, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

CONSTITUTION OF INDIA, 1950:

*Article 32 – Writ petition seeking direction to the Union of India to take steps for release of writ petitioner from jail in Pakistan – **HELD:** Supreme Court of India, for lack of jurisdiction, cannot give any direction to Pakistan authorities – Government of India on its own has been taking steps in this regard – However, the Court requests the Pakistan authorities to consider the appeal of the petitioner for remitting the remaining period of sentence and release him (as well as other similar Indian prisoners) in the humanitarian spirit – Pakistan Official Secrets Act, 1923 – s. 59/3.*

The petitioner, an Indian national, was awarded life sentence u/s 59/3 of the Pakistan Official Secrets Act, 1923, by Field General Count Martial in Pakistan on 27.12.1986, and since then was in jail in that country. The instant writ petition was filed seeking a direction to Union of India to take immediate steps for his release and repatriation. In the counter affidavit filed on behalf of the Ministry of External Affairs, Government of India, it was stated that Government of India under an agreement was continually pursuing the issue of release of Indian prisoners in jails in Pakistan.

Disposing of the petition, the Court

HELD:

This Court, for lack of jurisdiction, cannot give any directions to Pakistan authorities. However, the Court can make a request to the Pakistan authorities to consider the appeal of the petitioner for releasing him on humanitarian grounds by remitting the remaining part of his sentence as he has served almost 27 years in jail. Recently, on the request of delegations of both India and Pakistan, the Pakistan Supreme Court, ordered release of 442 Indian prisoners languishing in Pakistan jails. (The Pakistan Supreme Court deserves to be commended in this connection). They requested for similar release of Pakistani prisoners in Indian jails, and the Indian Government generously reciprocated the gesture by releasing many Pakistani prisoners in our jails. Thus there is a humanitarian spirit on both sides, which this Court applauds. Accordingly, this Court requests the Pakistan authorities to consider the appeal of the petitioner for remitting the remaining period of sentence and release him (as well as other similarly Indian prisoners) in the same spirit. [Para 8,9,11-13] [859-H; 860-A-B; E-H; 861-A-E]

CRIMINAL ORIGINAL JURISDICTION : Writ Petition (Criminal) No. 16 of 2008.

Under Article 32 of the Constitution of India.

Saurabh Mishra, Arvind Kr. Sharma for the Petitioner.

P.P. Malhotra, T.A. Khan, Anand Verma, Anil Katiyar for the Respondents.

The Judgment of the Court was delivered by

MARKANDEY KATJU, J.

"Qafas udaas hai yaaron sabaa se kuch to kaho

Kaheen to beher-e-khuda aaj zikr-e-yaar chale"

— FAIZ AHMED FAIZ

1. This is a writ petition filed under Article 32 of the Constitution of India praying for a direction to the respondent, Union of India, to take immediate and necessary steps for release and repatriation of the petitioner, who is allegedly detained in the Lahore Central Jail in Pakistan, through the diplomatic channel of the Ministry of External Affairs, Government of India, New Delhi.

2. It is alleged by the petitioner that he is an Indian national. He was intercepted and arrested by the Pakistan Border Security Force in July 1984 when he alleged to have mistakenly crossed over the Indo-Pakistan border into Pakistan.

3. The petitioner was tried by a Field General Court Martial at Sialkot Cantonment in Pakistan and was awarded life sentence on 27.12.1986 under Section 59/3 of the Pakistan Official Secrets Act, 1923. The said sentence was confirmed by Brigadier Mallik, Commander, 10th Brigade. He was lodged in different jails, and presently is allegedly in Mianwali Jail in Pakistan.

4. It is alleged that due to the petitioner's detention his whole family is suffering from the year 1986. His brother, through whom this petition has been filed, made several representations to the concerned authorities of the Government of India requesting them to take up the matter with the Pakistan authorities for taking necessary action for release of the petitioner and repatriation on humanitarian grounds, but as yet nothing has been done. It is further alleged that about 182 Indian prisoners have been languishing in Pakistan jails for many years. The petitioner has written several letters to his family members, copies of which have been annexed to this petition.

