B.N. SHIVANNA
v.
ADVANTA INDIA LIMITED & ANR.
(Criminal Appeal Nos. 1038-1039 of 2004)

MARCH 14, 2011

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

Contempt of Court Acts, 1971 – Criminal contempt – Lawyer betraying faith of his client – Appellant-Advocate committed fraud upon his client (respondent-company) and embezzled Rs. 72 lakhs by misusing orders of Court which he knew to be incorrect – Contempt proceedings – High Court convicted appellant under the Act and sentenced him to six months imprisonment – Justification of – Held: Justified – Appellant was beneficiary of the fraud and guilty of committing contempt of court – Conduct of the appellant was reprehensible and amounted to interference in administration of justice – No leniency permissible considering the gravity of the charges – Conviction and sentence upheld.

Contempt of Courts Act, 1971 – s.19 – New plea in criminal appeal before Supreme Court – Maintainability of – Contempt proceedings against appellant – Conviction by High Court – Challenged before Supreme Court on procedural grounds – Objection raised by appellant that the contempt proceedings had been conducted in utter disregard of the statutory rules framed for the purpose – Held: The appellant, for reasons best known to him, did not agitate the issue before the High Court – No explanation was furnished by the appellant as to under what circumstances, the question of fact was being agitated first time before the Supreme Court – Moreso, such an issue could not be agitated in absence of any application under s.391 of CrPC for taking additional evidence on record – No document was filed even before the Supreme Court to establish that the statutory provisions had

not been complied with – Objection raised by appellant was mere hyper-technical and did not warrant further consideration – Contempt of Court Act, 1971 – High Court of Karnataka (Contempt of Court Proceedings) Rules, 1981 – Rule 7.

Advocates – Duty of Advocate – Held: An Advocate is duty-bound to protect the dignity of the court and to behave towards his clients in an appropriate manner.

The appellant , an advocate practicing in the High Court of Karnataka, was engaged as a Retainer by respondent-company for its cases pending in various courts in Karnataka. It was alleged that by taking undue advantage of his position, the appellant played fraud upon the respondent-company by furnishing to it, copies of fabricated and forged orders purportedly passed by the Karnataka High Court and embezzled a huge sum of Rs. 72 lakhs under various pretexts including payment towards purchase of court fees from stamp vendor and payment of professional charges to other advocates; and as such, interfered with the administration of justice. The High Court initiated criminal contempt proceedings against the appellant, *suo motu* [CCC (Crl.) No. 12 of 2002] and also at the instance of the respondent-company the [CCC(Crl.) No. 7 of 2002] and ultimately convicted the appellant for committing criminal contempt of court and sentenced him to simple imprisonment for a period of six months. Hence, the instant appeals under Section 19 of the Contempt of Courts Act, 1971.

The appellant contended before this Court that the contempt proceedings had been conducted in utter disregard of the statutory rules framed for the purpose, namely, the High Court of Karnataka (Contempt of Court Proceedings) Rules, 1981, particularly Rule 7 thereof; that respondent company had also launched criminal prosecution against the appellant and his conviction herein would adversely affect his case in the said criminal

case; and further that some officials of the respondent-company hatched a conspiracy to amass wealth and that is why they had enroped the appellant and his relatives in these cases.

Dismissing the appeals, the Court

HELD:1. The appellant, for the reasons best known to him, did not agitate the issue as regards the application of the provisions of Rule 7 of the High Court of Karnataka (Contempt of Court Proceedings) Rules 1981, before the High Court and no explanation has been furnished by the counsel appearing for the appellant as under what circumstances, the question of fact is being agitated first time in criminal appeals before this Court. Moreso, such an issue cannot be agitated in absence of any application under Section 391 of CrPC for taking the additional evidence on record, nor any document has been filed even before this Court to establish that the said provisions have not been complied with. Therefore, the issue does not require any further consideration so far as the procedural aspects are concerned. The objection raised by the appellant is mere hyper-technical and does not warrant further consideration. [Paras 10, 15] [10-F-G; 12-D]

P.N. Duda v. P. Shiv Shanker & Ors. **AIR 1988 SC 1208;** *State of Kerala v. M.S. Mani & Ors.* **(2001) 8 SCC 82;** *Bal Thackrey v. Harish Pimpalkhute & Anr.* **AIR 2005 SC 396 and** *Amicus Curiae v. Prashant Bhushan & Anr.* **(2010) 7 SCC 592 – referred to.**

2. So far as merit is concerned, in view of the material on record, it is evident that huge amount of money was collected by the appellant in the name of his mother-in-law, the alleged stamp vendor, and the appellant was the beneficiary thereof as he had operated the Bank Account in her name. It is evident from the evidence on record that the appellant had been the beneficiary of fraud alleged in

these cases. Therefore, he is guilty of committing contempt of court. The appellant had been an employee of the respondent company and because of that relationship he had been retained as an Advocate and he has a duty towards his clients to behave in an appropriate manner and to protect the dignity of the court. The conduct of the appellant has been reprehensible and it tantamounts to as if the fence established to protect the crop starting to eat the crop itself. Thus, such misconduct has to be dealt with, with a heavy hand. [Para 19] [13-G-H; 14-A]

Re: Bineet Kumar Singh **(2001) 5 SCC 501 – relied on.**

3. It was the duty of the appellant to protect the dignity of the court through which he has earned his livelihood. There is no force in the submissions made by him that his conviction in these cases would prejudice his cause in the pending criminal trial for the reason that both cases are separate and offences are of a different nature. [Para 20] [14-B-C]

4. The further submission made by the appellant that the evidence recorded in the case lodged by the respondent company could not have been read in *suo motu* contempt proceedings initiated by the High Court, is preposterous, for the reason that they were not cross cases and in both the cases, criminal proceedings had been initiated on the basis of the same documents and the same allegations. It is a case of betrayal of faith by a lawyer of his clients, in a case of professional engagement. [Para 21] [14-D-E]

5. Also there is no force in the submission advanced on behalf of the appellant that he has already served 36 days in jail, thus, the punishment imposed by the High Court may be reduced. Considering the gravity of the charges, such a course is not warranted and no lenient view is permissible in the facts and circumstances of the

cases. The Chief Judicial Magistrate is directed to take the appellant into custody and send him to jail to serve the remaining part of the sentence forthwith. [Paras 22, 23] [14-F-G]

Case Law Reference:

AIR 1988 SC 1208	**referred to**	**Para 11**
(2001) 8 SCC 82	**referred to**	**Para 12**
AIR 2005 SC 396	**referred to**	**Para 13**
(2010) 7 SCC 592	**referred to**	**Para 14**
(2001) 5 SCC 501	**relied on**	**Para 18**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1038-1039 of 2004.

From the Judgment & Order dated 18.8.2004 of the High Court of Karnataka at Bangalore in CCC (Crl.) No. 7 of 2002 C/w CCC (Crl.) No. 12 of 2004.

Tomy Sebastian, P. Vishwanatha Shetty, D. Bharat Kumar, Balasubrahmanyam Kamarsu, S.J. Aristotle, Abhijit Sengupta for the Appellant.

Naresh Kaushik, Aditya Vikaram, Alok Kaushik, Lalita Kaushik, Sanjay R. Hegde, Gurudatta Ankolekhar, V.N. Raghupathi for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. These two appeals have been filed against the judgment and order passed by the High Court of Karnataka at Bangalore in CCC(Crl.) Nos. 7 and 12 of 2002 dated 18.8.2004 by which the appellant has been convicted for committing criminal contempt of court and has been awarded the sentence of simple imprisonment for a period of six months along with a fine of Rs.2,000/-, in default, to undergo simple imprisonment for a further period of one month.

2. Facts and circumstances giving rise to these appeals are that the appellant was enrolled as an advocate on 14.8.1998 and since then he has been practicing in the High Court of Karnataka at Bangalore. Prior to joining the Bar, he had been working for the respondent company as Marketing Executive. Being well known to the officials of the company, he was engaged as Retainer for the Company and thus, the appellant used to report to the company's officials about the progress of its cases pending in various courts in Karnataka. However, on receiving some orders purported to have been passed by the High Court of Karnataka, the officials of the company became suspicious and verified from the original record, and then submitted a complaint to the High Court that the appellant had furnished to the company copies of fabricated and forged orders purported to have been passed by the Karnataka High Court. On the basis of the same, criminal contempt proceedings were initiated suo motu by the High Court against the appellant by registering a case CCC(Crl.) No. 12 of 2002, whereas CCC(Crl.) No. 7 of 2002 was initiated at the instance of the respondent company. The High Court took cognizance under the provisions of the Contempt of Court Act, 1971 (hereinafter referred to as 'Act 1971') against the appellant. The court proceeded with the allegations that the appellant had taken advantage of his position telling the said company's officials falsely that criminal cases have been launched in various courts in Karnataka against various purchasers and distributors of seeds under the Seeds Act for the alleged producing and selling of the spurious/sub-standard seeds by the agriculturists. The appellant made the officials of the respondent company believe that a large number of criminal cases had been filed against the company and its officials in various courts in Karnataka.

3. In this regard, it was alleged that the appellant sent a policeman possessing summons/warrants, almost on regular basis, to the Head Office of the company and thereby made the higher officials of the company believe that a number of

criminal cases had been filed against the company and its officials and that there was an urgent need to take immediate action in that regard. Subsequently, the appellant told the company officials that he would arrange for avoidance of the warrants being executed against them, though there was imminent danger of officials being arrested, which he had so far successfully avoided.

4. The appellant advised the company officials to file criminal petitions in the High Court of Karnataka for quashing of the said criminal proceedings alleged to be pending in the courts at Hubli, Mysore, Chitradurga, Bellary, Sandur, Raichur etc., and the appellant asked the company in writing to pay a sum of Rs.10,000/- towards the court fee in each case for filing of criminal petitions before the High Court in addition to other miscellaneous expenses like his professional fee, typing etc. The company having full faith in the appellant remitted the said amount of court fee of Rs.10,000/- in each case for purchasing the court fees from the vendor, namely, Smt. S. Gauri, who was none other than the mother-in-law of the appellant. The company sent cheques in the names of Smt. S. Gauri as well as the appellant towards the court fees and his professional charges and other expenses. As the appellant had told the officials of the company that more than 500 criminal cases had been filed by various persons against the company and its officials, a sum of Rs.62 lakhs was paid by the company through cheques in the name of the appellant as well as Smt. S. Gauri, the alleged stamp vendor. The appellant also got a huge amount from the company under the pretext of payment of professional charges to other advocates purported to have been engaged by him to represent the company in various subordinate courts of the State. Thus, in all, according to the company, a sum of Rs. 72 lakhs had been paid to the appellant apart from his professional charges. In order to justify his bonafides and to show the result of his professional engagement and on enquiry by the company, the appellant is alleged to have produced a copy of the order dated 3.10.2001, purported to have been

passed by Hon'ble Mr. Justice G. Patri Basavanagowda of Karnataka High Court, showing that 341 criminal petitions filed by the company, had been allowed by the High Court and criminal proceedings launched against the company in those cases stood quashed.

5. It was, in fact, later on when the company's officials came to know that no court fee was payable in criminal cases filed before the High Court, that it made discreet inquiries and learnt that the amount had been collected by the appellant in the name of his mother-in-law Smt. S. Gauri, the alleged stamp vendor, fraudulently. On further inquiry, said officials came to know that the alleged stamp vendor Smt. S. Gauri was only a housewife and not a stamp vendor and the bank account for which the cheques were issued in her name, was being operated by the appellant himself, and no case had ever been filed in any subordinate court against the said company.

6. Being aggrieved, the company wrote a letter to the Registrar General of the High Court of Karnataka mentioning all the afore-mentioned facts submitting that the appellant had played fraud upon them by providing the forged and fabricated order purported to have been passed by the High Court of Karnataka and as such, abused the process of law and interfered with the administration of justice. On coming to know about these facts, the High Court itself suo motu initiated criminal contempt proceedings against the appellant. Notices were issued to the appellant and on his appearance, he denied the charges and was tried for the said allegations clubbing both the cases. The prosecution relied upon the evidence of 5 witnesses and marked a large number of documents. The appellant did not lead any oral evidence but marked several documents. After completing the trial, the High Court convicted the appellant and sentenced him as mentioned hereinabove. Hence, these appeals under Section 19 of the Act 1971.

7. S/Shri Tony Sebastian and P. Vishwanatha Shetty, learned senior counsel appearing for the appellant, have submitted that proceedings have been conducted in utter

disregard to the statutory rules framed for the purpose, namely, the High Court of Karnataka (Contempt of Court Proceedings) Rules, 1981 (hereinafter referred to as 'Rules 1981'). It has been submitted that Rule 7 thereof has not been complied with at the time of initiation of the proceedings. Rule 7 reads as under:

> "7. Initiation of proceedings on information - (i) Any information other than a petition or reference shall, in the first instance, be placed before the Chief Justice on the administrative side.
>
> (ii) If the Chief Justice or such other Judge as may be designated by him for the purpose, considers it expedient or proper to take action under the Act, he shall direct that the said information be placed for preliminary hearing."

In view of the above, it is submitted that none of the matter had been placed before the Hon'ble Chief Justice on the administrative side and the matter has been placed directly before the Division Bench which heard the matters after having some preliminary inquiry by the Registry of the High Court from the Secretary of Hon'ble Mr. Justice G. Patri Basavanagowda. Thus, the proceedings stood vitiated for non-compliance of the statutory requirement. It is further submitted that the respondent company has also launched a criminal prosecution against the appellant and the police after investigating the case, has filed the chargesheet against the appellant, and Smt. S. Gauri, his mother-in-law. However, the trial has not started in view of the pendency of these appeals before this Court. The appellant's conviction would adversely affect the case of the appellant in the said criminal case. In fact, some officials of the company have hatched a conspiracy to amass wealth and that is why they have enroped the appellant and his relatives in these cases. The appeals deserve to be allowed and the impugned judgment and order of the High Court is liable to be set aside.

8. On the other hand, S/Shri Naresh Kaushik and

Gurudatta Ankolekar, learned counsel appearing for the respondents, have opposed the appeal contending that the appellant being an advocate, had indulged in criminal activity and succeeded in having embezzled huge amount of more than Rs. 72 lacs, thus, he committed fraud upon the company of which the appellant had earlier been an employee and at the relevant time, a Retainer. His illegal activities amounted to interference in the administration of justice, thus, the High Court has rightly convicted the appellant and imposed the maximum sentence provided under the Act 1971. The facts and circumstances of the case do not require any interference by this Court, the appeals lack merit and are liable to be dismissed.

9. We have considered the rival submissions made by learned counsel for the parties and perused the records.

The facts are not in dispute, the findings of fact recorded by the High Court do not require any interference for the reason that nothing has been shown to us on the basis of which it can be held that the findings are perverse, are based on no evidence or are contrary to the evidence on record.

10. The issue regarding the application of the provisions of Rule 7 of the Rules 1981 has to be dealt with elaborately. The appellant, for the reasons best known to him, did not agitate this issue before the High Court and no explanation has been furnished by the learned counsel appearing for the appellant as under what circumstances, the question of fact is being agitated first time in criminal appeals before this Court. More so, such an issue cannot be agitated in absence of any application under Section 391 of Code of Criminal Procedure, 1973 (hereinafter called Cr.P.C.) for taking the additional evidence on record, nor any document has been filed even before this Court to establish that the said provisions have not been complied with.

11. In *P.N. Duda v. P. Shiv Shanker & Ors.,* AIR 1988 SC 1208, this Court while considering the provisions of Section

15(1)(a) and (b) of the Act 1971 and the Contempt of Supreme Court Rules, 1975, held that if any information was lodged even in the form of a petition inviting the Court to take action under the Act 1971 or the provisions of the Constitution dealing with the contempt of court, where the informant is not one of the persons named in Section 15 of the Act 1971, it should not be styled as a petition and should not be placed for admission on the judicial side of the court. Such a petition is required to be placed before the Chief Justice for orders in Chambers and the Chief Justice may decide either by himself or in consultation with the other Judges of the Court, whether to take any cognizance of the information. Thus, in a case where the Attorney General/Advocate General refuses to give the consent to initiate contempt proceedings; the aforesaid course is mandatory.

12. In *State of Kerala v. M.S. Mani & Ors.,* (2001) 8 SCC 82, this Court held that the requirement of obtaining prior consent of the Advocate General in writing for initiating proceedings of criminal contempt is mandatory and failure to obtain the prior consent would render the motion non-maintainable. In case, a party obtains consent subsequent to filing the petition, it would not cure the initial defect and thus, the petition would not become maintainable.

13. In *Bal Thackrey v. Harish Pimpalkhute & Anr.,* AIR 2005 SC 396, this Court held that in absence of the consent of the Advocate General in respect of a criminal contempt filed by a party under Section 15 of the Act 1971, taking suo motu action for contempt without a prayer, was not maintainable.

14. However, in *Amicus Curiae v. Prashant Bhushan & Anr.,* (2010) 7 SCC 592, this Court has considered the earlier judgments and held that in a rare case, even if the cognizance deemed to have been taken in terms of the Supreme Court Rules, without the consent of the Attorney General or the Solicitor General, the proceedings must be held to be maintainable in view of the fact that the issue involved in the

proceedings had far reaching greater ramifications and impact on the administration of justice and on the justice delivery system and the credibility of the court in the eyes of general public than what was under consideration before this Court in earlier cases.

15. In the instant case, the question of whether the matter had been placed before the Chief Justice in Chambers is a question of fact. The issue has not been agitated before the High Court, rather the complaint filed by the Registrar General of the High Court makes it clear that the complaint itself has been filed on behalf of the High Court by the Advocate General. It is evident from the record that case CCC(Crl.) No. 12 of 2002 has been filed by the Registrar General of the High Court of Karnataka (suo motu) through the Advocate General of the State. Therefore, the issue does not require any further consideration so far as the procedural aspects are concerned. Thus, in view of the above, the objection raised by the appellant is mere hyper-technical and does not want further consideration.

16. It is evident that the charges had been framed in accordance with law on 22.7.2002 and that the appellant has been given full opportunity to defend himself. All the documents placed before the High Court have been appreciated and considered.

17. So far as merit is concerned, we have been taken to various documents and to the evidence of the witnesses. There are certain documents to show that the appellant on certain occasions has also rendered a good service to the company. Some documents are also on record to show that some officials had an intention to misappropriate the funds of the company for their personal gain with the connivance of the appellant. However, there is nothing on record to show that they could succeed to any extent. Therefore, the defence taken by the appellant remains unsubstantiated. In view of the material on record, it is evident that the huge amount of money has been

collected by the appellant in the name of his mother-in-law, Smt. S. Gauri, the alleged stamp vendor, and the appellant has been the beneficiary thereof as he had operated the Bank Account in her name.

18. In *Re: Bineet Kumar Singh,* (2001) 5 SCC 501, while dealing with a case of similar nature, this Court held as under:

> "….The sole object of the court wielding its power to punish for contempt is always for the course of administration of justice. Nothing is more incumbent upon the courts of justice than to preserve their proceedings from being misrepresented, nor is there anything more pernicious when the order of the court is forged and produced to gain undue advantage. Criminal contempt has been defined in Section 2(c) to mean interference with the administration of justice in any manner. A false or misleading or a wrong statement deliberately and wilfully made by a party to the proceedings to obtain a favourable order would undoubtedly tantamount to interference with the due course of judicial proceedings. When a person is found to have utilised an order of a court which he or she knows to be incorrect for conferring benefit on persons who are not entitled to the same, the very utilisation of the fabricated order by the person concerned would be sufficient to hold him/her guilty of contempt, irrespective of the fact whether he or she himself or herself is the author of fabrication….." (Emphasis added).

19. It is evident from the evidence on record that the appellant had been the beneficiary of fraud alleged in these cases. Therefore, in view of the law referred to hereinabove, he is guilty of committing contempt of court. The appellant had been an employee of the respondent company and because of that relationship he had been retained as an Advocate and he has a duty towards his clients to behave in an appropriate manner and to protect the dignity of the court. The conduct of the appellant has been reprehensible and it is tantamount to

as if the fence established to protect the crop starting to eat the crop itself. Thus, such misconduct has to be dealt with, with a heavy hand.

20. We do find any force in the submissions made by learned counsel for the appellant that the conviction of the appellant in these cases would prejudice his cause in the pending criminal trial for the reason that both cases are separate and for offences of a different nature. It was the duty of the appellant to protect the dignity of the court through which he has earned his livelihood.

21. The submission made by learned counsel for the appellant that both complaints could not have been clubbed together and the evidence recorded in the case lodged by the respondent company could not have been read in suo motu contempt proceedings initiated by the High Court, is preposterous, for the reason that they were not cross cases and in both the cases, criminal proceedings had been initiated on the basis of the same documents and the same allegations. It is a case of betrayal of faith by a lawyer of his clients, in a case of professional engagement.

22. We also do not find any force in the submission advanced on behalf of the appellant that he has already served 36 days in jail, thus, the punishment imposed by the High Court may be reduced. Considering the gravity of the charges, such a course is not warranted and no lenient view is permissible in the facts and circumstances of the cases.

23. In view of the above, the appeals lack merit and are accordingly dismissed. We request the learned Chief Judicial Magistrate, Bangalore to take the appellant into custody and send him to jail to serve the remaining part of the sentence forthwith. A copy of the order may be transmitted by the Registry of this Court to the learned Chief Judicial Magistrate, Bangalore for taking appropriate further steps.

B.B.B. Appeals dismissed.

CHANDRA BONIA
v.
STATE OF ASSAM
(Criminal Appeal No. 131 of 2006)

MARCH 30, 2011

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

Penal Code, 1860 – s. 302 – Double murder – Conviction and sentence by the courts below – On basis of the extra-judicial confession made by accused before prosecution witness and recovery of the murder weapon at the instance of the accused before Investigating Officer – On appeal, held: Extra-judicial confession is a very weak piece of evidence and ordinarily a conviction solely on the basis of such evidence cannot be maintained – However, in the instant case, the extra-judicial confession was made by accused to the prosecution witness in a different background inasmuch as the accused suspected that he had been identified by the witness and he returned to warn her not to divulge any information to anyone – Statement of the prosecution witness recorded u/s. 164 Cr.P.C is almost in identical terms – The very proximity of the murder and the extra-judicial confession made to the prosecution witness shows that the confession is reliable – Also, the alleged murder weapon, had been recovered at the instance of the accused – Though, independent witnesses of the recovery did not support the prosecution, but no reason to doubt the evidence of the Investigating Officer – Thus, prosecution case proved beyond reasonable doubt – Evidence – Extra-judicial confession.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 131 of 2006.

From the Judgment & Order dated 24.8.2001 of the High

Court of Gauhati at Gauhati in Criminal Appeal No. 170 of 2000.

Praneet Ranjan (A.C.) Rranay Ranjan, Hemant Kr. Yadav, Rajesh Mishra for the Appellant.

Avijit Roy Corporate Law Group for the Respondent.

The following Order of the Court was delivered

O R D E R

This appeal against the conviction has been filed against the concurrent findings recorded by the trial court and the High Court for a double murder committed on 7th October,1990 for which the appellant was sentenced for life on two counts, both sentences to run concurrently.

As per the prosecution story, Somra Munda and Agnash Munda, the father and brother of the first informant were murdered during the night of 7th October, 1990 in their house. The First Information Report was lodged by Chukhnu Munda at Police Station Marian on the 8th October, 1990 alleging that during his absence from the house some persons had murdered his father and younger brother. During the course of the investigation, the police recorded the statement of various witnesses including PW 1 Pradip Das and PW 2 Niran Bonia (who were both declared hostile), PW 5, the Medical Officer who had conducted the post mortem on the two dead bodies, PW 6 the informant and PW 7 Baloni Bawri, who was a neighbour of the deceased, and to whom the accused had made an extra judicial confession on the date of the murder itself and PW 12 the Investigating Officer who was also a witness to the recovery of the murder weapon at the instance of the accused. The trial court and the High Court have both noticed that as the solitary eye witness had died and the other two material witnesses PW 1 and PW 2 had been declared hostile, the prosecution story rested exclusively on the confession made by the accused to PW 7 and the factum of

recovery of the dao at the instance of the accused before PW 12 the Investigating Officer.

At the hearing before us today, Mr. Praneet Ranjan, the learned Amicus Curiae for the accused appellant has argued that the only evidence against the accused was the extra judicial confession made before PW 7 and as this evidence was a weak kind of evidence, the conviction of the appellant could not be maintained. He has further submitted that police had, in fact, used third degree methods and tortured and threatened the witnesses to give false evidence and as such the case against the appellant appeared to be a concocted one.

Mr. Avijit Roy, the learned counsel for the State of Assam, however, has supported the judgments of the courts below.

It is true that an extra judicial confession is a very weak piece of evidence and ordinarily a conviction solely on the basis of such evidence cannot be maintained. The confession, made by the appellant to PW 7, however, falls in a different category. A reading of the evidence of PW 7 clearly reveals that her house was about 100 yards away from the murder site and that when she had come out from her house to throw the starch out of the cooked rice, she had seen three persons running away from the house of the deceased and that a little later, the appellant - accused had come to her house carrying a dao and addressing her as Didi had told her that he had murdered two persons and cautioned her not to disclose this fact to anybody otherwise she too would be killed, and on account of fear, she and her husband had left their residence and shifted to some other place. We also see that the statement of PW 7 recorded under Section 164 Cr.P.C is almost in identical terms. It is therefore evident that the extra judicial confession was made in a different background in as much that as the appellant suspected that he had been identified by the witness he had returned to warn her not to divulge any information to anyone. The very proximity of the murder and the extra judicial confession made to PW 7 speaks volumes as to its authenticity.

We also see from the record that the alleged murder weapon, a dao, had been recovered at the instance of the appellant. It is true that the independent witnesses of the recovery have not supported the prosecution, but we have no reason to doubt the evidence of PW 12 on this score.

On an overall assessment of the facts the prosecution story is proved beyond reasonable doubt.

We thus find no merit in this appeal and the same is dismissed.

The fee of the Amicus Curiae is fixed at Rs.7000/-.

N.J. Appeal dismissed.

MINERAL AREA DEVELOPMENT AUTHORITY ETC.

v.

M/S. STEEL AUTHORITY OF INDIA AND ORS.

(Civil Appeal Nos.4056-64 of 1999)

MARCH 30, 2011

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

Reference to larger Bench:

Mines and minerals – Royalty – Nature of – Tax on lands and buildings and on mineral rights – Conflict between decision rendered by five judge Bench of Supreme Court and decision delivered by seven Judge Bench of Supreme Court – Questions of law framed which need consideration by the larger bench – Request for reference to the Bench of nine Judge – Matter directed to be placed on the administrative side before the Chief Justice for appropriate orders – Mines and Minerals (Regulation and Development) Act, 1950 – ss.2, 9, 15(3) – Constitution of India, 1950 – Seventh schedule, List I, Entry 54; List II, Entries 49, 50.

State of West Bengal v. Kesoram Industries Ltd. and Ors. **(2004) 10 SCC 201;** *India Cement Ltd. and Ors. v. State of Tamil Nadu and Ors.* **(1990) 1 SCC 12;** *M.P.V. Sundararamier and Co. v. State of Andhra Pradesh* **(1958) 1 SCR 1422;** *Central Board of Dawoodi Bohra Community and Anr. v. State of Maharashtra and Anr.* **(2005) 2 SCC 673 – referred to.**

Case Law Reference:

(2004) 10 SCC 201	**referred to**	**Para 5**
(1990) 1 SCC 12	**referred to**	**Para 5**
(1958) 1 SCR 1422	**referred to**	**Para 9**

(2005) 2 SCC 673	**referred to**	**Para 11**

CIVIL APPELLATE/ORIGINAL JURISDICTION : Civil Appeal Nos. 4056-4064 of 1999.

From the Judgment & Order 22.3.1999 of the High Court of Judicature at Patna, Ranchi Bench Ranchi, in CWJC No, 1885, 178, 2251, 2252, 1783, 2915 of 1994 (R), 3113 of 1993 & 269 & 268 of 1994 (R).

WITH

C.A. Nos. 4710-4721, 4722-4724 of 1999, 1883 of 2006, T.P. (C) No. 722 of 2006, C.A. Nos. 4745, 4990, 4991, 4992, 4993 of 2006, TP (C) No. 951 of 2006, C.A. Nos. 5649, 5599 of 2006, 378, 665, 1180 of 2007, TP (C) Nos. 481, 906 of 2007, C.A. Nos. 3400, 3401, 3402, 3403 of 2008, 2055, 2174 of 2009, 6498, 6137 of 2008, SLP (C) No. 26160 of 2008, C.A. Nos. 6499, 6497, 7397 of 2008, 96, 97, 98 of 2009, SLP Nos. 3849 of 2006, 763, 15900 of 2007, TP (C) Nos. 613, 626 of 2009, C.A. Nos. 4478, 4479 of 2010 & SLP (C) No. 4191 of 2011.

Vivek K. Thanka Parag P. Tripathi, T.S. Doabia, ASG, Rakesh Dwivedi, K.K. Venugopal, Mahabir Singh, S.K. Bagaria, S.B. Upadhyay, Bhaskar, P. Gupta, Ajit Kumar Sinha, P. Sadasivan Nair, Dipankar Gupta, Nagendra Rai, R.F. Nariman, A.K. Ganguli, Shambhu Prasad Singh, H. N. Salve, Dr. Abhishek Manu Singhvi, Ajit Kumar Sinha, Mahabir Singh, Shail Kumar Dwivedi, AAG, Aparesh Kumar Singh, Tapesh Kumar Singh, Preetika Dwivedi, Sansriti Pathak, Gopal Pathak, Ma. Pooja Dhar, Gopal Sankaranarayana, Radha Shyam Jena, Gp. Capt. Karan Singh Bhati, Rashid, Aishwarya Bhati, Pawan Upadhyay, Rajesh R. Dubey, Anisha Upadhyay, Sharmila Upadhyay, Praveen Kumar, Bharat Sangal, Alka Singh, Akshat Shrivastava, P.P. Singh, Inderjeet Yadav, Anip Sachthey, Mohit Paul, Shagun Matta, Syed Shahid Hussain Rizvi, D.K. Pradhan, Ashok Kumar Gupta-I, T.G. Narayanan

Nair, K.N. Madhusoodanan, Sunil Kumar Jain, Parmatma Singh, Vanita Bhargava, Ajay Bhargava, Nitin Mishra (for Khaitan & Co.) S.K. Verma, E.C. Agrawala, Ashok Kumar Singh, Sunil Dogra (for Lawyer's Knit & Co.), P.V. Yogeswaran, U.A. Rana, Devina Sehgal (for Gagrat & Co.), Ruby Singh Ahuja, Sridhar Potarju, Gaichangpou Gangmei, Guntur Prabhakar, Kunal Verma, Prashant Kumar (for AP & J Chaambers), Gopal Prasad, Anupam Lal Dass, A. Bhavan Singh, Ajay Aggarwal, Kanika Gomber, Rajan Narain, Manu Nair, Kirat Singh, Tanuj Bhushan, Adit Pujari (for Suresh A. Shroff & Co.), Abhishth Kumar, Rakesh K. Sharma, Prashant Jha, Manjula Gupta, Vaibhav, Punam Kumari, Prem Sunder Jha, Lyna Perira, Manjula Gupta, Prashant Jha, Syed Shaid Hussain Rizvi, D.K. Pradhan, Manik Karanjawala, Praveen Kumar, Sunil Kumar Jain, Aneesh Mittal Parmatma Singh, Aakansksha Munjhal, Shally Bhasin Maheshwari, E.C. Agrawala, Bharat Sangal, R.R. Kumar Vernika Tomar, Alka Singh, B. Vijayalakshmi Menon, Gaurav Kejriwal, Jatinder Kumar Bhatia, Ashutosh Kumar Sharma, Gunnam Venkateswara Rao, B.S. Banthia, Vikas Upadhyay, Rishabh Sancheti, Sunita Sharma, Rekha Pandey, Asha G, Nair, D.S. Mahra, V.K. Verma, Dharmendra Kumar Sinha, Ashwarya Sinha, Ambhoj Kumar Sinha, Satyajit A. Desai, Prashant R. Dahat, Somanath Padhan, Ashid Khan, Rajneesh Bhaskar, Jyoti Tripathi, Atul Jha, Rajesh Srivastava, Ram Naresh Gupta, Abhishek Gupta, Milind Kumar, Kanku Gupta, Gaurav Jain, Abha Jain, G.N. Reddy, V. Pattabhiram, Nandini Sen, D.P. Mukherjee, Anip Sachthey, Mohit Paul, Shagun Matta for the appearing parties.

The following Order of the Court was delivered

O R D E R

Having heard the matter(s) for considerable length of time, we are of the view that the matter needs to be considered by the Bench of Nine Judges. The questions of law to be decided

by the larger Bench are as follows:

1. Whether 'royalty' determined under Sections 9/15(3) of the Mines and Minerals (Regulation & Development) Act, 1957 (Act 67 of 1957, as amended) is in the nature of tax?

2. Can the State Legislature while levying a tax on land under Entry 49 List II of the Seventh Schedule of the Constitution adopt a measure of tax based on the value of the produce of land? If yes, then would the Constitutional position be any different insofar as the tax on land is imposed on mining land on account of Entry 50 List II and its interrelation with Entry 54 List I?

3. What is the meaning of the expression "Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development" within the meaning of Entry 50 of List II of the Seventh Schedule of the Constitution of India? Does the Mines and Minerals (Regulation & Development) Act, 1957 contain any provision which operates as a limitation on the field of legislation prescribed in Entry 50 of List II of the Seventh Schedule of the Constitution of India? In particular, whether Section 9 of the aforementioned Act denudes or limits the scope of Entry 50 of List II?

4. What is the true nature of royalty / dead rent payable on minerals produced / mined / extracted from mines?

5. Whether the majority decision in *State of West Bengal v. Kesoram Industries Ltd. and Ors,* (2004) 10 SCC 201, could be read as departing from the law laid down in the *seven Judge Bench* decision

in *India Cement Ltd. and Ors. v. State of Tamil Nadu and Ors.,* (1990) 1 SCC 12?

6. Whether "taxes on lands and buildings" in Entry 49, List II of the Seventh Schedule to the Constitution contemplate a tax levied directly on the land as a unit having definite relationship with the land?

7. What is the scope of the expression "taxes on mineral rights" in Entry 50, List II of the Seventh Schedule to the Constitution?

8. Whether the expression "subject to any limitation imposed by Parliament by law relating to mineral development" in Entry 50, List II refers to the subject matter in Entry 54, List I of the Seventh Schedule to the Constitution?

9. Whether Entry 50, List II read with Entry 54, List I of the Seventh Schedule to the Constitution constitute an exception to the general scheme of Entries relating to taxation being distinct from other Entries in all the three Lists of the Seventh Schedule to the Constitution as enunciated in *M.P.V. Sundararamier & Co. v. State of Andhra Pradesh & Anr.,* (1958) 1 SCR 1422 at 1481 (bottom)?

10. Whether in view of the declaration under Section 2 of the Mines and Minerals (Development & Regulation) Act, 1957 made in terms of Entry 54 of List I of the Seventh Schedule to the Constitution and the provisions of the said Act, the State Legislature is denuded of its power under Entry 23 of List II and/or Entry 50 of List II?

11. What is the effect of the expression "…subject to any limitation imposed by Parliament by law relating to mineral development" on the taxing power of the

State Legislature in Entry 50 of List II, particularly in view of its uniqueness in the sense that it is the only entry in all the entries in three Lists (Lists I, II and III) where the taxing power of the State Legislature has been subjected to "any limitation imposed by Parliament by law relating to mineral development".

Before concluding, we may clarify that normally the Bench of five learned Judges in case of doubt has to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger coram than the Bench whose decision has come up for consideration (see: *Central Board of Dawoodi Bohra Community and Anr. v. State of Maharashtra and Anr.* – 2005 (2) SCC 673). However, in the present case, since prima facie there appears to be some conflict between the decision of this Court in *State of West Bengal v. Kesoram Industries Ltd. & Ors.* (supra) which decision has been delivered by a Bench of five-Judge of this Court and the decision delivered by seven-Judge Bench of this Court in *India Cement Ltd. and Ors. v. State of Tamil Nadu and Ors.* (supra) reference to the Bench of nine-Judge is requested. Office is directed to place the matter on the administrative side before the Chief Justice for appropriate orders.

D.G. Matter referred to larger Bench.

SUBRAMANI @ JEEVA @ KULLAJEEVA

v.

S.H.O., ODIYANSALAI

(Criminal Appeal No.1033 of 2005)

MARCH 30, 2011

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

Penal Code, 1860: s.304 (Part II) – Conviction under – PW-1, his brother-victim and friends assembled at restaurant for dinner – On slight pretext, the appellant and other accused present in the restaurant surrounded the table on which victim and friends were sitting – Appellant stabbed the victim on his neck – PW-1 intervened and suffered injuries – Victim was taken to hospital where he was declared dead – Trial court doubted the presence of PW-1 at the time of incident and also raised doubt about the test identification parade and ordered acquittal of all accused – High Court confirmed acquittal of 6 accused, however, held acquittal of appellant to be perverse and contrary to the evidence on record – It relied upon the evidence of PW-1, medical evidence and test identification parade and held that incident was the outcome of sudden quarrel and, therefore, matter fell within Exception 4 to s.300 and accordingly convicted appellant u/s.304 (Part II) and imposed sentence of 3 years R.I. keeping in view that appellant had a mentally challenged brother to look after – On appeal, held: The fact that PW.1 was present at the place of incident was fortified by the injuries found on his person – Though the incident took place in a public restaurant where there may be dim lighting but light in the restaurant in question was not so dim so as to preclude the identification of appellant – Admittedly, the appellant was not known to PW-1 before the incident – However, the physical description of the appellant was given in the FIR itself – In the absence of any evidence, the suggestion that PW-1 was drunk, was

completely baseless – In the facts of the case, High Court's interference in the appeal in so far as the appellant was concerned, was fully justified – Keeping in view the fact that the incident had happened 15 years earlier and the appellant had a mentally challenged brother, High Court had chosen to keep the sentence at only three years – No case made out for interference even on the quantum of sentence.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1033 of 2005.

From the Judgment & Order dated 2.2.2005 of the High Court of Judicature at Madras in Criminal Appeal No. 769 of 1996.

Raju Ragupathi, C. Paramasivam, P. Ramesh, M.P. Parthiban, Rakesh K. Sharma for the Appellant.

V. Kanagraj, V.G. Pragasam, S.J. Aristotle, S. Prabu Ramasubramanian, Vipin Jai for the Respondent.

The following Order of the Court was delivered

O R D E R

We have heard the learned counsel for the parties at a very great length, more particularly, as the judgment before us is one of reversal; the Trial Court having acquitted all the accused and the High Court reversing the judgment qua the solitary appellant herein. The facts of the case are as under:

On the 4th November, 1991 PW.1, along with his brother the deceased-Tamilvendhan, went to a restaurant in Labortene Street, Pondicherry. At the restaurant his friends PWs. 2, 3,4 and another person joined them. They ordered their food and while they were waiting to be served, asked for some drinks. A short while later they heard sounds of breaking of plates inside the restaurant. The seven accused then came out and while they were passing by PW's.1,2,4 and the deceased, appellant-Subramani made an abrasive comment on the complainant party. The deceased however laughed at him on which the appellant called his friends and they surrounded the

table of the complainants. The appellant also took up a bottle lying on the table, broke it by hitting it on the table and stabbed Tamilvendhan on his neck. When PW.1 intervened he too was caused injuries in that process. On seeing this PW.2 came out to rescue them and he too was attacked by the appellant. The deceased fell down on the ground whereafter all the accused ran away from the place. The incident happened at about 10.45 p.m. The deceased, accompanied by the injured PWs 1 and 2, was then taken to the Government hospital, Pondicherry, where they were examined by PW.10 at 11.10 p.m. Tamilvendhan was found dead on arrival. Information was also sent to the police at about 11.20 p.m. on which PW.20-the Sub-Inspector, attached to the concerned police station, reached the hospital and recorded the statements of PWs.1 and 2 and on that basis a First Information Report was registered at 1.10 a.m. on the 5th November, 1991. All the accused were arrested on the 26th November, 1991 and were subjected to a test identification parade three days later while in jail. PWs. 1 and 2 identified all the seven accused in the course of the test identification parade. On the completion of the investigation the accused were brought to trial for offences punishable under Sections 148, 302, 324 read with Sec.149 of the IPC. The Trial Court held that the statement of PW.1 could not be believed more particularly as both PW. 2 and PW.4 had been declared hostile. Doubt was also expressed with regard to the test identification parade by observing that the photographs of the accused had been shown to the prosecution witnesses prior thereto. The Court also held that there was also some doubt as to the place where the incident had happened. An appeal was thereafter filed by the State before the High Court. The High Court has, while confirming the acquittal of six of the accused, set aside the judgment of the Trial Court with respect to the appellant Subramani, by holding that his acquittal was perverse and contrary to the evidence on record. The High Court accordingly relying on the evidence of PW.1, the medical evidence, and the test identification parade held that the appellant was involved in the incident but as the incident was

the out come of a sudden quarrel the matter fell within Exception 4, to Section 300 of the IPC and the appellant was liable to be convicted under Section 304 Part-II of the IPC and accordingly keeping in the mind the fact that the case was fifteen years old and the appellant had a mentally challenged brother to look after, the ends of justice would be met if a sentence of three years R.I. was imposed on him. The Court also observed that in the facts of the case the involvement of the other accused i.e. Respondents Nos.2 to 7 before the High Court could not be made out with the aid of Section 149 of the IPC. It is in this situation that present appeal is before us at the instance of the solitary appellant.

Mr. Raju Raghupathi, the learned senior counsel for the appellant, has at the very outset argued that as PWs. 2 and 4, two of the eye-witnesses had been declared hostile the High Court's reliance on PW.1 alone was not acceptable more particularly in an appeal against acquittal. He has also pointed out that even assuming for a moment that PW.1 had been present at the place of incident the question of identification of the accused still remained alive as it had come in evidence that the light in the restaurant was very dim and as both parties were in a completely inebriated condition it was impossible for PW.1 to have identified anyone. He has also doubted the very basis of the test identification parade and has urged that as the photographs of the accused had been shown to PW.1 the sanctity of the identification parade was also in doubt He has finally prayed that even assuming that no cause for the setting aside the conviction was made out, the facts of the case required that the sentence of the appellant be reduced as the incident had happened twenty years ago.

Mr. V.Kanagaraj, the learned senior counsel for the State, has supported the judgment of the High Court and pointed out that in the light of the fact that the High Court had opined that the judgment of the Trial Court was perverse and based on a complete misreading of the evidence, interference in an acquittal appeal was fully justified. He has also urged that there

was no reason whatsoever to disbelieve PW.1 who was an injured witness and that the injured and the deceased had been removed to the hospital within 15-20 minutes and even the FIR had been lodged within an hour or two supported the prosecution story. He has also pointed out that there was absolutely no reason to doubt identification parade more particularly as there was absolutely no evidence to show that PW.1 was completely inebriated so as to be incapable of recognizing any one.

We have heard the learned counsel for the parties at a great length. It is true that the High Court dealing with an appeal against acquittal has its options some what circumscribed. It has however been observed by the High Court that the judgment of the Trial Court in so far as the appellant was concerned was completely against the record and perverse. It is the conceded position before us that PW.1 had indeed been present when the incident happened. Even otherwise, the evidence that the incident happened at about 10.30-10.45 p.m. on the 4th November 1991 and the injured had reached the hospital within 20 or 25 minutes and that the doctor had sent intimation to the police on which the ASI had reached the hospital within half an hour and the formal FIR recorded at 1.10 a.m. on the 5th November 1991 are all proved on record. The fact that PW.1 was present is fortified by the injuries found on his person. Mr. Raghupathi has, however, argued that as PW.1 was not in a position to identify any one and to who had caused the specific injuries, no relevance could be placed on his testimony. We find this plea to be unacceptable. The incident took place in a public restaurant and though such a place may have dim lighting but complete darkness would be an impossibility. Even otherwise, Mr. Raghupathi's argument that the dim light precluded the identification of the accused is without substance. Admittedly, the restaurant in question was a very small one having four tables. It has also come in the evidence that there were four tube lights in the restaurant. We must therefore assume that light was not so dim that a person standing a feet or two away would not be identifiable.

There is another relevant circumstance. Admittedly the accused were not known to PW.1 before the incident. However the physical description of the appellant was given in the FIR itself. The High Court has opined very adversely on the conduct of the Trial Court in ignoring this substantial and very pertinent evidence given as to identity the appellant.

Much time and effort has been expended by Mr. Regupathi on the fact that PW.1 was completely drunk at the time of the incident and therefore not in a position to identify any of the accused. We have gone through the evidence of PW.1 very carefully. There is not even a suggestion put to him that he was completely drunk at the time of the incident. We also find that no question had been put to the investigating officer or to the Doctor as to the condition of PW.1 at the time when he had been brought to the hospital or at the time when his statement had been recorded for the registration of the FIR. In the absence of any evidence the suggestion that PW.1 was drunk, is completely baseless. We must also emphasize the distinction between being drunk or having a drink. PW.1 and his friends and the deceased were having a drink in the restaurant prior to having their dinner but to say that PW.1 was drunk at that time is not forthcoming from the evidence. We therefore find in the facts of the case that the High Court's interference in the appeal in so far as the present appellant was concerned, was fully justified.

We have also considered Mr. Raghupathi's argument with regard to the quantum of sentence. The High Court was almost apologetic that a sentence of only three years was being awarded but keeping in view the fact that the incident had happened 15 years earlier and the appellant had a mentally challenged brother, had chosen to keep the sentence at only three years .

We think that no cause is made out for interference even on the quantum of sentence.

Dismissed.

D.G. Appeal dismissed.

K.K. VELUSAMY
v.
N. PALANISAMY
(Civil Appeal Nos. 2795-2796 of 2011)

MARCH 30, 2011

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

CODE OF CIVIL PROCEDURE, 1908:

s.151 and Order 18, Rule 17 – Applications by defendant seeking to reopen evidence and to recall PWs for further cross-examination – Suit for specific performance of agreement of sale – Applications filed after closure of evidence on the ground of admissions made by witnesses subsequently in conversation recorded on a Compact Disc – Rejected by trial court – Order upheld by High Court in revision petitions – HELD: Neither the trial court nor the High court considered the question whether it was a fit case for exercise of discretion u/s 151 or Order 18 Rule 17 of the Code – They have not considered whether the evidence sought to be produced would either assist in clarifying the evidence led on the issues or lead to a just and effective adjudication – Both the courts have mechanically dismissed the applications only on the ground that the matter was already at the stage of final arguments and the applications would have the effect of delaying the proceedings – If after closure of evidence, the plaintiff and the attesting witness, subsequently, admitted during conversation that the amount paid was not towards sale price, but only a loan and the agreement of sale was obtained to secure the loan, that would be material evidence which came into existence subsequent to recording of depositions, having a bearing on the decision and will also clarify the evidence already led on the issues – It was a fit case for exercising discretion u/s 151 – Orders of High Court and trial court dismissing the application u/s 151 are set aside – Trial

court would consider the said application afresh in accordance with law – However, orders of High Court and trial court dismissing the application under or.18 r.17 are affirmed.

s. 151 – Inherent power of the court – Principles enunciated in various decisions of Supreme Court, summarised in the instant judgment – Evidence Act, 1872 – ss.3 and 8 – Information Technology Act, 2000 – s.2 (t).

Order 18, Rule 17 – Application to recall a witness who has been examined – Exercise of power under Or.18 r. 17 – Explained.

EVIDENCE ACT, 1872:

ss. 3 and 8 –"Evidence" read with "electronic record" defined in s. 2(t) of Information Technology Act – Connotation of – Conversation recorded in a Compact Disc – Admissibility of in evidence – Explained – Information Technology Act, 2000 – s.2(t).

In a suit for specific performance of agreement of sale, the defendant, after closure of the evidence, while the arguments were in progress, filed I.A. No. 216/2009 u/s 151 CPC seeking to re-open the evidence for further cross examination of the plaintiff (PW 1) and the attesting witness (PW 2). He also filed I.A. No. 217/2009 under Order 18, Rule 17 CPC for recalling PWs 1 and 2 for further cross-examination. The applications were filed on the ground that the plaintiff-respondent admitted in the conversation, recorded on a compact disc that PW 2 had lent the amount to the appellant through the plaintiff-respondent and in another conversation PW 2 admitted that he had lent the said amount through the plaintiff-respondent; that this would show that the agreement of sale was only a security for the loan.

The plaintiff resisted the applications contending that the recordings were created with the help of mimicry

specialist and the applications were a dilatory tactic to drag on the proceedings. The trial court dismissed both the applications holding that as the evidence of parties had been concluded and the arguments also had been heard in part, the applications were intended only to delay the matter. The High Court declined to interfere in the revision petitions. Aggrieved, the defendant filed the appeals.

Allowing the appeals in part, the court

HELD: 1.1. The amended definition of "evidence" in s. 3 of the Evidence Act, 1872 read with the definition of "electronic record" in s.2(t) of the Information Technology Act 2000, includes a compact disc containing an electronic record of a conversation. Section 8 of Evidence Act provides that the conduct of any party, or of any agent to any party, to any suit, in reference to such suit, or in reference to any fact in issue therein or relevant thereto, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto. This Court in R.M. Malkani's case* has held that a contemporaneous electronic recording of a relevant conversation is a relevant fact comparable to a photograph of a relevant incident and is admissible as evidence u/s 8 of the Act. There is, therefore, no doubt that such electronic record can be received as evidence. [para 7] [41-G-H; 42-A-C]

R.M.Malkani vs. State of Maharashtra* ***AIR 1973 SC 157 – relied on.*

1.2. Order 18 Rule 17 CPC is primarily a provision enabling the court to clarify any issue or doubt, it may have in regard to the evidence led by the parties. It enables the court, at any stage of a suit, to recall any witness who has been examined (subject to the law of

evidence for the time being in force) and put such questions to him as it thinks fit. The power can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit . The power is discretionary and should be used sparingly in appropriate cases. The said power is not intended to be used to fill up omissions in the evidence of a witness who has already been examined; nor is the provision intended to enable the parties to recall any witnesses for their further examination-in-chief or cross-examination or to place additional material or evidence which could not be produced when the evidence was being recorded. [para 8] [42-D-H]

Vadiraj Naggappa Vernekar v. Sharadchandra Prabhakar Gogate **– (2009) 4 SCC 410 - relied on.**

1.3. In the absence of any provision in the Code enabling the parties to re-open the evidence or to recall any witness for further examination or cross-examination, for purposes other than securing clarification required by the court, the inherent power u/s 151 of the Code, subject to its limitations, can be invoked in appropriate cases to re-open the evidence and/or recall witnesses for further examination. This inherent power of the court is not affected by the express power conferred upon the court under Order 18 Rule 17 of the Code. The scope of s. 151 as explained by this Court in several decisions may be summarised as follows:-

(a) Section 151 is not a substantive provision which creates or confers any power or jurisdiction on courts. It merely recognizes the discretionary power inherent in every court as a necessary corollary for rendering justice in accordance with law, to do what is 'right' and undo what is 'wrong', that is, to do all things necessary to secure the ends of justice and prevent abuse of its process.

(b) As the provisions of the Code are not exhaustive, s. 151 recognizes and confirms that if the Code does not expressly or impliedly cover any particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of justice warrant it. The breadth of such power is co-extensive with the need to exercise such power on the facts and circumstances.

(c) A Court has no power to do that which is prohibited by law or the Code, by purported exercise of its inherent powers. If the Code contains provisions dealing with a particular topic or aspect, and such provisions either expressly or necessary implication exhaust the scope of the power of the court or the jurisdiction that may be exercised in relation to that matter, the inherent power cannot be invoked in order to cut across the powers conferred by the Code or a manner inconsistent with such provisions. Thus, a court cannot make use of the special provisions of s.151, where the remedy or procedure is provided in the Code.

