KAUSHALYA DEVI MASSAND
v.
ROOPKISHORE KHORE
(Criminal Appeal No.723 of 2011)

MARCH 15, 2011

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

NEGOTIABLE INSTRUMENTS ACT, 1881:

s.138 – Complaint of dishonour of cheques – Accused sentenced by Magistrate to pay a fine of Rs.4 lakh to complainant – High Court enhancing the amount of fine by Rs. 2 lakh – Appeal by complainant contending for jail sentence to the accused – Held: The gravity of a complaint under the Act cannot be equated with an offence under the provisions of the Penal Code or other criminal offences – An offence u/s 138 of the Act is almost in the nature of a civil wrong which has been given criminal overtones – The Magistrate, in his wisdom was of the view that imposition of a fine payable as compensation to the complainant was sufficient to meet the ends of justice – Besides, after an interval of 14 years, the Court is not inclined to interfere with the order of the High Court impugned in the appeal, except to the extent of increasing the amount of compensation payable by a further sum of Rs.2 lakh.

On a complaint by the appellant, for dishonour of cheques, the Magistrate sentenced the respondent to pay a fine of Rs.4 lakh to the complainant as compensation. The High Court enhanced the fine by Rs. 2 lakh. The complainant filed the instant appeal through the power of attorney contending that because of the respondent the complainant, an old widowed lady, was subjected to harassment for 14 years. Therefore, a jail sentence be awarded to the respondent so that it would serve as a

deterrent to others. On the other hand, it was submitted for the respondent that after an interval of 14 years it would be unjust to sentence him to a jail term, especially when the initial liability of Rs.2 lakh had been increased to Rs.4 lakh by the Magistrate and to Rs.6 lakh by the High Court.

Partly allowing the appeal, the Court

HELD: 1.1. The gravity of a complaint under the Negotiable Instruments Act, 1881 cannot be equated with an offence under the provisions of the Penal Code 1860 or other criminal offences. An offence u/s 138 of the Act, is almost in the nature of a civil wrong which has been given criminal overtones. The Magistrate, in his wisdom was of the view that imposition of a fine payable as compensation to the appellant was sufficient to meet the ends of justice in the instant case. Except having regard to the submission made that the appellant/ complainant, is a widowed lady of advanced age, there is no other special circumstance which calls for interference with the order of the Magistrate, as confirmed by the High Court, with an increased fine. [para 9] [883-F-H]

1.2. After an interval of 14 years, this Court is not inclined to interfere with the order of the High Court impugned in the appeal, except to the extent of increasing the amount of compensation payable by a further sum of Rs.2 lakhs in addition to the sum of Rs.6 lakhs already directed to be paid by the respondent to the appellant. [para 9] [883-H; 884-A-B]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 723 of 2011.

From the Judgment & Order dated 30.7.2009/14.9.2009 of the High Court of Madhya Pradesh at Indore in Misc. Cr. Case No. 1619 of 2008.

Power of Attorney holder (Air Marshal Harish Masand) for the Petitioner-In-Person.

Shakil Ahmed Syed, Shuaibuddin, S. Nadeem Aziz Taahaa for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. On a complaint filed by the Appellant herein, Smt. Kaushalya Devi Massand, the Respondent herein, Roopkishore, was convicted by the Judicial Magistrate First Class, Indore (M.P.), under Section 138 of the Negotiable Instruments Act, 1881, in Criminal Case No.445 of 2000. Having regard to the fact that the Respondent had deposited a sum of Rs.3,50,000/-, as against the cheque amounting to Rs.2 lakhs, the learned Magistrate was of the view that sentence of fine only would suffice without awarding any jail sentence. The learned Magistrate, accordingly, sentenced the Respondent to pay a fine of Rs.4 lakhs which was to be paid to the Appellant herein as compensation. However, the learned Magistrate also indicated that a sum of Rs.3,50,000/- had already been deposited and that the balance amounting to Rs.50,000/- was to be deposited by the Respondent and if deposited, the same was to be paid to the Appellant. On failure to deposit the said amount of Rs.50,000/-, the Respondent would have to undergo two months' Rigorous Imprisonment.

3. The order of the learned Magistrate was challenged by the Respondent before the learned Third Upper Sessions Judge, Indore (M.P.), by way of Criminal Revision No.593 of 2006. The learned Sessions Judge while confirming the judgment of conviction passed by the Magistrate, remanded the matter to the learned Magistrate for a fresh hearing on the question of quantum of sentence and to pass an order accordingly.

4. The said orders of the learned Sessions Judge and the learned Magistrate dated 27th December, 2007, and 23rd February, 2007, respectively are the subject matter of the present appeal. Incidentally, the appeal has been filed by the complainant, Smt. Kaushalya Devi Massand, who is being represented by her son, Shri Harish Massand, on the strength of a Power of Attorney executed by the Appellant in his favour.

5. Shri Massand submitted that the offence was in respect of three cheques dated 1st May, 1997, 15th May, 1997 and 30th May, 1997, for Rs.1 lakh each. The said cheques were issued in lieu of the payment of consideration against the sale of property. On presentation of the cheques to the Bank, the same were dishonoured on the ground of insufficient funds. Subsequently, in lieu of the three cheques which had been dishonoured, four cheques drawn on Central Bank of India, Sanyogitaganj Branch, Indore, were issued by the Respondent to the Appellant, namely, (i) Cheque No.0121035 dated 15th June, 1999 for Rs.50,000/-; (ii) Cheque No.0121036 dated 15th July, 1999 for Rs.1 lakh; (iii) Cheque No.0121037 dated 15th August, 1999 for Rs.50,000/-; and (iv) Cheque No.0121038 dated 15th September, 1999 for Rs.1 lakh. The said cheques presented to the Bank were again dishonoured due to insufficient funds resulting in the filing of the complaint, as indicated hereinabove.

6. Shri Massand submitted that since 1997, the Appellant, an old widowed lady, was subjected to unnecessary harassment for the last 14 years and the Respondent had not even been punished with a jail sentence for a day, despite the severe inconvenience and trouble which the Appellant had to suffer on account of the dishonesty of the Respondent and the fraud perpetrated by him. Shri Massand pointed out that while not sentencing the Respondent to a jail sentence despite the enormity of the offence committed by the Respondent, ironically the Magistrate sentenced the Respondent to two months' Rigorous Imprisonment in default of payment of Rs.50,000/-

towards the fine/compensation of Rs.4 lakhs. Shri Massand also took us through the order-sheet of the case before the learned Magistrate to show the manner in which the proceedings had been prolonged by the Respondent.

7. Shri Massand submitted that in order to maintain the faith of the people in the judicial system, it was only proper that a jail sentence be awarded to the Respondent to serve as a deterrent to others involved in similar activities.

8. Mr. Shakil Ahmed Syed, learned Advocate, who appeared for the Respondent, submitted that after an interval of 14 years it would be unjust to sentence the Respondent to a jail term, especially when the initial liability of Rs.2 lakhs had been increased to Rs.4 lakhs by the Magistrate and to Rs.6 lakhs by the High Court. Learned Counsel submitted that the Respondent was ready to pay a further sum of Rs.2 lakhs towards the compensation amount. In addition, learned counsel submitted that a jail sentence for an offence under Section 138 of the Negotiable Instruments Act, 1881, was not mandatory and it was within the discretion of the Magistrate to award a sentence of fine only, as has been done in the instant case.

9. Having considered the submissions made on behalf of the parties, we are of the view that the gravity of a complaint under the Negotiable Instruments Act cannot be equated with an offence under the provisions of the Indian Penal Code or other criminal offences. An offence under Section 138 of the Negotiable Instruments Act, 1881, is almost in the nature of a civil wrong which has been given criminal overtones. The learned Magistrate, in his wisdom was of the view that imposition of a fine payable as compensation to the Appellant was sufficient to meet the ends of justice in the instant case. Except having regard to the submission made that the Appellant/ complainant, is a widowed lady of advanced age, there is no other special circumstance which calls for interference with the order of the learned Magistrate, as confirmed by the High Court, with an increased fine. After an

interval of 14 years, we are not inclined to interfere with the order of the High Court impugned in the appeal, except to the extent of increasing the amount of compensation payable by a further sum of Rs.2 lakhs. The said amount of Rs.2 lakhs in addition to the sum of Rs.6 lakhs already directed to be paid by the Respondent to the Appellant, shall be deposited in the Trial Court within two weeks from date and upon such deposit being made, the Appellant will be at liberty to withdraw the same by way of compensation, together with the amounts already deposited, if not already withdrawn. In default of such deposit, the Appellant shall undergo one month's simple imprisonment.

10. The appeal is partly allowed to the aforesaid extent.

R.P. Appeal partly allowed.

REKHA

v.

STATE OF T. NADU TR. SEC. TO GOVT. & ANR.

(Special Leave Petition (Crl.) No . 576 of 2011)

MARCH 15, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Tamil Nadu Prevention of Dangerous Activities of Bottleggers, Drug- Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders, Sand Offenders, and Slum Grabbers and Video Pirates Act, 1982 – s. 3 – Detention order under – Legality of – Conflict of opinion on the point that since no bail application was pending when the detention order u/s. 3 was passed, hence, the detention order was illegal as the detenue was already in jail in a criminal case on the same facts – Matter referred to larger Bench.

T.V. Sravanan alias S.A.R Prasana Venkatachaariar Chaturvedi vs.State through Secretary and Anr. **(2006) 2 SCC 664;** *A. Shanthi(Smt.) vs. Govt. of T.N. and Ors.* **(2006) 9 SCC 711;** *Rajesh Gulati vs.Govt. of NCT of Delhi and Anr.* **(2002) 7 SCC 129;** *A. Geetha vs.State of T.N. and Anr.* **(2006) 7 SCC 603;** *Ibrahim Nazeer vs. State ofT.N. and Anr.* **(2006) 6 SCC 64 – referred to.**

Case Law Reference:

(2006) 2 SCC 664	**Referred to.**	**Para 7**
(2006) 9 SCC 711	**Referred to.**	**Para 7**
(2002) 7 SCC 129	**Referred to.**	**Para 7**
(2006) 7 SCC 603	**Referred to.**	**Para 8**
(2006) 6 SCC 64	**Referred to.**	**Para 8**

CRIMINAL APPELLATE JURISDICTION : Special Leave Petition (Crl.) No(s).576 of 2011

From the Judgment & Order dated 23.12.2010 of the High Court of Judicature at Madras in HCP No. 792 of 2010.

WITH

SLP(Crl) NO. 1859 of 2011, 2237 of 2011, 540 of 2011, 578 of 2011, 580 of 2011, 584 of 2011, 676 of 2011

K.V. Viswanathan, K.K. Mani, Abhishek Krishna, Mayur R. Shah, S. J. Aristotle, Ahanthem Rohen Singh, Bob, Prabhu Ramasubramanian, Priya, Aristotle, V.G. Pragasam, V. Mohana, Abhishek K., Vijay Prashant, G. Ananda Selvam, Andrew Jaimon, A. Santha, Kumaran, Ravindra Keshavrao Adsure, Guru Krishna Kumar, Akshat Hansaria, Mamta Chandel and Abhay Kumar for the petitioner.

Altaf Ahmed, Promila, S. Thananjayam for the Respondents.

The following Order of the Court was delivered

O R D E R

Heard learned counsel for the appearing parties.

Leave granted.

These Appeals have been filed against the impugned common judgment of the High Court of Madras dated 23.12.2010.

The facts have been stated in the impugned judgment and hence we are not repeating the same here.

Mr. K.K. Mani, learned counsel appearing for some of the appellants in these Appeals, submitted that since no bail application was pending when the detention order in question

under Section 3 of the Tamil Nadu Prevention of Dangerous Activities of Bottleggers, Drug-Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders, Sand Offenders, and Slum Grabbers and Video Pirates Act, 1982 was passed, hence the detention order in question was illegal as the appellant was already in jail in a criminal case on the same facts. Hence, there was no likelihood of his release.

It appears that there is some conflict of opinion on the aforesaid point.

Mr. K.K. Mani, learned counsel, has relied on judgments of this Court in *T.V. Sravanan alias S.A.R. Prasana Venkatachaariar Chaturvedi Vs. State through Secretary and Anr.,* (2006) 2 SCC 664; *A. Shanthi (Smt.) Vs. Govt. of T.N. and Ors.,* (2006) 9 SCC 711; and *Rajesh Gulati Vs. Govt. of NCT of Delhi and Anr.* (2002) 7 SCC 129, wherein it was held that if no bail application was pending and the detenue was already, in fact, in jail in a criminal case, the detention order under the preventive detention is illegal.

On the other hand, Mr. Altaf Ahmed, learned senior counsel appearing for the State of Tamil Nadu, has relied on the judgments of this Court in *A. Geetha Vs. State of T.N. And Anr.* (2006) 7 SCC 603; and *Ibrahim Nazeer Vs. State of T.N. and Anr.,* (2006) 6 SCC 64, wherein it has been held that even if no bail application is pending but if in similar cases bail has been granted, then this is a good ground for the subjective satisfaction of the detaining authority to pass the detention order.

Mr. K.K. Mani, learned counsel, has, however, submitted that in the decisions cited by him it was mentioned in the detention order that in similar cases bail had been granted. Despite this the detention order has been held to be illegal.

There seems to be conflict between the decisions cited by Mr. K.K. Mani, learned counsel, and the decisions cited by

Mr. Altaf Ahmed, learned senior counsel. Hence, in our opinion, the matter should be considered by a larger bench for resolving this difference of opinion.

Let the papers of these Appeals be placed before Hon'ble the Chief Justice of India for constituting a larger bench. Since the period of detention is expiring on 17.04.2011, we would request Hon'ble the Chief Justice of India to constitute a larger bench at the earliest otherwise these Appeals would become infructuous.

Any prayer for temporary relief may be made before the larger bench.

N.J. Matter referred to larger Bench.

NATIONAL CAMPAIGN COMMITTEE FOR CENTRAL LEGISLATION ON CONSTRUCTION LABOUR

v.

UNION OF INDIA & ORS.

Contempt Petition Nos. 42 & 43 of 2011

IN

Writ Petition (Civil) No. 318 of 2006

MARCH 15, 2011

[S.H. KAPADIA, CJI., K.S. RADHAKRISHNAN AND SWATANTER KUMAR, JJ.]

Constitution of India, 1950 – Article 32 – Writ petition under – Seeking implementation of the Building and Other Construction Workers (Regulations of Employment and Conditions of Service) Act, 1996 and Building and Other Construction Workers' Welfare Cess Act, 1996; and seeking directions to establish the Welfare Boards, collect cess, complete the registration and grant benefits to the beneficiaries – Also prayer made that the rules and regulations relating to the health, safety and welfare of the workers, mainly the workers engaged in construction activity should be framed and safety equipments be provided – Union of India and all 36 States/Union Territories impleaded as party-respondents to the petition – Issuance of various orders and directions by the Court requiring the respective States to implement the provisions of the Act – Status reports and affidavits filed on behalf of the respondents showing non-compliance of the statutory duty and functions by the appropriate Governments as also non-implementation of the provision of the Act in their entirety – Contempt petition filed by the petitioner alleging that the respondents have disobeyed the orders of Supreme Court for a long period, despite directions of the Supreme Court – In the circumstances, Supreme Court issuing notice to show cause

why proceedings under the Contempt of Courts Act, 1971 be not initiated against the respondents in Contempt Petitions – Also issuing directions to the officers of the respective/ appropriate Governments to be present in the Court on the next date of hearing – Building and Other Construction Workers (Regulations of Employment and Conditions of Service) Act, 1996 – Building and Other Construction Workers' Welfare Cess Act, 1996 – Contempt of Courts Act, 1971.

CIVIL ORIGINAL JURISDICTION : Contempt Petition Nos. 42 & 43 of 2011

IN

Writ Petition (Civil) No. 318 of 2006

Under Article 32 of the Constitution of India.

WITH

I.A. No. 6 of 2001 in W.P. (C) No. 318 of 2006.

Vivek K. Tankha, ASG, Colin Gonsalves, P.P. Malhotra, A. Mariarputham, AG, Dr. Manish Singhvi, Manjit Singh, Jayshree Anand, AAG, Tariq Abeed, Jyoti Mendiratta, Riku Sharma, Navnit Kaur (for Corporate Law Group), Arun K. Sinha, Sunita Sharma, Manpreet Singh Doabia, S.S. Rawat, S.W.A. Qadri, Saima Bakshi, Gargi Khanna, Shailendra Saini, A. Deb Kumar, D.S. Mahra, Anil Katiyar, S.N. Terdal, Nandini Gore, Gopal Singh, Rituraj Biswas, Manish Kumar, B.S. Banthia, Naveen Sharma, Jatinder Kumar Bhatia, T.V. George, Radha Shyam Jena, Ranjan Mukherjee, D. Bharathi Reddy, Sanjay V. Kharde, Asha Gopalan Nair, Pragyan P. Sharma, P.V. Yogeswaran, Hemantika Wahi, Nupur Kanungo, Anil Shrivastav, Rituraj Biswas, Khwairakpam Nobin Singh, Sapam Biswajit Meitei, Aruna Mathur, Yusuf Khan, Avneesh Arputham, Megha Gour (Arputham, Aruna & Co.), Naresh K.

Sharma, Radha Rangaswamy, Anil K. Jha, Chhaya Kumari, Anis Suhrawardy, Tara Chandra Sharma, Neelam Sharma Kamini Jaiswal, T. Harish Kumar, Devanshu Kumar Devesh, Milind Kumar, Balaji Srinivasan, Sanjay R. Hegde, A. Subhashini, Atul Jha, D.K. Sinha, J. K. Bhatia, Savitri Pandey, Shrish Kumar Misra, V.G. Pragasam, S. J. Aristotle, Prabu Rama Subramanian, Edward Belho, K. Enatoli Sema, Sunil Fernandes, Renu Gupta, Sidhan Geol, Vivekta Singh, Kamal Mohan Gupta, G.N. Reddy, V. Pattabhi Ram Vadrevu, R. Satish, S. Geetha, Ajay Pal, D. Mahesh Babu, Ramesh Allanki for the appearing parties.

The following Order of the Court was delivered

O R D E R

By this common order, we shall deal with IA No.6 in WP No.318 of 2006 and Contempt Petition Nos.41 and 42 of 2011.

In this petition under Article 32 of the Constitution of India the petitioner *inter alia* prayed for issuance of a writ of mandamus or any other appropriate writ or direction directing the respondents to forthwith implement the Building and Other Construction Workers (Regulations of Employment and Conditions of Service) Act, 1996 (hereinafter referred to as 'the Act') and The Building and Other Construction Workers' Welfare Cess Act, 1996 (hereinafter referred to as 'the Cess Act') in their entirety and, in particular, to establish the Welfare Boards, collect cess, complete the registration and grant benefits to the beneficiaries with immediate effect as per the provisions of the respective Acts. Further, it is also prayed that the rules and regulations relating to the health, safety and welfare of the workers, particularly the workers in relation to building and construction activity, should be framed and safety equipments including safety harness and safety nets should be provided to them at the place of work. The petitioner has impleaded the Union of India and all the 36 States/Union

Territories as party-respondents to the present petition.

This Court, vide its order dated 28th July, 2006 issued notice to all the respondents. Some of the States and the Union of India had filed their replies and after hearing the learned counsel appearing for the parties, the Court passed various directions as recorded in different orders of the Court from time to time and the respondents were required to comply with these directions. Vide order dated 12th May, 2008, a direction was issued by this Court to the Secretary of the Labour Department of each State requiring them to submit a detailed status report within eight weeks as to what steps have been taken by them to implement the provisions of the aforesaid two Acts. Some of the States had submitted their reports and it was evident from the content of those reports/affidavits that the provisions of both the Acts have not been substantially complied with. This resulted in passing of detailed order by this Court dated 13th January, 2009. In this order the Court noticed that under Section 6 of the Act, the appropriate Government has to appoint Registration Officers and under Section 7 of the Act every employer was to register their establishment with the said Officer. Reference was also made to the obligation on the part of the State to constitute the State Welfare Boards under the provisions of Section 18 the Act. After noticing that the petitioner had filed a chart indicating the steps taken by various Governments, it was evident that many of the Governments had not even taken steps as per provisions of the Act. The Court, thus, directed as under: -

> "We direct the Chief Secretary of the respective States and Secretary (Labour) of each States and the Union Territories to take timely steps as per the provisions of the Act, if not already done. We would like to have the appraisal report in the first week of May as to what steps have been taken in this regard. If any of the State Government has not done anything pursuant to the Act,

urgent steps are to be taken so that the benefits of this legislation shall not go waste. Otherwise the unorganized workers of the construction sector will be denied the benefit of the Act."

The Court thereafter passed various orders and directions requiring respective States to implement the provisions of the Act. Vide order dated 18th January, 2010, the Court noticed the object of the Act as well as made reference to various provisions of the Act and issued 11 directions. These directions relate to the constitution of the State Welfare Boards by the respective States, holding of meetings by the said Boards at regular intervals to discharge their statutory duties, creating awareness about the benefits of the Act amongst the beneficiaries through media, appointment of Registering Officers and setting up centres in each district for that purpose. This Court further directed that all contracts with Government shall require registration of workers under the Act to give benefits of the Act to the registered persons, the CAG to conduct audit of the entire implementation of the Act and use of the allocated funds and finally the Boards to prepare detailed reports in regard to the implementation.

Despite passing of these clear orders by the Court, the provisions of the Act have not been implemented in their entirety. Further, noticing the persisting default, the Court passed an order dated 10th September, 2010 referring to various provisions of the Act as well as the fact that the Central Government has not even issued any directions under Section 60 of the Act, despite the Court's order dated 18th January, 2010. Noticing the incidences in that regard the Court directed the Central Government to issue appropriate directions to the States as well as furnish the status report of Central Advisory Committee as to what steps had been taken by them with regard to implementation of the provisions of the respective Acts. On subsequent dates, the petitioner

submitted that the directions of the Court as well as the provisions of the Act were not being implemented by various States. The Court, thus, granted liberty to the petitioner, vide its order dated 22nd November, 2010, to take out contempt motion State-wise.

The petitioner filed IA No. 6 of 2011 on 5th January, 2011 primarily praying for filing of additional documents. In the documents annexed to this application there were charts giving details of the States which had not constituted the Welfare Boards, information about constitution of the Cess Collecting Authority, number of workers registered with each State and the Schemes framed and implemented. From the charts, it was obvious that most of the States had defaulted in complying with the provisions of the Act and some of them, in fact, had not even constituted the State Welfare Boards despite the writ petition being pending in this Court since the year 2006 and the Court having issued various directions in that regard. The petitioner then filed Contempt Petition Nos. 42 of 2011 and 43 of 2011.

In Contempt Petition No. 42 of 2011, the petitioner has averred that Respondent Nos.2 to 10 have failed to take even the preliminary steps to constitute the Welfare Boards under Section 18 of the Act and that the Central Government has neither issued any directions nor taken any steps in that behalf. The defaulters, in this regard, are stated to be the Union Territories of Lakshadweep, Government of the State of Meghalaya, Government of the State of Nagaland and the Union of India. The Labour Secretary of the respective States and the Director General of Inspection of the Government of India have been impleaded as respondents in this petition.

Contempt Petition No. 43 of 2011 has been filed primarily on the ground that the respondents in that petition had willfully disobeyed the orders of this Court, particularly the order dated 18th January, 2010 and they have not

implemented the provisions of the Act. The Registering Officers have not been appointed and the workers are not being registered, resulting in non-implementation of the schemes for grant of benefits and the facilities to such workers. Defaulters in this regard are the States of Maharashtra, Goa, Himachal Pradesh, Rajasthan, Uttarakhand, Uttar Pradesh, Manipur and the Union Territories of Daman & Diu, Dadra & Nagar Haveli, Chandigarh, Andaman & Nicobar Island. Their Labour Secretaries, Chief Inspector of Inspection and Administrators have been impleaded as respondents in this petition along with the Director General of Inspection, Government of India.

Having referred to the facts on record and the orders of this Court passed from time to time, we may now refer to some of the provisions of both the statutes which impose a statutory obligation upon the respondents to carry out their functions and duties in accordance with those provisions and the directions issued by this Court. Every State is required to constitute a State Welfare Board in accordance with the provisions of Section 18 of the Act which Board, upon its constitution, is required to discharge its functions under Section 22 of the Act. Some of the defined functions are to provide immediate assistance to the beneficiaries, sanction loans, give financial assistance for education of children and even make payment of maternity benefits to the female beneficiaries. The appropriate Government is further required to appoint Registering officers in terms of Section 6 of the Act and the establishments are required to be registered with that officer as per the provisions of Section 7. The beneficiaries/ workers are to be registered with the officer authorized by the Board in that behalf in accordance with the provisions of Section 12 of the Act. The beneficiaries are required to make their respective contributions in terms of Section 16 of the Act. The consequences of default both of the beneficiary and the establishment are provided under the statute itself and accordingly appropriate steps are to be taken by the

Registering Authority and the appropriate Government, as the case may be.

There shall be levy and collection of cess at the rate of and in the manner specified under Section 3 of the Cess Act and every employer has to furnish returns in accordance with Section 4 of that Act. After its assessment in accordance with law, the cess is to be paid and collected. The default in payment thereof bears the penal consequences as well as interest has to be paid on delayed payment of cess. Offences committed by the company and other defaulters are punishable under the provisions of the Cess Act.

From the various status reports and the affidavits filed on behalf of the respondents, it is clear that the appropriate Governments have, admittedly, not complied with their statutory duties and functions. All the application/petitions, subject matter of the present order, are supported by affidavit filed by the co-ordinator of the petitioner organization. Number of States, particularly Union Territory of Lakshadweep and States of Meghalaya and Nagaland have not even constituted the Welfare Boards in terms of Section 18 of the Act. The State of Uttar Pradesh has completed the formality of constituting a Board but it is a one man Board instead of having a minimum of three or more members as required under Section 18 of the Act. The charts submitted by the petitioner further show that no worker has been registered by the States of Assam, Mizoram, Sikkim and Jammu and Kashmir. The appropriate Governments and Registering Authorities, wherever constituted, particularly the respondent State Governments in these application/petitions have failed to either collect the requisite cess amount or have collected the same inadequately and in any case have failed to distribute the benefits and facilities to the beneficiaries. In this manner and for a considerable period, the respondents in these application/petitions have, on the one hand disobeyed the orders of this Court particularly orders dated 18.01.2010,

13.08.2010 and 10.09.2010, while on the other they have failed to perform their statutory obligations under the provisions of the Act despite directions of this Court. Default on the part of these respondents, thus, has persisted over a long period and the Court is left with no alternative except to pass appropriate directions/orders in accordance with law on these two contempt petitions. In the Circumstances afore-referred, we hereby issue notice to show cause why proceedings under the Contempt of Courts Act, 1971 be not initiated against all the respondents in Contempt Petition Nos.42 and 43 of 2011. Further we are also compelled to direct the following officers of the respective/appropriate Governments to be present in the Court on the next date of hearing :

1. The Labour Secretary,
   Ministry of Labour,
   Sharam Shakti Bhavan,
   Rafi Marg, New Delhi.
2. The Labour Secretary Lakshadweep,
   U.T. of Lakshadweep,
   Karvarthi – 682 555.
3. The Labour Secretary, Meghalaya,
   Government of Meghalaya,
   Department of Labour.
   Rilang Building,
   Shillong – 793 001.
4. The Labour Secretary, Nagaland,
   Government of Nagaland,
   Department of Labour.
   Civil Secretariat,
   Kohima – 797 001.

5. Director General of Inspection,
   Government of India,
   Mansingh Road,
   New Delhi – 110 011.

With the above orders, we direct these application/ petitions to be listed after four weeks. Notice to all the respondents returnable on the same date.

N.J. Matters pending.

GUFFIC CHEM P. LTD. ETC.
v.
C.I.T., BELGAUM & ANR.
(Civil Appeal No. 2522 of 2011)

MARCH 16, 2011

[S.H. KAPADIA, CJI, K.S. PANICKER RADHAKRISHNAN AND SWATANTER KUMAR, JJ.]

INCOME TAX ACT, 1961:

Capital receipt –Assessment year 1997-98 –Payment received under an agreement not to compete (negative covenant) –Held: Compensation attributable to a negative/ restrictive covenant during the relevant assessment year was a capital receipt not taxable under the Act –It became taxable only w.e.f. 1.4.2003 –A liability cannot be created restrospectively—s.28 (va) is a mandatory and not clarificatory.

During theassessment year 1997-1998, the assessee received Rs. 50 lakhs as non-competition fee in consideration of an agreement that contained prohibitive/ restrictive covenant. The assessee agreed to transfer its trade marks to transferee company and in consideration of such transfer on the terms and conditions appearing in the agreement, the assessee agreed that it would not carry on directly or directly business that was being carried on by it till that time. The Commissioner of Income Tax (Appeals) while overruling the decision of the AO held that the amount received by the assessee from transferee company was a capital receipt not taxable under the Income Tax Act, 1961. The decision was affirmed by the Tribunal. The High Court reversed the judgment of the Tribunal.

In the appeal filed by the Revenue, the question for

consideration before the Court was: whether a payment under an agreement not to compete (negative covenant agreement) is a capital receipt or a revenue receipt.

Allowing the appeal, the Court

HELD: 1.1. The position in law is clear and well settled. There is a dichotomy between receipt of compensation by an assessee for the loss of agency and receipt of compensation attributable to the negative/ restrictive covenant. The compensation received for the loss of agency is a revenue receipt whereas the compensation attributable to a negative/restrictive covenant is a capital receipt. [Para 5] [903-D-E]

Gillanders Arbuthnot and Co. Ltd. v. CIT, ***Calcutta*** **53 ITR 283 – relied on.**

1.2. The High Court has misinterpreted the judgment of this Court in *Gillanders' case***. In the instant case, the Department has not impugned the genuineness of the transaction. The High Court has erred in interfering with the concurrent findings of fact recorded by the CIT (A) and the Tribunal. [Para 7] [904-D-E]**

1.3. One more aspect needs to be highlighted. Payment received as non-competition fee under a negative covenant was always treated as a capital receipt till the assessment year 2003-04. In order to put an end to such litigations, Parliament stepped in to specifically tax such receipts under non-competition agreement with effect from 1.4.2003. It is only by Finance Act, 2002 with effect from 1.4.2003 that the said capital receipt is now made taxable [Section 28(va)]. The Finance Act, 2002 itself indicates that during the relevant assessment year compensation received by the assessee under non-competition agreement was a capital receipt, not taxable under the 1961 Act. It became taxable only with effect

from 1.4.2003. It is well settled that a liability cannot be created retrospectively. In the instant case, compensation received under Non-Competition Agreement became taxable as a capital receipt and not as a revenue receipt by specific legislative mandate by s. 28(va) and that too with effect from 1.4.2003. Therefore, the said s. 28(va) is amendatory and not clarificatory. [Para 7] [904-E-H]

Commissioner of Income-Tax, Nagpur v. Rai Bahadur Jairam Valji, **35 ITR 148 –referred to.**

1.4. The impugned judgment of the High Court is set aside and the order of the Tribunal restored. [Para 8] [905-D]

Case Law Reference:

53 ITR 283	**approved**	**para 4**
35 ITR 148	**referred to**	**para 7**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2522 of 2011

From the Judgment & Order dated 29.10.2009 of the High Court of Karnataka, Circuit Bench at Dharwad in ITA No. 985 of 2006.

B. Bhattacharya, ASG, Porus, F. Kaka, R.P. Bhatt, Manish Kanth, Rustom B. Hathikhanawala, Fuzail Ahmad Ayyubi, Naresh Kaushik, Arijit Prasad, Ajay Singh, B.V. Balram Das, Ajay Singh, K. Sampath and Rani Chhabra for the appearing parties.

The Judgment of the Court was delivered by

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

2. Whether a payment under an agreement not to compete (negative covenant agreement) is a capital receipt or a revenue receipt is the question which arises for determination in this case?

FACTS

3.During the assessment year 1997-98 the assessee received Rs. 50,00,000/- (Rupees Fifty Lakhs only) from Ranbaxy as non-competition fee. The said amount was paid by Ranbaxy under an agreement dated 31.3.1997. Assessee is a part of Gufic Group. Assessee agreed to transfer its trademarks to Ranbaxy and in consideration of such transfer assessee agreed that it shall not carry on directly or indirectly the business hitherto carried on by it on the terms and conditions appearing in the agreement. Assessee was carrying on business of manufacturing, selling and distribution of pharmaceutical and medicinal preparations including products mentioned in the list in Schedule-A to the agreement. The agreement defined the period, i.e., a period of 20 years commencing from the date of the agreement. The agreement defined the territory as territory of India and rest of the world. In short, the agreement contained prohibitive/restrictive covenant in consideration of which a non-competition fee of Rs. 50 lakhs was received by the assessee from Ranbaxy. The agreement further showed that the payment made to the assessee was in consideration of the restrictive covenant undertaken by the assessee for a loss of source of income.

4.On perusal of the said agreement, the CIT (A) while overruling the decision of AO observed that the AO had not disputed the fact that Rs. 50 lakhs received by the assessee from Ranbaxy was towards non-competition fee; that under the said agreement the assessee agreed not to manufacture, itself or through its associate, any of the products enlisted in the Schedule to the agreement for 20 years within India and the rest of the world; that the assessee and Ranbaxy were both engaged in the business of pharmaceuticals and to ward off competition in manufacture of certain drugs, Ranbaxy had entered into an agreement with the assessee restricting the

assessee from manufacturing the drugs mentioned in the Schedule and consequently the CIT(A) held that the said sum of Rs. 50 lakhs received by the assessee from Ranbaxy was a capital receipt not taxable under the Income Tax Act, 1961 (hereinafter for short 'the 1961 Act') during the relevant assessment year. This decision was affirmed by the Tribunal. However, the High Court reversed the decision of the Tribunal by placing reliance on the judgment of the Supreme Court in the case of *Gillanders Arbuthnot and Co. Ltd. v. CIT,* Calcutta 53 ITR 283. Against the said decision of the High Court assessee has come to this Court by way of petition for special leave to appeal, hence this civil appeal.

DECISION

5. The position in law is clear and well settled. There is a dichotomy between receipt of compensation by an assessee for the loss of agency and receipt of compensation attributable to the negative/restrictive covenant. The compensation received for the loss of agency is a revenue receipt whereas the compensation attributable to a negative/restrictive covenant is a capital receipt.

6. The above dichotomy is clearly spelt out in the judgment of this Court in *Gillanders'* case (supra) in which the facts were as follows. The assessee in that case carried on business in diverse fields besides acting as managing agents, shipping agents, purchasing agents and secretaries. The assessee also acted as importers and distributors on behalf of foreign principals and bought and sold on its own account. Under an agreement which was terminable at will assessee acted as a sole agent of explosives manufactured by Imperial Chemical Industries (Export) Ltd. That agency was terminated and by way of compensation the Imperial Chemical Industries (Export) Ltd. paid for first three years after the termination of the agency two-fifths of the commission accrued on its sales in the territory of the agency of the appellant and in addition in the third year full commission was paid for the sales in that year. The Imperial

Chemical Industries (Export) Ltd. took a formal undertaking from the assessee to refrain from selling or accepting any agency for explosives.

7. Two questions arose for determination, namely, whether the amounts received by the appellant for loss of agency was in normal course of business and therefore whether they constituted revenue receipt? The second question which arose before this Court was whether the amount received by the assessee (compensation) on the condition not to carry on a competitive business was in the nature of capital receipt? It was held that the compensation received by the assessee for loss of agency was a revenue receipt whereas compensation received for refraining from carrying on competitive business was a capital receipt. This dichotomy has not been appreciated by the High Court in its impugned judgment. The High Court has misinterpreted the judgment of this Court in *Gillanders'* case (supra). In the present case, the Department has not impugned the genuineness of the transaction. In the present case, we are of the view that the High Court has erred in interfering with the concurrent findings of fact recorded by the CIT(A) and the Tribunal. One more aspect needs to be highlighted. Payment received as non-competition fee under a negative covenant was always treated as a capital receipt till the assessment year 2003-04. It is only vide Finance Act, 2002 with effect from 1.4.2003 that the said capital receipt is now made taxable [**See**: Section 28(va)]. The Finance Act, 2002 itself indicates that during the relevant assessment year compensation received by the assessee under non-competition agreement was a capital receipt, not taxable under the 1961 Act. It became taxable only with effect from 1.4.2003. It is well settled that a liability cannot be created retrospectively. In the present case, compensation received under Non-Competition Agreement became taxable as a capital receipt and not as a revenue receipt by specific legislative mandate vide Section 28(va) and that too with effect from 1.4.2003. Hence, the said Section 28(va) is amendatory and not clarificatory. Lastly, in *Commissioner of Income-Tax,*

Nagpur v. Rai Bahadur Jairam Valji reported in 35 ITR 148 it was held by this Court that if a contract is entered into in the ordinary course of business, any compensation received for its termination (loss of agency) would be a revenue receipt. In the present case, both CIT (A) as well as the Tribunal, came to the conclusion that the agreement entered into by the assessee with Ranbaxy led to loss of source of business; that payment was received under the negative covenant and therefore the receipt of '50 lakhs by the assessee from Ranbaxy was in the nature of capital receipt. In fact, in order to put an end to the litigation, Parliament stepped in to specifically tax such receipts under non-competition agreement with effect from 1.4.2003.

8. For the above reasons, we set aside the impugned judgment of the Karnataka High Court dated 29.10.2009 and restore the order of the Tribunal. Consequently, the civil appeal filed by the assessee is allowed with no order as to the costs.

Civil Appeal No. 2523 of 2011 (arising out of SLP(C) 222/ 2011)

9. For the reasons given hereinabove, we affirm the judgment of the Delhi High Court in CIT Vs. Mandalay Investment Pvt. Ltd. decided on 29.07.2009 in ITA No. 728/ 2009. Consequently, we dismiss the civil appeal filed by the Department against the decision of the Delhi High Court dated 29.07.09 with no order as to the costs.

R.P. Appeal allowed.

UNION OF INDIA & OTHERS
v.
S.K. KAPOOR
(Civil Appeal No. 5341 of 2006)

MARCH 16, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Service Law – Departmental enquiry – Supply of the copy of the material relied upon in departmental proceedings to the charge sheeted employee in advance – Held: Is necessary, so that he may have a chance to rebut the same – Although Article 320(3)(c) is not mandatory, if the authorities consult the Union Public Service Commission and rely on its report for taking disciplinary action, then the principles of natural justice require that a copy of the report must be supplied in advance to the employee concerned so that he may have an opportunity of rebuttal – On facts, the report of the Commission was not supplied to the employee concerned in advance and therefore, the dismissal order was rightly quashed by the courts below – Principles of natural justice – Constitution of India, 1950 – Article 320(3)(c).

Constitution of India, 1950 – Article 141 – If a subsequent co-ordinate bench of equal strength wants to take a different view from the prior decision of a co-ordinate bench, it can only refer the matter to a larger bench – Otherwise the prior decision of a co-ordinate bench is binding on the subsequent bench of equal strength.

Union of India vs. T.V. Patel **(2007) 4 SCC 785 – held per incuriam**

S.N. Narula vs. Union of India and Ors. **Civil Appeal No.642 of2004 decided on 30th January, 2004 – relied on.**

Case Law Reference:

(2007) 4 SCC 785 Held per incuriam. Para 8

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5341 of 2006.

From the Judgment & Order dated 25.4.2005 of the High Court of Gujarat at Ahmedabad in Special Civil Application No. 7201 of 2005.

S.W.A. Qadri and Sunita Sharma (for P. Parmeswaran) for the Appellant.

Haresh Raichura and Shashi Juneja 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 judgment and order dated 25th April, 2005 passed by the High Court of Gujarat at Ahmedabad in Special Civil Application No.7201 of 2005.

It appears that the respondent had been charge sheeted for absence without leave and a dismissal order was passed against him on 01.11.2001.

The respondent approached the Central Administrative Tribunal, Ahmedabad Bench, which by its order dated 20th July, 2004 quashed the dismissal order and directed the authorities to proceed from the stage of making available a copy of the Report of the Union Public Service Commission.

Being aggrieved by the order of the Tribunal, the appellants herein filed a writ petition in the High Court of Gujarat at

Ahmedabad being Special Civil Application No.7201 of 2005, which has been dismissed by the impugned order. Hence, this appeal.

We have perused the impugned order and find no infirmity in the same.

It is a settled principle of natural justice that if any material is to be relied upon in departmental proceedings, a copy of the same must be supplied in advance to the charge sheeted employee so that he may have a chance to rebut the same.

Mr. Qadri, learned counsel for the appellant submitted that the copy of the Report of the Union Public Service Commission was supplied to the respondent-employee along with the dismissal order. He submitted that this is valid in view of the decision of this Court in *Union of India vs. T.V.Patel*, (2007) 4 SCC 785.

We do not agree.

In the aforesaid decision, it has been observed in para 25 that 'the provisions of Article 320(3)(c) of the Constitution of India are not mandatory'. We are of the opinion that although Article 320(3)(c) is not mandatory, if the authorities do consult the Union Public Service Commission and rely on the report of the commission for taking disciplinary action, then the principles of natural justice require that a copy of the report must be supplied in advance to the employee concerned so that he may have an opportunity of rebuttal. Thus, in our view, the aforesaid decision in *T.V.Patel's case* is clearly distinguishable.

There may be a case where the report of the Union Public Service Commission is not relied upon by the disciplinary authority and in that case it is certainly not necessary to supply a copy of the same to the concerned employee. However, if it is relied upon, then a copy of the same must be supplied in advance to the concerned employee, otherwise, there will be violation of the principles of natural justice.

This is also the view taken by this Court in the case of *S.N.Narula vs. Union of India & Others, Civil Appeal No.642 of 2004 decided on 30th January, 2004*.

It may be noted that the decision in *S.N.Narula's case (supra)* was prior to the decision in *T.V.Patel's case(supra)*. It is well settled that if a subsequent co-ordinate bench of equal strength wants to take a different view, it can only refer the matter to a larger bench, otherwise the prior decision of a co-ordinate bench is binding on the subsequent bench of equal strength. Since, the decision in *S.N.Narula's case (supra)* was not noticed in *T.V.Patel's case(supra)*, the latter decision is a judgment *per incuriam.* The decision in *S.N.Narula's case (supra)* was binding on the subsequent bench of equal strength and hence, it could not take a contrary view, as is settled by a series of judgments of this Court.

For the aforesaid reasons, this appeal is dismissed. Parties shall bear their own costs.

N.J. Appeal dismissed.

COMMR. OF COMMERCIAL TAXES AND ORS.
v.
CHITRAHAR TRADERS
(Civil Appeal No. 2686 of 2011)

MARCH 16, 2011

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

Sales tax: Agreement between NLC, a government undertaking and assessee for sale of iron and steel scrap to the assessee – Dispute arose between the sales authorities and the assessee as to nature of the article – According to authorities, the article was plant and machinery taxable @ 12% with 5% surcharge while as per assessee, it was scrap and liable to tax @ 4% – Held: Assessee is liable to pay sales tax @ 4% only – In the agreement between the NLC and the assessee, what was sought to be sold was iron and steel scrap and rejected/condemned and obsolete secondary arisings – Terms and conditions of e-auction also indicated that what was being sold was scrap – Moreover, there was an application by assessee to District collector for using explosives for dismantling the machinery – Sale in question was made by public sector undertaking and the said sale was conducted for and on behalf of another public sector undertaking – Selling agent was also engaged in the business of metal scraps – Sale took place 36 years after the purchase of machineries – Affidavit of NLC clearly established that those machineries became obsolete and condemned – It was also established from the contemporaneous documents that the plant and machineries had outlived its utility and had no value except scrap.

Rainbow Steels Ltd. and Anr. v. The Commissioner of Sales Tax, Uttar Pradesh, Lucknow and Anr. **1981 (47) STC 298 – Distinguished.**

Case Law Reference:

1981 (47) STC 298 Distinguished Para 13

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2686 of 2011.

From the Judgment & Order dated 26.2.2010 of the High Court of Madras in W.A. No. 639 of 2008.

R. Nedumaran for the Appellants.

Shyam Diwan, B. Raghunath, Vijay Kumar for the Respondent.

The following Order of the Court was delivered

O R D E R

Delay condoned.

Leave granted.

This appeal arises out of the judgment and order passed by the Division Bench of the Madras High Court dismissing the writ appeal filed by the Appellants herein whereby the Division Bench affirmed the judgment and order passed by the learned Single Judge allowing the writ petition filed by the respondent herein. Since the facts leading to filing of the aforesaid writ petition by the respondent are not disputed, we are not required to set out herein the entire factual position at length. However, for the purpose of deciding the present appeal, whatever facts are required to be dealt with and stated are being stated hereinafter.

The N.L.C., namely, Neyveli Lignite Corporation is a Government of India enterprise and a company, and is involved in the activity of generation and supply of electric energy to various State Electricity Boards. The said company set up a plant to produce Leco, which is a form of lignite in the year

1965. The said plant, however, was having frequent breakdowns and was incurring huge losses. Consequently, an effort was made to upgrade the plant which, however, turned out to be a failure due to which the entire plant was closed down on 4.4.2001 as unviable. Thereafter the company proceeded to dispose of the entire plant and machinery as according to the company, the plant was of not marketable value and also because it had lost its use and outlived its utility and had no value except as scrap. The said company thereafter appointed M/s. Metal Scrap and Trading Corporation Ltd. (hereinafter referred to as 'MSTC') on 3.11.2004, a Government of India enterprise, engaged in the business of scrap to arrange for disposal of condemned plant.

An agreement was entered into between the said company and MSTC. Clause 2.0 of the said agreement reads as follows:-

> "2.0 Whereas MSTC has approached the Principal with a request to engage MSTC as Selling Agent for disposal of Iron & Steel Scrap and Rejected/Condemned/obsolete Secondary arisings (ferrous & non-ferrous) as well as surplus obsolete Stores, equipments and miscellaneous articles etc."

Reference may also be made to Clause 4.1 which reads as follows:-

> "This Agreement covers disposal of all scraps,secondary arisings, surplus stores and equipment misc. items etc, as mentioned in Clause 2.0 before."

Since reliance was also placed on Clause 5.0, we extract the same as under:-

> *"Duration of Contract*
>
> The Contract will remain valid for Three years from 17-11-

2004 to 16-11-2007 which could be extended for such further period on such terms and conditions as mutually agreed upon by the parties hereto."

Pursuant to the aforesaid agreement arrived at, the aforesaid plant and machinery, which according to the company became scrap as obsolete and unviable, was sold through the process of e-auction and the respondent herein offered its bid which came to be accepted by the MSTC. The acceptance letter is also placed on record. The said letter is dated 16.2.2005 which states that the tender offer of respondent was accepted on "as is where is" basis for purchase of B & C Plant one lot and machinery as a whole lot as per the terms and conditions of the e-auction. In the said document it was also indicated that sales tax would be charged @ 12% with surcharge @ 5%. It was also made clear therein that the sales tax which is being levied would be provisional one and subject to any change. It was also specifically indicated therein that the material value along with taxes and duties including income tax and educational cess on IT would be paid on total value of the scrap.

However, a dispute arose thereafter as to whether sales tax is leviable and payable on the said articles @ 4% as the plant and machinery was sought to be sold as scrap or whether the respondent is liable to pay sales tax @ 12% with 5% surcharge also. In view of the aforesaid dispute which arose, the respondent wrote a letter dated 7.4.2005 to the sales tax authorities mentioning therein about the details and manner of the transaction that had taken place regarding purchase of the scrap by the respondent pursuant to the e-auction conducted by MSTC. In the said letter the entire background facts leading to the e-auction and acceptance of the tender were stated. A Form being Form No. XIV was also filled up by the respondent wherein it was mentioned by it that they had purchased plant and machineries as a whole in one lot but the same also enclosed another declaration made by the respondent herein indicating the full particulars of the goods and stating therein

that the total sale value ex-taxes and duties as a whole in one lot is Rs.70,01,00,019.00. While giving the said particulars of the case, it was also specifically mentioned by the respondent that what was purchased was scrap material and thereafter the details of such scrap materials were given in the said declaration.

As against the aforesaid letter written by the respondent, the sales tax authorities sent a letter to the respondent on 29.4.2005 stating therein that if the plant and machinery has been sold as scrap and the bidder was asked to dismantle and transport as scrap, such sales of scrap is taxable @ 4% without surcharge under Entry IV (1) (a) of the Second Schedule to the Tamil Nadu General Sales Tax Act, 1959. However, thereafter the Sales Tax Department appears to have changed their stand and held that the respondent is liable to pay sales tax @ 12% along with 5% surcharge.

Being so situated, two writ petitions came to be filed before the Madras High Court, one by the respondent herein and the other by Neyveli Lignite Corporation Ltd. In the writ petition filed by the aforesaid Corporation, a stand was taken that what was sought to be sold to the respondent company was scrap of the condemned plant and machineries, but sales tax and surcharge was realized from the respondent @ 12% and 5% on provisional basis, and subject to change at later stage. It was also pointed out that the aforesaid parts of the machineries were removed by issuance of 100 delivery notes-cum-gate passes. In paragraph 11 of the affidavit enclosed with the writ petition, the following statement was made by the said company: -

"I state that the items under Sale and Delivery relates to condemned plant and machinery disposed as scrap. In the impugned order of the First Respondent, there is an allegation that a few Delivery Notes issued by the Despatch Section, it was noted that here was sale of B & C plant machinery on as-is-where-is basis, and sales tax

and surcharge was mentioned at 12% and 5% respectively. There is an alleged reference to more than 100 Delivery Notes-cum-Gate Passes. This issue was never discussed and the preponderance of materials is entirely to the contrary. It is respectfully submitted that initial delivery notes of the Despatch Section issued from 05.05.2005 to 19.05.2005 bearing upto Serial Nos. 52, the description was mechanically states as B & C plant as-is-where-is with 12% S.T. (based on the sale order). The Buyers were all along contesting the rate of tax since the goods under sale was only condemned machinery disposed as scrap. Therefore, from Delivery Note Nos. 53 dated 20.05.2005, apart from the pre- printed words"B & C Plant & Machineries", it was, inter alia, specifically remarked by hand "Iron Scrap". It was also mentioned that the goods were delivered in lots even from Delivery Note No.1 dated 5.05.2005 with corresponding loads in the lorry. The finding that the sale was a plant and machinery as if there was intention to buy and sell plant and machinery is perverse and overlooks the dispute with regard to 12% sales tax at every stage between the Petitioners and buyers. Based on the communication of the Commercial Tax Officer, Cuddalore, the Second Respondent dated 10.05.2005 to the First Respondent, during the period of sale, only 4% tax was charged to the Buyers in view of the protest of the Buyers. The Petitioners state that the difference over and above 4% was subsequently recovered on 22.11.2005 from the EMD of the Buyers and paid under protest to the Second Respondent, the Commercial Tax Officer, Cuddalore, on 23.11.2005 consequent to later developments."

The Sales Tax Department contested the writ petitions and the learned Single Judge after hearing the counsel appearing for the parties allowed the writ petitions holding that the respondent is liable to pay sales tax @ 4% only. Being aggrieved by the aforesaid judgment and order passed by the

learned Single Judge, the Appellants herein filed two writ appeals which were registered and numbered as Writ Appeal Nos. 639 and 640 of 2008. The Division Bench took notice of the submissions made by the counsel appearing for the parties and thereafter dismissed both the appeals holding that what was sold was scrap and not plant and machineries as such and therefore the learned Single Judge was justified in holding that the respondent is liable to pay sales tax only @ 4%. The aforesaid findings and conclusions of the Division Bench are being assailed in this appeal on which we have heard the learned counsel appearing for the parties.

Counsel appearing for the Appellants has submitted that what was sold was plant and machineries and not scrap at the agreement stage as is indicated from the acceptance letter and that it is only subsequently and during the post-contract period only, the said plant and machineries were removed as scraps after dismantling them and dividing the articles into several lots and taking away the same by getting 100 gate passes and challans issued. He has specifically drawn our attention to the acceptance letter which is annexed with the paper book and also to the various communications issued between the parties to substantiate his submissions that it was plant and machineries which was sold and therefore the respondent is liable to pay tax @ 12% with 5% surcharge.

Counsel appearing for the Appellants also relies upon the decision of this Court titled as *Rainbow Steels Ltd. & Anr. Vs. The Commissioner of Sales Tax, Uttar Pradesh, Lucknow and Anr.* reported in 1981 (47) STC 298.

Counsel appearing for the respondent, however, drew our attention to the various documents on record and on the basis thereof submitted before us that the documents on record clearly indicate that what was sought to be sold was scrap and not the functional plant and machineries and therefore there should be no interference with the judgment and order passed by the Madras High Court.

In the light of the submissions of the counsel appearing for the parties, we have ourselves scrutinized the records. We have already extracted the relevant portion of the agreement between Neyveli Lignite Corporation and MSTC. The said agreement clearly proves and establishes that what was sought to be sold was iron and steel scrap and rejected/condemned and obsolete secondary arisings, etc. The said position is also reiterated in Clause 4.1 which also indicates that what was being sold through the e- auction was scraps and secondary arisings. In the acceptance letter on which heavy reliance was placed by the counsel appearing for the Appellants mentions the goods sold as plant and machineries but it is also indicated therein that it is sale of plant and machineries as per the terms and conditions of the e- auction. Terms and conditions of e-auction indicated from the agreement indicates that what was being sold was scrap. The said position is also reiterated in the said acceptance letter when it refers to the total value of the scrap. In the clarification issued by the Department itself, at one stage, i.e., by their letter dated 29.4.2005, it was clearly mentioned that if the plant and machineries has been sold as scrap and the bidder was asked to dismantle and transport as scrap, such sales of scrap would be taxable @ 4% without surcharge.