5. A counter affidavit has been filed on behalf of the

Ministry of External Affairs, Government of India dated January 2011. It has been stated therein that although the petitioner is an Indian citizen, he has been convicted by a Pakistani Court, and hence his detention is governed by the law in force in Pakistan. The Government of India has an agreement with Pakistan on Consular Access, and has been continually pursuing the issue of release of Indian prisoners in Pakistani jails. On a request made by the Government of India a list of prisoners in Pakistani jails was received from Pakistan's Ministry of Foreign Affairs in January 2010, which authenticates that the petitioner was awarded sentence of 25 years from 27.6.1986. On instructions from the Ministry of External Affairs, Government of India, the Indian High Commission in Pakistan has requested the Ministry of Foreign Affairs, Pakistan to urgently clarify whether the Court order sentencing the petitioner required pre-trial detention to be adjusted in the sentence. The Indian High Commission is still waiting for a response.

6. It is also stated in the counter affidavit that the Government of India has been consistently taking up the issue of Indian prisoners in Pakistani jails with the Pakistan authorities at all levels. An 'India-Pakistan Judicial Committee on Prisoners', consisting of retired Judges, four from each country, has been set up to recommend steps to ensure humane treatment and expeditious release of prisoners of the respective countries in each other's jails. The petitioner was produced before this Committee during their visit to Pakistani jails in June 2008. The Committee has held several meetings and made certain recommendations, and the response is awaited. It is alleged that there is no confirmation from the Government of Pakistan about completion of his sentence by the petitioner.

7. We have heard learned counsel for the petitioner and learned Solicitor General of India for the Union of India.

8. We regret we have to dismiss this petition on the short

ground that we have no jurisdiction over the Pakistani authorities. The Indian authorities have done all that they could in the matter.

9. However, that does not prevent us from making an appeal to the Pakistani authorities to release the petitioner on humanitarian grounds.

10. It may be noted that while in the counter affidavit of the Government of India, it is mentioned in paragraphs 5 and 7 that the petitioner has been awarded a sentence of 25 years imprisonment with effect from 27.6.1986 (which means he will be released on 26.6.2011), the order of the Lt. Colonel, Commanding Officer, 27 A.K. Regiment of Pakistan (Annexure P-1 to this appeal) states that the petitioner has been awarded life sentence by the Field General Court Martial, which has been confirmed by the higher authority.

11. Thus there is a discrepancy here. At any event, we think it appropriate to make an appeal on humanitarian grounds to the Pakistan authorities to release the petitioner as he has served almost 27 years in jail. For this we refer to Portia's famous speech in Shakespeare's 'Merchant of Venice' :

"The quality of mercy is not strain'd;

It droppeth as the gentle rain from heaven

Upon the place beneath. It is twice blest:

It blesseth him that gives and him that takes.

It is an attribute to God himself;

And earthly power doth then show likest God's

When mercy seasons justice."

12. It may be mentioned in this connection that a delegation from Pakistan had recently come to India to request for release

of Pakistani prisoners in Indian jails. This delegation was headed by Hon'ble Mr. Justice Nasir Alam Zahid, a very respected former Judge of the Pakistan Supreme Court, and it included Mr. Syed Iqbal Haider, Senior Advocate of the Pakistan Supreme Court (who had been Pakistan's Law Minister in Mrs. Bhutto's Cabinet). This delegation, accompanied by Mr. Kuldip Nayyar and Mr. Mahesh Bhat of the Hind-Pak Dosti Manch, met the Prime Minister, Union Home Minister, Minister of External Affairs and other authorities in India, and informed them that a petition was filed by them in the Pakistan Supreme Court and the Court ordered release of 442 Indian prisoners languishing in Pakistan jails. (The Pakistan Supreme Court deserves to be commended in this connection). They requested for similar release of Pakistani prisoners in Indian jails, and the Indian Government generously reciprocated the gesture by releasing many Pakistani prisoners in our jails. Thus there is a humanitarian spirit on both sides, which we applaud.

13. We, therefore, appeal to the Pakistani authorities to remit the petitioner's sentence and release him (as well as other Indian prisoners) in the same spirit.

14. With the above observations this petition is disposed off.

15. Learned Solicitor General of India shall communicate this order to the Pakistan High Commissioner in India who is requested to communicate it to the concerned Pakistan authorities.

R.P. Writ Petition disposed of.

