SRI INDRA DAS
v.
STATE OF ASSAM
(Criminal Appeal No. 1383 of 2007)

FEBRUARY 10, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Terrorist and Disruptive Activities (Prevention) Act, 1987 – s.3(5) – Membership of banned organisation – Conviction of appellant u/s.3(5) – Sustainability – Held: Mere membership of a banned organization cannot incriminate a person unless he is proved to have resorted to acts of violence or incited people to imminent violence, or did an act intended to create disorder or disturbance of public peace by resort to imminent violence – In the present case, even assuming that accused-appellant was a member of ULFA- a banned organization, there was no evidence to show that he did acts of the nature above mentioned – Thus, even if he was a member of ULFA it was not proved that he was an active member and not merely a passive member – Further, the provisions in various statutes i.e. 3 (5) of TADA or s.10 of the Unlawful Activities (Prevention) which on their plain language make mere membership of a banned organization criminal, have to be read down and one has to depart from the literal rule of interpretation in such cases, otherwise these provisions will become unconstitutional as violative of Articles 19 and 21 of the Constitution – Conviction of appellant accordingly set aside – Constitution of India, 1950 – Articles 19 and 21.

Interpretation of Statutes – Reading down of a statute – Held: The Constitution is the highest law of the land and no statute can violate it – If there is a statute which appears to violate it, one can either declare it unconstitutional or read it down to make it constitutional – The first attempt of the Court

should be try to sustain the validity of the statute by reading it down.

Interpretation of Statutes – Statute violating fundamental rights – Held: Statutory provisions cannot be read in isolation, but should be read in consonance with fundamental rights guaranteed by Constitution.

Evidence – Confession – Nature of – Held: It is a very weak type of evidence, particularly when alleged to have been made to the police, and it is not safe to convict on its basis unless there is adequate corroborative material.

Five persons including the appellant were charged for the death of a person. The only evidence against the appellant was the alleged confession made by him to a police officer. The said alleged confession was, however, subsequently retracted by the appellant and was not corroborated by any other material. The appellant was alleged to be a member of ULFA, a banned organisation, and convicted under Section 3(5) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 which makes mere membership of a banned organisation a criminal act, and sentenced to five years rigorous imprisonment. The conviction of the appellant was challenged in the instant appeal.

Allowing the appeal, the Court

HELD:1. Confession is a very weak type of evidence, particularly when alleged to have been made to the police, and it is not safe to convict on its basis unless there is adequate corroborative material. In the present case there is no corroborative material. [Para 5] [296-E]

2. In *Arup Bhuyan's* ***case*****, it was held that mere membership of a banned organization cannot incriminate a person unless he is proved to have resorted to acts of**

violence or incited people to imminent violence, or does an act intended to create disorder or disturbance of public peace by resort to imminent violence. In the present case, even assuming that the appellant was a member of ULFA which is a banned organization, there is no evidence to show that he did acts of the nature above mentioned. Thus, even if he was a member of ULFA it has not been proved that he was an active member and not merely a passive member. Hence the decision in *Arup Bhuyan's* case squarely applies in this case. [Para 7] [296-G-H; 297-A-B]

Arup Bhuyan vs. State of Assam; **decision dated 3-2-2011 of Supreme Court in Criminal Appeal No.889 of 2007 – held applicable.**

State of Kerala vs. Raneef, **2011 (1) SCALE 8 – referred to.**

Elfbrandt vs. Russell **384 US 17(1966);** *Schneiderman vs. U.S.* **320 US 118(136);** *Schware vs. Board of Bar Examiners* **353 US 232(246);** *Scales vs. U.S.* **367 US 203 (229);** *Apthekar vs. Secretary of State* **378 US 500;** *Baggett vs. Billit* **377 US 360;** *Cramp vs. Board of Public Instructions* **368 US 278;** *Gibson vs. Florida* **372 US 539;** *Noto vs. U.S.* **367 US 290(297-298);** *Communist Party vs. Subversive Activities Control Board* **367 US 1 (1961);** *Joint Anti-Fascist Refugee Committee vs. McGrath* **341 US 123, 174 (1951);** *Keyishian vs. Board of Regents of the University of the State of New York* **385 US 589, 606 (1967);** *Yates vs. U.S.,* **354 US 298 (1957);** *Brandenburg vs. Ohio* **395 US 444(1969);** *Whitney vs. California* **274 US 357 (1927);** *Gitlow vs. New York* **268 US 652 (1925);** *Terminiello vs. Chicago* **337 US 1 (1949);** *DeJonge vs. Oregon,* **299 US 353 (1937);** *Abrams vs. U.S.* **250 US 616 (1919) – referred to.**

3.1. Though it was submitted by the counsel for the Government before the TADA Court that under many laws

mere membership of an organization is illegal e.g. Section 3(5) of Terrorists and Disruptive Activities, 1989, Section 10 of the Unlawful Activities (Prevention) Act 1967, etc, but in the opinion of this Court these statutory provisions cannot be read in isolation, but have to be read in consonance with the Fundamental Rights guaranteed by Constitution. [Para 26] [304-G-H; 305-A]

3.2. The Constitution is the highest law of the land and no statute can violate it. If there is a statute which appears to violate it one can either declare it unconstitutional or one can read it down to make it constitutional. The first attempt of the Court should be try to sustain the validity of the statute by reading it down. [Para 27] [305-B]

3.3. The provisions in various statutes i.e. 3 (5) of TADA or Section 10 of the Unlawful Activities (Prevention) which on their plain language make mere membership of a banned organization criminal have to be read down and one has to depart from the literal rule of interpretation in such cases, otherwise these provisions will become unconstitutional as violative of Articles 19 and 21 of the Constitution. It is true that ordinarily one should follow the literal rule of interpretation while construing a statutory provision, but if the literal interpretation makes the provision unconstitutional one can depart from it so that the provision becomes constitutional. [Para 31] [306-C-E]

3.4. Every effort should be made by the Court to try to uphold the validity of the statute, as invalidating a statute is a grave step. Hence one may sometimes have to read down a statute in order to make it constitutional. [Para 32] [306-F]

3.5. There were Constitutions in India even under British Rule e.g. the Government of India Act, 1935, and

the earlier Government of India Acts. These Constitutions, however, did not have fundamental right guaranteed to the people. In sharp contrast to these is the Constitution of 1950 which has fundamental rights in Part III. These fundamental rights are largely on the pattern of the Bill of Rights to the U.S. Constitution. [Para 42] [310-C]

3.6. Had there been no Constitution having Fundamental Rights in it then of course a plain and literal meaning could be given to Section 3 (5) of TADA or Section 10 of the Unlawful Activities (Prevention) Act. But since there is a Constitution in India providing for democracy and Fundamental Rights one cannot give these statutory provisions such a meaning as that would make them unconstitutional. [Para 43] [310-D-E]

Kedar Nath Singh vs. State of Bihar **AIR 1962 SC 955;** *Government of Andhra Pradesh vs. P. Laxmi Devi* **2008(4) SCC 720;** *Sunil Batra vs. Delhi Administration* **AIR 1978 SC 1675;** *New India Sugar Mills vs. Commissioner of Sales Tax* **AIR 1963 SC 1207;** *Githa Hariharan vs. Reserve Bank of India* **AIR 1999 SC 1149;** *Govindlalji vs. State of Rajasthan* **AIR 1963 SC 1638;** *R.L. Arora vs. State of U.P.* **AIR 1964 SC 1230;** *Indian Oil Corporation vs. Municipal Corporation* **AIR 1993 SC 844;** *BR Enterprises vs. State of U.P.* **AIR 1999 SC 1867;** *State of Maharashtra & Ors. vs. Bhaurao Punjabrao Gawande* **(2008) 3 SCC 613;** *M. Nagaraj & Ors. vs. Union of India &Ors.* **(2006) 8 SCC 212;** *I.R. Coelho (dead) By LRs. vs. State of T.N.* **(2007) 2 SCC 1 – relied on.**

Bal Gangadhar Tilak vs. Queen Empress **ILR 22 Bom 528 (PC);** *Annie Besant vs. A-G of Madras* **AIR 1919 PC 31;** *Emperor vs. Sadasiv Narain* **AIR 1947 PC 84;** *Niharendra Dutta vs. Emperor* **AIR 1942 FC 22 – referred to.**

Case Law Reference:

2011(1) Scale 8	**referred to**	**Para 8**

384 US 17(1966)	**referred to**	**Para 8**
320 US 118(136)	**referred to**	**Para 10**
353 US 232(246)	**referred to**	**Para 10**
367 US 203 (229)	**referred to**	**Para 10, 11**
378 US 500	**referred to**	**Para 12**
377 US 360	**referred to**	**Para 10**
368 US 278	**referred to**	**Para 12**
372 US 539	**referred to**	**Para 12**
367 US 290(297-298)	**referred to**	**Para 13, 14**
367 US 1 (1961)	**referred to**	**Para 15**
341 US 123, 174 (1951)	**referred to**	**Para 16**
385 US 589, 606 (1967)	**referred to**	**Para 17**
354 US 298 (1957)	**referred to**	**Para 18**
395 US 444(1969)	**referred to**	**Para 19**
274 US 357 (1927)	**referred to**	**Para 19, 20**
268 US 652 (1925)	**referred to**	**Para 22**
337 US 1 (1949)	**referred to**	**Para 23**
299 US 353 (1937)	**referred to**	**Para 24**
250 US 616 (1919)	**referred to**	**Para 25**
2008(4) SCC 720	**relied on**	**Para 27, 32**
AIR 1962 SC 955	**relied on**	**Para 28, 29,30**
ILR 22 Bom 528 (PC)	**referred to**	**Para 34**
AIR 1919 PC 31	**referred to**	**Para 34**

AIR 1947 PC 84	**referred to**	**Para 34**
AIR 1942 FC 22	**referred to**	**Para 34**
AIR 1978 SC 1675	**relied on**	**Para 35**
AIR 1963 SC 1207	**relied on**	**Para 36**
AIR 1999 SC 1149	**relied on**	**Para 37**
AIR 1963 SC 1638	**relied on**	**Para 38**
AIR 1964 SC 1230	**relied on**	**Para 39**
AIR 1993 SC 844	**relied on**	**Para 40**
AIR 1999 SC 1867	**relied on**	**Para 41**
(2008) 3 SCC 613	**relied on**	**Para 44**
(2006) 8 SCC 212	**relied on**	**Para 44**
(2007) 2 SCC 1	**relied on**	**Para 44**

CRIMINAL APPELATE JURISDICTION : Criminal Appeal No. 1383 of 2007.

From the Judgment & Order dated 13.8.2007 of the Designated Court Assam, Guahati in TADA Session Case No. 22 of 1999.

Bikash Kar Gupta (for Abhijit Sengupta) for the Appellant.

The Judgment of the Court was delivered by

MARKANDEY KATJU, J. 1. Heard learned counsel for the appellant. Service of Notice of Lodgment of petition of Appeal is complete, but no one has entered appearance on behalf of the sole respondent-State.

2. The facts of the case are similar to the facts in *Arup Bhuyan vs. State of Assam* Criminal Appeal No.889 of 2007, which we allowed on 3.2.2011.

3. As in the case of *Arup Bhuyan* (supra), the only evidence against the appellant in this case is his alleged confession made to a police officer, for which he was charged under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short 'TADA').

4. The facts of the case are that one Anil Kumar Das went missing from the evening of 6.11.1991, and his dead body was recovered after two months on 19.1.1992 from the river Dishang. Five persons including the appellant were charged for his death. The appellant was not named in the FIR. No prosecution witness has attributed any role to the appellant. The charge sheet in the case was filed after a gap of nine years from the date of the commission of the offence, and charges were framed more than four years after filing of the charge sheet. There is no evidence against the appellant except the confessional statement.

5. The alleged confession was subsequently retracted by the appellant. The alleged confession was not corroborated by any other material. We have held in *Arup Bhuyan's* case (supra) that confession is a very weak type of evidence, particularly when alleged to have been made to the police, and it is not safe to convict on its basis unless there is adequate corroborative material. In the present case there is no corroborative material.

6. However, the appellant has been convicted under Section 3(5) of TADA which makes mere membership of a banned organization a criminal act, and sentenced to five years rigorous imprisonment and Rs.2000/- fine.

7. In *Arup Bhuyan's* case (supra) we have stated that mere membership of a banned organization cannot incriminate a person unless he is proved to have resorted to acts of violence or incited people to imminent violence, or does an act intended to create disorder or disturbance of public peace by resort to

imminent violence. In the present case, even assuming that the appellant was a member of ULFA which is a banned organization, there is no evidence to show that he did acts of the nature above mentioned. Thus, even if he was a member of ULFA it has not been proved that he was an active member and not merely a passive member. Hence the decision in *Arup Bhuyan's* case (supra) squarely applies in this case.

8. In our judgment in *State of Kerala vs. Raneef* 2011(1) Scale 8 we had referred to the judgment of the U.S. Supreme Court in *Elfbrandt vs. Russell* 384 US 17(1966) which rejected the doctrine of 'guilt by association'.

9. In *Elfbrandt's* case (supra) Mr. Justice Douglas, speaking for the Court observed :

> "Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat. This Act threatens the cherished freedom of association protected by the First Amendment, made applicable to the States by the Fourteenth Amendment. .....A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of 'guilt by association' which has no place here."

10. The decision relied on its earlier judgments in *Schneiderman vs. U.S.* 320 US 118(136) and *Schware vs. Board of Bar Examiners* 353 US 232(246). The judgment in *Elfbrandt's* case (supra) also referred to the decision of the U.S. Supreme Court in *Scales vs. U.S.* 367 US 203 (229) which made a distinction between an active and a passive member of an organization.

11. In *Scales* case (supra) Mr. Justice Harlan of the U.S. Supreme Court observed :

> "The clause (in the McCarran Act, 1950) does not make criminal all associations with an organization which has been shown to engage in illegal advocacy. *There must be clear proof that a defendant 'specifically intends to accomplish the aims of the organization by resort to violence'.* A person may be foolish, deluded, or perhaps merely optimistic, but he is not by this statute made a criminal."
>
> (emphasis supplied)

12. *Elfbrandt's* case (supra) also relied on the U.S. Supreme Court decisions in *Apthekar vs. Secretary of State* 378 US 500, *Baggett vs. Billit* 377 US 360, *Cramp vs. Board of Public Instructions* 368 US 278, *Gibson vs. Florida* 372 US 539, etc.

13. In *Noto vs. U.S.* 367 US 290(297-298) Mr. Justice Harlan of the U.S. Supreme Court observed :

> ".....The mere teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend colour to the otherwise ambiguous theoretical material regarding Communist Party teaching."

14. In *Noto's* case (supra) Mr. Justice Hugo Black in a concurring judgment wrote :

> "In 1799, the English Parliament passed a law outlawing certain named societies on the ground that they were engaged in 'a traitorous Conspiracy ..... in conjunction with the Persons from Time to Time exercising the Powers of Government in France .....' One of the

many strong arguments made by those who opposed the enactment of this law was stated by a member of that body, Mr. Tierney :

'The remedy proposed goes to the putting an end to all these societies together. I object to the system, of which this is only a branch; for the Right Hon. gentleman has told us he intends to propose laws from time to time upon this subject, as cases may arise to require them. I say these attempts lead to consequences of the most horrible kind. I see that government are acting thus. Those whom *they cannot prove to be guilty, they will punish for their suspicion. To support this system, we must have a swarm of spies and informers. They are the very pillars of such a system of government.*'

The decision in this case, in my judgment, dramatically illustrates the continuing vitality of this observation.

The conviction of the petitioner here is being reversed because the Government has failed to produce evidence the Court believes sufficient to prove that the Communist Party *presently advocates the overthrow of the Government by force.*"

(emphasis supplied)

15. In *Communist Party vs. Subversive Activities Control Board,* 367 US 1 (1961) Mr. Justice Hugo Black in his dissenting judgment observed :

"The first banning of an association because it advocates hated ideas – whether that association be called a political party or not — marks a fateful moment in the history of a free country. That moment seems to have arrived for this country…… This whole Act, with its pains and penalties, embarks this country, for the first time, on

the dangerous adventure of outlawing groups that preach doctrines nearly all Americans detest. When the practice of outlawing parties and various public groups begins, no one can say where it will end. In most countries such a practice once begun ends with a one party government."

16. In *Joint Anti-Fascist Refugee Committee vs. McGrath,* 341 US 123, 174 (1951) Mr. Justice Douglas in his concurring judgment observed :

"In days of great tension when feelings run high, it is a temptation to take short cuts by borrowing from the totalitarian techniques of our opponents. *But when we do, we set in motion a subversive influence of our own design that destroys us from within.*"

(emphasis supplied)

17. In *Keyishian vs. Board of Regents of the University of the State of New York,* 385 US 589, 606 (1967) the U.S. Supreme Court struck down a law which authorized the board of regents to prepare a list of subversive organizations and to deny jobs to teachers belonging to those organizations. The law made membership in the Communist Party prima facie evidence for disqualification from employment. Mr. Justice Brennan, speaking for the Court held that the law was too sweeping, penalizing "mere knowing membership without a specific intent to further the unlawful aims."

18. In *Yates vs. U.S.,* 354 US 298 (1957), Mr. Justice Harlan of the U.S. Supreme Court observed :

"In failing to distinguish between advocacy of forcible overthrow as an abstract doctrine and advocacy of action to that end, the District Court appears to have been led astray by the holding in Dennis that advocacy of violent action to be taken at some future time was enough. The District Court apparently thought that Dennis obliterated the traditional dividing line between advocacy of abstract

doctrine and advocacy of action."

19. In *Brandenburg vs. Ohio,* 395 US 444(1969), which we have referred to in our judgment, the U.S. Supreme Court by a unanimous decision reversed its earlier decision in *Whitney vs. California,* 274 US 357 (1927) and observed :

> "The Constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action."

20. In *Whitney vs. California* (supra) Mr. Justice Brandeis, the celebrated Judge of the U.S. Supreme Court in his concurring judgment (which really reads like a dissent) observed :

> "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burned women. It is the function of free speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that *the danger apprehended is imminent*…….. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind."
>
> (emphasis supplied)

21. Mr. Justice Brandeis in the same judgment went on to observe :

> "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous,

> self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence."

22. In *Gitlow vs. New York,* 268 US 652 (1925) Mr. Justice Holmes of the U.S. Supreme Court (with whom Justice Brandeis joined) in his dissenting judgment observed :

> ……."If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this Manifesto was more than a theory, that it was an incitement. *Every idea is an incitement*. It offers itself for belief, and, if believed, it is acted on unless some other belief outweighs it, or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence my set fire to reason. But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration. If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.
>
> If the publication of this document had been laid as an attempt to induce an uprising against government at once, and not at some indefinite time in the future, it would have presented a different question. The object would have been one with which the law might deal, subject to the

doubt whether there was any danger that the publication could produce any result; or, in other words, whether it was not futile and too remote from possible consequences. But the indictment alleges the publication and nothing more."

23. In *Terminiello vs. Chicago,* 337 US 1 (1949) Mr. Justice Douglas of the U.S. Supreme Court speaking for the majority observed :

"….[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute,…is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest….There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups."

24. In *DeJonge vs. Oregon,* 299 US 353 (1937) Chief Justice Hughes of the U.S. Supreme Court wrote that the State could not punish a person making a lawful speech simply because the speech was sponsored by a subversive organization.

25. In *Abrams vs. U.S.,* 250 US 616 (1919) Mr. Justice Holmes of the U.S. Supreme Court in his dissenting judgment wrote :

"Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your

premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that *time has upset many fighting faiths,* they may come to believe even more then they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas, — *that the best test of truth is the power of the thought to get itself accepted in the competition of the market;* and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the government that the 1st Amendment left the common law as to seditious libel in force. History seems to me against the notion."

(emphasis supplied)

26. It has been submitted by the learned counsel for the Government before the TADA Court that under many laws mere membership of an organization is illegal e.g. Section 3(5) of Terrorists and Disruptive Activities, 1989, Section 10 of the Unlawful Activities (Prevention) Act 1967, etc. In our opinion these statutory provisions cannot be read in isolation, but have

to be read in consonance with the Fundamental Rights guaranteed by our Constitution.

27. The Constitution is the highest law of the land and no statute can violate it. If there is a statute which appears to violate it we can either declare it unconstitutional or we can read it down to make it constitutional. The first attempt of the Court should be try to sustain the validity of the statute by reading it down. This aspect has been discussed in great detail by this Court in *Government of Andhra Pradesh vs. P. Laxmi Devi* 2008(4) SCC 720.

28. In this connection, we may refer to the Constitution Bench decision in *Kedar Nath Singh vs. State of Bihar* AIR 1962 SC 955 where the Supreme Court was dealing with the challenge made to the Constitutional validity of Section 124A IPC (the law against sedition).

29. In *Kedar Nath Singh's* case this Court observed(vide para 26):

> ……."If, on the other hand, we were to hold that even without any tendency to disorder or intention to create disturbance of law and order, by the use of words written or spoken which merely create disaffection or feelings of enmity against the Government, the offence of sedition is complete, then such an interpretation of the sections would make them unconstitutional in view of Article 19(1)(a) read with clause (2). It is well settled that if certain provisions of law construed in one way would make them consistent with the Constitution, and another interpretation would render them unconstitutional, the Court would lean in favour of the former construction. The provisions of the sections read as a whole, along with the explanations, make it reasonably clear that the sections aim at rendering penal *only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence.*"…….

30. Section 124A which was enacted in 1870 was subsequently amended on several occasions. This Court observed in *Kedar Nath's* case (supra) observed that now that we have a Constitution having Fundamental Rights all statutory provisions including Section 124A IPC have to be read in a manner so as to make them in conformity with the Fundamental Rights. Although according to the literal rule of interpretation we have to go by the plain and simple language of a provision while construing it, we may have to depart from the plain meaning if such plain meaning makes the provision unconstitutional.

31. Similarly, we are of the opinion that the provisions in various statutes i.e. 3 (5) of TADA or Section 10 of the Unlawful Activities (Prevention) which on their plain language make mere membership of a banned organization criminal have to be read down and we have to depart from the literal rule of interpretation in such cases, otherwise these provisions will become unconstitutional as violative of Articles 19 and 21 of the Constitution. It is true that ordinarily we should follow the literal rule of interpretation while construing a statutory provision, but if the literal interpretation makes the provision unconstitutional we can depart from it so that the provision becomes constitutional.

32. As observed by this Court in *Government of Andhra Pradesh vs. P. Laxmi Devi* (supra) every effort should be made by the Court to try to uphold the validity of the statute, as invalidating a statute is a grave step. Hence we may sometimes have to read down a statute in order to make it constitutional.

33. This principle was examined in some detail by the Federal Court in In re Hindu Women's Right to Property Act, AIR 1941 F.C 12 in considering the validity of the Hindu Women's Right to Property Act, 1937. The Act, which was passed by the Council of State after commencement of Part III of the Government of India Act, 1935, when the subject of devolution of agricultural land had been committed exclusively

to Provincial Legislatures, dealt in quite general terms with the 'Property' or 'separate property' of a Hindu dying intestate or his 'interest in joint family property'. A question, therefore, arose whether the Act was *ultra vires* of the powers of the Central Legislature. The Federal Court held the Act *intra vires* by construing the word 'property' as meaning 'property other than agricultural land'. In the aforesaid decision Gwyer, CJ. observed : "If that word (property) necessarily and inevitably comprises all forms of property, including agricultural land, then clearly the Act went beyond the powers of the Legislature; but when a Legislature with limited and restricted powers makes use of a word of such wide and general import, the presumption must surely be that it is using it with reference to that kind of property with respect to which it is competent to legislate and to no other." The learned Chief Justice further observed: "There is a general presumption that a Legislature does not intend to exceed its jurisdiction, and there is ample authority for the proposition that general words in a statute are to be construed with reference to the powers of the Legislature with enacts it."

34. The rule was applied by the Supreme Court in *Kedar Nath Singh vs. State of Bihar* (we have already referred to this decision earlier) in its construction of Section 124A of the IPC. The Section which relates to the offence of sedition makes a person punishable who 'by words, either spoken or written or by sign or visible representations, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law'. The Section, as construed by the Privy Council in *Bal Gangadhar Tilak vs. Queen Empress* ILR 22 Bom 528 (PC); *Annie Besant vs. A-G of Madras* AIR 1919 PC 31; and Emperor vs. Sadasiv Narain AIR 1947 PC 84; did not make it essential for an activity to come within its mischief that the same should involve intention or tendency to create disorder, or disturbance of law and order or incitement to violence. The Federal Court in *Niharendra Dutta vs. Emperor* AIR 1942 FC 22 had, however, taken a different view. In the Supreme Court

when the question came up as to the Constitutional validity of the Section, the Court differing from the Privy Council adopted the construction placed by the Federal Court and held that on a correct construction, the provisions of the Section are limited in their application "to acts involving intention or tendency to create disorder or disturbance of law and order or incitement to violence; and one of the reasons for adopting this construction was to avoid the result of unconstitutionality in view of Articles 19(1)(a) and 19(2) of the Constitution.

35. In *Sunil Batra vs. Delhi Administration* AIR 1978 SC 1675 the Supreme Court upheld the validity of Section 30(2) of the Prisons Act, 1894, which provides for solitary confinement of a prisoner under sentence of death in a cell and Section 56 of the same Act, which provides for the confinement of a prisoner in irons for his safe custody, by construing them narrowly so as to avoid their being declared invalid on the ground that they were violative of the rights guaranteed under Articles 14, 19 and 21 of the Constitution.

36. In *New India Sugar Mills vs. Commissioner of Sales Tax* AIR 1963 SC 1207, a wide definition of the word 'sale' in the Bihar Sales Tax Act, 1947, was restricted by construction to exclude transactions, in which property was transferred from one person to another without any previous contract of sale since a wider construction would have resulted in attributing to the Bihar Legislature an intention to legislate beyond its competence.

37. In Section 6(a) of the Hindu Minority and Guardianship Act, 1956 which provides that the natural guardian of a minor's person or property will be 'the father and after him, the mother', the words 'after him' were construed not to mean 'only after the lifetime of the father' but to mean 'in the absence of', as the former construction would have made the section unconstitutional being violative of the constitutional provision against sex discrimination vide *Githa Hariharan vs. Reserve Bank of India* AIR 1999 SC 1149.

38. In *Govindlalji vs. State of Rajasthan* AIR 1963 SC 1638, where a question arose as to the Constitutional validity of the Rajasthan Nathdwara Temple Act (13 of 1959), the words'affairs of the temple' occurring in Section 16 of the said Act were construed as restricted to secular affairs as on a wider construction the Section would have violated Articles 25 and 26 of the Constitution.

39. This Court in *R.L. Arora vs. State of U.P.* AIR 1964 SC 1230 applied the same principle in construing Section 40(1), clause (aa) of the Land Acquisition Act, 1894, as amended by Act 31 of 1962 so as to confine its application to such 'building or work' which will subserve the public purpose of the industry or work in which the company, for which acquisition is made, is engaged. A wider and a literal construction of the clause would have brought it in conflict with Article 31(2) of the Constitution and would have rendered it unconstitutional.

40. In *Indian Oil Corporation vs. Municipal Corporation* AIR 1993 SC 844 Section 123 of the Punjab Municipal Corporation Act, 1976 which empowered the Corporation to levy octroi on articles and animals 'imported into the city' was read down to mean articles and animals 'imported into the municipal limits for purposes of consumption, use or sale' only, as a wide construction would have made the provision unconstitutional being in excess of the power of the State Legislature conferred by Entry 52 of List II of Schedule VII of the Constitution.

41. A further illustration, where general words were read down to keep the legislation within permissible constitutional limits, is furnished in the construction of Section 5 of the Lotteries (Regulation) Act, 1998 which reads: 'A State Government may, within the State prohibit the sale of tickets of a lottery organized conducted or promoted by every other State'. To avoid the vice of discrimination and excessive

delegation, the Section was construed to mean that a State can only ban lotteries of other States, when it decides as a policy to ban its own lotteries, or in other words, when it decides to make the State a lottery free zone vide *BR Enterprises vs. State of U.P.* AIR 1999 SC 1867.

42. It may be mentioned that there were Constitutions in our country even under British Rule e.g. the Government of India Act, 1935, and the earlier Government of India Acts. These Constitutions, however, did not have fundamental right guaranteed to the people. In sharp contrast to these is the Constitution of 1950 which has fundamental rights in Part III. These fundamental rights are largely on the pattern of the Bill of Rights to the U.S. Constitution.

43. Had there been no Constitution having Fundamental Rights in it then of course a plain and literal meaning could be given to Section 3 (5) of TADA or Section 10 of the Unlawful Activities (Prevention) Act. But since there is a Constitution in our country providing for democracy and Fundamental Rights we cannot give these statutory provisions such a meaning as that would make them unconstitutional.

44. In *State of of Maharashtra & Ors. Vs. Bhaurao Punjabrao Gawande,* (2008) 3 SCC 613 (para 23) this Court observed :

> "...Personal liberty is a precious right. So did the Founding Fathers believe because, while their first object was to give unto the people a Constitution whereby a government was established, their second object, equally important, *was to protect the people against the government.* That is why, while conferring extensive powers on the government like the power to declare an emergency, the power to suspend the enforcement of fundamental rights or the the power to issue ordinances, they assured to the people a Bill of Rights by Part III of the Constitution, protecting against executive and legislative despotism those human rights

which they regarded as fundamental. The imperative necessity to protect these rights is a lesson taught by all history and all human experience. Our Constitution makers had lived through bitter years and seen an alien Government trample upon human rights which the country had fought hard to preserve. They believed like Jefferson that "an elective despotism was not the Government we fought for". And, therefore, while arming the Government with large powers to prevent anarchy from within and conquest from without, they took care to ensure that those powers were not abused to mutilate the liberties of the people. (vide *A.K. Roy Vs. Union of India* (1982) 1 SCC 271, and *Attorney General for India Vs. Amratlal Prajivandas,* (1994) 5 SCC 54." [emphasis supplied]

In *M. Nagaraj & Ors. Vs. Union of India & Ors.* (2006) 8 SCC 212, (para 20) this Court observed :

"It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any Constitution by reason of the basic fact that they are members of the human race."

In *I.R. Coelho (dead) By LRs. Vs. State of T.N.,* (2007) 2 SCC 1 (vide paragraphs 109 and 49), this Court observed :

"It is necessary to always bear in mind that fundamental rights have been considered to be heart and soul of the Constitution.....Fundamental rights occupy a unique place in the lives of civilized societies and have been described in judgments as "transcendental", "inalienable", and primordial".

45. The appeal is consequently allowed and the impugned judgment is set aside.

B.B.B. Appeal allowed.

SHEO SHANKAR SINGH
v.
STATE OF JHARKHAND & ANR.
(Criminal Appeal Nos. 791-792 of 2005)

FEBRUARY 15, 2011

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

Penal Code, 1860 – s.302 r/w s.34 – Murder – Person shot down on road, while he was riding pillion seat of motorcycle driven by PW 16 – Appellant S allegedly drove his motorcycle to the left of PW16's motorcycle, while appellant U, riding pillion, fired gun shots at the deceased from close range – Allegation that accused-appellants were part of the coal mafia and deceased, a sitting member of the State Legislative Assembly, incurred their wrath as he opposed their activities – Eye-witness account of PW16 and PW6 – Trial Court convicted the appellants and sentenced them to life imprisonment – High Court confirmed the conviction and also enhanced the sentence of life imprisonment to sentence of death – On appeal, held: The deceased was perceived by the appellants as a hurdle in their activities – The depositions of all the witnesses satisfactorily prove that the appellants were seen hanging around the place of occurrence on the incident date and were seen together riding a motorcycle proximate in point of time when the deceased was gunned down – Seizure evidence corroborated the prosecution version – Further corroboration from medical evidence – The prosecution proved beyond reasonable doubt , the sequence of events underlying the charge of murder levelled against the appellants – Conviction upheld but sentence modified to life imprisonment instead of death sentence.

Criminal Trial:

Motive – Importance of proof of motive – Distinction between cases where prosecution relies upon circumstantial evidence and where it relies upon the testimony of eye witnesses – Held: In the former category of cases, proof of motive itself constitutes a link in the chain of circumstances upon which the prosecution may rely – Proof of motive, however, recedes into the background in cases where the prosecution relies upon an eye-witness account of the occurrence – That is because if the court, upon a proper appraisal of the deposition of the eye-witnesses, comes to the conclusion that the version given by them is credible, absence of evidence to prove the motive is rendered inconsequential – Conversely, even if prosecution succeeds in establishing a strong motive for the commission of the offence, but the evidence of the eye-witnesses is found unreliable or unworthy of credit, existence of a motive does not by itself provide a safe basis for convicting the accused – That does not, however, mean that proof of motive even in a case which rests on an eye-witness account does not lend strength to the prosecution case or fortify the court in its ultimate conclusion – Proof of motive in such a situation certainly helps the prosecution and supports the eye-witnesses – The instant case rests upon the deposition of the eyewitnesses, hence, absence of motive would not by itself make any material difference, but if a motive is proved it would lend support to the prosecution version – The prosecution herein established the motive to fortify its charge against the accused-appellants.

Witness – Examination of – Delay in examination – Effect – Held: Mere delay in examination of a particular witness does not, as a rule of universal application, render the prosecution case suspect – In a case where the investigating officer has reasons to believe that a particular witness is an eye-witness to the occurrence but he does not examine him

without any possible explanation for any such omission, the delay may assume importance and require the Court to closely scrutinize and evaluate the version of the witness – But in a case where the investigating officer had no such information about any particular individual being an eye-witness to the occurrence, mere delay in examining such a witness would not ipso facto render the testimony of the witness suspect or affect the prosecution version – In the instant case, the trial court and the High Court had accepted the explanation offered by the investigating officer for delay – No reason to take a different view or to reject the testimony of the witness only because his statement was recorded a month and half after the occurrence.

Identification – Test identification parade (TIP) – Purpose of – Held: TIP is conducted with a view to strengthening the trustworthiness of the evidence – Such a TIP then provides corroboration to the witness in the Court who claims to identify the accused persons otherwise unknown to him – TIPs, therefore, remain in the realm of investigation – However, CrPC, does not oblige the investigating agency to necessarily hold a TIP nor is there any provision under which the accused may claim a right to the holding of a TIP – The failure of the investigating agency to hold a TIP does not, in that view, have the effect of weakening the evidence of identification in the Court – As to what should be the weight attached to such an identification is a matter which the Court will determine in the peculiar facts and circumstances of each case – In appropriate cases, the Court may accept the evidence of identification in the Court even without insisting on corroboration – On facts, the omission of the investigating agency to associate PW16 with the TIP in which PW1identified accused-appellant U did not ipso jure prove fatal to the case of the prosecution, although the investigating agency could and indeed ought to have associated the said witness also with the TIP especially when the witness had not claimed familiarity with the accused-U before the incident – The

omission did not affect the credibility of the identification of the said appellant by PW16 in the Court – That is because the manner in which the incident had taken place and the opportunity which PW16 had, to see and observe the actions of appellant U were sufficient for the witness to identify him in the Court – Absence of TIP and the failure of the Investigating Officer to associate the witness with the same did not, therefore, make any material difference in the instant case.

Investigation – Deficiencies in investigation – Effect of, on prosecution case – Held: Deficiencies in investigation by way of omissions and lapses on the part of investigating agency cannot by themselves justify a total rejection of the prosecution case – On facts, the failure on the part of the investigating officer in sending the blood stained clothes to FSL and the empty cartridges to the ballistic expert was not sufficient to reject the version given by the eye witnesses – Especially so, when a reference to the ballistic expert would not have had much relevance since the weapon from which the bullets were fired had not been recovered from the accused and was not, therefore, available for comparison by the expert.

Sentence/Sentencing – Death sentence – Commutation to life, if warranted – 'Rarest of rare' test – Murder of sitting member of State Legislative Assembly – Accused-appellants were part of the coal mafia and deceased being opposed to such activities incurred their wrath and got killed – Trial Court convicted the appellants but did not find it to be a rarest of rare case and awarded them life sentence – High Court enhanced the sentence by imposing upon the accused-appellants the extreme penalty of death– Whether the present case was one of those rare of rarest cases where High Court was justified in imposing extreme penalty of death upon the appellants – No – Reasons being, firstly, because the appellants were not professional killers – Secondly, because even when the deceased was a politician there was no political

angle to his killing – Thirdly, because while all culpable homicides amounting to murder are inhuman, hence legally and ethically unacceptable yet herein there was nothing particularly brutal, grotesque, diabolical, revolting or dastardly in the manner of its execution so as to arouse intense and extreme indignation of the community or exhaust depravity and meanness on the part of the accused-appellants to call for the extreme penalty – Fourthly, because there was difference of opinion between the trial court and the High Court on the question of sentence to be awarded to the convicts – Considering all the circumstances, death sentence awarded to the accused-appellants commuted to life imprisonment.

According to the prosecution, the accused-appellants were part of the coal mafia and deceased, a sitting member of the Jharkhand State Legislative Assembly, opposed their activities and that because of this opposition, the appellants killed the deceased by shooting him down on the road, when he was riding the pillion seat of the motorcycle driven by PW 16-informant. It was alleged that the accused-appellant S drove his motorcycle to the left of PW16's motorcycle, whereupon accused-appellant U, riding pillion, shot the deceased from close range on his head on which he slumped on the back of PW16 thereby disturbing the balance of his motorcycle and bringing both of them to the ground; that thereafter the motorcycle driven by appellant-S was stopped by him a little ahead whereupon appellant-U got down and threatened PW16 that even he would be killed; that so threatened PW16 hurried away from the spot whereupon appellant U fired another bullet at the deceased, pushed his dead body down the side slope of the road, walked back to the motorcycle whose engine was kept running by appellant-S and they both fled away. The deceased died a homicidal death caused by gunshot injuries.

The prosecution case rested entirely on the ocular testimony of PW16 and PW6, apart from the incriminating circumstances called in aid by the prosecution to lend support and corroboration to the testimony of the said two eye-witnesses. The trial court convicted the appellants under Section 302 r/w Section 34 IPC and sentenced them to undergo rigorous imprisonment for life. The appellant U was additionally convicted under Section 27 of the Arms Act. The conviction of the appellants was upheld by the High Court.

In the instant appeals, various questions arose for consideration viz. 1) whether the prosecution proved any motive for the commission of the crime alleged against the appellants and if so to what effect; 2) whether the prosecution proved beyond reasonable doubt, the sequence of events on which was based the charge of murder levelled against the appellants and finally 3) whether the present case was one of those rare of rarest cases in which the High Court could have awarded to the appellants the extreme penalty of death.

Partly allowing the appeals, the Court

HELD:1.1. The legal position regarding proof of motive as an essential requirement for bringing home the guilt of the accused is fairly well settled. There is a clear distinction between cases where prosecution relies upon circumstantial evidence on the one hand and those where it relies upon the testimony of eye witnesses on the other. In the former category of cases proof of motive is given the importance it deserves, for proof of a motive itself constitutes a link in the chain of circumstances upon which the prosecution may rely. Proof of motive, however, recedes into the background in cases where the prosecution relies upon an eye-witness account of the occurrence. That is because if the court upon a proper

appraisal of the deposition of the eye-witnesses comes to the conclusion that the version given by them is credible, absence of evidence to prove the motive is rendered inconsequential. Conversely even if prosecution succeeds in establishing a strong motive for the commission of the offence, but the evidence of the eye-witnesses is found unreliable or unworthy of credit, existence of a motive does not by itself provide a safe basis for convicting the accused. That does not, however, mean that proof of motive even in a case which rests on an eye-witness account does not lend strength to the prosecution case or fortify the court in its ultimate conclusion. Proof of motive in such a situation certainly helps the prosecution and supports the eye- witnesses. [Para 13] [337-D-H; 338-A]

1.2. The case at hand rests upon the deposition of the eyewitnesses to the occurrence. Absence of motive would not, therefore, by itself make any material difference. But if a motive is indeed proved it would lend support to the prosecution version. [Para 14] [338-C]

1.3. In the instant case, the depositions of PW16, PW15 and PW19 are relevant on the question of motive. There is evidence to prove that a petrol pump stood in the name of PW15 which had been allotted in his name in the Scheduled Tribe's quota. It is also evident that to establish and run the said petrol pump, PW15 had taken the help from appellant S and his father. Disputes between the original allottee and the appellant-S and his father had, however, arisen and manifested in the form of civil and criminal cases between them. PW15 had in that connection taken the help of the deceased who had with the help of the police and local administration secured the restoration of the petrol pump to PW15 which annoyed the appellant-S and his father. There is also evidence to the effect that the deceased had acted against what has

been described as 'coal mafia' of Dhanbad with the help of police and administration to prevent the coal theft in the region and the steps taken by the deceased had resulted in the arrest of the father of appellant S and a co-accused in connection with the said cases. Both these circumstances appear to have contributed to the incident that led to the killing of the deceased who was perceived by the appellants as a hurdle in their activities. [Paras 15, 20] [338-D; 340-F-H; 341-A-B]

Shivaji Genu Mohite v. The State of Maharashtra, **(1973) 3 SCC 219,** *Hari Shanker v. State of U.P.* **(1996) 9 SCC 40 and** *State of Uttar Pradesh v. Kishanpal and Ors.* **(2008) 16 SCC 73 – relied on.**

2.1. In the instant case, the evidence adduced by the prosecution in regard to the charge of murder levelled against the appellants comprises the following distinct features:

(i) Evidence suggesting that on the date of occurrence and proximate in point of time the appellants were seen together riding a black coloured motor cycle, without a registration number.

(ii) Evidence establishing seizure of the motor cycle on which the deceased was riding from the place of occurrence and that which was being driven by appellant-'S' from his factory.

(iii) The eye witness account of the occurrence as given by PW16 and PW6.

(iv) Medical evidence, supporting the version of PW 16, that he sustained injuries when he fell from the motor cycle being driven by him on the deceased who was on the pillion being shot by appellant 'U'. [Para 21] [341-C-H]

2.2. The depositions of all the witnesses satisfactorily prove that the appellants were seen hanging around the place of occurrence on the incident date and were seen together riding a motorcycle without registration number going towards Govindpur at around 1.30 p.m. which is proximate in point of time when the deceased was gunned down. From the deposition of PW1 it is further proved that the witness had identified appellant-U as the person who was riding the motorcycle sitting behind appellant-S not only in the Court, but also in the test identification parade held during the course of investigation. [Para 27] [344-D-E]

2.3. It is clear that while the motorcycle on which the deceased was travelling along with PW16 was seized from the place of occurrence in terms of seizure memo, the Motor Cycle used by accused was seized from the premises owned by appellant-S. From a reading of the seizure memo it is evident that the motorcycle was a black colour, Caliber Bajaj make with no registration number on the plate. From the motorcycle was recovered a certificate of registration and fitness showing the name of the brother of appellant-S, as its owner. [Para 28] [345-F-H; 346-A]

2.4. The prosecution led evidence to prove that the empty cartridges of 9 M.M. bullets were seized from the place of occurrence. One of the empty cartridges was recovered from near the dead body while the other was recovered from the mud footpath on the southern side of the road. This is evident from the seizure memo. In addition and more importantly is the seizure of light green T-shirt of the complainant- (PW-16) with blood stains at the arm and back thereof. The T-shirt is torn near the left shoulder. Blue coloured jeans worn by the witness was also seized with a tear on the left knee. The deposition of PW1 and PW2 support these seizures

which corroborate the version of the prosecution that the occurrence had taken place at the spot from where the dead body, the motorcycle, the empty cartridges and the blood stained earth were seized. The seizure of the T-shirt and the Jeans worn by PW16 with bloodstains on the T-shirt, scratches damaging the T-shirt near the left shoulder and the Jeans on the left knee also corroborates the prosecution version that when hit by the bullet fired by the pillion rider of the motorcycle driven by appellant-S, the motorcycle on which the deceased was travelling lost its balance bringing both of them down to the ground and causing damage to the clothes worn by PW16 and injuries to his person. The Courts below correctly appreciated the evidence produced by the prosecution in this regard and rightly concluded that the seizure of the articles mentioned above clearly supports the prosecution version and the sequence of evidence underlying the charge. [Para 29] [345-B-G]

2.5. The third aspect is the medical evidence, supporting the version of PW16 that he had sustained injuries when he fell down from the motor cycle after the deceased had been shot by the appellant-U. The medical certificate goes on to state that the injuries had been caused by hard and blunt substance. The making of the requisition by the Medical Officer (by which PW16 was sent for treatment with request for issue of an injury report), the medical examination of PW16 and presence of injuries on his person were satisfactorily proved by the prosecution and go a long way to support the prosecution version that PW16 was driving the motorcycle at the time of the incident and had sustained injuries once he lost his balance after the deceased sitting on the pillion was shot by the appellant-U. [Paras 30, 31] [345-H; 346-B-C; F-H]

2.6. PW16 was cross-examined extensively but his deposition was accepted by the Courts below who found

the version to be both consistent and reliable. There is nothing inherently improbable about the manner in which PW16 narrated the occurrence or his presence on the spot. There is not even a suggestion of any enmity between the appellants and the witness nor a bias favouring the prosecution to make his version suspect. The narration given by the witness is natural and does not suffer from any material inconsistency or improbability of any kind. The presence of the witness on the spot is proved by PWs 1 & 2, both of whom reached the place of occurrence immediately after hearing about the killing of the deceased and met PW16 on the spot. Both these witnesses have testified that the T-shirt worn by the witness was bloodstained and the motorcycle which he was driving was lying on the spot with the dead body of the deceased at some distance. Both of them have signed the statement made by PW16 before the police which constitutes the first information report about the incident in which both of them have claimed that they have seen appellant-S with one other person going on the motorcycle whom they could identify. The presence of PW16 on the spot is testified even by PW6, also an eye-witness to the occurrence. That apart the presence of injuries on the person of the PW16 duly certified by the medical officer concerned, and the fact that the T-shirt worn by him was torn at two different places corresponding to the injuries sustained by him also corroborates the version given by the witness that he was driving the motorcycle as claimed by him when the deceased was gunned down. [Para 34] [348-F-H; 349-A-E]

2.7. The first information report was registered without any delay and PW16 was medically examined on the incident date itself, though late in the evening. All these circumstances completely eliminate the possibility of the witness being a planted witness. The testimony of

this witness and the deposition of the PWs 1 and 2 prove his being with the deceased before the incident and being on the spot immediately after the occurrence with bloodstains on his clothes with the motorcycle being driven by him lying nearby. Therefore, the finding recorded by the two courts below that the deceased was travelling with PW16 on the latter's motorcycle from Dhanbad to Nirsa at the time of the occurrence and was, therefore, a competent witness who could and has testified to this occurrence, as the same took place, is affirmed. [Para 35] [349-F-H; 350-A-B]

3.1. Identification of an accused in the Court by a witness constitutes substantive evidence in a case although any such identification for the first time at the trial may more often than not appear to be evidence of a weak character. That being so, a test identification parade (TIP) is conducted with a view to strengthening the trustworthiness of the evidence. Such a TIP then provides corroboration to the witness in the Court who claims to identify the accused persons otherwise unknown to him. Test Identification parades, therefore, remain in the realm of investigation. The Code of Criminal Procedure does not oblige the investigating agency to necessarily hold a test identification parade nor is there any provision under which the accused may claim a right to the holding of a test identification parade. The failure of the investigating agency to hold a test identification parade does not, in that view, have the effect of weakening the evidence of identification in the Court. As to what should be the weight attached to such an identification is a matter which the Court will determine in the peculiar facts and circumstances of each case. In appropriate cases the Court may accept the evidence of identification in the Court even without insisting on corroboration. [Para 37] [350-F-H; 351-A-C]

3.2. The omission of the investigating agency to associate PW16 with the test identification parade in which PW1identified the appellant-U will not *ipso jure* prove fatal to the case of the prosecution, although the investigating agency could and indeed ought to have associated the said witness also with the test identification parade especially when the witness had not claimed familiarity with the appellant-U before the incident. Even so, its omission to do so does not affect the credibility of the identification of the said appellant by PW16 in the Court. That is because the manner in which the incident has taken place and the opportunity which PW16 had, to see and observe the actions of appellant-U were sufficient for the witness to identify him in the Court. This opportunity was more than a fleeting glimpse of the assailants. Appellant-U was seen by the witness pillion riding the motorcycle, coming in close proximity to his motorcycle, shooting the deceased from close range, stopping at some distance and coming back to the motorcycle where the deceased and the witness had fallen, abusing and threatening the witness and asking him to run away from the spot. All this was sufficient to create an impression that would remain imprinted in the memory of anyone who would go through such a traumatic experience. It is not a case where a chance and uneventful glance at another motorcyclist may pass without leaving any impression about the individual concerned. It is a case where the nightmare of the occurrence would stay in the memory of and indeed haunt the person who has undergone through the experience for a long long time. Absence of a test identification parade and the failure of the Investigating Officer to associate the witness with the same does not, therefore, make any material difference in the instant case. [Para 40] [353-D-H; 354-A-C]

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

746; *Pramod Mandal v. State of Bihar* **(2004) 13 SCC 150;** *Aqeel Ahmad v. State of Uttar Pradesh* **2008 (16) SCC 372 – relied on.**

Krishna Govind Patil v. State of Maharashtra **1964 (1) SCR 678 – referred to.**

4.1. It is true that not only according to PW16 but also according to PW1, PW2 and the Investigating Officer, the T-shirt worn by PW16 was bloodstained which was seized in terms of the seizure memo referred to earlier. It is also true that a reference to the forensic science laboratory would have certainly corroborated the version given by these witnesses about the T-shirt being bloodstained and the blood group being the same as that of the deceased. That no explanation is forthcoming for the failure of the prosecution in making a reference to the forensic science laboratory which could have strengthened the version given by PW16 too is not in dispute. However, the failure of the investigating agency to make a reference would not in the circumstances of the case discredit either the version of the witnesses that the T-shirt was bloodstained when it was seized or constitute a deficiency of the kind that would affect the prosecution version. Failure to make a reference to forensic science laboratory is in the circumstances of the case no more than a deficiency in the investigation of the case. Any such deficiency does not necessarily lead to the conclusion that the prosecution case is totally unworthy of credit. Deficiencies in investigation by way of omissions and lapses on the part of investigating agency cannot in themselves justify a total rejection of the prosecution case. [Para 42] [354-F-H; 355-A-C]

4.2. The failure on the part of the investigating officer in sending the blood stained clothes to the FSL and the empty cartridges to the ballistic expert would not be sufficient to reject the version given by the eye witnesses.

