STATE OF M.P.
v.
RAMESH AND ANR.
(Criminal Appeal No. 1289 of 2005)

MARCH 18, 2011

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

Penal Code, 1860 – s.302 and s.302 r/w s.120B – Murder – Allegation that respondent no.1 and respondent no.2 murdered the husband of respondent no.2 – Prosecution primarily relying upon testimony of PW1, the 8 year old minor daughter of respondent no.2 and deceased – Conviction of respondents by trial court – Set aside by High Court – On appeal, held: Testimony of P.W.1 is affirmed by the statements of other witnesses, proved circumstances and medical evidence – Her deposition being precise, concise, specific and vivid without any improvement or embroidery is worth acceptance in toto – High Court completely ignored the most material incriminating circumstances which appeared against the respondents-accused – Findings recorded by High Court were contrary to the evidence on record and thus, were perverse – Judgment of the trial Court restored.

Witness – Child witness – Evidence of – Appreciation – Held: Deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence – The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring – Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully – However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition.

Appeal – Appeal against acquittal – Power of appellate court – Scope –Held: The appellate court being the final court of fact is fully competent to re-appreciate, reconsider and review the evidence and take its own decision – Law does not prescribe any limitation, restriction or condition on exercise of such power and the appellate court is free to arrive at its own conclusion keeping in mind that acquittal provides for presumption in favour of the accused – If two reasonable views are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal.

Criminal jurisprudence – Presumption of innocence – Held: Every person is presumed to be innocent unless he is proved guilty by the competent court.

Code of Criminal Procedure, 1973 – ss.161(2); 313(3); and proviso (b) to s.315 – Rule against adverse inference from silence of the accused – Held: Statement of accused u/s.313 Cr.P.C. can be taken into consideration to appreciate the truthfulness or otherwise of the prosecution case – However, as such a statement is not recorded after administration of oath and the accused cannot be cross-examined, his statement so recorded u/s.313 Cr.P.C. cannot be treated to be evidence within the meaning of s.3 of the Evidence Act – Constitution of India, 1950 – Article 20(3) – Evidence Act, 1872.

Evidence Act, 1872 – s.6 – Admissibility of evidence under – Discussed.

Respondent no.2 lodged FIR stating that her husband 'C' died after falling during a spell of giddiness. In respect of the same incident, another complaint was lodged by PW2 alongwith PW1, the 8 year old daughter of respondent no.2 and 'C', stating that respondent no.1 and respondent no.2 killed 'C'.

The trial Court held that the injuries found on the

person of the deceased could not have been received from a fall on the ground and convicted respondent No.1 under Section 302 of IPC and respondent No.2 under Section 302 r/w Section 120-B IPC, and sentenced them to life imprisonment. The conviction was set aside by the High Court. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1. The evidence of a child must reveal that he was able to discern between right and wrong and the court may find out from the cross-examination whether the defence lawyer could bring anything to indicate that the child could not differentiate between right and wrong. The court may ascertain his suitability as a witness by putting questions to him and even if no such questions had been put, it may be gathered from his evidence as to whether he fully understood the implications of what he was saying and whether he stood discredited in facing a stiff cross-examination. A child witness must be able to understand the sanctity of giving evidence on a oath and the import of the questions that were being put to him. [Para 10] [14-G-H; 15-A-B]

1.2. There is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the Court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to

satisfy the Court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature. [Para 11] [15-C-F]

1.3. Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness. [Para 12] [15-G]

1.4. The deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition. [Para 13] [16-A-C]

Rameshwar S/o Kalyan Singh v. The State of Rajasthan **AIR 1952 SC 54; Mangoo & Anr. v. State of Madhya Pradesh AIR 1995 SC 959; Panchhi & Ors. v. State of U.P. AIR 1998 SC 2726;** *Nivrutti Pandurang Kokate & Ors. v. State of Maharashtra* **AIR 2008 SC 1460;** *Himmat Sukhadeo Wahurwagh & Ors. v. State of Maharashtra* **AIR 2009 SC 2292; State of U.P. v. Krishna Master & Ors. AIR 2010 SC 3071 and** *Gagan Kanojia & Anr. v. State of Punjab* **(2006) 13 SCC 516 – relied on.**

2. In an appeal against acquittal, in the absence of perversity in the impugned judgment, interference by this Court exercising its extraordinary jurisdiction, is not warranted. It is settled proposition of law that the appellate court being the final court of fact is fully competent to re-appreciate, reconsider and review the evidence and take its own decision. Law does not prescribe any limitation, restriction or condition on exercise of such power and the appellate court is free to arrive at its own conclusion keeping in mind that acquittal provides for presumption in favour of the accused. The presumption of innocence is available to the person and in criminal jurisprudence every person is presumed to be innocent unless he is proved guilty by the competent court and there can be no quarrel to the said legal proposition that if two reasonable views are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal. [Para 14] [16-D-G]

3. The injuries found on the body of 'C' are in consonance with the deposition of P.W.1. The doctor found that blood had oozed from the mouth of the deceased and such injury could be possible as per the case of the prosecution. Evidently, the statement of P.W.1 is affirmed by the statements of other witnesses, proved circumstances and medical evidence. Her deposition being precise, concise, specific and vivid without any improvement or embroidery is worth acceptance in toto. [Paras 16, 23] [17-H; 18-A-B; 21-A-B]

4. Section 6 of the Evidence Act, 1872 is an exception to the general rule whereunder the hearsay evidence becomes admissible. However, such evidence must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. The statements sought to be admitted, therefore, as forming part of res gestae, must have been made

contemporaneously with the acts or immediately thereafter. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" that it becomes relevant by itself. In the instant case, the statement of PW.2 indicating that PW.1 had come to him and told that her father was beaten by respondent no.1 with the help of her mother, is admissible under Section 6 of the Evidence Act. [Paras 17, 18] [18-D-G]

Gagan Kanojia & Anr. v. State of Punjab **(2006) 13 SCC 516 – relied on.**

5. The witness examined by the prosecution supported its case to the extent that the door of the room wherein the offence had been committed was bolted from inside. It was only when PW5, the village Watchman threatened respondent no.2 saying he would call the police, the door was opened and, by that time, respondent no.1 had left the place of occurrence and the respondent no.2's husband had died. Thus, there is no conflict between the medical and ocular evidence. The prosecution case is fully supported by PW.5 and partly supported by PW.7 and PW.3. Even the part of the depositions of hostile witnesses, particularly Sarpanch (PW.4) can be relied upon to the extent that on being called, he reached the place of occurrence and found that the room had been bolted from inside. It is also evident from the evidence on record that PW.1 and PW.2 had called the persons from their houses and after their arrival, they found that the room had been bolted from inside. So to that extent, the version of these witnesses including of the hostile witnesses, can be believed and relied upon. [Para 20] [19-C-G]

6. Respondent no.2 has admitted in her statement under Section 313 of CrPC that PW.1 was present inside

the room/place of occurrence and she further admitted that PW.1 had gone to call PW.2 at the relevant time. Thus, it is evident from the aforesaid admission of the said accused itself that both the persons were present inside the room and are well aware of the incident. All the witnesses have affirmed in one voice that P.W.2 had entered the room and after coming out, he disclosed that 'C' has died. In fact, this fact had been affirmed by all the witnesses. It is evident from the material available on record that there was only one room house where the incident took place and no other space was available. The presence of respondent no.2 in the house is natural. [Paras 21, 22] [19-H; 20-A-E]

7. Respondent no.2 herself reached the Police Station and lodged the complaint that her husband 'C' died because of falling from giddiness when he went to ease himself outside the house. This version has been disbelieved by the I.O. as well as by the Trial Court. Respondent no.2 would not have moved in the night for 8 K.Ms. to lodge the FIR, if she was not at fault or having a guilty mind. Secondly, she lodged the complaint in the name of Madhav Bai and not in her own name. [Para 26] [22-C-D]

8. The cumulative effect of reading the provisions of Article 20(3) of the Constitution with Sections 161(2); 313(3); and proviso (b) to Section 315 Cr.P.C. remains that in India, law provides for the rule against adverse inference from silence of the accused. Statement of the accused made under Section 313 Cr.P.C. can be taken into consideration to appreciate the truthfulness or otherwise of the prosecution case. However, as such a statement is not recorded after administration of oath and the accused cannot be cross-examined, his statement so recorded under Section 313 Cr.P.C. cannot be treated to be evidence within the meaning of Section 3 of the

Evidence Act, 1872. Section 315 Cr.P.C. enables an accused to give evidence on his own behalf to disprove the charges made against him. However, for such a course, the accused has to offer in writing to give his evidence in defence. Thus, the accused becomes ready to enter into the witness box, to take oath and to be cross-examined on behalf of the prosecution and/or of the accomplice, if it is so required. In such a fact-situation, the accused being a competent witness, can depose in his defence and his evidence can be considered and relied upon while deciding the case. [Para 27] [22-E-H; 23-A-C]

Tukaram G. Gaokar v. R.N. Shukla & Ors., **AIR 1968 SC 1050;** *Dehal Singh v. State of Himachal Pradesh* **(2010) 9 SCC 85 – relied on.**

9. All the witnesses including those who turned hostile had admitted that the room was bolted from inside and the statement of respondent no.2 that PW2 had bolted the room from outside has not been corroborated by any person. In case she and her husband 'C' were not having any relation with PW.2 for the last 8-10 years, it would be un-natural that she would send her daughter (PW.1) to call PW2 because he was her husband's elder brother. While lodging report Ext. D-7 she told her name as Madhav Bai. However, in cross-examination she has stated that police men recorded her name as Madhav Bai though her name is Bhaggo Bai. More so, she has not specifically denied having illicit relationship with respondent no.2, nor she has denied that she made a twisting statement to help the respondent no.2 to get acquitted in the rape case. [Para 28] [24-C-F]

10. All the witnesses examined by the prosecution including those who have turned hostile are admittedly the neighbours of 'C' and PW2. Thus, they are the most natural witnesses and the Trial Court has rightly placed

reliance on their testimonies. The High Court has completely ignored the most material incriminating circumstances which appeared against the respondents/ accused. The findings so recorded by the High Court are contrary to the evidence on record and thus, are held to be perverse. The judgment of the trial Court convicting the respondents/accused under Section 302 IPC is hereby restored. [Paras 30, 31 and 32] [25-C-F]

Case Law Reference:

AIR 1952 SC 54	**relied on**	**Para 6**
AIR 1995 SC 959	**relied on**	**Para 7**
AIR 1998 SC 2726	**relied on**	**Para 8**
AIR 2008 SC 1460	**relied on**	**Para 9**
AIR 2009 SC 2292	**relied on**	**Para 10**
AIR 2010 SC 3071	**relied on**	**Para 11**
(2006) 13 SCC 516	**relied on**	**Para 12**
(1999) 9 SCC 507	**relied on**	**Para 17**
AIR 1968 SC 1050	**relied on**	**Para 27**
(2010) 9 SCC 85	**relied on**	**Para 27**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1289 of 2005.

From the Judgment & Order dated 31.3.2004 of the High Court of Madhya Pradesh at Jabalpur Bench at Gwalior in Criminal Appeal No. 262 of 1997.

Vibha Datta Makhija for the Appellant.

K. Sarada Devi for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred by the State of Madhya Pradesh against the judgment and order dated 31.3.2004 passed by the High Court of Madhya Pradesh at Jabalpur (Gwalior Bench) in Criminal Appeal No. 262 of 1997, reversing the judgment and order dated 16.8.1996 passed by the Sessions Court, Guna in Sessions Trial No. 155/1995, convicting the respondent No.1 under Section 302 of Indian Penal Code, 1860 (hereinafter called as 'IPC') and respondent No.2 under Section 302 read with Section 120-B IPC, and sentencing them to life imprisonment.