KERALA FINANCIAL CORPORATION
v.
VINCENT PAUL & ANR.
(Civil Appeal No. 3446 of 2003)

MARCH 14, 2011

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

CONTRACT:

*Tender – Non-compliance of conditions – Condition of the tender to deposit 25% of sale price within one week – Letter issued to the sole tenderer to deposit the amount of sale price after adjusting the earnest money – Another letter sent to the bidder that further proceedings could be finalized only after the temporary injunction was vacated by court – **Held**: Unless the conditions were fulfilled, the bidder cannot take advantage of mere remittance of a sum towards earnest money – Trial court rightly dismissed the suit for specific perfo mance of agreement of auction sale – High Court in an erroneous assumption erred in concluding that there was a valid contract and for granting a decree for specific performance – Judgment of High Court set aside – Specific performance of contract – Suit.*

STATE FINANCIAL CORPORATION ACT, 1951:

*s.29 – Taking over of the borrower firm and attachment and sale of its security in discharge of debt – Notice inviting tenders published by KFC in a local news paper – Negotiation wit the sole tenderer – **Held**: KFC has not strictly followed the procedure in bringing the property to sale – State Government has not framed Rules or guidelines for sale of properties owned by them – Till such formation of Rules or guidelines or orders, KFC is directed to adhere to the directions for sale of properties owned by it, as issued by the*

Court in the judgment – Contract.

The Kerala Finance Corporation (KFC), for recovery of its loan amount from a firm, took over the borrower firm u/s 29 of the State Financial Corporation Act, 1951, on 11.09.1987. On the same day the firm filed O.S. No. 2194/87 with an application for temporary injunction restraining KFC from taking over the firm. KFC invited tenders and held negotiation with sole bidder, namely, the respondent, in respect of the property of the firm, and issued a letter on 31-10-1988 to the respondent expressing the willingness to sell the property for Rs. 8.25 lakh subject to certain conditions. On 01.11.1988 the firm filed another suit being O.S. No. 2109/88 for injunction to restrain the KFC from taking any action pursuant to the auction/sale proceedings, and the trial court directed to maintain status quo as on 31.10.1988. Eventually, both the suits were dismissed. The firm filed A.S. No. 56 of 1992 against the dismissal of O.S. No. 2109/88 and A.S. No. 146 of 1993 against dismissal of O.S. No. 2194 of 1987. On 6.12.1994 the respondent filed O.S. No.1522/94 for specific performance of agreement of sale. Subsequently, both the appeals filed by the firm were dismissed. The suit of the respondent was also dismissed and he filed A.S. No. 557 of 2000. On 17.09.2001 the KFC invited fresh tenders for sale of the assets and one 'KKU' offered Rs. 55,55,555/- which was the highest bid. Meanwhile on 27.11.2001, the appeal of the respondent was allowed and his suit for specific performance of agreement of sale was decreed by the High Court. KFC challenged the judgment of the High Court by filing C.A. No. 3446 of 2003, and KKU filed C.A.No. 3450 of 2003. KKU also filed C.A. No. 3451 of 2003 against the order of the High Court dismissing his O.P. No. 33834 of 2001 as infructuous.

Disposing of the appeals, the Court

HELD: 1.1. KFC is incorporated u/s 3 of the State

Financial Corporation Act, 1951; Section 29 of the Act empowers the KFC to attach and sell the security in discharge of debts and provides for speedy recovery. The procedure of attachment and sale of property though available under the Code of Civil Procedure, 1908, it shall apply only when there is a decree at the instance of any of the parties. In the instant case, the KFC had not proceeded through the Civil Court but has taken independent action u/s 29 of the Act. [para 6-7] [871-G-H; 872-A-B]

1.2. By notice under Ext. B1, KFC invited tenders from intending buyers for purchase of immovable property attached by it. The last date for submission of tender was 31.10.1988. The respondent submitted a tender quoting an amount of Rs. 7.5 lakh as bidding amount and the price was, ultimately, fixed at Rs. 8.25 lakh. He also deposited a sum of Rs. 10,000/- for earnest money deposit as stipulated in the tender notice. One of the conditions of tender was that the successful bidder whose bid is accepted should pay 25% of the purchase price offered within one week, if and when the tender is accepted, the balance amount be paid within one month thereafter. By letter dated 31.10.1988 (Ext. A2) issued by the KFC, the respondent was called upon to pay the balance amount. [para 8] [872-A-F]