There is yet another important factor which should not be lost sight of and that is using of explosives by the respondent for removing the aforesaid scrap from the premises in question. An application was submitted by the respondent to the District Collector for using explosives for the purpose of dismantling the machinery. The District Collector vide communication dated 21.2.2006 permitted the use of explosives consequent upon which machineries were dismantled by using the explosives and were transported out of the premises in trucks as steel scrap.

The sale in question was also made by a public sector undertaking and the said sale was conducted for and on behalf

of another public sector undertaking. The selling agent is also engaged in the business of metal scraps.

The plant and machineries were installed as far back as 1965 and have to be closed in the year 2001 as it was found that even after updating it could not be made functional. The sale has taken place after about 36 years of the purchase of the machineries and the affidavit of the Neyveli Lignite Corporation clearly proves and establishes that those machineries have become obsolete and the plant and machineries have become condemned articles. All these contemporaneous documents and factual position make it abundantly clear that what was sold and purchased by the respondent are nothing else but scrap and, therefore, we find no reason to interfere with the findings and conclusions arrived at by the Madras High Court. Consequently, we find no merit in this appeal, which is dismissed.

We have already referred to the judgment relied upon by the counsel appearing for the appellants. A perusal of the aforesaid decision on which reliance is placed would indicate that the factual situation in which the said judgment was rendered was completely different than the facts of the present case. In the said case, the decision was rendered in the context of sale of old thermal power plant which was in perfect working and running condition. The same, however, is not the case here. Here is a case of sale of a plant and machineries which were condemned. It is also established from the contemporaneous documents that the plant and machineries had outlived its utility and has no value except scrap. Therefore, the aforesaid decision is clearly distinguishable on facts and has no application to the facts and circumstances of the present case.

The respondent has paid sales tax and surcharge at the higher rate of 12% and 5% while taking out the goods out of the factory premises. In view of the present order passed today, the respondent becomes entitled for refund of overpaid amount

which shall be assessed by the Department within a period of three months from today and the amount found due and payable to the respondent shall be refunded back to the respondent along with interest as payable in accordance with law within two months thereafter.

The appeal is dismissed with the aforesaid observations.

D.G. Appeal dismissed.

DESIYA MURPOKKU DRAVIDA KAZHAGAM AND ANR.
v.
THE ELECTION COMMISSION OF INDIA
(Writ Petition (C) No. 532 of 2008)

MARCH 16, 2011

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Election Symbols (Reservation and allotment) Order, 1968:

Object of its enactment – Discussed.

Paragraphs 6A(i), (ii), 6B(A)(ii), 9(a), 9(b), 10A, 11, 12(1)(c) and 13(3)(a) – Validity of, challenged – Writ petitions and special leave petitions – Registered unrecognized political parties seeking direction to the Election Commission of India to allot common election symbols to their candidates in the ensuing elections to State legislative assembly – Elections process already set into motion in the State of Tamil Nadu – Held: An interim arrangement was made on 27th March, 2009 – At that time, registered unrecognized political parties before the Court were only three in numbers – Although it would be to the advantage of the registered unrecognized political parties if they are able to put up candidates on a common symbol, however, in the light of present situation when number of candidates who are likely to contest the elections and are required to be provided with free symbols in each constituency has increased, if all unrecognized registered political parties are provided with a common symbol, it would render the provisions of the Order completely unworkable and destroy the very object it seeks to achieve – In view of the said two possibilities, no interim arrangement made regarding the allotment of election symbols for the forthcoming General Assembly Elections – This would, however, not effect the final outcome of the

pending writ petitions and special leave petitions – Petitions listed for final disposal – Constitution of India, 1950 – Article 324 – Representation of the People Act, 1951 – s.29A – Conduct of Election Rules, 161 – rr.5, 10 – Notification no.56/2000/JUD-III dated 1.12.2000.

Words and phrases: Expression 'recognized political party, 'free symbol' and 'reserved symbol' – Meaning of, in the context of Election symbols (Reservation and allotment) Order, 1968.

CIVIL ORIGINAL JURISDICTION : Under Article 32 of the Constitution of India.

Writ Petition (Civil) No. 532 of 2008.

WITH

W.P. (C) Nos. 132, 315, 422, 426, 444, 447, 454 and 463 of 2009, SLP (C) Nos. 23494 & 7379-80 of 2009 and W.P. (C) Nos. 111 & 117 of 2011

K.K. Venugopal, Mukul Rohatagi, Rajiv Dutta, Jaideep Gupta, Ashok Desai, Col. Edwin Jesudass, Rukhsana Choudhary, S. Ravi Shankar, Hari Shankar K.R. Nedumaran, Pranav Kumar, Harinder Mohan Singh, Shuvodeep Roy, Rajiv Shankar Dvivedi, Ankur Mittal, Anil Kumar Mishra, Vijaya Bhaskar, V.P. Sengottuvel, Vikas Singh Jangra, S. Ravi Shankar, S. Yamunah Nachiar, R. Sharath, Satish Galla, N.R. Raman, Kumar Dushyant Singh, Anil Hooda, Sanjay Sharma, Padmakar Tripathi, Manoj Goel, Naushad Ahmad Khan, V. Elanchezhiyan, Subuhi Khan, Aftab Ali Khan, Pravin Satale, Sanjay R. Hegde, Abhishek Malviya, K.R. Joshi, Ramesh Babu M.R., Meenakshi Arora, S.K. Mendiratta, Poli Kataki, Vijay Kumar, Vishwajit Singh, Ramehs N. Keswani, Ram Lal Roy, Lawyer's Knit & Co., Venkateswara Rao Anumolu, Jogy Scaria and Keswani & Co., for the appearing parties.

The Order of the Court was delivered by

O R D E R

ALTAMAS KABIR, J. 1. The common challenge in these eleven Writ Petitions and three Special Leave Petitions is to the provisions of Paragraph 6A(i) & (ii), Paragraph 6B(A)(ii), Paragraph 9(a) and (b), Paragraphs 10A, 11, 12(1)(c) and Paragraph 12(3)(a) of the Election Symbols (Reservation and Allotment) Order, 1968, as amended from time to time. However, on account of paucity of time in the light of the election process being set into motion in the State of Tamil Nadu, we decided to focus our attention to the possibility of making a temporary arrangement till the Writ Petitions and the Special Leave Petitions could be decided finally.

2. Article 324 of the Constitution of India vests the superintendence, direction and control of the preparation of the electoral rolls for and the conduct of elections in the Election Commission. Since we shall be referring to the said provision hereinafter, the same is extracted hereinbelow :

"324. Superintendence, direction and control of elections to be vested in an Election Commission

(1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice President held under this Constitution shall be vested in a Commission"

3. Section 29A of the Representation of the People Act, 1951, which comes under Part IVA thereof, provides for the registration of associations and bodies as political parties with the Election Commission. Since the same will also have an impact on what is indicated hereinbelow, the provisions of Section 29A(1) are extracted below :

"29A. Registration with the Election Commission of associations and bodies as political parties. — (1) Any association or body of individual citizens of India calling itself a political party and intending to avail itself of the provisions of this Part shall make an application to the Election Commission for its registration as a political party for the purposes of this Act."

4. Since the facts in all these matters are more or less similar, we are treating W.P.(C)No.532 of 2008, filed by Desiya Murpokku Dravida Kazhagam, as the lead case in this group of matters. Incidentally, it may be indicated that SLP(C) Nos.7379-80 of 2009 have been filed by the Election Commission of India for quashing of the order of the High Court of Andhra Pradesh directing the Election Commission to consider allotment of a common symbol to the Lok Satta Party and other similarly situated unrecognized registered political parties. Similarly, W.P.(C)No.463 of 2009 and SLP(C)No.23494 of 2009 have been filed by certain registered unrecognized political parties for a direction upon the Election Commission of India to allot common election symbols to their candidates in the ensuing elections to the State Legislative Assembly. One of the States in question is the State of Tamil Nadu, in respect whereof Writ Petition (C) No.532 of 2008 has been filed by Desiya Murpokku Dravida Kazhagam, hereinafter referred to as "DMDK", & Anr. We have been informed that the date for notifying the election programme in the State of Tamil Nadu has been fixed as 16th April, 2011 and the filing of nomination papers for the election is said to be scheduled between 19th and 26th April, 2011. All other subsequent steps are to be taken thereafter.

5. Appearing in support of the Writ Petition, Mr. K.K. Venugopal, learned Senior Advocate, submitted that the Petitioner No.1 is a registered unrecognized political party and the Petitioner No.2 is a registered voter in the State of Tamil

Nadu. It was submitted that the DMDK contested 232 out of 234 constituencies in the 2006 Assembly Elections in the State of Tamil Nadu, which were the first elections which the party had contested within 8 months of its formation, and, although, it was an unrecognized political party, all its candidates were allotted the "Nagara" symbol in 224 out of 232 constituencies. In respect of the remaining 8 constituencies, the party candidates were allotted the "Bell" symbol in 6 constituencies and the "Ring" symbol in the remaining 2 constituencies. Mr. Venugopal submitted that the party had secured approximately 8.33% of the total valid votes polled in the State of Tamil Nadu, and it ultimately emerged as the third largest party in the State in terms of votes secured, without any electoral alliance with any other party or formation. Mr. Venugopal also submitted that the President of the Petitioner Party, Shri Vijaya Kant, contested the election from the Virudhachalam Assembly under the "Nagara" symbol and won the seat by a margin of 13,797 votes. Learned counsel submitted that despite the large number of votes that had been cast in its favour during the Assembly Elections, the DMDK Party was able to win only one seat in the Assembly Elections and that is the Virudhachalam Assembly Constituency mentioned hereinabove.

6. Mr. Venugopal also submitted that it was the grievance of the Petitioner Party that inspite of its reasonable performance in the State Assembly elections, its prayer for recognition as a State Party had been denied by the Election Commission of India in view of Paragraph 6B of the Election Symbols (Reservation and Allotment) Order, 1968, hereinafter referred to as the "Election Symbols Order, 1968".

7. In order to appreciate the submissions advanced by Mr. Venugopal, it is necessary to refer to some of the relevant provisions of the Election Symbols Order, 1968. The said Order was made by the Election Commission of India in exercise of the powers conferred on it by Article 324 of the Constitution read with Section 29A of the Representation of the People Act,

1951, hereinafter referred to as the "1951 Act", and Rules 5 and 10 of the Conduct of Election Rules, 1961, hereinafter referred to as the "1961 Rules". The said Order was promulgated in order to provide for specification, reservation, choice and allotment of symbols at elections in Parliamentary and Assembly constituencies, for the recognition of political parties in relation thereto and for matters connected therewith. Paragraph 4 of the Order provides for allotment of symbols and stipulates that in every contested election a symbol has to be allotted to a contesting candidate in accordance with the provisions of the Order and different symbols are to be allotted to different contesting candidates at an election in the same constituency.

8. Paragraph 5 of the aforesaid Order provides for the classification of symbols and divides symbols into two categories, namely, "reserved" and "free". It indicates that a reserved symbol is a symbol which is reserved for a recognized political party for exclusive allotment to contesting candidates set up by that party, whereas a free symbol is a symbol other than a reserved symbol. At this point, it may also be indicated that the Election Symbols Order, 1968, underwent certain changes in 2000 and 2005. Prior to its amendment, Paragraph 6, as it stood when the Order was promulgated in 1968, inter alia, provides that for the classification of symbols, political parties were to be categorized either as "recognized" political parties or "unrecognized" political parties and that a political party would be listed as a recognized political party in a State, if and only if either of the conditions specified in Clause (A) or the conditions in Clause (B) were fulfilled by that party and not otherwise. Clause (A) makes it imperative that such a political party would have had to be engaged in political activity for a continuous period of five years; and had at the General Election in that State to the House of the People or to the Legislative Assembly, for the time being in existence and functioning, returned at least one member to the House of the People for every 25 members of that House or any fraction of that number

of that State; or at least one member to the Legislative Assembly of that State for every 30 members of that Assembly or any fraction of that number. Paragraph 6 was subsequently expanded into Paragraphs 6, 6A, 6B and 6C by Notification No.56 dated 1st December, 2000. Paragraph 6A was again revised on 14th May, 2005, and set down certain conditions for recognition of a political party as a State Party. Paragraph 6A, as amended in 2005, provides as follows :

> *"6A. Conditions for recognition as a State Party* – A political party shall be eligible for recognition as a State party in a State, *if, and only if,* any of the following conditions is fulfilled:
>
> (i) At the last general election to the Legislative Assembly of the State, the candidates set up by the party have secured not less than six percent of the total valid votes polled in the State; and, in addition, the party has returned at least two members to the Legislative Assembly of that State at such general election; or
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> (ii) At the last general election to the House of the People from that State, the candidates set up by the party have secured not less than six percent of the total valid votes polled in the State; and, in addition, the party has returned at least one member to the House of the People from that State at such general election; or
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> (iii) At the last general election to the Legislative Assembly of the State, the party has won at least three percent of the total number of seats in the Legislative Assembly, (any fraction exceeding half being counted as one), or at least three seats in the Assembly, whichever is more; or
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> (iv) At the last general election to the House of the People from the State, the party has returned at least one member to the House of the People for every 25 members or any fraction thereof allotted to that State."

As has been indicated hereinabove, the major challenge in these Special Leave Petitions and Writ Petitions is to the validity of this provision.

19. Paragraphs 6A and 6B set out conditions for the recognition of a registered unrecognized party as a National Party and a State Party and Paragraph 6C deals with conditions for continued recognition as a National or State Party. The outcome of the Election Symbols Order, 1968, is that certain norms have been laid down in order to minimize the number of parties contesting an election since many persons forming themselves into a political party tend to take advantage of the other liberal provisions of the Order.

20. Mr. Venugopal urged that even prior to the Notification of 1st December, 2000, certain other amendments had been effected to the Election Symbols Order, 1968, in 1997 and 1999, whereby Paragraphs 10 and 10A were substituted. For instance, certain concessions are provided that if a political party, which is recognized as a State Party in some State or States, sets up a candidate at an election in a constituency in any other State or Union Territory in which it is not a recognized party, then such candidate may, to the exclusion of other candidates of the constituency, be allotted the symbol reserved for that party in that State or States, in which it is recognized as a State Party, notwithstanding that such symbol is not specified in the list of "free" symbols for such other State or Union Territory, upon fulfillment of further conditions, namely,

> "(a) that an application is made to the Commission by the said party for exclusive allotment of that symbol to the candidate set up by it, not later than the third day after the publication in the Official Gazette of the notification calling the election;
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> (b) that the said candidate has made a declaration in his nomination paper that he has been set up by that party at the election and that the party has also fulfilled the requirements of clauses (b), (c), (d) and (e) of paragraph 13 read with paragraph 13A in respect of such candidate; and
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> (c) that in the opinion of the Commission there is no reasonable ground for refusing the application for such allotment.
>
> Provided that nothing contained in this paragraph shall apply to a candidate set up by a State Party at an election in any constituency in a State in which that party is not a State Party and where the same symbol is already reserved for some other State Party in that State."

21. Paragraph 10A makes similar concessions in respect of candidates set up by an unrecognized party which was earlier recognized as a National or State Party. Mr. Venugopal submitted that Paragraph 6A, as amended, was highly arbitrary and negatively impacted upon the functioning and development of a multi-party democracy. Learned counsel submitted that the right to cast a vote allows a voter to make an intelligent choice, but unfortunately he is often unable to identify the political party to which a candidate belongs in addition to identifying a candidate. According to Mr. Venugopal, it is the percentage of the votes obtained at the previous elections which alone should be the criteria for recognition of a State Political Party and not the number of seats such party wins. Mr. Venugopal showed us several instances where even with a lower percentage of votes than other parties, a political party has come to power and has formed the Government. Mr. Venugopal urged that rather than the number of seats won, the number of votes polled by a State Political Party should really be the yardstick for recognition of a State Political Party.

22. It was submitted that the interim arrangement which had been made by the order dated 27th March, 2009, could be continued for the present General Elections as well.

23. Adopting Mr. Venugopal's submissions, Mr. Mukul Rohtagi, learned Senior Advocate, appearing for the Writ Petitioner, Kongunadu Munnetra Kazhagam, in Writ Petition (C) No.315 of 2009, contended that in the 2009 Parliamentary Elections the party had contested 12 out of 39 Parliamentary seats and "Gas Cylinder" as a symbol was allotted to all twelve candidates. In fact, the identity of candidates set up by the party came to be equated with the "Gas Cylinder" symbol and not as a free symbol, so much so that candidates who were provided with "Gas Cylinder" as an election symbol in other constituencies where the party had not put up any candidate, benefitted and had polled a large number of votes which they had never expected to get.

24. All the other learned counsel appearing for the other Writ Petitioners and Special Leave Petitioners, while adopting Mr. Venugopal's submissions, in one voice urged that the candidates to be put up by them as registered but unrecognised political parties may be provided with a common symbol in the constituencies in which they contest and such symbol may not be made available to other candidates as a free symbol. It was urged, as had been urged by Mr. Rohtagi, that after an election, voters come to associate the candidate of a party with the symbol under which he had fought the earlier election.

25. In reply, it was contended by Mr. Ashok Desai, learned Senior Advocate, appearing for the Election Commission that there were only a limited number of election symbols available as free symbols to the Election Commission and if all the registered unrecognized parties were to be accommodated by an interim arrangement in direct contrast to the Election Symbols Order, 1968, framed by the Election Commission, it would really amount to achieving something by an interim order which it could not achieve under the existing laws. Mr. Desai submitted that in its wisdom, the Election Commission had made certain Orders which, in its view, would contain the vice of fragmentation of seats leading to ultimate uncertainty in the

House. Mr. Desai contended that a great deal of thought and deliberation had gone into the making of the amendments in 2000 and 2005 in the Election Symbols Order, 1968, which ought not to be diluted for the purpose of making an interim arrangement as had been done earlier.

26. As we have indicated hereinbefore, the major challenge in these Writ Petitions and the Special Leave Petitions is to the validity of paragraph 6A of the Election Symbols Order, 1968, as it exists today. Keeping the same in mind, we have looked into the un-amended as well as the amended provisions of the Election Symbols Order, 1968. As on date, paragraph 6B as notified under Notification No.56/2000/JUD-III dated 1st December, 2000, for the purpose of recognition of a State Party is in force and it provides that in order to be recognized as a State Party, a Political Party, other than a National Party, shall be treated as a recognized State Party in a State or States, **if and only if,** either the candidates set up by it at the last General Elections to the House of People or to the Legislative Assembly of the State concerned had secured not less than six per cent of the total valid votes polled in that State at the General Elections and in addition, it has returned at least two members to the Legislative Assembly at the State in the last General Elections to that Assembly. Of course, the said notification is the subject matter of challenge in the present proceedings and is in existence by way of delegated legislation. If interim arrangement made earlier is to be continued it would be directly in violation of the said provisions. Such an arrangement cannot be made unless the operation of the impugned provision is stayed. At this stage we are not inclined to stay the impugned provision.

27. When the interim arrangements were made on 27th March, 2009, the registered unrecognized political parties before the Court were only three in number, whereas presently many others have joined the bandwagon. What we are required to consider at this stage is whether despite the above, any

prejudice would be caused to any of the stakeholders in the election process, if such prayer was allowed. It would certainly be to the advantage of the registered unrecognized political parties if they were able to put up candidates on a common symbol. On the other hand, if all registered unrecognized political parties were to be provided with a common symbol, prima facie, it would render the provisions of the Election Symbols Order, 1968, completely unworkable and destroy the very object it seeks to achieve.

28. Having regard to the aforesaid two possibilities, we are not inclined to make any interim arrangement similar to that made on an earlier occasion. The earlier interim arrangement was possible on account of the lesser number of parties, but in the present circumstances, the same will not be workable in view of the number of candidates who are likely to contest the elections and are required to be provided with free symbols in each constituency.

29. However, while we are not inclined to make any interim arrangement regarding the allotment of election symbols for the forthcoming General Assembly Elections, we make it clear that this is only a tentative view, which shall not, in any way, affect the final outcome of the pending Writ Petitions and Special Leave Petitions. We also make it clear that this order will not prevent the Election Commission from considering any representation that may be made by the political parties and from accommodating their prayer for a common symbol, to the extent practically possible.

30. Let these eleven Writ Petitions and three Special Leave Petitions be listed for final disposal on 3rd May, 2011.

D.G. Matter adjourned.

B.PREMANAND & OTHERS

v.

MOHAN KOIKAL & OTHERS

(Civil Appeal No. 2684 of 2007)

MARCH 16, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Kerala State and Subordinate Services Rules, 1959: r.27(c) – Seniority – Post of Block Development Officer – Inter-se seniority between the general category candidates (private respondents) and the Scheduled Caste/Scheduled Tribe candidates (appellants) – Rank list for the respondents prepared after due selection in 1987 but effective advice sent in 1993 and appointment made in 1993 – Rank list with regard to appellants published in 1992 and first effective advice made in 1992 and appointed during the year 1992 – r.27(C) states that seniority is to be determined by the date of first effective advice made by the Public Service Commission to the State Government for appointment – r.27(C) is plain and clear – Therefore, the literal rule of interpretation would apply to it – In view of r.27(C), appellants were senior to the private respondents, as the advice of their appointments was made prior to that of the respondents –No doubt, equity may be in favour of the respondents because they were selected earlier, but in case of conflict between equity and the law, it is the law which must prevail – The law, which is contained in r.27(c), is clearly in favour of the appellants – Service Law – Seniority – Equity – Interpretation of statutes.

M/s. Hiralal Ratanlal vs. STO **AIR 1973 SC 1034 – relied on.**

Dalilah Sojah vs. State of Kerala & Others **(1998) 9 SCC 641 – distinguished.**

Shankarsan Dash vs. Union of India **AIR 1991 SC 1612 – referred to.**

Interpretation of statutes:

Literal Rule of Interpretation – First and foremost principle of interpretation of a statute in every system of interpretation is the literal rule of interpretation – The other rules of interpretation e.g. the mischief rule, purposive interpretation etc.can only be resorted to when the plain words of a statute areambiguous or lead to no intelligible results or if read literally nullify the very object of the statute – Where the words of a statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule – Departure from the literal rule should only be done in very rare cases, and ordinarily there should be judicial restraint in this connection.

Mimansa Rules of Interpretation – Held: Are India's traditional principles of interpretation used for thousand of years by Indian jurists.

Principles of interpretation – Held: Are not principles of law but are only a methodology for explaining the meaning of words used in a text – Any system of interpretation which can help to resolve a difficulty can be utilised.

Swedish Match AB v. Securities and Exchange Board, India **AIR 2004 SC 4219;** *Prakash Nath Khanna v. C.I.T.* **2004 (9) SCC 686;** *Delhi Financial Corporation v. Rajiv Anand* **2004 (11) SCC 625;** *Government of Andhra Pradesh v. Road Rollers Owners Welfare Association* **2004 (6) SCC 210;** *J.P. Bansal v. State of Rajasthan & Anr.* **AIR 2003 SC 1405;** *State of Jharkhand & Anr. v. Govind Singh* **JT 2004(10) SC 349;** *Jinia Keotin v. K.S. Manjhi* **2003 (1) SCC 730;** *Shiv Shakti Co-operative Housing Society v. Swaraj Developers* **AIR 2003 SC 2434;** *Grasim Industries Limited v. Collector of Customs* **2002 (4) SCC 297;** *Union of India v. Hamsoli Devi*

2002 (7) SCC 273; *District Mining Officer v. Tata Iron and Steel Company* **2002 (7) SCC 358;** *Gurudevdatta VKSSS Maryadit v. State of Maharashtra* **AIR 2001SC 980;** *S. Mehta v. State of Maharashtra* **2001 (8) SCC 257;** *Patangrao Kaddam v. Prithviraj Sajirao Yadav Deshmugh* **AIR 2001 SC 1121;** *CIT v. Keshab Chandra Mandal* **AIR 1950 SC 265;** *Pandian Chemicals Ltd. v. C.I.T.* **2003(5) SCC 590;** *Narsiruddin v. Sita Ram Agarwal* **AIR 2003 SC 1543;** *Bhaiji v. Sub-Divisional Officer, Thandla* **2003(1) SCC 692 – relied on.**

Grundy v. Pinniger **(1852) 1 LJ Ch 405 – referred to.**

'Of Law & Men : Papers and Addresses of Felix Frankfurter; *G.P. Singh's Principles of Statutory Interpretations,* ***9th Edn.*** **– referred to.**

Mimansa Rules of Interpretation ***– referred to.***

Case Law Reference:

(1998) 9 SCC 641	**distinguished**	**Para 12**
AIR 1991 SC 1612	**referred to**	**Para 12**
AIR 1973 SC 1034	**relied on**	**Para 15**
AIR 2004 SC 4219	**relied on**	**Para 16**
2004 (9) SCC 686	**relied on**	**Para 16**
2004 (11) SCC 625	**relied on**	**Para 16**
2004 (6) SCC 210	**relied on**	**Para 16**
(1852) 1 LJ Ch 405	**referred to**	**Para 18**
AIR 1950 SC 265	**relied on**	**Para 21**
2003(5) SCC 590	**relied on**	**Para 22**
AIR 2003 SC 1543	**relied on**	**Para 23**

2003(1) SCC 692	**relied on**	**Para 23**
AIR 2003 SC 1405	**relied on**	**Para 24**
JT 2004(10) SC 349	**relied on**	**Para 24**
2003 (1) SCC 730	**relied on**	**Para 24**
AIR 2003 SC 2434	**relied on**	**Para 25**
2002 (4) SCC 297	**relied on**	**Para 26**
2002 (7) SCC 273	**relied on**	**Para 26, 27**
2002 (7) SCC 358	**relied on**	**Para 28**
AIR 2001 SC 1980	**relied on**	**Para 29**
2001 (8) SCC 257	**relied on**	**Para 30**
AIR 2001 SC 1121	**relied on**	**Para 30**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2684 of 2007.

From the Judgment & Order dated 24.5.2006 of the High Court of Kerala at Ernakulum in Writ Appeal No. 1774 of 2003-C.

Syed Shahid Hussain Rizvi and D.K. Pradhan for the Appellants.

V. Shekhar, S. Ganesh (for V. Sivasubramanian), G. Prakash and Vipin Nair (for Temple Law Firm) 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

judgment/order of the Full Bench of the High Court of Kerala at Ernakulam dated 24th May, 2006 passed in Writ Appeal No. 1774 of 2003. By that judgment the writ appeal filed by the appellants against the judgment of a learned Single Judge dated 24th September, 2003 has been dismissed.

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

The dispute in this appeal is about the inter se seniority on the post of Block Development Officer between the general category candidates (the respondent Nos.1 to 5 herein) and the Scheduled Caste/Scheduled Tribe candidates (the appellants herein).

The rule relevant for this purpose is Rule 27(c) of the Kerala State and Subordinate Services Rules, 1959 (for short 'the Rules'), which states:

> "27(c) Notwithstanding anything contained in clauses (a) and (b) above, the seniority of a person appointed to a class, category or grade in a service on the advice of the Commission shall, unless he has been reduced to a lower rank as punishment, be determined by the date of first effective advice made for his appointment to such class, category or grade and when two or more persons are included in the same list of candidates advised, their relative seniority shall be fixed according to the order in which their names are arranged in the advice list."

A perusal of the above rule shows that seniority is to be determined by the date of first effective advice made by the Public Service Commission to the State Government for appointment.

Admittedly, in the present case, the first effective advice for the appellants was made by the Kerala Public Service

Commission on 8.7.1992, and they joined between 13.8.1992 and 22.10.1992 whereas the advice for the respondent Nos. 1 to 5 was made on 6.4.1993, and they were appointed as B.D.O. On 28.9.1993 and they joined between 6.10.1993 and 17.11.1993. Hence, it is obvious from Rule 27(c) of the Rules that the appellants are senior to the private respondents. However, both the learned Single Judge and Full Bench have held in favour of the respondents.

We have carefully perused the judgments of the Full Bench and the learned Single Judge, and we regret we cannot agree with them.

The Full Bench and Single Judge have relied on equity, justice and good conscience, rather than law. We are of the opinion that this approach is incorrect. When there is a conflict between law and equity, it is the law which is to prevail. Equity can only supplement the lawwhen there is a gap in it, but it cannot supplant the law.

In the present case, Rule 27(c) clearly makes the appellants senior to the respondents as the advice for their appointments were made prior to that for the respondents.

Mr. V.Shekhar, learned senior counsel, appearing for the private respondents, however, submitted that due to certain obstructions for which the private respondents are not to be blamed, their first effective advice was sent later. Mr. Shekhar submitted that the rank list for the respondents was prepared after due selection on 25.11.1987, but the advice was not sent by the Public Service Commission till 1993 because of a letter dated 30.11.1988 issued by the Chief Secretary, Kerala Government directing the Commissioner of Rural Development to start applying the ratio in respect of cadre strength instead of the practice being followed. Since the respondents' rank list was expiring on 24.11.1990, they apprehended that they would not get appointment, and hence they filed writ petition No. 9161 of 1989 in the High Court. Ultimately, the writ petition was

allowed and the order of the Chief Secretary set aside, but in the meantime, the State Government issued notification dated 5.12.1989 inviting applications from SC/ ST candidates for appointment as B.D.Os. under the special recruitment as per Rule 17A of the Rules. The rank list with regard to these SC/ ST candidates was published on 20.6.1992, and hence they were appointed before the candidates whose rank list was published in 1987 (the respondents herein). However, under Rule 27(c) what has to be seen for determining seniority is not the date when the rank list was published but the date when the advice was sent.

Mr. Shekhar has relied on the decision of this Court in *Dalilah Sojah vs. State of Kerala & Others,* (1998) 9 SCC 641. That decision, in our opinion, is clearly distinguishable as it makes no reference to Rule 27(c) of the Rules. Moreover, the observation therein that "when two vacancies arose on 6.10.72 the appellant had a right to be appointed against one of the vacancies" is clearly against the settled legal position that even a selected candidate has no indefeasible right to be appointed vide Constitution Bench decision in *Shankarsan Dash vs. Union of India,* AIR 1991 SC 1612, and several decisions thereafter.

In our opinion, Rule 27(c) of the Rules is plain and clear. Hence, the literal rule of interpretation will apply to it. No doubt, equity may be in favour of the respondents because they were selected earlier, but as observed earlier, if there is a conflict between equity and the law, it is the law which must prevail. The law, which is contained in Rule 27(c), is clearly in favour of the appellants.

Hence, we cannot accept the submission of the learned senior counsel for the private respondents. The language of Rule 27(c) of the Rules is clear and hence we have to follow that language.

In *M/s. Hiralal Ratanlal vs. STO,* AIR 1973 SC 1034, this Court observed:

> "In construing a statutory provision the first and foremost rule of construction is the literaly construction. All that the Court has to see at the very outset is what does the provision say. If the provision is unambiguous and if from the provision the legislative intent is clear, the Court need not call into aid the other rules of construction of statutes. The other rules of construction are called into aid only when the legislative intent is not clear."
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> (emphasis supplied)

It may be mentioned in this connection that the first and foremost principle of interpretation of a statute in every system of interpretation is the literal rule of interpretation. The other rules of interpretation e.g. the mischief rule, purposive interpretation etc. can only be resorted to when the plain words of a statute are ambiguous or lead to no intelligible results or if read literally would nullify the very object of the statute. Where the words of a statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule, vide *Swedish Match AB vs. Securities and Exchange Board, India,* AIR 2004 SC 4219. As held in *Prakash Nath Khanna vs. C.I.T.* 2004 (9) SCC 686, the language employed in a statute is the determinative factor of the legislative intent. The legislature is presumed to have made no mistake. The presumption is that it intended to say what it has said. Assuming there is a defect or an omission in the words used by the legislature, the Court cannot correct or make up the deficiency, vide *Delhi Financial Corporation vs. Rajiv Anand* 2004 (11) SCC 625. Where the legislative intent is clear from the language, the Court should give effect to it, vide *Government of Andhra Pradesh vs. Road Rollers Owners Welfare Association* 2004(6) SCC 210, and the Court should not seek to amend the law in the garb of interpretation.

As stated by Justice Frankfurter of the U.S. Supreme Court (see 'Of Law & Men : Papers and Addresses of Felix Frankfurter') :

> "Even within their area of choice the courts are not at large. They are confined by the nature and scope of the judicial function in its particular exercise in the field of interpretation. They are under the constraints imposed by the judicial function in our democratic society. As a matter of verbal recognition certainly, no one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. The great judges have constantly admonished their brethren of the need for discipline in observing the limitations. A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation. He must not read out except to avoid patent nonsense or internal contradiction."

As observed by Lord Granworth in *Grundy v. Pinniger,* (1852) 1 LJ Ch 405:

> " 'To adhere as closely as possible to the literal meaning of the words used, is a cardinal rule from which if we depart we launch into a sea of difficulties which it is not easy to fathom."

In other words, once we depart from the literal rule, then any number of interpretations can be put to a statutory provision, each Judge having a free play to put his own interpretation as he likes. This would be destructive of judicial discipline, and also the basic principle in a democracy that it is not for the Judge to legislate as that is the task of the elected representatives of the people. Even if the literal interpretation results in hardship

or inconvenience, it has to be followed (see G.P. Singh's Principles of Statutory Interpretations, 9th Edn. pp 45-49). Hence departure from the literal rule should only be done in very rare cases, and ordinarily there should be judicial restraint in this connection.

As the Privy Council observed (per Viscount Simonds, L.C.):

> "Again and again, this Board has insisted that in construing enacted words we are not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used."(see *Emperor v. Benoarilal Sarma,* AIR 1945 PC 48, pg. 53).

As observed by this Court in *CIT vs. Keshab Chandra Mandal,* AIR 1950 SC 265:

> "Hardship or inconvenience cannot alter the meaning of the language employed by the Legislature if such meaning is clear on the face of the statute".

Where the words are unequivocal, there is no scope for importing any rule of interpretation vide *Pandian Chemicals Ltd. vs. C.I.T.* 2003(5) SCC 590.

It is only where the provisions of a statute are ambiguous that the Court can depart from a literal or strict construction vide *Narsiruddin vs. Sita Ram Agarwal* AIR 2003 SC 1543. Where the words of a statute are plain and unambiguous effect must be given to them vide *Bhaiji vs. Sub-Divisional Officer, Thandla* 2003(1) SCC 692.

No doubt in some exceptional cases departure can be made from the literal rule of the interpretation, e.g. by adopting a purposive construction, Heydon's mischief rule, etc. but that should only be done in very exceptional cases. Ordinarily, it is not proper for the Court to depart from the literal rule as that

would really be amending the law in the garb of interpretation, which is not permissible vide *J.P. Bansal vs. State of Rajasthan & Anr.* AIR 2003 SC 1405, *State of Jharkhand & Anr. vs. Govind Singh* JT 2004(10) SC 349 etc.. It is for the legislature to amend the law and not the Court vide *State of Jharkhand & Anr. vs. Govind Singh* JT 2004(10) SC 349. In *Jinia Keotin vs. K.S. Manjhi,* 2003 (1) SCC 730, this Court observed :

> " The Court cannot legislate.....under the garb of interpretation.....".

Hence, there should be judicial restraint in this connection, and the temptation to do judicial legislation should be eschewed by the Courts. In fact, judicial legislation is an oxymoron.

In *Shiv Shakti Co-operative Housing Society vs. Swaraj Developers* AIR 2003 SC 2434, this Court observed:

> "It is a well settled principle in law that the Court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent."

Where the language is clear, the intention of the legislature has to be gathered from the language used vide *Grasim Industries Limited vs. Collector of Customs* 2002 (4) SCC 297 and *Union of India vs. Hamsoli Devi* 2002 (7) SCC 273.

In *Union of India and another vs. Hansoli Devi and others* 2002(7)SCC (vide para 9), this Court observed :

> "It is a cardinal principle of construction of a statute that when the language of the statute is plain and unambiguous, then the court must give effect to the words used in the statute and it would not be open to the courts to adopt a hypothetical construction on the grounds that

such construction is more consistent with the alleged object and policy of the Act."

The function of the Court is only to expound the law and not to legislate vide *District Mining Officer vs. Tata Iron and Steel Company* 2002 (7) SCC 358. If we accept the interpretation canvassed by the learned counsel for the private respondents, we will really be legislating because in the guise of interpretation we will be really amending Rule 27(c) of the Rules.

In *Gurudevdatta VKSSS Maryadit vs. State of Maharashtra* AIR 2001 SC 1980, this Court observed :

"It is a cardinal principle of interpretation of statute that the words of a statute must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning, unless such construction leads to some absurdity or unless there is something in the context or in the object of the statute to suggest to the contrary. The golden rule is that the words of a statute must prima facie be given their ordinary meaning. It is yet another rule of construction that when the words of the statute are clear, plain and unambiguous, then the Courts are bound to give effect to that meaning, irrespective of the consequences. It is said that the words themselves best declare the intention of the law-giver. The Courts are adhered to the principle that efforts should be made to give meaning to each and every word used by the legislature and it is not a sound principle of construction to brush aside words in a statute as being inapposite surpluses, if they can have a proper application in circumstances conceivable within the contemplation of the statute".

The same view has been taken by this Court in *S. Mehta vs. State of Maharashtra* 2001 (8) SCC 257 (vide para 34) and *Patangrao Kaddam vs. Prithviraj Sajirao Yadav Deshmugh* AIR 2001 SC 1121.

The literal rule of interpretation really means that there should be no interpretation. In other words, we should read the statute as it is, without distorting or twisting its language.

We may mention here that the literal rule of interpretation is not only followed by Judges and lawyers, but it is also followed by the lay man in his ordinary life. To give an illustration, if a person says "this is a pencil", then he means that it is a pencil; and it is not that when he says that the object is a pencil, he means that it is a horse, donkey or an elephant. In other words, the literal rule of interpretation simply means that we mean what we say and we say what we mean. If we do not follow the literal rule of interpretation, social life will become impossible, and we will not understand each other. If we say that a certain object is a book, then we mean it is a book. If we say it is a book, but we mean it is a horse, table or an elephant, then we will not be able to communicate with each other. Life will become impossible. Hence, the meaning of the literal rule of interpretation is simply that we mean what we say and we say what we mean.

In this connection, we may also refer to the Mimansa Rules of Interpretation which were our traditional principles of interpretation used for thousand of years by our jurists. It is deeply regrettable that in our law courts today these principles are not cited. Today, our so called educated people are largely ignorant about the great intellectual achievements of our ancestors, and the intellectual treasury which they have bequeathed to us. The Mimansa Rules of Interpretation are one of these great achievements, but regrettably they are hardly ever used in our law courts.

It may be mentioned that it is not stated anywhere in the Constitution of India that only Maxwell's Principles of Interpretation can be utilised. We can utilise any system of interpretation which can help to resolve a difficulty. Principles of interpretation are not principles of law but are only a

methodology for explaining the meaning of words used in a text. There is no reason why we should not use Mimansa Principles of Interpretation in appropriate occasions.

In Mimansa, the literal rule of interpretation is known as the 'Shruti' or Abhida' Principle. This is illustrated by the Garhapatya nyaya (In Mimansa Maxims are known as nyayas). There is the vedic verse: "Aindrya garhapatyam upatishthate", which means "By the Mantra addressed to Indra establish the household fire." This verse can possibly have several meanings viz. (1) worship Indra (2) worship Garhapatya (the household fire) (3) worship both, or (4) worship either.

However, since the word 'Garhapatyam' is in the objective case, the verse has only one meaning, that is, 'worship Garhapatya'. The word 'Aindrya' means 'by Indra', and hence the verse means that by verses dedicated to Indra one should worship Garhapatya. The word 'Aindrya' in this verse is a Linga, (in Mimansa Linga means the suggestive power of a word), while the words 'Garhapatyam Upatishthate' are the Shruti. According to the Mimansa principles, the Shruti (literal meaning) will prevail over the Linga (suggestive power).

It is not necessary to go into details, but reference can be made to the Book 'Mimansa Rules of Interpretation' by K.L.Sarkar which is a collection of Tagore Law Lectures delivered by him in 1909. According to the Mimansa Principles, the Sruti Principle or literal rule of interpretation will prevail over all other principles, e.g., Linga, Vakya, Prakarana, Sthana, Samakhya etc.

As a result of the above discussion, this appeal is allowed and the impugned judgment of the Full Bench of the High Court as also the judgment of the learned Single Judge are set aside and the writ petition filed by the private respondents before the High Court is dismissed. No costs.

D.G. Appeal allowed.

RAVINDRA PAL SINGH

v.

AJIT SINGH & ANR

(Criminal Appeal No. 748 of 2011)

MARCH 17, 2011

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

Bail – Complainant's son allegedly shot down by the police – CBI after investigation of the matter submitted charge sheet against the accused police officials – Bail application – Rejected by the Sessions Judge –High Court, however, granted bail – On appeal, held: The allegations made against the accused-police officials cannot be brushed aside at this stage – CBI has already submitted charge-sheet – High Court ought to have taken into consideration the serious nature of the allegations, the possibilities of undue influence being exerted on the prosecution witnesses at the instance of the police officials – High Court committed serious error in granting bail to the accused-police officials – Penal Code, 1860 – ss. 302, 364, 201 and 120B.

The appellant filed a case against the police personnel under Section 120B, 364, 302, 201 IPC. It is the case of the appellant that his son was illegally picked up by the Dehradun Police and killed in cold blood. According to the post mortem report, a total of 29 bullets were fired at the deceased, 17 of these bullets hit the deceased at a very close range and 9 bullets were fired from a maximum distance of 3 feet. The investigation of the case was handed over to the CBI.

The first respondent along with other 4 accused police officers filed bail application in the Court of Sessions Judge. The Sessions Judge rejected the bail

application. The respondents thereafter moved the application for bail in the High Court. The High Court granted bail to the accused.

In the instant appeals, the appellant has challenged the orders passed by the High Court granting bail to the respondents. The appellant submitted that the High Court has been overly influenced by the fact that the CBI was not represented at the time when the bail application came up for hearing. According to the appellant, presence or absence of the counsel for the CBI was wholly irrelevant for examining the merits of the application for bail. He submitted that all the accused being police officials, the complainant and other witnesses are always under constant threat and there is *prima facie* involvement of all the accused in a case of false encounter.

Allowing the appeals, the Court

HELD:1. The allegations made against the respondents cannot be brushed aside at this stage. The CBI after investigation of the matter has already submitted the charge sheet. According to the prosecution all the accused were involved in the fake encounter in which an innocent young man lost his life. The High court also ought to have taken into consideration the serious nature of the allegations, the possibilities of undue influence being exerted on the witnesses for the prosecution at the instance of the police officials. The High Court committed serious error in granting bail to the respondents. [Para 10] [950-E-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 748 of 2011.

From the Judgment & Order dated 20.10.2010 of the High Court of Uttarakhand at Nainital in Bail Application No. 70 of 2010.

WITH

Criminal Appeal Nos, 754, 752, 749, 753, 750, 751 of 2011.

A.T. Rao and A. Subba Rao for the Appellant.

Gopal Subramanium, S.G. P.P. Malhotra, ASG, Brijender Chahar, Sushil Kumar, Rajat Khattry, Subramanium Prasad, Vinay Arora, Aditya Kumar, Vivek Kochar, S.S. Rawat, Sanjay Jain, Shweta Verma and Aman Ahuwalia (for Arvind Kumar Sharma) for the Respondents.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. Leave granted.

2. In all the appeals, the original complainant has challenged the separate orders passed by the High Court of Uttarakhand at Nainital in Bail Application No.70 of 2010 in SLP(Crl.)No.3520 of 2010, Bail Application No.73 of 2010 in SLP(Crl.)No.3573 of 2010 Bail Application No.75 of 2010 in SLP(Crl.)No.3527 of 2010, Bail Application No. 46 of 2010 in SLP(Crl)No.3521 of 2010, Bail Application No. 72 of 2010 in SLP(Crl)No.3529 of 2010, Bail Application No. 45 of 2010 in SLP(Crl)No.3522 of 2010, Bail Application No. 74 of 2010 in SLP(Crl)No.3523 of 2010 granted bail to the respondents herein.

3. It is the case of the appellant that the deceased Ranbir Singh was a MBA student. On 2nd of July, 2009, he had gone to Dehradun in search of a job. On 3rd of July, 2009, he was illegally picked up by the Dehradun Police. At around 3.30 on the same day, he was killed in cold blood by the accused police officials. According to the post mortem report, the police officials fired a total of 29 bullets at the deceased, 17 of these bullets hit the deceased at a very close range and 9 bullets were fired from a maximum distance of 3 feet.

4. On receiving information from some media persons that

his son had been shot down by the police at Dehradun, the complainant reached Dehradun and tried to contact the police officials. He was, however, threatened by one of the police officer that if he tries to interfere in the matter, he would also be eliminated like his son.

5. In the appeal, the appellant has given details of the prosecution version which are not necessary for us to recapitulate at this stage. After performing the last rites of his son, the complainant went back to Dehradun and filed a case against the police personnel which was recorded as FIR No.101/2009 dated 6.7.2009 under Section 120B, 364, 302, 201 IPC. On 30th July, 2009, for obvious reasons, the investigation of the case was handed over to the CBI, SCB, Lucknow.

6. The first respondent herein along with other 4 accused police officers filed bail application No.991/2009 in the Court of Sessions Judge, 4th FTC Dehradun for bail.

7. The learned Sessions Judge by order dated 10.12.2009 rejected the bail application. The respondent herein thereafter moved the application for bail in the High Court. A vacation Judge of the High Court by order dated 20th January, 2001 granted bail to the accused. Aggrieved by the aforesaid orders, the complainant, father of the deceased, has moved the petitions by special leave.

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

9. Mr.Malhotra, learned Additional Solicitor General submitted that the High Court committed an error in granting bail without any justification. Learned counsel appearing for the appellant emphasised the seriousness of the offences committed. Learned counsel appearing for the complainant submitted that the High Court has been overly influenced by the fact that the CBI was not represented at the time when the bail application came up for hearing. According to the complainant,

presence or absence of the counsel for the CBI was wholly irrelevant for examining the merits of the application for bail. He submitted that all the accused being police officials, the complainant and other witnesses are always under constant threat. There is prima facie involvement of all the accused in a case of false encounter. According to the prosecution, not only an innocent person has been eliminated but efforts have been made by all concerned to cover up the crime. The High Court merely noticed the submissions made by the counsel for the accused and arbitrarily granted bail. Mr.Sushil Kumar, learned counsel appearing for the respondents has submitted that there is no danger to either the complainant or any of the witnesses, as all the police officials have now been posted out of the district. Learned counsel further submitted that a perusal of the orders passed in the case of some of the accused would show that the bail applications were contested and vehemently opposed by the CBI.

10. We have considered the submissions made by the learned counsel. We are of the considered opinion that the allegations made against the respondents cannot be brushed aside at this stage. The CBI after investigation of the matter has already submitted the charge sheet. According to the prosecution all the accused were involved in the fake encounter in which an innocent young man lost his life. The High Court also ought to have taken into consideration the serious nature of the allegations, the possibilities of undue influence being exerted on the witnesses for the prosecution at the instance of the police officials. In our opinion, the High Court committed serious error in granting bail to the respondents.

11. Keeping in view the facts and circumstances of these cases, we allow the appeals and set aside the impugned orders of the High Court.

B.B.B. Appeals allowed.

COMMERCIAL TAXES OFFICER
v.
M/S. JALANI ENTERPRISES
(Civil Appeal No. 2558 of 2011)

MARCH 17, 2011

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

Rajasthan Sales Tax Act, 1954: Notification dated 29.03.2001, Entry No. 184:

Jaljira – Sales tax – Levy of – Held: From the manner and method of preparation of the product Jaljira, it is found that Jaljira is a mixture of different spices after grinding and mixing – Sales tax is levied on sale of commercial commodities, and individual spices could be termed as different commercial commodities – Therefore, Jaljira is a Masala packed into packets of different nature/quantity and sold to the consumers – It would come within the Entry No. 184 and taxable at the rate of 16%.

Aachar Masala, Jaljeera powder, Anar Masala, Methi Chatani, Pudina, Lehsoon Chatni, Chat Masala, Kitchen Masala, Mangodi Masala, Sambhar Masala, Dal Masala, Kasuri Methi, Heena Powder, Shikkai Powder, Lahsoon powder – Sales tax – Levy of – Held: These would be Masala packed falling under Entry No. 184 of the notification dated 29.03.2001 – Thus, taxable at the rate of 16%.

Idli Mix and Dosa Mix – Sales Tax – Levy of – Held: Cannot be said to be Masala – Thus, would be excluded from being assessed for the purpose of sales tax assessment as 'masala'.

The question which arose for consideration in these appeals are whether Jaljira and similar other products as also Idli Mix and Dosa Mix are not Masala and therefore,

they are liable to be assessed to sales tax at the rate of 10% and not 16%.

Allowing the appeals, the Court

HELD: 1.1 Each one of the contents of the product Jaljira, namely Salt, Kala Namak, Nimbu Ka Sat (Citric Acid), Sonth, Kalimirch, Pudina, Hing, Jira and Lalmirch, relied upon by the High Court would indicate that most of the items used in the manufacture of Jaljira are nothing else but spices. They are grinded and mixed. When spices are grinded and mixed, it gives rise to a new product, which is a mixed masala. Different ingredients are used in preparation of Masala after grinding and mixing several ingredients and when they are so grinded they lose their own identity and character and a new product separately known to the commercial world comes into existence. Sales tax is levied on sale of commercial commodities, therefore, individual spices could be termed as different commercial commodities. When they are grinded and mixed they give rise to a separate commercial commodity altogether which could be taxed separately. [Para 17] [960-G-H; 961-A-C]

1.2 When one particular item is covered by one specified entry, then the Revenue is not permitted to travel to the residuary entry. If from the records it is established that the product in question could be brought under a specific entry then there is no reason to take resort to the residuary entry. There is no doubt that Jaljira is a drink. The contents of Jaljira is put into water and taken as digestive drink but from the manner and method of preparation of the product Jaljira, it is found that it is a mixture of different spices after grinding and mixing. Therefore, it is nothing but a Masala packed into packets of different nature/quantity and sold to the consumers. It would, therefore, for all practical purposes would come

within the Entry No. 184 and it cannot be said that it would come under the residuary entry as held by the High Court. [Para 17] [961-C-E]

1.3 The clarificatory letter dated 12.11.2001 which was issued by the Deputy Secretary, Finance Department, Tax Division, Government of Rajasthan specifically states that "Packed Masala" used in entry number 184 means, a Masala where two or more ingredients are mixed and sold in packed conditions. The said letter is in the nature of clarification of entry number 184. Although the said letter is an inter-departmental communication, the revenue authorities, namely, the appellant is governed and bound by the said letter though the said letter may not have been circulated to the respondent but it cannot be said that clarification given by the Department cannot be made use of for interpreting the entry in the notification. Even otherwise, the entries in the notification by themselves are quite clear to include the said product within the ambit and parameters of the expression packed masala and therefore, the assessing officer was justified in demanding sales tax from the respondent at the rate of 16% holding that the product manufactured by the respondent falls within the category of items included in Entry No. 184. The judgment and order passed by the High Court is set aside. The order dated 15.03.2004 passed by the Tax Assessment Officer is restored. [Paras 18, 19 and 20] [961-F-H; 962-A-D]

2. With regard to SLP (C) Nos. 4304 of 2009, concerning financial years of 1999-2000 and 2001-2002, the aforesaid findings and the conclusions arrived at would also be applicable so far as the products of the respondent-assessee such as Aachar Masala, Jaljeera powder, Anar Masala, Methi Chatani, Pudina, Lehsoon Chatni, Chat Masala, Kitchen Masala, Mangodi Masala, Sambhar Masala, Dal Masala, Kasuri Methi, Heena

Powder, Shikkai Powder, Lahsoon powder which would be held to be Masala packed falling under Entry No. 184 of the notification dated 29.03.2001. Idli Mix and Dosa Mix cannot be said to be Masala and therefore, the same would be excluded from being assessed for the purpose of sales tax assessment as 'masala'. The judgment and order passed by the High Court is set aside. The order passed by the Tax Assessment Officer is restored. [Paras 21, 22, 23 and 24] [962-D-H; 963-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2558 of 2011.

From the Judgment & Order dated 30.8.2007 of the High Court of Rajasthan at Jodhpur in SBCST Revision No. 63 of 2007.

WITH

C.A. Nos. 2559, 2561, 2562 and 2563 of 2011.

Abhishek Gupta, Milind Kumar and Jatinder Kumar Bhatia for the Appellant.

Puneet Jain, Trishna Moha, Sushil Kumar Jain and H.K. Puri for the Respondent.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. Leave granted.

2. Since the issues involved in these appeals are identical, we propose to dispose of all these appeals by this common Judgment and Order.