2. **FACTUAL MATRIX:**

(A) Respondent No.2 Bhaggo Bai filed an FIR dated 31.1.1995 in Police Station, Ashok Nagar, mentioning her name as Madhav Bai stating that her husband Chatra died after falling during a spell of giddiness at about 11.00 p.m. In respect of the same incident, another complaint was lodged by Munna Lal (PW.2) along with Rannu Bai (PW.1), daughter of deceased Chatra and Bhaggo Bai, aged about 8 years stating that both the respondents-accused had murdered Chatra. After having a preliminary investigation, the Investigating Officer arrested respondent No.2 Bhaggo Bai and lodged the FIR formally on 4.2.1995.

(B) After completing the investigation, a charge-sheet was filed against both the accused for committing the murder of Chatra. A large number of witnesses were examined by the prosecution. Both the respondents-accused examined themselves as defence witnesses alongwith some other witnesses. After concluding the trial, both the respondents-accused were convicted and sentenced, as mentioned hereinabove, by the Sessions Judge vide judgment and order dated 16.8.1996.

(C) Being aggrieved, both the respondents –accused filed Criminal Appeal No.262/1997 which has been allowed by

the impugned judgment and order and both of them stood acquitted. Hence, this appeal.

3. Ms. Vibha Datta Makhija, learned counsel appearing for the appellant-State, has submitted that the judgment and order of the High Court is not sustainable in the eyes of law. The High Court has gravely erred in showing unwarranted sympathy towards the accused and dis-believed the prosecution case brushing aside the statement of Rannu Bai (PW.1), merely being a child witness and pointing out that there was contradiction in the medical and ocular evidence regarding the injuries found on the person of Chatra, deceased. The High Court further erred in holding that there was enmity between the accused Bhaggo Bai and Ramesh. At the time of death of Chatra, Ramesh accused was facing trial for committing rape on Bhagoo Bai; thus, question of conspiracy between the said two accused could not arise; several cases were also pending in different courts between Munna Lal (PW.2) and his wife Kusum Bai on one hand, and Chatra and Bhaggo Bai on the other hand. Thus, there was a possibility of false implication of Ramesh accused. Chatra died because of a fall when he went to urinate, as he was suffering from giddiness all the time because he used to take 'dhatura' and had become a Lunatic. Chatra used to eat soil etc. Rannu Bai (PW.1) though a child, was able to understand the questions put to her and her duty to speak the truth. She could not have any enmity with either of the accused. The rape case filed by deceased Chatra and Bhaggo Bai against accused Ramesh remained pending for a long time and Ramesh got acquitted after the death of Chatra, deceased. The Trial Court after appreciating the documentary evidence on record came to the conclusion that accused Ramesh committed rape upon Bhaggo Bai during the period between 24.6.1991 to 17.9.1994. In fact, they were having illicit relationship for a period of more than 3 years. The High Court brushed aside the said finding without giving any cogent reason. The allegation that Rannu Bai (PW.1) had been tutored by Munna Lal (PW.2) could not be spelled out from her

statement. The neighbours had come at the place of occurrence after being called by Rannu Bai (PW.1) and Munna Lal (PW.2). In spite of the fact that some of them had declared hostile, part of their evidence still could be relied upon in support of the prosecution case. Therefore, the judgment and order of the High Court, impugned is liable to be set aside, and appeal deserves to be allowed.

4. On the contrary, Ms. K. Sarada Devi, learned counsel appearing for the respondents, has submitted that the facts and circumstances of the case do not warrant interference by this Court against the judgment and order of acquittal by the High Court. The High Court being the first appellate court and the final court of facts had appreciated the entire evidence on record and came to the conclusion that it was not possible that Bhaggo Bai could have hatched a conspiracy with Ramesh accused for committing the murder of her husband Chatra during the pendency of the case filed by her against Ramesh under Section 376 IPC. Munna Lal (PW.2), his wife and son had also assaulted the deceased Chatra and Bhaggo Bai, accused and wanted to grab their property and so many civil and criminal cases were pending between them, his evidence cannot be relied upon. As per the medical evidence, it was possible that the injuries suffered by Chatra could have been received by fall caused by giddiness. More so, Chatra had become a lunatic and could not understand right or wrong. The testimony of Rannu Bai (PW.1), has been rightly dis-believed by the High Court as she had been tutored by Munna Lal (PW.2). Admittedly, she had been living with him since the death of her father Chatra. The High Court has rightly believed the defence version and appreciated the depositions of defence witnesses, including Radha Bai (D.W.1), elder daughter of Bhaggo Bai accused, in the correct perspective. The appeal lacks merit and is liable to be dismissed.

5. We have considered the rival submissions made by learned counsel for the parties and perused the record.

CHILD WITNESS :

6. In *Rameshwar S/o Kalyan Singh v. The State of Rajasthan,* AIR 1952 SC 54, this Court examined the provisions of Section 5 of Indian Oaths Act, 1873 and Section 118 of Evidence Act, 1872 and held that every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age, extreme old age, disease whether of body or mind or any other cause of the same kind. There is always competency in fact unless the Court considers otherwise.

The Court further held as under:

> "…..It is desirable that Judges and magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the Magistrate or Judge really was of that opinion can, I think, be gathered from the circumstances when there is no formal certificate…."

7. In *Mangoo & Anr. v. State of Madhya Pradesh,* AIR 1995 SC 959, this Court while dealing with the evidence of a child witness observed that there was always scope to tutor the child, however, it cannot alone be a ground to come to the conclusion that the child witness must have been tutored. The Court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring.

8. In *Panchhi & Ors. v. State of U.P.,* AIR 1998 SC 2726, this Court while placing reliance upon a large number of its earlier judgments observed that the testimony of a child witness

must find adequate corroboration before it is relied on. However, it is more a rule of practical wisdom than of law. It cannot be held that "the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring."

9. In *Nivrutti Pandurang Kokate & Ors. v. State of Maharashtra,* AIR 2008 SC 1460, this Court dealing with the child witness has observed as under:

> "The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

10. The evidence of a child must reveal that he was able to discern between right and wrong and the court may find out from the cross-examination whether the defence lawyer could bring anything to indicate that the child could not differentiate

between right and wrong. The court may ascertain his suitability as a witness by putting questions to him and even if no such questions had been put, it may be gathered from his evidence as to whether he fully understood the implications of what he was saying and whether he stood discredited in facing a stiff cross-examination. A child witness must be able to understand the sanctity of giving evidence on a oath and the import of the questions that were being put to him. (Vide: *Himmat Sukhadeo Wahurwagh & Ors. v. State of Maharashtra,* AIR 2009 SC 2292).

11. In *State of U.P. v. Krishna Master & Ors.,* AIR 2010 SC 3071, this Court held that there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the Court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the Court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature.

12. Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness. (Vide: *Gagan Kanojia & Anr. v. State of Punjab,* (2006) 13 SCC 516).

13. In view of the above, the law on the issue can be summarized to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition.

APPEAL AGAINST ACQUITTAL:

14. We are fully alive of the fact that we are dealing with an appeal against acquittal and in the absence of perversity in the said judgment and order, interference by this Court exercising its extraordinary jurisdiction, is not warranted. It is settled proposition of law that the appellate court being the final court of fact is fully competent to re-appreciate, reconsider and review the evidence and take its own decision. Law does not prescribe any limitation, restriction or condition on exercise of such power and the appellate court is free to arrive at its own conclusion keeping in mind that acquittal provides for presumption in favour of the accused. The presumption of innocence is available to the person and in criminal jurisprudence every person is presumed to be innocent unless he is proved guilty by the competent court and there can be no quarrel to the said legal proposition that if two reasonable views are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal.

INJURIES:

15. Dr. D.K. Jain (P.W.8) has performed Post Mortem of Chatra, deceased. He found following injuries on his person vide Post Mortem Report Ex.P-8:

(i) A contusion of size 1 cm x 1 cm on the L of mandible on right side with an abrasion on upper part of contusion 1 cm x 0.3 cm obliquely. Sub-cutaneous haemorrhage present.

(ii) An abrasion of size 0.5 cm x 0.2 cm 1-1/2" below the above contusion over neck. Sub-cutaneous haemorrhage present.

(iii) An abrasion of size 0.5 cm x 0.2 cm 1.5 cm below and lateral to L of mandible right on neck.

(iv) An abrasion of size 3.5 cm x 0.5 cm over left side of neck posterior laterally on upper part, transversely oblique going upwards. Sub-cutaneous haemorrhage present.

(v) A contusion over lower lip right side near to L of mouth of size 0.5 cm x 0.5 cm sub-cutaneous haemorrhage present.

(vi) An abrasion over right shoulder posterior laterally of size 4 cm x 1.5 cm post mortem in nature.

Dr. D.K. Jain (P.W.8) opined that injury No.(vi) was after the death. On internal examination, he found the right pleura adherent to lung parietes. Both the lungs were enlarged. On further dissection, he found a sub-cutaneous haemorrhage present in supra sternal notch area. Blood mixed fluid with froth stood discharged through mouth and noise. According to the doctor, cause of death was on account of 'asphyxia' as a result of throttling. No piece of cloth or thread was found inside the mouth of the deceased. The deceased had an ailment of the lungs.

16. The Trial Court after considering the entire evidence on record came to the conclusion that the injuries found on the person of the deceased could not have been received from a fall on the ground. The injuries found on his body are in

consonance with the deposition of Rannu Bai (P.W.1), who has stated that after hearing the noise, she woke up and saw that accused Ramesh was beating her father with "Gumma" (a hard object made of cloth), and her mother had caught hold of the deceased by his legs. The doctor had found that blood had oozed from his mouth and such injury could be possible as per the case of the prosecution. Undoubtedly, Munna Lal (PW.2) has deposed that Ramesh had caused injuries with the knife. The High Court has given undue weightage to his statement. In fact, as per the prosecution case, Munna Lal (PW.2) was not an eye witness. He was called by Rannu Bai (PW.1) and reached the place of occurrence along with some other persons.

17. In *Sukhar v. State of U.P.,* (1999) 9 SCC 507, this Court has explained the provisions of Section 6 of the Evidence Act, 1872 observing that it is an exception to the general rule whereunder the hearsay evidence becomes admissible. However, such evidence must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. The statements sought to be admitted, therefore, as forming part of res gestae, must have been made contemporaneously with the acts or immediately thereafter. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" that it becomes relevant by itself.

18. Applying the ratio of the said judgment to the evidence of Munna Lal (PW.2), we reach the conclusion that his statement indicating that Rannu Bai (PW.1) had come to him and told that her father was beaten by Ramesh with the help of her mother, is admissible under Section 6 of the Evidence Act.

19. Mrs. K. Sarada Devi, learned counsel appearing for the respondents has drawn our attention to certain minor contradictions in the statement of Rannu Bai (PW.1) and Munna Lal (PW.2). She has placed a very heavy reliance on the

statement of Rannu Bai (PW.1) that first she had gone to the house of her grandfather Lala and the trial Court committed an error reading it as Munna Lal (PW.2). In view of the fact that Bhaggo Bai, respondent/accused herself stated in her cross-examination while being examined under Section 315 Cr.P.C. that she had sent Rannu Bai (PW.1) to call Munna Lal (PW.2), such argument looses the significance. Even otherwise, the omissions/contradictions pointed out by Mrs. K. Sarada Devi are of trivial nature and are certainly not of such a magnitude that may materially affect the core of the prosecution case.

20. The witness examined by the prosecution supported its case to the extent that the door of the room wherein the offence had been committed was bolted from inside. It was only when Ram Bharose, village Watchman (P.W.5) threatened Bhaggo Bai, accused saying he would call the police, the door was opened and, by that time, accused Ramesh had left the place of occurrence and Chatra had died. Thus, there is no conflict between the medical and ocular evidence. The prosecution case is fully supported by Ram Bharose (PW.5) and partly supported by Hannu (PW.7) and Anand Lal (PW.3). Even the part of the depositions of hostile witnesses, particularly Basori Lal, Sarpanch (PW.4) can be relied upon to the extent that on being called, he reached the place of occurrence and found that the room had been bolted from inside. It is also evident from the evidence on record that Rannu Bai (PW.1) and Munna Lal (PW.2) had called the persons from their houses and after their arrival, they found that the room had been bolted from inside. So to that extent, the version of these witnesses including of the hostile witnesses, can be believed and relied upon. The post mortem report clearly explained that Chatra died of 'Asphyxia' and this version has been fully supported by Dr D.K. Jain (PW.8).