1.3. Admittedly, on receipt of the communication dated 31.10.1988 from the KFC, the plaintiff did not send any reply in the form of confirmation of the said transaction as provided in clause (1) of Ext. A2. In such circumstance, it cannot be said that there is a concluded contract between the KFC and the respondent. Undisputedly, KFC sent another letter on 05.11.1988 intimating the plaintiff that further proceedings can be finalized only after vacating the temporary injunction ordered by the Munsif Court. Inasmuch as the KFC has

agreed to sell the property in question for Rs.8.25 lakhs subject to compliance of three conditions mentioned in Ext. A2, unless the other party to the contract, namely, the respondent conveys his willingness within a week with regard to the terms stipulated therein, he cannot take advantage of mere remittance of a sum of Rs.10,000/- towards Earnest Money Deposit as stipulated in Ext. B1. These aspects have been correctly appreciated by the trial court and it rightly dismissed the suit filed by the respondent. On the other hand, the High Court, on an erroneous assumption as to the communication dated 31.10.1988 erred in concluding that there was a valid contract and granted a decree for specific performance. [para 10] [874-D-H; 875-A-D]

1.4. It is not in dispute that while ordering notice in the S.L.P giving rise to C.A. No. 3446 of 2003 filed by the KFC on 12.04.2002, this Court stayed the execution of the decree for specific performance which shows that the land and building and all accessories are with the KFC. The decree for specific performance granted by the High Court cannot be sustained. The judgment and order passed by the High Court granting decree for specific performance in favour of the respondent and all other sale transactions either in the form of tender or auction in respect of the property in question are set aside. [para 11-12 & 13] [875-G; 876-A-B-C-D; 878-C-D]

2.1. The KFC has not strictly followed the procedure in bringing the property for sale. Though the KFC has initiated proceedings u/s 29 of the Act, admittedly, the State Government has not framed rules or guidelines in the form of executive instructions for sale of public properties by way of tender or auction. Till such formation of Rules or guidelines or orders, the KFC is directed to adhere to the following directions for sale of properties owned by it: (i)The decision/ intention to bring

the property for sale shall be published by way of advertisement in two leading newspapers, one in vernacular language having sufficient circulation in the locality; (ii) Before conducting sale of immovable property, the authority concerned shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the methods: (a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying such assets; or (b) by inviting tenders from the public; or (c) by holding public auction; or (d) by private treaty. Among these, inviting tenders from the public or holding public auction is the best method for disposal of the properties belonging to the State; (iii) The authority concerned shall serve on the borrower a notice of 30 days for sale of immovable secured assets; (iv) A highest bidder in public auction cannot have a right to get the property or any privilege, unless the authority confirms the auction sale, being fully satisfied that the property has fetched the appropriate price and there has been no collusion between the bidders; (v) In the matter of sale of public property, the dominant consideration is to secure the best price for the property to be sold. This can be achieved only when there is maximum public participation in the process of sale and everybody has an opportunity of making an offer. It becomes a legal obligation on the part of the authority that property be sold in such a manner that it may fetch the best price; (vi) The essential ingredients of sale are correct valuation report and fixing the reserve price. In case proper valuation has not been made and the reserve price is fixed taking into consideration the inaccurate valuation report, the intending buyers may not come forward treating the property as not worth purchase by them (vii) 'Reserve price' means the price with which the public

auction starts and the auction bidders are not permitted to give bids below the said price, i.e., the minimum bid at auction; and (viii) The debtor should be given a reasonable opportunity in regard to the valuation of the property sought to be sold, in absence thereof the sale would suffer from material irregularity where the debtor suffer substantial injury by the sale. [para 12-13] [876-C-H; 877-A-H; 878-C-E]

2.2. The KFC is directed to first issue the advertisement calling for tenders by way of public auction by following the directions mentioned above. Before resorting to such recourse, if the KFC has accepted any deposit from any of the parties by way of tender or bid, the same shall be returned within a period of 30 days to the respective parties with simple interest @ 9% p.a. from the date of such deposit till it is repaid to the parties concerned. [para 13] [878-D-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3446 of 2003

From the Judgment & Order dated 27.11.2001 of the High Court of Kerala at Ernakulamin A.S. 557 of 2000 (E).

WITH

C.A. Nos. 3450 & 3451 of 2003.