3. In appeals arising out of SLP (C) Nos. 11358 of 2008 and 15883 of 2008 the issue which falls for our consideration is as to whether Jaljira which is a product manufactured by the respondent herein is only an appetizer and is not a masala and therefore liable to sales tax at the rate of 10% and not 16%. In appeals arising out of SLP (C) Nos. 27432 of 2008 and 27433 of 2008 a similar question arises for consideration that as to

whether Jaljira and similar other products are not Masala and therefore they are liable to be assessed to sales tax at the rate of 10% and not 16%.

4. In order to decide the aforesaid issues some factual aspects are required to be mentioned. The respondent firm is a manufacturer and seller of Jaljira and some other products but in the present appeals we are concerned only with the product called Jaljira. The respondent deposited sales tax at the rate of 10% assuming that Jaljira is not a Masala and hence taxable at the general rate of 10% as residuary entry 199, which reads as under:

"199. General rate, that is all goods that are not covered by S. No. 1 – 198. 10%"

5. The counsel appearing for the appellant submitted that the respondent is liable to pay sales tax at the rate of 16% on the product manufactured by it and the assessing officer was justified in treating the respondent liable to pay sales tax at the rate of 16%.

6. On examining the entire matter it appears that a Notification being notification dated 26.03.1999 was issued by the State Government, which was to the following effect:

Sr. No.	Detail of Goods	Tax Rate
xxxxxx	xxxxxx	Xxxxxx
119	All kinds of eatables & non alcoholic potable liquids such as fruit syrups, distilled juices, jams [chatni, murabbas], fruit juice, dry milk power, drink concentrates of all types and forms, essence, concentrates, corn flaks and wheat flakes, custard powder, baking powder, ice-cream powder and **packed masala.**	12%

Subsequently another notification being notification dated 29.03.2001 was issued by the State Government to the following effect:

Sr. No.	Detail of Goods	Tax Rate
xxxxxx	xxxxxx	Xxxxxx
82	Dry Fruits, Supari, Kirana items, Masala (different from packed masala) such as Mirch, Dhanai, Saunf, Methi, Ajwain, Sua, Halsdi, Kathodi, Amchur, Elaichi, Jeera (cumin seed)	4%
184	All kinds of eatables & non alcoholic potable liquids such as fruit syrups, distilled juices, jams [chatni, murabbas], fruit juice, dry milk power, drink concentrate of all types and forms, essence, concentrates, corn flaks and wheat flakes, custard powder, baking powder, ice-cream powder and **packed masala.**	16%

Subsequent thereto also a notification was issued by the appellant herein on 22.03.2002 making the same effective from the date of its issuance, wherein Entry 80 includes the following:

Sr. No.	Detail of Goods	Tax Rate
80	Dry Fruits, Supari, Kirana items, Masala ([when sold in unmixed form, whether lose or in polyethylene packs]) like Mirchi, Dhaniya, sonf, methi, ajwain, suwa, haldi, kathodi, amchoor and asalia, jeera (cumin seed)	4%

Whereas Entry 186 includes the following:

Sr. No.	Detail of Goods	Tax Rate
186	All kinds of eatables & non-alcoholic potable liquids such as fruit syrups, distilled juices, jams [chatni, murabbas], fruit juices, drink concentrates of all types and forms, essences, concentrates, corn flaks and wheat flakes, custard powder, baking powder, ice-cream powder and [multi-ingredient packed masala].	16%

A letter dated 12.11.2001 was issued by the Deputy Secretary, Finance Department, Tax Division, Government of Rajasthan to the Commissioner, Commercial Taxes Deptt, Rajasthan, Jaipur, which reads as follows:

"……..I am to state that "Packed Masala" used in entry number 184 means, a Masala where two or more ingredients are mixed and sold in packed conditions. Spices sold singly will continue to be taxed as per entry number 82……"

7. In the backdrop of the aforesaid facts, an assessment order was passed by the assessing officer so far as respondent is concerned. In the said assessment order it is sated that the respondent has shown its product Jaljira, which is manufactured by it, as liable to sales tax at the general rate of 10%. The officer, however, referred to the contents of the notification dated 29.03.2001 holding that jaljira is a masala and the same falls in the category of packed masala and therefore liable to be taxed at the rate of 16% as mentioned under Entry No. 184 of rate notification.

8. On examining the entire matter the assessing officer held that Jaljira manufactured by the assessee is spice, which

is sold in different types of packing due to which it would come within the category of packed masala for which tax rate is 16%.

9. The respondent itself has described Jaljira as spice on the packed containers of Jaljira marketed by it. The officer also referred to the application dated 07.07.1984 filed by the proprietor of the Respondent firm for registration under Rajasthan Sales Tax Act as well as under the Central Sales Tax Act. In both the applications it is sated as follows:

> "Manufacturing of food products, mix MASALA, AURVEDIC MEDICINES, all types of MEDICINES, MEDICATED – NON MEDICATED food for sale."

10. There are other materials also which are referred to by the officer on record indicating that the assessee itself described the product Jaljira as Masala. That is how the product is described in the bill books of sale, even for the assessment year 2001-2002.

11. Placing reliance on all those facts the assessing officer held that the product manufactured by the assessee known and called as jaljira is a Masala falling under Entry 184. It is also undisputed fact in the present case that except for the assessment year 2001-2002 with which we are concerned, the respondent assessee is paying sales tax for subsequent assessment years for jaljira at the rate of 16% in view of the notification dated 22.03.2002 wherein it categorically sated that multi-ingredient packed masala would carry taxable rate of 16% in view of entry No. 186. The assessing officer has specifically stated that jaljira is multi-ingredient packed masala and therefore respondent is liable to pay sales tax on the manufactured Jaljira at the rate of 16%. But the submission of the Respondent is that for the assessment year in question, the said notification dated 22.03.2002 being not applicable and the earlier notification being applicable, rate of sales tax at the rate of 10% for the same is only payable.

12. Being aggrieved by the aforesaid order passed by the assessing officer, the respondent preferred an appeal before the Deputy Commissioner (Appeals) Commercial Taxes, Ajmer challenging the order passed by the Commercial Tax Officer, Special Circle-II, Jodhpur. The Deputy Commissioner (Appeals) by his order dated 01.08.2005 held that Jaljira is not a Masala and therefore tax levied at general rate of 10% was justified and he set aside the demand raised by the Assessing Authority.

13. Appellant filed two appeals before the Rajasthan Tax Board, Ajmer challenging the aforesaid order of Deputy Commissioner (Appeals), Ajmer. The Rajasthan Tax Board, Ajmer by its common order dated 11.12.2002 set aside the order dated 01.08.2005 passed by the Deputy Commissioner (Appeals) and restored the orders passed by the Assessing Authority.

14. Being aggrieved by the said order the respondent herein filed a Revision Petition before the Rajasthan High Court which came to be allowed by the High Court under the impugned judgment and order. Feeling aggrieved the appellant filed the present appeals on which we heard learned counsel appearing for the parties and also perused the records.

15. In the impugned judgment and order passed by the High Court it was held that Jaljira cannot be termed as a Masala in itself, but it is a mixture of masalas and other materials, which can be used for digestion. The High Court therefore held that Jaljira is nothing but edible preparation ready for use either directly or after dissolving in water for human consumption and as it is not used as additional constituent in any food substance, therefore, it cannot be termed as packed masala. The aforesaid findings were arrived at by the High Court after referring to the contents of Jaljira shown to be as follows:

Sr. No.	Name of Item	Percentage
1.	Salt	40%
2.	Kala Namak	1%
3.	Nimbu Ka Sat (Citric Acid)	8%
4.	Sonth	10%
5.	Kalimirch	10%
6.	Pudina	10%
7.	Hing	1%
8.	Jira	18%
9.	Lalmirch	2%

According to the High Court Jaljira would therefore fall in the residuary clause and therefore tax should be levied at the rate of 10% and not 16%.

16. The aforesaid findings of the High Court are challenged before us by the appellant. The counsel appearing for the appellant had taken us through all the documents on record. He submitted that respondent has itself shown the product manufactured by it Jaljira as Packed Masala and therefore the assessing officer was justified in treating the respondent liable to pay sales tax at the rate of 16%.

17. Each one of the contents of the product referred to above and relied upon by the High Court would indicate that most of the items used in the manufacture of Jaljira are nothing else but spices. They are grinded and mixed. When spices are grinded and mixed, it gives rise to a new product, which is a

mixed masala. Different ingredients are used in preparation of Masala after grinding and mixing several ingredients and when they are so grinded they lose their own identity and character and a new product separately known to the commercial world comes into existence. Sales tax is levied on sale of commercial commodities, therefore, individual spices could be termed as different commercial commodities. When they are grinded and mixed they give rise to a separate commercial commodity altogether which could be taxed separately. It is settled law that when one particular item is covered by one specified entry, then the Revenue is not permitted to travel to the residuary entry. If from the records it is established that the product in question could be brought under a specific entry then there is no reason to take resort to the residuary entry. There is no doubt that Jaljira is a drink. The contents of Jaljira is put into water and taken as digestive drink but when we look into the manner and method of preparation of the product Jaljira, we find that it is a mixture of different spices after grinding and mixing. Therefore, it is nothing but a Masala packed into packets of different nature/quantity and sold to the consumers. It would, therefore, for all practical purposes would come within the Entry No. 184 and it cannot be said that it would come under the residuary entry as held by the High Court.

18. The clarificatory letter dated 12.11.2001 which was issued by the Deputy Secretary, Finance Department, Tax Division, Government of Rajasthan is also placed on record which specifically states that "Packed Masala" used in entry number 184 means, a Masala where two or more ingredients are mixed and sold in packed conditions. The said letter is in the nature of clarification of entry number 184 with which we are concerned. Although the said letter is an inter departmental communication, the revenue authorities, namely, the appellant is governed and bound by the aforesaid letter although the said letter may not have been circulated to the respondent but it cannot be said that clarification given by the Department cannot

be made use of for interpreting the entry in the notification.

19. Even otherwise, in our considered opinion the entries in the notification by themselves are quite clear to include the product in question within the ambit and parameters of the expression packed masala and therefore the assessing officer was justified in demanding sales tax from the respondent at the rate of 16% holding that the product manufactured by the respondent falls within the category of items included in Entry No. 184.

20. Therefore, appeals arising out of SLP (C) Nos. 11358 of 2008, 15883 of 2008, 27432 of 2008 and 27433 of 2008 are allowed and the judgment and order passed by the High Court is set aside. The order dated 15.03.2004 passed by the Tax Assessment Officer is restored.

21. Having held thus, we may now examine the facts of the appeal arising out of SLP (C) Nos. 4304 of 2009. In this appeal, we are concerned with the two financial years, namely, financial years of 1999-2000 and 2001-2002. The aforesaid discussion and the findings and the conclusions arrived at would also be applicable so far the products of the respondent herein are concerned but except for product like Idli Mix and Dosa Mix.

22. Other products of the assessee such as Aachar Masala, Jaljeera powder, Anar Masala, Methi Chatani, Pudina, Lehsoon Chatni, Chat Masala, Kitchen Masala, Mangodi Masala, Sambhar Masala, Dal Masala, Kasuri Methi, Heena Powder, Shikkai Powder, Lahsoon powder, must be held to be Masala packed falling under Entry No. 184 of the notification dated 29.03.2001.

23. So far as Masala and other products are concerned the same principle would apply but at the same time Idli Mix and Dosa Mix cannot be said to be Masala and therefore the same would be excluded from being assessed for the purpose

of sales tax assessment as 'masala'.

24. In view of the above, appeal arising out of SLP (C) No. 4304 of 2009 is also allowed and the judgment and order passed by the High Court is set aside. The order passed by the Tax Assessment Officer is restored.

N.J. Appeals allowed.

COMMR.OF POLICE AND ORS

v.

SANDEEP KUMAR

(CIVIL APPEAL NO. 1430 OF 2007)

MARCH 17, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Service law: Appointment – Respondent applied for the post of Head Constable – Application form contained a question if he was ever arrested, prosecuted, kept under detention, fined or convicted by court of law for any offence – Respondent answered the question in negative – He qualified in all the tests – While filling the attestation form, he disclosed for the first time that he had been involved in a criminal case with his tenant which later on was compromised and he was acquitted – His candidature was cancelled on the ground that he made a false statement since he was involved in a criminal case – Aggrieved, the respondent filed petition before CAT – CAT dismissed the petition – High Court holding that cancellation of candidature of respondent was illegal – Justification of – Held: Justified – Respondent was 20 years of age when the incident had happened – At that age, young people often commit indiscretions, and such indiscretions can often been condoned – They are not expected to behave in a mature manner as older people – The modern approach should be to reform a person instead of branding him as a criminal all his life – In the application form, the respondent may not have mentioned that he was involved in a criminal case out of fear of automatic disqualification – Even otherwise, it was not such a serious offence like murder, dacoity or rape, and, therefore, in such matters, a more lenient view should be taken.

Morris v. Crown Office **(1970) 2 Q.B. 114 – referred to.**

Case Law Reference:

(1970) 2 Q.B. 114 referred to Para 14

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1430 of 2007.

From the Judgment & Order dated 31.7.2006 of the High Court of Delhi at New Delhi in W.P. (C) No. 12565 of 2004.

T.S. Doabia, Rekha Pandey, Mukesh Verma and D.S. Mahra for the Appellants.

Deepak Kumar and Sudarsh Menon 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 judgment of the High Court of Delhi dated 31.07.2006.

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

The respondent herein-Sandeep Kumar applied for the post of Head Constable (Ministerial) in 1999. In the application form it was printed :

> "12(a) Have you ever been arrested, prosecuted kept under detention or bound down/fined, convicted by a court of law for any offence debarred/disqualified by any Public Service Commission from appearing at its examination/ selection or debarred from any Examination, rusticated by any university or any other education authority/Institution."

Against that column the respondent wrote : 'No'.

It is alleged that this is a false statement made by the respondent because he and some of his family members were involved in a criminal case being FIR 362 under Section 325/ 34 IPC. This case was admittedly compromised on 18.01.1998 and the respondent and his family members were acquitted on 18.01.1998.

In response to the advertisement issued in January 1999 for filing up of certain posts of Head Constables (Ministerial), the respondent applied on 24.02.1999 but did not mention in his application form that he was involved in the aforesaid criminal case.

The respondent qualified in all the tests for selection to the post of temporary Head Constable (Ministerial). On 03.04.2001 he filled the attestation form wherein for the first time he disclosed that he had been involved in a criminal case with his tenant which, later on, had been compromised in 1998 and he had been acquitted.

On 02.08.2001 a show cause notice was issued to him asking the respondent to show cause why his candidature for the post should not be cancelled because he had concealed the fact of his involvement in the aforesaid criminal case and had made a wrong statement in his application form. The respondent submitted his reply on 17.08.2001 and an additional reply but the authorities were not satisfied with the same and on 29.05.2003 cancelled his candidature.

The respondent filed a petition before the Central Administrative Tribunal which was dismissed on 13.02.2004. Against that order the respondent filed a writ petition which has been allowed by the Delhi High Court and hence this appeal.

The learned counsel for the appellants has submitted that the respondent should have disclosed the fact of his involvement in the criminal case even if he had later been acquitted. Hence, it was submitted that his candidature was rightly cancelled.

We respectfully agree with the Delhi High Court that the cancellation of his candidature was illegal, but we wish to give our own opinion in the matter.

When the incident happened the respondent must have been about 20 years of age. At that age young people often commit indiscretions, and such indiscretions can often been condoned. After all, youth will be youth. They are not expected to behave in as mature a manner as older people. Hence, our approach should be to condone minor indiscretions made by young people rather than to brand them as criminals for the rest of their lives.

In this connection, we may refer to the character 'Jean Valjean' in Victor Hugo's novel 'Les Miserables', in which for committing a minor offence of stealing a loaf of bread for his hungry family Jean Valjean was branded as a thief for his whole life.

The modern approach should be to reform a person instead of branding him as a criminal all his life.

We may also here refer to the case of Welsh students mentioned by Lord Denning in his book 'Due Process of Law'. It appears that some students of Wales were very enthusiastic about the Welsh language and they were upset because the radio programmes were being broadcast in the English language and not in Welsh. Then came up to London and invaded the High Court. They were found guilty of contempt of court and sentenced to prison for three months by the High Court Judge. They filed an appeal before the Court of Appeals. Allowing the appeal, Lord Denning observed :-

> "I come now to Mr. Watkin Powell's third point. He says that the sentences were excessive. I do not think they were excessive, at the time they were given and in the circumstances then existing. Here was a deliberate interference with the course of justice in a case which was

> no concern of theirs. It was necessary for the judge to show – and to show to all students everywhere – that this kind of thing cannot be tolerated. Let students demonstrate, if they please, for the causes in which they believe. Let them make their protests as they will. But they must do it by lawful means and not by unlawful. If they strike at the course of justice in this land – and I speak both for England and Wales – they strike at the roots of society itself, and they bring down that which protects them. It is only by the maintenance of law and order that they are privileged to be students and to study and live in peace. So let them support the law and not strike it down.
>
> But now what is to be done? The law has been vindicated by the sentences which the judge passed on Wednesday of last week. He has shown that law and order must be maintained, and will be maintained. But on this appeal, things are changed. These students here no longer defy the law. They have appealed to this court and shown respect for it. They have already served a week in prison. I do not think it necessary to keep them inside it any longer. These young people are no ordinary criminals. There is no violence, dishonesty or vice in them. On the contrary, there was much that we should applaud. They wish to do all they can to preserve the Welsh language. Well may they be proud of it. It is the language of the bards – of the poets and the singers – more melodious by far than our rough English tongue. On high authority, it should be equal in Wales with English. They have done wrong – very wrong – in going to the extreme they did. But, that having been shown, I think we can, and should, show mercy on them. We should permit them to go back to their studies, to their parents and continue the good course which they have so wrongly disturbed."

[Vide : *Morris Vs. Crown Office,* (1970) 2 Q.B. 114]

In our opinion, we should display the same wisdom as displayed by Lord Denning.

As already observed above, youth often commit indiscretions, which are often condoned.

It is true that in the application form the respondent did not mention that he was involved in a criminal case under Section 325/34 IPC. Probably he did not mention this out of fear that if he did so he would automatically be disqualified.

At any event, it was not such a serious offence like murder, dacoity or rape, and hence a more lenient view should be taken in the matter.

For the reasons above given, this Appeal has no force and it is dismissed. No costs.

D.G. Appeal dismissed.

RAVINDRA PAL SINGH

v.

SANTOSH KUMAR JAISWAL & ORS.

(TRANSFER PETITION (CRIMINAL) NO. 222 OF 2010)

MARCH 17, 2011

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

CODE OF CRIMINAL PROCEDURE, 1973:

s. 406 – Transfer petition – Complaint against police officials for killing a man in an alleged fake encounter in Dehradun – Investigation entrusted to CBI – Father of deceased seeking transfer of case to Ghaziabad/Lucknow – Held : It is necessary to ensure that there is no possibility of any undue influence being exerted by the respondents on the prosecution – The complainant has made a serious grievance about the manner in which the prosecution has been conducted – Prayer for transfer of the case to Ghaziabad/ Lucknow has been resisted by the respondent expressing similar apprehension about undue influence being exerted by the petitioner – Case is, therefore, transferred from the Court of Special Judicial Magistrate, CBI, Dehradun to the Court of Special Judge, CBI, Delhi.

The son of the transfer petitioner was stated to have been killed in a fake encounter by the police in Dehradun. The petitioner got registered an FIR against the respondents-police officials, but as there was no progress, the investigation was entrusted to CBI. However, the police officials were stated to have continued to exert influence on investigation. It was alleged by the petitioner that he was threatened by the local police and he could not even engage an advocate to file an application for cancellation of bail of the respondents.

Disposing of the petition, the Court

HELD:

In the peculiar facts and circumstances of the case, it is necessary to ensure that there is no possibility of any undue influence being exerted by the respondents on the prosecution. The complainant has made a serious grievance about the manner in which the prosecution has been conducted. The Court would refrain from recording any firm opinion on the issue, at this stage. However, at the same time it must be ensured that the prosecution witnesses are able to depose without any fear of repercussions. This can only be ensured by transferring the criminal case out of the area in which no allegations could be made of undue influence against the prosecution. The prayer made by the petitioner was for transfer of the case to the CBI Court at Ghaziabad/ Lucknow. However, the accused have also expressed similar apprehension about undue influence being exerted by the petitioner, if the case is transferred to the Court at Ghaziabad/Lucknow. Therefore, purely in the interest of justice it is deemed appropriate to transfer the case to Delhi. Case Crime No. 3 of 2010 *State through CBI vs. S.K. Jaiswal* **is transferred from the Court of Special Judicial Magistrate, CBI, Dehradun to the Court of Special Judge, CBI, Delhi, for trial or its assignment to an appropriate court, as the Special Judge may consider it fit and proper. [para 6-7] [976-B-F]**

CRIMINAL ORIGINAL JURISDICTION : Transfer Petition (Criminal) No. 222 of 2010.

Petition Under Section 46 Code of Criminal Procedure.

A.T. Raom and A. Subba Rao for the Petitioner.

Gopal Subramanium, S.G. P.P. Malhotra, ASG, Sushil

Kumar, Brijender Chahar, Rajat Khattry, Vinay Arora, Aditya Kumar, Vivek Kochar, S.S. Rawat, Sanjay Jain, Shweta Verma, Aman Ahluwalia, Subramonium Prasad and Arvind Kumar Sharma for the Respondents.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. This transfer petition has been filed by the father of Ranbir Singh (hereinafter referred to as 'the deceased'), who according to the prosecution, was killed by the respondents in a fake encounter. On 2nd of July, 2009, the deceased who was a MBA student had gone to Dehradun in search of a job and stayed at Digambar Jain Mandir, Dharmasala. On 3rd of July, 2009, he was arrested by the Police of Police Station Dalanwala at around 1312 hrs. According to the prosecution, this can be seen from the record of Global Positioning System (GPS) log of the vehicle of SHO, Dalanwala. At around 1530 hrs on the same day, the deceased was killed in a cold blooded manner by pumping 29 bullets into him by the police officials. It is the case of the prosecution that Santosh Kumar Jaiswal (A1) had fired 2 bullets from his service revolver, Neeraj Kumar, SI (A4) fired 2 bullets from his revolver; Chandra Mohan Singh Rawat (A6) fired 6 bullets from his pistol; Gopal Dutt Bhatt (A2) fired 7 bullets from his pistol; NItin Chouhan (A5) fired 6 bullets from his pistol; Rajesh Bisht (A3) fired 7 bullets from his pistol and Ajit Singh (A7) fired 2 bullets from AK-47. It is also alleged that 5 bullets were fired by police officials from the 9 mm Pistol, which was subsequently planted by them on the deceased to camouflage the fake encounter into a real encounter. The CFSL Report has confirmed that 29 bullets were fired at the deceased. Seventeen bullets hit him from a very close range as there was blackening surrounding the wounds. It was also opined that atleast 9 bullets were fired at the deceased from actual distance of 3 feet. The father of the deceased was informed by media persons that his son had been shot down by the police at Dehradun. He reached Dehradun in the night itself. When he tried to contact the police

officials, he was threatened by one of the police officers, namely, Ajay Singh C.O. Dalanwala that if he tries to interfere in the matter, he would also be eliminated like his son. On 4th July, 2009, the complainant went to the hospital where he was again threatened by another police officer, namely Mr. Tamta. Thereafter, the complainant took the body of his son to Meerut to perform his last rites. After performing the last rites of his son, the complainant came back to Dehradun and got registered FIR No.101 of 2009 dated 6th July, 2009. As the investigation was not progressing due to the influence of the local police, the matter was entrusted to the CBI for investigation. However, the police officials continue to exert influence even on the investigation which was being conducted by the CBI.

2. In order to cover up the fake encounter, the deceased had been made an accused in a case of theft and dacoity by the police officials. It was alleged that Ranbir Singh and his co-accused were planning to commit robbery in the house of one Kavita Saxena situated at Madhuban Enclave, Mohini Road, Dehradun. Ranbir Singh, the deceased, was suspected to be in conspiracy with his friend Shekhar Tyagi, Ram Kumar, Ashok Panwar and Amit Bhatnagar. In order to commit the robbery, the deceased and his friends had procured and were in possession of lethal weapons. The deceased and his companions were said to be in possession of one katta. They had reached Dehradun on 2nd July, 2009. They had planned to commit the robbery on 3rd July, 2009. It was further the case of the respondents that the deceased and his friends had stayed at Flat No.9 of Jain Dharamshala, Gandhi Road, Dehradun on the night of 2nd July, 2009. On 3rd July, 2009, they left the Jain Dharamshala at about 1230 hrs. At that time, the deceased and his friend were carrying a black bag containing katta, ropes and "cello tape" etc. on a motor cycle. They were being followed by Ram Kumar. Ashok had been sent to see the lane in which the house of Kavita Saxena was located. They were waiting for Ashok to come back with the

information at a place near Gurudwara on Mohini road. At about 1245 hrs. they were met by G.D. Bhatt, S.I. Incharge Araghar Chowki who was on routine patrol checking. Whilst respondent No. 2 was checking the deceased and his friends, an altercation broke out between them. In the altercation, the deceased attacked respondent No. 2 and snatched his service pistol. At that stage, a passerby, Anjum Parvej Khan intervened and fired a shot in the air from his licenced pistol. The deceased and his companion fled away on a motor cycle along with service pistol which they had stolen from S.I. G.D. Bhatt. According to the respondents, the deceased was killed in an encounter with the police personnel in cross firing. Consequently, an FIR was registered against the deceased and his associates on 3rd July, 2009 under Section 394, IPC. Another FIR was also registered under Section 307 IPC against the deceased and his associates. The motor cycle was also recovered from the place where the deceased was killed in the encounter. According to the respondents, even the motor cycle had earlier been stolen by the deceased and his associates. Subsequently, chargesheet had been filed against the deceased and his associates under Sections 120B, 392, 333 and 411 IPC.

3. It is the case of the respondents that the transfer petition is wholly misconceived. The investigation has been transferred to the CBI. The CBI has submitted a closure report in the case registered against the deceased and his companion. Clearly, therefore, the police officers cannot be said to be exerting any influence on the proceedings in court. Once the investigation has been entrusted to the CBI, the local police has no further role to play. Further more, answering respondents are no longer posted at Dehradun. Even otherwise the respondents are not high officials and cannot exert any influence on the State. One of the respondents is an Inspector. Five respondents are Sub-Inspectors and the rest are in the rank of Constables. The impartiality of the State is also apparent that all the respondents have been transferred out of Dehradun.

4. The justification given by the respondents is, however, controverted by the complainant illustrating the influence wielded by the respondents. It is highlighted that even the transfer of the case to the CBI has made no difference. In fact, none of the police officers were even suspended. All the accused had managed to create such circumstances which led to the High Court granting bail to the respondents. The complainant apprehends that the prosecuting agency at Dehradun will not properly conduct the case. It will not be able to resist the influence of the accused. The influence of the accused is such that the complainant was not able to even engage an advocate to file application for cancellation of bail in the High Court against the respondents. Even the CBI counsel was deliberately absent when the application for bail was heard by the High court only to help the respondents.

5. We have heard the learned counsel for the parties at length. We are of the considered opinion that the apprehensions expressed by the complainant, father of the deceased, cannot be said to be unfounded. Mr. Sushil Kumar, learned counsel appearing for the respondents submitted that the deceased and his friends were in possession of lethal weapons at a very crucial and sensitive time. According to the learned counsel, on that very day the President of India was due to visit Dehradun, therefore, there was very intensive checking. At the relevant time, when the deceased and his friends were stopped for checking they became nervous. There was a scuffle between the deceased and the police and in the process, the deceased snatched the service revolver from the Inspector G.D. Bhatt. As a consequence, there was a genuine encounter in which unfortunately the son of the complainant was hit by some bullets in the cross fire. Learned counsel further submitted that merely because the accused in the case are police officials would not lead to a presumption that there would not be a fair trial in the State of U.P. He submitted that all the concerned police officials have been transferred out of Dehradun. They have in fact been put on non active duties. In the event, the case

is transferred out of State of U.P. it would cause injustice to respondents. According to the learned counsel the respondents are low ranking police officials who would not be able to bear the expenses in defending themselves at a court which is situated a long distance away.

6. In our opinion, given the peculiar facts and circumstances of this case, it is necessary to ensure that there is no possibility of any undue influence being exerted by the respondents on the prosecution. The complainant has made a serious grievance about the manner in which the prosecution has been conducted. We would refrain from recording any firm opinion on the issue, at this stage. However, at the same time it must be ensured that the prosecution witnesses are able to depose without any fear of repercussions. This can only be ensured by transferring the criminal case out of the area in which no allegations could be made of undue influence, against the prosecution.

7. The prayer made by the petitioner was for transfer of this case to the CBI Court at Ghaziabad/Lucknow. However, the accused had expressed similar apprehension about undue influence being exerted by the petitioner, if the case is transferred to the Court at Ghaziabad/Lucknow. Therefore, purely in the interest of justice, we deem it appropriate to transfer the case to Delhi. Case Crime No. 3 of 2010 titled State through CBI vs. S.K. Jaiswal is transferred from the Court of Special Judicial Magistrate, CBI, Dehradun to the Court of Special Judge, CBI, Delhi, for trial or its assignment to an appropriate court, as the Special Judge may consider it fit and proper.

R.P. Transfer Petition disposed of.`

MRS. RUBI (CHANDRA) DUTTA

v.

M/S. UNITED INDIA INSURANCE CO. LTD.

(CIVIL APPEAL NO. 2588 OF 2011)

MARCH 18, 2011

[DALVEER BHANDARI AND DEEPAK VERMA, JJ]

CONSUMER PROTECTION ACT, 1986:

s.12 read with s. 21(b) – Complaint by insured against insurer for reimbursement of damages, caused to the insured vehicle in an accident – District Forum allowed the claim to a sum of Rs. 4 lakh – State Commission reduced the claim to Rs.2,72,517/- – National Commission, in revision, setting aside the finding of the two fora and holding that the driver had no valid licence on the relevant date – Held: From the evidence on record it has been clearly established that at the relevant time the driver had a valid driving licence – Since no revision was filed by the insured, against the amount allowed by the State Commission, compensation cannot be enhanced beyond that – Though the Act does not contain any provision for granting interest, in order to do complete justice, invoking provisions of s.34 CPC, the insurer will pay interest @ 9% on the amount awarded by State Commission from the date of the claim petition till the payment is made – Code of Civil Procedure, 1908 – s.34 – Interest – Constitution of India, 1950 – Article 142 – Motor Vehicles Procedure Manual (promulgated by Government of West Bengal).

s..21(b) – Revisional power of National Commission – In the claim petition filed by insured against insurer both, the District Forum and the State Commission, after considering the evidence on record, recorded a finding that on the date of the accident, the driver of the bus was holding a valid licence to drive the bus – National Commission set aside the said

finding and held that the driver had no valid licence on the relevant date – Held: Revisional power u/s 21(b) can be exercised only if there is some prima facie jurisdictional error appearing in the impugned order, and only then, may the same be set aside – In the instant case, there was no jurisdictional error or miscarriage of justice, which could have warranted the National Commission to have taken a different view than what was taken by the two Forums – The order of National Commission set aside.

The insured-appellant filed a claim petition u/s 12 of the Consumer Protection Act, 1986, stating that her bus which was insured with the respondent company was damaged in an accident. She claimed Rs. 5,33,782/- as compensation towards the repairs of the bus. The insurer besides resisting the claim as exorbitant, contended that on the day of accident the bus driver had no valid licence. The District Forum, after considering the evidence adduced by the claimant and the court witness, namely, the authorized officer of the R.T.O and the documentary evidence produced through him, held that the driver was holding a valid licence on the relevant date to drive the bus, and allowed Rs.4 lakh as compensation to be paid by the insurer. The State Commission upheld the finding but, relying on the evidence of the surveyor, reduced the compensation to Rs.2,72,517/-. However, the National Commission, in revision, held that the driver of the bus was not holding a valid driving licence at the relevant point of time, and quashed the orders of the two forums. Aggrieved, the insured filed the appeal.

Partly allowing the appeal, the Court

HELD: 1.1. The Motor Vehicles Procedure Manual promulgated by the Government of West Bengal lays down the procedure to be followed for obtaining a duplicate driving licence. In the instant case, the

deposition of the Court witness, namely, the authorized officer of the RTA, states that the said procedure had been adopted by head office at the time of issuance of duplicate license. In view of the admission made by him, there remains no doubt that the duplicate licence was issued by the office after checking the previous credentials of the driver and following the normal procedure by the Licensing Authority. On close scrutiny of the licence bearing No. 676/96 issued by Licensing Authority, it is found that the noting categorically states that the said duplicate license was issued only after "verification from the original". Even if the original application was not available but since the duplicate licence was issued by the same Licensing Authority, it cannot be challenged that the original licence was fake, forged, manufactured or engineered document. This unequivocal admission made by the witness of RTO fully establishes this fact. Besides, the reports of both the Surveyors have mentioned that the driver was holding a driving licence bearing No. 676/96 issued by Licensing Authority. [para 17- 20] [985-E-H; 986-A-E]

1.2. The cumulative effect of the facts of the case, would clearly establish that at the relevant point of time the driver was holding a valid driving licence to drive the bus. [para 21] [986-F]

2.1. The revisional powers of the National Commission are derived from s. 21(b) of the Consumer Protection Act, 1986 under which the said power can be exercised only if there is some prima facie jurisdictional error appearing in the impugned order, and only then, may the same be set aside. In the instant case, there was no jurisdictional error or miscarriage of justice, which could have warranted the National Commission to have taken a different view than what was taken by the two Forums. The decision of the National Commission rests

not on the basis of some legal principle that was ignored by the courts below, but on an erroneous interpretation of the same set of facts. It was not a case where such a view could have been taken, by setting aside the concurrent findings of two fora. Thus, the jurisdiction conferred on the National Commission u/s 21(b) of the Act has been transgressed. [para 23] [986-H; 987-A-D]

2.2. The impugned order passed by National Commission cannot be sustained in law and, as such, is set aside and quashed. [para 25 and 27] [987-G; 988-C-D]

3. Against the order of State Commission, whereby the amount of Rs. 2,72,517/- was awarded, no further revision was preferred by the appellant. Thus, in any case the compensation awarded to the appellant cannot be enhanced beyond what has been pegged down by the State Commission. [para 25] [987-G-H]

4. Although the Act does not contain any provision for grant of interest, but on account of catena of cases of this Court, interest can still be awarded, taking recourse to s. 34 of the Code of Civil Procedure, 1908, to do complete justice between the parties. This principle is based upon justice, equity and good conscience, which would certainly authorize this Court to grant interest, otherwise, the very purpose of awarding compensation to the appellant would be defeated. Accordingly, the respondent is held liable to pay the amount of Rs. 2,72,517/- to the appellant together with interest at the rate of 9% per annum, from the date of filing of the application till it is actually paid. [para 26-27] [988-A-D]

CIVIL APPEALLATE JURISDICTION : Civil Appeal No. 2588 of 2011.

From the Judgment & Order dated 18.12.2008 of the National Consumer Disputes Redressal Commission in

Revision Petition No. 2899 of 2008.

Sanjay Kumar Ghosh and Rupail s. Ghosh (for Avijit Bhattacharjee) for the Appellant.

P.R. Sekka (for P.N. Puri) for the Respondent.

The Judgment of the Court was delivered by

DEEPAK VERMA, J.1. Leave granted.

2. Insured is before us challenging the correctness, legality and propriety of the order passed by National Consumer Disputes Redressal Commission, New Delhi (in short 'National Commission') in Revision Petition No. 2899 of 2008 on 18.12.2008 titled *M/s. United India Insurance Company Ltd. Vs. Rubi (Chandra) Dutta.*

3. Facts lie in narrow compass:

Appellant is the owner of bus bearing Registration No. WB-57/6715. Appellant had taken an Insurance Policy Cover from Respondent Insurance Company with respect to the bus, for the period between 13.1.2003 to 12.1.2004 and had paid the insurance premium for the same, acknowledging which, the Respondent had issued the receipt in her favour. On the intervening night of 4/5.07.2003 on National Highway No. 34 while the said Bus was proceeding to Hilli from Puri, it dashed against a Neem tree and turned turtle. The bus was massively damaged on impact and then slid into a roadside ditch. Thus, not only the body of bus but its internal systems also suffered extensive damage. The passengers travelling therein were also injured.

4. F.I.R. was lodged with the local Police Station and after investigation, the police commenced a case bearing No.226/2003 under various sections of Indian Penal Code. In the meanwhile, the Appellant had promptly informed the Respondent Insurance Company about the said accident and

the consequent damage caused to the bus. Accordingly, she then requested for assessment of loss sustained including cost of repairs. The Respondent duly appointed Mr. Sujit Kumar Sarkar as Surveyor, who submitted his preliminary report on 21.07.2003 assessing the total loss at Rs. 2,90,000/-. Following the receipt of this report, the Respondent then appointed Mr. Surya Dutt to prepare a detailed Final Report dated 31.12.2003 and as per his investigation, the total amount of damages was computed to be Rs. 2,72,517.90/-.

5. According to Appellant, the amount assessed by both Surveyors was far less than the actual amount spent by her in getting the said bus roadworthy. According to her, she had spent a sum of Rs. 1,95,000/- simply for getting the body of the bus rebuilt by Hara Gouri Technical and Engineering Works. Thereafter, the mechanical parts were repaired after spending a further sum of Rs.3,38,782/- by Bhandari Motors Pvt. Ltd., Sukchar. The Appellant submitted all the bills and receipts showing payments and requested Respondent to pay the total sum of Rs. 5,33,782/- but the Respondent failed to pay the said amount despite repeated demands. Respondent, in fact, repudiated the Appellant's Claim.

6. Thus, the Appellant was constrained to file a complaint under Section 12 of the Consumer Protection Act, 1986 (in short 'the Act') before District Consumer Disputes Redressal Forum, Berhampore, Murshidabad, being Consumer Protection Case No. 202/2005.

7. On notice being issued to the Respondent, it filed written statement denying all material allegations of the Appellant. It submitted that Appellant has claimed exorbitant amount towards cost of repairing and in fact no such payments were made to either of the two workshops. The receipts produced by Appellant have been fabricated only with an intention to claim an unreasonably large amount from the Respondent.

8. Apart from the above, it also took a plea that at the time

of accident, the bus was being driven by a person who was not holding a valid driving licence. It further took a plea that on enquiry and investigation, it was revealed that driving license bearing No. CD-676/96 was not, in fact, issued by the Licensing Authority, Murshidabad in favour of Sirajul Haque, the then Driver of the Bus. Thus,the duplicate licence presented by Appellant was obviously fake and fabricated. Under the circumstances, Appellant was not entitled to claim any amount from the Respondent. However, it was not disputed that at the relevant point of time the vehicle in question was insured with the Respondent Company.

9. Thus, the bone of contention before the District Forum was whether at the relevant point of time, Sirajul Haque, driver of the bus was holding a valid driving licence or not. Respondent placed reliance on the deposition made by an employee of R.T.A., Murshidabad before the Claims Tribunal in Case No. 115/2004 that the driver of the said bus was not holding a licence and no driving licence OD-676/96 was issued in his favour. To controvert the said averment, Appellant had filed Xerox copy of the original license issued in favour of Sirajul Haque before that Tribunal.

10. During the course of hearing on the suggestion being made by the learned Counsel for the parties, the District Forum issued a direction that an authorized officer of the R.T.A., Murshidabad be asked to appear before the Forum with relevant register and documents to establish whether the said driver of the bus in question was holding driving licence bearing No. OD-676/96 or not.

11. Pursuant to the said request the RTO appeared in this case and his evidence was also recorded. He deposed that in the original register it was noticed that application of Sirajul Haque bearing Serial No. 676 was missing and from the register it was noticed that a duplicate driving licence was issued in favour of Sirajul Haque by the said Licensing Authority on 31.5.2005. Since the original application of the Sirajul

Haque was not available, he had been asked to submit an affidavit and Xerox copy of the original driving licence, which he did. Only after going through the same a duplicate driving licence was issued in his favour. After issuance of duplicate license in favour of Sirajul Haque, an entry was made in the Miscellaneous Register maintained in this regard, after charging Rs. 100/- for issuance of duplicate licence from him on 25.5.2005. All this was categorically admitted by the said witness, Mr. Lawrence Sitling.

12. Considering the matter from all angles the District Forum was pleased to allow the complaint of the Appellant and directed the Respondent to pay to the Appellant a total sum of Rs. 4,00,000/- together with an interest at the rate of 9%, if the payment was not made within two months from the date of the said order.

13. This order was subject matter of challenge before the State Consumer Disputes Redressal Commission, West Bengal in an appeal filed under Section 15 of the Act. The State Commission also perused the matter in due detail and agreed with the findings that at the relevant point of time bus was being driven by a person holding a valid driving licence. However, it came to the conclusion that Appellant would be entitled to a sum of Rs. 2,72,517/- only, which was assessed as damages by the Surveyor. The amount was ordered to be paid within six weeks failing which it will carry interest at the rate of 9% per annum till the amount is paid in full. Thus, the finding of the District Forum were confirmed by the State Commission except that the amount was reduced as mentioned above.

14. Against the aforesaid orders of District Forum and State Commission, Respondent preferred a Revision Petition under Section 21(b) of the Act, before the National Consumer Disputes Redressal Commission (for short, 'National Commission'). National Commission after considering the matter came to the conclusion that the driver of the bus at the relevant point of time was not holding a valid driving licence.

Accordingly, it allowed the plea of the Respondent and thereby set aside and quashed the orders passed by District Forum and State Commission. Hence this Appeal.

15. We have heard learned Counsel Shri Sanjay Kumar Ghosh for Appellant and Shri P.R. Sikka for Respondent at length and perused the record.

16. In the appeal the sole ground to be examined by us is whether at the relevant point of time Sirajul Haque was having a valid driving licence or not. We have once again critically gone through the evidence produced by the parties, and the statements made by the authorized officer of the RTO and other material documents filed by the parties. In the light of the admission of the witness, who had appeared with the relevant records from the office of RTO, we have absolutely no doubt in our mind that at the relevant point of time Sirajul Haque was having a valid driving licence. The reasoning behind our opinion is explained hereunder.

17. No doubt, it is true that the original application of Sirajul Haque bearing No. 676/96 was missing in the Register of Driving Licences but on the strength of other available documents, he was issued a duplicate licence by the same RTO, a fact admitted by the Court witness. After having gone through the copy of the duplicate licence we are further reassured that the same was duly issued following normal procedure by the Licensing Authority.

18. Apart from the above, we have also seen the preliminary report of Surveyor Mr. Sujit Kumar Sarkar who has mentioned that Sirajul Haque was having a driving licence bearing No. 676/96 issued by Licensing Authority, Murshidabad. Similar is the report of another Surveyor Mr. Surya Dutt who has mentioned in the report that at the time of driving the bus, driver was having a valid driving licence. On close scrutiny of the Copy of the Duplicate Licence issued by Licensing Authority, Murshidabad we also observed a noting

which categorically states that the said duplicate license was issued only after "verification from the original."

19. The Government of West Bengal has promulgated the Motor Vehicles Procedure Manual in which there is a chapter that deals with the procedure to be followed for obtaining a duplicate driving licence. According to the stated requirements, under this Manual, a driver is required to submit an affidavit that his driving licence has been lost and has not been seized in any case and in case he possesses photocopy of the original licence then the same may also be submitted alongwith the prescribed application form duly filled in. After verification, thereof, a duplicate driving licence may be issued in favour of the applicant. Deposition of Mr. Lawrence Sitling states that the same procedure had been adopted by head office at the time of issuance of duplicate license.

20. In view of the aforesaid admission made by him, there remains no doubt that the said duplicate licence was issued by the said office in his favour after checking the previous credentials of the driver. Even if the original application was not available but since the duplicate licence was issued by the same licensing Authority, Murshidabad, it cannot be challenged that the original licence was fake, forged, manufactured or engineered document. This unequivocal admission made by the said witness of RTO fully establishes this fact.

21. The cumulative effect of the aforesaid facts would clearly establish that at the relevant point of time driver Sirajul Haque was holding a valid driving licence to drive the bus.

22. Unfortunately, all these facts have not been carefully dealt with by the National Commission and still it went on to upset and quash the concurrent findings of the two lower fora.

23. Also, it is to be noted that the revisional powers of the National Commission are derived fromSection 21(b) of the Act,

under which the said power can be exercised only if there is some prima facie jurisdictional error appearing in the impugned order, and only then, may the same be set aside. In our considered opinion there was no jurisdictional error or miscarriage of justice, which could have warranted the National Commission to have taken a different view than what was taken by the two Forums. The decision of the National Commission rests not on the basis of some legal principle that was ignored by the Courts below, but on a different (and in our opinion, an erroneous) interpretation of the same set of facts. This is not the manner in which revisional powers should be invoked. In this view of the matter, we are of the considered opinion that the jurisdiction conferred on the National Commission under Section 21(b) of the Act has been transgressed. It was not a case where such a view could have been taken, by setting aside the concurrent findings of two fora.

24. Obviously, it goes without saying that at the time of giving employment to Sirajul Haque, the owner of the bus must have examined the licence issued to him and after satisfaction thereof, he must have been given employment. Nothing more was required to have been done by the Appellant. After all, at the time of giving employment to a driver, owner is required to be satisfied with regard to correctness and genuineness of the licence he was holding. After taking the test, if the owner is satisfied with the driving skills of the driver then, obviously, he may be given an appointment.

25. In the light of the aforesaid discussion, we are of the considered opinion that the impugned order passed by National Commission cannot be sustained in law. It is necessary to point out that against the order of State Commission, whereby the amount of Rs. 2,72,517/- was awarded, no further Revision was preferred by the Appellant. Thus, in any case the compensation awarded to the Appellant cannot be enhanced beyond what has been pegged down by the State Commission.

26. It is correct that the Act does not contain any provision for grant of interest, but on account of catena of cases of this Court that interest can still be awarded, taking recourse to Section 34 of the Code of Civil Procedure, to do complete justice between the parties. We accordingly do so. This principle is based upon justice, equity and good conscience, which would certainly authorize us to grant interest, otherwise, the very purpose of awarding compensation to the Appellant would be defeated. We accordingly deem it fit to award interest at the rate of 9% per annum on the aforesaid amount from the date of filing the complaint till it is actually paid.

27. The order of National Commission is set aside and quashed. We accordingly, hold that Respondent is liable to pay the aforesaid amount of Rs. 2,72,517/- to the Appellant together with interest at the rate of 9% per annum, from the date of filing of the application till it is actually paid. Appeal thus, stands allowed to the aforesaid extent. Respondent to bear the cost of the litigation throughout.

28. Counsels' fee Rs. 10,000/-.

R.P. Appeal partly allowed.

CHILDLINE INDIA FOUNDATION & ANR.
v.
ALLAN JOHN WATERS & ORS.
(Criminal Appeal Nos. 1208-1210 of 2008)

MARCH 18, 2011

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

PENAL CODE 1860:

ss.377, 377 r/w 120B, 373,373, r/w 109, 372, 323 and 120-B and s.23 of Juvenile Justice Act – Sexual abuse of, and physical assault on children of Anchorage Shelters in Mumbai – Conviction by trial court of all the three accused – Acquittal by High Court – HELD: The analysis of the evidence of the two victims at the hands of the accused in the shelter homes clearly shows that both A-3 and A-2 had sex with them on many occasions – They also had similar sex with other boys who stayed in the shelter homes – Trial court has correctly appreciated the evidence of the victims, and arrived at a proper conclusion – On the other hand, the High Court committed an error in holding that their statements are suspicious and not reliable and not proved beyond shadow of doubt – There is no such basis for the High Court to have come to such a conclusion—In the circumstances, the impugned judgment of the High Court acquitting all the accused in respect of charges levelled against them is set aside and the conviction and sentence passed by the trial court restored – Juvenile Justice (Care and Protection of Children) Act, 2000 – s.23.

CONSTITUTION OF INDIA, 1950

Articles 23,15(3), 21-A, 24, 39 (e), (f), and 45 r/w s.23 of Juvenile Justice Act – Protection of children against sexual abuse – HELD: Sexual abuse of children is one of the most heinous crimes – There are special safeguards in the

Constitution that apply specifically to children – The Constitution has envisaged a happy and healthy childhood for children which is free from abuse and exploitation – Thus, our Constitution provides several measures to protect our children – It obligates the Central and all State Governments and Union Territories to protect them from the evils, provide free and good education and make them good citizens of this country – Several legislations and directions of the Supreme Court are there to safeguard their interests – But these are to be properly implemented and monitored – The Court hopes and trusts that all the authorities concerned through various responsible NGOs implement the same for better future of the children – Juvenile justice (Care and Protection of Children) Act, 2000 – Penal Code, 1860.

In a writ petition complaining about the plight of children of shelter homes in Maharashtra, the High Court appointed a Committee, namely, the Maharashtra State Monitoring Committee on Juvenile Justice, which was headed by a retired Judge of the High Court. The Committee after visiting various shelter houses, submitted a report to the High Court specifically mentioning unconfirmed report of sexual exploitation of children. PW 2, an Advocate, after consulting the Committee, filed another writ petition on which the High Court passed an order for protection of children of Anchorage Shelter Homes. On 24.10.2001 the appellant NGO filed a complaint with the Cuffe Parade Police Station, Mumbai with regard to sexual abuse and physical abuse of children at the Anchorage Shelters. It was stated that when the police did not take any action, PW 2 recorded statements of some of the victims. The Committee placed the facts before the High Court and on its direction the police of Colaba Police Station recorded the statements of two of the victims, namely, PW 1 and PW 4, and registered an FIR against three accused (A-1, A-2 and A-3). A-3, a British national, was running three

shelters called Archorage Shelters for welfare of street children; A-2 another British national and a friend of A-2 used to visit the shelters regularly; and A-1 was the Manager of the Anchorage Shelters. The trial court convicted A-1 u/s 377, r/w s 109, ss.120-B and 323 IPC and s. 23 of Juvenile Justice (Care and Protection of Children) Act, 2000 and sentenced him to 3 years RI and a fine of Rs. 5,500/-; A-2 and A-3 were convicted, inter alia, u/ss 377, 377 r/w s.120-B, s.373 IPC and sentenced to 6 years RI and to pay a fine of 20,000/- UK pounds each. However, the High Court acquitted all the three accused of all the charges. Aggrieved, the NGO, namely, Childline India Foundation filed the appeals.