21. Bhaggo Bai, accused/respondent has admitted in her statement under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter called as 'Cr.P.C.') that Rannu Bai

(PW.1) was present inside the room/place of occurrence and she further admitted that Rannu Bai, (PW.1) had gone to call Munna Lal (PW.2) at the relevant time. Thus, it is evident from the aforesaid admission of the said accused itself that both the persons were present inside the room and are well aware of the incident.

22. Undoubtedly, there had been some minor contradictions in the statements of witnesses in regard to the fact as to who had reached the place of occurrence first. All the witnesses have affirmed in one voice that Munna Lal (P.W.2) had entered the room and after coming out, he disclosed that Chatra has died. In fact, this fact had been affirmed by all the witnesses. In view of the contradictions in the statements of witnesses as to whether torch was used to create artificial light in the room or not to find out the scene therein, becomes immaterial. It is evident from the material available on record that there was only one room house where the incident took place and no other space was available. Thus, in case the other witnesses had not deposed that Radha Bai (D.W.1) was also present in the house along with accused Bhaggo Bai, remains immaterial for the reason that her presence is natural.

23. The Trial Court after taking note of rulings of various judgments of this Court as what are the essential requirements to accept the testimony of a child witness held as under:

> "In the present case, statement of child witness gets affirmed by the circumstances of the incident, facts and from the activities of the other witnesses carried out by them on reaching at the place of occurrence. Thus, on the basis of above-said law precedents, statement of witness Rannu Bai not being unreliable in my opinion are absolutely true and correct……Statement of child witness Rannu Bai gets affirmed by the statements of Munna and witness Hannu and from the medical evidence. Therefore, facts of the above-stated law precedents are not applicable to the

present case."

In view of the above, it is evident that the statement of Rannu Bai (P.W.1) is affirmed by the statements of other witnesses, proved circumstances and medical evidence. Her deposition being precise, concise, specific and vivid without any improvement or embroidery is worth acceptance in toto.

24. A very heavy reliance has been placed by defence counsel Ms. K. Sarada Devi on the statements of defence witnesses, particularly, Radha Bai (D.W.1). However, it may be relevant to point out the initial part of her statement made in examination-in-chief:

"In view of the witness's age before she was sworn she was asked as under:

Q. Are you literate? Have you gone to school for reading?

A. No.

Q. Do you understand right or wrong?

A. I do not understand.

Q. Do you understand Saugandh or Sau (Oath or hundred)

A. I do not know.

Considering the said answers of the witness it appears that the *witness does not understand right, wrong or oath,* therefore the witness was not sworn."

(Emphasis added)

In view of the above, we are of the view that it cannot be safe to rely upon her evidence at all.

25. So far as the deposition of Budha (DW.2), father of Bhaggo Bai, accused, is concerned, he was 80 years of age at the time of examination and not the resident of the same village. He has deposed only on the basis of the information he had received from his daughter Bhaggo Bai, accused. Thus, he is not of any help to the defence as we see no reason to believe the theory put forward by the defence.

26. Complaint was lodged promptly at 6.00 a.m. on 1.2.1995 in the Police Station, Ashok Nagar at a distance of 8.00 K.Ms. It may also be relevant to mention herein that formal FIR was lodged on 4.2.1995 after having preliminary investigation and arresting Bhaggo Bai accused. Bhaggo Bai herself has reached the Police Station and lodged the complaint that her husband Chatra died because of falling from giddiness when he went to ease himself outside the house. This version has been dis-believed by the I.O. as well as by the Trial Court. In our considered opinion, Bhagoo Bai would not have moved in the night for 8 K.Ms. to lodge the FIR, if she was not at fault or having a guilty mind. Secondly, she lodged the complaint in the name of Madhav Bai and not in her own name Bhaggo Bai.

27. The cumulative effect of reading the provisions of Article 20(3) of the Constitution with Sections 161(2); 313(3); and proviso (b) to Section 315 Cr.P.C. remains that in India, law provides for the rule against adverse inference from silence of the accused.

Statement of the accused made under Section 313 Cr.P.C. can be taken into consideration to appreciate the truthfulness or otherwise of the prosecution case. However, as such a statement is not recorded after administration of oath and the accused cannot be cross-examined, his statement so recorded under Section 313 Cr.P.C. can not be treated to be evidence within the meaning of Section 3 of the Evidence Act, 1872.

Section 315 Cr.P.C. enables an accused to give evidence

on his own behalf to disprove the charges made against him. However, for such a course, the accused has to offer in writing to give his evidence in defence. Thus, the accused becomes ready to enter into the witness box, to take oath and to be cross-examined on behalf of the prosecution and/or of the accomplice, if it is so required. (Vide: *Tukaram G. Gaokar v. R.N. Shukla & Ors.,* AIR 1968 SC 1050; and *Dehal Singh v. State of Himachal Pradesh,* (2010) 9 SCC 85).

In such a fact-situation, the accused being a competent witness, can depose in his defence and his evidence can be considered and relied upon while deciding the case.

28. Bhaggo Bai, accused examined herself as a defence witness (DW.3) and entered into the witness box. She has also been cross-examined on behalf of the prosecution as well as on behalf of co-accused Ramesh. Bhaggo Bai/accused (DW.3) deposed that accused Ramesh had committed rape upon her 6 years ago and in that case, criminal prosecution was launched against him. She has further deposed that after her husband Chatra fell from giddiness, she had brought him inside the room with the help of her elder daughter Radha Bai (DW.1) and put him on the bed. She herself sent her younger daughter Rannu Bai (PW.1) to call Munna. Munna came and saw Chatra. The relevant part of her deposition reads as under:

> "…Then he (Munna) bolted the door from outside. He called the watchman. The watchman and Munna seeing me in the room went to the police station…..It is right that for the last 8-10 years, I, Chatra and Munna had no contact with Ramesh…..I got my name to be written as Bhaggo Bai at the time of report Ext.D-7. My name is not Madhav Bai. The Policemen recorded the report in the name of Madhav Bai. I sent Rannu Bai to call Munna because Munna was my husband's elder brother.
>
> ……..

> Q.17 Had you illicit and immoral relations with the accused Ramesh when Chatra was alive?
>
> A. What can I say?
>
> ……..
>
> Q. We are saying that you had given twisting statement in a rape case on which the accused Ramesh was acquitted?
>
> A. I gave statement."

Her aforesaid statement is not worth acceptance for the reason that all the witnesses including those who turned hostile had admitted that the room was bolted from inside and her statement that Munna had bolted the room from outside has not been corroborated by any person. In case she and her husband Chatra were not having any relation with Munna (PW.2) for the last 8-10 years, it would be un-natural that she would send her daughter Rannu Bai (PW.1) to call Munna because he was her husband's elder brother. While lodging report Ext. D-7 she told her name as Madhav Bai. However, in cross-examination she has stated that police men recorded her name as Madhav Bai though her name is Bhaggo Bai. More so, she has not specifically denied having illicit relationship with Ramesh accused, nor she has denied that she made a twisting statement to help the accused Ramesh to get acquitted in the rape case.

29. The Trial Court after examining the entire material on record, particularly the documentary evidence came to the conclusion as under:

> "43….It appears on viewing all the above documents Exh. D-8 to D-42 that all these documents are related to incident of rape of Bhaggo Bai committed by accused Ramesh for the period 24.6.1991 to 17.9.1994…"

The High Court did not deal with this aspect at all.

30. All the witnesses examined by the prosecution including those who have turned hostile are admittedly the neighbours of Chatra deceased and Munna Lal. Thus, they are the most natural witnesses and the Trial Court has rightly placed reliance on their testimonies.

31. After appreciating the entire evidence on record, we came to the inescapable conclusion that the High Court has completely ignored the most material incriminating circumstances which appeared against the respondents/ accused. The findings so recorded by the High Court are contrary to the evidence on record and thus, are held to be perverse.

32. In view of the above, the appeal deserves to be allowed and it is hereby allowed. The judgment and order of the High Court dated 31.3.2004 in Criminal Appeal No.262 of 1997 is hereby set aside and the judgment and order of the trial Court dated 16.8.1996 convicting the respondents/accused under Section 302 IPC in Sessions Trial No.155/1995 is hereby restored. A copy of the judgment be sent to the Chief Judicial Magistrate, Guna, M.P. to take the said respondents into custody and to send them to jail to serve the remaining part of the sentence.

B.B.B. Appeal allowed.

KARNATAKA INDUSTRIAL AREAS DEVELOPMENT BOARD & ANR.

v.

M/S. PRAKASH DAL MILL & ORS.

(Civil Appeal Nos. 5406-5445 of 2005)

April 06, 2011

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

Karnataka Industrial Area Development Board Regulations, 1969 – Allotment of industrial sites by appellant-Industrial Area Development Board – Application by respondents – Execution of lease-cum-sale agreement in favour of respondent – Fixation of final price by the Industrial Board – Thereafter, enhanced demand raised for payment of final allotment price – Writ petition by the respondents challenging the enhanced price dismissed – However, in writ appeal, the Division Bench of the High Court quashed the enhanced demands as proposed by the appellant – On appeal, held: Division Bench of the High Court correctly concluded that the fixation of final price by the Board was without authority of law and was violative of Article 14 of the Constitution – Even though the Clause 7(b) of the agreement gives the Board an undefined power to fix the final price, it would have to be exercised in accordance with the principle of rationality and reasonableness – Respondents have placed on record sufficient material to show that acquisition and development of land in the industrial area was made in phases – Thus, it cannot be said that all the allottees formed one class – Earlier allottees having sites in fully developed segments cannot be intermingled with the subsequent allottees in areas which may be wholly undeveloped – Also, once the allotment has been made, the Board cannot be permitted to exercise its powers of fixing the final price at any indefinite time in the future – Board sought to fix the final price

after a gap of 13 years which is not permissible – Constitution of India, 1950 – Article 14.

Appellant No. 1, Industrial Area Development Board invited interested purchasers to make applications for allotment of industrial sites. The respondents applied for the allotment of sites at different points of time. The lease-cum-sale agreements were executed in favour of the respondents on their complying with the conditions of allotment. The appellants issued letters to the respondents, raising the demands with regard to the penal allotment price and directed the respondents to pay the balance of final allotment price within a stipulated period. The respondents filed a writ petition challenging the issuance of the said letters enhancing the price and for a direction to the appellant to execute the sale deeds on the basis of the price indicated in the lease deed. The High Court dismissed the same. The Division Bench allowed the appeal and quashed the enhanced demands as proposed by the appellants. Therefore, the appellants filed the instant appeals.