Rajendran Nair, V. Giri, C.S. Rajan, R. Sundarvardan, P.V. Dinesh, K.R. Nambiar, Roy Arbraham, Seema Jain, Vikas Garg, Himinder Lal, P.I. Jose, E.M.S. Anam, Fazlin Anam, K.R. Nambiar, Vipin Nair, P.B. Suresh (for Temple Law Firm) for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. These appeals are filed against the judgments and orders dated 27.11.2001 and 22.01.2002 passed by the High Court of Kerala at Ernakulam in A.S. No.

557 of 2000 and O.P. No. 33834 of 2001 respectively.

2. Brief facts:

(a) The Kerala Financial Corporation (in short "the KFC"), a Public Sector Undertaking, is a State Financial Corporation. On 24.10.1977, a loan of Rs.50 lakhs was sanctioned by the KFC to a firm called Cable India (hereinafter referred to as "the Firm") on hypothecation of land and machinery. In view of consistent failure of the firm to repay the loan, on 11.09.1987, the KFC took over the firm under Section 29 of the State Financial Corporations Act, 1951 (in short "the Act"). On the same day, the Firm filed O.S. No. 2194 of 1987 with I.A. No. 1776 of 1987 for temporary injunction restraining the KFC from taking over the firm.

(b) On 07.10.1988, a notice was published by the KFC in Mathrubhumi Malayalam Daily inviting tenders from intending buyers for purchase of the property. The last date for submission of tender was 31.10.1988. Pursuant to the same, only one bidder, i.e. one Vincent Paul, submitted the tender quoting an amount of Rs. 7.5 lakhs as bid amount and also deposited the earnest money of Rs. 10,000/- as stipulated in the tender notice. On the same day, after discussion and negotiation between the KFC and Vincent Paul, the KFC issued a letter to the said Vincent Paul expressing its willingness to sell the property for Rs. 8.25 lakhs subject to certain conditions.

(c) By letter dated 01.11.1988, the Firm filed O.S. No. 2109 of 1988 before the Munsiff Court, Thrissur, seeking injunction to restrain the KFC from taking any action pursuant to the auction/sale proceedings and on the very same day the learned Judge directed to maintain status quo as on 31.10.1988.

(d) By letter dated 05.11.1988, the KFC informed Vincent

Paul that further proceedings of the sale could be finalized only after vacating the temporary injunction ordered by the Munsif Court, Thrissur. On 10.11.1988, I.A. No. 1776 of 1987 in O.S. No. 2194 of 1987 filed by the firm was dismissed. On 17.01.1992, O.S. No. 2109 of 1988 was also dismissed and the injunction was vacated. Against the said order, on 26.02.1992, the Firm filed A.S. No. 56 of 1992 before the District Judge, Thrissur. In the meantime, on 03.02.1993, the first suit i.e. O.S. No. 2194 of 1987 itself was dismissed. Against the said order, the Firm filed AS. No. 146 of 1993 before the District Judge, Thrissur.

(e) On 06.12.1994, Vincent Paul filed a suit bearing O.S. No. 1522 of 1994 before the subordinate Judge, Thrissur for specific performance of the agreement of sale. Subsequent to the filing of the said suit, the appeals i.e. A.S. No. 56 of 1992 and A.S. No. 146 of 1993 were dismissed by a common judgment dated 10.04.1995 by the Addl. District Judge, Thrissur. The suit for specific performance i.e. O.S No 1522 of 1994, filed by Vincent Paul was also dismissed by the Sub-ordinate Judge, Thrissur, vide judgment dated 07.03.2000, holding that there is no concluded contract between the parties so as to entitle the plaintiff to a decree for specific performance. Against the said order, on 18.09.2000, Vincent Paul filed A.S. No. 557 of 2000 before the High Court of Kerala.

(f) On 17.09.2001, the KFC invited fresh tenders for the sale of assets. One K.K. Ummer Farook responded to the tender by making an offer of Rs. 55,55,555/- for the land and building which was the highest amount among the four offers received. In the meantime, by judgment dated 27.11.2001, the Division Bench of the High Court allowed A.S. No.557 of 2000 filed by Vincent Paul, consequently decreed the suit filed by him. Against the said judgment, the KFC filed Civil Appeal No. 3446 of 2003 before this Court by way of special leave petition. Challenging the

same judgment, K.K. Ummer Farook filed Civil Appeal No. 3450 of 2003 before this Court by way of special leave petition. K.K. Ummer Farook also filed O.P. No. 33834 of 2001 before the High Court praying for direction to convey the property being the highest bidder in the second tender and the same was dismissed as infructuous by the High Court vide judgment dated 22.01.2002. Against the said judgment, K.K. Ummer Farook filed C.A. No. 3451 of 2003 before this Court by way of special leave petition.