That is especially so when a reference to the ballistic expert would not have had much relevance since the weapon from which the bullets were fired had not been recovered from the accused and was not, therefore, available for comparison by the expert. [Para 44] [356-E]

Ram Bihari Yadav v. State of Bihar and Ors. **(1998) 4 SCC 517;** *Surendra Paswan v. State of Jharkhand* **(2003) 12 SCC 360;** *Amar Singh v. Balwinder Singh and Ors.* **(2003) 2 SCC 518 – relied on.**

5. The fact that the motorcycle on which the deceased was travelling along with PW16 was found at the place of occurrence is amply proved by the evidence adduced by the prosecution. It is also clear that the motorcycle in question did not belong either to the deceased or to PW16. In the circumstances there is no improbability in the version of PW16 that the said motorcycle had been borrowed by him from his friend. The mere fact that the owner of the motorcycle or PW16 had not applied for release of the motorcycle in their favour does not in the least affect the prosecution case muchless does it render the same doubtful in toto. [Para 45] [356-G-H; 357-A-B]

6. The incident in question had taken place around 2.45 p.m. The statement of PW16 was recorded by the investigating officer at around 4.15 p.m. on the same day based on which first information report was registered in the police station. The copy of the first information was received by the jurisdictional magistrate the next day. Apart from PW16, the statement was also signed by PW1 and PW2. All the three witnesses have stood by what has been attributed to them in the first information report. Also, there was absence of any unexplained or abnormal delay in the registration of the case and the despatch of the first information report to the jurisdictional magistrate. [Para 46] [356-G-H; 357-C-G]

7.1. No doubt there was delay of one and half months in the recording of statement of PW-6, however, the same does not by itself justify rejection of his testimony. The legal position is well settled that mere delay in the examination of a particular witness does not, as a rule of universal application, render the prosecution case suspect. It depends upon circumstances of the case and the nature of the offence that is being investigated. It would also depend upon the availability of information by which the investigating officer could reach the witness and examine him. It would also depend upon the explanation, if any, which the investigating officer may offer for the delay. In a case where the investigating officer has reasons to believe that a particular witness is an eye-witness to the occurrence but he does not examine him without any possible explanation for any such omission, the delay may assume importance and require the Court to closely scrutinize and evaluate the version of the witness but in a case where the investigating officer had no such information about any particular individual being an eye-witness to the occurrence, mere delay in examining such a witness would not *ipso facto* render the testimony of the witness suspect or affect the prosecution version. [Para 49] [359-D-H; 360-A]

7.2. The investigating officer, in the instant case, stated that PW6 had met him for the first time on 2nd June, 2000 and that he recorded his statement on the very same day. He further stated that prior to 2nd June, 2000 he had no knowledge that PW6 was a witness to the occurrence. Even PW6 has given an explanation how the investigating officer reached him. According to his deposition the Inspector had told him that he had come to record his statement after making an enquiry from the person who was sitting on the pillion of his motorcycle on the date of occurrence. The pillion rider had also informed him that his statement had been recorded by the police. The Trial

Court and the High Court have accepted the explanation offered by the investigating officer for the delay. There is no reason to take a different view or to reject the testimony of this witness only because his statement was recorded a month and half after the occurrence. [Para 51] [360-F-H; 361-A-B]

Ranbir and Ors. v. State of Punjab **(1973) 2 SCC 444;** *Satbir Singh and Ors. v. State of Uttar Pradesh* **(2009) 13 SCC 790 – relied on.**

8. PW6 clearly stated that he has seen the deceased going on a motorcycle on the date of the occurrence and that appellant-S had brought his motorcycle to the left of the motorcycle of the deceased whereupon appellant-U pillion rider had shot the deceased in the head. The version given by the witness does not admit of being understood to suggest that the witness reached the place of occurrence after the occurrence had taken place. What the witness has stated is that he went to the place where the deceased had fallen 5-7 minutes after the occurrence was over. Witnessing the occurrence cannot be confused with going to the place where the deceased had fallen. On a careful reading of the deposition of the witness it is clear that there is no infirmity in the same that may justify the rejection of the version of PW6. Both the Courts below rightly accepted the testimony of PW 6 while finding the appellants guilty. [Para 52] [361-B-E]

9. In the instant case, the High Court was, however, not justified in imposing the extreme penalty of death upon the appellants for reasons more than one. Firstly, because the appellants are not professional killers. Even according to the prosecution they were only a part of the coal mafia active in the region indulging in theft of coal from the collieries. The deceased being opposed to such activities appears to have incurred their wrath and got killed. Secondly, because even when the deceased was

a politician there was no political angle to his killing. Thirdly, because while all culpable homicides amounting to murder are inhuman, hence legally and ethically unacceptable yet there was nothing particularly brutal, grotesque, diabolical, revolting or dastardly in the manner of its execution so as to arouse intense and extreme indignation of the community or exhaust depravity and meanness on the part of the assailants to call for the extreme penalty. Fourthly, because there was difference of opinion on the question of sentence to be awarded to the convicts. The Trial Court did not find it to be a rarest of rare case and remained content with the award of life sentence only which sentence the High Court enhanced to death. Considering all these circumstances, the death sentence awarded to the appellants deserves to be commuted to life imprisonment. [Para 60] [365-E-H; 366-A-B]

Jagmohan Singh v. The State of U.P **(1973) 1 SCC 20;** *Bachan Singh* v. *State of Punjab* **(1980) 2 SCC 684;** *Machhi Singh and Ors. v. State of Punjab* **(1983) 3 SCC 470;** *Farooq alias Karattaa Farooq and Ors. v. State of Kerala* **(2002) 4 SCC 697;** *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* **(2009) 6 SCC 498;** *State of Maharashtra v. Prakash Sakha Vasave and Ors.* **(2009) 11 SCC 193 – relied on.**

10. In the result, the judgments and orders under appeal are affirmed with the modification that instead of sentence of death as awarded by the High Court, the appellants shall suffer rigorous imprisonment for life. [Para 61] [366-B-C]

Case Law Reference:

(1973) 3 SCC 219	**Relied on**	**Para 13**

(1996) 9 SCC 40	**Relied on**	**Para 13**
(2008) 16 SCC 73	**Relied on**	**Para 13**
(1964) 1 SCR 678	**Referred to**	**Para 36**
(2003) 5 SCC 746	**Relied on**	**Para 37**
(2004) 13 SCC 150	**Relied on**	**Para 38**
(2008) 16 SCC 372	**Relied on**	**Para 39**
(1998) 4 SCC 517	**Relied on**	**Para 42**
(2003) 12 SCC 360	**Relied on**	**Para 42**
(2003) 2 SCC 518	**Relied on**	**Para 43**
(1973) 2 SCC 444	**Relied on**	**Para 49**
(2009) 13 SCC 790	**Relied on**	**Para 50**
(1973) 1 SCC 20	**Relied on**	**Para 54**
(1980) 2 SCC 684	**Relied on**	**Para 55**
(1983) 3 SCC 470	**Relied on**	**Para 56**
(2002) 4 SCC 697	**Relied on**	**Para 57**
(2009) 6 SCC 498	**Relied on**	**Para 58**
(2009) 11 SCC 193	**Relied on**	**Para 59**

CRIMINAL APPELATE JURISDICTION : Criminal Appeal Nos. 791-792 of 2005.

From the Judgment & Order dated 6.5.2005 of the High Court of Jharkhand at Ranchi in Criminal Appeal (DB) No. 43 of 2004 and Criminal Revision No. 136 of 2004.

WITH

Criminal Appeal No. 793-794 of 2005.

U.R. Lalit, A.T.M. Rangaramanujam, Sunil Kumar, Ashok Kumar Singh, Prakhar Sharma, Anu Gupta, S Biswajit Meitei, S. Chandra Shekhar, P. Sharma, M.K. Jha, Anil K. Jha, Lalita Kaushik, V.N. Raghupathy for the appearing parties.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. These appeals by special leave are directed against a common judgment and order dated 6th May, 2005 passed by the High Court of Jharkhand at Ranchi whereby the conviction of appellant-Sheo Shankar Singh under Section 302 read with Section 34 IPC and that of appellant-Umesh Singh under Section 302 read with Section 34 IPC and Section 27 of the Arms Act have been confirmed and the sentence of rigorous imprisonment for life imposed upon the said two appellants by the Trial Court enhanced to the sentence of death. Criminal Revision Petition No.136 of 2004 seeking enhancement of sentence imposed upon Umesh Singh and Sheo Shankar Singh has been consequently allowed by the High Court while Criminal Revision Petition No.135 of 2004 filed against the acquittal of three other accused persons Md. Zahid, Premjeet Singh and Uma Shankar Singh dismissed.

2. Briefly stated the prosecution case is that on 14th April, 2000, the deceased-Shri Gurudas Chatterjee, a sitting member of Jharkhand State Legislative Assembly was returning to Nirsa from Dhanbad riding the pillion seat of a motorcycle that was being driven by the first informant Apurba Ghosh, examined at the trial as PW 16. At about 2.45 p.m. when the duo reached a place near Premier Hard Coke, Apurba Ghosh, the informant heard the sound of a gunshot from behind. He looked back only to find that appellant-Sheo Shankar Singh was driving a black motorcycle on the left of the informant with an unknown person, later identified as Umesh Singh, sitting on the pillion seat carrying a pistol in his hand. Umesh Singh, the pillion rider, is alleged to have fired a second time from close range which hit the deceased-Gurudas Chatterjee in the head, who slumped

on the back of the informant thereby disturbing the balance of the motorcycle and bringing both of them to the ground. The motorcycle driven by Sheo Shanker Singh was stopped by him a little ahead whereupon Umesh Singh the pillion rider got down; walked back to the place where the deceased had fallen, abused the informant verbally and asked him to run away from there failing which even he would be killed. So threatened the informant hurried away from the spot whereupon Umesh Singh-appellant fired a third bullet at the deceased, pushed his dead body down the side slope of the road, walked back to the motorcycle whose engine was kept running by Sheo Shankar Singh and fled towards Nirsa. Some people are said to have run towards them but were scared away by Umesh Singh with the gun. The motorcycle did not have a registration number. A crowd is said to have gathered on the spot that included Abdul Kudus Ansari (PW1) and Lal Mohan Mahto (PW2) who disclosed that they had seen Sheo Shankar Singh and one unknown person moving on a motorcycle without a registration number sometime before the occurrence.

3. On hearing a rumour about the killing of the deceased MLA, Sub Inspector of Police Ramji Prasad (PW17) rushed to the spot and recorded the statement of Apurba Ghosh (PW16) in which the informant narrated the details of the incident as set out above. The statement of Apurba Ghosh constituted the First Information Report in the case which was signed not only by Apurba Ghosh but also by Abdul Kudus Ansari (PW1) and Lal Mohan Mahto (PW2). Based on the said statement/FIR a case under Section 302/34 and 120B of IPC and Section 27 of the Arms Act was registered in Police Station Govindpur and the investigation commenced.

4. In the course of the investigation an inquest report was prepared by BDO, Shishir Kumar Sinha, while the investigating officer seized two empties of 9 M.M. bullet engraved with “HP 59/2” at the bottom from the spot, apart from the red Hero Honda splendour motorcycle bearing registration No. WB 38

E 7053 on which the deceased was travelling at the time of occurrence. Blood-stained T Shirt and a light blue coloured jeans worn by Apurba Ghosh were also seized, besides blood-stained earth from the place of occurrence.

5. On 15th April, 2000 investigation was taken over by Shri Raja Ram Prasad (PW18) who on 16th April, 2000 seized the black coloured Bajaj Caliber motorcycle allegedly being driven by appellant-Sheo Shankar Singh at the time of the commission of the offence. In addition, a Test Identification Parade was got conducted in which Abdul Qudus Ansari (PW1) identified the accused appellant-Umesh Singh. After completion of the investigation a charge-sheet was eventually filed against the accused persons for offences punishable under Section 302/34/120B and 201 of the Indian Penal Code. Appellant-Umesh Singh was further charged with an offence punishable under Section 27 of the Arms Act. The accused were committed to the Court of Sessions at Dhanbad who made the case over to the Court of Additional Sessions Judge XIII, Dhanbad for trial before whom the accused pleaded not guilty and claimed a trial.

6. At the trial the prosecution examined 20 witnesses while the accused remained content with two in defence. The trial court by its judgment dated 18th November, 2003 found the appellants Sheo Shankar Singh and Umesh Singh guilty of the charges under Section 302/34 IPC. Appellant-Umesh Singh was further held guilty of the charge under Section 27 of the Arms Act. Out of the remaining six accused persons, the trial court found Narmedeshwar Pd. Singh @ Chora Master, Bijay Singh and Md. Nooren Master guilty of the charge under Section 302 read with Section 120B of the IPC. Accused Uma Shankar Singh, Premjee Singh and Md. Zahid were, however, acquitted for insufficiency of evidence against them.

7. By a separate order dated 20th November, 2003 passed by the Trial Court, appellants Sheo Shanker Singh and Umesh Singh were sentenced to undergo rigorous imprisonment for life. Appellant-Umesh Singh was in addition

sentenced to undergo rigorous imprisonment for three years under Section 27 of the Arms Act. Similarly, accused Narmedeshwar Pd. Singh @ Chora Master, Bijay Singh and Md. Nooren Master were sentenced to undergo rigorous imprisonment for life under section 302/120B IPC.

8. Aggrieved by their conviction and sentence, the appellants herein and the other three convicts filed criminal appeals No.43 and 78 of 2004 before the High Court of Jharkhand at Ranchi. Criminal Revision Petition No.135 of 2004 was filed by Apurba Ghosh against the acquittal of accused Uma Shankar Singh, Premjeet Singh and Md. Zahid, while Criminal Revision Petition No.136 of 2004 prayed for enhancement of the sentence imposed upon the appellants from life to death.

9. By the judgment and order impugned in these appeals the High Court acquitted Narmedeshwar Pd. Singh @ Chora Master, Bijay Singh and Md. Nooren Master and allowed criminal appeals No.43 and 78 to that extent. The conviction of appellants Sheo Shankar Singh and Umesh Singh was upheld by the High Court and the sentence imposed upon them enhanced to the sentence of death by hanging. Criminal Revision Petition No.135 of 2004 against the acquittal of Uma Shankar Singh, Premjeet Singh and Md. Zahid was, however, dismissed and their acquittal affirmed. The present appeals assail the correctness of the said judgment and order as noticed above.

10. We have heard Mr. U.R. Lalit, learned senior counsel for the appellants, Mr. A.T.M. Rangaramanujam and Mr. Sunil Kumar, learned senior counsels appearing for the respondents at considerable length. We have also been taken through the evidence on record and the judgments of the Courts below. We shall presently advert to the submissions made by learned counsel for the parties but before we do so we may at the outset point out that the cause of death of late Shri Gurudas Chatterjee being homicidal was not disputed and in our view rightly so. That

is because the evidence on record amply proves that the deceased died of gunshot injuries sustained by him in the head. The deposition of Dr. Shailender Kumar (PW14) who conducted the post-mortem examination of the deceased along with two other doctors viz. Prof. Dr. Rai Sudhir Prasad, and Dr. Chandra Shekhar Prasad leaves no manner of doubt that the death of Shri Gurudas Chaterjee was the result of two ante-mortem gunshot wounds, which the witness has described as under in his deposition in the Court and the post-mortem report, Ex.5:

> I. Fire arm wound of entrance ¾ cm x ½ cm cavity deep with inverted margins and abrasion collar located on the front of upper portion of left side of face about 1.5 cm in front of Pinna of left ear. No burning, singing or tattooing were seen.
>
> II. Fire arm exit wound 1¼ cm x ¾ cm cavity deep with inverted margins placed 2.5 cm above the mid zone of right eye brow. No evidence of abrasion collar seen.
>
> III. Fire arm wound of entrance ¾ cm diameter, cavity deep with inverted margins and abrasion collar on left side of back of head in prito occipital area 5 cm away from left ear low. No burning, singing or tattooing were seen.
>
> IV. Fire arm exit wounds ¾ cm diameter cavity deep with inverted margins and protruding brain matter in the left side of back of head in perito occipital area 2 cm away from left ear low. No abrasion collar was seen.
>
> Injury no.IV is the exit wound of injury no.1 and injury no.2 is exit wound of injury no.3 as it was confirmed by the track of blood clot and laceration found in dissection.
>
> V. Lacerated wounds:
>
> (a) 1cm x ½ cm x scalp deep on the right side of forehead, 6 cm above the inner end of right eye brow.

> (b) ¾ cm x ½ cm x scalp deep on occuipttal.
>
> VI. Abrasions:
>
> (a) 1-½ cm x ¾ cm on middle of left side of forehead.
>
> (b) 2½ cm x 1½ cm with tail of 3 cm x ½ cm horizontally placed on back of right shoulder.
>
> (c) ½ cm linear abrasion of 9 cm x 1/3 cm horizontally placed on back of lower portion of left side of chest.
>
> (d) 2½ cm x ¾ cm on back of left side flank of abdomen."
>
> On dissection
>
> Multiple fractures of frontal and both parietal bones were found Stomach contain about 100 M.L. semi digested rice and sag. All viscera were pale, heart and bladder empty.
>
> Opinion
>
> In our opinion death occurred instantaneously due to aforementioned cranio – cerebral injuries resulting from the fire arm.
>
> Time elapsed since death – between 18 and 24 hrs. before the time of post-mortem."

11. In the light of the above there is no gainsaying that the deceased died a homicidal death caused by gunshot injuries. Apart from the fact that cause of the homicidal death was never questioned by the accused before the trial court, the appellate court or even before us, the line of cross- examination of the doctor who conducted the post-mortem examination too does not question the veracity of the opinion of the medical expert that the deceased had died because of the gunshot injuries received by him. It is true that the doctor has not been able to specifically state which of the two gunshot injuries had proved

fatal, but that in our opinion is wholly inconsequential, having regard to the sequence of events unfolded by the deposition of the witnesses examined at the trial.

12. Coming then to the substratum of the prosecution case we need point out that the same rests entirely on the ocular testimony of Apruva Ghosh (PW16) and Prasant Banerjee (PW6), apart from the incriminating circumstances called in aid by the prosecution to lend support and corroboration to the testimony of the said two eye-witnesses. We shall take up for discussion the deposition of the said witnesses, but before we do so we may deal with the question whether the prosecution has proved any motive for the commission of the crime alleged against the appellants and if so to what effect.

13. The legal position regarding proof of motive as an essential requirement for bringing home the guilt of the accused is fairly well settled by a long line of decisions of this Court. These decisions have made a clear distinction between cases where prosecution relies upon circumstantial evidence on the one hand and those where it relies upon the testimony of eye witnesses on the other. In the former category of cases proof of motive is given the importance it deserves, for proof of a motive itself constitutes a link in the chain of circumstances upon which the prosecution may rely. Proof of motive, however, recedes into the background in cases where the prosecution relies upon an eye-witness account of the occurrence. That is because if the court upon a proper appraisal of the deposition of the eye-witnesses comes to the conclusion that the version given by them is credible, absence of evidence to prove the motive is rendered inconsequential. Conversely even if prosecution succeeds in establishing a strong motive for the commission of the offence, but the evidence of the eye-witnesses is found unreliable or unworthy of credit, existence of a motive does not by itself provide a safe basis for convicting the accused. That does not, however, mean that proof of motive even in a case which rests on an eye-witness account does not lend strength to the prosecution case or fortify the court

in its ultimate conclusion. Proof of motive in such a situation certainly helps the prosecution and supports the eye- witnesses. See *Shivaji Genu Mohite v. The State of Maharashtra,* (1973) 3 SCC 219, *Hari Shanker v. State of U.P.* (1996) 9 SCC 40 and *State of Uttar Pradesh v. Kishanpal and Ors.* (2008) 16 SCC 73.

14. The case at hand rests upon the deposition of the eyewitnesses to the occurrence. Absence of motive would not, therefore, by itself make any material difference. But if a motive is indeed proved it would lend support to the prosecution version. The question is whether the prosecution has established any such motive to fortify its charge against the appellants.

15. Depositions of Apurba Ghosh (PW16), Aamlal Kisku (PW15) and Arup Chatterjee (PW19) are relevant on the question of motive and may be briefly discussed at this stage. Arup Chatterjee (PW19) happens to be the son of the deceased Gurudas Chatterjee. According to this witness the appellants and most of their family members constitute what is described by him as “coal mafia” of Dhanbad whom the deceased used to fight, with the help of the police and administration to prevent the theft of coal in the region. The witness further states that Aamlal Kisku had a petrol pump situate at Belchadi, which petrol pump was given by Shri Kisku to the accused-Sheo Shanker Singh for being run. Aamlal Kisku being an illiterate adivasi was, according to the witness, being kept as a bonded (bandhua) labourer by the appellant on payment of Rs.30/- per day. The witness further states that Aamlal Kisku approached the deceased for help and the later with the help of police and administration got the ownership of the petrol pump restored to Shri Kisku. Both these steps namely prevention of theft of coal in the region and restoration of the petrol pump to Aamlal Kisku annoyed the appellant-Sheo Shanker Singh, for which reason the deceased was done to

death after he had won his third consecutive election to the State Assembly.

16. In cross-examination the witness has expressed his ignorance about the land where the petrol pump was installed and about the source of income of Aamlal Kisku. The witness also expressed ignorance about the expenditure involved in the installation of the pump or the source from where Shri Kisku had arranged finances. The witness stated that criminal cases were pending before the Court against Sheo Shanker Singh and Narmedeshwar Pd. Singh and his sons, but expressed ignorance about filing of the civil suit by Narmadeshwar Singh regarding the petrol pump in dispute. Witness claimed to have heard a conversation between Aamlal Kisku and the deceased regarding the dispute over the petrol pump.

17. Aamlal Kisku (PW15) has, in his deposition, stated that he owns a petrol pump in Belchadi which was allotted to him out of the Advasi quota. Since he was not familiar with the business in the sale of oil and lubricants he had taken help from Narmedeshwar Pd. Singh and Sheo Shanker Singh. Subsequently Sheo Shanker Singh-appellant started treating him like a labourer and did not render any accounts regarding the petrol pump. He, therefore, made complaints to the company and approached late Gurudas Chatterjee MLA, and it was after long efforts that the petrol pump was restored to the witness. Sheo Shankar Singh and Narmedeshwar Pd. Singh had extended threats to him regarding which he had informed the police.

18. In cross-examination the witness stated that the business of petrol pump was carried on by him in partnership with Sheo Shanker Singh for 4-5 months in the year 1997. No partnership-deed was, however, written. He did not know whether any joint account with the appellants had been opened in Poddardih branch of Allahabad Bank. He also did not know whether sales tax registration was in joint names and whether the land belonged to Sheo Shankar Singh. The witness admits

that he had lodged a criminal case against Sheo Shankar Singh, Rama Shanker Singh and Rajesh Singh and that another case was filed against Narmedeshwar Pd. Singh also. The witness denied that the petrol pump had been installed with the help of the money provided by Sheo Shanker Singh and Narmedeshwar Pd. Singh and that the cases referred to by him had been lodged against the said two persons on the incitement of others.

19. Apurba Ghosh (PW16) apart from being an eye-witness to the incident also mentions about a petrol pump situated on G.T. Road at Nirsa owned by a person belonging to Scheduled Tribe community but was being run by Narmedeshwar Pd. Singh illegally. The deceased fought against them with the help of Police and local administration because of which the ownership of the petrol pump was got restored to the owner concerned. The witness also refers to a statement made by the deceased regarding coal theft 5 or 6 days before the incident in question as a result whereof Narmedeshwar Pd. Singh and Nooren Master were both sent to jail.

20. There is thus evidence to prove that a petrol pump situated at G.T. Road at Nirsa stood in the name of Aamlal Kisku which had been allotted in his name in the Scheduled Tribe's quota. It is also evident that to establish and run the said petrol pump Aamlal Kisku had taken the help from Shri Narmedeshwar Pd. Singh and Sheo Shankar Singh. Disputes between the original allottee and the appellant-Sheo Shankar Singh and his father Narmedeshwar Pd. Singh had, however, arisen and manifested in the form of civil and criminal cases between them. Aamlal Kisku had in that connection taken the help of the deceased who had with the help of the police and local administration secured the restoration of the petrol pump to Shri Kisku which annoyed the appellant-Sheo Shankar Singh and his father Narmedeshwar Pd. Singh. There is also evidence to the effect that the deceased had acted against

what has been described as 'coal mafia' of Dhanbad with the help of police and administration to prevent the coal theft in the region and the steps taken by the deceased had resulted in the arrest of Narmedeshwar Pd. Singh and Nooren Master in connection with the said cases. Both these circumstances appear to have contributed to the incident that led to the killing of the deceased who was perceived by the appellants as a hurdle in their activities.

21. That brings us to the most critical part of the case in which we shall examine whether the prosecution has proved beyond a reasonable doubt, the sequence of events on which is based the charge of murder levelled against the appellants. The evidence adduced by the prosecution in this regard comprises the following distinct features:

(i) Evidence suggesting that on the date of occurrence and proximate in point of time the appellants were seen together riding a black coloured motor cycle, without a registration number.

(ii) Evidence establishing seizure of the motor cycle on which the deceased was riding from the place of occurrence and that which was being driven by appellant-Sheo Shankar Singh from his factory.

(iii) The eye witness account of the occurrence as given by Shri Apurva Ghosh PW16 and Shri Prabshant Banerjee PW6.

(iv) Medical evidence, supporting the version of PW 16, that he sustained injuries when he fell from the motor cycle being driven by him on the deceased who was on the pillion being shot by appellant Umesh Singh.

We propose to deal with each one of the above aspects *ad seriatim*.

22. Abdul Kudus Ansari (PW1), in his deposition before

the trial court stated that on 14th April, 2000 i.e. the date of occurrence while he was at "Amona turn" (Mod in Hindi) he saw appellant-Sheo Shankar Singh going towards Nirsa on a Caliber Motorcycle at about 11.15 A.M. The witness further states that he was at Amona Mod till around 1 p.m.-1.15 p.m. when he saw appellant-Sheo Shankar Singh going towards Gobindpur on a motorcycle with another person on the pillion seat. At about 2.45 p.m. when he was at his house, he heard that the deceased M.L.A. had been murdered. He reached the spot where some persons were already present. The person who was driving the motorcycle on which the deceased was riding said that appellant-Sheo Shanker Singh was driving the motorcycle while the person sitting behind had fired the shots. In a Test Identification Parade the witness claims to have identified appellant-Umesh Singh as the person whom he had seen on the pillion seat of the motorcycle driven by appellant-Sheo Shankar Singh on the date of the occurrence. The witness was extensively cross-examined by the defence, but there is nothing in the deposition which would render the version given by him doubtful and unworthy or credence. The fact that the witness is a signatory to the statement of Apurba Ghosh (PW16), which statement was recorded by the Investigating Officer on 14th April, 2000 at about 4.15 p.m. only shows that he had indeed reached the place of occurrence immediately after hearing about the killing of the deceased as stated by him in his deposition in the court; and that he had not only offered but actually identified the pillion rider in the Test Identification Parade.

23. To the same effect is the deposition of Lal Mohan Mahto (PW2) who in his deposition stated that on 14th April, 2000 at about 11 A.M. he saw the deceased going towards Dhanbad on a motorcycle, who told him to stay near the party office at Ratanpur. After some time he saw appellant-Sheo Shanker Singh riding a motorcycle without a registration number and going towards Nirsa. Around 1.30 P.M. again he saw the said appellant going towards Govindpur by the same

motorcycle with one other person sitting on the pillion seat. Around 3 P.M. there was a hue and cry that M.L.A. Shri Gurudas Chatterjee had been killed. He reached the G.T. Road at Deoli and found the deceased soaked in blood. Apurva Ghosh (PW16) told the witness that while appellant-Sheo Shanker Singh was driving the motorcycle the person sitting behind had fired the bullet that killed the deceased. The witness identified the appellant-Sheo Shanker Singh as the person who was driving the motorcycle and appellant-Umesh Singh as the person who was sitting on the pillion seat.

24. In cross-examination this witness has, inter alia, stated that he reached the place of occurrence on hearing the noise about the killing of the deceased. There was a crowd. The police had arrived on the spot after few minutes of his reaching there. He told the police he could identify the person sitting behind Sheo Shankar Singh and that he knew Apurva Ghosh (PW16) from the date of incident itself. He had seen Sheo Shankar Singh standing near Khalsa hotel on the date of the incident. At that time there was nobody with him. The witness denies being a member of Maharashta Coordination Committee (MCC). He admitted being a member of the Committee formed for the construction of a memorial to Gurudas Chatterjee.

25. The deposition of Subodh Chandra Kumbhkar (PW8) goes to show that the appellant-Umesh Singh was seen by the witness on 14th April, 2000 at 11.00 a.m. at Amona turn (Mod) when he visited the restaurant of the witness for food. The witness further stated that he had seen appellant-Sheo Shankar Singh on the same day in the morning towards the side of the weigh bridge (Kanta). Appellant-Sheo Shankar Singh was at that time with Vijay Singh Chaudhari.

26. In cross-examination this witness has stated that the license to run the restaurant (described as Hotel by the witness) is in the name of his brother Nagenddra Nath Kumbhkar. He is running the hotel for the past 10-12 years. The witness does

not know where Umesh Singh used to work and had no acquaintance with him. The witness denied the suggestion that he used to ask Umesh Singh about his well being whenever he met him. Umesh Singh had on that date taken food in the hotel of the witness and gone away. There were several others like Tapan Bharti and Mantoo present in the restaurant. The witness denied the suggestion that he had made a false statement that he had seen Sheo Shankar Singh and Umesh Singh on the date of the incident. There is nothing in the deposition of even this witness that could render his version unworthy of credence.

27. The depositions of all the witnesses referred to above, in our opinion, satisfactorily prove that the appellants were seen hanging around the place of occurrence on 14th April, 2000 and were seen together riding a motorcycle without registration number going towards Govindpur at around 1.30 p.m. which is proximate in point of time when the deceased was gunned down. From the deposition of Abdul Kudus Ansari (PW1) it is further proved that the witness had identified Umesh Singh as the person who was riding the motorcycle sitting behind appellant-Sheo Shankar Singh not only in the Court, but also in the test identification parade held during the course of investigation.

28. Coming to the second aspect on which the prosecution has led evidence in support of its case we may point out that while the motorcycle on which the deceased was travelling along with Apurba Ghosh PW16 was seized from the place of occurrence in terms of seizure memo marked Exh.3, the Motor Cycle used by accused was seized from the premises of Kalyans Vyapor Brisket Udyog owned by the appellant-Sheo Shankar Singh. This seizure was made on 16th April, 2000 at 2.20 p.m. From a reading of the seizure memo it is evident that the motorcycle was a black colour, Caliber Bajaj make with no registration number on the plate. From the motorcycle was recovered a certificate of registration and fitness showing the

name of Jai Shankar Singh, son of N.P. Singh of Nirsa, as its owner. Jai Shankar Singh, it is noteworthy, is none other than the brother of appellant-Sheo Shankar Singh.

29. Apart from the seizure mentioned above, the prosecution has led evidence to prove that the empty cartridges of 9 M.M. bullets with HP-59-II and Triger mark on them were seized from the place of occurrence. One of the empty cartridges was recovered from near the dead body while the other was recovered from the mud footpath on the southern side of the road. This is evident from the seizure memo marked Exh.1/9. In addition and more importantly is the seizure of light green T-shirt of the complainant-Apurba Ghosh (PW-16) with blood stains at the arm and back thereof. The T-shirt is torn near the left shoulder. Blue coloured jeans worn by the witness was also seized with a tear on the left knee. The deposition of Abdul Qudus (PW1) and Lal Mohan Mahto (PW2) support these seizures which corroborate the version of the prosecution that the occurrence had taken place at the spot from where the dead body, the motorcycle, the empty cartridges and the blood stained earth were seized. The seizure of the T-shirt and the Jeans worn by Apurba Ghosh (PW16) with bloodstains on the T-shirt, scratches damaging the T-shirt near the left shoulder and the Jeans on the left knee also corroborates the prosecution version that when hit by the bullet fired by the pillion rider of the motorcycle driven by appellant-Sheo Shankar Singh, the motorcycle on which the deceased was travelling lost its balance bringing both of them down to the ground and causing damage to the clothes worn by Apurba Ghosh (PW16) and injuries to his person. The Courts below have, in our opinion, correctly appreciated the evidence produced by the prosecution in this regard and rightly concluded that the seizure of the articles mentioned above clearly supports the prosecution version and the sequence of evidence underlying the charge.

30. The third aspect on which the prosecution has led evidence and which we need to examine before we go to the

deposition of the eye witnesses is the medical evidence, supporting the version of Apurba Ghosh (PW16) that he had sustained injuries when he fell down from the motor cycle after the deceased had been shot by the appellant-Umesh Singh. Reliance is in this regard placed by the prosecution upon the request made by Ramjee Prasad (PW17) to the Medical Officer, Primary Health Centre, Govindpur by which Apurba Ghosh (PW16) was sent for treatment with a request for issue of an injury report. The requisition is dated 14th April, 2000 and records three injuries which the witness had sustained apart from the complaint of pain in the chest and the body. Dr. S.C. Kunzni of Primary Health Centre, Govindpur accordingly examined the injured Apurba Ghosh (PW16) at 10.25 p.m. on 14th April, 2000 and found the following injuries on his person:

1. Complain of chest pain.
2. An abrasion about ½" x ½" injury on the left knee it. And blackish colour.
3. An abrasion on the lateral malloouo of left leg which is ¼" x ¼" size.
4. Abrasion about ½" in radius on circular in size and blackish crust on the left shoulder.
5. Complain of body ache.

31. The certificate goes on to state that the injuries had been sustained within 8 hours and had been caused by hard and blunt substance. The making of the requisition, the medical examination of the injured, the presence of injuries on his person have been, in our opinion, satisfactorily proved by the prosecution and go a long way to support the prosecution version that Apurba Ghosh (PW16) was driving the motorcycle at the time of the incident and had sustained injuries once he lost his balance after the deceased sitting on the pillion was shot by the appellant-Umesh Singh.

32. Time now to examine the eye-witness account of the occurrence. In his deposition before the trial court Apurba Ghosh (PW16) stated that according to a previously arranged programme he had borrowed a Hero Honda motorcycle from one of his friends and reached the house of the deceased Gurudas Chatterji at 7.00 a.m. After visiting the party office and talking to some persons there the deceased returned to his residence at 9.30 a.m., had his meals and left for Dhanbad at about 10.15 a.m. On the way they visited Mylasia Company and finally started for Dhanbad from there at 11.00 a.m. At Govindpur Block they met Lal Mohan Mahto (PW2) who was told by the deceased to remain at the party office till he returned from Dhanbad. They started from Dhanbad at about 12.00 noon and reached Kalyan Bhawan for the meeting in which the MLA met the people assembled there. In the meantime the witness went to the mining office which was closed and handed over a sum of Rs.9850/- to the Peon for making a deposit of the same towards royalty. The witness then returned to the place where the meeting was convened and started back for Nirsa at around 1.30 p.m. on the motorcycle with the deceased sitting on the pillion seat. At about 2.45 p.m. they crossed Premier Hard Coke, situated at G.T. Road, when the witness heard the sound of firing from behind. On this he turned back only to see that one 100 CC black coloured Caliber motorcycle which was being driven by the appellant-Sheo Shankar Singh with an unknown person sitting on the pillion carrying a pistol in his right hand, was on his left. The person fired a second shot which hit the deceased who slumped on the back of the witness with the result that the balance of the motorcycle got disturbed bringing the witness and the deceased down to the ground. The appellant-Sheo Shankar Singh stopped the motorcycle being driven by him at some distance whereupon the man sitting at the back ran towards the deceased verbally abusing the witness and asking him to run away. On seeing this, the witness started running towards the west. The unknown person went near the MLA and fired another shot and pushed the dead body towards the slope on the side of the road. The unknown person then ran

back to the motorcycle driven by Sheo Shanker Singh who was waiting for him with the engine of the motorcycle running.

33. The witness further stated that a crowd assembled near the place of occurrence including Lal Mohan Mahto (PW2) and Abdul Kudus Ansari (PW1) who stated that they had seen Sheo Shankar Singh riding 100 CC black colour Caliber motorcycle without a registration number going towards Nirsa. After some time they had again seen appellant-Sheo Shankar Singh coming back from Nirsa going towards Govindpur. At about 1.15 p.m. Sheo Shankar Singh was again seen by these two witnesses going towards Govindpur on the same motorcycle with a person sitting on the pillion seat. The witness proved the statement recorded by the investigating officer after the police arrived at the spot, which statement has been marked Exh.1/6. The witness also identified in the Court Sheo Shankar Singh as the person driving the motorcycle and Umesh Singh as the person who had fired the bullets that killed the deceased. He further stated that he was given treatment for the injuries sustained by him and that his bloodstained clothes as also the motorcycle were seized.

34. The witness was cross-examined extensively but his deposition has been accepted by the Courts below who have found the version to be both consistent and reliable. Mr. Lalit, learned senior counsel all the same took pains to read before us the entire deposition of this witness, in an attempt to show that he was not actually present on the spot with the deceased at the time of the occurrence either driving his motorcycle or otherwise. He urged that the witness could not have looked back while driving the motorcycle and that the fleeting glimpse he may have got of the assailant was not enough for the witness to identify him. We do not think so. There is in the first place nothing inherently improbable about the manner in which the witness has narrated the occurrence or his presence on the spot. There is not even a suggestion of any enmity between the appellants and the witness nor a bias favouring the prosecution

to make his version suspect. The narration given by the witness is natural and does not suffer from any material inconsistency or improbability of any kind. Having said that we must also note that the presence of the witness on the spot is proved by PWs 1 & 2, Abdul Kudus Ansari and Lal Mohan Mahto both of whom reached the place of occurrence immediately after hearing about the killing of the deceased and met Apurba Ghosh (PW16) on the spot. Both these witnesses have testified that the T-shirt worn by the witness was bloodstained and the motorcycle which he was driving was lying on the spot with the dead body of the deceased at some distance. Both of them have signed the statement made by Apurba Ghosh (PW16) before the police which constitutes the first information report about the incident in which both of them have claimed that they have seen Sheo Shankar Singh with one other person going on the motorcycle whom they could identify. The presence of Apurba Ghosh (PW16) on the spot is testified even by Prasant Banerjee (PW6), also an eye-witness to the occurrence. That apart the presence of injuries on the person of the Apurba Ghosh (PW16) duly certified by the medical officer concerned, and the fact that the T-shirt worn by him was torn at two different places corresponding to the injuries sustained by him also corroborates the version given by the witness that he was driving the motorcycle as claimed by him when the deceased was gunned down.

35. It is noteworthy that the first information report was registered without any delay and Apurba Ghosh (PW 16) medically examined on 14th April, 2000 itself though late in the evening. All these circumstances completely eliminate the possibility of the witness being a planted witness. The testimony of this witness and the deposition of the PWs Abdul Kudus Ansari and Lal Mohan Mahto prove his being with the deceased before the incident and being on the spot immediately after the occurrence with bloodstains on his clothes with the motorcycle being driven by him lying nearby. We have, therefore, no difficulty in affirming the finding recorded

by the two courts below that the deceased was travelling with Apurba Ghosh (PW16) on the latter's motorcycle from Dhanbad to Nirsa at the time of the occurrence and was, therefore, a competent witness who could and has testified to this occurrence, as the same took place.

36. Mr. Lalit, then argued that while a test identification parade had been conducted in which the appellant-Umesh Singh was identified by Abdul Kudus Ansari (PW1) as the person who was the pillion rider with Sheo Shankar Singh driving the motorcycle, the version of Apurba Ghosh (PW16) was not similarly put to test by holding a test identification parade for him also. He urged that while the identification of the accused in the Court is the substantive evidence and a test identification parade only meant to reassure that the investigation of the case is proceeding in the right direction, the failure of the prosecution to offer an explanation for not holding a test identification parade for this witness would cast a serious doubt about the credibility of the witness and his version that it was the appellant-Umesh Singh who had shot the deceased. Relying upon the decision of this Court in *Krishna Govind Patil v. State of Maharashtra* 1964 (1) SCR 678, Mr. Lalit argued that Umesh Singh had not been identified properly and cannot, therefore, be convicted in which event Section 34 will not be available to convict appellant-Sheo Shankar Singh also.

37. It is fairly well-settled that identification of the accused in the Court by the witness constitutes the substantive evidence in a case although any such identification for the first time at the trial may more often than not appear to be evidence of a weak character. That being so a test identification parade is conducted with a view to strengthening the trustworthiness of the evidence. Such a TIP then provides corroboration to the witness in the Court who claims to identify the accused persons otherwise unknown to him. Test Identification parades, therefore, remain in the realm of investigation. The Code of

Criminal Procedure does not oblige the investigating agency to necessarily hold a test identification parade nor is there any provision under which the accused may claim a right to the holding of a test identification parade. The failure of the investigating agency to hold a test identification parade does not, in that view, have the effect of weakening the evidence of identification in the Court. As to what should be the weight attached to such an identification is a matter which the Court will determine in the peculiar facts and circumstances of each case. In appropriate cases the Court may accept the evidence of identification in the Court even without insisting on corroboration. The decisions of this Court on the subject are legion. It is, therefore, unnecessary to refer to all such decisions. We remain content with a reference to the following observations made by this Court in *Malkhansingh and Ors. v. State of M.P.* (2003) 5 SCC 746 :

> "It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification

> parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See *Kanta Prashad* v. *Delhi Admn.* AIR 1958 SC 350, *Vaikuntam Chandrappa* v. *State of A.P.* AIR 1960 SC 1340, *Budhsen* v. *State of U.P.* (1970) 2 SCC 128 and *Rameshwar Singh* v. *State of J&K*. (1971) 2 SCC 715)"

38. We may also refer to the decision of this Court in *Pramod Mandal v. State of Bihar* (2004) 13 SCC 150 where this Court observed:

> "20. It is neither possible nor prudent to lay down any invariable rule as to the period within which a test identification parade must be held, or the number of witnesses who must correctly identify the accused, to sustain his conviction. These matters must be left to the courts of fact to decide in the facts and circumstances of each case. If a rule is laid down prescribing a period within which the test identification parade must be held, it would only benefit the professional criminals in whose cases the arrests are delayed as the police have no clear clue about their identity, they being persons unknown to the victims. They, therefore, have only to avoid their arrest for the prescribed period to avoid conviction. Similarly, there may be offences which by their very nature may be witnessed by a single witness, such as rape. The offender may be

unknown to the victim and the case depends solely on the identification by the victim, who is otherwise found to be truthful and reliable. What justification can be pleaded to contend that such cases must necessarily result in acquittal because of there being only one identifying witness? Prudence therefore demands that these matters must be left to the wisdom of the courts of fact which must consider all aspects of the matter in the light of the evidence on record before pronouncing upon the acceptability or rejection of such identification."

39. The decision of this Court in *Malkhansingh's* case (supra) and *Aqeel Ahmad v. State of Uttar Pradesh* 2008 (16) SCC 372 adopt a similar line of the reasoning.

40. The omission of the investigating agency to associate Apurba Ghosh (PW16) with the test identification parade in which Abdul Kudus Ansari (PW1) identified Umesh Singh will not *ipso jure* prove fatal to the case of the prosecution, although the investigating agency could and indeed ought to have associated the said witness also with the test identification parade especially when the witness had not claimed familiarity with the appellant-Umesh Singh before the incident. Even so, its omission to do so does not, in our opinion, affect the credibility of the identification of the said appellant by Apurba Ghosh (PW16) in the Court. That is because the manner in which the incident has taken place and the opportunity which Apurba Ghosh (PW16) had, to see and observe the actions of appellant-Umesh Singh were sufficient for the witness to identify him in the Court. This opportunity was more than a fleeting glimpse of the assailants. Appellant-Umesh Singh was seen by the witness pillion riding the motorcycle, coming in close proximity to his motorcycle, shooting the deceased from close range, stopping at some distance and coming back to the motorcycle where the deceased and the witness had fallen, abusing and threatening the witness and asking him to run away from the spot. All this was sufficient to create an impression that

would remain imprinted in the memory of anyone who would go through such a traumatic experience. It is not a case where a chance and uneventful glance at another motorcyclist may pass without leaving any impression about the individual concerned. It is a case where the nightmare of the occurrence would stay in the memory of and indeed haunt the person who has undergone through the experience for a long long time. Absence of a test identification parade and the failure of the Investigating Officer to associate the witness with the same does not, therefore, make any material difference in the instant case.

41. Mr. Lalit next contended that according to the prosecution case and deposition of Apurba Ghosh (PW16), the T-shirt worn by him had got bloodstained when the deceased was shot. He urged that although the T-shirt was seized by the investigating officer the same was not sent to the forensic science laboratory for examination and for matching the blood group of the deceased with that found on the T-shirt nor were the empty cartridges seized from the spot sent to the Ballistic Expert. This was, according to the learned counsel, a serious discrepancy which adversely affected the prosecution version that Apurba Ghosh (PW16) indeed was the driver of the motorcycle on which the deceased was a pillion rider.

42. It is true that not only according to Apurba Ghosh (PW16) but also according to Abdul Kudus Ansari (PW1), Lal Mohan Mahto (PW2) and the Investigating Officer, the T-shirt worn by Apurba Ghosh (PW16) was bloodstained which was seized in terms of the seizure memo referred to earlier. It is also true that a reference to the forensic science laboratory would have certainly corroborated the version given by these witnesses about the T-shirt being bloodstained and the blood group being the same as that of the deceased. That no explanation is forthcoming for the failure of the prosecution in making a reference to the forensic science laboratory which could have strengthened the version given by Apurba Ghosh (PW16) too is not in dispute. The question, however, is whether

the failure of the investing agency to make a reference would in the circumstances of the case discredit either the version of the witnesses that the T-shirt was bloodstained when it was seized or constitute a deficiency of the kind that would affect the prosecution version. Our answer is in the negative. Failure to make a reference to forensic science laboratory is in the circumstances of the case no more than a deficiency in the investigation of the case. Any such deficiency does not necessarily lead to the conclusion that the prosecution case is totally unworthy of credit. Deficiencies in investigation by way of omissions and lapses on the part of investigating agency cannot in themselves justify a total rejection of the prosecution case. In *Ram Bihari Yadav v. State of Bihar and Ors.* (1998) 4 SCC 517 this Court while dealing with the effect of shoddy investigation of cases held that if primacy was given to such negligent investigation or to the omissions and lapses committed in the course of investigation, it will shake the confidence of the people not only in the law enforcing agency but also in the administration of justice. The same view was expressed by this Court in *Surendra Paswan v. State of Jharkhand* (2003) 12 SCC 360. In that case the investigating officer had not sent the blood samples collected from the spot for chemical examination. This Court held that merely because the sample was not so sent may constitute a deficiency in the investigation but the same did not corrode the evidentiary value of the eye-witnesses.

43. In *Amar Singh v. Balwinder Singh and Ors.* (2003) 2 SCC 518 the investigating agency had not sent the firearm and the empties to the forensic science laboratory for comparison. It was argued on behalf of the defence that omission was a major flaw in the prosecution case sufficient to discredit prosecution version. This Court, however, repelled that contention and held that in a case where the investigation is found to be defective the Court has to be more circumspect in evaluating the evidence. But it would not be right to completely throw out the prosecution case on account of any such defects, for doing so

would amount to playing in the hands of the investigating officer who may have kept the investigation designedly defective. This Court said:

> "It would have been certainly better if the investigating agency had sent the firearms and the empties to the Forensic Science Laboratory for comparison. However, the report of the ballistic expert would in any case be in the nature of an expert opinion and the same is not conclusive. The failure of the investigating officer in sending the firearms and the empties for comparison cannot completely throw out the prosecution case when the same is fully established from the testimony of eyewitnesses whose presence on the spot cannot be doubted as they all received gunshot injuries in the incident."

44. In the light of the above the failure on the part of the investigating officer in sending the blood stained clothes to the FSL and the empty cartridges to the ballistic expert would not be sufficient to reject the version given by the eye witnesses. That is especially so when a reference to the ballistic expert would not have had much relevance since the weapon from which the bullets were fired had not been recovered from the accused and was not, therefore, available for comparison by the expert.

45. It was argued by Mr. Lalit that the version given by Apurba Ghosh (PW16) about his having borrowed the motorcycle on which the deceased was travelling with him on the pillion on the fateful day had not been corroborated by examining the owner of the motorcycle. The fact that no effort was made by Apurba Ghosh (PW16) or by the owner to have the motorcycle released in his favour also, contended the learned counsel, adversely reflected upon the veracity of the case set up by the prosecution. We do not think so. The fact that the motorcycle on which the deceased was travelling along with Apurba Ghosh (PW16) was found at the place of

occurrence is amply proved by the evidence adduced by the prosecution. It is also clear that the motorcycle in question did not belong either to the deceased or to Apurba Ghosh (PW16). In the circumstances there is no improbability in the version of Apurba Ghosh (PW16) that the said motorcycle had been borrowed by him from his friend. The mere fact that the owner of the motorcycle or Apurba Ghosh (PW16) had not applied for release of the motorcycle in their favour does not in the least affect the prosecution case muchless does it render the same doubtful in toto.

46. It was also contended by Mr. Lalit that the first information report was not lodged as claimed by the prosecution. According to the learned counsel if appellant-Sheo Shankar Singh had been named in the first information report, there is no reason why the investigating officer would not have gone after him before taking any further step in the matter. The argument has not appealed to us. The incident in question had taken place around 2.45 p.m. The statement of Apurba Ghosh (PW16) was recorded by the investigating officer at around 4.15 p.m. on the same day based on which first information report No.90/2000 was registered in the police station. The copy of the first information was received by the jurisdictional magistrate on 15.4.2000. Apart from Apurba Ghosh (PW16) the statement was also signed by Abdul Kudus Ansari (PW1) and Lal Mohan Mahto (PW2). All the three witnesses have stood by what has been attributed to them in the first information report. In the absence of any unexplained or abnormal delay in the registration of the case and the despatch of the first information report to the jurisdictional magistrate we have no reason to hold that the obvious is not the real state of affairs as claimed by Mr. Lalit.

47. We may now turn to the deposition of Prasant Banerjee (PW6) who is the other eye-witness to the occurrence. This witness has in his deposition before the trial court stated that on 14th April, 2000 he was at a distance of about 100 yards

from the place of occurrence. According to the witness while he was going on his motorcycle with Ravi Ranjan Prasad, on the pillion seat the deceased Gurdas Chatterjee was going on the pillion seat of another motorcycle. Appellant-Sheo Shankar Singh was following the deceased on a motorcycle with appellant-Umesh Singh sitting on the pillion of that motorcycle. The witness further states that appellant-Sheo Shankar Singh took the motorcycle to the left of the motorcycle on which the deceased was travelling whereupon appellant-Umesh Singh who was sitting on the pillion fired two shots because of which the deceased fell down on the south side of the G.T. Road. The motorcycle of appellant-Sheo Shankar Singh stopped at a short distance whereupon the appellant-Umesh Singh got down from the motorcycle and came to the place where the deceased was lying and then fired another shot at him, pushed him so that his body rolled down the slope. Appellant-Umesh Singh then returned to the motorcycle and went away towards Nirsa. The witness further stated that he knew both the accused-appellants.

48. In cross-examination this witness stated that he remained on the spot for 10-15 minutes after the occurrence during which time Ravi Ranjan was with him. He and Ravi Ranjan then proceeded to Panchat. He did not lodge any report in the police station but the witness told his wife, son and father about the occurrence. He knew the deceased for the last 10-12 years prior to the occurrence but had not visited his house. He was summoned to the police station in the month of April 2000 but could not meet the officer in-charge. The police recorded his statement one and half months after the occurrence at Nirsa. The witness further states that the first shot from the motorcycle was fired from behind that injured the back portion of the head of MLA while the second shot was fired by appellant-Umesh Singh after he got down from the motorcycle which too had injured the deceased in his head. The witness further stated that a large crowd had assembled at the place of occurrence during the time he remained on the spot but he

did not talk to any person nor remember any persons having talked to him. The witness also denies the suggestion made to him that he had old friendship with appellants-Umesh Singh and Sheo Shankar Singh or that he had been frequently visiting the house of both the appellants. The witness stated that he went to the place where Gurdas Chatterji had fallen after 7-8 minutes and that 10-15 persons had arrived at the place of occurrence before he reached there. The witness denied the suggestions that he is a member of the political party of the deceased-Gurdas Chatterji.

49. Mr. Lalit contended that Mr. Prasant Banerjee (PW-6) was not an eye-witness as he had come to the place of occurrence 7-8 minutes after the occurrence. He also argued that the witness had not made any statement to the police till 2nd June, 2000 which renders his story suspect. There is no doubt a delay of one and half months in the recording of statement of Prasant Banerjee (PW-6). The question is whether the same should by itself justify rejection of his testimony. Our answer is in the negative. The legal position is well settled that mere delay in the examination of a particular witness does not, as a rule of universal application, render the prosecution case suspect. It depends upon circumstances of the case and the nature of the offence that is being investigated. It would also depend upon the availability of information by which the investigating officer could reach the witness and examine him. It would also depend upon the explanation, if any, which the investigating officer may offer for the delay. In a case where the investigating officer has reasons to believe that a particular witness is an eye-witness to the occurrence but he does not examine him without any possible explanation for any such omission, the delay may assume importance and require the Court to closely scrutinize and evaluate the version of the witness but in a case where the investigating officer had no such information about any particular individual being an eye-witness to the occurrence, mere delay in examining such a witness would not *ipso facto* render the testimony of the witness

suspect or affect the prosecution version. We are supported in this view by the decision of this Court in *Ranbir and Ors. v. State of Punjab* (1973) 2 SCC 444 where this Court examined the effect of delayed examined of a witness and observed:

> "..... The question of delay in examining a witness during investigation is material only if it is indicative and suggestive of some unfair practice by the investigating agency for the purpose of introducing a got-up witness to falsely support the prosecution case. It is, therefore, essential that the "Investigating Officer should be asked specifically about the delay and the reasons therefore....."

50. Again in *Satbir Singh and Ors. v. State of Uttar Pradesh* (2009) 13 SCC 790 the delay in the examination of the witness was held to be not fatal to the prosecution case. This Court observed:

> "32. Contention of Mr. Sushil Kumar that the Investigating officer did not examine some of the witnesses on 27th January, 1997 cannot be accepted for more than one reason; firstly, because the delay in the investigation itself may not benefit the accused; secondly, because the Investigating Officer (PW 8) in his deposition explained the reasons for delayed examination of the witnesses....."

51. The investigating officer has, in the instant case, stated that Prasant Banerjee (PW6) had met him for the first time on 2nd June, 2000 and that he recorded his statement on the very same day. He has further stated that prior to 2nd June, 2000 he had no knowledge that Prasant Banerjee (PW6) was a witness to the occurrence. Even Prasant Banerjee has given an explanation how the investigating officer reached him. According to his deposition the Inspector had told him that he had come to record his statement after making an enquiry from the person who was sitting on the pillion of his motorcycle on the date of occurrence. Ravi Ranjan the pillion rider had also informed him that his statement had been recorded by the

police. The Trial Court and the High Court have accepted the explanation offered by the investigating officer for the delay. We see no reason to take a different view or to reject the testimony of this witness only because his statement was recorded a month and half after the occurrence.

52. Coming then to the second facet of the submission made by Mr. Lalit, we find that the contention urged by the learned counsel is not based on an accurate reading of the deposition of the witness. The witness has clearly stated that he has seen the deceased going on a motorcycle on the date of the occurrence and that appellant-Sheo Shankar Singh had brought his motorcycle to the left of the motorcycle of the deceased whereupon appellant-Umesh Singh pillion rider had shot the deceased in the head. The version given by the witness does not admit of being understood to suggest that the witness reached the place of occurrence after the occurrence had taken place. What the witness has stated is that he went to the place where the deceased had fallen 5-7 minutes after the occurrence was over. Witnessing the occurrence cannot be confused with going to the place where the deceased had fallen. On a careful reading of the deposition of the witness we do not see any infirmity in the same that may justify the rejection of the version of PW6. Both the Courts below have, in our opinion, rightly accepted the testimony of Prashant Banerjee PW 6 while finding the appellants guilty.