Dismissing the appeals, the Court

HELD: 1. The High Court correctly concluded that the fixation of final price by the Industrial Area Development Board is without authority of law. It violates Article 14 of the Constitution of India being arbitrary and unreasonable exercise of discretionary powers. [Para 20] [43-C-D]

2.1 Under Clause 7(b) of the lease-cum-sale-agreement, the Board reserved to itself the right to fix the final price of the demised premises as soon as it may be convenient to it and communicate the same to the concerned lessee. Upon communication of the price, the lessee is required to pay the balance of the value of the site. Determination of the price by the Board is binding

on the lessee. Clause 7(b) would not permit the Board to arbitrarily or irrationally fix the final price of the site without any rational basis. The power of price fixation under Clause 7 being statutory in nature would have to be exercised, in accordance with statutory provisions; it can not be permitted to be exercised arbitrarily. The appellants are required to fix the price within the stipulated parameters contained in the Statute and the Board Regulations. [Paras 15, 16] [38-D-F; 40-B]

Premji Bhai Parmar and Ors. **(1980) 2 SCC 129 – distinguished.**

Centre for Public Interest Litigation and Anr. vs. Union of India and Ors. **(2000) 8 SCC 606;** *Meerut Developent Authority vs. Association of Management Studies* **(2009) 6 SCC 171 – referred to.**

2.2 The High Court has the jurisdiction to satisfy itself on the material on record that the authority has not acted in an arbitrary or erratic manner. The High Court, in the instant case, has not acted beyond such jurisdiction. The judgment of the High Court is within the parameters of the jurisdiction vested in it under Article 226 of the Constitution of India. [Para 17] [41-F]

Indore Development Authority vs. Sadhana Agarwal (Smt.) and Ors. **(1995) 3 SCC 1;** *Kanpur Development Authority vs. Sheela Devi (Smt.) and Ors.* **(2003) 2 SCC 497 –referred to.**

2.3 The Board being a State within the meaning of Article 12 of the Constitution of India is required to act fairly, reasonably and not arbitrarily or whimsically. The guarantee of equality before law or equal protection of the law, under Article 14 embraces within its realm exercise of discretionary powers by the State. The High Court examined the entire issue on the touchstone of

Article 14 of the Constitution of India. It observed that the fixation of price done by the Board has violated the Article 14 of the Constitution of India. It correctly observed that though Clause 7(b) permits the Board to fix the final price of the demised premises, it cannot be said that where the Board arbitrarily or irrationally fixes the final price of the site without any basis, such fixation of the price could bind the lessee. In such circumstances, the court would have the jurisdiction to annul the decision, upon declaring the same to be void and non-est. A bare perusal of Clause 7(b) would show that it does not lay down any fixed components of final price. Clause 7(b) also does not speak about the power of the Board to revise or alter the tentative price fixed at the time of allotment. The High Court correctly observed that Clause 7(b) does not contain any guidelines which would ensure that the Board does not act arbitrarily in fixing the final price of demised premises. [Para 18] [41-G-H; 42-A-D]

2.4 Even though the Clause gives the Board an undefined power to fix the final price, it would have to be exercised in accordance with the principle of rationality and reasonableness. The Board can and is entitled to take into account the final cost of the demised premises in the event of it incurring extra expenditure after the allotment of the site. But in the garb of exercising the power to fix the final price, it cannot be permitted to saddle the earlier allottees with the liability of sharing the burden of expenditure by the Board in developing some other sites subsequent to the allotment of the site to the respondents. The respondents have placed on record sufficient material to show that acquisition and development of land in the industrial area has been in phases. Some areas and segments are fully developed and others are in different stages of development. Sites and plots have been allotted at different times and locations. Thus, it cannot be said that all the allottees form

one class. Earlier allottees having sites in fully developed segments cannot be intermingled with the subsequent allottees in areas which may be wholly undeveloped. Such action is clearly violation of Article 14. The Board cannot be permitted to exercise its powers of fixing the final price under Clause 7(b) at any indefinite time in the future after the allotment is made. This would render the word 'as soon as' in Clause 7(b) wholly redundant. In the instant case, the Board has sought to fix the final price after a gap of 13 years. Such a course is not permissible in view of the expression 'as soon as' contained in Clause 7(b). [Para 19] [42-E-H; 43-A-C]

Case Law Reference:

(1980) 2 SCC 129	**Distinguished**	**Para 16**
(2000) 8 SCC 606	**Referred to**	**Para 12**
(2009) 6 SCC 171	**Referred to**	**Para 12**
(1995) 3 SCC 1	**Referred to**	**Para 16**
(2003) 2 SCC 497	**Referred to**	**Para 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5406-5445 of 2005.

From the Judgment & Order dated 18.02.2003 of the High Court of Karnataka at Bangalore in W.A. No. 2183 to 2221 & 1492 of 2000.

Basava Prabhu S. Patil, Kiran Suri, S.J. Smith, Vijay Verma, B. Subramanya Prasad, Ajay Kumar M., A.S. Bhasme, V.N. Raghupathy for the appearing parties.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. The instant appeals are preferred against the final order and judgment of the High Court of Karnataka at Bangalore in W.A. Nos. 2183 to 2221

of 2000 & W.A. No. 1492 of 2000 dated 18th February, 2003 whereby the Division Bench of the High Court allowed the writ appeal by setting aside the judgment of the High Court in W.P. Nos. 23578 to 23617 of 1999 dated 7th July, 1999.

2. We may now briefly notice the relevant facts which are necessary for the adjudication of the present case. The Karnataka Industrial Areas Development Board (hereinafter referred to as 'appellant No.1) had formed an industrial layout at Tarihal village in the year 1983, pursuant to which, it invited interested purchasers to make applications for allotment of industrial sites. Pursuant to the same, the respondents herein, applied for the allotment of sites. It is a matter of record that the respondents had applied for the allotment of sites at different points of time. Consequently, the appellant issued letters of intent, indicating that it had resolved to allot all respondents the sites shown in their cause titles at Tarihal Industrial Estate. The said letter also indicated the tentative price at which the land was sought to be allotted.

3. In response to the offer made by the appellant No.1, the respondents being desirous of purchasing their respective plots indicated their willingness for the abovementioned site. Accordingly, they affirmed their interest to purchase the same. Thereafter, the letters of allotment were issued in favour of the respondents incorporating the terms and conditions of allotment. Subsequent thereto, lease-cum-sale agreements were executed in favour of the respondents on their complying with conditions of allotment.

4. One of the conditions mentioned in the lease-cum-sale agreement reads thus:-

> "7(b) As soon as it may be convenient the Lessor will fix the price of the demised premises at which it will be sold to the Lessee and communicate it to the Lessee and the decision of the Lessor in this regard will be final and binding on the Lessee. The Lessee shall pay the balance

> of the value of the property, if any after adjusting the premium and the total amount of rent paid by the Lessee, and earnest money deposit within one month from the date of receipt of communication signed by the Executive Member of the Board. On the other hand, if any sum is determined as payable by the Lessor to the Lessee after the adjustment as aforesaid, such sum shall be refunded to the Lessee before the date of execution of the sale deed."

5. The lease-cum-sale agreement, entered into between the Board and the respondents, contained covenants that the respondents shall pay 99% of the allotment price immediately and remaining 1% in 10 equal yearly installments plus lease premium alongwith the interest at 12.5%. The respondents claim to have complied with all the stipulations and the conditions incorporated in the lease-cum-sale agreements. It seems that the appellants even after a lapse of 11 long years did not execute the regular sale deeds in favour of the respondents. On the contrary, the appellants after a gap of 6 months from the date of expiry of the lease period, issued letters to the respondents, raising therein the demands with regard to the final allotment price and also directed the respondents to pay the balance of final allotment price within a stipulated period. The appellants vide its Board meeting dated 18th September, 1997 resolved to fix the final price of the land as follows:

	Allotment made at the basic tentative rates as per acre (in Rs.)	Basic final prices fixed per acre (in Rs.)
1.	40,000/-	1.08 lakhs
2.	60,000/-	1.27 lakhs
3.	1.00 lakh to 1.25 lakhs	2.01 lakhs
4.	1.50 lakhs to 1.60 lakhs	2.61 lakhs

6. On receipt of the aforesaid demand, respondents filed their objections individually putting forth their grievances and declined to pay the increased amount. It was contended by them that the final allotment price was unreasonable, arbitrary, unjust and contrary to what was legitimately expected and assured by the appellant, i.e., only marginal increase, based on the cost of land acquisition. Pursuant to the objections filed individually by the respondents, the appellant invited them to Bangalore for a discussion. According to the respondents, during the course of discussions, they had sought for the detailed break up, based on which the enhanced claim was made. The board had furnished them a statement showing the basis for enhancement of the price. In the break–ups statement, as provided by the appellant, it was shown that Rs.34.17 lakhs were indicated to be the cost of future development. The respondents having expressed their inability to pay the hiked prices, once again brought to the notice of the appellants that the proposed enhancement was unjust and arbitrary. Thereafter, the appellant No.1, on consideration of the objections raised by the respondents reduced the final allotment price marginally and issued demand notices to the respondents as follows:

	Basic final prices fixed in the meeting held on 18.9.1997	Reduction in the final prices approved (Rs. in lakhs)
1.	1.08 lakhs	0.95 lakhs
2.	1.27 lakhs	1.10 lakhs
3.	2.01 lakhs	1.80 lakhs
4.	2.61 lakhs	2.40 lakhs

7. Aggrieved by the same, the respondents filed a writ petition W.P. No. 23578–23617 of 1999 before the High Court of Karnataka at Bangalore and prayed for a writ in the nature of certiorari for quashing the letters enhancing the price and for a direction to the appellant to execute the sale deeds on the

basis of the price indicated in the lease deed. The High Court in its judgment dated 7th July, 1999 dismissed the writ petition. The Division Bench of the High Court in writ appeal vide its final order and judgment dated 18th February, 2003 allowed the same and quashed the enhanced demands as proposed by the appellant. Hence the instant appeals by special leave before us.

8. We have heard the learned counsel for parties. Ms. Kiran Suri, learned counsel appearing for the appellants submits that the High Court committed a grave error in holding that Clause 7(b) of the lease-cum-sale agreement doesn't confer power on the appellants to revise or alter the tentative price. She submits that the appellant No.1 is an industrial board established for the purpose of establishment of industrial areas. Section 13 of the Karnataka Industrial Areas Development Board stipulates functions of the Board which includes establishing, maintaining, developing and managing industrial estates within industrial areas. Thus, power of fixation of price of the land vested with the appellant.

9. She further submits that enhanced price was fixed after taking into consideration, the cost of acquisition, the development expenditure, statutory charges and interest. The price fixed at the time of the allotment was only tentative since the appellants could not foresee the quantum of land acquisition compensation that would be fixed in future. The price so fixed was uniform to all allottees. She further submits that the High Court was not right in holding that the allottees of the site in one industrial area cannot be regarded as persons belonging to same class. The final price fixed was much less than the actual market price and hence the High Court erred in holding that it was arbitrary, unjust and unfair. The appellant No.1 was entrusted with the responsibility to develop the industrial area as a whole and it had nothing to do with any class of allottees. She also submitted that the present matter was not one of escalation of price but the fixation of the final price.

10. Learned counsel further submitted that the final price fixation is in accordance with the allotment letters issued to the respondents. As per the allotment letter, the tentative price of the land had been fixed at Rs.40,500/- per acre in Tarihal Industrial Area. The allottees were to exercise option with regard to the mode of payment of the purchase price. The letter clearly indicated that the price was only tentative. The final price was fixed taking into account the cost of acquisition, development expenditure, statutory charges and interest. On the basis of the above criteria, the cost of land per allotable acre worked out approximately to 2.61 lakhs per acre. Therefore, the break-ups of the same was as follows:-

Rs. in Lakhs

a)	Cost of acquisition	0.20
b)	Development expenditure:	
	Already incurred (as on 31.12.96)	0.88
	Future development (as estimated on 31.12.96)	0.98
c)	Statutory Charges:	0.23
d)	Interest	0.32
		2.61

Therefore, keeping the above cost per acre as the basis, the appellant Board, at its Board Meeting dated 18th September, 1997 resolved to fix the final price of the lands as follows:-

	Allotment made at the basic tentative rates as per acre (in Rs.)	Basic final prices fixed per acre (in Rs.)
1.	40,000/-	1.08 lakhs
2.	60,000/-	1.27 lakhs
3.	1.00 lakh to 1.25 lakhs	2.01 lakhs
4.	1.50 lakhs to 1.60 lakhs	2.61 lakhs

11. According to the learned counsel, the aforesaid exercise carried out by the Board would clearly indicate that the decision has been taken upon consideration of all the

relevant parameters for determination of the final price. Learned counsel further submitted that the respondents have wrongly claimed that they had been allotted plots in fully developed area. The development work had just begun in 1982. These allotments have been made at a heavily subsidized rate. The final price has been fixed to put all allottees at par, irrespective of the date, area/phase/segment of the allotment. The development costs had been worked out as a whole and the allottees had not been segregated into separate groups. The respondents having voluntarily entered into lease agreement can not now be permitted to question the power of the Board to fix the final price. She relied on *Premji Bhai Parmar & Ors. Vs. Delhi Development Authority & Ors.*[1] and *Centre for Public Interest Litigation & Anr. Vs. Union of India & Ors.*[2].