Allowing the appeals, the Court

HELD: 1.1. The two victim boys, namely, PW-1 and PW-4, deposed in detail about the activities going-on at the Anchorage Shelters and their depositions reflect that there was a criminal conspiracy amongst the accused to obtain possession of minor vulnerable boys residing on the streets and subject them to sexual abuse. The trial court, by order dated 18.03.2006, accepted the evidence of PWs 1 and 4 who have been victimised in the Shelter Homes, and social activists PWs 2 and 3 and after considering various aspects rightly convicted and sentenced all the three accused. [para 12] [1006-G-H; 1007-A-C]

1.2. On the date of deposing before the court, PW-1 was about 20 years old. However, from the age of 12-13 he was wandering in the streets and earning by doing any sort of work for maintaining himself. He stated that there was no shelter for him at that time and he was sleeping on footpath. He used to stay on the pavements near Gateway of India. While deposing before the court, he identified A-2 and A-3 in the dock. According to him, he came to know that A-3 had opened a Shelter Home

and he was asked to stay in the Shelter Home along with other boys. He admitted that he knows A-2 because he was a friend of A-3 and he met him at the Shelter Home. He also informed that about 40-50 boys between the age of 8 to 20 years were staying in the said Shelter Home. He stayed in the Shelter Home up to 2001. He highlighted how A-2 and A-3 had sex with him and also explained how he was beaten by A-1. In his cross-examination he stated that he could not assign any reason as to why his statement in exact sequence is missing in the police report. He said that he did state the said fact to the police at the time of recording his statement. [para 14] [1008-A-E; 1010-A-B]

1.3. PW-4 deposed before the court that he lost his father when he was a child and he along with his mother used to stay on the pavements near Gateway of India. He said that he was offered by A-3 to stay in Anchorage home. Thereafter, he went to stay at Anchorage Shelter and met A-2 there. He also informed the Court that A-1 used to beat them by a cane when they were staying at Anchorage Shelter for no reason. He stated that A-2 and A-3 used to have sex with him. PW-4 has identified each accused correctly when they were in the dock. [para 15] [1010-D-F]

1.4. The analysis of the evidence of PW-1 and PW-4, the victims, at the hands of the accused in the shelter homes clearly shows that both A-3 and A-2 had sex with them on many occasions. They also had similar sex with other boys who stayed in the shelter homes. Though many other boys had similar experience, out of fear, except PWs 1 and 4, nobody narrated the incident to the police or to the Court. As a matter of fact, they did not attribute any sexual activities to A-1 except alleging that he used to beat them on flimsy grounds. Both PWs 1 and 4 asserted that A-1 never had sex with them or other boys. As rightly observed by the trial court, the above

information by PWs 1 and 4 shows that they were staying in the shelter homes at the relevant time. [para 16] [1013-B-F]

1.5. After analyzing the evidence of PWs 1 and 4, this Court is of the view that more confidence can be reposed on their evidence and the omissions as pointed out by the High Court are not fatal to the prosecution case. There may be some omissions because the Public Prosecutor has put questions to these witnesses which the I.O. has not, however, there is no variance between the examination-in-chief and cross-examination of PWs 1 and 4 with regard to the material particulars of sexual abuse. No statement of these boys in the examination-in-chief has been negated during cross-examination. Considering the background of PWs 1 and 4, the delay in divulging the facts of beating and also of sexual abuse to any other person does not mean that there is no sexual exploitation or abuse or that they were deterred or that they had deposed falsely as per the design of some other person. The trial court has correctly appreciated the evidence of PWs 1 and 4 and arrived at a proper conclusion, on the other hand, the High Court committed an error in holding that their statements are suspicious and not reliable and not proved beyond shadow of doubt. There is no such basis for the High Court to have come to such a conclusion. [para 16] [1013-E-H; 1014-A-B]

1.6. PW-2, is a practising advocate, however, evincing more interest on the welfare of uncared street children. All alone she worked and even on date she is working sincerely and selflessly to protect the street children for no personal gain. As an activist, her intention was to protect the children. The High Court of Bombay had reposed faith in her and appointed her as an *amicus curiae* in child related cases. From the initial stage, she brought all the events that have taken place at

Anchorage Shelters to the notice of the Committee and to the Bombay High Court. Even in cross-examination, the statement of PW-2 has not been shattered and there is no reason to doubt her integrity. It is true that whatever she did cannot be the basis for convicting the accused. However, she enquired the children and submitted a report to the Committee and to the High Court and also participated as a prosecution witness, as PW-2 and highlighted the grievance of the neglected children at shelter homes and sexual abuse undergone by them. On going through the activities of PW-2 prior to the launching of prosecution against the accused, her report to the High Court and to the Committee, her evidence before the court and her activities aimed for the welfare of the neglected children, particularly, in shelter homes, the conclusion arrived at by the High Court in rejecting her evidence in *toto* cannot be accepted. Though conviction cannot be based on evidence of PW-2 alone, however, while appreciating the evidence of victims PWs 1 and 4, the work done by PW-2 cannot be ignored. [para 17] [1014-C-H; 1015-A]

1.7. The academic credentials of PW-3 show that she retired as Vice Principal of Nirmala Niketan and she is also a Member of the Committee appointed by the High Court. PW-3 in association with PW-2 and others, personally and independently interacted with the children in the shelter homes and as in the case of the evidence of PW-2, the evidence of PW-3 also solely cannot be relied on for convicting the accused. However, as rightly observed by the trial court, her evidence can be considered for a limited purpose, namely, to corroborate the evidence of PW-2. The role played by PW-2 and PW-3 undoubtedly supported this case for taking the cause of vulnerable street children and in bringing to the notice of the relevant authorities what was happening in the Anchorage Shelters. They played their role in a

responsible manner. Undoubtedly PW-3, like PW-2, had no enmity with the accused nor can any ulterior motive be attributed to them. [para 18] [1015-B-D]

1.8. Based on the statement of PWs 2 and 3, undoubtedly the accused persons cannot be convicted. But taking into account their initiation, work done, interview with the children at the shelter homes laid the foundation for the investigation. To that extent, the trial court has rightly considered their statements and actions. Unfortunately, the High Court ignored their statements as unacceptable. [para 20] [1015-G-H; 1016-A]

1.9. As regards the plea of the accused that except the testimony of PWs 1 and 4, there is no corroborative statement by any of the other boys who stayed with them in the shelter homes, first of all, there is no need to examine more victims of similar nature. It is not in dispute that most of the children before reaching the shelter homes were on streets, particularly, near Gateway of India to eke out their livelihood and used the same place as night shelter. Since the boys in the shelter homes were provided with stay, clothes and food and were not taken care of by their families, and most of the them had lost their parents and relatives, out of fear and in order to continue the life in the same shelter, they did not make a complaint to anyone. Only when the matter was taken up to the High Court by persons like PWs 2 and 3 and on the orders of the High Court they enquired and submitted a report which was the basis for investigation by the Police. [para 21] [1016-B-E]

1.10. Further, regarding the requirement of corroboration about the testimony of PWs 1 and 4, with regard to sexual abuse, as has been held by this Court in *Kurissum Moottil Antony's* *case*, the Court is not justified in asking further corroboration apart from the testimony of PWs 1 and 4. [para 21] [1016-E-F]

State of Kerala vs. Kurissum Moottil Antony, **(2007) 1 SCC (Crl) 403 - relied on.**

1.11. It cannot be said that the acts of the accused do not constitute offence u/s. 377 IPC. To attract the said offence, the ingredients required are: (1) carnal intercourse and (2) against the order of nature. Though the High Court has adverted to various dictionary meanings and decisions to hold that the offence has not been made out, the exact statements of the victims - PWs 1 and 4. show how these accused, particularly, A1 and A2, sexually abused the children at the shelter homes. The way in which the children at all the three places i.e. Colaba, Murud (Janjira) and Cuffe Parade were being used for sexual exploitation, it cannot be claimed that the ingredients of s.377 have not been proved. The street children having no roof on the top, no proper food and no proper clothing used to accept the invitation to come to the shelter homes and became the prey of the sexual lust of the paedophilia. By reading the entire testimony of PWs 1 and 4 coupled with the other materials even prior to the occurrence, it cannot be claimed that the prosecution has not established all the charges leveled against the accused. On the other hand, the analysis of the entire material clearly support the prosecution case and the conclusion arrived at by the trial court is concurred with. [para 22-23] [1091-B-E-F; 1020-G-H; 1021-A-B]

1.12. In the circumstances, the impugned judgment of the High Court acquitting all the accused in respect of charges leveled against them is set aside and the conviction and sentence passed by the trial court restored. It is brought to the notice of the Court that A1 has undergone imprisonment for 3 years and 1 month and A2 was in custody for about 5 years and A3 was in custody for about 3 years and 2 months. Inasmuch as the trial court has imposed maximum sentence of 3 years

on A-1 and he has already undergone 3 years and 1 month. While confirming his conviction imposed by the trial court, it is clarified that there is no need for him to undergo further imprisonment. On the other hand, inasmuch as A-2 and A-3 were awarded 6 years imprisonment u/s. 377 IPC, while confirming their conviction, the Court directs them to serve the remaining period of sentence. The trial court is directed to take appropriate steps to serve the remaining sentence and for payment of compensation amount, if not already paid. For the disbursement and other modalities, the directions of the trial Court shall be implemented. [para 31] [1023-C-F]

2. Children are the greatest gift to humanity. Sexual abuse of children is one of the most heinous crimes. It is an appalling violation of their trust, an ugly breach of our commitment to protect the innocent. There are special safeguards in the Constitution that apply specifically to children. The Constitution has envisaged a happy and healthy childhood for children which is free from abuse and exploitation. Article 15(3) of the Constitution of India has provided the State with the power to make special provisions for women and children. Article 21A mandates free and compulsory education to every one upto the age of 14 years. The word "life" in the context of article 21 has been found to include "education" and accordingly this Court has implied that "right to education" is in fact a fundamental right. Article 23 prohibits traffic in human beings, beggars and other similar forms of forced labour and exploitation. This article is more relevant in the context of children because they are the most vulnerable section of the society. It is a known fact that many children are exploited because of their poverty. They are deprived of education, made to do all sorts of work injurious to their health and personality. Article 24 expressly prohibits child labour. The Directive Principles

of State Policy embodied in the Constitution provide policy of protection of children. Article 45 recognizes the importance of dignity and personality of the child and directs the State to provide free and compulsory education for the children upto the age of 14 years. Article 45 is supplementary to Article 24 in as much as when the child is not to be employed before the age of 14 years, he is to be kept occupied in some educational institutions. It is suggested that Article 24 in turn supplements clauses (e) and (f) of Article 39, thus ensuring distributive justice to children in the matter of education. Thus, our Constitution provides several measures to protect our children. It obligates all, the Central and State Governments and Union Territories to protect them from the evils, provide free and good education and make them good citizens of this country. The Juvenile Justice Act was enacted to provide for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles and for the adjudication of such matters relating to disposition of delinquent juveniles. This is being ensured by establishing observation homes, juvenile houses, juvenile homes for neglected juveniles and special homes for delinquent or neglected juveniles. Several legislations and directions of this Court are there to safeguard their interests. But these are to be properly implemented and monitored. The Court hopes and trusts that all the authorities concerned through various responsible NGOs implement the same for better future of these children. [para 24-27,28 and 30] [1021-C-H; 1022-A-F; 1023-A-B]

Vishal Jeet vs. Union of India **(1990) 3 SCC 318 – relied on.**

Case Law Reference:

(2007) 1 SCC (Crl) 403	**relied on**	**para 21**
(1990) 3 SCC 318	**relied on**	**para 28**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1208-1210 of 2008.

WITH

Criminal Appeal Nos. 1205-1207 of 2008.

K.V. Vishwanatha, Shekhar Naphade, Trideep Pais, Mahrook Adenwal, Shakthi Kumaran, Nikhil Nayyar, Sanjay V. Kharde, Arun Pendenker, Asha, G. Nair, Ravindra Keshavrao Adsure, Rameshwar Prasad Goyal, Taraq Sayyad, Sushil Karanjkar, K.N. Rai and Nikhil Nayyar for the appearing parties.

The Judgmemnt of the Court was delivered by

P. SATHASIVAM, J. 1. These appeals are filed against the common final judgment and order dated 23.07.2008 passed by the Division Bench of the High Court of Bombay in Criminal Appeal Nos. 476, 603 and 681 of 2006 whereby the High Court allowed the appeals and reversed the judgment dated 18.03.2006 passed by the Additional Sessions Judge for Greater Bombay in Sessions Case Nos. 87 of 2002, 886 of 2004 and 795 of 2005 convicting all the accused under various Sections of the Indian Penal Code (in short 'the IPC'), the Code of Criminal Procedure, 1973 (in short 'the Code') and the Juvenile Justice Act, 2000 (in short 'the JJ Act').

2. **Brief Facts:**

(a) In the year 1986, a petition was brought before the High Court of Bombay complaining about the plight of children at various children homes in Maharashtra. In the same petition, the High Court appointed a Committee, namely, the Maharashtra State Monitoring Committee on Juvenile Justice (in short "the Committee") headed by Justice Hosbet Suresh, a retired Judge of the High Court of Bombay. This Committee received some complaints from the Child Rights Organizations like Saathi Online, Childline and CRY about the mismanagement of Anchorage

Shelters, and on that basis, the Committee sought permission of the High Court to visit various Anchorage Shelters. After visiting various Anchorage Shelters including the one at Colaba and Cuffe Parade, a report was submitted before the High Court.

(b) On the basis of the said report, specifically expressing unconfirmed report of sexual exploitation of children, on 17.10.2001, one Ms. Meher Pestonji telephoned Advocate Ms. Maharukh Adenwala and informed her that some children residing in Shelter Homes were sexually exploited by those who were running these Homes. On receiving this information, Ms. Maharukh Adenwala met those boys, who were allegedly sexually assaulted, at the residence of Ms. Meher Pestonji to ascertain the truth. After confirming the said fact, Ms. Maharukh Adenwala thought it proper to inform it to the Members of the Committee. After consulting the Committee, Ms. Maharukh Adenwala moved a suo motu Criminal Writ Petition No 585 of 1985 before the High Court. On 19.10.2001, the High Court passed an order for the protection of the children at Anchorage Shelter Homes. On 21.10.2001, one Shridhar Naik telephonically contacted Ms Maharukh Adenwala and informed her that the order of the High Court giving protection to the children was being misinterpreted by the police and, therefore, certain clarifications were sought from the High Court and by order dated 22.10.2001, the High Court clarified the same.

(c) With regard to the sexual and physical abuse at the Anchorage Shelters, on 24.10.2001, Childline India Foundation filed a complaint with the Cuffe Parade Police Station and while lodging the said complaint, Ms. Maharukh Adenwala was also present there. In spite of the fact that a complaint had been lodged, the police did not take cognizance of the offence under the pretext that the matter was sub judice and was pending before the High Court. Since the matter was not being looked into by the

police, Ms. Maharukh Adenwala recorded statements of some of the victims and informed the said fact to the Members of the Committee. On 28.10.2001, Dr. (Mrs.) Kalindi Muzumdar and Dr. (Mrs.) Asha Bajpai met those victims at the office of India Centre for Human Rights and Law and endorsed that the statements previously recorded by Ms. Maharukh Adenwala were correctly recorded. After ascertaining the correctness of the statements by the Members of the Committee, the said facts were placed before the High Court and it was also submitted that the police authorities at Cuffe Parade Police Station were not seriously pursuing the complaint. The High Court, by order dated 07.11.2001, directed the police authorities of the State of Maharashtra to take action on the basis of the complaint lodged by the Childline India Foundation.

(d) Based on this specific direction, Sr. Inspector of Police, Colaba Police Station was directed to investigate in detail the complaint lodged by Childline and to take such action as is required to be taken in law. On 12.11.2001, Colaba Police Station recorded the statement of one Sonu Raju Thakur and the statement of one Sunil Kadam (PW-1) was recorded by Murud police station on 13.11.2001. On 15.11.2001, police ultimately registered an offence at Colaba police station by treating the statement of Sonu Raju Thakur as formal First Information Report (in short 'the FIR') being C.R. No. 312/2001 and started investigation.

(e) Though the offence was mainly registered against three accused barring William D'Souza (A1), the remaining two accused, namely, Allan John Waters (A2) and Duncan Alexander Grant (A3) had already left the country and therefore, on 05.04.2002, an Interpol Red Corner Notice was issued against A2 and A3. In pursuance of Red Corner Notice, A2 was arrested in USA and sometimes thereafter A3 also surrendered before the Court in India. The Metropolitan Magistrate committed the case to the

Court of Session and after committal, it was initially assigned to the First Track Court at Sewree. All the three accused pleaded not guilty and, therefore, claimed to be tried.

(f) The Sessions Judge, by judgment dated 18.03.2006, convicted William D'Souza (A1) for the offence punishable under Section 377 read with Section 109 IPC, Sections 120B and 323 IPC and under Section 23 of the JJ Act. Allan John Waters (A2) was convicted under Section 377 IPC, Section 120B read with Section 377 IPC and Section 373 IPC. Duncan Aleander Grant (A3) was convicted under Section 377 IPC, Section 373 read with 109 IPC, Section 372 IPC and Section 23 of JJ Act.

(g) Aggrieved by the said order, A1 filed Criminal Appeal No. 681 of 2006, A2 and A3 filed Criminal Appeal No. 476 of 2006 before the High Court of Bombay. State Government also preferred Criminal Appeal No. 603 of 2006 before the High Court for enhancement of the sentence of the accused persons. The High Court, vide its common judgment dated 23.07.2008, set aside the order of conviction passed by the Sessions Judge and allowed the criminal appeals filed by A1, A2 and A3 and acquitted all of them from the charges leveled against them and dismissed the appeal filed by the State Government.

(h) Aggrieved by the order of the High Court, Childline India Foundation and Ms. Maharukh Adenwala filed Criminal Appeal Nos. 1208-1210 of 2008 and State of Maharashtra has filed Criminal Appeal No. 1205-1207 of 2008 before this Court by way of special leave petitions.

3. Heard Mr. K.V. Vishwanathan, learned senior counsel for the appellants in Criminal Appeal Nos. 1208-1210 of 2008, Mr. Sanjay V. Kharde, learned counsel for the appellants in Criminal Appeal Nos. 1205-1207 of 2008, Mr. Shekhar Naphade, learned senior counsel for Respondent Nos. 1 & 2

in Crl. A. Nos. 1208 and 1210 of 2008 and Respondent Nos. 2 & 3 in Crl. A. No. 1206 of 2008 and Respondent No. 3 in Crl. A. No. 1210 of 2008 and Mr. Rameshwar Prasad Goyal, learned counsel for Respondent No. 1 in Crl.A. Nos. 1209, 1210, 1206 and sole Respondent in Crl. A.No. 1207 of 2008.

4. The only point for consideration in these appeals is whether the High Court is justified in acquitting all the accused by interfering with the order of conviction and sentence passed by the trial Court?

5. Childline India Foundation is a project of the Ministry of Social Justice & Empowerment, Government of India and runs a 24 hrs. emergency phone helpline for children in distress. It was at their behest that investigation into the sexual and physical abuse of children at the Anchorage Shelters was initiated and F.I.R. No. 312 of 2001 was registered. When initially the police refused to record the statements of the victims, it was the Childline along with Ms. Maharukh Adenwala and others talked to the victims and recorded their statements and also produced them before the Committee. The Childline India Foundation intervened in support of the prosecution before the trial Court.

6. Ms. Maharukh Adenwala has been a practicing advocate since 1985 litigating matters concerning social issues, including child rights. She has been appointed as Amicus Curiae in several child related cases by the Bombay High Court including suo motu Criminal Writ Petition No. 585 of 1985 about the plight of street children in Mumbai. She was involved in the present case since its inception and she brought the activities going-on at Anchorage Shelters to the notice of the Bombay High Court in the above said suo motu writ petition and obtained several orders and directions for the protection of the boys. She was examined before the trial Court as PW-2, especially to depose about the background of the case, how the complaint came to be filed and the various orders passed by the Bombay High Court in the abovesaid suo motu writ petition. Childline India Foundation and Ms. Maharukh

Adenwala have been closely associated with the present case right from its inception. Childline India Foundation as a de facto complainant and intervenor and Ms. Maharukh Adenwala as PW-2.

7. In October, 2001, when it was brought to the notice of Ms. Maharukh Adenwala that some children living at the Anchorage Shelters had complained about sexual abuse, she immediately brought this to the notice of the High Court of Bombay and obtained necessary orders. She along with the representatives of Childline lodged a complaint at Cuffe Parade Police Station about the unlawful activities at Anchorage Shelters. Since the police officers of Cuffe Parade Police Station refused to investigate the said complaint under the pretext that the matter is sub judice and pending before the High Court, she recorded the statements of some of the victims and placed it before the High Court seeking direction for the police to investigate into the complaint filed by the Childline. By order dated 07.11.2001 passed by the High Court in suo motu Criminal W.P. No. 585 of 1985, the representatives of the Childline were permitted to visit the Anchorage Shelters to interview the boys and to submit a report before the High Court and seek police assistance, if any. Their representatives have since been regularly visiting the Anchorage Shelters and providing necessary assistance to the boys residing there.

8. The other facts relating to these criminal appeals are that Duncan Alexander Grant (A3), a British national, in and around 1995 opened three Shelters called the Anchorage Shelters for the welfare of street children in Mumbai and its vicinity, namely, at Colaba, Cuffe Parade and Murud. Allan John Waters (A2), who was also a British national and a friend of Dunkan Alexander Grant (A3) used to visit the said Shelters regularly. Both of them were formerly working with the British Navy. Another accused William D'Souza (A-1) was the Manager of the Anchorage Shelters.

9. In January, 2001, Dr. (Mrs.) Kalindi Muzumdar, a

Member of the Committee received complaints from organizations working in the field of child rights such as Childline, Saathi, CRY about the sexual exploitation of children residing in Anchorage Shelters and other children's institutions in Mumbai. She has been examined as PW-3. By letter dated 22.01.2001, she sought permission from the High Court to visit Anchorage Shelters and other institutions in respect of which she had received complaints and permission was subsequently granted by the Division Bench of the High Court by its order dated 28.02.2001 in Suo Moto Criminal W.P. No. 585 of 1985. Accordingly, on 18.08.2001, the Members of the Committee including Justice H. Suresh who headed the said Committee, visited the Anchorage Shelters and submitted their reports to the High Court. These reports show that the atmosphere in the Shelters was unconducive for growing children, there was no education and health facilities, the management of the Shelters was unprofessional, the children were scared to go to the Murud Shelter, there were allegations of repeated beatings of the boys, the Shelters were not licensed and did not maintain children's records, nor proper accounts were maintained etc. Moreover, the said Report stated that, "There are unconfirmed reports of sexual abuse in the Shelters especially at Murud", and that "the Shelters, especially, the Murud Shelter should be investigated thoroughly for possibility of sexual abuse".

10. There is no doubt that when Cuffe Parade Police Station refused to investigate the matter, it was Ms. Maharukh Adenwala and Ms. Meher Pestonjee who recorded the statements and supplementary statements of the minor boys, namely, Rasul Mohd. Sheikh, Sonu Thakur and Gopal Shrivastav, on 25th, 26th and 27th October, 2001. In their respective statements, the boys have spoken of the sexual abuse at the hands of (A2) and (A3) and physical abuse at the hands of (A1). The said statements also show that the boys had told (A1) about the sexual abuse, but he did not take any appropriate action to protect them. The complaint of the Childline is the basis of the FIR in this case. The written

complaint dated 24.10.2001 submitted by the Childline to the Cuffe Parade Police Station and the boys' statements were brought to the notice of the High Court. On 07.11.2001, the High Court directed the police authorities of the State of Maharashtra to take immediate action on the complaint of Childline. Thereafter, the matter was investigated by Colaba Police Station and an offence was registered on 15.11.2001 being FIR No. C.R.No. 312 of 2001. In the course of the investigation, the police recorded the statements of five boys, who had suffered sexual abuse at the hands of (A2) and (A3) and physical abuse at the hands of (A1). All the three accused were arrested at different times. The Colaba Police Station filed three separate charge sheets but the matters, viz., Sessions Case Nos. 87 of 2002, 886 of 2004 and 795 of 2005 were heard together by the trial Court and the accused persons were charged under Sections 377, 373, 372 and 323 IPC read with Sections 120-B and 109 IPC and Section 120-B IPC and Section 23 of the JJ Act.

11. The prosecution examined six witnesses, namely, two victim boys – Sunil Suresh Kadam as PW-1 & Kranti Abraham Londhe as PW-4, Ms. Maharukh Adenwala as PW-2, Ms. Kalindi Muzumdar as PW-3 and two Investigation Officers as PWs 5 & 6. The defence examined two witnesses, namely, Kiran Waman Salve as DW-1 and Rasul Mohd. Sheikh as DW-2, both being boys who resided in the Anchorage Shelters at Mumbai. DW-2 had been cited as a prosecution witness. Thereafter the prosecution examined Veersingh P. Taware – the Additional Chief Metropolitan Magistrate as PW-7, who had recorded the statement of Rasul Mohd. Sheikh under Section 164 of the Code, wherein he had spoken about the sexual abuse.

12. The two victim boys, namely, Sunil Suresh Kadam (PW-1) and Kranti Abraham Londhe (PW-4) deposed in detail about the activities going-on at the Anchorage Shelters and their depositions reflect that there was a criminal conspiracy

amongst the accused to obtain possession of minor vulnerable boys residing on the streets and subject them to sexual abuse. The trial Court, by order dated 18.03.2006, accepted the evidence of PWs 1 & 4 who have been victimised in the Shelter Homes and social activists PWs 2 & 3 and after considering various aspects convicted all the three accused and sentenced them as mentioned hereunder:

Accused	U/s	Sentence
A-1 William D'Souza	377 r/w 149 IPC 120B IPC 323 IPC 23 JJ Act	3 Yrs RI+Rs. 5000/- ID 1yr RI No separate sentence. 3mRI+Rs. 5000/-ID 15 days RI 1m RI+Rs. 500/- ID 1 week RI.
A-2 Allan John Waters	377 IPC 377 r/w 120B IPC 373 IPC	6 yrs. RI no fine No separate sentence 3 yrs. RI. No fine Compensation of 20000 UK pounds ID 1 yr RI.
A-3 Duncan Alexander Grant	377 IPC 377r/w 120B IPC 373 r/w 109 IPC 372 IPC	6 yrs. RI. No fine. 6 yrs. RI. No fine. 3 yrs. RI. No fine. 3 yrs. RI. No fine. 3 months RI. No fine. Compensation of 20000 UK pounds ID 1 yr RI.

13. The Division Bench of the High Court, by the impugned order, doubted the veracity of the statements of PWs 1 & 4. According to the High Court, their statements are suspicious, unreliable, not proved beyond shadow of doubt and not credit worthy. The High Court has also eschewed the evidence of PWs 2 & 3 as not admissible and ultimately doubting the prosecution case, set aside the order of conviction and sentence passed by the trial Court and acquitted all the three accused from the charges leveled against them.

14. We have already highlighted the plight of street children

at the Shelter Homes in Mumbai. At the foremost, let us consider the testimony of PWs 1 and 4. On the date of deposing before the Court, PW-1 was about 20 years old. However, from the age of 12 to 13 he was wandering in the streets and earning by doing any sort of work for maintaining himself. He had stated that there was no shelter for him at that time and he was sleeping on footpath. His father was earning a little amount by shoe shining and he was addicted to liquor and he used to quarrel with the family everyday. He used to stay on the pavements near Dhanraj Mahal which is situated near Gateway of India. While deposing before the Court and in the dock, he identified A2 and A3. According to him, he came to know that A3 has opened one Shelter Home and he was asked to stay in the Shelter Home along with other boys. The Shelter Home is situated at Colaba. He admitted that he knows A2 because he was a friend of A-3 and he met him at the Shelter Home. He also informed that about 40-50 boys were staying in the said Shelter Home and the boys staying there were between the age of 8 to 20 years. There is one more Shelter Home situated at Murud at Alibag District and one at Cuffee Parade. He stayed in the Shelter Home up to 2001. He highlighted how Duncan Alexander Grant (A3) and Allen Water (A2) had sex with him and also explained how he was beaten by William (A1). PW-1 has stated before the trial Court as under:

> "Duncan had sex with me on many occasions. He used to tell me to hold his penis and also he used to hold my penis. This must have taken place at least on 20 to 25 occasions. This happened at Murud (Janjira) shelter home as well as Colaba shelter home. Allan Waters also had sat with me on many occasions. He also used to tell me to hold his penis and he also used to hold my penis. Allan waters also had sex with me at Colaba shelter home and also at Murud (Janjira) shelter home. Allan must have had sex with me on 10 to 15 occasions. Duncan Grant and Allan Waters also had a similar relationship with other boys. Accused Duncan and Allan Waters used to ask for fellatio with the

other boys and not the other way round. I have seen this happened with my own eyes. I have seen this with respect to other boys named Babu, Kiran, Sai and Dhanraj. I know Sonu Thakur, Rasul Sheikh, Gopal Srivastava, Kranti Londhe. With the abovementioned boys also the same thing had happened and I had witnessed it. The abovementioned boys used to stay in the shelter home during the relevant period. When this happened for the first time with me I was aged about 14/15 years. Prior to that I had no knowledge about sex. When I had it for the first time I did not like it. Even though I did not like it, I stayed in the shelter home because it was my compulsion. I made a complaint to William about the conduct of Duncan Grant and Allan Water"

"Accused No.1 William used to beat us on flimsy grounds. He used to do canning. However, he never had sex with either me or with other boys. When I made a complaint to William (about Allan and Duncan), he told me not to divulge the said fact to anybody failing which he would beat me."

"On the day I was interrogated I had an injury on my right hand as William had bitten me. I had taken medical treatment with respect to the said injury."

In the cross-examination, PW-1 asserted that during his stay in the shelter home, nearly for a period of five years, these instances were happening regularly. He also stated that "Accused Duncan Grant and Allan Waters used to have sex with me independently and they did not do it together with me". About William, in cross-examination PW-1 has stated that "it is a fact that whenever we used to commit mistake, William used to beat us". When a question was put to him whether he had said so before police, he answered that "I did state that fact to the police at the time of recording my statement that Allan Waters also had sex with me at Colaba shelter home and also at Murud

(Janjira) shelter home. Allen must have had sex with me on 10-15 occasions. I cannot assign any reason as to why the said statement in exact sequence is missing in the police report. I did state the said fact to the police at the time of recording my statement that, "Accused Duncan and Allan Waters used to ask for fellatio with the other boys. Duncan Grant and Allan Waters used to do fellatio with the other boys and not the other way round. I have seen this happened with my own eyes. I have seen this with respect to other boys named Babu, Kiran, Sai and Dhanraj. I know Sonu Thakur, Rasul Sheikh, Gopal Srivastava, Krani Londhe. With the abovementioned boys also the same thing had happened and I had witnessed it."

15. Before analyzing the evidence of PW-1 further, it is also useful to refer the statement of PW-4 before the Court. He deposed that he lost his father when he was a child and his entire family was residing on a footpath near Gateway of India. Though his house was at Jogeswari, according to him, he along with his mother used to stay on the pavements near Gateway of India. His elder brother Madhu Londhe was a Rickshaw puller. He has not studied in any school. He used to work as guide and earn his livelihood. According to him, for many days, he used to stay on the pavements near Gateway of India. PW-4 has identified each accused correctly when they were in the dock. About William (A1), he deposed that:

"I know accused William since my childhood. I know William because he used to come at Gateway of India to work. William used to work as a pimp. William is also known as Natwar."

About Duncan (A3), he stated that:

"I know accused Duncan since I used to stay near Gateway of India along with my mother. I know accused Duncan

because he used to come near Gateway of India and used to collect the boys there and used to talk to the boys. Duncan used to come near Gateway of India sometimes on bicycle and sometimes on foot. I had a conversation with Duncan at that point of time and he used to offer me to stay at Anchorage. The said Anchorage of Duncan is situated at Colaba. I do not know as to why he was offering me to come and stay at Anchorage. When I was offered to stay at Anchorage after I lost my mother, I am unable to state approximately when I went to stay at Anchorage. Today, I stay near Gateway of India on the pavements. I am unable to state as to how long I stayed at Anchorage. When I started residing at Anchorage, I met William (accused No. 1) as he was working as a Manager at Anchorage. I do not know the name of the building in which the said anchorage is situated. I also do not know the name of the road on which the said building is situated. The said Anchorage is situated on the 3rd floor. 30 to 40 boys used to stay in the Anchorage when I was staying there. All the boys were from the age group of 10 to 12 years.

Thereafter, he went to stay at Anchorage and met Allan Water (A2). The Anchorage is consisting of one big room with attached bathroom and a terrace. All of them were provided food at Anchorage Shelters. Duncan also used to distribute pocket money on every Sunday amongst the boys staying at Anchorage Shelters. He also explained the reason for his stay at Anchorage was that on many days, he had no earnings and he was starving. After staying at Anchorage, he used to work in a garage and getting Rs. 10/- or Rs. 20/- a day. He also informed the Court that William used to beat them by a cane when they were staying at Anchorage for no reason.

About Duncan, PW-4 has also deposed:

"Duncan used to beat me when I used to stay at Anchorage. Duncan used to remove all the clothes and by

making me naked he used to beat me. Duncan used to hold my head between his thighs and then used to ask the monitor to beat me by a stick either 6 times at a time or 12 times at a time. In spite of my telling them not to beat me, they used to beat me. The same was the treatment given to the other boys residing in the Anchorage by Duncan."

About Allan Waters (A2), he deposed that

"Allan Waters used to have sex with the boys. Allan used to have fellatio with me and the other boys. Allan used to take my penis in his mouth. He might have done this act with me on 30 to 40 occasions. When I was staying in Anchorage Duncan also did the same thing with me. Duncan did this act with me on many occasions. When this was done for the first time with me I felt bad. I then told the said fact to William with respect to the act done by Duncan and Allan. Thereafter William beat me. I was beaten because I told William about the acts done by Duncan and Allan."

He further stated that:

"Allan and Duncan used to have sex with me sometimes in the bathroom and sometimes on the cot. When these persons used to have this act with me on the cot the other boys used to remain in the same room but asleep."

In the cross-examination, about recording of his statement by Police, it was stated:

"When my statements were recorded for the first time the other boys from Anchorage were also present in the police station with whom similar instances had taken place. It is true that the other boys also stated the same thing to the police about the incident. It is true that those boys also stated it in my presence about the incident. The questions were asked to me in Hindi and I answered the questions

in Hindi to the police."

He also asserted that similar statements were made by him before the Police and according to him, it is not clear why the same were not recorded fully.

16. The analysis of the evidence of PW-1 and PW-4, victims, at the hands of these accused in the shelter homes clearly shows that both Duncan Alexander Grant (A3) and Allan Waters (A2) had sex with them on many occasions. They also had similar sex with other boys who stayed in the shelter homes. Both these accused used to have fellatio with them and also with other boys. They also asserted that the accused used to direct them and other boys to hold their penis and they also used to hold penis of them. It is also seen that many a times they directed them to take their penis in their mouth. Though many other boys had similar experience, out of fear, except PWs 1 and 4 nobody narrated the incident to the police and to the Court. As a matter of fact, they did not attribute any sexual activities to William except alleging that he used to beat them on flimsy grounds and used to do canning. Both PWs 1 and 4 asserted that William never had sex with them or other boys. As rightly observed by the trial Judge, the above information by PWs 1 and 4 shows that they were staying in the shelter homes at the relevant time. After analyzing the evidence of PWs 1 and 4, we are of the view that more confidence can be reposed on their evidence and the omissions as pointed out by the High Court are not fatal to the prosecution case. In case, there may be some omissions because the Public Prosecutor has put questions to these witnesses which the I.O. has not, we are, however, satisfied that there is no variance between the examination-in-chief and cross-examination of PWs 1 and 4 with regard to the material particulars of sexual abuse. No statement of these boys during cross-examination has been negated before the examination-in-chief. Considering the background of PWs 1 and 4, the delay in divulging the facts of beating and also of sexual abuse to any other person does not

mean that there is no sexual exploitation or abuse or that they were deterred or that they were deposed falsely as per the design of some other person. We hold that the trial Judge has correctly appreciated the evidence of PWs 1 and 4 and arrived at a proper conclusion, on the other hand, the High Court committed an error in holding that their statements are suspicious and not reliable and not proved beyond shadow of doubt. We are fully satisfied that there is no such basis for arriving at the above conclusion.

17. Coming to the evidence of Maharukh Adenwala (PW-2), as stated in the earlier paragraphs she is a practising advocate, however, evincing more interest on the welfare of uncared street children. It was brought to our notice that all alone she worked and even now working sincerely and selflessly to protect the street children for no personal gain. As an activist, her intention was to protect the children. The High Court of Bombay had reposed faith in her and appointed her as an amicus curiae in child related cases. From the initial stage, she brought all the events that have taken place at Anchorage Shelters to the notice of the Committee and to the Bombay High Court. Even in cross-examination, the statement of PW-2 has not been shattered and there is no reason to doubt her integrity. It is true that whatever she did cannot be the basis for convicting the accused. However, she did not stop enquiring the children and submitting a report to the Committee and to the High Court but she also participated as a prosecution witness, namely PW-2 and highlighted the grievance of the neglected children at shelter homes and sexual abuse undergone by them. On going through the activities of PW-2 prior to the launching of prosecution against the accused, her report to the High Court and to the Committee, her evidence before the Court and her activities aimed for the welfare of the neglected children, particularly, in shelter homes, we are unable to agree with the conclusion arrived at by the High Court in rejecting her evidence in toto. We have already noted that conviction cannot be based on her evidence alone. However,

while appreciating the evidence of victims PWs 1 and 4, the work done by PW-2 cannot be ignored.

18. Coming to the evidence of PW-3 Dr (Mrs.) Kalindi Muzumdar, her academic credentials show that she retired as Vice Principal of Nirmala Niketan and she is also a Member of the Committee appointed by the High Court. PW-3 in association with Dr. Asha Bajpai and PW-2, personally and independently interacted with the children in the shelter homes and as in the case of the evidence of PW-2, the evidence of PW-3 also solely relied on for convicting the accused. However, as rightly observed by the trial Court for a limited purpose, namely, to corroborate the evidence of Ms. Maharukh Adenwala, the role played by Ms. Maharukh Adenwala (PW-2) and Mrs. Kalindi Mazmudar (PW-3) undoubtedly supported this case for taking the cause of vulnerable street children and they played their role in a responsible manner. Undoubtedly PW-3, like PW-2, had no enmity with the accused nor can any ulterior motive be attributed to them.

19. The analysis of the evidence and the role played by PWs 2 and 3 show that they supported the boys in bringing to the notice of the relevant authorities that what was happening in the Anchorage Shelters. As rightly observed by the trial Court, both of them, particularly, PW-2 played her role in a responsible manner. It is further seen that PW-3 along with Dr. Asha Bajpai, Members of the Committee verified the witnesses and endorsed their statements made to PW-2. It is further seen that PW-3 forwarded statement of victims to the Registrar of the High Court on many occasions.

20. As stated earlier, based on the statement of PWs 2 and 3, undoubtedly the accused persons cannot be convicted. But as observed earlier and taking into account their initiation, work done, interview with the children at the shelter homes laid the foundation for the investigation. To that extent, the trial Court has rightly considered their statements and actions.

Unfortunately, the High Court ignored their statements as unacceptable.

21. Learned senior counsel appearing for the accused submitted that except the testimony of PWs 1 and 4, there is no corroborative statement by any of the other boys who stayed with them in the shelter homes. First of all, there is no need to examine more victims of similar nature. It is not in dispute that most of the children before reaching the shelter homes were on streets, particularly, near Gateway of India to eke out their livelihood and used the same place as shelter during night. Since the boys in the shelter homes were provided with stay, clothes and food and these persons were not taken care of by their families, most of them lost their parents and relatives, out of fear and in order to continue the life in the same shelter, they did not make a complaint to anyone. Only when the matter was taken up to the High Court by persons like PWs 2 and 3 and on the orders of the High Court they enquired and submitted a report which was the basis for investigation by the Police. Regarding the requirement of corroboration about the testimony of PWs 1 and 4, with regard to sexual abuse, it is useful to refer the decision of this Court in *State of Kerala vs. Kurissum Moottil Antony,* (2007) 1 SCC (Crl) 403. In that case, the respondent was found guilty of offences punishable under Section 451 and 377 IPC. The trial Court had convicted the respondent and imposed sentence of six months and one year's rigorous imprisonment respectively with a fine of Rs.2,000/- in each case. The factual background shows that on 10.11.1986 the accused trespassed into the house of the victim girl who was nearly about 10 years of age on the date of occurrence and committed unnatural offence on her. After finding the victim alone in the house, the accused committed unnatural offence by putting his penis having carnal intercourse against order of nature. The victim PW-1 told about the incident to her friend PW-2 who narrated the same to the parents of the victim and accordingly on 13.11.1986, an FIR was lodged. On consideration of the entire prosecution version, the trial Court

found the accused guilty and convicted and sentenced as aforesaid. An appeal before the Sessions Judge did not bring any relief to the accused and revision was filed before the High Court which set aside the order of conviction and sentence. The primary ground on which the High Court directed acquittal was the absence of corroboration and alleged suppression of a report purported to have been given before the FIR in question was lodged. In support of the appeal, the State submitted that the High Court's approach is clearly erroneous and it was pointed out that corroboration is not necessary for a case of this nature. The following observations and conclusion are relevant:

> "7. An accused cannot cling to a fossil formula and insist on corroborative evidence, even if taken as a whole, the case spoken to by the victim strikes a judicial mind as probable. Judicial response to human rights cannot be blunted by legal jugglery. A similar view was expressed by this Court in Rafiq v. State of U.P. with some anguish. The same was echoed again in Bharwada Bhoginbhai Hirjibhai v. State of Gujarat. It was observed in the said case that in the Indian setting refusal to act on the testimony of the victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. A girl or a woman in the tradition-bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity or dignity had ever occurred. She would be conscious of the danger of being ostracised by the society and when in the face of these factors the crime is brought to light, there is inbuilt assurance that the charge is genuine rather than fabricated. Just as a witness who has sustained an injury, which is not shown or believed to be self-inflicted, is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of sex offence is entitled to great weight, absence of corroboration notwithstanding. Corroboration is not the sine qua non for conviction in a

> rape case. The observations of Vivian Bose, J. in Rameshwar v. State of Rajasthan were:
>
> "The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge, …"
>
> 8. To insist on corroboration except in the rarest of rare cases is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars as in "the case of an accomplice to a crime". (See State of Maharashtra v. Chandraprakash Kewalchand Jain.) Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance.
>
> 9. It is unfortunate that respect for womanhood in our country is on the decline and cases of molestation and rape are steadily growing. Decency and morality in public and social life can be protected only if courts deal strictly with those who violate the social norms.
>
> *10. The above position was highlighted by this Court in* Bhupinder Sharma *v.* State of H.P.
>
> 11. The rule regarding non-requirement of corroboration is equally applicable to a case of this nature, relating to Section 377 IPC."

We are in agreement with the said conclusion and in a case of this nature, the Court is not justified in asking further

corroboration apart from the testimony of PWs 1 and 4. Accordingly, we reject the contention raised by the learned senior counsel for the accused.

22. A serious argument was projected by learned senior counsel for the accused stating that even if the allegations/ statements of prosecution witnesses are acceptable, the same would not constitute an offence under Section 377 IPC. Section 377 reads thus:

> *"377. Unnatural offences.*- Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
>
> Explanation.- *Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."*

23. To attract the above offence, the following ingredients are required: 1) Carnal intercourse and 2) against the order of nature. Though the High Court has adverted to various dictionary meanings and decisions to hold that the offence has not been made out, we have extracted the exact statements of the victims - PWs 1 and 4. PW-1 has stated before the trial Court as under:

i "Duncan had sex with me on many occasions. He used to tell me to hold his penis and also he used to hold my penis."

ii "Allan Waters also had sex with me on many occasions. He also used to tell me to hold his penis and he also used to hold my penis."

iii "Duncan Grant and Allan Waters also had a similar relationship with other boys. Accused Duncan and Allan Waters used to ask for fellatio with the other boys Duncan Grant and Allan Waters used to do fellatio with the other boys and not the other way round. I have seen this happened with my own eyes"

iv "Accused No.1 William used to beat us on flimsy grounds. He used to do canning. However, he never had sex with me or with other boys. When I made a complaint to William (about Allan and Duncan), he told me not to divulge the said fact to anybody failing which he would beat me."

(PW4) has stated before the trial Court as under:

i. "Allan Waters used to have sex with the boys. Allan used to have fellatio with me and the other boys. Allan used to take my penis in his mouth"

ii. "When I was staying in Anchorage Duncan also did the same thing with me."

iii. "When this was done for the first time with me, I felt bad. I then told the said fact to William with respect to the act done by Duncan and Allan. Thereafter William beat me. I was beaten because I told William about the acts done by Duncan and Allan."

iv. "William used to tell me to speak before the Court that Allan and Duncan are good people."

Those statements show how these accused, particularly, A1 and A2, sexually abused the children at the shelter homes. The way in which the children at all the three places i.e. Colaba, Murud (Janjira) and Cuffe Parade were being used for sexual exploitation, it cannot be claimed that the ingredients of Section 377 have not been proved. The street children having no roof on the top, no proper food and no proper clothing used to accept the invitation to come to the shelter homes and became the prey of the sexual lust of the paedophilia. By reading all the

entire testimony of PWs 1 and 4 coupled with the other materials even prior to the occurrence, it cannot be claimed that the prosecution has not established all the charges leveled against them. On the other hand, the analysis of the entire material clearly support the prosecution case and we agree with the conclusion arrived at by the trial Judge.

Constitutional provisions relating to children

24. Children are the greatest gift to humanity. The sexual abuse of children is one of the most heinous crimes. It is an appalling violation of their trust, an ugly breach of our commitment to protect the innocent. There are special safeguards in the Constitution that apply specifically to children. The Constitution has envisaged a happy and healthy childhood for children which is free from abuse and exploitation. **Article 15(3)** of the Constitution has provided the State with the power to make special provisions for women and children. **Article 21A** of the Constitution mandates that every child in India shall be entitled to free and compulsory education upto the age of 14 years. The word "life" in the context of article 21 of the Constitution has been found to include "education" and accordingly this Court has implied that "right to education" is in fact a fundamental right.

25. **Article 23** of the Constitution prohibits traffic in human beings, beggars and other similar forms of forced labour and exploitation. Although this article does not specifically speak of children, yet it is applied to them and is more relevant in their context because children are the most vulnerable section of the society. It is a known fact that many children are exploited because of their poverty. They are deprived of education, made to do all sorts of work injurious to their health and personality. **Article 24** expressly provides that no child below the age of 14 years shall be employed to work in any factory or mine or engaged in any hazardous employment. This Court has issued elaborate guidelines on this issue.

26. The Directive Principles of State Policy embodied in the Constitution of India provides policy of protection of children with a self- imposing direction towards securing the health and strength of workers, particularly, to see that the children of tender age is not abused, nor they are forced by economic necessity to enter into avocations unsuited to their strength.

27. **Article 45** has provided that the State shall endeavor to provide early childhood care and education for all the children until they complete the age of fourteen years. This Directive Principle signifies that it is not only confined to primary education, but extends to free education whatever it may be upto the age of 14 years. Article 45 is supplementary to Article 24 on the ground that when the child is not to be employed before the age of 14 years, he is to be kept occupied in some educational institutions. It is suggested that Article 24 in turn supplements the clause (e) and (f) of Article 39, thus ensuring distributive justice to children in the matter of education. Virtually, Article 45 recognizes the importance of dignity and personality of the child and directs the State to provide free and compulsory education for the children upto the age of 14 years.

28. The Juvenile Justice Act was enacted to provide for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles and for the adjudication of such matters relating to disposition of delinquent juveniles. This is being ensured by establishing observation homes, juvenile houses, juvenile homes or neglected juveniles and special homes for delinquent or neglected juveniles.

29. Even in the case of *Vishal Jeet vs. Union of India,* (1990) 3 SCC 318 this Court issued several directions to the State and Central Government for eradicating the child prostitution and for providing adequate and rehabilitative homes well manned by well qualified trained senior workers, psychiatrists and doctors.

30. The above analysis shows our Constitution provides

several measures to protect our children. It obligates both Central, State & Union territories to protect them from the evils, provide free and good education and make them good citizens of this country. Several legislations and directions of this Court are there to safeguard their intent. But these are to be properly implemented and monitored. We hope and trust that all the authorities concerned through various responsible NGOs implement the same for better future of these children.

31. Under these circumstances, the impugned judgment of the High Court acquitting all the accused in respect of charges leveled against them is set aside and we restore the conviction and sentence passed by the trial Judge. It is brought to our notice that A1 has undergone imprisonment for 3 years and 1 month and A2 was in custody for about 5 years and A3 was in custody for about 3 years and 2 months. Inasmuch as the trial Court has imposed maximum sentence of 3 years for William D'Souza (A1) and he had already undergone 3 years and 1 month while confirming his conviction imposed by the trial Court, we clarify that there is no need for him to undergo further imprisonment. On the other hand, inasmuch as Allan John Waters (A2) and Duncan Alexander Grant (A3) were awarded 6 years imprisonment under Section 377 IPC while confirming their conviction, we direct them to serve the remaining period of sentence. The trial Judge is directed to take appropriate steps to serve the remaining sentence and for payment of compensation amount, if not already paid. For the disbursement and other modalities, the directions of the trial Court shall be implemented. The appeals are allowed on the above terms.

R.P. Appeals allowed.

NARAYAN CHANDRA GHOSH

v.

UCO BANK & ORS.

(Civil Appeal No. 2681 of 2011)

MARCH 18, 2011

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

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002:

s.18 – Requirement of pre-deposit of amount in terms of s.18 – Whether mandatory – Held: Right to file appeal u/s.18 is conferred subject to condition laid down in the second proviso thereto – The second proviso postulates that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal 50% of the amount of debt due from him, as claimed by the secured creditors or as determined by the Debts Recovery Tribunal, whichever is less – However, under the third proviso to the sub-section, the Appellate Tribunal has the power to reduce the amount, for the reasons to be recorded in writing, to not less than 25% of the debt, referred to in the second proviso – Thus, there is an absolute bar to entertainment of an appeal u/s.18 of the Act unless the condition precedent, as stipulated, is fulfilled – In the instant case, the order of the Appellate Tribunal, entertaining borrower's appeal without insisting on pre-deposit was clearly unsustainable – In the notice issued to the borrower u/s.13(2) of the Act, the debts due was Rs. 52,42,474/- – Since the Debts Recovery Tribunal had not determined the debt due, the borrower is directed to deposit with the Appellate Tribunal an amount of Rs. 15 lakhs within a period of four weeks – Thereafter, appeal to be entertained and decided on merits.

s.18, second proviso – Right to file appeal subject to

conditions – Held: When a statute confers a right of appeal, while granting the right, the legislature can impose conditions for the exercise of such right, so long as the conditions are not so onerous as to amount to unreasonable restrictions, rendering the right almost illusory – Bearing in mind the object of the Act, the conditions hedged in the second proviso cannot be said to be onerous – Interpretation of statutes.

The appellant-borrower filed an appeal under Section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The Debt Recovery Tribunal did not entertain the appeal on a technical ground. The Debt Recovery Appellate Tribunal while allowing the application filed by the appellant under Section 18 of the Act exempted him from making any deposit in terms of second proviso to Section 18 of the Act.

The question which arose for consideration in the instant appeal was whether the Appellate Tribunal has the jurisdiction to exempt the person, preferring an appeal under Section 18 of the Act from making any pre-deposit in terms of the said provision.

Disposing of the appeal, the Court

HELD: Section 18(1) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 confers a statutory right on a person aggrieved by any order made by the Debts Recovery Tribunal under Section 17 of the Act to prefer an appeal to the Appellate Tribunal. However, the right conferred under Section 18(1) is subject to the condition laid down in the second proviso thereto. The second proviso postulates that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent of the amount of debt due from him, as claimed by the secured creditors or determined by the

Debts Recovery Tribunal, whichever is less. However, under the third proviso to the sub-section, the Appellate Tribunal has the power to reduce the amount, for the reasons to be recorded in writing, to not less than twenty-five per cent of the debt, referred to in the second proviso. Thus, there is an absolute bar to entertainment of an appeal under Section 18 of the Act unless the condition precedent, as stipulated, is fulfilled. Unless the borrower makes, with the Appellate Tribunal, a pre-deposit of fifty per cent of the debt due from him or determined, an appeal under the said provision cannot be entertained by the Appellate Tribunal. The language of the said proviso is clear and admits of no ambiguity. It is well-settled that when a statute confers a right of appeal, while granting the right, the Legislature can impose conditions for the exercise of such right, so long as the conditions are not so onerous as to amount to unreasonable restrictions, rendering the right almost illusory. Bearing in mind the object of the Act, the conditions hedged in the said proviso cannot be said to be onerous. Thus, the requirement of pre-deposit under sub-section (1) of Section 18 of the Act is mandatory and there is no reason whatsoever for not giving full effect to the provisions contained in Section 18 of the Act. In that view of the matter, no court, much less the Appellate Tribunal, a creature of the Act itself, can refuse to give full effect to the provisions of the Statute. The deposit under the second proviso to Section 18 (1) of the Act being a condition precedent for preferring an appeal under the said section, the Appellate Tribunal had erred in law in entertaining the appeal without directing the appellant to comply with the said mandatory requirement. [Para 8] [1030-C-H; 1031-A-C]

2. The argument that as the amount of debt due had not been determined by the Debts Recovery Tribunal, appeal could be entertained by the Appellate Tribunal

without insisting on pre-deposit, is equally fallacious. Under the second proviso to sub-section(1) of Section 18 of the Act, the amount of fifty per cent, which is required to be deposited by the borrower, is computed either with reference to the debt due from him as claimed by the secured creditors or as determined by the Debts Recovery Tribunal, whichever is less. Obviously, where the amount of debt is yet to be determined by the Debts Recovery Tribunal, the borrower, while preferring appeal, would be liable to deposit fifty per cent of the debt due from him as claimed by the secured creditors. Therefore, the condition of pre-deposit being mandatory, a complete waiver of deposit by the appellant was beyond the provisions of the Act, as is evident from the second and third proviso to the said Section. At best, the Appellate Tribunal could have, after recording the reasons, reduced the amount of deposit of fifty per cent to an amount not less than twenty five per cent of the debt referred to in the second proviso. The order of the Appellate Tribunal, entertaining appellant's appeal without insisting on pre-deposit was clearly unsustainable and, therefore, the decision of the High Court in setting aside the same cannot be flawed. In the notice issued to the appellant under Section 13(2) of the Act, the debts due from the appellant as on 25th September, 2006 was Rs. 52,42,474/-. Since in the instant case, the Debts Recovery Tribunal had not determined the debt due, the appellant is directed to deposit with the Appellate Tribunal an amount of Rs. 15 lakhs within a period of four weeks. Thereafter, his appeal shall be entertained and decided on merits. In case of failure of the appellant to make the said deposit within the time granted, his appeal before the Appellate Tribunal would stand dismissed and it would be open to the respondent bank to take further steps in the matter in accordance with law. [Paras 9,10, 11] [1031-D-H; 1032-A-D]

CIVIL APPELLATE JURISIDICTION : Civil Appeal No. 2681 of 2011.

From the Judgment & Order dated 7.12.2010 of the High Court at Calcutta in C.O.No. 3608 of 2009.

Ranjan Mukherjee, S. Bhowmick, S.C. Ghosh for the Appellant.

Partha Sil for the Respondents.