53. That brings us to the question whether the present is one of those rare of rarest cases in which the High Court could have awarded to the appellants the extreme penalty of death.

54. In *Jagmohan Singh v. The State of U.P* (1973) 1 SCC 20 a Constitution Bench of this Court held that in cases of culpable homicide amounting to murder the normal rule is to sentence the offender to imprisonment for life, although the Court could for special reasons to be recorded in writing depart from that rule and impose a sentence of death. The Court held that while a large number of murders are of the common type,

there are some that are diabolical in conception and cruel in execution. Such murders cannot be wished away by finding alibis in the social maladjustment of the murderer. Prevalence of such crimes speaks in the opinion of many, for the inevitability of death penalty not only by way of a deterrence but as a token of emphatic disapproval by the society.

55. In *Bachan Singh v. State of Punjab* (1980) 2 SCC 684 this Court examined the constitutional validity of Section 302 IPC and sentencing procedure provided in Section 354 (3) of the Code of Criminal Procedure and ruled that Section 302 of the Indian Penal Code, 1860 did not violate Article 19 or Article 21 of the Constitution of India. It was further held that while considering the question of sentence to be imposed for the offence of murder the Court must record every relevant circumstance regarding the crime as well as the criminal and that if the Court finds that the offence is of an exceptionally depraved and heinous character and constitutes on account of its design and the manner of its execution, a source of grave danger to the society at large, it may impose the death sentence. Taking note of the aggravating circumstances relevant to the question of determination of the sentence to be imposed upon an offender, this Court held that death sentence could be imposed only in the rarest of rare cases when the alternative option was unquestionably foreclosed. This Court observed:

> "209. …….Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and Figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme infrequency — a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guide-lines indicated by us, will discharge the onerous function with evermore scrupulous care and

humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

56. In *Machhi Singh and Ors. v. State of Punjab* (1983) 3 SCC 470 this Court followed the guidelines flowing from *Bachan Singh's* case (supra) and held that death sentence could be imposed only in the rarest of rare cases when the collective conscience of the community is so shocked that it would expect the holders of judicial power to inflict the death penalty irrespective of their personal opinion as regards the desirability or otherwise of retaining death penalty as a sentencing option. This Court enumerated the following circumstances in which such a sentiment could be entertained by the community:

"(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward; or cold-blooded murder for gains of a person vis-a-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.

(3) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath; or in cases of "bride burning" or "dowry deaths" or when

murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

(5) When the victim of murder is an innocent child or a helpless woman or old or infirm person or a person vis-a-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community"

57. In *Farooq alias Karattaa Farooq and Ors. v. State of Kerala* (2002) 4 SCC 697 this Court was dealing with a case where the appellant was alleged to have thrown a bomb on an under-trial prisoner at the jail gate resulting his death and severe injuries to others. Relying upon the decision of this Court in *Bachan Singh* case and in the case of *Machhi Singh* (supra) this Court held that the extreme penalty of death was not called for and accordingly commuted the sentence to life imprisonment.

58. In *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* (2009) 6 SCC 498 this Court once again reviewed the case law on the subject and reiterated that although judicial principle of imposition of death penalty were far from being uniform the basic principle that life imprisonment is the rule and death penalty an exception, would call for examination of each case to determine the appropriateness of punishment bearing in mind that death sentence is awarded only in rarest of rare cases where reform is not possible. The discretion given to the Court in such cases assumes importance and its exercise rendered extremely difficult because of the irrevocable character of that penalty. The Court held where two views are possible imposition of death sentence

would not be appropriate, but where there is no other option and where reform was not possible death sentence may be imposed. Applying the principles evolved in *Bachan Singh* case and in the case of *Machhi Singh* (supra) this Court commuted the death sentence awarded to one of the appellants to life imprisonment holding that the case did not satisfy the "rarest of rare" test to warrant the award of death sentence, even when the decapitation of the victim's body and its disposal was termed brutal.

59. *State of Maharashtra v. Prakash Sakha Vasave and Ors.* (2009) 11 SCC 193 too was a case where this Court while setting aside the acquittal of the accused awarded life imprisonment to him. That was a case where the accused was alleged to have hit the deceased with an axe with such great force that the axe got struck into the head of the deceased and the handle of the axe was also broken.

60. Coming to the case at hand we are of the opinion that the High Court was not justified in imposing the extreme penalty of death upon the appellants. We say so for reasons more than one. Firstly, because the appellants are not professional killers. Even according to the prosecution they were only a part of the coal mafia active in the region indulging in theft of coal from the collieries. The deceased being opposed to such activities appears to have incurred their wrath and got killed. Secondly, because even when the deceased was a politician there was no political angle to his killing. Thirdly, because while all culpable homicides amounting to murder are inhuman, hence legally and ethically unacceptable yet there was nothing particularly brutal, grotesque, diabolical, revolting or dastardly in the manner of its execution so as to arouse intense and extreme indignation of the community or exhaust depravity and meanness on the part of the assailants to call for the extreme penalty. Fourthly, because there was difference of opinion on the question of sentence to be awarded to the convicts. The Trial Court did not find it to be a rarest of rare case and

remained content with the award of life sentence only which sentence the High Court enhanced to death. Considering all these circumstances, the death sentence awarded to the appellants in our opinion deserves to be commuted to life imprisonment.

61. In the result, we affirm the judgments and orders under appeal with the modification that instead of sentence of death awarded by the High Court, the appellants shall suffer rigorous imprisonment for life. The appeals are accordingly allowed but only in part and to the extent indicated above.

B.B.B. Appeals partly allowed.

P. S. SOMANATHAN AND ORS.
v.
DISTRICT INSURANCE OFFICER AND ANR.
(Civil Appeal No. 1891 of 2011)

FEBRUARY 17, 2011

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

Motor Vehicles Act, 1988 – ss.166 and 163A – Motor accident – Compensation claim – Quantum of compensation – Fixation of – Appropriate multiplier – In the present case, the original claim petition had been filed by the mother and brother of the deceased and the deceased was 33 years of age when he died in the accident – The deceased was looking after the entire family – Tribunal calculated compensation by considering a multiplier of 16 – High Court, however, held that the deceased's mother was the real legal representative and others could not claim to be the legal representatives of the deceased, and accordingly reduced compensation by applying a multiplier of 5 – Held: The High Court took a very technical view in the matter of applying the multiplier – The High Court could not have kept out of its consideration the claim of the daughter of the first claimant, since later the daughter was also impleaded in the claim petition – Reasoning of the High Court not correct in view of the ratio in Sarla Verma's case – Following the same, the High Court should have proceeded to compute the compensation on the age of the deceased – Judgment of the High Court set aside and the award of the Tribunal restored.

A 33 year old unmarried man died due to injuries sustained in an accident when a lorry suddenly hit him while he was walking on the Highway. The lorry was insured with the first respondent and was owned by the second respondent.

The appellants, who are family members of the deceased, filed claim petition before the Motor Accident Claims Tribunal (MACT) under Section 166 of the Motor Vehicles Act, 1988, claiming Rs.1,75,000/- as compensation. The original claim petition was filed by the mother and brother of the deceased. Later on, the daughter of the first claimant was also impleaded in the claim petition. The MACT concluded that the accident had occurred in view of the rash and negligent driving of the second respondent; that the monthly income of the deceased was Rs.1,200/- and that he had been looking after the entire family. By applying a multiplier of 16, the MACT awarded a total compensation of Rs.1,71,600/- together with interest at the rate of 12% p.a. and cost of Rs.1,500/-. The first respondent appealed against the judgment of the MACT before the High Court. The High Court held that the mother of the deceased was the real legal representative and others could not claim to be the legal representatives of the deceased, and accordingly applied a multiplier of 5 and thus reduced the compensation to Rs.85,000/- along with interest at the rate of 12% p.a. Hence the present appeal against the judgment of the High Court.

Allowing the appeal, the Court

HELD: In the present case, the claimants had filed for compensation under Section 166 of the Motor Vehicles Act, 1988. The original claim petition had been filed by the mother and brother of the deceased and the deceased was 33 years of age when he died in the accident. For the purpose of calculating the multiplier, the High Court held that mother was the real legal representative and others could not claim to be the legal representatives of the deceased, and accordingly applied a multiplier of 5, whereas the Tribunal had calculated compensation by considering a multiplier of 16. The High Court

unfortunately took a very technical view in the matter of applying the multiplier. The High Court cannot keep out of its consideration the claim of the daughter of the first claimant, since the daughter was impleaded, and was 49 years of age. Admittedly, the deceased was looking after the entire family. In determining the age of the mother, the High Court should have accepted the age of the mother at 65, as given in the claim petition, since there is no controversy on that. By accepting the age of mother at 67, the High Court further reduced the multiplier from 6 to 5, even if the reasoning of the High Court is accepted to be correct. The reasoning of the High Court is not correct in view of the ratio in *Sarla Verma's* case. Following the same, the High Court should have proceeded to compute the compensation on the age of the deceased. The judgment of the High Court is therefore set aside and the award of MACT is restored. [Paras 20, 21, 23 and 25] [378-D-E; G-H; 379-A-B, D]

Sarla Verma (Smt.) & Ors. v. Delhi Transport Corporation & Anr. **(2009) 6 SCC 121 – relied on.**

Concord of India Insurance Co. Ltd. v. Nirmala Devi **(1979) 118 ITR 507(SC);** *General Manager, Kerala State Road Transport Corporation, Trivandrum v. Mrs. Susamma Thomas and Ors.* **AIR 1994 SC 1631;** *U.P. State Road Transport Corporation and Ors. v. Trilok Chandra and Ors.* **(1996) 4 SCC 362;** *Tamil Nadu State Transport Corporation Ltd. v. S. Rajapriya & Ors.* **AIR 2005 SC 2985;** *United India Insurance Co. Ltd. v. Bindu & Ors.* **(2009) 3 SCC 705;** *Supe Dei (Smt) & Ors. v. National Insurance Co. Ltd. & Anr.* **(2009) 4 SCC 513 and** *New India Assurance Co. Ltd. v. Charlie & Anr.***(2005) 10 SCC 720 – referred to.**

Case Law Reference:

(1979) 118 ITR 507(SC)	**referred to**	**Para 11**
AIR 1994 SC 1631	**referred to**	**Para 12, 14, 19**

(1996) 4 SCC 362	**referred to**	**Para 14, 19**
AIR 2005 SC 2985	**referred to**	**Para 15**
(2009) 3 SCC 705	**referred to**	**Para 16**
(2009) 4 SCC 513	**referred to**	**Para 17**
(2009) 6 SCC 121	**relied on**	**Para 18, 22, 23, 24**
(2005) 10 SCC 720	**referred to**	**Para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1891 of 2011.

From the Judgment & Order dated 5.1.2007 of the High Court of Kerala at Ernakulam in MFA No. 444 of 2001.

Alex Joseph for the Appellant.

R. Sathish for the Respondent.

The Judgment of the Court was delivered by

GANGULY, J. 1. Delay condoned.

2. Leave granted.

3. One Suresh Chandra Babu, was walking along the side of Alappuzha-Kollam National Highway near Punnapra junction on 25.07.1994, when a lorry (bearing registration No. KL 4/ 6802) which was being driven rashly suddenly hit him. As a result of which he sustained serious injuries and died on the spot. The lorry which was insured with the first respondent was owned by the second respondent.

4. The appellants (claimants) who are the family members of the deceased filed a claim petition before the Motor Accident Claims Tribunal (MACT), claiming Rs.1,75,000/- as compensation. The same was contested by the first and second respondents.

5. Before the MACT, the following issues were framed:

"i. Whether the accident was due to the rash and negligent driving of the second respondent herein?

ii. Whether the petitioners were entitled to get any compensation and if so, what was the quantum and who all were liable?"

6. Based on the evidence on record, MACT concluded that the accident had occurred in view of the rash and negligent driving of the second respondent and it awarded a total compensation of Rs.1,71,600/- together with interest at the rate of 12% p.a. and cost of Rs.1,500/-. It calculated the same as follows:

"…Suresh Chandra Babu aged 33 years died due to injuries sustained in the accident. PW1 swears that at the time of accident Suresh Chandra Babu was working as an operator in Motherland Industries, Punnapra and was getting Rs.4,500/- p.m. In Ext. A1 FIR, it is stated that Suresh Chandra Babu was working as a mechanic operator in Motherland Industries Company. PW1 swears that Suresh Chandra Babu was unmarried and he was looking after the affairs of the family. Considering the nature of the work done by deceased Suresh Chandra Babu, his monthly income can be assessed as Rs.1,200/- for the purpose of calculating just compensation. After deducting his personal expenses he would be contributing Rs.800/- p.m. to his mother- the first petitioner. In this manner, the annual dependency of the first petitioner of the deceased comes to Rs.9,600/-. In this case 16 can be determined as suitable multiplier. Therefore, the amount of compensation on account of loss of dependency comes to Rs.1,53,000/-. Rs.15,000/- can be awarded towards compensation for pain and suffering. Rs.1,900/- can be awarded towards transportation charges and Rs.2,000/-

can be awarded towards funeral expenses. Thus, in total, the petitioner is entitled to get Rs.1,71,600/- as compensation."

7. The first respondent appealed against the judgment of the MACT before the High Court of Kerala at Ernakulam.

8. The High Court, vide its impugned judgment, reduced the compensation to Rs.85,000/- along with interest at the rate of 12% p.a., the relevant portion of High Court judgment reads as follows:

"Heard both sides. The learned Government Pleader submits that father was aged about 70 years even at the time of the accident and therefore the Tribunal had committed an error in fixing the multiplier at 16 whereas it has to only apply a multiplier of 5. In the award, the age of first claimant is not shown but the daughter of the first claimant namely Leela has filed an affidavit before this Court for getting impleaded as I.A. 1407/06 where her age is shown as 61 years. So it is clear that she would be 49 years at the time of the accident and therefore even if the minimum age that can be fixed for the mother will be 67 years and not less. The mother is the real legal representative and others cannot claim the status of legal representative and therefore the appropriate multiplier to be used in this case is only 5. It is true that the Tribunal has taken his income at Rs.1,200/- per month whereas claimants claimed that the deceased was getting an amount of Rs.1,500/- as his income. We fix it at Rs.1,500/- deduct 1/3rd for personal expenses and applying a multiplier of 5 the loss of dependency compensation would come to Rs.60,000/-. The Tribunal has awarded Rs.15,000/- towards pain and suffering, Rs.1,000/- towards transportation charges and Rs.2,000/- for funeral expenses. They are only just and reasonable and we do not find any ground to interfere with the same. But the Tribunal has not awarded any amount towards love and

affection. Hence, we grant an amount of Rs.5,000/- under that head and also award a sum of Rs.2,500/- towards loss of estate. Therefore, the total compensation that the claimants are entitled to will be Rs.85,000/-."

9. Aggrieved with the judgment of the High Court, the appellants (claimants) filed a Special Leave Petition before this Court.

10. On the question of fixing the quantum of compensation in motor accident claim cases, this Court has laid down several guidelines.

11. In the case of *Concord of India Insurance Co. Ltd. v. Nirmala Devi* [(1979) 118 ITR 507(SC)], Justice Krishna Iyer, speaking for a Bench of this Court, observed that the determination of compensation must be liberal, not niggardly since the law values life and limb in a free country in generous scales.

12. In the case of *General Manager, Kerala State Road Transport Corporation, Trivandrum v. Mrs. Susamma Thomas and Ors.* [AIR 1994 SC 1631], this Court held that:

"The assessment of damages to compensate the dependants is beset with difficulties because from the nature of things, it has to take into account many imponderables, e.g., the life expectancy of the deceased and the dependants, the amount that the deceased would have earned during the remainder of his life, the amount that he would have contributed to the dependants during that period, the chances that the deceased may not have lived or the dependants may not live up to the estimated remaining period of their life expectancy, the chances that the deceased might have got better employment or income or might have lost his employment or income together.

The manner of arriving at the damages is to ascertain the

net income of the deceased available for the support of himself and his dependants, and to deduct therefrom such part of his income as the deceased was accustomed to spend upon himself, as regards both self- maintenance and pleasure, and to ascertain what part of his net income the deceased was accustomed to spend for the benefit of the dependants. Then that should be capitalized by multiplying it by a figure representing the proper number of year's purchase.

Much of the calculation necessarily remains in the realm of hypothesis "and in that region arithmetic is a good servant but a bad master" since there are so often many imponderables. In every case "it is the overall picture that matters" and the court must try to assess as best as it can the loss suffered."

13. The Bench also observed that the proper method of computation is the multiplier-method, which was an accepted method of arriving at 'just' compensation. Any departure, save in exceptional and extraordinary cases, would introduce inconsistency of principle, lack of uniformity and an element of unpredictability for the assessment of compensation. Further, the Bench held that the multiplier was determined by two factors, namely, the rate of interest appropriate to a stable economy and the age of the deceased or of the claimant whichever was higher.

14. The principles laid down in *Susamma* (supra) were upheld in the case of *U.P. State Road Transport Corporation and Ors. v. Trilok Chandra and Ors.* [(1996) 4 SCC 362].

15. In the case of *Tamil Nadu State Transport Corporation Ltd. v. S. Rajapriya & Ors.* [AIR 2005 SC 2985], this Court observed that the choice of the multiplier was to be determined by the age of the deceased (or that of the claimants whichever is higher) and by the calculation as to what the capital sum, if invested at a rate of interest appropriate to a stable economy,

would yield by way of annual interest. In ascertaining this, regard was also to be had to the fact that ultimately the capital sum would also be consumed-up over the period for which the dependency was expected to last.

16. In *United India Insurance Co. Ltd. v. Bindu & Ors.* [(2009) 3 SCC 705], this Court again reiterated that the choice of the multiplier was to be determined by the age of the deceased (or that of the claimants whichever is higher) and by the calculation of a capital sum which, if invested at a rate of interest appropriate to a stable economy, would yield by way of annual interest.

17. In *Supe Dei (Smt) & Ors. v. National Insurance Co. Ltd. & Anr.* [(2009) 4 SCC 513], the Court observed that while considering the question of just compensation payable in a case all relevant factors including appropriate multiplier had to be considered, and that the Second Schedule under Section 163-A to the Motor Vehicles Act, 1988, which gave amount of compensation to be determined for purpose of claim under the section, could be taken as a guideline while determining the compensation under Section 166 of the Act.

18. In *Sarla Verma (Smt.) & Ors. v. Delhi Transport Corporation & Anr.* [(2009) 6 SCC 121], this Court formulated the principles very lucidly and which are quoted below:

> "Basically only three facts need to be established by the claimants for assessing compensation in the case of death:
>
> (a) age of the deceased;
>
> (b) income of the deceased; and the
>
> (c) the number of dependents.
>
> The issues to be determined by the Tribunal to arrive at the loss of dependency are:

> (i) additions/deductions to be made for arriving at the income;
>
> (ii) the deduction to be made towards the personal living expenses of the deceased; and
>
> (iii) the multiplier to be applied with reference of the age of the deceased.
>
> If these determinants are standardized, there will be uniformity and consistency in the decisions. There will lesser need for detailed evidence. It will also be easier for the insurance companies to settle accident claims without delay.
>
> To have uniformity and consistency, the Tribunals should determine compensation in cases of death, by the following well-settled steps:
>
> Step 1 (Ascertaining the multiplicand)
>
> The income of the deceased per annum should be determined. Out of the said income a deduction should be made in regard to the amount which the deceased would have spent on himself by way of personal and living expenses. The balance, which is considered to be the contribution to the dependant family, constitutes the multiplicand.
>
> Step 2 (Ascertaining the multiplier)
>
> Having regard to the age of the deceased and period of active career, the appropriate multiplier should be selected. This does not mean ascertaining the number of years he would have lived or worked but for the accident. Having regard to several imponderables in life and economic factors, a table of multipliers with reference to the age has been identified by this Court. The multiplier should be chosen from the said table with reference to the age of the

deceased.

Step 3 (Actual calculation)

The annual contribution to the family (multiplicand) when multiplied by such multiplier gives the 'loss of dependency' to the family."

19. Further, this Court considered the principles laid down in *Susamma* (supra), *Trilok Chandra* (supra) and *New India Assurance Co. Ltd. v. Charlie & Anr.* [(2005) 10 SCC 720] and gave the following table for multiplier:

Age of the Deceased	Multiplies Scale as envisaged in Susamma Thomas	Multiplier Scale as adopted by Trilok Chandra	Multiplier Scale in Trilok Chandra as clarified in Charlie	Multiplier specified in Second Column in the Table in Second Schedule to the MV Act	Multiplier actually used in Second Schedule to the MV Act (as seen from the quantum of Compen-sation)
(1)	(2)	(3)	(4)	(5)	(6)
Up to 15 yrs	-	-	-	15	20
15 to 20 yrs	16	18	18	16	19
21 to 25 yrs	15	17	18	17	18
26 to 30 yrs	14	16	17	18	17
31 to 35 yrs	13	15	16	17	16
36 to 40 yrs	12	14	15	16	15
41 to 45 yrs	11	13	14	15	14
46 to 50 yrs	10	12	13	13	12
51 to 55 yrs	9	11	11	11	10
56 to 60 yrs	8	10	09	8	8
61 to 65 yrs	6	08	07	5	6
Above 65 Yrs	5	05	05	5	5

20. In the present case, the claimants had filed for compensation under Section 166 of the Motor Vehicles Act, 1988. The original claim petition had been filed by the mother and brother of the deceased and the deceased was 33 years of age when he died in the accident.

21. For the purpose of calculating the multiplier, the High Court held that mother was the real legal representative and others could not claim to be the legal representatives of the deceased, and accordingly applied a multiplier of 5, whereas the Tribunal had calculated compensation by considering a multiplier of 16.

22. This Court is of the opinion that the law as has been laid correctly in the case of *Sarla Varma* (supra), in a very well considered judgment, is to be followed.

23. The High Court unfortunately took a very technical view in the matter of applying the multiplier. The High Court cannot keep out of its consideration the claim of the daughter of the first claimant, since the daughter was impleaded, and was 49 years of age. Admittedly, the deceased was looking after the entire family. In determining the age of the mother, the High

Court should have accepted the age of the mother at 65, as given in the claim petition, since there is no controversy on that. By accepting the age of mother at 67, the High Court further reduced the multiplier from 6 to 5, even if we accept the reasoning of the High Court to be correct. The reasoning of the High Court is not correct in view of the ratio in *Sarla Verma* (supra). Following the same the High Court should have proceeded to compute the compensation on the age of the deceased.

24. Thus, the finding of the High Court is contrary to the ratio in *Sarla Verma* (supra), which is the leading decision on this question and which we follow.

25. This Court, therefore, cannot sustain the High Court judgment and is constrained to set aside the same. The award of MACT is restored.

26. The appeal is allowed. No costs.

B.B.B. Appeal allowed.

BHARAT SANCHAR NIGAM LTD.
v.
GHANSHYAM DASS AND ORS.
(Civil Appeal No. 4369 of 2006)

FEBRUARY 17, 2011

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

Service Law – Promotion – Department of Telecommunications – Four grades of employees viz. Basic Grade, Grade II, Grade III and Grade IV – Biennial Cadre Review (BCR Scheme) – Order dated 07.07.1992 passed by Tribunal in O.A. No.1455 of 1991 filed by some Grade III officers, whereby the Government was directed to consider the applicants in the O.A. for promotion to Grade-IV on the basis of seniority in the basic grade as per the BCR Scheme – Order dated 07.07.1992 attained finality – Entitlement of respondents to claim promotion to Grade-IV on the basis of their seniority in the basic grade in terms of the order dated 07.07.1992 – Held: Not entitled – Respondents were not the applicants in O.A. No.1455 of 1991 and there was no direction to the Government to consider the respondents for promotion to Grade-IV scale on the basis of seniority in the basic cadre as per the BCR Scheme – The Tribunal had not directed in its order dated 07.07.1992 that the benefits of the order would also be extended to those who had not approached the Tribunal – Since the respondents preferred to sleep over their rights and approached the Tribunal only in 1997, they cannot get the benefit of the order dated 07.07.1992 and will only be entitled to the benefit of the circular dated 13.12.1995 which was in force in 1997 – Vide circular dated 13.12.1995 the Government took a fresh decision in supersession of earlier instructions that promotion to Grade-IV may be given from amongst officials in Grade-III on the basis of their seniority in

the basic grade – Hence, the decision of the Government to make promotions to Grade-IV on the basis of their seniority in the basic grade could take effect only from 13.12.1995 and not from a prior date – Respondents cannot claim any promotion to Grade-IV on the basis of their seniority in the basic cadre with effect from any date prior to 13.12.1995.

In the Department of Telecommunications of the Government of India there were four Grades of employees: Basic Grade Pay (Scale Rs.975-1660); Grade II (Pay Scale Rs.1400-2300); Grade III (Pay Scale Rs.1600-2660) and Grade IV (Pay Scale Rs.2000-3200). By circular dated 16.10.1990, the Government introduced a new Scheme known as 'Biennial Cadre Review' (BCR Scheme) under which, those employees, who were on regular service and had completed 26 years of satisfactory service in the basic grades, if found suitable, were to be upgraded in the higher scale. The circular dated 16.10.1990, however, limited such upgradation to 10% of the posts in the lower pay-scale.

Some officers of Grade III who were senior in the basic grade but had lost their seniority in Grade III because of their later promotions and who were not considered for upgradation to Grade IV under the BCR Scheme filed O.A. No.1455 of 1991 before the Central Administrative Tribunal. The Tribunal vide its order dated 07.07.1992 directed that promotions of 10% posts in the scale of Rs.2000-3200 (Grade IV) would have to be based on seniority in the basic grade subject to fulfillment of other conditions in the BCR Scheme and further directed the Government to consider the applicants in the O.A. from due dates with consequential benefits. In the order dated 07.07.1992, the Tribunal, however, observed that employees who may be senior to the applicants in the O.A. in the scale of Rs.1600-2660 (Grade III) and who may have already been given the scale of Rs.2000-3200

(Grade IV) at the cost of those who were senior in the basic grades by any different interpretation of the BCR Scheme, may in the discretion of the Government instead of being reverted, be considered for promotion to scale of Rs.2000-3200 (Grade IV) by suitable adjustments in the number of posts by upgradation as necessary.

The Government challenged the order dated 07.07.1992 of the Tribunal in Civil Appeal No.3201 of 1993 but by order dated 09.09.1993 this Court dismissed the appeal. Pursuant thereto, supernumerary posts were created in the scale of Rs.2000-3200 (Grade IV) to adjust the employees who had already been given the scale of Rs.2000-3200 on the basis of their seniority in the scale of Rs.1600-2660 (Grade III). Moreover, after a review of the procedure for promotions from Grade III to Grade IV, the Government issued a fresh circular dated 13.12.1995 saying that promotion to Grade-IV may be given from amongst officials in Grade-III on the basis of their seniority in the basic grade, subject to fitness determined by the DPC and subject to the ceiling of 10% of the posts in Grade-III (scale Rs.1600-2660) as provided in the BCR Scheme.

Subsequently, placing reliance on the order dated 07.07.1992 of the Tribunal in O.A.No. 1455 of 1991 as affirmed by this Court, the respondents filed O.As before the Tribunal contending that employees who were juniors to them in the basic grade but otherwise senior in Grade-III, had been given promotion to Grade-IV earlier to the dates when the respondents were given such promotion. The Tribunal allowed the O.As. and directed the Government to consider promoting them to Grade IV with effect from the dates their immediate juniors in the basic grade seniority were so promoted subject to their otherwise being found fit for promotion on such dates with consequential benefits including seniority and arrears of pay and allowances and retiral benefits in the

case of those who had retired on superannuation. The Government filed writ petitions in the High Court which held that the Tribunal, while allowing the applications, had directed the Government to follow its own circular dated 13.12.1995 and accordingly dismissed the writ petitions. Hence the instant appeals.

Allowing the appeals, the Court

HELD:1. It is clear from the directions in the aforesaid order dated 07.07.1992 in O.A. No. 1455 of 1991 that the Government was directed to consider only the applicants in the O.A. for promotion to 10% posts in the scale Rs.2000-3200 (Grade-IV) on the basis of seniority in the basic cadres from the due dates with consequential benefits. The respondents herein were not the applicants in O.A. No.1455 of 1991 and there was no direction to the Government to consider the respondents for promotion to Grade-IV scale on the basis of seniority in the basic cadre as per the BCR Scheme. Hence, the respondents were not entitled to claim any promotion to Grade-IV on the basis of their seniority in the basic grade on the basis of the order dated 07.07.1992 of the Tribunal in O.A. No.1455 of 1991 as affirmed by the order dated 09.09.1993 of this Court in Civil Appeal No.3201 of 1993. [Para 11] [394-C-F]

2. The Tribunal had not directed in its order dated 07.07.1992 in O.A. No.1455 of 1991 that the benefits of the order would also be extended to those who had not approached the Tribunal. The principle laid down in *K.I. Shephard's case* that it is not necessary for every person to approach the court for relief and it is the duty of the authority to extend the benefit of a concluded decision in all similar cases without driving every affected person to court to seek relief would apply only in the following circumstances: a) where the order is made in a petition filed in a representative capacity on behalf of all similarly

situated employees; b) where the relief granted by the court is a declaratory relief which is intended to apply to all employees in a particular category, irrespective of whether they are parties to the litigation or not; c) where an order or rule of general application to employees is quashed without any condition or reservation that the relief is restricted to the petitioners before the court; and d) where the court expressly directs that the relief granted should be extended to those who have not approached the court. Where only the affected parties approach the court and relief is given to those parties, the fence-sitters who did not approach the court cannot claim that such relief should have been extended to them thereby upsetting or interfering with the rights which had accrued to others. Since the respondents preferred to sleep over their rights and approached the Central Administrative Tribunal only in 1997, they cannot get the benefit of the order dated 07.07.1992 of the Tribunal in O.A. No.1455 of 1991 and will only be entitled to the benefit of the circular dated 13.12.1995 which was in force in 1997. [Paras 12, 13, 14] [395-C-H; 396-B-C; 397-D]

K.I. Shephard and others v. Union of India and others **(1987) 4 SCC 431 – held inapplicable.**

Jagdish Lal and others v. State of Haryana and others **(1997) 6 SCC 538 – relied on.**

Ajit Singh Januja v. State of Punjab **(1996) 2 SCC 715;** *Union of India v. Virpal Singh Chauhan* **(1995) 6 SCC 684;** *R.K. Sabharwal v. State of Punjab* **(1995) 2 SCC 745 – referred to.**

3. Further, it is clear from the circular dated 13.12.1995 of the Government that after the order dated 07.07.1992 of the Tribunal in OA. No.1455 of 1991 was affirmed by this Court in Civil Appeal No.3201 of 1993 on 09.09.1993, the Government undertook a review of the

existing procedure of promotion to Grade-IV and decided in supersession of earlier instructions that promotion to Grade-IV may be given from amongst officials in Grade-III on the basis of their seniority in the basic grade. The language of the circular dated 13.12.1995 makes it crystal clear that the Government took a fresh decision in supersession of earlier instructions that promotion to Grade-IV may be given from amongst officials in Grade-III on the basis of their seniority in the basic grade. Hence, the decision of the Government to make promotions to Grade-IV on the basis of their seniority in the basic grade could take effect only from 13.12.1995 and not from a prior date and the respondents could not claim any promotion to Grade-IV on the basis of their seniority in the basic cadre with effect from any date prior to 13.12.1995. The Tribunal was, therefore, not right in allowing O.As, directing the Government to consider promoting the applicants to Grade-IV with effect from the dates their immediate juniors in the basic grade seniority were so promoted subject to their being found fit with consequential benefits of seniority as well as arrears of pay and allowance and of retiral benefits in the case of those of the applicants in the O.As. who had retired on superannuation. The High Court ought to have interfered with the decision of the Tribunal. [Paras 16, 17] [398-D-E-G-H; 399-A-D]

Case Law Reference:

(1987) 4 SCC 431	**held inapplicable**	**Para 10, 12, 13**
(1997) 6 SCC 538	**relied on**	**Para 14**
(1996) 2 SCC 715	**referred to**	**Para 14**
(1995) 6 SCC 684	**referred to**	**Para 14**

(1995) 2 SCC 745 referred to Para 14

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4369 of 2006.

From the Judgment & Order dated 22.5.2003 of the High Court of Delhi at New Delhi in C.W. No. 4555 of 2002.

WITH

C.A. No. 4370 of 2006.

R.D. Agrawala, S.R. Singh, Pavan Kumar, Prithvi Pal, Abhisth Kumar, Archana Singh, Pankaj Sharma, Sudershan Rajan, P. Narasimhan, Debasis Mukerjee, Neeraj Kr. Sharma, Vivek Sharma, Surya Kant, Rameshwar Prasad Goyal, T.N. Bhat, Pankaj Gupta, Manoj K. Mishra, Pramod Kumar Yadav, S. Talukedar for the appearing parties.

The Judgment of the Court was delivered by

A. K. PATNAIK, J. 1. These two appeals are against two separate but identical orders passed by a Division Bench of the High Court of Delhi on 22.05.2003 in C.W. No.4555 of 2002 and C.W. No.4556 of 2002.

2. The facts very briefly are that in the Department of Telecommunications of the Government of India there are four Grades of employees and these are:

Basic Grade [Telegraph Assistant / Telegraphist] = Pay Scale Rs.975-1660.

Grade II [Section Supervisor / Telegraph Master] = Pay Scale Rs.1400-2300.

Grade III [Senior Section Supervisor] = Pay Scale Rs.1600-2660.

Grade IV [Chief Section Supervisor] = Pay Scale Rs.2000-3200.

3. Initially, promotions from one Grade to the higher grade were made on the basis of seniority to the 2/3rd of the posts and on the basis of departmental examination to the 1/3rd of the posts. With effect from 30.11.1983, the Government of India, Ministry of Communications, Department of Telecommunications (for short 'the Government') introduced One Time Bound Promotion Scheme under which regular employees, who had completed sixteen years of service in a grade, were placed in the next higher grade. Thereafter, by a circular dated 16.10.1990 the Government introduced a new Scheme known as 'Biennial Cadre Review' (for short 'the BCR Scheme'). Under the BCR Scheme, those employees, who were on regular service as on 01.01.1990 and had completed 26 years of satisfactory service in the basic grades, were to be screened by a duly constituted Committee to assess their performance and determine their suitability for advancement and if they were found suitable they were to be upgraded in the higher scale. The circular dated 16.10.1990, however, limited such upgradation to 10% of the posts in the lower pay-scale and the review of the cadres for the purpose of such upgradation was to take place once in two years. The Government then issued clarifications on some points in its letter dated 11.03.1991 on the BCR Scheme. Point No.10 and the clarification thereon in the letter dated 11.03.1991 are quoted hereunder:-

"Point raised by the field unit Clarification

"10. Whether Officers already having pay scale of Rs.1600-2600 will rank senior to Officials in the scale of Rs.1400-2300 for the 10% quota (Rs.2000-3200)

The seniority of officials is to be maintained with reference to the basic cadres and functional promotional posts they hold and not merely with reference to the pay scales."

4. Some officers of Grade III who were senior in the basic grade but had lost their seniority in Grade III because of their later promotions and who were not considered for upgradation to Grade IV under the BCR Scheme, namely, Smt. Santosh Kapoor and others, filed O.A. No.1455 of 1991 before the Central Administrative Tribunal, New Delhi, contending on the basis of clarification on Point No.10 made in the letter dated 11.0.3.1991 that under the BCR Scheme, seniority in the basic grade was to be counted for the purpose of upgradation on completion of 26 years of service and this contention was resisted by the Government and other respondents in the O.A. and the Tribunal in its order dated 07.07.1992 directed that promotions of 10% posts in the scale of Rs.2000-3200 (Grade IV) would have to be based on seniority in the basic grade subject to fulfillment of other conditions in the BCR Scheme and further directed the Government to consider the applicants in the O.A. from due dates with consequential benefits. In the order dated 07.07.1992, the Tribunal, however, observed that employees who may be senior to the applicants in the O.A. in the scale of Rs.1600-2660 (Grade III) and who may have already been given the scale of Rs.2000-3200 (Grade IV) at the cost of those who were senior in the basic grades by any different interpretation of the BCR Scheme, may in the discretion of the Government instead of being reverted, be considered for promotion to scale of Rs.2000-3200 (Grade IV) by suitable adjustments in the number of posts by upgradation as necessary. The Government challenged the order dated 07.07.1992 of the Tribunal in Civil Appeal No.3201 of 1993 but by order dated 09.09.1993 this Court held that the direction by the Tribunal cannot be faulted and accordingly dismissed the appeal.

5. Pursuant to the order dated 07.07.1992 of the Tribunal in O.A. No.1455 of 1991 as affirmed by this Court in Civil Appeal No.3201 of 1993, supernumerary posts were created in the scale of Rs.2000-3200 (Grade IV) to adjust the employees who had already been given the scale of Rs.2000-

3200 on the basis of their seniority in the scale of Rs.1600-2660 (Grade III). Moreover, after a review of the procedure for promotions from Grade III to Grade IV, the Government issued a fresh circular dated 13.12.1995 saying that promotion to Grade-IV may be given from amongst officials in Grade-III on the basis of their seniority in the basic grade, subject to fitness determined by the DPC and subject to the ceiling of 10% of the posts in Grade-III (scale Rs.1600-2660) as provided in the BCR Scheme.

6. The respondents in C.A. No.4369 of 2006 Shri Ghanshyam Dass and others filed O.A. No.2484 of 1997 and the respondents in C.A. No.4370 of 2006 Shri Chiddu Singh and others filed O.A. No.2099 of 1997 before the Central Administrative Tribunal contending that employees who were juniors to them in the basic grade but otherwise senior in Grade-III, had been given promotion to Grade-IV earlier to the dates when the respondents were given such promotion and by a common order dated 11.08.2000 the Tribunal allowed the O.As. and directed the Government to consider promoting them to Grade IV with effect from the dates their immediate juniors in the basic grade seniority were so promoted subject to their otherwise being found fit for promotion on such dates with consequential benefits including seniority and arrears of pay and allowances and retiral benefits in the case of those who had retired on superannuation. The Government filed writ petitions C.W. No.4555 of 2000 and C.W. No.4556 of 2000 in the High Court of Delhi, but by the two separate impugned orders the High Court found that the Tribunal, while allowing the applications, had directed the Government to follow its own circular dated 13.12.1995 which had been issued pursuant to the order of the Tribunal dated 07.07.1992 in O.A. No.1455 of 1991 which had attained finality after dismissal of the appeals by this Court and accordingly dismissed the two writ petitions.

7. When these two Civil Appeals were heard by a two Judge Bench of this Court on 14.03.2007, they were of the view

that the matter should be referred to a larger Bench for the reasons stated in the order dated 14.03.2007, which are quoted hereinunder:

> "…….. The question is that on what basis the promotion is to be given. In normal course of business a person in Grade-I is to be promoted on the basis of seniority from Grade I to Grade II and likewise from Grade II to Grade III and from Grade III to Grade IV. But because of a clarification issued by the Department dated 3.4.1991, the basic Grade seniority should be taken into consideration for promotion and not the pay-scales. If this is to be taken, then this will mean that a person who is in Grade I and has put in 26 years of service on 1.1.1990 will be entitled for promotion from Grade I to Grade IV. Therefore, the concept of basic cadre has to be interpreted with reference to the seniority in each Grade. But on account of the order passed by the CAT which has been affirmed by this Court on 9.9.1993 in Civil Appeal No.3201 of 1993 this anomalous situation has been created. Therefore, in our view, it is appropriate if this matter is referred to a larger Bench so that the controversy involved in the matter can be resolved. ….."

Thus, the learned Judges were of the view that on account of the order passed by Central Administrative Tribunal in O.A. No. 1455 of 1991 which had been affirmed by this Court on 09.09.1993 in C.A. No. No.3201 of 1993 an anomalous situation has been created inasmuch as a person who is in Grade I and had put in 26 years of service would be entitled for promotion from Grade I to Grade IV. They were of the view that the concept of basic cadre has to be interpreted with reference to the seniority in each grade.

8. In the course of hearing before us, however, it has been brought to our notice by learned counsel for the parties that the controversy before us is confined to promotions of only employees from Grade-III to Grade-IV and not of employees

working in either Grade-I or Grade-II. This will be clear from the order dated 07.07.1992 of the Central Administrative Tribunal in O.A. No.1455 of 1991 [*Smt. Santosh Kapoor and others v. Union of India and others*] in which the Tribunal has directed that promotions to 10% posts in Grade-IV (Pay Scale 2000-3200) would have to be based on seniority in basic cadres subject to fulfillment of other conditions in the BCR Scheme and it is this order of the Tribunal which was affirmed by this Court in the order dated 09.09.1993 in Civil Appeal No.3201 of 1993. This will also be clear from the fresh circular dated 13.12.1995 which was confined to promotions from Grade III to Grade IV under the BCR Scheme. Hence, the question of an employee of the basic Grade (Grade-I) being promoted to Grade-IV directly does not arise in the appeals before us.

9. Coming now to the merits of the two appeals before us, Mr. R.D. Agrawala, learned counsel for the appellants, submitted that the Central Administrative Tribunal allowed the claims of the respondents on the ground that in the basic grade they were senior to some employees who had already been promoted to Grade-IV and this was clearly contrary to the fresh circular dated 13.12.1995 of the Government according to which promotions to Grade-IV may be given from amongst officials in Grade-III on the basis of their seniority in the basic grade. He submitted that the Tribunal in its common order in the two O.As. has given the illustrative example of Lakhpat Rai Gumbar who was at serial No.73 of the seniority list in the basic cadre while the respondents Ghanshyam Dass and Shyamlal Sachdeva, who were applicants in O.A. No. 2484 of 1997, were placed above him in the seniority list of the basic cadre at serial Nos.69 and 70 and yet Lakhpat Rai Gumbar had been promoted to Grade-IV by order dated 08.01.1993 while the said two Ghanshayam Dass and Shyamlal Sachdeva had been promoted to Grade-IV with effect from 01.01.1997 and 01.07.1997 respectively. Mr. Agrawala submitted that the Tribunal failed to appreciate that Lakhpat Rai Gumbar had been promoted from Grade-III to Grade-IV with effect from 08.01.1993 pursuant to the order

dated 07.07.1992 of the Central Administrative Tribunal in O.A. No.1455 of 1991 in which the Tribunal had allowed the Government to create supernumerary posts for promotion to Grade-IV for those employees who were senior to the applicants in the O.A. in the scale of Rs.1600-2600 (Grade III) and who had been given the scale of Rs.2000-3200 (Grade IV) at the cost of those who were senior in the basic grades by a different interpretation of the BCR Scheme. He further submitted that the Tribunal also failed to appreciate that the fresh circular dated 13.12.1995 of the Government could have only prospective effect and could govern only promotions made after 13.12.1995 and in fact Ghanshyam Dass and Shyamlal Sachdeva, the two applicants in O.A. No. 2484 of 1997, and many other employees had been promoted from Grade-III to Grade-IV on the basis of seniority in the basic cadre after the fresh circular dated 13.12.1995. He submitted that the High Court has lost sight of all these aspects and has affirmed the order of the Tribunal in the two O.As. erroneously.

10. Mr. Sudarshan Rajan, learned counsel appearing for the respondents, in reply, submitted that the consolidated list of promotions under the BCR Scheme (Annexure P/1 in C.A.No.4370 of 2006) would show that Ghanshyam Dass was at serial No.69 and Shyamlal Sachdeva was at serial No.70, whereas Lakhpat Rai Gumbar was at serial No.73 in the seniority list of the basic grade. He submitted that since the Central Administrative Tribunal in its order dated 07.07.1992 in O.A. No.1455 of 1991 has held that promotions to 10% posts in Grade-IV would have to be based on seniority in the basic Cadre, Ghanshyam Dass and Shyamlal Sachdeva ought to have been promoted before Lakhpat Rai Gumbar but the chart at page 34A in C.A. No.4370 of 2006 would show that Lakhpat Rai Gumbar was promoted on 08.01.1993 whereas Ghanshyam Dass and Shyamlal Sachdeva were promoted much later on 01.01.1997 and 01.07.1997 respectively. He vehemently submitted that Ghanshyam Dass and Shyamlal Sachdeva and all other respondents have to be given the

benefit of the order dated 07.07.1992 of the Tribunal in O.A. No.1455 of 1991 as affirmed by this Court, even though they were not parties in the aforesaid O.A. before the Tribunal or before this Court. He cited the decision in *K.I. Shephard and others v. Union of India and others* [(1987) 4 SCC 431] in which this Court held that employees who had not come to the Court should not be penalized for not having litigated and would be entitled to the same benefits as the petitioners in that case. Mr. Rajan further submitted that the Central Administrative Tribunal in its order dated 07.07.1992 in O.A. No.1455 of 1991 had only observed that employees who may be senior to the applicants in the O.A. in the scale Rs.1600-2600 and which may have been given the scale of Rs.2000-3200 at the cost of those senior in the basic grades may be 'considered for promotion' and the Tribunal had not given any direction to promote all such employees such as Lakhpat Rai Gumbar. He submitted that the clarification on Point No.6 in the letter dated 11.03.1991 of the Government on the BCR Scheme was that the selection for promotion from Grade-III to Grade-IV was to be based on merit and not simply fitness and, therefore, Lakhpat Rai Gumbar and others could not have been promoted to supernumerary posts without a proper selection on merit pursuant to the order dated 07.07.1992 of the Tribunal in O.A. No.1455 of 1991.

11. We have considered the submissions of learned counsel for the parties. The order dated 07.07.1992 of the Central Administrative Tribunal in O.A. No.1455 of 1991 (*Smt. Santosh Kapoor and Others v. Union of India & Ors*.), contained the following directions:

> "In the above view of the matter, we direct that the promotions to 10% posts in scale 2000-3200 would have to be based on seniority in basic cadres subject to fulfillment of other conditions in the BCR Scheme viz. those who were regular employees as on 1.1.1990 and had completed 26 years of service in basic grades (including higher scales). The respondents are directed to consider applicants accordingly from due dates with consequential benefits. The employees who may be senior to applicants in the scale of Rs.1600-2660 and who may have already been given the scale of Rs.2000-3200 at the cost of those senior in basic grades by any different interpretation of the BCR Scheme, may in the discretion of the respondents, instead of being reverted, be considered for promotion to scale of Rs.2000-3500 by suitable adjustments in the matter of posts by upgradation as necessary."

It will be clear from the directions in the aforesaid order dated 07.07.1992 in O.A. No.1455 of 1991 that the Government was directed to consider only the applicants in the O.A. for promotion to 10% posts in the scale Rs.2000-3200 (Grade-IV) on the basis of seniority in the basic cadres from the due dates with consequential benefits. The respondents in the two Civil Appeals before us were not the applicants in O.A. No.1455 of 1991 and there was no direction to the Government to consider the respondents in the two appeals for promotion to Grade-IV scale on the basis of seniority in the basic cadre as per the BCR Scheme. Hence, the respondents were not entitled to claim any promotion to Grade-IV on the basis of their seniority in the basic grade on the basis of the order dated 07.07.1992 of the Tribunal in O.A. No.1455 of 1991 as affirmed by the order dated 09.09.1993 of this Court in Civil Appeal No.3201 of 1993.

12. In *K.I. Shephard* (supra) relied upon by the learned counsel for the respondents, this Court directed that each of the transferee banks should take over the employees who had been excluded from employment under the amalgamation schemes of the banks on the same terms and conditions of employment under the respective banking companies prior to amalgamation and further directed that such employees, who were taken over, would be entitled to the benefit of continuity of service for all purposes including salary and perks. This Court further found that some of the excluded employees had

not come to Court and held that there was no justification to penalize them for not having litigated and that they too shall be entitled to the same benefits as the petitioners in that case. There was, therefore, a clear direction in the judgment of this Court in *K.I. Shephard* (supra) that the excluded employees, who had not approached the Court, shall also be entitled to the same benefits as the petitioners in that case were entitled under the judgment of this Court. In the present case, as we have seen, the Central Administrative Tribunal has not directed in its order dated 07.07.1992 in O.A. No.1455 of 1991 that the benefits of the order would also be extended to those who had not approached the Tribunal.

13. The principle laid down in *K.I. Shephard* (supra) that it is not necessary for every person to approach the court for relief and it is the duty of the authority to extend the benefit of a concluded decision in all similar cases without driving every affected person to court to seek relief would apply only in the following circumstances:

(a) where the order is made in a petition filed in a representative capacity on behalf of all similarly situated employees;

(b) where the relief granted by the court is a declaratory relief which is intended to apply to all employees in a particular category, irrespective of whether they are parties to the litigation or not;

(c) where an order or rule of general application to employees is quashed without any condition or reservation that the relief is restricted to the petitioners before the court; and

(d) where the court expressly directs that the relief granted should be extended to those who have not approached the court.

14. On the other hand, where only the affected parties approach the court and relief is given to those parties, the fence-sitters who did not approach the court cannot claim that such relief should have been extended to them thereby upsetting or interfering with the rights which had accrued to others. In *Jagdish Lal and others v. State of Haryana and others* [(1997) 6 SCC 538], the appellants who were general candidates belatedly challenged the promotion of Scheduled Caste and Scheduled Tribe candidates on the basis of the decisions in *Ajit Singh Januja v. State of Punjab* [(1996) 2 SCC 715], *Union of India v. Virpal Singh Chauhan* [(1995) 6 SCC 684] and *R.K. Sabharwal v. State of Punjab* [(1995) 2 SCC 745] and this Court refused to grant the relief saying:

> "….this Court has repeatedly held, the delay disentitles the party to the discretionary relief under Article 226 or Article 32 of the Constitution. It is not necessary to reiterate all the catena of precedents in this behalf. Suffice it to state that the appellants kept sleeping over their rights for long and elected to wake up when they had the impetus from *Virpal Chauhan* and *Ajit Singh* ratios. But *Virpal Chauhan* and *Sabharwal* cases, kept at rest the promotion already made by that date, and declared them as valid; they were limited to the question of future promotions given by applying the rule of reservation to all the persons prior to the date of judgment in *Sabharwal case* which required to be examined in the light of the law laid in *Sabharwal case*. Thus earlier promotions cannot be reopened. Only those cases arising after that date would be examined in the light of the law laid down in *Sabharwal case* and *Virpal Chauhan case* and equally *Ajit Singh case*. If the candidate has already been further promoted to the higher echelons of service, his seniority is not open to be reviewed. In *A.B.S. Karamchari Sangh case* a Bench of two Judges to which two of us, K. Ramaswamy and G.B. Pattanaik, JJ. were members, had reiterated the above view and it was also held that all the prior promotions are

not open to judicial review. In *Chander Pal* v. *State of Haryana* a Bench of two Judges consisting of S.C. Agrawal and G.T. Nanavati, JJ. considered the effect of *Virpal Chauhan, Ajit Singh, Sabharwal* and *A.B.S. Karamchari Sangh cases* and held that the seniority of those respondents who had already retired or had been promoted to higher posts could not be disturbed. The seniority of the petitioner therein and the respondents who were holding the post in the same level or in the same cadre would be adjusted keeping in view the ratio in *Virpal Chauhan* and *Ajit Singh*; but promotion, if any, had been given to any of them during the pendency of this writ petition was directed not to be disturbed…."

Since the respondents preferred to sleep over their rights and approached the Central Administrative Tribunal only in 1997, they cannot get the benefit of the order dated 07.07.1992 of the Tribunal in O.A. No.1455 of 1991 and will only be entitled to the benefit of the circular dated 13.12.1995 which was in force in 1997.

15. We also find on a reading of paragraph 8 of the order dated 07.07.1992 of the Central Administrative Tribunal in O.A. No.1455 of 1991 that the Tribunal gave liberty to the Government to consider employees who were senior to the applicants in that case in a scale of Rs.1600-2660 (Grade-III) and who may have already been given the scale of Rs.2000-3200 (Grade-IV) at the cost of those senior in the basic grades by any different interpretation of the BCR Scheme then one given by the Tribunal by suitable adjustments in the number of posts by upgradation as necessary. It appears that pursuant to this liberty granted to the Government, Lakhpat Rai Gumbar had been promoted to Grade-IV scale w.e.f. 08.01.1993 because of his seniority in Grade-III scale over two the respondents in the Civil Appeal No.4369 of 2006, Ghanshyam Dass and others and Shyamlal Sachdeva, even though he was junior to these officers in the basic grade. Hence, Lakhpat Rai

Gumber was promoted to one of the posts in Grade-IV created by the Government for the specific purpose of protecting promotions done on a different interpretation of the BCR Scheme by the Government as allowed by the Tribunal in the order dated 07.07.1992 in O.A. No.1455 of 1991 and the respondents in these appeals can have no claim of promotion to these supernumerary posts. Moreover, if the respondents were in any way aggrieved by the promotion of Lakhpat Rai Gumber and others who were junior to them in the basic grade, they could have challenged their promotion in the appropriate forum, but they have not done so.