12. The learned counsel further submits that it is a settled proposition of law that price fixation is beyond the scope of judicial review in writ petitions. The High Court, therefore, exceeded its jurisdiction in allowing the writ appeal in favour of the respondents. She relied on the judgment of this Court in the case of *Meerut Development Authority Vs. Association of Management Studies*.[3] She then brought to our notice that if the impugned judgment prevails then it would cause a loss of Rs.1,66,000/- for allotment of every acre.

13. On the other hand, Mr. Basava Prabhu S. Patil, learned senior counsel appearing for the respondents submitted that the allotment letters have been issued by the appellant Board in exercise of its powers under Section 41 of the Karnataka Industrial Area Development Act, 1966. Section 41 empowers the Board to make regulations consistent with the Act and the Rules made there under, to carry out the purposes of this Act. Sub-section 41(2) provides that the Board can make regulations with regard to "(b) the terms and conditions under

1. (1980) 2 SCC 129.
2. (2000) 8 SCC 606.
3. (2009) 6 SCC 171.

which the Board may dispose of land". In exercise of this power, the Board has framed Karnataka Industrial Area Development Board Regulations, 1969. Under Regulation 7, the Board has to notify the availability of land for which applications may be made by the intending purchaser. The notice has to specify the manner of disposal, the last date for submission of application and such other particulars as the Board may consider necessary in each case by giving wide publicity through newspapers, having circulation in and outside Karnataka State. Upon receipt of the applications, the allotment letter has to be issued in terms of Regulation 10. According to the learned senior counsel, the exercise of power with regard to the fixation of price by the Board has to be within four corners of the aforesaid statutory provisions. He further pointed out that the lease agreement between the applicants/lessee and the Board has to be executed in terms of Form IV contained in the third schedule. The Form is issued in terms of Regulation 10(c). The form being statutory, it was necessary to strictly comply with the aforesaid provisions. However, in the contracts entered into between the appellant Board and the allottees, Clauses 7(a) and 7(b) have been introduced without amending the applicable Regulations or Form IV. Therefore, according to the learned senior counsel, the final price fixation is without any statutory basis. Learned senior counsel further submitted that in calculating the final price, the respondents have not only included the cost of land acquisition which is not disputed, but also included future development costs and interest on investments. According to the learned counsel, the Board had no power to levy such amounts either under the contract or under the regulations. Learned senior counsel submitted that the difference between the so called tentative price and the final price is excessive and unquestionable. The increase in price can not be said to be marginal as the allottees are now required to pay double the amount which was initially indicated. Under Clause 7 of the Regulations, the appellants were required to fix the final price as soon as possible. In the present case, the price has been finalized after a period of 13 years.

14. Learned senior counsel further submitted that the respondents were not entitled to such an arbitrary increase in price. This itself shows that the decision making process was totally flawed. The respondents had taken into consideration factors which were not permissible under the Statute or the Regulations. Thus, the decision has been rendered arbitrarily. This is evident from the fact that a sum of Rs.237.14 lakhs is sought to be calculated for future development. Learned senior counsel submitted that the Division Bench, considering the entire issue has recorded the correct conclusions and, therefore, does not call for any interference.

15. We have considered the submissions made by the learned counsel. It is true that under Clause 7(b), the Board reserved to itself the right to fix the final price of the demised premises as soon as it may be convenient to it and communicate the same to the concerned lessee. Upon communication of the price, the lessee is required to pay the balance of the value of the site. Determination of the price by the Board is binding on the lessee. In our opinion, the aforesaid clause would not permit the Board to arbitrarily or irrationally fix the final price of the site without any rational basis. The power of price fixation under Clause 7 being statutory in nature would have to be exercised, in accordance with statutory provisions; it can not be permitted to be exercised arbitrarily. Undoubtedly, as observed by this Court in the case of *Premji Bhai Parmar* (supra), Courts would not reopen the concluded contracts. Ms. Suri had placed reliance on the observations made by this Court in Paragraph 10 of the judgment, which are as follows:-

> "Pricing policy is an executive policy. If the Authority was set up for making available dwelling units at reasonable price to persons belonging to different income groups it would not be precluded from devising its own price formula for different income groups. If in so doing it uniformly collects something more than cost price from those with cushion to benefit those who are less fortunate

it cannot be accused of discrimination. In this country where weaker and poorer sections are unable to enjoy the basic necessities, namely, food, shelter and clothing, a body like the Authority undertaking a comprehensive policy of providing shelter to those who cannot afford to have the same in the competitive albeit harsh market of demand and supply nor can afford it on their own meagre emoluments or income, a little more from those who can afford for the benefit of those who need succour, can by no stretch of imagination attract Article 14. People in the MIG can be charged more than the actual cost price so as to give benefit to allottees of flats in LIG, Janata and CPS. And yet record shows that those better off got flats comparatively cheaper to such flats in open market. It is a well recognised policy underlying tax law that the State has a wide discretion in selecting the persons or objects it will tax and that the statute is not open to attack on the ground that it taxes some persons or objects and not others. It is only when within the range of its selection the law operates unequally, and this cannot be justified on the basis of a valid classification, that there would be a violation of Article 14 (see East India Tobacco Co. v. State of A.P.). Can it be said that classification income-wise-cum-scheme-wise is unreasonable? The answer is a firm no. Even the petitioners could not point out unequal treatment in same class. However, a feeble attempt was made to urge that allottees of flats in MIG scheme at Munirka which project came up at or about the same time were not subjected to surcharge. This will be presently examined but aside from that, contention is that why within a particular period, namely, November, 1976 to January, 1977 the policy of levying surcharge was resorted to and that in MIG schemes pertaining to period prior to November, 1976 and later April, 1977 no surcharge was levied. If a certain pricing policy was adopted for a certain period and was uniformly applied to projects coming up during that period,

it cannot be the foundation for a submission why such policy was not adopted earlier or abandoned later."

16. In our opinion, these observations would not be applicable in the facts of this case. The appellants are required to fix the price within the stipulated parameters contained in the Statute and the Board Regulations. Ms. Suri has also relied on a judgment of this Court in the case of *Indore Development Authority Vs. Sadhana Agarwal (Smt.) & Ors.*[4] in support of the submissions that since the allotment letters indicated only the tentative price, the respondents could not demand that they be allowed the sites at the original price. In that case, this Court observed as follows:-

"Although this Court has from time to time, taking the special facts and circumstances of cases in question, has upheld the excess charged by the development authorities over the cost initially announced as estimated cost, but it should not be understood that this Court has held that such development authorities have absolute right to hike the cost of flats, initially announced as approximate or estimated cost for such flats. It is well known that persons belonging to middle and lower income groups, before registering themselves for such flats, have to take their financial capacity into consideration and in some cases it results in great hardship when the development authorities announce an estimated or approximate cost and deliver the same at twice or thrice of the said amount. The final cost should be proportionate to the approximate or estimated cost mentioned in the offers or agreements. With the high rate of inflation, escalation of the prices of construction materials and labour charges, if the scheme is not ready within the time-frame, then it is not possible to deliver the flats or houses in question at the cost so announced. It will be advisable that before offering the flats to the public such development authorities should fix the

4. (1995) 3 SCC 1.

estimated cost of the flats taking into consideration the escalation of the cost during the period the scheme is to be completed. In the instant case the estimated cost for the LIG flat was given out at Rs 45,000. But by the impugned communication, the appellant informed the respondents that the actual cost of the flat shall be Rs 1,16,000 i.e. the escalation is more than 100%. The High Court was justified in saying that in such circumstances, the Authority owed a duty to explain and to satisfy the Court, the reasons for such high escalation. We may add that this does not mean that the High Court in such disputes, while exercising the writ jurisdiction, has to examine every detail of the construction with reference to the cost incurred. The High Court has to be satisfied on the materials on record that the Authority has not acted in an arbitrary or erratic manner."

17. These observations make it clear that the High Court has the jurisdiction to satisfy itself on the material on record that the authority has not acted in an arbitrary or erratic manner. In our opinion, the High Court, in the present case, has not acted beyond such jurisdiction. Ms. Suri then relied on the case of *Kanpur Development Authority Vs. Sheela Devi (Smt.) & Ors.*[5] In the aforesaid case, this Court reiterated the jurisdiction of the High Court to satisfy itself, that there was material on the record to justify the escalation of cost of a house/flat. The Court can take notice as to whether the delay was caused by the allottee or the authority itself. In our opinion, the judgment of the High Court is within the parameters of the jurisdiction vested in it under Article 226 of the Constitution of India.

18. The Board being a State within the meaning of Article 12 of the Constitution of India is required to act fairly, reasonably and not arbitrarily or whimsically. The guarantee of equality before law or equal protection of the law, under Article 14 embraces within its realm exercise of discretionary powers

5. (2003) 12 SCC 497.

by the State. The High Court examined the entire issue on the touchstone of Article 14 of the Constitution of India. It has been observed that the fixation of price done by the Board has violated the Article 14 of the Constitution of India. It is correctly observed that though Clause 7(b) permits the Board to fix the final price of the demised premises, it cannot be said that where the Board arbitrarily or irrationally fixes the final price of the site without any basis, such fixation of the price could bind the lessee. In such circumstances, the Court will have the jurisdiction to annul the decision, upon declaring the same to be void and non-est. A bare perusal of Clause 7(b) would show that it does not lay down any fixed components of final price. Clause 7(b) also does not speak about the power of the Board to revise or alter the tentative price fixed at the time of allotment. The High Court has correctly observed that Clause 7(b) does not contain any guidelines which would ensure that the Board does not act arbitrarily in fixing the final price of demised premises. Since the validity of the aforesaid Clause was not challenged, the High Court has rightly refrained from expressing any opinion thereon.

19. Even though the Clause gives the Board an undefined power to fix the final price, it would have to be exercised in accordance with the principle of rationality and reasonableness. The Board can and is entitled to take into account the final cost of the demised premises in the event of it incurring extra expenditure after the allotment of the site. But in the garb of exercising the power to fix the final price, it can not be permitted to saddle the earlier allottees with the liability of sharing the burden of expenditure by the Board in developing some other sites subsequent to the allotment of the site to the respondents. The respondents have placed on record sufficient material to show that acquisition and development of land in the industrial area has been in phases. Some areas and segments are fully developed and others are in different stages of development. Sites and plots have been allotted at different times and locations. Thus, it cannot be said that all the allottees form one

class. Earlier allottees having sites in fully developed segments cannot be intermingled with the subsequent allottees in areas which may be wholly undeveloped. Such action is clearly violation of Article 14. We are also of the opinion that the Board can not be permitted to exercise its powers of fixing the final price under Clause 7(b) at any indefinite time in the future after the allotment is made. This would render the word "as soon as" in Clause 7(b) wholly redundant. As noticed earlier, in the present case, the Board has sought to fix the final price after a gap of 13 years. Such a course is not permissible in view of the expression "as soon as" contained in Clause 7(b).

20. In our opinion, the High Court correctly concluded that the fixation of final price by the Board is without authority of law. It violates Article 14 of the Constitution of India being arbitrary and unreasonable exercise of discretionary powers.

21. In view of the above, we find no merit in these appeals. The appeals are accordingly dismissed.

N.J. Appeals dismissed.