(d) The inherent powers of the court being complementary to the powers specifically conferred, a court is free to exercise them for the purposes mentioned in s. 151 when the matter is not covered by any specific provision in the Code and the exercise of those powers would not in any way be in conflict with what has been expressly provided in the Code or be against the intention of the Legislature.

(e) While exercising the inherent power, the court will be doubly cautious, as there is no legislative guidance to deal with the procedural situation and the exercise of power depends upon the discretion and wisdom of the court, and the facts and

circumstances of the case. The absence of an express provision in the code and the recognition and saving of the inherent power of a court, should not however be treated as a carte blanche to grant any relief.

(f) The power u/s 151 will have to be used with circumspection and care, only where it is absolutely necessary, when there is no provision in the Code governing the matter, when the bona fides of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of court. [para 9, 10] [43-B-H; 44-A-H; 45-A-D]

Padam Sen vs. State of UP **AIR 1961 SC 218;** *Manoharlal Chopra vs. Seth Hiralal* **AIR 1962 SC 527;** *Arjun Singh vs. Mohindra Kumar* **AIR 1964 SC 993;** *Ram Chand and Sons Sugar Mills (P) Ltd. vs. Kanhay Lal* **AIR 1966 SC 1899***; Nain Singh vs. Koonwarjee* **(1970) 1 SCC 732;** *The Newabganj Sugar Mills Co.Ltd. vs. Union of India* **AIR 1976 SC 1152;** *Jaipur Mineral Development Syndicate vs. Commissioner of Income Tax,* **New Delhi AIR 1977 SC 1348;** *National Institute of Mental Health & Neuro Sciences vs. C Parameshwara* **(2005) 2 SCC 256; and** *Vinod Seth vs. Devinder Bajaj* **(2010) 8 SCC 1) – relied on**

1.4. The convention that no application should be entertained once the trial or hearing is concluded and the case is reserved for judgment is a sound rule, but not a straitjacket formula. There can always be exceptions in exceptional or extra-ordinary circumstances, to meet the ends of justice and to prevent abuse of process of court, subject to the limitation recognized with reference to exercise of power u/s 151 of the Code. [para 13] [46-G-H; 47-A]

1.5. If for valid and sufficient reasons, the court

exercises its discretion to recall the witnesses or permit the fresh evidence, it should ensure that the process does not become a protracting tactic. The court should firstly award appropriate costs to the other party to compensate for the delay. Secondly, the court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly, if the application is allowed, but ultimately it is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with exemplary costs, apart from ordering prosecution if it involves fabrication of evidence. [para 16] [38-B-F]

1.6. In the instant case, the applications were made before the conclusion of the arguments. Neither the trial court nor the High court considered the question whether it was a fit case for exercise of discretion u/s 151 or Order 18 Rule 17 of the Code. They have not considered whether the evidence sought to be produced would either assist in clarifying the evidence led on the issues or lead to a just and effective adjudication. Both the courts have mechanically dismissed the application only on the ground that the matter was already at the stage of final arguments and the application would have the effect of delaying the proceedings. The appellant-defendant has taken a consistent stand in his reply notice, written statement and evidence that the agreement of sale was executed to secure a loan of Rs.1,50,000/- as the respondent insisted upon execution and registration of such agreement. If after the completion of recording of evidence, PW1 and PW2 admitted during conversations that the amount paid was not advance towards sale price, but only a loan and the agreement of sale was obtained to secure the loan, that would be material evidence which came into existence subsequent to the recording of the depositions, having a bearing on the decision and will also clarify the evidence already led

on the issues. According to the appellant, the said evidence came into existence subsequently and, therefore, he could not have produced this material earlier and if the said evidence, if found valid and admissible, would assist the court to consider the evidence in the correct perspective or to render justice, it was a fit case for exercising the discretion u/s.151 of the Code. The courts below have not applied their mind to the question whether such evidence will be relevant and whether the ends of justice require permission to let in such evidence. This Court is satisfied that in the interests of justice and to prevent abuse of the process of court, the trial court ought to have considered whether it was necessary to re-open the evidence and if so, in what manner and to what extent further evidence should be permitted in exercise of its power u/s 151 of the Code. The orders of the High Court and the trial court dismissing IA No. 216/2009 u/s. 151 of the Code are set aside. The orders are affirmed in regard to the dismissal of IA No.217/2009 under Order 18 Rule 17 of the Code. [para 13-15 and 18-19] [46-E-H; 47-A-H; 49-B-D]

Case Law Reference:

AIR 1973 SC 157	relied on	para 7
(2009) 4 SCC 410	relied on	para 8
AIR 1961 SC 218	relied on	para 10
AIR 1962 SC 527	relied on	para 8
AIR 1964 SC 993	relied on	para 8
AIR 1966 SC 1899	relied on	para 8
(1970) 1 SCC 732	relied on	para 8
AIR 1976 SC 1152	relied on	para 8
AIR 1977 SC 1348	relied on	para 8

(2005) 2 SCC 256; relied on para 8

(2010) 8 SCC 1 relied on para 8

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2795-2796 of 2011.

From the Judgment & Order dated 7.4.2010 of the High Court of Judicature at Madras in C.R.P. (PD) 3637 and 3638 of 2009.

S. Mahendran for the Appellant.

P. Vishwanatha Shetty, G. Indira, K.V. Jagdishwaran, Mona K. Rajvanshi for the Respondent.

The Judgment of the Court was delivered by

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

2. The respondent herein has filed a suit for specific performance (OS No.48/2007) alleging that the appellant-defendant entered into a registered agreement of sale dated 20.12.2006 agreeing to sell the suit schedule property to him, for a consideration of Rs.240,000/-; that he had paid Rs.160,000/- as advance on the date of agreement; that the appellant agreed to execute a sale deed by receiving the balance of Rs.80,000/- within three months from the date of sale; that he was ready and willing to get the sale completed and issued a notice dated 16.3.2007 calling upon the appellant to execute the sale deed on 20.3.2007; and that he went to the Sub-Registrar's office on 20.3.2007 and waited, but the appellant did not turn up to execute the sale deed. On the said averments, the respondent sought specific performance of the agreement of sale or alternatively refund of the advance of Rs.160,000/- with interest at 12% per annum from 20.12.2006.

3. The appellant resisted the suit. He alleged that he was in need of Rs.150,000 and approached the respondent who

was a money lender, with a request to advance him the said amount as a loan; that the respondent agreed to advance the loan but insisted that the appellant should execute and register a sale agreement in his favour and also execute some blank papers and blank stamp-papers, as security for the repayment of the amount to be advanced; and that trusting the respondent, the appellant executed the said documents with the understanding that the said documents will be the security for the repayment of the loan with interest. The appellant therefore contended that the respondent - plaintiff was not entitled to specific performance.

4. The suit was filed on 26.3.2007. The written statement was filed on 12.9.2007. Thereafter issues were framed and both parties led evidence. On 11.11.2008 when the arguments were in progress, the appellant filed two applications (numbered as IA No.216/2009 and IA No.217/2009). The first application was filed under section 151 of the Code of Civil Procedure ('Code' for short) with a prayer to reopen the evidence for the purpose of further cross-examination of Plaintiff (PW1) and the attesting witness Eswaramoorthy (PW2). IA No.217/2009 was filed under Order 18 Rule 17 of the Code for recalling PWs.1 and 2 for further cross examination. The appellant wanted to cross-examine the witnesses with reference to the admissions made during some conversations, recorded on a compact disc (an electronic record). In the affidavits filed in support of the said applications, the appellant alleged that during conversations among the appellant, respondent and three others (Ponnuswamy alias Krishnamoorthy, Shiva and Saravana Kumar), the respondent-plaintiff admitted that Eswaramoorthy (PW2) had lent the amount (shown as advance in the agreement of sale) to the appellant through the respondent; and that during another conversation among the appellant, Eswaramoorthy and Shiva, the said Eswaramoorthy (PW2) also admitted that he had lent the amount (mentioned in the agreement of sale advance)

through the respondent; that both conversations were recorded by a digital voice recorder; that conversation with plaintiff was recorded on 27.10.2008 between 8 a.m. to 9.45 a.m. and the conversation with Eswaramoorthy was recorded on 31.10.2008 between 7 to 9.50 p.m.; and that it was therefore necessary to reopen the evidence and further cross-examine PW1 and PW2 with reference to the said admissions (electronically recorded evidence) to demonstrate that the agreement of sale was only a security for the loan. It is stated that the Compact Disc containing the recording of the said conversations was produced along with the said applications.

5. The respondent resisted the said applications. He denied any such conversations or admissions. He alleged that the recordings were created by the appellant with the help of mimicry specialists and Ponnuswamy, Shiva and Saravana Kumar. He contended that the application was a dilatory tactic to drag on the proceedings.

6. The trial court, by orders dated 9.9.2009, dismissed the said applications. The trial court held that as the evidence of both parties was concluded and the arguments had also been heard in part, the applications were intended only to delay the matter. The revision petitions filed by the appellant challenging the said orders, were dismissed by the High Court by a common order dated 7.4.2010, reiterating the reasons assigned by the trial court. The said order is challenged in these appeals by special leave. The only question that arises for consideration is whether the applications for reopening/recalling ought to have been allowed.

7. The amended definition of "evidence" in section 3 of the Evidence Act, 1872 read with the definition of "electronic record" in section 2(t) of the Information Technology Act 2000, includes a compact disc containing an electronic record of a conversation. Section 8 of Evidence Act provides that the conduct of any party, or of any agent to any party, to any suit,

in reference to such suit, or in reference to any fact in issue therein or relevant thereto, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto. In *R.M Malkani vs. State of Maharastra* – AIR 1973 SC 157, this court made it clear that electronically recorded conversation is admissible in evidence, if the conversation is relevant to the matter in issue and the voice is identified and the accuracy of the recorded conversation is proved by eliminating the possibility of erasure, addition or manipulation. This Court further held that a contemporaneous electronic recording of a relevant conversation is a relevant fact comparable to a photograph of a relevant incident and is admissible as evidence under Section 8 of the Act. There is therefore no doubt that such electronic record can be received as evidence.

8. Order 18 Rule 17 of the Code enables the court, at any stage of a suit, to recall any witness who has been examined (subject to the law of evidence for the time being in force) and put such questions to him as it thinks fit. The power to recall any witness under Order 18 Rule 17 can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit requesting the court to exercise the said power. The power is discretionary and should be used sparingly in appropriate cases to enable the court to clarify any doubts it may have in regard to the evidence led by the parties. The said power is not intended to be used to fill up omissions in the evidence of a witness who has already been examined. [Vide *Vadiraj Naggappa Vernekar v. Sharadchandra Prabhakar Gogate* - 2009 (4) SCC 410]. Order 18 Rule 17 of the Code is not a provision intended to enable the parties to recall any witnesses for their further examination-in-chief or cross-examination or to place additional material or evidence which could not be produced when the evidence was being recorded. Order 18 Rule 17 is primarily a provision enabling the court to *clarify any issue or doubt*, by recalling any witness either suo moto, or at the request of any party, so that the court

itself can put questions and elicit answers. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions.

9. There is no specific provision in the Code enabling the parties to re-open the evidence for the purpose of further examination-in-chief or cross-examination. Section 151 of the Code provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent powers of the Code to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court. In the absence of any provision providing for re-opening of evidence or recall of any witness for further examination or cross-examination, for purposes other than securing clarification required by the court, the inherent power under section 151 of the Code, subject to its limitations, can be invoked in appropriate cases to re-open the evidence and/or recall witnesses for further examination. This inherent power of the court is not affected by the express power conferred upon the court under Order 18 Rule 17 of the Code to recall any witness to enable the court to put such question to elicit any clarifications.

10. The respondent contended that section 151 cannot be used for re-opening evidence or for recalling witnesses. We are not able to accept the said submission as an absolute proposition. We however agree that section 151 of the Code cannot be routinely invoked for reopening evidence or recalling witnesses. The scope of section 151 has been explained by this Court in several decisions (*See* : *Padam Sen vs. State of UP*–AIR 1961 SC 218; *Manoharlal Chopra vs. Seth Hiralal* – AIR 1962 SC 527; *Arjun Singh vs. Mohindra Kumar* – AIR 1964 SC 993; *Ram Chand and Sons Sugar Mills (P) Ltd. vs. Kanhay Lal* – AIR 1966 SC 1899; *Nain Singh vs. Koonwarjee* – 1970 (1) SCC 732; *The Newabganj Sugar Mills Co.Ltd. vs. Union of India* – AIR 1976 SC 1152; *Jaipur Mineral Development Syndicate vs. Commissioner of Income Tax, New Delhi – AIR 1977 SC 1348*; *National Institute of Mental*

Health & Neuro Sciences vs. C Parameshwara – 2005 (2) SCC 256; and *Vinod Seth vs. Devinder Bajaj* – 2010 (8) SCC 1). We may summarize them as follows:

(a) Section 151 is not a substantive provision which *creates* or confers any power or jurisdiction on courts. It merely recognizes the discretionary power inherent in every court as a necessary corollary for rendering justice in accordance with law, to do what is 'right' and undo what is 'wrong', that is, to do all things necessary to secure the ends of justice and prevent abuse of its process.

(b) As the provisions of the Code are not exhaustive, section 151 recognizes and confirms that if the Code does not expressly or impliedly cover any particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of justice warrant it. The breadth of such power is co-extensive with the need to exercise such power on the facts and circumstances.

(c) A Court has no power to do that which is prohibited by law or the Code, by purported exercise of its inherent powers. If the Code contains provisions dealing with a particular topic or aspect, and such provisions either expressly or necessary implication exhaust the scope of the power of the court or the jurisdiction that may exercised in relation to that matter, the inherent power cannot be invoked in order to cut across the powers conferred by the Code or a manner inconsistent with such provisions. In other words the court cannot make use of the special provisions of Section 151 of the Code, where the remedy or procedure is provided in the Code.

(d) The inherent powers of the court being complementary to the powers specifically conferred, a court is free to exercise them for the purposes mentioned in Section 151 of the Code when the matter is not covered by any specific

provision in the Code and the exercise of those powers would not in any way be in conflict with what has been expressly provided in the Code or be against the intention of the Legislature.

(e) While exercising the inherent power, the court will be doubly cautious, as there is no legislative guidance to deal with the procedural situation and the exercise of power depends upon the discretion and wisdom of the court, and the facts and circumstances of the case. The absence of an express provision in the code and the recognition and saving of the inherent power of a court, should not however be treated as a *carte blanche* to grant any relief.

(f) The power under section 151 will have to be used with circumspection and care, only where it is absolutely necessary, when there is no provision in the Code governing the matter, when the bona fides of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of court.

11. The Code earlier had a specific provision in Order 18 Rule 17A for production of evidence not previously known or the evidence which could not be produced despite due diligence. It enabled the court to permit a party to produce any evidence even at a late stage, after the conclusion of his evidence if he satisfied the court that even after the exercise of due diligence, the evidence was not within his knowledge and could not be produced by him when he was leading the evidence. That provision was deleted with effect from 1.7.2002. The deletion of the said provision does not mean that no evidence can be received *at all,* after a party closes his evidence. It only means that the amended structure of the Code found no need for such a provision, as the amended Code contemplated little or no time gap between completion of evidence and commencement and conclusion of arguments. Another reason for its deletion was the misuse thereof by the parties to prolong the proceedings under the pretext of

discovery of new evidence.

12. The amended provisions of the Code contemplate and expect a trial court to hear the arguments immediately after the completion of evidence and then proceed to judgment. Therefore, it was unnecessary to have an express provision for re-opening the evidence to examine a fresh witness or for recalling any witness for further examination. But if there is a time gap between the completion of evidence and hearing of the arguments, for whatsoever reason, and if in that interregnum, a party comes across some evidence which he could not lay his hands earlier, or some evidence in regard to the conduct or action of the other party comes into existence, the court may in exercise of its inherent power under section 151 of the Code, permit the production of such evidence if it is relevant and necessary in the interest of justice, subject to such terms as the court may deem fit to impose.

13. The learned counsel for respondent contended that once arguments are commenced, there could be no re-opening of evidence or recalling of any witness. This contention is raised by extending the convention that once arguments are concluded and the case is reserved for judgment, the court will not entertain any interlocutory application for any kind of relief. The need for the court to act in a manner to achieve the ends of justice (subject to the need to comply with the law) does not end when arguments are heard and judgment is reserved. If there is abuse of the process of the court, or if interests of justice require the court to do something or take note of something, the discretion to do those things does not disappear merely because the arguments are heard, either fully or partly. The convention that no application should be entertained once the trial or hearing is concluded and the case is reserved for judgment is a sound rule, but not a straitjacket formula. There can always be exceptions in exceptional or extra-ordinary circumstances, to meet the ends of justice and to prevent abuse of process of court, subject to the limitation recognized

with reference to exercise of power under section 151 of the Code. Be that as it may. In this case, the applications were made before the conclusion of the arguments.

14. Neither the trial court nor the High court considered the question whether it was a fit case for exercise of discretion under section 151 or Order 18 Rule 17 of the Code. They have not considered whether the evidence sought to be produced would either assist in clarifying the evidence led on the issues or lead to a just and effective adjudication. Both the courts have mechanically dismissed the application only on the ground that the matter was already at the stage of final arguments and the application would have the effect of delaying the proceedings.

15. The appellant – defendant has taken a consistent stand in his reply notice, written statement and evidence that the agreement of sale was executed to secure a loan of Rs.150,000, as the respondent insisted upon execution and registration of such agreement. If after the completion of recording of evidence, PW1 and PW2 had admitted during conversations that the amount paid was not advance towards sale price, but only a loan and the agreement of sale was obtained to secure the loan, that would be material evidence which came into existence subsequent to the recording of the depositions, having a bearing on the decision and will also clarify the evidence already led on the issues. According to the appellant, the said evidence came into existence only on 27.10.2008 and 31.10.2008, and he prepared the applications and filed them at the earliest, that is on 11.11.2008. As defendant could not have produced this material earlier and if the said evidence, if found valid and admissible, would assist the court to consider the evidence in the correct perspective or to render justice, it was a fit case for exercising the discretion under section 151 of the Code. The courts below have not applied their minds to the question whether such evidence will be relevant and whether the ends of justice require permission to let in such evidence. Therefore the order calls for interference.

16. We may add a word of caution. The power under section 151 or Order 18 Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be bona fide and where the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issues and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it should ensure that the process does not become a protracting tactic. The court should firstly award appropriate costs to the other party to compensate for the delay. Secondly the court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs. If the application is allowed and the evidence is permitted and ultimately the court finds that evidence was not genuine or relevant and did not warrant the reopening of the case recalling the witnesses, it can be made a ground for awarding exemplary costs apart from ordering prosecution if it involves fabrication of evidence. If the party had an opportunity to produce such evidence earlier but did not do so or if the evidence already led is clear and unambiguous, or if it comes to the conclusion that the object of the application is merely to protract the proceedings, the court should reject the application. If the evidence sought to be produced is an electronic record, the court may also listen to the recording before granting or rejecting the application.

17. Ideally, the recording of evidence should be continuous, followed by arguments, without any gap. Courts should constantly endeavour to follow such a time schedule. The amended Code expects them to do so. If that is done, applications for adjournments, re-opening, recalling, or interim measures could be avoided. The more the period of pendency,

the more the number of interlocutory applications which in turn add to the period of pendency.

18. In this case, we are satisfied that in the interests of justice and to prevent abuse of the process of court, the trial court ought to have considered whether it was necessary to re-open the evidence and if so, in what manner and to what extent further evidence should be permitted in exercise of its power under section 151 of the Code. The court ought to have also considered whether it should straightway recall PW1 and PW2 and permit the appellant to confront the said recorded evidence to the said witnesses or whether it should first receive such evidence by requiring its proof of its authenticity and only then permit it to be confronted to the witnesses (PW1 and PW2).

19. In view of the above, these appeals are allowed in part. The orders of the High Court and Trial Court dismissing IA No. 216/2009 under section 151 of the Code are set aside. The orders are affirmed in regard to the dismissal of IA No.217/ 2009 under Order 18 Rule 17 of the Code. The trial court shall now consider IA No.216/2009 afresh in accordance with law.

R.P. Appeals partly allowed.

UNION OF INDIA
v.
GLAXO INDIA LTD. & ANR.
(Civil Appeal No. 6497 of 2002)

MARCH 30, 2011

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

DRUG (PRICE CONTROL) ORDER, 1979 :

Paragraphs 3, 12, 13 and 27 – Price Fixation of bulk drugs – Central Government fixing the price of scheduled bulk drugs by Notification dated 2.1.1989 superseding the earlier Notification dated 12.5.1981 – Demand raised towards the difference between the formulation prices fixed in the price fixation orders and the actual prices charged by company for the period 12.5.1981 to 25.8.1987 to be deposited in DRUG PRICES EQUILASITAION ACCOUNT – Held : When fresh notification was issued on 2.1.1989, the earlier notifications were superseded and, therefore, it cannot be said that they become non est for all purposes – The earlier notification, fictionally must be held to have subsisted and were operative from such points of time of commencement upto the date it was superseded –The Central Government is well within its rights to raise demands for making deposit into DPEA on the basis of prices shown in Notification dated 20.11.1986 – The demand raised by the Central Government is confirmed.

Para 27 – Review – Concept of – Explained – Held : Once a review petition filed by the manufacturer of a bulk drug is considered and a fresh notification is issued, the same would be prospective and it does not relate back to the notification fixing the price of bulk drugs issued earlier – Administrative Law – Subordinate Legislation.

DRUG PRICES EQUALISATION ACCOUNT :

Drug manufacturing company required to deposit in DPEA the excess of the common selling price over retention price –Held :The provision is a beneficial one –This provision applies equally both to indigenously manufactured drugs as well as the drugs imported so as to maintain uniformity in the price of bulk drug.

WORDS AND PHRASES :

Expression 'supersession' – Connotation of in the context of drugs price fixation.

The respondent-company was engaged in manufacture and sale of three bulk drugs, namely, BA, BV and BP and formulations based thereon. The Central Government, in exercise of power under Para 3(1) of the Drug (Price Control) Order, 1979 (DPCO, 1979) fixed the maximum price of the three bulk drugs by its order dated 12.5.1981. The respondent-company challenged the order before the High Court in CWP No. 1551 of 1981. The High Court stayed implementation of the order dated 12.5.1981 in view of the undertaking of the respondent company to maintain the prices of the bulk drugs and its formulations prior to the notification dated 12.5.1981, and directed the parties for settlement in view of the petition for review of the order dated 12.5.1981 filed by the respondent company. The Central Government re-fixed the price of the bulk drugs by order dated 20.11.1986 with retrospective effect from 12.5.1981. The High Court disposed of the writ petition by its judgment dated 31.8.1987. It did not quash the price fixation order dated 20.11.1986, but directed the respondent company to file review petition before the Central Government. The Central Government constituted 'Murthy Committee' which gave its report dated 12.10.1988.

The Central Government, issued price fixation order dated 2.1.1989 under DPCO 1989 fixing the price for the three bulk drugs higher than that fixed under order dated 20.11.1986, and, by letters dated 18.6.1990 and 16.11.1990 raised a demand of Rs. 71.2 crores, as difference between the formulation prices fixed and the actual price charged by the company for the period 12.5.1981 to 25.8.1987, to be deposited in Drug Prices Equalisation Account (DPEA). The company filed another writ petition (CWP No. 2170/90). The High Court allowed the writ petition holding, inter alia, that the demands raised were contrary to the directions of the High Court in earlier writ petition (CWP No. 1551/81); that the price fixation order was retrospective in its operation and related back to the order dated 12.5.1981; and that the demands raised were in violation of Para 7(2) (a) of DPCO 1979 inasmuch as it was not based on "common selling prices" and "retention prices of bulk drugs" but was based on "common selling price and the price of formulators". The High Court also observed that even if the DPCO 1979 was violated the company would be still entitled to retain the excess amount over and above the maximum statutory price and the only option available to the Central Government was to initiate criminal proceedings. The High Court directed the Central Government to raise the demands on the basis of the revised prices of the bulk drugs as notified on 2.1.1989 and determine the excess amount not on the basis of prices of the formulations, but on the basis of the prices of bulk drugs used by the company in its formulations. Aggrieved, the Union of India filed the appeal.

The questions for considerations before the Court were (i) whether the Central Govt. was justified in issuing a demand based on Drug Prices fixed on 02.01.1989, instead of drug prices fixed on 20.11.1986; (ii) whether the

Central Government was justified in directing the respondent-Company to deposit an amount of Rs.71.21 crores in the Drug Prices Equalization Account (in short, "DPEA"); and (iii) what was the effect of 'supersession' of a notification and when such supersession is made, would it have the prospective or retrospective effect.

Allowing the appeal, the Court

HELD : 1. The three bulk drugs manufactured by the respondent-Company were covered under DPCO 1979, which empowered the Central Government to fix the maximum prices thereof. Para 17 of DPCO, 1979 authorized the Central Government to maintain a Drug Prices Equalization Account comprised of the Grants as may be made by the manufacturers, importers and distributors of the drugs. The purpose and object of this account was to control and maintain the prices of drugs by getting the amounts determined under Para 7(2) and the excess of the common selling price over retention price deposited into this account from those manufacturers who were selling or utilizing the bulk drug in their formulations. This provision appears to be a beneficial provision. The reason being, if the "common selling price" happens to be less than the "retention price", the manufacturer could be paid out of DPEA. This provision applies equally both to indigenously manufactured drugs as well as the drugs imported, so as to maintain uniformity in the price of bulk drugs. [para 24] [76-G-H; 77-A-D]

2.1. There are three notifications. The first one is dated 12.05.1981, wherein the Central Government fixed the maximum sale prices of the three bulk drugs. The second notification is dated 21.11.1986, whereby the Central Government has fixed the revised prices of the aforesaid three bulk drugs. These notifications were subject matters of the writ petitions filed before the Delhi

High Court. Pursuant to the directions issued in the aforesaid writ petition, the Central Government issued the notification dated 02.01.1989. [para 25] [77-E-F]

2.2. The Notification dated 2.1.1989 was issued by the Central Government in supersession of the earlier Notification dated 12.5.1981. By this notification, the Government has fixed the maximum price at which indigenously manufactured bulk drugs shall be sold by the respondent-Company and others. The impugned notification uses the expression "supersession" of the earlier notification. When the fresh notification was issued on 02.01.1989, the earlier notifications were superseded, therefore, it could not be said that they became *non est* for all purposes and were unable to support the proceedings for the enforcement of liability incurred for the period prior to 1989, otherwise it would produce the anomalous results. The point to be noted is that the notification dated 26.11.1986 became effective from 12.5.1981. This notification, fictionally must be held to have subsisted and was operative from such points of time of its commencement upto the date it was superseded. [para 27-28] [78-G-H; 79-A, E-G]

State of Orissa Vs. Titaghur Paper Mills Company Ltd. **AIR 1980 SC 1293 – relied on.**

Webster's Third New International Dictio and P. Ramanathan Aiyar's Advanced Law Lexicon **– referred to.**

2.3. In *Titaghur's* **case, this Court came to the conclusion that the previous liability to tax for a period prior to the supersession was not wiped out. The results that flow from changes in the law by way of amendment, 'repeal', 'substitution' or 'supersession' on the earlier rights and obligations cannot be decided on any set formulae. It is essentially a matter for construction and depends on the intendment of the law as could be**

gathered from the provisions in accordance with accepted cannons of construction. The notification in the instant case is close to the consequences arising out of repeal without the benefit of a saving clause in respect of the obligations previously incurred, but for saving principle in the *Titaghur's* case. In *Nand Kishore's* case, it has been stated that the effect of an Act or an order which is superseded is not to obliterate it altogether. An Act or order is said to be superseded where a later enactment or order effects the same purpose as an earlier one by repetition of its terms or otherwise. [para 29] [80-C-E-G-H; 81-A-B]

Nand Kishore Vs. Emperor, **AIR 1945 Oudh 214;** *Syeda Mustafa Mohamed Gouse Vs. State of Mysore* **(1963) 1 Crl.L.J. 372 (Mys) and** *R.S. Anand Behari Lal Vs. Government of U.P.* **AIR 1955 NUC 2769 All) – referred to.**

2.4. The appellants are well within their rights to raise demands for making deposit into DPEA on the basis of the prices notified by their notification dated 20.11.1986. [para 29] [81-E]

3.1. Para 27 of the DPCO 1979 lays down that any person aggrieved by any notification or order under paragraphs 3,4,5,6,7,9,12,13,14,15 or 16, may apply to the Government for a review of the notification or order within fifteen days of the date of the notification in the Official Gazette. After receipt of the application/review petition, the Government may make such order on the application as it may consider necessary. In *Cyanamide's* case* it has been observed that the review in para 27 of DPCO 1979 is in the form of a post decisional hearing which is sometimes afforded after the making of some of the administrative orders, but not truly so. From the scheme of the Control Order and the context and content of Para 27, the review insofar as it concerns the orders under Paras 3, 12 and 13 appears to be in the nature of a

legislative review of legislation, or more precisely a review of subordinate legislation by a subordinate legislative body at the instance of an aggrieved person. In the instant case, the Central Government was directed by the High Court in the first judgment to consider certain grievances of the respondent-Company regarding working out of certain weighted averages, such as rate of income tax being taken low, the packaging and distribution expenses taken lower than the actual cost, etc., by the Central Government while the prices of the bulk drugs were being fixed. The Court had permitted the respondent-company to file review petition, if they so desire and further had directed the Central Government to pass an order as they deem fit, that is, either affirming or reviewing the prices fixed by order dated 20.11.1986 and to make consequent changes in the prices for drug formulations, if fixed in the meanwhile. Thus, the High Court had reserved liberty to the Central Government either to affirm or review the prices of the bulk drugs fixed by order dated 20.11.1986 and to make consequent changes in the prices for drug formulations. The Central Government, taking clue from the directions issued by the High Court, which order has become final, has passed the impugned Notification dated 02.01.1989, by refixing the prices of drug formulations by applying the provisions contained in DPCO 1989. In this view of the matter, no fault can be found with the exercise done by Central Government while notifying the impugned notification. The notification so issued is in accordance with the observations made by this Court in *Cyanamide case which supports the stand of the Revenue, that once a review petition filed by the manufacturer of a bulk drug is considered and a fresh notification is issued, the same would be prospective and it does not relate back to the notification fixing the prices of bulk drugs issued earlier. [para 30-32] [81-E-H; 82-A-F-H; 83-A-G; 84-B-C]**

Union of India v. Cyanamide India Ltd.* **1987 (2) SCR 841 = (1987) 2 SCC 720 – relied on.

3.2. It is no doubt true that the Murthy Committee was constituted pursuant to the direction issued by the High Court to look into the data that may be furnished by the respondent-Company and give its report for the purpose of fixing the prices of the bulk drugs manufactured by the respondent-Company. It is also not in dispute that the prices fixed by the Murthy Committee were much higher than those notified by the Central Government, while issuing the notification dated 20.11.1986. That itself will not make any difference for the reason, the Central Government, after taking into consideration the report and the recommendations made by the Murthy Committee, has issued a notification which is only prospective and not retrospective. Hence, there was no implied rejection of the recommendations of the Murthy Committee. [para 33] [84-D-F]

3.3. Therefore, firstly, it cannot be said that the Central Government while considering the review petition filed by the respondent-company had disregarded the direction issued by the Delhi High Court in its first judgment. Secondly, it cannot be said, as has been contended by the respondent-company, that the price fixation order of 02.01.1989 was the result of decision taken by the Central Government on the review petition filed by the respondent-company and, therefore, the demands raised as per the price fixation order dated 20.11.1986 had to be revised according to the price fixation order dated 02.01.1989, cannot be accepted. Further, since the notification dated 02.01.1989 fixing prices of bulk drugs is prospective, the earlier notification would operate during the intervening period. [para 34] [84-G-H; 85-A]

3.4. To sum up, the findings of this Court in regard

to the first and third issues are: (i) The demand to be raised on the respondent-company for the period 12.05.1981 to 25.08.1987 is to be based on the prices fixed under the notification dated 20.11.1986 and not on the drug prices fixed on 02.01.1989; and (ii) The supersession of a notification does not obliterate the liability incurred under the earlier notification. [para 34] [85-B-D]

4.1. Para 7 of the DPCO, 1979 is in two parts. Sub-para (1) of Para-7 authorises the Central Government to fix retention price and pooled price for the sale of Bulk drugs specified in First Schedule or Second Schedule indigenously manufactured and those of imported bulk drugs. Sub-Para (2) of Para 7 speaks of a situation where a manufacturer of formulations sells the formulations of any bulk drug, either manufactured by him or procured by him from other sources, being lower than the price allowed to him in the price of his formulations, the Government may require such manufacturer of formulations to deposit into DPEA the excess amount as determined by the Central Government. Sub Para 7(2)(b) mandates the manufacturer of the formulations to sell such formulations as fixed by the Central Government. Para 7 of DPCO 1979 provides two different situations, one based on the difference in the common selling prices of bulk drugs and the second the difference based on common selling prices of the formulations. Para 17 of DPCO 1979, authorizes the Central Government to maintain DPEA comprised of the grants made by the Government, deposits to be made by the manufacturers, importers and distributors of the drugs. It is a cardinal principle of interpretation that a statute must be read as a whole. [para 37 and 40] [86-G-H; 87-A-C; 88-F]

Phillips India Ltd. v. Labour Court, **1985 (3) SCR 491 = (1985) 3 SCC 103 - relied on**

Colguhoun v. Brooks, **(1889) 14 AC 493 – referred to.**

4.2. A plain reading of Para 7(2)(a) of the DPCO 1979 shows what can be directed by the Central Government to be deposited into DPEA by the manufacturer of bulk drugs and any formulations using those drugs or procured from outside, as in the instant case. Firstly, Para 7(2)(a) applies to a manufacturer of formulations. The manufacturer must utilize in the formulation(s) any bulk drug. The bulk drug could be either from his own production or procured from any other sources. If the price of such bulk drugs is notified as lower than the price allowed to him in the price of his formulations, the Central Government may require the manufacturer of formulation the excess amount determined to be deposited into DPEA. Under Para 7(2)(b), the Central Government may direct the manufacturer of formulations to sell the formulations at such prices as may be fixed by the Government. [para 46] [92-F-H; 93-A]

4.3. The Central Government, while issuing the letters/demand dated 18.06.1990 and 16.11.1990, has specifically bifurcated the differential amount that requires to be paid by the respondent-company on the bulk drugs and their formulations. In the letter, it is made clear that in view of the notification dated 20.11.1986, the respondent-company has to deposit into DPEA the difference between the retention price and pooled price for the sale of bulk drugs. Similarly, since the respondent-company manufactures drug formulations by captive consumption of the bulk drugs, the Central Government initially could not fix the retention price of the formulations in view of the interim orders passed by the High Court while admitting the writ petition filed by the respondent-company. After disposal of the writ petitions filed and in view of the specific liberty that was granted by the High Court in the petitions filed by the respondent-

company, the Central Government directed the company to pay not only the difference amount payable for the price of bulk drugs but also those drugs which are utilized in their formulations over and above the prices fixed by the Central Government. [para 47] [93-B-E]

4.4. It cannot be said that under para 7(2)(a) of DPCO 1979, the Central Government could issue demand on the basis of bulk drugs only and not on the basis of difference between the prices of bulk drugs and the prices of the formulations in which the company had used those bulk drugs. [para 47] [93-E-F]

4.5. The respondent company (and similar companies) not only manufacture bulk drugs but also use them for their drug formulations for its supply in retail vending and thereby, the ordinary consumer is burdened with a higher price than what they could have got at a lesser price. That is taken care of in para 17 of DPCO 1979. [para 48] [93-G-H; 94-A]

4.6. The demands raised by the Central Government is confirmed. [para 49] [94-B-C]

Case Law Reference:

1987 (2) SCR 841	**relied on**	**Para 11**
AIR 1980 SC 1293	**relied on.**	**Para 28**
AIR 1945 Oudh 214	**referred to**	**Para 29**
(1963) 1 Crl.L.J. 372	**referred to**	**Para 29**
(AIR 1955 NUC 2769 All)	**referred to**	**Para 29**
(1889) 14 AC 493	**referred to**	**Para 40**
1985 (3) SCR 491	**relied on**	**Para 41**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6497 of 2002.

From the Judgment & Order dated 19.10.2001 of the High Court of Delhi at New Delhi in Civil Writ Petition No. 2170 of 1990.

Parag Tripathi, ASG, Sadhana Sandhu, Kiran Bhardwaj, Amey Nargolkar, Vaibhav Joshi, S.N. Terdal, Kunal Bahri, B.V. Balaram Das for the Appellant.

T.R. Andhyarujina, S. Ganesh, U.A. Rana, Mrinal Majumdar, Priyanka Dayal, Gagrat & Co. of the Respondent.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. The issues that arise for our consideration and decision in this appeal are :-

(i) Whether the Central Govt. was justified in issuing a demand based on Drug Prices fixed on 02.01.1989, instead of drug prices fixed on 20.11.1986.

(ii) Whether the Central Government was justified in directing Glaxo India Ltd. (hereinafter referred to as, "Respondent-Company") to deposit an amount of Rs. 71.21 crores in the Drug Prices Equalization Account (in short, "DPEA").

(iii) What is the effect of 'supersession' of a notification and when such supersession is made, would it have the prospective or retrospective effect.

Factual Background

2. The Respondent-Company is engaged in manufacture and sale of three bulk drugs, namely, Betamethasone Alcohol (B.A.), Betamethasone 17 valerate (B.V.) and Betamethasone di Sodium Phosphate (B.P.), and various formulations based on these bulk drugs. They were sold at the price that was declared by the Respondent-Company under the Drugs (Price

Control) Order, 1970 [in short, "DPCO 1970"]. The Central Government promulgated the Drug (Price Control) Order, 1979, [in short, "DPCO 1979"], replacing DPCO 1970 which included the above mentioned bulk drugs in Schedule II to the order. The Central Government is vested with the power under Para 3(i) of DPCO 1979 to fix the maximum sale price of indigenously manufactured bulk drugs in First or Second Schedule by issuing a notification in the official gazette. Sub-Para 3(2) provides that while fixing the price of a bulk drug, the Government may take into account the average cost of production of such bulk drug manufactured by an efficient manufacturer and allow a reasonable return on net worth. Sub-Para 3(3) prohibits any person from selling a bulk drug at a price exceeding the price fixed under sub-para(1) and other local taxes, if any, payable.

3. In exercise of the powers so conferred, the Central Government had fixed the maximum price of the above mentioned bulk drugs vide its order dated 12.05.1981.

4. The Respondent-Company had called in question the legality and validity of the price fixation order dated 12.05.1981 before the High Court of Delhi in C.W.P No. 1551 of 1981, mainly on the ground that the price fixation order did not take into account the cost of production of bulk drugs as was required to be done. On 27.08.1981, the High Court passed an interim order staying the implementation of the bulk drug prices fixed as per order dated 12.05.1981 as well as the prices of the formulations from the said bulk drug, in view of the undertaking of the respondent company to maintain the prices of both bulk drugs and its formulations prior to the notification dated 12.05.1981. During the pendency of the proceedings, the High Court, by order dated 13.05.1982, directed the parties to explore the possibilities of a settlement, when it was brought to the notice of the High Court that the Respondent-Company has filed a review petition for review of the price fixation order dated 12.05.1981 passed by the Central

Government in exercise of its power under Para 3(1) of DPCO 1979.

5. Pursuant to the said direction, the Respondent-Company made available the actual cost of production of bulk drugs to the Central Government and also requested for an oral hearing. After considering the material available on the record and also the oral submissions made, the Central Government re-fixed the price of the three bulk drugs mentioned above by an Order dated 20.11.1986 with retrospective effect from 12.05.1981. Aggrieved by the same, the Respondent-Company amended the relief claimed in the pending proceedings before the High Court.

6. The Division Bench of the High Court, by its judgment and order dated 31.08.1987, disposed of the writ petition. While doing so, the Court did not quash the impugned price fixation order dated 20.11.1986 (made after the first review) passed by the Central Government, but directed the Respondent-Company to file another review petition before the Central Government for reconsideration of the price fixed by impugned price fixation order and the Central Government to condone the delay and consider the review petition on merits.

7. In the light of the said directions issued by the Delhi High Court in CWP No.1551 of 1981, the Central Government constituted the "Murthy Committee" consisting of experts in the field. The Committee conducted the review in accordance with directions issued by the High Court and submitted its report dated 12.10.1988 to the Central Government. The Government, vide its order dated 02.01.1989, issued price fixation order under DPCO 1989 fixing the price for three Bulk Drugs higher than the earlier price fixed vide order dated 20.11.1986. For convenience, we give below the price declared by the respondent company under DPCO 1970 and the price fixed by the Government on 12.05.1981, on 20.11.1986 after first review and on 02.01.1989 after the second review.

			Price Fixed by the Central Govt.		
S. No.	Name	Declared price with DPCO 1970 (Rs.)	Vide Notification dt. 12.05.81 (Rs.)	Vide Notification dt. 20.11.86 (first review) (Rs.)	Vide Notification dt. 02.01.1989 (second review) (Rs.)
1.	Betamethasone Alcohol	134.28	113.34	127.70	144.19
2.	Betamethasone 17-Valerate	220.00	105.85	122.00	136.58
3.	Betamethasone D-Sodium Phosphate	225.00	126.23	135.00	144.58

Pursuant to the order so passed, the Union of India had issued tentative demand of Rs. 66.35 Crores, which was finally revised to Rs. 71.21 Crores (towards the difference between the formulation prices fixed in the price fixation orders and the actual prices charged by the respondent company for the period 12.05.1981 to 25.08.1987) to be deposited by the respondent-company in the DPEA, by their letters dated 18.06.1990 and 16.11.1990.

8. Aggrieved by the demand so made by the Central Government vide its letters dated 18.06.1990 and 16.11.1990, the Respondent-Company filed C.W.P. No. 2170 of 1990 before the High Court of Delhi, inter alia, questioning the legality and validity of the demands raised by the Central Government and for its deposit into DPEA. The main issues raised therein were that the demand was contrary to the directions issued by the High Court in CWP No.1551 of 1981. Secondly, the demands were in violation of para 7(2)(a) of the DPCO 1979 and further, the demands were not based on the difference in

prices of "common selling prices" and "retention prices" of bulk drugs, but were based on the difference between the "common selling prices" and the "price of formulations". The writ petition was contested by the Union of India, and it was contended that the prices were fixed after taking into consideration all the relevant data and the same was done in accordance with the judgment and order of the Division Bench of the High Court in C.W.P. No. 1551 of 1981.

9. The High Court, by its order dated 19.10.2001, allowed the writ petition and quashed the demands made by the Central Government as illegal, arbitrary and contrary to the directions issued by the Division Bench of the High Court in C.W.P. No. 1551 of 1981. It was held that the price fixation order dated 02.01.1989 was retrospective in its operation and related back to the order dated 12.05.1981. It was also held that the demand raised by the Central Government was in violation of Para 7(2)(a) of the DPCO 1979, inasmuch as it is not based on the "common selling prices" and "retention prices of bulk drugs", but is based on the difference between the "common selling prices" and the "price of formulations". The Court further observed that even though the DPCO 1979 contained statutory provisions for fixation of formulation prices, even if it is violated, the respondent company would still be entitled to retain the excess amount over the statutory maximum price and the only option available to the Central Govt. was to initiate criminal proceedings. The High Court directed the appellants to raise demands on the basis of the revised prices of the bulk drugs as notified on 02.01.1989 and for the purpose of Para 7(2) (a) of DPCO 1979, determine the excess amount not on the basis of the prices of the formulations but on the basis of the prices of bulk drugs used by the respondent company in its formulations. The correctness of the said judgment and order is called in question by the Union of India in this appeal.

10. Since we will be referring to two Division Bench judgments and orders of the High Court of Delhi in the course

of our judgment, we will refer to the judgment in C.W.P. 1551 of 1981 as the 'first judgment' and the judgment in C.W.P. No. 2170 of 1990 as the 'impugned judgment', to avoid any confusion.

Submissions of the Appellant – Union of India

11. The case of the learned Additional Solicitor General Shri. Parag P. Tripathi is that the Division Bench of the High Court erred in coming to the conclusion that the price fixed by the Central Government on the bulk drugs manufactured by the Respondent-Company is contrary to the statutory provision and the direction issued by the High Court in the first judgment. It is further argued that the Murthy Committee constituted to examine the review petition filed by the Respondent-Company considered the data between 1980-81 and 1984-85, which itself prima facie rules out that the price fixation order was to be applied retrospectively and should relate back to the order passed on 12.05.1981. It is further submitted that that the decision of the executive in the mechanics of price fixation is beyond the scope of judicial review as held by this Court in the case of *Union of India v. Cyanamide India Ltd., (1987) 2 SCC 720*. Our attention was also drawn to the affidavit of the Union of India filed before the Delhi High Court, and the file notings of Shri. R.N. Tandon. By placing reliance on these material, he would submit, that the recommendations of the Murthy Committee were to come into effect prospectively, and not retrospectively. Alternatively, it is submitted that the price fixation order dated 2.1.1989 in the Review Petition filed by the Respondent-Company was under the DPCO 1987 and had nothing to do with the price fixation order dated 20.11.1986 and therefore, it should be presumed that the Review Petition filed by the Respondent-Company was impliedly rejected. It is also submitted that the intention of the Central Government to fix the price of bulk drug and its formulations prospectively could be clearly inferred from the price fixation order itself. It is urged that the Review Petition was impliedly rejected and the prices that

were fixed on 2.1.1989 were to be given effect prospectively and did not relate back to price fixation order dated 20.11.1986, which has been retrospectively applied with effect from 12.05.1981.

12. With regard to the finding of the Division Bench in the impugned judgment that the demands raised is in contravention of Para 7(2)(a) of the DPCO 1979, it is submitted that the Respondent-Company has already benefited from the stay order passed by the High Court, and the demand was based on the difference on the price of bulk drug prevalent prior to the stay order and the prices fixed on 2.1.1989. It is further submitted that the stand of the Respondent-Company that since there is no provision in the DPCO 1979 for the deposit of the excess amount in the DPEA, the Respondent-Company should be allowed to retain the same, is against the basic principles of 'unjust enrichment' as held by this Court. In support of this contention, our attention was drawn to observations made by this Court in *Mafatlal,* (1997) 5 SCC 536; *Concap Capacitators* (2007) 8 SCC 658, *Swanstone Multiplex Cinema,* (2009) 10 SCALE 148]. It is argued that the Drugs (Prices Control) Order is a socio-economic measure, and the same has to be interpreted by this Court in the light of the object sought to be achieved, viz. to ensure that there is a proper availability of drugs at reasonable prices, which are fair to the consumer as well as to the industry. It is also contended that the phrase "excess amount to be determined by the Government" in Para 7(2)(a) of the DPCO 1979, gives a wide discretion to the Government to determine any amount to be recovered, and that the demand made as amount due is therefore justified. It is further submitted that it is incorrect to proceed on the basis that the DPCO 1979 permitted such retention of excess money that was in excess over the formulation price fixed under the price fixation order and such an interpretation will be contrary to the object of the provisions of the Essential Commodities Act and of the DPCO 1979. It is further argued that since Para 7(2)(a) dealt with DPEA only, and it is totally incorrect to interpret the

same in a manner that would permit drug companies to violate price fixation order and get away with the same, by stating that the Respondent-Company was liable only to criminal proceedings, if any.

13. In the alternative, it is submitted that Para 14 of the DPCO 1987, provides for recovery of dues accrued under DPCO 1979 and deposit of the same into DPEA. In view of the said provision, the Central Government has the power to direct the drug companies to deposit such amounts in the DPEA. A further reference is also made to Para 15 of the DPCO 1987, which gives the power to the Central Government to recover dues accrued due to charging of prices higher than those fixed or notified by the Government as per the provisions of the DPCO 1987.

Submissions of the Respondent-Company

14. Shri. T.R. Andhyarujina and Shri. S. Ganesh, learned senior counsel, submitted that there is a basic difference between 'review' and 'revision' under the DPCO 1979, and that a 'review' operates retrospectively from the date of fixation of the drug price under review, whereas, the order passed in a `revision' is prospective in its operation. It is brought to our notice that in *Cyanamide's case,* it was held that a review was in the nature of a post decisional hearing that is granted to the manufacturers of bulk drugs. It is argued that the review was filed by the Respondent-Company for review of the bulk drug price fixation order dated 12.05.1981 even before filing of the first writ petition and the same was considered by the Central Government by its order dated 20.11.1986, in which the price fixed were considerably higher than those in 1981. It is also submitted that this review was based on the Respondent-Company's cost of production for 5 years from 1981 to 1985. It is further submitted that the review conducted by the Government took the actual cost of production between 1981 and 1985, instead of the projected cost of production, as the

normal practice was, in the review that was conducted in 1986. It is further argued that the Division Bench, in the first judgment, had directed the Respondent-Company to file a review of the price fixation order 1986, and, therefore, the same would necessarily relate back to the price fixation order dated 12.5.1981. It is further argued by the learned counsel that the price fixation order of 02.01.1989 had superseded the price fixation order dated 12.5.1981 and, therefore, the same is retrospective and not prospective as contended by the Revenue. It is contended that the Murthy Committee carried out the review strictly in conformity with the first decision of the High Court and on the same basis as conducted in 1986, i.e. the actual costs between 1981 and 1984-85 were considered by the Murthy Committee. It is also brought to our notice that though the Respondent-Company requested the Committee to consider the costs up to 1986-87, the same was not granted by the Committee, thereby bringing to our notice that the Committee followed the directions issued by the Division Bench of the High Court. It is further submitted that the price fixation order passed by the Committee in pursuance of the directions of the High Court in the first judgment, were significantly revised upwards, though based on the same data that was considered in the year 1986.

15. The learned counsel submits that the contention of the Central Government that the Review Petition filed by the Respondent-Company was impliedly rejected by the Government is incorrect, since no such order was ever communicated to the Respondent-Company. It is submitted that the order passed in review petition necessarily operates retrospectively, and it is fallacious even to suggest that an order passed in review petition operates prospectively. It is further submitted that the Central Government, while issuing the letter dated 16.11.1990 by way of demand notice directing a particular amount to be paid to DPEA, considered only the first review dated 20.11.1986, and ignored the review of 02.01.1989 as though it never happened. Hence, it is argued

that the demand of Rs. 71.21 crores made by the Central Govt. is illegal, arbitrary and in violation of the price control order.

16. According to the learned counsel for the Respondent-Company, the situation contemplated for deposit into the DPEA is the profit earned by the manufacturer between the formulation price that has been fixed on the basis of certain bulk drugs and the bulk drug price, if in case, the manufacturer of formulations procures and uses the bulk drug at a price which is lower than the prices fixed. It is urged that the same is clear from the combined reading of Para 7(2)(a) and Para 17 of the DPCO 1979. It is contended that this difference in bulk drug prices can be recovered by the Central Government from the manufacturer by directing them to deposit the excess amount in the DPEA. It is further submitted that the phrase "excess amount" when read in the context can only mean the difference in the prices of bulk drugs and the same is clear from scheme of DPCO 1979.

17. It is further contended that the Central Government entered into agreements with other drug companies for recovery of the differential amounts, and no such agreement was entered into with the Respondent-Company. It is submitted that the doctrine of contemporaneous exposition demanded that the settled understanding of Para 7(2)(a) should be continued.