16. We further find on a reading of the circular dated 13.12.1995 of the Government that after the order dated 07.07.1992 of the Tribunal in OA. No.1455 of 1991 was affirmed by this Court in Civil Appeal No.3201 of 1993 on 09.09.1993 the Government undertook a review of the existing procedure of promotion to Grade-IV and decided in supersession of earlier instructions that promotion to Grade-IV may be given from amongst officials in Grade-III on the basis of their seniority in the basic grade. This would be clear from the relevant portion of the circular dated 13.12.1995 extracted below:

"Review of the existing procedure of promotion to Grade-IV (now designated as Chief Section Supervisor) under the BCR Scheme has been under consideration in view of the judgment of Principal Bench, New Delhi upheld by the Supreme Court. It has now been decided in supersession of earlier instructions that promotion to the said Grade-IV may be given from amongst officials in Grade-III on the basis of their seniority in the basic grade. ……"

17. The language of the circular dated 13.12.1995 makes it crystal clear that the Government took a fresh decision in supersession of earlier instructions that promotion to Grade-IV may be given from amongst officials in Grade-III on the basis of their seniority in the basic grade. Hence, the decision of the

Government to make promotions to Grade-IV on the basis of their seniority in the basic grade could take effect only from 13.12.1995 and not from a prior date and the respondents, who had filed O.A. No.2484 of 1997 and O.A. No.2099 of 1997 in the Central Administrative Tribunal could not claim any promotion to Grade-IV on the basis of their seniority in the basic cadre with effect from any date prior to 13.12.1995. The Central Administrative Tribunal was, therefore, not right in allowing O.A. No.2484 of 1997 and O.A. No.2099 of 1997 by order dated 11.08.2000, directing the Government to consider promoting the applicants to Grade-IV with effect from the dates their immediate juniors in the basic grade seniority were so promoted subject to their being found fit with consequential benefits of seniority as well as arrears of pay and allowance and of retiral benefits in the case of those of the applicants in the O.As. who had retired on superannuation. In our considered opinion, the High Court ought to have interfered with the decision of the Tribunal.

18. We accordingly allow these appeals and set aside the impugned orders dated 22.05.2003 of the High Court and the common order dated 11.08.2000 of the Central Administrative Tribunal in O.A. No. 2484 of 1997 and O.A. No.2099 of 1997. The two O.As. stand rejected. There will be no order as to costs.

B.B.B. Appeals allowed.

RAVI

v.

BADRINARAYAN AND ORS.

(Civil Appeal No. 1926 of 2011)

FEBRUARY 18, 2011

[DALVEER BHANDARI AND DEEPAK VERMA, JJ.]

Motor Vehicles Act, 1988 – ss.140 and 166:

Motor accident – Compensation claim – Whether delay in lodging FIR of the accident can prove fatal so as to result into dismissal of the claim petition filed by the claimant – Held: Although lodging of FIR is vital in deciding motor accident claim cases, delay in lodging the same should not be treated as fatal for such proceedings, if claimant is able to demonstrate satisfactory and cogent reasons for it – There could be variety of reasons in genuine cases for delayed lodgment of FIR – In cases of delay, the courts are required to examine the evidence with a closer scrutiny and in doing so; the contents of the FIR should also be scrutinized more carefully – If court finds that there is no indication of fabrication or it has not been concocted or engineered to implicate innocent persons then, even if there is a delay in lodging the FIR, the claim case cannot be dismissed merely on that ground – In the present case, it was amply proved that the truck owned by respondent no.2 and driven by respondent no.1 was involved in the road accident, which had caused injuries to the appellant – No doubt, there was delay in lodging the FIR but the same was explained by the appellant's father – The explanation offered by him was not only satisfactory; it inspired confidence as cogent and valid reasons were assigned therein – Further, a consistent stand was taken by appellant's father right from the beginning till the lodging of the F.I.R. – Under the circumstances, it cannot be said that delay in lodging the FIR was fatal to the claim case filed by

the appellant – FIR.

Motor accident – Adequate and proper compensation – Appellant, a minor boy aged 8 years, hit by a moving truck – He sustained permanent disability to the extent of 50% and even after several surgeries not able to control his urination – Appellant now aged about 16 years but still prosecuting his studies in class V only – Held: Apparently, on account of nature of injuries sustained by the appellant, he was unable to prosecute his studies in right earnest and lagged behind in the same – In a case where injury sustained by victim is of permanent nature, he suffers much more than the person who succumbs to the injury – In the present case, the appellant has to suffer throughout his life; thus the compensation should not only be adequate but proper also – Looking into the nature of injuries suffered by appellant which are permanent in nature, and in the interest of justice, appellant granted compensation of Rs.2.5 lakhs, payable by the respondents, jointly and severally – Said amount to carry interest @ 6% p.a. from the date of filing of claim petition till the same is actually paid.

Appellant, a minor boy aged 8 years, suffered grievous injuries after being allegedly hit by a truck driven by respondent no.1. The truck in question was owned by respondent no.2 and insured with respondent no.3. The appellant's father lodged formal FIR almost 3 months after the date of the incident. The appellant filed claim petition (through his father) under ss.140 and 166 of the Motor Vehicles Act, 1988, which was dismissed, primarily on the ground that formal FIR of the incident was lodged belatedly and that the appellant failed to establish that on the fateful day, the said truck was involved in a motor road accident causing injuries to him. The order was upheld by the High Court.

In the instant appeal, the questions arising for consideration of the Court were: 1) whether delay in

lodging FIR of the accident proved fatal so as to result into dismissal of the claim petition filed by the appellant and 2) whether the truck driven by respondent no.1 and owned by respondent no.2 was involved in the accident and if so, to what extent the victim-appellant could be compensated.

Allowing the appeal, the Court

HELD:1.1. On the fateful day, the appellant was attending to his call of nature, just in front of his house when respondent no.1 was reversing a truck. Since there was no conductor, probably, respondent no.1 was not able to notice that the appellant was sitting on the side of the road, thus while reversing the vehicle rashly and negligently, it hit him from behind. The said accident was witnessed by AW1, the father of the appellant and AW2. Soon after the accident, both of them took the appellant to the hospital for treatment. Thus, they were not in a position to lodge the FIR immediately. Even though police had come to the hospital to record FIR but it could not be recorded on account of mental agony and stress through which AW 1 was passing. Obviously at that point of time, he was more concerned to get the medical treatment for his son rather than lodging FIR. Being a common man, oblivious of the niceties of law, he did not deem it necessary to lodge the FIR immediately. [Para 5] [408-F-H; 409-A-B]

1.2. Critical perusal of the formal FIR lodged by the appellant's father shows that he had given the exact and vivid description of the accident and the injuries sustained by his son in the said accident. He further disclosed therein that since 7.10.2001, his son was time and again admitted in the Hospital and was undergoing treatment, he could not lodge the FIR immediately. He further mentioned that police had come to the Hospital next day to record the FIR and complete other formalities,

but everyone present there suggested that since Respondent no.1 was the neighbour of the appellant, it was not desirable to lodge an FIR and instead the matter of compensation could be sorted out in an amicable manner amongst themselves. In view of this, FIR was not lodged immediately or soon after the accident. Secondly, the appellant was still in Hospital undergoing treatment, attending to which was more important for him than lodging the FIR. Hence, there was delay in lodging the FIR. [Para 11 & 12] [410-E-H; 411-A]

1.3. In response to the notice issued under Section 133 of M.V. Act, Respondent No.2 categorically admitted that his vehicle had met with an accident on 7.10.2001 and he was intimated about the same on phone the very same day. Thus, on this admission, it is clearly made out that the vehicle in question was involved in the accident, causing physical injuries to the appellant. On 7.10.2001, the appellant was admitted in the hospital, his injury report form was also filled up by the attending doctors, which bears the signature of the appellant's father. It is clearly mentioned therein that the cause of injury was road transport accident at about 9.00 a.m. on 7.10.2001, near his house. [Paras 13, 14] [411-B-D]

1.4. Under the aforesaid facts and circumstances, it is amply proved that the aforesaid truck was involved in the road accident, which had caused injuries to the appellant. No doubt, it is true that there has been delay in lodging the FIR but the same has already been explained by the appellant's father. The explanation offered by him is not only satisfactory; it inspires confidence as cogent and valid reasons have been assigned therein. Not only this, a consistent stand has been taken by the appellant's father right from the beginning till the lodging of the F.I.R. [Para 16] [411-F-H]

1.5. The cumulative effect of the events clearly

established that accident had taken place on 7.10.2001 at about 8.30 in the morning on account of rash and negligent reversing of the truck by driver respondent no.1, owned by Respondent No.2. Under these circumstances, it cannot be said that delay in lodging the FIR could have proved fatal to the claim case filed by the appellant. The events show the *bona fides* of the appellant's father. A consistent stand has been taken by him right from the beginning till the lodging of the FIR. The chronological events inspire confidence and it does not smack of a concocted case which has been filed against the driver and the owner of the vehicle only with an intention to get compensation. [Paras 18, 19] [412-G-H; 413-A-B]

1.6. It is well-settled that delay in lodging FIR cannot be a ground to doubt the claimant's case. Knowing the Indian conditions as they are, one cannot expect a common man to first rush to the Police Station immediately after an accident. Human nature and family responsibilities occupy the mind of kith and kin to such an extent that they give more importance to get the victim treated rather than to rush to the Police Station. Under such circumstances, they are not expected to act mechanically with promptitude in lodging the FIR with the Police. Delay in lodging the FIR thus, cannot be the ground to deny justice to the victim. In cases of delay, the courts are required to examine the evidence with a closer scrutiny and in doing so; the contents of the FIR should also be scrutinized more carefully. If court finds that there is no indication of fabrication or it has not been concocted or engineered to implicate innocent persons then, even if there is a delay in lodging the FIR, the claim case cannot be dismissed merely on that ground. [Para 20] [413-C-E]

1.7. The purpose of lodging the FIR in such type of cases is primarily to intimate the police to initiate

investigation of criminal offences. Lodging of FIR certainly proves factum of accident so that the victim is able to lodge a case for compensation but delay in doing so cannot be the main ground for rejecting the claim petition. In other words, although lodging of FIR is vital in deciding motor accident claim cases, delay in lodging the same should not be treated as fatal for such proceedings, if claimant has been able to demonstrate satisfactory and cogent reasons for it. There could be variety of reasons in genuine cases for delayed lodgment of FIR. Unless kith and kin of the victim are able to regain a certain level of tranquility of mind and are composed to lodge it, even if, there is delay, the same deserves to be condoned. In such circumstances, the authenticity of the FIR assumes much more significance than delay in lodging thereof supported by cogent reasons. [Para 21] [413-F-H; 414-A-B]

1.8. In the case in hand, the Claims Tribunal as well as the High Court, committed grave error in not appreciating the mental agony through which the appellant's father was passing, whose son was severely injured. The Claims Tribunal as well as the High Court committed error in coming to the conclusion that lodging the FIR belatedly would result in dismissal of the claim petition. [Paras 22, 23] [414-C-D]

2.1. Record shows that victim is now aged about 16 years but is still prosecuting his studies in class V only. Apparently, on account of nature of injuries sustained by him, he was unable to prosecute his studies in right earnest and lagged behind in the same. Medical Board Certificate issued by Government R.D.B.P. Jaipuria Hospital, Jaipur dated 17.12.2004 shows that he has suffered a number of grievous injuries and was admitted as many as on four occasions in the hospital. [Para 24] [414-E-F]

2.2. In a case where injury sustained by victim is of permanent nature, he suffers much more than the person who succumbs to the injury. In such cases, the injured has to carry on the burden of permanent disability throughout his life, which is certainly much more painful to the victim. In the present case, the appellant had suffered an injury of permanent nature as a result of which he is not able to control his urine. He has to suffer with it throughout his life; thus the compensation should not only be adequate but proper also. [Para 25] [414-H; 415-A-B]

2.3. On account of aforesaid injury, his permanent physical disability has been assessed at 50%. This report of the experts further shows that he is unable to control urine and suffers from continence disability which could not be cured even after surgical operation and frequent dilatation still takes place. He has also been accordingly issued a permanent disability certificate by the said Medical Board. Therefore, the said certificate clearly establishes that Appellant had sustained permanent disability to his own body to the extent of 50% and even after several surgeries; he was not able to control his urination. One can well appreciate and imagine the problems and difficulties of a young boy aged 16 years, who is not able to control his urination and spoils his clothes even while attending school. This Court has been given to understand that he is required to go with additional sets of clothings so that he could change the same, in case they are spoiled. This is the state of affairs even as on date. The genuineness and correctness of the aforesaid certificate is not doubtful. Even otherwise, Respondents have also not contended that this certificate is forged or fabricated and has been obtained with an intention to get compensation. [Paras 26, 27] [415-B-F]

2.4. Looking into the matter from all angles, it is

clearly established that in the said accident, the appellant had suffered severe injuries of permanent nature which have not been cured till date despite several surgeries. Looking into the nature of injuries which are permanent in nature, this Court is of the opinion that a total amount of Rs. 2,50,000 (Rs. 2.5 Lakhs) to be awarded to the appellant payable by Respondents jointly and severally, would meet the ends of justice. The aforesaid amount would also carry interest @ 6% p.a. from the date of filing of petition till the same is actually paid. As a result thereof, award of the Claims Tribunal and judgment and order of the High Court are hereby set aside and quashed, instead the appellant's claim petition is allowed. [Para 28] [415-G-H; 416-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1926 of 2011.

From the Judgment & Order dated 29.10.2007 of the High Court of Judicature for Rajasthan Bench at Jaipur in S.B. Civil Misc. Appeal No. 3927 of 2007.

Shobha, Mohinder Pal Thakur, Ridhima Garg for the Appellant.

Pankaj Bala Verma (for Dharma Bir Raj Vohra) for the Respondents.

The Judgment of the Court was delivered by

DEEPAK VERMA, J. 1. Leave granted.

2. Cruel hands of destiny played havoc with the life of Ravi, then aged 8 years, on account of motor road accident, on 7.10.2001 at about 8.30 AM, when rear side of truck bearing Registration No. RJP - 1008, driven by Respondent No. 1 - Badrinarayan, owned by Respondent No. 2 - Prahlad Singh and insured with Respondent No. 3 – M/s. National Insurance Company Limited, hit the victim, causing multiple injuries to him.

To add to his miseries, his claim petition filed under Section 140 and 166 of the Motor Vehicles Act, 1988 (hereinafter shall be referred to as 'M.V. Act') before Motor Accident Claims Tribunal, Jaipur (for short, 'MACT'), registered as Claim Petition No. 865 of 2004, came to be dismissed on 19.9.2007 by learned Presiding Judge of the said Tribunal, mainly on the ground that formal FIR of the incident was lodged belatedly and Appellant failed to establish that on the fateful day, the said truck was involved in a motor road accident causing injuries to him.

3. An appeal filed before the learned Single Judge of the High Court of Judicature for Rajasthan, Jaipur under Section 173 of the M.V. Act also came to be dismissed on 29.10.2007. Thus, all hopes of, at least, getting some amount of compensation to mitigate the miseries of the victim so as to lead a respectful and decent life had come to a grinding halt. It is under these circumstances, he has preferred the present appeal.

4. The question which arises for our consideration in this Appeal is as to whether delay in lodging the FIR of the accident could prove fatal so as to result into dismissal of the Claim Petition filed by the claimant?

5. Facts shorn of unnecessary details are as under:-

On 7.10.2001, at about 8.30 AM, Ravi was attending to his call of nature, just in front of his house. There appears to be a 20' wide *kutcha* road in front of the said house. At that time, Respondent No. 1, Badrinarayan, was reversing truck bearing Registration No. RJP - 1008. Since there was no conductor, probably, he was not able to notice that Ravi was sitting on the side of the road, thus while reversing the vehicle rashly and negligently, it hit him from behind. The said accident was witnessed by AW 1 - Suresh Kumar, father of the victim and AW 2, Hari Narayan. Soon after the accident, both of them took Ravi to the hospital for treatment. Thus, they were not in a position to lodge the FIR immediately. Even though police had

come to the hospital to record FIR but it could not be recorded on account of mental agony and stress through which AW 1 - Suresh Kumar was passing. Obviously at that point of time, he was more concerned to get the medical treatment for his son rather than lodging FIR. Being a common man, oblivious of the niceties of law, he did not deem it necessary to lodge the FIR immediately. Statements of Hari Narayan, Suresh Kumar, Asif Khan and Ravi were recorded under Section 161 CrPC. On notice being issued under Section 133 of the M.V. Act, the owner of the vehicle submitted the following reply :

> "It is submitted that as per the registration I am owner of truck no. RJP- 1008. On 7.10.2001 and at the time of the accident, my truck was being driven by the driver Badri Narayan S/o sh. Ram Nath Cast, Brahmin, Age 45 years R/o Purana Ghat, opposite Khaniya Dayal Hospital, Police Station – Transport Nagar, Jaipur. I was informed about the said accident on phone on the very same day.
>
> Sd/- (Prahlad Singh)
>
> Dated: 16.3.2002."

6. This admission of Prahlad Singh, owner of the vehicle, amply proves that he was aware of the accident and knew that his truck bearing Registration No. RJP – 1008 had met with accident on 7.10.01. Even though the aforesaid statement of Respondent No. 2, Prahlad Singh, was recorded on 16.3.2002, but in this statement he has categorically admitted that he was informed about the said accident on phone on the very same day, i.e., on 7.10.01. It is also not in dispute that at the relevant point of time the said truck was being driven by Respondent No. 1, Badrinarayan, a fact also admitted by the owner of the truck.

7. Father of the victim, Suresh Kumar, lodged formal FIR under Section 154 of the CrPC on 26.1.2002, almost after 3 months from the date of the accident, giving details of the said accident.

8. Thereafter, as mentioned hereinabove, the Appellant, being minor, filed a claim petition through his father, before MACT claiming Rs. 11 lakhs to be awarded to him as compensation.

9. On notices being issued, Respondent Nos. 1 and 2, driver and owner of the truck respectively, remained absent, despite due service. Thus, they were proceeded *ex-parte*. Written statement was filed only by Respondent No. 3, the Insurance Company. But the Respondents did not lead any evidence in rebuttal to the evidence led by the Appellant. Even the driver of the truck did not enter the Witness Box to deny the factum of the accident.

10. Under the aforesaid circumstances, we have to examine whether the said truck was involved in the accident and if so, to what extent victim Ravi could be compensated.

11. For the accident that had taken place on 7.10.2001 at 8.30 AM, formal FIR was lodged by Appellant's father with Police Station, T.P. Nagar, Jaipur on 26.1.2002 at 12.15 PM. Critical perusal thereof shows that Appellant's father had given the exact and vivid description of the accident and the injuries sustained by his son Ravi in the said accident. He has further disclosed therein that since 7.10.2001, his son Ravi was time and again admitted in the Hospital and was undergoing treatment, he could not lodge the FIR immediately.

12. He further mentioned that police had come to the Hospital next day to record the FIR and complete other formalities, but everyone present there suggested that since Respondent no.1 was the neighbour of the Appellant, it was not desirable to lodge an FIR and instead the matter of compensation could be sorted out in an amicable manner amongst themselves. In view of this, FIR was not lodged immediately or soon after the accident. Secondly, Ravi was still in Hospital undergoing treatment, attending to which was more

important for him than lodging the FIR. Hence, there was delay in lodging the FIR.

13. It has already been mentioned hereinabove that in response to the notice issued under Section 133 of M.V. Act, Respondent No.2, the owner of the vehicle, Prahlad Singh categorically admitted that his vehicle had met with an accident on 7.10.2001 and he was intimated about the same on phone the very same day. Thus, on this admission, it is clearly made out that the vehicle in question was involved in the accident, causing physical injuries to Ravi.

14. On 7.10.2001, Ravi was admitted in the hospital, his injury report form was also filled up by the attending doctors, which bears the signature of Ravi's father Suresh. It is clearly mentioned therein that the cause of injury was road transport accident at about 9.00 a.m. on 7.10.2001, near his house. Suresh, father of the victim, further declared that at that time he did not want any medical examination relating to police case regarding the injuries caused to his son.

15. When the formal FIR was registered by Suresh on 26.1.2002, a charge-sheet dated 21.03.2002 against Badrinarayan was prepared for commission of offences under Section 279 and 338 of the IPC and it was requested that legal action against accused Badrinarayan be taken. This report was prepared by SHO of the concerned Police Station.

16. Under the aforesaid facts and circumstances, it is amply proved that the aforesaid truck was involved in the road accident, which had caused injuries to Ravi. No doubt, it is true that there has been delay in lodging the FIR but the same has already been explained by Suresh. The explanation offered by him is not only satisfactory; it inspires confidence as cogent and valid reasons have been assigned therein. Not only this, a consistent stand has been taken by Suresh right from the beginning till the lodging of the F.I.R.

17. The reasons for delay are as under :-

(i) Ravi was seriously injured, thus it was more important for Suresh to get him treated first.

(ii) Police had arrived at the hospital, where injury report was prepared in which it was mentioned that injuries were caused on account of road accident at 9.00 a.m. on 7.10.2001.

(iii) The categorical admission made by Prahlad Singh, owner of the truck, that vehicle in question was involved in the accident on 7.10.2001, when the same was being driven by Badrinarayan and this information was conveyed to him on phone the very same day.

(iv) FIR could not be lodged immediately as other persons in the locality pressurised Suresh that it could be sorted out amicably since Badrinarayan, the driver of the vehicle, was his neighbour.

(v) Suresh was not aware of the niceties of law that lodging of FIR was condition precedent before filing the Claim Petition.

All these facts find place in the formal FIR which was registered on 26.01.2002 at the instance of Suresh.

18. The cumulative effect of the aforesaid events clearly established that accident had taken place on 7.10.2001 at about 8.30 in the morning on account of rash and negligent reversing of the truck by driver Badrinarayan, owned by Respondent No. 2, Prahlad Singh. Under these circumstances, it cannot be said that delay in lodging the FIR could have proved fatal to the claim case filed by Ravi.

19. Narration of the aforesaid events would show the *bona*

fides of Suresh. As mentioned hereinabove, a consistent stand has been taken right from the beginning till the lodging of the FIR. The chronological events narrated hereinabove inspire confidence and it does not smack of a concocted case which has been filed against the driver and the owner of the vehicle only with an intention to get compensation.

20. It is well-settled that delay in lodging FIR cannot be a ground to doubt the claimant's case. Knowing the Indian conditions as they are, we cannot expect a common man to first rush to the Police Station immediately after an accident. Human nature and family responsibilities occupy the mind of kith and kin to such an extent that they give more importance to get the victim treated rather than to rush to the Police Station. Under such circumstances, they are not expected to act mechanically with promptitude in lodging the FIR with the Police. Delay in lodging the FIR thus, cannot be the ground to deny justice to the victim. In cases of delay, the courts are required to examine the evidence with a closer scrutiny and in doing so; the contents of the FIR should also be scrutinized more carefully. If court finds that there is no indication of fabrication or it has not been concocted or engineered to implicate innocent persons then, even if there is a delay in lodging the FIR, the claim case cannot be dismissed merely on that ground.

21. The purpose of lodging the FIR in such type of cases is primarily to intimate the police to initiate investigation of criminal offences. Lodging of FIR certainly proves factum of accident so that the victim is able to lodge a case for compensation but delay in doing so cannot be the main ground for rejecting the claim petition. In other words, although lodging of FIR is vital in deciding motor accident claim cases, delay in lodging the same should not be treated as fatal for such proceedings, if claimant has been able to demonstrate satisfactory and cogent reasons for it. There could be variety of reasons in genuine cases for delayed lodgment of FIR.

Unless kith and kin of the victim are able to regain a certain level of tranquility of mind and are composed to lodge it, even if, there is delay, the same deserves to be condoned. In such circumstances, the authenticity of the FIR assumes much more significance than delay in lodging thereof supported by cogent reasons.

22. In the case in hand, the Claims Tribunal as well as the High Court, committed grave error in not appeciating the mental agony through which Suresh was passing, whose son was severely injured.

23. In the light of the aforesaid discussion, we are of the considered opinion that the MACT as well as High Court committed error in coming to the conclusion that lodging the FIR belatedly would result in dismissal of the claim petition.

24. Now, the question comes for consideration as to how much amount can be awarded to the Appellant. Record shows that victim is now aged about 16 years but is still prosecuting his studies in class V only. Apparently, on account of nature of injuries sustained by him, he was unable to prosecute his studies in right earnest and lagged behind in the same. Medical Board Certificate issued by Government R.D.B.P. Jaipuria Hospital, Jaipur dated 17.12.2004 shows that he has suffered the following injuries and was admitted as many as on four occasions in the hospital, intermittently :

> "Diagnosis: Abdominal Injury with fractured Pelvis stricture urethra with ruptured urethra couplet transacted urethra (Case No. 020762) IInd Adm. 10.11.2001 to 12.11.2001, IIIrd Adm. 27.11.01 to 12.12.01; IVth Adm. 28.12.01 to 1.1.2002."

25. It is to be noted that in a case where injury sustained by victim is of permanent nature, he suffers much more than the person who succumbs to the injury. In such cases, the injured has to carry on the burden of permanent disability throughout

his life, which is certainly much more painful to the victim. In the present case, the Appellant had suffered an injury of permanent nature as a result of which he is not able to control his urine. He has to suffer with it throughout his life; thus the compensation should not only be adequate but proper also.

26. On account of aforesaid injury, his permanent physical disability has been assessed at 50%. This report of the experts further shows that he is unable to control urine and suffers from continence disability which could not be cured even after surgical operation and frequent dilatation still takes place.

27. He has also been accordingly issued a permanent disability certificate by the said Medical Board. Therefore, the said certificate clearly establishes that Appellant had sustained permanent disability to his own body to the extent of 50% and even after several surgeries; he was not able to control his urination. We can well appreciate and imagine the problems and difficulties of a young boy aged 16 years, who is not able to control his urination and spoils his clothes even while attending school. We have been given to understand that he is required to go with additional sets of clothings so that he could change the same, in case they are spoiled. This is the state of affairs even as on date. We do not doubt the genuineness and correctness of the aforesaid certificate. Even otherwise, Respondents have also not contended that this certificate is forged or fabricated and has been obtained with an intention to get compensation.

28. Thus, looking into the matter from all angles, it is clearly established that in the said accident, Appellant had suffered severe injuries of permanent nature which have not been cured till date despite several surgeries. In our most modest computation, looking into the nature of injuries which are permanent in nature, we are of the opinion that a total amount of Rs. 2,50,000 (Rs. 2.5 Lakhs) to be awarded to the Appellant payable by Respondents jointly and severally, would meet the

ends of justice. The aforesaid amount would also carry interest @ 6% p.a. from the date of filing of petition till the same is actually paid. As a result thereof, award of the Claims Tribunal and judgment and order of the High Court; are hereby set aside and quashed, instead the Appellant's claim petition is allowed as mentioned above with costs throughout. The appeal is allowed accordingly. Counsel's fee quantified at Rs. 10,000/-.

B.B.B. Appeal allowed.

KOKKANDA B. POONDACHA AND OTHERS
v.
K.D. GANAPATHI AND ANR.
(Civil Appeal No. 2015 of 2011)

FEBRUARY 22, 2011

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

Code of Civil Procedure, 1908 – Order XVI, Rules 1 and 2 r/w s.151 – Partition suit – Defendants filed application for permission to file a list of witnesses, which included the name of the plaintiff's Advocate – Trial Court granted the defendants the leave to file the list of witnesses but rejected their prayer for permission to cite the plaintiff's advocate as a witness on ground that no reason therefor was assigned in the application – Justification of – Held: Justified – If the parties to the litigation are allowed to file list of witnesses without indicating the purpose for summoning the particular person(s) as witness(es), the unscrupulous litigants may create a situation where the cases may be prolonged for years together – Such litigants may include the name of the advocate representing the other side as a witness and if the Court casually accepts the list of witnesses, the other side will be deprived of the services of the advocate – Therefore, it would be a prudent exercise of discretion by the Court to insist that the party filing the list of witnesses should briefly indicate the purpose of summoning the particular person as a witness – In the instant case, the concerned advocate was engaged by the plaintiffs almost 11 years prior to the filing of application by the defendants – During this long interregnum, the defendants never objected to the appearance of the plaintiff's advocate by pointing out that he was interested in the subject matter of the suit – The prayer made by the defendants for being allowed to cite the plaintiff's advocate as a witness was not only

misconceived but also mischievous ex-facie with an oblique motive of boarding him out of the case.

Constitution of India, 1950 – Articles 226 and 227 – Interlocutory order passed by Subordinate Court – Challenge to – Exercise of powers under Arts. 226 and 227 – Scope – Held: In the instant case, the High Court totally ignored the principles and parameters laid down by this Court for exercise of power u/Articles 226 and 227 of the Constitution qua an interlocutory order passed by the Subordinate Court and set aside the order of the trial Court without assigning any tangible reason.

Advocates – Relationship between lawyer and his client – Duty imposed upon an Advocate – Discussed – Held: An Advocate cannot ordinarily withdraw from engagement without sufficient cause and without giving reasonable and sufficient notice to the client – If an Advocate has reason to believe that he will be a witness in the case, he should not accept a brief or appear in the case – Principles of 'uberrima fides' – Bar Council of India Rules, 1975 – Rules 12, 13, 14 and 15 of Section II, Chapter II of Part IV.

Appellant Nos.1 to 3 and one other person filed suit for partition and separate possession of 1/6th share each in the suit property and also for grant of a declaration that sale deed dated 10.7.1997 executed by appellant Nos.4 to 6 was not binding on them. Respondent Nos.1 and 2 filed written statement, and subsequently, also filed an application under Order XVI Rule 1(1) and (2) read with Section 151 C.P.C. supported by an affidavit of respondent No.1 for permission to file the list of witnesses, which included the name of 'NRK', the Advocate who had been representing the appellants in the suit from the very beginning.

The trial Court partly allowed the application of

respondent Nos.1 and 2 and granted them leave to file the list of witnesses but rejected their prayer for permission to cite 'NRK' as a witness on ground that no reason therefor was assigned in the application. The respondents challenged the order of the trial Court by filing a petition under Articles 226 and 227 of the Constitution insofar as their prayer for citing 'NRK' as a witness was rejected. The High Court allowed the petition and set aside the order of the trial Court holding that reasons were not required to be assigned to justify the summoning of a particular person as a witness.

In the instant appeal, the questions arising for consideration were: 1) whether the High Court committed serious error by interfering with the order of the trial Court without recording a finding that the said order was vitiated due to want of jurisdiction or any patent legal infirmity in exercise of jurisdiction; and 2) whether a litigant filing the list of witnesses is bound to indicate, howsoever briefly, the relevance of the witness to the subject matter of the suit etc., and, in any case, one party to the proceedings cannot cite the advocate representing the other side as a witness and thereby deprive the latter of the services of the advocate without disclosing as to how his testimony is relevant to the issues arising in the case.

Allowing the appeal, the Court

HELD:1. The High Court totally ignored the principles and parameters laid down by this Court for exercise of power under Articles 226 and 227 of the Constitution qua an interlocutory order passed by the Subordinate Court and set aside the order of the trial Court without assigning any tangible reason. [Para 10] [427-H; 428-A-B]

Surya Dev Rai v. Ram Chander Rai and others **(2003) 6 SCC 675 and** *Shalini Shyam Shetty v. Rajendra Shankar Patil* **(2010) 8 SCC 329 – relied on.**

2.1. The relationship between a lawyer and his client is solely founded on trust and confidence. A lawyer cannot pass on the confidential information to anyone else. This is so because he is a fiduciary of his client, who reposes trust and confidence in the lawyer. Therefore, he has a duty to fulfill all his obligations towards his client with care and act in good faith. Since the client entrusts the whole obligation of handling legal proceedings to an advocate, he has to act according to the principles of *uberrima fides*, i.e., the utmost good faith, integrity, fairness and loyalty. [Para 12] [428-F-G]

2.2. The duties of an advocate to the Court, the client, opponent and colleagues are enumerated in Chapter II of Part IV of the Bar Council of India Rules, 1975. Rules 12, 13, 14 and 15 of Section II, Chapter II of Part IV of the Rules, regulate the duty of an advocate to the client. An analysis of the above Rules show that one of the most important duty imposed upon an advocate is to uphold the interest of the client fearlessly by all fair and honourable means. An advocate cannot ordinarily withdraw from engagement without sufficient cause and without giving reasonable and sufficient notice to the client. If he has reason to believe that he will be a witness in the case, the advocate should not accept a brief or appear in the case. [Paras 13, 14] [428-H; 429-A-B; H; 430-A]

2.3. If the prayer made by the respondents for being allowed to cite 'NRK' as a witness is critically scrutinized in the backdrop of the duties of an advocate towards his client, it is clear that the same was not only misconceived but was mischievous *ex-facie*. Neither in the written statement nor the additional written statement filed by them before the trial Court, the respondents had

attributed any role to 'NRK' in relation to the subject matter of the suit. The concerned advocate was engaged by the plaintiffs-appellants in 1996 i.e. almost 11 years prior to the filing of application by the respondents under Order XVI Rule 1(1) and (2) read with Section 151 CPC. During this long interregnum, the respondents never objected to the appearance of 'NRK' as an advocate of the appellants by pointing out that he was interested in the subject matter of the suit. Notwithstanding this, the respondents cited him as a witness in the list filed along with the application. The sole purpose of doing this was to create a situation in which the advocate would have been forced to withdraw from the case. Luckily for the appellants, the trial Court could see the game plan of the respondents and frustrated their design by partly dismissing the application. The Single Judge of the High Court ignored that the respondents had included the name of 'NRK' in the list of witnesses proposed to be summoned by them with an oblique motive of boarding him out of the case and passed the impugned order by recording one line observation that the respondents were not required to give reasons for summoning the particular person as a witness. [Para 15] [430-G-H; 431-A-D]

2.4. If the parties to the litigation are allowed to file list of witnesses without indicating the purpose for summoning the particular person(s) as witness(es), the unscrupulous litigants may create a situation where the cases may be prolonged for years together. Such litigants may include the name of the advocate representing the other side as a witness and if the Court casually accepts the list of witnesses, the other side will be deprived of the services of the advocate. Therefore, it would be a prudent exercise of discretion by the Court to insist that the party filing the list of witnesses should briefly indicate the purpose of summoning the particular person as a witness. The impugned order of the High Court is set aside and the one passed by the trial Court is restored. The respondents shall pay cost of Rs.50,000/- to the appellants. [Para 16] [431-E-H]

Mange Ram v. Brij Mohan **(1983) 4 SCC 36 and** *V. C. Rangadurai* v. *D. Gopalan* **(1979) 1 SCC 308 – relied on.**

Case Law Reference:

(2010) 8 SCC 329	**relied on**	**Para 6, 9**
(1983) 4 SCC 36	**relied on**	**Para 6, 11**
(2003) 6 SCC 675	**relied on**	**Para 7, 8**
(1979) 1 SCC 308	**relied on**	**Para 14**

CIVIL APPELLLATE JURISDICTION : Civil Appeal No. 2015 of 2011.

From the Judgment & Order dated 24.2.2010 of the High Court of Karnataka at Bangalore in W.P. No. 2610 of 2007 (GM-CPC).

Krian Suri for the Appellants.

S.N. Bhat for the Respondents.

The following Judgment of the Court was delivered

J U D G M E N T

Leave granted.

2. Whether the respondents (defendant Nos.5 and 6 in the suit filed by the appellants), could cite the advocate representing the appellants as a witness in the list filed under Order XVI Rule 1 (1) and (2) read with Section 151 of the Code of Civil Procedure (CPC) without giving an iota of indication about the purpose of summoning him in future is the question

which arises for consideration in this appeal filed against order dated 24.02.2010 passed by the learned Single Judge of the Karnataka High Court whereby he set aside the order passed by the trial Court partly dismissing the application of the respondents.

3. Appellant Nos.1 to 3 and one Parvathy filed suit, which came to be registered as O.S. No.75 of 1996, for partition and separate possession of 1/6th share each in the suit property and also for grant of a declaration that sale deed dated 10.7.1997 executed by defendant Nos.2 to 4, who were, later on, transposed as plaintiff Nos.5 to 7 (appellant Nos.4 to 6 herein), was not binding on them. Defendant Nos.5 to 7 (including respondent Nos.1 and 2 herein) filed written statement on 19.2.1998. Respondent Nos.1 and 2 filed additional written statement on 9.8.2002. After two years and seven months, they filed an application dated 11.3.2005 under Order XVI Rule 1 (1) and (2) read with Section 151 C.P.C. supported by an affidavit of respondent No.1 for permission to file the list of witnesses, which included the name of Shri N. Ravindranath Kamath, Advocate, who was representing the appellants in the suit from the very beginning.

4. The trial Court partly allowed the application of respondent Nos.1 and 2 and granted leave to them to file the list of witnesses but rejected their prayer for permission to cite Shri N. Ravindranath Kamath as witness No.1. The reasons assigned by the trial Court for partially declining the prayer of respondent Nos.1 and 2 are extracted below:

> ".....While citing advocate of the opposite party as a witness, the defendants 3 and 4 ought to have given reason for what purpose they are citing him as a witness and examining him in their favour. Once the advocate for the opposite party is cited as a witness in the list, the opposite party losses precious service of his advocate. In that circumstances, the party will suffer. Under the circumstances, so as to know for what purpose the

> defendant no.2 and 3 are citing and examining the N.R. Kamath advocate for the plaintiff in their favour have to assign reason. The Court has to very cautious and careful while considering such an aspect of the matter of examining and citing the advocate for the opposite party in their favour. The Court has to determine as to whether the evidence of said advocate is material for the decision of the case or not? Unless defendant no.2 and 3 assigned reason in the application or in the affidavit as to why they are citing the advocate for the opposite party and examining in their favour, the application filed by defendant no.2 and 3 is not maintainable and the said application is not sustainable under law. In the above said Judgment, in para 2, it is clearly held that, "but appellants then filed a petition seeking permission to cite the advocate of the respondents as a witness". But herein this case, the defendant no.2 and 3 are not seeking permission to cite the advocate for the plaintiff as a witness. Defendant no.2 and 3 not only have to seek permission of this Court to cite the advocate for the Plaintiff as a witness, but also he has to give good reasons for what purpose he is citing him as a witness and examining in his favour. Without assigning any reasons and without seeking permission to cite the advocate for the Plaintiff as a witness in the witness list, application to that extent is not tenable and same is liable to be dismissed to that extent."

5. The respondents challenged the order of the trial Court by filing a petition under Articles 226 and 227 of the Constitution insofar as their prayer for citing Shri N. Ravindranath Kamath as a witness was rejected. The learned Single Judge allowed the petition and set aside the order of the trial Court by simply observing that reasons are not required to be assigned to justify the summoning of a particular person as a witness.

6. Mrs. Kiran Suri, learned counsel for the appellants relied upon the judgment of this Court in *Shalini Shyam Shetty vs.*

Rajendra Shankar Patil (2010) 8 SCC 329 and argued that the order under challenge is liable to be set aside because the High Court committed serious error by interfering with the order of the trial Court without recording a finding that the said order is vitiated due to want of jurisdiction or any patent legal infirmity in the exercise of jurisdiction and that refusal of the trial Court to permit the respondents to cite Shri N. Ravindranath Kamath as a witness had prejudiced their cause. She further argued that the respondents are not entitled to cite and summon as a witness the advocate representing the appellants because in the application filed by them, no justification was offered for doing so. In support of this argument, Mrs. Suri relied upon the judgment of this Court in *Mange Ram vs. Brij Mohan* (1983) 4 SCC 36.

7. Shri S.N. Bhatt, learned counsel for the respondents argued that even though his clients had filed application belatedly, the trial Court was not justified in declining their prayer for citing Shri N. Ravindranath Kamath as a witness merely because he was representing the appellants. Learned counsel submitted that at the stage of filing the list of witnesses, the plaintiffs or for that reason the defendants are not required to disclose the nature of the evidence to be given by the particular witness or its relevance to the subject matter of the suit etc. and the trial Court had grossly erred in not granting leave to the respondents to cite Shri N. Ravindranath Kamath as one of their witnesses. Shri Bhatt relied upon the judgment in *Surya Dev Rai v. Ram Chander Rai and others* (2003) 6 SCC 675 and argued that even after amendment of Section 115, C.P.C., the High Court can, in exercise of supervisory power under Article 227, correct the error of jurisdiction committed by the Subordinate Court.

8. We have considered the respective submissions. We shall first consider the question whether the High Court could interfere with the order of the trial Court without considering the question whether the said order was vitiated due to want of

jurisdiction or the trial Court had exceeded its jurisdiction in deciding the application of the respondents and the order passed by it has resulted in failure of justice. In *Surya Dev Rai's* case (supra), the two Judge Bench, after detailed analysis of the various precedents on the scope of the High Court's powers under Articles 226 and 227 of the Constitution culled out nine propositions including the following:-

> "(2) Interlocutory orders, passed by the courts subordinate to the High Court, against which remedy of revision has been excluded by CPC Amendment Act 46 of 1999 are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.
>
> (3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction i.e. when a subordinate court is found to have acted (i) without jurisdiction – by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction – by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.
>
> (4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.
>
> (5) Be it a writ of certiorari or the exercise of supervisory

jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (I) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby."

9. In *Shalini Shyam Shetty vs. Rajendra Shankar Patil* (supra), the Court again examined the scope of the High Court's power under Article 227 of the Constitution and laid down the following proposition:

"Article 227 can be invoked by the High Court suo motu as a custodian of justice. An improper and a frequent exercise of this power will be counterproductive and will divest this extraordinary power of its strength and vitality. The power is discretionary and has to be exercised very sparingly on equitable principle. This reserve and exceptional power of judicial intervention is not to be exercised just for grant of relief in individual cases but should be directed for promotion of public confidence in the administration in the larger public interest whereas Article 226 is meant for protection of individual grievances. Therefore, the power under Article 227 may be unfettered but its exercise is subject to high degree of judicial discipline. The object of superintendence under Article 227, both administrative and judicial, is to maintain efficiency, smooth and orderly functioning of the entire machinery of justice in such a way as it does not bring it into any disrepute. The power of interference under Article 227 is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and courts subordinate to the High Court."

10. The learned Single Judge of the High Court totally

ignored the principles and parameters laid down by this Court for exercise of power under Articles 226 and 227 of the Constitution qua an interlocutory order passed by the Subordinate Court and set aside the order of the trial Court without assigning any tangible reason.

11. The next question which needs consideration is whether a litigant filing the list of witnesses is bound to indicate, howsoever briefly, the relevance of the witness to the subject matter of the suit etc., and, in any case, one party to the proceedings cannot cite the advocate representing the other side as a witness and thereby deprive the latter of the services of the advocate without disclosing as to how his testimony is relevant to the issues arising in the case. In *Mange Ram vs. Brij Mohan* (supra), this Court interpreted Order XVI Rule 1 (1),(2) and (3) CPC and observed:

"If the requirements of these provisions are conjointly read and properly analysed, it clearly transpires that the obligation to supply the list as well as the gist of the evidence of each witness whose name is entered in the list has to be carried out in respect of those witnesses for procuring whose attendance the party needs the assistance of the court."

12. At this stage, we may also advert to the nature of relationship between a lawyer and his client, which is solely founded on trust and confidence. A lawyer cannot pass on the confidential information to anyone else. This is so because he is a fiduciary of his client, who reposes trust and confidence in the lawyer. Therefore, he has a duty to fulfill all his obligations towards his client with care and act in good faith. Since the client entrusts the whole obligation of handling legal proceedings to an advocate, he has to act according to the principles of uberrima fides, i.e., the utmost good faith, integrity, fairness and loyalty.

13. The duties of an advocate to the Court, the client,

opponent and colleagues are enumerated in Chapter II of Part IV of the Bar Council of India Rules, 1975 (for short, "the Rules"). Rules 12, 13, 14 and 15 of Section II, Chapter II of Part IV of the Rules, which regulate the duty of an advocate to the client, read as under:

> "12. An advocate shall not ordinarily withdraw from engagements, once accepted, without sufficient cause and unless reasonable and sufficient notice is given to the client. Upon his withdrawal from a case, he shall refund such part of the fee as has not been earned.
>
> 13. An advocate should not accept a brief or appear in a case in which he has reason to believe that he will be a witness, and if being engaged in a case, it becomes apparent that he is a witness on a material question of fact, he should not continue to appear as an advocate if he can retire without jeopardising his client's interests.
>
> 14. An advocate shall, at the commencement of his engagement and during the continuance thereof, make all such full and frank disclosures to his client relating to his connection with the parties and any interest in or about the controversy as are likely to affect his client's judgment in either engaging him or continuing the engagement.
>
> 15. It shall be the duty of an advocate fearlessly to uphold the interests of his client by all fair and honourable means without regard to any unpleasant consequences to himself or any other. He shall defend a person accused of a crime regardless of his personal opinion as to the guilt of the accused, bearing in mind that his loyalty is to the law which requires that no man should be convicted without adequate evidence."

14. An analysis of the above reproduced Rules show that one of the most important duty imposed upon an advocate is to uphold the interest of the client fearlessly by all fair and honourable means. An advocate cannot ordinarily withdraw

from engagement without sufficient cause and without giving reasonable and sufficient notice to the client. If he has reason to believe that he will be a witness in the case, the advocate should not accept a brief or appear in the case. In *V. C. Rangadurai v. D. Gopalan* (1979) 1 SCC 308, A.P.Sen, J. outlined the importance of the relationship of an advocate with his client in the following words:

> "Nothing should be done by any member of the legal fraternity which might tend to lessen in any degree the confidence of the public in the fidelity, honesty and integrity of the profession. Lord Brougham, then aged eighty-six, said in a speech, in 1864, that the first great quality of an advocate was 'to reckon everything subordinate to the interests of his client'. What he said in 1864 about 'the paramountcy of the client's interest', is equally true today. The relation between a lawyer and his client is highly fiduciary in its nature and of a very delicate, exacting, and confidential character requiring a high degree of fidelity and good faith. It is purely a personal relationship, involving the highest personal trust and confidence which cannot be delegated without consent. A lawyer when entrusted with a brief, is expected to follow the norms of professional ethics and try to protect the interests of his clients, in relation to whom he occupies a position of trust. The appellant completely betrayed the trust reposed in him by the complainants."

15. If the prayer made by the respondents for being allowed to cite Shri N. Ravindranath Kamath as a witness is critically scrutinised in the backdrop of the above noted statement on the duties of an advocate towards his client, we have no hesitation to hold that the same was not only misconceived but was mischievous ex-facie. Neither in the written statement nor the additional written statement filed by them before the trial Court, the respondents had attributed any role to Shri N. Ravindranath Kamath in relation to the subject matter of the suit. The concerned advocate was engaged by

the plaintiffs-appellants in 1996 i.e. almost 11 years prior to the filing of application by the respondents under Order XVI Rule 1(1) and (2) read with Section 151 CPC. During this long interregnum, the respondents never objected to the appearance of Shri N. Ravindranath Kamath as an advocate of the appellants by pointing out that he was interested in the subject matter of the suit. Notwithstanding this, the respondents cited him as a witness in the list filed along with the application. The sole purpose of doing this was to create a situation in which the advocate would have been forced to withdraw from the case. Luckily for the appellants, the trial Court could see the game plan of the respondents and frustrated their design by partly dismissing the application. The learned Single Judge ignored that the respondents had included the name of Shri N. Ravindranath Kamath in the list of witnesses proposed to be summoned by them with an oblique motive of boarding him out of the case and passed the impugned order by recording one line observation that the respondents were not required to give reasons for summoning the particular person as a witness.

16. We may add that if the parties to the litigation are allowed to file list of witnesses without indicating the purpose for summoning the particular person(s) as witness(es), the unscrupulous litigants may create a situation where the cases may be prolonged for years together. Such litigants may include the name of the advocate representing the other side as a witness and if the Court casually accepts the list of witnesses, the other side will be deprived of the services of the advocate. Therefore, it would be a prudent exercise of discretion by the Court to insists that the party filing the list of witnesses should briefly indicate the purpose of summoning the particular person as a witness.

17. In the result, the appeal is allowed, the impugned order is set aside and the one passed by the trial Court is restored. The respondents shall pay cost of Rs.50,000/- to the appellants.

B.B.B. Appeal allowed.

THE STATE OF MAHARASHTRA AND ORS.
v.
M/S. ARK BUILDERS PVT. LTD.
(Civil Appeal No. 2152 of 2011)

FEBRUARY 28, 2011

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

Arbitration and Conciliation Act, 1996: *s.34 – Period of limitation for making an application u/s.34 for setting aside an arbitral award – Held: Is to be reckoned from the date a signed copy of the award is delivered to the objector by the arbitrator and not from the date a copy of the award is received by him by any means and from any source – Limitation.*

Interpretation of statutes: *If the law prescribes that a copy of the order/award is to be communicated, delivered, dispatched, forwarded, rendered or sent to the parties concerned in a particular way and sets a period of limitation for challenging the order/award in question by the aggrieved party, then the period of limitation can only commence from the date on which the order/award was received by the party concerned in the manner prescribed by the law – Arbitration and Conciliation Act, 1996 – s.34.*

The question which arose for consideration in the instant appeal was whether the period of limitation for making an application under section 34 of the Arbitration and Conciliation Act, 1996 for setting aside an arbitral award is to be reckoned from the date a copy of the award is received by the objector by any means and from any source, or it would start running from the date a signed copy of the award is delivered to him by the arbitrator.

Allowing the appeal, the Court

HELD: 1.1. Section 31(1) of the Arbitration and Conciliation Act, 1996 obliges the members of the arbitral tribunal/ arbitrator to make the award in writing and to sign it **and sub-section (5) then mandates that a** signed **copy of the award would be delivered to each party. A signed copy of the award would normally be delivered to the party by the arbitrator himself. The High Court clearly overlooked that what was required by law was the delivery of a copy of the award** signed **by the members of the arbitral tribunal/ arbitrator and not any copy of the award. Section 34 of the Act then provides for filing an application for setting aside an arbitral award, and sub-section (3) of that section lays down the period of limitation for making the application. The expression "..party making that application had** received **the arbitral award.." appearing in sub-section (3) of Section 34 cannot be read in isolation and it must be understood in light of what is said earlier in section 31(5) that requires a signed copy of the award to be delivered to each party. Reading the two provisions together would make it clear that the limitation prescribed under section 34(3) would commence only from the date a signed copy of the award is delivered to the party making the application for setting it aside. [Para 10, 11] [439-F-H; 440-A-G]**

Union of India v. *Tecco Trichy Engineers & Contractors* **(2005) 4 SCC 239 – relied on.**

1.2. The period of limitation prescribed under section 34(3) of the Act would start running only from the date a signed copy of the award is delivered to/received by the party making the application for setting it aside under section 34(1) of the Act. If the law prescribes that a copy of the order/award is to be communicated, delivered, dispatched, forwarded, rendered or sent to the parties concerned in a particular way and in case the law also

sets a period of limitation for challenging the order/award in question by the aggrieved party, then the period of limitation can only commence from the date on which the order/award was received by the party concerned in the manner prescribed by the law. The High Court overlooked that what section 31(5) contemplated was not merely the delivery of any kind of a copy of the award but a copy of the award that is duly signed by the members of the arbitral tribunal. In the facts of the case, the appellants would appear to be deriving undue advantage due to the omission of the arbitrator to give them a signed copy of the award coupled with the supply of a copy of the award to them by the claimant-respondent but that would not change the legal position and it would be wrong to tailor the law according to the facts of a particular case. [Paras 13, 16,17] [441-F-H; 442-A; 443-E-H]

Dr. Sheo Shankar Sahay v. *Commissioner, Patna Division and Ors.* **1965 BLJR 78 – approved.**

Case Law Reference:

(2005) 4 SCC 239	**relied on**	**Para 7, 12**
1965 BLJR 78	**approved**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2152 of 2011.

From the Judgment & Order 6.10.2009 of the High Court of Judicature of Bombay Bench at Aurangabad in Arbitration Appeal No. 2.

Chinmoy A. Khaladkar (for Asha Gopalan Nair) for the Appellants.

Shyam Diwan, Shirish K. Deshpande (for Anirudha P. Mayee) for the Respondent.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. Leave granted.

2. Whether the period of limitation for making an application under section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter 'the Act') for setting aside an arbitral award is to be reckoned from the date a copy of the award is received by the objector by any means and from any source, or it would start running from the date a signed copy of the award is delivered to him by the arbitrator? This is the short question that arises for consideration in this appeal.

3. The material facts of the case are brief and admitted by both sides. These may be stated thus. On March 20, 2003 the arbitrator gave a copy of the award, signed by him, to the claimant (the respondent) in whose favour the award was made. No copy of the award was, however, given to the appellant, the other party to the proceedings, apparently because the appellant had failed to pay the costs of arbitration. The respondent submitted a copy of the award in the office of the Executive Engineer (appellant no.4) on March 29, 2003, claiming payment in terms of the award. On April 16, 2003, the Executive Engineer submitted a proposal to challenge the award before the Chief Engineer, and the Financial Advisor and Joint Secretary. The respondent sent a reminder to the Chief Engineer on June 13, 2003, for payment of the money awarded to him by the arbitrator and a second reminder to the Secretary and Special Commissioner on January 8, 2004. The Executive Engineer by his letter dated January 15, 2004, acknowledged all the three letters of the claimant and informed him that the government had decided to challenge the award before the appropriate forum.