The following Order of the Court was delivered

O R D E R

1. Leave granted.

2. This appeal by the borrower is directed against judgment dated 7th December, 2010 delivered by the High Court of Calcutta in C.O. No.3608 of 2009. By the impugned judgment, the High Court has set aside the order passed by the Debts Recovery Appellate Tribunal, Kolkata (for short, "the Appellate Tribunal") in Appeal No.35 of 2009, whereby the Appellate Tribunal, while allowing the application filed by the appellant under Section 18(1) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, "the Act") had exempted the appellant from making any deposit in terms of second proviso to Section 18 of the Act before entertaining the appeal against the order passed by the Debts Recovery Tribunal.

3. With the consent of learned counsel for the appellant as also the respondent-bank, which is on caveat, we have heard the matter finally at the motion hearing stage itself. Since the issue canvassed before us is a pure question of law, we deem it unnecessary to state the facts giving rise to this appeal.

4. Assailing the judgment, Mr. Ranjan Mukherjee has submitted that since the Debts Recovery Tribunal had not

entertained the appeal preferred by the appellant under Section 17 of the Act on a technical ground and the quantum of amount due from the appellant had not been determined, the Appellate Tribunal could not saddle the appellant with any liability of pre-deposit under Section 18 of the Act. It is thus, asserted that the Appellate Tribunal was justified in entertaining the appeal without insisting on any deposit in terms of Section 18 of the Act.

5. Per contra, learned counsel for the bank, while supporting the judgment of the High Court has submitted that the Appellate Tribunal had failed to appreciate that the deposit of an amount in terms of Section 18 of the Act is a condition precedent for entertainment of the appeal. According to the learned counsel, the language of Section 18(1) of the Act being clear and unambiguous, the order passed by the Appellate Tribunal was clearly unsustainable.

6. Thus, the short question for consideration is whether the Appellate Tribunal has the jurisdiction to exempt the person, preferring an appeal under Section 18 of the Act from making any pre-deposit in terms of the said provision?

7. Section 18, which provides for appeal to the Appellate Tribunal, reads as under:

> *"18. Appeal to Appellate Tribunal*.—(1) Any person aggrieved, by any order made by the Debts Recovery Tribunal under section 17, may prefer an appeal along with such fee, as may be prescribed to an Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal.
>
> Provided that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrower:
>
> Provided further that no appeal shall be entertained unless

> the borrower has deposited with the Appellate Tribunal fifty per cent of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less:
>
> Provided also that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent of debt referred to in the second proviso.
>
> (2) ...."

8. Section 18(1) of the Act confers a statutory right on a person aggrieved by any order made by the Debts Recovery Tribunal under Section 17 of the Act to prefer an appeal to the Appellate Tribunal. However, the right conferred under Section 18(1) is subject to the condition laid down in the second proviso thereto. The second proviso postulates that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less. However, under the third proviso to the sub-section, the Appellate Tribunal has the power to reduce the amount, for the reasons to be recorded in writing, to not less than twenty-five per cent of the debt, referred to in the second proviso. Thus, there is an absolute bar to entertainment of an appeal under Section 18 of the Act unless the condition precedent, as stipulated, is fulfilled. Unless the borrower makes, with the Appellate Tribunal, a pre- deposit of fifty per cent of the debt due from him or determined, an appeal under the said provision cannot be entertained by the Appellate Tribunal. The language of the said proviso is clear and admits of no ambiguity. It is well-settled that when a Statute confers a right of appeal, while granting the right, the Legislature can impose conditions for the exercise of such right, so long as the conditions are not so onerous as to amount to unreasonable restrictions, rendering the right almost illusory. Bearing in mind

the object of the Act, the conditions hedged in the said proviso cannot be said to be onerous. Thus, we hold that the requirement of pre-deposit under sub-section (1) of Section 18 of the Act is mandatory and there is no reason whatsoever for not giving full effect to the provisions contained in Section 18 of the Act. In that view of the matter, no court, much less the Appellate Tribunal, a creature of the Act itself, can refuse to give full effect to the provisions of the Statute. We have no hesitation in holding that deposit under the second proviso to Section 18(1) of the Act being a condition precedent for preferring an appeal under the said Section, the Appellate Tribunal had erred in law in entertaining the appeal without directing the appellant to comply with the said mandatory requirement.

9. The argument of learned counsel for the appellant that as the amount of debt due had not been determined by the Debts Recovery Tribunal, appeal could be entertained by the Appellate Tribunal without insisting on pre-deposit, is equally fallacious. Under the second proviso to sub-section (1) of Section 18 of the Act the amount of fifty per cent, which is required to be deposited by the borrower, is computed either with reference to the debt due from him as claimed by the secured creditors or as determined by the Debts Recovery Tribunal, whichever is less. Obviously, where the amount of debt is yet to be determined by the Debts Recovery Tribunal, the borrower, while preferring appeal, would be liable to deposit fifty per cent of the debt due from him as claimed by the secured creditors. Therefore, the condition of pre-deposit being mandatory, a complete waiver of deposit by the appellant with the Appellate Tribunal, was beyond the provisions of the Act, as is evident from the second and third proviso to the said Section. At best, the Appellate Tribunal could have, after recording the reasons, reduced the amount of deposit of fifty per cent to an amount not less than twenty five per cent of the debt referred to in the second proviso. We are convinced that the order of the Appellate Tribunal, entertaining appellant's appeal without insisting on pre-deposit was clearly

unsustainable and, therefore, the decision of the High Court in setting aside the same cannot be flawed.

10. It is stated before us that in the notice issued to the appellant under Section 13(2) of the Act, the debt due from the appellant as on 25th September, 2006 was Rs. 52,42,474/-. Since in the present case Debts Recovery Tribunal had not determined the debt due, we direct that on appellant's depositing with the Appellate Tribunal an amount of Rs. 15 lakhs within a period of four weeks from today, his appeal shall be entertained and decided on merits. We direct that till the Appellate Tribunal takes a final decision in the appeal, the bank shall maintain status quo in respect of the property of which physical possession is stated to have been taken by it.

11. Needless to add that if the appellant fails to make the said deposit within the time granted, his appeal before the Appellate Tribunal shall stand dismissed and it will be open to the respondent bank to take further steps in the matter in accordance with law.

12. The appeal stands disposed of with no order as to costs.

D.G. Appeal disposed of.

SANGAM SPINNERS LTD.
v.
UNION OF INDIA & ORS.
(Civil Appeal No. 476 of 2003)

MARCH 18, 2011

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

Central Excise Rules, 1944 – rr. 57A and 57B – High Speed Diesel Oil – MODVAT credit – Benefit of – High Speed Diesel Oil used for the purpose of generation of electricity – Credit of duty paid on High Speed diesel Oil on 17/18.03.1997 – Entitlement for – Held: Not entitled as High Speed Diesel Oil was specifically excluded from the list of eligible inputs as per the Notifications dated 01.03.1994 and 16.03.1995 – Since the product High Speed Diesel Oil was excluded specifically from the list of eligible inputs in the Notifications, there was no question of creation of any right in favour of the appellant to avail such benefit – Therefore, it cannot be said that a vested or accrued right is sought to be taken away by an Act of Parliament giving retrospective effect – Central Excise Act, 1944 – Finance Act, 2000 –Notifications – Notification No. 5/94-CE(NT) dated 01.03.1994 and Notification No. 8/95-CE(NT) dated 16.3.1995.

It is the case of the appellants that they used High Speed Diesel Oil as input/goods in diesel generation set for generation of electricity which in turn is used in the manufacture of final goods or for other purposes in the factory of the appellants. They submitted declarations in respect of the diesel as well as oil and lubricants as required under Rule 57G read with Rule 57B as also under Rule 57(H) of the Central Excise Rules, 1944, intending to avail the credit of duty on the said goods/inputs on 17/18.3.1997 but were informed that after 1.3.1997, MODVAT

credit was not available on High Speed Diesel Oil. The appellant was issued show cause notice as to why the credit given should not be disallowed to the appellant. Aggrieved, the appellant filed a writ petition and the same was dismissed.

The question which arose for consideration in these appeals is whether the appellants are entitled to credit of duty paid on High Speed Diesel Oil at any time during the period commencing on and from 16th March, 1995 and ending with the day of Finance Act, 2000 which received assent of the President on 1st April, 2000.

Dismissing the appeals, the Court

HELD: 1.1. High Speed Diesel Oil for the purpose of generation of electricity was specifically excluded from the list of eligible inputs in the Notification No. 5/94-CE(NT) dated 1st March, 1994 issued under Rule 57A of the Central Excise Rules, 1944 as also under Notification No. 8/95-CE(NT) dated 16.3.1995 from the list of eligible inputs. Therefore, on a conjoint reading of the said Notifications as also the amendment to Rule 57D, it is sufficiently indicated that the appellants are not entitled to credit of duty paid in respect of High Speed Diesel Oil which was used for the purpose of generation of electricity. [Para 24] [1045-G-H; 1046-A-B]

1.2. A careful reading of the explanation to Rule 57B in sub-rule (1) would make it explicitly clear that by adding the said explanation by Notification No. 5/98-CE(NT) dated 2.3.1998, the inputs mentioned in Rule 57B refers only to such inputs as specified in the Notification issued under Rule 57A. Thus, the appellants are not entitled to get the benefit of, credit of duty paid on High Speed Diesel oil as High Speed Diesel Oil is excluded from the list of eligible inputs as per Notification issued under Rule 57A of the Rules. [Para 28] [1047-D-E]

1.3. The intention regarding availment of the credit under MODVAT would be guided and governed by the said Notifications which specifically excluded the benefit of availment of such credit as High Speed Diesel Oil is specifically excluded from the list of eligible inputs as per Notification under Rule 57A of the Central Excise Rules, 1944. Since it was specifically excluded from the list of eligible inputs such credit though may otherwise be available would not have created a vested right. The intention of the legislature is clear from the beginning to exclude the benefit of such credit by excluding High Speed Diesel Oil from the list of eligible inputs by making substantial exclusion thereof in the Notifications. [Paras 30 and 36] [1048-B; 1050-A-B]

Tata Motors Ltd. vs. State of Maharashtra **(2004) 5 SCC 783 – Distinguished.**

1.4. When the Central Excise Act and the Rules made thereunder, and the various Notifications issued by the Government of India, are read collectively in the aforesaid context the only conclusion that can be drawn is that the appellants are not entitled to the credit of duty as High Speed Diesel Oil is specifically excluded from the list of eligible inputs as per the Notification issued under Rule 57A of the Central Excise Rules 1944. Therefore, the submission that explanation to Section 57-B not being clarificatory, and to whittle down the width of non-obstante clause of Section 57-B, cannot be accepted. The submission that the provisions of Rule 57B prevails over Rule 57A and consequently, the inputs enumerated under Rule 57B would be inputs for the availment of MODVAT credit in spite of any provision to the contrary which may be contained in Rule 57A, is misreading of the provisions, for the said explanation added to the Notification No. 5/98 dated 2.3.1998, clearly intends that the inputs mentioned in Rule 57B refers only to such inputs as

specified in a Notification issued under Rule 57A. [Para 35] [1049-C-F]

1.5. It was held in *Associated Cement Companies Ltd.*'s case and *Rama Vision's* case that no credit is admissible on any duty paid on High Speed Diesel Oil for the period commencing from 16.3.1995 and ending with the day of Finance Act, 2000 which received the assent of the President on 1st April, 2000. Despite the said fact, since the Tribunal held otherwise, therefore, there was a necessity for the Finance Act to be brought in giving a clarificatory explanation to the legal position which is being prevailing all alone and established by the long list of the Notifications which were issued from time to time. [Paras 37 and 38] [1050-D-E]

Commissioner of Central Excise, Hyderabad vs. Associated Cement Companies Ltd. **(2005) 180 ELT 3 (S.C.);** *Commissioner of Central Excise, Meerut Vs. Rama Vision* **(2005) 181 ELT 201 – referred to.**

Shri Prithvi Cotton Mills Ltd. and Anr. vs. Broach Borough Municipality and Ors. **(1969) 2 SCC 283;** *D.G. Gose and Co.(Agents) Pvt. Ltd. vs. State of Kerala and Anr.* **(1980) 2 SCC 410 – referred to.**

1.6. Since the product High Speed Diesel Oil was excluded specifically from the list of eligible inputs in the Notifications, there was no question of creation of any right in favour of the appellant to avail such benefit. Therefore, contention that a vested or accrued right is sought to be taken away by giving retrospective effect is without any merit. The submission is based on misreading of the language of the said Notifications which do not support, but in fact destroy the very basis of the case of the appellants. Further on a conjoint reading of all the Notifications, it is clearly established that the intention of the Government all along was to exclude

the appellants from getting the benefit of the MODVAT credit, therefore, the submission that the Finance Act violates the vested right is without any basis. [Para 41] [1053-A-D]

M/s. Gujarat Ambuja Cement vs. UOI **2005 (182) ELT 33 (SC);** *India Cements Ltd. vs. Commissioner of Customs and C.Ex. Hyderabad* **1997 (95). E.L.T. 520;** *Jindal Polymers vs. Commissioner of C. Ex., Indore* **1999 (114) E.L.T. 322;** *Commissioner of Central Excise, Shillong vs. Vinay Cement Ltd.* **1999 (114) E.L.T. 753 – referred to.**

Case Law Reference:

2005 (181) ELT 201 (SC)	**Referred to**	**Para 11**
2005 (182) ELT 33 (SC)	**Referred to**	**Para 12**
1997 (95) .E.L.T. 520	**Referred to**	**Para 29**
1999 (114) E.L.T. 322	**Referred to**	**Para 29**
1999 (114) E.L.T. 753	**Referred to**	**Para 29**
2005 (180) ELT 3 (S.C.)	**Referred to**	**Para 31**
2005 (181) ELT 201	**Referred to**	**Para 31**
2004 (5) SCC 783	**Distinguished**	**Para 34**
2005 (180) ELT 3 (S.C.)	**Referred to**	**Para 36**
2005 (181) ELT 201	**Referred to**	**Para 36**
1969 (2) SCC 283	**Referred to**	**Para 39**
1980 (2) SCC 410	**Referred to**	**Para 40**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 476 of 2003.

From the Judgment & Order dated 3.4.2002 of the High Court of Judicature for Rajasthan at Jodhpur in DB Civil Writ Petition No. 4112 of 1997.

WITH

C.A. Nos. 477-478. 479 and 1436 of 2003.

Manish Singhvi, D.K. Devesh, Naresh Kumar, Gagrat & Co. and Vijay K. Jain for the Appellant.

P.P. Malhotra, ASG, Kiran Bhardwaj, Rahul Kaushik, B.K. Prasad, Anil Katiyar, Pramod B. Agarwala and Abhishek Baid for the Respondent.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. The issue that falls for consideration in these appeals is whether the appellants are entitled to credit of duty paid on High Speed Diesel oil at any time during the period commencing on and from 16th March, 1995 and ending with the day of Finance Act, 2000 which received assent of the President on 1st April, 2000.

In Civil Appeal No. 476 of 2003:

The appellants are engaged in the business of manufacturing and selling Man Made PV Blended Yarn and have installed a diesel generating set for generation of electricity for captive consumption in their factory premises. It is the case of the appellants that they purchased High Speed Diesel oil for generation of electricity from Indian Oil Corporation Ltd. / Hindustan Petroleum Corporation Ltd. through their sales office/depots in Rajasthan, which was cleared under heading 27.10 (sub heading 2710.90) on payment of central excise duty.

In Civil Appeal No. 477-478 of 2003:

The appellants are engaged in the business of manufacturing and selling Portland cement and have installed a diesel generating set for generation of electricity for captive consumption in their factory premises. It is the case of the

appellants that they purchased High Speed Diesel oil for generation of electricity from Indian Oil Corporation Ltd. / Hindustan Petroleum Corporation Ltd. through their sales office/ depots in Rajasthan, which was cleared under heading 27.10 (sub heading 2710.90) on payment of central excise duty.

In Civil Appeal No. 479 of 2003:

The appellants are engaged in the business of manufacturing and selling Cotton Yarn and Yarn of Synthetic/ Artificial Staple Fiber and have installed a diesel generating set for generation of electricity for captive consumption in their factory premises. It is the case of the appellants that they purchased High Speed Diesel oil for generation of electricity from Indian Oil Corporation Ltd. / Hindustan Petroleum Corporation Ltd. through their sales office/depots in Rajasthan, which was cleared under heading 27.10 (sub heading 2710.90) on payment of central excise duty.

2. In all these Appeals, identical issues are involved and therefore, we propose to dispose of all these appeals by this common judgment and order.

3. The case of the appellants is that the said diesel oil is used as input/goods in the said diesel generation set for generation of electricity which is used in the manufacture of final goods or for other purposes in the factory of the appellants. They submitted a declaration in respect of the diesel as well as oil and lubricants as required under Rule 57G read with Rule 57B of the Central Excise Rules 1944, [for short "the Rules"] intending to avail the credit of duty on the said goods/inputs on 17/18.3.1997 with the Assistant Commissioner, Central Excise, Ajmer. But the Assistant Commissioner informed the appellants that after 1.3.1997, MODVAT credit was not available on high speed diesel oil and therefore no action could be taken on the declaration submitted by the company. The appellant company submitted declaration under Rule 57(H) of the Rules declaring the stock position of HSD oil as on 17.3.1997. They also prayed

for condonation of delay in submitting the declaration. The Superintendent, Central Excise Range Beawar vide letter dated 25.6.1997 informed the appellant company that the MODVAT credit was not admissible on high speed diesel oil under Rule 57(A) of the Rules.

4. After denial of MODVAT credit, the appellant company was given a show cause notice by Superintendent Central Excise Range, Beawar to project as to why the credit given should not be disallowed to the appellant.

5. The appellant filed a writ petition in the year 1997 seeking direction to quash the Trade Notice No. 26/27, the entry regarding the explanation of the HSD Oil in the Notification No. 5/94 and also the order dated 2.9.1997.

6. The said writ petition came up for consideration before the Rajasthan High Court and by the impugned judgment and order dated 3.4.2002, the writ petition was dismissed.

7. Aggrieved by the aforesaid judgment and order, the present appeals were filed on which we heard the learned counsel appearing for the parties.

8. Counsel appearing for the parties drew our attention to Chapter V of the Rules which deals with levy of excise duty on manufactured goods other than salt. Rule 43 to Rule 57 under Section A of Chapter V provides the general provisions. Rule 57 speaks of offences and penalties. Rule 57A provides for availment of MODVAT credit in respect of inputs used in manufacture of the finished product. The rule empowers the Central Government to specify the final product by issuing notifications in the official gazette for the purpose of allowing MODVAT credit of any duty of excise paid on the goods i.e. inputs used in the manufacture of the said final products.

9. Learned counsel appearing for the parties also drew our attention to various notifications issued by the Government of

India which are relevant for the purpose of deciding the present case and also to various decisions to which reference shall be made during the course of our discussion.

10. Learned counsel appearing for the appellants submitted that the High Court in the impugned judgment failed to draw a distinction between an accrued and vested right because of the operation of the Rules and the power to tax which in certain circumstances could be used retrospectively by issuing a validating Act to cure the defect in the statute. It was also contended that MODVAT credit is an accrued and vested right and therefore it would be governed by the Rules prevailing on that date and such vested and accrued right cannot be taken away by an Act of Parliament giving retrospective effect. It was also contended that the explanation added to Rule 57B with notification dated 2.3.1998 was retrospective in nature and the explanation can only clarify a legal position already existing but it cannot restrict or enlarge the scope of the substantive provisions of law so as to nullify the substantive provisions itself. Another submission of the counsel appearing for the appellants was that the Finance Act of 2000 intends to take away the rights accrued retrospectively which is burdensome and oppressive as the appellants were unable to pass on the burden on the customer and that in view of the law enacted, the appellants would have to bear the entire burden and that too retrospectively and therefore such provision is in violation of Article 14 of the Constitution of India.

11. Counsel appearing for the respondent, however, refuted all the aforesaid allegations and submitted that the Act sought to be named as a validating Act by the appellant is not a validating Act, but in fact explanatory in nature in order to clarify and put in proper perspective the legal position as existing on the issue. It was also submitted that the courts have held that the power of the legislature to validate the acts done in respect of a particular provision is permissible particularly in respect of fiscal matter. Reference was also made to the

decision of this Court in *Central Excise, Meerut Vs. Rama Vision Ltd.* reported in 2005 (181) ELT 201 (SC), wherein it was held by this Court that no such MODVAT credit is available on the duty paid on HSD Oil as fuel in the generation of electricity for the period 16.3.1995 to 1.4.2000.

12. Reference was also made to the decision of this Court in *M/s. Gujarat Ambuja Cement Vs. UOI* reported in 2005 (182) ELT 33 (SC), wherein this Court held that because of the inherent complexity of fiscal adjustments of diverse elements in the field of tax, the legislature has large discretion in classifying as to what should be taxed in which manner. It was also the submission of the learned counsel appearing for the respondents that the respondents never intended to allow any such credit which is being claimed by the appellants and a Finance Bill was introduced justifying the action taken to deny the credit of any duty paid on the HSD oil from 16.3.1995. In fact the explanatory note is not issued to signify any legislative change but the same was issued in order to explain the real position as existing by issuing an Act by way of Finance Bill 2000 and thereafter the Finance Act, 2000 which was passed by the Parliament and received the assent of the Parliament on 12.5.2000.

13. In the context of the aforesaid submissions of the counsel appearing for the parties, we proceed to deal with the issues raised before us more elaborately. However, in order to effectively deal with and understand the implications and ambit of the issues raised it may be necessary to set out the various relevant provisions of the Central Excise Act, 1944 [for short "the Act"], and the Rules framed thereunder and also the various notifications issued which are relevant for the purpose of deciding the present issues.

14. In order to appreciate the contentions raised and also to answer the issue that falls for our consideration it would be necessary to extract herein relevant part of the notifications in question as also relevant part of Section 112 of the Finance

Act, 2000 and such other related provisions.

15. The Finance Act, 2000 received the assent of the President on 1st April, 2000 and the said Act was enacted for validation of the denial of duty paid on High Speed Diesel oil. Sub-section (1) of Section 112 of the Finance Act, 2000, which is material, reads as follows:

> "112(1) Notwithstanding anything contained in any rule of the Central Excise Rules, 1944, no credit of any duty paid on high speed diesel oil at any time during the period commencing on and from the 16th March, 1995 and ending with the day, the Finance Act, 2000 received the assent of the President shall be deemed to be admissible."

16. In order to understand and appreciate the true import of the aforesaid provision it is also necessary to read clause 108 of the Finance Act, 2000, the same reads as follows:

> "Clause 108 – seeks to deny credit of the duty paid on high speed diesel oil when used in the manufacture of excisable goods with retrospective effect from the 16th day of March, 1995. It was never the legislative intention to permit credit of duty paid on high speed diesel oil. The clause also seeks to validate the action taken in the past on this basis. This amendment has become necessary to overcome certain judicial pronouncements."

In this connection, memorandum to legislative changes, which is a part of the document is also required to be noted, which reads as under:

> "Modvat Credit on high speed diesel oil was not intended to be allowed at any stage. Suitable retrospective provision made to give effect to confirm this."

17. We are also concerned for the purpose of deciding the

issues with the contents and scope of with Notification No. 5/94-CE(NT) dated 01.03.1994, Notification No. 8/95-CE(NT) dated 16.03.1995 and Notification No. 11/95-CE(NT) dated 16.03.1995.

18. Notification No. 5/94-CE(NT) dated 01.03.1994 was issued by the Central Government specifying therein the final products described in column (3) of the Table in respect of which credit of duty under MODVAT was made available. However, in the said table it was provided that high speed diesel oil which fell under tariff entry 2710.31 of the Central Excise Tariff Act, 1985, would not be considered as eligible input and it was specifically excluded from the list of eligible inputs. In the same notification, it was mentioned that the final product, Man Made PV Blended Yarn falling under Chapter 55 of the Central Excise Tariff Act, 1985 was also specifically excluded.

19. The aforesaid notification was issued in exercise of the powers conferred by Rule 57A of the Central Excise Rules, 1944. By issuing the said notification the Central Government identified the inputs in respect of which duty paid was allowed as credit if they were used in relation to the manufacture of the final products which were also specified in the notification as indicated hereinbefore. The high speed diesel oil and the final product of the Man Made PV Blended Yarn falling under Chapter 55 of the Central Excise Tariff Act, 1985 were specifically excluded from the list of eligible inputs.

20. The aforesaid notification came to be amended specifically by issuing Notification No. 8/95-CE(NT) dated 16.03.1995, where also high speed diesel oil classifiable under heading 27.10 was specifically excluded from the list of eligible inputs. Woven fabrics classifiable under Chapter 52 or Chapter 54 or Chapter 55 were also specifically excluded from the list of final products. Thus, the input and the final product of the appellants were specifically excluded in the Notification No. 8/95-CE(NT) dated 16.03.1995.

21. Reliance was also placed on the 2nd proviso in Rule 57D by Notification No. 11/95-CE (NT) dated 16th March, 1995. The aforesaid amendment was to the following effect:

"4. In the said Rules, in Rule 57D, for the proviso, the following provisos shall be substituted, namely:-

Provided that such intermediate products are –

(a) ……..

(b) Specified as inputs or as final products under a notification issued under rule 57A:

Provided that the credit of specified duty shall be allowed in respect of inputs which are used for generation of electricity, used within the factory of production for manufacture of final products or for any other purpose."

22. It is to be remembered at this stage that although the aforesaid 2nd proviso in Rule 57D was brought in, but inputs like high speed diesel oil used for the purpose of generation of electricity was specifically excluded by another Notification issued on the same date i.e. on 16.03.1995 to which we have already made a reference.

23. The contention of the appellants in this regard was that by the insertion of the 2nd proviso in Rule 57D by Notification No. 11/95-CE (NT) dated 16th March, 1995 they became entitled for the credit of duty paid on high speed diesel oil which was used for generation of electricity.

24. But in our observation, high speed diesel oil for the purpose of generation of electricity was specifically excluded from the list of eligible inputs in the Notification No. 5/94-CE(NT) dated 1st March, 1994 issued under Rule 57A also under Notification No. 8/95-CE(NT) dated 16.3.1995 from the list of eligible inputs. Therefore on a conjoint reading of the aforesaid

Notifications dated 1st March, 1994 and 16.3.1995 as also the amendment to Rule 57D, it is sufficiently indicated that the appellants are not entitled to credit of duty paid in respect of high speed diesel oil which was used for the purpose of generation of electricity.

25. Our attention was also drawn to the Notification dated 1.3.1997 whereby the Central Government amended Central Excise Rules and the provisos of Rule 57D were deleted, but the appellants, however, claim that they became entitled to such benefit as per Rule 57B. Relevant part of which reads as follows:

"57B. Eligibility of credit of duty on certain goods:-

(1) Notwithstanding anything contained in Rule 57A, the manufacturer of final products shall be allowed to take credit of the specified duty paid on the following goods, used in or in relation to the manufacture of the final products, whether directly or indirectly and whether contained in the final products or not, namely,:-

(i) goods which are manufactured and used within the factory of production;

(ii) paints;

(iii) goods used as fuel;

(iv) goods used for generation of electricity or steam, used for manufacture of final products or for any other purpose, within the factory of production.

xxxxxxxxxxxxxxxxxxxxxxxxxx"

26. On 10.03.1997, a Notification No. B42/1/97 was issued in the nature of corrigendum whereby in Rule 57B in sub-rule (1) for "goods" wherever it occurs it was provided that it should

be read as "Inputs". The relevant part of the same read as under:

> "Explanation: For the purposes of this sub-rule, it is hereby clarified that the term "inputs" refers only to such inputs as may be specified in a notification issued under rule 57A."

27. We may also refer to another Notification No. 5/98-CE(NT) dated 2.3.1998 wherein an explanation was added in Rule 57B in sub-rule (1), which reads as follows:

> "(I) in rule 57B, in sub-rule (1), for "goods" wherever it occurs read "inputs"."

28. A careful reading of the above said provision would make it explicitly clear that by adding the aforesaid explanation by Notification No. 5/98-CE(NT) dated 2.3.1998 the inputs mentioned in Rule 57B refers only to such inputs as specified in the notification issued under Rule 57A. Accordingly, the appellants are not entitled to get the benefit of, credit of duty paid on High Speed Diesel oil as high speed diesel oil is excluded from the list of eligible inputs as per notification issued under Rule 57A of the Central Excise Rules, 1944.

29. It is the contention of the respondents that despite the aforesaid clear position the Central Excise Gold (Control) Appellate Tribunal (in short "the Tribunal") delivered three judgments, namely,

(a) *India Cements Ltd. vs. Commissioner of Customs & C.Ex., Hyderabad* reported in 1997 (95) .E.L.T. 520.

(b) *Jindal Polymers vs. Commissioner of C. Ex., Indore* reported in 1999 (114) E.L.T. 322; and

(c) *Commissioner of Central Excise, Shillong vs. Vinay Cement Ltd.* reported in 1999 (114) E.L.T. 753.

wherein it was held that high speed diesel oil would be

considered as eligible input to get the benefit.

30. The intention regarding availment of the credit under MODVAT would be guided and governed by the aforesaid notifications which specifically excluded the benefit of availment of such credit as high speed diesel oil is specifically excluded from the list of eligible inputs as per notification under Rule 57A of the Central Excise Rules, 1944. Since it was specifically excluded from the list of eligible inputs such credit though may otherwise be available would not have created a vested right.

31. In the light of the aforesaid factual as also legal position, this Court in the case of *Commissioner of Central Excise, Hyderabad Vs. Associated Cement Companies Ltd.* reported in 2005 180 ELT 3 (S.C.) and *Commissioner of Central Excise, Meerut Vs. Rama Vision* reported in 2005 181 ELT 201 clearly laid down the proposition that no credit is admissible on any duty paid on high speed diesel oil for the period commencing from 16.3.1995 and ending with the day of Finance Act, 2000 which received the assent of the President on 1st April, 2000.

32. Despite the aforesaid factual position, since the Tribunal held otherwise, therefore, there was a necessity for the Finance Act to be brought in whereby a clarificatory explanation to the legal position was laid down.

33. Despite the aforesaid two decisions of this court laying down the proposition, it must be clarified that in those decisions validity of Section 112 of the Finance Act was not challenged and therefore this Court did not have the opportunity to examine all the aspects of Section 112.

34. In the case of *Tata Motors Ltd. Vs. State of Maharashtra* reported in (2004) 5 SCC 783, this Court observed that retrospective withdrawal of the benefit of set-off only for a particular period should be justified on some tangible and rational ground when challenged on the ground of

unconstitutionality. However, in the present case the ratio of the **Tata Motors** case [supra] would not be applicable as the appellants in this case never had a right with regard to availment of MODVAT credit. Hence, the contentions of the appellants that their vested and accrued right cannot be taken away with retrospective effect cannot be held as just and proper.

35. We have already discussed the applicability of the provisions of the Central Excise Act and the Rules made there under, which are also read in context of the various notifications issued by the Government of India. When read collectively in the aforesaid context the only conclusion that can be drawn is that the appellants are not entitled to the credit of duty as high speed diesel oil is specifically excluded from the list of eligible inputs as per the notification issued under Rule 57A of the Central Excise Rules 1944. Therefore, the contention of the counsel appearing for the appellants that explanation to Section 57-B not being clarificatory, and to whittle down the width of non-obstante clause of Section 57-B, cannot be accepted. The contention that the provisions of Rule 57B prevails over Rule 57A and consequently the inputs enumerated under Rule 57B would be inputs for the availment of MODVAT credit in spite of any provision to the contrary which may be contained in Rule 57A, is misreading of the provisions, for in our considered opinion, the aforesaid explanation added to the Notification No. 5/98 dated 2.3.1998, clearly intends that the inputs mentioned in Rule 57B refers only to such inputs as specified in a notification issued under Rule 57A.

36. So far the contention with regard to concept of MODVAT is concerned, the intention regarding availment of the credit under MODVAT would be guided and governed by the aforesaid notifications which specifically excluded the benefit of availment of such credit, as high speed diesel is specifically excluded from the list of eligible inputs as per the notification under Rule 57A of the Central Excise Rules. Since, it was specifically excluded, such credit though may be otherwise

available, could not have created any vested right. In our considered opinion the intention of the legislature is clear from the beginning to exclude the benefit of such credit by excluding high speed diesel oil from the list of eligible inputs by making substantial exclusion thereof in the notifications referred to hereinbefore. The aforesaid position is also verified by the decision of this Court in the case of *Commissioner of Central Excise, Hyderabad Vs. Associated Cement Companies Ltd.* reported in 2005 180 ELT 3 (S.C.) and *Commissioner of Central Excise, Meerut Vs. Rama Vision* reported in 2005 181 ELT 201 (supra).

37. The aforesaid decisions of this Court have clearly laid down the proposition that no credit is admissible on any duty paid on high speed diesel oil for the period commencing from 16.3.1995 and ending with the day of Finance Act, 2000 which received the assent of the President on 1st April, 2000.

38. Despite the aforesaid fact, since the Tribunal held otherwise, therefore, there was a necessity for the Finance Act to be brought in giving a clarificatory explanation to the legal position which had been prevailing all along and established by the long list of the notifications which were issued from time to time and referred to hereinbefore.

39. We may also appropriately refer to at this stage to the decision of this Court in *Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Ors.* reported in (1969) 2 SCC 283 wherein the Supreme Court in paragraph 4 has stated thus:-

> "4. Before we examine Section 3 to find out whether it is effective in its purpose or not we may say a few words about validating statutes in general. When a Legislature sets out to validate a tax declared by a court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. The most

important condition, of course, is that the Legislature must possess the power to impose the tax, for, if it does not, the action must ever remain ineffective and illegal. Granted legislative competence, it is not sufficient to declare merely that the decision of the Court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the Legislature does not possess or exercise. A court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. Ordinarily, a court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the rules or both are invalid or do not sufficiently create the jurisdiction. Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law. Sometimes the Legislature gives its own meaning and interpretation of the law under which tax was collected and by legislative fiat makes the new meaning binding upon courts. The Legislature may follow any one method or all of them and while it does so it may neutralise the effect of the earlier decision of the court which becomes ineffective after the change of the law. Whichever method is adopted it must be within the competence of the legislature and legal and adequate to attain the object of validation. If the Legislature has the power over the subject-matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions. The validity of a Validating Law, therefore, depends upon whether the Legislature possesses the competence which it claims over the subject-matter and

whether in making the validation it removes the defect which the courts had found in the existing law and makes adequate provisions in the Validating Law for a valid imposition of the tax."

40. There are similar decisions to that effect of this Court in *D.G. Gose & Co. (Agents) Pvt. Ltd. Vs. State of Kerala & Anr.* reported in (1980) 2 SCC 410. In paragraph 14 of the said judgment, this Court stated thus:-

"14. Craies on Statute Law, seventh Edn., has stated the meaning of "retrospective" at p. 367 as follows:

"A statute is to be deemed to be retrospective, which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. But a statute 'is not properly called a retrospective statute because a part of the requisites for its action is drawn from a time antecedent to its passing'."

It has however, not been shown how it could be said that the Act has taken away or impaired any vested right of the assessees before us which they had acquired under any existing law, or what that vested right was. It may be that there was no liability to building tax until the promulgation of the Act (earlier the Ordinances) but mere absence of an earlier taxing statute cannot be said to create a "vested right", under any existing law, that it shall not be levied in future with effect from a date anterior to the passing of the Act. Nor can it be said that by imposing the building tax from an earlier date any new obligation or disability has been attached in respect of any earlier transaction or consideration. The Act is not therefore retrospective in the strictly technical sense."

41. In the light of the aforesaid decisions and legal position

which emanates from reading of the provisions of the Act and the Rules framed there under and notifications which are issued from time to time, the contentions of the counsel appearing for the appellants are found to be without any merit. Since the product High Speed Diesel oil was excluded specifically from the list of eligible inputs in the notifications, there was no question of creation of any right in favour of the appellant to avail such benefit. Therefore, contention that a vested or accrued right is sought to be taken away by giving retrospective effect is without any merit. Consequently, in the facts of this case we are not required to answer whether a vested or accrued right could be taken away with retrospective effect. Further on a conjoint reading of all the notifications it is clearly established that the intention of the Government all along was to exclude the appellants from getting the benefit of the MODVAT credit, therefore, the contentions that the Finance Act violates the vested right is without any basis. The various decisions referred to and relied upon by the counsel appearing for the appellants in support of his contention that the vested right created in their favour could not have been divested by the respondent retrospectively is found to be based on misreading of the language of the aforesaid notifications which do not support, but in fact destroy the very basis of the case of the appellants.

42. In that view of the matter, we find no merit in these appeals which are dismissed but leaving the parties to bear their own costs.

N.J. Appeals dismissed.

R. RAMACHANDRAN NAIR

v.

THE DEPUTY SUPERINTENDENT VIGILANCE POLICE & ANR.

(Criminal Appeal No. 792 of 2011)

MARCH 28, 2011

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

Sree Sankaracharya University of Sanskrit Act, 1994: s.50(2) – Protection under – Criminal proceedings against the appellant-Vice-Chancellor of the University – Requirement of previous sanction of the Syndicate of the University – Held: Any act done by the Officers of the University in good faith is protected u/s.50(2) – Vice-Chancellor of the University, is one of the Officers of the University in terms of s.23 of the Act – s.50(2) is, therefore, applicable to the appellant and in respect of any act done under the Act or Statutes or Ordinances or Regulations, no suit or prosecution or other proceeding could be initiated against him without the previous sanction of the Syndicate – Prevention of Corruption Act, 1988 s.13(1)(d) – Penal Code, 1860 – ss.120-B and 463.

Code of Criminal Procedure, 1973: s.239 – Discharge application – Allegation that appellant-Vice-Chancellor of the University obtained pecuniary advantage and caused corresponding wrongful loss to the University – FIR – Charge-sheet filed after 8-1/2 years – Application for discharge – Held: In the absence of previous sanction of the Syndicate of the University which is mandatory in nature, the prosecution could not be launched against the appellant – Delay of 8-1/2 years in filing charge-sheet was also not explained – Even otherwise, there was no mention in the FIR or in the charge-sheet that the appellant had made any personal gain in the transaction – The FIR stated that the appellant had obtained a pecuniary advantage of around Rs. 59,51,543/- whereas in

the charge-sheet, it came down to less than 5 per cent of the original estimate, nearly, Rs. 2,68,358/- – There was no mention in the charge-sheet about the huge difference in the calculation of the loss between the FIR and the charge-sheet – Moreover, in view of sincere and speedy actions taken by the appellant as Vice-Chancellor, Government had decided earlier to withdraw the criminal proceedings against the appellant – In terms of s.114 of Evidence Act, 1872, presumption can be drawn that the Government had taken conscious decision of exonerating the appellant and there was no reason to doubt integrity of the appellant – Even on merits, records depicted that the appellant had not caused any loss to the government by his actions – Thus, appellant made out a case for discharge from the criminal proceedings – Sree Sankaracharya University of Sanskrit Act, 1994 – Evidence Act, 1872 –s.114.

The appellant was appointed as Special Officer for creating the first Sanskrit University in the State of Kerala. For the said purpose, land of 42.5 acres was acquired. The land so acquired consisted of low lying and water logged fields and any development work could be started only after filling up land with earth. The appellant got the land filled with earth. An amount of Rs.5925 was spent for filling up of every one cent of the water logged land. From 1.1.1994 to 30.6.1996, the appellant was appointed as Vice Chancellor of the University. On 18.12.1996, FIR was registered against the appellant and four other persons under Section 13(2) r.w. Section 13(1)(d) of the Prevention of Corruption Act, 1988 and Sections 120-B and 463, IPC. The allegation against the appellant was that the work of filling of earth in the land acquired for the University was done in an irregular manner and the appellant obtained a pecuniary advantage of Rs.59,51,543/- with the contractors thereby causing corresponding wrongful loss to the University. Charge-sheet was filed in the Court of the Enquiry Commissioner

and Special Judge, eight and a half years after the F.I.R. and without obtaining the previous sanction of the Syndicate of the University under Section 50(2) of the Sree Sankaracharya University of Sanskrit Act, 1994. In the F.I.R., the pecuniary loss caused to the University was indicated as Rs.59,51,543/- whereas in the charge-sheet it came down to less than 5% of the originally estimated amount, i.e., Rs.2,68,358/-. The appellant filed an application under Section 239 Cr.P.C. for discharge. The Special Judge dismissed the application on the ground that the appellant was not entitled to get the protection of Section 50 of the 1994 Act as being the Vice-Chancellor, he was a public servant. The High Court dismissed the revision filed by the appellant. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

HELD: 1. The heading of Section 50 of the Sree Sankarayacharya University of Sanskrit Act, 1994 would make it clear that any act done in good faith is protected. The appellant, being Vice-Chancellor of the University was one of the Officers of the University in terms of Section 23 of the Act. In that event, Section 50(2) was applicable to the appellant and in respect of any act done under the Act or Statutes or Ordinances or Regulations, no suit or prosecution or other proceeding could be initiated against him without the previous sanction of the Syndicate. A perusal of the FIR made it clear that there was not even a whisper of an allegation or in the charge-sheet that the appellant had made any personal gain in the transaction. The allegation was only that the contractor who did the earth filling obtained an excess amount of Rs. 2,68,358/-. It is not clear why the prosecution waited for nearly 8-1/2 years to file the charge-sheet or waited until the death of the contractor and until the Assistant Executive Engineer who prepared

the quotation for the work and in-charge of the work retired from service on superannuation and left the country before filing of the chargesheet in the court. I n the light of the language used in sub-section 2 which is mandatory in the absence of previous sanction of the Syndicate of the University, the prosecution cannot be launched or proceeded. Even otherwise, the appellant being a Vice-Chancellor, acted diligently by following the procedure, therefore, no action could be initiated after a period of 8 years from the initiation of the complaint. [Paras 9, 10] [1064-B-H; 1065-A-C]

2. A perusal of the proceedings of the Government of Kerala, Vigilance (B) Department communicated by Principal Secretary to Government to the Director, Vigilance & Anti Corruption Bureau made it clear that on examination of the entire facts in the 3 cases pending before the Special Courts and the sincere and speedy action taken by the appellant as Vice-Chancellor of the University and also action taken by the appellant in good faith in the discharge of the function imposed on him under the Act, the Government requested the Director Vigilance, Anti-Corruption Bureau to take action to withdraw all the 3 cases pending before the respective courts. In spite of such decision at the highest level, namely, Chief Secretary to Government, no follow up action was taken before the concerned courts seeking permission to withdraw the criminal proceedings pending against the appellant. In terms of Section 114 of the Evidence Act, 1872, this Court may legitimately draw a presumption that the Government had taken a conscious decision exonerating the appellant even in 2006 and there was no reason to doubt the integrity of the appellant. [Para 12] [1067-C-F]

3. Apart from the legal issues which were in favour of the appellant, even on merits, prosecution could not

be allowed to proceed against the appellant. When the appellant was asked to take required steps for formation of the University under the Act, the Government allotted 42.5 acres of land which was water logged and any development work could be started only after it was to be filled up with earth. The records showed that the estimate was prepared by the Assistant Executive Engineer and based on which tenders were called for and the appellant accepted the lowest tender which was of lesser amount than the one prescribed by the Engineer. Before the work was started, the appellant had consulted several experts in the field including the higher officials of the State and actually brought them to the site regarding the filling up of the earth. Further, there was no mention in the charge-sheet about the huge difference in the calculation of the loss between the FIR and the charge-sheet. Further, when the Government of Kerala decided to establish a University exclusively for Sanskrit in its State two decades ago, admittedly, nothing came out for a long time and only in the year 1991, the appellant was appointed as Special Officer for creating a University. Within two years, the mission was completed and Sri Sankaracharya University of Sanskrit was created and started functioning in November 1993 and in the next month i.e. in December 1993, the Government appointed him as the first Vice-Chancellor of the University and he assumed charge of the post with effect from January 1, 1994. He continued in the post for a period of 2-1/2 years i.e. till 30.06.1996. All these factual details clearly showed that even on merits the respondents were not justified in continuing the criminal proceedings. Though all these legal and factual details were projected before the trial court as well as the High Court, the same were not correctly appreciated and both the courts committed an error in dismissing his petition for discharge. The appellant made out a case for discharge from the criminal proceedings. [Para 13] [1067-G-H; 1068-A-H]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 792 of 2011.

From the Judgment & Order dated 12.7.2010 of the High Court of Kerala at Ernakulam in Crl. R.P. No. 1606 of 2010.

K.V. Viswanathan, Nikhil Goel, Marsook Bafakai, Rajesh B., A. Venayagam Balan, for the Appellant.

Jayadeep Gupta, G. Prakash, Beena Prakash for the Respondent.

The Judgment of the Court was delivered by

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Jayadeep Gupta, G. Prakash, Beena Prakash for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the impugned judgment and order dated 12.07.2010 passed by the High Court of Kerala at Ernakulam in Criminal R.P. No. 1606 of 2010 whereby the High Court dismissed the petition filed by the appellant herein seeking discharge from the criminal case pursuant to a charge sheet filed in the Court of the Enquiry Commissioner and Special Judge, Thrissur, by the Vigilance Police Department.

3. **Brief facts:**

(a) The Government of Kerala was trying to establish a Sanskrit University in the State from the year 1972 onwards. On 15.07.1991, the appellant was appointed as Special Officer for creating the first Sanskrit University in the State. On 16.01.1993, the State issued a Government Order directing the District Collector, Ernakulam to acquire the land for the establishment of the University. The entire land of 42.5 acres, so acquired in Kalady (the holy birth place of Sree Sankaracharya) in Ernakulam District which was handed over to the University by the District Collector of Ernakulam for establishing the University consisted of low-lying and water-logged paddy fields and any development work could be started only after it was filled up with earth. Before starting the work of filling up, the appellant, who was functioning as the Chief Secretary to State Government at the State Headquarters, had consulted several experts in the field including the Chief Engineer of the State Public Works Department (hereinafter referred to as PWD") who was actually brought to the site. The appellant filled 42.5 acres of waterlogged land with earth brought from distance. An amount of Rs.5,925/- was spent for filling up of every one cent of the water logged land.

(b) From 01.01.1994 to 30.06.1996, the appellant was appointed as the first Vice-Chancellor of the University. On 18.12.1996, an FIR being Crime No.9 of 1996 was registered in the Vigilance Police Station, Ernakulam against the appellant and four other persons under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 (hereinafter referred to as "the PC Act") and Sections 120-B and 463 of the Indian Penal Code (in short "IPC"). The allegation against the appellant was that the work of filling of earth in the land acquired for the said University was done in an irregular manner and

he obtained a pecuniary advantage of Rs. 59,51,543/- with the contractors thereby causing corresponding wrongful loss to the University.

(c) During May-June, 1997 the Vigilance Department examined the site relating to the alleged earth-filling during the years 1993 and 1994. This examination was done after three years and after the occurrence of six monsoons. Due to the impact of rains during six monsoons during that time, the field had got thoroughly consolidated.

(d) On 30.06.2005, a charge-sheet was filed in the Court of the Enquiry Commissioner and Special Judge, Thrissur with a delay of eight and a half years after the F.I.R. and without obtaining the previous sanction of the Syndicate of the University under Section 50(2) of the Sree Sankaracharya University of Sanskrit Act, 1994 (hereinafter referred to as "the Act"). In the FIR, the pecuniary loss caused to the University was indicated as Rs.59,51,543/- whereas in the charge-sheet it has come down to less than 5% of the originally estimated amount, i.e., Rs.2,68,358/-.

(e) In the meanwhile, on 03.04.2006, the Principal Secretary to the State Government directed the Director, Vigilance and Anti Corruption Bureau to withdraw the cases against the appellant. In this communication, the State has admitted that the conduct of the appellant was in good faith and that only because of the speedy actions taken by him, the University had become a reality within a short period of time and that the appellant is eligible for the protection under Section 50(3) of the Act.

(f) On 19.12.2008, the appellant filed an application under Section 239 of the Criminal Procedure Code (in short "the Code") being CMP No. 2933 of 2008 in CC No. 31 of 2005 in the Court of Enquiry Commissioner and Special Judge, Thrissur for discharge. By order dated 29.08.2009,

the Special Judge dismissed the abovesaid application on the ground that the appellant is not entitled to get the protection of Section 50 of the Act as being the Vice-Chancellor, the appellant was a public servant.

(g) Against the said order, the appellant preferred Criminal Revision Petition No. 1606 of 2010 before the High Court of Kerala. By order dated 12.07.2010, the High Court dismissed the revision filed by the appellant herein. The said order is under challenge in this appeal.

4. Heard Mr. K.V. Viswanathan, learned senior counsel for the appellant and Mr. Jaideep Gupta, learned senior counsel for the respondents.

5. The only allegation on the appellant was that while functioning as the Vice-Chancellor of the University he was found guilty for filling of earth in the land acquired for the University in a most perfunctory and irregular manner with ulterior motive by not recording the measurements correctly, showing inflated figures of measurements in the records and thereby committed falsification of accounts and forgery, criminal breach of trust and cheated the Government by corrupt or illegal means and committed misconduct, obtained undue pecuniary advantage of Rs.2,68,358/-, and he being the first accused has committed offence punishable under Sections 13(1) (d) and 13(2) of the PC Act and Sections 409, 468, 477A and 120-B of IPC.

6. Mr. K.V. Viswanathan, learned senior counsel for the appellant, at the foremost, submitted that in view of Section 50(2) of the Act, without the previous sanction of the Syndicate of the University, the prosecution cannot be allowed to proceed against the appellant. He pointed out that Section 50(2) of the Act stipulates "sanction of the Syndicate". He further highlighted that the prosecution, which has been initiated without the sanction of the University, ought not to be allowed to continue against the appellant. He also submitted that inasmuch as even

in 2006 the Government of Kerala, Vigilance (B) Department Thiruvananthapuram, after considering all the relevant materials, decided to withdraw the criminal proceedings against the appellant in the cases i.e. CC No. 21 of 2000 and CC No. 49 of 2000 pending before the Court of Enquiry Commissioner & Special Judge, Kozhikode and CC No. 31 of 2005 pending before the Court of Enquiry Commissioner & Special Judge, Thrissur, with the permission of the respective Courts. He also submitted that even on merits inasmuch as the appellant obtained the approval of the Chief Engineer of the PWD and accepted the lowest tender which was below the amount prescribed by the competent officer of the PWD i.e. Assistant Executive Engineer, there is no loss to the Government hence he cannot be held liable.

7. On the other hand, Mr. Jaideep Gupta, learned senior counsel for the respondents submitted that in view of the materials available, the appellant has not made out a case for discharge and he has to face the trial. He also submitted that the plea of the appellant was considered and rejected by the trial Court as well as by the High Court, therefore, interference by this Court is not warranted.

8. We have carefully considered the rival submissions and perused all the relevant materials.

9. Insofar as the first issue, namely, whether or not a prosecution can be allowed to proceed in the face of Section 50(2) of the Act without the sanction of the Syndicate of the University, it is useful to refer the relevant provision which reads as:-

"**50. Protection of acts done in good faith**—

(1) XXX

(2) No suit, prosecution or other proceedings shall lie against any officer or other employee of the University for any act done or purported to have been done under this Act, or the Statutes or the Ordinances or the Regulations without the previous sanction of the Syndicate.

(3) XXX"

The headnote makes it clear that any act done in good faith is protected. The appellant, being Vice-Chancellor of the University, is one of the Officers of the University in terms of Section 23 of the Act. In that event, it is not in dispute that Section 50(2) is applicable to the appellant and in respect of any act done under the Act or Statutes or Ordinances or Regulations, no suit or prosecution or other proceeding be initiated against him without the previous sanction of the Syndicate. Inasmuch as sub-Section 2 used the word "shall", previous sanction of the Syndicate is a pre-condition or mandate before initiating either civil or criminal prosecution. To put it clear, as per Section 50(2) of the Act, no prosecution will lie against the appellant without the previous sanction of the Syndicate. It is important to note that the allegations against him related to actions which he had taken while he was discharging his duties as an Officer of the University, namely, the Vice-Chancellor of the University. A perusal of the FIR makes it clear that there was not even a whisper of an allegation or in the charge-sheet that the appellant had made any personal gain in the transaction. The allegation was only that the contractor who did the earth filling obtained an excess amount of Rs. 2,68,358/-. It is not clear why the prosecution has waited for nearly 81/2 years to file the charge-sheet or waited until the death of the contractor and until the Assistant Executive Engineer who prepared the quotation for the work and in-charge of the work got promoted as Executive Engineer and then as Superintending Engineer and retired from service on superannuation and left the country for working in UAE before filing the chargesheet in the Court.

10. Apart from the above conclusion, in the light of the language used in sub-Section 2 which is mandatory in the

absence of previous sanction of the Syndicate of the University, the prosecution cannot be launched or proceeded. It is not the case of the prosecuting agency that they obtained sanction from the Syndicate of the University which is the competent authority to sanction. In the light of the language used in sub-Section 2 and in the absence of previous sanction by the Syndicate of the University, we hold that the prosecution cannot be allowed to proceed, even otherwise, he being a Vice-Chancellor, acted diligently by following the procedure, no action could be initiated after a period of 8 years from the initiation of the complaint.