18. The learned counsel disputes that there was any unjust enrichment by the Respondent-Company, as contended by the learned counsel for the Revenue and to the contrary, the returns filed by the Respondent-Company would amply demonstrate that there was less margin of profit than what it is entitled to under the Fifth Schedule of the DPCO 1979. It is also stated that the Respondent-Company never charged prices higher than those that were fixed by the Central Government. It is also contended that the impugned demand made by the Central Government is without the authority of law and in total disregard to the directions contained in the first judgment. It is submitted that Para 7 of the DPCO 1987 did not give any authority to

recover the difference in 'notional' prices of formulation as the Central Government sought to do vide letter dated 16.11.1990. It is further argued that the only liability that the Respondent-Company had, was the liability that accrued in respect of actions taken prior to 25.08.1987, which was nothing but the difference in bulk drug prices. It is stated that only this amount could be recovered by virtue of Para 14 of the DPCO 1987, unlike what was claimed by the Central Government. It is also argued that the High Court, in the impugned judgment, had correctly decided the issue by quashing the demand for payment of Rs. 71.21 crores made by the Central Government. It is submitted that the demands made vide letter dated 16.11.1990 is liable to be set aside as the demand was made on the prices based on notional formulation prices worked out by the Bureau of Indian Standards, which were not revealed to the Respondent-Company, and that these notional formulation prices were in total disregard of the review of the bulk drug prices notified on 02.01.1989, which were in pursuance of the directions of the first judgment, but on the basis of the previously fixed bulk drug prices of 20.11.1986. In conclusion, it is argued that the Central Government should recalculate the amount based on the difference in bulk drug prices as reviewed and notified on 02.01.1989, in compliance of the directions of the High Court.

The First Judgment of the Delhi High Court

19. The submission of the learned Additional Solicitor General is in view of Para 17, 18 and 19 of the judgment in C.W.P. No. 1551 of 1981, it is clear that the Order dated 26-11-1986 was not quashed and the Central Government was only asked to consider the review petition filed by the Respondent-Company. At this stage, it is useful to extract Para 17 and 18 of the Judgment to understand the direction issued by the High Court:-

"17. We have come to the conclusion that the interests of

justice require that the respondents should give the petitioner once more an opportunity of being heard on the price fixation order of 1986. We, however, wish to make it clear that we are not setting aside the order dt. 20-11-1986 for this purpose; nor do we, in view of the categorical observations of the Supreme Court, consider it necessary, proper or appropriate to stay further implementation of the said order or to stay any proceedings for fixation of prices of various drug formulations of the petitioner which that respondents might wish to initiate. We would only direct the petitioner to file a formal application for review and the Government to deal with the same (condoning the delay in filing the same due to the pendency of this writ petition) after giving the petitioner a hearing on the lines indicated above and, in the light of such hearing, to affirm or revise the prices fixed by the order dt. 20-11-1986 and to make consequent changes, thereafter, in the prices for drug formulations, if fixed in the meanwhile.

18. We would also, as was done by the Supreme Court, indicate a time bound schedule for the course of action suggested above:

(a) Within ten days from the date of receipt of this order, the applicants may request the department to furnish such specific information as it may need as to the basis on which the figures of net worth of

assets, interest on borrowings and rate of return have been taken by them in respect of each of the drugs and the department should make the same available to the petitioner within ten days thereafter;

(b) Within ten days thereafter the petitioner may file a formal application for review of the order dt. 20-11-1986 with an application to condone delay. This application should not content itself with criticising the department's figures but should specifically set out petitioner's own

detailed working out of the price to be fixed on the basis of the annual and cost audit reports of the Company for the period 1981 to 1985;

(c) The respondent should fix a hearing within a period of 15 days from the date of receipt of the application and the petitioner may be heard thereon;'

(d) Within two weeks thereafter, the respondents may dispose of the application as they deem fit. In case they allow it in whole or in part they should pass an order notifying the revised prices under para 3 of the 1979 DPCO.

19. The writ petition is disposed of accordingly with no order as to costs. It is made clear that the interim stay orders are vacated and the department will be free to implement the order dt. 20-11-1986 as well as to proceed to fix the prices for the petitioner's drug formulation, subject to the outcome of the procedure indicated in the previous para."

The Impugned Judgment

20. The issue decided by the Division Bench in the impugned judgment is whether the demands made by the Central Government for deposit of Rs.71.21 crores was on the basis of the prices notified vide Order dated 2.1.1989 or Order dated 20.11.1986. The High Court, apart from others, has concluded that from a combined reading of paragraphs 15 to 19 of the directions of the Division Bench in the first judgment, it is clear that the High Court has neither upheld the Order dated 26.11.1986 nor given any finality to the same; that the Central Government, for the purpose of considering the Review Petition filed, pursuant to the directions issued in the first judgment, the matter was referred to the Murthy Committee and that the Murthy Committee has conducted the price re-fixation of bulk drugs in accordance with the directions that was issued by the

High Court. The Murthy Committee has taken into consideration the weighted_average figures from 1980-81 to 1984-85 and refused the request of the Respondent-Company to consider the cost of production for the later years, which clearly shows that the Committee focused only on the Order dated 26.11.1986 and not thereafter; that it was apparent that the prices fixed by the order dated 20.11.1986 were based on the costing of the year 1981 only, whereas the one dated 2.1.1989 was based on the weighted average cost figures from the year 1981 to 1985; that the notings on the file and the statements of the Hon'ble Minster on the floor of Parliament indicate that the prices that were re-fixed by the Murthy Committee were accepted.

21. The High Court has also rejected the contention of the Central Government that there was an implied rejection of the review as there was no notification to that effect. It is also noted that there was no communication from the Central Government to the Respondent-Company expressing that the review had been rejected at any stage. The Court has also observed that there was a letter dated 20.3.1989 by the Central Government to the Respondent-Company informing them that the revised prices of bulk drugs was with effect from 12.5.1981, and this was enough to show that the Respondent-Company was notified that the order dated 2.1.1989 held the field in place of the order dated 26.11.1986. It was also noted by the High Court that even though the word 'retrospective' was not mentioned in the notification dated 02.01.1989, if it were not construed retrospectively, the order impugned would be in violation of the directions of the Division Bench in the first judgment.

22. The High Court, after considering the language of para 3 to 17 of the DPCO 1979, has taken the view that the Central Government was not justified in considering the prices of the formulations under Para 7(2)(a) of the DPCO 1979 for determining the excess amount. The reasons and conclusion so reached by the Delhi High Court is the subject matter of this

appeal.

Our Conclusion

23. To our mind, after hearing the learned counsel, the undisputed facts appears to be that the Respondent-Company, as required under para 5 and 14 of DPCO 1970, had informed the Central Government the selling prices/notional prices of their bulk drugs manufactured and sold and also the retail prices of the formulation of these drugs. The maximum selling prices of these drugs so informed/proposed by the respondent-company was approved by the Central Government.

The Central Government, in exercise of the powers conferred under para 3(1) of the Price Control Order 1979 by its order dated 12.05.1981 had fixed the maximum selling prices of these bulk drugs manufactured and sold by Respondent Company. After receipt of the said order, the Respondent-Company had filed a Review Petition dated 23.06.1981. May be prior to or after the receipt of this representation, the Central Government, by its letter dated 29.06.1981, had informed the Respondent-Company of its liability to pay into DPEA the difference between the prices that the company was enjoying under Prices Control Order 1970 and the prices as notified by the Central Government with effect from 12.05.1981. The Respondent-Company filed CWP 1551 of 1981 before the High Court of Delhi, inter alia, seeking a writ of certiorari of the notification issued by the Central Government on the ground that the notification issued by the Central Government fixing the maximum selling prices of the three bulk drugs manufactured and sold by them as illegal, arbitrary and unconstitutional. The High Court, while issuing notice of the petition to the Respondents therein, granted the interim order dated 01.07.1981, inter alia, staying the implementation of any formulation prices for the three bulk drugs. On a later date, the High Court, after recalling its earlier order dated 01.07.1981, granted stay of the implementation of the bulk drug prices notified by the Central Government by its

order dated 12.05.1981. Since the Central Government passed yet another order dated 20.11.1986, the Respondent-Company by way of amendment of the relief sought in the writ petition, questioned the said order also. The High Court, by its order dated 31.08.1987, disposed of the petition with certain observations and directions, which we have already noticed in extenso. Pursuant to the directions so issued, the Respondent-Company filed review petition dated 09.03.1988 to review the order dated 20.11.1986. The Central Government, by its order dated 02.01.1989, in exercise of its power conferred by Sub-para (1) of para 3 of the Control Order 1987 and in supersession of the order dated 12.05.1981 in so far as the three bulk drugs, has fixed the maximum price at which the indigenously manufactured drugs should be sold. After issuing the aforesaid notification, the Government by its letter dated 18.06.1990, after referring to the Judgment of Delhi High Court dated 31.08.1987, has stated that the Respondent-Company has not been authorized to retain the amounts over charged by the company. It is also stated that the prices of the bulk drugs fixed on 20.11.1986 based on the direction issued by the High Court is also not disturbed and the Court is also authorized to fix the prices of the formulations. Accordingly, the Central Government, vide their letters dated 18.06.1990 and 16.11.1990, made a tentative demand of Rs.66.35 crores, which was subsequently revised based on the data made available by the Respondent Company to Rs.71.21 crores payable by the Respondent-Company to be deposited into DPEA. These were those orders/letters which were impugned by the Respondent-Company by filing CWP 2170 of 1990 before the High Court.

24. The Central Government, exercising its powers under the Essential Commodities Act, 1955, had promulgated DPCO 1970. Para 3 of this order empowered the Central Government to fix the maximum selling price of an essential bulk drug specified in Schedule-I appended to the order. However, the three bulk drugs manufactured by the Respondent-Company

were covered under DPCO 1979, and empowered the Central Government to fix the maximum prices thereof. Para 17 authorized the Central Government to maintain a Drug Prices Equalization Account comprised of the Grants as may be made by the manufacturers, importers and distributors of the drugs. The purpose and object of this account was to control and maintain the prices of drugs by getting the amounts determined under Para 7(2) and the excess of the common selling price over retention price deposited into this account from those manufacturers who were selling or utilizing the bulk drug in their formulations. This provision appears to be a beneficial provision. The reason being, if the "common selling price" happens to be less than the "retention price", the manufacturer could be paid out of DPEA. This provision applies equally both to indigenously manufactured drugs as well as the drugs imported, so as to maintain uniformity in the price of bulk drugs.

25. As of now, we have three notifications. The first one is dated 12.05.1981, wherein the Central Government fixed the maximum sale prices of the aforesaid three bulk drugs. The second notification is dated 21.11.1986, whereby the Central Government has fixed the revised prices of the aforesaid three bulk drugs. These notifications were subject matters of the writ petitions filed before the Delhi High Court. Pursuant to the directions issued in the aforesaid writ petition, the Central Government has now issued the notification dated 02.01.1989. It is this notification which the Central Government contends is prospective in its operation but the Respondent-Company claims that it relates back to the notification dated 12.05.1981.

26. To appreciate the controversy raised in this appeal, it would be useful to extract the Gazette Notification dated 02.01.1989 issued by the Central Government under Drugs (Prices Control) Order 1987 :-

> S.O.6(E) – In exercise of the powers conferred by sub paragraph (1) of paragraph 3 of the Drugs (Prices Control) Order, 1987, and in supersession of the order of the Government of India in the erstwhile Ministry of Petroleum, Chemicals and Fertilizers (Department of Chemicals and Fertilizers) No. S.O. 373 (E) dated the 12th May, 1981, in so far as it relates to the drugs 'Betamethesone Alcbhol', 'Betamethasone' '17-Valerate' and 'Betamethasone Di-sodium Phosphate' against serial numbers 1 to 3, the Central Government hereby fixes the prices specified in column (3) of the Table below as the maximum price at which the indigenously manufactured bulk drug specified in the corresponding entry column (2) thereof shall be sold :-

TABLE

S.No	*Name of the Bulk Drug*	*Maximum price (Rs. Per gramme)*
1.	*Betamethasone Alcohol*	*144.19*
2.	*Betamethasone Valerate*	*136.50*
3.	*Batemethasone Di-Sodium Phosphate*	*144.58"*

27. The aforesaid notification is issued by the Central Government in supersession of the earlier Notification issued by the Government of India No. S.O. 373(E) dated the 12th May, 1981. By this notification, the Government has fixed the maximum price at which indigenously manufactured bulk drugs shall be sold by the Respondent-Company and others. According to the Revenue, the notification is prospective and the notification issued earlier would hold the field till the impugned notification is issued. However, it is the stand of the Respondent-Company that the notification dated 02.01.1989 is retrospective in its operation and relates back to first notification issued by the Central Government dated 12.05.1981.

28. The impugned notification uses the expression "supersession" of the earlier notification. Therefore, the first question that requires to be considered and answered by us is, what is the meaning of the expression "supersession" and what is its effect. Webster's Third New International Dictionary defines the word "supersession" to mean 'the State of being superseded', 'removal' and 'replacement'. P. Ramanathan Aiyar's Advanced Law Lexicon defines 'superseded' as `set aside' and `replaced by'. The view of this Court in some of the decisions is that the expression "supersession" has to be understood to amount 'to repeal' and when notification is repealed, the provisions of Section 6 of the General Clauses Act would not apply to notifications. The question whether statutory obligations subsist in respect of a period prior to repeal of a provision of a Statute or any subordinate legislation promulgated thereunder has to be ascertained on legal considerations apposite to the particular context. The matter is essentially one of construction. Such problems do not admit of being answered on the basis of any single principle or legal consideration. When the fresh notification was issued on 02.01.1989, the earlier notifications were superseded, could it be said that they became *non est* for all purposes and were unable to support the proceedings for the enforcement of liability incurred for the period prior to 1989. To hold so, would produce the anomalous results. The answer, in our opinion, must depend on proper construction to be placed on the notification themselves. The point to be noted is that the notification dated 26.11.1986 became effective from 12th day of May, 1981. This notification, fictionally must be held to have subsisted and were operative from such points of time of their commencement upto the date it was superseded. The position here is somewhat analogous to the one considered in the case of *State of Orissa Vs. Titaghur Paper Mills Company Ltd.* AIR 1980 SC 1293. In the said decision, the effect of supersession of notifications under Orissa Sales Tax Act came up for consideration. Referring to the effect of supersession of the notification, this Court observed :-

> "The word "supersession" in the notifications dated December 29, 1977 is used in the same sense as the words "repeal and replacement' and therefore, does not have the effect of wiping out the tax liability under the previous notifications. All that was done by using the words in supersession of all previous notifications in the notifications dated December 29, 1977, was to repeal and replace previous notifications and not to wipe out any liability incurred under the previous notifications."

29. In Titaghur's case, the specific question whether on "supersession" of a notification, the liability to tax for a period prior to the supersession was wiped out or not, directly arose and was considered. This Court came to the conclusion that the previous liability to tax for a period prior to the supersession was not wiped out. In our view, the results that flow from changes in the law by way of amendment, 'repeal', 'substitution' or 'supersession' on the earlier rights and obligations cannot be decided on any set formulae. It is essentially a matter for construction and depends on the intendment of the law as could be gathered from the provisions in accordance with accepted cannons of construction. The question whether the liability for payment of difference amount incurred by the respondent-company could be enforced after the order dated 02.01.1989 passed under DPCO 1987, when the notification was superseded clearly falls within the principles laid down in Titaghur Mills case. It is no doubt true that in some cases, there are statements which admit the construction that once a notification is 'superseded', it amounts to repeal and that Section 6 of the General Clauses Act has no application to such cases. If that principle is applied, then after 12th day of May, 1981, the notification becomes unavailable to Central Govt. to give effect to the notification issued under DPCO 1979, even in respect of the period when the notification must be deemed to have been in force. The notification in this case is close to the consequences arising out of repeal without the benefit of a saving clause in respect of the obligations previously incurred,

but for saving principle in the Titaghur's case. We may also usefully refer to the observations made by Kaul, J. in *Nand Kishore Vs. Emperor, AIR 1945 Oudh 214.* It is stated "that the effect of an Act or an order which is superseded is not to obliterate it altogether. An Act or order is said to be superseded where a later enactment or order effects the same purpose as an earlier one by repetition of its terms or otherwise. In *Syeda Mustafa Mohamed Gouse Vs. State of Mysore (1963) 1 Crl.L.J. 372 (Mys),* the Sugar (Movement Control) Order 1959, of 6th November, 1959 was passed in supersession of the Sugar (Movement Control) Order, 1959, dated 27th July, 1959. It was held that in law `supersession' has not the same effect as repeal and proceedings of a superseded order can be commenced. In *R.S. Anand Behari Lal Vs. Government of U.P. (AIR 1955 NUC 2769 All*), it was held that in case of supersession of a notification, the objections and liabilities accrued and incurred under the earlier notification remain unaffected, since the supersession will be effected from the date of second notification and not retrospectively, so as to abrogate the earlier notification from the date of its commencement. In view of the above discussion, we are of the view that the appellants are well within their rights to raise demands for making deposit into DPEA on the basis of the prices notified by their notification dated 20.11.1986.

30. We now deal with the concept of 'review' that finds a place in para 27 of the DPCO 1979. What is contemplated in this provision is that any person aggrieved by any notification or order under paragraphs 3,4,5,6,7,9,12,13,14,15 or 16, may apply to the Government for a review of the notification or order within fifteen days of the date of the notification in the Official Gazette. After receipt of the application/review petition, the Government may make such order on the application as it may consider necessary. What is the scope of the review that is contemplated under Drugs (Prices Control Order) is explained by this Court in *Cyanamide's* case (supra). It is observed that the review in para 27 of DPCO 1979 is in the form of a post

decisional hearing which is sometimes afforded after the making of some of the administrative orders, but not truly so. "It is a curious amalgam of a hearing which occasionally precedes a subordinate legislative activity such as the fixing of municipal rates etc. that we mentioned earlier and a post-decision hearing after the making of an administrative or quasi-judicial order. It is a hearing which follows a subordinate legislative activity intended to provide an opportunity to affected persons such as the manufacturers, the industry and the consumer to bring to the notice of the subordinate legislative body the difficulties or problems experienced or likely to be experienced by them consequent on the price fixation, whereupon the government may make appropriate orders. Any decision taken by the Government cannot be confined to the individual manufacturer seeking review but must necessarily affect all manufacturers of the bulk drug as well as the consumer. Since the maximum price of a bulk drug is required by Para 3 to be notified, any fresh decision taken in the proceeding for review by way of modification of the maximum price has to be made by a fresh notification fixing the new maximum price of the bulk drug. In other words, the review, if it is fruitful, must result in fresh subordinate legislative activity. The true nature of the review provided by Para 27 insofar as it relates to the fixation of maximum price of bulk drugs under Para 3 and leader price and prices of formulations under Paras 12 and 13 is hard to define. It is difficult to give it a label and to fit it into a pigeonhole, legislative, administrative or quasi-judicial. Nor is it desirable to seek analogies and look to distant cousins for guidance. From the scheme of the Control Order and the context and content of Para 27, the review insofar as it concerns the orders under Paras 3, 12 and 13 appears to be in the nature of a legislative review of legislation, or more precisely a review of subordinate legislation by a subordinate legislative body at the instance of an aggrieved person."

31. In the present case, the Central Government was directed by the High Court in the first judgment to consider

certain grievances of the Respondent-Company regarding working out of certain weighted averages, such as rate of income tax being taken low, the packaging and distribution expenses taken lower than the actual cost, etc., by the Central Government while the prices of the bulk drugs were being fixed. The Court specifically observed that in the interest of justice, the Respondent-Company should be given one more opportunity of being heard on the price fixation order of 1986. The Court further made it clear that they are not setting aside the order dated 20.11.1986 or staying further implementation of the said order or stay any proceedings for fixation of prices of various drug formulation of the Respondent-Company of which the appellants – Central Government may wish to initiate. The Court had permitted the Respondent-Company to file review petition, if they so desire and further had directed the Central Government to pass an order as they deem fit, that is, *either affirming or reviewing the prices fixed by order dated 20.11.1986 and to make consequent changes in the prices for drug formulations, if fixed in the meanwhile.*

32. In our view, a reading of the observations made by the Court, would indicate that it had reserved liberty to the Central Government either to affirm or review the prices of the bulk drugs fixed by order dated 20.11.1986 and to make consequent changes in the prices for drug formulations. The Central Govt., taking clue from the directions issued by the Court, which order has become final, has passed the impugned Notification dated 02.01.1989, by refixing the prices of drug formulations by applying the provisions contained in DPCO 1989. In view of the above, it is difficult for us to find fault with the exercise done by Central Government while notifying the impugned notification. In our considered view, the notification so issued is in accordance with the observations made by this Court in *Cyanamide* case (supra) wherein it is stated:-

> ".....since the maximum price of a bulk drug is required by paragraph 3 to be notified any fresh decision taken in the proceeding for review by way of modification of the maximum price has to be made by a fresh notification fixing the new maximum price of the bulk drug. In other words, the review if it is fruitful it must result in fresh subordinate legislative activity."

These observations of this Court in Cyanamide case, in our view, supports the stand of the Revenue, that once a review petition filed by the manufacturer of a bulk drug is considered and a fresh notification is issued, the same would be prospective and it does not relate back to the notification fixing the prices of bulk drugs issued earlier.

33. It is no doubt true that the Murthy Committee was constituted pursuant to the direction issued by the High Court to look into the data that may be furnished by the Respondent-Company and give its report for the purpose of fixing the prices of the bulk drugs manufactured by the Respondent-Company. It is also not in dispute that the prices fixed by the Murthy Committee was much higher than those notified by the Central Government, while issuing the notification dated 20.11.1986. In our view, that itself will not make any difference for the reason, the Central Government, after taking into consideration the report and the recommendations made by the Murthy Committee, has issued a notification which we have already said is only prospective and not retrospective as contended by learned counsel for the Respondent-Company. Hence, we are of the view that there was no implied rejection of the recommendations of the Murthy Committee.

34. Therefore, firstly, it cannot be said that the Central Government while considering the review petition filed by the Respondent-Company had disregarded the direction issued by the Delhi High Court in its first judgment. Secondly, the contention of the respondent-company that the price fixation order of 02.01.1989 was the result of decision taken by the Central Govt. on the review petition filed by the respondent-company and therefore, the demands raised as per the price

fixation order dated 20.11.1986 had to be revised according to the price fixation order dated 02.01.1989, cannot be accepted. We also add, since the notification dated 02.01.1989 fixing prices of bulk drugs is prospective, the earlier notification would operate during the intervening period.

To sum up, our findings in regard to the first and third issues are as under :-

(i) The demand to be raised on the respondent-company for the period 12.05.1981 to 25.08.1987 is to be based on the prices fixed under the notification dated 20.11.1986 and not on the drug prices fixed on 02.01.1989.

(ii) The supersession of a notification does not obliterate the liability incurred under the earlier notification.

35. Now to answer the second issue, viz. whether the demand raised under para 7(2)(a) of DPCO 1979, should be computed on the basis of difference in bulk drug prices or on the basis of difference in formulation prices, it is necessary to extract para 7 of DPCO 1979 and the other relevant paras in DPCO 1979. Para 7 reads:

"7. Power to fix retention price and pooled price for the sale of bulk drugs specified in First Schedule or Second Schedule indigenously manufactured as well as imported – (1) Where a bulk drug specified in the First Schedule or the Second Schedule is manufactured indigenously and is also imported, the Government may, having regard to the sale prices prevailing from time to time in respect of indigenously manufactured bulk drugs and those of imported bulk drugs, by order, fix, with such adjustments as the Government may consider necessary –

(a) retention prices for individual manufacturers, importers, or distributors of such bulk drugs;

(b) a pooled price for the sale of such bulk drugs

(2) Where a manufacturer of formulations utilises in the formulations any bulk drug, either from his own production or procured by him from any other source, the price of such bulk drug being lower than the price allowed to him in the price of his formulations the Government may require such manufacturer –

(a) to deposit into the Drug Prices Equalisation Account referred to in paragraph 17 the excess amount to be determined by the Government; or

(b) to sell the formulations at such prices as may be fixed by the Government".

36. Para 8 speaks of prices of bulk drugs produced through indigenous research and development, Para 9 authorises the Central Government to direct manufacturer of bulk drugs to sell bulk drugs to manufacturers of formulations, Para 10 provides for the calculation of retail prices of the formulations, Para 12 authorises the Central Government to fix retail prices of formulations specified in Category III of Third Schedule, Para 14 provides for general provisions regarding prices of formulations, Para 15 speaks of power of the Central Government to revise prices of formulations, Para 17 speaks of Drug Prices Equalisation Account (DPEA). The other paras may not be relevant to be noticed for the purposes of this case.

37. Para 7 of the DPCO, 1979 is in two parts. Sub-para (1) of Para-7 authorises the Central Government to fix retention price and pooled price for the sale of Bulk drugs specified in First Schedule or Second Schedule indigenously manufactured and those of imported bulk drugs. Sub-Para (2) of Para 7 speaks of a situation where a manufacturer of formulations sells the formulations of any bulk drug, either manufactured by him or procured by him from other sources, being lower than the

price allowed to him in the price of his formulations, the Government may require such manufacturer of formulations to deposit into DPEA the excess amount as determined by the Central Government. Sub Para 7(2)(b) mandates the manufacturer of the formulations to sell such formulations as fixed by the Central Government. Para 7 of DPCO 1979 provides two different situations, one based on the difference in the common selling prices of bulk drugs and the second the difference based on common selling prices of the formulations. Para 17 of DPCO 1979, as we have already stated, authorizes the Central Government to maintain DPEA comprised of the grants made by the Government, deposits to be made by the manufacturers, importers and distributors of the drugs.

38. The Respondent-Company in the month of June, 1990 and November, 1990 received a demand on the allegations that the Respondent-Company had over charged for the bulk drugs as well as formulations being manufactured by it. These demands are based on the prices fixed by order dated 20.11.1986. The Respondent-Company had questioned this demand before the High Court primarily on the ground that the sale prices of the formulations cannot not be taken into consideration and only the cost of bulk drugs consumed in those formulations could be taken into consideration for making calculations. The prayer in the writ petition was to direct the Central Government to reassess and calculate the demand on the basis of the revised bulk drug prices fixed on 02.01.1989, instead of taking into consideration the prices of the formulations and to consider the excess amount on the basis of prices of bulk drugs used in the formulations. The stand of the Central Government in the affidavit filed before the High Court was that the prices of the bulk drugs had been fixed vide their order dated 12.05.1981 and 20.11.1986, but the prices of the formulation could not be fixed because of the stay granted by the Court and as such the Respondent-Company was bound to charge only prices as were liable to be fixed under the DPCO 1979. They had also stated that the

Respondent-Company was entitled to charge such prices for its bulk drug as was fixed by the price fixation order dated 20.11.1986 or liable to be fixed for formulations under DPCO of 1979 and was bound to deposit the over charged amounts to DPEA.

39. The learned senior counsel Shri. Andhyarujina submits that Para 7(2)(a) read with Para 17 of DPCO 1979 makes it clear that the Scheme of the DPCO 1979 was to encourage domestic production of bulk drugs through a system of retention and pooled pricing. It is also submitted that para 17(2) and (3) sets out the manner in which the DPEA was to be utilized and how a manufacturer of bulk drugs could make a claim in respect of bulk drugs manufactured by it from DPEA. Therefore, para 7(2)(a)was never intended to cover prices of formulation but only the differences in the price of bulk drugs used in formulations which the manufacturer can be asked to deposit into the DPEA under para 7(2)(a). However, it is argued by learned counsel for the Central Government that the expression "excess amount to be determined by the Government" in para 7(2)(a) of DPCO 1979 gives a wide discretion to the Government in the matter of determining the amount recoverable under the para and, therefore, the Government was justified in raising the demand taking into consideration the difference between the common selling prices and the price of the formulations.

40. It is a cardinal principle of interpretation that a statute must be read as a whole. Lord Herschell in the case of *Colguhoun v. Brooks,* (1889) 14 AC 493, aptly pointed out:

> "It is beyond dispute, too, that we are entitled, and indeed bound, when construing the terms of any provision found in a statute, to consider any other parts of the Act which throw light on the intention of the legislature, and which may serve to show that the particular provision ought not to be construed as it would be alone and apart from the rest of the Act."

41. This Court in the case of *Phillips India Ltd. v. Labour Court,* (1985) 3 SCC 103 has observed :

> "15. No canon of statutory construction is more firmly established that the statue must be read as a whole. This is a general rule of construction applicable to all statutes alike which is spoken of as construction *ex visceribus actus*……The only recognized exception to the well-laid principle is that it cannot be called in aid to alter the meaning of what is of itself clear and explicit. Lord Coke laid down that: "it is the most natural and genuine exposition of a statute, to construe one part of a statute by another part of the same statute, for that best expresseth meaning of the makers" (Quoted with approval in *Punjab Beverages Pvt. Ltd.* v. *Suresh Chand*, [(1978) 2 SCC 144])"

42. To our mind, the grievance of the respondent-company which was projected before the High Court and also before us is that the impugned demands were in violation of Para 7(2)(a) of DPCO 1979, mainly for the reason that they were not computed on the basis of difference in the prices of bulk drugs but on the difference between the prices of bulk drugs and the prices of formulations in which the company had used those bulk drugs. The appellants/Central Government while justifying the impugned demand had contended before the High Court and even before us, that the prices of bulk drugs were fixed vide orders dated 12.05.1981, which were revised by order dated 20.11.1986, but the formulations could not be fixed because of the interim order granted by the High Court and, *ergo*, the respondent-company is liable to deposit into DPEA the over charged amount in respect of their formulations also.

43. To resolve the controversy on this issue, it is necessary to notice the impugned demands raised by the appellants/ Central Government dated 16th November, 1990. The relevant portion is extracted by omitting what is not necessary for the

purpose of considering the issue before us. They are as under:-

> "Subject: Recovery into the Drug prices Equalisation Account in respect of Betamethasone and its formulations.
>
> Dear Sirs,
>
> I am directed to refer to your letter dated the 17th September, 1990 on the above subject and to say that the liability of your company upto 25th August, 1987 has since been determined based on the available data. The details are as under:-
>
> (i) Bulk drugs sold to others
>
> (a) Attached statement at Annexure-I gives the details of your liability of Rs.23.62 lakhs in respect of the bulk drug.
>
> (ii) Formulations and bulk drug captively used.
>
> (b) The liability in respect of 16th packs of formulations has been determined at Rs.7121.03 lakhs as per details annexed.
>
> (c) Liability in respect of 8 packs of formulations have been worked out at Rs.33.53 lakhs subject to your company making available the details of the packs produced and sold during 12th May, 1981 and 30th June, 1981. The liability in respect of these 8 packs would be finalized after these details are received.
>
> 2. While determining the liability the prices charged by your company based on the stay granted by the Hon'ble Delhi High Court and the prices to which your company would have been entitled had the stay not been granted have been taken into consideration. The prices to which your

company was entitled to are shown in column 5 of the statement and these prices have been worked out by the Expert Body, namely, Bureau (sic.) of Industrial Costs and prices based on the price of the bulk drug as upheld by the High Court and other parameters like conversion cost, packing charges, packing materials excipients (sic.) etc. As prevalent in May, 1981, the norms of conversion cost and packing charges for formulations have also been upheld by the Hon'ble Supreme Court.

3. Liability in respect of two packs of formulations indicated at S.No.17 and 18 (sic.) would be communicated to you after the details of the price prevailing on 12th May, 1981 and the basis thereof are communicated to the Government.

4. The liability in respect of 6 packs of formulations would be finalized after the details of packs produced/sold during 12th May, 1981 to 30th June, 1981 are made available. It is brought to your notice once again that as already advised in this Ministry's letter of even number dated the 20th September, 1990 and as directed by the Hon'ble High Court vide its orders dated the 9th August, 1990 your company is still to make available the details in respect of bulk drug Betamathasone and its formulations after 25th August, 1987. Please expedite these details also so that your liability can be finalized for this period as well.

Yours faithfully,
Sd./-
(J.L. Sharma)
UNDER SECRETARY TO
THE GOVERNMENT OF INDIA"

44. Now let us see how the High Court has decided this issue. The Court after noticing elaborately the intent, object and the possible construction that could be placed on paras 3 to 9 and para 17 has observed that:

"Neither paras 3 to 9 nor para 17 of DPCO 1979 suggest that the amount to be deposited in DPEA had anything to do with the prices of the formulations which were being fixed in terms of paras 10 and 11 of the said order. Para 7(2) of the order, which speaks of utilization of bulk drugs in the formulations, makes it abundantly clear that the amount to be deposited into DPEA in this regard related only to the common selling price of bulk drug which was lower than the price allowed to him in the price of his formulations. As a natural consequence, therefore, the demand for the amount to be deposited in DPEA account could be based and calculated only on the basis of the prices of the bulk drugs consumed in the formulations and not on the basis of notional prices of formulations. The prices of the formulations, therefore, were not at all relevant for the purpose. *Thus the impugned demands, which were based on the formulations prices suffer from the vice of considering the formulations prices and not the quantity and the price of the bulk drugs consumed therein."* (Emphasis supplied)

45. In our view, the fallacy in the impugned judgment appears to be in not properly analyzing the clear meaning of the expressions used in para 7(2)(b) of DPCO 1979.

46. A plain reading of Para 7(2)(a) of the DPCO 1979 shows what can be directed by the Central Government to be deposited into DPEA by the manufacturer of bulk drugs and any formulations using those drugs or procured from outside, as in the present case. Firstly, Para 7(2)(a) applies to a manufacturer of formulations. The manufacturer must utilize in the formulation(s) any bulk drug. The bulk drug could be either from his own production or procured from any other sources. If the price of such bulk drugs is notified as lower than the price allowed to him in the price of his formulations, the Central Government may require the manufacturer of formulation the excess amount determined to be deposited into DPEA. Under

Para 7(2)(b), the Central Government may direct the manufacturer of formulations to sell the formulations at such prices as may be fixed by the Government.

47. The Central Government, while issuing the letters/ demand dated 18.06.1990 and 16.11.1990, has specifically bifurcated the differential amount that requires to be paid by the respondent-company on the bulk drugs and their formulations. In the letter, it is made clear that in view of the notification dated 20.11.1986, the respondent-company has to deposit into DPEA the difference between the retention price and pooled price for the sale of bulk drugs. Similarly, since the respondent-company manufactures drug formulations by captive consumption of the bulk drugs, the Central Government initially could not fix the retention price of the formulations in view of the interim orders passed by the High Court while admitting the writ petition filed by the respondent-company. After disposal of the writ petitions filed and in view of the specific liberty that was granted by the High Court in the petitions filed by the respondent-company, the Central Government directed the company to pay not only the difference amount payable for the price of bulk drugs but also those drugs which are utilized in their formulations over and above the prices fixed by the Central Government. In our view, since the para 7(2)(a) of DPCO 1979 does not admit a construction which the respondent-company suggests, it is difficult to hold that under para 7(2)(a) of DPCO 1979, the Central Government could issue demand on the basis of bulk drugs only and not on the basis of difference between the prices of bulk drugs and the prices of the formulations in which the company had used those bulk drugs.

48. Before we conclude, it is important to mention that the respondent company (and similar companies) not only manufacture bulk drugs but also use them for their drug formulations for its supply in retail vending and thereby, the ordinary consumer is burdened with a higher price than what they could have got at a lesser price. Since that is taken care

of in para 17 of DPCO 1979, it may not be necessary to lean towards the submissions made by learned counsel for the respondent-company.

49. In conclusion, we would only say that none of the submissions made by learned counsel for the respondent-company were worth accepting. Accordingly, we allow this appeal and set aside the order passed by the High Court and thereby, we confirm the demands raised by the Central Government. In the facts and circumstances of the case, we deem it proper that the parties will bear their own costs.

R.P. Appeal allowed.

THE DIRECTOR GENERAL, INDIAN COUNCIL FOR AGRICULTURAL RESEARCH & OTHERS
v.
D. SUNDARA RAJU
(Civil Appeal No. 2714 of 2005)

MARCH 30, 2011

[DALVEER BHANDARI AND DEEPAK VERMA, JJ.]

SERVICE LAW:

Career Advancement Scheme (formulated by Indian Council for Agricultural Research):

Para 2.4 – Agricultural Research Services – Senior Scientist – Promotion as Principal Scientist – Selection Committee prescribing 50 marks for viva voce out of total 100 marks – Officer securing total 49 marks not found fit – CAT quashed the order and directed consideration of officer for promotion – High Court held that Career Advancement Scheme did not sanction the procedure adopted by the Selection Committee – Held: Promotion to the post of Principal Scientist pertains to the "Career Advancement Scheme" – Norms, Rules and Guidelines which are employed while granting benefit of Career Advancement Scheme ought to be applied in the instant case – Allocation of 50% marks for interview was unjustified, particularly when the officer was not even disclosed that interview would also be held to evaluate suitability of the candidate – The procedure adopted by Selection Committee for evaluating the officer was totally arbitrary and contrary to the settled legal position – No interference with the judgment of High Court called for.

The respondent, a Senior Scientist in the Agricultural Research Services Cadre, was called upon to present

himself for assessment and interview for his promotion as Principal Scientist in terms of the Career Advancement Scheme. The respondent appeared before the Selection Committee, but he was found unfit as he secured only 49 marks out of 100 marks, the minimum qualifying marks being 60. The respondent filed an O.A before the Central Administrative Tribunal, which quashed the order of the appellant-authorities and directed them to consider the case of the respondent for promotion. The writ petition filed by the authorities was dismissed by the High Court holding that Career Advancement Scheme did not sanction the procedure which was adopted by the Selection Committee. Aggrieved, the authorities filed the appeal.

Dismissing the appeal, the Court

HELD: 1.1 No interference with the judgment of the High Court is called for the following reasons:

(A) Promotion to the post of Principal Scientist pertains to the "Career Advancement Scheme". Norms, Rules and Guidelines which are employed while granting the benefit of Career Advancement Scheme ought to be applied in the instant case.

(B) It is amply clear that the quinquennial assessment scheme for the ICAR/ARS Policies and Rules were: (a) for providing opportunities for the career advancement, irrespective of the occurrence of vacancies, through a system of assessment should lead to each scientist competing with his or her rather than with colleagues and to the acceptance of the principle that "all the rights accrue from a duty well done"; (b) to enable scientists to get the highest salary possible, within the system while remaining rooted to work in their respective discipline/ field, thereby eliminating both the undue importance attached in the past to research management policy and

the request for such positions purely for the advancement of salary; and (c) to link rights and responsibilities and instill through the five-year assessment system the conviction that dedicated and efficient discharge of responsibilities alone would be the means of securing professional advancement. [para 45-46] [114-G-H; 15-A-G]

1.2 The procedure evolved by the Selection Committee for evaluating the respondent was totally arbitrary and allocation of 50% marks for the interview was highly excessive and contrary to the settled legal position crystallized from a series of the judgment of this Court. The respondent was not disclosed by the appellant either that the interview would be held for evaluating personal or intellectual qualities that attribute a Scientist and that it shall carry 50% of the total marks. This is uncontroverted position. Had the appellants disclosed the method of evaluation the respondent may have challenged the same before participating in the selection process. The appellants themselves have found 50% marks for interview highly excessive, therefore, now the criterion has been changed from 50% to 10%. In this view of the matter, no fault can be found with the impugned judgment. [para 47,48 and 50-51] [115-G-H; 116-A-F]

K.A. Nagamani v. *Indian Airlines and Others* **2009 (5) SCR 89 = 2009 (5) SCC 515; and** *Kiran Gupta and Others* v. *State of U.P. and Others* **(2000) 7 SCC 719 – held inapplicable.**

Ashok Kumar Yadav & Others v. State of Haryana & Others **1985 (1) Suppl. SCR 657 = 1985 (4) SCC 417;** *Ajay Hasia and Others v. Khalid Mujib Sehravardi and Others* **1981 (2) SCR 79 = 1981 (1) SCC 722;** *Minor A. Peeriakaruppan v. Sobha Joseph* **1971 (2) SCR 430 = 1971 (1) SCC 38,** *Lila Dhar v. State of Rajasthan and Others* **1982**

(1) SCR 320 = 1981 (4) SCC 159, *Nishi Maghu & Others v. State of J&K & Others* **1980 (3) SCR 1253 = 1980 (4) SCC 95,** *Mohinder Sain Garg v. State of Punjab & Others* **1990 (3) Suppl. SCR 108 = 1991 (1) SCC 662,** *P. Mohanan Pillai v. State of Kerala & Others* **2007 (3) SCR 53 = 2007 (9) SCC 497;** ***Ashok alias Somanna Gowda and Another v. State of Karnataka*** **1991 (1) Suppl. SCR 493 = 1992 (1) SCC 28 - relied on.**

R. Chitralekha v. State of Mysore and Others **1964 AIR 1823 = 1964 SCR 368,** *Mehmood Alam Tariq v. State of Rajasthan* **1988 (1) Suppl. SCR 379 = 1988 (3) SCC 241- referred to.**

Dr. S.M. Ilyas and Others v. *Indian Council of Agricultural Research and Others* **1992 (2) Suppl. SCR 438 = 1993 (1) SCC 182 - cited.**

Case Law Reference:

1991 (1) Suppl. SCR 493	**relied on**	**para 12**
2009 (5) SCR 89	**held inapplicable**	**para 22**
(2000) 7 SCC 719	**held inapplicable**	**para 23**
1992 (2) Suppl. SCR 438	**cited**	**para 30**
1985 (1) Suppl. SCR 657	**relied on**	**para 32**
1982 (1) SCR 320	**relied on**	**para 33**
1981 (2) SCR 79	**relied on**	**para 35**
1971 (2) SCR 430	**relied on**	**para 36**
1964 SCR 368	**referred to**	**Para 38**
1980 (3) SCR 1253	**relied on**	**para 40**
1988 (1) Suppl. SCR 379	**referred to**	**para 41**
1990 (3) Suppl. SCR 108	**relied on**	**para 43**

2007 (3) SCR 53 relied on para 44

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2714 of 2005.

From the Judgment & Order dated 3.6.2004 of the High Court of Karnataka at Bangalore in WP No. 19516 of 2004.

Kush Chaturvedi, Perna Priyadarshni, Rohit Bhat (for Vikas Mehta) for the Appellants.

Manu Mridul, Anant K. Vatsya (for Surya Kant) for the Respondent.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. This appeal emanates from the judgment and order of the Division Bench of the High Court of Karnataka at Bangalore delivered in Writ Petition No. 19516 of 2004.

2. Brief facts which are relevant to dispose of this appeal are recapitulated as under:

3. The controversy in this appeal pertains to the promotion to the post of Principal Scientist under the "Career Advancement Scheme" formulated by the Indian Council for Agricultural Research (hereinafter referred to as 'ICAR'). There are two streams from which selections are made to the post of Principal Scientist: (i) Direct recruitment; and (ii) Promotion from the post of Senior Scientist on the basis of personal merit.

4. The ICAR had formulated the "Career Advancement Scheme" in consultation with the Department of Personnel & Training and Ministry of Finance, Government of India laying down guidelines for promotion of a Scientist from one grade to another in the Agricultural Research Services (ARS) cadre, which were made effective from 27.7.1998. The promotion of scientist to the next higher grade (Principal Scientist) is

independent of the occurrence of vacancies and is based only when the applicant secures the requisite merit.

5. The procedure for promotion to the post of Principal Scientist is contained in Para 2.4 of the Career Advancement Scheme. The relevant rule is set out as under:

> "In addition to the sanctioned posts of Principal Scientists as per cadre strength already fixed, which is to be filled through direct recruitment through All India advertisement, promotions will be made from posts of Senior Scientist to the posts of Principal Scientists after 8 years of service as Senior Scientist. This promotion will be personal to the Scientist who is promoted.
>
> A senior Scientist will be promoted to the post of Principal Scientist if he/she:
>
> i. has completed 8 years of service; and
>
> ii. he/she presents himself/herself before the Selection Committee constituted by ASRB with some of the following:
>
> (a) Self appraisal reports (required).
>
> (b) Research contribution/books/ articles/ research papers published.
>
> (c) Any other academic contributions. The best three written contributions of the Sr. Scientist (as defined by him/her) may be sent in advance to the experts to review before coming for the selection. The candidate should be asked to submit these in 3 sets with the application.
>
> (d) Seminars/conferences attended.
>
> (e) Contribution to teaching/academic

environment/institutional corporate life.

(f) Extensions and filed outreach activities."

6. A Selection Committee was constituted under the Career Advancement Scheme for considering eligibility of applicants for promotion from the post of Senior Scientist to Principal Scientist. The Selection Committee consisted of a Chairman, Agricultural Scientists Recruitment Board (hereinafter referred to as "ASRB"), Director General, ICAR or his nominee, three experts and the Director of the Institute of the applicant. For different disciplines, different Selection Committees were constituted with three experts from the relevant discipline so that the merit of the applicant could be comprehensively and accurately assessed. The said Selection Committee allocated marks for the assessment procedure for promotion as under:-

Research Publication/Achievement	30 marks
Recommendation of Superiors	20 marks
Personal Interview	50 marks

7. The minimum required marks to qualify for promotion to the post of Principal Scientist was 60 marks out of 100 marks. The candidates were accordingly assessed and the recommendation for promotion or otherwise was submitted to the Minister of Agriculture for his approval in his capacity as the President of ICAR.

8. The respondent is a Senior Scientist in the service of the ICAR at the National Research Centre for Cashew at Puttur, Karnataka. Upon the respondent submitting information as per the prescribed assessment proforma, the ASRB addressed a letter to the Respondent calling upon him to present himself for assessment and interview for the Career Advancement Scheme. Accordingly, the respondent appeared for an interview before Selection Committee on 3.5.2001. However,

the respondent secured only 49 marks out of 100 and was found unfit for promotion to the post of Principal Scientist. The recommendation of the Selection Committee was approved by the competent authority, i.e., the Union Minister for Agriculture. The respondent was accordingly intimated of his non-promotion as a Principal Scientist on 14.8.2001.

9. The respondent made representations to the appellant Institute for review of the decision of not promoting him, but, when the respondent did not get any relief from the appellant institute, he filed a case (original application) before the Central Administrative Tribunal, Madras Bench. The Tribunal clearly held that the ICAR had acted in an arbitrary manner to allocate 50% marks for a personal interview and on this ground alone the non-selection of the applicant ought to be set aside.

10. The Central Administrative Tribunal, Madras Bench quashed the order of the ICAR and the appellants were directed to consider the case of the respondent for promotion to the higher grade of a Principal Scientist with effect from 27.07.1998. The Tribunal also observed that the respondent would be entitled for notional fixation of pay but would not be entitled for arrears of back wages.

11. The appellants, aggrieved by the said order of the Tribunal filed a writ petition before the Karnataka High Court. The High Court observed that it is not in dispute that the respondent was entitled to be considered for promotion to the post of Principal Scientist under the Career Advancement Scheme. It was also not in dispute that he was invited for such consideration by the concerned authorities. The only question which, according to the High Court, fell for consideration was whether the claim of the respondent was considered was in consonance with the Scheme? The Selection Committee constituted by the appellant had devised a method of evaluation of the candidates according to which it had allocated 30 marks for research publication/achievement, 20 marks for recommendation of superiors and 50 marks for personal

interview out of a total of 100 marks.

12. The High Court held that the Career Advancement Scheme does not however sanction any such procedure. It does not refer to or even remotely indicate that an interview of the candidate can provide a basis for determining his entitlement to promotion. The High Court also observed that the Central Administrative Tribunal, Madras was justified in allowing the petition of the respondent. The High Court relied on a judgment of this Court in the case of *Ashok alias Somanna Gowda and Another v. State of Karnataka* (1992) 1 SCC 28 in which it has been laid down that 50% marks in the interview was excessive and rendered the process of selection arbitrary.

13. The High Court has also observed that the Central Administrative Tribunal, Bangalore, correctly came to the conclusion that the Scheme did not envisage holding of any interview.

14. The High Court also relied on para 2.4(ii) of the Scheme and observed that Senior Scientists are eligible to the post of Principal Scientist if they have completed eight years of service and if he/she presents himself/herself before the Selection Committee constituted by ASRB with the documents indicated therein. The fact that the eligible officer appears before the Selection Committee with the relevant documents does not necessarily imply that the process of evaluation of his merit has to be on the basis of an interview nor does it indicate that the weightage to the interview can go to the extent of 50% of the total marks. The High Court upheld the judgment of the Tribunal.

15. The appellants, aggrieved by the order of the Tribunal, as upheld by the Division Bench of the High Court, has preferred this appeal on the following grounds before this Court.

(A) Whether the Division Bench erred in holding that award of 50% of marks for interview was excessive and rendered the selection process arbitrary?

(B) Whether the inclusion of an interview process is a material irregularity that vitiated the selection process?

(C) Whether the Division Bench was justified in holding that the Career Advancement Scheme precluded the Selection Committee from adopting an appropriate method of evaluation?

(D) Whether a distinguished body of experts constituting the Selection Committee appointed under the Career Advancement Scheme had no power to assess and interview the applicants for promotion?

(E) Whether the High Court was justified in not appreciating that appointment to the post of a Principal Scientist was not on the basis of seniority but on the basis of merit alone through a process of assessment by a high powered Selection Committee.

(F) Whether, under the Career Advancement Scheme, the promotion to the post of a Principal Senior Scientist is merely upon the completion of 8 years of service or is based exclusively on the individual merit of the applicant?

(G) Whether the Central Administrative Tribunal, Bangalore was bound to follow an erroneous Order rendered by the Central Administrative Tribunal, Madras.

16. Learned counsel appearing for the appellants submitted that the Division Bench erred in directing the appellants to reconsider the case of the respondent as he had secured only 49 out of 100 in the selection process and was

not found fit for promotion to the post of Principal Scientist under the Career Advancement Scheme.

17. The impugned judgment was also challenged on the ground that the Division Bench ought to have appreciated that the Career Advancement Scheme provides for an interview procedure in para 2.4 (ii), where it states that "the applicant shall present himself/herself before the Selection Committee".

18. The appellants also submitted that the Division Bench has erred in holding that award of 50% of marks for interview was excessive and rendered the entire selection process arbitrary. The appellant further submitted that Division Bench erred in holding that the inclusion of an interview process is a material irregularity that vitiated the selection process.

19. The appellants further submitted that the Division Bench of the High Court ought to have appreciated that the post of Principal Scientist is a very senior post which requires many personal and intellectual qualities and attributes which can be evaluated only through a personal interview of the applicant.

20. The impugned judgment was also challenged on the ground that the Division Bench of the High Court ought to have appreciated that the weightage to be given for the interview procedure had been determined by a body of experts constituting the Selection Committee based on the post for which promotions were being considered.

21. Mr. Kush Chaturvedi, learned counsel appearing for the appellants submitted that the inclusion of an interview could not be treated as material irregularity that vitiated the entire selection process. Mr. Chaturvedi further submitted that the Division Bench seriously erred in holding that award of 50% of marks for interview was excessive and rendered the selection process arbitrary.

22. Mr. Chaturvedi also submitted that the interview Board consisted of academicians and they were justified in

formulating the criteria which should not be disturbed by the court. He submitted that according to the Career Advancement Scheme, the promotion to the post of Principal Scientist is not dependant merely on completion of 8 years of service. He placed reliance on the judgment of this court in *K.A. Nagamani v. Indian Airlines and Others* (2009) 5 SCC 515 to strengthen his submission. According to him, for the post of Upper Managerial cadre, allocation of 50% marks for interview cannot be termed as arbitrary. In this case, 25% marks were kept for viva voce which were not found to be excessive. This case has no application to the facts of the instant case because in the instant case, 50% marks have been kept for interview. This case does not support the case of the appellants in any manner.

23. Learned counsel for the appellants also placed reliance on the judgment of this court in *Kiran Gupta and Others v. State of U.P. and Others* (2000) 7 SCC 719. In this case, this court has taken the view that it is difficult to accept the omnibus contention that selection on the basis of viva voce only was arbitrary and illegal since allocation of 15% marks for the interview was not held to be arbitrary by this court, this case also provides no assistance to the appellants because in the instant case 50% marks have been kept for the interview.