CHAIRMAN-CUM-M.D., COAL INDIA LTD., & ORS.
v.
ANANTA SAHA & ORS.
(Civil Appeal No. 2958 of 2011)

APRIL 6, 2011

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

Service Law:

Disciplinary inquiry – Medical Officer appointed by the principal company and posted in subsidiary company – Complaint against, for abusing and attempting to assault his senior, the Chief Medical Officer, and beating others who tried to intervene – Punishment of dismissal from service, awarded by CMD of subsidiary company – Set aside by High Court holding that it was not passed by the competent authority – Liberty given to employers to initiate the proceedings de novo – Proceedings held again, but on the basis of the earlier charge-sheet – HELD: High Court erred in holding that CMD of the subsidiary company was not competent to initiate the proceedings – However, since the entire previous proceedings including the charge-sheet issued earlier stood quashed, inquiry could not have been initiated without giving a fresh charge-sheet – There was no proper initiation of disciplinary proceedings after the first round of litigation and, as such, all the consequential proceedings stood vitiated – In case the employers choose to hold a fresh inquiry, they would reinstate the delinquent – All the entitlements of the delinquent would be determined by the disciplinary authority in accordance with law – Coal India Executives (Conduct Discipline and Appeal) Rules 1978 – rr. 27 and 28 – Constitution of India, 1950 – Article 311 – Maxim "sublato fundamento cadit opus" – Applicability of – Administrative Law - Bias.

Disciplinary inquiry – Revival of – HELD: The order of

revival reveals that the note prepared by the OSD was merely signed by the disciplinary authority in a routine manner – There is nothing on record to show that the disciplinary authority put its signature after applying its mind – Therefore, it cannot be said that the proceedings had been properly revived – The order of revival could not be sufficient to initiate any disciplinary proceedings.

Disciplinary inquiry – Order of dismissal – Requirement of a speaking order – HELD: An order of dismissal from service passed against a delinquent and the proceedings held against such a public servant under the statutory rule to determine whether he is guilty of the charges framed against him are in the nature of quasi-judicial proceedings – The authority has to give reasons for initiation of the inquiry and conclusion thereof.

Evidence Act, 1872:

s. 114, Illustration (f) – Presumption as to service of notice – Disciplinary inquiry – Notice sent to delinquent by registered post – Delinquent not participating in the proceedings and contending that notices were not served upon him in accordance with law – HELD: The second show cause notice and the copy of the inquiry report had been sent to him under registered post – Therefore, there is a presumption in law, particularly, u/s 27 of the General Clauses Act, 1897 and s.114 Illustration (f) of the Evidence Act that the addressee has received the materials sent by post – General Clauses Act, 1897 – s.27.

Constitution of India, 1950:

Article 226 – Writ petition challenging disciplinary inquiry and dismissal order – Statutory appeal against order of dismissal pending – HELD: Writ petition could not have been proceeded with and heard on merits when statutory appeal

was pending – Department also proceeded with the case without any sense of responsibility, as subsequent to dismissal of writ petition and writ appeal by High Court, the statutory appeal filed by delinquent after 15 months of the order of punishment was entertained though the limitation prescribed under the Rules was 30 days and the appeal was dismissed on merits without dealing with the issue of limitation – Coal India Executives (Conduct, Discipline and Appeal) Rules, 1978 – Appeal – Limitation.

Administrative Law:

Bias – Held: The presumption is in favour of bonafides of the order unless contradicted by acceptable material – In the instant case, though in respect of the allegation of bias / prejudice malafides, a ground has been taken in the writ petition before the High Court, but no material on record could be pointed out to substantiate the allegation.

Respondent no. 1, a Medical Officer (E-2 Grade) employed by Coal India Ltd. (CIL), while posted at the Central Hospital established under the control of Eastern Coal Fields Ltd. (ECL), a subsidiary of CIL, abused and made an attempt to physically assault the Chief Medical Officer. In the process, the other officers who tried to intervene got assaulted. On conclusion of the disciplinary proceedings, the Chief Managing Director of ECL, by his order dated 17.6.1993, dismissed the delinquent from service. The order was challenged in a writ petition, which was allowed by the Single Judge holding that CMD, CIL was the competent authority to pass the order of punishment. However, liberty was given to the employees to initiate the proceedings de novo. The Division Bench of the High Court by order dated 8.8.2001 dismissed the appeal. Accordingly, disciplinary proceedings were initiated afresh. The delinquent did not participate in the proceedings which were concluded ex-parte. The

charges were proved and the CMD, CIL passed the order of dismissal on 24.2.2004. The delinquent filed the statutory appeal belatedly on 27.5.2005, and without waiting for its result filed a writ petition before the High Court. The writ petition was allowed by the Single Judge holding that the disciplinary authority did not ensure compliance with the orders dated 8.8.2001 passed by the High Court and that the fresh inquiry was not initiated by the competent authority as it was initiated by the Officer on Special Duty and had been merely seen by the CMD, ECL. The Division Bench of the High Court dismissed the employers' appeal holding that the disciplinary proceedings had been initiated by an authority not competent to initiate the proceedings and no person other than the CMD, CIL could initiate the same. Aggrieved, the employers filed the appeal.

Disposing of the appeal, the Court

HELD: 1. The charge-sheet dated 26.7.1991 reveals a very serious misconduct by the delinquent as on 29.6.1991 the delinquent tried to assault the CMO, and when other employees tried to intervene, they were beaten by the delinquent. The charge-sheet further reveals that the delinquent had also been found guilty of serious misconduct in respect of charge-sheet dated 18.4.1989. However, the management was watching his behaviour and during this time, the delinquent committed the misconduct again on 29.6.1991. [para 11] [62-B-E]

2.1. So far as the competence to initiate the disciplinary proceedings is concerned, the Coal India Executives (Conduct, Discipline and Appeal) Rules 1978 provide complete guidance and rr. 27 and 28 thereof, if read together, cumulatively provide that major penalties, including dismissal from service can be awarded only by CMD, CIL. Rule 28.3 clearly stipulates that the disciplinary

proceedings can be initiated by the authorities shown in the Schedule framed under r. 27. However, in a case where major penalty is to be imposed, the matter be referred to the CMD, CIL. [para 19] [64-G-H; 65-A]

2.2. This Court while interpreting the provisions of Article 311(1) of the Constitution of India, has consistently held that as per the requirement of the said provisions, a person holding a civil post under the State cannot be dismissed or removed from service by an authority subordinate to that by which he was appointed. "However, that Article does not in terms require that the authority empowered under the provision to dismiss or remove an official, should itself initiate or conduct enquiry proceeding". [para 20] [66-B-C]

Sampuran Singh v. State of Punjab, **AIR 1982 SC 1407; and** *State of U.P. & Anr. v. Chandrapal Singh & Anr.*, **2003 (2) SCR 1062 = (2003) 4 SCC 670 – relied on.**

2.3. In the instant case, admittedly, the delinquent has been an officer in E-2 Grade and has been posted in Subsidiary Company, i.e. ECL. Therefore, there is no doubt that disciplinary proceedings could be initiated by the CMD, CIL or by the CMD of the Subsidiary Company concerned, i.e., ECL. As the delinquent was working in the Subsidiary Company, the High Court erred in holding that in such an eventuality the CMD of the Subsidiary Company concerned was not competent to initiate the proceedings. [para 21] [66-E]

2.4. The plea of the delinquent that at the time of his appointment, the CMD, CIL was the competent authority to initiate the disciplinary proceedings and if the rules were subsequently amended that would not be applicable in his case, cannot be considered. It is well established that Rules made under the proviso to Article

309 of the Constitution of India being legislative in nature and character, could be given effect to retrospectively. [para 12-14] [62-F-G; 63-C]

Roshan Lal Tandon v. Union of India & Anr., **1968 SCR 185 =AIR 1967 SC 1889,** *State of Mysore v. Krishna Murthy & Ors.,* **1973 (2) SCR 575 =AIR 1973 SC 1146;** *Raj Kumar v. Union of India & Ors.,* **1975 (3) SCR 963 =AIR 1975 SC 1116; *and*** *Ex-Capt. K.C. Arora & Anr. v. State of Haryana & Ors.,* **1984 (3) SCR 623 = (1984) 3 SCC 281,** *Keshav Lal Soni & Ors.,* **1983 (2) SCR 287 = AIR 1984 SC 161,** *K. Nagaraj & Ors. v. State of Andhra Pradesh & Anr.* ***etc.,*** **AIR 1985 SC 551,** *State of Jammu & Kashmir v. Shiv Ram Sharma & Ors.,* **AIR 1999 SC 2012; *and*** *State of U.P. & Ors. v. Hirendra Pal Singh etc.* **JT (2010) 13 SC 610,** *State of Karnataka & Anr. v. Mangalore University Non-Teaching Employees Association & Ors.,* **2002 (2) SCR 121 = AIR 2002 SC 1223,** *State of Tamil Nadu v. M/s. Hind Stone etc. etc.* **AIR 1981 SC 711;** *V. Karnal Durai v. District Collector, Tuticorin & Anr.,* **(1999) 1 SCC 475;** *Union of India and Ors. v. Indian Charge Chrome & Anr.* **(1999) 7 SCC 314; *and*** *Howrah Municipal Corporation & Ors. v. Ganges Rope Company Ltd. & Ors.* **(2004) 1 SCC 663 – relied on.**

3.1. Further, the delinquent did not participate in the disciplinary proceedings nor did he make any comment on receiving the inquiry report along with the second show cause notice and contended that the notices had not been served upon him in accordance with law. The second show cause notice and the copy of the inquiry report had been sent to him under registered post. Therefore, there is a presumption in law, particularly, u/s 27 of the General Clauses Act, 1897 and s.114 Illustration (f) of the Evidence Act, 1872 that the addressee has received the materials sent by post. [para 22] [66-F-H; 67-A]

Greater Mohali Area Development Authority & Ors. v. Manju Jain & Ors., **2010 (10) SCR 134 = AIR 2010 SC 3817 – relied on.**

3.2. In the instant case, the proceedings were held ex-parte against the delinquent as he failed to appear in spite of notice and such a course of the inquiry officer was justified. There is no averment by the delinquent that he did not receive the notice and the copy of the inquiry report. The plea taken by the delinquent shows that he has adopted a belligerent attitude and kept the litigation alive for more than two decades merely on technical grounds. In such a fact-situation, the High Court ought to have refused to entertain his writ petition. More so, the writ petition could not have been proceeded with and heard on merits when the statutory appeal was pending before the Board of Directors, CIL. [para 23] [67-B-E]

State of U.P. v. Saroj Kumar Sinha, **2010 (2) SCR 326 =AIR 2010 SC 3131,** *Transport and Dock Workers Union & Ors. v. Mumbai Port Trust & Anr.,* **2010 (14) SCR 873 = (2011) 2 SCC 575 – relied on.**

4.1. Unfortunately, both the parties proceeded with the case without any sense of responsibility, as subsequent to disposal of the writ petition and appeal by the High Court, the statutory appeal filed by the delinquent after 15 months of imposition of punishment was entertained, though the limitation prescribed under the 1978 Rules is only 30 days and the appeal has been dismissed on merits without dealing with the issue of limitation. [para 23] [67-F-G]

4.2. In the first round of litigation, the Single Judge of the High Court by judgment and order dated 22.2.2001 after quashing the orders impugned therein, had given liberty to the appellants to start the proceedings *de-novo* giving adequate opportunity to the delinquent. The

Division Bench by judgment and order dated 8.8.2001 dismissed the appeal filed by the appellants. Thus, the entire earlier proceedings including the chargesheet issued earlier stood quashed. In such a fact-situation, it was not permissible for the appellants to proceed on the basis of the chargesheet issued earlier. In view thereof, the question of initiating a fresh enquiry without giving a fresh chargesheet could not arise. [para 24-26] [68-A-E]

Union of India etc. etc. v. K.V. Jankiraman etc. etc., **1991 (3) SCR 790 = AIR 1991 SC 2010; and** *UCO Bank & Anr. v. Rajinder Lal Capoor,* **2007 (7) SCR 543 = (2007) 6 SCC 694 – relied on.**