4. According to the appellants, the decision to make an application for setting aside the award was taken on December 16, 2003, but no application could be made for want of a copy of the award from the arbitrator. Hence, on January 17, 2004,

a messenger was sent to the arbitrator with a letter asking for a copy of the award. The arbitrator made an endorsement on the letter sent to him stating that on the request of the claimant the original award was given to him and the Xerox copy of the award (sent to him along with the letter), was being certified by him as true copy of the award. The endorsement from the arbitrator along with the Xerox/certified copy of the award was received from the arbitrator on January 19, 2004 and on January 28, 2004, the appellants filed the application under section 34 of the Act.

5. The respondent raised an objection regarding the maintainability of the petition contending that it was hopelessly barred by limitation. The Principal District Judge, Latur, by order dated February 15, 2007 passed in Civil Application No.84 of 2005 (previously Suit No.1 of 2004) upheld the respondent's contention and dismissed the appellants' application as barred by limitation.

6. Against the order of the Principal District Judge, the appellants preferred an appeal (Arbitration Appeal No.2 of 2008) before the Bombay High Court.

7. Before the High Court, the appellants contended that they were able to obtain a copy of the award duly signed by the arbitrator only on January 19, 2004 and the period of limitation prescribed under section 34 (3) of the Act would, therefore, commence from that date. The application for setting aside the award was filed on January 20, 2004 and hence, there was no question of the application being barred by limitation. In support of the contention, the appellants relied upon the last order passed in the arbitral proceedings on February 22, 2003 in which it was stated that the case was closed and the arbitrator would proceed with the framing of the award which would be declared and *copies sent to both parties in due course*. On behalf of the appellants it was stated that contrary to the order passed on February 22, 2003, the arbitrator did

not send them a copy of the award even though a Xerox copy of the award was sent to them by the claimant-respondent to whom the arbitrator had given a copy of the award duly signed by him. In support of the submission that the period of limitation prescribed under section 34(3) of the Act would start running from the date they received a copy of the award duly signed by the arbitrator, they also relied upon section 31(5) read with section 34(3) of the Act. They also relied upon a decision of this Court in *Union of India* v. *Tecco Trichy Engineers & Contractors*, (2005) 4 SCC 239.

8. On behalf the claimant-respondent it was pointed out that a copy of the award was undeniably received in the office of the Executive Engineer on March 29, 2003 and as a matter of fact the receipt of the copy of the award on that date was expressly acknowledged in the letter of the Executive Engineer dated January 15, 2004 in which he told him that the appellants had decided to challenge the award. The respondent further pointed out that it was only on the basis of the copy of the award received from him that the office communications and deliberations were made and finally on December 16, 2003 the decision was taken to challenge the award when the matter had already become barred by limitation. It was submitted on behalf of the respondent that the appellants undertook the exercise of sending the Xerox copy of the award to the arbitrator for obtaining his signature on it (when the period for making an application to set it aside was long over) just to make out a case to overcome the bar of limitation prescribed by section 34 (3) of the Act. In the admitted facts of the case there should be no question of there being any other date for the computation of limitation than March 29, 2003, the date on which he supplied a copy of the award to the Executive Engineer.

9. The High Court upheld the submissions made on behalf of the claimant-respondent, affirmed the view taken by the Principal District Judge and by judgment and order dated October 6, 2009 dismissed the appeal filed by the appellants.

It took note of section 31(5) and section 34(3) of the Act and the decision of this Court in *Tecco Trichy Engineers & Contractors* but rejected the appellant's contention highlighting that the word used in section 31(5) is 'delivered' and not 'dispatched'. The High Court held and observed as follows:

> "17. It is to be noted that sub-section (5) of Section 31 prescribes that after arbitral award is made, a signed copy shall be 'delivered' to each party. The word 'delivered' appearing in Section 31(5) cannot be equated with 'dispatched'. A distinction has to be made between these two words. The 'Shorter Oxford English Dictionary' gives meaning of the word 'delivered' as, "to bring and handover a letter, a parcel to the proper recipient or address". "Deliver" means: (i) bring and handover (a letter or goods) to the proper recipient; formally hand over (someone); and (iii) provide (something promised or expected). Thus, what is important is that the copy of the award should be handed over to the proper recipient or addressee. In this view of the matter, sub-section (5) of Section 31 does not require that a copy of the arbitral award should be sent off by the Arbitrator to the concerned party, but it is required that copy of the arbitral award be handed over to the proper parties.
>
> 18. In the instant matter, admittedly the copy of award was received by the Executive Engineer in the month of April 2003. However, appellants did not act till January 2004 for about nine months. Thus, for their inaction, appellants have to blame only themselves. In the instant matter, it cannot be said that there is non compliance of sub-section (5) of Section 31 of the Act of 1996. There is sufficient compliance of the provisions of Section 31(5), as admittedly, appellants received copy of the award in the month of April, 2003. Appellants thereafter did not take steps in respect of raising challenge to the award and allowed the matter to remain in cold storage. The delay

occasioned in presenting the application is essentially because of the lapses committed by the appellants only."

10. The appellants are now before this court by grant of special leave. The two provisions of the Arbitration and Conciliation Act, 1996, relevant to answer the question raised in the case are sections 31 and 34. Section 31 deals with 'form and contents of arbitral award; and in so far as relevant for the present provides as follows:

"31. Form and contents of arbitral award.- (1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.

(2) xxxxxxxxxxx

(3) xxxxxxxxxxx

(4) xxxxxxxxxxx

(5) After the arbitral award is made, a *signed* copy shall be delivered to each party.

(6), (7), (8) xxxxxxxxxxx

(emphasis added)

Section 31(1) obliges the members of the arbitral tribunal/ arbitrator to make the award in writing *and to sign it* and sub-section (5) then mandates that a *signed* copy of the award would be delivered to each party. A signed copy of the award would normally be delivered to the party by the arbitrator himself. The High Court clearly overlooked that what was required by law was the delivery of a copy of the award *signed* by the members of the arbitral tribunal/ arbitrator and not any copy of the award.

11. Section 34 of the Act then provides for filing an application for setting aside an arbitral award, and sub-section

(3) of that section lays down the period of limitation for making the application in the following terms:

"34. Application for setting aside arbitral award.-(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub- section (2) and sub-section (3).

(2) xxxxxxx

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) xxxxxxx"

The expression "..party making that application had **received** the arbitral award.." can not be read in isolation and it must be understood in light of what is said earlier in section 31(5) that requires a signed copy of the award to be delivered to each party. Reading the two provisions together it is quite clear that the limitation prescribed under section 34 (3) would commence only from the date a signed copy of the award is delivered to the party making the application for setting it aside.

12. We are supported in our view by the decision of this Court in *Union of India* v. *Tecco Trichy Engineers & Contractors*, (2005) 4 SCC 239; in paragraph 8 of the decision it was held and observed as follows:

"8. The delivery of an arbitral award under sub-section (5) of Section 31 is not a matter of mere formality. It is a matter of substance. It is only after the stage under Section 31 has passed that the stage of termination of arbitral proceedings within the meaning of Section 32 of the Act arises. The delivery of arbitral award to the party, to be effective, has to be "received" by the party. This delivery *by the Arbitral Tribunal and receipt by the party of the award sets in motion several periods of limitation such as* an application for correction and interpretation of an award within 30 days under Section 33(1), an application for making an additional award under Section 33(4) and *an application for setting aside an award under Section 34(3) and so on.* As *this delivery of the copy of award* has the effect of conferring certain rights on the party as also bringing to an end the right to exercise those rights on expiry of the prescribed period of limitation *which would be calculated from that date,* the delivery of the copy of award by the Tribunal and the receipt thereof by each party constitutes an important stage in the arbitral proceedings."

(emphasis added)

13. The highlighted portion of the judgment extracted above, leaves no room for doubt that the period of limitation prescribed under section 34(3) of the Act would start running only from the date a signed copy of the award is delivered to/ received by the party making the application for setting it aside under section 34(1) of the Act. The legal position on the issue may be stated thus. If the law prescribes that a copy of the order/ award is to be communicated, delivered, dispatched, forwarded, rendered or sent to the parties concerned in a particular way and in case the law also sets a period of limitation for challenging the order/award in question by the aggrieved party, then the period of limitation can only commence from the date on which the order/award was

received by the party concerned in the manner prescribed by the law.

14. We may here refer to a decision of the Patna High Court in *Dr. Sheo Shankar Sahay* v. *Commissioner, Patna Division and Ors.*, 1965 BLJR 78. Section 18(1) of the Bihar Building (Lease, Rent and Eviction) Control Act, 1947 prescribed a period of limitation of 15 days for filing an appeal against an order of the House Controller and provided as follows:

"any person aggrieved by an order passed by the Controller may, within fifteen days from the date of receipt of such order by him, prefer an appeal in writing to the appellate authority"

It was contended on behalf of the petitioner before the High Court that the order-sheet of the House Controller was shown to the lawyer of the respondent on June 10, 1959 and therefore, that would be the starting point of limitation under section 18(1) of the Bihar Building (Lease, Rent and Eviction) Control Act, 1947. A division bench of the High Court consisting of Chief Justice V. Ramaswami (as his Lordship then was) and Justice N.L. Untwalia (as his Lordship then was) rejected the submission observing as follows:

"2. … But we shall assume that the petitioner is right in alleging that the order was shown to the lawyer on the 10th June, 1959. Even so, we are of opinion that the appeal preferred by respondent no.4 before the Collector of Shahabad was not barred by limitation. The reason is that Sec. 18(1) provides limitation of fifteen days "from the date of receipt of the order" and not from the date of communication of the order. It is significant that Sec. 14 of the Bihar House Rent Control Order, 1942, had provided that "any person aggrieved by an order of the Controller may, within fifteen days from the date on which the order is communicated to him, present an appeal in writing to

the Commissioner of the division". Sec. 18(1) of Bihar Act III of 1949 is couched in different language. *In our opinion, Sec. 18(1) implies that the Controller is bound, as a matter of law, to send a written copy of his order to the person aggrieved, and limitation for filing an appeal does not start unless and until the copy of the order is sent.* In the present case it is not disputed that no copy of the order was sent to respondent no.4. It is true that the respondent himself applied for a copy of the order on the 11th December, 1959, and obtained a copy on the 14th December, 1959. In any event, therefore, limitation will not start running against respondent no.4 under Sec. 18(1) of the Act till the 14th December, 1959, and as the appeal was filed on the 26th December, 1959, there is no bar of limitation in this case…."

(emphasis added)

15. We are in respectful agreement with the view taken by the Patna High Court in the case of *Dr. Sheo Shankar Sahay*.

16. In light of the discussions made above we find the impugned order of the Bombay High Court unsustainable. The High Court was clearly in error not correctly following the decision of this Court in *Tecco Trichy Engineers & Contractors* and in taking a contrary view. The High Court overlooked that what section 31(5) contemplates is not merely the delivery of any kind of a copy of the award but a copy of the award that is duly signed by the members of the arbitral tribunal.

17. In the facts of the case the appellants would appear to be deriving undue advantage due to the omission of the arbitrator to give them a signed copy of the award coupled with the supply of a copy of the award to them by the claimant-respondent but that would not change the legal position and it would be wrong to tailor the law according to the facts of a particular case.

18. In the light of the discussion made above this appeal must succeed. We, accordingly, set aside the judgments and orders passed by the Bombay High Court and the Principal District Judge, Latur. The application made by the appellants under section 34 of the Act is restored before the Principal District Judge, Latur, who shall now proceed to hear the parties on merits and pass an order on the application in accordance with law. Since the matter is quite old, it is hoped and expected that the Principal District Judge will dispose this matter preferably within 6 months from the date of receipt of this order.

D.G. Appeal allowed.

CENTRE FOR PIL & ANR.
v.
UNION OF INDIA & ANR.
(Writ Petition (C) No. 348 of 2010)

MARCH 3, 2011

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

Central Vigilance Commission Act, 2003:

Object of its enactment – Discussed.

s.4(1), proviso – Appointment of respondent no.2 (Shri P.J. Thomas) as Central Vigilance Commissioner on recommendation of the High Powered Committee – Held: Is non est in law and is quashed.

s.4(1), proviso – Recommendation under – Primary consideration for making the recommendation – Duty of the High Powered Committee (HPC) – Held: If the institutional competency would be adversely affected by pending criminal proceedings against the candidate and by that touchstone the candidate stands disqualified then it is the duty of the HPC not to recommend such a candidate – While making the recommendation, the HPC performs a statutory duty – The word 'recommendation' in the proviso stands for an informed decision to be taken by the HPC on the basis of a consideration of relevant material keeping in mind the purpose, object and policy of the 2003 Act – The object and purpose of the 2003 Act is to have an integrity Institution like CVC which is in-charge of vigilance administration and which constitutes an anti-corruption mechanism – The 2003 Act confers autonomy and independence to the institution of CVC so that the Central Vigilance Commissioner could act without fear or favour – The institution is more important than an

individual – While making the recommendations, the service conditions of the candidate being a public servant or civil servant in the past is not the sole criteria – The HPC must also take into consideration the question of institutional competency into account – The HPC has, therefore, to take into consideration the values, independence and impartiality of the Institution – In the instant case, this vital aspect was not taken into account by the HPC while recommending the name of respondent no.2 (Shri P.J. Thomas) as Central Vigilance Commissioner – The entire emphasis was placed by the CVC, the DoPT and the HPC only on the bio-data of the empanelled candidates – None of these authorities looked at the matter from the larger perspective of institutional integrity including institutional competence and functioning of CVC – All the notings of DoPT observed that penalty proceedings may be initiated against respondent no.2 – However, such notings were not considered in juxtaposition with the clearance of CVC – Even in the brief submitted to the HPC by DoPT, there was no reference to the said notings – In the C.V. of respondent no.2 also there was no reference to the earlier notings of DoPT recommending initiation of penalty proceedings against him – Therefore, even on personal integrity, the HPC did not consider the relevant material and, therefore, the recommendation of name of respondent no. 2 was non est in law – Penal Code, 1860 – s.120-B – Prevention of Corruption Act – s.13(1)(d).

s.4(1) – Advice tendered to the President by the Prime Minister regarding appointment of the Central Vigilance Commissioner – Binding effect of – Held: Central Vigilance Commissioner is appointed u/s.4(1) by the President by warrant under her hand and seal after obtaining the recommendation of the HPC, consisting of the Prime Minister as the Chairperson and two other Members – Although under the Act, the Central Vigilance Commissioner is appointed after obtaining the recommendation of the HPC, such recommendation has got to be accepted by the Prime

Minister, who is the concerned authority u/Article 77(3), and if such recommendation is forwarded to the President u/ Article 74, then the President is bound to act in accordance with the advice tendered – Further under the Rules of Business the concerned authority is the Prime Minister – Therefore, the advice tendered to the President by the Prime Minister regarding appointment of the Central Vigilance Commissioner will be binding on the President – Constitution of India, 1950 – Articles 74, 77.

s.4(1), proviso, s.4(2) – Unanimity or consensus u/s.4(2) – Held: Under proviso to s.4(1), Parliament has put its faith in the HPC consisting of the Prime Minister, the Minister for Home Affairs and the Leader of the Opposition in the House of the People – Such Committee, entrusted with wide discretion to make a choice, is expected to exercise its powers in accordance with the Act, objectively and in a fair and reasonable manner – It is well settled that mere conferment of wide discretionary powers per se will not violate the doctrine of reasonableness or equality – The 2003 Act is enacted with the intention that such Committee will act in a bipartisan manner and shall perform its statutory duties keeping in view the larger national interest – Each member is presumed by the legislature to act in public interest – If veto power is given to one of the three Members, the working of the Act would become unworkable – Moreover, s.4(2) stipulates that the vacancy in the Committee shall not invalidate the appointment – This provision militates against the argument of the petitioner that the recommendation u/s.4 has to be unanimous – To accept such contention would mean conferment of a "veto right" on one of the members of the HPC – To confer such a power on one of the members would amount to judicial legislation – Therefore, it is incorrect to state that the recommendation/decision of name of respondent no.2 (P.J. Thomas) stood vitiated on the ground that it was not unanimous – Doctrine of reasonableness or equality.

Chapter III – Central Vigilance Commission – Functions and powers of – Discussed.

s.3(3)(a) – Appointment of Central Vigilance Commissioner, Vigilance Commissioner – Eligibility criteria – Discussed.

Setting up of CVC – Historical background and purpose behind the setting up of CVC – Discussed.

Concept of integrity institution – Held: Exists in Australia, US, UK, Canada, Hongkong – CVC is an integrity institution – It is an institution statutorily created under the Act – It is to supervise vigilance administration – The Act provides for a mechanism by which the CVC retains control over CBI – It is given autonomy and insulation from external influences under the Act.

s.4(2) – Appointment of Central Vigilance Commissioner, Vigilance Commissioner – Guidelines – There is no prescription of unanimity or consensus u/s.4(2) – Therefore, if one Member of the Committee dissents, that Member should give reasons for the dissent and if the majority disagrees with the dissent, the majority shall give reasons for overruling the dissent – This would bring about fairness-in-action – In future, the zone of consideration should be in terms of s.3(3) – It shall not be restricted to civil servants – All the civil servants and other persons empanelled shall be outstanding civil servants or persons of impeccable integrity – The empanelment shall be carried out on the basis of rational criteria, which is to be reflected by recording of reasons and/or noting akin to reasons by the empanelling authority – The empanelment shall be carried out by a person not below the rank of Secretary to the Government of India in the concerned Ministry – The empanelling authority, while forwarding the names of the empanelled officers/persons, shall enclose complete information, material and data of the

concerned officer/person, whether favourable or adverse – Nothing relevant should be withheld from the Selection Committee – It would not only be useful but would also serve larger public interest and enhance public confidence if the contemporaneous service record and acts of outstanding performance of the officer under consideration, even with adverse remarks is specifically brought to the notice of the Selection Committee – The Selection Committee may adopt a fair and transparent process of consideration of the empanelled officers – Guidelines.

***Administrative law**: Judicial review and merit review – Difference between – Held: Government is not accountable to the courts for the choice made but Government is accountable to the courts in respect of the lawfulness/legality of its decisions when impugned under the judicial review jurisdiction.*

***Writ**: Writ of Quo Warranto – Appointment of respondent no.2 (Shri P.J. Thomas) as Central Vigilance Commissioner on recommendation of the High Powered Committee – Writ of Quo Warranto challenging the appointment – Held: The procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions – Before a citizen can claim a writ of quo warranto, he must satisfy the court inter-alia that the office in question is a public office and it is held by a person without legal authority and that leads to the inquiry as to whether the appointment of the said person has been in accordance with law or not – A writ of quo warranto is issued to prevent a continued exercise of unlawful authority – In the instant petition, a declaratory relief was sought besides seeking a writ of quo warranto – In the main writ petition, the petitioner prayed for issuance of any other writ, direction or order which the Court may deem fit and proper in the facts and circumstances of the case – Thus, nothing prevented the Court from issuing a*

writ of declaration – Further, recommendation of the HPC and, consequently, the appointment of respondent no.2 was in contravention of the provisions of the 2003 Act – If public duties are to be enforced and rights and interests are to be protected, then the court may, in furtherance of public interest, consider it necessary to inquire into the state of affairs of the subject matter of litigation in the interest of justice – Central Vigilance Commission Act, 2003.

***Words and phrases**: Word 'recommendation' – Connotation of, in the context of Central Vigilance Commission Act, 2003.*

In the instant writ petitions filed under Article 32 of the Constitution of India, the legality of the appointment of respondent no.2 (Shri P.J. Thomas) as the Central Vigilance Commissioner under Section 4(1) of the Central Vigilance Commission Act, 2003 was challenged.

Respondent no.2 was appointed to IAS (Kerala Cadre), 1973 batch where he served in different capacities with the State Government. During that period, 15000 MT of palmolein oil was imported. There was allegation of irregularities committed in the said import. An FIR was registered against the then Chief Minister and six others including respondent no.2 under Section 13(2) r.w. Section 13(1)(d) of the Prevention of Corruption Act, 1988 and Section 120B, IPC. The State Government accorded sanction for prosecution. In the charge sheet before the trial court, definite role was attributed to respondent no.2. On 18th January, 2001, a note was put that departmental enquiry should be held against respondent no.2 and another. On 3rd June, 2003, the CVC conveyed its opinion to the DOPT that DOPT should initiate major penalty proceedings against respondent no.2. The matter was still kept pending despite receipt of opinion of the CVC. In the meanwhile, the State of Kerala

by letter dated 24th January, 2005, wrote to the DOPT its desire to withdraw the request for according sanction for prosecution of the officers including respondent no.2. However, on 10th October, 2006, State Government again wrote a letter to Government of India informing them about its decision to continue the prosecution launched by it and it sought to withdraw letter dated 24th January, 2005. By order dated 18th September, 2007, respondent no.2 was appointed as the Chief Secretary. There were at least six notings of DoPT between 26th June, 2000 and 2nd November, 2004 which recommended initiation of penalty proceedings against respondent no.2 and yet clearance was given by CVC on 6th October, 2008 and in the Brief prepared by DoPT dated 1st September, 2010 and placed before HPC, there was no reference to the earlier notings of the then DoPT nor any reason was given as to why CVC had changed its views while granting vigilance clearance on 6th October, 2008. On 23rd January, 2009, respondent no.2 was appointed as Secretary, Parliamentary Affairs to the Government of India. The DoPT empanelled three officers on 1st September, 2010 for the post of Central Vigilance Commissioner. The meeting of the HPC consisting of the Prime Minister, the Home Minister and the Leader of the Opposition was held on 3rd September, 2010 and disagreement was recorded by the Leader of the Opposition. Despite the disagreement, the name of respondent no.2 was recommended for appointment to the post of Central Vigilance Commissioner by majority. A note was thereafter put up with the recommendation of the HPC and placed before the Prime Minister which was approved on the same day. On 4th September, 2010, the same note was submitted to the President who also approved it on the same day. Consequently, respondent no.2 was appointed as Central Vigilance Commissioner. The instant writ petitions were filed challenging the legality of the appointment of respondent no.2.

Allowing the writ petitions, the Court

HELD: 1. The recommendation dated 3rd September, 2010 of the High Powered Committee recommending the name of respondent no.2 as Central Vigilance Commissioner under the proviso to Section 4(1) of the Central Vigilance Commission Act, 2003 is *non est* in law and, consequently, the impugned appointment of respondent no.2 as Central Vigilance Commissioner is quashed. [Para 56] [507-H; 508-A]

2. Setting-up of CVC: Vigilance is an integral part of all government institutions. Anti-corruption measures are the responsibility of the Central Government. Towards this end, the Government set up the following departments : (i) CBI (ii) Administrative Vigilance Division in DoPT (iii) Domestic Vigilance Units in the Ministries/ Departments, Government companies, Government Corporations, nationalized banks and PSUs (iv) CVC.Thus, CVC as an *integrity institution* was set up by the Government of India in 1964 vide Government Resolution pursuant to the recommendations of Santhanam Committee. However, it was not a statutory body at that time. According to the recommendations of the Santhanam Committee, CVC, in its functions, was supposed to be independent of the executive. The sole purpose behind setting up of the CVC was to improve the *vigilance administration* of the country. In September, 1997, the Government of India established the Independent Review Committee to monitor the functioning of CVC and to examine the working of CBI and the Enforcement Directorate. Independent Review Committee vide its report of December, 1997 suggested that CVC be given a *statutory status*. It also recommended that the selection of Central Vigilance Commissioner shall be made by a High Powered Committee comprising of the Prime Minister, the Home Minister and the Leader of Opposition in Lok

Sabha. It also recommended that the appointment shall be made by the President of India on the specific recommendations made by the HPC. That, the CVC shall be responsible for the efficient functioning of CBI; CBI shall report to CVC about cases taken up for investigations; the appointment of CBI Director shall be by a Committee headed by the Central Vigilance Commissioner; the Central Vigilance Commissioner shall have a minimum fixed tenure and that a Committee headed by the Central Vigilance Commissioner shall prepare a panel for appointment of Director of Enforcement. On 18th December, 1997, the judgment in the case of *_Vineet Narain_ was delivered. Exercising authority under Article 32 read with Article 142, this Court in order to implement an important Constitutional principle of the rule of law ordered that CVC shall be given a statutory status as recommended by Independent Review Committee. The judgment in *_Vineet Narain's_ case was followed by the 1999 Ordinance under which CVC became a multi-member Commission headed by Central Vigilance Commissioner. The 1999 Ordinance conferred statutory status on CVC. The said Ordinance incorporated the directions given by this Court in *_Vineet Narain's_ case. The 1999 Ordinance stood promulgated to improve the _vigilance administration_ and to create a culture of _integrity_ as far as government administration is concerned. The said 1999 Ordinance was ultimately replaced by the enactment of the 2003 Act which came into force with effect from 11th September, 2003.[[Para 20-25] [476-C-H; 477-A-H; 478-A]

Vineet Narain v. Union of India* **(1998) 1 SCC 226 – relied on.

3.1. <u>Analysis of the 2003 Act</u>: The 2003 Act was enacted to provide for the constitution of a Central Vigilance Commission as an institution to inquire or

cause inquiries to be conducted into offences alleged to have been committed under the Prevention of Corruption Act, 1988 by certain categories of public servants of the Central Government, corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by the Central Government and for matters connected therewith or incidental thereto. In Australia, US, UK and Canada, there exists a concept of _integrity institutions_. Hongkong has an Independent Commission against corruption. In Western Australia, there exists a statutory Corruption Commission. Queensland has Misconduct Commission. In New South Wales, there is Police Integrity Commission. All these come within the category of _integrity institutions_. CVC is an _integrity institution_. The 2003 Act gives a statutory status to CVC. It stands established as an Institution. CVC stands established to inquire into offences alleged to have been committed under the Prevention of Corruption Act, 1988 by certain categories of public servants. Under Section 3(3)(a), the Central Vigilance Commissioner and the Vigilance Commissioners are to be appointed from amongst persons <u>who have been or are</u> in All India Service or in any civil service of the Union or who are in a civil post under the Union having knowledge and experience in the matters relating to vigilance, policy making and administration including police administration. The underlined words "who have been or who are" in Section 3(3)(a) refer to the person holding office of a civil servant or who has held such office. The said words 'who have been or who are' indicate the eligibility criteria and further they indicate that such past or present eligible persons should be without any _blemish_ whatsoever and that they should not be appointed merely because they are eligible to be considered for the post. One more aspect which is highlighted is that the constitution of CVC as a statutory

body under Section 3 shows that CVC is an Institution. The key word is "Institution". The emphasis on the key word is for the simple reason that in the instant case, the recommending authority (High Powered Committee) had gone by personal integrity of the officers empanelled and not by institutional integrity. [Paras 26, 28] [478-B-E; 484-E-H; 485-A-B]

N. Kannadasan v. Ajoy Khose and Others **(2009) 7 SCC 1 – relied on.**

3.2. Section 4 refers to appointment of Central Vigilance Commissioner and Vigilance Commissioners. Under Section 4(1), they are to be appointed by the President by warrant under her hand and seal. Section 4(1) indicates the importance of the post. Section 4(1) has a proviso. Every appointment under Section 4(1) is to be made after obtaining the *recommendation* of a committee consisting of the Prime Minister as Chairperson; the Minister of Home Affairs as Member and the Leader of the Opposition in the House of the People as Member. The key word in the proviso is the word "*recommendation*". While making the recommendation, the HPC performs a statutory duty. The impugned recommendation dated 3rd September, 2010 is in exercise of the statutory power vested in the HPC under the proviso to Section 4(1). The post of Central Vigilance Commissioner is a statutory post. The Commissioner performs statutory functions as enumerated in Section 8. The word 'recommendation' in the proviso stands for an informed decision to be taken by the HPC on the basis of a consideration of relevant material keeping in mind the purpose, object and policy of the 2003 Act. The object and purpose of the 2003 Act is to have an integrity Institution like CVC which is in charge of *vigilance administration* and which constitutes an anti-corruption mechanism. In its functions, the CVC is similar to Election Commission, Comptroller and

Auditor General, Parliamentary Committees etc. Thus, while making the recommendations, the service conditions of the candidate being a public servant or civil servant in the past is not the sole criteria. The HPC must also take into consideration the question of institutional competency into account. If the selection adversely affects institutional competency and functioning then it shall be the duty of the HPC to not recommend such a candidate. Thus, the institutional integrity is the primary consideration which the HPC is required to consider while making recommendation under Section 4 for appointment of Central Vigilance Commissioner. In the instant case, this vital aspect was not taken into account by the HPC while recommending the name of respondent no.2 for appointment as Central Vigilance Commissioner. The HPC has also to keep in mind the object and the policy behind enactment of the 2003 Act. The 2003 Act indicates that the office of the Central Vigilance Commissioner is not only given independence and insulation from external influences, it also indicates that such protections are given in order to enable the Institution of CVC to work in a free and fair environment. The prescribed form of oath under Section 5(3) requires Central Vigilance Commissioner to uphold the sovereignty and *integrity* of the country and to perform his duties without *fear or favour*. The HPC has, therefore, to take into consideration the values, independence, impartiality of the Institution and the institutional competence. [Paras 29, 30] [485-C-H; 486-A-H; 487-A-C]

3.3. Chapter III refers to functions and powers of the Central Vigilance Commission. CVC exercises superintendence over the functioning of the Delhi Special Police Establishment insofar as it relates to investigation of offences alleged to have been committed under the Prevention of Corruption Act, 1988, or an offence with which a public servant specified in sub-section (2) may,

under the Code of Criminal Procedure, 1973 be charged with at the trial. Thus, CVC is empowered to exercise superintendence over the functioning of CBI. It is also empowered to give directions to CBI. It is also empowered to review the progress of investigations conducted by CBI into offences alleged to have been committed under the Prevention of Corruption Act, 1988 or under the Code of Criminal Procedure by a public servant. CVC is also empowered to exercise superintendence over the vigilance administration of various ministries of the Central Government, PSUs, Government companies etc. The powers and functions discharged by CVC is the sole reason for giving the institution the administrative autonomy, independence and insulation from external influences. [Para 31] [487-D-H]

4.1. Validity of the recommendation dated 3rd September, 2010: Judicial review seeks to ensure that the statutory duty of the HPC to recommend under the proviso to Section 4(1) is performed keeping in mind the policy and the purpose of the 2003 Act. Appointment to the post of the Central Vigilance Commissioner must satisfy not only the eligibility criteria of the candidate but also the decision making process of the recommendation. The decision to recommend has got to be an informed decision keeping in mind the fact that CVC as an institution has to perform an important function of vigilance administration. If a statutory body like HPC, for any reason whatsoever, fails to look into the relevant material having nexus to the object and purpose of the 2003 Act or takes into account irrelevant circumstances then its decision would stand vitiated on the ground of official arbitrariness. Under the proviso to Section 4(1), the HPC had to take into consideration what is good for the institution and not what is good for the candidate. When institutional integrity is in question, the touchstone should

be "public interest" which has got to be taken into consideration by the HPC and in such cases the HPC may not insist upon proof. However, it is not that the personal integrity is not relevant. It certainly has a co-relationship with institutional integrity. In the instant case, the entire emphasis was placed by the CVC, the DoPT and the HPC only on the bio-data of the empanelled candidates. None of these authorities looked at the matter from the larger perspective of institutional integrity including institutional competence and functioning of CVC. Moreover, between 2000 and 2004, the notings of DoPT dated 26th June, 2000, 18th January, 2001, 20th June, 2003, 24th February, 2004, 18th October, 2004 and 2nd November, 2004 have all observed that penalty proceedings may be initiated against respondent no.2. Whether State should initiate such proceedings or the Centre should initiate such proceedings was not relevant. What was relevant was that such notings were not considered in juxtaposition with the clearance of CVC granted on 6th October, 2008. Even in the brief submitted to the HPC by DoPT, there was no reference to the said notings between the years 2000 and 2004. Even in the C.V. of respondent no.2, there was no reference to the earlier notings of DoPT recommending initiation of penalty proceedings against him. Therefore, even on personal integrity, the HPC did not consider the relevant material. The system governance established by the Constitution is based on distribution of powers and functions amongst the three organs of the State, one of them being the Executive whose duty is to enforce the laws made by the Parliament and administer the country through various statutory bodies like CVC which is empowered to perform the function of vigilance administration. It is the independence and impartiality of the institution like CVC which has to be maintained and preserved in larger interest of the rule of law. [Para 33] [488-A-H; 489-A-H; 490-A-C]

State of Andhra Pradesh v. Nalla Raja Reddy **(1967) 3 SCR 28, relied on.**

4.2. If the institutional competency would be adversely affected by pending proceedings and if by that touchstone the candidate stands disqualified then it shall be the duty of the HPC not to recommend such a candidate. In the instant case, apart from the pending criminal proceedings, between the period 2000 and 2004 various notings of DoPT recommended disciplinary proceedings against respondent no.2 in respect of Palmolein case. Those notings were not considered by the HPC. The 2003 Act confers autonomy and independence to the institution of CVC. Autonomy has been conferred so that the Central Vigilance Commissioner could act without fear or favour. The *institution is more important than an individual***. This was the test laid down in** *N. Kannadasan's case***. In the instant case, the HPC failed to take this test into consideration. The recommendation dated 3rd September, 2010 of HPC was entirely premised on the blanket clearance given by CVC on 6th October, 2008 and on the fact of respondent No. 2 being appointed as Chief Secretary of Kerala on 18th September, 2007; his appointment as Secretary of Parliamentary Affairs and his subsequent appointment as Secretary, Telecom. In the process, the HPC, for whatever reasons, has failed to take into consideration the pendency of Palmolein case before the Special Judge; the sanction accorded by the Government of Kerala on 30th November, 1999 under Section 197 Cr.P.C. for prosecuting inter alia respondent no.2 for having committed alleged offence under Section 120-B IPC read with Section 13(1)(d) of the Prevention of Corruption Act; the judgment of the Supreme Court dated 29th March, 2000 in the case of *****K. Karunakaran v. State of Kerala*** **in which this Court observed that, "the registration of the FIR against Shri Karunakaran and <u>others</u> cannot be held**

to be the result of malafides or actuated by extraneous considerations. The menace of corruption cannot be permitted to be hidden under the carpet of legal technicalities and in such cases probes conducted are required to be determined on facts and in accordance with law". The clearance of CVC dated 6th October, 2008 was not binding on the HPC. However, the judgment of the Supreme Court in the case of *****K. Karunakaran vs. State of Kerala* **was certainly binding on the HPC and, in any event, required due weightage to be given while making recommendation, particularly when the said judgment had emphasized the importance of probity in high offices. Therefore, the <u>recommendation</u> made by the HPC on 3rd September, 2010 is *non-est* in law. [Para 33] [490-D-H; 491-A-G]

***K. Karunakaran vs. State of Kerala and Another* **2000(2) SCR 735 – referred to.**

5.1. <u>Is Writ of Quo Warranto invocable?</u> The procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions. Before a citizen can claim a writ of quo warranto, he must satisfy the court inter-alia that the office in question is a public office and it is held by a person without legal authority and that leads to the inquiry as to whether the appointment of the said person has been in accordance with law or not. A writ of quo warranto is issued to prevent a continued exercise of unlawful authority. In the instant petition, a declaratory relief is also sought besides seeking a writ of quo warranto. In the main writ petition, the petitioner has prayed for issuance of any other writ, direction or order which this Court may deem fit and proper in the facts and circumstances of this Case. Thus, nothing prevented this Court, if so satisfied, from issuing a writ

of declaration. If public duties are to be enforced and rights and interests are to be protected, then the court may, in furtherance of public interest, consider it necessary to inquire into the state of affairs of the subject matter of litigation in the interest of justice. [Paras 35-37] [491-G; 492-F-H; 493-A]

Ashok Lanka v. Rishi Dixit **(2005) 5 SCC 598;** *Ashok Kumar Yadav v. State of Haryana* **(1985) 4 SCC 417;** *R.K. Jain v. Union of India* **(1993) 4 SCC 119;** *Hari Bansh Lal v. Sahodar Prasad Mahto* **(2010) 9 SCC 655 – relied on .**

5.2. Difference between judicial review and merit review. Government is not accountable to the courts for the choice made but Government is accountable to the courts in respect of the lawfulness/legality of its decisions when impugned under the judicial review jurisdiction. [Paras 44, 45] [496-H; 497-A; D-E]

6. Appointment of Central Vigilance Commissioner at the President's discretion: The Central Vigilance Commissioner is appointed under Section 4(1) of the 2003 Act by the President by warrant under her hand and seal after obtaining the recommendation of a Committee consisting of the Prime Minister as the Chairperson and two other Members. Although under the 2003 Act, the Central Vigilance Commissioner is appointed after obtaining the recommendation of the High Powered Committee, such recommendation has got to be accepted by the Prime Minister, who is the concerned authority under Article 77(3), and if such recommendation is forwarded to the President under Article 74, then the President is bound to act in accordance with the advice tendered. Further under the Rules of Business the concerned authority is the Prime Minister. Therefore, the advice tendered to the President by the Prime Minister regarding appointment of the Central Vigilance Commissioner will be binding on the President. There is

no merit in the contention advanced on behalf of respondent No. 2 that in the matter of appointment of Central Vigilance Commissioner under Section 4(1) of the 2003 Act the President is not to act on the advice of the Council of Ministers as is provided in Article 74 of the Constitution. [Para 48] [501-D-H; 502-A-E]

Bhuri Nath v. State of J & K **(1997) 2 SCC 745;** *Hardwari Lal v. G.D. Tapase* **AIR 1982 P&H 439 – held inapplicable.**

Samsher Singh v. State of Punjab **(1974) 2 SCC 831 – referred to.**

7. Unanimity or consensus under Section 4(2) of the 2003 Act: Under the proviso to Section 4(1), Parliament has put its faith in the High Powered Committee consisting of the Prime Minister, the Minister for Home Affairs and the Leader of the Opposition in the House of the People. It is presumed that such High Powered Committee entrusted with wide discretion to make a choice will exercise its powers in accordance with the 2003 Act, objectively and in a fair and reasonable manner. It is well settled that mere conferment of wide discretionary powers per se will not violate the doctrine of reasonableness or equality. The 2003 Act is enacted with the intention that such High Powered Committee will act in a bipartisan manner and shall perform its statutory duties keeping in view the larger national interest. Each of the Members is presumed by the legislature to act in public interest. On the other hand, if veto power is given to one of the three Members, the working of the Act would become unworkable. One more aspect needs to be mentioned. Under Section 4(2) of the 2003 Act it has been stipulated that the vacancy in the Committee shall not invalidate the appointment. This provision militates against the argument of the petitioner that the recommendation under Section 4 has to be unanimous. To accept such contention would mean conferment of a

"veto right" on one of the members of the HPC. To confer such a power on one of the members would amount to judicial legislation. Therefore, it is incorrect to state that the recommendation/decision dated 3rd September, 2010 stood vitiated on the ground that it was not unanimous. [Paras 50, 53] [503-E-H; 504-A-C; 505-G]

Grindley and Another v. Barker **1 Bos. & Pul. 229 – referred to.**

Halsbury's Laws of England **– referred to.**

8. Guidelines/Directions of this Court: Under Section 3(3), the Central Vigilance Commissioner and the Vigilance Commissioners are to be appointed from amongst persons – (a)who have been or who are in All-India Service or in any civil service of the Union or in a civil post under the Union having requisite knowledge and experience as indicated in Section 3(3)(a); or (b) who have held office or are holding office in a corporation established by or under any Central Act or a Central Government company and persons who have experience in finance including insurance and banking, law, vigilance and investigations. No reasons were given as to why in the instant case, the zone of consideration stood restricted only to the civil service. Therefore following directions are passed:

(i) There is no prescription of unanimity or consensus under Section 4(2) of the 2003 Act. However, the question still remains as to what should be done in cases of difference of opinion amongst the Members of the High Powered Committee. As in the instant case, if one Member of the Committee dissents, that Member should give reasons for the dissent and if the majority disagrees with the dissent, the majority shall give reasons for overruling the dissent. This will bring about fairness-in-action. Since legality of the

choice or selection is open to judicial review, if the above methodology is followed, transparency would emerge which would also maintain the integrity of the decision-making process.

(ii) In future the zone of consideration should be in terms of Section 3(3) of the 2003 Act. It shall not be restricted to civil servants.

(iii) All the civil servants and other persons empanelled shall be outstanding civil servants or persons of impeccable integrity.

(iv) The empanelment shall be carried out on the basis of rational criteria, which is to be reflected by recording of reasons and/or noting akin to reasons by the empanelling authority.

(v) The empanelment shall be carried out by a person not below the rank of Secretary to the Government of India in the concerned Ministry.

(vi) The empanelling authority, while forwarding the names of the empanelled officers/persons, shall enclose complete information, material and data of the concerned officer/person, whether favourable or adverse. Nothing relevant or material should be withheld from the Selection Committee. It will not only be useful but would also serve larger public interest and enhance public confidence if the contemporaneous service record and acts of outstanding performance of the officer under consideration, even with adverse remarks is specifically brought to the notice of the Selection Committee.

(vii) The Selection Committee may adopt a fair and transparent process of consideration of the

empanelled officers. [Paras 54, 55] [505-H; 506-A-H; 507-A-G]

Case Law Reference:

(1998) 1 SCC 226	**relied on**	**Paras 23, 24, 33, 49**
(2009) 7 SCC 1	**relied on**	**Paras 28, 33**
(1967) 3 SCR 28	**relied on**	**Para 33**
2000(2) SCR 735	**referred to**	**Para 33**
(2005) 5 SCC 598	**relied on**	**Paras 37, 38**
(1985) 4 SCC 417	**relied on**	**Para 39, 44**
(2010) 9 SCC 655	**relied on**	**Para 43**
(1993) 4 SCC 119	**relied on**	**Para 42, 45, 48**
(1974) 2 SCC 831	**referred to**	**Para 48**
(1997) 2 SCC 745	**held inapplicable**	**Para 48**
AIR 1982 P&H 439	**held inapplicable**	**Para 48**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 348 of 2010 etc.

Under Article 32 of the Constitution of India.

WITH

Writ Petition (C) No. 355 of 2010.

Goolam E. Vahanvati, AG, K.K. Venugopal, Prashant Bhushan, Pranav Sachdeva, Siddharth Bhatnagar, Prashant Kumar, B.S. Iyenger (for AP & J Chambers), Devadatt Kamat, T.A. Khan, Anoopam N. Prasad, Nishanth Patil, Rohit Sharma, Naila Jung, Anil Katiyar, S.N. Terdal, Gopal Sankaranarayanan, Wills Mathews, Rajdipa Behura, Shyam Mohan, D.K. Tiwari, A. Venayagam Balan, Wills Mathews, Braj Kishore Mishra, Aparna Jha, Vikas Malhotra, M.P. Sahay, Abhisehk Yadav, Vikram for the appearing parties.

The Judgemnt of the Court was delivered by

S. H. KAPADIA, CJI.

Introduction

1. The two writ petitions filed in this Court under Article 32 of the Constitution of India give rise to a substantial question of law and of public importance as to the legality of the appointment of Shri P.J. Thomas (respondent No. 2 in W.P.(C) No. 348 of 2010) as Central Vigilance Commissioner under Section 4(1) of the Central Vigilance Commission Act, 2003 ("2003 Act" for short).

2. Government is not accountable to the courts in respect of policy decisions. However, they are accountable for the legality of such decisions. While deciding this case, we must keep in mind the difference between legality and merit as also between judicial review and merit review. On 3rd September, 2010, the High Powered Committee ("HPC" for short), duly constituted under the proviso to Section 4(1) of the 2003 Act, had recommended the name of Shri P.J. Thomas for appointment to the post of Central Vigilance Commissioner. The validity of this recommendation falls for judicial scrutiny in this case. If a *duty* is cast under the proviso to Section 4(1) on the HPC to recommend to the President the name of the selected candidate, the integrity of that decision making process is got to ensure that the powers are exercised for the purposes and in the manner envisaged by the said Act, otherwise such recommendation will have no existence in the eye of law.

Clarification

3. At the very outset we wish to clarify that in this case our

judgment is strictly confined to the legality of the recommendation dated 3rd September, 2010 and the appointment based thereon. As of date, Shri P.J. Thomas is Accused No. 8 in criminal case CC 6 of 2003 pending in the Court of Special Judge, Thiruvananthapuram with respect to the offences under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 and under Section 120B of the Indian Penal Code ("IPC" for short) [hereinafter referred to as the "Palmolein case"]. According to the petitioners herein, Shri P.J. Thomas allegedly has played a big part in the cover-up of the 2G spectrum allocation which matter is subjudice. Therefore, we make it clear that we do not wish to comment in this case on the pending cases and our judgment herein should be strictly understood to be under judicial review on the legality of the appointment of respondent No. 2 and any reference in our judgment to the Palmolein case should not be understood as our observations on merits of that case.

Facts

4. Shri P.J. Thomas was appointed to the Indian Administrative Service (Kerala Cadre) 1973 batch where he served in different capacities with the State Government including as Secretary, Department of Food and Civil Supplies, State of Kerala in the year 1991. During that period itself, the State of Kerala decided to import 30,000 MT of palmolein. The Chief Minister of Kerala, on 5th October, 1991, wrote a letter to the Prime Minister stating that the State was intending to import Palmolein oil and that necessary permission should be given by the concerned Ministries. On 6th November, 1991, the Government of India issued a scheme for direct import of edible oil for Public Distribution System (PDS) on the condition that an ESCROW account be opened and import clearance be granted as per the rules. Respondent No. 2 wrote letters to the Secretary, Government of India stating that against its earlier demand for import of 30,000 MT of Palmolein oil, the present minimum need was 15,000 MT and the same was to meet the

heavy ensuing demand during the festivals of Christmas and *Sankranti*, in the middle of January, 1992, therefore, the State was proposing to immediately import the said quantity of Palmolein on obtaining requisite permission. The price for the same was fixed on 24th January, 1992, i.e., 56 days after the execution of the agreement. The Kerala State Civil Supplies Corporation Ltd. was to act as an agent of the State Government for import of Palmolein. The value of the Palmolein was to be paid to the suppliers only in Indian rupees. Further, the terms governing the ESCROW account were to be as approved by the Ministry of Finance. This letter contained various other stipulations as well. This was responded to by the Joint Secretary, Government of India, Ministry of Civil Supplies and Public Distribution, New Delhi vide letter dated 26th November, 1991 wherein it was stated that it had been decided to permit the State to import 15,000 MT of Palmolein on the terms and conditions stipulated in the Ministry's circular of even number dated 6th November, 1991. It was specifically stated that the service charges up to a maximum of 15% in Indian rupees may be paid. After some further correspondence, the order of the State of Kerala is stated to have been approved by the Cabinet on 27th November, 1991, and the State of Kerala actually imported Palmolein by opening an ESCROW account and getting the import clearance at the rate of US $ 405 per MT in January, 1992.

5. The Comptroller and Auditor General ('CAG'), in its report dated 2nd February, 1994 for the year ended 31st March, 1993 took exception to the procedure adopted for import of Palmolein by the State Government. While mentioning some alleged irregularities, the CAG observed, "therefore, the agreement entered into did not contain adequate safeguards to ensure that imported product would satisfy all the standards laid down in Prevention of Food Adulteration Rules, 1956". This report of the CAG was placed before the Public Undertaking Committee of the Kerala Assembly. The 38th Report of the Kerala Legislative Assembly - Committee on Public

Undertakings dated 19th March, 1996, *inter alia,* referred to the alleged following irregularities:-

a. That the service fee of 15% to meet the fluctuation in exchange rate was not negotiated and hence was excessive. Even the price of the import product ought not to have been settled in US Dollars.

b. That the concerned department of the State of Kerala had not invited tenders and had appointed M/s. Mala Export Corporation, an associate company of M/s. Power and Energy Pvt. Ltd., the company upon which the import order was placed as handling agent for the import.

c. That the delay in opening of ESCROW accounts and in fixation of price, which were not in conformity with the circular issued by the Central Government had incurred a loss of more than Rupees 4 crores to the Exchequer.

6. The Committee also alleged that under the pretext of plea of urgency, the deal was conducted without inviting global tenders and if the material was procured by providing ample time by inviting global tenders, other competitors would have emerged with lesser rates for the import of the item, which in turn, would have been more beneficial.

7. The Chief Editor of the Gulf India Times even filed a writ petition being O.P. No. 3813 of 1994 in the Kerala High Court praying that directions be issued to the State to register an FIR on the ground that import of Palmolein was made in violation of the Government of India Guidelines. However, it came to be dismissed by the learned Single Judge of the Kerala High Court on 4th April, 1994. Still another writ petition came to be filed by one Shri M. Vijay Kumar, who was MLA of the Opposition in the Kerala Assembly praying for somewhat similar relief. This writ petition was dismissed by a learned

Single Judge of the Kerala High Court and even appeal against that order was also dismissed by the Division Bench of that Court vide order dated 27th September, 1994.

8. Elections were held in the State of Kerala on 20th May, 1996 and the Left Democratic Front formed the government. An FIR was registered against Shri Karunakaran, former Chief Minister and six others in relation to an offence under Section 13(2) read with Section 13(1) (d) of the Prevention of Corruption Act, 1988 and Section 120B of the IPC. The State of Kerala accorded its sanction to prosecute the then Chief Minister Shri Karunakaran and various officers in the State hierarchy, who were involved in the import of Palmolein, including respondent No. 2 on 30th November, 1999.

9. Shri Karunakaran, the then Chief Minister filed a petition before the High Court being Criminal Miscellaneous No.1353/1997 praying for quashing of the said FIR registered against him and the other officers. Shri P.J. Thomas herein was not a party in that petition. However, the High Court dismissed the said writ petition declining to quash the FIR registered against the said persons. In the meanwhile, a challan (report under Section 173 of the Code of Criminal Procedure) had also been filed before the Court of Special Judge, Thiruvananthapuram and in this background the State of Kerala, vide its letter dated 31st December, 1999 wrote to the Department of Personnel and Training (DoPT) seeking sanction to prosecute the said person before the Court of competent jurisdiction. Keeping in view the investigation of the case conducted by the agency, two other persons including Shri P.J. Thomas were added as accused Nos. 7 and 8.

10. Shri Karunakaran challenged the order before this Court by filing a Petition for Special Leave to Appeal, being Criminal Appeal No. 86 of 1998, which also came to be dismissed by this Court on 29th March, 2000. This Court held that "after going through the pleadings of the parties and keeping in view the rival submissions made before us, we are

of the opinion that the registration of the FIR against the appellants and others cannot be held to be the result of mala fides or actuated by extraneous considerations. The menace of corruption cannot be permitted to be hidden under the carpet of the legal technicalities…". The Government Order granting sanction (Annexure R-I in that petition) was also upheld by this Court and it was further held that "our observations with respect to the legality of the Government Order are not conclusive regarding its constitutionality but are restricted so far as its applicability to the registration of the FIR against the appellant is concerned. We are, therefore, of the opinion that the aforesaid Government Order has not been shown to be in any way illegal or unconstitutional so far as the rights of the appellants are concerned…". Granting liberty to the parties to raise all pleas before the Trial Court, the appeal was dismissed. In the charge-sheet filed before the Trial Court, in paragraph 7, definite role was attributed to Accused No. 8 (respondent No. 2 herein) and allegations were made against him.

11. For a period of 5 years, the matter remained pending with the Central Government and vide letter dated 20th December, 2004, the Central Government asked the State Government to send a copy of the report which had been filed before the Court of competent jurisdiction. After receiving the request of the State Government, it appears that the file was processed by various authorities and as early as on 18th January, 2001, a note was put up by the concerned Under Secretary that a regular departmental enquiry should be held against Shri P.J. Thomas and Shri Jiji Thomson for imposing a major penalty. According to this note, it was felt that because of lack of evidence, the prosecution may not succeed against Shri P.J. Thomas but sanction should be accorded for prosecution of Shri Jiji Thomson. On 18th February, 2003, the DoPT had made a reference to the Central Vigilance Commission ("CVC" for short) on the cited subject, which was responded to by the CVC vide their letter dated 3rd June, 2003 and it conveyed its opinion as follows: -

"Department of Personnel & Training may refer to their DO letter No.107/1 /2000-AVD.I dated 18.02.2003 on the subject cited above.

2. Keeping in view the facts and circumstances of the case, the Commission would advise the Department of Personnel & Training to initiate major penalty proceedings against Shri P.J. Thomas, IAS (KL:73) and Shri Jiji Thomson, IAS (KL:80) and completion of proceedings thereof by appointing departmental IO.

3. Receipt of the Commission's advice may be acknowledged."

12. Despite receipt of the above opinion of CVC, the matter was still kept pending, though a note was again put up on 24th February, 2004 on similar lines as that of 18th January, 2001. In the meanwhile, the State of Kerala, vide its letter dated 24th January, 2005 wrote to the DoPT that for reasons recorded in the letter, they wish to withdraw their request for according the sanction for prosecution of the officers, including respondent No. 2, as made vide their letter dated 31st December, 1999. The matter which was pending for all this period attained a quietus in view of the letter of the State of Kerala and the PMO had been informed accordingly.

13. In its letter dated 4th November, 2005, the State took the position that the allegations made by the Investigating Agency were invalid and the cases and request for sanction against Shri P.J. Thomas should be withdrawn.