24. Mr. Manu Mridul, the learned counsel for the respondent submitted that the Career Advancement Scheme did not envisage conducting of any interview for the eligible candidates and introduction of interview itself was arbitrary and against the Career Advancement Scheme.

25. He also submitted that the candidates were never informed that 50% marks would be allocated for interview. Therefore, there was no occasion for the respondent to have challenged the aspect of allocating marks for interview before his appearing for the interview.

26. He also contended that allocation of 50% marks for interview out of a total of 100 marks was highly excessive,

hence arbitrary. He submitted the allocation of 50% marks for interview is clearly contrary to a large number of judgments of this court.

27. Mr. Mridul further contended that the respondent was considered for selection to the post of Principal Scientist on the basis of his work and performance from 1985 to 1998. According to him, the nature, work, duties and responsibilities of a Senior Scientist and Principal Scientist are almost identical in nature, but in order to remove stagnation, the promotion is envisaged under the Career Advancement Scheme. He submitted that the stand of the respondent is fortified, reinforced and strengthened by the Career Advancement Scheme 2004 and 2005 of the appellants. According to the 'Information Handbook of Agricultural Scientists' Recruitment Board under Right to Information Act, 2005, the criteria for promotion is that the Board evaluates the contribution made by the concerned Scientist in academic research. The Board also evaluates the confidential reports for the last eight years while granting benefit of the scheme.

28. According to the procedure of the Career Advancement Scheme of 2004, the allocation of marks for personal interview has been reduced from 50% to 10% because the appellants themselves realized that allocation of 50% marks was highly excessive and in clear contravention to the series of judgments of this court.

29. He also submitted that in 2007, the Career Advancement Scheme has undergone a further change and for personal interview, 20% marks have been allocated. According to him, in any event, allocation of 50% marks was highly excessive and in contravention of the law declared by this court in a series of judgments.

30. Mr. Mridul fairly submitted that in exceptional cases if the nature of job is such then even 50% allocation of marks for interview could be justified. But, in the instant case, the

promotion to the post of Principal Scientist is primarily dependant on the length of service as Senior Scientist, publication and evaluation of confidential reports. The promotion to this post is granted predominantly to remove stagnation. For the selection to the post of Principal Scientist, by no stretch of imagination, 50% marks can be justified. He placed reliance on the judgment of this court in *Dr. S.M. Ilyas and Others v. Indian Council of Agricultural Research and Others* (1993) 1 SCC 182. In the Career Advancement Scheme, the seniority is the important criteria apart from the publication and the evaluation of the confidential reports. Therefore, there cannot be any justification in allocating 50% marks for interview.

31. Mr. Mrudil also argued that the appellants in their wisdom reduced the allocation of marks for interview from 50% to 10% to eliminate or reduce the arbitrariness for the subsequent selections for the post of Principal Scientist.

32. Learned counsel for the respondent, Mr. Mridul submitted that 50% marks allocated for interview were highly excessive and rendered the selection of the candidates arbitrary. He placed reliance on a judgment of this court in *Ashok Kumar Yadav & Others v. State of Haryana & Others* (1985) 4 SCC 417, wherein the Court observed as under:

> "..the object of any process of selection for entry into public service is to secure the best and the most suitable person for the job, avoiding patronage and favouritism. Selection based on merit, tested impartially and objectively, is the essential foundation of any useful and efficient public service. So open competitive examination has come to be accepted almost universally as the gateway to public services. But the question is how should the competitive examination be devised? The competitive examination may be based exclusively on written examination or it may be based exclusively on oral interview or it may be a mixture

of both. It is entirely for the Government to decide what kind of competitive examination would be appropriate in a given case. To quote the words of Chinnappa Reddy, J. "In the very nature of things it would not be within the province or even the competence of the Court and the Court would not venture into such exclusive thickets to discover ways out, when the matters are more appropriately left" to the wisdom of the experts. It is not for the Court to lay down whether interview test should be held at all or how many marks should be allowed for the interview test. Of course the marks must be minimal so as to avoid charges of arbitrariness, but not necessarily always. There may be posts and appointments where the only proper method of selection may be by a viva voce test. Even in the case of admission to higher degree courses, it may sometimes be necessary to allow a fairly high percentage of marks for the viva voce test. That is why rigid rules cannot be laid down in these matters by courts. The expert bodies are generally the best judges. The Government aided by experts in the field may appropriately decide to have a written examination followed by a viva voce test."

33. This Court further observed that the Court does not possess the necessary equipment and it would not be right for the Court to pronounce upon it, unless to use the words of Chinnappa Reddy, J. in *Lila Dhar v. State of Rajasthan and Others* (1981) 4 SCC 159 observed that the exaggerated weight has been given with proven or obvious oblique motives.

34. Mr. Mridul, learned counsel for the respondent submitted that the controversy is no longer *res integra*. According to him, a 4-Judge Bench of this Court in *Ashok Kumar Yadav & Others* (supra) has observed 22.2% marks of the total marks allocated for the viva voice test as infecting the selection process with the vice of arbitrariness.

35. In *Ashok Kumar Yadav (supra)*, the Court relied on earlier judgment of this Court in *Ajay Hasia and Others v. Khalid Mujib Sehravardi and Others* (1981) 1 SCC 722, wherein the Court took up the view that allocation of as high a percentage as 33.3% of the total marks for the viva voice test was beyond reasonable proportion and rendered the selection of the candidates arbitrary.

36. In *Minor A. Peeriakaruppan v. Sobha Joseph* (1971) 1 SCC 38, the Court observed that earmarking 75 marks out of 275 marks for interview as interview marks *prima facie* appears to be excessive. The Court observed that various researches conducted in other countries particularly in USA show that there is possibility of serious errors creeping in interviews made on haphazard basis. C.W. Valentine on "Psychology and its Bearing on Education" refers to the marks given to the same set of persons interviewed by two competent Boards and that is what is stated in his book:

> "The members of each board awarded a mark to each candidate and then he was discussed and an average mark agreed on.
>
> When the orders of merit for the two boards were compared it was found that the man placed first by Board A was put 13th by Board B when the man placed 1st by Board B was 11th with Board A."

37. In this case, the Court also observed that even when the interviews were conducted by impartial and competent persons on scientific lines very many uncertain factors like the initial nervousness on the part of some candidates, the mood in which the interviewer happens to be and the odd questions that may be put to the persons interviewed may all go to affect the result of the interview.

38. This Court in *R. Chitralekha v. State of Mysore and Others* AIR 1964 SC 1823 observed as under:-

"In the field of education there are divergent views as regards the mode of testing the capacity and calibre of students in the matter of admissions to colleges. Orthodox educationists stand by the marks obtained by a student in the annual examination. The modern trend of opinion insists upon other additional tests, such as interview, performance in extracurricular activities, personality test, psychiatric tests, *etc.* Obviously we are not in a position to judge which method is preferable or which test is the correct one. If there can be manipulation or dishonesty in allotting marks at interviews, there can equally be manipulation in the matter of awarding marks in the written examination. In the ultimate analysis, whatever method is adopted its success depends on the moral standards of the members constituting the selection committee and their sense of objectivity and devotion to duty. This criticism is more a reflection on the examiners than on the system itself. The scheme of selection, however, perfect it may be on paper, may be abused in practice. That it is capable of abuse is not a ground for quashing it. So long as the order lays down relevant objective criteria and entrusts the business of selection to qualified persons, this Court cannot obviously have any say in the matter."

39. In *Minor A. Peeriakaruppan* (supra), the Court referred to *Ajay Hasia's* case *(supra)* where the Court found that the allocation of more than 15 per cent of the total marks for the oral interview would be arbitrary and unreasonable and would be liable to be struck down as constitutionally invalid. The Court observed that the viva voce test conducted must be held to be fair, free from the charge of arbitrariness, reasonable and just.

40. In *Nishi Maghu & Others v. State of J&K & Others* (1980) 4 SCC 95, the Court observed that 50% marks out of total 150 marks allotted for interview were excessive.

41. In *Mehmood Alam Tariq v. State of Rajasthan* (1988)

3 SCC 241, the question involved was regarding the validity of certain provisions of the Rajasthan State and Subordinate Services (Direct Recruitment by Combined Competitive Examination) Rules, 1962, the Rajasthan Administrative Service Rules, 1954, the Rajasthan Forest Service Rules, 1962 which contained a provision special to the said three services and not applicable to other services, that candidates, other than those belonging to Scheduled Castes and Scheduled Tribes should secure a minimum of 33 per cent marks in the viva voce test. The rules further stipulated that the candidates for these services must also secure 50 per cent marks in the written examination, but that was not in the area of controversy. While dealing with the above questions a reference was made to cases *Ajay Hasia* (supra), *Lila Dhar* (supra) and *A.K. Yadav* (supra). It was observed as under:

"The much desired transformation from patronage to open competition is a later development, to which, now, all civilised governments profess commitment. However, though there is agreement in principle that there should be a search for the best talent particularly in relation to higher posts, however, as to the methods of assessment of efficiency, promise and aptitude, ideas and policies widely vary, though it has now come to be accepted that selection is an informed professional exercise which is best left to agencies independent of the services to which recruitment is made. The 'interview' is now an accepted aid to selection and is designed to give the selectors some evidence of the personality and character of the candidates. Macaulay had earlier clearly declared that a young man who in competition with his fellowmen of the same age had shown superiority in studies might well be regarded as having shown character also since he could not have prepared himself for the success attained without showing character in eschewing sensual pleasures. But the interview came to be recognised as an essential part of the process of selection on the belief that some qualities

necessary and useful to public servants which cannot be found out in a written test would be revealed in a viva voce examination. In justification of the value and utility of the viva voce, the committee on Class I examinations in Britain said:

> ...It is sometimes urged that a candidate, otherwise well qualified, may be prevented by nervousness from doing himself justice in viva voce. We are not sure that such lack of nervous control is not in itself a serious defect, nor that the presence of mind and nervous equipoise which enables a candidate to marshall all of his resources in such conditions is not a valuable quality. Further, there are undoubtedly some candidates who can never do themselves justice in written examinations, just as there are others who under the excitement of written competition do better than on ordinary occasions.... We consider that the viva voce can be made a test of the candidate's alertness, intelligence and intellectual outlook, and as such is better than any other....

42. As to the promise as well as the limitations of the viva voce, Herman Finer says:

> If we really care about the efficiency of the civil service as an instrument of government, rather than as a heaven sent opportunity to find careers for our brilliant students, these principles should be adopted. The interview should last at least half an hour on each of the two separate occasions. It should be also entirely devoted to a discussion ranging over the academic interests of the candidate as shown in his examination syllabus, and a short verbal report could be required on the subject, the scope of which would be announced at the interview. As now, the interview should be a supplementary test and not

> a decisive selective test. The interviewing board should include a business administrator and a university administrator. The interview should come after and not before the written examination, and if this means some inconvenience to candidates and examiners, then they must remember that they are helping to select the government of a great State, and a little inconvenience is not to be weighed against such a public duty....""

43. In *Mohinder Sain Garg v. State of Punjab & Others* (1991) 1 SCC 662, allocation of 25 per cent of total marks for viva voce test in selection was held arbitrary and excessive.

44. In *P. Mohanan Pillai v. State of Kerala & Others* (2007) 9 SCC 497, 50% marks were fixed for the interview. The Court observed as under:

> "16. In this case allocation of marks for interview was in fact misused. It not only contravened the ratio laid down by this Court in *Ashok Kumar Yadav* and subsequent cases, but in the facts and circumstances of the case, it is reasonable to draw an inference of favouritism. The power in this case has been used by the appointing authority for unauthorised purpose. When a power is exercised for an unauthorised purpose, the same would amount to malice in law. (*See: Govt. Branch Press v. D.B. Belliappa* (1979) 1 SCC 477, *Punjab SEB Ltd. v. Zora Singh* (2005) 6 SCC 776 and *K.K. Bhalla v. State of M.P* (2006) 3 SCC 581)."

45. We have heard the learned counsel for the parties at length and have carefully perused the impugned judgment and the orders of the Tribunal.

46. In our considered view, no interference is called for, on account of following reasons:-

(A) Promotion to the post of Principal Scientist

pertains to the "Career Advancement Scheme". Norms, Rules and Guidelines which are employed while granting the benefit of Career Advancement Scheme ought to be applied in the instant case.

(B) It is amply clear that the quinquennial assessment scheme for the ICAR/ARS Policies and Rules were-

(a) for providing opportunities for the career advancement, irrespective of the occurrence of vacancies, through a system of assessment should lead to each scientist competing with his or her rather than with colleagues and to the acceptance of the principle the "all the rights accrue from a duty well done".

(b) Enable scientists to get the highest salary possible, within the system while remaining rooted to work in their respective discipline/ field, thereby eliminating both the undue importance attached in the past to research management policy and the request for such positions purely for the advancement of salary.

(c) Link rights and responsibilities and instill through the five-year assessment system the conviction that dedicated and efficient discharge of responsibilities alone would be the means of securing professional advancement.

47. The respondent was not disclosed by the appellant either that the interview would be held for evaluating personal or intellectual qualities that attribute a Scientist and that it shall carry 50% of the total marks. This is uncontroverted position.

Had the appellants disclosed the method of evaluation the respondent may have challenged the same before participating in the selection process.

48. No fault can be found in the impugned judgment in view of the legal position which emerges after proper scrutiny of following cases of this Court, namely, *Ashok Kumar Yadav* (supra), *Ajay Hasia* (supra), *Lila Dhar* (supra) and *Minor A. Peeriakaruppan* (supra). 50% marks allocated for the interview were highly excessive for the post of a Principal Scientist and contrary to the settled legal position crystallized from a series of the judgments of this court.

49. The appellants were totally unjustified in allocating 50% marks for the interview particularly when the appellants did not even disclose to the respondent that the interview would also be held to evaluate suitability of the candidate for the said post.

50. The procedure evolved by the Selection Committee for evaluating the respondent was totally arbitrary and contrary to the settled legal position.

51. The appellants themselves have found 50% marks for interview highly excessive, therefore, now the criterion has been changed from 50% to 10%. This is indicative of the fact that good sense had ultimately dawned on the appellants.

52. The appeal is totally devoid of any merit and is accordingly dismissed with costs which are quantified as 50,000/-. The costs to be paid to the respondent within four weeks.

R.P. Appeal dismissed.

SHINDO ALIAS SAWINDER KAUR AND ANR.
v.
STATE OF PUNJAB
(Criminal Appeal No. 1902 of 2010)

MARCH 31, 2011

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

Penal Code, 1860: ss.304B, 498A – Dowry death – Allegation that sister-in-law and mother-in-law of the victim-deceased poured kerosene on her and lit fire as she could not satisfy their demand for dowry – Dying declarations recorded by the police officer and the Magistrate – Trial court did not find dying declarations reliable for the reason that the deceased had suffered 100% burn injuries and would not have been in a position to give dying declarations – Order of acquittal – High Court endorsed the view of trial court that both the dying declarations were not reliable, however, relying on the evidence of father of the deceased held that the demand for dowry soon before the death had been made and as the death was unnatural, the ingredients of s.304B were spelt against the accused – Conviction – On appeal, held: In statement made u/s.161, Cr.P.C., the father of the deceased admitted that allegation of dowry demand was not made by him – Improvement made in his evidence in court clearly spelt out a case of doubt with regard to the veracity of his evidence – There was no reference whatsoever to the accused-appellants either to demand of dowry or their involvement in any manner – The doctor who gave fitness certificate to the deceased for making statement was not cited as a prosecution witness – The evidence of the doctor (who gave post mortem report) was general in nature with regard to the capacity of 100% burnt victim to make a statement – No doubt, death was unnatural and had taken place within

seven years of the marriage but the third ingredient of dowry demand soon before the death was not proved – In this view of the matter, the presumption u/s.113B of the Evidence Act could not be raised – Conviction set aside – Evidence Act, 1872 – s.113B.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1902 of 2010.

From the Judgment & Order dated 17.2.2010 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 394-DBA of 2011.

N. Rai, Tara Chandra Shrama and Neelam Sharma for the Appellants.

Kuldip Singh for the Respondent.

The following Order of the Court was delivered

O R D E R

This appeal arises out of the following facts:

On the 19th March, 1999 ASI Gurmit Singh posted at police station, Mehta received information from the Guru Nanak Dev Hospital, Amritsar to the effect that one Balbir Kaur was lying admitted in the hospital with severe burn injuries. The police officer rushed to the hospital at about 8.15 p.m. and found her lying admitted in the 5th Surgical Ward. An application was thereafter moved by the police officer seeking the opinion of the doctor regarding her fitness to make a statement as her condition was critical. The ASI then went on to record the statement (Ext.PC). In her statement Balbir Kaur stated that she had been married with Jarnail Singh about three years prior to the date of the incident and two children had been born from the marriage and that during the course of the deliberations before the marriage and even thereafter several articles of dowry had been given to satisfy the demands of the

two accused Shindo-her mother-in-law and Paramjit Kaur-her married sister-in-law. She further stated that on account of the harassment meted out to her by the two accused an additional sum of rupees one lakh had been obtained by her from her father and handed over to them. She further went on to say that at about 2.20 p.m. on that date the two accused who were present along with her in the house had asked her to bring more money from her parents but she had replied that as her father had already given sufficient dowry as per his status nothing more would be brought by her and this had apparently annoyed the accused and whereas Shindo had poured kerosene oil on her, Paramjit Kaur had set her alight causing severe burn injuries. She further stated that on receiving information about the happening, her husband Jarnail Singh had rushed back from his shop and after arranging a vehicle had taken her to Amritsar and had got her admitted to the hospital. On the very next day i.e. on the 20th March, 1999 Ajit Singh (PW.2) Balbir Kaur's father, moved an application (Ext. P.H.) requesting the Chief Judicial Magistrate, Amritsar to record the statement of his daughter as the police was not doing the necessary investigations. The CJM directed the duty Magistrate to do the needful whereupon the Judicial Magistrate, Ist Class, recorded another statement of Balbir Kaur in the hospital after obtaining a certificate of fitness from Dr. Rahul Gupta, the attending doctor. In this statement she gave almost the same details as in the statement made to the ASI. Balbir Kaur died on the 23rd march 1999 and a case under Sections 304-B and 498-A was registered. On the completion of the investigation a charge under Section 302/34 and in the alternative 304-B/34 read with Section 498-A of the IPC was framed against the two accused. The Trial Court in the Course of an elaborate judgment observed that the two dying declarations, one made by the ASI, and another to the Judicial Magistrate could not be relied upon, primarily for the reason that Balbir Kaur was in a very serious condition with 100% burn injuries and would not have been able to give a dying declaration to the ASI. The second dying declaration was rejected as well on the additional ground that

Dr. Rahul Gupta who had given the endorsement of her fitness had not even been cited as a prosecution witness during the trial. The trial Judge also rejected the evidence with regard to the demand of dowry of PW.2 Ajit Singh, as it was brought out during the course of the cross examination that in his statement under Sec.161 Cr.P.C. he had not referred to any such demands having been made by the accused. The Trial Court accordingly acquitted both the accused.

An appeal was thereafter taken by the State to the Punjab and Haryana High Court. The High Court has endorsed the opinion of the Trial Court that both the dying declarations deserved to be rejected. However, the High Court relying on the evidence of PW.2, held that demands for dowry soon before the death had indeed been made and that some parts of two dying declarations supported the allegations of such demands and as the death was undoubtedly unnatural the ingredients of Section 304-B were spelt out against the accused. The judgment of the Trial Court was accordingly reversed and the accused were convicted under Section 304-B of the IPC and 498-A of the IPC and sentenced to imprisonment for seven years and under 498-A to two years with a fine of Rs.5000/- in default, to further undergo rigorous imprisonment for a period of six months, both the sentences to run concurrently. This appeal has been filed challenging the order of the High Court.

During the course of the hearing today Mr. Nagender Rai, the learned senior counsel for the appellant, has argued that in the light of the fact that the dying declarations had been rejected by both the Courts the only other evidence if at all was the statement of PW.2 Ajit Singh and as his evidence pertaining to the demands of dowry was uncertain his statement could not be relied upon. He has also taken us to the evidence of PW.2 Ajit Singh and we have gone through the same very carefully. In his examination in chief he did refer to the fact that demands for dowry had been made and that Balbir Kaur, his daughter, had been harassed on that account. However, he was

confronted with his statement under Section 161 of the Cr.P.C. and has forced to admit that no such demand had been referred to in the said statement. We find that the improvements made by PW.2 Ajit Singh in his evidence in Court clearly spells out a case of doubt with regard to the veracity of his evidence. It is also extremely significant that in the applications Exh. PH(2) and PH(3) dated 20th March, 1999 which he had had made before the CJM requesting that the the dying declaration of his daughter be recorded, he had referred to the fact that the demands for dowry had been made by her husband Jarnail Singh and he was the one to have set her alight. We find that there is no reference whatsoever to the appellants before us either to the demands of dowry or their involvement in any manner.

Mr. Kuldip Singh, the learned State counsel has however argued that the dying declarations particularly the one recorded by the Magistrate required to be accepted. He has pointed out that though Dr. Rahul Gupta had not been cited as a witness but from the evidence of the Dr.Jagdish Singh Gill(Pw.1) who had conducted the post-mortem examination, it was clear that a person with 100% burn injuries could also make a lucid statement and as such it was apparent that Balbir Kaur had been in a fit condition to make a statement. We see from the evidence of PW.1 that his evidence was general in nature with regard to the capacity of a person suffering from 100% burn injuries to make a statement. In the case before us, however, Dr. Rahul Gupta had given a positive opinion that she was in a fit condition to make a statement but he was not even cited as a prosecution witness. Both the Courts have therefore found that the two dying declarations were not trustworthy or capable of reliance.

We also notice that the High Court was dealing with an appeal against acquittal. Undoubtedly in a case of a dowry death under Section 304-B, a presumption of Sec.113-B does arise against the accused. However, the presumption is

relateable to the fact that the prosecution must first spell out the ingredients of the offence and then only can a presumption arise. In the present case we find that the death was an unnatural one and had taken place within seven years of the marriage but the third ingredient that any demand for dowry had been made soon before the death has not been proved. In this view of the matter the presumption under Section. 113-B of the evidence cannot be raised. We accordingly allow this appeal; set aside the judgment/order of the High Court.

The appellants are in custody; they shall be released forthwith if not required in any other case.

D.G. Appeal allowed.

STATE OF U.P.
v.
PREETAM & ORS.
(Criminal Appeal No. 506 of 2006)

MARCH 31, 2011

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

Penal Code, 1860 – s. 302/149, s. 307/149 and s. 323/149 – Armed accused chased two persons and beat them to death – Trial court convicting the accused-respondents under the provisions of Penal Code – However, High Court acquitted all the respondents – Interference with – Held: Not called for – The cumulative effect of the infirmities in the prosecution case and the probabilities of the plea of self defence renders the prosecution case doubtful – Conclusions reached by the High Court cannot be said to be either perverse or based on no evidence – Thus, the High Court recorded plausible as well as probable conclusion – Respondents entitled to benefit of doubt.

According to the prosecution, respondent Nos. 1-5, armed with axes and lathis chased two persons and beat them to death. On hearing the voice of the victims, PW1 and his brother-PW2 reached the place of the incident and were also assaulted. They suffered simple injuries. Other witnesses also reached the place of occurrence. PW1 lodged an FIR the next day. The respondents also sustained minor injuries. The prosecution witnesses were examined. PW4 and PW5 were declared hostile. The trial court convicted the respondents under the provisions of the Penal Code and sentenced accordingly. The High Court set aside the order of conviction and acquitted all the respondents. Therefore, the appellant-State filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1 On a thorough re-examination of the evidence, the High Court discarded the evidence of each witness. The High Court disbelieved the prosecution story as projected through PW1. He had stated that 'G' and 'C' had engaged in a "marpeet" with 'P' at place 'DH'. Both sides had assaulted each other. 'G' and 'C' had run towards the village. They were followed upto the field of 'H' by the respondents and were assaulted. This alleged incident at place 'DH' was sought to be proved by PW3. However, the High Court disbelieved her evidence on the ground that she was unlikely to be present at the scene of the incident. Her name did not figure in the FIR. She had just supported her father and uncle entirely. She had improved her version; which did not even tally with the version given by the injured, when they were examined. Similarly, the High Court noticed the prosecution version that 'G' and 'C' have been assaulted by a number of persons. They were supposed to have been assaulted by three of the respondents, who were armed with axes. Others were using lathis. But the postmortem report shows that none of the deceased had suffered any injuries which could have been caused by lathis. Therefore, the High Court concluded that the ocular version has been contradicted by the medical evidence. [Para 15] [133-D-H]

1.2. The High Court noticed that there seems to be no plausible explanation about the delay in registration of the FIR. The conclusion reached by the High Court is that there was a delay of 17 hours between the alleged occurrence and the registration of the FIR. The only explanation given is that due to the fear of the respondents, the family of the complainants kept sitting near the dead body. They did not even call for a doctor or medical assistance. The High Court disbelieved the sequence of events leading to the registration of the FIR.

It is noticed that according to PW1, the Chowkidar of the village had arrived at the spot soon after the incident. Even his help was not taken for the registration of the FIR. Noticing the technical terminology used in the FIR, the High Court expressed the opinion that FIR was not scribed by the rustic villager 'PN'. It was scribed by a professional, PW 7. It is further noticed that even though PW3 was stated to be the only witness to prove as to how the fight originated and where, yet her name was not mentioned in the FIR. On the other hand, the two ladies, daughter of the informant and wife of 'B'-PW2, were withheld by the prosecution though according to the FIR, they had witnessed the incident that took place in the field of 'H'. The prosecution also withheld 'T'-PW 5 and 'J', whose names had also been mentioned in the FIR. The High Court, taking serious notice of the manipulations and modulations doubted the authenticity of the version given by PW3. It is noticed by the High Court that even the most independent and important witness in the chain, PW4, was in fact declared hostile by the prosecution. Similarly, the last witness namely, PW5, who completes the chain, was also declared hostile. It becomes evident that the prosecution version was not proved beyond reasonable doubt. [Para 16] [134-A-G]

1.3. Coming to the defence version, the High Court held that the incident might have initially happened at 'DH'. At that time, the parties had been separated. After sometime, the second incident occurred when the prosecution party tried to graze their cattle in the field of respondent No.2 forcibly. When he objected, they started beating him up. On the alarm being raised by 'KS', 'P' 'M' etc. came to the spot armed with axes. The High Court also disbelieved the version given by PW1 that two deceased had run towards their village. This version is disbelieved as the prosecution has failed to bring any

evidence to show that H's field falls on the way to the village. [Para 17] [134-H; 135-A-B]

1.4. In such circumstances, the High Court has held that the respondents have established their plea of self defence. The High Court ultimately concluded that the cumulative effect of all the infirmities of the prosecution and the probabilities of the plea of self defence renders the case put forward by the prosecution doubtful. In such circumstances, the appeal of the respondents was allowed and they were acquitted. [Para 18] [135-C-D]

1.5. The conclusions reached by the High Court cannot be said to be either perverse or based on no evidence. The High Court has recorded plausible as well as probable conclusion. Therefore, the respondents were clearly entitled to the benefit of doubt and have been rightly acquitted. Thus there is no reason to interfere with the judgment of the High Court. [Paras 19 and 20] [135-D-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 506 of 2006.

From the Judgment & Order dated 23.3.2004 of the High Court of Judicature at Allahabad in Criminal Appeal No. 577 of 1981.

T.N. Singh, S.K. Dwivedi, Rajeev Dubey, Kamlendra Mishra for the Appellant.

Anis Ahmad Khan, Shoaib Ahmad Khan for the Respondents.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. The present appeal is directed by the State of U.P. against the final order and judgment dated 23rd March, 2004 passed by the High Court

of Judicature at Allahabad in Criminal Appeal No. 577 of 1981 whereby the High Court allowed the criminal appeal by setting aside the order of conviction recorded by the trial court against the respondents.

2. We may now briefly note the background facts, necessary for the adjudication of the present matter. It is the case of the prosecution that on 20th August, 1977 at around 3.30 p.m., Gulab and his nephew Chhatrapal were grazing their cattle in Dhadhai Haar. Preetam (hereinafter referred to as 'respondent No.1'), who is a collateral of the above two, came there and asked Chhatrapal and Gulab, as to why they were grazing their cattle in his field. Chhatrapal and Gulab told him that they were not grazing in his field. Respondent No. 1 then abused and started beating them. Chhatrapal and Gulab retaliated and started beating Preetam. On an alarm raised by respondent No. 1, his family members, who were present in the vicinity doing work in their fields, namely Dilli, Tutti, Mukundi, Karan Singh, Balli, Katti, Hari Singh, Baura, Thakurdas and Siya Brahims came running to his rescue. They were armed with *kulharis* and lathis.

3. Respondent No. 1, Karan Singh (hereinafter referred to as 'respondent No. 2') and Mukundi (hereinafter referred to as 'respondent No. 3') were armed with axes and Katti alias Hari Singh (hereinafter referred to as 'respondent No. 4') and Tutti alias Babu Lal (hereinafter referred to as 'respondent No. 5') were armed with lathis. On seeing them, Chhatrapal and Gulab, due to the fear of the respondents, ran towards the village Abadi. They were prevented from reaching their house by the respondents. They were encircled in the field of Hirwa, which was in the Thakur Baba Har. In the field, they were assaulted by respondent Nos. 1, 2 and 3 and seven other accused persons with axes and lathis. On hearing the voice of Chhatrapal and Gulab, informant (PW1) and his brother, Bahadur (PW2) rushed to save them. They were ploughing their fields in the near by ground. On reaching the spot of the incident,

they were also assaulted. Some other witnesses also arrived at the spot of occurrence on hearing the alarm raised by Punna, PW1 and Bahadur, PW2. They include his daughter Lachchi and Sunkiya, wife of his brother Bahadur. After the assault, the respondents ran away towards the village. Gulab and Chhatrapal were lying dead in a pool of blood in the field of Hirwa. They had suffered axe and lathi injuries. Due to rain and fear of the respondents, they did not go to the police station that day. The FIR was lodged on 21st August, 1977 at 8.30 a.m. by Punna, PW1. The distance between the police station and the place of occurrence was 5 miles.

4. On the prosecution side, apart from the two deceased, Punna, PW1 suffered only blunt object injuries. Bahadur, PW2 had suffered an incised wound 2 cm x 5 cm muscle deep at the border of the right mandibular angle 4 cm, below right ear. These injuries were medically examined by PW6, Dr. R.S. Mishra on 21st August, 1977 between 10.30 and 11.30 a.m. He had proved the injury reports of Punna and Bahadur. A perusal of his statement shows that none of the injuries were grievous in nature. No X-Ray report or any other supplementary reports were placed on record. The injuries were apparently simple.

5. The postmortem examination on the body of the two deceased, Gulab and Chhatrapal was conducted by PW8, Dr. V.D. Mishra. In his report, he stated that there were three incised wounds on the body of Chhatrapal, two of them being on head, one covered right side face, lower part of the right ear and part of neck and the other on the left side of head 12 cm above the left ear. In both the injuries underlying bones were cut. The third injury was on buttock. In the opinion of the doctor, cause of death was due to shock and hemorrhage as a result of injuries No. 1 and 2.

6. The postmortem examination of deceased Gulab took place at 2.45 p.m. on 22nd August, 1977 and was conducted by PW8, Dr. V.D. Mishra. Three incised wounds were also

found in the body of Gulab, one on the upper side of head 10 cm above from left ear, underlying bone was found cut and the second and third incised wounds were on the left side head. The third injury was 2 cm above injury No. 2. The doctor then stated that all three injuries were on his skull. The cause of death was shock and hemorrhage due to the above injuries.

7. The prosecution in support of its case examined five eye witnesses. PW1, Punna and PW2 Bahadur both were injured witnesses. PW3, Kumari Pramod was daughter of PW2. The fourth witness was Kunwar, PW4, he was declared hostile by the prosecution. PW5, Thakur Das alias Munna too turned hostile and did not support the prosecution case. The other witnesses are PW7, Ram Swaroop, the scribe of the report, PW6, Dr. R.S. Mishra, who examined the injuries of the prosecution witnesses and PW8, Dr. V.D. Mishra who performed the autopsy of dead bodies.

8. On the other hand, respondents also sustained minor injuries. The injuries suffered by them were of blunt object. Preetam Singh, respondent No. 1 suffered two lacerated wounds, one on the left elbow joint and the other on the left side of the segital suture. Other injuries were on the left ring finger at the level of second phalangial joint and on the left shoulder joint. Hari Singh, respondent No. 4 had suffered only an abrasion on the first phalanx of the right thumb. Karan Singh, respondent No. 2 had a contusion vertically on the left side of the back and another contusion horizontally at the level of the inferior angle of the left scapula, abrasion circular in the radius of .5 cm on the outer aspect of the left shoulder joint, contusion at the outer aspect of the left shoulder joint and lateral wound, bone deep, on the right parietal protuberance. Injury No. 5 was on the vitalo part of his person. Mukundi, respondent No. 3 had three contusions, on the right shoulder joint, right side of mid neck and dorsal surface of the right palm. Babu Lal, respondent No. 5 suffered one lacerated wound and a contusion. The lacerated wound was skin deep at the level of the left temporo mandibular

joint and contusion with swelling on the dorsal surface of the first phalanx of left thumb. All the injured respondents were examined on the same night, i.e., 20th August, 1977 between 9.00 p.m. and 10.15 p.m. All these injuries were suffered from a blunt object.

9. Subsequently, the charge sheet was filed by the investigation officer, Bhagwan Singh, PW9 and respondents were put on trial. The trial court vide its judgment dated 24th February, 1981 convicted all the respondents as follows:

" ORDER

Accused Preetam, Karan, Mukundi, Katti alias Hari Singh and Tutti alias Babu Lal are held guilty of the offence punishable under Section 302 read with Section 149 IPC for committing murder of Gulab and Chhatrapal. Accused Preetam and Mukundi are further held guilty of the offence punishable under Section 307 IPC. Accused Karan Singh, Tutti and Katti are further held guilty of the offence punishable under Section 307 read with Section 149 IPC.

The Preetam, Karan, Mukundi, Katti and Tutti are also held guilty of the offence punishable under Section 323 read with Section 149 IPC. In view of above, I award no sentence under Section 148 and 147 IPC.

Accused Baura alias Drigpal, Siyaram, Thakkoo alias Thakurdas and Balli alias Baladin are held not guilty of the offences with which they stand charged and are acquitted. Their bail bonds are discharged.

Accused Dillipat is dead and the case against him abates.

Sd/
(B.N. Misra)
Addl. Sessions Judge,
Hamirpur,
24.02.1981

SENTENCE

I have heard the learned counsel for accused Preetam, Karan, Mukundi, Katti alias Hari Singh and Tutti alias Babu Lal on the questions of sentence.

I have found all these five accused guilty of the offence punishable under Section 302 read with Section 149 IPC. The only punishment provided for this offence is death sentence or imprisonment for life. Hence, I award these five accused a sentence of imprisonment for life. These accused shall undergo imprisonment for life for the offence punishable under Section 302 read with Section 149 IPC.

I further award sentence of seven years R.I. to accused Preetam and Mukundi under Section 307 IPC and two years R.I. to accused Karan Singh, Tutti and Katti under Section 307 read with Section 149 IPC.

I further award sentence of six months R.I. to accused Preetam, Karan Singh, Mukundi, Katti and Tutti under Section 323 read with Section 149 IPC.

All the sentences shall run concurrently.

All the five accused be taken into custody to serve out the sentences awarded to them. The bail bonds are cancelled.

Sd/
(B.N. Misra)
Addl. Sessions Judge,
Hamirpur,
24.02.1981"

10. The High Court, in appeal, vide its judgment and order dated 23rd March, 2004 set aside the order of conviction recorded by the trial court and acquitted all the respondents. Hence the present appeal is filed by the State before us.

11. We have heard the learned counsel for both parties.

The learned counsel appearing on behalf of State, Mr. T.N. Singh submits that the High Court was not correct in holding that respondents did not exceed the right of private defence. The injuries suffered by respondents are not at all proportionate and reasonable as compared to the injuries sustained by the deceased. He further submits that evidence of PW1 and PW2 clearly show that they had only 'painas' in their hands when they had come to rescue of the two deceased.

12. Learned counsel further submits that the High Court was not right in holding that prosecution had suppressed the genesis of the crime. The fact that two persons lost their lives and two got injured clearly shows that the respondents even if they acted in self defence, exceeded it. The High Court also did not give any valid reasons for such assumptions. The injuries suffered by respondents were simple in nature and were inflicted by some blunt object whereas on the other hand, they had mercilessly attacked and killed two innocent persons with axes. The evidence of PW1 shows that the respondents were the aggressors and hence cannot take the plea of self defence. From his deposition, it is also clear that two deceased were chased by the respondents and were beaten to death and, therefore, right of private defence does not arise at all.

13. On the other hand, Mr. Anis Ahmad Khan, learned counsel appearing on behalf of the respondents submits that the FIR itself lays the foundation of self defence. PW1 has categorically stated in the FIR that the Chhatarpal and Gulab had first beaten Preetam, i.e., respondent No.1 and on the alarm raised by him, other respondents had come to save him.

14. He further submits that in fact there is no credible evidence to show as to how the original fight had started between Gulab and Chhatrapal on the one side and Preetam on the other. According to the learned counsel, the High Court has correctly discarded the evidence of the prosecution witnesses as the witnesses have successively made improvements in the prosecution version. According to the

learned counsel, the place of occurrence is not the one suggested by the prosecution, but was the field belonging to the respondents. The witnesses examined by the prosecution had been working in their own field, a long distance away, which would have made it impossible for them to witness the incident. He further submits that the prosecution has miserably failed to explain the injuries suffered by the respondents. Learned counsel further submitted that the prosecution had deliberately introduced a false witness namely Kumari Pramod, PW3. She had been brought in merely to support the version given by her father Bahadur, PW2.

15. We have considered the submissions made by the learned counsel. On a thorough reexamination of the evidence, the High Court discarded the evidence of each witness. The High Court disbelieved the prosecution story as projected through PW1, Punna. He had stated that Gulab and Chhatrapal had engaged in a "*marpeet*" with Preetam in Dhadhai Haar. Both sides had assaulted each other. Gulab and Chhatrapal had run towards the village. They were followed up to the field of Hirwa by the respondents and were assaulted. This alleged incident in Dhadhai Haar was sought to be proved by PW3, Kumari Pramod. However, the High Court disbelieved her evidence on the ground that she was unlikely to be present at the scene of the incident. Her name did not figure in the FIR. She had just supported her father and uncle entirely. She had improved her version; which did not even tally with the version given by the injured, when they were examined. Similarly, the High Court noticed the prosecution version that Gulab and Chhatrapal have been assaulted by a number of persons. They were supposed to have been assaulted by three of the respondents, who were armed with axes. Others were using *lathis*. But the postmortem report shows that none of the deceased had suffered any injuries which could have been caused by *lathis*. The High Court, therefore, concluded that the ocular version has been contradicted by the medical evidence.

16. The High Court, thereafter, notices that there seems to be no plausible explanation about the delay in registration of the FIR. The conclusion reached by the High Court is that there was a delay of 17 hours between the alleged occurrence and the registration of the FIR. The only explanation given is that due to the fear of the respondents, the family of the complainants kept sitting near the dead body. They did not even call for a doctor or medical assistance. The High Court disbelieved the sequence of events leading to the registration of the FIR. It is noticed that according to PW1, the Chowkidar of the village had arrived at the spot soon after the incident. Even his help was not taken for the registration of the FIR. Noticing the technical terminology used in the FIR, the High Court has expressed the opinion that it has not been scribed by the rustic villager Punna. It was scribed by a professional, Ram Swaroop, PW7. It is further noticed that even though PW3 was stated to be the only witness to prove as to how the "*marpeet*" (fight) originated and where, yet her name was not mentioned in the FIR. On the other hand, the two ladies (daughter of the informant and wife of Bahadur, PW2) were withheld by the prosecution though according to the FIR, they had witnessed the incident that took place in the field of Hirwa. The prosecution also withheld Thakur Baba and Jageshwar, whose names had also been mentioned in the FIR. The High Court, taking serious notice of the manipulations and modulations doubted the authenticity of the version given by PW3. It is noticed by the High Court that even the most independent and important witness in the chain, PW4, Kunwar was in fact declared hostile by the prosecution. Similarly, the last witness namely, Thakur Das, PW5, who completes the chain, was also declared hostile. From the above, it becomes evident that the prosecution version was not proved beyond reasonable doubt.

17. Coming to the defence version, the High Court has held that the incident might have initially happened at Dhadhai Haar. At that time, the parties had been separated. After sometime, the second incident occurred when the prosecution party tried

to graze their cattle in the field of Karan Singh, respondent No.2 forcibly. When he objected, they started beating him up. On the alarm being raised by Karan Singh, Preetam, Mukundi etc. came to the spot armed with axes. The High Court also disbelieved the version given by PW1 that two deceased had run towards their village. This version is disbelieved as the prosecution has failed to bring any evidence to show that Hirwa's field falls on the way to the village.

18. In such circumstances, the High Court has held that the respondents have established their plea of self defence. The High Court ultimately concluded that the cumulative effect of all the infirmities of the prosecution and the probabilities of the plea of self defence renders the case put forward by the prosecution doubtful. In such circumstances, the appeal of the respondents was allowed and they were acquitted.

19. We are of the considered opinion that the conclusions reached by the High Court can not be said to be either perverse or based on no evidence. The High Court has recorded plausible as well as probable conclusion. The respondents were, therefore, clearly entitled to the benefit of doubt and have been rightly acquitted.

20. In this view of the matter, we find no reason to interfere with the judgment of the High Court. The appeal is, therefore, dismissed.

N.J. Appeal dismissed.

K.J.S. BUTTAR
v.
UNION OF INDIA AND ANR.
(Civil Appeal No. 5591 of 2006)

MARCH 31, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

SERVICE LAW:

ARMED FORCES:

Disability Pension and other consequential claims – Army-ex-Captain – Invalided for injury attributable to military service – Disability assessed at 50% in Low Medical Category – Disability Pension granted w.e.f. 26.7.1979 – Claims for War Injury Pension w.e.f. 1.1.1996 in terms of Ministry of Defence letter dated 31.1.2001 – Disability to be raised to 75% from 50% – Grant of service element of 10 years of service instead of 2 years – Revision of rates of disability pension w.e.f. 1.1.1996 – HELD: The restriction of the benefits only to officers who were invalided out of service after 1.1.1996 is violative of Article 14 of the Constitution – Letter dated 31.1.2001 is only liberalization of the existing Scheme – Claims allowed with 8% interest on arrears – Constitution of India, 1950 – Article 14.

The appellant, an ex-Captain, had been granted Short Service Commission in the Indian Army on 21.1.1969. While participating in the exercise conducted with live ammunition, he suffered gun shot on his left elbow resulting into 50% disability. He was accordingly invalided out of service with Disability Pension w.e.f. 26.7.1979. The appellant filed a writ petition claiming: (a) War Injury Pension w.e.f. 1.1.1996 in terms of Ministry of Defence letter dated 31.1.2001; (b) treating the disability

at 75% instead of 50% w.e.f. 1.1.1996 as per Ministry of Defence letter dated 31.1.2001; (c) grant of service element for full 10 years of service instead of 2 years; and (d) revision of the rates of the disability pension w.e.f. 1.1.1996 in terms of the letter dated 31.1.2001.

The respondents resisted the claims of the appellant on the ground that he had retired prior to 1.1.1996. The High Court declined the reliefs. Aggrieved, the pensioner filed the appeal.

Allowing the appeal, the Court

HELD: 1.1. The claim of the appellant for pension for his full 10 years service as a Short Service Commission Officer, as has been held in *C.S. Sidhu's* *case, is justified. Hence the entire service of the appellant in the army has to be taken into consideration for grant of Disability Pension and he must be given arrears with interest @ 8% per annum. The restriction of the benefit to only officers who were invalided out of service after 1.1.1996 is violative of Article 14 of the Constitution and hence illegal. The letter of the Ministry of Defence dated 31.1.2001 is only liberalization of an existing scheme. [para 9.11-12] [142-C-F-H; 143-A]**

******Union of India & Anr. vs. C.S. Sidhu* **2010(4) SCC 563,** *Union of India & Anr. vs. Deoki Nandan Aggarwal* **1992 Suppl.(1) SCC 323,** *State of Punjab vs. Justice S.S. Dewan* **(1997) 4 SCC 569,** *Union of India & Anr. vs. S.P.S. Vains (Retd.) & Ors.* **2008(9) SCC 125- relied on.**

1.2. The appellant was entitled to the benefit of para 7.2 of the Instructions dated 31.1.2001 according to which where the disability is assessed between 50% and 75% then the same should be treated as 75%, and it makes no difference whether he was invalided from service before or after 1.1.1996. Therefore, the appellant was

entitled to the said benefits with arrears from 1.1.1996. [para 14] [144-F-G]

1.3. It may be mentioned that the Government of India, Ministry of Defence had been granting War Injury Pension to pre-1996 retirees also in terms of para 10.1 of Ministry's letter No.1(5)/87/D(Pen-Ser) dated 30.10.1987 (Page 59 Para 8). The mode of calculation however was changed by Notification dated 31.1.2001 which was restricted to post 1996 retirees. The appellant, therefore, was entitled to the War Injury Pension even prior to 1.1.1996 and especially in view of the instructions dated 31.1.2001 issued by the Government of India. The said instruction was initially for personers retiring after 1.1.1996 but later on by virtue of the subsequent Notifications dated 16.5.2001 it was extended to pre-1996 retirees also on rationalization of the scheme. [para 15] [144-H; 145-A-C]

1.4. As per Para 10.1 of the Instructions dated 31.1.2001, where an Armed Forces personnel is invalided on account of disability sustained under circumstances mentioned in Category-E(f)(ii) of Para 4.1, he shall be entitled to War Injury Pension consisting of service element and war injury element. Para 4.1 provides for the different categories to which the pensionary benefits are to be awarded. Category-E(f)(ii) of Para 4.1 pertains to any death or disability which arises due to battle inoculation, training exercises or demonstration with live ammunition. Appellant is entitled to the War Injury Pension in terms of Category-E(f)(ii) of Para 4.1 and Para 10.1 of the Instructions dated 31.1.2001. [para 15] [145-C-E]

1.5. As per para-6 of the Instructions/letter dated 16.5.2001, any person, who is in receipt of disability pension as on 1.1.1996 is entitled to the same benefit as given in letter dated 31.1.2001. Further as per para-7 of this letter w.e.f. 1.1.1996 the rates of War Injury element

shall be the rates indicated in letter dated 31.1.2001. Thus, in view of the Instruction dated 31.1.2001 read with Instructions dated 16.5.2001, the appellant was entitled to the War Injury Pension. It is pertinent to state that a reading of paras 6, 7 and 8 of the Notifications/Circular dated 16.5.2001 makes it absolutely clear that the said benefits were available to pre 1996 retirees also but the rates were revised on 31.1.2001 and the revised rates were made applicable to post 1996 retirees only. But subsequently by means of the Notification dated 16.5.2001 the revised rates were extended to pre 1996 retirees also. [para 16] [147-B-D]

1.6. The appellant was invalided out and released in a low medical category with permanent disability assessed at 50% by the Release Medical Board. As per the Defence Service Regulation/Pension Regulation for the Army 1961 where any officer is found suffering from disability attributable to or aggravated by Military Service he shall be deemed to have been invalided out of service. The appellant is entitled to the benefit of the above Regulation. [para 18] [147-F-G]

1.7. The appellant is entitled to grant of War Injury Pension w.e.f. 1.1.1996. The disability element of the Disability Pension shall be commuted as 75% instead of 50% and the appellant will be granted arrears w.e.f. 1.1.1996 with an interest of 8% per annum. He will also be granted 10 years' commission service and interest as granted in C.S. Sidhu's case from the date of his release. The impugned judgment is set aside. [para 19] [148-F-G]

Case Law Reference:

2010(4) SCC 563	**relied on**	**para 9**
1992 Suppl.(1) SCC 323	**relied on**	**para 11**
(1997) 4 SCC 569	**relied on**	**para 12**
2008(9) SCC 125	**relied on**	**para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5591 of 2006.

From the Judgment & Order dated 13.9.2004 of the High Court of Punjab & Haryana at Chandigarh in CWP No. 20447 of 2002.

Seeraj Bagga (for Sureshta Bagga) for the Appellant.

P.P. Malhotra, Purnima Bhat, Anil Katiyar for the Respondents.

The Judgment of the Court was delivered by

MARKANDEY KATJU, J. 1. This appeal has been filed against the judgment and order dated 13.9.2004 in C.W.P. No.20447 of 2002 of the High Court of Punjab and Haryana at Chandigarh.

2. Heard learned counsel for the parties and perused the record.

3. The appellant is an ex-captain in the Indian Army, who was commissioned on 12.1.1969. During the course of his service, the appellant suffered serious injuries of a permanent nature and was invalided out of service. The Release Medical Board held on 3.1.1979 viewed his injury 'gun shot wound left elbow' as attributable to military service and assessed the degree of disability at 50% and the appellant was released from service in Low Medical Category on 10.4.1979. Accordingly, the appellant was granted Disability Pension w.e.f. 26.7.1979.

4. The appellant filed a writ petition in the High Court claiming following benefits under Circular and Notification issued by the Ministry of Defence, Union of India from time to time :

"(a) War Injury Pension w.e.f. 1.1.1996 in terms of

Ministry of Defence letter dated 31.1.2001;

(b) Treating the disability at 75% instead of 50% w.e.f. 1.1.1996 as per Ministry of Defence letter dated 31.1.2001;

(c) Grant of service element for full 10 years of service instead of 2 years; and

(d) Revision of the rates of the disability pension w.e.f. 1.1.1996 in terms of the letter dated 31.1.2001.

It is pertinent to state that the Ministry of Defence letter dated 31.1.2001 had revised the rates pursuant to recommendations of Fifth Pay Commission.

5. The appellant was denied the above benefits by the respondent on the basis that he retired before 1.1.1996, and hence in terms of the notification dated 31.1.2001 he could not get the said benefits as they were granted to officers who retired on or after 1.1.1996. The appellant contended that that in view of the instruction issued on 31.1.2001 and subsequent instructions the said benefits are available to those who were invalided even prior to 1.1.1996. In addition, the appellant also prays that his disability should be treated as 75% instead of 50% in terms of clause 7.2 of the subsequent instructions.

6. The appellant had been granted the short service commission in the Indian Army on 21.1.1969. According to him while participating in the exercise conducted with live ammunition, he suffered gun shot on his left elbow and as a result the appellant was relieved from Indian Army with 50% disability on 10.4.1979.

7. A counter affidavit was filed by the respondent in the writ petition in which it was alleged that instruction dated 1.1.1996 is not applicable to the appellant. It was also contended that as regards the instruction dated 31.1.2001 it is not applicable to the appellant as he had not retired but was invalided out. With regard to the instruction dated 16.5.2001 it was alleged

that the said instruction is applicable only with respect to paragraph 7.1(ii)(a) of the instruction dated 31.1.2001, and it has no application to the appellant.

8. The High Court in the impugned judgment held that paragraph 7.2 of the instructions dated 31.1.2001 is not applicable to the appellant. With respect we cannot agree.

9. As regards the claim of the appellant for pension for his full 10 years service as a short service commission officer, we have already held in *Union of India & Anr. vs. C.S. Sidhu* 2010(4) SCC 563 that this claim is justified. Hence his entire service in the army has to be taken into consideration for grant of Disability Pension and he must be given arrears with interest @ 8% per annum as was granted in *C.S. Sidhu's* case.

10. The stand of the respondent is that the disability of the appellant cannot be enhanced to 75% because the relevant provision being para 7.2 of Government of India, Ministry of Defence, letter dated 31.1.2001 is applicable only to those cases where the officer was invalided out of service after 1.1.1996. It is alleged that the appellant was invalided out much before the date.