4.3. The proceedings were purported to have been revived by the CMD, ECL and the order dated 17.1.2002 reveals that the OSD had prepared the note which has merely been signed by the CMD, ECL. The proposal has been signed by the CMD, ECL in a routine manner and there is nothing on record to show that he had put his signature after applying his mind. Therefore, it cannot be held in strict legal sense that the proceedings had been properly revived even from the stage subsequent to the issuance of the charge sheet. The law requires that the disciplinary authority should pass some positive order taking into consideration the material on record. Thus, the said order could not be sufficient to initiate any disciplinary proceedings. [para 27,28 and 29] [68-F; 69-E-F; 70-C]

4.4. This Court has repeatedly held that an order of dismissal from service passed against a delinquent employee after holding him guilty of misconduct may be an administrative order, nevertheless proceedings held against such a public servant under the statutory Rules to determine whether he is guilty of the charges framed against him are quasi-judicial in nature. The authority has to give some reason, which may be very brief, for

initiation of the inquiry and conclusion thereof. It has to pass a speaking order and the order cannot be an ipse dixit either of the inquiry officer or the authority. [para 29] [69-G-H; 70-A-B]

Bachhittar Singh v. State of Punjab & Anr., **1962 Suppl. SCR 713 = AIR 1963 SC 395;** *Union of India v. H.C. Goel,* **1964 SCR 718 = AIR 1964 SC 364;** *Anil Kumar v. Presiding Officer & Ors.,* **AIR 1985 SC 1121; and** *Union of India & Ors. v. Prakash Kumar Tandon,* **2008 (17) SCR 855 = (2009) 2 SCC 541 – relied on.**

4.5. It is a settled legal proposition that if initial action is not in consonance with law, subsequent proceedings would not sanctify the same. In such a fact-situation, the legal maxim *"sublato fundamento cadit opus"* is applicable, meaning thereby, in case a foundation is removed, the superstructure falls. In the instant case, as there had been no proper initiation of disciplinary proceedings after the first round of litigation, all other consequential proceedings stood vitiated and on that count no fault can be found with the impugned judgment and order of the High Court. [para 30 and 32] [70-D; G-H]

Badrinath v. Govt. of Tamil Nadu & Ors., **AIR 2000 SC 3243,** *State of Kerala v. Puthenkavu N.S.S. Karayogam & Anr.,* **(2001) 10 SCC 191; and** *Kalabharati Advertising v. Hemant Vimalnath Narichania & Ors.* **2010 (10) SCR 971 = *AIR 2010 SC 3745 – relied on.***

5.1. In respect of the allegation of bias/prejudice/ malafide, though a ground has been taken by the delinquent in his writ petition before the High Court, but he could not point out any material on record to substantiate the said averment. There has to be a very strong and convincing evidence to establish the allegations of *mala fides* specifically alleged in the petition, as the same cannot merely be presumed. The

presumption is in favour of the *bona fides* of the order unless contradicted by acceptable material. In the instant case, there is no material on record on the basis of which the High Court could be justified in recording a finding of fact that disciplinary proceedings had been initiated against the delinquent with a pre-determined mind only to punish him. In view of the fact that inquiry officers have consistently found the delinquent guilty of committing a serious misconduct, such an observation was totally unwarranted, particularly, in view of the fact that there is nothing on record to substantiate such an averment made by the delinquent. [para 33, 37 and 40] [71-A-C; 72-C; 73-C]

Tara Chand Khatri v. Municipal Corporation of Delhi & Ors., **1977 (2) SCR 198 = AIR 1977 SC 567, E.P. Royappa v. State of Tamil Nadu & Anr., 1974 (2) SCR 348 =AIR 1974 SC 555,** *M. Sankaranarayanan, IAS v. State of Karnataka & Ors.,* **1992 (2) Suppl. SCR 368 = AIR 1993 SC 763;** *M/s. Sukhwinder Pal Bipan Kumar & Ors. v. State of Punjab & Ors.,* **1982 (2) SCR 31 = AIR 1982 SC 65;** *Shivajirao Nilangekar Patil v. Dr. Mahesh Madhav Gosavi & Ors.,* **1987 (1) SCR 458 = AIR 1987 SC 294; and** *Samant & Anr. v. Bombay Stock Exchange & Ors.,* **(2001) 5 SCC 323,** *State of Punjab v. V.K. Khanna & Ors.,* **2000 (5) Suppl. SCR 200 = (2001) 2 SCC 330,** *Jasvinder Singh & Ors. v. State of J & K & Ors.,* **(2003) 2 SCC 132, – relied on.**

Sheo Nandan Paswan v. State of Bihar & Ors., **1987 (1) SCR 702 =AIR 1987 SC 877; and** *State of Haryana & Ors. v. Ch. Bhajan Lal & Ors.,* **1990 (3) Suppl. SCR 259 =AIR 1992 SC 604 – referred to.**

5.2. Therefore, the finding of bias i.e. predetermination of the disciplinary authority to punish the delinquent is set aside as it is totally perverse being based on no evidence. Further, the finding that CMD, ECL was not competent to initiate the proceeding is also

not sustainable in the eyes of law, and thus, set aside. It is open to the appellants to initiate fresh disciplinary proceedings, i.e., issuing a fresh chargesheet by the competent authority as per the 1978 Rules and concluding the proceedings under all circumstances within a period of 6 months. It is made clear that in case the delinquent does not participate or co-operate in the inquiry, the inquiry officer, may proceed ex-parte passing such an order recording reasons. [para 42-43] [73-F-H; 74-A-B]

6.1. In *B. Karunakar and Y.S. Sandhu**, **this Court has held that where the punishment awarded by the disciplinary authority is quashed by the court/tribunal on some technical ground, the authority must be given an opportunity to conduct the inquiry afresh from the stage where it stood before alleged vulnerability surfaced. However, for the purpose of holding the fresh inquiry, the delinquent is to be reinstated and may be put under suspension. [para 46] [74-H; 75-A-B]**

Managing Director, ECIL, Hyderbad etc. etc. v. B. Karunakar etc. etc.,* **1993 (2) Suppl. SCR 576 =AIR 1994 SC 1074; *Union of India v. Y.S. Sandhu, Ex. Inspector,* **AIR 2009 SC 161;** *R. Thiruvirkolam v. Presiding Officer & Anr.,* **1996 (10) Suppl. SCR 199 =AIR 1997 SC 637;** *Punjab Dairy Development Corporation Ltd. & Anr. v. Kala Singh etc.,* **1997 (1) Suppl. SCR 235 = AIR 1997 SC 2661; and** *Graphite India Ltd. & Ors. v. Durgapur Project Ltd. & Ors.,* **(1999) 7 SCC 645, - relied on**

6.2. The issue of entitlement of back wages has been considered by this Court time and again and it has consistently held that even after the punishment imposed upon the employee is quashed by the court or tribunal, the payment of back wages still remains discretionary. Power to grant back wages is to be exercised by the court/tribunal keeping in view the facts

in their entirety as no straitjacket formula can be evolved, nor a rule of universal application can be laid for such cases. Even if the delinquent is re-instated, it would not automatically make him entitled for back wages as entitlement to get back wages is independent of re-instatement. The factual scenario and the principles of justice, equity and good conscience have to be kept in view by an appropriate authority/court or tribunal. In such matters, the approach of the court or the tribunal should not be rigid or mechanical but flexible and realistic.

Therefore, in case the appellants choose to hold a fresh inquiry, they are bound to reinstate the delinquent and, in case, he is put under suspension, he shall be entitled for subsistence allowance till the conclusion of the enquiry. All other entitlements would be determined by the disciplinary authority after the conclusion of the enquiry. [para 47-48] [75-C-H; 76-A-B]

U.P.SRTC v. Mitthu Singh, **2006 (4) Suppl. SCR 672 = AIR 2006 SCC 3018; Secy.,** *Akola Taluka Education Society & Anr. v. Shivaji & Ors.,* ***(2007) 9*** **SCC 564; and** *Managing Director, Balasaheb Desai Sahakari S.K. Limited v. Kashinath Ganapati Kambale,* **(2009) 2 SCC 288, relied on.**

Case Law Reference:

1993 (2) Suppl. SCR 576	relied on	para 4
1968 SCR 185	relied on	para 13
1973 (2) SCR 575	relied on	para 14
1975 (3) SCR 963	relied on	para 14
1984 (3) SCR 623	relied on	para 14
1983 (2) SCR 287	relied on	para 15
AIR 1985 SC 551	relied on	para 16
AIR 1999 SC 2012	relied on	para 16
JT (2010) 13 SC 610	relied on	para 16

2002 (2) SCR 121	relied on	para 17
AIR 1981 SC 711	relied on	para 18
(1999) 1 SCC 475	relied on	para 18
1999 (7) SCC 314	relied on	para 18
1982 AIR 1407	relied on	para 20
2003 (2) SCR 1062	relied on	para 20
2010 (10) SCR 134	relied on	para 21
2010 (2) SCR 326	relied on	para 21
2010 (14) SCR 873	relied on	para 23
1991 (3) SCR 790	relied on	para 25
2007 (7) SCR 543	relied on	para 25
1962 Suppl. SCR 713	relied on	para 29
1964 SCR 718	relied on	para 29
1985 AIR 1121	relied on	para 29
2008 (17) SCR 855	relied on	para 29
AIR 2000 SC 3243	relied on	para 31
2001) 10 SCC 191	relied on	para 31
2010 (10) SCR 971	relied on	para 31
1977 (2) SCR 198	relied on	para 34
1974 (2) SCR 348	relied on	para 35
1992 (2) Suppl. SCR 368	relied on	para 36
1982 (2) SCR 31	relied on	para 37
1987 (1) SCR 458	relied on	para 37
2001 (5) SCC 323	relied on	para 37
2000 (5) Suppl. SCR 200	relied on	para 38
2003 (2) SCC 132	relied on	para 39

1987 (1) SCR 702	**referred to**	**para 41**
1990 (3) Suppl. SCR 259	**referred to**	**para 41**
1996 (10) Suppl. SCR 199	**cited**	**para 45**
1997 (1) Suppl. SCR 235	**cited**	**para 45**
(1999) 7 SCC 645	**cited**	**para 45**
2006 (4) Suppl. SCR 672	**relied on**	**para 47**
(2007) 9 SCC 564	**relied on**	**para 47**
(2009) 2 SCC 288)	**relied on**	**para 47**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2958 of 2011.

From the Judgment & Order dated 22.7.2008 of the High Court of Calcutta in M.A.T. No. 2852 of 2007.

K.K. Bandhopadhyay, Shagun Matta, Mohit Paul, Anip Sachthey for the Appellants.

Ananta Saha Respondent-In-Person.

The Judgment of the Court was delivered by

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

2. This appeal has been preferred against the judgment and order dated 22.7.2008 passed in M.A.T. No. 2852 of 2007 by the Calcutta High Court dismissing the appeal of the present appellants against the judgment and order of the learned single Judge dated 16.8.2007, passed in Writ Petition No. 22658(W) of 2005, by which the learned single Judge had quashed the punishment order of dismissal from service as well as the disciplinary proceeding against respondent no.1 (hereinafter called the delinquent), giving liberty to the present appellants to initiate the proceedings afresh, if the disciplinary authority so desired.

3. Facts and circumstances giving rise to this case are that the delinquent has been employed as a Medical Officer (E-2 grade) in Coal India Limited (hereinafter called as 'CIL'). On 29.6.1991, when the delinquent was posted at Central Hospital, Asansol, established under the control of Eastern Coalfields Limited (hereinafter called as ECL), he abused and made an attempt to physically assault his senior officer Dr. P.K. Roy, the then Chief Medical Officer, unprovoked. In this process, other officers who tried to intervene stood assaulted. Disciplinary proceedings were initiated against the delinquent by issuing a chargesheet dated 26.7.1991. After the conclusion of the proceedings, the inquiry officer submitted the report holding that the charge stood proved against him. After considering the inquiry report, the delinquent was dismissed from service, vide order dated 17.6.1993, by the Chief Managing Director (hereinafter called as CMD) of the ECL, a subsidiary of the CIL. The said order of dismissal was challenged by the delinquent by filing Writ Petition CR No. 11177(W) of 1993 and the same stood allowed by the learned single Judge vide judgment and order dated 22.2.2001 on the ground that the order of dismissal had been passed in contravention of the Statutory Rules. The competent authority under the disciplinary rules was the CMD, CIL, who had not passed the order of punishment. All other issues raised by the delinquent were left open. The appellants-employers were given liberty to initiate the proceedings *de-novo,* giving adequate opportunity to the delinquent to defend himself.