14. On 18th May, 2006 again, the Left Democratic Front formed the Government in the State of Kerala with Mr. Achuthanandan as the Chief Minister. This time the Government of Kerala filed an affidavit in this Court disassociating itself from the contents of the earlier affidavit.

15. Vide letter dated 10th October, 2006, the Chief

Secretary to the Government of Kerala again wrote a letter to the Government of India informing them that the State Government had decided to continue the prosecution launched by it and as such it sought to withdraw its above letter dated 24th January, 2005. In other words, it reiterated its request for grant of sanction by the Central Government. Vide letter dated 25th November, 2006, the Additional Secretary to the DoPT wrote to the State of Kerala asking them for the reasons for change in stand, in response to the letter of the State of Kerala dated 10th October, 2006. This action of the State Government reviving its sanction and continuing prosecution against Shri Karunakaran and others, including Respondent No. 2, was challenged by Shri Karunakaran by filing Criminal Revision Petition No. 430 of 2001 in the High Court of Kerala on the ground that the Government Order was liable to be set aside on the ground of mala fide and arbitrariness. This petition was dismissed by the High Court. In its judgment, the High Court referred to the alleged role of Shri P.J. Thomas in the Palmolein case. The action of the State Government or pendency of proceedings before the Special Judge at Thiruvananthapuram was never challenged by Shri P.J. Thomas before any court of competent jurisdiction. The request of the State Government for sanction by the Central Government was considered by different persons in the Ministry and vide its noting dated 10th May, 2007, a query was raised upon the CVC as to whether pendency of a reply to Ministry's letter, from State Government in power, on a matter already settled by the previous State Government should come in the way of empanelment of these officers for appointment to higher post in the Government. Rather than rendering the advice asked for, the CVC vide its letter dated 25th June, 2007 informed the Ministry as follows :

> "Department of Personnel & Training may refer to their note dated 17.05.2007, in file No.107/1/2000-AVD-I, on the above subject.
>
> 2. The case has been re-examined and Commission has observed that no case is made out against S/Shri P.J. Thomas and Jiji Thomson in connection with alleged conspiracy with other public servants and private persons in the matter of import of Palmolein through a private firm. The abovesaid officers acted in accordance with a legitimately taken Cabinet decision and no loss has been caused to the State Government and most important, no case is made out that they had derived any benefit from the transaction. (emphasis supplied)
>
> 3. In view of the above, Commission advises that the case against S/Shri P.J. Thomas and Jiji Thomson may be dropped and matter be referred once again thereafter to the Commission so that Vigilance Clearance as sought for now can be recorded.
>
> 4. DOPT's file No.107/1/2000-AVD-I along with the records of the case, is returned herewith. Its receipt may be acknowledged. Action taken in pursuance of Commission's advice may be intimated to the Commission early."

16. It may be noticed that neither in the above reply nor on the file any reasons are available as to why CVC had changed its earlier opinion/stand as conveyed to the Ministry vide its letter dated 3rd June, 2003. After receiving the above advice of CVC, the Ministry on 6th July, 2007 had recorded a note in the file that as far as CVC's advice regarding dropping all proceedings is concerned, the Ministry should await the action to be taken by the Government of Kerala and the relevant courts.

17. The legality and correctness of the order of the Kerala High Court dated 19th February, 2003 was questioned by Shri Karunakaran by filing a petition before this Court on which leave was granted and it came to be registered as Criminal Appeal No. 801 of 2003. This appeal was also dismissed by this Court vide its order dated 6th December, 2006. However, the parties

were given liberty to raise the plea of mala fides before the High Court. Even on reconsideration, the High Court dismissed the petition filed by Shri Karunakaran raising the plea of mala fides vide its order dated 6th July, 2007. The High Court had, thus, declined to accept that action of the State Government in prosecuting the persons stated therein was actuated by mala fides. The order of the High Court was again challenged by Shri Karunakaran by preferring a Petition for Special Leave to Appeal before this Court. This Court had stayed further proceedings before the Trial Court. This appeal remained pending till 23rd December, 2010 when it abated because of unfortunate demise of Shri Karunakaran.

18. Vide order dated 18th September, 2007, the Government of Kerala appointed Shri P.J. Thomas as the Chief Secretary. Thereafter, on 6th October, 2008 CVC accorded vigilance clearance to all officers except Smt. Parminder M. Singh. We have perused the files submitted by the learned Attorney General for India. From the said files we find that there are at least six notings of DoPT between 26th June, 2000 and 2nd November, 2004 which has recommended initiation of penalty proceedings against Shri P.J. Thomas and yet in the clearance given by CVC on 6th October, 2008 and in the Brief prepared by DoPT dated 1st September, 2010 and placed before HPC there is no reference to the earlier notings of the then DoPT and nor any reason has been given as to why CVC had changed its views while granting vigilance clearance on 6th October, 2008. On 23rd January, 2009, Shri P.J. Thomas was appointed as Secretary, Parliamentary Affairs to the Government of India.

19. The DoPT empanelled three officers vide its note dated 1st September, 2010. Vide the same note along with the Brief the matter was put up to the HPC for selecting one candidate out of the empanelled officers for the post of Central Vigilance Commissioner. The meeting of the HPC consisting of the Prime Minister, the Home Minister and the Leader of the

Opposition was held on 3rd September, 2010. In the meeting, disagreement was recorded by the Leader of the Opposition, despite which, name of Shri P.J. Thomas was recommended for appointment to the post of Central Vigilance Commissioner by majority. A note was thereafter put up with the recommendation of the HPC and placed before the Prime Minister which was approved on the same day. On 4th September, 2010, the same note was submitted to the President who also approved it on the same day. Consequently, Shri P.J. Thomas was appointed as Central Vigilance Commissioner and he took oath of his office.

Setting-up of CVC

20. Vigilance is an integral part of all government institutions. Anti-corruption measures are the responsibility of the Central Government. Towards this end the Government set up the following departments :

(i) CBI

(ii) Administrative Vigilance Division in DoPT

(iii) Domestic Vigilance Units in the Ministries/ Departments, Government companies, Government Corporations, nationalized banks and PSUs

(iv) CVC

21. Thus, CVC as an *integrity institution* was set up by the Government of India in 1964 vide Government Resolution pursuant to the recommendations of Santhanam Committee. However, it was not a statutory body at that time. According to the recommendations of the Santhanam Committee, CVC, in its functions, was supposed to be independent of the executive. The sole purpose behind setting up of the CVC was to improve the *vigilance administration* of the country.

22. In September, 1997, the Government of India

established the Independent Review Committee to monitor the functioning of CVC and to examine the working of CBI and the Enforcement Directorate. Independent Review Committee vide its report of December, 1997 suggested that CVC be given a *statutory status*. It also recommended that the selection of Central Vigilance Commissioner shall be made by a High Powered Committee comprising of the Prime Minister, the Home Minister and the Leader of Opposition in Lok Sabha. It also recommended that the appointment shall be made by the President of India on the specific recommendations made by the HPC. That, the CVC shall be responsible for the efficient functioning of CBI; CBI shall report to CVC about cases taken up for investigations; the appointment of CBI Director shall be by a Committee headed by the Central Vigilance Commissioner; the Central Vigilance Commissioner shall have a minimum fixed tenure and that a Committee headed by the Central Vigilance Commissioner shall prepare a panel for appointment of Director of Enforcement.

23. On 18th December, 1997 the judgment in the case of *Vineet Narain v. Union of India* [(1998) 1 SCC 226] came to be delivered. Exercising authority under Article 32 read with Article 142, this Court in order to implement an important constitutional principle of the rule of law ordered that CVC shall be given a statutory status as recommended by Independent Review Committee. All the above recommendations of Independent Review Committee were ordered to be given a statutory status.

24. The judgment in *Vineet Narain's* case (supra) was followed by the 1999 Ordinance under which CVC became a multi-member Commission headed by Central Vigilance Commissioner. The 1999 Ordinance conferred statutory status on CVC. The said Ordinance incorporated the directions given by this Court in *Vineet Narain's* case. Suffice it to state, that, the 1999 Ordinance stood promulgated to improve the *vigilance administration* and to create a culture of *integrity* as far as government administration is concerned.

25. The said 1999 Ordinance was ultimately replaced by the enactment of the 2003 Act which came into force with effect from 11th September, 2003.

Analysis of the 2003 Act

26. The 2003 Act has been enacted to provide for the constitution of a Central Vigilance Commission as an institution to inquire or cause inquiries to be conducted into offences alleged to have been committed under the Prevention of Corruption Act, 1988 by certain categories of public servants of the Central Government, corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by the Central Government and for matters connected therewith or incidental thereto (see Preamble). By way of an aside, we may point out that in Australia, US, UK and Canada there exists a concept of *integrity institutions*. In Hongkong we have an Independent Commission against corruption. In Western Australia there exists a statutory Corruption Commission. In Queensland, we have Misconduct Commission. In New South Wales there is Police Integrity Commission. All these come within the category of *integrity institutions*. In our opinion, CVC is an *integrity institution*. This is clear from the scope and ambit (including the functions of the Central Vigilance Commissioner) of the 2003 Act. It is an *Institution* which is statutorily created under the Act. It is to supervise *vigilance administration*. The 2003 Act provides for a mechanism by which the CVC retains control over CBI. That is the reason why it is given autonomy and insulation from external influences under the 2003 Act.

27. For the purposes of deciding this case, we need to quote the relevant provisions of the 2003 Act.

3. Constitution of Central Vigilance Commission.-

(2) The Commission shall consist of—

(a) a Central Vigilance Commissioner — Chairperson;

(b) not more than two Vigilance Commissioners - Members.

(3) The Central Vigilance Commissioner and the Vigilance Commissioners shall be appointed from amongst persons—

(a) who have been or are in an All-India Service or in any civil service of the Union or in a civil post under the Union having knowledge and experience in the matters relating to vigilance, policy making and administration including police administration;

4. Appointment of Central Vigilance Commissioner and Vigilance Commissioners.-

(1) The Central Vigilance Commissioner and the Vigilance Commissioners shall be appointed by the President by warrant under his hand and seal:

Provided that every appointment under this sub-section shall be made after obtaining the recommendation of a Committee consisting of—

(a) the Prime Minister — Chairperson;

(b) the Minister of Home Affairs — Member;

(c) the Leader of the Opposition in the House of the People —Member.

Explanation.—For the purposes of this sub-section, "the Leader of the Opposition in the House of the People" shall, when no such Leader has been so recognized, include the Leader of the single largest group in opposition of the Government in the House of the People.

(2) No appointment of a Central Vigilance Commissioner or a Vigilance Commissioner shall be invalid merely by reason of any vacancy in the Committee.

5. Terms and other conditions of service of Central Vigilance Commissioner. -

(1) Subject to the provisions of sub-sections (3) and (4), the Central Vigilance Commissioner shall hold office for a term of four years from the date on which he enters upon his office or till he attains the age of sixty-five years, whichever is earlier. The Central Vigilance Commissioner, on ceasing to hold the office, shall be ineligible for reappointment in the Commission.

(3) The Central Vigilance Commissioner or a Vigilance Commissioner shall, before he enters upon his office, make and subscribe before the President, or some other person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in Schedule to this Act.

(6) On ceasing to hold office, the Central Vigilance Commissioner and every other Vigilance Commissioner shall be ineligible for—

(a) any diplomatic assignment, appointment as administrator of a Union territory and such other assignment or appointment which is required by law to be made by the President by warrant under his hand and seal.

(b) further employment to any office of profit under the Government of India or the Government of a State.

6. Removal of Central Vigilance Commissioner and Vigilance Commissioner.- (1) Subject to the provisions of sub-section (3), the Central Vigilance Commissioner or any Vigilance Commissioner shall be removed from his office

only by order of the President on the ground of proved misbehaviour or incapacity after the Supreme Court, on a reference made to it by the President, has, on inquiry, reported that the Central Vigilance Commissioner or any Vigilance Commissioner, as the case may be, ought on such ground be removed.

(3) Notwithstanding anything contained in sub-section (1), the President may by order remove from office the Central Vigilance Commissioner or any Vigilance Commissioner if the Central Vigilance Commissioner or such Vigilance Commissioner, as the case may be,—

(a) is adjudged an insolvent; or

(b) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or

(c) engages during his term of office in any paid employment outside the duties of his office; or

(d) is, in the opinion of the President, unfit to continue in office by reason of infirmity of mind or body; or

(e) has acquired such financial or other interest as is likely to affect prejudicially his functions as a Central Vigilance Commissioner or a Vigilance Commissioner.

8. *Functions and powers of Central Vigilance Commission-*

(1) The functions and powers of the Commission shall be to—

(a) exercise superintendence over the functioning of the Delhi Special Police Establishment in so far as it relates to the investigation of offences alleged to have been committed under the Prevention of Corruption Act, 1988 or an offence with which a public servant specified in sub-

section (2) may, under the Code of Criminal Procedure, 1973, be charged at the same trial;

(b) give directions to the Delhi Special Police Establishment for the purpose of discharging the responsibility entrusted to it under sub-section (1) of section 4 of the Delhi Special Police Establishment Act, 1946:

(d) inquire or cause an inquiry or investigation to be made into any complaint against any official belonging to such category of officials specified in sub-section (2) wherein it is alleged that he has committed an offence under the Prevention of Corruption Act, 1988 and an offence with which a public servant specified in subsection (2) may, under the Code of Criminal Procedure, 1973, be charged at the same trial;

(e) review the progress of investigations conducted by the Delhi Special Police Establishment into offences alleged to have been committed under the Prevention of Corruption Act, 1988 or the public servant may, under the Code of Criminal Procedure, 1973, be charged at the same trial;

(f) review the progress of applications pending with the competent authorities for sanction of prosecution under the Prevention of Corruption Act, 1988;

(h) exercise superintendence over the vigilance administration of the various Ministries of the Central Government or corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by that Government:

(2) The persons referred to in clause (d) of sub-section (1) are as follows:—

(a) members of All-India Services serving in connection

with the affairs of the Union and Group 'A' officers of the Central Government;

(b) such level of officers of the corporations established by or under any Central Act, Government companies, societies and other local authorities, owned or controlled by the Central Government, as that Government may, by notification in the Official Gazette, specify in this behalf:

Provided that till such time a notification is issued under this clause, all officers of the said corporations, companies, societies and local authorities shall be deemed to be the persons referred to in clause (d) of sub-section (1).

11. Power relating to inquiries. **-** The Commission shall, while conducting any inquiry referred to in clauses (c) and (d) of sub-section (1) of section 8, have all the powers of a civil court trying a suit under the Code of Civil Procedure, 1908 and in particular, in respect of the following matters, namely:—

(a) summoning and enforcing the attendance of any person from any part of India and examining him on oath;

(b) requiring the discovery and production of any document;

(c) receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any court or office;

(e) issuing commissions for the examination of witnesses or other documents; And

(f) any other matter which may be prescribed.

THE SCHEDULE

[See section 5(3)]

Form of oath or affirmation to be made by the Central Vigilance Commissioner or Vigilance Commissioner:—

"I, A. B., having been appointed Central Vigilance Commissioner (or Vigilance Commissioner) of the Central Vigilance Commission do swear in the name of god/ solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or ill-will and that I will uphold the constitution and the laws.".

28. On analysis of the 2003 Act, the following are the salient features. CVC is given a statutory status. It stands established as an Institution. CVC stands established to inquire into offences alleged to have been committed under the Prevention of Corruption Act, 1988 by certain categories of public servants enumerated above. Under Section 3(3)(a) the Central Vigilance Commissioner and the Vigilance Commissioners are to be appointed from amongst persons who have been or are in All India Service or in any civil service of the Union or who are in a civil post under the Union having knowledge and experience in the matters relating to vigilance, policy making and administration including police administration. The underlined words "who have been or who are" in Section 3(3)(a) refer to the person holding office of a civil servant or who has held such office. These underlined words came up for consideration by this Court in the case of *N. Kannadasan v. Ajoy Khose and Others* [(2009) 7 SCC 1] in which it has been held that the said words indicate the eligibility criteria and further they indicate that such past or

present eligible persons should be without any *blemish* whatsoever and that they should not be appointed merely because they are eligible to be considered for the post. One more aspect needs to be highlighted. The constitution of CVC as a statutory body under Section 3 shows that CVC is an Institution. The key word is Institution. We are emphasizing the key word for the simple reason that in the present case the recommending authority (High Powered Committee) has gone by personal integrity of the officers empanelled and not by institutional integrity.

29. Section 4 refers to appointment of Central Vigilance Commissioner and Vigilance Commissioners. Under Section 4(1) they are to be appointed by the President by warrant under her hand and seal. Section 4(1) indicates the importance of the post. Section 4(1) has a proviso. Every appointment under Section 4(1) is to be made after obtaining the *recommendation* of a committee consisting of-

(a) The Prime Minister - Chairperson;

(b) The Minister of Home Affairs - Member;

(c) The Leader of the Opposition in the House of the People - Member.

30. For the sake of brevity, we may refer to the Selection Committee as High Powered Committee. The key word in the proviso is the word "*recommendation*". While making the recommendation, the HPC performs a statutory duty. The impugned recommendation dated 3rd September, 2010 is in exercise of the statutory power vested in the HPC under the proviso to Section 4(1). The post of Central Vigilance Commissioner is a statutory post. The Commissioner performs statutory functions as enumerated in Section 8. The word 'recommendation' in the proviso stands for an informed decision to be taken by the HPC on the basis of a consideration of relevant material keeping in mind the purpose, object and

policy of the 2003 Act. As stated, the object and purpose of the 2003 Act is to have an integrity Institution like CVC which is in charge of *vigilance administration* and which constitutes an anti-corruption mechanism. In its functions, the CVC is similar to Election Commission, Comptroller and Auditor General, Parliamentary Committees etc. Thus, while making the recommendations, the service conditions of the candidate being a public servant or civil servant in the past is not the sole criteria. The HPC must also take into consideration the question of institutional competency into account. If the selection adversely affects institutional competency and functioning then it shall be the duty of the HPC not to recommend such a candidate. Thus, the institutional integrity is the primary consideration which the HPC is required to consider while making recommendation under Section 4 for appointment of Central Vigilance Commissioner. In the present case, this vital aspect has not been taken into account by the HPC while recommending the name of Shri P.J. Thomas for appointment as Central Vigilance Commissioner. We do not wish to discount personal integrity of the candidate. What we are emphasizing is that institutional integrity of an institution like CVC has got to be kept in mind while recommending the name of the candidate. Whether the incumbent would or would not be able to function? Whether the working of the Institution would suffer? If so, would it not be the duty of the HPC not to recommend the person. In this connection the HPC has also to keep in mind the object and the policy behind enactment of the 2003 Act. Under Section 5(1) the Central Vigilance Commissioner shall hold the office for a term of 4 years. Under Section 5(3) the Central Vigilance Commissioner shall, before he enters upon his office, makes and subscribes before the President an oath or affirmation according to the form set out in the Schedule to the Act. Under Section 6(1) the Central Vigilance Commissioner shall be removed from his office only by order of the President and that too on the ground of proved misbehaviour or incapacity after the Supreme Court, on a reference made to it by the President, has on inquiry reported

that the Central Vigilance Commissioner be removed. These provisions indicate that the office of the Central Vigilance Commissioner is not only given independence and insulation from external influences, it also indicates that such protections are given in order to enable the Institution of CVC to work in a free and fair environment. The prescribed form of oath under Section 5(3) requires Central Vigilance Commissioner to uphold the sovereignty and *integrity* of the country and to perform his duties without *fear or favour*. All these provisions indicate that CVC is an *integrity institution.* The HPC has, therefore, to take into consideration the values independence and impartiality of the Institution. The said Committee has to consider the institutional competence. It has to take an informed decision keeping in mind the abovementioned vital aspects indicated by the purpose and policy of the 2003 Act.

31. Chapter III refers to functions and powers of the Central Vigilance Commission. CVC exercises superintendence over the functioning of the Delhi Special Police Establishment insofar as it relates to investigation of offences alleged to have been committed under the Prevention of Corruption Act, 1988, or an offence with which a public servant specified in sub-section (2) may, under the Code of Criminal Procedure, 1973 be charged with at the trial. Thus, CVC is empowered to exercise superintendence over the functioning of CBI. It is also empowered to give directions to CBI. It is also empowered to review the progress of investigations conducted by CBI into offences alleged to have been committed under the Prevention of Corruption Act, 1988 or under the Code of Criminal Procedure by a public servant. CVC is also empowered to exercise superintendence over the vigilance administration of various ministries of the Central Government, PSUs, Government companies etc. The powers and functions discharged by CVC is the sole reason for giving the institution the administrative autonomy, independence and insulation from external influences.

Validity of the recommendation dated 3rd September, 2010

32. One of the main contentions advanced on behalf of Union of India and Shri P.J. Thomas before us was that once the CVC clearance had been granted on 6th October, 2008 and once the candidate stood empanelled for appointment at the Centre and in fact stood appointed as Secretary, Parliamentary Affairs and, thereafter, Secretary Telecom, it was legitimate for the HPC to proceed on the basis that there was no impediment in the way of appointment of respondent No. 2 on the basis of the pending case which had been found to be without any substance.

33. We find no merit in the above submissions. Judicial review seeks to ensure that the statutory duty of the HPC to recommend under the proviso to Section 4(1) is performed keeping in mind the policy and the purpose of the 2003 Act. We are not sitting in appeal over the opinion of the HPC. What we have to see is whether relevant material and vital aspects having nexus to the object of the 2003 Act were taken into account when the decision to recommend took place on 3rd September, 2010. Appointment to the post of the Central Vigilance Commissioner must satisfy not only the eligibility criteria of the candidate but also the decision making process of the recommendation [see para 88 of *N. Kannadasan* (supra)]. The decision to recommend has got to be an informed decision keeping in mind the fact that CVC as an institution has to perform an important function of vigilance administration. If a statutory body like HPC, for any reason whatsoever, fails to look into the relevant material having nexus to the object and purpose of the 2003 Act or takes into account irrelevant circumstances then its decision would stand vitiated on the ground of official arbitrariness [see *State of Andhra Pradesh v. Nalla Raja Reddy* (1967) 3 SCR 28]. Under the proviso to Section 4(1), the HPC had to take into consideration what is good for the institution and not what is good for the candidate

[see para 93 of *N. Kannadasan* (supra)]. When institutional integrity is in question, the touchstone should be "public interest" which has got to be taken into consideration by the HPC and in such cases the HPC may not insist upon proof [see para 103 of *N. Kannadasan* (supra)]. *We should not be understood to mean that the personal integrity is not relevant. It certainly has a co-relationship with institutional integrity.* The point to be noted is that in the present case the entire emphasis has been placed by the CVC, the DoPT and the HPC only on the bio-data of the empanelled candidates. None of these authorities have looked at the matter from the larger perspective of institutional integrity including institutional competence and functioning of CVC. Moreover, we are surprised to find that between 2000 and 2004 the notings of DoPT dated 26th June, 2000, 18th January, 2001, 20th June, 2003, 24th February, 2004, 18th October, 2004 and 2nd November, 2004 have all observed that penalty proceedings may be initiated against Shri P.J. Thomas. Whether State should initiate such proceedings or the Centre should initiate such proceedings was not relevant. What is relevant is that such notings were not considered in juxtaposition with the clearance of CVC granted on 6th October, 2008. Even in the Brief submitted to the HPC by DoPT, there is no reference to the said notings between the years 2000 and 2004. Even in the C.V. of Shri P.J. Thomas, there is no reference to the earlier notings of DoPT recommending initiation of penalty proceedings against Shri P.J. Thomas. Therefore, even on personal integrity, the HPC has not considered the relevant material. The learned Attorney General, in his usual fairness, stated at the Bar that only the Curriculum Vitae of each of the empanelled candidates stood annexed to the agenda for the meeting of the HPC. The fact remains that the HPC, for whatsoever reason, has failed to consider the relevant material keeping in mind the purpose and policy of the 2003 Act. The system governance established by the Constitution is based on distribution of powers and functions amongst the three organs of the State, one of them being the Executive whose duty is to enforce the laws made by the

Parliament and administer the country through various statutory bodies like CVC which is empowered to perform the function of vigilance administration. Thus, we are concerned with the institution and its integrity including institutional competence and functioning and not the desirability of the candidate alone who is going to be the Central Vigilance Commissioner, though personal integrity is an important quality. It is the independence and impartiality of the institution like CVC which has to be maintained and preserved in larger interest of the rule of law [see *Vineet Narain* (supra)]. While making recommendations, the HPC performs a statutory duty. Its duty is to recommend. While making recommendations, the criteria of the candidate being a public servant or a civil servant in the past is not the sole consideration. The HPC has to look at the record and take into consideration whether the candidate would or would not be able to function as a Central Vigilance Commissioner. Whether the institutional competency would be adversely affected by pending proceedings and if by that touchstone the candidate stands disqualified then it shall be the duty of the HPC not to recommend such a candidate. In the present case apart from the pending criminal proceedings, as stated above, between the period 2000 and 2004 various notings of DoPT recommended disciplinary proceedings against Shri P.J. Thomas in respect of Palmolein case. Those notings have not been considered by the HPC. As stated above, the 2003 Act confers autonomy and independence to the institution of CVC. Autonomy has been conferred so that the Central Vigilance Commissioner could act without fear or favour. We may reiterate that *institution is more important than an individual.* This is the test laid down in para 93 of *N. Kannadasan's* case (supra). In the present case, the HPC has failed to take this test into consideration. The recommendation dated 3rd September, 2010 of HPC is entirely premised on the blanket clearance given by CVC on 6th October, 2008 and on the fact of respondent No. 2 being appointed as Chief Secretary of Kerala on 18th September, 2007; his appointment as Secretary of Parliamentary Affairs and his subsequent appointment as

Secretary, Telecom. In the process, the HPC, for whatever reasons, has failed to take into consideration the pendency of Palmolein case before the Special Judge, Thiruvananthapuram being case CC 6 of 2003; the sanction accorded by the Government of Kerala on 30th November, 1999 under Section 197 Cr.P.C. for prosecuting inter alia Shri P.J. Thomas for having committed alleged offence under Section 120-B IPC read with Section 13(1)(d) of the Prevention of Corruption Act; the judgment of the Supreme Court dated 29th March, 2000 in the case of *K. Karunakaran v. State of Kerala and Another* in which this Court observed that, "the registration of the FIR against Shri Karunakaran and others cannot be held to be the result of malafides or actuated by extraneous considerations. The menace of corruption cannot be permitted to be hidden under the carpet of legal technicalities and in such cases probes conducted are required to be determined on facts and in accordance with law". Further, even the judgment of the Kerala High Court in Criminal Revision Petition No. 430 of 2001 has not been considered. It may be noted that the clearance of CVC dated 6th October, 2008 was not binding on the HPC. However, the aforestated judgment of the Supreme Court dated 29th March, 2000 in the case of *K. Karunakaran vs. State of Kerala and Another* in Criminal Appeal No. 86 of 1998 was certainly binding on the HPC and, in any event, required due weightage to be given while making recommendation, particularly when the said judgment had emphasized the importance of probity in high offices. This is what we have repeatedly emphasized in our judgment – *institution is more important than individual(s)*. For the above reasons, it is declared that the recommendation made by the HPC on 3rd September, 2010 is non-est in law.

Is Writ of Quo Warranto invocable?

34. Shri K.K. Venugopal, learned senior counsel appearing on behalf of respondent No. 2, submitted that the present case is neither a case of infringement of the statutory provisions of

the 2003 Act nor of the appointment being contrary to any procedure or rules. According to the learned counsel, it is well settled that a writ of quo warranto applies in a case when a person usurps an office and the allegation is that he has no title to it or a legal authority to hold it. According to the learned counsel for a writ of quo warranto to be issued there must be a clear infringement of the law. That, in the instant case there has been no infringement of any law in the matter of appointment of respondent No. 2.

35. The procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions. Before a citizen can claim a writ of quo warranto he must satisfy the court inter-alia that the office in question is a public office and it is held by a person without legal authority and that leads to the inquiry as to whether the appointment of the said person has been in accordance with law or not. A writ of quo warranto is issued to prevent a continued exercise of unlawful authority.

36. One more aspect needs to be mentioned. In the present petition, as rightly pointed by Shri Prashant Bhushan, learned counsel appearing on behalf of the petitioner, a declaratory relief is also sought besides seeking a writ of quo warranto.

37. At the outset it may be stated that in the main writ petition the petitioner has prayed for issuance of any other writ, direction or order which this Court may deem fit and proper in the facts and circumstances of this Case. Thus, nothing prevents this Court, if so satisfied, from issuing a writ of declaration. Further, as held hereinabove, recommendation of the HPC and, consequently, the appointment of Shri P.J. Thomas was in contravention of the provisions of the 2003 Act, hence, we find no merit in the submissions advanced on behalf of respondent No. 2 on non-maintainability of the writ petition. If public duties are to be enforced and rights and interests are

to be protected, then the court may, in furtherance of public interest, consider it necessary to inquire into the state of affairs of the subject matter of litigation in the interest of justice [see *Ashok Lanka v. Rishi Dixit* (2005) 5 SCC 598].

38. Keeping in mind the above parameters, we may now consider some of the judgments on which reliance has been placed by the learned counsel for respondent No. 2.

39. In *Ashok Kumar Yadav v. State of Haryana* [(1985) 4 SCC 417], the Division Bench of the Punjab and Haryana High Court had quashed and set aside selections made by the Haryana Public Service Commission to the Haryana Civil Service and other Allied Services.

40. In that case some candidates who had obtained very high marks at the written examination failed to qualify as they had obtained poor marks in the viva voce test. Consequently, they were not selected. They were aggrieved by the selections made by Haryana Public Service Commission. Accordingly, Civil Writ Petition 2495 of 1983 was filed in the High Court challenging the validity of the selections and seeking a writ for quashing and setting aside the same. There were several grounds on which the validity of the selection made by the Commission was assailed. A declaration was also sought that they were entitled to be selected. A collateral attack was launched. It was alleged that the Chairperson and members of Public Service Commission were not men of high integrity, calibre and qualification and they were appointed solely as a matter of political patronage and hence the selections made by them were invalid. This ground of challenge was sought to be repelled on behalf of the State of Haryana who contended that not only was it not competent to the Court on the existing set of pleadings to examine whether the Chairman and members of the Commission were men of high integrity, calibre and qualification but also there was no material at all on the basis of which the Court could come to the conclusion that they were men lacking in integrity, calibre or qualification.

41. The writ petition came to be heard by a Division Bench of the High Court of Punjab and Haryana. The Division Bench held that the Chairperson and members of the Commission had been appointed purely on the basis of political considerations and that they did not satisfy the test of high integrity, calibre and qualification. The Division Bench went to the length of alleging corruption against the Chairperson and members of the Commission and observed that they were not competent to validly wield the golden scale of viva voce test for entrance into the public service. This Court vide para 9 observed that it was difficult to see how the Division Bench of the High Court could have possibly undertaken an inquiry into the question whether Chairman and members of the Commission were men of integrity, calibre and qualification; that such an inquiry was totally irrelevant inquiry because even if they were men lacking in integrity, calibre and qualification, it would not make their appointments invalid so long as the constitutional and legal requirement in regard to appointment are fulfilled. *It was held that none of the constitutional provisions, namely, Article 316 and 319 stood violated in making appointments of the Chairperson* and members of the Commission nor was any legal provision breached. Therefore, the appointments of the Chairperson and members of the Commission were made in conformity with the constitutional and legal requirements, and if that be so, it was beyond the jurisdiction of the High Court to hold that such appointments were invalid on the ground that the Chairman and the members of the Commission lacked integrity, calibre and qualification. The Supreme Court observed that it passes their comprehension as to how the appointments of the Chairman and members of the Commission could be regarded as suffering from infirmity merely on the ground that in the opinion of the Division Bench of the High Court the Chairperson and the members of the Commission were not men of integrity or calibre. In the present case, as stated hereinabove, there is a breach/ violation of the proviso to Section 4(1) of the 2003 Act, hence, writ was maintainable.

42. In *R.K. Jain v. Union of India* [(1993) 4 SCC 119] Shri Harish Chandra was a Senior Vice-President when the question of filling up the vacancy of the President came up for consideration. He was qualified for the post under the Rules. No challenge was made on that account. Under Rule 10(1) the Central Government was conferred the power to appoint one of the members to be the President. The validity of the Rule was not questioned. Thus, the Central Government was entitled to appoint Shri Harish Chandra as the President. It was stated that the track record of Shri Harish Chandra was poor. He was hardly fit to hold the post of the President. It was averred that Shri Harish Chandra has been in the past proposed for appointment as a Judge of the Delhi High Court. His appointment, however, did not materialize due to certain adverse reports. It was held by this Court that judicial review is concerned with whether the incumbent possessed requisite qualification for appointment and the manner in which the appointment came to be made or the procedure adopted was fair, just and reasonable. When a candidate was found qualified and eligible and is accordingly appointed by the executive to hold an office as a Member or Vice President or President of a Tribunal, in judicial review the Court cannot sit over the choice of the selection. It is for the executive to select the personnel as per law or procedure. Shri Harish Chandra was the Senior Vice President at the relevant time. The question of comparative merit which was the key contention of the petitioner could not be gone into in a PIL; that the writ petition was not a writ of quo warranto and in the circumstances the writ petition came to be dismissed. It was held that even assuming for the sake of arguments that the allegations made by the petitioner were factually accurate, still, this Court cannot sit in judgment over the choice of the person made by the Central Government for appointment as a President of CEGAT so long as the person chosen possesses the prescribed qualification and is otherwise eligible for appointment. It was held that this Court cannot interfere with the appointment of Shri Harish Chandra as the President of CEGAT on the ground that his track record

was poor or because of adverse reports on which account his appointment as a High Court Judge had not materialized.

43. In the case of *Hari Bansh Lal v. Sahodar Prasad Mahto* [(2010) 9 SCC 655], the appointment of Shri Hari Bansh Lal as Chairman, Jharkhand State Electricity Board stood challenged on the ground that the board had been constituted in an arbitrary manner; that Shri Hari Bansh Lal was a person of doubtful integrity; that he was appointed as a Chairman without following the rules and procedure and in the circumstances the appointment stood challenged. On the question of maintainability, the Division Bench of this Court held that a writ of quo warranto lies only when the appointment is contrary to a statutory provision. It was further held that "suitability" of a candidate for appointment to a post is to be judged by the appointing authority and not by the court unless the appointment is contrary to the statutory rules/provisions. It is important to note that this Court went into the merits of the case and came to the conclusion that there was no adequate material to doubt the integrity of Shri Hari Bansh Lal who was appointed as the Chairperson of Jharkhand State Electricity Board. This Court further observed that in the writ petition there was no averment saying that the appointment was contrary to statutory provisions.

44. As stated above, we need to keep in mind the difference between judicial review and merit review. As stated above, in this case the judicial determination is confined to the integrity of the decision making process undertaken by the HPC in terms of the proviso to Section 4(1) of the 2003 Act. If one carefully examines the judgment of this Court in *Ashok Kumar Yadav's* case (supra) the facts indicate that the High Court had sat in appeal over the personal integrity of the Chairman and Members of the Haryana Public Service Commission in support of the collateral attack on the selections made by the State Public Service Commission. In that case, the High Court had failed to keep in mind the difference between

judicial and merit review. Further, this Court found that the appointments of the Chairperson and Members of Haryana Public Service Commission was in accordance with the provisions of the Constitution. In that case, there was no issue as to the legality of the decision-making process. On the contrary the last sentence of para 9 supports our above reasoning when it says that it is always open to the Court to set aside the decision (selection) of the Haryana Public Service Commission *if such decision is vitiated by the influence of extraneous considerations* or if such selection is made in breach of the statute or the rules.

45. Even in *R.K. Jain's* case (supra), this Court observed vide para 73 that judicial review is concerned with whether the incumbent possessed qualifications for the appointment and *the manner in which the appointment came to be made* or whether procedure adopted was fair, just and reasonable. We reiterate that Government is not accountable to the courts for the choice made but Government is accountable to the courts in respect of the lawfulness/legality of its decisions when impugned under the judicial review jurisdiction. We do not wish to multiply the authorities on this point.

Appointment of Central Vigilance Commissioner at the President's discretion

46. On behalf of respondent No. 2 it was submitted that though under Section 4(1) of the 2003 Act, the appointment of Central Vigilance Commissioner is made on the basis of the *recommendation* of a High Powered Committee, the President of India is not to act on the *advice* of the Council of Ministers as is provided in Article 74 of the Constitution. In this connection, it was submitted that the exercise of powers by the President in appointing respondent No. 2 has not been put in issue in the PIL, nor is there any pleading in regard to the exercise of powers by the President and in the circumstances it is not open to the petitioner to urge that the appointment is invalid.

47. Shri G.E. Vahanvati, learned Attorney General appearing on behalf of Union of India, however, submitted that the proposal sent after obtaining and accepting the recommendations of the High Powered Committee under Section 4(1) was binding on the President. Learned counsel submitted that under Article 74 of the Constitution the President acts in exercise of her function on the aid and advice of the Council of Ministers headed by the Prime Minister which advice is binding on the President subject to the proviso to Article 74. According to the learned counsel Article 77 of the Constitution inter alia provides for conduct of Government Business. Under Article 77(3), the President makes rules for transaction of Government Business and for allocation of business among the Ministers. On facts, learned Attorney General submitted that under Government of India (Transaction of Business) Rules, 1961 the Prime Minister had taken a decision on 3rd September, 2010 to propose the name of respondent No. 2 for appointment as Central Vigilance Commissioner after the recommendation of the High Powered Committee. It was accordingly submitted on behalf of Union of India that this advice of the Prime Minister under Article 77(3), read with Article 74 of the Constitution is binding on the President. That, although the recommendation of the High Powered Committee under Section 4(1) of the 2003 Act may not be binding on the President *proprio vigore*, however, if such recommendation has been accepted by the Prime Minister, who is the concerned authority under Article 77(3), and if such recommendation is then forwarded to the President under Article 74, then the President is bound to act in accordance with the advice tendered. That, the intention behind Article 77(3) is that it is physically impossible that every decision is taken by the Council of Ministers. The Constitution does not use the term "Cabinet". Rules have been framed for convenient transaction and allocation of such business. Under the Rules of Business, the concerned authority is the Prime Minister. The advice tendered to the President by the Prime Minister regarding the

appointment of the Central Vigilance Commissioner would be thus binding on the President. Lastly, it was submitted that unless the Constitution expressly permits the exercise of discretion by the President, every decision of the President has to be on the aid and advice of Council of Ministers.

48. Shri Venugopal, learned counsel appearing on behalf of respondent No. 2 submitted that though the President has an area of discretion in regard to exercise of certain powers under the Constitution the Constitution is silent about the exercise of powers by the President/Governor where a Statute confers such powers. In this connection learned counsel placed reliance on the judgment of this Court in *Bhuri Nath v. State of J & K* [(1997) 2 SCC 745]. In that case, the appellants-Baridars challenged the constitutionality of Jammu and Kashmir Shri Mata Vaishno Devi Shrine Act, 1988 which was enacted to provide for better management, administration and governance of Shri Mata Vaishno Devi Shrine and its endowments including the land and buildings attached to the Shrine. By operation of that Act the administration, management and governance of the Shrine and its Funds stood vested in the Board. Consequently, all rights of Baridars stood extinguished from the date of the commencement of the Act by operation of Section 19(1) of the Act. One of the questions which came up for consideration in that case was that when the Governor discharges the functions under the Act, is it with the aid and advice of the Council of Ministers or whether he discharges those functions in his official capacity as the Governor. This question arose because by an order dated 16th January, 1995, this Court had directed the Board to frame a scheme for rehabilitation of persons engaged in the performance of Pooja at Shri Mata Vaishno Devi Shrine. When that matter came up for hearing on 20th March, 1995, the Baridars stated that they did not want rehabilitation. Instead, they preferred to receive compensation to be determined under Section 20 of the impugned Act 1988. This Court noticed that in the absence of guidelines for determination of the compensation by the Tribunal to be appointed under Section

20 it was not possible to award compensation to the Baridars. Consequently, the Supreme Court ordered that the issue of compensation be left to the Governor to make appropriate guidelines to determine the compensation. Pursuant thereto, guidelines were framed by the Governor which were published in the State Gazette and placed on record on 8th May, 1995. It is in this context that the question arose that when the legislature entrusted the powers under the Act to the Governor whether the Governor discharges the functions under the Act with the aid and advice of the Council of Ministers or whether he acts in his official capacity as a Governor under the Act. After examining the Scheme of the 1988 Act the Division Bench of this Court held that the legislature of Jammu & Kashmir, while making the Act was aware that similar provisions in the Endowments Act, 1966 gives power of the State Government to dissolve the Board of Trustees of Tirupati Devasthanams and the Board of Trustees of other institutions. Thus, it is clear that the legislature entrusted the powers under the Act to the Governor in his official capacity. On examination of the 1988 Act this Court found that the Governor is to preside over the meetings of the Board and in his absence his nominee, a qualified Hindu, shall preside over the functions. That, under the 1988 Act no distinction was made between the Governor and the Executive Government. That, under the scheme of the 1988 Act there was nothing to indicate that the power was given to the Council of Ministers and the Governor was to act on its advice as executive head of the State. It is in these circumstances that this Court held that while discharging the functions under the 1988 Act the Governor acts in his official capacity. In the same judgment this Court has also referred to the judgment of the Full Bench of the Punjab and Haryana High Court in *Hardwari Lal v. G.D. Tapase* [AIR 1982 P&H 439] in which a similar question arose as to whether the Governor in his capacity as the Chancellor of Maharshi Dayanand University acts under the 1975 Act in his official capacity as Chancellor or with the aid and advice of the Council of Ministers. The Full Bench of the High Court, after elaborate consideration of the

provisions of the Act, observed that under the Maharshi Dayanand University Act 1975, the State Government would not interfere in the affairs of the University. Under that Act, the State Government is an Authority different and distinct from the authority of the Chancellor. Under that Act the State Government was not authorized to advise the Chancellor to act in a particular manner. Under that Act the University was a statutory body, autonomous in character and it had been given powers exercisable by the Chancellor in his absolute discretion. In the circumstances, under the scheme of that Act it was held that while discharging the functions as a Chancellor, the Governor does everything in his discretion as a Chancellor and he does not act on the aid and advice of his Council of Ministers. This judgment has no application to the scheme of the 2003 Act. As stated hereinabove, the CVC is constituted under Section 3(1) of the 2003 Act. The Central Vigilance Commissioner is appointed under Section 4(1) of the 2003 Act by the President by warrant under her hand and seal after obtaining the recommendation of a Committee consisting of the Prime Minister as the Chairperson and two other Members. As submitted by the learned Attorney General although under the 2003 Act the Central Vigilance Commissioner is appointed after obtaining the recommendation of the High Powered Committee, such recommendation has got to be accepted by the Prime Minister, who is the concerned authority under Article 77(3), and if such recommendation is forwarded to the President under Article 74, then the President is bound to act in accordance with the advice tendered. Further under the Rules of Business the concerned authority is the Prime Minister. Therefore, the advice tendered to the President by the Prime Minister regarding appointment of the Central Vigilance Commissioner will be binding on the President. It may be noted that the above submissions of the Attorney General find support even in the judgment of the Division Bench of this Court in *Bhuri Nath's* case (supra) which in turn has placed reliance on the judgment of this Court in *Samsher Singh v. State of Punjab* [(1974) 2 SCC 831] in which a Bench of 7 Judges of this Court

held that under the Cabinet system of Government, as embodied in our Constitution, the Governor is the formal Head of the State. He exercises all his powers and functions conferred on him by or under the Constitution with the aid and advice of his Council of Ministers. That, the real executive power is vested in the Council of Ministers of the Cabinet. The same view is reiterated in *R.K. Jain's* case (supra). However, in *Bhuri Nath's* case (supra) it has been clarified that the Governor being the constitutional head of the State, unless he is required to perform the function under the Constitution in his individual discretion, the performance of the executive power, which is coextensive with the legislative power, is with the aid and advice of the Council of Ministers headed by the Chief Minister. Thus, we conclude that the judgment in *Bhuri Nath's* case has no application as the scheme of the Jammu and Kashmir Shri Mata Vaishno Devi Shrine Act, 1988 as well as the scheme of Maharshi Dayanand University Act, 1975 as well as the scheme of the various Endowment Acts is quite different from the scheme of the 2003 Act. Hence, there is no merit in the contention advanced on behalf of respondent No. 2 that in the matter of appointment of Central Vigilance Commissioner under Section 4(1) of the 2003 Act the President is not to act on the advice of the Council of Ministers as is provided in Article 74 of the Constitution.

Unanimity or consensus under Section 4(2) of the 2003 Act

49. One of the arguments advanced on behalf of the petitioner before us was that the recommendation of the High Powered Committee under the proviso to Section 4(1) has to be unanimous. It was submitted that CVC was set up under the Resolution dated 11th February, 1964. Under that Resolution the appointment of Central Vigilance Commissioner was to be initiated by the Cabinet Secretary and approved by the Prime Minister. However, the provision made in Section 4 of the 2003 Act was with a purpose, namely, to introduce an element of

bipartisanship and political neutrality in the process of appointment of the head of the CVC. The provision made in Section 4 for including the Leader of Opposition in the High Powered Committee made a significant change from the procedure obtaining before the enactment of the said Act. It was further submitted that if unanimity is ruled out then the very purpose of inducting the Leader of Opposition in the process of selection will stand defeated because if the recommendation of the Committee were to be arrived at by majority it would always exclude the Leader of Opposition since the Prime Minister and the Home Minister will always be ad idem. It was submitted that one must give a purposive interpretation to the scheme of the Act. It was submitted that under Section 9 it has been inter alia stated that all business of the Commission shall, as far as possible, be transacted unanimously. It was submitted that since in *Vineet Narain's* case (supra) this Court had observed that CVC would be selected by a three member Committee, including the Leader of the Opposition it was patently obvious that the said Committee would decide by unanimity or consensus. That, it was no where stated that the Committee would decide by majority.

50. We find no merit in these submissions. To accept the contentions advanced on behalf of the petitioners would mean conferment of a *"veto right"* on one of the members of the HPC. To confer such a power on one of the members would amount to judicial legislation. Under the proviso to Section 4(1) Parliament has put its faith in the High Powered Committee consisting of the Prime Minister, the minister for Home Affairs and the Leader of the Opposition in the House of the People. It is presumed that such High Powered Committee entrusted with wide discretion to make a choice will exercise its powers in accordance with the 2003 Act, objectively and in a fair and reasonable manner. It is well settled that mere conferment of wide discretionary powers per se will not violate the doctrine of reasonableness or equality. The 2003 Act is enacted with the intention that such High Powered Committee will act in a

bipartisan manner and shall perform its statutory duties keeping in view the larger national interest. Each of the Members is presumed by the legislature to act in public interest. On the other hand, if veto power is given to one of the three Members, the working of the Act would become unworkable. One more aspect needs to be mentioned. Under Section 4(2) of the 2003 Act it has been stipulated that the vacancy in the Committee shall not invalidate the appointment. This provision militates against the argument of the petitioner that the recommendation under Section 4 has to be unanimous. Before concluding, we would like to quote the observations from the judgment in *Grindley and Another v. Barker,* 1 Bos. & Pul. 229, which reads as under :

> "I think it is now pretty well established, that where a number of persons are entrusted with the powers not of mere private confidence, but in some respects of a general nature and all of them are regularly assembled, *the majority will conclude the minority, and their act will be the act of the whole."*

51. The Court, while explaining the raison d'etre behind the principle, observed :

> "It is impossible that bodies of men should always be brought to think alike. There is often a degree of coercion, and the majority is governed by the minority, and vice versa, according to the strength of opinions, tempers, prejudices, and even interests. We shall not therefore think ourselves bound in this case by the rule which holds in that. I lay no great stress on the clause of the act which appoints a majority to act in certain cases, because that appears to have been done for particular reasons which do not apply to the ultimate trial: it relates only to the assembling the searchers; now there is no doubt that all the six triers must assemble; and the only question, what they must do when assembled? We have no light to direct us in this part, except the argument from the nature of the subject. The

leather being subject to seizure in every stage of the manufacture, the tribunal ought to be composed of persons skilful in every branch of the manufacture. And I cannot say there is no weight in the argument, drawn from the necessity of persons concurring in the judgments, who are possessed of different branches of knowledge, but standing alone it is not so conclusive as to oblige us to break through the general rule; besides, *it is very much obviated by this consideration when all have assembled and communicated to each other the necessary information, it is fitter that the majority should decide than that all should be pressed to a concurrence. If this be so, then the* reasons drawn from the act and which have been supposed to demand, that the whole body should unite in the judgment, have no sufficient avail, and consequently the general rule of law will take place; viz. that *the judgment of four out of six being the whole body to which the authority is delegated regularly assemble and acting, is the judgment of the all."*

52. Similarly, we would like to quote Halsbury's Laws of England (4th Ed. Re-issue), on this aspect, which states as under:

"Where a power of a public nature is committed to several persons, in the absence of statutory provision or implication to the contrary the act of the majority is binding upon the minority."

53. In the circumstances, we find no merit in the submission made on behalf of the petitioner on this point that the recommendation/decision dated 3rd September, 2010 stood vitiated on the ground that it was not unanimous.

Guidelines/Directions of this Court

54. The 2003 Act came into force on and from 11th September, 2003. In the present case we find non-compliance

of some of the provisions of the 2003 Act. Under Section 3(3), the Central Vigilance Commissioner and the Vigilance Commissioners are to be appointed from amongst persons –

(a) who have been or who are in All-India Service or in any civil service of the Union or in a civil post under the Union having requisite knowledge and experience as indicated in Section 3(3)(a); **or**

(b) who have held office or are holding office in a corporation established by or under any Central Act or a Central Government company and persons who have experience in finance including insurance and banking, law, vigilance and investigations.

55. No reason has been given as to why in the present case the zone of consideration stood restricted only to the civil service. We therefore direct that:

(i) In our judgment we have held that there is no prescription of unanimity or consensus under Section 4(2) of the 2003 Act. However, the question still remains as to what should be done in cases of difference of opinion amongst the Members of the High Powered Committee. As in the present case, if one Member of the Committee dissents that Member should give reasons for the dissent and if the majority disagrees with the dissent, the majority shall give reasons for overruling the dissent. This will bring about fairness-in-action. Since we have held that legality of the choice or selection is open to judicial review we are of the view that if the above methodology is followed transparency would emerge which would also maintain the integrity of the decision-making process.

(ii) In future the zone of consideration should be in

terms of Section 3(3) of the 2003 Act. It shall not be restricted to civil servants.

(iii) All the civil servants and other persons empanelled shall be outstanding civil servants or persons of impeccable integrity.

(iv) The empanelment shall be carried out on the basis of rational criteria, which is to be reflected by recording of reasons and/or noting akin to reasons by the empanelling authority.

(v) The empanelment shall be carried out by a person not below the rank of Secretary to the Government of India in the concerned Ministry.

(vi) The empanelling authority, while forwarding the names of the empanelled officers/persons, shall enclose complete information, material and data of the concerned officer/person, whether favourable or adverse. Nothing relevant or material should be withheld from the Selection Committee. It will not only be useful but would also serve larger public interest and enhance public confidence if the contemporaneous service record and acts of outstanding performance of the officer under consideration, even with adverse remarks is specifically brought to the notice of the Selection Committee.

(vii) The Selection Committee may adopt a fair and transparent process of consideration of the empanelled officers.

Conclusion

56. For the above reasons, it is declared that the recommendation dated 3rd September, 2010 of the High Powered Committee recommending the name of Shri P.J.

Thomas as Central Vigilance Commissioner under the proviso to Section 4(1) of the 2003 Act is non-est in law and, consequently, the impugned appointment of Shri P.J. Thomas as Central Vigilance Commissioner is quashed.

57. The writ petitions are accordingly allowed with no order as to costs.

D.G. Writ petitions allowed.

UNION OF INDIA AND ORS.
v.
VARTAK LABOUR UNION
(Civil Appeal Nos.2129-2130 of 2004)

MARCH 4, 2011

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

Labour Law:

Regularization – Border Roads Organization (BRO) – Respondent-trade union filed writ petition seeking regularization of casual labourers employed by BRO – High Court directed appellant No.1 to regularize such casual workers on basis of an Office Memo, purportedly issued by the appellants – Direction challenged – Held: The High Court erroneously construed the said Office memo as an approved scheme for absorption and regularization of the casual workers – The said Office Memo was merely in the nature of an inter-department communication between the Border Roads Development Board headquarters and its officials – Claim for regularization of casual workers, merely because they had been working for BRO for a considerable period of time, cannot be granted – Casual employment terminates when the same is discontinued, and merely because a temporary or casual worker was engaged beyond the period of his employment, he would not be entitled to be absorbed in regular service or made permanent, if the original appointment was not in terms of the process envisaged by the relevant rules.

Regularisation – Casual workers engaged by Border Roads Organization (BRO) for thirty to forty years, with short breaks – Need for appropriate regulation/scheme – Union of India to consider enacting an appropriate regulation/scheme

for absorption and regularization of the services of the casual workers engaged by BRO.

Administrative Law – Administrative policy – Inter-departmental communications and notings in departmental files – Held: Do not have the sanction of law and do not create a legally enforceable right.