3. Heard Mr. Rajendran Nair, learned senior counsel for the appellant in C.A.No.3446 of 2003, Mr. V. Giri, learned senior counsel for the appellant in C.A. Nos. 3450 and 3451 of 2003 and Mr. C.S. Rajan, learned senior counsel for respondent No.1 in C.A. Nos. 3446 and 3450 of 2003, Mr. R. Sundarvardan, learned senior counsel for respondent No.2 in C.A.No.3446/2003 and respondent No.3 in C.A.No.3450 of 2003.

4. During the course of hearing, Mr. P.V. Dinesh, learned counsel appearing for the KFC filed additional affidavit stating that the KFC, formed in 1953, is a statutory Corporation constituted under the Act and more than 95% of the shares are held and controlled by the State Government. The Board is constituted under Section 10 of the Act. According to him, the Managing Director is appointed by the State Government and its Chairman is the nominee of Small Industries Development Bank of India (in short "SIDBI") and substantial re-finance is granted from SIDBI for sanctioning loans. He pointed out that the procedure for the sale is as per the standing orders and recovery policy as approved by the Board from time to time and the recovery policy may change every year for settlement of NPA loan accounts. According to the procedure that was followed in 1988, a sale proclamation shall be published in a local daily newspaper in Vernacular language with details of property and date of opening tender or auction. The tender has to be submitted to the Managing Director at the Head Office

and the opening of tender/auctioning has to be conducted at the Head Office. The sale will be confirmed by the Managing Director. Officers of the Corporation will value the properties and 80% of that valuation will be considered as upset price for the purpose of sale of properties.

5. He further pointed out the procedure which has been followed in the present case. He stated that the notice to defaulter/promoter under Section 29 was issued and thereafter, the assets were taken by the Branch/District Manager authorized by Managing Director. Valuation of assets was done by the officers of KFC. Land valuation was done by the Legal Officer in consultation with Village Officer concerned and by conducting local enquiry for fixing market value. Valuation of building, plant and machinery was done by Technical Officer based on the norms approved by the Institute of Engineers. The tender notice was published in two newspapers for the sale of the property.

6. Though these details have been furnished by the counsel for the KFC during the course of hearing, the fact remains that the State Government has not framed rules or guidelines for sale of public properties by way of tender or auction. KFC is incorporated under Section 3 of the Act. Section 29 of the Act empowers the KFC to attach and sell the security in discharge of debts. It gives KFC the right to take over possession of the security offered while taking the loan and the right to transfer/ sale the same as if KFC is the owner. The money acquired after such transfer/sale of the secured property shall be used in discharge of debts due to KFC including all expenses incurred by it. The residue amount, if any, is to be paid to the person entitled. Section 31 of the Act also provides the same remedy but the procedure goes through the District Judge. In terms of this Section, KFC has to apply to the District Judge in whose jurisdiction the property may lie for an order of sale. However, Section 29 provides for speedy recovery.

7. The procedure of attachment and sale of property

though available under the Code of Civil Procedure, 1908, it shall apply only when there is a decree at the instance of any of the parties. In the present case, the KFC had not proceeded through the Civil Court but has taken independent action under Section 29 of the Act.