11. In our opinion, the restriction of the benefit to only officers who were invalided out of service after 1.1.1996 is violative of Article 14 of the Constitution and is hence illegal. We are fortified by the view as taken by the decision of this Court in *Union of India & Anr. vs. Deoki Nandan Aggarwal* 1992 Suppl.(1) SCC 323, where it was held that the benefit of the Amending Act 38 of 1986 cannot be restricted only to those High Court Judges who retired after 1986.

12. In *State of Punjab vs. Justice S.S. Dewan* (1997) 4 SCC 569 it was held that if it is a liberalization of an existing scheme all pensioners are to be treated equally, but if it is introduction of a new retrial benefit, its benefit will not be available to those who stood retired prior to its introduction. In our opinion the letter of the Ministry of Defence dated 31.1.2001

is only liberalization of an existing scheme.

13. In *Union of India & Anr. vs. S.P.S. Vains (Retd.) & Ors.* 2008(9) SCC 125 it was observed :

"**26.** The said decision of the Central Government does not address the problem of a disparity having created within the same class so that two officers both retiring as Major Generals, one prior to 1-1-1996 and the other after 1-1-1996, would get two different amounts of pension. While the officers who retired prior to 1-1-1996 would now get the same pension as payable to a Brigadier on account of the stepping up of pension in keeping with the fundamental rules, the other set of Major Generals who retired after 1-1-1996 will get a higher amount of pension since they would be entitled to the benefit of the revision of pay scales after 1-1-1996.

27. In our view, it would be arbitrary to allow such a situation to continue since the same also offends the provisions of Article 14 of the Constitution.

28. The question regarding creation of different classes within the same cadre on the basis of the doctrine of intelligible differentia having nexus with the object to be achieved, has fallen for consideration at various intervals for the High Courts as well as this Court, over the years. The said question was taken up by a Constitution Bench in *D.S. Nakara* where in no uncertain terms throughout the judgment it has been repeatedly observed that the date of retirement of an employee cannot form a valid criterion for classification, for if that is the criterion those who retired by the end of the month will form a class by themselves. In the context of that case, which is similar to that of the instant case, it was held that Article 14 of the Constitution had been wholly violated, inasmuch as, the Pension Rules being statutory in character, the amended Rules, specifying a cut-off date resulted in differential and discriminatory treatment of equals in the matter of commutation of

pension. It was further observed that it would have a traumatic effect on those who retired just before that date. The division which classified pensioners into two classes was held to be artificial and arbitrary and not based on any rational principle and whatever principle, if there was any, had not only no nexus to the objects sought to be achieved by amending the Pension Rules, but was counterproductive and ran counter to the very object of the pension scheme. It was ultimately held that the classification did not satisfy the test of Article 14 of the Constitution.

30. However, before we give such directions we must also observe that the submissions advanced on behalf of the Union of India cannot be accepted in view of the decision in *D.S. Nakara case*. The object sought to be achieved was not to create a class within a class, but to ensure that the benefits of pension were made available to all persons of the same class equally. To hold otherwise would cause violence to the provisions of Article 14 of the Constitution. It could not also have been the intention of the authorities to equate the pension payable to officers of two different ranks by resorting to the step-up principle envisaged in the fundamental rules in a manner where the other officers belonging to the same cadre would be receiving a higher pension."

14. In our opinion the appellant was entitled to the benefit of para 7.2 of the instructions dated 31.1.2001 according to which where the disability is assessed between 50% and 75% then the same should be treated as 75%, and it makes no difference whether he was invalided from service before or after 1.1.1996. Hence the appellant was entitled to the said benefits with arrears from 1.1.1996, and interest at 8% per annum on the same.

15. It may be mentioned that the Government of India Ministry of Defence had been granting War Injury Pension to pre 1996 retirees also in terms of para 10.1 of Ministry's letter

No.1(5)/87/D(Pen-Ser) dated 30.10.1987 (Page 59 Para 8). The mode of calculation however was changed by Notification dated 31.1.2001 which was restricted to post 1996 retirees. The appellant, therefore, was entitled to the War Injury Pension even prior to 1.1.1996 and especially in view of the instructions dated 31.1.2001 issued by the Government of India. The said instruction was initially for persons retiring after 1.1.1996 but later on by virtue of the subsequent Notifications dated 16.5.2001 it was extended to pre 1996 retirees also on rationalization of the scheme. As per the Instructions, different categories have been provided by the Government for award of pensionary benefits on death/disability in attributable/ aggravated cases. As per Para 10.1 of the Instructions dated 31.1.2001, where an Armed Forces personnel is invalided on account of disability sustained under circumstances mentioned in Category-E(f)(ii) of Para 4.1, he shall be entitled to War Injury Pension consisting of service element and war injury element. Para 4.1 provides for the different categories to which the pensionary benefits are to be awarded. Category-E(f)(ii) of Para 4.1 pertains to any death or disability which arises due to battle inoculation, training exercises or demonstration with live ammunition. Appellant is entitled to the War Injury Pension in terms of Category-E(f)(ii) of Para 4.1 and Para 10.1 of the Instructions dated 31.1.2001, which are reproduced hereunder for ready reference :-

Para 10.1

Where an armed forces personnel is invalided out of service on account of disability sustained under circumstances mentioned in category 'E' of para 4.1 above, he/she shall be entitled to war injury pension consisting of service element and War Injury Pension as follows :

(a) Service element : Equal to retiring/service pension which he/she would have been entitled to on the basis of his/her pay on the date of invalidment but

counting service up to the date on which he/she would have retired in that rank in the normal course including weightage as admissible. Provisions of para 6 of the Ministry of Defence letter No.1/6/98/ D(Pens/Ser) dated 3.2.1998 shall apply for calculating retiring/service pension. There shall be no condition of minimum qualifying service for earning this element.

(b) War Injury element: Equal to reckonable emoluments last drawn for 100% disablement. However, in no case the aggregate of service element and war injury element should exceed last pay drawn. For lower percentage of disablement, war injury element shall be proportionately reduced.

Category 'E"

Death or disability arising as a result of :-

(a) to (e) xxx xxx xxx

(f) War like situations, including cases, which are attributable to/aggravated by :-

(i) extremist acts, exploding mines etc., while on way to an operational areas;

(ii) battle inoculation training exercises for demonstration with live ammunition;

(iii) Kidnapping by extremists while on operational duty

(g) to (i) xxx xxx xxx

These instructions, which were initially restricted to Armed Forces personnel, who retired on or before 1.1.1996 were subsequently made applicable to the pre 1996 retirees also by virtue of instruction dated 16.5.2001. Relevant portion of the Instruction/Notification in this regard is reproduced hereunder :-

Subject – Rationalization of Pension Structure for pre 1996 Armed Forces Pensioners – Implementation of Government decisions on the recommendations of the Fifth Central Pay Commission."

16. As per para-6 of these instructions/letter dated 16.5.2001, any person, who is in receipt of disability pension as on 1.1.1996 is entitled to the same benefit as given in letter dated 31.1.2001. Further as per para-7 of this letter w.e.f. 1.1.1996 the rates of War Injury element shall be the rates indicated in letter dated 31.1.2001. Thus, in our opinion in view of the instruction dated 31.1.2001 read with our opinion 16.5.2001, the appellant was entitled to the War Injury Pension. It is pertinent to state that reading of paras 6, 7 and 8 of the Notifications/Circular dated 16.5.2001 makes it absolutely clear that the said benefits were available to pre 1996 retirees also but the rates were revised on 31.1.2001 and the revised rates were made applicable to post 1996 retirees only. But subsequently by means of the Notification dated 16.5.2001 the revised rates were extended to pre 1996 retirees also.

17. At any event, we have held that there will be violation of Article 14 of the Constitution if those who retired/were invalided before 1.1.1996 are denied the same benefits as given to those who retired after that date.

18. The respondents submitted that the appellant was not entitled to the above benefits as he had retired on completion of his short service commission of 10 years and had not been invalided out of service. In this connection it may be mentioned that the appellant was invalided out and released in a low medical category with permanent disability assessed at 50% by the Release Medical Board. As per the Defence Service Regulation/Pension regulation for the Army 1961 where any officer is found suffering from disability attributable to or aggravated by Military Service he shall be deemed to have been invalided out of service. Relavant provision (page 25 additional documents) read as under :-

"Officers Compulsorily Retired on account of Age or on Completion of Tenure.

53.(1) An officer retired on completion of tenure or on completion of terms of engagement or on attaining the age of 50 years (irrespective of their period of engagement), if found suffering from a disability attributable to or aggravated by military service and recorded by service Medical Authorities, shall be deemed to have been invalided out of service and shall be granted disability pension from the date of retirement, if the accepted degree of disability is 20 percent or more, and service element if the degree of disability is less than 20 percent. The retiring pension/retiring gratuity, if already, sanctioned and paid, shall be adjusted against the disability pension/ service element, as the case may be.

(2) The disability element referred to in clause (1) above shall be assessed on the accepted degree of disablement at the time of retirement/discharge on the basis of the rank held on the date on which the wound/injury was sustained or in the case of disease."

In our opinion the appellant is entitled to the benefit of the above Regulation.

19. As a result this appeal is allowed and we hold that the appellant is entitled to grant of War Injury Pension w.e.f. 1.1.1996. The disability element of the Disability Pension shall be commuted as 75% instead of 50% and the appellant will be granted arrears w.e.f. 1.1.1996 with an interest of 8% per annum. He will also be granted 10 years' commission service and interest as granted in *C.S. Sidhu's* case from the date of his release. The impugned judgment is set aside.

20. The appeal is allowed. There shall be no order as to costs.

R.P. Appeal allowed.

DEEPAK AGARWAL & ANR.
v.
STATE OF UTTAR PRADESH & ORS.
(Civil Appeal No. 6587 of 2003)

MARCH 31, 2011

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

UTTAR PRADESH EXCISE GROUP 'A' SERVICE RULES, 1983:

Rules 5(3)(as amended w.e.f.16.5.1999), 7 and 8 – Promotion to Deputy Excise Commissioner – Exclusion of Technical Officer and Statistical Officer from the feeder streams w.e.f. 16.5.1999 – Vacancies occurring prior to amendment filled after amendment according to substituted Rule 5(3) – Held: There is no statutory duty cast upon the State to complete the selection process within a prescribed period – Nor is there a mandate to fill up the posts within a particular time – The requirement of filling up of old vacancies under the old rules is interlinked with the candidate having acquired a right to be considered for promotion which accrues on the date of consideration of the eligible candidates – In the instant case, consideration for promotion took place after the amendment came into operation – Therefore, it cannot be held that any accrued right of the two officers was taken away by the amendment – Moreover, a conscious decision was taken to abolish the feeder cadre consisting of Technical Officers and Statistical Officers for promotion to the post of Deputy Excise Commissioner – Service Law – Uttar Pradesh Government Criterion for Recruitment by Promotion Rules, 1994 – r.4.

SERVICE LAW:

Promotion – Need to open avenues for – Technical

Officers and Statistical Officers excluded from the feeder stream for promotion to Deputy Excise Commissioner in the State of U.P. – But posts upgraded – HELD: Mere upgradation may not be sufficient compensation for loss of opportunity of promotion – State Government advised to re-look at the promotion policy to provide some opportunity of further promotion to officers concerned – Uttar Pradesh Excise Group 'A' Service Rules, 1983.

Appellant no. 1, who was appointed as a Technical Officer and appellant no. 2, who was appointed as Statistical Officer, filed a writ petition before the High Court seeking to quash the Notification dated 17.5.1999 whereby they had been rendered ineligible for promotion to the post of Deputy Excise Commissioner; as also the Notification dated 26.5.1999 promoting respondent nos. 3 to 9 as Deputy Excise Commissioners. They further prayed for a direction to the respondent-authorities to consider and promote them as Deputy Excise Commissioners. The stand of the appellants was that the vacancies arising prior to 17.5.1999 ought to be filled up in terms of the Uttar Pradesh Excise Group 'A' Service Rules, 1983, as they existed prior to the amendment dated 17.5.1999. The High Court dismissed the writ petition.

In the instant appeal it was contended for the appellants that by the Uttar Pradesh Excise Group 'A' Service (5th Amendment) Rules, 1999, the posts of Technical Officer and Statistical Officer, were excluded from the feeder streams to the post of Deputy Excise Commissioner, w.e.f. 17.5.1999, but as there were 10 vacancies prior to 17.5.1999, those vacancies should have been filled as per the Rules existing at the time the vacancies occurred, and, therefore, the appellants were entitled to be considered for the said 10 vacancies under

Rule 5(2). The stand of the respondents, on the other hand, was that no selection before the amendment had taken place and that the amendment of the Rules was based on a conscious decision taken by the Government upon consideration of representations of both the sides.

Dismissing the appeal, the Court

HELD: 1.1. Service conditions of the appellants and the private respondents are governed by U.P. Excise Group 'A' Service Rules, 1983, framed in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India. A perusal Rule 5(3) of the 1983 Rules and Rule 4 of the Uttar Pradesh Government Criterion for Recruitment by Promotion Rules, 1994 would indicate that the appellants would have been eligible for promotion on the basis of seniority, as determined under the Note to Rule 8. However, the said right for consideration to be promoted on the post of Deputy Excise Commissioner has been taken away by the Uttar Pradesh Excise Group 'A' Service (5th amendment) Rules, 1999 by substitution of sub-rule (3) whereunder only Assistant Excise Commissioners, who have completed two years service as such are made eligible for consideration for promotion as Deputy Excise Commissioner. [paras 15,16 and 18] [162-C-D; 164-D-E; 165-B-D]

1.2. Rule 7 of the 1985 Rules provides that the appointing authority shall determine the vacancies to be filled during the course of the year. There is no statutory duty cast upon the State to complete the selection process within a prescribed period. Nor is there a mandate to fill up the posts within a particular time. Rather the proviso to Rule 2 enables the State to leave a particular post unfilled. There is no statutory duty cast upon the respondents to either prepare a year-wise panel of the eligible candidates or the selected candidates for

promotion. Therefore, clearly there is no statutory duty which the State could be mandated to perform under the applicable rules. The requirement to identify the vacancies in a year or to take a decision how many posts are to be filled under Rule 7 cannot be equated with not issuing promotion orders to candidates duly selected for promotion. Therefore, it can not be said that the vacancies, which had arisen before 17-5-1999 had to be filled under the unamended rules. It can also not be said that the amendment has been given a retroactive operation as the vacancies which arose prior to the amendment are sought to be filled under the amended rules. [para 17, 21 and 26] [164-G-H; 165-A-B; 166-H; 167-A-C-E-H; 170-A-B]

1.3. It is by now a settled proposition of law that a candidate has the right to be considered in the light of the existing rules, which implies the 'rule in force' on the date the consideration took place. There is no rule of universal or absolute application that vacancies are to be filled invariably by the law existing on the date when the vacancy arises. The requirement of filling up old vacancies under the old rules is interlinked with the candidate having acquired a right to be considered for promotion. The right to be considered for promotion accrues on the date of consideration of the eligible candidates, unless, of course, the applicable rule lays down any particular time frame, within which the selection process is to be completed. In the instant case, consideration for promotion took place after the amendment came into operation. Thus, it can not be accepted that any accrued or vested right of the appellants have been taken away by the amendment. [para 22] [167-F-H; 168-A-B]

Rajasthan Public Service Commission Vs. Chanan Ram & Anr. **1998 (1) SCR 1099 = 1998 (4) SCC 202 ,** *Dr. K. Ramulu & Anr. Vs. Dr. S. Suryaprakash Rao & Ors* **1997 (1)**

SCR 287 = 1997 (3) SCC 59 , *Union of India vs. K.V.Vijeesh* **1992 (3) Suppl. SCR 816 = 1993 (2) Suppl. SCC 600 ;** *Jai Singh Dalal vs. State of Hryana* **1992 (3) Suppl. SCR 816 = 1993 (2) Suppl. SCC 600 ; and** *State of M.P. & Ors. Vs. Raghuveer Singh Yadav & Ors* **1994 (2) Suppl. SCR 459 = 1994 (6) SCC 151 ,** *H.S. Grewal Vs. Union of India & Ors.* **(1997) 11 SCC 758 - relied on.**

Y.V.Rangaiah & Ors. Vs. J.Sreenivasa Rao & Ors. **(1983) 3 SCC 284;** *Food Corporation of India Vs. Parashotam Das Bansal* **2008 (2) SCR 412 = 2008 (5) SCC 100 ;** *P. Ganeshwar Rao Vs. State of Andhra Pradesh,* **1988 Suppl. SCR 805 = 1988 Suppl. SCC 740;** *N.T. Devin Katti & Ors. Vs. Karnataka Public Service Commission & Ors* **1990 (2) SCR 239 = 1990 (3) SCC 157,** *A.A. Catton Vs. Director of Education,* **(1983) 3 SCC 33,** *State of Rajasthan Vs. R. Dayal* **1997 (2) SCR 108 = 1997 (10) SCC 419 , and** *B.L. Gupta Vs. M.C.D.* **(1998) 9 SCC 223- held inapplicable.**

1.4. The High Court has noticed that the post of Technical Officers and Statistical Officers have been deleted from the feeder cadre for promotion to the post of Deputy Excise Commissioner for valid reasons. The Government was of the opinion that the Technical Officers and Statistical Officers were not suitable to be promoted on the post of Deputy Excise Commissioner, which involved multifarious administrative responsibilities. The experience gained by the officials working on the post of Technical Officer and Statistical Officer was of no relevance for the duties to be performed on the post of Deputy Excise Commissioner. Consequently, a conscious decision was taken to abolish the feeder cadre consisting of Technical Officers and Statistical Officers for promotion to the post of Deputy Excise Commissioner. It cannot be said that the conscious decision so taken is not grounded on the relevant facts. A perusal of the counter affidavit filed by the respondent shows that the

recruitment of appellant No.1 has been made purely with the objective of looking after the technical work pertaining to pharmacies and industrial units. Therefore, the requisite qualification for the post is Degree in Chemical Engineering. Appellant No.2 has been recruited for compilation, analysis and maintenance of statistical data of the Excise Department. The basic qualification for the post of Statistical Officer is Graduation in Statistics. It appears that the two categories of posts have been eliminated as the incumbents on the said posts do not have any administrative experience. The decision was taken clearly in public interest. Since the decision has been taken after taking into consideration the view points of both the sides, it can not be said to be arbitrary or based on irrelevant considerations. [para 25-26] [169-A-H; 170-A-B]

2. It may be that the removal of the two posts, namely, Technical Officer and Statistical Officer, from the feeder cadre would lead to some stagnation for the officers working on the said two posts. In fact, the Government seems to recognize such a situation. It is perhaps for this reason that the posts have been upgraded to the post of Deputy Excise Commissioner. However, mere upgradation of the post may not be sufficient compensation for the officers working on the two posts for loss of opportunity to be promoted on the post of Deputy Excise Commissioner. In such circumstances, the Government may be well advised to have a re-look at the promotion policy to provide some opportunity of further promotion to the officers working on these posts. [para 29] [172-H; 173-A-B]

Case Law Reference:

(1983) 3 SCC 284	**held inapplicable para 2**
2008 (2) SCR 412	**held inapplicable para 10**

1988 Suppl. SCR 805	**held inapplicable**	**para 10**
1990 (2) SCR 239	**held inapplicable**	**para 10**
(1983) 3 SCC 33	**held inapplicable**	**para 10**
1997 (2) SCR 108	**held inapplicable**	**para 10**
(1998) 9 SCC 223	**held inapplicable**	**para 10**
1997 (1) SCR 287	**relied on**	**para 11**
1998 (1) SCR 1099	**relied on**	**para 13**
1992 (3) Suppl. SCR 816	**relied on**	**para 13**
1994 (2) Suppl. SCR 459	**relied on**	**para 13**
(1996) 3 SCC 139	**relied on**	**para 25**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6587 of 2003.

From the Judgment & Order dated 16.4.2002 of the High Court of Judicature at Allahabad in C.M.W.P. No. 34533 of 1999.

Dr. Rajesh Dhawan, P.S. Narasimha, Dinesh Dwivedi, Pankaj Bhatia, Vivek Chaudhary, Dr. Kailash Chand, Priyanka Singh, K. Parmeshwar, K.K. Mohan, Ravi Prakash Mehrotra, Mukesh Verma, Vibhu Tiwari, Abhishek K. Singh for the appearing parties.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. This appeal is directed against the judgment of the High Court of Judicature at Allahabad dated 16th April, 2002, dismissing the writ petition challenging the Notification dated 17th May, 1999, wherein the appellants had been rendered ineligible for promotion to the post of Deputy Excise Commissioner (DEC) and the Notification dated 26th May, 1999, promoting respondents No.

3 to 9 as Deputy Excise Commissioner, and further to consider and promote the appellants as Deputy Excise Commissioner, on the vacancies that arose before 17th May, 1999.

2. Old vacancies have to be filled under the old rules is the mantra, sought to be invoked by the appellants in support of their claim that the vacancies arising prior to 17th May, 1999, ought to be filled under the 1983 Rules as they existed prior to the amendment dated 17th May, 1999. The claim is based on the principle enunciated by this Court in *Y.V.Rangaiah & Ors. Vs. J.Sreenivasa Rao & Ors.*[1].

3. The appellants were recruited through the Uttar Pradesh Public Service Commission on Class II posts in the Excise Department under the Excise Commissioner, Uttar Pradesh. Deepak Agarwal (hereinafter referred to as 'appellant No.1') was appointed on the post of Technical Officer in the pay scale of Rs.2200–4000 by an order dated 13th August, 1991. Similarly, Jogendra Singh (hereinafter referred to as 'appellant No. 2') was directly recruited through the Uttar Pradesh Public Service Commission and appointed on the post of Statistical Officer by Notification dated 8th January, 1992 in the pay scale of Rs.2200–4000. It is not disputed that both the appellants are confirmed in service. There is no adverse entry in their service record. The appellants are the only two officers recruited directly to Class II Excise Service. Otherwise, majority of the officers have entered service as Inspectors in the Excise Department and subsequently promoted to higher posts.

4. The U.P. Excise Group 'A' Service Rules, 1983 govern the procedure for recruitment and conditions service of officers of Group 'A' of the Excise Department. Initially under Rule 5(2) only Assistant Excise Commissioners and Technical Officers were eligible for promotion. Subsequently by amendment of the 1983 Rules on 22nd June, 1998, Statistical Officers were also made eligible for promotion to the post of Deputy Excise Commissioner.

1. (1983) 3 SCC 284.

5. It came to the knowledge of the appellants that U.P. Excise Officers Sangh, Allahabad had filed a representation before the State Government in the month of September, 1998 protesting against the inclusion of the Technical Officers and Statistical Officers in the feeder cadre for promotion to the post of Deputy Excise Commissioner. The appellants, therefore, also made representations before the Departmental Promotion Committee (DPC). In the year, 1997-98 and 1998–99, 12 vacancies arose for the post of Deputy Excise Commissioner. Out of these 12 vacancies, 10 vacancies had arisen prior to 17th May, 1999 and 2 vacancies had arisen on 30th June, 1999 due to the retirement of Deputy / Joint Excise Commissioner. It is the case of the appellants that they were entitled to be considered for the aforesaid 10 vacancies under Rule 5(2).

6. Inspite of the representation made by the appellants, the 1983 Rules were amended on 17th May, 1999. By the aforesaid amendment, the posts of Technical Officers and Statistical Officers have been excluded from the feeder cadre for promotion to the post of Deputy Excise Commissioner. This amendment came just two days before the DPC was scheduled to meet on 19th May, 1999. As a consequence of the amendment, the DPC did not consider the appellants for promotion. The justification given for the aforesaid amendment is that the State Government had taken a "conscious decision" to exclude the Technical Officers and Statistical Officers as they were not fit for the post of Deputy Excise Commissioner because of their peculiar qualifications, duties, responsibilities and work experience. However, to compensate for loss of promotion, the pay scale of these two posts has been upgraded to the level of Deputy Excise Commissioner.

7. Thereafter, the State Government issued a Notification dated 26th May, 1999 wherein the State Government granted promotion to the 10 persons (Respondent Nos. 3 to 9) to the posts of Deputy Excise Commissioner. Aggrieved by the same, the appellants filed a writ petition before the Allahabad High Court challenging the Notification dated 26th May, 1999. It was

also prayed that they should be considered for the posts of Deputy Excise Commissioner and Notification dated 17th May, 1999 be quashed. The High Court vide its judgment dated 16th April, 2002 dismissed the petition. Hence the present appeal.

8. We have heard the exhaustive submissions made by the learned counsel for parties. Dr. Rajeev Dhawan, learned senior counsel, appearing for appellants, has highlighted the primary issues involved herein, which are as follows:

Whether the State of Uttar Pradesh amendment of 17th May, 1999 in the Schedule is invalid because –

(a) it abolishes Technical Assistant Officers (TAO) and Statistical Officer (SO) as feeder streams to the post of Deputy Excise Commissioner.

(b) denies TAO and SO the right to be considered for promotion.

(c) stagnates them by denying any promotional avenue and merely gives them a 'sop' of up-gradation with no avenue to promotion.

(d) gives retroactive application to the amendment to exclude persons covered by the pre-amended rules of 1983.

SUBMISSIONS ON FACTS –

9. By the amendment, the avenue of promotion of the appellants has been totally blocked. The up-gradation of the pay scale is a mere sop. The decision to amend the rules on 19th May, 1999 came within one year of granting eligibility to the post of Statistical Officer on 22nd June, 1998. It was unreasonable for the State to do a total volte-face. Only reason for such a volte-face was the pressure from the Excise Commissioner to be favoured.

SUBMISSIONS ON LAW –

10. Right to be considered for promotion is a valuable right.

The Government is required to make necessary provision in the rules to remove stagnation on a particular post and by giving suitable promotion avenue to its employees. Learned counsel relied on a decision of this Court in the case of *Food Corporation of India Vs. Parashotam Das Bansal*[2] in support of the submissions that the Superior Courts have the jurisdiction to issue necessary direction to the Government. He submits, the issue herein, is squarely covered by the judgment of this Court in the case of *Y.V. Rangaiah* (supra). Therefore, the appellants were entitled to be considered for promotion against the ten vacancies that occurred prior to the amendment dated 17th May, 1999. Reliance is also placed on Rule 7 to show that the Government has to determine the number of vacancies to be filled during the course of the year. Learned counsel also relied on the decisions of this Court in the cases of *P. Ganeshwar Rao Vs. State of Andhra Pradesh,*[3] *N.T. Devin Katti & Ors. Vs. Karnataka Public Service Commission & Ors.*[4] *A.A. Catton Vs. Director of Education,*[5] *State of Rajasthan Vs. R. Dayal and B.L. Gupta Vs. M.C.D.*[7] to emphasis that the rule of prospectivity application requiring the pre-amendment vacancies to be considered under the unamended rule is firmly embedded in the law. He has, however, very fairly stated that although the normal rule of prospectivity will apply, a subsidiary rule has come into existence since 1997 that if the Government takes a conscious decision not to apply the rule to pre-amendment vacancies under the old rules, it has the power to do so.

11. On facts, he submits that there was no legally binding conscious decision taken in this case. The criteria laid down

2. (2008) 5 SCC 100.
3. 1988 (Supp) SCC 740.
4. (1990) 3 SCC 157.
5. (1983) 3 SCC 33.
6. (1997) 10 SCC 419.
7. (1998) 9 SCC 223.

in the case of *Dr. K. Ramulu & Anr. Vs. Dr. S. Suryaprakash Rao & Ors.*[8] has not been satisfied. He submits that the conscious decision has to satisfy the test of reasonableness and relevancy of criteria. In the present case, there is no evidence of a conscious decision being taken. The plea was not even raised in the High Court. It is raised in this Court based on the observations made by the High Court. Such a conscious decision must be based on existing facts and cannot be conjured up in the affidavit to oppose the writ petition. He further submits that under Note to Rule 8 the respondents are required to prepare combined eligibility list of the candidates in order of seniority determined by the dates of their substantive appointments. Furthermore, the promotions under Rule 5(2) are to be made on the basis of the criteria in "The Uttar Pradesh Servants Criterian for Recruitment by Promotion Rules, 1994."

12. Rule 4 of these Rules provides that the promotion shall be made on the basis of seniority subject to the rejection of the unfit. Under these Rules, Dr. Dhawan has submitted that the appellants were bound to be promoted being senior and having a good record of service. The attempt by the State without amendment in this rule to introduce comparative merit on irrelevant considerations to exclude the appellants from the feeder cadre was ex facie illegal and arbitrary.

13. On the other hand, Mr. P.S. Narasimha, learned senior counsel for the respondents submitted that:

(i) The amendment in the rules is based on a conscious decision taken by the Government upon consideration of the representations of both the sides.

(ii) The ratio in *Rangaiah's case* (supra) will not be applicable in the facts of this case. No selection before the amendment had taken place in this case.

(iii) The right of the candidate is to be considered under

8. (1997) 3 SCC 59.

the Rules in force on the date the consideration takes place. In support of his submission, he relied on the decisions of this Court in the cases of *Jai Singh Dalal & Ors. Vs. State of Haryana & Anr.*[9], *Rajasthan Public Service Commission Vs. Chanan Ram & Anr.*[10], *State of M.P. & Ors. Vs. Raghuveer Singh Yadav & Ors.*[11], *H.S. Grewal Vs. Union of India & Ors*[12] *and Dr. K. Ramulu & Anr. Vs. S.Suryaprakash Rao & Ors. (supra).*

(iv) The Officers have only a right of consideration under the Rules in force.

(v) In this case, there is no acquired or vested right of the appellants which has been taken away. He relied on the decisions of this Court in the cases of *High Court of Delhi & Anr. Vs. A.K. Mahajan & Ors.*[13], *New India Sugar Works Vs. State of U.P*[14]. and *Dr. K. Ramulu* (Supra).

(vi) The issue herein is squarely covered by the judgment in *Dr. K. Ramulu's case* (supra). The cases relied upon by the appellants have been explained in the case of *Rajasthan Public Service Commission* (Supra).

(vii) The State is conscious of the loss of promotion avenue to the posts of Senior Technical Officer (STO) and Senior Statistical Officer (SSO). The Court can issue necessary directions to the State to remove any stagnation on the aforesaid two posts.

14. Mr. Dinesh Dwivedi, learned senior counsel for the State submits that the ratio in the case of *Y.V. Rangaiah* (supra) is not applicable in the facts of this case. There is no

9. 1993 (Supp) 2 SCC 600.
10. (1998) 4 SCC 202.
11. (1994) 6 SCC 151.
12. (1997) 11 SCC 758.
13. (2009) 12 SCC 62.
14. (1981) 2 SCC 293.

requirement under Rule 7 of the applicable rules in this case to prepare a year wise panel of the selected candidates. Therefore, no acquired or vested right of the appellants has been taken away. Under Rule 7, the vacancies have only to be identified. The right accrues only at the time of consideration for promotions. Therefore, the amendment has not been given a retroactive effect. The matter is covered by the judgment in the case of *Dr. K. Ramulu* (supra) as a conscious decision has been taken by the State to exclude the two parts of STO and SSO from the feeder cadre for promotion as DEC.

15. We have considered the submissions made by the learned counsel for parties. Service conditions of the appellants and the respondents are governed by U.P. Excise Group 'A' Service Rules, 1983, framed in exercise of the powers conferred by the proviso of Article 309 of the Constitution of India. Therefore, it would be appropriate to notice the relevant provisions of the Rules at this juncture.

Rule 2:- Status of the Service – The Uttar Pradesh Excise Group 'A' Service is a State service comprising Group 'A' posts.

Rule 3(g):- "Service" means the Uttar Pradesh Excise Group 'A' Service;

(h); "Substantive appointment" means an appointment, not being an adhoc appointment on a post in the cadre of the service after selection in accordance with the rules and, if there are no rules, in accordance, with the procedure prescribed for the time being by executive instructions issued by the Government;

(i) "Year of recruitment" means a period of twelve months commencing from the first day of July of a calendar year.

Rule 4: Cadre of Service - (1) the strength of the service shall be such as may be determined by the Government from time to time.

(2) The strength of the service shall, until orders varying the same are passed under sub-rule (1), be as follows:

.....

Name of the post	Number of Posts	
	Permanent	Temporary
Joint Excise Commissioner	-	6
Deputy Excise Commissioner	11	6

.....

Provided that –

[i] The appointing authority may leave unfilled or the Governor may hold in abeyance any vacant post, without thereby entitling any person to compensation;

[ii] The Governor may create such additional permanent or temporary posts as he may consider proper.

Rule 5(2): Recruitment to the post of Deputy Excise Commissioner shall be made by promotion from amongst substantively appointed Assistant Excise Commissioners and Technical Officers who have completed two years service as such, on their respective posts, on the first day of the year of recruitment.

Rule 7: Determination of vacancies – The Appointing Authority shall determine the number of vacancies to be filled during the course of the year as also the number of vacancies, if any, to be reserved for candidates belonging to Scheduled Castes, Scheduled Tribes and other categories under Rule 6.

Rule 8(3): The Appointing Authority shall prepare eligibility list of the candidates in accordance with the Uttar Pradesh

Promotion by Selection (on posts outside the purview of the Public Service Commission) Eligibility List Rules, 1986 and place it before the Selection Committee along with their character rolls and such other records pertaining to them as may be considered necessary.

NOTE:- For the purpose of promotion to the post of Deputy Excise Commissioner, under Rule 5(2), a combined eligibility list shall be prepared by arranging the names of Assistant Excise Commissioners and Technical Officer in order of seniority as determined by the dates of their substantive appointment.

16. A perusal of the aforesaid rules would show that Rule 5, recruitment to the post of Joint Excise Commissioner shall be made by promotion from amongst substantively appointed Deputy Excise Commissioner. Under Rule 5(2), recruitment to the post of Deputy Excise Commissioner shall be made by promotion from amongst substantively appointed Assistant Excise Commissioners and Technical Officers, who have completed two years of service on their respective posts on the first day of the year of recruitment.

17. The short question that arises for consideration is as to whether the appellants were entitled to be considered for promotion on the post of Deputy Excise Commissioner under the 1983 Rules, on the vacancies, which occurred prior to the amendment in the 1983 Rules on 17th May, 1999. Under the unamended 1983 Rules, the petitioners would be eligible to be considered for promotion by virtue of Rule 5(2). By virtue of the Note to Rule 8, a combined eligibility list has to be prepared by arranging the names of Assistant Excise Commissioner and Technical Officers in order of seniority as determined by the date of their substantive appointment. The appellants were, therefore, clearly in the feeder cadre of the post for promotion to the post of Deputy Excise Commissioner. Rule 7 provides that the Appointing Authority shall determine the vacancies to be filled during the course of the year and the number of

vacancies. There is no statutory duty cast upon the State to complete the selection process within a prescribed period. Nor is there a mandate to fill up the posts within a particular time. Rather the proviso to Rule 2 enables the State to leave a particular post unfilled.

18. However, it is a matter of record that the promotions under the 1983 Rules were to be made on the basis of the criteria's laid down in the Uttar Pradesh Government Criterion for Recruitment by Promotion Rules, 1994. Rule 4 of these Rules provided that "Recruitments by promotion……..shall be made on the basis of seniority subject to the rejection of the unfit." Consequently, the appellants would have been eligible for promotion on the basis of seniority, as determined under the Note to Rule 8. The aforesaid right for consideration to be promoted on the post of Deputy Excise Commissioner has been taken away by the Uttar Pradesh Excise Group 'A' Service (5th amendment) Rules, 1999.

19. The unamended and the amended Rule 5(3) of the 1983 Rules are as under:

COLUMN 1	**COLUMN 2**
Existing sub-rule [3] Deputy Excise Commissioner - By promotion from amongst substantively appointed Assistant Excise Commissioners, Technical Officers and Statistical Officers who have completed two years service as such, on their respective posts, on the first day of the year of recruitment.	Sub-rule as hereby substituted [3] Deputy Excise Commissioner - By promotion from amongst substantively appointed Assistant Excise Commissioners who have completed two years service as such on the first day of the year of recruitment.

From the above, it is evident that under the existing sub-rule 3, substantively appointed Assistant Excise Commissioner, Technical Officers and Statistical Officers, who have completed two years of service as such on their respective posts were entitled to be considered for promotion on the post of Deputy Excise Commissioner. By substitution of sub-rule 3, only Assistant Excise Commissioner, who have completed two years service as such are made eligible for consideration for promotion as Deputy Excise Commissioner. It is also a matter of record that 12 vacancies existed on the post of Deputy Excise Commissioner for the year 1997-98 and 1998-99. Out of these 12 vacancies, 10 had arisen prior to 17th May, 1999 and two vacancies arose on 30th June, 1999. By virtue of the amendment in sub-rule 3 of Rule 5, the appellants have been deprived of the right to be considered for promotion on the post of Deputy Excise Commissioner. Respondents have been promoted by the impugned order dated 26th May, 1999 under the amended Rules.

20. Could the right of the appellants, to be considered under the unamended 1983 Rules be taken away? The promotions of the 12 vacancies have been made on 26th May, 1999 under the amended Rules. The High Court rejected the submissions of the appellants that the controversy herein is squarely covered by the judgment of this Court in the case of *Y.V. Rangaiah* (Supra). The High Court has relied on the judgment of this Court in *Dr. K. Ramulu* (supra).

21. We are of the considered opinion that the judgment in *Y.V. Rangaiah's* case (supra) would not be applicable in the facts and circumstances of this case. The aforesaid judgment was rendered on the interpretation of Rule 4(a)(1)(i) of the Andhra Pradesh Registration and Subordinate Service Rules, 1976. The aforesaid Rule provided for preparation of a panel for the eligible candidates every year in the month of September. This was a statutory duty cast upon the State. The exercise was required to be conducted each year. Thereafter,

only promotion orders were to be issued. However, no panel had been prepared for the year 1976. Subsequently, the rule was amended, which rendered the petitioners therein ineligible to be considered for promotion. In these circumstances, it was observed by this Court that the amendment would not be applicable to the vacancies which had arisen prior to the amendment. The vacancies which occurred prior to the amendment rules would be governed by the old rules and not the amended rules. In the present case, there is no statutory duty cast upon the respondents to either prepare a year-wise panel of the eligible candidates or the selected candidates for promotion. In fact, the proviso to Rule 2 enables the State to keep any post unfilled. Therefore, clearly there is no statutory duty which the State could be mandated to perform under the applicable rules. The requirement to identify the vacancies in a year or to take a decision how many posts are to be filled under Rule 7 cannot be equated with not issuing promotion orders to candidates duly selected for promotion. In our opinion, the appellants had not acquired any right to be considered for promotion. Therefore, it is difficult to accept the submissions of Dr. Rajeev Dhawan that the vacancies, which had arisen before 17th May, 1999 had to be filled under the unamended rules.

22. It is by now a settled proposition of law that a candidate has the right to be considered in the light of the existing rules, which implies the 'rule in force' on the date the consideration took place. There is no rule of universal or absolute application that vacancies are to be filled invariably by the law existing on the date when the vacancy arises. The requirement of filling up old vacancies under the old rules is interlinked with the candidate having acquired a right to be considered for promotion. The right to be considered for promotion accrues on the date of consideration of the eligible candidates. Unless, of course, the applicable rule, as in *Y.V. Rangaiah's* case (supra) lays down any particular time frame, within which the selection process is to be completed. In the present case,

consideration for promotion took place after the amendment came into operation. Thus, it can not be accepted that any accrued or vested right of the appellants have been taken away by the amendment. The judgments cited by learned counsel for the appellants namely *B.L. Gupta Vs. MCD* (supra), *P. Ganeshwar Rao Vs. State of Andhra Pradesh* (supra) and *N.T. Devin Katti & Ors. Vs. Karnataka Public Service Commission & Ors* (supra) are reiterations of a principle laid down in *Y.V. Rangaiah's* case (supra).

23. All these judgments have been considered by this Court in the case of *Rajasthan Public Service Commission Vs. Chanan Ram & Anr.* (supra). In our opinion, the observations made by this Court in paragraphs 14 and 15 of the judgment are a complete answer to the submissions made by Dr. Rajiv Dhawan. In that case, this Court was considering the abolition of the post of Assistant Director (Junior) which was substituted by the post of Marketing Officer. Thus the post of Assistant Director (Junior) was no longer eligible for promotion, as the post of Assistant Director had to be filled by 100% promotion from the post of Marketing Officer. It was, therefore, held that the post had to be filled under the prevailing rules and not the old rules.

24. In our opinion, the matter is squarely covered by the ratio of the judgment of this Court in the case of *Dr. K. Ramulu* (supra). In the aforesaid case, this Court considered all the judgments cited by the learned senior counsel for the appellant and held that *Y.V. Rangaiah's* case (supra) would not be applicable in the facts and circumstances of that case. It was observed that for reasons germane to the decision, the Government is entitled to take a decision not to fill up the existing vacancies as on the relevant date. It was also held that when the Government takes a conscious decision and amends the Rules, the promotions have to be made in accordance with the rules prevalent at the time when the consideration takes place.

25. The High Court has noticed that the post of Technical Officers and statistical Officers have been deleted from the feeder cadre for promotion to the post of Deputy Excise Commissioner for valid reasons. The Government was of the opinion that the Technical Officers and Statistical Officers were not suitable to be promoted on the post of Deputy Excise Commissioner, which involved multifarious administrative responsibilities. The experience gained by the officials working on the post of Technical Officer and Statistical Officer was of no relevance for the duties to be performed on the post of Deputy Excise Commissioner. Consequently, a conscious decision was taken to abolish the feeder cadre consisting of Technical Officers and Statistical Officers for promotion to the post of Deputy Excise Commissioner. The Division Bench, therefore, correctly applied the ratio laid down in *Dr. K. Ramulu's* case **(supra)** wherein this Court reiterated the ratio in *Union of India Vs. K.V. Vijeesh*[15] that for reasons germane to the decision, the Government is entitled to take a decision not to fill up the existing vacancies on the relevant date.

26. We are also unable to accept the submissions of Dr. Dhawan that the conscious decision taken herein is not grounded on the relevant facts. A perusal of the Counter Affidavit filed by the respondent herein shows that the recruitment of the appellant No.1 has been made purely with the objective of looking after the technical work pertaining to pharmacies and industrial units. Therefore, the requisite qualification for the post is Degree in Chemical Engineering. Appellant No.2 has been recruited for compilation, analysis and maintenance of statistical data of the Excise Department. The basic qualification for the post of Statistical Officer is Graduation in Statistics. It appears that the two categories of posts have been eliminated as the incumbents on the said posts do not have any administrative experience. The decision was taken clearly in public interest. Since the decision has been taken after taking into consideration the view points of both the sides, it can not be

15. 1996 3 SCC 139.

said to be arbitrary or based on irrelevant considerations. We also do not find any merit in the submission of Dr. Dhawan that the amendment has been given a retroactive operation as the vacancies which arose prior to the amendment are sought to be filled under the amended rules.

27. This Court in the case of *Jai Singh Dalal Vs. State of Haryana* (supra) has held as under:

> "It is clear from the above pleadings that in 1990 the State Government resolved to resort to special recruitment to the Haryana Civil Service (Executive Branch) invoking the proviso to Rule 5 of the rules. Pursuant thereto, it issued the notifications dated December 20, 1990 and January 25, 1991. The names of the candidates were forwarded by the State Government to the HPSC for selection. The HPSC commenced the selection process and interviewed certain candidates. In the meantime, on account of an undertaking given by the Advocate General to the High Court at the hearing of C.W.P. No. 1201 of 1991 and allied writ petitions, the State Government was required to forward the names of the candidates belonging to two other departments of the State Government. Before it could do so, the new Government came into power and it reviewed the decision of the earlier Government and found the criteria evolved by the earlier Government unacceptable and also noticed certain infirmities in the matter of forwarding the names of eligible candidates. It, therefore, resolved to rescind the earlier notifications of December 20, 1990 and January 25, 1991. It will thus be seen that at the time when the writ petition which has given rise to the present proceedings was filed, the State Government had withdrawn the aforesaid two notifications by the notification dated December 30, 1991. The stage at which the last-mentioned notification came to be issued was the stage when the HPSC was still in the process of selecting candidates for appointment by special

recruitment. During the pendency of the present proceedings the State Government finalised the criteria for special recruitment by the notification of March 9, 1992. Thus, the HPSC was still in the process of selecting candidates and had yet not completed and finalised the select list nor had it forwarded the same to the State Government for implementation. The candidates, therefore, did not have any right to appointment. There was, therefore, no question of the High Court granting a mandamus or any other writ of the type sought by the appellants. The law in this behalf appears to be well settled."

28. Similarly, this view has been reiterated by this Court in the cases of *State of M.P. & Ors. Vs. Raghuveer Singh Yadav & Ors.* (supra), *H.S. Grewal Vs. Union of India & Ors.* (supra) and *Rajasthan Public Service Commission Vs. Chanan Ram & Anr.* (supra). This Court in *Rajasthan Public Service Commission's* case (supra) has held that it is the rules which are prevalent at the time when the consideration took place for promotion, which would be applicable. In Para 17, it has been held as follows:

"In the case of *State of M.P.* v. *Raghuveer Singh Yadav* a Bench of two learned Judges of this Court consisting of K. Ramaswamy and N. Venkatachala, JJ., had to consider the question whether the State could change a qualification for the recruitment during the process of recruitment which had not resulted into any final decision in favour of any candidate. In paragraph 5 of the Report in this connection it was observed that it is settled law that the State has got power to prescribe qualification for recruitment. In the case before the Court pursuant to the amended Rules, the Government had withdrawn the earlier notification and wanted to proceed with the recruitment afresh. It was held that this was not the case of any accrued right. The candidates who had appeared for the examination and

passed the written examination had only legitimate expectation to be considered according to the rules then in vogue. The amended Rules had only prospective operation. The Government was entitled to conduct selection in accordance with the changed rules and make final recruitment. Obviously no candidate acquired any vested right against the State. Therefore, the State was entitled to withdraw the notification by which it had previously notified recruitment and to issue fresh notification in that regard on the basis of the amended Rules. In the case of *J&K Public Service Commission* v. *Dr Narinder Mohan*[9] another Division Bench of two learned Judges of this Court consisting of K. Ramaswamy and N.P. Singh, JJ. considered the question of interception of recruitment process earlier undertaken by the recruiting agency. In this connection it was observed that the process of selection against existing and anticipated vacancies does not create any right to be appointed to the post which can be enforced by a mandamus. It has to be recalled that in fairness learned Senior Counsel, Shri Ganpule for the respondent-writ petitioner, stated that it is not his case that the writ petitioner should be appointed to the advertised post. All that he claimed was his right to be considered for recruitment to the advertised post as per the earlier advertisement dated 5-11-1993 Annexure P-1 and nothing more. In our view, the aforesaid limited contention also, on the facts of the present case, cannot be of any assistance to the writ petitioner as the earlier selection process itself had become infructuous and otiose on the abolition of the advertised posts, as we have seen earlier. The second point, therefore, will have to be answered in the negative in favour of the appellants and against the respondent-writ petitioner."

29. It may be that the removal of the two posts from the feeder cadre would lead to some stagnation for the officers working on the two aforesaid posts. In fact, the Government

seems to recognize such a situation. It is perhaps for this reason that the posts have been upgraded to the post of Deputy Excise Commissioner. However, mere upgradation of the post may not be sufficient compensation for the officers working on the two posts for loss of opportunity to be promoted on the post of Deputy Excise Commissioner.

30. In such circumstances, the Government may be well advised to have a re-look at the promotion policy to provide some opportunity of further promotion to the officers working on these posts.

31. With these observations, the impugned judgment is affirmed and the appeal is accordingly dismissed with no order as to costs.

R.P. Appeal dismissed.

AFJAL IMAM

v.

STATE OF BIHAR & ORS.

(Civil Appeal No. 2843 of 2011)

APRIL 01, 2011

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

Bihar Municipal Act, 2007 – ss. 27, 25 (4), 23(3), 21(3) and 21(4) – Election of appellant as Mayor of Municipal Corporation – Appellant nominated seven Municipal Councillors to the Empowered Standing Committee – Entitlement of the appellant as well as the members of the Empowered Standing Committee to exercise all the powers as the Mayor and the members of the Empowered Standing Committee as provided in the Act – Held: Entitled – Judgment containing the reasons to follow separately – s. 27 is to be read down harmoniously with ss. 25(4), 23(3), 21(3) and 21(4) – Direction issued to respondent no.3-District Magistrate Patna, Bihar to administer the oath of secrecy u/s. 24 to the seven Municipal Councillors.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2843 of 2011.

From the Judgment & Order dated 8.7.2010 of the High Court of Judicature of Patna in Civil Writ Jurisdiction Case No. 9981 of 2010.

S.B.K. Mangalam, Rajesh Anand, Ashutosh Pande, Madhumita Singh, Abhay Kumar for the Appellant.

Santosh Mishra, Gopal Singh, Manish Kumar, Chandan Kumar, Santosh Kumar Tripathi, Neeraj Shekhar for the Respondents.

The following Order of the Court was delivered

O R D E R

1. Leave Granted.

2. Appeal allowed. Impugned judgment and order passed by the Division Bench of the Patna High Court in Writ Petition bearing No.CWJC 9981/2010 dated 8th July, 2010 is set aside. The said writ petition filed by the appellant herein stands allowed in part. Section 27 of the Bihar Municipal Act 2007 shall be read down harmoniously with Sections 25 (4), 23 (3), 21 (3) and 21 (4) of the said Act. The respondent no.3, the District Magistrate Patna, Bihar is directed to administer the oath of secrecy under Section 24 of the Act to the seven Municipal Councillors nominated by the appellant to the Empowered Standing Committee. The appellant as well as the members of the Empowered Standing Committee shall be entitled to exercise all the powers as the Mayor and the members of the Empowered Standing Committee as provided in the Bihar Municipal Act, 2007, in accordance with law.

3. Judgment containing the reasons to follow separately.

N.J. Appeal allowed.

SIDDAMURTHY JAYARAMI REDDY (D) BY LRS.

v.

GODI JAYA RAMI REDDY & ANR.

(Civil Appeal No. 2916 of 2005)

APRIL 1, 2011

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

WILL:

Construction of will – Defeasance clause in the will – Effect of – Testator bequeathing all his properties to his grand-daughter by a will – Further clause in the will that if his daughter did not take a son in adoption and if that son did not marry his grand-daughter, then he intended to give 1/3 share in the property to his daughter and son-in-law together – Held: The will must be read and construed as a whole to gather the intention of the testator and the endeavor of the court must be to give effect to each and every disposition – In ordinary circumstances, ordinary words must bear their ordinary construction and every disposition of the testator contained in will should be given effect to, as far as possible consistent with the testator's desire – The legacy vested in the grand-daughter, albeit, defeasibly to the extent of 1/3 share upon happening of any of the events mentioned in the will – The clause in the will is not a repugnant condition that invalidates the will, but a defeasance provision – Hindu Wills Act, 1870 – s.2 – Inian Succession Act, 1865 – Indian Succession Act, 1925 – ss. 57(a), (b), 147 and 74 to 111.

WILL

Will in favour of minor – Obligation cast upon the guardian/executor – Failure to perform the obligation – Effect of – Explained.

One 'BS' who had his dependents and other

relations, namely, his wife 'S', daughter 'P', son-in-law 'RR', widowed daughter-in-law, grand-daughter 'LX' (daughter of predeceased son) and a widowed sister, executed a will on 21.5.1920 bequeathing all his movable and immoveable properties to his grand- daughter 'LX'. As 'LX' was a minor, the testator appointed his son-in-law (RR) as executor of the will. As 'P' and 'RR' had no issue, the testator expressed his desire in the will that 'P' would take a son in adoption with the consent of her husband 'RR' and that his grand -daughter 'LX' be married to such adopted son of 'P'. It was further provided in the will that 'RR' and 'LX' would look after all the other female members in the family; that in case his daughter 'P' did not take any boy in adoption or if the boy so adopted did not accept to marry 'LX', then 1/3 share of the property would go to 'P' and her husband 'RR' and 2/3 to 'LX'. After few years of death of 'BS', 'P' wanted to adopt a boy namely 'GVR' but 'RR' did not agree and left the village and his wife 'P', and settled in a different village where he performed a second marriage out of which two sons 'JR' and 'SR' were born. In due course "LX' married 'GVR' and a son 'GJR' was born to them. Soon thereafter 'GVR' died and with the passage of time 'RR' and 'P' also died. 'LX', the legatee, also died in 1971.