11. Coming to the second contention, namely, the stand of the Government which is reflected in the proceedings dated 03.04.2006, it is also useful to extract the decision of the Government of Kerala, Vigilance (B) Department which was communicated by Principal Secretary to Government to the Director, Vigilance & Anti Corruption Bureau, Thiruvananthapuram which reads thus:-

"GOVERNMENT OF KERALA

No. 9575/B1/05/Vig. Vigilance (B) Department
Thiruvananthapuram
Dated 03.04.2006

From

The Principal Secretary to Government

To

The Director
Vigilance & Anti-Corruption Bureau
Thiruvananthapuram

Sir,

Sub: Withdrawal of cases pending against Shri R Ramachandran Nair, former Vice-Chancellor, Sree Sankaracharya University

of Sanskrit – Reg.

Ref. 1. Govt. letter of even No. dated 07.10.2005.

2. Your letter No. C5/SJK/16465/2000 dated 03.12.05 & 18.02.06.

I am directed to invite your attention to the references cited and to inform you that a further examination of facts in respect of the three cases viz. (CC No. 21/2000 and CC No. 49/2000) of the Court of Enquiry Commissioner & Special Judge, Kozhikode and CC No. 31 of 2005 of the Court of Enquiry Commissioner & Special Judge, Thrissur it is found that steps were taken by the University Centres at the earliest possible date and it was due to such speedy action that the University which was being contemplated for a very long time became a reality within such a short period of 1994-1996. As the former Vice-Chancellor had acted in good faith in the discharge of the functions imposed on him under the University Act, he is fully eligible for the protection of Section 50(3) of Sree Sankaracharya University of Sanskrit Act, 1994, which read as follows:-

50(3) "No Officer or other employee of the University shall be liable in respect of any such act in any civil or criminal proceedings if the act was done in good faith and in the course of the execution of the duties or in the discharge of the functions imposed by or under this Act."

As the action taken by the former Vice-Chancellor was "in good faith" in all three cases, it is decided that prosecution shall be withdrawn in CC 21/2000 and CC No. 49/2000 of the Enquiry Commissioner & Special Judge, Kozhikode, and CC No. 31/2005 of the Enquiry Commissioner & Special Judge Court, Thrissur.

Hence, I am to request you to take urgent action to withdraw the cases in CC 21/2000 and CC No 49/2000 pending before the Court of Enquiry Commissioner &

Special Judge, Kozhikode and CC No. 31/2005, before the Enquiry Commissioner & Special Judge, Thrissur, with the permission of the respective courts.

The action taken in matter may be intimated to Government immediately.

Yours faithfully
Sd//-
K.A. BHAGAVATHY AMMAL
Additional Secretary
For Principal Secretary to Government"

12. Perusal of the above communication at the highest level makes it clear that on examination of the entire facts in the 3 cases, namely, CC Nos. 21 and 49 of 2000 and CC No. 31 of 2005 which are pending before the Special Judge, Kozhikode and Thrissur respectively and the sincere and speedy action taken by the appellant as Vice-Chancellor of the University and also acted in good faith in the discharge of the function imposed on him under the Act, the Government requested the Director Vigilance, Anti-Corruption Bureau to take action to withdraw all the 3 cases pending before the respective Courts. It is not clear, in spite of such decision at the highest level, namely, Chief Secretary to Government, no follow up action was taken before the concerned courts seeking permission to withdraw the criminal proceedings pending against the appellant. In terms of Section 114 of the Evidence Act, 1872 this Court may legitimately draw a presumption that the Government had taken a conscious decision exonerating the appellant even in 2006 and there is no reason to doubt the integrity of the appellant.

13. Apart from the legal issues which are in favour of the appellant, even on merits, prosecution cannot be allowed to proceed against the appellant. When the appellant was asked to take required steps for formation of the University under the Act, the Government allotted 42.5 acres of land which was water logged and any development work could be started only after it was to be filled up with earth. It is also available from the

records that the estimate was prepared by the Assistant Executive Engineer and based on which tenders were called for and it is not in dispute that the appellant accepted the lowest tender which is of lesser amount than the one prescribed by the Engineer. It can also be seen that before the work was started, the appellant had consulted several experts in the field including the higher officials of the State and actually brought them to the site regarding the filling up of the earth. Further, though in the FIR, the complainant had claimed that the appellant had obtained a pecuniary advantage of around Rs. 59,51,543/- whereas in the charge-sheet filed by the prosecution in the Court, it has come down to less than 5 per cent of the original estimate, nearly, Rs. 2,68,358/-, admittedly, there is no mention in the chargesheet about the huge difference in the calculation of the loss between the FIR and the chargesheet. Further, when the Government of Kerala decided to establish a University exclusively for Sanskrit in its State two decades ago, admittedly, nothing came out for a long time and only in the year 1991 the appellant was appointed as Special Officer for creating a University. It was pointed out that within two years the mission was completed and Sri Sankaracharya University of Sanskrit was created and started functioning in November 1993 and in the next month i.e. in December 1993, the Government appointed him as the first Vice-Chancellor of the University and he assumed charge of the post with effect from January 1, 1994. He continued in the post for a period of 21/2 years i.e. till 30.06.1996. All these factual details clearly show that even on merits the respondents are not justified in continuing the criminal proceedings. Though all these legal and factual details have been projected before the Trial Court as well as the High Court, the same were not correctly appreciated and both the courts committed an error in dismissing his petition filed for discharge. With the abundant materials and in view of the non-compliance of statutory provisions mentioned above, we accept the claim of the appellant. For all these reasons, we are satisfied that the appellant has made a case for discharge from the criminal proceedings.

14. In these circumstances, the orders passed by the Enquiry Commissioner and Special Judge, Thrissur dated 29.08.2009 in CMP No 2933 of 2008 and CC No. 31 of 2005 and order of the High Court dated 12.07.2010 in Crl. RP No. 1606 of 2010 are set aside, consequently, the appellant is discharged from all the allegations leveled against him. The appeal is allowed.

D.G. Appeal allowed.

RAJESH SINGH & ORS.
v.
STATE OF U.P.
(Criminal Appeal No. 1160 of 2005)

MARCH 28, 2011

[V.S. SIRPURKAR AND T.S. THAKUR, JJ.]

CODE OF CRIMINAL PROCEDURE, 1973:

Appeal against acquittal – Scope of – Held: While upsetting the judgment of acquittal, the appellate court must show the perversity in the judgment of the trail court – Appellate court also must record the finding that the view taken by the trial court was not possible in law at all – In the instant case, the judgment of the appellate court very clearly records a finding that the acquittal recorded by the trial court was based on flimsy grounds and was wholly unjustified – High Court has given very good reasons to set aside the findings arrived at by the trial court – Penal Code, 1860 – s. 302/34.

PENAL CODE, 1860:

s. 302/34 – Murder – An eleven year old boy beaten and hanged to death by three ccused – Acquittal by trial court – Conviction by High Court – Held: The evidence of eye-witnesses clearly established that the boy was beaten by three accused in public gaze – Thereafter the accused dragged the boy inside the room and when they opened the door and fled away, the boy was found hanged and dead – Medical evidence established that death was homicidal – It is clear that all the three accused had taken part in beating the victim and they all dragged him into the room and closed the door- It was for the accused to explain as to how the victim died – It is very clear that all the three accused had acted with common intention of causing the death – High Court rightly

convicted and sentenced them to imprisonment for life u/s 302 with the aid of s. 34 – The reasons given by trial court for acquittal are wholly unacceptable and can safely be called perverse – High Court having noted the defects in the judgment of the trial court and its casual approach, was justified in reversing the acquittal – Code of Criminal Procedures, 1973.

The three accused-appellants (A-1, A-2, A-3) were prosecuted for causing death of an eleven year old boy. The prosecution case was that on the day of incident at about 5 PM, when PW-1 and his brother were going to have 'paan' at the 'paan' shop near Pico Centre, belonging to A-1, they saw the three accused beating the son of PW-1. On being asked, the accused told that the boy had stolen some money. PW-1 requested the accused to spare the child but the accused dragged him inside the house and shut the door. PW-1 and others kept on shouting from outside. After about half an hour the three accused opened the door and ran away. When PW-1 and others went inside, they saw the boy hung with a hook in the ceiling and he was dead. PW-1 informed the Police and lodged the FIR. The trail court acquitted the accused. However, the High Court convicted all the three accused u/s 302/134 IPC and sentenced each of them to imprisonment for life.

Aggrieved, the accused filed the appeal.

Dismissing the appeal, the Court

HELD: 1.1. It is settled law that while dealing with the judgment of acquittal, unless the reasoning by the trial court is found to be perverse, the acquittal cannot be upset; and that where two views are possible even then the judgment of acquittal should not be upset in the sense that the court while dealing with the judgment of

acquittal must see as to whether the trial court has taken a possible view. [Para 7] [1079-B-C]

1.2. It is a well settled position and is reiterated that while upsetting the judgment of acquittal, the appellate court must show the perversity in the judgment of the trial court and further the appellate court also must record the finding that the view taken by the trial court was not possible in law at all. [Para 8] [1079-D-E]

1.3. In the instant case, the appellate court's judgment very clearly records a finding that the acquittal recorded by the trial court was based on flimsy grounds and was wholly unjustified. The High Court has also given very good reasons to set aside the findings arrived at by the trial court. [Para 9] [1079-F-G]

2.1. The first finding by the trial court was that the FIR was ante-timed on the ground that as per the evidence of PW-4, the Investigating Officer, the dead body of the deceased was dispatched from the spot after being sealed at 9 p.m. for the police lines. However, in the record of the police lines, it was shown to have been r0eceived at 10 a.m. on 12.4.1993. Trial court also observed that there was no evidence offered by the prosecution to suggest that the special report of the crime was sent to the higher authorities. The High Court has found that the FIR was lodged by PW-1 on 11.4.93 itself at 6.40 p.m. Thus, if the incident happened at about 5 O'Clock in the evening, the recording of the FIR at 6.40 p.m. in a police station which was 8 Kms. away from the spot of occurrence could not be said to be late reporting. The High Court has also relied upon the evidence of PW-4. Merely because the copy of FIR was received in the office of the Circle Officer on 13.4.1993, it should not lead to the conclusion that the FIR was ante-timed. The High Court has also found that if the dead body reached the police lines late at mid night and if it was shown in the

record that it was received at 10 a.m. the following day, there was nothing significantly doubtful. Though the timing is slightly irregular, that alone would not be sufficient to reach a conclusion that the FIR was ante-timed. This circumstance cannot be taken to be of such a nature so as to throw the whole prosecution story which was proved by two eye witnesses, one of them being the father of the boy. [Para 10 and 11] [1079-H; 1080-A-H]

2.2. A close examination of PW-1, the father of the deceased boy shows that he and his brother had gone near the Pico Centre to have *paan*. That pico centre was in the house No. 128/22. According to this witness, he saw crowd in front of the Pico centre and saw that three accused were beating his 11 year old son. On being asked, A-1 replied that the victim had stolen his money. This incident was seen by three other persons also. However, in their presence, the accused persons dragged the victim inside the nearby house and shut the door. It was after about half an hour that the accused persons opened the door and fled away. When the witnesses entered the room, they found the victim hanging with the rope and was dead. There was nothing unnatural for the witness to choose his *Paan* shop and merely because he did not go to the nearest *Paan* shop, no fault could be found with the witness. Further, it has come in the evidence that the residence of PW-1 is hardly 300-350 steps away from the Pico Centre where the incident was happening, therefore, to call this witness a chance witness is a perversity. [Para 11 and 12] [1081-A-F; 1082-G-H; 1083-A]

2.3. The other reason given by the trial court was that PW-2 was present at the time of writing the FIR and his name was bound to have been mentioned in the FIR, but it did not mention his name and, therefore, PW-2 also appeared to be a chance witness. The trial court also

observed that his claim that he saw the incident when he was going to fetch ice near the Pico centre was false, as "*according to this witness, normally he drinks fresh water of hand pipe.*" **The High Court has found this reasoning in respect of PW-2 to be perverse. PW-2 is a literate witness. He is MA LLB and had practiced law for two years. He also claimed that he knew and recognized the three accused persons. He had given a correct and graphic picture of what happened. It was really a matter of importance that there are no prevarications or inter se contradictions in the evidence of these witnesses. He has also given the correct picture of what each accused was doing. It was to be realized that PW-1, the author of the FIR had seen his son being killed by three bullies of the locality. Under these circumstances, to expect each and every detail including the names of the witnesses, would be totally unnatural when both these witnesses faced their cross examination extremely well. There was nothing brought in their cross examination which could falsify their claim of having seen the ghastly incident. [Para 12-13] [1082-G-H; 1083-A-G]**

2.4. The trial court has also found fault with the fact that none of the witnesses tried to stop the accused persons when they fled. That is hardly any reason to disbelieve the prosecution case. One of the accused persons was already facing a murder case. PW-1 has also spoken about that. It should be seen that the accused were viewed as bullies and, therefore, nobody might have tried to apprehend them. Further, the trial court has found fault with the fact that the other witnesses like 'SK' was not examined. That would be hardly a circumstance in favour of the defence, particularly, when the two other witnesses were offered. It is not the quantity but the quality of the evidence which matters. After perusing the whole evidence, this Court is convinced that the

approach of the trial court, while appreciating the evidence of the two eye witnesses was extremely perverse. [Para 14-15] [1084-F-H; 1085-A-B]

2.5. The trial court did not take into consideration the evidence of the doctor who wholeheartedly supported the prosecution case. It is obvious from the post-mortem report that there were ante-mortem injuries. The injuries described were also serious injuries for an 11 year old child. His hyoid bone was also found fractured. Therefore, the fact that death of the victim was homicidal death was obvious. He had suffered the contusion on the back of left side below scapula and contusion on back of legs below knee etc. which were in perfect unison with the evidence of the two eye witnesses. The High Court has taken note of the medical evidence in a correct manner. At least the injuries of the deceased read with the evidence by the eye witnesses should have put the trial court on guard. The trial court had acquitted the accused persons in a very casual manner. [Para 16] [1085-B-E]

2.6. The most important circumstance in this case is the recovery of the dead body from the house of one of the accused persons. It is clear that all the three accused persons had taken part in the beating of the victim and all the accused persons dragged him in the room and closed the door. Therefore, it was up to the accused persons to explain as to how the victim died. There was absolutely no explanation from the accused persons, more particularly, A-1, as to how the body was found in a hanging position in the house of one of the accused. All the witnesses are unanimous on the point that all the three accused persons went inside the house dragging the victim with them. This important circumstance was completely lost sight of by the trial court. That also can be said to be a perversity on the part of the trial court. [Para 17 and 18] [1085-G-H; 1086-A-C]

2.7. After examining the evidence closely, this court is of the firm opinion that the acquittal in this case was completely out of the question. It is very clear that all the three accused persons had acted with common intention of causing the death and, therefore, the High Court has rightly held them guilty with the aid of s. 34, IPC. The reasoning given by the trial court was wholly unacceptable and can safely be called perverse. The High Court having noted these defects in the judgment of the trial court and the casual approach of the trial court was justified in reversing the acquittal. [Para 18 and 19] [1086-B-D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1160 of 2005.

From the Judgment & Order dated 4.4.2005 of the High Court of Judicature at Allahabad in Criminal Appeal No. 1554 of 1998.

Sanjay Jain for the Appellants.

R.K. Dash, Pradeep Misra, Suraj Singh for the Respondent.

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. The judgment passed by the High Court allowing the appeal against acquittal and convicting the appellant for the offence under Section 302 read with Section 34, IPC is in challenge in this appeal.

2. The three appellants, Rajesh Singh (accused No.1), Najai Srivastav (accused No.2) and Mohan Singh (accused No.3) came to be tried by the trial Court on the allegation that they had committed murder of a young boy Deepak on 11.4.1993 in the evening at about 5 O'Clock. Deceased Deepak was the son of Virendra Kumar (PW-1). Virendra Kumar (PW-1) was a lawyer's clerk. When he and his brother S.K. Srivastav, an advocate, were going for having '*paan*' at

the *paan* shop near Pico centre belonging to accused No.1, Rajesh, they saw that the three accused persons were beating Deepak. Deepak was made to take the posture like a cock (*murga*) and two bricks were kept on his back. Rajesh was hitting him with those bricks and the hands and feet of the boy had been tied and accused Najai was hitting him with a can. When Virendra Kumar (PW-1) asked as to why his son was being beaten, it was told that Deepak had stolen some money. Virendra Kumar (PW-1) requested the accused persons to let the child go as they had already beaten him severely. However, Rajesh refused to leave him and threatened that if he does not go he would also be assaulted. This incident was seen by some others also. On this Virendra Kumar (PW-1) said that he would inform the police but waited. All the three accused persons dragged Deepak to house No.128/21, C-Block, Kidwai Nagar, Kanpur which was the house of accused No.3, Mohan Singh. They confined him inside and shut the door. Virendra Kumar (PW-1) and others kept on shouting from outside. After about half an hour, the three accused persons ran away. When Virendra Kumar (PW-1) and others went inside they saw that the boy was hung with a hook in the ceiling. His feet were dangling at the height of 4-5 feet from the floor and he was dead. Virendra Kumar (PW-1) then informed the police by lodging an FIR.

3. The investigation was taken up by Chandra Shekhar Yadav (PW-4). He reached the spot, did the necessary formalities and sent the body for autopsy. As many as five ante-mortem injuries were found on the dead body during the post-mortem which was conducted by Dr. Jugal Kishore Sharma (PW-3). These injuries were in the nature of large abraded contusions. On internal examination his hyoid bone was found fractured. As per the opinion expressed, the boy died due to asphyxia as a result of throttling. After the investigation, charge sheet was filed. The prosecution examined Virendra Kumar (PW-1), Shyam Ji Pandey (PW-2) as eye-witnesses while Dr. Jugal Kishre Sharma who had conducted autopsy on the dead

body of deceased was examined as PW-3. In addition to this, police witnesses were also examined. The accused abjured the guilt. The trial Court, however, acquitted the accused persons dis-believing the eye witnesses and held that their presence was doubtful. He also held that the conduct of Virendra Kumar (PW-1) was unnatural. The trial Court also observed that the prosecution had failed to examine S.K. Srivastav advocate, another eye witness.

4. The State filed an appeal against this judgment and the High Court allowed the appeal convicting the three accused persons of the offence under Section 302 read with Section 34, IPC. That is how the appeal has come before us.

5. It was vehemently argued by Shri Sanjay Jain, learned counsel for the appellants that this was a case where the medical evidence was contradictory with the evidence of eye witnesses. He also pointed out that the trial Court had given sound reasons and the High Court had not exercised the caution while upsetting the finding of acquittal handed out by the trial Court. The learned counsel also urged that it not was found that the judgment of the trial Court was perverse and the inferences were not possible at all. The appellate Court could not have upset the judgment and convicted the accused persons. We were also taken through the evidence of the witnesses which was severely criticized by the learned counsel. Lastly, the learned counsel claimed that all the accused persons could not be held guilty, particularly, when it was not certain as to which accused had caused the murder by throttling deceased Deepak.

6. As regards this, the learned Senior Counsel appearing on behalf of the State supported the judgment passed by the High Court and pointed out that this was the most foul murder and the reasoning given by the trial Court was extremely perverse. Shri R.K. Dash, learned Senior Counsel pointed out by reference to the judgment of the trial Court that the trial Court was extremely casual in appreciating the evidence and had

rejected the important evidence of the eye witnesses for no reasons.

7. On this backdrop, it is to be seen whether the appellate Court was right in convicting the accused persons. There can be no dispute about the principles which are now more or less settled while dealing with the judgment of acquittal. There can be no dispute with the proposition argued by Shri Jain that unless the reasoning by the trial Court is found to be perverse, the acquittal cannot be upset. There can also be no dispute of the other proposition argued by Shri Jain that where two views are possible even then the judgment of acquittal should not be upset in the sense that the Court while dealing with the judgment of acquittal must see as to whether the trial Court has taken a possible view.

8. It is a well settled position now and we reiterate the same that while upsetting the judgment of acquittal, the appellate Court must show the perversity in the judgment of the trial Court and the appellate Court's judgment must show that the Court was alive to the fact that it was dealing with the judgment of acquittal and further the appellate Court also must record the finding that the view taken by the trial Court was not possible in law at all.

9. Testing the judgment from these angles, it has to be said that the appellate Court's judgment very clearly records a finding that the acquittal recorded by the trial Court was based on flimsy grounds and was wholly unjustified. The High Court has also considered the benefit of doubt awarded by the trial Court and has observed that it should not become a fetish. The High Court has also given very good reasons to set aside the findings arrived at by the trial Court.

10. The first such finding by the trial Court was that the FIR was ante-timed on the ground that as per the evidence of Chandra Shekhar Yadav (PW-4), the investigating officer, the dead body of deceased Deepak was dispatched from the spot

after being sealed at 9 p.m. for the police lines. However, in the record of the police lines, it was shown to have received at 10 a.m. on 12.4.1993. The FIR was also criticized by the trial Court and the defence counsel here on the ground that there was no evidence offered by the prosecution to suggest that the special report of the crime was sent to the higher authorities. The High Court has found that this criticism was not justified. The High Court has given the reasoning that the FIR was lodged by the witness Virendra Kumar (PW-1) on 11.4.93 itself at 6.40 p.m. Thus, if the incident happened at about 5 O'Clock in the evening, the recording of the FIR at 6.40 p.m. in a police station which was 8 Kms. away from the spot of occurrence could not be said to be late reporting. The High Court has also relied upon the evidence of Chandra Shekhar Yadav (PW-4) that the FIR had been lodged in the police station when he was not present there and he was informed about it only on wireless and, therefore, he happened to reach the spot directly with ASI and started the investigation of the case and was busy there in drawing of *Panchnama* etc. right up to 11 p.m. and merely because the copy of FIR was received in the office of the circular officer on 13.4.1993, it should not lead to the conclusion that the FIR was ante-timed. The High Court has also found that if the dead body reached the police lines late at mid night and if it was shown in the record that it was received at 10 a.m. on 12.4.93, there was nothing significantly doubtful. We have also gone through the record as well as the evidence of the investigating officer Chandra Shekhar Yadav (PW-4) and though the timing is slightly irregular, that alone would not be sufficient to reach a conclusion that the FIR was ante-timed. After all nothing was going to be gained by the prosecution by ante-timing the FIR. Had the FIR been ante-timed, the *Panchnama* could not have been commenced at 7.30 p.m. We do not find any significant cross examination of the *Panchas* and the police officers, particularly, on the aspect of timing thereof. We do not find this circumstance to be of such a nature so as to throw the whole prosecution story which was proved by two eye witnesses, one of them being the father of the boy.

11. The learned counsel severely criticized the evidence of Virendra Kumar (PW-1) on the ground that the behaviour of Virendra Kumar (PW-1) was extremely unnatural and that his presence on the spot was extremely doubtful. We have seen the evidence of Virendra Kumar (PW-1) very closely. We have also seen the reasons given by the trial Court for rejecting his evidence. According to this witness, he and his brother S.K. Srivastav had gone near Rajesh Pico Centre to have *paan*. That pico centre was in the house of 128/22, C-Block, Kidwai Nagar, Kanpur. According to this witness, he saw crowd in front of the Rajesh Pico centre and saw that three accused beating his 11 year old son. He was made to take posture of a cock (*murga*) and he was being hit by accused Najai with a can. While Rajesh was pressing bricks and Mohan was slapping his son which he did twice. On being asked, the accused Rajesh replied that Deepak had stolen his money and even after requests by the witness, Deepak was not being released and, therefore, Virendra Kumar (PW-1) made hue and cry that the would inform the police. This incident was seen by Brij Bhan Singh, Shyam Ji Pandey and Dinesh Kumar also. However, in their presence, the accused persons dragged Deepak inside the nearby house at 128/22, C-Block, Kidwai Nagar, Kanpur and shut the outside door. It was after about half an hour that the accused persons opened the door and the three accused persons fled away towards a square known as Chalis Dookan Chauraha. When the witnesses entered the room, they found Deepak was hanging with the rope and was dead. His legs were dangling at 4-5 feet above the floor. It was on this basis that the First Information Report was given in their hand writing after it was prepared. The trial Court then noted the topography of the area as also the houses of the witnesses. Thereafter, the trial Court observed that there were 3-4 *paan* shops including one Pandit Ji's *Paan* shop. The trial Court also noted that the witness did not have *paan* at Pandit Ji's *Paan* shop and proceeded towards the *paan* shop which was near the shop of the accused Rajesh. The trial Court also noted that there were about 100-150

persons gathered when the door was shut by the accused persons and that when the accused persons escaped by opening the door nobody tried to catch them. He also noted that this witness had taken the name of Shyam Ji Pandey to be present in the crowd. While considering the evidence of this witness, who was an eye witness and father of the unfortunate boy, the trial Court held that Virendra Kumar (PW-1) and Dinesh Kumar who were the clerks of the advocate as also SK Srivastav the brother of Virendra Kumar (PW-1) and Shyam Ji Pandey who himself was an advocate were residents of different places. The trial Court then observed:

> "the presence of many advocates and clerks is natural in the court but the presence of these four at the spot of occurrence on a holiday does not seem more probable."

The trial Court then further observed:

> "the betel shop of Pandit Ji is situated near the house of witness Virendra Kumar (PW-1) before Pico centre but witness did not eat the betel on the aforesaid shop but came to eat betel near Pico centre where the incident was happening. These circumstances make the presence of this witness on the spot of occurrence at the time of incident doubtful and this witness appears to be a chance witness."

12. It is on the basis of this that the trial Court has dis-believed the evidence of Virendra Kumar (PW-1). We do not find any other reason having been given to dis-believe his evidence. That we are surprised by this finding would be an understatement. There was nothing unnatural for the witness to choose his *Paan* shop and merely because he did not go to the nearest *Paan* shop, no fault could be found with the witness. Further, it has come in the evidence that the residence of Virendra Kumar (PW-1) is hardly 300-350 steps away from the Pico centre where the incident was happening, therefore, to call

this witness a chance witness is a perversity. The High Court has noted this perversity and has adversely commented on the finding reached by the trial Court. The other reason given by the trial Court was that one Shyam Ji Pandey was present at the time of writing the FIR and his name was bound to have been mentioned in the FIR, but it did not mention the name of Shyam Ji Pandey and, therefore, Shyam Ji Pandey also appeared to be a chance witness. As regards Shyam Ji Pandey, the Sessions Judge said that his claim that he saw the incident when he was going to fetch ice near the Pico centre was obviously false and the trial Court has mentioned "*according to this witness, normally he drinks fresh water of hand pipe. The incident is of 11th April at 5 p.m. At that time it is not hot worth drinking cold water especially when the witness used to drink hand pipe water daily.*"

13. Again, this reason for rejecting the evidence of Shyam Ji Pandey, to say the least, is perverse. There is no law saying that merely because one is used to drink water from hand pipe, he should not purchase ice. The High Court has found this reasoning in respect of Shyam Ji Pandey to be perverse. Again the Sessions Judge found that Shyam Ji Pandey who was present was not mentioned in the FIR. It was bound to be realized that Virendra Kumar (PW-1), the author of the FIR had seen his own son being killed by three bullies of the locality. It has also come in the evidence that accused No.1, Rajesh was already facing a murder case and was on bail. Under these circumstances, to expect each and every detail including the names of the witnesses, would be totally unnatural when both these witnesses faced their cross examination extremely well. There was nothing brought in their cross examination which could falsify their claim of having seen the ghastly incident.

14. It is true that the others like the brother of Virendra Kumar (PW-1) did not step into the witness box but that by itself will not make the evidence of two witnesses suspect in any manner. The witness was candid enough to say that he did not have any enmity with accused Mohan and he had heard that

he was being tried under Section 302, Indian Penal Code. He was also candid enough to say that accused Mohan and accused Najai had not raised any accusation against deceased Deepak that he had stolen their belongings. It has come in his cross examination that when he was requesting the accused persons to spare his son, Brij Bhan Singh, Shyam Ji Pandey and Dinesh reached there on hearing the shouts thereby the presence of Shyam Ji Pandey was thoroughly established by him in his cross examination itself. In his cross examination, he gave a graphic description of what each accused was doing while beating Deepak. The tenor of his evidence was natural and even after closely examining the evidence we also feel like the High Court that the Sessions Judge was in error in rejecting the evidence on flimsy grounds. Same is true of the evidence of Shyam Ji Pandey and excepting that Shyam Ji Pandey was not expected to purchase ice and for that purpose come out on the spot, nothing has been found inconsistent with the evidence of Virendra Kumar (PW-1). Shyam Ji Pandey is a literate witness. He is MA LLB and had practiced law for two years. He also claimed that he knew and recognized the three accused persons. He had given a correct and graphic picture of what happened. Much of his cross examination was on the fringes without confronting him with any inconsistencies. It was really a matter of importance that there are no prevarications or inter se contradictions in the evidence of these witnesses. He has also given the correct picture of what each accused was doing. After seeing the whole evidence, we are convinced that the approach of the Sessions Judge, while appreciating the evidence of these two eye witnesses was extremely perverse. The trial Court has also found fault with the fact that none of the witnesses tried to stop the accused persons when they fled. That is hardly any reason to dis-believe the prosecution case. One of the accused persons was already facing a murder case. The witness Virendra Kumar (PW-1) has also spoken about that. It should be seen that the accused were viewed as bullies and, therefore, nobody might have tried to apprehend them.

15. Further the trial Court has found fault with the fact that the other witnesses like Shiv Kumar was not examined. That would be hardly a circumstance in favour of the defence, particularly, when the two other witnesses were offered. It is not the quantity but the quality of the evidence which matters.

16. The Sessions Judge did not take into consideration the evidence of the doctor who wholeheartedly supported the prosecution case. It is obvious from the post-mortem report that there were ante-mortem injuries. There were 10 abraded contusions on both sides of neck in front and just below chin. The injuries described were also serious injuries for an 11 year old child. His hyoid bone was also found fractured. Therefore, the fact that Deepak's death was homicidal death was obvious. He had suffered the contusion on the back of left side below scapula and contusion on back of legs below knee etc. which were in perfect unison with the evidence of the two eye witnesses. The High Court has taken note of the medical evidence in a correct manner. At least the injuries of the deceased read with the evidence by the eye witnesses should have put the trial Court on guard. We must say that the trial Court had acquitted the accused persons in a very casual manner.

17. The most important circumstance in this case is the finding of the dead body in the house of one of the accused persons. Surely, the dead body could not have walked inside the house of the accused person. There was absolutely no explanation from the accused persons, more particularly, accused Rajesh as to how the body was found in a hanging position in the house of one of the accused. All the witnesses are unanimous on the point that all the three accused persons went inside the house dragging Deepak with them. This important circumstance was completely lost sight of by the trial Court. That also can be said to be a perversity on the part of the trial Court.

18. As regards the argument of learned counsel for the

defence that it was not certain as to which accused actually caused the murder and, therefore, all the three accused persons were bound to be given the benefit of doubt, it has to be said that the argument is without any substance. It is clear that all the three accused persons had taken part in the beating of deceased Deepak and all the accused persons dragged him in the room and closed the door. Therefore, it was up to the accused persons to explain as to how Deepak died. It is very clear that all the three accused persons had acted with common intention of causing the death and, therefore, all the three accused persons would be guilty with the aid of Section 34, IPC. The High Court has rightly held them guilty.

19. In short, after examining the evidence closely, we are of the firm opinion that the acquittal in this case was completely out of the question. The reasoning given by the trial Court was wholly unacceptable and can safely be called perverse. The High Court having noted these defects in the judgment of the trial Court and the casual approach of the trial Court was justified in reversing the acquittal. In our opinion, the appeal has no merits and must be dismissed. It is accordingly dismissed.

R.P. Appeal dismissed.

BHARAT RATNA INDIRA GANDHI COLLEGE OF ENGINEERING & OTHERS

v.

STATE OF MAHARASHTRA & ORS.

(Civil Appeal No. 2704 of 2011)

MARCH 28, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Judgment/Order – Suo motu orders – Orders passed by Court on its own motion – Sustainability of – Held: Such suo motu orders, without even a petition on which they are passed, are ordinarily not justified nor sustainable – Ordinarily, there must be a petition on which the court can pass an order – On facts, the High Court was not justified in taking suo motu action on the basis of some information which was not disclosed in the impugned order – Judges must exercise restraint in such matters – By the impugned order, the High Court directed that if the Colleges failed to fill in the post of Principal within the stipulated period, the University would issue orders prohibiting admissions in the concerned Colleges – There is no statutory rule that in the absence of a permanent Principal, admissions in the Colleges cannot be made – Thus, the High Court indulged in judicial legislation, which is not ordinarily permissible – Also, none of the Colleges were made parties before the High Court – There was violation of the principles of natural justice – Order of the High set aside.

Divisional Manager, Aravali Golf Club and Anr. vs. Chander Hassand Anr. **(2008) 1 SCC 683 – relied on.**

Case Law Reference:

(2008) 1 SCC 683 Relied on. Para 12

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2704 of 2011 ect.

From the Judgment & Order dated 3.12.2008 of the High Court of Judicature at Bombay, Bench at Nagpur in Writ Petition No. 2216 of 2006.

WITH

C.A. Nos. 2705-2716, 2776, 2717-2725, 2727, 2728, 2731-2736, 2738-2744 & 2746-2769 of 2011.

Jayant Bhushan, U. Hazarika, S.B, Sanyal, Ravindra K. Adsure, G. Ananda Selvam (for Gaurav Agrawal), Arun R. Pednekar (for Chandan Ramamurthi), Gopal Balwant Sathe, Sridhar Y. Chitale, Abhijat P. Medh, Kiran Singh, Sarang Aradhye, Shivaji M. Jadhav, Brij Kishor Sah, Prashant B., Amit Singh, P.V. Vaidya, Ketki P. Vaidya, Manish Pitale, Wasi Haider (for Chander Shekhar Ashri), Nikhil Nayyar, Ravindra Keshavrao Adsure, Sanjay Sen, Rana S. Biswas Hemant Singh, Amitab Narendra (for Sharmila Upadhyay), Vikas Mehta, Jitendra Kumar, Dr. R.R. Deshpande, Ujwala R. Deshpande, Sudhanshu S. Choudhari, Sanjay Kharde (for Asha Gopalan Nair), Vijay Kumar (for Vishwajit Singh), Aniruddha P. Mayee, Charudatta Mahendrakar, Ruche A. Mayee, Satyajit A. Desai, Somanath Padhan (for Anagha S. Desai) for the appearing parties.

The following Order of the Court was delivered

O R D E R

Delay condoned.

Leave granted.

Heard learned counsel for the parties.

These Appeals have been filed against the impugned judgment and order dated 03rd December, 2008 passed by the High Court of Judicature at Bombay, Bench at Nagpur in Writ Petition No.2216 of 2006.

At the very outset we may note that in fact there was no petition before the High Court on which the impugned order was passed. The High Court took suo motu action on the basis of some information which has not been disclosed in the impugned order. The cause title in the impugned judgment reads:

> "Court on its own motion vs. State of Maharashtra through its Secretary, Education Department."

None of the colleges in respect of which the impugned order was passed were made respondents, nor was notice issued to them, nor were they heard by the High Court.

To say the least, this was a strange procedure adopted by the High Court.

In our opinion, such suo motu orders, without even a petition on which they are passed, are ordinarily not justified nor sustainable. Ordinarily, there must be a petition on which the Court can pass an order. In our opinion, the High Court was not justified in taking suo motu action in this case. Judges must exercise restraint in such matters.

Moreover, we have perused the impugned order and we are of the opinion that the directions contained in paragraph 7 of the impugned judgment were wholly unwarranted as they amount to judicial legislation.

It appears that many private unaided Degree Colleges in Maharashtra did not have permanent Principals, and this is what motivated the High Court to pass the impugned order.

By the impugned order, the High Court has directed that if the colleges fail to fill in the post of Principal by 31st May, 2009, the University will issue orders in the first week of June, 2009 prohibiting admissions in the Colleges concerned.

In our opinion, no such direction could have been validly

given by the High Court. If there is no permanent Principal, obviously the Acting Principal shall officiate as Principal, but that does not mean that in the absence of the permanent Principal, admissions to the college should be prohibited. There is no statutory rule that in the absence of a permanent Principal admissions in the Colleges cannot be made. Thus, the High Court has indulged in judicial legislation, which is not ordinarily permissible to the Courts vide Divisional *Manager, Aravali Golf Club & Another vs. Chander Hass & Another* (2008) 1 SCC 683.

Also, none of these Colleges were made parties before the High Court, and hence the aforesaid direction is violative of the principles of natural justice.

Accordingly, we allow these appeals and set aside the impugned order of the High Court. No costs.

However, we direct that the process for filling up the posts of Principal may continue in accordance with law, and should be done expeditiously.

N.J. Appeals allowed.

MEHBOOB BATCHA AND ORS.
v.
STATE REP. BY SUPDT. OF POLICE
(Criminal Appeal No. 1511 of 2003)

MARCH 29, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Custodial violence – Accused-police personnel wrongfully confined PW-1's husband in police custody and beat him to death and also gang-raped PW1 in a barbaric manner within the premises of the police station – Conviction by Courts below – One accused sentenced to 3 years rigorous imprisonment, while the other accused were sentenced to 10 years rigorous imprisonment – On appeal, held: The accused deserve no mercy and should have been awarded death sentence – However, none of the accused were charged under s.302 IPC and instead the lower Courts treated the death of PW-1's husband as suicide – Both trial Court and High Court failed in their duty in this connection – In the normal course, Supreme Court could have issued notice of enhancement of sentence, but as no charge under s.302 IPC was framed, conviction under that provision cannot be straightaway recorded and the punishment cannot be enhanced – Penal Code, 1860 – s.302.

Custodial violence – Offence of – Held: Calls for harsh punishment – Custodial violence is in violation of this Court's directive in D.K. Basu's case – Directive to all police officers up to the level of S.H.O. to follow directions given by this Court in D.K. Basu's case.

Crimes against Women – Held: Crimes against women are not ordinary crimes committed in a fit of anger or for property – They are social crimes – They disrupt the entire social fabric, and hence they call for harsh punishment.

The accused-appellants are policemen who wrongfully confined PW1's husband in police custody on suspicion of theft for four days and beat him to death there with lathis, and also gang raped PW1 in a barbaric manner within the premises of the police station. The accused also confined several other persons (who were witnesses) and beat them in the police station with lathis. Both the trial Court and the High Court found the appellants guilty. Hence the instant appeal.

Dismissing the appeal, the Court

HELD:1. There is no reason to disagree with the verdict of the trial court and the High Court. If ever there was a case which cried out for death penalty it is this one, but it is deeply regrettable that not only was no such penalty imposed but not even a charge under Section 302 IPC was framed against the accused by the Courts below. [Paras 1, 5] [1095-E; 1096-B]

2. To prove the charges the prosecution examined as many as 37 witnesses, and they proved the guilt of the accused beyond reasonable doubt. PW1 has given her evidence in great detail and there is no reason to disbelieve the same. Her evidence discloses the inhuman and savage manner in which the accused, who were police personnel, treated PW1 and her husband. Ordinarily no self respecting woman would come forward in Court to falsely make such a humiliating statement against her honour. [Paras 5, 6 and 8] [1096-B-C; 1101-G]

3. Though the accused-appellants referred to some discrepancies in the evidence of PW-1, but it is well settled that minor discrepancies cannot demolish the veracity of the prosecution case. There is no major discrepancy in the prosecution case, which is supported by the evidence of a large number of witnesses, including

injured witnesses, apart from the testimony of PW-1, who identified the accused in the identification parade. Although A10 was not identified by her, the High Court has given good reasons for holding him guilty too, and this Court agrees with the same. [Para 9] [1101-H; 1102-A-B]

4. The Medical Officer who examined PW-1 found multiple nail scratches on her breasts. She complained of severe pain in her private parts. There were multiple abrasions on her vagina and cervix with discharge of foul smelling fluids. The chemical analysis of her vaginal smear showed plenty of pus cells and epithetical cells. Crimes against women are not ordinary crimes committed in a fit of anger or for property. They are social crimes. They disrupt the entire social fabric, and hence they call for harsh punishment. The horrendous manner in which PW-1 was treated by policemen was shocking and atrocious, and calls for no mercy. [Paras 10, 11 and 12] [1102-C-F]

Satya Narain Tiwari @ Jolly & Anr. v. State of U.P. **JT 2010(12) SC 154;** *Sukhdev Singh vs. State of Punjab,* **SLP (Criminal) No.8917 of 2010 decided on 12.11.2010 – relied on.**

5. The injuries (indicated by the pot-mortem report) show the horrible manner in which PW-1's husband was beaten and killed in police custody. It is surprising that the accused were not charged under Section 302 IPC and instead the Courts below treated the death of PW-1's husband as suicide. In fact they should have been charged under that provision and awarded death sentence, as murder by policemen in police custody is in the category of rarest of rare cases deserving death sentence, but surprisingly no charge under Section 302 IPC was framed against any of the accused. Both the trial

Court and High Court failed in their duty in this connection. [Paras 14, 15] [1103-F-G; 1104-A-B]

6. The entire incident took place within the premises of police station and the accused deserve no mercy. In this appeal the appellant no.1 has been given the sentence of 3 years rigorous imprisonment and a fine, while the other appellants have been given sentence of 10 years rigorous imprisonment with a fine. In the normal course, this Court could have issued notice of enhancement of sentence, but as no charge under Section 302 IPC was framed, conviction under that provision cannot be straightaway recorded and the punishment cannot be enhanced. [Paras 16, 17 and 18] [1104-C-E]

7. Custodial violence in police custody is in violation of this Court's directive in *D.K. Basu's* case. All policemen in the country are warned that this will not be tolerated. The graphic description of the barbaric conduct of the accused in this case shocks the conscience of this Court. Policemen must learn how to behave as public servants in a democratic country, and not as oppressors of the people. A copy of this order is directed to be sent to Home Secretary and Director General of Police of all States and Union Territories, who shall circulate the same to all police officers up to the level of S.H.O. with a directive that they must follow the directions given by this Court in *D.K. Basu's* **case, and that custodial violence shall entail harsh punishment. [Paras 20, 22] [1104-F-G; 1106-D-E]**

D.K. Basu vs. State of West Bengal **1997(1) SCC 416 – referred to.**

Case Law Reference:

JT 2010(12) SC 154	**relied on**	**Para 11**
1997(1) SCC 416	**referred to**	**Para 20**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1511 of 2003.

From the Judgment & Order dated 28.11.2002 of the High Court of Judicature at Madras in Criminal Appeal No. 677 of 1997.

S. Shunmu Gavelayutham, K.K. Mani, Abhishek Krishna, Mayur R. Shah for the Appellants.

R. Sunmugasundaram, Promila, S. Thananjayan for the Respondent.

The Judgment of the Court was delivered by

MARKANDEY KATJU, J.

"Bane hain ahal-e-hawas muddai bhi munsif bhi

Kise vakeel karein kisse munsifi chaahen"

— Faiz Ahmed Faiz

1. If ever there was a case which cried out for death penalty it is this one, but it is deeply regrettable that not only was no such penalty imposed but not even a charge under Section 302 IPC was framed against the accused by the Courts below.

2. Heard learned counsel for the parties.

3. The facts in detail have been stated in the impugned judgment of the High Court as well as of the trial court and hence we are not repeating the same here, except where necessary.

4. The appellants are policemen who wrongfully confined one Nandagopal in police custody in Police Station Annamalai Nagar on suspicion of theft from 30.5.1992 till 2.6.1992 and beat him to death there with lathis, and also gang raped his wife Padmini in a barbaric manner. The accused also confined

several other persons (who were witnesses) and beat them in the police station with lathis.

5. Both the trial Court and the High Court have found the appellants guilty and we see no reason to disagree with their verdict. To prove the charges the prosecution examined as many as 37 witnesses, and they have proved the guilt of the accused beyond reasonable doubt.

6. PW1 Padmini has given her evidence in great detail and we see no reason to disbelieve the same. We have read her evidence which discloses the inhuman and savage manner in which the accused, who were police personnel, treated Nandagopal and Padmini. We may quote just parts of her testimony which are as follows :

> ……."on Sunday at about 1.00 p.m. two policemen came in an auto to my house. They are A3, A6 and A8. All of them beat me by lathis on my buttocks. A3 caught hold of my leg and pulled me saying get into the auto. I ran outside. Two autos came and in one auto Subramaniam and Nandagopal were sitting with handcuffs jointly. Unable to bear pain I sat by their side. The auto went to Annamalai Nagar police station and they asked me to go inside and I went inside. A6 beat me up. I was surrounded by 4, 5 persons who were beating me. At that time my jacket (blouse) was torn. Some one tore off my jacket and I do not remember as to who tore off that jacket. They said 'you will not bear any more and go and sit' I sat in the corner where the Head constable was sitting earlier. Some time afterwards two women police came there. Thinking that I would be let off, I stated to them that I took oleander seeds, for that the women police gave me water mixed with tamarind and soap and asked me to drink it. That night myself and the women police were lying down in the room where the Sub Inspector of Police was sitting and in the early morning the women police went out. My husband's sister's daughter by name Priya gave coffee. I could talk

anything. I ate idly. My husband told me why you are coming here, I am being tortured by them. I told him that they would not do anything and they would let you free. At that time a policeman came and told 'what are you talking to her', and saying so he kicked him and pushed him down. A6, beat my husband and kept him in the lock up. Subramani, Kolanchi and Subramaniam were also in the lock up. Then I was given good meals and my husband was given waste food. Therefore I gave my food to Nandagopal. For that A1 said you should take that food and be good and why did you give it him, by saying so he beat me by lathi. In the evening all of them jointly discussed with themselves saying that each one of them should give Rs.50/- for giving a party. One police man asked for what purpose you are giving a party and one police man whispered some thing in his ear. On hearing that, he asked were you not born with your sisters, and saying so he left that place. On Monday at about 8.00 pm night, Nandagopal was brought out from the lock up. A6 told that he should see some one has to remove my saree. He called the accused Kolanchi from the lock up and asked him to remove my saree. He was holding my palla, but I was holding it tightly without leaving it. The said Kolanchi told that he should not pull it. Immediately the first accused beat him with a lathi. Then after beating him, he asked him to get to the side of the open court yard. Immediately A3 came to remove my saree. A3 removed the entire saree of mine. At that time I was wearing petty coat and jacket. A1, A3, A6, A8 and A10 removed my jacket and petty coat and made me nude. They asked me to run through the court yard and beat me and I fell down. All the five accused person one by one embarrassed me and kissed me. Then I fell down. At that time one said 'your private part is big in size, cannot you bear this pain'. I cried and asked him to stop beating. At that time some one came there in connection with a case. They said not to say this to anyone outside. I wrapped the saree over the body and sat. At that

time two women police came there. I stated to them what had happened. They said that no one will beat you hereafter, and I went to lie down along with them in a room. In the early morning on Tuesday one Senthil came and brought coffee. Senthil is the son of my husband's sister. On that evening my husband was taken outside and brought to the police station along with Rani, Dandapani. Rani is the younger sister of Nandagopal. Dandapani is the husband of Rani. When Dandapani was asked about the tape recorder, he showed a bill of a shop where he purchased it. For that the police said 'why are you telling a lie'. Yesterday we have removed the saree of the wife of Nandagopal and saw, and it would be proper if we remove the saree of your wife. At that time there were bleeding injuries on the back, leg and shoulder of Nandagopal and blood was oozing out in strips. Police stated like that. My husband sustained injury on account of beatings by the police A1, A3, A6, A8 and A10 beat my husband. Then the police asked Rani and Dandapani to go to their house. On Tuesday night two women police came to the police station. They were talking with each other as to whether any clothes have been brought for staying in the night. Along with them one male police came and asked whether they had seen Tamil picture 'Sembaruthi'. I asked them not to leave me alone and asked them to take me along with them. They said they would not do anything, by saying so those two women police went out. I cannot identify those police properly and I do not remember their names. On Tuesday at about 10.30 pm my husband Nandagopal was brought to the open court yard from the lock up. Myself and Nandagopal were brought to a room opposite to the open court yard. My husband was kept in a standing position on the wall and beaten up by them. A6 Dhass pulled out my saree. A10 removed my jacket and petty coat and made me to become nude and I was beaten and pushed down. My leg had stuck into a bench and I could not remove it. At that

time the 2nd accused Sub-Inspector of police came to Annamalai Nagar police station. He said that he would go first. At that time he used rubber loop at the genital organ and committed rape on me. A2, A3, A6, A8 and A10 also raped me forcibly. All of them have used rubber loop. All of them raped me in the presence of my husband. At that time my husband Nandagopal requested them not to do harm to my wife, and leave her. At that time A6 beat Nandagopal with lathi on his genital part. He fell down. He asked water by gesture. At that time after wrapping the saree over my body I took water from the pot. At that time the said five police men surrounded me and said if you want to give water to Nandagopal, you should give a kiss to everyone. Then I gave kisses to all the five. When I went to take water to my husband, they threw it away. That fell down. With an intention to spoil me again, they pulled me and I said I cannot come and leave me, by saying so I sat down. When A6 came and tried to force me, I fell on his leg and bit. On account of the sexual intercourse, I sustained bleeding injuries on the breast and genital organ and then I fell unconscious. When I woke up after regaining consciousness, the clothes were wrapped halfly. I said I wanted to see my husband. I was brought outside saying that my husband was sent to court. One of the policemen asked me to get into the van. I was kept at Chidambaram police station. They offered me idli and coffee. I ate it. One lady police was with me. All the other policemen went out with lathis. The woman police who was with me stated that there was students' agitation and some one was done to death at Annamalai Nagar Police Station. I wept and then I was left out. I asked the auto man at Mariamman temple to take me in the auto. He asked me whether I am the wife of Nandagopal, I said yes. He said that Nandagopal was done to death by the police and asked me not to go there. Then I went to court in the auto. This occurrence was talked in court. Then I went to Tahsildar's office immediately. I stated what had happened there. The Officers have gone to take action and they asked me to be here. I was sitting there. I went to Annamalai Nagar police station in a Jeep. There was a crowd there. I cried saying that not only I was raped by five persons but they also assaulted my husband and done him to death. One of the police men who raped me was standing there. I beat him with a chappal. He is A10. R.D.O. was there. He asked me what had happened and I said what had happened. I fell down unconscious. Then I was taken to the hospital. At about 1.00 pm one male doctor examined me. Then I came to the police station at Annamalai Nagar and gave my statement. That was recorded by them. Ex.P.1 is the statement typed by R.D.O. and obtained my signature therein. Then I went to the house of my mother in law. Nandagopal was lying dead. I was weeping. At that time Balakrishnan, Jankirani and politicians came there. I stated to them what had happened. Balakrishnan is the District Secretary of Communist Party, Janki Rani is the President of All Indian Madhar Sangam at Chidambaram. Janki Rani is the wife of Balakrishnan. I gave a petition to the R.D.O. to send me to the hospital that is Ex.P.2. I was admitted in the hospital at about 11.00 pm in the night. On the next day at about 7 or 7.30 am I was examined by a lady doctor. After coming from the hospital, on Thursday evening my husband was buried. On 5.6.1992 I sent a petition to the District Superintendent of Police. After I came to my house, a police officer came to my house. I have stated to him what had happened."…….

7.Padmini also stated :

……."The two police asked me to come to the rest room. Then at the same time three police without any uniform came inside. Then I cried in front of the lock up where my husband was kept inside saying that are calling me, but no one to help me. My husband was brought from the lock to the open court yard with handcuff. I cried to the

police by kneeling down. At that time Subramaniam asked them not to do anything to my sister and not to beat my friend. Then they removed the jacket and saree and made me to become nude in the open yard and squeezed my breast and bit and the old aged police hit against my private part with a stick saying that it is very big and I have to see how long it would go……..

……..Five police men came smelling of Brandy in their mouth. My husband was beaten while he was taken from the lock up and myself and my husband were kept in a room where the rice bags were kept. I was made to become nude. My husband cried to the police with handcuff to release him. The police kicked my husband on his chest. You would be alive only tonight and if you want you can enjoy. By saying so they hit him with gun. At that time Sub-Inspector stated that others can do only if I say because I am the officer here and so I will do first and other can afterwards, and by saying so he raped me. I raised a noise saying I am having much pain and asked him to leave me and the other police men were beating my husband. My husband asked them to remove the handcuff put on him. They did not do so. After finishing the work, Sub Inspector went away and asked others to do the same and he would see whether anybody is coming and asked them to finish the work. I was asked to lie facing up, one of them was holding my leg and another one was holding the hand and another one was lying on me and had intercourse with me. Like that all the five persons spoiled me."…….

8. We see no reason to disbelieve Padmini's evidence. Ordinarily no self respecting woman would come forward in Court to falsely make such a humiliating statement against her honour.

9. The learned counsel for the accused referred to some discrepancies in her evidence, but it is well settled that minor discrepancies cannot demolish the veracity of the prosecution

case. In our opinion there is no major discrepancy in the prosecution case, which is supported by the evidence of a large number of witnesses, including injured witnesses, apart from the testimony of Padmini, who identified the accused in the identification parade held on 13.8.1992 in Central Jail, Cuddalore. Although A10 was not identified by her, the High Court has given good reasons for holding him guilty too, and we agree with the same.

10. The Medical Officer who examined Padmini found multiple nail scratches on her breasts. She complained of severe pain in her private parts. There were multiple abrasions on her vagina and cervix with discharge of foul smelling fluids. The chemical analysis of her vaginal smear showed plenty of pus cells and epithetical cells. The doctors also examined Subramaniam and Chidambaranathan who were beaten by the accused policemen with lathis.