The respondent, a registered trade union comprising of casual workers employed by the Border Roads Organization (BRO), filed writ petition before the High Court praying for issuance of a writ, *inter-alia,* directing appellant No.1 viz. Union of India to regularize the services of the members of the respondent. A Single Judge of the High Court allowed the writ petition, and directed appellant No.1 to regularize the services of the members of the respondent who had been in service for more than five years. In writ appeal, the Division Bench of the High Court modified the order of the Single Judge on the basis of circular dated 25th May, 1988 issued by D.D.G. (P&V), for and on behalf of the Director General Border Roads, New Delhi to all Chief Engineers for consideration of regularization of casually paid labourers employed by the BRO. Aggrieved by the directions of the Division Bench, the appellants preferred appeal before this Court. This Court remanded the matter back to the Division Bench.

During the course of fresh hearing of the writ appeal before the Division Bench, the Central Government counsel on behalf of the appellants stated that pursuant to circular dated 25th May 1988, the appellants had framed a scheme vide Office Memo No.Sectt. BRDB ID No. BRDB/04(90)/99-GE-II dated 2nd February, 2001, for the welfare of casually paid employees. Upon perusal of the scheme and recording the satisfaction of the counsel appearing for the respondent-Union, the Court observed

that the scheme had been framed on a rational basis. Accordingly, disposing of the writ appeal on the basis of the said office memo, the Division Bench directed appellant no.1 to regularize the services of the members of the respondent Union, employed by BRO, as postulated in Office Memo No. Sectt. BRDB ID No. BRDB/ 04(90)/99-GE-II dated 2nd February, 2001. Review application filed by the appellants was dismissed.

In the instant appeals, the question which arose for consideration were: 1) whether the office memo dated 2nd February, 2001 was merely in the nature of an inter-departmental communication between the Border Roads Development Board headquarters and its officials and the High Court erred in treating such communication as a final scheme for regularization of the casual labourers and 2) whether formulation of any scheme for regularisation being a matter of policy, it is not within the domain of the Court to direct regularisation of temporary appointees de hors the recruitment rules.

Allowing the appeals, the Court

HELD:1. It is trite that inter-departmental communications and notings in departmental files do not have the sanction of law, creating a legally enforceable right. The Division Bench of the High Court erroneously construed the Office memo dated 2nd February, 2001 as an approved scheme for absorption and regularization of the casual workers. It is manifest from a bare reading of the said memo that it was merely in the nature of an inter-departmental communication between the Border Roads Development Board headquarters and its officials. There is no substance in the stand of the respondent that the appellants are withholding the approved scheme from this Court. The plea of the respondent that a final scheme did come into existence on 2nd February 2001, stands

belied from the letter of the Border Roads Development Board dated 22nd July 2002. [Paras 13, 14] [519-C-E; 520-B-C]

Sethi Auto Service Station & Anr. Vs. Delhi Development Authority & Ors. **(2009) 1 SCC 180;** *Jasbir Singh Chhabra & Ors. Vs. State of Punjab & Ors.* **(2010) 4 SCC 192 – relied on.**

Indian Drugs & Pharmaceuticals Ltd. Vs. Workmen, Indian Drugs & Pharmaceuticals Ltd. **(2007) 1 SCC 408;** *R. Viswan & Ors. Vs. Union of India & Ors.* **(1983) 3 SCC 401 – referred to.**

2. The respondent Union's claim for regularization of its members merely because they have been working for BRO for a considerable period of time cannot be granted in light of several decisions of this Court, wherein it has been consistently held that casual employment terminates when the same is discontinued, and merely because a temporary or casual worker has been engaged beyond the period of his employment, he would not be entitled to be absorbed in regular service or made permanent, if the original appointment was not in terms of the process envisaged by the relevant rules. In light of the settled legal position and on a conspectus of the factual scenario, the impugned directions by the High Court cannot be sustained. These are set aside accordingly. [Paras 16, 19] [521-A-B; 523-A-B]

Secretary, State ofKarnataka & Ors. Vs. Umadevi (3) & Ors. **(2006)4 SCC 1;** *Official Liquidator Vs. Dayanand & Ors.* **2008) 10 SCC 1;** *State of Karnataka & Ors. Vs. Ganapathi Chaya Nayak & Ors.* **(2010) 3 SCC 115;** *Union of India & Anr. Vs. Kartick Chandra Mondal & Anr.; Satya Prakash & Ors. Vs. State of Bihar & Ors.* **(2010) 4 SCC 179;** *Rameshwar Dayal Vs. Indian Railway Construction Company Limited & Ors.* **(2010) 11 SCC 733 – relied on.**

3. The conduct of the appellants in engaging casual workers for a period of less than six months, and giving them artificial breaks so as to ensure that they do not become eligible for permanent status, does not behove the Union of India and its instrumentalities, which are supposed to be model employers. Therefore, in the facts and circumstances of the instant case, where members of the respondent Union have been employed in terms of the Regulations and have been consistently engaged in service for the past thirty to forty years, of course with short breaks, this Court feels, the Union of India would consider enacting an appropriate regulation/scheme for absorption and regularization of the services of the casual workers engaged by BRO for execution of its on-going projects. [Paras 20 and 21] [523-B-C; 524-A-B]

Case Law Reference:

(2007) 1 SCC 408	**referred to**	**Para 11**
(1983) 3 SCC 401	**referred to**	**Para 12**
(2009) 1 SCC 180	**relied on**	**Para 14**
(2010) 4 SCC 192	**relied on**	**Para 15**
(2006) 4 SCC 1	**relied on**	**Paras 16,17,18**
(2008) 10 SCC 1	**relied on**	**Paras 16,18**
(2010) 3 SCC 115	**relied on**	**Para 16**
(2010) 4 SCC 179	**relied on**	**Para 16**
(2010) 11 SCC 733	**relied on**	**Para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2129-2930 of 2004.

From the Judgment & Order dated 27.3.2001 of the High Court of Guwahati In Writ Appeal No. 548 of 1996 and order dated 22.1.2003 in R.P. No. 25 of 2001.

Vivek Tankha, ASG, T.S. Doabia, Rashmi Malhotra, Vaibhav Srivastava, D.S. Mahra, Anil Katiyar, B. Krishna Prasad for the Appellants.

Dr. Krishan Singh Chauhan, Tej Singh, Varun, Ajit Kumar Ekka, Kartar Singh, Irshad Ahmad for the Respondent.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. Challenge in these appeals, by special leave, is to the judgments and orders dated 27th March, 2001 and 22nd January, 2003 delivered by a Division Bench of the Gauhati High Court at Guwahati in Writ Appeal No. 548 of 1996 whereby it has directed appellant No.1 viz. Union of India to regularize the services of the members of the respondent Union, employed by the Border Roads Organization (for short the "BRO"), as postulated in Office Memo No. Sectt. BRDB ID No. BRDB/04(90)/99-GE-II dated 2nd February, 2001. Appellants No. 2 to 17 are the functionaries of appellant No. 1.

2. Shorn of unnecessary details, the facts essential for adjudication of the present appeals may be stated as follows:

The respondent is a registered trade union comprising of casual workers employed by the BRO, in terms of paragraph 503 of the Border Road Regulations (for short "the Regulations"), some of whom have been working with the BRO for the last thirty years. In the year 1993, the respondent filed a writ petition before the Gauhati High Court praying for issuance of a writ, inter-alia, directing appellant No.1 to regularize the services of the members of the respondent.

3. Vide judgment dated 27th August, 1996, the High Court allowed the writ petition, and directed appellant No.1 to regularize the services of the members of the respondent who have been in service for more than five years, within six months of the date of order.

4. Being aggrieved, appellants filed a writ appeal before a Division Bench of the Gauhati High Court. The Division Bench, while partly allowing the appeal, modified the order of the Single Judge on the basis of a circular dated 25th May, 1988 issued by one Brig. S.K. Mehta, D.D.G. (P&V), for and on behalf of the Director General Border Roads, New Delhi to all Chief Engineers for consideration of regularization of casually paid labourers employed by the BRO. The Division Bench held that:

> "There shall be a writ of mandamus issued to the appellant herein with a direction to consider the case of these employees who are working in the above Organization/ Institution who have put in more than 5 (five) years and above period of service for the purpose of regularization of their service in the light of the Circular referred to above keeping in view of the requirements of Articles 14, 15 and 16 for the purpose of maintaining the reservation Policy followed by the Govt. of India.
>
> In so far as the casual labourers working in the organization/Institution are concerned, they shall continue to work till they attain the eligibility coming within the purview of the Circular for being considered."

5. At this juncture, it would be expedient and useful to extract relevant portions of the said circular, which read as follows:

> "REGULARISATION OF CASUALLY PAID LABOURERS EMPLOYED IN BORDER ROADS ORGANIZATION-CONSTITUTION OF BOARD OF OFFICERS TO EXAMINE THE PROBLEMS.
>
> 1. Border Roads Organisation has been employing a large number of Casual Labourers for the past 28 years. There have been cases where Labour Unions have been formed though not recognized by us, as also there have

> been demands for their regularization. A large number of Court cases are also pending, connected with this issue.
>
> 2. Ministry of Surface Transport (BRDB) has offered a Board of Officers to examine various aspects. The terms of reference of the Board are at appendix 'A'.
>
> 3. Before the Board examines the terms of reference as also other connected aspects, certain data is required from the Projects which is discussed in the succeeding paragraphs.
>
> .....
>
> 7. It may be appreciated that the recommendations of the Board of Officers have far reaching consequences. Your views and suggestions are, therefore should be deliberate and keeping in view the long term implications of the suggestions made. CEs are therefore, requested to kindly give personal thought to these problems and make their recommendations accordingly.
>
> 8. We would expect your reply by 30 June 88 positively."

6. Being aggrieved by the directions of the Division Bench, the appellants preferred an appeal, by special leave, before this Court. Vide order dated 19th February, 1999, this Court, while allowing the appeal and remanding the matter back to the Division Bench, observed thus:

> "It appears that there was some bona fide misunderstanding by learned counsel who appeared before the Division Bench on behalf of the appellants. Even that apart, the Circular dated 25.05.1988 on which reliance was placed requires a closer scrutiny of the Division Bench of the High Court. This was unfortunately not done because of the aforesaid misunderstanding. Hence, without expressing any opinion on the merits of the controversy

between the parties, we deem it fit in the interest of justice to allow this appeal and set aside the order of the Division Bench."

7. During the course of fresh hearing of the writ appeal before the Division Bench, senior Central Government standing counsel appearing on behalf of the appellants stated that pursuant to circular dated 25th May 1988, the appellants had framed a scheme vide Office Memo No. Sectt. BRDB ID No. BRDB/04(90)/99-GE-II dated 2nd February, 2001, for the welfare of casually paid employees. Upon perusal of the scheme and recording the satisfaction of the counsel appearing for the respondent-Union, the Court observed that the scheme had been framed on a rational basis. Accordingly, disposing of the writ appeal on the basis of the said office memo, the Division Bench directed the appellants to implement the said office memo dated 2nd February, 2001.

8. Still being aggrieved, the appellants preferred a review application before the High Court. Vide the impugned order, the Division Bench declined to entertain the said application.

9. Hence, the present appeals against the main judgment and the order in review.

10. We have heard learned counsel for parties and perused the documents/circulars referred to and relied upon by the High Court as also some office notings produced before us by learned counsel appearing for the appellants.

11. Mr. Vivek Tankha, the learned Additional Solicitor General of India, strenuously urged that the High Court committed serious error in law in treating communication dated 2nd February 2001, as a final scheme framed for regularization of the casual labourers engaged by BRO for a maximum period of 6 months at a time. According to the learned counsel, it is evident from communication dated 2nd February 2001, that as on that date the Border Roads Development Board was still in

the process of collecting information from other departments of the Central Government, particularly from the Railways for the purpose of examining if any of such schemes could be adopted in the BRO. In support of his stand that so far no scheme for absorption or regularization of casual labourers had been devised, learned counsel placed before us some correspondence exchanged between the Headquarters of the Border Roads Development Board and the office of the Director General Border Roads, which shows that in view of the guidelines issued by the DOPT, it has not been possible to frame and implement any policy or scheme for regularization of muster roll working in BRO. It was asserted that circular dated 25th May 1988, on which emphasis is laid on behalf of the respondent, was merely a proposal which has been misconstrued by the High Court as a scheme. It was urged that the proposals or suggestions by the field officers in favour of the respondent Union did not result in creating any enforceable right in their favour. Placing reliance on the decision of this Court in *Indian Drugs & Pharmaceuticals Ltd. Vs. Workmen, Indian Drugs & Pharmaceuticals Ltd.*[1], learned counsel submitted that formulation of any scheme for regularization being a matter of policy, it is not within the domain of the court to direct regularization of temporary appointees in the absence or dehors the recruitment rules.

12. Per contra, Dr. K.S. Chauhan, in his written submissions, has submitted that even if it is assumed that there is no approved proposal or scheme for regularization of the casual labourers, on the touchstone of Articles 14, 16 and 21 of the Constitution of India, this Court is empowered to examine whether the action of the appellants is not opposed to principles of reasonableness evolved by this Court, as the casual labourers have been working with BRO for the last twenty to thirty years. It is alleged that the appellants are intentionally withholding the scheme dated 2nd February 2001 and, therefore, an adverse inference must be drawn against them.

1. (2007) 1 SCC 408.

In support of his submission that there is clear discrimination between the members of the Union and the General Reserve Engineering Force (GREF), who have been declared to be members of the Armed Forces in *R. Viswan & Ors. Vs. Union of India & Ors.*[2], it is pointed out that the members of the respondent Union are facilitating the GREF in hard positions and dangerous locations in hilly areas to perform their functions. It is thus, argued that the directions issued by the High Court are fully justified and should be implemented.

13. We are of the opinion that there is force in the contentions urged on behalf of the appellants and these must prevail. We are convinced that the Division Bench has erroneously construed the Office memo dated 2nd February, 2001 as an approved scheme for absorption and regularization of the casual workers. It is manifest from a bare reading of the said memo that it was merely in the nature of an inter-department communication between the Border Roads Development Board headquarters and its officials. We do not find any substance in the stand of learned counsel for the respondent that the appellants are withholding the approved scheme from this Court. This plea of the respondent that a final scheme did come into existence on 2nd February 2001, stands belied from the letter of the Border Roads Development Board dated 22nd July 2002. It would be useful to extract the relevant portion of the said letter, which reads:

> "In the year 1993, a Labour Welfare Scheme i.e. Scheme for Grant of Temporary Status and Regularisation of Casual Workers was formulated. Thus, when we approached DOPT for approval to the scheme proposed by DGBP, they did not support our proposal and advised us that if we felt that there are sufficient grounds to formulate a separate scheme which is at variance with the scheme of DOPT, we may approach the Cabinet for approval of such scheme. The Secretariat delved into the issue at length and

2. (1983) 3 SCC 401.

> came to the conclusion that there is not sufficient justification for going to the Cabinet for approval of a separate scheme. This decision has already been communicated to the Dte GBR vide our letter No.BRDB/04(129)/2000-GE.II dated 24th June, 2002."

14. It is trite that inter-departmental communications and notings in departmental files do not have the sanction of law, creating a legally enforceable right. In *Sethi Auto Service Station & Anr. Vs. Delhi Development Authority & Ors.*[3], a Division Bench of this Court, in which one of us (D.K. Jain, J.) was a member has observed thus:

> "Needless to add that internal notings are not meant for outside exposure. Notings in the file culminate into an executable order, affecting the rights of the parties, only when it reaches the final decision-making authority in the department, gets his approval and the final order is communicated to the person concerned."

15. Similar views are echoed in *Jasbir Singh Chhabra & Ors. Vs. State of Punjab & Ors.*[4]. This Court has observed that:

> "It must always be remembered that in a democratic polity like ours, the functions of the Government are carried out by different individuals at different levels. The issues and policy matters which are required to be decided by the Government are dealt with by several functionaries some of whom may record notings on the files favouring a particular person or group of persons. Someone may suggest a particular line of action, which may not be conducive to public interest and others may suggest adoption of a different mode in larger public interest. However, the final decision is required to be taken by the designated authority keeping in view the larger public interest."

3. (2009) 1 SCC 108.

4. (2010) 4 SCC 192

16. We are of the opinion that the respondent Union's claim for regularization of its members merely because they have been working for BRO for a considerable period of time cannot be granted in light of several decisions of this Court, wherein it has been consistently held that casual employment terminates when the same is discontinued, and merely because a temporary or casual worker has been engaged beyond the period of his employment, he would not be entitled to be absorbed in regular service or made permanent, if the original appointment was not in terms of the process envisaged by the relevant rules. (See: *Secretary, State of Karnataka & Ors. Vs. Umadevi (3) & Ors.*[5]*; Official Liquidator Vs. Dayanand & Ors.*[6]*; State of Karnataka & Ors. Vs. Ganapathi Chaya Nayak & Ors.*[7]*; Union of India & Anr. Vs. Kartick Chandra Mondal & Anr.; Satya Prakash & Ors. Vs. State of Bihar & Ors.*[8] and Rameshwar Dayal Vs. Indian Railway Construction Company Limited & Ors.[9].)

17. In *Umadevi* (3) (supra), a Constitution Bench of this Court had observed that:

> "It was then contended that the rights of the employees thus appointed, under Articles 14 and 16 of the Constitution, are violated. It is stated that the State has treated the employees unfairly by employing them on less than minimum wages and extracting work from them for a pretty long period in comparison with those directly recruited who are getting more wages or salaries for doing similar work. The employees before us were engaged on daily wages in the department concerned on a wage that was made known to them. There is no case that the wage agreed upon was not being paid. Those who are working on daily wages formed a class by themselves, they cannot claim

5. (2006) 4 SCC 1.
6. (2008) 10 SCC 1.
7. (2010) 3 SCC 115.
8. (2010) 4 SCC 179.
9. (2010) 11 SCC 733.

> that they are discriminated as against those who have been regularly recruited on the basis of the relevant rules. No right can be founded on an employment on daily wages to claim that such employee should be treated on a par with a regularly recruited candidate, and made permanent in employment, even assuming that the principle could be invoked for claiming equal wages for equal work. There is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatment with those who were regularly employed. That would be treating unequals as equals. It cannot also be relied on to claim a right to be absorbed in service even though they have never been selected in terms of the relevant recruitment rules. The arguments based on Articles 14 and 16 of the Constitution are therefore overruled."

18. Explaining the dictum laid down in *Umadevi* (supra), a three judge Bench in *Official Liquidator* (supra) has observed that:

> "In *State of Karnataka v. Umadevi* (3), the Constitution Bench again considered the question whether the State can frame scheme for regularisation of the services of ad hoc/temporary/daily wager appointed in violation of the doctrine of equality or the one appointed with a clear stipulation that such appointment will not confer any right on the appointee to seek regularisation or absorption in the regular cadre and whether the Court can issue mandamus for regularisation or absorption of such

appointee and answered the same in negative."

19. In light of the settled legal position and on a conspectus of the factual scenario noted above, the impugned directions by the High Court cannot be sustained. These are set aside accordingly.

20. Before parting with the case, we are constrained to observe that the conduct of the appellants in engaging casual workers for a period of less than six months, and giving them artificial breaks so as to ensure that they do not become eligible for permanent status, as evidenced from the additional affidavit dated 23rd April, 2010 does not behove the Union of India and its instrumentalities, which are supposed to be model employers. With anguish, we extract the relevant paragraph of the said affidavit:

> "Relying upon the provisions contained in Paragraph 501 to 518 of the Regulation, it was contended that the casual labourers are mustered on daily or monthly basis. If on monthly rates, the period of engagement shall be for a minimum period of six months. *It is a fact that large number of casual labourers have worked with Project Vartak for number of years but their period of engagement at no stage has existed more than six months at a time. Their services are terminated before completion of six month and as per requirement they are recruited afresh by publishing Part II order by Mustering Unit. Due to the fact that they have not been in continuous engagement for more than six months they do not get the status of permanent employee and accordingly as per Paragraph 503 of the Regulation referred to above, the casual personnel are not eligible for any other privileges for continued employment under the Government."*
>
> (Emphasis supplied by us)

21. Therefore, in the facts and circumstances of the instant case, where members of the respondent Union have been employed in terms of the Regulations and have been consistently engaged in service for the past thirty to forty years, of course with short breaks, we feel, the Union of India would consider enacting an appropriate regulation/scheme for absorption and regularization of the services of the casual workers engaged by BRO for execution of its on-going projects.

22. In the final analysis, the appeals are allowed, and the impugned judgments and orders are set aside. However, in the circumstances of the case, the parties are left to bear their own costs.

B.B.B. Appeals allowed.

STATE OF U.P. AND ORS.
v.
BHARAT SINGH AND ORS.
(Civil Appeal No. 2351 of 2011)

MARCH 8, 2011

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

Uttar Pradesh Higher Education Services Commission Act, 1980:

Purpose of the Act – Discussed.

Post of Principal in affiliated/aided Degree and Post-Graduate institutions – Whether amenable to reservation – Held: The post of principal in aided/affiliated institution being a single post in the cadre is not amenable to any reservation – Interchangeability of the post and transferability of incumbents to another post in the same cadre are essential attributes of a cadre, which is absent in the case of post of Principal – There is no power vested in the State Government or any other authority for that matter to transfer the Principal from one institution to another institution as it may do for instance in the case of Government run institutions where Principal from one government college may be transferred to another government college in the same cadre – There is no cadre of Principals serving in different aided and affiliated institutions and that Principal's post is a solitary post – Reservation of such a post is clearly impermissible not only because the Reservation Act of 1994 provides for reservation based on the 'cadre strength' in aided institutions but also because such strength being limited to only one post in the cadre is legally not amenable to reservation – Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1994 –

Service law – Reservation – Education/Educational institutions.

Selection process – Complaints received by State Government against the selection process alleging large scale irregularities and malpractices of serious nature – State Government ordered appointment of Divisional Commissioner as an inquiry officer and withholding of appointment orders in favour of selected candidates – Challenged by selected candidates before High Court by way of writ petitions – High court quashing the appointment of the enquiry officer and issuing a mandamus to the Selection Commission to make placements in favour of selected candidates – Held: High Court was justified in quashing the appointment of the enquiry officer – High Court had given an opportunity to the counsel of State to take instructions whether the Government intended to institute any further enquiry in the matter – Despite the opportunity, the counsel did not report any instructions in the matter – High Court, therefore, proceeded on the basis that the Government did not intend to conduct any further enquiry into the matter and accordingly quashed the order appointing the enquiry officer as also the instructions issued by him against the making of the appointments – Question whether there were any malpractices and if so whether the selection process could be nullified by the State Government in exercise of its power u/s.6 of the 1980 Act or Article 154 of the Constitution left open in the light of the fact that the question regarding legality of the selection process is pending adjudication before the High Court where all parties concerned would have an opportunity to present their respective cases – Selected candidates who were appointed on the basis of the selection process and who had filed undertakings before Supreme Court shall, therefore, be impleaded as parties to the pending writ petitions to avoid any technical infirmity in the proceedings and any consequent delay in the disposal of the matter – In such circumstances, a parallel enquiry at the Government level into those questions

would be unnecessary – Directions passed – Constitution of India, 1950 – Article 154.

A consolidated advertisement was issued by U.P. Higher Education Service Commission inviting applications for the post of Principals in aided/affiliated Degree and Post-Graduate colleges. The validity of advertisement was challenged in large number of writ petitions on the ground that the post of Principals being single posts in the cadre was not amenable to reservation. By interim order, the High Court directed the Commission that the post of Principal should to be treated as non-reserved posts. The Commission issued a fresh advertisement inviting applications for 140 posts of Principals in Degree and Post-Graduate colleges. The entire selection process was subject to the outcome of the writ petitions pending before the High Court. A select list was published in terms of Notification dated 15th May 2007. With the publication of select list, the writ petitions pending before the High Court were dismissed as infructuous. The High Court while doing so noted the submission made on behalf of the Commission that there was no cadre of Principals in the Post Graduate colleges and the posts of Principals were not interchangeable or transferable.

Meanwhile, the appellant-State of U.P. received number of complaints against the said selection alleging large scale irregularities and malpractices of serious nature in the selection procedure and demanding an enquiry into the same. On 12th June, 2007, the State Government appointed the Divisional Commissioner to hold an enquiry into the allegations and to submit a report. The Divisional Commissioner in turn asked for certain information from the Service Commission in connection with the inquiry with a copy to the Director of Education requesting him to show restraint in issuing the placement

orders in terms of the recommendations received from the Service Commission. Aggrieved by the said communication, the selected candidates filed writ petitions before the High Court challenging the notification of appointment of the Divisional Commissioner as an inquiry officer and the letter written by him to the Director of Education asking him to withhold the issue of placement orders in favour of the selected candidates. While the writ petitions were still pending disposal, the Divisional Commissioner submitted a preliminary inquiry report in which he recorded prima facie conclusion that a series of irregularities and malpractices were committed in the selection process.

The High Court passed the interim order staying the notification of appointment of the Divisional Commissioner and directing the respondent to issue the appointment letters to the selected candidates. The State filed special leave petition before the Supreme Court against the interim order. The Supreme Court stayed the interim direction in so far it related to issuance of appointment letters to the selected candidates.

The High court ultimately allowed the writ petitions quashing the two orders and issued a mandamus to the Selection Commission to make placements in favour of the selected candidates. The instant appeals were filed challenging the order of the High Court.

An interim order dated 20th November, 2008 was passed by the Supreme Court directing the appellant-State to appoint the selected candidates-respondents as Principals of various aided non-governmental degree colleges and post graduate colleges subject to decision of the appeals provided the respondents filed undertakings to the effect that in case they lose the battle they would stand reverted to the posts of readers and the difference of salary drawn by them as Principals would be

paid back to the State. The State has pursuant to the said directions appointed the selected candidates upon their filing undertaking before the Supreme Court with the result that all the selected candidates were duly appointed subject to the outcome of the instant appeals and subject to the conditions stipulated in he interim order.

The questions which arose for consideration in the instant appeals were whether the High Court was justified in quashing the appointment of the enquiry officer appointed to look into the allegations of malpractice allegedly committed in the course of selection process and whether the posts of Principals in different affiliated/aided Degree and Post-Graduate institutions constituted a cadre and were, therefore, subject to reservation as prescribed under the provisions of the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1994.

Disposing of the appeals, the Court

HELD: 1. The selection of Principals in affiliated/aided Degree and Post-graduate colleges is regulated by the Uttar Pradesh Higher Education Services Commission Act and the Rules and Regulations framed thereunder. The selection process was initiated and concluded by the Commission treating the post to be open category post pursuant to the interim directions issued by the High Court. The select list was also duly notified. In the ordinary course recommendations of a statutory Commission established for selecting suitable candidates as teachers including Principals for the colleges ought to get the respect it deserved. However, an enquiry was initiated by the State Government on the basis of some complaints received culminating in the submission of a preliminary report finding fault with the procedure adopted by the Commission in the conduct of the selection process. The High Court had given an opportunity to the counsel of

State to take instructions whether the Government intended to institute any further enquiry in the matter. Despite the opportunity, the counsel did not report any instructions in the matter. The High Court proceeded on the basis that the Government did not intend to conduct any further enquiry into the matter and accordingly quashed the order appointing the enquiry officer as also the instructions issued by him against the making of the appointments. Any enquiry by the State Government whether in exercise of its power under Section 6 or in exercise of its executive power under Article 154 would only duplicate the exercise which was already pending before the High Court in the form of several writ petitions in which the aggrieved candidates had raised issues relating to the validity of the selection process on several grounds including those which the State Government purported to be looking into on the basis of the complaints received by it. Therefore, there is no need for the State Government to undertake a parallel exercise especially when the examination by the High Court of all matters concerning the validity of selection would give an opportunity not only to the State Government but also to the aggrieved candidates who have been selected to present their respective version before it. If the High Court on the basis of whatever material is placed before it by the parties comes to the conclusion that there was nothing wrong with the selection process, any enquiry made by the State would be wholly unnecessary. On the contrary, if the High Court comes to the conclusion that the selection was vitiated by any illegality or irregularity, the State Government could exercise its power and institute an enquiry for the removal of any member who may have committed any misconduct by being a party to any such illegality or irregularity. In the circumstances, no decision is given on the question whether the institution of enquiry by the State Government was justified, and if so, whether

the source of power invoked by the Government was indeed available to it. In the writ petitions filed by the aggrieved candidates before the High Court, all aspects of the matter shall be open to examination in which everyone connected with the selection process would have an opportunity to place his/her point of view. The selected candidates may not have been impleaded as parties to the pending writ petitions although they were necessary parties having regard to the fact that any order that the High Court may pass regarding the validity of the selection may affect them adversely. The selected candidates who were appointed on the basis of the selection process and who had filed undertakings before this Court shall, therefore, be impleaded as parties to the pending writ petitions to avoid any technical infirmity in the proceedings and any consequent delay in the disposal of the matter. [Paras 22, 23, 24] [550-A-F; 551-A-H; 552-A-G]

2.1. Uttar Pradesh Higher Education Services Commission Act, 1980 was introduced to make the selection of teachers in Degree and Post-graduate Colleges fair, objective and transparent. The statement of objects and reasons for the legislation has referred to favoritism in the selection of candidates for such colleges and elimination of such infirmities from the selection process as one of the objectives underlying the enactment. Section 12 of the Act stipulates the process for appointment of teachers and inter alia provides that appointment of a teacher of any college shall be made by the Management only in accordance with the provisions of the Act and that any appointment made in contravention thereof shall be void. A careful reading of the provisions of the Act, the Rules and the Regulations do not support the theory that the same by a fiction of law create a cadre of principals either for the purpose of applying reservation or otherwise. The object underlying the legislation was

limited to ensuring a combined process of selection that would save time and expense involved in such selections if the same are made individually for each college. It is also intended tor remove the element of arbitrariness and other malpractices that were noticed in the making of such selections and appointments by the institutions if left to themselves. The setting up of the Statutory Commission, appointment of persons qualified for the same, stipulating the terms and conditions of service of those appointed and the power to remove the members for misconduct and laying down the procedure for appointment of teachers are all meant to ensure that the process of selection is free from mal-practices that were generally associated with such process when handled by the institutions. There is nothing in the Act, the Rules and Regulations, to even remotely, suggest that the legislature intended to create a cadre of principals even where none existed earlier either for purposes of reservation or otherwise. The fact that the management was required to communicate the available vacancies to the Director of Higher Education or that an appointment order must be issued, once the selection process is completed and a candidate is recommended for appointment also does not have the effect of creating a cadre of principals. All that the provisions of the Act intend to achieve is to ensure that the vacancies are referred to the Statutory Commission to enable it to conduct the process of selection and once the process is completed and recommendations made, the management do not refuse appointment to the candidate considered best for the post. [Paras 25, 31, 32] [552-H; 553-A; 535-A-G]

2.2. The power vested in the Director to hold an enquiry and to issue directions for payment of salary, in case the management does not appoint, is also meant to be a step-in-aid of the process of selection and appointment giving primacy to the opinion of the

Commission regarding the merit and suitability of the candidate for such appointment and entitling the candidate to claim salary if the appointment is unjustifiably denied to him. The provisions of the Act and the Regulations do not have anything to do with creation of a cadre of Principals nor can the commonality of the selection process be confused with the caderisation of the post of Principals. The fact that the State Government offers financial aid to the affiliated colleges in terms of payment of salary of those serving such institutions does not have any relevance to the question whether the posts of Principals in different colleges under different managements constitute a cadre. Merely because the Government supports the institutions which are in all other respects autonomous in their functioning, and are managed by individual managements cannot by any stretch of reasoning be taken as a circumstance constituting the posts in such colleges into a single cadre. So also the fact that the terms and conditions of service of such teachers serving in different colleges including Principals are similar on account of such colleges being affiliated to the same university and being governed by the same set of Statutes, Rules and Regulations also does not have anything to do with the creation or the existence of a single cadre comprising such posts. There is no gainsaying that such common features do not in any way impinge upon the autonomous character of such institutions nor does payment of salaries and the similarity of conditions of service of the employees provide a test for holding that although serving in different institutions totally independent of each other the Principals appointed in such institution form a common cadre. [Paras 33, 34] [556-C-H; 557-A-C]

2.3. In terms of Section 14 of the Act, managements are required to issue an appointment letter to the person whose name has been intimated to it but any such obligation flowing from Section 14 does not make the State

Government the employer of the person appointed. It is evident from a plain reading of Section 14 that the appointment letter has to be issued only by the management. There is no provision empowering the Director to do so. This implies that the selected candidate is taken into the employment of the institution only when the management of the institution issues in his favour a letter of appointment. It is manifest that the appointing authority even under the scheme of the Act remains the management of the institutions. The provisions of the Act simply make sure that the management makes an appointment only of the persons selected for the post and no more. The authorities under the Act do not substitute themselves as the employer of the person appointed. [Para 35] [557-E-H; 558-A]

2.4. The post of Principals in different aided/affiliated institutions is not transferable or interchangeable. Interchangeability of the post and transferability of incumbents to another post in the same cadre are essential attributes of a cadre, which is in the instant case absent. There is no power vested in the State Government or any other authority for that matter to transfer the Principal from one institution to another institution as it may do for instance in the case of Government run institutions where Principal from one government college may be transferred to another government college in the same cadre. Sub-rule (1) of Rule 4 does not talk about the power of transfer vested in any authority. It talks about entitlement of a permanent teacher to be transferred after 10 years of service only once in the whole service period. Sub-rule (2) provides that the transferred teacher shall become an employee of the college to which he has been transferred. More importantly sub-rule (4) makes the transferred teacher go to the bottom of the cadre to which he may be transferred. That provision may not make much sense when it comes to transfer of a Principal from one college

to another but it certainly shows that even when there are plurality of posts in the cadre lower than the principal the person transferred from another institution would figure at the bottom of the said cadre. This again is a circumstance which negates the theory of Principals being a part of the same cadre. The attribute of interchangeability and transferability is missing in the case of Principals – in much the same measure as in the case of teachers, in the lower cadre. Therefore, there is no cadre of Principals serving in different aided and affiliated institutions and that the Principal's post is a solitary post in an institution. Reservation of such a post is clearly impermissible not only because the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1994 provides for reservation based on the 'cadre strength' in aided institutions but also because such strength being limited to only one post in the cadre is legally not amenable to reservations. [Paras 36- 39] [558-C-D; 559-F-H; 560-A-G]

2.5. It is true that Section 10 of the 1982 Act which stipulates the procedure for selection of candidates for direct recruitment requires determination of the vacancies to be reserved for candidates belonging to SC, ST and Backward Classes and reference of such vacancies to be made to the Commission established under the said Act but excluding the post of Principal/Head of the institution from the said determination but it is equally true that Section 12 of 1982 Act does not require any exercise to be undertaken by the Institutions for determining the number of vacancies to be reserved for candidates belonging to reserved categories. There is consequently no provision by which the post of Principal/Head of the institution is excluded from any such process. The two provisions in that sense are not comparable. In one case the number of vacancies to be reserved is required to be determined

while in the other no such requirement has been stipulated. Exclusion of the Principal's post from such determination under the 1982 Act cannot, therefore, be overemphasized in the absence of a provision requiring a determination of the reserved vacancies under Section 12 of the 1980 Act. If the posts of Principals in the secondary school which are much larger in number than the Degree and Post-Graduate colleges are not amenable to reservation and have been specifically excluded from that process, there is no earthly reason why posts of Principals in Degree and Post-Graduate colleges which are relatively fewer in number available in colleges imparting higher education ought to be subjected to such reservation. What is true in the case of secondary schools would, therefore, be true in the case of Degree and Post-Graduate colleges also. Any interpretation that may render the legal position anomalous or absurd shall, therefore, have to be eschewed. [Paras 42, 43] [562-E-H; 563-A-E]

Post Graduate Institute of Medical Education & Research, Chandigarh v. Faculty Association & Ors. **(1998) 4 SCC 1 – Followed**

Balbir Kaur and Anr. v. Uttar Pradesh Secondary Education Services Selection Board, Allahabad and Ors. **(2008) 12 SCC 1 – relied on.**

Onkar Dutt Sharma and Ors. v. State of U.P. and Ors. **(2001) 1 SAC505;** *Dr. Chakradhar Paswan v. State of Bihar & Ors.* **(1988) 2 SCC214;** *Indra Sawhney and Ors. v. Union of India and Ors.* **1992Supp.(3) SCC 217;** *Arati Ray Choudhury v. Union of India* **1974(1) SCC 87;** *M.R. Balaji v. State of Mysore* **AIR 1963 SC 649;** *T. Devadasan v. Union of India* **AIR 1964 SC 179;** *Bhide Girls Education Society v. Education Officer, Zila Parishad Nagpur and Ors.***1993 Supp (3) SCC 527;** *Post-graduate Institute of Medical Education & Research, Chandigarh v. Faculty Association and Ors.***(1998) 4 SCC 1;**

Union of India and Anr. v. Madhav s/o GajananChaubal and Anr. **(1997) 2 SCC 332;** *Union of India v. Brij Lal Thakur* **(1997) 4 SCC 278;** *State of Bihar v. Bageshwari Prasad* **1995 Supp (1) SCC 432 – referred to.**

2.6. In the result the following directions were passed:

(1) The impugned orders passed by the High Court to the extent the same hold that the posts of Principals in affiliated/aided colleges are not amenable to reservation are affirmed.

(2) Order dated 12th June, 2007 issued by the Government appointing the Divisional Commissioner, Allahabad as an Enquiry Officer to hold an enquiry into the validity of selection process and the report submitted by the said Enquiry Officer shall stand quashed and the order passed by the High Court to that effect affirmed.

(3) The question whether the Government was competent to direct an enquiry into the validity of the selection process under Section 6 of the Uttar Pradesh Higher Education Services Commission Act, 1980 or under Article 154 of the Constitution is left open in view of the pendency of the writ petitions challenging the validity of the selection process before the High Court.

(4) The High Court shall in the writ petitions pending before it be free to examine all issues regarding the selection process in question including the validity of the procedure followed in making the same. Depending upon whether the High Court finds the selection process to be valid or otherwise the Government shall have the liberty to institute an enquiry against the members of the State Services Selection Commission if such enquiry is otherwise

permitted under law. In case, however, the High Court upholds the selection process and dismisses the writ petitions there shall be no room left for the State Government to embark upon any further enquiry into the matter on the administrative side. The aggrieved party shall be free to challenge the view taken by the High Court in appropriate proceedings in accordance with law.

(5) The selected candidates who have filed undertakings in this Court and have been appointed to the posts of Principals pursuant to the orders of this Court shall stand impleaded as parties to each of the writ petitions pending in the High Court and challenging the selection process. The selected candidates shall based on this direction appear before the High Court on 2.5.2011 without any further notice in each one of the petitions and file their counter-affidavits. Failure on the part of the candidates to do the needful shall be suitably dealt with by the High Court who shall be free to proceed ex-parte, against those who fail to comply with this direction.

(6) In order to expedite the hearing of the case the Chief Justice of the High Court of Allahabad is requested to place the writ petitions before a Division Bench of the High Court for an early hearing and disposal as far as possible before the 1st December, 2011.

(7) Pending disposal of the writ petitions by the High Court the selected candidates shall be entitled to receive their pay and allowances including increments etc. otherwise admissible to the post of Principal as if the appointments were made on a valid and substantive basis. Such benefits flowing from the

same shall, however, be subject to the outcome of the writ petitions before the High Court and the undertakings furnished by the appointed candidates to this Court which undertaking shall be deemed to have been continued till such time the writ petitions are finally disposed of. [Para 53] [567-F-H; 568-A-H; 569-A-E]

Case Law Reference:

(2008) 12 SCC 1	**relied on**	**Paras 18, 40, 41, 44**
(2001) 1 SAC 505	**referred to**	**Para 14**
(1988) 2 SCC 214	**referred to**	**Paras 40, 46**
(1998) 4 SCC 1	**relied on**	**Para 40**
1992 Supp.(3) SCC 217	**referred to**	**Para 45**
1974 (1) SCC 87	**referred to**	**Para 46**
AIR 1963 SC 649	**referred to**	**Para 46**
AIR 1964 SC 179	**referred to**	**Para 46**
1993 Supp (3) SCC 527	**referred to**	**Para 46**
(1998) 4 SCC 1	**Followed**	**Para 47**
(1997) 2 SCC 332	**referred to**	**Para 47**
(1997) 4 SCC 278	**referred to**	**Para 47**
1995 Supp (1) SCC 432	**referred to**	**Para 47**

CIVIL APPELLATE JURISDICITION : Civil Appeal No. 2351 of 2011.

From the Judgment & Order dated 7.8.2008 of the High Court of Judicature at Allahabad in Civil Writ Petition No. 29524 of 2007.

WITH

C.A. Nos. 2352, 2353-2355, 2356-2358, 2359-2360 & 2361 of 2011, T.P. 3 of 2009, Contempt Petition No. 32 of 2009, T.P. (C) No. 1136 of 2009.

Ravindra Srivastava, Dinesh Dwivedi, P.S. Patwalia, Pallav Shishodia, V. Shekhar, P.S. Narasimhan, T.N. Singh, Rajeev Dubey, Kunal Verma, Kamlendra Mishra, Rana Mukherjee, Deependra Narain Singh, Kirti Yadav, Sunaina Kumar, Ankita Mishra (for Legal Options), Sanjay Visen, J.K. Mishra, G.P. Singh, Vidit Khanna, Anirudha P. Mayee, Amit Anand Tiwari, Rakesh Mishra, Rajeev Kumar Bansal, Amanpreet Singh Raji, Tushar Bakshi, Manoj K. Mishra, Raj Singh Rana, K.L. Janjani, Pankaj Singh, Avinash Jain, Pooja Dhar, Prashant Kumar (for AP & J Chambers), Niranjana Singh, Nalin Tripati, Deepak Agnihotri (for Rajeev Agnihotri), for Rameshwar Prasad Goyal, Ranbir Singh Yadav, Praneet Ranjan, Pranay Ranjan, Jeevan Prakash, Kamlendra Mishra, Praveen Jain, R.D. Upadhyay, Aftab Ali Khan, S.S. Nehra, H.K. Puri, Nikhil Nayyar, Abhishek Atrey, Shiam Narain Singh, Praveen Swarup, Rakesh K. Sharma, Sangita Chauhan, Aniruddha P. Mayee, Praneet Rajan, Sulalit K. Sisodia, Pranay Ranjan, V.J. Francis, Anupam Mishra, Nagendra Singh, Vishwa Pal Singh, Nalin Tripathi, Deepak Agnihotri, Anil Kumar Pathak for the appearing parties.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. Leave granted.

2. These appeals arise out of a judgment and order dated 7th August 2008 passed by the High Court of Allahabad whereby the High Court has allowed the writ petitions filed by the selected candidates, quashed the orders under challenge in the same and by a mandamus directed the Director, Higher Education to give effect to the recommendations made by the U.P. Higher Education Service Commission for appointment to the post of Principals in aided/affiliated Degree and Post-Graduate

colleges. The High Court has further directed issue of placement orders in favour of the selected candidates without any delay. The facts giving rise to the filing of the petitions may be summarized as under:

3. The Government of U.P. has established what is known as 'Uttar Pradesh Higher Education Services Commission' in terms of Section 3 of the U.P. Higher Education Services Act, 1980. The Commission is, among other functions assigned to it under the Act, empowered to prepare guidelines touching the method of recruitment of teachers in colleges and conduct examinations, hold interviews and make selection of candidates for being appointed as teachers and make recommendations to the managements concerned regarding the appointment of selected candidates. The selection process undertaken by the Commission is, however, confined only to colleges to which the privileges of affiliation or recognition have been granted by the University including colleges that are maintained by local authorities. Colleges that are maintained by the State Government or colleges imparting medical education are outside the purview of the Act aforementioned. We shall presently refer to the provisions of the Act in greater detail but we may at this stage only say that in terms of Section 12 of the Act, the Managements of the colleges are required to intimate the existing vacancies and the vacancies likely to be caused during the course of the ensuing academic year to the Director of Education who is then required to notify to the Commission a subject wise consolidated list of vacancies intimated to him from all colleges to enable the Commission to initiate and undertake the selection process.

4. Based on the information notified to the Commission in terms of the above procedure, a consolidated advertisement bearing multiple numbers (33 to 36) was issued by it on 29th May 2003 inviting applications for the vacancies mentioned in the said advertisement. A large number of writ petitions challenging the said advertisement came to be filed before the High Court

of Allahabad primarily on the ground that the post of Principals notified by the Commission available as they were in different colleges affiliated to the University being single posts in the cadre were not amenable to reservation. These writ petitions were entertained by the High Court and by interim orders dated 1st September, 15th September and 22nd September 2003, directions issued to the Commission to the effect that the post of Principals shall be treated as non-reserved posts.

5. In compliance with the above directions, the Commission issued a fresh advertisement dated 24th February 2005 being advertisement No.39 inviting applications for 140 posts of Principals, out of which 87 posts were available in Post-Graduate Colleges while 53 others were in Degree Colleges. The advertisement did not make any mention about any reservation implying thereby that the posts were offered in the general/open merit category. The entire selection process was to be subject to the ultimate outcome of the writ petitions pending before the Allahabad High Court. It is common ground that interim orders dated 1st September 2003, 15th September 2003 and 22nd September 2003 were challenged before this Court by way of SLPs, but the said petitions were dismissed on the ground of delay and laches by this Court's order dated 3rd November, 2008.

6. The Commission took nearly two years to complete the selection process which culminated in the publication of a select list in terms of a notification dated 15th May 2007. With the publication of the select list, the batch of writ petitions pending before the High Court in which the interim orders mentioned above had been issued was dismissed as infructuous. The High Court while doing so noted the submission made on behalf of the Commission that there was no cadre of Principals in the Post-Graduate colleges and the posts of Principals were not interchangeable or transferable.

7. In the case of the appellant-State of Uttar Pradesh that before appointment orders could be issued to those included in

the select list, a number of complaints were received by it against the selection held by the Commission alleging large scale irregularities and malpractices of serious nature in the selection procedure and demanding an inquiry into the same. The State Government accordingly directed the Divisional Commissioner, Allahabad to hold an inquiry into the allegations and to submit a report within 15 days. The Divisional Commissioner in turn asked for certain information from the Service Commission in connection with the inquiry with a copy to the Director, Higher Education requesting him to show restraint in issuing the placement orders in terms of the recommendations received from the Service Commission.

8. Aggrieved by the said communication, the selected candidates filed several writ petitions before the High Court of Allahabad challenging the notification issued by the Government appointing the Divisional Commissioner as an inquiry officer and the letter written by him to the Director of Education asking him to withhold the issue of placement orders in favour of the selected candidates. While the said writ petitions were still pending disposal the Divisional Commissioner submitted a preliminary inquiry report dated 6th July 2007 in which he recorded a *prima facie* conclusion that a series of irregularities and malpractices had been committed by the Service Commission in the process of selection. The High Court in the meantime passed an interim order dated 13th July 2007 staying the operation of the notification appointing the Divisional Commissioner as an inquiry officer with a direction to the respondent to issue appointment letters to the selected candidates within three weeks.

9. Aggrieved by the interim order referred to above, the State filed a special leave petition in this Court in which this Court by an order dated 21st August 2007 stayed the interim direction in so far as the same directed the Director, Higher Education to issue appointment letters in favour of the selected candidates. The special leave petition was finally disposed by this Court on

12th February 2008 with a request to the High Court to dispose of the writ petitions within four months. The interim order issued by this Court on 21st August 2007 was continued in the meantime.

10. Before the High Court, the Government filed a counter affidavit to the writ petition stating that there were serious infirmities in the process and an indepth inquiry into the matter was necessary. The High Court eventually allowed the writ petition quashing orders dated 12th June 2007 and 16th June 2007 impugned therein and issued a mandamus to the Director, Higher Education Service Commission to make placements in favour of the selected candidates. The present appeals assail the correctness of the said orders.

11. We may at this stage point out that by an interim order dated 20th November, 2008 passed in these cases this Court directed the appellant-State to appoint the selected candidates-respondents in these appeals as Principals of various aided non-Government degree colleges and post-graduate colleges within a period of one month subject to the decision of these appeals, provided the respondents filed undertakings in this Court to the effect that in case they lose the battle they will stand reverted to the posts of Readers and the difference of salary amount drawn by them as Principals recovered and paid back to the State. That direction was reiterated by this Court in terms of order dated 23rd April, 2009 whereby this Court directed that although 56 candidates had already been appointed out of the select list in different Degree and Post-Graduate colleges, the direction issued by this Court should be complied with in toto within a period of one month from the date of the said order. Hearing of the SLPs was also directed to be expedited. It is not in dispute that the State has pursuant to the above direction appointed the selected candidates upon their filing undertakings before this Court with the result that all the selected candidates are duly appointed subject to the outcome of the present appeals and subject to the conditions stipulated in the interim orders

mentioned above.

12. Appearing for the appellant-State Mr. Srivastava made a two-fold submission in support of the appeals. Firstly, he contended that the High Court had fallen in error in quashing order dated 12th June, 2007 appointing the Divisional Commissioner, Allahabad for holding a preliminary enquiry into the allegations of malpractices in the selection process based on the complaints received by the Government. He urged that Section 6(1) of the Uttar Pradesh Higher Education Services Commission Act, 1980 empowered the State Government to remove from office any member of the Service Commission, in situations where the State Government considers them unfit to continue in office by reason of proved misconduct. The source of power so available was according to the learned counsel sufficient for the Government to hold an enquiry into the allegations regarding the legality and procedural regularity of the selection process for it was only on the basis of any such enquiry that the Government could determine whether any misconduct had been committed by the members of the Commission. The Government could on the basis of the outcome of the enquiry act against the member responsible for such misconduct and irregularity and/or refuse to approve the end result of the selection process. The preliminary enquiry, therefore, had the sanction of law, argued the learned counsel and could not be cut short by the High Court in the manner it has done.

13. Mr. Srivastava further contended that even if Section 6 is given a restricted interpretation its rigors are confined to the removal of the members of the Commission from office and do not extend to the holding of an enquiry into the validity of the selection process, yet the general executive power vested in the State Government under Article 154 of the Constitution of India was wide enough to entitle the Government to institute such an enquiry in cases where allegations of rampant corruption, malpractice and the like vitiating the selection process are made. Relying upon the pronouncements of this Court it was urged that

no candidate had a right to seek an appointment simply because he has been empanelled for such an appointment. In cases where the State has serious, reservations about the fairness of the selection process and where allegations casting a cloud on the legality and propriety of the procedure have been made, the State could not refuse an enquiry nor could any such enquiry be struck down and appointments ordered having regard to the compelling need for maintaining absolute purity in the selection process leading to such appointments.

14. Secondly, it was argued that the High Court was wrong in disposing of writ petition Nos. 39369/2003, 39370/2003, 48621/2003, 41191/2003, 52411/2003, 70062/2003, 42992/2003, 41345/2003 and 38714/2003 as infructuous. The High Court had ignored the fact that the issue of advertisement No.39 pursuant to the interim direction of the High Court and the selection process concluded on the basis thereof was subject to the outcome of the said writ petitions. Mere issue of a fresh notification in compliance with the order passed by the High Court or the completion of the selection process did not render the writ petitions infructuous, for the question whether the posts of Principals were subject to reservation had to be answered by the High Court which it had omitted to do. It was further argued that the High Court had not only ignored the decision of a coordinate Bench in *Onkar Dutt Sharma and Ors. v. State of U.P. and Ors.* (2001) 1 SAC 505, but failed to satisfactorily address the question whether the post of Principals constituted a cadre and was, therefore, amenable to reservation in terms of The Uttar Pradesh Services (Reservation for Scheduled Castes and Scheduled Tribes and other Backward Classes) Act, 1994. It was contended that the provisions of the Uttar Pradesh Higher Education Service Commission Act, 1980 had the effect of clubbing posts of Principals in different affiliated colleges and once such clubbing was statutorily prescribed for purposes of process of selection and recommendations for appointment, the said posts could be treated as a part of one single cadre to which provisions of Reservation Act, 1994 would apply.

15. Mr. Dinesh Dwivedi learned, senior counsel appearing for the management who are interveners in SLP No.27077/2008 contended that the expression "cadre" appearing in the Reservation Act, 1994 had to be interpreted liberally. So interpreted Uttar Pradesh Higher Services Commission Act had the effect of bringing about a cadre of Principals in aided and affiliated Degree and Post-Graduate institutions argued the learned counsel. He further submitted that several features supported the caderisation of the posts in such institutions. For instance the salary of the incumbent Principals in such institutions was paid by the State Government. Reference in this regard was made by him to Sections 60-A, 60-B, 60-D and 60-E of the Uttar Pradesh State Universities Act, 1973. It was argued that the clubbing of posts for conduct of a common selection process under 1980 Act (supra) and the fact that the power of appointment against the said post was effectively with the Director having regard to the provisions of Sections 12 and 13 of the Act was also a significant feature that indicated that the posts comprised a single cadre of Principals. The posts of teachers were also interchangeable subject to certain conditions and restrictions. The fact that the terms and conditions of service of the employees were the same under the relevant rules stipulated by the affiliating universities and the retirement and termination was not in the hands of the managements also suggested, according to the learned counsel, that the posts of Principals constituted a single cadre. Mr. Dwivedi also drew support from the fact that posts of Principals of secondary schools were excluded from the rigors of reservations while the Degree and Post-Graduate institutes did not enjoy any such immunity. The difference between the two provisions was, according to Mr. Dwivedi, significant and showed that wherever reservation was not intended to apply to the post of Principals as in the case of secondary schools, a specific provision to that effect was made in the statute.