In 1980, the two sons of 'RR' born out of the second marriage filed a suit for partition claiming 1/3 share in the property bequeathed by 'SB' as also for rent and profits. The suit was contested by the defendants stating that after 'RR' abandoned 'P' and his rights to the property, 'P' bequeathed her share in the property to 'LX' in 1953. The trial court passed a preliminary decree in favour of the plaintiffs. On appeal by the defendants, the High Court held that 'RR' failed to discharge both the obligations – in maintaining the dependants of the testator and in acting as the executor – and, therefore, he could not claim any property under the will; and that the will executed by

'P' in 1953 was genuine. The High Court allowed the appeal and dismissed the suit. Aggrieved, the plaintiffs filed the appeal.

Dismissing the appeal, the Court

HELD: 1.1. By the Hindu Wills Act, 1870, statutory provisions were made to regulate the wills of Hindus, Jainas, Sikhs and Buddhists in the Lower Provinces of Bengal and in the towns of Madras and Bombay. Inter alia, by virtue of s. 2 thereof certain provisions of the Indian Succession Act, 1865 were made applicable to all such wills and codicils. Clauses (a) and (b) of s.57 of the Indian Succession Act, 1925 are *pari materia* to clauses (a) and (b) of s. 2 of the 1870 Act. [Para 21-22] [191-E; 193-D]

1.2. In the instant case, the will dated 21.5.1920 is admittedly a muffussil will as it has not been executed within the local limits of ordinary original civil jurisdiction of the High Court of Judicature at Madras. Clause (a) of s. 57 of the Indian Succession Act, 1925 is apparently not attracted. Since the subject will is not covered by any of the clauses of s. 57, Part VI of the 1925 Act is not applicable thereto. Further, the parties were *ad idem* that s.. 141 of the 1925 Act, as it is, has also no application at all. Although the statutory provisions concerning construction of wills from ss. 74 to 111 of the 1925 Act do not apply but the general principles incorporated therein would surely be relevant for construction of the subject will. [Para 23-25] [193-F-H; 194-B-C]

1.3. It is well settled that the court must put itself as far as possible in the position of a person making a will in order to collect the testator's intention from his expressions; because upon that consideration must very much depend the effect to be given to the testator's intention, when ascertained. The will must be read and construed as a whole to gather the intention of the

testator and the endeavor of the court must be to give effect to each and every disposition. In ordinary circumstances, ordinary words must bear their ordinary construction and every disposition of the testator contained in will should be given effect to, as far as possible, consistent with the testator's desire. [Para 26] [194-D-E]

1.4. In the instant case, the only son of the testator had predeceased him. At the time of execution of the will, he had his wife, widowed sister, widowed daughter-in-law, daughter and minor granddaughter surviving; the only other male member was his son-in-law – 'RR'. He intended to give all his properties to the granddaughter but he was aware that after her marriage, she would join her husband's family. The testator intended that his entire estate remained in the family and did not go out of that and having that in mind, he desired that his daughter adopted a son with the consent of her husband and his granddaughter married the adopted son of his daughter. He expressed in unequivocal terms, "after my demise, my granddaughter 'LX' who is the daughter of my son shall have absolute rights in my entire properties". [Para 27] [194-F-H; 195-A]

1.5. The testator gave two very particular directions in the will that until 'LX' attained the age of majority and attained power to manage the properties: (1) 'RR' shall act as an executor till then and (2) the executor shall look after the female members in the family, namely, his wife, widowed daughter-in-law, daughter 'P', widowed sister and granddaughter 'LX'. 'RR', thus, was obligated to carry out the wishes of the testator by managing his properties and looking after the minor granddaughter 'LX' till she attained majority and also to look after other female members in the family. 'RR' neither continued as a guardian of minor granddaughter 'LX' nor did he look after the testator's wife, widowed daughter-in-law,

widowed sister and daughter. The female folk were left in lurch with no male member to look after. He took no care or interest in the affairs of the family or properties of the testator and thereby failed to discharge his duties as executor. It can not be said that abandonment was not voluntary and conscious. [Para 28, 35 and 36] [195-B-C; 197-F-G]

1.6. The testator was clear in his mind that after his death, his granddaughter should have absolute rights in his entire properties. He has said so in so many words in the will. However, he superadded a condition that, should his daughter 'P' and son-in-law 'RR' not adopt a son or if his daughter and son-in-law adopted a son but that boy did not agree to marry his granddaughter, then 1/3rd share in his properties shall go over to his daughter 'P' and her husband 'RR'. The bequest to the extent of 1/3rd share in the properties of the testator in favour of 'P' and her husband 'RR' jointly was conditional on happening of an uncertain event. As a matter of fact and in law, immediately after the death of testator in 1920, what became vested in 'RR' was not legacy but power to manage the properties of the testator as an executor; the legacy vested in 'LX', albeit, defeasibly to the extent of 1/3rd share. The only event on which the legacy to 'LX' to the extent of 1/3rd share was to be defeated was upon happening of any of the above events. The said clause in the will is not a repugnant condition that invalidates the will but is a defeasance provision. It can not, therefore, be said that on the death of testator in 1920, the legacy came to be vested in 'RR' and once vesting took place, it could not have been divested. [Para 34] [196-F-H; 197-A-B]

Mt. Rameshwar Kuer & Anr. v. *Shiolal Upadhaya and Ors* **AIR 1935 Patna 401 –referred to.**

1.7. The conditional legacy to 'RR' (to the extent of 1/3rd share jointly with 'P') was not intended to be given

to him if he happened to be instrumental in defeating the testator's wish in not agreeing to the adoption of a son by his (testator's) daughter. Such an intention might not have been declared by the testator in express terms but necessary inference to that effect can safely be drawn by reading the will as a whole. In the circumstances, the legacy to the extent of 1/3rd share cannot be held to have ever vested in 'RR' jointly with 'P' as it was he who defeated the adoption of son by the testator's daughter. As a matter of fact by his conduct, 'RR' rendered himself disentitled to any legacy. [Para 37] [198-B-C]

1.8. Not only that 'RR' did not discharge his obligations under the will of looking after the family and managing the properties as an executor but he was also instrumental in frustrating the adoption of son by the testator's daughter. Much before the defeasance clause came into operation when 'LX' married 'GVR' who could not be adopted as son by 'P', 'RR' had already left the testator's family for good and abandoned the legacy that could have come to him under that clause. [Para 38] [198-D-E]

2.1. The plea of the appellants that RR's family from the second wife and the testator's family was a composite family and the properties were joint family properties of the plaintiffs and the defendants, has not been accepted by the trial court as well as High Court. This Court has no justifiable reason to take a different view on this aspect. [Para 39] [199-F]

2.2. Importantly, 'RR' during his life time – although he survived for about 19 years after the death of the testator – never claimed any legacy under the subject will. [Para 40] [199-G]

2.3. All in all, on the construction of the will and, in the circumstances, it must be held, and this Court holds that no legacy came to be vested in 'RR' and he did not become entitled to any interest in the estate of the testator and, therefore, the plaintiffs did not acquire any right, title or interest in the properties of the testator. [Para 41] [190-H; 199-A]

(Katreddi) Ramiah and another v. *Kadiyala Venkata Subbamma and others* **A.I.R. 1926 Madras 434;** *Balmakund* v. *Ramendranath Ghosh* **A.I.R. 1927 Allahabad 497;** *Ratansi D. Morarji* v. *Administrator-General of Madras* **A.I.R. 1928 Madras 1279;** *Bhojraj* v. *Sita Ram and others* **A.I.R. 1936 Privy Council 60;** *Ketaki Ranjan Bhattacharyya and others v. Kali Prasanna Bhattacharyya and others* **A.I.R. 1956 Tripura 18;** *P. Lakshmi Reddy v. L. Lakshmi Reddy* **(1957) SCR 195;** *AL. PR. Ranganathan Chettiar and another v. Al. PR. AL. Periakaruppan Chettiar and others* **A.I.R. 1957 S.C. 815;** *Darshan Singh and others v. Gujjar Singh (Dead) By LRs. and others* **(2002) 2 SCC 62;** *Govindammal v. R. Perumal Chettiar and others* **(2006) 11 SCC 600 and** *Govindaraja Pillai and others* v. *Mangalam Pillai and another* **A.I.R. 1933 Madras 80 – cited.**

Case Law Reference:

AIR 1935 Patna 401	**referred to**	**para 31**
A.I.R. 1926 Madras 434	**cited**	**para 43**
A.I.R. 1927 Allahabad 497	**cited**	**para 43**
A.I.R. 1928 Madras 1279	**cited**	**para 43**
A.I.R. 1936 Privy Council 60	**cited**	**para 43**
A.I.R. 1956 Tripura 18	**cited**	**para 43**
(1957) SCR 195	**cited**	**para 43**
A.I.R. 1957 S.C. 815	**cited**	**para 43**
(2002) 2 SCC 62	**cited**	**para 43**

(2006) 11 SCC 600	**cited**	**para 43**
A.I.R. 1933 Madras 80	**cited**	**para 43**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2916 of 2005.

From the Judgment & Order dated 21.4.2003 of the High Court of Andhra Pradesh at Hyderabad in Appeal No. 397 of 1987.

R. Sundaravaradan, V. Sridhar Reddy, Ch. Leela Sarveswar, Abhijit Sengupta for the Appellants.

P.S. Narasimha, K. Parameshwar (for Sudha Gupta) for the Respondent.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. The controversy in this appeal, by special leave, is concerned with will dated May 21, 1920 executed by Bijivemula Subba Reddy resident of Chennavaran, village Kattera Gandla, Badwel Taluq, Cuddapah District. The question is one of construction upon which the two courts – High Court and trial court – are not in accord and, have taken divergent view.

2. At the time of execution of the will, Bijivemula Subba Reddy – a Hindu – was aged about 75 years. He had his wife Subbamma, daughter Pitchamma, son-in-law Rami Reddy, widowed sister Chennamma, widowed daughter-in-law and granddaughter Lakshumamma living. His only son Sesa Reddy had died in 1917. The testator was man of sufficient wealth. He had landed property (wet and dry lands and wells) at various places, namely, in Katteragandla, Rampadu, Varikuntla and Thiruvengala Puram. He also owned few houses and plots of lands at different places. He had moveable properties as well in the form of bonds, securities and promissory notes. The will recites, as indeed is the undisputed fact, that the testator,

except one house situate at Kotha Laxmipally village in which he had 1/3rd share, was the absolute owner of the properties specified therein.

3. Pitchamma had no child although she had married 20 years before the execution of the will. The testator desired that his daughter Pitchamma adopted a son with the consent of her husband and his granddaughter Lakshumamma got married to the adopted son of his daughter Pitchamma.

4. The will is written in vernacular (Telugu). The correctness of its English translation annexed with the appeal was disputed by the respondents. The parties were then directed to submit agreed translation of the will which they did and that reads as follows:

> "I, Bijivemula Subba Reddy son of Balachennu, resident of Chennavaran village Kattera gandla, Badwel Taluq Cuddapah District, cultivation, this the 21st day of May, 1920, with sound mind, free will executing the will.
>
> Now I am aged about 75 years. My wife Subbamma is living. I had one son by name Sesa Reddy. He died at the age of 24 years, about three years back. He had one wife and one daughter aged about 6 years by name Lakshumma. I have one daughter by name Pitchamma. I have given in marriage to one Rami Reddy adopted son of Siddamurthi Duggi Reddy, Papireddypally village Rampadu Majira., though she married about 20 years back, but she has no issues.
>
> She intended to take a boy in adoption with the consent of her husband.
>
> As I am old I could not [sic] able to run my family. After the death of my son, since 15 years, the above persons are looking after my family and my welfare.
>
> I have also one widow sister by name Chennamma.

She is living with me since 30 years. She is also helping me in all aspects. I intend to give my grand daughter Lakshumamma to the proposed adopted son of my daughter Pitchamma.

In the said event, I intend to give all my belongings, moveable and immovable properties to the said Lachumma and the adopted son of my daughter Pitchamma. But my daughter and her husband so far did not take any steps for getting a boy in adoption. Now as I am sick and suffering from fever and other ailments, I am doubting whether I can perform the above said acts during my life time.

I own lands in Katteragandla Village, Rampadu village, Varikuntla village, and Thiruvengala puram village, both wet and dry lands and also wells. I also own a Midde in Majira. I have one Beeruva in Pancha of my house. I also have household articles, kallamettelu. I also have lands in Papireddypally village of Rampadu Majira, two plots and I have absolute rights in one of the same. I also have one house in Kotha Laxmipally village, of Kathera gandla majira and in that I have 1/3rd share. I also have bonds and securities and promissory notes transactions. As I have the above said moveable and immoveable properties and as I am having absolute rights over the same, none others have any rights whatsoever in the above said properties. Therefore, I intend to execute the will and the same shall come into force after my demise.

The following are the terms of the will.

(1) After my demise, my grand daughter, Lachumamma who is the daughter of my son shall have absolute rights in my entire properties.

(2) As my grand daughter is minor, till she attains the age of majority and attains power to manage the

above said properties, I hereby appoint my son in law Siddamurthy ramireddy as executor of the will till then.

(3) According to the will of my grand daughter Laxmamma, in case to marry the adopted son of my daughter, it shall be performed.

(4) As I am having my wife Subbamma, Widow daughter in law, Pitchamma, and my widow sister Chennamma, the present guardian, Ramireddy and my grand daughter Laxmumma, after attaining majority, shall look after the above persons. If they do not satisfied (*sic*) with the above arrangements, they shall enjoy my property with limited rights and necessary arrangements shall be made by the guardian and after him and my grand daughter Laxmamma after attaining majority.

(5) In case, as God's grace is not in favour of my aforesaid proposals, namely if my daughter did not take any boy in adoption and if the said boy will not accept to marry my grand daughter Laxmamma, I intend to give my aforesaid properties, 1/3rd share to my daughter Pitchamma and her husband who is also my son in law Ramireddy together. The remaining 2/3rd share is given to my grand daughter Laxmumma.

Accordingly I executed the will and they have the right to partition and they shall enjoy the properties after division with absolute rights during their life time and thereafter their legal heirs"

5. Bijivemula Subba Reddy died within few months of the execution of the will. After few years of death of the testator, Pitchamma wanted to adopt Godi Venkat Reddy as her son but her husband Rami Reddy did not agree to that adoption.

Rami Reddy left the Village Chennavaran, his wife Pitchamma and settled in other village – Pappireddypally. Rami Reddy then married with Subbamma. Out of the wedlock of Rami Reddy and his second wife, two sons were born : (i) Siddamurthy Jayarami Reddy and (ii) Siddamurthy Rami Reddy.

6. Lakshumamma married Godi Venkat Reddy somewhere in 1926 and out of that wedlock one son Godi Jayarami Reddy was born. Unfortunately Godi Venkat Reddy died within three years of marriage. Godi Jayarami Reddy has one son Godi Ramachandra Reddy. Rami Reddy died in 1939; Pitchamma died in 1953 and Lakshumamma died in 1971.

7. In 1980, the two sons of Rami Reddy, born out of wedlock of his second wife Subbamma, filed a suit for partition of the schedule properties – the properties bequeathed by Bijivemula Subba Reddy vide his will dated May 21, 1920 – claiming 1/3rd share therein under that will. They also claimed rent and profits. The case of the plaintiffs was that they and the defendants were members of a composite family and were in joint possession and enjoyment of the properties of Bijivemula Subba Reddy and as per the will they were entitled to 1/3rd share. During the pendency of the suit, one of the sons died and his legal representatives were brought on record. The plaintiffs are the present appellants.

8. The defendants traversed the claim of the plaintiffs and set up the plea that there was a dispute between Pitchamma and her husband Rami Reddy over the adoption of Godi Venkat Reddy; Rami Reddy left the house somewhere in 1924 and settled in Village Pappireddypally. It was averred that Rami Reddy married a second wife and not only abandoned Pitchamma but also abandoned his rights to the property given under the will. Pitchamma then looked after the family in the absence of any male member, managed the properties and got the patta of these properties transferred in the name of Lakshumamma and bequeathed her share in the property by a will in 1953 to Lakshumamma.

9. The defendants also set up the plea that Lakshumamma purchased few properties mentioned in the schedule from her own resources in 1955. They gave the details of those properties. They further set up the case that Lakshumamma after executing the will on March 6, 1953 partitioned the properties between herself and first defendant. By way of additional written statement, the plea of *res judicata* was raised. The defendants are the respondents herein.

10. On the basis of the pleadings of the parties, the trial court framed diverse issues; the parties let in oral as well as documentary evidence and the trial court heard the counsel for the parties.

11. The trial court in its judgment dated December 22, 1986 negated the plaintiffs' claim that they and the defendants were members of a composite family and the subject properties were in their joint possession and enjoyment. However, the trial court did hold that under the will dated May 21, 1920 Pitchamma and Rami Reddy got 1/6th share each in the properties of the testator. While concluding so, the trial court held that there was no condition imposed in the will by the testator that his daughter Pitchamma and son-in-law Rami Reddy must adopt a son and her granddaughter should marry the adopted son of Pitchamma and her husband. It was only a pious wish of Bijivemula Subba Reddy that his daughter Pitchamma adopted a son with the consent of her husband and that his granddaughter Lakshumamma should marry the adopted son of Pitchamma and her husband. The trial court further held that the plaintiffs were not claiming the property directly as legatees under the will but as legal heirs of Rami Reddy and Pitchamma since will had come into force and was acted upon after the death of Bijivemula Subba Reddy and, accordingly, Pitchamma and Rami Reddy got 1/6th share each. The trial court also held that the property acquired by Pitchamma by way of bequest under the will was a separate property and after her death, it devolved upon her husband's

heirs (i.e. plaintiffs) and, thus, plaintiffs were entitled to 1/3rd share in the schedule properties. The trial court negated the plea of adverse possession set up by the defendants and passed a preliminary decree for partition in favour of plaintiffs with regard to their 1/3rd share.

12. The defendants (present respondents) challenged the judgment and decree passed by the trial court in appeal before the High Court. The High Court formulated three points for determination in the appeal viz; (i) whether Rami Reddy failed to comply with the obligations cast on him under the will dated May 21, 1920 executed by Bijivemula Subba Reddy and he abandoned the family and if so, whether his legal heirs (Plaintiffs) could claim his share in the property of the testator; (ii) whether will executed by Pitchamma in 1953 was genuine, true and bona fide and (iii) whether the defendants have acquired rights in the schedule properties by adverse possession.

13. The High Court held that it was obligated upon Rami Reddy under the will to maintain the dependants of the testator and act as an executor of the will. Rami Reddy failed to discharge both obligations - in maintaining the dependants of the testator and in acting - as executor. The High Court, thus, concluded that Rami Reddy could not claim any property under the will. The High Court overturned the finding of the trial court as regards the will executed by Pitchamma and held that the will executed by her in 1953 was genuine and true. As regards plea of adverse possession set up by the defendants—although negated by the trial court—the High Court held that there was ouster of the plaintiffs 60 years back and there was no semblance of any enjoyment of property by the plaintiffs' predecessors-in-title along with the defendants jointly. Consequently, the High Court by its judgment dated April 20, 2003 reversed the judgment and decree of the trial court and allowed the appeal preferred by the defendants.

14. It is from the judgment of the High Court that present appeal by special leave arises.

15. Mr. R. Sundaravaradan, learned senior counsel for the appellants argued: The importation of Section 57 and Section 141 of Indian Succession Act, 1925 (for short, 'the 1925 Act') is wholly inappropriate since the present case is concerned with the muffussil will of a Hindu dated May 21, 1920 with regard to the properties situate outside the city of Madras. The muffussil wills (executed before 1927) do not require the formalities of execution, attestation and revocation to be carried out in the manner required by the 1925 Act. The parties did not join issue about the truthfulness of the will and there was only dispute about its construction and implementation. Even if it be assumed that Section 141 of the 1925 Act is attracted, the same has been complied with; the attesters were already dead.

16. It was vehemently contended by Mr. R. Sundaravaradan that the property vested in the executor in 1920 on the death of testator and Section 141 of the 1925 Act, even if applicable, could not divest such vesting in title. Dealing with the expression "take the legacy" in Section 141, it was argued by learned senior counsel that the said expression means taking possession of legacy and not vesting of the legacy. He submitted that the word "executor" used in the will has been used in loose sense of the term; Rami Reddy was the son-in-law of the testator, he was looking after and managing the lands and, therefore, the legacy bequeathed to him was not because he was to be the executor in strict sense but because he was the testator's son-in-law and manager.

17. Learned senior counsel submitted that there is no legal evidence of mismanagement, malversation or misappropriation and a vague allegation that the executor has not done his job required no serious consideration. He argued that the marriage of Rami Reddy with Subbamma was with the consent of Pitchamma and there was no legal impediment for a Hindu to have a second wife before Hindu Succession Act, 1956 or Bigamy Prevention Act, 1949 especially when Pitchamma was barren and it is indeed a legal requirement based on Shastric injunction to have progeny so that religious efficacy of satisfying

the souls of forefathers is completed. Learned senior counsel contended that there was no voluntary and conscious abandonment by Rami Reddy and the High Court was in clear error in holding so.

18. Mr. R. Sundaravaradan criticized the findings of the High Court on the plea of adverse possession set up by the defendants and genuineness of the will executed by Pitchamma in 1953 in favour of Lakshumamma.

19. Mr. P.S. Narasimha, learned senior counsel for the respondents, on the other hand, supported the judgment of the High Court.

20. Indian Succession Act, 1865 (for short, 'the 1865 Act') was enacted to provide for intestate and testamentary succession in British India. Section 331 of the 1865 Act, however, excluded its applicability to intestate or testamentary succession to the property of any Hindu, Muhammadan or Buddhist and it further provided that its provisions shall not apply to any will made, or any intestacy occurring, before January 1, 1866.

21. By the Hindu Wills Act, 1870 (for short, 'the 1870 Act'), statutory provisions were made to regulate the wills of Hindus, Jainas, Sikhs and Buddhists in the Lower Provinces of Bengal and in the towns of Madras and Bombay. Inter alia, Section 2 thereof provided as follows :

"S. 2. The following portions of the Indian Succession Act, 1865, namely,—

sections forty-six, forty-eight, forty-nine, fifty, fifty-one, fifty-five and fifty-seven to seventy-seven (both inclusive),

sections eighty-two, eighty-three, eighty-five, eighty-eight to one hundred and three (both inclusive),

sections one hundred and six to one hundred and seventy-seven (both inclusive),

sections one hundred and seventy-nine to one hundred and eighty-nine (both inclusive),

sections one hundred and ninety-one to one hundred and ninety-nine (both inclusive),

so much of Parts XXX and XXXI as relates to grants of probate and letters of administration with the will annexed, and

Parts XXXIII to XL (both inclusive), so far as they relate to an executor and an administrator with the will annexed,

shall, notwithstanding anything contained in section three hundred and thirty-one of the said Act, apply—

(a) to all wills and codicils made by any Hindu, Jaina, Sikh or Buddhist, on or after the first day of September one thousand eight hundred and seventy, within the said territories or the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(b) to all such wills and codicils made outside those territories and limits, so far as relates to immoveable property situate within those territories or limits:"

22. The 1925 Act which came into force on September 30, 1925 has eleven parts. Part VI has twenty three chapters. Section 57 to Section 191 are covered by Part VI. Section 57 provides thus:

"S.57. Application of certain provisions of Part to a class of Wills made by Hindus, etc. – The provisions of this Part which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply—

(a) to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of

September, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(b) to all such Wills and codicils made outside those territories and limits so far as relates to immoveable property situate within those territories or limits; and

(c) to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of January, 1927, to which those provisions are not applied by clauses (a) and (b):]

Provided that marriage shall not revoke any such Will or codicil."

Clauses (a) and (b) of Section 57 of the 1925 Act are *pari materia* to clauses (a) and (b) of Section 2 of the 1870 Act. Clause (c) is a new provision.

23. As noticed above, present case is concerned with the will executed in 1920. The will is admittedly a muffussil will as it has not been executed within the local limits of ordinary original civil jurisdiction of the High Court of Judicature at Madras. Clause (a) of Section 57 is apparently not attracted. The subject will also does not relate to immoveable properties situate within the local limits or territories as set out in clause (a). In this view of the matter, clause (b) is also not attracted. Clause (c) does not get attracted, as it applies to wills and codicils made on or after January 1, 1927.

24. Since the subject will is not covered by any of the clauses of Section 57, Part VI of the 1925 Act is not applicable thereto. Section 141 which falls in Chapter XIII of Part VI of the 1925 Act that provides – if a legacy is bequeathed to a person who is named an executor of the will, he shall not take the

legacy, unless he proves the will or otherwise manifests an intention to act as executor — is, thus, not applicable to the subject will. As a matter of fact, both learned senior counsel were *ad idem* that Section 141 of the 1925 Act, as it is, has no application at all.

25. We may also state that although the statutory provisions concerning construction of wills from Sections 74 to 111 of the 1925 Act do not apply but the general principles incorporated therein would surely be relevant for construction of the subject will.

26. It is well settled that the court must put itself as far as possible in the position of a person making a will in order to collect the testator's intention from his expressions; because upon that consideration must very much depend the effect to be given to the testator's intention, when ascertained. The will must be read and construed as a whole to gather the intention of the testator and the endeavor of the court must be to give effect to each and every disposition. In ordinary circumstances, ordinary words must bear their ordinary construction and every disposition of the testator contained in will should be given effect to as far as possible consistent with the testator's desire.

27. The above are the principles consistently followed and, we think, ought to be guided in determining the appeal before us. What then was the intention of this testator? The only son of the testator had predeceased him. At the time of execution of will, he had his wife, widowed sister, widowed daughter-in-law, daughter and minor granddaughter surviving; the only other male member was his son-in-law – Rami Reddy. He intended to give all his properties to the granddaughter but he was aware that after her marriage, she would join her husband's family. The testator intended that his entire estate remained in the family and did not go out of that and having that in mind, he desired that his daughter adopted a son with the consent of her husband and his granddaughter married the adopted son of his daughter. He, therefore, stated, "I intend to give all my belongings,

moveable and immoveable properties to the said Lakshumamma and the adopted son of my daughter Pitchamma". He expressed in unequivocal terms, "after my demise, my granddaughter Lakshumamma who is the daughter of my son shall have absolute rights in my entire properties".

28. The testator gave two very particular directions in the will that until Lakshumamma attained the age of majority and attained power to manage properties; (one) Rami Reddy shall act as an executor till then and (two) the executor shall look after the female members in the family, namely, his wife Subbamma, widowed daughter-in-law, daughter Pitchamma, widowed sister Chennamma and granddaughter Lakshumamma. Rami Reddy, thus, was obligated to carry out the wishes of the testator by managing his properties and looking after the minor granddaughter Lakshumamma till she attained majority and also look after other female members in the family.

29. The clause, however, upon which the appellants' are claiming the rights in the properties of Rami Reddy is the clause that reads "…if my daughter did not take any boy in adoption and if the said boy will not accept to marry my granddaughter Lakshumamma, I intend to give my aforesaid properties, 1/3rd share to my daughter Pitchamma and her husband, who is also my son-in-law Rami Reddy together. The remaining 2/3rd share is given to my granddaughter Lakshumamma".

30. Mr. R. Sundaravaradan, senior counsel for the appellants is right in contending that the above clause in the will is not a repugnant condition that invalidates the will but is a defeasance provision.

31. In *Mt. Rameshwar Kuer & Anr*. v. *Shiolal Upadhaya and Ors.*[1], Courtney-Terrell, C.J., speaking for the Bench, explained the distinction between a repugnant provision and a defeasance provision thus :

1. A.I.R. 1935 Patna 401

> "The distinction between a repugnant provision and a defeasance provision is sometimes subtle, but the general principle of law seems to be that where the intention of the donor is to maintain the absolute estate conferred on the donee but he simply adds some restrictions in derogation of the incidents of such absolute ownership, such restrictive clauses would be repugnant to the absolute grant and therefore void; but where the grant of an absolute estate is expressly or impliedly made subject to defeasance on the happening of a contingency and where the effect of such defeasance would not be a violation of any rule of law, the original estate is curtailed and the gift over must be taken to be valid and operative."

32. The distinction between a repugnant provision and a defeasance provision explained in *Mt. Rameshwar Kuer1* has been followed subsequently. In our view, Patna High Court rightly explains the distinction between a repugnant provision and a defeasance provision.

33. The question, however, upon which the fate of this appeal depends is : whether Rami Reddy became entitled to any legacy by virtue of the defeasance clause under the will at all.

34. The testator was clear in his mind that after his death, his granddaughter should have absolute rights in his entire properties. He has said so in so many words in the will. However, he superadded a condition that, should his daughter Pitchamma and son-in-law Rami Reddy not adopt a son or if his daughter and son-in-law adopted a son but that boy did not agree to marry his granddaughter, then 1/3rd share in his properties shall go over to his daughter Pitchamma and her husband Rami Reddy. The bequest to the extent of 1/3rd share in the properties of the testator in favour of Pitchamma and her husband Rami Reddy jointly was conditional on happening of an uncertain event noted above. As a matter of fact and in law, immediately after the death of testator in 1920, what became

vested in Rami Reddy was not legacy but power to manage the properties of the testator as an executor; the legacy vested in Lakshumamma, albeit, defeasibly to the extent of 1/3rd share. The only event on which the legacy to Lakshumamma to the extent of 1/3rd share was to be defeated was upon happening of any of the above events. Mr. R. Sundaravaradan, learned senior counsel, thus, is not right in contending that on the death of testator in 1920, the legacy came to be vested in Rami Reddy and once vesting took place, it could not have been divested.

35. It has come in evidence that Pitchamma wanted to adopt Godi Venkat Reddy as her son, but her husband – Rami Reddy – did not agree to that and as a result thereof Godi Venkat Reddy could not be adopted by Pitchamma. On the issue of adoption of Godi Venkat Reddy, a serious dispute ensued between Pitchamma and her husband. Rami Reddy left the family of the testator and the village Chennavaran somewhere in 1924 and went to nearby village Pappireddypally where he married second time. It may be that there was no legal impediment for Rami Reddy to have a second wife before the Hindu Succession Act, 1956 or Bigamy Prevention Act of 1949 when no child was begotten from Pitchamma yet the fact of the matter is that he abandoned the family of the testator. There is no merit in the submission of Mr. R. Sundaravaradan that abandonment was not voluntary and conscious.

36. Rami Reddy neither continued as a guardian of minor granddaughter Lakshumamma nor looked after the testator's wife, widowed daughter-in-law, widowed sister and daughter. The female folk were left in lurch with no male member to look after. He took no care or interest in the affairs of the family or properties of the testator and thereby failed to discharge his duties as executor.

37. In view of the predominant desire that his granddaughter should have his properties and that his

properties did not go out of the family, the testator desired that his daughter adopted a son with the consent of her husband and his granddaughter married that boy. The conditional legacy to Rami Reddy (to the extent of 1/3rd share jointly with Pitchamma) was not intended to be given to him if he happened to be instrumental in defeating the testator's wish in not agreeing to the adoption of a son by his (testator's) daughter. Such an intention might not have been declared by the testator in express terms but necessary inference to that effect can safely be drawn by reading the will as a whole. In the circumstances, the legacy to the extent of 1/3rd share cannot be held to have ever vested in Rami Reddy jointly with Pitchamma as it was he who defeated the adoption of son by the testator's daughter. As a matter of fact by his conduct, Rami Reddy rendered himself disentitled to any legacy.

38. Not only that Rami Reddy did not discharge his obligations under the will of looking after the family and managing the properties as an executor but he was also instrumental in frustrating the adoption of son by the testator's daughter. Much before the defeasance clause came into operation when Lakshumamma married Godi Venkat Reddy who could not be adopted as son by Pitchamma, Rami Reddy had already left the testator's family for good and abandoned the legacy that could have come to him under that clause.

39. The plea, of the appellants, that Rami Reddy's family from the second wife and the testator's family was a composite family and the properties were joint family properties of the plaintiffs and the defendants, has not been accepted by the trial court as well as High Court. We have no justifiable reason to take a different view on this aspect.

40. Importantly, Rami Reddy during his life time – although he survived for about 19 years after the death of the testator – never claimed any legacy under the subject will.

41. All in all, on the construction of the will and, in the

circumstances, it must be held, and we hold that no legacy came to be vested in Rami Reddy and he did not become entitled to any interest in the estate of the testator and, therefore, the plaintiffs did not acquire any right, title or interest in the properties of Bijivemula Subba Reddy.

42. In view of the above, the challenge to the findings of the High Court on the plea of adverse possession set up by the defendants and the genuineness of the will executed by Pitchamma in 1953 pale into significance and needs no consideration.

43. In fairness to Mr. R. Sundaravaradan, learned senior counsel for the appellants, it must be stated that he cited the following authorities: *(Katreddi) Ramiah and another* v. *Kadiyala Venkata Subbamma and others* [A.I.R. 1926 Madras 434]; *Balmakund* v. *Ramendranath Ghosh* [A.I.R. 1927 Allahabad 497]; *Ratansi D. Morarji* v. *Administrator-General of Madras* [A.I.R. 1928 Madras 1279]; *Bhojraj* v. *Sita Ram and others* [A.I.R. 1936 Privy Council 60]; *Ketaki Ranjan Bhattacharyya and others* v. *Kali Prasanna Bhattacharyya* and others [A.I.R. 1956 Tripura 18]; *P. Lakshmi Reddy* v. *L. Lakshmi Reddy* [(1957) SCR 195]; *AL. PR. Ranganathan Chettiar and another* v. *Al. PR. AL. Periakaruppan Chettiar and others* [A.I.R. 1957 S.C. 815]; *Darshan Singh and others* v. *Gujjar Singh (Dead) By LRs. and others* [(2002) 2 SCC 62]; *Govindammal* v. *R. Perumal Chettiar and others* [(2006) 11 SCC 600] and *Govindaraja Pillai and others* v. *Mangalam Pillai and another* [A.I.R. 1933 Madras 80]. However, in view of our discussion above, we do not think we need to deal with these authorities in detail.

44. In the result, appeal fails and is dismissed with no order as to costs.

R.P. Appeal dismissed.

K. P. THIMMAPPA GOWDA

v.

STATE OF KARNATAKA

(Criminal Appeal No. 1499 of 2004)

APRIL 04, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA JJ.]

PENAL CODE, 1860:

s. 376 – Sexual intercourse with a girl of about 18 years of age on the false promise to marry her – Prosecutrix giving birth to a child after few days of the FIR – Acquittal by trial court – Conviction by High Court – Held : In criminal cases the rule is that the accused is entitled to benefit of doubt – If the court is of opinion that on the evidence adduced two views are possible, benefit of doubt goes to accused – In the instant matter, prosecution has not been able to prove its case beyond reasonable doubt – Accused deserves benefit of doubt – Judgment of High Court set aside – Criminal Law – Benefit of doubt.

The appellant was prosecuted on the basis of an FIR dated 4.1.1996 for committing an offence punishable u/s. 376 IPC. The prosecution case was that the appellant had sex with the prosecutrix several times on the false promise to marry her. The prosecutrix gave birth to a child on 25.1.1996. The trial court acquitted the accused, but the High Court convicted him u/s. 376 IPC and sentenced him to imprisonment for 7 years and to pay a fine of Rs.10,000/-. Aggrieved, the appellant filed the appeal.

Allowing the appeal, the Court

HELD: 1.1. In criminal cases, the rule is that the accused is entitled to the benefit of doubt. If the court is

of the opinion that on the evidence two views are reasonably possible, one that the appellant is guilty, and the other that he is innocent, then the benefit of doubt goes in favour of the accused. In the instant case, the appellant deserves the benefit of doubt because on careful consideration of the evidence on record, it cannot be said that the prosecution has been able to prove its case beyond reasonable doubt. [para 11-12] [204-H; 205-A; 204-G]

1.2. The facts are that the prosecutrix herself stated in her evidence that she had sex with the appellant on several occasions. It is also an admitted fact that the FIR against the appellant was lodged just a few days before the birth of the child of the prosecutrix, which means there is delay of over 8 months in lodging the FIR. The finding of the trial court, which has not been disturbed by the High Court, is that the prosecutrix was about 18 years of age at the relevant time. On these facts a view is reasonably possible that the prosecutrix had sex with the appellant with her consent and hence there was no offence punishable u/s. 376 IPC because sex with a woman above 16 years of age with her consent is not rape. Impugned judgment and order of High Court is set aside. [para 13-14] [204-B-D]

1.3. Besides, the appellant has stated in an affidavit filed in this Court that he has agreed to transfer two acres of land due to breach of promise to marry the prosecutrix and she has given her consent to accept the same. The appellant is directed to give/transfer the said land to the prosecutrix. [para 15-16] [204-E-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1499 of 2004.

From the Judgment Order dated 17.9.2004 of the High Court of Karnataka at Bangalore in Criminal Appeal No. 149 of 1999.

Shanth Kr. V. Mahale, Harish S.R. and Rajesh Mahale for the Appellant.

Sanjay R. Hegde for the Respondent.

MARKANDEY KATJU, J. 1. This appeal has been filed against the impugned judgment dated 17.9.2004 passed by the High Court of Karnataka in Criminal Appeal No. 149 of 1999.

2. The facts of the case have been stated in the impugned judgment of the High Court and the trial court and we are not repeating the same except where necessary.

3. The trial court had acquitted the appellant in the criminal case, but the High Court reversed the judgment and convicted the appellant under Section 376 IPC and sentenced him to imprisonment of 7 years and a fine of Rs. 10,000/-, and also sentenced him to imprisonment of 1 year under Section 417 IPC and a fine of Rs. 10,000/-, both sentences to run concurrently.

4. The case of the prosecution is that on 4.1.1996 the appellant raped one Rathnamma aged 18 years, but he assured her that he would marry her and asked her to keep quiet. It is alleged that subsequently also the appellant had sex with Rathnamma several times and assured her that he would marry her. Rathnamma became pregnant, but the appellant refused to marry her. Hence an FIR was registered in the police station on 4.1.1996 against the appellant under Section 376 IPC.

5. In the trial court the appellant contended that Rathnamma was 20 years of age at the relevant time and she had admitted in her cross-examination that she had sexual intercourse with the appellant nearly 100 times. It was submitted that this showed that she was a consenting party and hence no case under Section 376 IPC is made out against the appellant. Rathnamma's mother Gowramma PW-11 stated in

her evidence that Rathnamma was 18 years of age. Hence she was above 16 years of age and there could be no rape since there was consent.

6. The trial court accordingly held that there was no rape as Rathnamma was above 16 years of age and had consented to the act. Subsequently Rathnamma gave birth to a female child on 25.1.1996.

7. The trial court held that the version of Rathnamma that the appellant gagged her mouth and raped her is not believable. The fact that her child was born on 25.1.1996 means that the conception was in the month of April, 1995. This was disclosed to her parents somewhere in the month of July or August in 1995 and there was a Panchayat which failed.

8. The complaint was filed on 4.1.1996 i.e. just a few days before the birth of the child and not when the sexual act had taken place. Thus there was a delay of over 8 months in filing the complaint which has not been properly explained.

9. For the reasons given above, the trial court disbelieved the prosecution version and acquitted the appellant.

10. In the appeal filed by the State Government the High court reversed the finding of the trial court and held that the appellant had raped Rathnamma and had promised to marry her. It was observed that since the accused had given the impression that he would honour his promise of marrying her, this fact was not disclosed by her to anybody, including her mother.

11. Admittedly, the appellant has married another woman. We are of the opinion that the appellant deserves the benefit of doubt because on careful consideration of the evidence on record, it cannot be said that the prosecution has been able to prove its case beyond reasonable doubt.

12. In criminal cases, the rule is that the accused is entitled

to the benefit of doubt. If the court is of the opinion that on the evidence two views are reasonably possible, one that the appellant is guilty, and the other that he is innocent, then the benefit of doubt goes in favour of the accused.

13. In the present case, the facts are that Rathnamma herself stated in her evidence that she had sex with the appellant on several occasions. It is also an admitted fact that the FIR against the appellant was lodged just a few days before the birth of Rathnamma's child, which means there is delay of over 8 months in lodging the FIR. The finding of the trial court, which has not been disturbed by the High Court, is that Rathnamma was about 18 years of age at the relevant time. On these facts a view is reasonably possible that Rathnamma had sex with the appellant with her consent and hence there was no offence under Section 376 IPC because sex with a woman above 16 years of age with her consent is not rape.

14. For the reasons given above, the appeal is allowed. The impugned judgment and order of the High court is set aside

15. Apart from the above, the appellant has stated in an affidavit filed in this Court that he has agreed to transfer two acres of land situated in Palavanahalli due to breach of promise to marry Rathnamma and she has given her consent to accept the same.

16.The appellant is directed to give/transfer two acres of land as stated in the affidavit filed before Court to Rathnamma within three months from the date of this judgment.

R.P. Appeal allowed.

M/S. BHARAT STEEL TUBES LTD. ETC.
v.
IFCI LTD. & ORS.
(SLP (Civil) No(s) 9728-9729 of 2011)

APRIL 4, 2011

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

COMPANIES ACT, 1956:

ss. 4A(1)(ii) and 4A(2) Proviso (i) – Industrial Financial Corporation of India Limited (IFCIL) – HELD: Provisions of sub-s.(1) of s.4A stand independent of sub-s.(2) of s.4A and recognize the financial institutions mentioned therein to be public financial institutions which are not covered by embargo enforced by proviso to sub-s.(2) – Further, IFCIL was covered by Proviso (i) to sub-s.(2) of s.4A since it was constituted under the Companies Act which is a Central Act – High Court rightly held IFCIL entitled to take recourse to provisions of SARFAESI Act to enforce a "security interest" which had accrued in its favour – Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 – Industrial Finance Corporation (Transfer of Undertaking and Repeal) Act, 1993 – s. 5.

The instant special leave petitions were filed by the petitioner-company challenging the judgment and order dated 9-7-2010, passed by a Division Bench of the High Court holding that the respondent, Industrial Finance Corporation of India Limited, was a "financial institution" u/s 4A(2) of the Companies Act, 1956, read with s. 2(1)(m) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, and that, as a consequence, the respondent IFCI Ltd. would be entitled to take recourse to the provisions of the SARFAESI Act, 2002 in order to enforce a "security

interest" which had accrued in its favour. The petitioner also challenged an order passed by the Single Judge of the High Court vacating the injunction order earlier passed in the suit.

It was primarily contended for the petitioner that at the relevant time, the Central Government did not hold or control 51% or more of the paid up share capital of the respondent institute as envisaged by proviso (ii) to s. 4 A (2) of the Companies Act, 1956 and, as such, it was no longer covered by the definition of "public financial institution" in s. 4A of the Companies Act, 1956 and was not, therefore, entitled to invoke the provisions of the SARFAESI Act, 2002, notwithstanding the provisions of s. 5 of the 1993 Act.

Dismissing the petitions, the Court

HELD: 1.1. The provisions of sub-s. (1) of s. 4A of the Companies Act, 1956 stand independent of sub-s. (2) and the financial institutions named in sub-s. (1) of s.4A recognize the financial institutions mentioned therein to be public financial institutions which are not covered by the embargo enforced by the proviso to sub-s. (2) of the said Section. The proviso controls the width of sub-s. (2) which refers to the powers of the Central Government to specify by notification in the Official Gazette and subject to the provisions of sub-s. (1), such other institutions as it may think fit to be a public financial institution. Sub-s. (2) of s. 4A is applicable only to institutions which are not mentioned in sub-s. (1). It is the latter category of financial institutions to which the proviso applies. In view of s. 4 A(1)(ii) of the Companies Act, 1956, the Industrial Finance Corporation of India was admittedly regarded as a 'public financial institution' for the purpose of the said Act. [para 14] [213-D-G]

1.2. The conversion of the Industrial Finance

Corporation of India into a Company did not alter its position and status as a financial institution in view of s. 5 of the Industrial Finance Corporation (Transfer of Undertaking and Repeal) Act, 1993, which was in the nature of a saving clause, whereby all matters, including all benefits, relating to the Corporation, stood wholly transferred in favour of the new Company. [para 14] [213-G-H; 214-A-B]

1.3. Clauses (i) and (ii) are not conjunctive but disjunctive and even though Clause (ii) may not have any application to respondent No.1 Company, it was covered by clause (i), since it was constituted under the Companies Act, 1956, which is a Central Act. [para 15] [214-C-D]

1.4. There is no reason to interfere with the judgment and orders of the High Court impugned in these special leave petitions. [para 16] [214-D-E]

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 9728-9729 of 2011.

From the Judgment & Order dated 9.7.2010 & 10.9.2010 of the High Court of Delhi at New Delhi in WPC No. 7097 of 2008 & CSOS No. 1886 of 2009 & IA No. 12908 of 2009.

Rakesh Dwivedi, M. Dutta, Amit Duggal, Vivek Malik, Amit Dhupav, Rishi Maheshwari, P.S. Sudheer for the Petitioners.

K.K. Venugopal, Subramonium Prasad, Shweta Mazumdar, Shyam D. Nandan, Rajat Khattry for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Permission to file Special Leave Petitions is granted.

2. In these Special Leave Petitions, M/s Bharat Steel Tubes Ltd. has challenged the judgment and order dated 9th July, 2010, passed by a Division Bench of the Delhi High Court in WP(C) No.7097 of 2008, holding that the Respondent, Industrial Finance Corporation of India Limited is a "financial institution" under Section 4A(2) of the Companies Act, 1956, read with Section 2(1)(m) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (hereinafter referred to as 'the SARFAESI Act') and that, as a consequence, the Respondent IFCI Ltd. would be entitled to take recourse to the provisions of the SARFAESI Act in order to enforce a "security interest" which had accrued in its favour. The Petitioner has also challenged an order passed by a Single Bench of the Delhi High Court on 10th September, 2010, in I.A.No.12908/09 in CS(OS)No.1886 of 2009 vacating the injunction order earlier passed in the suit.

3. Appearing for the Petitioner, Mr. Rakesh Dwivedi, learned Senior Advocate, firstly drew our attention to Section 4A of the Companies Act, 1956, which was introduced by way of an amendment with effect from 1st February, 1975, defining "Public Financial Institutions". It provides that the various financial institutions specified in Sub-Section (1), including the Industrial Finance Corporation of India, established under Section 3 of the Industrial Finance Corporation Act, 1948, is to be regarded for the purposes of the said Act, as a public financial institution. Learned counsel also pointed out that Sub-Section (2) of Section 4A also provides that subject to the provisions of Sub-Section (1), the Central Government may, by notification in the Official Gazette, specify such other institutions as it may think fit to be a public financial institution. A limitation, however, has been imposed on the said powers of the Central Government by the proviso to Sub-Section (2) which provides that no institution is to be specified as a public financial institution unless:-

(i) It has been established or constituted by or under any Central Act; or

(ii) Not less than 51% of the paid-up share capital of such institution is held or controlled by the Central Government.

4. Mr. Dwivedi submitted that while clause (i) of the proviso to Sub-Section (2) of Section 4A of the above Act is not attracted to the facts of this case, the second clause would have been attracted, but for the fact that at the relevant point of time and even now the Central Government does not hold or control 51% or more of the paid-up share capital of the institution concerned. Mr. Dwivedi submitted that on account of disinvestment at regular intervals, the Central Government does not hold any share in the Company and the day it ceased to hold 51% or more of the paid-up share capital, it ceased to enjoy the benefits of Section 4A(ii) and became a private company which could no longer be covered by the definition of "public financial institution" in Section 4A of the Companies Act, 1956. It was submitted that even if the Central Government continue to hold shares in the Company, its status would be that of any other private shareholder and the Corporation could no longer enjoy the status of a Public Financial Institution given to it under Section 4A of the Companies Act, 1956.

5. In order to bolster his submissions, Mr. Dwivedi referred to the Industrial Finance Corporation (Transfer of Undertaking and Repeal) Act, 1993, hereinafter referred to as "the 1993 Act", whereunder the nature and character of the Industrial Finance Corporation of India underwent a change and the Corporation was incorporated as a Company as defined in Section 1(i)(b) of the aforesaid Act. Mr. Dwivedi pointed out that under Section 3, the undertaking of the Corporation was to vest in the Company on a date to be appointed by notification in the Official Gazette and on the said date the undertaking of the Corporation would stand transferred and vested in the newly- incorporated Company. It appears that the

appointed date was subsequently notified as 1st July, 1993.

6. It was also pointed out by Mr. Dwivedi that Section 4 of the 1993 Act mentions the general effect of vesting of an undertaking in the Company to be so incorporated. By virtue of Sub-Section (2) of Section 4, the undertaking of the Corporation, which was transferred to and vests in the Company under Section 3, shall be deemed to include all the various items set out in Sub-Section (2) of Section 4. In addition, under Sub-Section (3) of Section 4, all contracts, deeds, bonds, guarantees, powers of attorney, other instruments and working arrangements subsisting immediately before the appointed date and affecting the Corporation would cease to have effect or to be enforceable against the Corporation and would be of full force and effect against or in favour of the Company, in which the undertaking of the Corporation had vested.

7. Reference was then made to Sub-Section (5) of Section 4, whereunder with effect from the appointed date, fiscal and other concessions, licences, benefits, privileges and exemptions granted to the Corporation in connection with the affairs and business of the Corporation under any law for the time being in force would be deemed to have been granted to the Company. Mr. Dwivedi contended that under the said provision, it could not be said that the status given to the Respondent Company was saved or continued under Section 5 of the Act and, accordingly, once the Central Government ceased to hold 51% or more of the paid-up share capital of the Company, it ceased to enjoy the benefits under Section 5 of the 1993 Act.

8. Mr. Dwivedi submitted that since the Respondent No.1 Company no longer fulfilled the criteria contained in Clause (ii) of the proviso to Sub-Section (2) of Section 4A of the Companies Act, 1956, it had lost the status given to it under Clause (ii) of Sub-Section (1) of Section 4A thereof and was not, therefore, entitled to invoke the provisions of the

SARFAESI Act, 2002, notwithstanding the provisions of Section 5 of the 1993 Act.

9. Mr. Dwivedi also pointed out that the fact that the Respondent No.1 Company was no longer a public company under the control of the Central Government, had also been admitted on behalf of the Respondent No.1 before the Delhi High Court in Writ Petition (Civil)4596 of 2006, which would be reflected from the judgment delivered therein on 17th August, 2010. Mr. Dwivedi pointed out that in paragraph 10 of the judgment it had been mentioned by the learned Single Judge that a submission had been advanced on behalf of the Respondent No.1 Company that it was neither substantially financed by the Central Government nor did the Central Government hold any share whatsoever in the Respondent No.1 Company.

10. Mr. K.K. Venugopal, learned Senior Advocate, appearing for the Respondent No.1 Company, on the other hand, contended that Section 5 of the aforesaid Act was in the nature of a saving clause, whereby all matters relating to the Corporation stood wholly transferred in favour of the new Company after its incorporation, including, the status which had been afforded to the Corporation under Clause (ii) of Section 4A(1) of the Companies Act, 1956. Mr. Venugopal submitted that in exercise of the powers conferred by Sub-Section (2) of Section 4A of the aforesaid Act, the Central Government issued Notification No.S.O.98(E) dated 15th February, 1995, specifying the Industrial Finance Corporation of India Limited formed and registered under the Companies Act, 1956, to be a financial institution and, accordingly, amended the Notification issued by the Government of India, Ministry of Law, Justice and Company Affairs (Department of Company Affairs) No.S.O.1329 dated 8th May, 1978, to include the Industrial Finance Corporation of India Limited in the said notification.