11. We have held in *Satya Narain Tiwari @ Jolly & Anr. vs. State of U.P.,* JT 2010(12) SC 154 and in *Sukhdev Singh vs. State of Punjab,* SLP (Criminal) No.8917 of 2010 decided on 12.11.2010 that crimes against women are not ordinary crimes committed in a fit of anger or for property. They are social crimes. They disrupt the entire social fabric, and hence they call for harsh punishment.

12. The horrendous manner in which Padmini was treated by policemen was shocking and atrocious, and calls for no mercy.

13. The post-mortem report of Nandagopal shows the following injuries :

"I. A rope like ligature mark centre of neck encircling obliquely upwards. M Right to left neck with knot like mark on right neck. (Size about "1/2 in width O Rope mark). Middle lateral aspect. Underlying skin dry parchment in colour.

II. An abrasion 1 x 1 cm left cheek.

III. An abrasion 3 x 1 cm right hip anterior.

IV. An abrasion 2 x 1 cm left leg middle anterior.

V. An abrasion 3 x 1 cm right leg middle anterior.

VI. An abrasion 2 x 1 cm left arm shoulder posterior lower.

VII. An abrasion 2 x 1 cm right arm shoulder posterior lower.

VIII. An abrasion 2 x 1 cm left elbow antero-medical.

IX. An abrasion 2 x 1 cm right elbow posterior lower.

X. An abrasion 2 x 1 cm right scrotum lower antero-lateral. No underneath haemotoma injuries are ante-mortem in nature.

XI. Tongue bitten in between the teeth partially protruded outside.

The post-mortem certificate contains the final opinion of the doctor that Nandagopal died on asphyxial death due to atypical hanging about 10 to 24 hours prior to post-mortem."

14. The above injuries show the horrible manner in which Nandagopal was beaten and killed in police custody. In her evidence Padmini stated that on the evening of Sunday, "Four policemen beat my husband with sticks. They kicked my husband with boots on his chest." She also stated "At that time there were bleeding injuries on back leg and shoulder (of Nandagopal) and blood was oozing out and found in strip form". Even when she was being raped by the policemen Nandagopal was beaten.

15. We are surprised that the accused were not charged under Section 302 IPC and instead the Courts below treated the death of Nandagopal as suicide. In fact they should have been charged under that provision and awarded death sentence, as murder by policemen in police custody is in our opinion in the category of rarest of rare cases deserving death sentence, but surprisingly no charge under Section 302 IPC was framed against any of the accused. We are constrained to say that both the trial Court and High Court have failed in their duty in this connection.

16. The entire incident took place within the premises of Annamalai Nagar police station and the accused deserve no mercy.

17. In this appeal the appellant no.1 has been given the sentence of 3 years rigorous imprisonment and a fine, while the other appellants have been given sentence of 10 years rigorous imprisonment with a fine.

18. In the normal course, we could have issued notice of enhancement of sentence, but as no charge under Section 302 IPC was framed, we cannot straightaway record conviction under that provision and enhance the punishment.

19. For the reasons given above this appeal is dismissed.

20. Before parting with this case, we once again reiterate that custodial violence in police custody is in violation of this Court's directive in *D.K. Basu vs. State of West Bengal* 1997(1) SCC 416 and we give a warning to all policemen in the country that this will not be tolerated. The graphic description of the barbaric conduct of the accused in this case shocks our conscience. Policemen must learn how to behave as public servants in a democratic country, and not as oppressors of the people.

21. In *D.K. Basu's* case this Court observed :

.....“Custodial violence, including torture and death in the lock-ups, strikes a blow at the rule of law, which demands that the powers of the executive should not only be derived from law but also that the same should be limited by law. Custodial violence is a matter of concern. It is aggravated by the fact that it is committed by persons who are supposed to be the protectors of the citizens. It is committed under the shield of uniform and authority in the four walls of a police station or lock-up, the victim being totally helpless. The protection of an individual from torture and abuse by the police and other law-enforcing officers is a matter of deep concern in a free society.

In spite of the constitutional and statutory provisions aimed at safeguarding the personal liberty and life of a citizen, growing incidence of torture and deaths in police custody has been a disturbing factor. Experience shows that worst violations of human rights take place during the course of investigation, when the police with a view to secure evidence or confession often resorts to third-degree methods including torture and adopts techniques of screening arrest by either not recording the arrest or describing the deprivation of liberty merely as a prolonged interrogation. A reading of the morning newspapers almost everyday carrying reports of dehumanising torture, assault, rape and death in custody of police or other governmental agencies is indeed depressing. The increasing incidence of torture and death in custody has assumed such alarming proportions that it is affecting the credibility of the rule of law and the administration of criminal justice system. The community rightly feels perturbed. Society’s cry for justice becomes louder.

Custodial death is perhaps one of the worst crimes in a civilized society governed by the rule of law. The rights inherent in Articles 21 and 22(1) of the Constitution require to be jealously and scrupulously protected. We cannot wish

away the problem. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law-breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchism. No civilized nation can permit that to happen. Does a citizen *shed off* his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in *abeyance* on his arrest? These questions touch the spinal cord of human rights’ jurisprudence. The answer, indeed, has to be an emphatic ‘No’.”……..

(emphasis supplied)

22. Let a copy of this order be sent to Home Secretary and Director General of Police of all States and Union Territories, who shall circulate the same to all police officers up to the level of S.H.O. with a directive that they must follow the directions given by this Court in *D.K. Basu’s* case (supra), and that custodial violence shall entail harsh punishment.

B.B.B. Appeal dismissed.

RANJIT SINGH

v.

STATE OF PUNJAB

(Criminal Appeal No. 389 of 2004)

MARCH 29, 2011

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

Penal Code, 1860: s.302 – Murder – Allegation that the victim-deceased was strangulated by her husband, sister-in-law and grandmother-in-law which caused her death – Trial Court acquitted all the accused on the ground that there was no motive for the murder and the sanctity of the extra judicial confession was doubtful – High Court held the appellant-husband guilty, however upheld the order of acquittal as far the other accused were concerned – On appeal, held: There was no evidence to connect the appellant with the crime – Extra-judicial confession was made by the appellant to PWs 8 and 9 – Trial court gave good reason for discarding the evidence of PWs 8 and 9 by observing that the appellant and the other accused were in custody from the 2nd September, 1990 onwards when the incident occurred and as such the prosecution story that he was arrested on 10th September after he had made the extra judicial confessions was unbelievable – High Court observed that the extra judicial confessions were irrelevant in the circumstances, and yet relied on those confessions – There was no other evidence against the appellant – Some of the conclusions drawn by High Court were merely conjectural and were not borne out by evidence – The view taken by trial court was possible and should not have been interfered with by High Court – Appellant acquitted.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 389 of 2004.

From the Judgment & Order dated 4.12.2003 of the Division Bench of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 93-DBA of 1994.

O.P. Khullar and R.C. Kohli for the Appellant.

Kuldip Singh, K.K. Pandey and H.S. Sandhu for the Respondent.

The following Order of the Court was delivered

O R D E R

This appeal has been filed by Ranjit Singh challenging his conviction and sentence under Section 302 of the IPC for having committed the murder of his wife on Ist September 1990 in the area of village Sandhwan, District Faridkot.

As per the prosecution story Gurtej Singh-PW.10 of village Sandhwan found the dead body of Gurmail Kaur lying in the house of the appellant on the Ist September 1990. None of the family members of the appellant were present in the house at that time but an electric wire was lying near the dead body. Gurtej Singh-PW. thereafter informed PW.3-Harjinder Singh-the brother of the deceased, who rushed to village Sandhwan accompanied by his son Mohan Singh and Sarpanch Harbhajan Singh. They found the dead body lying in the house. The matter was reported by Harjinder Singh to the Police Station at 5.30 a.m. on the 2nd September, 1990. ASI-Sant Parkash (PW.14) thereafter reached the house of the appellant in village Sandhwan. He recorded the inquest proceedings and sent the dead body for its post-mortem examination. He also picked up an electric wire 15 feet in length from the spot. The post-mortem examination conducted on the 2nd September at 1.45 by Dr. K.K.Agarwal revealed ten injuries on the dead body. The Doctor opined that the death had been caused by asphyxia due to strangulation. It was also opined that after the deceased had been done to death efforts had been made to electrocute

her as well. During the course of the investigation it was found that Ranjit Singh – appellant and his sisters Manjit Kaur and Baljit Kaur and grandmother-Gurcharan Kaur were also involved in the murder. Baljit Kaur and Manjit Kaur were accordingly arrested on the September 12, 1990 whereas, as per the prosecution story, the appellant was produced before the Investigating officer on the same day by PW.8 Geja Singh before whom he had made an extra judicial confession. A charge-sheet was also filed against Ranjit Singh, Baljit Kaur and Manjit Kaur whereas Gurcharan Kaur was shown in Column No.2 but was subsequently summoned and sent up for trial on the basis of an application made under Section 319 of the Cr.P.C. On appearance of Gurcharan Kaur charges under Section 302/34 of the IPC were framed against all the accused.

The prosecution in support of its case relied inter alia on the evidence of Dr. K.K. Aggarwal (PW.1) who had conducted the post-mortem, PW.3-Harjinder Singh-the first informant, PW.4-Mohan Singh, and PW.8-Geja Singh and PW.9-Arjan Singh to whom Ranjit Singh had made extra judicial confessions and PW.13-Tejvir Singh to whom Baljit Kaur and Manjit Kaur had made extra-judicial confessions. After the close of the prosecution case the statements of the accused were recorded under Section 313 of the Cr.P.C. They denied all the allegations against them and stated that they had never sought any money from Gurnail Kaur's father for the purpose of sending Baljit Kaur and Manjit Kaur Canada to join their mother who was living there. They also pleaded alibis in defence and also produced evidence to that effect.

The Trial Court recorded some positive findings in favour of the accused on a perusal of the evidence. It observed that there appeared to be no motive for the murder and none had been suggested by the prosecution and the story that the accused were attempting to extort money from the deceased and her father so that they could buy tickets for going abroad was not based on any evidence. The court also observed that

but for the extra-judicial confession allegedly made by the accused to PW's. 8,9 and 13, there was no other evidence against the accused. The Court then examined this evidence and held that as per the statement of PW.8 Geja Singh the accused had been arrested on the 2nd September, 1990 whereas the I.O. PW.14 had categorically stated that they had been arrested on the 10th September, 1990 and in this view of the matter the sanctity of the extra judicial confession was suspect. It has also observed that PW.9 was closely related to the family of the deceased and was therefore improbable that the accused would make an extra judicial confession to him. The Trial Court accordingly acquitted the accused. The matter was thereafter taken in appeal to the High Court by the State of Punjab. The High Court, has on a reconsideration of the evidence, allowed the State appeal qua Ranjit Singh-the appellant and dismissed the appeal qua the other two i.e. Baljit Kaur and Manjit Kaur. The High Court has opined that the appellant was the husband of the deceased and as the death of Gurmail Kaur was homicidal and as the appellant had made absolutely no effort to raise a hue and cry despite the fact that his wife had been murdered, clearly spelt out that he was guilty of the crime. It was also observed that the extra judicial confession though of little significance but an inference could be drawn that the appellant wanted his wife out of the way so that he could move to Canada to be with his mother who was settled there. The Court however observed that this was not a case of a murder for dowry but was nevertheless a diabolical crime. The State appeal was accordingly allowed and the appellant sentenced to life imprisonment under Section 302 of the IPC. This statutory appeal has been filed by Ranjit Singh.

We have heard the learned counsel for the parties very carefully and had gone through the record. The Trial Court had gone into the evidence and observed that there was no evidence to connect the appellant with the crime. It is true that the incident happened in the matrimonial home and some presumption regarding the special knowledge etc. could be

raised in such a situation. But the basic onus on the prosecution is to prove its case and the onus does not change merely because the victim is the wife and the accused the husband and the incident happened in the matrimonial home. In this case it has been found that the extra-judicial confession has been made by the appellant to two persons i.e. Geja Singh and Arjun Singh. The Trial Court had given very good reasons for discarding this evidence by observing that the appellant along with his sisters were in custody from the 2nd September, 1990 onwards and as such the prosecution story that he had been arrested on the 10th September, 1990 after he had made the extra judicial confession was unbelievable. The High Court has observed however that the extra judicial confession was really irrelevant in the circumstances, but at the same time, curiously, relied on those very confessions. We also find that some of the conclusions drawn by the High Court are merely conjectural and are not borne out by evidence. An extra judicial confession is an extremely weak kind of evidence and conviction on its basis alone is rarely recorded, there is absolutely no other evidence in the case. We are of the opinion that the judgment of the High Court was a little stretched out and not possible on the facts of the case. The view taken by the Trial Court was clearly possible and should not have been interfered with by the High Court.

We accordingly allow the appeal, set aside the judgment of the High Court and direct the appellant's acquittal. His bail bonds are discharged.

D.G. Appeal allowed.

STATE OF RAJASTHAN
v.
TARA SINGH
(Criminal Appeal No. 262 of 2006)

MARCH 29, 2011

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

Narcotic Drugs and Psychotropic Substances Act, 1985 – s. 50 – Accused found carrying a gunny bag containing opium on his head – Search and seizure – Samples sent to laboratory for analysis – Accused convicted and sentenced accordingly – High Court setting aside the conviction on two grounds, viz: (i) non-compliance with s. 50 of the Act, and (ii) absence of evidence to show as to when the sample had been sent to the laboratory – On appeal, held: Provisions of s. 50 would no longer be applicable to a search such as the one made in the instant case as the opium had been carried on the head in a gunny bag – However, there was no evidence to show as to when the sample had been sent to the laboratory – Samples remained in some unknown custody for fifteen days – High Court was fully justified in holding that the sanctity of the samples had been compromised which cast a doubt on the prosecution case – Thus, judgment of the High Court on the second aspect does not call for interference – Acquittal upheld.

State of Himachal Pradesh v. Pawan kumar **(2005) 4 SCC 350 – referred to.**

Case Law Reference:

(2005) 4 SCC 350 Referred to. Para 2

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 262 of 2006.

From the Judgment & Order dated 17.10.2003 of the High Court of Judicature for Rajasthan at Jodhpur in S.B. Criminal Misc. Appeal No. 398 of 1999.

Abhishek Gupta, Milind Kumar for the Appellant.

Naresh Kumar for the Respondent.

The following Order of the Court was delivered

O R D E R

1. This appeal against acquittal filed by the State of Rajasthan arises out of the following facts:

1.1. At about 5:00p.m. on the 2nd February, 1988 the Station in charge of police station Sangdia received information through an informer that one Tara Singh would be coming near the Jhandewalan Sikhan river, carrying opium. The necessary entries etc. were made in the Police Station register and a raiding party was organised by the Police Officer. As the raiding party reached near Jhandewalan Sikhan at 6:00p.m. a person carrying a white coloured bag was seen coming from the opposite side and on seeing the police party took a sudden turn and started running away. He was chased and apprehended and on enquiry revealed his name as Tara Singh, the respondent herein. An offer of a search in terms of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called 'the Act'), was, accordingly, made to him and he stated that he would like to be searched in the presence of the Station incharge himself. He was, accordingly, searched and the bag that he was carrying was found to contain 8 kg. of opium. Samples of the opium were taken out and sent to the laboratory for analysis and the balance was deposited in the Malkhana. On the completion of the investigation, the respondent was charged under Sections 8/15 of the Act and was brought to trial. The trial court relying on the evidence of several witnesses who had constituted the raiding party as also

the report of the laboratory, held that the case against the respondent had been proved beyond doubt. He was, accordingly, sentenced to 10 years R.I. and to a fine of Rs. 1 lakh. An appeal was thereafter filed by the respondent in the High Court. The High Court allowed the appeal on two grounds: (i) that the provisions of Section 50 of the Act had not been complied with and the offer to the accused that he could be searched in the presence of a Gazetted Officer or Magistrate had not made to him; and (ii) that there was no evidence to show as to when the sample had been sent to the laboratory, as the forwarding letter dated 26th February, 1998, of the Superintendent of Police (Exhibits P20 and P21) sent along with the samples did not explain why the samples had reached the laboratory on the 9th March, 1998 and it was not thus clear where the samples had remained between the 26t February, 1998 and 9th March, 1998. The appeal was, accordingly, allowed and the respondent was, acquitted,. It is in these circumstances that the present appeal has been preferred by the State.

2. At the very outset, it must be understood that the provisions of Section 50 would no longer be applicable to a search such as the one made in the present case as the opium had been carried on the head in a gunny bag. A Bench of this Court in *State of Himachal Pradesh v. Pawan Kumar* (2005) 4 SCC 350 after examining the discrepant views rendered in various judgments of this Court has found that Section 50 of the Act would not apply to any search or seizure where the article was not being carried on the person of the accused. Admittedly, in the present case, the opium was being carried on the head in a bag. Mr. Abhishek Gupta, the learned counsel for the appellant-State, therefore, appears to be right when he contends that the observations of the High Court that the provisions of Section 50 of the Act would not be applicable was no longer correct in view of the judgment in *Pawan Kumar's case*. We find, however, that the second aspect on which the High Court has opined calls for no interference. As per the

prosecution story the samples had been removed from the Malkhana on the 26th of February, 1998, and should have been received in the laboratory the very next day. The High Court has, accordingly observed that the prosectuion had not been able to show as to in whose possession the samples had remained from 26th February, 1998 to 9th March, 1998. The High Court has also disbelieved the evidence of P.W. 6 and P.W.9, the former being the Malkhana incharge and the latter being the Constable, who had taken the samples to the Laboratory to the effect that the samples had been taken out on the 9th of March, 1998 and not on the 26th February, 1998. The Court has also found that in the absence of any reliable evidence with regard to the authenticity of the letter dated 26th February, 1998 it had to be found that the samples had remained in some unknown custody from the 26th February, 1998 to 9th March, 1998. We must emphasise that in a prosecution relating to the Act the question as to how and where the samples had been stored or as to when they had despatched or received in the laboratory is a matter of great importance on account of the huge penalty involved in these matters. The High Court was, therefore, in our view, fully justified in holding that the sanctity of the samples had been compromised which cast a doubt on the prosecution story. We, accordingly, feel that the judgment of the High Court on the second aspect calls for no interference. The appeal is, accordingly, dismissed. The respondent is on bail. His bail bonds stand discharged.

N.J. Appeal dismissed.

ASMATHUNNISA

v.

STATE OF A.P. REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF A.P., HYDERABAD & ANOTHER

(Criminal Appeal No. 766 of 2011)

MARCH 29, 2011

[DALVEER BHANDARI AND DEEPAK VERMA, JJ.]

Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 – s. 3(1)(x) – Punishment for offences of atrocities against a member of SC/ST – Appellant's husband speaking offending words by naming caste against the complainant in presence of his wife, when the complainant himself was not present – Incident took place at the residence of complainant – Prosecution of the appellant and her husband u/s. 3 (1)(x) – Petition u/s. 482 Cr.P.C. by the appellant – Dismissed by the High Court – On appeal held: For offence u/s. 3(1)(x), the public must view the person being insulted for which he must be present which is not the case herein – Even if all the facts mentioned in the complaint are accepted as correct in its entirety, the complaint does not disclose the essential ingredients of an offence – Thus, the High Court should ensure that such frivolous prosecutions are quashed under its inherent powers u/s. 482 Cr.P.C. – Order of the High Court set aside – Complaint qua appellant quashed – Code of Criminal Procedure, 1973 – s. 482.

Code of Criminal Procedure, 1973 – s. 482 – Scope and ambit of – Explained.

According to the prosecution, husband of 'S', filed complaint alleging that the husband of the appellant spoke offending words against him in presence of his wife, using filthy language by naming caste and others

words while he was himself not present. The incident allegedly took place at the residence of the complainant. The appellant and her husband were prosecuted for an offence under Section 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. The appellant filed a petition before the High Court under Section 482 of the Code of Criminal Procedure for quashing the proceedings, and the same was dismissed. Therefore, the appellant filed the instant appeal.

The appellant contended that no offence under Section 3(1)(x) of the 1989 Act, could be made out against the appellant because the ingredients of the offence are not made out; that in the complaint so called offending words were not even attributed to the appellant; that the appellant merely accompanied her husband and the offending words were spoken by the husband of the appellant; that the husband of 'S' was not present when the offending words, if any, were spoken by the husband of the appellant and in absence of real aggrieved person present at that point of time, no offence under the said Section can be made out against the appellant; that the entire incident allegedly took place at the residence of 'S' and not in any place within public view; and that even if the contents of the complaint in its entirety are taken as correct and true even then no offence is made out against the appellant.

Allowing the appeal, the Court

HELD: 1. The words used in Section 3 (1) (x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 are 'in any place but within public view', which means that the public must view the person being insulted for which he must be present and no offence on the allegations under the said Section gets attracted if the person is not present. [Para 10] [1124-F-G]

2.1. Inherent power under Section 482 Cr.P.C., though wide, have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this Section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute. [Para 13] [1125-F-G]

2.2. If all the facts mentioned in the complaint are accepted as correct in its entirety and even then the complaint does not disclose the essential ingredients of an offence, in such a case the High Court should ensure that such frivolous prosecutions are quashed under its inherent powers under Section 482 of the Cr.P.C. [Para 27] [1132-G-H; 1133-A]

M. Mohan v. The State **2011 (3) SCALE 78 – relied on.**

2.3. In the instant case, the High Court ought to have exercised its jurisdiction under Section 482 of the Code of Criminal Procedure and quashed the complaint qua the appellant only to prevent abuse of the process of law. The impugned judgment passed by the High Court is set aside and complaint qua the appellant, is quashed. [Paras 28 and 29] [1133-B-C]

E. Krishnan Nayanar v. Dr. M.A. Kuttappan and Ors. **1997 Crl. L.J. 2036;** *Gorige Pentaiah v. State of Andhra Pradesh and Ors.* **(2008) 12 SCC 531;** *R.P. Kapur v. State of Punjab* **AIR 1960 SC 866;** *Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi and Ors.* **(1976) 3 SCC 736;** *State of Karnataka v. L. Muniswamy and Ors.* **(1977) 2 SCC 699;** *Janta Dal v. H.S. Chowdhary and Ors.* **(1992) 4 SCC 305;** *Dr Raghubir Sharan v. State of Bihar* **(1964) 2 SCR 336;** *State of Haryana and*

Ors. v. Bhajan Lal and Ors. **(1992) Suppl.1 SCC 335;** *Zandu Pharmaceutical Works Ltd. and Ors. v. Mohd. Sharaful Haque and Anr.* **(2005) 1 SCC 122;** *Inder Mohan Goswami v. State of Uttaranchal* **(2007) 12 SCC 1;** *Devendra and Others v. State of Uttar Pradesh and Anr.* **(2009) 7 SCC 495;** *State of A.P. v. Gourishetty Mahesh and Ors.* **(2010) 11 SCC 226 – referred to.**

Connelly v. Director of Public Prosecutions **1964 AC 1254 – referred to.**

Case Law Reference:

1997 Crl. L.J. 2036	**Referred to.**	**Para 9**
(2008) 12 SCC 531	**Referred to.**	**Para 12**
AIR 1960 SC 866	**Referred to.**	**Para 14**
(1976) 3 SCC 736	**Referred to.**	**Para 15**
(1977) 2 SCC 699	**Referred to.**	**Para 16**
(1992) 4 SCC 305	**Referred to.**	**Para 17**
(1964) 2 SCR 336	**Referred to.**	**Para 18**
1964 AC 1254	**Referred to.**	**Para 20**
(1992) Supp 1 SCC	**Referred to.**	**Para 21**
(2005) 1 SCC 122	**Referred to.**	**Para 23**
(2007) 12 SCC 1	**Referred to.**	**Para 24**
(2009) 7 SCC 495	**Referred to.**	**Para 25**
(2010) 11 SCC 226	**Referred to.**	**Para 26**
2011 (3) SCALE 78	**Relied on.**	**Para 27**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 766 of 2011.

From the Judgment & Order dated 14.8.2006 of the High Court of Judicature Andhra Pradesh at Hyderabad in Criminal Petition No. 2127 of 2006.

Swarupa Reddy (for Balbir Singh Gupta), Ambar Qamaruddin, D. Mahesh Babu, A. Ramesh, C.K. Sucharita for the appearing parties.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. Leave granted.

2. The appellant is the Headmistress in the Little Star School located at Gayatri Hills, Yousufguda, Hyderabad has preferred this appeal against the impugned judgment and order passed by the High Court of Judicature of Andhra Pradesh at Hyderabad in Criminal Petition No.2127 of 2006.

3. It may be pertinent to mention that her husband Mohd. Samiuddin and the appellant are being prosecuted for an offence under section 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short 'the 1989 Act').

4. The appellant filed a petition before the Andhra Pradesh High Court under section 482 of the Code of Criminal Procedure for quashing the proceedings in Crime No.50 of 2006, Police Station Jubilee Hills, Hyderabad. The High Court, by the impugned judgment, has declined to quash the proceedings.

5. The brief facts which are necessary to dispose of this appeal are recapitulated as under:

A complaint was filed against the appellant and her husband Mohd. Samiuddin on 09.02.2006 before the Sub-Inspector of Police, Jubilee Hills Police Station, Hyderabad, which reads as under:

"I am to inform you that just besides my house a building bearing No.8-2-293/82/B/60, in 1+3 storied building, a school is being run from 1 to 10th class. I have informed the management of the school with regard to sound pollution. I have also submitted representation to the DEO, Hyderabad. Since the authorities have not taken any action in this regard, I approached the Hon'ble High Court of A.P., and obtained an interim order on 03.10.1995. While the DEO trying to implement the interim orders, the Little Star School management, Gayathri Hills, has created more sound pollution. When we were not able to stay at our houses due to sound pollution, we invited the press people and expressed our grievances on 08.02.2006. The same news was published in the Newspapers on 09.02.2006. After reading the news, the School management, Smt. Asmatunnisa and her husband namely Md. Samiuddin came to my house at 9.00 a.m., when I was not there. Md. Samiuddin abused in filthy language by naming caste and asked my wife, R. Sridevi, without even looking that she is a lady, that where did she sent me and also said that "AA LAMBADODU", "let him come home today we will settle the matter with him." Smt. Asmatunnisa also abused my wife. Smt. Anuradha, who is staying opposite to my house was the eye witness for the incident."

The significant part of this complaint is that the offending words were admittedly spoken by Mohd. Samiuddin, the husband of the appellant. He abused Sridevi's husband in filthy language by naming caste and said that "AA LAMBADODU", "let him come home today we will settle the matter with him." At that time, admittedly Sridevi's husband was not present.

6. The appellant has also been implicated because she had accompanied her husband to the house of the complainant. Admittedly, the appellant did not utter offending words. It would be relevant to set out relevant provisions of law as under:

7. Section 3 sub-section (1) sub-section (x) of the 1989 Act is reproduced as under:

"3. Punishments for offences of atrocities. – (1) Whoever, not being a member of a Scheuled Caste or a Scheduled Tribe,-

xxx xxx xxx

intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view;"

8. Learned counsel for the appellant submitted that:

A. According to the complaint, no offence under the aforesaid section can be made out against the appellant because the ingredients of the offence are not made out. In the complaint so called offending words were not even attributed to the appellant. It is alleged that the appellant merely accompanied her husband and the offending words were spoken by the husband of the appellant, therefore, the appellant in this appeal by no stretch of imagination can be held guilty of the offence under the section 3(1)(x) of the 1989 Act.

B. According to the section, any word which intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe is an offence under the 1989 Act. In the instant case, the husband of Sridevi was not present when the offending words, if any, were spoken by the husband of the appellant. In absence of real aggrieved person present at that point of time, no offence under the said section can be made out against the appellant.

C. It is not established that the words were spoken by a person who was not a member of Scheduled Caste or Scheduled Tribe.

D. The entire incident is alleged to have taken place at the residence of Sridevi and not in any place within public view.

E. None of the ingredients of this offence are present in the instant case. Even if the contents of the complaint in its entirety are taken as correct and true even then no offence is made out against the appellant.

9. In this connection, learned counsel for the appellant has placed reliance on a judgment of the Kerala High Court in *E. Krishnan Nayanar v. Dr. M.A. Kuttappan & Others* 1997 Crl. L.J. 2036. The relevant paragraphs of this judgment are paras 12, 13 and 18. The said paragraphs read as under:

"12. A reading of Section 3 shows that two kinds of insults against the member of Scheduled Castes or Scheduled Tribes are made punishable – one as defined under sub-section (ii) and the other as defined under sub-section (x) of the said section. A combined reading of the two sub-sections shows that under section (ii) insult can be caused to a member of the Scheduled Castes or Scheduled Tribes by dumping excreta, waste matter, carcasses or any other obnoxious substance in his premises or neighbourhood, and to cause such insult, the dumping of excreta etc. need not necessarily be done in the presence of the person insulted and whereas under sub-section (x) insult can be caused to the person insulted only if he is present in view of the expression "in any place within public view". The words "within public view", in my opinion, are referable only to the person insulted and not to the person who insulted him as the said expression is conspicuously absent in sub-section (ii) of Section 3 of Act 3/1989. By avoiding to use the expression "within public view" in sub-section (ii), the Legislature, I feel, has created two different kinds of offences an insult caused to a member of the Scheduled Castes or Scheduled Tribes, even in his absence, by dumping excreta etc. in his premises or neighbourhood and an insult by words caused to a member of the

Scheduled Castes or Scheduled Tribes "within public view" which means at the time of the alleged insult the person insulted must be present as the expression "within public view" indicates or otherwise the Legislature would have avoided the use of the said expression which it avoided in sub-section (ii) or would have used the expression "in any public place".

13. Insult contemplated under sub-section (ii) is different from the insult contemplated under sub-section (x) as in the former a member of the Scheduled Castes or Scheduled Tribes gets insulted by the physical act and whereas is the latter he gets insulted in public view by the words uttered by the wrongdoer for which he must be present at the place.

xxx xxx xxx

18. As stated by me earlier the words used in sub-section (x) are not "in public place", but "within public view" which means the public must view the person being insulted for which he must be present and no offence on the allegations under the said section gets attracted. In my view, the entire allegations contained in the complaint even if taken to be true do not make out any offence against the petitioner".

10. The aforesaid paragraphs clearly mean that the words used are "in any place but within public view", which means that the public must view the person being insulted for which he must be present and no offence on the allegations under the said section gets attracted if the person is not present.

11. Learned counsel for the appellant also submitted that, in any event, the words were not attributed to the appellant. She merely accompanied her husband to that place even according to the allegation in the complaint and she did not utter offending

words. According to appellant, in the facts and circumstances of this case, Section 3(1)(x) of the 1989 Act is not attracted.

12. Learned counsel for the appellant has also drawn our attention to a judgment of this Court *Gorige Pentaiah v. State of Andhra Pradesh & Others* (2008) 12 SCC 531. The relevant paragraph of this judgment is as under:

> "6. .. According to the basic ingredients of Section 3(1)(*x*) of the Act, the complainant ought to have alleged that the appellant-accused was not a member of the Scheduled Caste or a Scheduled Tribe and he (Respondent 3) was intentionally insulted or intimidated by the accused with intent to humiliate in a place within public view. In the entire complaint, nowhere it is mentioned that the appellant-accused was not a member of the Scheduled Caste or a Scheduled Tribe and he intentionally insulted or intimidated with intent to humiliate Respondent 3 in a place within public view. When the basic ingredients of the offence are missing in the complaint, then permitting such a complaint to continue and to compel the appellant to face the rigmarole of the criminal trial would be totally unjustified leading to abuse of process of law.

13. This Court, in a number of cases, has laid down the scope and ambit of the High Court's power under section 482 of the Code of Criminal Procedure. Inherent power under section 482 Cr.P.C. though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute.

14. The law has been crystallized more than half a century ago in the case of *R.P. Kapur v. State of Punjab* AIR 1960

SC 866 wherein this Court has summarized some categories of cases where inherent power can and should be exercised to quash the proceedings. This Court summarized the following three broad categories where the High Court would be justified in exercise of its powers under section 482:

> (i) where it manifestly appears that there is a legal bar against the institution or continuance of the proceedings;
>
> (ii) where the allegations in the first information report or complaint taken at their face value and accepted in their entirety do not constitute the offence alleged;
>
> (iii) where the allegations constitute an offence but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge."

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

> "(1) where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;
>
> (2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;

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

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

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

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

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

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

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

"... Every High Court as the highest court exercising criminal jurisdiction in a State has inherent power to make any order for the purpose of securing the ends of justice .... Being an extraordinary power it will, however, not be pressed in aid except for remedying a flagrant abuse by a subordinate court of its powers ...."

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

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

21. In *State of Haryana & Others* v. *Bhajan Lal & Others* reported in (1992) Suppl.1 SCC p.335, this court had an

occasion to examine the scope of the inherent power of the High Court in interfering with the investigation of an offence by the police and laid down the following rule: [SCC pp. 364-65, para 60: SCC (Cri) p. 456, para 60].

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

22. In *Bhajan Lal (supra)*, this court in the backdrop of interpretation of various relevant provisions of the Code of Criminal Procedure under Chapter XIV and of the principles of law enunciated by this court in a series of decisions relating to the exercise of the extraordinary power under Article 226 of the Constitution of India or the inherent powers under Section 482

Cr.P.C., gave the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of the court or otherwise to secure the ends of justice. Thus, this court made it clear that it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list to myriad kinds of cases wherein such power should be exercised:

> (1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not *prima facie* constitute any offence or make out a case against the accused.
>
> (2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155 (2) of the Code.
>
> (3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.
>
> (4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, on investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.
>
> (5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient grounds for proceeding against the accused.

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

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

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

"It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers, court would be justified to quash any proceeding if it finds that initiation/ continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto."

24. A three-Judge Bench of this Court in *Inder Mohan Goswami v. State of Uttaranchal* (2007) 12 SCC 1 (wherein one of us, namely, Dalveer Bhandari, J. was the author of the judgment) has examined scope and ambit of Section 482 of the Criminal Procedure Code. The Court in the said case observed that inherent powers under Section 482 should be exercised for the advancement of justice. If any abuse of the

process leading to injustice is brought to the notice of the court, then the court would be fully justified in preventing injustice by invoking inherent powers of the court.

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

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

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

27. In a recent decision in *M. Mohan v. The State* 2011 (3) SCALE 78 this Court again had an occasion to consider the case of similar nature and this court held that if all the facts mentioned in the complaint are accepted as correct in its entirety and even then the complaint does not disclose the essential ingredients of an offence, in such a case the High

Court should ensure that such frivolous prosecutions are quashed under its inherent powers under section 482 of the Cr.P.C.

28. When we apply the ratio of the settled principles of law to the facts of this case, then, in our considered opinion, the High Court ought to have exercised its jurisdiction under section 482 of the Code of Criminal Procedure and quashed the complaint qua the appellant only to prevent abuse of the process of law.

29. Consequently, we set aside the impugned judgment passed by the High Court and quash the complaint qua the appellant in Crime No.50 of 2006, Police Station Jubilee Hills, Hyderabad, Andhra Pradesh.

30. This appeal is accordingly allowed and disposed of.

N.J. Appeal allowed.

P. SESHADRI

v.

S. MANGATI GOPAL REDDY AND ORS.

(Civil Appeal No(s). 2688 of 2011)

MARCH 29, 2011

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

PUBLIC INTEREST LITIGATION :

Writ petition before High Court – Challenging extensions granted to Parpathedar of Tirumala Tirupathi Devasthanam by TTD Board – Allowed by High Court – Held : High Court ought to have satisfied itself with regard to the credentials of the writ petitioner before entertaining the petition as public interest litigation – A pure and simple service matter has been deliberately disguised as a public interest litigation at the instance of some disgruntled employees – The controversy with regard to the management of the Temple properties and funds, regarding which different proceedings are pending, have been deliberately mixed up with the extension granted to the employee – Order of High Court set aside – Service law – Constitution of India, 1950 – Article 226.

SERVICE LAW :

TIRUMALA TIRUPATHI DEVASTHANAM SERVICE RULES, 1989:

rr. 2 and 13 – Extensions of service of Parpathedar on contract basis after his superannuation at the age of sixty – High Court holding the extensions as contrary to r.13 and setting aside the order of TTD Board – Held : In terms of r.2, officers or staff who are appointed on contract basis or are taken on deputation from Government or other organization

form a separate class and are not covered by the Rules – Engagement of employee concerned on contract basis would not attract r.13 – High Court erred in relying on r.13 to nullify the appointment of the employee – Order of High Court set aside – Public interest litigation – Constitution of India, Article 226.

CONSTITUTION OF INDIA, 1950 :

Article 226 – Order disposing of writ petition – Recording of reasons – Held: Is the fundamental to the administration of justice – In the instant case, the order passed by High Court does not satisfy the bare minimum requirement of an order disposing of writ petition under Article 226 – Administration of justice – Judgments/Orders.

Respondent no.1 filed a writ petition stated to be in public interest alleging that the various extensions given by the Tirumala Tirupathi Devasthanam Board to the appellant, who had superannuated as Parpathedar from the service of the Board w.e.f. 31-7-2006, were wholly illegal and were in arbitrary exercise of power by the TTD Board. The last such extension challenged was dated 1.8.2009 for a period of 2 years from 2-8-2009 to 1-9-2011. It was stated that the writ petition was filed to bring to the notice of the High Court various mis-appropriations and embezzlement of funds; that the actions of the appellant were doubted; and that his services were extended for ulterior motives. The High Court allowed the writ petition holding that as per r.13 of the Tirumala Tirupathi Deveasthanam Service Rule, 1989, services of the appellant could not have been extended beyond the age of sixty years and as the appellant had crossed the age of sixty years, prohibition in r. 13 against his continuation was manifest.

Allowing the appeal, the Court

HELD: 1.1. From the pleadings of the parties, it appears that there is a serious dispute with regard to the management and the administration of the affairs of the Temple. Admittedly, separate proceedings are pending in different courts of competent jurisdiction with regard to those issues. Those proceedings cannot be confused or merged with the subject matter of the writ petition filed by respondent No.1. [para 15] [1145-G-H; 1146-A]

1.2. It is not disputed that the appellant was in the service of the Temple for many years. He retired from the service of the Temple on 31st July, 2006. It appears from the records that the Board of Trustees, keeping in view the vast experience of the appellant, his profound knowledge of fairs and festivals and day-to-day affairs of the Temple, his public relations skill and his availability round the clock for all the 365 days of the year, resolved to utilize his services on contract basis for a period of two years initially which was followed by further extensions, and the last such extension being for a period of two years through Resolution No.178 dated 28th July, 2009 pursuant to which a formal order was passed on 1-8-2009 extending the services of the appellant till 1-8-2011 on contract basis. The High Court has nullified the said Resolution and the consequential order holding the same to be contrary to r. 13 of the Tirupati Tirumala Devasthanam Rules, 1989. The High Court failed to notice that in view of r. 2, the 1989 Rules have no application to engagements made on contract basis or when services of government servants or employees of other organizations are utilized on deputation. [para 16-17] [1146-B-D; 1147-C-E]

1.3. A perusal of r. 2 leaves no manner of doubt that the Rules apply to every employee "except to the officers or staff taken on contract basis and officers or staff taken on deputation from the Government or other

organizations". Thus, officers or staff who are appointed on contract basis or are taken on deputation from the Government or other organizations form a separate class and are not covered by the 1989 Rules. The High Court was in error, in relying on r. 13 to nullify the appointment of the appellant. [para 18] [1147-G-H; 1148-A]

2.1. The High Court has committed a serious error in permitting respondent No.1 to pursue the writ petition as a public interest litigation. The parameters within which a public interest litigation can be entertained by this Court and the High Courts, have been laid down and reiterated by this Court in a series of cases. By now it ought to be plain and obvious that this Court does not approve of an approach that would encourage petitions filed for achieving oblique motives on the basis of wild and reckless allegations made by individuals, i.e., busybodies, having little or no interest in the proceedings. The credentials, the motive and the objective of the petitioner have to be apparently and patently aboveboard. Otherwise, the petition is liable to be dismissed at the threshold. [para 19] [1148-B-D]

2.2. The High Court ought to have satisfied itself with regard to the credentials of respondent No.1 before entertaining the writ petition, styled as public interest litigation. Even a cursory perusal of para 2 of the affidavit filed in the High Court by respondent No.1 would clearly show that he has no special concern with the extension granted to the appellant. He had merely pleaded that he moved the writ petition as he is a devotee of Lord Venkateswara. He is an agriculturist by profession. He has failed to supply any specific particulars as to how he is in possession of any special information. The controversy with regard to the management and administration of the Temple's properties and funds have been deliberately mixed up with the extension granted to the appellant by the TTD Board. It is an admitted position

that different proceedings are pending with regard to the management controversy of the Temple Trust. The controversy had no relevance to the extension granted to the appellant. [para 20] [1148-E-H]

(DR.) B. Singh vs. Union of India and Ors. **(2004) 3 SCC 363;** *Neetu vs. State of Punjab and Ors.* **(2007) 10 SCC 614;** *Ashok Kumar Pandey vs. State of West Bengal.* **(2004) 3 SCC 349;** *Divine Retreat Centre vs. State of Kerala and Ors.* **(2008) 3 SCC 542 – relied on.**

2.3. The facts placed on record in the instant proceeding would clearly indicate that respondent No. 1 has not come to Court with clean hands. He has failed to establish his credential for moving the writ petition as public interest litigation. The High Court has failed to examine the matter in its correct perspective. The writ petition was undoubtedly moved by motives other than what was stated in the writ petition. A perusal of the affidavit in support of the writ petition would clearly show that the writ petition had been filed by respondent no. 1 at the instance of some other persons who are hiding behind the veil. In view of the assertions, in the affidavit made by respondent no. 1, it cannot be said that he is the actual moving spirit behind the writ petition. [para 24] [1150-F-H; 1151-A-D]

Gurpal Singh vs. State of Punjab and Ors. **(2005) 5 SCC 136 – relied on.**

2.4. Respondent No.1 had failed to satisfy any of the criteria which would have enabled him to move the High Court by way of a public interest litigation. A pure and simple service matter has been deliberately disguised as a public interest litigation at the instance of some disgruntled employees. [para 26] [1151-E-F]

3.1. The High Court failed to notice that the writ

petition was not maintainable for a variety of reasons. The High Court did not even care to examine all the provisions of 1989 Rules before concluding that the appointment of the appellant was contrary to r. 13. The appellant had raised numerous preliminary objections with regard to the maintainability of the writ petition, in particular, at the instance of respondent No.1. The High Court, committed a serious error in not analyzing all the relevant provisions of the 1989 Rules, before concluding that the extension in the service granted to the appellant was contrary to r.13. [para 27] [1151-G-H; 1152-A-B]

3.2. This Court has, on numerous occasions, emphasised the importance of recording reasons by the High Court in support of the orders passed in exercise of its extra ordinary jurisdiction under Article 226 of the Constitution of India. Necessity for recording reasons is the fundamental to the administration of justice. The recorded reasons would enable the parties to the litigation to know the factors which weighed with the court in determining the lis between the parties. In the instant case, the order passed by the High Court does not satisfy the bare minimum requirements of an order disposing of the writ petition under Article 226 of the Constitution of India. The impugned judgment passed by the High Court is accordingly set aside. [para 27] [1152-A-C; 1153-D]

Vasudeo Vishwanath Saraf vs. New Education Institute and Ors. **1986 (4) SCC 31 – relied on.**

Case Law Reference:

(2004) 3 SCC 363	**relied on**	**Para 16**
(2007) 10 SCC 614	**relied on**	**Para 13 and 22**
(2004) 3 SCC 349	**relied on**	**Para 23**
(2008) 3 SCC 542	**relied on**	**Para 13 and 24**
(2005) 5 SCC 136	**relied on**	**Para 13 and 25**
1986 (4) SCC 31	**relied on**	**Para 27**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2688 of 2011.

From the Judgment & Order dated 28.4.2010 of the High Court of Judicature of Andhra Pradesh at Hyderabad in Writ Petition No. 24124 of 2009.

P.S. Narasimha, Sridhar Potaraju, D. Julius Riamei, Gaichangpou Gagemi for the Appellant.

Atul Pandey, Tara Shankar Pandey (for Dr. Kailash Chand), Guntur Prabhakar, Guntur Pramod Kumar for the Respondents.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. Leave granted.

2. This appeal by special leave is directed against the judgment of the High Court of Andhra Pradesh at Hyderabad rendered in Writ Petition No. 24124 of 2009 dated 28th April, 2010 whereby the High Court set aside the extension granted to the appellant as officer on Special Duty in the establishment of Tirumala Tirupathi Devasthanam (hereinafter referred to as "the Temple") till 1st August, 2011.

3. The aforesaid order has been passed in a writ petition styled as a public interest litigation by S. Mangati Gopal Reddy (hereinafter referred to as "respondent No.1"). Respondent No. 1 claims to be an agriculturist and a staunch devotee of Lord Venkateswara since his childhood. In Paragraph 2 of the affidavit in support of the writ petition, respondent No.1, in order to establish his locus standi to file the public interest litigation stated as under:-

"I am an Agriculturist. I am a staunch devotee of Lord

Venkateswara since my childhood. I regularly visit the temple to offer my prayers to God. I also have donated to the temple as per my capacity. I am a citizen of this country and a Hindu by religion. I am a native and a resident of Tirupathi. I have come to know certain misdeeds, discrepancies, Mismanagement of the T.T.D. Funds by some vested interests. As a citizen of India and also as a staunch devotee of Lord Venkateswara, it is my bounden duty to bring the said facts, which have come to my knowledge, to the notice of this Honourable Court for appropriate directions of this Honourble Court. I also submit that I have no personal interest in filing the above writ affidavit nor I have any enmity with the persons whose details are furnished hereunder and against the persons certain directions are sought in this Writ Petition. This Writ Petition is being filed in the larger interest of the public."

4. He has further pleaded that the Temple was established as a result of Tirumala Tirupathi Devasthanam Act, 1932 (in short 'TTD Act'). The aforesaid Act was followed in 1933 by a special Act in 1951 whereby the administration of the Temple was under the control of the Andhra Pradesh Government. According to respondent No.1, since the enactment of the Hindu Charitable and Religious Institutions Act, 1989, the management and administration vests in the Board called "TTD Board" constituted under Section 96 of the aforesaid Act.

5. It was further the case of the respondent that the management and administration of the Temple is controlled by the statutory provisions of the 1989 Act and the rules made thereunder. However, the responsible officers of the TTD Board have acted in violation of the rules framed under the aforesaid Act. He further stated that certain discrepancies and misdeeds have been brought to the notice of the Andhra Pradesh High Court by way of various writ petitions. The writ petition was filed to bring to the notice of the Court various misappropriations and embezzlement of funds. There is an ongoing controversy with

regard to embezzlement of funds and, in particular, loss of 300 gold dollars each weighing 5 gms. since August, 2008. It was further the case of the respondent that the actions of the appellant have been doubted in the case of missing gold dollars as he was Bokkasam Incharge and Parpathedar of the Temple. His name was primarily mentioned in the reports of two IPS officers, who had conducted two separate vigilance reports. These reports categorically recommended that the appellant should not be continued in office. In spite of such recommendations of the vigilance officer, the appellant had been continued in service.

6. According to respondent No.1, the appellant retired on 31st July, 2006. Since then, he has been given five years extension in the Temple. According to the respondent, the services of the appellant have been extended for ulterior motives. Respondent makes a grievance that the services of the appellant have been extended as if there is no other suitable person in the Temple or elsewhere to perform the duties of the appellant. The respondent further alleges that the services of the appellant were extended on a number of occasions, vide order, viz; No. Roc No. BG/10949/2006 dated 31st July, 2006 for a period of two years, Roc No. BG/10949/2007 dated 5th August 2008, for a period of two years from 2nd August, 2007 to 1st August, 2009 and Roc No. P1/308/Sri TT/ml/2009 dated 1st August, 2009 for a further period of two years i.e. from 2nd August, 2009 to 1st August, 2011.

7. The respondent claimed that these extensions were wholly illegal and arbitrary exercise of power by the TTD Board. These allegations were made relying on the recommendations made by B.V. Ramana Kumar, IPS, the then Chief Vigilance and Security Officer. In his report dated 28th July, 2008 initiation of disciplinary action for major penalty has been recommended against the appellant. This report was deliberately ignored by the TTD Board and the appellant continued to enjoy the patronage of the Board.

8. The writ petition came up for hearing before the High Court on 9th November, 2009. Whilst issuing notice in the writ petition, the High Court made an interim order which was as follows:-

> "……..And it is further ordered that there shall be interim suspension of the proceedings bearing Roc. No. P1/308/Sri/TT/Tml/2009, dated 01-08-2009 of the Tirumala Tirupathi Devasthanams, Tirupathi, which was issued in pursuance of Resolution No. 178 dated: 28.07.2009 of the TTD Board, extending the service of Sri P. Seshadri (retired employee) i.e. Respondent No.4 from 02-08-2009 to 01-08-2011."

9. This order was challenged by the appellant in SLP (C) No.30517 of 2009. This Court stayed the operation of the aforesaid order passed by the High Court. On 4th December, 2009, this Court disposed of the special leave petition with the following order:-

> "Heard both sides.
>
> The petitioner has challenged the ad-interim order passed by the High Court of Judicature of A.P. whereby extension of service of the petitioner was terminated. When the matter was mentioned before this Court on 24.11.2009, we had granted stay of the impugned order passed by the High Court. As it is a service matter, the High Court is requested to dispose of the petition pending before it at an early date at least within a period of two months. Till such time, the order passed by this Court on 24.11.2009 will be in operation.
>
> The Special Leave Petition is disposed of accordingly."

10. Pursuant to the aforesaid order, the High Court heard the writ petition and allowed the same by its order dated 28th April, 2010 in the following terms:-

> "Sri P. Seshadri—respondent 4, Parpathyadar in the establishment of the Tirumala Tirupathi Devasthanams—respondent 3 retired on superannuation on 31.07.2006. He was accorded extension in three spells and the last one has the effect of extending his service as Officer on Special Duty till 01.08.2011 which has become subject matter of this public interest litigation. Rule 13 of the Tirumala Tirupathi Devasthanams Employees Service Rules, 1989 reads thus:
>
> > "The person or persons appointed in Tirumala Tirupathi Devasthanams on re-employment basis after superannuation shall in no case be continued beyond the completion of the age of sixty years."
>
> Admittedly, respondent 4 has crossed the age of sixty years. On that count the learned counsel for respondent 4—beneficiary of the order has not joined issue. That being so, prohibition in the rule supra against his continuation is manifest. Situated thus he cannot be continued anymore. We direct respondent 3 accordingly. Settled"

11. It is this order which is challenged by the appellant in the present appeal.

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

13. Mr. Narsimha submits that the writ petition ought to have been dismissed at the threshold by the High Court and controversy pertaining to a service matter which could not be filed in a writ petition styled as a public interest litigation. In support of the submission, the learned counsel relied on the following judgments of this Court:- *Dr. Duryodhan Sahu and Ors. Vs. Jitendra Kumar Mishra*[1]*, Gurpal Singh Vs. State of Punjab and Ors.*[2]*, Neetu Vs. State of Punjab & Ors*[3]*.* and

1. (1998) 7 SCC 273.
2. (2005) 5 SCC 136.
3. (2007) 10 SCC 614

Divine Retreat Centre Vs. State of Kerala & Ors[4]. He further submitted that in any event, the petition was not filed by respondent No.1 bonafide. It has been filed at the behest of some persons, who are the hidden forces pursuing the writ petition. Last but not the least, it is the submission of Mr. Narsimha that the High Court judgment deserves to be set aside on the short ground that it is based on a complete misinterpretation of the Tirumala Tirupathi Devasthanams Employees Service Rules, 1989. According to the learned senior counsel, the aforesaid rules would not be applicable to the petitioner as his service has been extended only on contractual basis. Mr. Guntur Prabhakar, counsel for the Temple, respondent No.4 has supported the submissions made by Mr. Narsimha. He has also relied on the judgment of *Neetu's* case (supra).

14. Mr. Atul Pandey, appearing for respondent No.1 submitted that the services of the appellant had been extended arbitrarily for extraneous consideration. The Board is going out of the way to protect the appellant, who is involved in serious embezzlement of Temple property. He submits that the extensions have been given, in spite of the recommendations made by the Chief Vigilance and security officer, B.V. Ramana Kumar, IPS.

15. We have considered the submissions made by the learned counsel. In our opinion, it is not at all necessary to make any observations with regard to the ongoing controversy between different groups/parties with regard to the management of the affairs of the Temple. It is also not necessary to make any observations with regard to the involvement or otherwise of the appellant in any activities which may invite either adverse comments or disciplinary actions. From the pleadings of the parties, it appears to us that there is a serious dispute with regard to the management and the administration of the affairs of the Temple. Admittedly, separate proceedings

4. (2008) 3 SCC 542.

are pending in different Courts of competent jurisdiction with regard to those issues. In our opinion, those proceedings cannot be confused or merged with the subject matter of the writ petition filed by the respondent No.1.