16. On behalf of the respondents Mr. P.S. Patwalia, senior counsel, argued that the enquiry instituted by the Government into

the validity of the selection process was motivated by political considerations. He urged that selection process having been completed by the Commission during the previous regime the same was not found palatable by the successor Government in the State of Uttar Pradesh who contrived to subvert the entire exercise on one pretext or other.

17. Mr. Patwalia further submitted that there was no real basis for the Government to institute an enquiry into the validity of the selection especially when the allegations were totally vague, unfounded and imaginary containing an appeal to the Government to intervene on caste and community considerations rather than any concrete evidence regarding the commission of any malpractices. He drew our attention to the order passed by the High Court to show that the State Government had failed to come out with a specific statement that it intended to conduct any further enquiry or proceedings in the matter. The High Court was, therefore, justified in quashing the preliminary report submitted by the Divisional Commissioner especially because the Government did not, according to the learned counsel, have the power under Section 6 of the Uttar Pradesh Higher Education Services Act to nullify a validly concluded selection process. He refuted the contention that the Government could exercise its general executive power under Article 154 of the Constitution and submitted that no such argument was ever urged before the High Court.

18. Mr. Patwalia further contended that the provisions of the Uttar Pradesh Higher Education Services Commission Act did not have the effect of bringing about a cadre of Principals and termed the submissions made to that effect to be wholly fallacious. He submitted that the minimum requirement for holding that a cadre exists in any given service is that those who constitute a part of a given cadre must have a common employer. This requirement was not satisfied in the instant case as the employer of each one of the Principals was the management of the college concerned. The posts of the Principals were not

interchangeable or transferrable under the Rules except with the mutual consent of the incumbents and the management under whom they were serving. The question whether a cadre existed in such circumstances was, according to Mr. Patwalia, concluded by the decision of this Court in *Balbir Kaur and Anr. v. Uttar Pradesh Secondary Education Services Selection Board, Allahabad and Ors.* (2008) 12 SCC 1.

19. Mr. Pallav Shishodia and Mr. V. Shekhar, senior counsels who appeared for some of the respondents also adopted the arguments advanced by Mr. Patwalia that there was nothing in the provisions of the Uttar Pradesh Higher Education Services Commission Act or the Reservation Act of 1994 for that matter to suggest that the Legislature ever intended to create a cadre of Principals serving under different managements. The only purpose underlying the two legislations, according to the learned counsel, was to provide a unified mechanism for selection of suitable candidates for appointment as Principals to ensure that appointments are made on a fair and transparent basis. The State considered that to be necessary not only in the interests of getting the best candidates for the institutions that were affiliated to the universities and were serving a laudable public purpose but also because the salary payable to those appointed against such vacancies was reimbursed to the institutions by the State.

20. Two questions fall for our determination, these are :

(i) Whether the High Court was justified in quashing the appointment of the enquiry officer appointed to look into the allegations of malpractice allegedly committed in the course of selection process and

(ii) Whether the posts of Principals in different affiliated/ aided Degree and Post-Graduate institutions constitute a cadre and are, therefore, subject to reservation as prescribed under the provisions of the Reservation Act of 1994.

21. We propose to take up the questions ad seriatim.

Re: Question No.(i)

22. Selection of Principals in affiliated/aided Degree and Post-graduate colleges is regulated by the Uttar Pradesh Higher Education Services Commission Act, the Rules and Regulations framed thereunder. The selection process was initiated and concluded by the Commission treating the post to be open category post pursuant to the interim directions issued by the High Court. The select list was also duly notified. In the ordinary course recommendations of a statutory Commission established for selecting suitable candidates as teachers including Principals for the colleges ought to get the respect it deserved. The State Government, however, appears to have received some complaints on the basis of which it initiated an enquiry culminating in the submission of a preliminary report finding fault with the procedure adopted by the Commission in the conduct of the selection process. According to the appellant-State of U.P. the allegations made in the complaint were serious in nature and deserved to be looked into. It was urged that the State had all the intentions of instituting a further enquiry into the matter on the basis of the preliminary report submitted to it. The High Court did not think so. From a reading of the order passed in W.P. No.29524 of 2007, it appears that the High Court had given an opportunity to the learned counsel for the State to take instructions whether the Government intended to institute any further enquiry in the matter. Despite the opportunity learned counsel for the State had reported no instructions in the matter. This is evident from the following passage appearing in the order passed by the High Court:

> "On all these dates, we requested the standing counsel to give the stand of the State Government. Learned standing counsel informs that he had sent the information to the State Government but no instructions have been received by him."

23. The High Court, therefore, proceeded on the basis that the Government did not intend to conduct any further enquiry into the matter and accordingly quashed the order appointing the enquiry officer as also the instructions issued by him against the making of the appointments. We consider it unnecessary to examine whether the complaints allegedly received by the State Government made out a prima facie case for an enquiry into the matter or whether the enquiry instituted by the Government was vitiated by any political or other considerations. We would also not like to go into the question whether or not the power vested in the State under Section 6 of the Uttar Pradesh Higher Education Services Commission Act (supra) which the State Government purportedly invoked could be invoked by it for purposes of undoing the selection process and if could not be, whether the general executive power vested in the State under Article 154 of the Constitution could be exercised by it to institute an enquiry in the facts and circumstances of the case. We say so not because the questions were not germane to the controversy before us but because any enquiry by the State Government whether in exercise of its power under Section 6 or in exercise of its executive power under Article 154 would only duplicate the exercise which is already pending before the High Court in the form of several writ petitions in which the aggrieved candidates have raised issues relating to the validity of the selection process on several grounds including those which the State Government purports to be looking into on the basis of the complaints received by it. We had in that view asked Mr. Srivastava whether there was any need for the State Government to undertake a parallel exercise especially when the examination by the High Court of all matters concerning the validity of selection would give an opportunity not only to the State Government but also to the aggrieved candidates who have been selected to present their respective version before it. If the High Court on the basis of whatever material is placed before it by the parties came to the conclusion that there was nothing wrong with the selection process, any enquiry made by the State would be wholly unnecessary. On the contrary, if the High Court

came to the conclusion that the selection was vitiated by any illegality or irregularity, the State Government could exercise its power and institute an enquiry for the removal of any member who may have committed any misconduct by being a party to any such illegality or irregularity. To the credit of Mr. Srivastava, we must record that he was agreeable to the course of action suggested by us with the only exception that the vigilance case that stood registered by the State Vigilance Department is allowed to go on to look into the criminal angle if any involved in the so-called illegal selection conducted by the Commission. In the circumstances, therefore, it is unnecessary for us to authoritatively determine the question whether the institution of enquiry by the State Government was justified and, if so, whether the source of power invoked by the Government was indeed available to it. We are of the view that in the writ petitions filed by the aggrieved candidates before the High Court all aspects of the matter shall be open to examination in which everyone connected with the selection process would have an opportunity to place his/her point of view.

24. We are told that the selected candidates may not have been impleaded as parties to the pending writ petitions although they are necessary parties having regard to the fact that any order that the High Court may pass regarding the validity of the selection may affect them adversely. The selected candidates who have been appointed on the basis of the selection process and who have filed undertakings before this Court shall, therefore, be impleaded as parties to the pending writ petitions to avoid any technical infirmity in the proceedings and any consequent delay in the disposal of the matter. A specific direction to this effect is being issued by us in the operative part of this order. Question No.(i) is answered accordingly.

Regarding Question No. (ii)

25. Uttar Pradesh Higher Education Services Commission Act, 1980 was introduced to make the selection of teachers in Degree and Post-graduate Colleges fair, objective and

transparent. The statement of objects and reasons for the legislation has referred to favoritism in the selection of candidates for such colleges and elimination of such infirmities from the selection process as one of the objectives underlying the enactment.

26. In terms of Section 4 of the Act, the Commission established under Section 3 consists of a Chairman and not less than two and not more than four other members to be appointed by the State Government satisfying the conditions of eligibility stipulated under sub-section (2) and (2-a) thereof. Section 11 enumerates the functions of the Commission which includes the preparation of guidelines on matters relating to the method of recruitment, conduct of examinations where considered necessary, holding of interviews for making selection of candidates to be appointed as teachers and selection of experts and appointment of examiners for such examination. Section 12 of the Act stipulates the process for appointment of teachers and inter alia provides that appointment of a teacher of any college shall be made by the Management only in accordance with the provisions of the Act and that any appointment made in contravention thereof shall be void. Sub-section (2) of Section 12 requires the management of the colleges to intimate the existing vacancies and the vacancies likely to be caused during the ensuing academic year to the Director of Education (Higher Education) in such manner as may be prescribed. Sub-section (3) requires the Director to notify to the Commission in the manner prescribed a subject wise consolidated list of vacancies intimated to him from all colleges.

27. The manner of selection of persons for appointment to the post of teacher of a college has also to be determined by regulations. It is further provided that candidate shall be required to indicate their order of preference for the various colleges, vacancies wherein have been advertised. Section 13 of the Act requires the Commission to hold interviews with or without written examination and to send to the Director a list recommending such

number of names of candidates found most suitable in each subject as may be as far as practicable twenty five percent more than the number of vacancies in that subject duly arranged in the order of merit. Such a list would then be valid till the receipt of new list from the Commission. Sub-section (3) empowers the Director to intimate to the Management the name of a candidate from the list referred to in sub-section (1) for being appointed in the vacancies. Sub-section (6) requires a copy of such intimation to be sent to the candidate concerned.

28. Section 14 of the Act enjoins upon the Management to issue an appointment letter to the person whose name has been intimated to it. It reads:

> "14. Duty of Management.- (1) The management shall within a period of one month from the date of receipt of intimation under sub-section (3) or sub-section (4) or sub-section (5) of Section 13, issue appointment letter to the person whose name has been intimated.
>
> (2) Where the person referred to in sub-section(1) fails to join the post within the time allowed in the appointment letter or within such extended time as the management may allow in this behalf, or where such person is otherwise not available for appointment, the Director, shall on the request of the management intimate fresh name from the list sent by the Commission under sub-section(1) of Section 13 in the manner prescribed."

29. Section 15 entitles the person recommended for appointment but not so appointed by the management to approach the Director for issue of an appropriate direction under sub-section (2). Director is under the said provision empowered to hold an inquiry and to pass an order requiring the management to appoint the applicant as a teacher and to pay to him the salary from the date specified in the order.

30. The Government has in exercise of its power under

Section 32 and Section 31 of the Uttar Pradesh Higher Education Services Commission Act, 1980 framed what are known "Uttar Pradesh Higher Education Services Commission Rules, 1981" and "Uttar Pradesh Higher Education Services Commission (Procedure for Selection of Teachers) Regulations, 1983". While the Rules aforementioned deal with the constitution of the Commission, disqualification of the members, investigation into misconduct of members, staff etc. the Regulations referred to above deal with matters like qualifications and experience for appointment as teacher, determination and intimation of vacancies, procedure for selection and the like.

31. A careful reading of the provisions of the Act, the Rules and the Regulations referred to above do not support the theory propounded by Mr. Srivastava and Mr. Dwivedi that the same by a fiction of law create a cadre of principals either for the purpose of applying reservation or otherwise. As seen earlier the object underlying the legislation was limited to ensuring a combined process of selection that would save time and expense involved in such selections if the same are made individually for each college. It is also intended to remove the element of arbitrariness and other malpractices that were noticed in the making of such selections and appointments by the institutions if left to themselves. The setting up of the Statutory Commission, appointment of persons qualified for the same, stipulating the terms and conditions of service of those appointed and the power to remove the members for misconduct and laying down the procedure for appointment of teachers are all meant to ensure that the process of selection is free from mal-practices that were generally associated with such process when handled by the institutions. There is nothing in the Act, the Rules and Regulations, to even remotely, suggest that the legislature intended to create a cadre of principals even where none existed earlier either for purposes of reservation or otherwise.

32. The fact that the management was required to

communicate the available vacancies to the Director of Higher Education or that an appointment order must be issued, once the selection process is completed and a candidate is recommended for appointment also does not in our opinion have the effect of creating a cadre of principals. All that the said provision is intend to achieve is to ensure that the vacancies are referred to the Statutory Commission to enable it to conduct the process of selection and once the process is completed and recommendations made, the management do not refuse appointment to the candidate considered best for the post.

33. The power vested in the Director to hold an enquiry and to issue directions for payment of salary, in case the management does not appoint, is also meant to be a step in aid of the process of selection and appointment giving primacy to the opinion of the Commission regarding the merit and suitability of the candidate for such appointment and entitling the candidate to claim salary if the appointment is unjustifiably denied to him. Suffice it to say that the provisions of the Act and the Regulations do not have anything to do with creation of a cadre of Principals nor can the commonality of the selection process be confused with the caderisation of the post of Principals.

34. That brings us to the question whether similarity of the terms and conditions of the employees serving in the aided/affiliated colleges and the effect the payment of salary due to such teachers is reimbursed by the State Government would have the effect of creating a cadre of Principals. Our answer is in the negative. The fact that the State Government offers financial aid to the affiliated colleges in terms of payment of salary of those serving such institutions does not in our opinion have any relevance to the question whether the posts of Principals in different colleges under different managements constitute a cadre. Merely because the Government supports the institutions which are in all other respects autonomous in their functioning, and are managed by individual managements cannot by any

stretch of reasoning be taken as a circumstance constituting the posts in such colleges into a single cadre. So also the fact that the terms and conditions of service of such teachers serving in different colleges including Principals are similar on account of such colleges being affiliated to the same university and being governed by the same set of Statutes, Rules and Regulations also does not have anything to do with the creation or the existence of a single cadre comprising such posts. There is no gainsaying that such common features do not in any way impinge upon the autonomous character of such institutions nor does payment of salaries and the similarity of conditions of service of the employees provide a test for holding that although serving in different institutions totally independent of each other the Principals appointed in such institution form a common cadre.

35. It was also contended on behalf of the respondents, that the power of appointment effectively rests only with the Director of Higher Education and that managements have no option but to comply with the directions in that regard. This according to the respondents suggests that the Director of Education is the real employer and the management of the institutions in which such appointments are made only carry out a ministerial duty that does not clothe them with the character of being the true employers. We see no merit even in that contention. It is true that in terms of Section 14 of the Act, managements are required to issue an appointment letter to the person whose name has been intimated to it but any such obligation flowing from Section 14 does not make the State Government the employer of the person appointed. It is evident from a plain reading of Section 14 that the appointment letter has to be issued only by the management. There is no provision empowering the Director to do so. This implies that the selected candidate is taken into the employment of the institution only when the management of the institution issues in his favour a letter of appointment. It is manifest that the appointing authority even under the scheme of the Act remains the management of the institutions. The provisions of the Act simply make sure that the management makes an appointment

only of the persons selected for the post and no more. The authorities under the Act do not substitute themselves as the employer of the person appointed.

36. Last but not the least is the fact that the post of Principals in different aided/affiliated institutions is not transferable or interchangeable. Interchangeability of the post and transferability of incumbents to another post in the same cadre are essential attributes of a cadre, which is in the instant case absent. Reference in this connection may be made to the Uttar Pradesh Higher Education Aided Colleges Transfer of Teachers Rules, 2005 framed by the State Government in exercise of its powers under Section 32 of the U.P. Higher Education Services Commission Act, 1980. Rule 4 of the said Rules is in this regard relevant and may be extracted:

> "4(1) Teachers appointed on regular basis and holding lien as permanent teachers shall be entitled to transfer after 10 years of service only once in the whole service period.
>
> (2) The transferred teacher shall become the employee of the college to which he has been transferred as his service conditions shall be governed by the statutes of the University concerned.
>
> (3) The protection of salary of the teacher shall be admissible but the service rules of the new employers shall be applicable, to such teacher.
>
> (4) The transferred teacher, shall be the junior most teacher of his cadre working on the date of his joining in the college concerned.
>
> (5) The teachers shall be transferred against such posts for which salary is paid from the salary payment account. The management of the college before giving its consent to any teacher, shall ensure that no enquiry or any proceeding is pending against the teacher concerned and the post to which he has been considered to be appointed by transfer

shall not be advertised by the Uttar Pradesh Higher Education Services Commission.

(6) The transfer application for single/mutual transfers from one college to other shall be submitted to the Director, High Education through the management legally construed and approved by the University along with the written consent of both the two management. The Director, High Education shall submit his recommendations to the Government within one month from the date of receipt of the application within one month from the date of receipt of the application. The Government shall take decision either on the basis of recommendation of the Director or on its own.

(7) No travel Allowance shall be admissible to the teachers against such transfers.

(8) The Manager of the former institution shall send its service book, Character Rolls, Leave Account, G.P.F., Group Insurance account and last pay certificate counter signed by the District Inspector of Schools/Regional Higher Education Officer, as the case may be, to the Regional Higher Education Officer of the Region concerned and to the Director, Higher Education."

37. It is evident from the above that there is no power vested in the State Government or any other authority for that matter to transfer the Principal from one institution to another institution as it may do for instance in the case of Government run institutions where Principal from one government college may be transferred to another government college in the same cadre. Sub-rule (1) of Rule 4 (supra) does not talk about the power of transfer vested in any authority. It talks about entitlement of a permanent teacher to be transferred after 10 years of service only once in the whole service period. Sub-rule (2) provides that the transferred teacher shall become an employee of the college to which he has been transferred. More importantly sub-rule (4) makes the transferred teacher go to the bottom of the cadre to which he may be

transferred. That provision may not make much sense when it comes to transfer of a Principal from one college to another but it certainly shows that even when there are plurality of posts in the cadre lower than the principal the person transferred from another institution would figure at the bottom of the said cadre. This again is a circumstance which negates the theory of Principals being a part of the same cadre.

38. Similarly in terms of sub-rule (5) the management of the college has to ensure that no enquiry or any proceeding is pending against the teacher concerned before giving its consent for the transfer of the teacher. This means that the institutions may refuse to relieve a teacher even when he may like to be transferred, should an enquiry be pending against him. Sub-rule (6) envisages that the transfer can be made only by mutual consent.

39. It is abundantly clear from the above that the attribute of interchangeability and transferability is missing in the case of Principals – in much the same measure as in the case of teachers, in the lower cadre. We have, therefore, no hesitation in holding that there is no cadre of Principals serving in different aided and affiliated institutions and that the Principal's post is a solitary post in an institution. Reservation of such a post is clearly impermissible not only because the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1994 provides for reservation based on the 'cadre strength' in aided institutions but also because such strength being limited to only one post in the cadre is legally not amenable to reservations in the light of the pronouncement of this Court to which we shall presently refer.

40. We may before referring to the decisions of this Court on the question whether a single post can be reserved, notice the decision of this Court in *Balbir Kaur's* case (supra) relied upon by Mr. Patwalia. That was also a case from the State of U.P. It related to appointment of a Principal under the U.P. Secondary

Education Services Commission and Selection Boards Act, 1982. One of the questions that fell for consideration was whether the post of Principal in institutions offering secondary education was amenable to reservation having regard to the Reservation Act of 1994 referred above. This Court answered the question in the negative and gave two reasons in support of that conclusion. Firstly, the Court found that Section 10 of the U.P. Secondary Education Services Commission and Selection Boards Act, 1982 expressly excluded the post of Principal from the purview of the Reservation Act of the year 1994. Secondly and more importantly the post of Principal in an educational institution being a single post in the cadre such a post was held not amenable to reservation for any such reservation would amount to making a 100% reservation which was found impermissible under Articles 15 and 16 of the Constitution. Relying upon the decision of this Court in *Dr. Chakradhar Paswan v. State of Bihar & Ors.* (1988) 2 SCC 214 and *Post Graduate Institute of Medical Education & Research, Chandigarh v. Faculty Association & Ors.* (1998) 4 SCC 1, this Court held that any reservation qua a single post cadre either directly or by the device of rotation of roster was not valid. The Court also held that since the Reservation Act, 1994 did not provide for clubbing of all the educational institutions in the State of U.P. for the purpose of reservation there is no question of clubbing the post of Principals in all the educational institutions for the purpose of applying the principles of reservation under the 1994 Act. The following passage is in this regard apposite:

> "it was held that there cannot be any reservation in a single post cadre and the decisions to the contrary, upholding reservation in single post cadre either directly or by device of rotation of roster were not approved. Besides, as noted above, neither the principal Act, nor the Rules made thereunder or the 1994 Act provide for clubbing of all educational institutions in the State of U.P. for the purpose of reservation and, therefore, there is no question of clubbing the post of Principals in all the educational

> institutions for the purpose of applying the principle of reservation under the 1994 Act."

41. It was argued on behalf of the respondents that while Section 10 of the U.P. Secondary Education Services Commission and Selection Boards Act, 1982 specifically excluded the post of Head of the institution from the process of determination of number of vacancies to be reserved for candidates belonging to Scheduled Caste, Scheduled Tribes and other Backward Classes, no such exclusion was made in the case of the 1980 Act that regulates selection for appointment to the Degree and Post-degree Colleges. This according to learned counsel for the appellant implied that wherever the legislature intended that the post of Principal should be excluded from reservation it specifically provided so and in case such exclusion was not intended no such provision was made. The decision in *Balbir Kaur's* case (supra) argued learned counsel for the appellants was on that basis distinguishable.

42. We do not think so. It is true that Section 10 of the 1982 Act which stipulates the procedure for selection of candidates for direct recruitment requires determination of the vacancies to be reserved for candidates belonging to SC, ST and Backward Classes and reference of such vacancies to be made to the Commission established under the said Act but excluding the post of Principal/Head of the institution from the said determination but it is equally true that Section 12 of 1982 Act with which we are concerned does not require any exercise to be undertaken by the Institutions for determining the number of vacancies to be reserved for candidates belonging to reserved categories. There is consequently no provision by which the post of Principal/Head of the institution is excluded from any such process. The two provisions in that sense are not comparable. In one case the number of vacancies to be reserved is required to be determined while in the other no such requirement has been stipulated. Exclusion of the Principal's post from such determination under the 1982 Act cannot, therefore, be

overemphasized in the absence of a provision requiring a determination of the reserved vacancies under Section 12 of the 1980 Act.

43. That apart we repeatedly asked learned counsel for the appellant-State and Mr. Dwivedi, learned counsel appearing for the managements whether there was any rationale for giving a differential treatment to Principals in Degree & Post-Graduate colleges in the matter of reservation, keeping in view the fact that Principals in Secondary Educational Institutions were not subject to any such reservation. We neither expected nor got any explanation from the learned counsel. The reason was obvious. If the posts of Principals in the secondary school which are much larger in number than the Degree and Post-Graduate colleges are not amenable to reservation and have been specifically excluded from that process, there is no earthly reason why posts of Principals in Degree and Post-Graduate colleges which are relatively fewer in number available in colleges imparting higher education ought to be subjected to such reservation. What is true in the case of secondary schools would, therefore, be true in the case of Degree and Post-Graduate colleges also. Any interpretation that may render the legal position anomalous or absurd shall, therefore, have to be eschewed.

44. The other reason why we have no difficulty in rejecting the contention urged by appellants is the fact that this Court has in *Balbir Kaur's* case (supra) specifically examined the question whether the post of Principals in secondary institutions can be reserved independent of the provision by which such post are excluded from reservation. This Court held that since the posts of Principals are single post such reservation is not permissible qua them. There is no way that view can be ignored or wished away by the State or the managements. Whether or not a single post can be reserved is even otherwise fairly well settled by the decisions of this Court to which we need refer only briefly.

45. The decision of this Court in *Indra Sawhney and Ors.*

v. Union of India and Ors., 1992 Supp.(3) SCC 217, continues to be the locus classicus on the subject of reservation. This Court in that case held that reservation under Articles 14, 15 and 16 must be applied in a manner so as to strike a balance between opportunities for the reserved classes on the one hand and other members of the community on the other. Such reservation cannot exceed 50% in order to be constitutionally valid.

46. In *Chakradhan Paswan's* case (supra) this Court relying upon the decision in *Arati Ray Choudhury v. Union of India* 1974 (1) SCC 87, *M.R. Balaji v. State of Mysore* AIR 1963 SC 649 and *T. Devadasan v. Union of India* AIR 1964 SC 179 held that separate posts in different institutions cannot be clubbed together for the purpose of reservation and that reservations may be made only where there are more than one posts. Reservation of only a single post in the cadre would amount to 100% reservation and thereby violate Articles 14(1) and 16(4) of the Constitution.

In *Bhide Girls Education Society v. Education Officer, Zila Parishad, Nagpur and Ors.,* 1993 Supp (3) SCC 527 this Court held that a single post of Headmistress of an institution could not be reserved as the same would amount to making a 100% reservation.

47. The controversy was authoritatively set at rest by the Constitution Bench decision of this Court in *Post-graduate Institute of Medical Education & Research, Chandigarh v. Faculty Association and Ors.* (1998) 4 SCC 1 case (supra) where this Court overruled the decisions of this Court in *Union of India and Anr. v. Madhav s/o Gajanan Chaubal and Anr.* (1997) 2 SCC 332, *Union of India v. Brij Lal Thakur* (1997) 4 SCC 278 and *State of Bihar v. Bageshwari Prasad* 1995 Supp (1) SCC 432 and observed:

> **"34.** In a single post cadre, reservation at any point of time on account of rotation of roster is bound to bring about a situation where such a single post in the cadre will be kept

reserved exclusively for the members of the backward classes and in total exclusion of the general members of the public. Such total exclusion of general members of the public and cent per cent reservation for the backward classes is not permissible within the constitutional framework. The decisions of this Court to this effect over the decades have been consistent.

35. Hence, until there is plurality of posts in a cadre, the question of reservation will not arise because any attempt of reservation by whatever means and even with the device of rotation of roster in a single post cadre is bound to create 100% reservation of such post whenever such reservation is to be implemented. The device of rotation of roster in respect of single post cadre will only mean that on some occasions there will be complete reservation and the appointment to such post is kept out of bounds to the members of a large segment of the community who do not belong to any reserved class, but on some other occasions the post will be available for open competition when in fact on all such occasions, a single post cadre should have been filled only by open competition amongst all segments of the society."

48. In the light of the above decision, we have no hesitation in holding that the post of principals in each one of the aided/ affiliated institution being a single post in the cadre is not amenable to any reservation. Question No.(ii) is accordingly answered in the affirmative.

49. Mr. Patwalia, learned counsel for the selected candidates then argued that if the High Court was correct in holding that the provisions of 1994 Act regulating reservation of vacancy did not apply to the post of Principals in different affiliated/aided Degree and Post-Graduate colleges, there was no reason why the undertakings furnished by the selected candidates to this Court as a step in aid of their appointments should not be discharged and the selected candidates allowed

to assume office on a substantive basis subject to any direction which the competent Court may issue as regards the validity of the selection process and the consequent appointments. He urged the State Government was not releasing in favour of the appointed candidates the full benefits of such appointments in the form of increments and allowances etc. only because the appointments made were subject to the outcome of these proceedings and the undertaking furnished by the candidates. Alternatively, he urged that even if the appointments made by the State pursuant to the directions of this Court were to remain incohate and subject to the outcome of the writ petitions before the High Court there was no reason why dues legitimately payable to the selected candidates should not be directed to be released on such conditions as the Court deem fit and proper.

50. On behalf of the State and the management it was per contra argued that the release of any further benefits to the selected candidates could await the disposal of the writ petitions pending before the High Court which disposal could be expedited in the interest of all concerned.

51. The view taken by the High Court in so far as the applicability of reservation to single posts of Principal in the affiliated and aided institutions has been affirmed by us while answering question No.(ii) above. To that extent the controversy is being given a quietus. All the same the question whether there were any malpractices and if so whether the selection process could be nullified by the State Government in exercise of its power under Section 6 of the 1980 Act or Article 154 of the Constitution has been left open by us in the light of the fact that the question regarding legality of the selection process is pending adjudication before the High Court where all parties concerned would have an opportunity to present their respective cases. A parallel enquiry at the Government level into those questions has been held by us to be unnecessary. There is, therefore, no final adjudication of the dispute between the parties in so far as the validity of the selection process is concerned.

Such being the case we do not consider it necessary to relieve the appointed candidates of the obligations flowing from the undertaking given by them subject to which only the appointments were allowed to be made. This may not, however, mean that the appointed candidates will not be entitled to claim full benefit of the post admissible to the incumbent to which they have been appointed during the period such appointments continue to remain in force. The directions under which the appointments were allowed to be made also did not permit the State to withhold benefits legitimately flowing from such appointments. If any additional financial benefits by way of allowances become payable to the appointed candidates the same must be allowed to be drawn by them. Enjoyment of all such benefits would also remain subject to the undertakings which the appointed candidates have filed before this Court.

52. An apprehension was expressed before us that the matter may continue languishing in the High Court for a long time especially because of the failure of the writ petitioners before the High Court in impleading the selected candidates as parties. It was submitted that orders for addition of the selected candidates could be passed by this Court to allay any such apprehensions. We see no impediment in passing appropriate orders in that regard, especially when, none of the parties before us were opposed to any such orders impleading the selected candidates as party respondents to the pending writ petitions before the High Court.

53. In the result we dispose of these appeals with the following directions:

(1) The impugned orders passed by the High Court to the extent the same hold that the posts of Principals in affiliated/ aided colleges are not amenable to reservation are affirmed.

(2) Order dated 12th June, 2007 issued by the Government

appointing the Divisional Commissioner, Allahabad as an Enquiry Officer to hold an enquiry into the validity of selection process and the report submitted by the said Enquiry Officer shall stand quashed and the order passed by the High Court to that effect affirmed.

(3) The question whether the Government was competent to direct an enquiry into the validity of the selection process under Section 6 of the Uttar Pradesh Higher Education Services Commission Act, 1980 or under Article 154 of the Constitution is left open in view of the pendency of the writ petitions challenging the validity of the selection process before the High Court.

(4) The High Court shall in the writ petitions pending before it be free to examine all issues regarding the selection process in question including the validity of the procedure followed in making the same. Depending upon whether the High Court finds the selection process to be valid or otherwise the Government shall have the liberty to institute an enquiry against the members of the State Services Selection Commission if such enquiry is otherwise permitted under law. In case, however, the High Court upholds the selection process and dismisses the writ petitions there shall be no room left for the State Government to embark upon any further enquiry into the matter on the administrative side. The aggrieved party shall be free to challenge the view taken by the High Court in appropriate proceedings in accordance with law.

(5) The selected candidates who have filed undertakings in this Court and have been appointed to the posts of Principals pursuant to the orders of this Court shall stand impleaded as parties to each of the writ petitions pending in the High Court and challenging the selection process. The selected candidates shall based on this direction appear before the High Court on 2.5.2011 without any further notice

in each one of the petitions and file their counter-affidavits. Failure on the part of the candidates to do the needful shall be suitably dealt with by the High Court who shall be free to proceed ex-parte, against those who fail to comply with this direction.

(6) In order to expedite the hearing of the case the Chief Justice of the High Court of Allahabad is requested to place the writ petitions before a Division Bench of the High Court for an early hearing and disposal as far as possible before the 1st December, 2011.

(7) Pending disposal of the writ petitions by the High Court the selected candidates shall be entitled to receive their pay and allowances including increments etc. otherwise admiss ible to the post of Principal as if the appointments were made on a valid and substantive basis. Such benefits flowing from the same shall, however, be subject to the outcome of the writ petitions before the High Court and the undertakings furnished by the appointed candidates to this Court which undertaking shall be deemed to have been continued till such time the writ petitions are finally disposed of.

54. The parties shall bear their own costs.

D.G. Appeals disposed of.

KUMARI RANJANA MISHRA AND ANR.
v.
THE STATE OF BIHAR AND ORS.
(Civil Appeal No. 2416 of 2011)

MARCH 10, 2011

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

Education/Educational Institutions – Bihar School Examination Board Rules, 1963 – Rule 7 –Entitlement of students to appear in examination after de-recognition of educational institution – Physical Training College in question was recognized by the State Government during the years when the appellants undertook C.P.Ed. (Certificate of Physical Education) course from the said College – Subsequently, NCTE Act came into force and Regional Committee of the NCTE was vested with the power to grant recognition – Much later, the State Government revoked the recognition of the said College – Appellants filed writ petition for direction to the Examination Board to allow them to appear in C.P.Ed. examination – Writ petition dismissed by the High Court – On appeal, held: The Examination Board was under a duty to hold C.P.Ed. examination for students of the college and this duty could be enforced by the Court by an appropriate writ or direction by the High Court u/Article 226 of the Constitution – The High Court was not right in taking the view that without a direction of the State Government to the Examination Board to allow the appellants to take the examinations, no relief could be granted by the High Court to the appellants – The College in question was duly recognized by the State Government during the year 1989-1990 when the appellants were admitted to the C.P.Ed. course and when the NCTE Act had neither been enacted nor come into force – Also, recognition of all non-Government Physical Training Colleges including the College in question was revoked presumably

because the State Government no longer had the power to grant recognition and non-Government Physical Training Colleges in the State were required to obtain recognition from the Regional Committee of the NCTE – Order of the High Court accordingly set aside and Examination Board directed to conduct C.P.Ed. examination for the appellants – National Council for Teacher Education Act, 1993 – s.14 – Constitution of India, 1950 – Art. 226.

The Government of Bihar granted temporary recognition to the Physical Training College in question for C.P.Ed. (Certificate of Physical Education) course from July, 1986 alongwith permission to the students of the College to appear in the examinations subject to certain conditions stipulated in the order dated 09.08.1988. The two appellants took admission in the C.P.Ed. course in the said College in the academic session 1989-1990. Several other students also took admission in the C.P.Ed. course in the College in different academic years 1989-1990 to 1995-1996. With effect from 01.07.1995, the National Council for Teacher Education Act, 1993 came into force and under Section 14 of the NCTE Act, the power to grant recognition was vested in the Regional Committee of the National Council for Teacher Education (NCTE) with effect from 17.08.1995. On 13.04.2004, the State revoked the recognition of the College and all other Non-Government Physical Training Colleges in the State.

The two appellants and five other candidates, who had undergone the C.P.Ed. course in the said College during the academic years 1989-1990 to 1995-1996, moved the High Court under Article 226 of the Constitution for a direction to the Bihar School Examination Board to release the forms and accept the fees and forms of the appellants and the five other

candidates on the basis of the training courses completed in the academic sessions 1989-1990 to 1995-1996 from the College and to allow them to appear in the examination to be conducted in 2007. A Single Judge of the High Court dismissed the Writ Petition. The order was upheld by the Division Bench of the High Court.

The appellants contended before this Court that their College was recognized by the State Government during the years 1989-1990 to 1995-1996 when the appellants and five other candidates undertook the C.P.Ed. course and that the Regional Committee of NCTE was vested with the power to grant recognition only after the NCTE Act came into force on 01.07.1995 and, therefore, the Bihar School Examination Board should be directed to allow the appellants to take the C.P.Ed. examination.

Allowing the appeal, the Court

HELD: 1. The word "shall" in sub-rule (1) of the Rule 7 of the Bihar School Examination Board Rules, 1963 indicates that a duty is cast duty on the Bihar School Examination Board to conduct the Certificate in Physical Education (C.P.Ed.) examinations on such terms and conditions as may be laid down by the State Government. In the order dated 09.08.1988 of the State Government granting recognition to the College, there were ten conditions. It is clear from the terms and conditions of the order dated 09.08.1988 that the students of the College were to appear in the C.P.Ed. and D.P.Ed. examinations conducted by the Bihar School Examination Board. Hence, the Bihar School Examination Board was under a duty to hold the C.P.Ed. and D.P.Ed. examinations for the students of the college and this duty could be enforced by the Court by an appropriate writ or direction by the High Court under Article 226 of the Constitution. The High Court was not

right in taking the view in the impugned order that without a direction of the State Government to the Bihar School Examination Board to allow the appellants to take the examinations, no relief could be granted by the High Court to the appellants. [Para 7] [580-E-H; 581-A-C]

2.1. The High Court was also not right in distinguishing the present case from the case of Sunil Kumar Parimal. In the case of Sunil Kumar Parimal, this Court having found that the College in question in that case was recognized by the State Government prior to the date when the NCTE Act came into force and the NCTE came into existence, directed that the students of the College would be permitted to appear in the examination for the courses of C.P.Ed and D.P. Ed. for the Sessions 1994-1995 and 1995-1996 to be conducted by the Bihar School Examination Board on the next available opportunity. The decision of this Court in Sunil Kumar Parimal squarely applies to the facts of this case also, as the College in question herein was duly recognized by the State Government during the year 1989-1990 when the appellants were admitted to the C.P.Ed. course and when the NCTE Act had neither been enacted nor come into force. The order of the State Government granting recognition to the College in which the appellants studied in the year 1989-1990 was issued on 09.08.1988, several years before the NCTE Act came into force. The recognition of the College had not been revoked by the State Government until 13.04.2004 and on 13.04.2004 the recognition of all non-Government Physical Training Colleges including that of the College in the present case were revoked presumably because the State Government no longer had the power to grant recognition and the non-Government Physical Training Colleges in the State were required to obtain recognition from the Regional Committee of the NCTE under the NCTE Act. [Paras 8, 9, 10] [581-D-H; 582-B-D; 583-C-D]

2.2. The impugned order of the High Court is accordingly set aside and the Bihar School Examination Board is directed to conduct the C.P.Ed. examination for the appellants as soon as possible. [Para 12] [584-B]

Sunil Kumar Parimal & Anr. v. State of Bihar & Ors. **(2007) 10 SCC 150 – held applicable.**

Bhagwan Budha Prathmik Technical Training College Nirmali v. TheState of Bihar & Ors. **2010 (12) SCALE 364 – held inapplicable.**

L. Muthukumar & Anr. v. State of T. N. & Ors. **(2000) 7 SCC 618;** *St.John's Teachers Training Institute (for Women), Madurai & Ors. v.State of Tamil Nadu & Ors.* **(1993) 3 SCC 595;** *State of Maharashtra v. Vikas Sahebrao Roundale & Ors.* **(1992) 4 SCC 435 and** *N. M. Nageshwaramma, etc. v. State of Andhra Pradesh & Anr.,* **etc. 1986 (Supp.) SCC 166 – distinguished.**

P.M. Joseph v. State of T. N. **(1993) Writ LR 604 – referred to.**

Case Law Reference:

(2007) 10 SCC 150	**held applicable**	**Para 4, 8**
2010 (12) SCALE 364	**held inapplicable**	**Para 5, 9**
(2000) 7 SCC 618	**distinguished**	**Para 5, 10**
(1993) 3 SCC 595	**distinguished**	**Para 5, 11**
(1992) 4 SCC 435	**distinguished**	**Para 5, 10**
1986 (Supp.) SCC 166	**distinguished**	**Para 5**
(1993) Writ LR 604	**referred to**	**Para 10**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2416 of 2011.

From the Judgment & Order dated 23.05.2008 of the High Court of Judicature at Patna in L.P.A. No. 972 of 2007.

Sunil Kumar, Shree Pakash Sinha and Shekhar Kumar for the Appellants.

Gopal Singh, Manish Kumar, Lakshmi Raman Singh, Amitesh Kumar, Dr. Amaresh Kumar, Mrinal Amaresh and Shuvodeep Roy for the Respondents.

The Judgment of the Court was delivered by

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

2. This is an appeal against the order dated 23.05.2008 of the Division Bench of the High Court of Patna in Letters Patent Appeal No.972 of 2007.

3. The facts very briefly are that the Government of Bihar in the Department of Human Resource Development granted temporary recognition to the Champaran Physical Training College (for short 'the College') for C.P.Ed. (Certificate of Physical Education) and D.P. Ed. (Diploma in Physical Education) courses from July, 1986 alongwith permission to the students of the College to appear in the examinations subject to certain conditions stipulated in the order dated 09.08.1988. The two appellants took admission in the C.P.Ed. course in the College in the academic session 1989-1990. Several other students also took admission in the C.P.Ed. course in the College in different academic years 1989-1990 to 1995-1996. With effect from 01.07.1995, the National Council for Teacher Education Act, 1993 (for short 'the NCTE Act') came into force and under Section 14 of the NCTE Act, the power to grant recognition was vested in the Regional Committee of the National Council for Teacher Education (NCTE) with effect from 17.08.1995. On 13.04.2004, the State revoked the recognition of the College and all other Non-Government Physical Training Colleges in the State. The two

appellants and five other candidates, who had undergone the C.P.Ed. course in the College during the academic years 1989-1990 to 1995-1996, moved the High Court under Article 226 of the Constitution in C.W.J.C. No. 11413 of 2007 for a direction to the Bihar School Examination Board to release the form and accept the fees and forms of the appellants and the five other candidates on the basis of the training courses completed in the academic sessions 1989-1990 to 1995-1996 from the College and to allow them to appear in the examination to be conducted in 2007. By order dated 07.11.2007, a learned Single Judge of the High Court dismissed the Writ Petition. The two appellants and the five other candidates then filed Letters Patent Appeal No. 972 of 2007 before the Division Bench of the High Court. By the impugned order dated 23.05.2008, the Division Bench of the High Court dismissed the Letters Patent Appeal. Aggrieved, the appellants have filed this appeal.

4. Mr. Sunil Kumar, learned senior counsel appearing for the appellants, submitted that before the Division Bench of the High Court, the appellants contended that the College was recognized by the State Government during the years 1989-1990 to 1995-1996 when the appellants and five other candidates undertook the C.P.Ed. course and that the Regional Committee of NCTE was vested with the power to grant recognition only after the NCTE Act came into force on 01.07.1995 and, therefore, the Bihar School Examination Board should be directed to allow the appellants to take the C.P.Ed. examination. He submitted that before the High Court the appellants relied on the decision in *Sunil Kumar Parimal & Anr. v. State of Bihar & Ors.* [(2007) 10 SCC 150] in which this Court has held that the Tirhut Physical Education College, Muzaffarpur, was duly recognized by the State Government and lost its recognition only with effect from the date the NCTE Act came into force, and hence the candidates, who had undertaken the course in the aforesaid College recognized by

the State Government before the NCTE Act came into force, were eligible to appear in the examination of C.P.Ed. course. He submitted that the High Court did not accept the contention of the appellants and instead held that Tirhut Physical Education College, Muzaffarpur, was a recognized institution and despite repeated requests of the State to allow the students to appear in the examination, the Bihar School Examination Board did not follow the request of the State Government, but in the facts of the present case no such request had been made by the State Government and no direction was issued by the State Government to the Bihar School Examination Board to allow the students of the College to take the C.P. Ed. examination. He submitted that the High Court further held that the order passed by this Court in Sunil Kumar Parimal's case was in exercise of this Court's jurisdiction under Article 142 of the Constitution to do complete justice between the parties and the High Court had no such power to do complete justice under Article 226 of the Constitution. Mr. Sunil Kumar further submitted that the High Court also held that after the NCTE Act had come into force the College had also not applied for recognition and in fact the recognition of the College had been cancelled in the year 2004 and that it was only after the College was derecognized that the appellants sought to appear in the examination to be conducted by the Bihar School Examination Board in the year 2007, to which the appellants were not entitled. He argued that the case of the appellants is squarely covered by the decision of this Court in *Sunil Kumar Parimal's* case (supra) and this Court should direct the Bihar School Examination Board to allow the appellants to take the C.P.Ed. examination. Learned counsel for the respondents nos. 8 and 9, namely, the Secretary and the Principal of the College, adopted the aforesaid arguments of Mr. Sunil Kumar.

5. In reply, Mr. Gopal Singh, learned counsel appearing for respondent Nos. 1 to 5, namely, the State of Bihar and the Bihar School Examination Board and their officers, submitted

that the Bihar School Examination Board has conducted examinations on several occasions during the years 1989-90 onwards, but the appellants did not make any request to sit in the examination in all the years till 2007 and it is only after the State Government started recruitment of teachers in large numbers and appointed Panchayat Teachers that the appellants were anxious to take a chance in the examination. He further submitted that the recognition of the College in which the appellants had studied was in fact withdrawn by the State Government in 2004, and after the NCTE Act came into force, the College had not been granted recognition by the Regional Committee of the NCTE. He submitted that Section 16 of the NCTE Act is very clear that no examining body shall hold examination for a course or training conducted by a recognized institution unless the institution concerned has obtained recognition from the Regional Committee of the NCTE under Section 14 or permission for a course or training under Section 15 of the NCTE Act. He argued that since the College had not obtained recognition of the Regional Committee of the NCTE under Section 14 or permission for the course or training under Section 15 of the NCTE Act, the Bihar School Examination Board was clearly prohibited under Section 16 of the NCTE Act from holding the examination for the appellants. Mr. Gopal Singh submitted that considering the judicial pronouncements in *L. Muthukumar & Anr. v. State of T. N. & Ors.* [(2000) 7 SCC 618], *St. John's Teachers Training Institute (for Women), Madurai & Ors. v. State of Tamil Nadu & Ors.* [(1993) 3 SCC 595], *State of Maharashtra v. Vikas Sahebrao Roundale & Ors.* [(1992) 4 SCC 435] and *N. M. Nageshwaramma, etc. v. State of Andhra Pradesh & Anr., etc.* [1986 (Supp.) SCC 166] the appellants are not entitled to take the examination after derecognition of the College. He also cited a recent decision of this Court in *Bhagwan Budha Prathmik Technical Training College Nirmali v. The State of Bihar & Ors.* [2010 (12) SCALE 364] in which it has been held that after the NCTE Act came into force in July, 1995 the

State Government had no authority to issue the order dated 16.03.2007 granting recognition to an institution for the period 1987-1995.

6. We have considered the submissions of the learned counsel for the parties and we find from the record of this case that the College was established after permission was granted by the State Government to open the College and the College started C.P.Ed. and D.P. Ed. courses from July 1986. Thereafter, a spot inspection of the College was carried out pursuant to the orders of the State Government in the Department of Youth Affairs, Games and Culture, and the Inspection Committee comprising the Director-cum-Deputy Secretary, Student and Youth Welfare, Deputy Director, Youth Welfare-Bihar and Principal, Government-cum-Teaching College, Patna, submitted a report dated 04.12.1987 stating that the College had a building over 10 acres 30 decimals of land, seven Lecturers, two Instructors, one Library and other non-teaching staff and all the Teachers were eligible and experienced and that the College was running properly. On the basis of the said report dated 04.12.1987, the Government of Bihar in the Department of Human Resource Development by order dated 09.08.1988 granted temporary recognition to the College from July 1986 for the C.P.Ed. and D.P.Ed. courses till further orders "along with permission to the students to appear in the examination".

7. Rule 7 of the Bihar School Examination Board Rules, 1963 which has been referred to in paragraph 6 of the reply of the Bihar School Examination Board reads as follows:

> **"7. Departmental Examinations to be conducted by the Board:** (1) The Board shall on, such terms and conditions as may be laid down by the State Government, conduct the following departmental Examinations, namely:--
>
> (a) Certificate in Social Education;

> (b) Diploma in Physical Education;
>
> (c) Certificate in Physical Education;
>
> (d) Short Training Course in Physical Education;
>
> (e) Primary Training Course in Physical Education; and
>
> (f) Training School Examinations:
>
> Provided that the State Government may, by notification in the official gazette, authorize the Board to conduct such other departmental examinations not specified or withdraw the authority given to the Board to conduct any of the examinations mentioned, in this sub-rule.
>
> (2) The State Government may give instructions to the Board about the content as well as the academic and vocational standards of these examinations, and may modify these instructions, as and when necessary."

The word "shall" in sub-rule (1) of the Rule 7 indicates that a duty is cast duty on the Bihar School Examination Board to conduct the Certificate in Physical Education (C.P.Ed.) examinations on such terms and conditions as may be laid down by the State Government. In the order dated 09.08.1988 of the State Government granting recognition to the College, there were ten conditions and condition no.6 was to the following effect:-

> "Students will be compulsorily required to perform successfully as per the standard of one star, in the test conducted by Government Health and Physical Training College, Rajendranagar, Patna, before appearing in the examination conducted by the Bihar School Examination Board."

It is thus clear from the terms and conditions of the order dated

09.08.1988 of the State Government granting recognition that the students of the College were to appear in the C.P.Ed. and D.P.Ed. examinations conducted by the Bihar School Examination Board. Hence, the Bihar School Examination Board was under a duty to hold the C.P.Ed. and D.P.Ed. examinations for the students of the college and this duty could be enforced by the Court by an appropriate writ or direction by the High Court under Article 226 of the Constitution. The High Court was not right in taking the view in the impugned order that without a direction of the State Government to the Bihar School Examination Board to allow the appellants to take the examinations, no relief could be granted by the High Court to the appellants.

8. The High Court was also not right in distinguishing the present case from the case of *Sunil Kumar Parimal* (supra). In the case of *Sunil Kumar Parimal* (supra), this Court had found that the Tirhut Physical Education College, Muzaffarpur, had been granted permission to enroll the students in C.P.Ed. and D.P. Ed. courses for the Sessions 1994-1995 to 1995-1996 and was duly recognized by the State Government and this Court held that the NCTE Act will be applicable prospectively to those students who have to undertake the examination after the Act came into force. This Court having found that the aforesaid College was recognized by the State Government prior to the date when the NCTE Act came into force and the NCTE came into existence, directed that the students of the College would be permitted to appear in the examination for the courses of C.P.Ed and D.P. Ed. for the Sessions 1994-1995 and 1995-1996 to be conducted by the Bihar School Examination Board on the next available opportunity. In our considered view, the decision of this Court in *Sunil Kumar Parimal* (supra) squarely applies to the facts of this case also as the College was duly recognized by the State Government during the year 1989-1990 when the appellants were admitted to the C.P.Ed. course and when the NCTE Act had neither been enacted nor come into force.

9. The decision of this Court in *Bhagwan Budha Prathmik Technical Training College Nirmali v. The State of Bihar & Ors.* (supra), cited by learned counsel for respondent nos.1 to 5, is not applicable to the facts of the present case. In that case, after the appointed date (17.08.1995) when the NCTE had been established under the NCTE Act, the State Government passed an order dated 16.03.2007 granting recognition to the Teachers' Training College at Nirmali, District Supaul (Bihar) for 1987-1989 onwards and this Court held that after the appointed date the State Government cannot exercise the power of recognition nor can the examining body hold examination of the students of a teacher training institute unless the institution was recognized by the Regional Committee of the NCTE as laid down in Section 16 of the NCTE Act. In the facts of the present case, on the other hand, we find that the order of the State Government granting recognition to the College in which the appellants studied in the year 1989-1990 was issued on 09.08.1988, several years before the NCTE Act came into force.

10. In *L. Muthukumar & Anr. v. State of T. N. & Ors.* (supra) on which great reliance has been placed by learned counsel for the respondent nos. 1 to 5, some students had filed writ petitions contending that they had undergone secondary grade teachers' training in different training institutes between the period 1989 to 1991 and that they had taken public examination in May 1992, but their results were not published and certificates were not awarded. The Court found that the institutes, in which they had undergone training, had recognition but the same was withdrawn subsequently by virtue of the judgment in *P.M. Joseph v. State of T. N.* (1993 Writ LR 604) holding that the orders of recognition had been granted only on extraneous considerations. On these facts, this Court held that as the students had undergone the training in the institutes which were derecognized by virtue of the judgment in *P. M. Joseph's* case, the prayers of the students for writ of mandamus

for issuing of mark-sheets and/or diplomas/certificates contrary to the judgment in *P.M. Joseph's* case could not be granted by the High Court. In the facts of the present case, however, the recognition to the College that was granted by the State Government for the years 1989-1990 during which the appellants were admitted in the course had not been withdrawn on the ground that the recognition was granted for extraneous considerations. On the contrary, we find from the record of this case that until 13.04.2004 the recognition of the College had not been revoked by the State Government and on 13.04.2004 the recognition of all non-Government Physical Training Colleges including that of the College in the present case were revoked presumably because the State Government no longer had the power to grant recognition and the non-Government Physical Training Colleges in the State were required to obtain recognition from the Regional Committee of the NCTE under the NCTE Act.

11. We have also perused the decisions of this Court in *St. John's Teachers Training Institute (for Women), Madurai & Ors. v. State of Tamil Nadu & Ors.* (supra), *State of Maharashtra v. Vikas Sahebrao Roundale & Ors.* (supra) and *N. M. Nageshwaramma, etc. v. State of Andhra Pradesh & Anr., etc.* (supra) cited by learned counsel for respondent nos.1 to 5 and we find that in these decisions this Court has held that the students studying in the unrecognized institutions are not entitled to any relief, interim or final, from the Court for taking examinations. The main reason given by this Court for refusing such relief is that standards of education, sports, administration and maintenance of the Teachers Training Institutes should not be compromised by granting such reliefs. These decisions have no relevance to the facts in the present case in which we find that after inspection of the College the Inspection Committee had submitted a report stating that the College had the required facilities and the teaching and other staff and on the basis of such report the State Government had, in fact,

granted temporary recognition to the College by order dated 09.08.1988 and the appellants were admitted in the College during the year 1989-1990 when the recognition granted by the State was in force.

12. In the result, we allow this appeal, set aside the impugned order of the High Court and direct the Bihar School Examination Board to conduct the C.P.Ed. examination for the appellants as soon as possible. No costs.

B.B.B. Appeal allowed.