11. Mr. Venugopal urged that the mere fact that the Respondent No.1 Company was no longer under the control of

the Central Government did not affect or alter its status under Section 4A(1)(ii) of the Companies Act, 1956, as a public financial institution and that, in effect, more than 4,000 cases filed by the Respondent No.1 Company in its capacity as a public financial institution were pending and would be rendered infructuous if the interpretation being sought to be given on behalf of the Petitioner in relation to the status of the Respondent No.1 Company was to be accepted.

12. Having regard to the large number of cases filed by the Respondent No.2 Company, in its capacity as a public financial institution, which are said to be pending, we have given our anxious consideration to the submissions advanced on behalf of the respective parties and the provisions of the Companies Act, 1956, and the Industrial Finance Corporation (Transfer of Undertaking and Repeal) Act, 1993.

13. Section 4A of the Companies Act, 1956, as far as the Industrial Finance Corporation of India Limited is concerned, provides as follows :-

4A. Public financial institutions.-

(1) Each of the financial institutions specified in this sub-section shall be regarded, for the purposes of this Act, as a public financial institution, namely:-

(i) .....

(ii) the Industrial Finance Corporation of India, established under Section 3 of the Industrial Finance Corporation Act, 1948 (7 of 1948);

(iii) .....

(iv) .....

(v) .....

(vi) .....

(vii) …….

(2) Subject to the provisions of sub-section (1) the Central Government may, by notification in the Official Gazette, specify such other institution as it may think fit to be a public financial institution:

Provided that no institution shall be so specified unless-

(i) it has been established or constituted by or under any Central Act, or

(ii) not less than fifty-one per cent, of the paid-up share capital of such institution is held or controlled by the Central Government."

14. In our view, the provisions of Sub-Section (1) of Section 4A stand independent of Sub-Section (2) and the financial institutions named in Sub-Section (1) of Section 4A recognize the financial institutions mentioned therein to be public financial institutions which are not covered by the embargo enforced by the proviso to Sub-Section (2) of the said Section. The proviso controls the width of Sub-Section (2) which refers to the powers of the Central Government to specify by notification in the Official Gazette and subject to the provisions of Sub-Section (1), such other institutions as it may think fit to be a public financial institution. It appears to us that Sub-Section (2) of Section 4A is applicable only to institutions which are not mentioned in Sub-Section (1). It is the latter category of financial institutions to which the proviso applies. In view of Section 4 A(1)(ii) of the Companies Act, 1956, the Industrial Finance Corporation of India was admittedly regarded as a 'public financial institution' for the purpose of the said Act. The conversion of the Industrial Finance Corporation of India into a Company did not alter its position and status as a financial institution in view of Section 5 of the Industrial Finance Corporation (Transfer of Undertaking and Repeal) Act, 1993,

which, as pointed out by Mr. K.K. Venugopal, was in the nature of a saving clause, whereby all matters, including all benefits, relating to the Corporation, stood wholly transferred in favour of the new Company.

15. Mr. Dwivedi has submitted that the Notification dated 15th February, 1995, had been issued under Section 4A(2) of the Companies Act which will have to conform to the proviso thereto. Mr. Dwivedi has contended that both the conditions in the proviso would have to be fulfilled in order to be eligible for being specified as a public financial institution. We are unable to accept such contention in view of the fact that clauses (i) and (ii) are not conjunctive but disjunctive and even though Clause (ii) may not have any application to the Respondent No.1 Company, it was covered by clause (i), since it was constituted under the Companies Act, 1956, which is a Central Act.

16. We, therefore, find no reason to interfere with the judgment and orders of the High Court impugned in these Special Leave Petitions, which are, accordingly, dismissed.

17. There shall, however, be no order as to costs.

R.P. Special Leave Petitions dismissed.

GANESH (D) BY LRS. & ORS.
v.
ASHOK & ANR.
(Civil Appeal No(s). 5514 of 2005)

APRIL 4, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

PARTITION:

Family settlement – Land gifted to sons of pre- deceased son of the tenure-holder – Later, by way of a family settlement other agricultural lands settled amongst other heirs – Decree in a civil suit passed in terms of the settlement – Subsequent suit by sons of the deceased son for declaration of decree in earlier suit as null and void – Held: Lands with the tenure-holder were not ancestral property – A family settlement is not a transfer of property – The first appellate court rightly held that the family settlement was bona fide to avoid dispute in the family – High Court, in second appeal, was not justified in setting aside the finding of fact recorded by the first appellate court, which was the last court of facts – Judgment of High Court set aside and that of first appellate court restored – Code of Civil Procedure, 1908 – s.100 – Second appeal – Scope of – Transfer of property – Family settlement, not transfer of property.

The plaintiffs-respondents, who were the sons of the pre-deceased son of defendant no. 1, while they were minors, filed a suit through their mother for declaration that the decree passed in Civil Suit No. 476 of 1978 be declared as null and void and a declaration be made that the plaintiffs had a right to inherit the suit land on the death of defendant No. 1 and in the alternative for declaration that the alienation of the suit land made by defendant no. 1 in favour of defendants nos. 2 to 5 by the

judgment and decree in the said suit was null and void. The defendants contested the suit contending that the plaintiffs had already been gifted certain agricultural lands; and in order to avoid dispute in the family, defendants nos. 2 to 5 were given the lands under a family settlement. The trial court decreed the suit, but the first appellate court dismissed the suit. However, the High Court, in second appeal, reversed the judgment of the first appellate court. Aggrieved, the defendants filed the appeal.

Allowing the appeal, the Court

HELD: 1.1. The judgment of the High Court cannot be sustained. It is well settled that the High Court in second appeal cannot interfere with the findings of fact of the first appellate court. The first appellate court held that the land with the tenure-holder was not the ancestral property and there was no proof that the land descended from his father. [para 12-13] [220-D-F]

1.2. A family settlement is not a transfer of property, as rightly held by the first appellate court. The first appellate court held that the family settlement was bona fide to avoid disputes in the family. The decree in Civil Suit No. 476 of 1978 was only in pursuance of that family settlement and, therefore, it could not be interfered with. A perusal of the judgment of the first appellate court which was the last court of facts indicates that the findings of fact given by it are based on relevant evidence. Therefore, the High Court was not justified in interfering with those findings. [para 14-15] [220-G-H; 221-A-B]

1.3. The impugned judgment and order of the High Court is set aside and that of the first appellate court restored. [para 16] [221-C]

Kale & Ors. vs. Deputy Director of Consolidation **1976 (2) SCR 202 =AIR 1976 SC 807 - cited**

Case Law Reference:

1976 (2) SCR 202	**Cited**	**Para 11**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5514 of 2005.

From the Judgment & Order dated 29.3.2005 of the High Court of Punjab & Haryana at Chandigarh in Regular Second Appeal No. 476 of 1984.

Ajay Majithia, R.S. Ahuja, Rajesh Kumar, Dr. Kailash Chand for the Appellants.

Shivaji M. Jadhav for the Respondents.

The Judgment of the Court was delivered by

MARKANDEY KATJU, J. 1. This appeal has been filed against the judgment and order dated 29.3.2005 of the Punjab & Haryana High Court at Chandigarh in Regular Second Appeal No. 476 of 1984.

2. Heard learned counsel for the parties and perused the record.

3. The respondents herein filed a Civil Suit being No. 58 of 1980 with a prayer that the judgment and decree passed in Civil Suit No. 476 of 1978 titled Jagbir and others vs. Ganeshi and others dated 27.10.1978 relating to the suit land be declared null and void and a declaration be given that the plaintiffs have a right to inherit the suit land on the death of defendant No. 1 and in the alternative for declaration that the alienation of the suit land made by defendant No. 1 in favour of defendants 2 to 5 by the aforesaid judgment and decree dated 27.10.1978 is null and void being against the custom and

will not operate against the right for succession of the plaintiffs and other heirs of defendant No. 1 on his death. Plaintiffs Nos.1 and 2 were minors and the suit was filed on their behalf by the mother Smt. Padam Devi who was also one of the plaintiffs.

4. The case of plaintiff Nos.1 and 2 was that they are the sons of one Ramgopal and Padam Devi, widow of deceased Ramgopal. It was alleged that the plaintiffs as well as the other defendants were the descendants of defendant No. 1 as given in the pedigree table given in para of the plaint. The plaintiffs Nos. 1 and 2 are minors and they filed the present suit through their mother Smt. Padam Devi. It was alleged that defendant No. 1 is a Hindu Jat and is governed by the agricultural custom according to which ancestral immovable property cannot be alienated except for legal necessity and consideration.

5. It was alleged that defendant No.1 Ganeshi had three sons, being Ramgopal, Dharambir and Jugal. Ramgopal , father of the plaintiffs died some years ago. It was also alleged that defendant No. 1 was under the influence of his surviving sons namely, Dharambir and Yugal Kishore @ Jugal Singh. Defendant No. 2 is the son and defendant No. 3 is the wife of Dharambir. Defendant No. 4 is the son and defendant No. 5 is the wife of Yugal Kishore @ Jugal Singh.

6. It was alleged that a month before filing of the plaint, the plaintiffs came to know the that in order to deprive them of their right to inherit the suit land on the death of defendant No. 1, defendant Nos. 2 to 5 filed a collusive suit against defendant No. 1 bearing suit No. 476 of 1978 in the Court of sub-Judge, IInd Class, Palwal for declaration that they are owners of the suit land. Defendant No. 1 suffered that decree against him on his admission on 27.10.1978. It was alleged that the said decree could not extinguish the rights of ownership of the plaintiffs in respect of the suit land, and it was null and void and would not operate against the plaintiff's right of succession on the death of defendant No.1. It was further alleged that plaintiffs Nos.1 and 2 are sons of Ramgopal and the land is ancestral

property. According to agricultural custom defendant No.1 could not transfer the suit land in favour of defendant Nos.2 to 5 who were not his heirs to the exclusion of the plaintiffs who were his heirs. It was further alleged that, in the alternative, the said decree amounts to alienation and without consideration and legal necessity. It was alleged that defendants Nos.6 & 7 have colluded with defendant Nos.1 to 5.

7. The defendants contested the suit. It was alleged in the written submissions that defendant No. 1 did not transfer and alienate the land in suit in favour of the answering defendants, but the suit land was settled on them by way of family settlement arrived at between the defendants. Some agricultural land was already gifted by defendant No.1 in favour of plaintiffs Nos.1 and 2. It was because of that reason that the family settlement was arrived at in order to avoid family dispute.

8. It was alleged that since defendant No.1 gifted some of his land in favour of plaintiff Nos.1 & 2, this resulted in a family unrest and hence defendant No. 1 pacified all the members of the family by way of a family settlement. It was denied that the land was ancestral. It was also denied that defendant No.1 was under the influence of his surviving sons.

9. The trial court decreed the suit holding that the judgment and decree dated 27.10.1978 amounts to alienation and without consideration and legal necessity. It was held that the decree created new rights in defendants Nos.2 to 5, and it cannot be said to be based on family settlement. Any alienation of immovable property of value of Rs. 100/- had to be registered and in the present case, the alienation is not by a registered document.

10. The trial court held that the suit land was ancestral property of Ganeshi qua the plaintiffs. This finding is based on admission of Ganeshi that he has inherited the property from his father Pran Sukh. The trial court also held that defendant No.1 was governed by the custom in the matter of alienation,

and under that custom ordinarily ancestral immovable property is inalienable except for legal necessity or with the consent of the male lineal descendants.

11. The defendants filed an appeal which was allowed by the first appellate court by the judgment of the District Judge, Faridabad dated 2.11.1983. The first appellate court held that plaintiffs Nos.1 & 2 (respondents in the first appeal) was given land in 1969 by way of gift by Ganeshi and because of this there was some unrest in the family, and hence the family settlement was made. The first appellate court relied upon the judgment of this Court in *Kale & Ors. vs. Deputy Director of Consolidation* AIR 1976 SC 807 which held that in order to sustain a family settlement it is not necessary that there must be evidence of antecedent title of the parties.

12. The first appellate court held that the land was not ancestral property of Ganeshi because there was no proof that the land had descended from the father of Ganeshi. It was held that Ganeshi held the land in question along with some co-sharer's who acquired the same in whatever manner after the death of Bhim Kaur.

13. In second appeal, the High Court has set aside the judgment of the first appellate court and restored the judgment of the trial court. In our opinion, the judgment of the High Court cannot be sustained. It is well settled that the High Court in second appeal cannot interfere with the findings of fact of the first appellate court.

14. A family settlement is not a transfer of property, as rightly held by the first appellate court. The first appellate court held that the family settlement was bona fide to avoid disputes in the family. The decree in Civil Suit No.476 of 1978 was only in pursuance of that family settlement, and hence it could not be interfered with.

15. We have carefully perused the judgment of the first

appellate court which was the last court of facts and we are of the opinion that the findings of fact given by it are based on relevant evidence. Hence the High Court was not justified in interfering with those findings.

16. For the foregoing reasons, the appeal is allowed. The impugned judgment and order of the High court is set aside and that of the first appellate court is restored. There shall be no order as to costs.

R.P. Appeal allowed.

GURMUKH SINGH
v.
JASWANT KAUR
(Civil Appeal No. 5140 of 2004)

APRIL 04, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Suit – Suit for recovery – Execution of pronote and receipt by the respondent in favour of the appellant – Failure of the respondent to repay the amount – Suit filed by the appellant for recovery of the amount – Rejected by all three the courts below on the finding that the documents were not duly stamped and that the stamps affixed on the pronote were removed from another document – Interference with – Held: Findings of the courts below are findings of fact and cannot be interfered with – The pronote in question cannot be taken into consideration – Indian Stamps Act, 1899.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5140 of 2004.

From the Judgment & Order dated 11.8.2003 of the High Court of Punjab & Haryana at Chandigarh in RSA No. 1069 of 2002.

A.V. Palli, Rekha Palli for the Appellant.

K.G. Bhagat, Manju Bhagat, Dr. Manohar Singh Bakshi, Vineet Bhagat, Debasis Misra 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 11.8.2003 in R.S.A. No.1069 of 2002 of the High Court of Punjab and Haryana at Chandigarh.

2. Heard learned counsel for the parties and perused the record.

3. The plaintiff-appellant had filed a suit for recovery of Rs.2,31,000/-. He claimed that the defendant had executed a pronote and receipt dated 2.5.1994 whereby the defendant had borrowed a sum of Rs.1,50,000/- from the plaintiff and agreed to repay the same along with interest @ 2% per annum on demand. Since the defendant had not paid the aforesaid amount, the suit was filed.

4. The defendant-respondent contested the suit and denied the execution of the pronote and receipt in favour of the plaintiff. She alleged that the aforesaid pronote and receipt were forged and fictitious documents.

5. The trial court on the basis of evidence found that the pronote and receipt were executed by the defendant in favour of the plaintiff. However, the trial court rejected the plaintiff's claim by holding that the said documents were not duly stamped as required under the provisions of Indian Stamps Act. It was found by the trial court that the stamps which were affixed on the pronote were removed from another document and affixed on the said pronote.

6. The first appellate court and the High Court have agreed with the view of the trial court. Thus all the three courts below decided against the appellant.

7. The findings of the courts below are findings of fact and we cannot interfere with the same in this appeal. The finding is that the stamps which have been affixed were removed from other documents, and hence, it has rightly been said that such a pronote cannot be taken into consideration.

8. Thus there is no force in this appeal and it is dismissed. No costs.

N.J. Appeal dismissed.

SURAZ INDIA TRUST

v.

UNION OF INDIA AND ANR.

(Writ Petition (C) No. 204 of 2010)

APRIL 4, 2011

[DEEPAK VERMA AND DR. B.S. CHAUHAN, JJ.]

Constitution of India, 1950:

Article 124(2) – Appointment of Supreme Court and High court Judges – Writ petition – The petitioner sought review of a judgment by nine Judges' Bench of Supreme Court whereby the Court declared the primacy of the collegium in the matter of appointment of the Judges of the Supreme Court and the High Courts – The plea of petitioner was that by the judicial verdicts in the two cases, Article 124(2) was practically amended, although amendment to the Constitution could only be done by Parliament in accordance with the procedure laid down in Article 368 of the Constitution – Held: Even at the stage of preliminary hearing for admission of the petition, the matter is required to be heard by a larger Bench as this matter was earlier dealt with by a three Judges Bench and involved very complicated legal issues – Matter placed before the Hon'ble Chief Justice for appropriate directions.

Advocate on Record Association v. Union of India & Ors. **(1993) 4 SCC 441; Special Reference No.1 of 1998 (1998) 7 SCC 739;** *Coir Board Ernakulam & Anr. v. Indira Devai P.S. & Ors.* **(2000) 1 SCC 224;** *Bangalore Water Supply & Sewerage Board v. A Rajappa* **(1978) 2 SCC 213;** *Pradip Chandra Parija & Ors. v. Pramod Chandra Patnaik & Ors.* **AIR 2002 SC 296;** *Union of India & Anr. v. Hansoli Devi* **(2002) 7 SCC 273;** *B.P. Singhal v. Union of India & Anr.* **(2010) 6 SCC 331 – referred to.**

Case Law Reference:

(1993) 4 SCC 441	**referred to**	**Para 1**
(1998) 7 SCC 739	**referred to**	**Para 1**
(2000) 1 SCC 224	**referred to**	**Para 8**
(1978) 2 SCC 213	**referred to**	**Para 8**
AIR 2002 SC 296	**referred to**	**Para 9**
(2002) 7 SCC 273	**referred to**	**Para 10**
(2010) 6 SCC 331	**referred to**	**Para 11**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 204 of 2010.

Under Article 32 of the Constitution of India.

G.E. Vahanvati, A.G., A.K. Ganguli, (A.C.), Bharat Sangal (A.C) R.R. Kumar Suraj Daiya (Petitioner-In-Person) for the appearing parties.

The following order of the Court was delivered

O R D E R

1. This writ petition has been filed under Article 32 of the Constitution by the present petitioner claiming itself to be the registered Trust under the provisions of Rajasthan Public Trust Act, 1959. It has been established in the legal arena for the larger public interest. The Trust's motto is to challenge those provisions of law which are ultra vires and unconstitutional. Basically the petitioner has sought the review of the judgment by nine Judges' Bench of this Court in *Advocate on Record Association v. Union of India & Ors.,* (1993) 4 SCC 441; so also in the case of Special Reference No.1 of 1998 (reported in (1998) 7 SCC 739), whereby this Court declared the primacy of the collegium in the matter of appointment of the Judges of the Supreme Court and the High Courts.

2. As Mr. Rajiv Daiya, Chairman of the Trust appeared in person and was not able to render any assistance to the Court, thus, we requested Mr A.K. Ganguli, learned Senior counsel alongwith Mr. Bharat Sangal to assist the Court as amicus curiae. The petition raises large number of complicated issues. Meanwhile, we also sought assistance of the learned Attorney General for India.

3. Shri A.K. Ganguly, learned senior Advocate, has submitted:

That the method of appointment of a Supreme Court Judge is mentioned in Article 124(2) of the Constitution of India which states:

> "Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty five years.
>
> Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted."

It may be noted that there is no mention:

(i) for any Collegium in Article 124(2).

(ii) The word used in Article 124(2) is 'consultation', and not 'concurrence'.

(iii) The President of India while appointing a Supreme Court Judge can consult any Judge of the Supreme Court or even High Court as he deems necessary for the purpose, and is not bound to consult only the five seniormost Judges of the Supreme Court.

4. That by the judicial verdicts in the aforesaid two cases,

Article 124(2) has been practically amended, although amendment to the Constitution can only be done by Parliament in accordance with the procedure laid down in Article 368 of the Constitution of India.

5. That under Article 124(2) while appointing a Supreme Court Judge, the President of India has to consult the Chief Justice of India, but he may also consult any other Supreme Court Judge and not merely the four seniormost Judges. Also, the President of India can even consult a High Court Judge, whereas, according to the aforesaid two decisions the President of India cannot consult any Supreme Court Judge other than the four seniormost Judges of the Supreme Court, and he cannot consult any High Court Judge at all.

6. Shri Ganguli submits that the matter is required to be considered by a larger Bench as the petition raises the following issues of Constitutional importance:

(1) Whether the aforesaid two verdicts, viz. the 7-Judge Bench and 9-Judge Bench decisions of this Court referred to above really amount to amending Article 124(2) of the Constitution?

(2) Whether there is any 'Collegium' system for appointing Supreme Court or High Court Judges in the Constitution?

(3) Whether the Constitution can be amended by a judicial verdict or it can only be amended by Parliament in accordance with Article 368?

(4) Whether the Constitutional scheme was that the Supreme Court and High Court Judges can be appointed by mutual discussions and mutual consensus between the judiciary and the executive; or whether the judiciary can alone appoint Judges of the Supreme Court and High Courts?

(5) Whether the word 'consultation' in Article 224 means 'concurrence'?

(6) Whether by judicial interpretation words in the Constitution can be made redundant, as appears to have been done in the aforesaid two decisions which have made consultation with High Court Judges redundant while appointing a Supreme Court Judge despite the fact that it is permissible on the clear language of Article 124(2)?

(7) Whether the clear language of Article 124(2) can be altered by judicial verdicts and instead of allowing the President of India to consult such Judges of the Supreme Court as he deems necessary (including even junior Judges) only the Chief Justice of India and four seniormost Judges of the Supreme Court can alone be consulted while appointing a Supreme Court Judge?

(8) Whether there was any convention that the President is bound by the advice of the Chief Justice of India, and whether any such convention (assuming there was one) can prevail over the clear language of Article 124(2)?

(9) Whether the opinion of the Chief Justice of India has any primacy in the aforesaid appointments?

(10) Whether the aforesaid two decisions should be overruled by a larger Bench?

7. Mr. G.E. Vahanvati, learned Attorney General for India, supports the petitioner contending that the aforesaid judgments require reconsideration. However, he also submits:

(a) A writ petition under Article 32 is not maintainable at the behest of a Trust as the Trust cannot claim violation of any of its fundamental rights;

(b) Petitioner has no locus standi to seek review of the judgments of this Court. In fact, a petition under Article 32 of the Constitution does not lie to challenge the correctness of a judicial order; and

(c) A bench of two Judges cannot examine the correctness of the judgment of nine Judges Bench.

(d) A Bench of two Judges cannot refer the matter to the larger bench of nine Judges or more directly.

8. In *Coir Board Ernakulam & Anr. v. Indira Devai P.S. & Ors.,* (2000) 1 SCC 224, this Court while dealing with a similar reference by a Bench of two Judges doubting the correctness of seven Judges' Bench judgment in *Bangalore Water Supply & Sewerage Board v. A Rajappa,* (1978) 2 SCC 213, held as under:-

"The judgment delivered by the seven learned Judges of the Court in Bangalore Water Supply case, does not, in our opinion, require any reconsideration on a reference being made by a two Judge Bench of the Court, which is bound by the judgment of the larger Bench. The appeals shall, therefore, be listed before the appropriate Bench for further proceedings."

9. The Constitution Bench of this Court in *Pradip Chandra Parija & Ors. v. Pramod Chandra Patnaik & Ors.,* AIR 2002 SC 296, while dealing with a similar situation held that judgment of a co-ordinate Bench or larger Bench is binding. However, if a Bench of two Judges concludes that an earlier judgment of three Judges is so very incorrect that in no circumstances it can be followed, the proper course for it to adopt is to refer the matter to a Bench of three Judges setting out, the reasons why it could not agree with the earlier judgment. If, then, the Bench of three Judges also comes to the conclusion that the earlier judgment of a Bench of three Judges is incorrect, reference to a Bench of five Judges is justified.

10. In *Union of India & Anr. v. Hansoli Devi,* (2002) 7 SCC 273, this Court reiterated the same view placing reliance upon its earlier judgment in *Pradip Chandra Parija* (supra).

11. However, Mr. Ganguli dealing with the issue of locus standi of the Trust has submitted that the petition may not be maintainable but it should be entertained because it raises a large number of substantial questions of law. In order to fortify his submission he places reliance upon a recent Constitution Bench judgment of this Court in *B.P. Singhal v. Union of India & Anr.,* (2010) 6 SCC 331 wherein while dealing with the issue of removal of Governors, this Court held as under:

"*The petitioner has no locus to maintain the petition* in regard to the prayers claiming relief for the benefit of the individual Governors. At all events, *such prayers no longer survive* on account of passage of time. However, with regard to *the general question of public importance* referred to the Constitution Bench, touching upon the scope of Article 156(1) and the limitations upon the doctrine of pleasure, *the petitioner has the necessary locus."*

(Emphasis added)

Thus, Mr. Ganguli submits that considering the gravity of the issues involved herein, the matter should be entertained.

12. While dealing with the issue of reference to the larger Bench, Mr. Ganguli has placed a very heavy reliance of the recent order of this Court dated 30.3.2011 in Civil Appeal Nos.4056-4064 of 1999 (*Mineral Area Development Authority v. M/s. Steel Authority of India & Ors.*) wherein considering the issue of interpretation of the Constitutional provisions and validity of the Act involved therein, a three Judges Bench presided over by Hon'ble the Chief Justice has referred the matter to nine Judges' Bench.

13. At this juncture, Mr. Ganguli as well as Mr. Vahanvati

have submitted that even at the stage of preliminary hearing for admission of the petition, the matter requires to be heard by a larger Bench as this matter has earlier been dealt with by a three Judges Bench and involves very complicated legal issues.

14. In view of the above, we place the matter before the Hon'ble Chief Justice for appropriate directions.

D.G. Matter referred to larger bench.

U. SOWRI REDDY (DEAD) BY LRS.
v.
B. SUSEELAMMA AND ORS.
(Civil Appeal No. 6322 of 2004)

APRIL 4, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Code of Civil Procedure, 1908 – s.115 – Suit for recovery of principal amount and interest due on pronote executed by the appellant – Decreed ex-parte – Respondent-plaintiff filed Execution Petition for realization of the decretal amount by sale of the immovable property of the appellant – Sale held in favour of the respondents – Appellant filed application to set aside the sale of the property – Application dismissed – Multiple rounds of litigation – Matter remanded to trial court for fresh disposal – Sale set aside with direction to appellant to deposit a sum of Rs.18,000/- – Order set aside by High Court in Civil Revision – Held: High Court ignored the deposit of Rs.18,000/-in pursuance of the court order, and also failed to take into account earlier orders in the matter – High Court was not justified in interfering in a Civil Revision Petition under s.115 CPC, when the amount of Rs.18,000/- was already deposited.

The predecessor of the respondents had filed a suit against the appellant for recovery of the principal amount and interest due on a pronote executed by the appellant. The suit was decreed ex-parte and the plaintiff-respondent filed an Execution Petition for realization of the decretal amount by sale of the immovable property of the appellant. The sale was held in favour of the respondents. The appellant filed an application under Order 21 Rule 90 C.P.C. to set aside the sale of property. The application was dismissed on which the appellant

filed a Civil Revision Petition whereupon the High Court gave an opportunity to the appellant-judgment debtor to pay the decretal amount. The appellant deposited the decretal amount. However, subsequently the Executing Court dismissed the application to set aside the sale of the property in question. Against that order a Civil Revision was filed. The High Court allowed the Civil Revision Petition and remanded the matter to the trial court for fresh disposal. Thereafter the application of the appellant was allowed and the sale was set aside with a direction to the appellant to deposit a sum of Rs.18,000/-. That order was set aside by the impugned order of the High Court and hence the present appeal.

Allowing the appeal, the Court

HELD:1. The impugned order of the High Court cannot be sustained. It appears that the High Court ignored the deposit of Rs.18,000/- in pursuance of order dated 2.11.2001, and failed to take into account the order dated 11.12.2001 of the Additional Senior Civil Judge dismissing the Execution Petition No.17 of 1996 and also did not take into consideration the earlier order dated 10.4.1998 in Civil Revision Petition. The High Court was not justified in interfering in a Civil Revision Petition under Section 115 C.P.C. when the amount of Rs. 18,000/- was deposited on 06.11.2001 as per order dated 02.11.2001. [Paras 7, 8] [235-C-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6322 of 2004.

From the Judgment & Order dated 12.4.2002 of the High Court of Andhra Pradesh at Hyderbad in Civil Revision Petition No. 5939 of 2001.

A. Subba Rao for the Appellants.

A.T.M. Rangaramanujam, V. Sridhar Reddy for Abhijit Sengupta) for the Respondents.

The Judgment of the Court was delivered by

MARKANDEY KATJU, J. 1. This appeal has been filed against the order dated 12.4.2002 in C.R.P. No.5939 of 2001 of the High Court of Andhra Pradesh at Hyderabad.

2. Heard learned counsel for the parties and perused the record.

3. The facts have been stated in detail in the impugned order and hence we are not repeating the same here except where necessary.

4. One B. Chandrasekhara Reddy, the predecessor of the respondents herein filed suit no.23 of 1992 before the Subordinate Judge, Gooty against the appellant herein for recovery of an amount of Rs.26,720/- being the principal amount and interest due on a pronote dated 3.4.1991 executed by the appellant herein for Rs.24,000/- payable with interest at 12% per annum. That suit was decreed ex-parte by the learned Subordinate Judge, Gooty on 10.2.1995 and the plaintiff-respondent filed an Execution Petition for realization of the decretal amount by sale of the immovable property of the appellant. On 15.9.1997 the sale was held in favour of the respondents herein. It is alleged that the property was worth of Rs.15 lacs but was sold for Rs.3,15,000/- to realize the decretal amount of Rs.40,364/-.

5. The appellant herein filed an application under Order 21 Rule 90 C.P.C. to set aside the sale of property. That application was dismissed by the trial court. A Civil Revision Petition No.1423 of 1998 was filed by the appellant in the High Court against that order. The High Court by order dated 10.04.1998 gave an opportunity to the judgment debtor to pay the decretal amount.

6. It is alleged that on 16.4.1998 in pursuance of the High Court order dated 10.4.1998 the appellant herein deposited the decretal amount. However, on 22.7.1998 the Executing Court dismissed the application to set aside the sale of the property in question. Against that order a Civil Revision was filed and on 9.10.1998 the High Court allowed the Civil Revision Petition No.3957 of 1998 and remanded the matter to the trial court for fresh disposal. Thereafter on 2.11.2001 the application of the appellant was allowed and the sale was set aside with a direction to the appellant to deposit a sum of Rs.18,000/-. That order has been set aside by the impugned order of the High Court and hence this appeal.

7. In our opinion the impugned order of the High Court cannot be sustained. It appears that the High Court ignored the deposit of Rs.18,000/- on 06.11.2001 in pursuance of order dated 2.11.2001, and failed to take into account the order dated 11.12.2001 of learned Additional Senior Civil Judge dismissing the Execution Petition No.17 of 1996 and also did not take into consideration the earlier order dated 10.4.1998 in Civil Revision Petition No.3957 of 1998.

8. In our opinion the High Court was not justified in interfering in a Civil Revision Petition under Section 115 C.P.C. when the amount of Rs. 18,000/- was deposited on 06.11.2001 as per order dated 02.11.2001.

9. For the reasons given above this appeal is allowed and the impugned order of the High Court is set aside.

B.B.B. Appeal allowed.

M/S. KUNJ ALUMINIUM PRIVATE LIMITED

v.

M/S. KONINKLIJKE PHILIPS ELECTRONICS NV

(Civil Appeal No. 2915 of 2011)

APRIL 4, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Judgment/Order – Non-reasoned order – Letters Patent appeal – Division Bench of High Court did not give any reason for dismissing appeal against the order of the Single Judge – Justification – Held: Not justified – The order of Division Bench was too cryptive – There should have been at least a brief discussion of facts and some reasons – Even an order of affirmance must give some reasons, even if brief – Matter remanded to Division Bench of High Court for consideration afresh.

Chairman, Disciplinary Authority, Rani Lakshmi Bai KshetriyaGramin Bank v. Jagdish Sharan Varshney and Ors. **JT (2009) 4 SC 519 – relied on.**

Case Law Reference:

JT (2009) 4 SC 519	**relied on**	**Para 5**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2915 of 2011.

From the Judgment & Order dated 30.11.2009 of the High Court of Delhi in Letters Patent Appeal No. 613 of 2009.

Mrigang Dutta (for Rajiv Mehta) for the Appellant.

Sudhir Chandra, N. Mahabir, Sheetal Vohra (for R. Chandrachud) for the Respondent.

The Judgment of the Court was delivered by

MARKANDEY KATJU, J. 1. Leave granted.

2. Heard learned counsel for the parties.

3. This appeal has been filed against the impugned judgment of the Delhi High Court dated 30.11.2009 passed in Letters Patent Appeal No.613 of 2009. Without going into the merits of the controversy we find that the impugned judgment of the Division Bench dated 30.11.2009 gives no reasons.

4. The impugned judgment of the Division Bench only states :

> "5. We have heard Mr. Arvind Nigam, learned Senior counsel appearing for the appellant at length. We have also perused the documents on records as well as the impugned judgment of the learned Single Judge.
>
> 6. We are of the considered view that the impugned order suffers from no legal infirmity which warrants interference by way of appeal."

5. In our opinion this was not the way to dispose off an appeal. The impugned order is too cryptive. There should have been at least a brief discussion of facts and some reasons. It has been held by this Court that even an order of affirmance must give some reasons, even if brief vide *Chairman, Disciplinary Authority, Rani Lakshmi Bai Kshetriya Gramin Bank vs. Jagdish Sharan Varshney & Ors.* JT 2009(4) SC 519. Hence we set aside the impugned order and remand the matter to the Division Bench for a fresh hearing in accordance with law, expeditiously.

6. Appeal is allowed. No costs.

B.B.B. Appeal allowed.

SYED MAQBOOL ALI

v.

STATE OF UTTAR PRADESH & ANR.

(Civil Appeal Nos. 2913-2914 of 2011)

APRIL 04, 2011

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

Land Acquisition Act, 1894 – s. 18 – Acquisition of lands for construction of road – Payment of compensation to certain land owners – Appellant's case that his land was taken over without acquisition – Writ petition by the appellant almost two decades after the dispossession seeking direction for acquisition and payment of compensation – Dismissed by the High Court holding that the remedy lies u/s. 18 – Held: Not justified – Application seeking reference to court u/s. 18 would lie only where the land-holder is aggrieved by the award made by the Land Acquisition Collector in regard to land acquired under the Act – Application u/s. 18 cannot be filed in regard to a land which was not acquired at all – Remedy of a land holder whose land is taken without acquisition is either to file a civil suit for recovery of possession and/or for compensation, or approach the High Court by filing a writ petition, if the action can be shown to be arbitrary, irrational, unreasonable, biased, malafide or without the authority of law, and seek a direction that the land should be acquired in a manner known to law – When a writ petitioner makes out a case for invoking the extra-ordinary jurisdiction under Article 226 of the Constitution, the High Court would not relegate him to the alternative remedy of a civil court, merely because the matter may involve an incidental examination of disputed questions of facts – High Court would see whether the person is seeking remedy in a matter which is a civil dispute or the matter relates to a dispute having a public law element or violation of any fundamental right or to any arbitrary and high-

handed action – Also, belated writ petitions, without proper explanation for the delay, are liable to be dismissed – High Courts should also be cautious in entertaining such writ petitions – However, on facts, the High Court did not examine any of the relevant questions – Writ petition was dismissed after a pendency for seven years by a short order on a baseless assumption about the existence of a non-existent alternative remedy – Thus, matter remitted to the High Court for consideration afresh – Delay/laches – Constitution of India, 1950 – Article 226.

ABL International Ltd. v. Export Credit Guarantee Corporationof India Ltd **2004(3) SCC 553;** *Kisan Sahkari Chini Mills Ltd. v. Vardan Linkers* **2008(12) SCC 500 – relied on.**

Case Law Reference:

2004 (3) SCC 553	**Relied on.**	**Para 6**
2008 (12) SCC 500	**Relied on.**	**Para 6**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2913-2914 of 2011.

From the Judgment & Order dated 9.7.2007 of the High Court of Judicature at Allahabad in W.P. No. 11212 of 2000 and order dated 22.2.2008 in Review Application No. 189319 of 2007 in W.P. No. 11212 of 2000.

Tameem Hashmi, Promila for the Appellant.

Shobha Dikshit, Shalini Kumar, Pardeep Misra for the Respondents.

The Order of the Court was delivered by

O R D E R

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

2. Certain lands in village Sarai Badli and Ibrahimpur, Danda, Pargana Kora, District Fatehpur, UP, were acquired for construction of a six Kilometre road from Jahanabad to Garhi Jafraganj in the year 1982 and compensation was paid to the land owners in the year 1983.

3. In the year 1996, the appellant submitted a complaint to the Lokayukta alleging that his plots (bearing No.87/5, 88, 90, and 232 in Sarai Badli and plot No.580/5 and 602/1 in Ibrahimpur Danda) were included in the said acquisition; that in 1995 when he got his other lands measured, he found that his plots bearing Nos.27, 57, 58, 450, 451 and 452 (new numbers 103, 90, 93/1, 232/2, 231/2 and 229/5) measuring 0.7068 Hectare had been illegally and unauthorisedly used for constructing the road. On enquiry by the Lok Ayukta, the Addl. District Magistrate (Land Acquisition) informed that there was a possibility of the acquired lands being left out and the road being constructed in the adjoining lands which were not acquired. On the other hand, the concerned Executive Engineer, PWD, informed the Lok Ayukta that the Khasra numbers in respect of which the appellant alleged encroachment and claimed compensation had never stood in his name and that even for the lands acquired in 1982, the compensation was paid to Mohammed Hussain alias Bhola and others and not to the appellant. The said complaint was however closed on 7.9.1999 as time barred, in view of the delay of 12 years in seeking relief. Thereafter, the appellant approached the High Court in the year 2000 seeking a direction to the respondents to pay compensation in regard to the extra land used and occupied by respondents by diverting the road from its original alignment. The said writ petition was dismissed by order dated 9.7.2007 on the ground that petitioner can have recourse to section 18 of the Land Acquisition Act, 1894 ('Act' for short), if he wanted enhancement

of compensation. The review petition filed by the appellant was dismissed on 22.2.2008. The said orders are challenged in these appeals by special leave.

4. The respondents deny any encroachment or unauthorized use. They point out on account of the inordinate delay in approaching the High Court, and the disputes/questions relating to identity of land, boundaries, title etc., the writ petition was not maintainable and liable to be dismissed.

5. The limited question that arises for our consideration is whether the High Court could have dismissed a writ petition seeking a direction to acquire the land and pay compensation (on the ground that his land has been taken over without acquisition) by holding that the remedy lies under Section 18 of the Act. An application seeking reference to court under Section 18 of the Act would lie only where the land-holder is aggrieved by the award made by the Land Acquisition Collector in regard to land acquired under the provisions of the Act, either with reference to quantum of compensation, or the measurements of the land, or the persons shown as being entitled to compensation. An application under section 18 of the Act cannot be filed in regard to a land which was not acquired at all. The remedy of a land holder whose land is taken without acquisition is either to file a civil suit for recovery of possession and/or for compensation, or approach the High Court by filing a writ petition if the action can be shown to be arbitrary, irrational, unreasonable, biased, malafide or without the authority of law, and seek a direction that the land should be acquired in a manner known to law. The appellant has chosen to follow the second course. The High Court was not therefore, justified in dismissing the writ petition on the ground that the remedy was under section 18 of the Act. The order of the High Court, which is virtually a non-speaking order, apparently proceeded on the basis that appellant was seeking increase in compensation for an acquired land. The matter

therefore requires to be reconsidered by the High Court, on merits.

6. But that does not mean that the delay should be ignored or appellant should be given relief. In such matters, the person aggrieved should approach the High Court diligently. If the writ petition is belated, unless there is good and satisfactory explanation for the delay, the petition will be rejected on the ground of delay and laches. Further the High Court should be satisfied that the case warrants the exercise of the extra-ordinary jurisdiction under Article 226 of the Constitution of the India, and that the matter is one where the alternative remedy of suit is not appropriate. For example, if the person aggrieved and the State are owners of adjoining lands and he claims that the State has encroached over a part of his land, or if there is a simple boundary dispute, the remedy will lie only in a civil suit, as the dispute does not relate to any highhanded, arbitrary or unreasonable action of the officers of the State and there is a need to examine disputed questions relating to title, extent and actual possession. But where the person aggrieved establishes that the State had highhandedly taken over his land without recourse to acquisition or deprived him of his property without authority of law, the landholder may seek his remedy in a writ petition. When a writ petitioner makes out a case for invoking the extra ordinary jurisdiction under Article 226 of the Constitution, the High Court would not relegate him to the alternative remedy of a civil court, merely because the matter may involve an incidental examination of disputed questions of facts. The question that will ultimately weigh with the High Court is this : Whether the person is seeking remedy in a matter which is primarily a civil dispute to be decided by a civil court, or whether the matter relates to a dispute having a public law element or violation of any fundamental right or to any arbitrary and high-handed action. (See the decisions of this court in *ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd* – 2004(3) SCC 553 and *Kisan Sahkari Chini Mills Ltd. v. Vardan Linkers* – 2008(12) SCC 500].

7. High Courts should also be cautious in entertaining writ petitions filed decades after the dispossession, seeking directions for acquisition and payment of compensation. It is not uncommon for villagers to offer/donate some part of their lands voluntarily for a public purpose which would benefit them or the community - as for example, construction of an access road to the village or their property, or construction of a village tank or a bund to prevent flooding/erosion. When they offer their land for such public purpose, the land would be of little or negligible value. But decades later, when land values increase, either on account of passage of time or on account of developments or improvements carried out by the State, the land holders come up with belated claims alleging that their lands were taken without acquisition and without their consent. When such claims are made after several decades, the State would be at a disadvantage to contest the claim, as it may not have the records to show in what circumstances the lands were given/donated and whether the land was given voluntarily. Therefore, belated writ petitions, without proper explanation for the delay, are liable to be dismissed. Be that as it may.

8. The High Court has not examined any of the relevant questions. The High Court has dismissed the writ petition, after a pendency for seven years, by a short order on a baseless assumption about the existence of a non-existent alternative remedy.

9. We therefore allow these appeals, set aside the orders of the High Court and remit the matter to the High Court for fresh consideration and disposal of the writ petition in accordance with law. Nothing stated above shall be construed as expression of any opinion on the merits of the matter. It is open to the State to contest the matter on all ground available to it.

N.J. Appeals allowed.

LOCAL ADMINISTRATION DEPARTMENT & ANR.
v.
M. SELVANAYAGAM @ KUMARAVELU
(Civil Appeal No(s) 2206 of 2006)

APRIL 5. 2011

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

SERVICE LAW:

Compassionate appointment – Son of deceased employee applying for appointment after 7½ years of the death of his father after he attained majority – Wife of deceased never applied for appointment – Held: In such a case, the appointment cannot be said to sub-serve the basic object and purpose of the scheme – It would rather appear that on attaining majority, the applicant staked his claim on the basis that his father was an employee of the Municipality and he had died while in service – In the facts of the case, the claim of the appellant did not come under the scheme of compassionate appointments – An appointment made many years after the death of the employee or without due consideration of the financial resources available to his/her dependents and the financial deprivation caused to the dependents as a result of his death, simply because the claimant happened to be one of the dependents of the deceased employee, would be directly in conflict with Articles 14 and 16 of the Constitution and, therefore, quite bad and illegal – In dealing with cases of compassionate appointment, it is imperative to keep this vital aspect in mind – Constitution of India, 1950 – Articles 14 and 16.

The father of the respondent died while in service of the appellant Municipality. The respondent was a minor at that time and his mother did not apply for the

application, which was after 7½ years of the death of his father. The employers declined the appointment. His writ petition was dismissed by the Single Judge, but allowed by the Division Bench of the High Court with a direction to the employers to appoint him within three months.

Allowing the appeal filed by the employers, the Court

HELD: 1.1. In the order dated April 19, 2000, two reasons were assigned for rejecting the respondent's claim for appointment on compassionate basis. First, on the death of the employee, his wife and the mother of the respondent did not make any request for appointment and this showed that the demise of the employee concerned had not caused a very serious financial crisis in the family. Secondly, following the death of the employee, the family was given Rs.26,674/- as terminal benefits besides family pension to the widow. Thus, the dependents of the deceased employee were not left completely without any financial resources. The second reason given for not accepting the respondent's claim was rightly rejected by the Division Bench of the High Court. [para 5-6] [249-A-E]

Balbir Kaur and another vs. Steel Authority of India Ltd. and others, **2000 (3) SCR 1053 =AIR 2000 SC 1596 – relied on.**

1.2. However, the view taken by the Division Bench of the High Court on the first issue is completely divorced from the object and purpose of the scheme of compassionate appointments. The High Court accepted the respondent's explanation for her mother not applying for a job and held that it could not be a ground for denying appointment to him on compassionate basis. The explanation that his mother was suffering from anemia and hypo tension is an afterthought and completely unacceptable. It has been said a number of times earlier

but it needs to be recalled here that an appointment made many years after the death of the employee or without due consideration of the financial resources available to his/her dependents and the financial deprivation caused to the dependents as a result of his death, simply because the claimant happened to be one of the dependents of the deceased employee, would be directly in conflict with Articles 14 and 16 of the Constitution and, therefore, quite bad and illegal. In dealing with cases of compassionate appointment, it is imperative to keep this vital aspect in mind. [para 6-7] [249-E-F; 250-F-H; 251-A-B]

1.3. Ideally, the appointment on compassionate basis should be made without any loss of time but having regard to the delays in the administrative process and several other relevant factors such as the number of already pending claims under the scheme and availability of vacancies etc. normally the appointment may come after several months or even after two to three years. It is not possible to lay down a rigid time limit within which appointment on compassionate grounds must be made but what needs to be emphasised is that such an appointment must have some bearing on the object of the scheme. [para 8] [251-D-E]

1.4. In the instant case, the respondent was only 11 years old at the time of the death of his father. The first application for his appointment was made on July 2, 1993, even while he was a minor. Another application was made on his behalf on attaining majority after 7 years and 6 months of his father's death. In such a case, the appointment cannot be said to sub-serve the basic object and purpose of the scheme. It would rather appear that on attaining majority he staked his claim on the basis that his father was an employee of the Municipality and he had died while in service. In the facts of the case, the municipal authorities were clearly right in holding that

with whatever difficulty; the family of the deceased employee had been able to tide over the first impact of his death. That being the position, the case of the respondent did not come under the scheme of compassionate appointments. [para 9] [251-F-H; 252-A]

1.5. The impugned order of the Division Bench of the High Court is unsustainable in law and is set aside. [para 10] [252-B]

Case Law Reference:

2000 (3) SCR 1053 relied on Para 5 and 6

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2206 of 2006.

From the Judgment & Order dated 30.4.2004 of the High Court of Madras in Writ Appeal No. 3308 of 2002.

R. Venkataramani, V.G. Pragasam, S.J. Aristotle, Prabhu Ramasubramanian, for the Appellants.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. This appeal by special leave is directed against the judgment passed by a Division Bench of the Madras High Court. By the judgment and order coming under appeal, the High Court directed the appellants to provide appointment to the respondent under the scheme of "compassionate appointments" for the death of his father while he was in service. The High Court further asked the appellants to comply with the direction within three months from the date of the order.

2. The respondent's father Meenakshisundaram worked as a Watchman in Karaikal Municipality. He died on November 22, 1988, after putting in 4 years 3 months and 25 days of service. He left behind a widowed wife and two sons, including

the respondent who was 11 years old at that time. The wife of the deceased, whose age at the time of the death of her husband was 39 years, did not make any request for her appointment on compassionate grounds.

3. After about five and a half years of his father's death, the respondent passed the S.S.L.C. examination in April, 1993. And then, for the first time on July, 29, 1993, the respondent's mother made an application for his appointment on compassionate grounds. No action was possible on this application since the respondent was still a minor. Later on, another application was made for his appointment on compassionate grounds after 7 years and 6 months of the death of his father. Failing to get a favourable response to his application, he filed a Writ Petition before the High Court seeking appropriate directions to the concerned authorities. That Writ Petition was disposed of by a single Judge of the High Court with a direction to the authorities to consider his claim for appointment on compassionate grounds afresh and pass an order on his application within four months from the date of receipt of that order. This order (first in the series) passed by the High Court was followed by a contempt proceeding initiated against the authorities at the instance of the respondent but that is not relevant for the present and we need not go into that any further. Suffice to note that eventually, the Municipality rejected the respondent's claim for compassionate appointment *vide* order dated 19.4.2000. He once again went to the High Court. A single Judge of the High Court, this time, rejected the Writ Petition. Against the order passed by the single Judge, he filed an intra-court appeal which was allowed by judgment and order dated April 30, 2004, and the Municipality was given the direction to appoint the respondent within three months from the date of the order.

4. The appellants have now brought this matter to this Court.

5. In the order dated April 19, 2000, two reasons were assigned for rejecting the respondent's claim for appointment on compassionate basis. First, on the death of Meenakshisundaram, his wife, the mother of the respondent did not make any request for appointment and this showed that the demise of the concerned employee had not caused a very serious financial crisis in the family. In this connection it was also stated that in case on the death of Meenakshisundaram, his wife had made a request for appointment on compassionate grounds, her application might have been considered giving her relaxation of age and academic qualification. The second reason given for rejecting the respondent's claim was that following the death of Meenakshisundaram, the family was given Rs.26,674/- as terminal benefits besides family pension to the widow. Thus, the dependents of the deceased employee were not left completely without any financial resources.

6. The second reason given for not accepting the respondent's claim was rejected outright by the Division Bench relying upon a decision of this Court in *Balbir Kaur and another* Versus *Steel Authority of India Ltd. and others*, AIR 2000 SC 1596. And on this score, the decision of the High Court cannot be faulted. But the Division Bench also disapproved the first reason assigned for rejecting the respondent's claim. It accepted the respondent's explanation for her mother not applying for a job on the death of his father and held that could not be a ground for denying appointment to him on compassionate basis. In this connection, the Division bench said:

> "So far as the first reasoning is concerned, at the time of death of father of the petitioner, the petitioner was just 11 years old. In the S.S.L.C., examination conducted in April, 1993, he came out successfully and made an application on 12-7-1993 for compassionate appointment. Thereafter, number of representations were sent to the

> Karaikal Municipality and this Court finds in one such representation dated 13-9-1996 (as found in the file produced by the Municipality), it has been stated as under,
>
> "My mother could not immediately seek for self-employment, as she was suffering from anaemia and hypo tension. Though my family was really in harness (sic distress), my mother managed to maintain the family with the help of her pension amount and that of her earnings from attending menial works from house to house."
>
> This claim was made in fact three years prior to the filing of the first writ petition. In the affidavit filed in support of the present writ petition also in paragraph 2, a specific mention about this has been made. If that is so, obviously that was the reason as to why she did not apply for the job immediately after the death of her husband in the municipality, that is, due to bad health. In these circumstances, this Court does not find any substance in the first reasoning as well that the failure on the part of the mother of the appellant to apply immediately for appointment relaxing the relevant rules would show that the family was not in difficulties."

7. We think that the explanation given for the wife of the deceased not asking for employment is an after-thought and completely unacceptable. A person suffering from anaemia and low blood pressure will always greatly prefer the security and certainty of a regular job in the municipality which would be far more lucrative and far less taxing than doing menial work from house to house in an unorganised way. But, apart from this, there is a far more basic flaw in the view taken by the Division Bench in that it is completely divorced from the object and purpose of the scheme of compassionate appointments. It has been said a number of times earlier but it needs to be recalled here that under the scheme of compassionate appointment, in case of an employee dying in harness one of his eligible dependents is given a job with the sole objective to provide

immediate succour to the family which may suddenly find itself in dire straits as a result of the death of the bread winner. An appointment made many years after the death of the employee or without due consideration of the financial resources available to his/her dependents and the financial deprivation caused to the dependents as a result of his death, simply because the claimant happened to be one of the dependents of the deceased employee would be directly in conflict with Articles 14 & 16 of the Constitution and hence, quite bad and illegal. In dealing with cases of compassionate appointment, it is imperative to keep this vital aspect in mind.