16. It is not disputed that the appellant was in the service of the Temple for many years. He retired from the service of the Temple on 31st July, 2006. It appears from the records that Board of Trustees in its Resolution No.151 dated 5th/6th May, 2006 resolved to utilize the services of the appellant on contract basis for a period of two years initially. An order to that effect was duly passed by the Board on 31st July, 2006. It appears that subsequent Resolution No.263 was passed on 25th July, 2007, giving further extension to the appellant for a period of two years from 2nd August, 2007 to 1st August, 2009. Again, the services of the appellant have been extended for a period of two years through Resolution No.178 dated 28th July, 2009. The reason for continuing the services of the appellant are stated in the Resolution itself, which are as under:-

1. With his vast experience and profound knowledge in the day to day affairs in Sri. Tirumala Temple, particularly during festive and special occasion, his services are very much required for successful and timely conduct of fairs and festivals.

2. He is well versed with the procedures of various sevas that are being performed in Sri. Tirumala Temple.

3. His services are vastly utilized during Kalyanamasthu programs organized throughout the country. He could able to conduct the programs successfully to keep up the gallery of the institution.

4. Apart from all his role in extending honours to various Matadhipathies/Peetadhipathies visiting Srivari Temple is commendable and he is

maintaining a good rapport with all the Swamijis, Matadhipathies and Peetadhipathies which is much essential for the religious institutions like TTD.

5. Besides, he is available round the clock for all the 365 days in a year for the administration to organize various programs like Bhajagovindam, Kalyanam being conducted outside and other religious activities."

17. Pursuant to the aforesaid Resolution, the Board passed a formal order on 1st August, 2009 extending the services of the appellant till 1st August, 2011 on contract basis on payment of monthly remuneration at last pay drawn. The High Court has nullified the Resolution dated 21st July, 2009 and the consequential order dated 1st August, 2009 holding the same to be contrary to Rule 13 of the 1989 rules. Undoubtedly, Rule 13 provides that re-employment of any employee after superannuation shall in no case be beyond the completion of age of 60 years. The High Court, however, failed to notice that the 1989 Rules have no application to engagements made on contract basis or when services of government servants or employees of other organizations are utilized on deputation. Rule 2 of the aforesaid Rules provides as under:-

"2. They shall apply to every employee of Tirumala Tirupathi Devasthanams except to the officers or staff taken on contract basis and officers or staff taken on deputation from the Government or other organization."

18. A perusal of the aforesaid Rule leaves no manner of doubt that the aforesaid Rules apply to every employee "except to the officers or staff taken on contract basis and officers or staff taken on deputation from the Government or other organizations". In other words, officers or staff who are appointed on contract basis or are taken on deputation from the Government or other organizations form a separate class

and are not covered by the aforesaid Rules. The High Court, in our opinion, was in error, in relying on Rule 13 to nullify the appointment of the appellant.

19. The High Court has committed a serious error in permitting respondent No.1 to pursue the writ petition as a public interest litigation. The parameters within which Public Interest Litigation can be entertained by this Court and the High Court, have been laid down and reiterated by this Court in a series of cases. By now it ought to be plain and obvious that this Court does not approve of an approach that would encourage petitions filed for achieving oblique motives on the basis of wild and reckless allegations made by individuals, i.e., busybodies; having little or no interest in the proceedings. The credentials, the motive and the objective of the petitioner have to be apparently and patently aboveboard. Otherwise the petition is liable to be dismissed at the threshold.

20. The High Court ought to have satisfied itself with regard to the credentials of respondent No.1 before entertaining the writ petition, styled as public interest litigation. Even a cursory perusal of Paragraph 2 of the affidavit filed in the High Court by the respondent No.1 would clearly show that the respondent No.1 has no special concern with the extension granted to the appellant. Respondent No.1 had merely pleaded that he moved the writ petition as he is a devotee of Lord Venkateswara. He is an agriculturist by profession. The appellant has failed to supply any specific particulars as to how he is in possession of any special information. The controversy with regard to the management and administration of the Temple's properties and funds have been deliberately mixed up with the extension granted to the appellant by the TTD Board. It is an admitted position that different proceedings are pending with regard to the management controversy of the Temple Trust. The aforesaid controversy had no relevance to the extension granted to the appellant. The writ petition seems to have been actuated by some disgruntled elements. He has also failed to show as to

how and in what manner he represents the public interest.

21. This Court in the case of *(DR.) B. Singh Vs. Union of India & Ors*[5]*.* quoted with approval the definition of public interest as stated in the report of Public Interest Law, USA, 1976 by the council for Public Interest Law set up by the Ford foundation in USA. In the aforesaid report, the definition of public interest is given as under:-

> 'Public interest law is the name that has recently been given to efforts which provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in the recognition that ordinary marketplace for legal services fails to provide such services to significant segments of the population and to significant interests. Such groups and interests include the proper environmentalists, consumers, racial and ethnic minorities and others.'

22. This Court in the case of *Neetu Vs. State of Punjab* (Supra) emphasized the need to ensure that public interest litigation is not misused to unleash a private vendetta against any particular person. In Paragraph 7, it is observed as follows:-

> "When a particular person is the object and target of a petition styled as PIL, the court has to be careful to see whether the attack in the guise of public interest is really intended to unleash a private vendetta, personal grouse or some other mala fide object."

23. Similar observations had been made by this Court in the case of *Ashok Kumar Pandey Vs. State of West Bengal*[6]*.* We may reiterate here the observations made in Paragraph 12 herein, which are as follows:-

> "Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary

5. (2004) 3 SCC 363.

6. (2004) 3 SCC 349.

> has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity-seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity-oriented or founded on personal vendetta. As indicated above, court must be careful to see that a body of persons or a member of the public, who approaches the court is acting *bona fide* and not for personal gain or private motive or political motivation or other oblique consideration. The court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busybodies deserve to be thrown out by rejection at the threshold, and in appropriate cases, with exemplary costs."

24. This Court again in the case of *Divine Retreat Centre* (Supra) reiterated that public interest litigation can only be entertained at the instance of bonafide litigants. It cannot be permitted to be used by unscrupulous litigants to disguise personal or individual grievances as public interest litigations. The facts placed on record in the present proceeding would clearly indicate that the appellant has not come to Court with clean hands. He has failed to establish his credential for moving the writ petition as public interest litigation. In our opinion, the High Court has failed to examine the matter in its correct perspective. The writ petition was undoubtedly moved by motives other than what was stated in the writ petition. A perusal of the affidavit in support of the writ petition would clearly show that the writ petition had been filed by the petitioner at the instance of some other persons who are hiding behind the veil.

In paragraph 8 of the affidavit, respondent No. 1 states:

> "Sri P. Seshadri who retired on 31.7.2006, has been given 5 years extension in the TTD. It is ununderstandable whether there is no other suitable person in the T.T.D. or elsewhere to perform the duties of Sri. P. Seshadri which he was doing or whether he is so indispensable that he should be given extension for 5 years. The T.T.D. has not bothered to fill up the said post of Par Pathedar till now, and have chosen to extend the services of Sri P.Seshadri again and again, vide Board's proceedings roc.No.BG/ 10949/2006 dated 31.7.2006."

In view of the above, we are unable to accept that the petitioner is the actual moving spirit behind the writ petition.

25. In the case of *Gurpal Singh* (Supra), this Court again emphasized that the Court must not allow its process to be abused for oblique considerations by masked phantoms who monitor at times from behind.

26. Respondent No.1 had failed to satisfy any of the criteria which would have enabled him to move the High Court by way of a public interest litigation. A pure and simple service matter has been deliberately disguised as a public interest litigation at the instance of some disgruntled employees who were perhaps hopeful of occupying the seat presently occupied by the appellant.

27. The High Court failed to notice that the writ petition was not maintainable for a variety of reasons. As noticed earlier, the High Court did not even care to examine all the provisions of 1989 rules before concluding that the appointment of the respondent was contrary to Rule 13. The respondent had raised numerous preliminary objectives with regard to the maintainability of the writ petition, in particular, at the instance of the respondent No.1. The High Court, in our opinion, committed a serious error in not analyzing all the relevant

provisions of the 1989 Rules, before concluding that the extension in the service granted to the appellant was contrary to Rule 13. This Court has, on numerous occasions, emphasised the importance of recording reasons by the High Court in support of the orders passed in exercise of its extra ordinary jurisdiction under Article 226 of the Constitution of India. Necessity for recording reasons is the fundamental to the administration of justice. The recorded reasons would enable the parties to the litigation to know the factors which weighed with the court in determining the lis between the parties. This Court in the case of *Vasudeo Vishwanath Saraf Vs. New Education Institute & Ors*[7]*.* clearly indicated the bare essentials of an order passed by the High Court while disposing of a writ petition under Article 226 of the Constitution of India. In paragraph 14, it is observed as follows :-

> "14. It is a cardinal principle of rule of law which governs our policy that the court including Writ Court is required to record reasons while disposing of a writ petition in order to enable the litigants more particularly the aggrieved party to know the reasons which weighed with the mind of the court in determining the questions of facts and law raised in the writ petition or in the action brought. This is imperative for the fair and equitable administration of justice. More so when there is a statutory provision for appeal to the higher court in the hierarchy of courts in order to enable the superior court or the appellate court to know or to be apprised of the reasons which impelled the court to pass the order in question. This recording of reasons in deciding cases or applications affecting rights of parties is also a mandatory requirement to be fulfilled in consonance with the principles of natural justice. It is no answer at all to this legal position that for the purpose of expeditious disposal of cases a laconic order like "dismissed" or 'rejected' will be made without passing a reasoned order or a speaking order. It is not, however,

7. 1986 (4) SCC 31.

necessary that the order disposing of a writ petition or of a cause must be a lengthy one recording in detail all the reasons that played in the mind of the court in coming to the decision. What is imperative is that the order must in a nutshell record the relevant reasons which were taken into consideration by the court in coming to its final conclusions and in disposing of the petition or the cause by making the order, thereby enabling both the party seeking justice as well as the superior court where an appeal lies to know the mind of the court as well as the reasons for its finding on questions of law and facts in deciding the said petition or cause. In other words fair play and justice demands that justice must not only be done but must seem to have been done."

The order passed by the High Court does not satisfy the bare minimum requirements as indicated above. In view of the above, we have no option but to allow the appeal and set aside the impugned judgment passed by the High Court.

28. Before parting, we may notice here that under the Resolution No. 178 dated 28th July, 2007 services of the appellant have been extended upto 1st August, 2011. We are informed by Mr. Narsimha that his services were discontinued immediately upon the judgment having been passed by the High Court on 28th April, 2010. Consequently, the appellant has been denied the full benefit under the Resolution and the Order dated 1st August, 2009. Since the aforesaid benefit has been denied to the appellant without any fault on his part, we direct the Board to consider whether the appellant ought to be granted further extension to compensate for the loss of service since 28th April, 2010.

29. With these observations, the appeal is allowed and the impugned judgment of the High Court is set aside.

R.P. Appeal allowed.

STATE OF U.P. AND ORS.
v.
REKHA RANI
(Civil Appeal No. 1017 of 2007)

MARCH 30, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Service Law:

Regularization – Claim for – Writ petition – Held: The High Court in exercise of its power under Article 226 cannot regularize an employee – Constitution of India, 1950 – Article 226.

Termination – Of respondent-temporary employee – Challenge to – Held: On facts, the respondent's service was not terminated as a measure of punishment, hence, no opportunity of hearing was necessary for terminating her service – Direction for her reinstatement cannot be sustained as she was only a temporary employee and hence had no right to the post – Merely because some others had been regularized did not give any right to the respondent – An illegality cannot be perpetuated – Constitution of India, 1950 – Articles 14 and 16.

Precedent – Supreme Court dismissing SLP against judgment of High Court – Held: The decision of the Supreme Court did not amount to a precedent as it did not contain any discussion on the merits of the case.

The respondent, a BAMS (Bachelor of Ayurvedic Medicine and Surgery) degree holder, had been appointed under the *Anshkalik* (temporary) Scheme of the State Government and posted at a Government Hospital. She was terminated from service.

The respondent filed writ petition before High Court

claiming entitlement to regularization in service and parity in wages as regular employees alleging that the State government had terminated her service arbitrarily. The respondent alleged that *Anshkalik* doctors had filed a writ petition being Civil Writ Petition No. 4886 of 1990 before the High Court which allowed the same on 11.2.1992 holding that there was violation of Articles 14 and 16 of the Constitution, and directed that the claim of the writ petitioners for regularization be considered. The respondent alleged that the said High Court judgment became final when SLP filed thereagainst was dismissed by this Court on 19.2.1996 and that she is entitled to benefit of the said decision. The writ petition filed by the respondent was allowed by the High Court. Hence, the present appeal.

Allowing the appeal, the Court

HELD:1. There is no discussion on the merits in the order of this Court dated 19.2.1996 passed in the SLP filed against the judgment and order of the High Court in writ petition No. 4886 of 1990. Thus, the aforesaid decision of this Court does not amount to a precedent and the respondent can take no benefit from the same. [Para 10] [1159-B]

2. A regular appointment can only be made after selection by the U.P. Public Service Commission. Also, admittedly, the respondent was only a temporary employee and had not worked after 16.4.1991. The High Court in exercise of its power under Article 226 cannot regularize an employee. Merely because some others had been regularized does not give any right to the respondent. An illegality cannot be perpetuated. [Paras 11, 12] [1159-C-E]

State of Rajasthan vs. Daya Lal **2011(2) SCC 429 and** *State of Karnataka vs. Umadevi* **(2006) 4 SCC 1 – relied on.**

3. Also, it is well-settled that a temporary employee has no right to the post. The respondent's service was not terminated as a measure of punishment. Hence no opportunity of hearing was necessary for terminating her service. The direction for her reinstatement is not sustainable as she was only a temporary employee and hence had no right to the post. The impugned judgment and order of the High Court is set aside and the writ petition is dismissed. [Paras 13, 14] [1159-F-H]

State of U.P. vs. Kaushal Kishore Shukla **(1991) 1 SCC 691 – relied on.**

Case Law Reference:

2011(2) SCC 429	**relied on**	**Para 12**
(2006) 4 SCC 1	**relied on**	**Para 12**
(1991) 1 SCC 691	**relied on**	**Para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1017 of 2007.

From the Judgment and Order dated 28.7.2003 of the High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 1213 of 1999.

S.R. Singh, Niranjana Singh and Prema Singh, Prema Singh for the Appellants.

Dinesh Kumar Garg for the Respondent.

The Judgment of the Court was delivered by

MARKANDEY KATJU, J. 1. This appeal has been filed against the judgment and order dated 28.7.2003 in CMWP No. 1213 of 1999 of the High Court of Judicature at Allahabad.

2. Heard learned counsel for the parties and perused the record.

3. The respondent has a degree of B.A.M.S.(Bachelor of Ayurvedic Medicine and Surgery). She alleged in her writ petition filed in the High Court that she had all the requisite qualifications to be appointed as Medical Officer in the U.P. State Services. She was appointed vide order dated 1.8.1997 under the Anshkalik (temporary) Scheme of the State Government and was posted at a Government Female Hospital in Bulandshahar district.

4. It is alleged in her writ petition that to avoid the claim of regular service of the writ petitioner the State Government acted against the spirit of law laid down by this Court in *Rattanlal and others vs. State of Haryana and others* AIR 1987 SC 478 and in *Rabinarayan Mohapatra vs. State of Orissa and others* AIR 1991 SC 1286 and other decisions given from time to time by this Court, declaring illegal the policy of making ad hoc appointment having time bound period and thereafter terminating the services of the appointee and after a short interval giving re-appointment. It was alleged that artificial break of service was given by the State Government which is against the spirit of the aforesaid decisions of this Court. The appellant was appointed from 1.8.1987 to 31.7.1988, then from 3.8.1988 to 2.8.1989, then from 4.8.1989 to 3.8.1990 and from 7.8.1990 for a period one year. It is also alleged that the appellant's work was always found to be satisfactory, and certificates to this effect were given by the Chief Medical Officer, Bulandshahar which were marked as Annexure-4 to the writ petition filed in the High Court. It is alleged that others similarly situated were also given artificial breaks in service. It is alleged that Anshkalik doctors filed a writ petition being Civil Writ Petition No. 4886 of 1990 before the Allahabad High Court (Lucknow Bench) which was allowed on 11.2.1992 and the said judgment became final. The High Court held that there was violation of Articles 14 and 16 of the Constitution of India, and that the claim of the writ petitioner(s) for regularization shall be considered within six months from the date of production of copy of the said judgment before the respondent (the State Government). The

writ petitioner (respondent in the present appeal) has alleged that she is entitled to the benefit of the said decision, although she had not filed any individual writ petition.

5. The respondent herein did not work after 16.4.1991 in the State service as her services came to an end on that date. She made several representations to the government authorities but to no avail. It is alleged that the State government arbitrarily terminated the service of the respondent on 16.4.1991. It is alleged that she was entitled to regularization in service and parity in wages as regular employees.

6. It is alleged that an SLP(C) No. 25503 of 1995 was filed before this Court against the Allahabad High Court judgment and order dated 11.2.1991 passed in writ petition No. 4886 of 1990, but the same was dismissed on 19.2.1996. It is also alleged that after the dismissal of the said SLP the writ petitioner(s) should have been regularized in service, but that was not done.

7. It is alleged that others similarly situated have been regularized e.g. Dr. Sudha Trivedi in pursuance of the order dated 21.3.1996 in writ petition No. 6528 of 1992. Similarly, Dr. Lilawati Tripathi was also regularized in service. Hence, it is alleged that the writ petitioner (respondent herein) has been discriminated against.

8. A counter affidavit was filed before the High Court in which it was stated that the respondent herein had been appointed as a temporary employee from time to time, and the last appointment was given on 7.8.1990 for one year. She was not in service w.e.f 16.4.1991. Hence, it was alleged that she could not claim regularization particularly when Chikitsa Adhikari comes under the purview of U.P. Public Service Commission and regular appointment can only be made on the recommendation of the said Commission.

9. Relying on its earlier decision the High Court allowed

the impugned writ petition No. 4886 of 1990 on 11.2.1992. Hence, this appeal.

10. We have perused the order of this Court dated 19.2.1996 passed in the SLP filed against the judgment and order of the High Court in writ petition No. 4886 of 1990 and we find that there is no discussion on the merits of the case. Thus, the aforesaid decision of this Court does not amount to a precedent and the respondent can take no benefit from the same.

11. A regular appointment can only be made after selection by the U.P. Public Service Commission. Also, admittedly, the respondent was only a temporary employee and had not worked after 16.4.1991.

12. It has been held in a recent decision of this Court in *State of Rajasthan vs. Daya Lal* 2011(2) SCC 429 following the Constitution Bench decision of this Court in *State of Karnataka vs. Umadevi* (2006) 4 SCC 1 that the High Court in exercise of its power under Article 226 cannot regularize an employee. Merely because some others had been regularized does not give any right to the respondent. An illegality cannot be perpetuated.

13. Also, it is well-settled that a temporary employee has no right to the post vide *State of U.P. vs. Kaushal Kishore Shukla* (1991) 1 SCC 691. The respondent's service was not terminated as a measure of punishment. Hence no opportunity of hearing was necessary for terminating her service. The direction for her reinstatement is not sustainable as she was only a temporary employee and hence had no right to the post.

14. For the reasons aforementioned, the appeal is allowed. The impugned judgment and order of the High Court is set aside and the writ petition is dismissed. There shall be no order as to costs.

B.B.B. Appeal allowed

DEDICATED FREIGHT CORRIDOR CORPORATION OF INDIA

v.

SUBODH SINGH & ORS.

(Civil Appeal No. 2794 of 2011)

MARCH 30, 2011

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

Railways Act, 1989:

s.20F(2) – Time period for making the award – Commencement of – Held: Period of one year, stipulated u/s.20F(2) for making the award, has to be reckoned from the date of publication of the declaration u/s.20E(1) in the official gazette – Land acquisition – Compensation.

s.20E(1) – Publication of notification under – Requirement for – Held: s.20E requires the notification to be published only in the official gazette – The section does not require the notification of declaration to be published in any newspaper or by any other mode.

s.20F(2), first proviso – Award by competent authority within six months after the expiry of one year from the date of publication of the declaration – Validity of – Held: If the competent authority is satisfied that the award could not be made within a period of one year due to unavoidable circumstances, which are to be recorded in writing, he could make the award within eighteen months – The requirement regarding recording of reasons is not mandatory – In the instant case, the competent authority while passing award proceeded under bona fide impression that the notification of declaration u/s.20E(1) was required to be published not only in the official gazette, but also in the form of a public notice in two newspapers and that the latter of the two dates of

publication would be the date of commencement of the period of one year, u/s.20F(2) – As a consequence, he applied the principle that when publication is required to be made by more than one mode, the date of publication by the last of the prescribed modes is the date of publication – On the facts of the case and on harmonious reading of the provision of s.20F, the said reasoning in the award is treated as the reason for the delay in making the award – The acquisition did not, therefore, lapse – However, having regard to the second proviso to s.20F(2), the land owners are entitled to additional compensation for the delay in making of the award at a rate not less than 5% of the value of the award for each month of delay.

Several anomalies in the provisions of Chapter VIA – Discussed – Need for legislation – Legislation.

The land belonging to the first respondent along with others was acquired for the purpose of special railway project. The acquisition was under Chapter IVA of the Railways Act, 1989. A notification dated 10.6.2008 under Section 20A(1) of the Act was published in official gazette on 10.6.2008. This was followed by a declaration dated 12.12.2008 under Section 20E(1) of the Act published in official gazette on 16.12.2008 declaring that the lands mentioned therein should be acquired for the purpose mentioned in the notification under Section 20A(1) of the Act. A public notice referring to the two notifications and inviting claims from all the persons interested in the lands was published by the competent authority in two newspaper on 20.2.2009. Thereafter, the competent authority passed the order on 8.2.2010 determining the compensation payable under Section 20F(1) of the Act. The first respondent filed writ petition for quashing the award dated 8.2.2010 and for a declaration that the entire acquisition proceedings stood lapsed under Section 20F(2) of the Act, as the award was not made within one

year from the date of publication of the date of declaration dated 12.12.2008. The High Court allowed the writ petition and quashed the award dated 8.2.2010 and declared that the acquisition proceedings stood lapsed.

The questions which arose for consideration in the instant appeal were whether the period of one year, stipulated under section 20F(2) of the Railways Act, 1989 for making the award, has to be reckoned from the date of publication of the declaration under section 20E(1) of the Act in the official gazette or from the date of any subsequent publication of the declaration in newspapers and whether an award made within six months after the expiry of one year from the date of publication of the declaration, is valid under the first proviso to section 20F(2) of the Act, even if reasons are not recorded by the competent authority in writing to show that he was satisfied that the delay had been caused due to unavoidable circumstances.

Allowing the appeal, the Court

HELD: 1.1. Sub-section (1) of section 20E of the Railways Act, 1989 provides that the central government shall, on receipt of the report of the competent authority, declare by notification that the land should be acquired for the purpose mentioned in section 20A(1). Sub-section (2) of section 20E of the Act provides that on the publication of such declaration by notification, by the central government, under sub-section (1), the lands shall vest absolutely in the central government free from all encumbrances. Section 20E thus requires the notification to be published only in the official gazette. The section does not require the notification of declaration to be published in any newspaper or by any other mode. Section 20A(4) relating to preliminary notification requires that in addition to publication of a notification by the

central government, of the declaration of its intention to acquire any land, the competent authority shall cause the substance of the notification to be published in two local newspapers, one of which will be in a vernacular language. Section 20F(4) of the Act requires that before proceeding to determine the compensation, the competent authority shall give a public notice in two local newspapers inviting claims. Thus, wherever newspaper publication is required, it has been specifically provided by the legislature. The absence of a similar provision in section 20E for publication in newspapers, makes it clear that the publication of the declaration under section 20E(1) is complete when it is published in the official gazette. The publication of the notification under section 20E(1), or its substance, in any newspaper, is not, therefore, a requirement under the Act. Even if it is published in any newspaper, such publication will be only for general information and will not serve any purpose under the Act. [Para 6] [1176-F-H; 1177-A-C]

1.2. In the instant case, public notice dated 20.2.2009 published in the newspapers was not a publication of the notification of declaration under section 20E(1) of the Act, but was a public notice required to be issued under sub-section (4) of section 20F by the competent authority inviting claims, after the publication of a notification under Section 20E(1) of the Act. Even if the public notice in the newspapers dated 20.2.2009, was to be regarded as publication of the declaration under section 20E(1) of the Act, it would not be of any relevance to calculate the period of one year under section 20F(2) of the Act. [Para 7] [1177-D-F]

2.1. Sub-section (2) of section 20F of the Act requires the competent authority to make an award within a period of one year from the date of publication of the declaration and provides that if no award is made within that period,

the entire proceedings for acquisition of land shall lapse. The term "publication" in section 20F(2) refers to publication of the declaration in the official gazette. In this case, the declaration under section 20E(1) was made by notification dated 12.12.2008 which was published in the official gazette on 16.12.2008. Therefore, the award ought to have been made within one year from 16.12.2008. The award made on 8.2.2010, was clearly beyond one year from the date of publication of the declaration. If the benefit of additional period of six months under the first proviso to section 20F(2) is taken, the award made on 8.2.2010 would be in time and the acquisition proceedings would not lapse. The proviso enables the competent authority to make the award within an extended period of six months if he is satisfied that the delay had been caused due to unavoidable circumstances and reasons therefor are recorded in writing. In this case, admittedly, the competent authority has not recorded any reasons in writing to hold that the delay was due to unavoidable circumstances. [Paras 8, 9] [1178-B-G]

2.2. In view of the inconsistencies and ambiguities in section 20F of the Act, the provisions of the section are to be read harmoniously. The effect of such harmonious reading would be that the award has to be made within one year from the date of publication of the declaration. If the competent authority is satisfied that the award could not be made within a period of one year due to unavoidable circumstances, which are to be recorded in writing, he could make the award within eighteen months. The requirement regarding recording of reasons is not mandatory. The acquisition proceedings will stand eclipsed at the end of one year from the date of publication if no award is made within one year. If no award is made within eighteen months, the proceedings for acquisitions would lapse. If the award is made within

eighteen months, the acquisition will emerge out of the eclipse and will not lapse. But additional compensation will become payable for the period beyond one year, as provided in the second proviso to section 20F(2). If the reasons are not recorded or if the reasons are not satisfactory, the additional compensation under the second proviso can be at a rate higher than the minimum of 5% per month stipulated in the second proviso to section 20F(2). The award dated 8.2.2010 by the competent authority proceeded on the basis that the notification of declaration under section 20E(1) of the Act has to be published not only in the official gazette, but also in the form of a public notice in two newspapers and that the latter of the two dates of publication would be the date of commencement of the period of one year, under section 20F(2) of the Act. It is evident from the award that the competent authority proceeded under the *bonafide* impression that publication of the public notice under section 20F(4) in the two newspapers on 20.2.2009 referring to the declaration under section 20E(1), subsequent to the date of gazette publication (16.12.2008) is also part of the process of publication of the declaration under section 20E(1). As a consequence, he applied the principle that when publication is required to be made by more than one mode, the date of publication by the last of the prescribed modes is the date of publication. He, therefore, assumed that the date of publication of the public notice in the two newspapers dated 20.2.2009 to be the date of publication of declaration for the purposes of section 20E(1) and 20F(2) of the Act and that consequently the award was made within one year from such date. On the facts of the case and on a harmonious reading of the provision of section 20F of the Act, the said reasoning in the award can be treated as the reason for the delay in making the award. The acquisition did not, therefore, lapse. However, having regard to the second proviso to section 20F(2), the land owners

(described as "entitled persons") would be entitled to additional compensation for the delay in making of the award at a rate not less than 5% of the value of the award for each month of delay. [Paras 10, 11] [1178-H; 1179-A-H; 1180-D-H; 1181-A]

<u>Certain anomalies in the provisions of Chapter VIA of the Act.</u>

3.1. Several apparent anomalies in Chapter IVA of the Act, in particular in section 20F, require the attention of the law makers.

(i) Sub-section (2) of section 20F provides that if no award is made within one year from the date of publication of the declaration, the entire proceedings for the acquisition shall lapse. The first proviso to sub-section (2) provides that the competent authority may, *after the expiry of the period of one year,* if he is satisfied that the delay has been caused due to unavoidable circumstances and for reasons to be recorded in writing, make an award within an extended period of six months. This means that when an award is not made within one year from the date of publication of the declaration, the proceedings for acquisition would lapse, but if within six months of such lapsing, the competent authority makes an award after recording reasons for the delay, what stood lapsed would stand revived. But if the acquisition proceedings had already lapsed at the end of one year, mere making of an award thereafter cannot revive the acquisition proceedings, in the absence of any provision in the Act providing for revival of the lapsed acquisition.

(ii) Sub-section (2) of section 20F requires the award to be made by the competent authority and the first proviso requires the competent authority to record

the reasons for the delay. What are "unavoidable circumstances" leading to the delay which would enable the competent authority to make an award beyond one year, would invariably lead to litigations as to whether there were unavoidable circumstances, whenever the award is made beyond one year. As the consequence of making an award beyond one year but within eighteen months, involving payment of additional compensation, is set out in the second proviso to section 20F(2), there is no need for requiring the competent authority to record reasons in writing showing that the delay was due to unavoidable circumstances.

(iii) The second proviso to section 20F(2) requires payment of additional compensation for the delay in making of the award, at the rate of *not less than five percent of the value of the award*, for each month of delay. This vests unguided discretion in the competent authority or the arbitrator to award additional compensation at any higher rate and gives room for unnecessary litigation at the instance of "entitled persons" claiming higher percentages as additional compensation. It is necessary to consider whether specifying a fixed monthly rate of increase would serve the ends of justice better instead of indicating a minimum rate per month.

(iv) Sub-section (1) of section 20F refers to an "*order*" of the competent authority determining the amount to be paid for the land acquired. Sub-section (2) refers to the competent authority making an "*award*". It is not clear whether the award by the competent authority is consequential to the order that is made under sub-section (1) of section 20F or whether the order under sub-section (1) is itself the award referred to in sub-section (2) of section 20F.

Confusion can be avoided by using only one of the words -'order' or 'award' - to refer to the decision of the competent authority determining compensation, at all places.

(v) Sub-section (4) of section 20F provides that before determining the amount under sub-section (1) or sub-section (3), the competent authority shall give a public notice inviting claims from all persons interested *in land to be acquired*. The issue of such public notice under section 20F(4) is after the publication of notification of declaration under section 20E(1). Sub-section (2) of section 20E provides that on publication of the declaration, the land vests in the central government. If the land has *already vested* in the government on publication of the declaration under section 20E(1), the question of issuing a public notice thereafter, inviting claims under section 20F(4) from persons interested in the lands "*to be acquired*" does not arise. The words "to be acquired" may have to be replaced by the words "acquired".

(vi) If the land has already vested absolutely in the Central Government on publication of declaration of acquisition in the Official Gazette under section 20E(1), it is not clear how the proceedings for acquisition could lapse if the award is not made within one year or even 18 months. This Court while dealing with other enactments relating to acquisition has held that acquisition would not lapse as consequence of not making the award within the specified time, if the land had already vested in the government and the Act does not provide for re-vesting in the land owner.

(vii) Section 20I of the Act provides that though the

land vests in the central government on publication of the declaration under section 20E(1), the competent authority can demand the surrender or delivery of possession *only after the* compensation is determined under section 20F and is deposited under section 20H. However section 20J provides that once the land vests in the central government on publication of a declaration under section 20E(2), it shall be lawful for any persons authorized by the central government "to enter and do other act necessary upon the land for carrying out the building, maintenance, management or operation of the special railway project or part thereof or any work connected therewith". In other words section 20-J enables the central government to enter upon possession of the land on publication of the declaration under section 20E, even before the award is made, and carry on the activities connected with the special railway project for which the land was acquired. The provisions of section 20J apart from being badly worded, are contrary to provisions of section 20I. Section 20J would lead to deprivation of possession of the land to the land owner without even determining or offering any compensation. This requires to be examined and corrected. Further, there is no indication as to what should happen if the central government or person authorized by it *starts executing* the special railway project in the acquired land under section 20 J and thereafter, the acquisition lapses on account of the award not being made within the time frame mentioned in section 20F(2). [Para 12] [1181-A-H; 1182-A-H; 1183-A-H; 1184-A-D]

3.2. These anomalies are likely to give room for considerable avoidable litigation, in regard to acquisitions under Chapter IVA of the Act. These anomalies may also defeat the very legislative intent to

provide a progressive form of land acquisition when compared to the provisions of Land Acquisition Act, 1894 and, therefore, require the attention of law makers. [Para 12] [1184-E]

Satendra Prasad Jain vs. State of U.P. **1993 (4) SCC 369** *Awadh Bihari Yadav vs. State of Bihar* **1995 (6) SCC 31** *UP Jal Nigam, Lucknow vs. Kalra Properties (P) Ltd.* **1996 (3) SCC 124** *Allahabad Development Authority vs. Nasiruzzaman* **1996 (6) SCC 424;** *Ginnar Traders (3) vs. State of Maharashtra* **2011 (3) SCC 1 – relied on.**

Case Law Reference:

1993 (4) SCC 369	**relied on**	**Para 12**
1995 (6) SCC 31	**relied on**	**Para 12**
1996 (3) SCC 124	**relied on**	**Para 12**
1996 (6) SCC 424	**relied on**	**Para 12**
2011 (3) SCC 1	**relied on**	**Para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2794 of 2011.

From the Judgment & Order dated 12.5.2010 of the High Court of Judicature at Allahabad in WP (C) No. 14945 of 2010.

Gopal Subramanium, SG, Atul Chitale, Suchitra Atul Chitale, Sunaina Dutta, Nishtha Kumar, Snigdha Pandey for the Appellant.

S.B. Upadhyay, Aftab Sharma, Deep Kumar Sharma and Aftab Ali Khan for the Respondents.

The Judgment of the Court was delivered by

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

2. The first respondent was the owner of lands bearing Gata Nos.106, 118, 119, 123, 126 and 145 in village Kakrahi, District Auraiya, Uttar Pradesh. The said lands, among others, were acquired for a special railway project, that is, the Dedicated Freight Corridor at Kanpur (Rural), Auraiya and Etava Districts. The acquisition was under chapter IVA of the Railways Act, 1989 ('Act' for short) which dealt with land acquisitions for special railway projects. A notification dated 10.6.2008 (gazetted on 10.6.2008) under section 20A(1) of the Act was published by the Central Government declaring its intention to acquire lands in question for execution of a special railway project. This was followed by a declaration dated 12.12.2008 (gazetted on 16.12.2008) under section 20E(1) of the Act declaring that the lands mentioned therein should be acquired for the purpose mentioned in the notification under section 20A(1) of the Act. On such declaration, the land vested absolutely in the Central Government free from encumbrances, in view of the vesting provision in section 20E(2) of the Act. A public notice referring to the notifications dated 10.6.2008 and 12.2.2008 under section 20A(1) and 20E(1) of the Act and inviting claims from all persons interested in the lands was published by the competent authority in two newspapers (*Amar Ujala and Dainik Jagran*) dated 20.2.2009. Thereafter an order dated 8.2.2010 was made by the competent authority determining the compensation payable, under section 20F(1) of the Act.

3. The first respondent filed W.P.No.14945/2010 for quashing the award dated 8.2.2010 and for a declaration that the entire acquisition proceedings stood lapsed under section 20F(2) of the Act, as the award was not made within one year from the date of publication of the date of declaration dated 12.12.2008. A Division bench of the High Court allowed the said writ petition by the impugned order dated 12.5.2010. It quashed the award dated 8.2.2010 and declared that the acquisition proceedings stood lapsed. The said decision was based on the following findings recorded by the division bench :

(a) The award was made beyond one year from the date of publication of the declaration under section 20E(1) of the Act.

(b) The benefit of the first proviso to section 20F(2) of the Act which enabled the competent authority to make the award within an extended period of six months (after the expiry of one year specified in section 20F(2) of the Act) was not available to save the acquisition, as the competent authority failed to record in writing any reason to show that he was satisfied that the delay was caused due to unavoidable circumstances.

Questions for consideration

4. Feeling aggrieved the appellant has filed this appeal. The appellant contends that the award was validly made within one year from the date of declaration under section 20E(1) of the Act, as it was made within one year from 20.2.2009, the date on which public notice of the said notification dated 12.12.2008 was published in the newspapers. According to the appellant, where the publication is made in the official gazette and the newspapers, the last of the dates of such publication shall be the date of publication of the declaration. It is alternatively contended that as the award was made within 18 months of the date of publication of the declaration, the acquisition did not lapse. On the contentions urged the following questions arise for consideration :

(i) Whether the period of one year, stipulated under section 20F(2) of the Act, for making the award, has to be reckoned from the date of publication of the declaration under section 20E(1) of the Act in the official gazette or from the date of any subsequent publication of the declaration in newspapers?

(ii) Whether an award made within six months after the expiry of one year from the date of publication of the declaration, is valid under the first proviso to section 20F(2) of the Act, even if reasons are not recorded by the competent authority in writing to show that he was satisfied that the delay had been caused due to unavoidable circumstances?

The relevant legal provisions

5. A reference to the relevant provisions will be necessary to provide answers to these questions. Chapter IVA was inserted in the Act by Amendment Act 11 of 2008 with effect from 31.1.2008. The said chapter is a self contained code in regard to land acquisitions for special railway projects.

5.1) Sub-section 20A relates to power to acquire land and reads thus :

"20A. Power to acquire land, etc.: (1) Where the Central Government is satisfied that for a public purpose any land is required for execution of a special railway project, it may, by notification, declare its intention to acquire such land.

(2) Every notification under sub-section (1), shall give a brief description of the land and of the special railway project for which the land is intended to be acquired.

(3) The State Government or the Union Territory, as the case may be, shall for the purposes of this section, provide the details of the land records to the competent authority, whenever required.

(4) The competent authority shall cause the substance of the notification to be published in two local newspapers, one of which shall be in a vernacular language.

5.2. "Special railway project" is defined in section 2(37A) of the Act and means a project, notified as such by the central

government from time to time, for providing national infrastructure for a public purpose in a specified time-frame, covering one or more states or the union territories. Clauses (7A) and (26) of section 2 of the Act define "competent authority" and notification as under :

"2(7A). 'competent authority' means any person authorized by the Central Government, by notification, to perform the functions of the competent authority for such area as may be specified in the notification.

2(26). 'notification' means a notification published in the Official Gazette."

5.3. Section 20B deals with power to enter for survey etc. Section 20C relates to evaluation of damages during survey, measurement etc. Section 20D provides for hearing of objections to the acquisition.

5.4. Section 20E deals with declaration of acquisition and the same is extracted below :

"20E. Declaration of acquisition : (1) Where no objection under subs-section (1) of section 20D has been made to the competent authority within the period specified therein or where the competent authority has disallowed the objections under sub-section (2) of that section, the competent authority shall, as soon as may be, submit a report accordingly to the Central Government and on receipt of such report, the Central Government shall declare, by notification, that the land should be acquired for the purpose mentioned in sub-section (1) of section 20A.

(2) On the publication of the declaration under sub-section (1), the land shall vest absolutely in the Central Government free from all encumbrances.

(3) Where in respect of any land, a notification has been published under sub-section (1) of section 20A for its acquisition, but no declaration under sub-section (1) of this section has been published within a period of one year from the date of publication of that notification, the said notification shall cease to have any effect :

Provided that in computing the said period of one year, the period during which any action or proceedings to be taken in pursuance of the notification issued under sub-section (1) of section 20A is stayed by an order of a court shall be excluded.

(4) A declaration made by the Central Government under sub- section (1) shall not be called in question in any court or by any other authority."

5.5. Section 20F deals with determination of amount payable as compensation. Sub-sections 1, 2 and 4 which are relevant for our purpose are extracted below :

"20F. Determination of amount payable at compensation – (1) Where any land is acquired under this Act, there shall be paid an amount which shall be determined by an order of the competent authority.

(2) The competent authority shall make an award under this section within a period of one year from the date of the publication of the declaration and if no award is made within that period, the entire proceedings for the acquisition of the land shall lapse :

Provided that the competent authority may, after the expiry of the period of limitation, if he is satisfied that the delay has been caused due to unavoidable circumstances, and for the reasons to be recorded in writing, he may make the award within an extended period of six months.

Provided further that where an award is made within the

extended period, the entitled person shall, in the interest of justice, be paid an additional compensation for the delay in making of the award, every month for the period so extended, at the rate of not less than five per cent of the value of the award, for each month of such delay.

xxx xxx xxx

(4) Before proceeding to determine the amount under sub-section (1) or sub-section (3), as the case may be, the competent authority shall give a public notice published in two local newspapers, one of which shall be in a vernacular language inviting claims from all persons interested in the land to be acquired."

xxx xxx xxx

Re : Question (i)

6. Sub-section (1) of section 20E of the Act provides that the central government shall, on receipt of the report of the competent authority, declare by notification that the land should be acquired for the purpose mentioned in section 20A(1). Sub-section (2) of section 20E of the Act provides that on the publication of such declaration by notification, by the central government, under sub-section (1), the lands shall vest absolutely in the central government free from all encumbrances. Clause (26) of section 2 defines "notification" as a notification published in the official gazette. Section 20E thus requires the notification to be published only in the official gazette. The section does not require the notification of declaration to be published in any newspaper or by any other mode. By way of contrast, we may refer to section 20A(4) relating to preliminary notification and 20F(4) relating to public notice inviting claims before making the award of the Act. Section 20A(4) requires that in addition to publication of a notification by the central government, of the declaration of its intention to acquire any land, the competent authority shall

cause the substance of the notification to be published in two local newspapers one of which will be in a vernacular language. Section 20F(4) of the Act requires that before proceeding to determine the compensation, the competent authority shall give a public notice in two local newspapers inviting claims. Wherever newspaper publication is required, it has been specifically provided by the legislature. The absence of a similar provision in section 20E for publication in newspapers, makes it clear that the publication of the declaration under section 20E(1) is complete when it is published in the official gazette. The publication of the notification under section 20E(1), or its substance, in any newspaper, is not therefore a requirement under the Act. Even if it is published in any newspaper, such publication will be only for general information and will not serve any purpose under the Act.

7. The appellant submits that a public notice under section 20F(4) of the Act was published in two newspapers on 20.2.2009 notifying the public about the declaration under section 20E(1) and inviting claims from persons interested and consequently, the period of one year should be reckoned from 20.2.2009 and not from 16.12.2008 (date on which the notification was gazetted). According to appellant, if the date of publication in the newspapers (20.2.2009) is taken into account, the award made on 8.2.2010 would satisfy the requirement of making the award within one year stipulated in section 20F(2) of the Act. We find no merit in this contention. The public notice dated 20.2.2009 published in the newspapers was not a publication of the notification of declaration under section 20E(1) of the Act, but a public notice required to be issued under sub-section (4) of section 20F by the competent authority inviting claims, after the publication of a notification under Section 20E(1) of the Act. Even if the public notice in the newspapers dated 20.2.2009, is to be regarded as publication of the declaration under section 20E(1) of the Act, it would not be of any relevance to calculate the period of one year under section 20F(2) of the Act. As noticed above what is relevant

for the purpose of reckoning the period of one year is the date of publication of notification of declaration under section 20E(1) of the Act in the official gazette and nothing else.

Re : Question (ii))

8. Sub-section (2) of section 20F of the Act requires the competent authority to make an award within a period of one year from the date of publication of the declaration and provides that if no award is made within that period, the entire proceedings for acquisition of land shall lapse. The term "publication" in section 20F(2) refers to publication of the declaration in the official gazette. In this case, the declaration under section 20E(1) was made by a notification dated 12.12.2008 which was published in the official gazette on 16.12.2008. Therefore the award ought to have been made within one year from 16.12.2008. The award made on 8.2.2010, was clearly beyond one year from the date of publication of the declaration. If the benefit of additional period of six months under the first proviso to section 20F(2) is taken, the award made on 8.2.2010 would be in time and the acquisition proceedings would not lapse. The question is whether it is permissible to do so on the facts of this case.

9. Though sub-section (2) of section 20F provides that if the award is not made by the competent authority within one year from the date of publication of the declaration, the entire proceedings for acquisition of land shall lapse, the proviso thereto enables the competent authority to make the award within an extended period of six months if he is satisfied that the delay had been caused due to unavoidable circumstances and reasons therefor are recorded in writing. In this case admittedly the competent authority has not recorded any reasons in writing to hold that the delay was due to unavoidable circumstances.

10. In view of the inconsistencies and ambiguities in section 20F of the Act, (enumerated in para 12 below), it becomes

necessary to read the provisions of the section harmoniously. The effect of such harmonious reading will be as under :

(a) The award has to be made within one year from the date of publication of the declaration.

(b) If the competent authority is satisfied that the award could not be made within a period of one year due to unavoidable circumstances, which are to be recorded in writing, he could make the award within eighteen months. The requirement regarding recording of reasons is not mandatory.

(c) The acquisition proceedings will stand eclipsed at the end of one year from the date of publication if no award is made within one year. If no award is made within eighteen months, the proceedings for acquisitions would lapse.

(d) If the award is made within eighteen months, the acquisition will emerge out of the eclipse and will not lapse. But additional compensation will become payable for the period beyond one year, as provided in the second proviso to section 20F(2). If the reasons are not recorded or if the reasons are not satisfactory, the additional compensation under the second proviso can be at a rate higher than the minimum of 5% per month stipulated in the second proviso to section 20F(2).

11. The award dated 8.2.2010 by the competent authority proceeds on the basis that the notification of declaration under section 20E(1) of the Act has to be published not only in the official gazette, but also in the form of a public notice in two newspapers and that the latter of the two dates of publication would be the date of commencement of the period of one year, under section 20F(2) of the Act. This is evident from the following observations in the said award dated 8.2.2010 of the competent authority:

> "Thereafter, the proposal for the issuance of the notification for the acquisition of land under section 20E of Indian Railways Act and report of the competent officer has been presented before the Central Government. The Central Government issued notification through Gazette No. Ka.Aa.2903 (A) dated 12.12.2008 for the acquisition of total 1.2180 hectare land in village Kakahari. *The publication of above mentioned notification* has been issued in two daily newspapers Amar Ujjala and Dainik Jagran under the amended provisions of section 20E(4) of the Indian Railways Act 1989 on 20.2.2009."
>
> *(emphasis supplied)*

It is evident from the award that the competent authority proceeded under the bona fide impression that publication of the public notice under section 20F(4) in the two newspapers (*Amar Ujala* and *Dainik Jagran*) on 20.2.2009 referring to the declaration under section 20E(1), subsequent to the date of gazette publication (16.12.2008) is also part of the process of publication of the declaration under section 20E(1). As a consequence, he applied the principle that when publication is required to be made by more than one mode, the date of publication by the last of the prescribed modes is the date of publication. He therefore assumed that the date of publication of the public notice in the two newspapers dated 20.2.2009 to be the date of publication of declaration for the purposes of section 20E(1) and 20F(2) of the Act and that consequently the award was made within one year from such date. On the facts of the case and on a harmonious reading of the provision of section 20F of the Act, the aforesaid reasoning in the award can be treated as the reason for the delay in making the award. The acquisition did not, therefore, lapse. However, having regard to the second proviso to section 20F(2), the land owners (described as "entitled persons") will be entitled to additional compensation for the delay in making of the award at a rate not less than 5% of the value of the award for each month of

delay.

Certain anomalies in the provisions of Chapter VIA of the Act

12. Before parting we may refer to several apparent anomalies noticed in Chapter IVA of the Act, in particular in section 20F, which requires the attention of the law makers. As neither the validity of Chapter VIA of the Act nor the validity of any provision therein is under challenge in this appeal, but as we have faced difficulties in the application of section 20F, we are referring to some of the anomalies in the provisions of Chapter IVA, without pronouncing upon the validity of the provision.

(i) Sub-section (2) of section 20F provides that if no award is made within one year from the date of publication of the declaration, the entire proceedings for the acquisition shall lapse. The first proviso to sub-section (2) provides that the competent authority may, *after the expiry of the period of one year,* if he is satisfied that the delay has been caused due to unavoidable circumstances and for reasons to be recorded in writing, make an award within an extended period of six months. This means that when an award is not made within one year from the date of publication of the declaration, the proceedings for acquisition would lapse, but if within six months of such lapsing, the competent authority makes an award after recording reasons for the delay, what stood lapsed would stand revived. But if the acquisition proceedings had already lapsed at the end of one year, mere making of an award thereafter cannot revive the acquisition proceedings, in the absence of any provision in the Act providing for revival of the lapsed acquisition.

(ii) Sub-section (2) of section 20F requires the award to be made by the competent authority and the first proviso requires the competent authority to record the reasons for the delay. What are "unavoidable circumstances" leading to the delay which would enable the competent authority to make an

award beyond one year, would invariably lead to litigations as to whether there were unavoidable circumstances, whenever the award is made beyond one year. As the consequence of making an award beyond one year but within eighteen months, involving payment of additional compensation, is set out in the second proviso to section 20F(2), there is no need for requiring the competent authority to record reasons in writing showing that the delay was due to unavoidable circumstances.

(iii) The second proviso to section 20F(2) requires payment of additional compensation for the delay in making of the award, at the rate of *not less than five percent of the value of the award*, for each month of delay. This vests unguided discretion in the competent authority or the Arbitrator to award additional compensation at any higher rate and gives room for unnecessary litigation at the instance of "entitled persons" claiming higher percentages as additional compensation. It is necessary to consider whether specifying a fixed monthly rate of increase would serve the ends of justice better instead of indicating a minimum rate per month.

(iv) Sub-section (1) of section 20F refers to an "*order*" of the competent authority determining the amount to be paid for the land acquired. Sub-section (2) refers to the competent authority making an "*award*". It is not clear whether the award by the competent authority is consequential to the order that is made under sub-section (1) of section 20F or whether the order under sub-section (1) is itself the award referred to in sub-section (2) of section 20F. Confusion can be avoided by using only one of the words -'order' or 'award' - to refer to the decision of the competent authority determining compensation, at all places.

(v) Sub-section (4) of section 20F provides that before determining the amount under sub-section (1) or sub-section (3), the competent authority shall give a public notice inviting claims from all persons interested *in land to be acquired*. The issue of such public notice under section 20F(4) is after the

publication of notification of declaration under section 20E(1). Sub- section (2) of section 20E provides that on publication of the declaration, the land vests in the central government. If the land has *already vested* in the government on publication of the declaration under section 20E(1), the question of issuing a public notice thereafter, inviting claims under section 20F(4) from persons interested in the lands "*to be acquired*" does not arise. The words "to be acquired" may have to be replaced by the words "acquired".

(vi) If the land has already vested absolutely in the Central Government on publication of declaration of acquisition in the Official Gazette under section 20E(1), it is not clear how the proceedings for acquisition could lapse if the award is not made within one year or even 18 months. This Court while dealing with other enactments relating to acquisition has held that acquisition would not lapse as consequence of not making the award within the specified time, if the land had already vested in the government and the Act does not provide for re-vesting in the land owner. [See : *Satendra Prasad Jain vs. State of U.P*. - 1993 (4) SCC 369, *Awadh Bihari Yadav vs. State of Bihar* - 1995 (6) SCC 31, *UP Jal Nigam, Lucknow vs. Kalra Properties (P) Ltd.* – 1996 (3) SCC 124, *Allahabad Development Authority vs. Nasiruzzaman* – 1996 (6) SCC 424 and *Ginnar Traders (3) vs. State of Maharashtra* – 2011 (3) SCC 1].

(vii) Section 20 I of the Act provides that though the land vests in the central government on publication of the declaration under section 20E(1), the competent authority can demand the surrender or delivery of possession *only after the* compensation is determined under section 20F and is deposited under section 20 H. However section 20 J provides that once the land vests in the central government on publication of a declaration under section 20E(2), it shall be lawful for any persons authorized by the central government "*to enter and do other act necessary upon the land for carrying out the building, maintenance, management or operation of the special railway*

project or part thereof or any work connected therewith". In other words section 20-J enables the central government to enter upon possession of the land on publication of the declaration under section 20E, even before the award is made, and carry on the activities connected with the special railway project for which the land was acquired. The provisions of section 20-J apart from being badly worded, are contrary to provisions of section 20-I. Section 20 J would lead to deprivation of possession of the land to the land owner without even determining or offering any compensation. This requires to be examined and corrected. Further, there is no indication as to what should happen if the central government or person authorized by it *starts executing* the special railway project in the acquired land under section 20 J and thereafter, the acquisition lapses on account of the award not being made within the time frame mentioned in section 20F(2).

We have referred to these anomalies as they are likely to give room for considerable avoidable litigation, in regard to acquisitions under Chapter IVA of the Act. These anomalies may also defeat the very legislative intent to provide a progressive form of land acquisition when compared to the provisions of Land Acquisition Act, 1894. Be that as it may.

Conclusion

13. In view of our finding that the acquisition has not lapsed, we allow this appeal, set aside the judgment of the High Court, and dismiss the challenge to the acquisition. It is however made clear that in view of the delay in making the award beyond one year, the first respondent shall be entitled to additional compensation as provided under the second proviso to section 20F(2) of the Act. Parties to bear their respective costs.

14. The Registry is directed to send copies of this order to the Law Commission of India and Ministry of Railways.

D.G. Appeal allowed.