8. Coming to the decree for specific performance granted by the High Court in favour of Vincent Paul, by notice under Ex. B1, KFC invited tenders from intending buyers for purchase of immovable property attached by them. The last date for submission of tender was 31.10.1988. Vincent Paul submitted a tender quoting an amount of Rs. 7.5 lakhs as bidding amount. He also deposited a sum of Rs.10,000/- for earnest money deposit as stipulated in the tender notice. One of the conditions of tender was that the successful bidder whose bid is accepted should pay 25% of the purchase price offered within one week, if and when the tender is accepted, the balance amount be paid within one month thereafter. When the tender was opened on 31.10.1988, the amount quoted by Vincent Paul was noticed as the highest one. After discussion and negotiation between the KFC and Vincent Paul, the price was ultimately fixed at Rs. 8.25 lakhs. Thereafter, letter dated 31.10.1988 (Ex. A2) was issued by the KFC to Vincent Paul calling upon him to pay the balance amount of Rs.8.15 lakhs after appropriating Rs.10,000/- paid by him towards Earnest Money Deposit. According to Vincent Paul-the plaintiff, as per Ex. A2 the plaintiff has to deposit 25% of the amount payable within a week thereof i.e., on or before 05.11.1988 and the balance amount within one month thereafter. It is his grievance that inasmuch as the defendant- KFC did not abide by the agreement to sell despite his compliance, he filed suit for specific performance. On the other hand, it was contended by the defendant-KFC that there was no concluded contract and Ex. A2 has not been accepted by the plaintiff. According to them, Ex. B1 was only a tender notice and the suit for specific performance is not maintainable and in any event is barred by limitation since it was filed only in 1994. Though the trial Court accepted the case

of the defendant and dismissed the suit, the High Court in appeal filed by the plaintiff granted decree for specific performance.

9. Whether the plaintiff-Vincent Paul has made out a case for discretionary relief of specific performance? For this, it is useful to refer the letter dated 31.10.1988 of the KFC addressed to Vincent Paul which reads as under:

"KERALA FINANCIAL CORPORATION

HEAD OFFICE: VELLAYAMBALAM, TRIVANDRUM-695 033

No. BL.1158/R/88 Date : 31.10.1988

Shri Vincent Paul
Pellissery House
P.O. Ammadam,
Trichur.

Sir,

Sub: Sale of the assets of M/s Cables India Punkunnam, Trichur.

Ref: Your tender letter dated 31.10.1988 and further discussion with us.

With reference to the above we may inform that we are agreeable to sell the assets viz. the landed properties comprised in Sy. Nos. 1856/6 (19 cents) and 1856/7 (43 cents) together with building thereon and machinery including the electrical fittings and accessories for Rs.8,25,000/- subject to compliance of the following conditions:-

1. 25% of the sale consideration should be remitted to us within a week from the date of confirmation of the transaction.

2. The balance should be remitted in a lump sum within one month from the date of remittance of the initial payment.

3. All the formalities in this regard should be complied within two months.

Leaving the amount of Rs.10,000/- remitted on 31.10.1988, the balance consideration amounting to Rs.8,15,000/- should be remitted to the Corporation to execute the sale deed and transfer the possession to you.

Yours faithfully,

Sd/-
MANAGER (RECOVERY)"

10. According to the plaintiff-Vincent Paul, it was agreed to by him as to the offer of Rs. 8.25 lakhs by the KFC and in view of the fact that he has remitted a sum of Rs.10,000/- on 31.10.1988 as Earnest Money Deposit, he was ready to pay the balance amount but the sale was not completed due to failure on the part of the KFC. Learned senior counsel for Vincent Paul submitted that communication dated 31.10.1988 is a concluded contract and no further confirmation is required in this regard and the plaintiff has to pay the balance amount and the KFC has to execute the sale deed and transfer the possession to him. The stand taken by the learned senior counsel for Vincent Paul was totally denied by the KFC by submitting that the communication dated 31.10.1988 is not absolute but subject to confirmation by Vincent Paul within a week. Admittedly on receipt of the communication dated 31.10.1988 from the KFC, the plaintiff had not sent any reply in the form of confirmation of the said transaction as provided in clause (1) of Ex. A2. In such circumstance, it cannot be contended that there is a concluded contract between the KFC and Vincent Paul. After 31.10.1988, KFC sent another letter on 05.11.1988 intimating the plaintiff that further proceedings can

be finalized only after vacating the temporary injunction ordered by the Munsif Court, Thrissur. The said letter has not been disputed by Vincent Paul. Inasmuch as the KFC has agreed to sell the property in question for Rs.8.25 lakhs subject to compliance of three conditions mentioned in Ex. A2, unless the other party to the contract, namely, Vincent Paul conveys his willingness within a week with regard to the terms stipulated therein, he cannot take advantage of mere remittance of a sum of Rs.10,000/- towards Earnest Money Deposit as stipulated in Ex. B1. These aspects have been correctly appreciated by the trial Court and it rightly dismissed the suit filed by Vincent Paul. On the other hand, the High Court, on an erroneous assumption as to the communication dated 31.10.1988 concluded that there was a valid contract and granted a decree for specific performance. We are unable to accept the reasoning of the High Court for granting decree for specific performance in favour of Vincent Paul.