8. Ideally, the appointment on compassionate basis should be made without any loss of time but having regard to the delays in the administrative process and several other relevant factors such as the number of already pending claims under the scheme and availability of vacancies etc. normally the appointment may come after several months or even after two to three years. It is not our intent, nor it is possible to lay down a rigid time limit within which appointment on compassionate grounds must be made but what needs to be emphasised is that such an appointment must have some bearing on the object of the scheme.

9. In this case the respondent was only 11 years old at the time of the death of his father. The first application for his appointment was made on July 2, 1993, even while he was a minor. Another application was made on his behalf on attaining majority after 7 years and 6 months of his father's death. In such a case, the appointment cannot be said to sub-serve the basic object and purpose of the scheme. It would rather appear that on attaining majority he staked his claim on the basis that his father was an employee of the Municipality and he had died while in service. In the facts of the case, the municipal authorities were clearly right in holding that with whatever difficulty, the family of Meenakshisundaram had been able to tide over the first impact of his death. That being the position,

the case of the respondent did not come under the scheme of compassionate appointments.

10. In light of the discussions made above, we find the impugned order of the Division Bench of the Madras High Court unsustainable in law. It is set aside and the appeal is allowed but with no order as to costs.

R.P. Appeal allowed.

ASHOK @ DANGRA JAISWAL
v.
STATE OF M.P.
(Criminal Appeal No. 1438 of 2008)

APRIL 05, 2011

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

Narcotic Drugs and Psychotropic Substances Act, 1985 – ss. 8/21(b) – Personal search of appellant and his two employees – Alleged recovery of smack powder – Conviction and sentence u/ss. 8/21(b) – Appeal by the appellant and one of his employee dismissed by the High Court – Appeal before the Supreme Court by the appellant – Held: Independent witness of seizure were declared hostile by the prosecution – It is not clear where the samples were laid or were handled by how many people and in what ways, from the time of the seizure of the narcotic substance till their deposit in the Forensic Laboratory – Alleged narcotic substance that was seized from the accused was deposited in the Malkhana about two months later – No explanation where the seized substance was kept in the meanwhile – Also non-production of the alleged narcotic powder as also the appellant before the trial court – Thus, no evidence to connect the forensic report with the substance that was seized from the possession of the appellant or the other accused – Appellant entitled to the benefit of doubt and acquitted of the charges – Benefit of the order of acquittal extended to the non-appealing accused as well.

According to the prosecution, on a personal search, smack powder was recovered from the appellant as also his employees, 'K' and 'G'. The samples were taken from the recoveries made and sent for investigation. On the basis of the forensic report, the appellant and his two employees were convicted under Sections 8/21 (b) of the

Narcotic Drugs and Psychotropic Substances Act, 1985 and sentenced accordingly. Only, the appellant and 'G' filed appeals before the High Court and the same were dismissed. The appellant has filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1 There were two independent witnesses of the seizure, namely, 'A' and 'U' whose signatures were taken on the seizure memos. They were examined before the court as PWs 8 and 9 respectively. Neither of the two supported the case of the prosecution. PW.8 was, as a matter of fact, quite emphatic in his denial of any recovery having been made from the appellant or the other accused in his presence. Both were declared hostile by the prosecution. Therefore, both the trial court and the High Court had to rely upon the testimony of PW 10 who was the Station House Officer at the material time and who had conducted the raid to accept the prosecution case of recovery of the suspected narcotic from the accused. The seizure witnesses turning hostile may not be very significant, as it is not an uncommon phenomenon in criminal trials, particularly in cases relating to NDPS but there are some other circumstances which, when taken together, make it very unsafe to uphold the appellant's conviction. [Paras 8 and 9] [258-G-H; 259-A-C]

1.2 The seizure of the alleged narcotic substance is shown to have been made on March 8, 2005, at 11:45 in the evening. The samples taken from the seized substance were sent to FSL on March 10, 2005, along with the draft. The samples sent for forensic examination were, however, not deposited at the FSL on that date but those came back to the police station on March 12, 2005 due to some mistake in the draft or with some query in respect of the draft. The samples were sent back to the FSL on March 14, 2005, after necessary corrections in the

draft and/or giving reply to the query and on that date the samples were accepted at the FSL. From the time of the seizure in the late evening of March 8, 2005, till their deposit in the FSL on March 14, 2005, it is not clear where the samples were laid or were handled by how many people and in what ways. [Para 10] [259-D-F]

1.3 The FSL report came on March 21, 2005, and on that basis the police submitted charge-sheet against the accused on March 31, 2005, but the alleged narcotic substance that was seized from the accused, including the appellant was deposited in the Malkhana about two months later on May 28, 2005. There is no explanation where the seized substance was kept in the meanwhile. [Para 11] [259-G-H; A]

1.4 The alleged narcotic powder seized from the possession of the accused, including the appellant was never produced before the trial court as a material exhibit and there is no explanation for its non-production. Thus, there is no evidence to connect the forensic report with the substance that was seized from the possession of the appellant or the other accused. [Para 12] [260-B]

1.5 The appellant is entitled to the benefit of doubt and acquit him of the charges and set aside the judgments and orders passed by the trial court and the High Court. [Para 15]

Jitendera and Anr. v. State of M.P. **(2004) 10 SCC 562 – relied on.**

2. Though the other two accused, 'K and ''G' did not file appeal before this Court, there is no reason why the benefit of this judgment may not be extended to them as well. From the possession of ''K' the recovered quantity was 100 grams and from 'G' 35 grams. All the three accused including the appellant were tried together and

the other two accused 'K' and 'G' have also been given the same sentence as the appellant. The lapses in the prosecution and the facts and circumstances that have been noted and that have taken into account for setting aside the conviction of the appellant apply equally to the case of 'K' and 'G'. It 'would be unjust, therefore, to let them rot in jail even while allowing the appeal preferred by the appellant. The conviction and sentence is also set aside and they too along with the appellant are directed to be released forthwith unless anyone of them is required in connection with any other case. [Paras 16 and 17] [262-C-H]

Raja Ram and Ors. v. State of M.P. **(1994) 2 SCC 568;** *Dandu Lakshmi Reddy v. State of A.P.* **(1999) 7 SCC 69;** *State of Haryana and Ors. v. Sumitra Devi and Ors.* **(2004) 12 SCC 322;** *Mangoo v. State of M.P.* **(2008) 8 SCC 283;** *Bachan Singh v. State of Bihar* **(2008) 12 SCC 23 – relied on.**

Case Law Reference:

(2004) 10 SCC 562	**Relied on**	**Para 13**
(1994) 2 SCC 568	**Relied on**	**Para 16**
(1999) 7 SCC 69	**Relied on**	**Para 16**
(2004) 12 SCC 322	**Relied on**	**Para 16**
(2008) 8 SCC 283	**Relied on**	**Para 16**
(2008) 12 SCC 23	**Relied on**	**Para 16**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1438 of 2008.

From the Judgment & Order dated 17.04.2008 of the High Court of Judicature Madhya Pradesh at Jabalpur in Criminal Appeal No. 2511 of 2005.

Akshat Shrivastava (for Dharam Bir Raj Vohra) for the Appellant.

Vibha Datta Makhija for the Respondent.

THe Judgment of the Court was delivered by

AFTAB ALAM, J. 1. The appellant stands convicted under Sections 8/21(b) of the Narcotics Drugs & Psychotropic Substance Act, 1985 (hereinafter referred to as "the NDPS Act") and sentenced to undergo rigorous imprisonment for 7 years and a fine of Rs.25,000/- with the direction that in default of payment of fine, he would undergo rigorous imprisonment for a further period of one year.

2. On March 8, 2005, at about 3.30 p.m. one Anil Kumar Jharkhadia (PW.10), Town Inspector, Police Station Kareli received information that the appellant, the owner of Satyanarain Talkies is engaged in selling of smack powder (heroin in common parlance) from his cinema hall. After completing the formalities, the police party proceeded to the cinema hall where the Town Inspector, complying with the mandate of the law, subjected the appellant to a personal search. The search, made under the Search Memo, Exhibit P.17, yielded three packets from the pocket of the 'kurta' worn by the appellant. The plastic packets contained smack powder, the total weight of which was 175 grams. The suspected narcotic recovered from the appellant was seized under seizure memo, Exhibit P.22. From the seized powder, two samples of five grams each were taken and were put in two separate sealed packets marked as Article A and A1. The remainder 165 gram was put in a separate sealed packet marked as Article A-2.

3. Following the appellant, his two employees, namely Kanki @ Vishnu and Guddu Maharaj, who were present there at that time, were also subjected to personal search and from the possession of Kanki 100 grams and from Guddu Maharaj 35 grams smack powder was recovered. Samples were

similarly taken from the recoveries made from those two accused also.

4. The samples taken from the smack powder alleged to have been recovered from the three accused, including the appellant were sent to Forensic Science Laboratory vide draft, Exhibit P.31. The FSL report, Exhibit P.32 confirmed that the samples contained diacetylmorphine (heroin). On completion of investigation, charge-sheet was submitted against all the three accused, including the appellant on 31.3.2005. Charges were framed against the accused and they were put on trial. The trial court by judgment and order dated 9.11.2005 passed in Special Case No.4/2005 held all the three accused, including the appellant guilty of offences punishable under Sections 8/21(b) of the NDPS Act and sentenced them as noted above.

5. Against the judgment of the trial court, the appellant preferred Criminal Appeal No.2511/2005 before the High Court. Another appeal being Criminal Appeal no.86 of 2006 was filed by Guddu Maharaj. There is, however, no indication that the third accused Kanaki took the matter in appeal. The High Court dismissed both the appeals by judgment and order dated April 17, 2008.

6. The appellant alone has come in appeal against the judgment of the High Court.

7. On hearing Mr. Akshat Shrivastava, learned counsel for the appellant and Ms. Vibha Datta Makhija, learned counsel for the State and on going through the materials on record, we find there are several features in this case that make it very difficult for us to sustain the conviction of the appellant.

8. To begin with, there were two independent witnesses of the seizure, namely, Ajay Purohit and Udaipal Singh whose signatures were taken on the seizure memos, Exhibits P.22 to 24. They were examined before the Court as PWs 8 and 9 respectively. Neither of the two supported the case of the

prosecution. PW.8 was, as a matter of fact, quite emphatic in his denial of any recovery having been made from the appellant or the other accused in his presence. Both were declared hostile by the prosecution. Both the trial court and the High Court had, therefore, to rely upon the testimony of R. K. Jharkhandia, PW 10 who was the Station House Officer at the material time and who had conducted the raid to accept the prosecution case of recovery of the suspected narcotic from the accused.

9. The seizure witnesses turning hostile may not be very significant, as it is not an uncommon phenomenon in criminal trials, particularly in cases relating to NDPS but there are some other circumstances which, when taken together, make it very unsafe to uphold the appellant's conviction.

10. The seizure of the alleged narcotic substance is shown to have been made on March 8, 2005, at 11:45 in the evening. The samples taken from the seized substance were sent to FSL on March 10, 2005, along with the draft, Exhibit P.31. The samples sent for forensic examination were, however, not deposited at the FSL on that date but those came back to the police station on March 12, 2005 due to some mistake in the draft or with some query in respect of the draft. The samples were sent back to the FSL on March 14, 2005, after necessary corrections in the draft and/or giving reply to the query and on that date the samples were accepted at the FSL. From the time of the seizure in the late evening of March 8, 2005, till their deposit in the FSL on March 14, 2005, it is not clear where the samples were laid or were handled by how many people and in what ways.

11. The FSL report came on March 21, 2005, and on that basis the police submitted charge-sheet against the accused on March 31, 2005, but the alleged narcotic substance that was seized from the accused, including the appellant was deposited in the Malkhana about two months later on May 28, 2005. There

is no explanation where the seized substance was kept in the meanwhile.

12. Last but not the least, the alleged narcotic powder seized from the possession of the accused, including the appellant was never produced before the trial court as a material exhibit and once again there is no explanation for its non-production. There is, thus, no evidence to connect the forensic report with the substance that was seized from the possession of the appellant or the other accused.

13. It may be noted here that in *Jitendera and another* v. *State of M.P.,* (2004) 10 SCC 562, on similar facts this Court held that the material placed on record by the prosecution did not bring home the charge against the accused beyond reasonable doubt and it would be unsafe to maintain their conviction on that basis. In *Jitendra* (supra), the Court observed and held as under:-

> "The evidence to prove that *charas* and *ganja* were recovered from the possession of the accused consisted of the evidence of the police officers and the panch witnesses. The panch witnesses turned hostile. Thus, we find that apart from the testimony of Rajendra Pathak (PW 7), Angad Singh (PW 8) and Sub-Inspector D.J. Rai (PW 6), there is no independent witness as to the recovery of the drugs from the possession of the accused. The *charas* and *ganja* alleged to have been seized from the possession of the accused were not even produced before the trial court, so as to connect them with the samples sent to the Forensic Science Laboratory. There is no material produced in the trial, apart from the interested testimony of the police officers, to show that the *charas* and *ganja* were seized from the possession of the accused or that the samples sent to the Forensic Science Laboratory were taken from the drugs seized from the possession of the accused. Although the High Court noticed the fact that the *charas* and *ganja* alleged to have been seized from the

custody of the accused had neither been produced in the court, nor marked as articles, which ought to have been done, the High Court brushed aside the contention by observing that it would not vitiate the conviction as it had been proved that the samples were sent to the Chemical Examiner in a properly sealed condition and those were found to be *charas* and *ganja*. The High Court observed, "non-production of these commodities before the court is not fatal to the prosecution. The defence also did not insist during the trial that these commodities should be produced". The High Court relied on Section 465 CrPC to hold that non-production of the material object was a mere procedural irregularity and did not cause prejudice to the accused.

6. In our view, the view taken by the High Court is unsustainable. In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of *charas* and *ganja* were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act. In this case, we notice that panchas have turned hostile so the panchnama is nothing but a document written by the police officer concerned. The suggestion made by the defence in the cross-examination is worthy of notice. It was suggested to the prosecution witnesses that the landlady of the house in collusion with the police had lodged a false case only for evicting the accused from the house in which they were living. Finally, we notice that the investigating officer was also not examined. Against this background, to say that, despite the panch witnesses having turned

hostile, the non-examination of the investigating officer and non-production of the seized drugs, the conviction under the NDPS Act can still be sustained, is far-fetched."

14. The decision in *Jitendra* (supra) applies to the facts of this case with full force.

15. We, accordingly, hold that the appellant is entitled to the benefit of doubt and acquit him of the charges and set aside the judgments and orders passed by the trial court and the High Court.

16. At this stage, it may be noted that though the other two accused, namely, Kanki @ Vishnu and Guddu Maharaj are not before us, we see no reason why the benefit of this judgment may not be extended to them as well. From the possession of Kanki @ Vishnu, the recovered quantity was 100 grams and from Guddu Maharaj 35 grams. All the three accused including the appellant were tried together and the other two accused Kanki @ Vishnu and Guddu Maharaj have also been given the same sentence as the appellant. The lapses in the prosecution and the facts and circumstances that have been noted above and that have weighed with us for setting aside the conviction of the appellant apply equally to the case of Kanki @ Vishnu and Guddu Maharaj. It will be unjust, therefore, to let them rot in jail even while allowing the appeal preferred by the appellant. (See: *Raja Ram and others* v. State of M.P., (1994) 2 SCC 568, *Dandu Lakshmi Reddy* v. *State of A.P.*, (1999) 7 SCC 69, *State of Haryana and others* v. *Sumitra Devi and others*, (2004) 12 SCC 322, *Mangoo* v. *State of M.P.*, (2008) 8 SCC 283, *Bachan Singh v. State of Bihar,* (2008) 12 SCC 23) We, accordingly, direct that their conviction and sentence be also set aside and they too along with the appellant be released forthwith unless anyone of them is required in connection with any other case.

17. The appeal is, accordingly, allowed.

N.J. Appeal allowed

COMMISSIONER OF TRADE TAX, U.P.
v.
M/S. KARTOS INTERNATIONAL ETC.
(Civil Appeal Nos.2983-2988 of 2011)

APRIL 6, 2011

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

Uttar Pradesh Trade Tax Act, 1948: Notification dated 10.4.2000 – Exemption under – Scientific and biological equipments/instruments used mainly by biological scientists for research purpose – The said articles manufactured and sold to hospitals, medical colleges, advance research institutions and laboratories – Held: The equipments would not be entitled to benefit of exemption under the said Notification – These equipments fall in the category of "Biological Instruments" and are outside the purview of "Biology instruments" which are to be used by students in schools and colleges – All the goods mentioned in the entry of notification relate to articles used for study of life science in schools and colleges, such as, maps, educational charts, scientific mathematical survey, mechanical drawing and biology instruments and apparatus – All of them belong to one class as they are the tools for learning biology and other life science – Applying the doctrine of Nositur a Sociis *and also on considering the intention of the Government for issuing the notification granting exemption for learning life science, it is established that no exemption was desired for the articles manufactured and sold by the assessee but it was meant exclusively for use by the students of schools and colleges – Doctrines/Principles.*

Doctrines/Principles: Nositur a Sociis – Meaning of.

Tax/Taxation: Classification of goods – Basis of – Held:

The classification of any commodity cannot be made on its scientific and technical meaning – It is only the common parlance meaning of the term which should be taken into consideration for the purpose of determining the tax liability – Uttar Pradesh Trade Tax Act, 1948.

The assessee-respondent was engaged in the manufacture and sale of various "scientific and biological equipments/instruments which were used mainly by biological scientists for research purposes for which the assessee was duly registered under the provisions of U.P. Trade Tax Act, 1948 as well as the Central Sales Tax Act, 1956. The articles manufactured and sold by the respondent were Biological Safety Cabinets; Laminar Flow Cabinets; Fume Hoods; Air Showers; Operation Theatre Modules; Air Curtains; Air Conditioner Modules; Clean Tents; Clean Room Garments; Pass Boxes; Air Handling, Filter etc. These articles were sold by the respondent to Hospitals, Medical Colleges, Advance Research Institutions and Laboratories.

The question which arose for consideration in the instant appeals filed by the Revenue was whether the scientific and biological instruments/equipments manufactured by the assessee were entitled to exemption under notification no.1166 dated 10.4.2000.

Allowing the appeals, the Court

HELD: 1. The fact that the assessee himself never treated the goods as exempted goods and treated them as taxable goods under Section 3-A (1)(C) of the U.P Trade Tax Act as unclassified goods and charged full rate of tax would make it clear that even the assessee was aware of the fact that the goods did not fall within ambit of the notification dated 10.4.2000. [Para 20] [272-H; 273-A-B]

2.1. The Hindi version of the Notification dated

10.4.2000 is "Jeev Vigyan Sammandhi Upkaranikayen Aur Sanyantra". That means the instruments which are used for the study of Life Science (Jeev Vigyan) by students in educational institutions. The various articles manufactured and sold by the respondent were not meant for teaching Life Science (Jeev Vigyan). They were meant for Hospital, Medical Colleges and Research Laboratories which may fall in the category of "Biological Instruments" and are outside the purview of "Biology Instruments" to be used by the students in educational institutions. The classification of any commodity cannot be made on its scientific and technical meaning. It is only the common parlance meaning of the term which should be taken into consideration for the purpose of determining the tax liability. [Paras 22, 23] [273-D-G]

Maharashtra University of Health Sciences v. Satchikitsa Prasarak Mandal **(2010) 3 SCC 786;** *Ramavatar Budhaiprasad v. Asstt. STO* **AIR 1961 SC 1325;** *Hansraj Gordhandas v. H.H. Dave, Asst. Collector of Central Excise and Customs* **AIR 1970 SC 755 – relied on.**

2.2. There is a vast difference between Biology Instruments and Biological Instruments. The term "Biology Instruments" refers to those instruments which are used in the education of Biology as a subject in the educational institutions. It refers to a limited range of instruments confined for their use in study of Jeev Vigyan only. But the words "Biological Instruments" should be interpreted in a broader sense, and it includes various articles which are supplied to hospitals and medical colleges for various purposes including research. The word "Biological Instrument" is a general word with its utility where wide scale applications including the goods as manufactured by the assessee/respondent are taken. Government Notification dated 10.4.2000 refers to words "Biology Instruments". This means that only such articles as meant for education institution for the study of Jeev

Vigyan such as Maps Chart, Instrument Boxes, etc., are included in the said notification. Biological Instruments are outside the ambit of the said Notification. [Paras 22, 27] [273-E-F; 276-D-F]

3. Nositur a Sociis means that when two words are capable of being analogously defined, then they take colour from each other. The term ejusdem generis is a facet of Nositur a Sociis. The said principle means that the general words following certain specific words would take colour from the specific words. All these goods which are mentioned in the entry of notification dated 10.04.2000 relate to articles used for study of life science in schools and colleges, such as, maps, educational charts, scientific mathematical survey, mechanical drawing and biology instruments and apparatus. All of them belong to one class as they are the tools by using which a student would and could learn life science. In the said manner, the doctrine of Nositur a Sociis would be applicable to the facts of the instant case. The earlier entry on the same subject used in notification dated 20.05.1976 was "Maps, Educational Charts, Instruments Boxes, Educational Globes and instruments, such as instruments used in Mechanical drawings and Biology used by Students." The said entry came to be amended subsequently and the entry vide notification dated 10.04.2000 was inserted granting exemption to the sales of Maps, Educational Charts, Instruments Boxes, Educational Globes and Scientific Mathematical Survey, Mechanical Drawings and Biology instruments and apparatus. All these items are used by the students studying in schools and colleges. A glance at the items manufactured and sold by the respondent would establish that what was exempted under notification dated 10.04.2000 were basic items to learn the Life Science and which were instruments and apparatus for learning Biology and other Life Science. Therefore, on

applicability of the said doctrine and also on considering the intention of the Government for issuing the said notification granting exemption for learning Life Science, it is established that no exemption was desired for the articles manufactured and sold by the respondent but it was meant exclusively for articles used by the students of schools and colleges. The exclusion of the word "students" in the subsequent notification would not in any manner materially change the intention for which such notification is issued. In the instant case, the goods manufactured and sold by the assessee were not meant for Educational Institutions but were meant for Research Laboratories. Therefore, the commodities in question are not covered by the said notification dated 10.4.2000, and are not entitled for exemption. [Paras 29-33, 35, 37] [276-H; 277-A-H; 278-A-F; 279-A-B]

M/S Pradeep Agarbatties v. State of Punjab and Others **1997 8 SCC 511 – referred to.**

Case Law Reference:

(2010) 3 SCC 786	**relied on**	**Para 24**
AIR 1961 SC 1325	**relied on**	**Para 25**
AIR 1970 SC 755	**relied on**	**Para 26**
1997 8 SCC 511	**referred to**	**Para 36**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2983-2988 of 2011.

From the Judgment & Order dated 25.05.2009 of the High Court of Judicature at Allahabad in Trade Tax Revision Nos. 329, 330, 331, 332, 333 & 334 of 2007.

Sunil Gupta, Shail Kr. Dwivedi, AAG, Gunnam Venkateswara Rao, Manoj Kumar Dwivedi, Ardendumauli Kr. Prasad for the Appellant.

Kavin Gulati, Rashmi Singh, T. Mahipal for the Respondent.

The Judgment of the Court was delivered by

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

2. The present appeals are filed against the impugned judgment and order dated 25.5.2009 in TTR No. 329/2007 & TTR No. 330/2007 & TTR No. 331/2007 & TTR No. 332/2007 & TTR No. 333/2007 & TTR No. 334/2007 passed by the High Court whereby the High Court allowed the Trade Tax Revision filed by the respondent and reversed the order passed by the Trade Tax Tribunal, UP (Noida Bench).

3. The issue that falls for our consideration in the present appeals is whether scientific and biological instruments/ equipments manufactured and sold by the respondent/ assessee would be entitled to get exemption from payment of tax under the UP Trade Tax Act, 1948 (for short "the UP Act") as well as the Central Sales Tax Act, 1956 (for short "the Central Act") in view of the notifications No. 1166 dated 10.4.2000. The aforesaid issue was the only issue which was decided by the Tribunal in favour of the respondent – assessee and therefore in this appeal we are required to answer and decide the said issue, which is framed by us.

4. In order to answer the aforesaid issue which arises for our consideration, it would be necessary to set out some facts leading to filing of the present appeals.

5. The assessee/respondent is a proprietorship firm, which is engaged in the manufacture and sales of various "scientific and biological equipments/instruments, which are used mainly by biological scientists for research purposes for which the assessee is duly registered under the provisions of U.P. Act as well as the Central Act. The assessee/respondent was issued a notice by the assessing authority and the assessee

appeared before the assessing authority and claimed that the goods sold by it are exempted from tax in view of the notification no. 1166 dated 10.4.2000 and also claimed relief on account of Inter-State sales made to various government organisations and institutions against the Forms 3D and D.

6. The Assessing Authority, after examining the accounts and details, issued a show cause notice to the assessee proposing to make the best judgment assessment on the basis of an inference that the assessee had effected sales at concessional rate of tax to various organizations against the declaration of form 3D and form D even though the said organizations were not the Government organisations and no benefits of concessional rate of tax could have been claimed by the assessee. The assessing authority further took a view that the goods sold by the assessee are not covered by the notification No. 1166 dated 10.4.2000 and hence the goods of the assessee were liable to be taxed at the rate of 10% as unclassified goods.

7. The assessee replied to the show cause notice and stated that the goods sold by the assessee are fully covered by the notification no. 1166 dated 10.4.2000 and that the assessee had charged and deposited tax at concessional rate on the Intra-State sales as well as Inter-State sales made to various Government Organizations and institutions but claimed that it was exempted under the said notification also.

8. The explanation as submitted by the assessee was not accepted by the assessing authority and assessment orders were passed on 20.2.2004, 17.3.2005 and 30.3.2005 for the Assessment Year 2001-2002, 2002-2003 and 1998-1999 respectively and the tax was levied under the UP Act and also under the Central Act. The Assessing Authority has accepted books of accounts of the assessee as well as declared turnover but rejected the benefits of declaration Form 3-D/D and on the Intra-State/ inter-state sales made to the Central/ State Government organizations and also treated the goods as

unclassified goods, declining it to grant benefit of exemption under notification no.1166 dated 10.4.2000 holding that the assessee is not entitled to get exemption under the aforesaid notification.

9. Thereafter, appeals were filed before the Joint Commissioner (Appeals) and by its common order dated 31.12.2005, the Joint Commissioner (Appeals) dismissed both the appeals holding that the equipment manufactured and sold by the respondent are used as instruments in the research laboratories for maintaining the environment free from bacteria, and therefore, the respondents are not entitled to claim exemption.

10. The Assessee/Respondent filed appeals before the Trade Tax Tribunal, UP (Noida Bench) and the Tribunal by an order dated 21.2.2007 dismissed the appeals filed by the assessee/respondent holding that only such articles are exempted from tax which are used for educating children such as maps, charts, instrumental box, educational globe, biology instruments, and not those used for research purposes.

11. Thereafter, a Trade Tax Revision under Section 11 of the Trade Tax Act, 1948 was filed by the Respondent before the High Court of Allahabad and the High Court by its impugned judgment and order upheld the contention of the assessee/ respondent and held that the assessee is entitled to the benefit of notification No. 1166 dated 10.4.2000 holding that the description of the goods made in the notification has been clarified to be used by all the persons. While coming to such conclusions, reference was also made to the Hindi version of the notification dated 10.4.2000 holding that the same makes it clear that the exemption has been granted to the instrument which has been used.

12. The aforesaid findings and conclusions arrived at by the High Court are under challenge in these appeals on which we heard the learned counsel appearing for the parties.

13. Learned counsel appearing for the appellant submitted that the words "biology instruments" necessarily mean the instruments, which are used by the students in educational institutions, more particularly, in schools and colleges and not in research institutions. It was also submitted that each word of the notification must be distinctly read to take colour from the preceding words by applying the principle of ejusdem generis. Next submission was that the equipments manufactured by the assessee could not be clubbed with other items as mentioned in the notification as the goods manufactured by the assessee are not similar or identical as that of the goods mentioned in the notification. It was also contended that the words "biology" instruments and apparatus are confined to the items used in the study of science of physical life in respect of plants and animals in school and colleges but the goods in question supplied by the respondent are used in laboratories and research institute.

14. It was further submitted that the assessee himself never treated the goods in question as "exempted goods" but treated them as "taxable goods" under Section 3-A(1)(C) of the U.P. Act as unclassified goods and the assessee charged full rate of tax as is evident from the various cash memos, which are on record and also claimed concessional rate of tax against the Form 3D (U.P. Act) and Form D (Central Act).

15. It was further submitted that the plain language of the notification is to be read for the purpose of understanding its language and the common parlance meaning or the popular sense meaning should be preferred over the technical or scientific meaning of the items and since the goods manufactured by the assessee are not being used for the study of biology, the same is not entitled for exemption from tax. Reliance was also placed by the counsel for the appellant on the Hindi version of the notification, which classifies it as relatable to life science (Jeev Biology) taught in schools and colleges.

16. Learned counsel appearing for the respondent, however, refuted the aforesaid contentions of the appellant and submitted that the equipments and instruments which are being manufactured by the assessee/respondent are mainly used for providing a safe environment for scientific experiments and research work and also they are used for the safety of scientists who are engaged in micro-biological research, diagnostic laboratories, hospitals and operation theatres. According to the counsel these equipments are used by persons, who undertake research work on high risk diseases like T.B, Hepatitis B, who are prone to get it and are at a higher risk of being infected by agents/ bacteria which they handle and therefore, the surroundings where such research work is being undertaken requires to be made free from contamination to prevent, reduce or eliminate the risk of spread of infectious disease. He urged that the main purpose of these equipments is to provide bacteria/dust free i.e bio-clean environment in the working chamber to prevent the risk of infections and the same are entitled for exemption.

17. It was further submitted that the word "biology" and "biological" are not different from each other and are interchangeable.

18. It was also submitted on behalf of the respondent that the entry also contains the word "maps" and "survey instruments and apparatus". The maps are used by the school students alone, however, these apparatus are also used by the numerous people including geologists. It was contended that the notification does not only include the word biology instruments and apparatus, but also includes scientific instruments.

19. On the basis of the submissions made by the learned counsel appearing for the parties, we have perused the records.

20. The fact that the assessee himself never treated the

goods as exempted goods and treated them as taxable goods under Section 3-A(1)(C) of the U.P Act as unclassified goods and charged full rate of tax makes it clear that even the assessee was aware of the fact that the goods does not fall within ambit of the notification dated 10.4.2000.

21. The other issue that came for consideration is whether there is a difference between the term "Biology Instruments" and "Biological Instruments". The term "Biology Instruments" refers to those instruments which are used in the education of Biology as a subject in the educational institutions. But the words "Biological Instruments" should be interpreted in a broader sense, and it includes various articles which are supplied to hospitals and medical colleges for various purposes including research.

22. The Hindi version of the Notification dated 10.4.2000 is "Jeev Vigyan Sammandhi Upkaranikayen Aur Sanyantra". That means the instruments which are used for the study of Life Science (Jeev Vigyan) by students in educational institutions. The various articles in question as manufactured and sold by the respondent are not meant for teaching Life Science (Jeev Vigyan) to be taught in educational institutions. The articles in question are meant for Hospital, Medical Colleges and Research Laboratories which may fall in the category of "Biological Instruments" and are outside the purview of "Biology Instruments" to be used by the students in educational institutions.

23. Moreover, classification of any commodity cannot be made on its scientific and technical meaning. It is only the common parlance meaning of the term which should be taken into consideration for the purpose of determining the tax liability. In the present case the commodities that have been grouped together are articles used in Education Institutions such as Maps Chart, Sketch Map, Instrument Box, Educational Globes etc.

24. This Court in the case of *Maharashtra University of Health Sciences Vs. Satchikitsa Prasarak Mandal* reported in (2010) 3 SCC 786 held as follows:-

> "27. The Latin expression "ejusdem generis" which means "of the same kind or nature" is a principle of construction, meaning thereby when general words in a statutory text are flanked by restricted words, the meaning of the general words are taken to be restricted by implication with the meaning of the restricted words. This is a principle which arises "from the linguistic implication by which words having literally a wide meaning (when taken in isolation) are treated as reduced in scope by the verbal context". It may be regarded as an instance of ellipsis, or reliance on implication. This principle is presumed to apply unless there is some contrary indication [see Glanville Williams, The Origins and Logical Implications of the Ejusdem Generis Rule, 7 Conv (NS) 119].
>
> 34. It is also one of the cardinal canons of construction that no statute can be interpreted in such a way as to render a part of it otiose. It is, therefore, clear where there is a different legislative intent, as in this case, the principle of ejusdem generis cannot be applied to make a part of the definition completely redundant."

25. This Court in the case of *Ramavatar Budhaiprasad v. Asstt. STO* reported in AIR 1961 SC 1325 stated technical meaning of a commodity cannot be a basis for adjudicating the classification and held as follows

> *"3. .....Reliance was placed on the dictionary meaning of the word "vegetable" as given in Shorter Oxford Dictionary where the word is defined as "of or pertaining to, comprised or consisting of, or derived, or obtained from plants or their parts".* But this word must be construed not in any technical sense nor from the botanical

point of view but as understood in common parlance. It has not been defined in the Act and being a word of every day use it must be construed in its popular sense meaning "that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it". *It is to be construed as understood in common language; Craies on Statute Law, p. 153 (5th Edn.). It was so held in Planters Nut Chocolate Co. Ltd. v. The King 1. This interpretation was accepted by the High Court of Madhya Pradesh in Madhya Pradesh Pan Merchants' Association, Santra Market, Nagpur v. The State of Madhya Pradesh (Sales Tax Department) 2 where it was observed:*

"In our opinion, the word 'vegetables' cannot be given the comprehensive meaning the term bears in natural history and has not been given that meaning in taxing statutes before. The term 'vegetables' is to be understood as commonly understood denoting those 'classes of vegetable matter which are grown in kitchen gardens and are used for the table.'"

(emphasis supplied)

26. In *Hansraj Gordhandas Vs. H.H. Dave, Asst. Collector of Central Excise and Customs* reported in AIR 1970 SC 755, this Court held as follows:-

"It is well established that in a taxing statute there is no room for any intendment but regard must be had to the clear meaning of the words. The entire matter is governed wholly by the language of the notificatlon. If the tax-payer is within the plain terms of the exemption it cannot be denied its benefit by calling in aid any supposed intention of the exempting authority. If such intention can be gathered from the construction of the words of the notification or by necessary implication therefrom, the matter is different, but that is not the case here. In this

connection we may refer to the observations of Lord Watson in Salomon v. Salomon & Co. 1:

"Intention of the legislature is a common but very slippery phrase, which, popularly understood may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication."

27. It would also be relevant to mention here that there is a vast difference between Biology Instruments and Biological Instruments. The term Biology Instrument refers to a limited range of instruments confined for their use in study of Jeev Vigyan only. The word Biological Instrument is a general word with its utility where wide scale applications including the goods as manufactured by the assessee/respondent are taken. In the Government Notification dated 10.4.2000, the words Biology Instruments have been referred. This means that only such articles as meant for education institution for the study of Jeev Vigyan such as Maps Chart, Instrument Boxes, etc., are included in the notification in question. Biological Instruments are outside the ambit of the said Notification. The term "Biological Instruments" is the most general term, which comprises of goods manufactured and sold by the respondent. But such goods are certainly not Biology goods.

28. In the light of the aforesaid decisions of this Court we must analyse as to whether or not the principles of Nositur a Sociis or the principle of ejusdem generis could be said to be applicable on the facts of the present case.

29. Nositur a Sociis means that when two words are capable of being analogously defined, then they take colour

from each other. The term ejusdem generis is a facet of Nositur a Sociis. The aforesaid principle means that the general words following certain specific words would take colour from the specific words.

30. The counsel appearing for the appellant submitted that the aforesaid principles, particularly, the principle of Nositur a Sociis would be applicable to the facts of the present case. The counsel appearing for the respondent, however, submitted that the aforesaid principle would have no application to the facts of the present case as the words in the entry do not represent a homogenous class as maps, educational charts, scientific mathematical survey, mechanical drawing and biology instruments and apparatus, all belong to different categories of goods and they are not followed by any general words.

31. We are unable to accept the aforesaid stand of the counsel appearing for the respondents for all these goods which are mentioned in the aforesaid entry of the notification relate to articles used for study of life science in schools and colleges, such as, maps, educational charts, scientific mathematical survey, mechanical drawing and biology instruments and apparatus. All of them belong to one class as they are the tools by using which a student would and could learn life science. In the aforesaid manner the doctrine of Nositur a Sociis would be applicable to the facts of the present case.

32. At this stage reference could also be made to the earlier entry on the same subject which was used in the notification dated 20.05.1976. In the said notification the entry was in the following manner:

> "Maps, Educational Charts, Instruments Boxes, Educational Globes and instruments, such as instruments used in Mechanical drawings and Biology used by Students."

33. The aforesaid entry came to be amended subsequently

and the entry vide notification dated 10.04.2000 was inserted granting exemption to the sales of Maps, Educational Charts, Instruments Boxes, Educational Globes and Scientific Mathematical Survey, Mechanical Drawings and Biology instruments and apparatus. All these items are used by the students studying in schools and colleges.

34. The respondent on the other hand manufacture and sell the articles, such as, Bilogical Safety Cabinets; Laminar Flow Cabinets; Fume Hoods; Air Showers; Operation Theatre Modules; Air Curtains; Air Conditioner Modules; Clean Tents; Clean Room Garments; Pass Boxes; Air Handling, Filter etc. These articles are manufactured and sold by the respondent to Hospitals, Medical Colleges, Advance Research Institutions and Laboratories.

35. A glance at the aforesaid items would establish that what is exempted under notification dated 10.04.2000 are basic items to learn the Life Science and which are instruments and apparatus for learning Biology and other Life Science. Therefore, on applicability of the aforesaid doctrine and also on considering the intention of the Government for issuing the aforesaid notification granting exemption for learning Life Science it is established that no exemption was desired for the articles manufactured and sold by the respondent but it was meant exclusively for articles used by the students of schools and colleges. The exclusion of the word students in the subsequent notification would not in any manner materially change the intention for which such notification is issued.

36. This Court in the case of *M/S Pradeep Agarbatties V. State of Punjab and Others* 1997 8 SCC 511, held that: -

> "Entries in the Schedule of sales tax and Excise Statues list some articles separately and some articles are grouped together, when they are grouped together each word in the entry draws colour from the other words, therein. This is the principle of NOSITUR A SOCIIS."

37. In the present case, the goods manufactured and sold by the assessee are not meant for Educational Institutions but are meant for Research Laboratories. Hence the commodities in question are not covered by the said notification dated 10.4.2000, and are not entitled for exemption.

38. In view of the aforesaid discussion and law laid down by the Supreme Court in earlier decisions, we are of the considered opinion that the appeals deserve to be allowed. Accordingly, the appeals are allowed. The order passed by the High Court is set aside and the order of the Tribunal is restored.

D.G. Appeals allowed.

S.B.I.

v.

HEMANT KUMAR

(Civil Appeal No. 2957 of 2011)

APRIL 6, 2011

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

Service law: Disciplinary proceedings – Misappropriation of funds – Enquiry – Delinquent employee remaining absent during the enquiry – Number of adjournments – No intimation from employee about absence – Enquiry officer recording evidence on behalf of management and finding the employee guilty – Disciplinary officer passing order of dismissal – In appeal thereagainst, employee admitting guilt – Dismissal of appeal – Industrial dispute – Tribunal holding that the domestic enquiry held against the employee suffered from violation of principles of natural justice and enquiry officer ought to have made enquiry from the management about the alleged letter sent by employee for seeking adjournment and given another opportunity to him to lead evidence in rebuttal – Writ petition filed by management dismissed by High Court – On appeal, held: Both the reasons assigned by the Tribunal for condemning the departmental enquiry as defective were completely untenable – Principles of natural justice cannot be stretched to a point where they would render the in-house proceedings unworkable – Admittedly, the employee had not appeared for the enquiry on two earlier dates – On the third date too he was absent and there was no intimation from him before the Enquiry Officer – Employee had already tendered two admissions of guilt and there was hardly anything that could be said on his behalf to repel the charges – Tribunal's findings were wholly unreasonable and perverse – High Court, unfortunately, did not consider the matter in the right perspective – The order passed by the High Court and the award made by the Tribunal set aside – Natural justice.

The respondent was working in the appellant-bank as cashier-cum-clerk. The appellant-bank discovered that the respondent had indulged in misappropriation of funds by making fictitious entries and manipulations in the bank's ledgers. He was given a charge-sheet. On the first day of enquiry, the respondent did not appear without any intimation to the Enquiry Officer. The enquiry was adjourned. On the adjourned date, the respondent sent the request for adjournment again on the ground of illness of his mother-in-law. The enquiry was once again adjourned and the respondent was intimated about the next date fixed in the enquiry through registered post as well as hand delivered letters. The respondent was once again absent and there was no intimation from him. PW.1 was the Branch Manager where the respondent was posted at the material time and where the misappropriation was committed by him. He had come in connection with the enquiry from Delhi to Dehradun for the third time, and the Enquiry Officer proceeded with the enquiry and examined him. After recording the evidence of PW-1, the Enquiry Officer closed the enquiry and submitted his report holding the respondent guilty of all the charges. A copy of the enquiry report was sent to the respondent along with a letter informing him that it was tentatively decided to dismiss him from service and asking him to show cause. The respondent gave his reply to the enquiry report and after hearing him in person, the disciplinary authority passed the order of his dismissal from service.

Against the order passed by the disciplinary authority, the respondent preferred an appeal and during the pendency of the appeal he submitted yet another letter admitting his guilt in writing. His appeal was dismissed and then the respondent raised an industrial dispute. The Industrial Tribunal held that the domestic

enquiry held against the respondent suffered from violation of the principles of natural justice. While holding so, the Tribunal assigned two reasons. Firstly, the respondent had sent an application through post for adjournment of the enquiry on the ground that he had sustained injuries and even though this application did not reach the Enquiry Officer, it was his duty to find out from the bank whether or not such a letter was received and secondly, even after examining PW.1 *ex parte*, the Enquiry Officer ought to have given another opportunity to the respondent to lead evidence in rebuttal. The Tribunal, accordingly, set aside the order of dismissal and directed for the respondent's reinstatement with full back-wages. By impugned judgment, the High Court dismissed the writ petition filed by the appellant and affirmed the award passed by Tribunal. The instant appeal was filed challenging the impugned order.

Allowing the appeal, the Court

HELD: Both the reasons assigned by the Tribunal for condemning the departmental enquiry as defective were completely untenable. The principles of natural justice cannot be stretched to a point where they would render the in-house proceedings unworkable. Admittedly, the respondent had not appeared for the enquiry on two earlier dates. On the third date too he was absent and there was no intimation from him before the Enquiry Officer, yet the Tribunal insisted that it was the duty of the Enquiry Officer to find out from the concerned department of the bank whether any intimation or application was received from the respondent. In a situation where the enquiry is not being held in the bank premises or even in the same town, where the concerned branch of the bank is located, it may take hours or even a day or two to find out whether any letter or intimation from the person facing the enquiry was received in the

bank and for all that time the Enquiry Committee would remain in suspended animation. The Tribunal's observation that it was only the third date of hearing and hence, it could not be said that the respondent had adopted dilatory tactics cannot be accepted. The second reason assigned by the Tribunal that the Enquiry Officer should have allowed the respondent the opportunity to lead evidence in rebuttal was also without substance in the overall facts of the case. The respondent had already tendered two admissions of guilt in writing and one orally before PW.1 and there was hardly anything that could be said on his behalf to repel the charges. The Tribunal's findings were wholly unreasonable and perverse and fit to be set aside. The High Court, unfortunately, did not consider the matter in the right perspective. The order passed by the High Court and the award made by the Tribunal are set aside. [Paras 9-12] [286-F-H; 287-E-H; 288-A-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2957 of 2011.

From the Judgment & Order dated 08.08.2008 & 17.02.2010 of the High Court of Uttarakhand at Nainital in Writ Petition No. 1746 of 2001 (MS) Review Application R.A. No. 14 of 2010.

Sanjay Kapur, Abhishek Kumar, Ashmi Mohan for the Appellant.

Randhir Singh Jain, Ruchika Jain for the Respondent.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. Delay condoned.

2. Leave granted.

3. This appeal is directed against the judgment and order

dated August 8, 2008 passed by the High Court of Uttarakhand. By the impugned judgment, the High Court dismissed the Writ Petition filed by the appellant before it and affirmed the award dated November 6, 1998 made by the Central Government Industrial Tribunal-cum-Labour Court, Pandu Nagar, Kanpur, directing reinstatement of the respondent in the service of the appellant-bank with full back-wages.

4. The respondent worked in the appellant-bank as Cashier-cum-Clerk. In January, 1994 it was discovered that the respondent had been indulging in misappropriation of money by making fictitious entries and manipulations in the bank's ledgers. On his malfeasance coming to light, the respondent not only admitted his guilt in writing *vide* memo dated March 3, 1994 but also deposited the amount of Rs.14,000/- to make good the amount earlier defalcated by him. He was given a chargesheet detailing his various acts of omission and commission to which he did not give any reply. Nevertheless, before the Enquiry Officer in course of the preliminary enquiry he expressed the intent to defend himself in the enquiry. The enquiry was first fixed on November 15, 1994 but on that date the respondent did not appear without giving any intimation to the Enquiry Officer. Due to his non-appearance the enquiry was adjourned to November 28, 1994. On that date, once again, he did not come to participate in the enquiry proceedings but sent a request for adjournment on the ground that his mother-in-law was seriously ill at Agra. The enquiry was once again adjourned and it was fixed for December 14, 1994. He was intimated about the next date fixed in the enquiry through registered post as well as hand delivery letters dated November 15, 1994 and November 28, 1994 respectively.

5. On December 14, 1994 the respondent was once again absent and there was no intimation from him. In those circumstances and having regard to the fact that the witness intended to be examined by the management in support of the charge had come in connection with that enquiry from Delhi to

Dehradun for the third time, the Enquiry Officer decided to proceed with the enquiry and examine him *ex parte.* PW.1 happened to be the Branch Manager where the respondent was posted at the material time and where the misappropriation was committed by him. In course of his evidence, in reply to the question what action was taken by him when the fraudulent entry came to light, the witness stated as follows:-

> "PW.1: Shri Hemant Kumar (EPA) confessed having made a fraudulent entry of Rs.14000/- dated 26.09.93 in the A/C No.1287 of Miss Shivani and also confessed having balanced the ledger No.10 by manipulating the total on page 2 & 3 of Ex.P2. Hemant Kumar (EPA) gave a confession letter Ex.P4 probably on 10.02.94 and he was asked to deposit Rs.14000/-. Shri Hemant Kumar (EPA) deposited Rs.14000/- in the A/c of Miss Shivani on 11.02.94 *vide* credit voucher Ex.P3 which has been written in the hand of Hemant Kumar."

6. After recording his evidence, the Enquiry Officer closed the enquiry and submitted his report holding the respondent guilty of all the charges. A copy of the enquiry report was sent to the respondent along with a letter telling him that it was tentatively decided to dismiss him from service and asking him to show cause and to appear for a personal hearing. The respondent gave his reply to the enquiry report and after hearing him in person, the disciplinary authority passed the order of his dismissal from service.

7. Against the order passed by the disciplinary authority, the respondent preferred an appeal and during the pendency of the appeal he submitted yet another letter admitting his guilt in writing, presumably hoping that a lenient view would be taken in the appeal. In the memo dated December 10, 1986 addressed to the Manager, State Bank of India, the respondent stated as follows:-

> "Dear Sir,
>
> Subject: Entry dated 26.09.93 for Rs.14,000/-.
>
> With reference to above, I committed a fraud by wrong crediting Rs.14,000/- on 26.09.93 which was Sunday in SB account No.1287 of Shivani and lt. col. G.G. Agrawal and I was closing the wrong balancing of ledger No.10 — months. For which I am extremely sorry and shameful. I beg you to — for this shameful act and I promise you not to do such thing in future."

8. His appeal was, however, dismissed and then the respondent raised an industrial dispute which was referred for adjudication before the Central Government Industrial Tribunal-cum-Labour Court. The Industrial Tribunal found and held that the domestic enquiry held against the respondent suffered from violation of the principles of natural justice. The Tribunal further noted that in the written statement filed by the appellant-bank, the plea was not reserved to make good the charges by leading evidence before the Tribunal in case the domestic enquiry was held to be defective. The Tribunal, accordingly, set aside the order of dismissal and directed for the respondent's reinstatement with full back-wages.

9. The Tribunal has assigned two reasons for holding that the departmental enquiry held in the case was in violation of the principles of natural justice. First, it held that the respondent had sent an application through post for adjournment of the enquiry on December 14, 1994 on the ground that he had sustained injuries and even though this application had not reached the Enquiry Officer it was his duty to find out from the bank whether or not such a letter was received and secondly, even after examining PW.1 *ex parte* the Enquiry Officer should have given another opportunity to the respondent to lead evidence in rebuttal. In this connection, the Tribunal made the following observations:-

"In the instant case I find that after 14.12.94 the witness of the management were (*sic* was) examined but no opportunity was given for adducing evidence in defence. Apart from this I find that the concerned workman had applied through post and (*sic* for) adjournment on 14.12.94 on the ground that he had sustained injuries. Before this tribunal concerned workman has adduced evidence to prove that fact that he had applied for adjournment through post. O.P. Chaudhary PW1 enquiry officer has stated that he had not received any such application. However, he had admitted in cross-examination that the mail is received in the office of the bank premises. It appears that from the bank this letter was not handed over to the enquiry officer. In any case it is held that application was sent by post and in this way there is a presumption that such application would have been reached the addresses. Hence, the concerned workman had applied for adjournment. There was no inordinate delay in holding of enquiry as it was only third date of hearing hence it cannot be said that the concerned workman had adopted dilatory tactics."

10. We are of the view that both the reasons assigned by the Tribunal for condemning the departmental enquiry as defective are completely untenable. The principles of natural justice cannot be stretched to a point where they would render the in-house proceedings unworkable. Admittedly, the respondent had not appeared for the enquiry on two earlier dates. On the third date too he was absent and there was no intimation from him before the Enquiry Officer, yet the Tribunal insists that it was the duty of the Enquiry Officer to find out from the concerned department of the bank whether any intimation or application was received from the respondent. Let us take a case where the enquiry is not being held in the bank premises or even in the same town, where the concerned branch of the bank is located. In such a situation, it may take hours or even a day or two to find out whether any letter or intimation from the person facing the enquiry was received in

the bank and for all that time the Enquiry Committee would remain in suspended animation. The Tribunal's observation that it was only the third date of hearing and hence, it could not be said that the respondent had adopted dilatory tactics can only be described as unfortunate. We completely reject the notion that three barren dates in an in-house proceeding do not amount to delay. Let the in-house proceedings at least be conducted expeditiously and without in any undue loss of time.

11. The second reason assigned by the Tribunal that the Enquiry Officer should have allowed the respondent the opportunity to lead evidence in rebuttal is also without substance in the overall facts of the case. The respondent had already tendered two admissions of guilt in writing and one orally before PW.1 and there was hardly anything that could be said on his behalf to repel the charges.

12. We are, therefore, satisfied that the Tribunal's findings are wholly unreasonable and perverse and fit to be set aside. The High Court, unfortunately, did not consider the matter as it should have, in light of the discussions made above. The High Court's order is equally unsustainable. We, accordingly, set aside the order passed by the High Court and the award made by the Tribunal. The appeal is allowed but with no order as to costs.

D.G. Appeal allowed.