11. During the pendency of the appeal filed by Vincent Paul in the High Court, the KFC invited fresh tenders for the sale of assets of the Firm on 17.09.2001. One K.K. Ummer Farook responded to the tender by making an offer of Rs. 55,55,555/- for the land and building which was the highest amount among the four offers received. By letter dated 17.11.2001, the KFC informed K.K. Ummer Farook that they are unable to proceed with the sale in view of the pendency of A.S. No. 557 of 2000 before the High Court. In the meantime, by judgment dated 27.11.2001, the Division Bench of the High Court allowed A.S. No.557 of 2000 filed by Vincent Paul, consequently decreed the suit filed by him. Against the said judgment, the KFC filed Civil Appeal No. 3446 of 2003 and K.K. Ummer Farook filed Civil Appeal No. 3450 of 2003 before this Court by way of special leave petition. K.K. Ummer Farook also filed O.P. No. 33834 of 2001 before the High Court praying for direction to convey the property being the highest bidder in the second tender and the same was dismissed as infructous by the High Court vide judgment dated 22.01.2002. Against the said

judgment, K.K. Ummer Farook filed C.A. No. 3451 of 2003 before this Court. It is not in dispute that while ordering notice in the S.L.P.(C) No 7072 of 2002 (C.A. No. 3446 of 2003) filed by the KFC even on 12.04.2002, this Court stayed the execution of the decree for specific performance which shows that the land and building and all accessories are with the KFC and the same position continues even today.

12. We have already concluded that the decree for specific performance granted by the High Court cannot be sustained. We also observed in the earlier part of our judgment that though the KFC has initiated proceedings under Section 29 of the Act, admittedly, the State has not framed Rules or guidelines in the form of executive instructions for sale of properties owned by them. Till such formation of Rules or guidelines or orders as mentioned above, we direct the KFC to adhere the following directions for sale of properties owned by it:

(i) The decision/intention to bring the property for sale shall be published by way of advertisement in two leading newspapers, one in vernacular language having sufficient circulation in that locality.

(ii) Before conducting sale of immovable property, the authority concerned shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods:

(a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying such assets; or

(b) by inviting tenders from the public; or

(c) by holding public auction; or

(d) by private treaty.

Among the above modes, inviting tenders from the public or holding public auction is the best method for disposal of the properties belonging to the State.

(iii) The authority concerned shall serve to the borrower a notice of 30 days for sale of immovable secured assets.

(iv) A highest bidder in public auction cannot have a right to get the property or any privilege, unless the authority confirms the auction sale, being fully satisfied that the property has fetched the appropriate price and there has been no collusion between the bidders.

(v) In the matter of sale of public property, the dominant consideration is to secure the best price for the property to be sold. This can be achieved only when there is maximum public participation in the process of sale and everybody has an opportunity of making an offer. It becomes a legal obligation on the part of the authority that property be sold in such a manner that it may fetch the best price.

(vi) The essential ingredients of sale are correct valuation report and fixing the reserve price. In case proper valuation has not been made and the reserve price is fixed taking into consideration the inaccurate valuation report, the intending buyers may not come forward treating the property as not worth purchase by them.

(vii) Reserve price means the price with which the public auction starts and the auction bidders are not permitted to give bids below the said price, i.e., the

minimum bid at auction.

(viii) The debtor should be given a reasonable opportunity in regard to the valuation of the property sought to be sold, in absence thereof the sale would suffer from material irregularity where the debtor suffer substantial injury by the sale.

13. In view of our discussion and conclusion, we are satisfied that the KFC has not strictly followed the above procedure in bringing the property for sale. Accordingly, we set aside the judgment and order passed by the High Court granting decree for specific performance in favour of Vincent Paul and all other sale transactions either in the form of tender or auction in respect of the property in question. We direct the KFC to first issue the advertisement calling for tenders by way of public auction by following the directions mentioned above. Before resorting to such recourse, if the KFC has accepted any deposit from any of the parties by way of tender or bid, the same shall be returned within a period of 30 days to the respective parties with simple interest @ 9% p.a. from the date of such deposit till it is repaid to the parties concerned.

14. All the appeals are disposed of on the above terms.

R.P. Appeals disposed of.