4. Being aggrieved, the appellants challenged the said judgment and order dated 22.2.2001 by filing MA No. 1081 of 2001. The said appeal was dismissed vide judgment and order dated 8.8.2001 observing that CMD, CIL was the only competent authority to award a major punishment like dismissal. The court further held that the delinquent would be treated in the light of the judgment of this court in *Managing Director, ECIL, Hyderabad etc. etc. v. B. Karunakar etc. etc.,* AIR 1994 SC 1074. However, the direction for holding the

disciplinary proceedings *de-novo* was not altered.

5. In view of the Division Bench judgment and order dated 8.8.2001, the delinquent was reinstated. The disciplinary proceedings were initiated and a fresh suspension order was passed. On conclusion of the proceedings ex-parte, as the delinquent did not participate in the proceedings, the inquiry officer found the charges proved against the delinquent vide report dated 18.9.2003. A copy of the inquiry report along with a second show-cause notice was sent to the delinquent by registered post on 26.9.2003, giving him an opportunity to make a representation on the same. However, the delinquent did not avail of the opportunity to file the objections thereupon. After considering the inquiry report, the CMD, CIL, the disciplinary authority, passed the punishment order of "dismissal from service" of the delinquent vide order dated 24.2.2004. A copy of the order of dismissal was served upon the delinquent immediately thereafter.

6. The delinquent filed the appeal prescribed under the Statutory Rules on 27.5.2005, i.e., after the expiry of more than one year and three months from the date of receipt of the order of dismissal. Without waiting for the result or outcome of the appeal pending before the Board of Directors, CIL, the delinquent filed Writ Petition No. 22658(W) of 2005 challenging the said order of punishment. The said writ petition was allowed by the learned single Judge vide order dated 16.8.2007 on the ground that the disciplinary authority did not ensure compliance with the orders of the High Court dated 8.8.2001, which stood confirmed by the Division Bench and also on the ground that the fresh inquiry was not initiated by the competent authority as it was initiated by the Officer on Special Duty (hereinafter called as OSD) and had been merely seen by the CMD, ECL. The proceedings could have been initiated only by the CMD, CIL, thus, entire proceedings stood vitiated. The impugned order dated 24.2.2004, imposing the order of punishment of dismissal from the service, was quashed. However, the

appellants were given liberty to initiate fresh inquiry in accordance with law and to conclude the same within a stipulated period.

7. Being aggrieved, the appellants preferred M.A.T. No. 2852 of 2007, however, the Division Bench dismissed the said appeal observing that the disciplinary proceedings had been initiated by an authority not competent to initiate such proceedings and no person other than the CMD, CIL could initiate the same. In fact, the inquiry had been initiated by the OSD, of the ECL and CMD, ECL also did not even approve it, rather he put his signature without making any observation whatsoever. The CMD, ECL was not the Competent Authority. The court had also made an observation that the disciplinary authority had been biased and prejudiced towards the delinquent and proceedings had been initiated with pre-determined mind to punish him. Hence, this appeal.

8. Shri K.K. Bandopadhyay, learned senior counsel appearing for the appellants, has submitted that as per the statutory rules, namely, Coal India Executives' Conduct Discipline and Appeal Rules, 1978 (hereinafter called 'the Rules 1978') as the delinquent was an officer in E-2 Grade, the CMD, ECL was competent to initiate the proceedings. The Schedule framed under Rule 27 of the said Rules 1978 specifically provided for it. The CMD, CIL was competent to impose any major penalty and against the order of punishment, appeal is provided to the Board of Directors, CIL. In view of the provisions of Rules 27 and 28 of the Rules 1978, proceedings could be initiated even by the CMD, ECL and after conclusion of the inquiry, if the facts warrant imposition of major penalty, the matter could be referred to the CMD, CIL for the purpose of awarding the punishment, as he was the only competent authority to award major punishments. During the pendency of the appeal before the Board of Directors, CIL, writ petition could not have been entertained by the High Court, particularly, when such a fact had been disclosed by the delinquent in his

writ petition. As the earlier disciplinary proceedings had been quashed and the appellants had been given liberty to proceed *de-novo* against the delinquent, there was no occasion for the appellants to issue a fresh chargesheet. The chargesheet had been issued by the CMD, ECL, but the High Court has wrongly construed it to have been issued by OSD of the company. The High Court failed to appreciate that the chargesheet had been duly approved by the CMD, ECL. The High Court ought to have refused to entertain the writ petition on the grounds that the delinquent had also been found guilty of serious misconduct earlier; did not participate in the inquiry and it was concluded ex-parte. More so, the delinquent did not file reply/comments to the second show-cause in spite of having received the same. The High Court erred in recording a finding that proceedings had been initiated in this case with pre-determined mind just to punish the delinquent. Thus, the appeal deserves to be allowed.

9. Per contra, the delinquent-in-person has opposed the appeal on the grounds that the rules in force at the time of his initial appointments, provided that the proceedings could be initiated only by the CMD, CIL not by the CMD of the subsidiary company. A subsequent change/amendment in law would not be applicable so far as the delinquent was concerned. He did not participate in the inquiry on all the dates and did not submit the reply to the second show-cause as he had not been informed in accordance with law and, in such a fact-situation, there was no obligation on his part either to participate in the inquiry or to submit a reply to the second show cause. Once, in the first round of litigation, the High Court had given liberty to the disciplinary authority to proceed *de-novo*, a fresh chargesheet ought to have been issued to him by the disciplinary authority. In the instant case, proceedings had been initiated only by the OSD of the Company. The CMD, ECL was not the Competent Authority, even otherwise, he had merely signed the order without making any observation whatsoever. The appellants had a grudge against him, hence proceedings

were initiated because of malice. The appeal lacks merit and is liable to be dismissed.

10. We have considered the rival submissions made by learned Senior counsel for the appellants and the delinquent-in-person.

11. The chargesheet dated 26.7.1991 reveals a very serious misconduct by the delinquent, as on 29.6.1991 the delinquent approached Dr. P.K. Roy, CMO, Central Hospital Kalla, and asked why he had marked him absent for 3 days in June, 1991, though the delinquent had applied for compensatory leave through proper channel and then used abusive language and threatened the CMO to the extent of saying that he (the delinquent) would kill the CMO. He took his shoes in hand and rushed towards the CMO, to hit him but other officers present there at that time caught hold of the delinquent with great difficulty and prevented him from assaulting the CMO. Even at that stage, he made all attempts to get rid of them. In this process other employees were beaten by the delinquent.

The chargesheet further reveals that the delinquent had also been found guilty of serious misconduct in respect of chargesheet dated 18.4.1989. However, the management was watching his behaviour and during this time, the delinquent committed the misconduct again on 29.6.1991.

12. The submission made by the delinquent that at the time of his initial appointment, the CMD, CIL was the competent authority to initiate the disciplinary proceedings and if the rules have subsequently been amended, that would not be applicable in his case as the amendment made unilaterally cannot govern the service conditions of the employees appointed prior to the date of amendment, and that such amendment would not apply retrospectively, is preposterous.

13. A Constitution Bench of this Court in *Roshan Lal Tandon v. Union of India & Anr.,* AIR 1967 SC 1889, examined a similar issue and observed as under:–

> ".....The legal position of a Government servant is more one of status than of contract. The Hall-mark of status is the attachment to a legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties. The emolument of the government servant and his terms of service are governed by Statute or statutory Rules which may be *unilaterally altered by the Government without the consent of the employee."*

14. In *State of Mysore v. Krishna Murthy & Ors.,* AIR 1973 SC 1146; *Raj Kumar v. Union of India & Ors.,* AIR 1975 SC 1116; and *Ex-Capt. K.C. Arora & Anr. v. State of Haryana & Ors.,* (1984) 3 SCC 281, this Court observed that it was well-established that Rules made under the proviso to Article 309 of the Constitution of India, being legislative in nature and character, could be given effect to retrospectively.

15. A Constitution Bench of this Court in *State of Gujarat & Anr. v. Raman Lal Keshav Lal Soni & Ors.,* AIR 1984 SC 161, observed as under:–

> "The legislature is undoubtedly competent to legislate with retrospective effect to take away or impair any vested right acquired under existing laws but since the laws are made under a written Constitution, and have to conform to the do's & dont's of the Constitution, neither prospective nor retrospective laws can be made so as to contravene fundamental rights. The law must satisfy the requirements of the Constitution today taking into account the accrued or acquired rights of the parties today."

16. In *K. Nagaraj & Ors. v. State of Andhra Pradesh & Anr. etc.,* AIR 1985 SC 551, this Court upheld the amendment in the Andhra Pradesh Public Employees (Regulation of Conditions of Service) Ordinance, 1983 by which the age of retirement was reduced from 58 to 55 years holding it was neither arbitrary nor irrational. The court held that as it would apply in future to the existing employees and does not take

away the rights of the persons who have already retired, the amendment was not retrospective and those persons who were already in service and were expecting to retire at the age of 58 years and would now be required to retire at the age of 55, cannot claim that the Rules have been amended with retrospective effect taking away their accrued rights.

(See also : *State of Jammu & Kashmir v. Shiv Ram Sharma & Ors.,* AIR 1999 SC 2012; and *State of U.P. & Ors. v. Hirendra Pal Singh etc.* JT (2010) 13 SC 610).

17. Similarly, in *State of Karnataka & Anr. v. Mangalore University Non-Teaching Employees Association & Ors.,* AIR 2002 SC 1223, this Court held that conditions of service can be altered unilaterally by the employer but it should be in conformity with legal and constitutional provisions.

18. This Court in *State of Tamil Nadu v. M/s. Hind Stone etc. etc.,* AIR 1981 SC 711; *V. Karnal Durai v. District Collector, Tuticorin & Anr.,* (1999) 1 SCC 475; *Union of India & Ors. v. Indian Charge Chrome & Anr.,* (1999) 7 SCC 314; and *Howrah Municipal Corporation & Ors. v. Ganges Rope Company Ltd. & Ors.,* (2004) 1 SCC 663, has clearly held that the law which is to be applied in a case is the law prevailing on the date of decision making.

Thus, in view of the above, submissions made by the delinquent are not worth consideration.

19. So far as the competence to initiate the disciplinary proceedings is concerned, the Rules 1978 provide complete guidance and Rules 27 and 28 thereof, if read together, cumulatively provide that major penalties, i.e., compulsory retirement, removal or dismissal from service can be made only by CMD, CIL. Rule 28.3 clearly stipulates that the disciplinary proceedings can be initiated by the authorities shown in the Schedule framed under Rule 27. However, in a case where major penalty is to be imposed, the matter be

referred to the CMD, CIL. Therefore, in order to find out as to whether any officer other than the CMD, CIL, could initiate the disciplinary proceedings and issue the chargesheet, we have to examine the Schedule framed under Rule 27. The relevant part thereof reads as under:

SCHEDULE UNDER RULE 27.0

Sl. No.	Grade of Employee	Disciplinary Authority	Penalties which it may impose	Appellate Authority
1.	2.	3.	4.	5.
1.	……			
2.	(a) Officers in Grade E-1 to M-3 posted in CIL or any of the Subsidiary Companies	Chairman-cum Managing Director, Coal India Ltd.	All penalties	Board of Directors Coal India Ltd.
	(b) ……			
	(c) ……			
3.	(a) Officers in grade E-1 to M-3 posted in Subsi-diary Companies	CMD of the concerned Subsidiary Company	All penalties except those under Rule 27.1(iii) (b) to 27.1 (iii)(d)	Chairman-cum Managing Director, CIL
(b)	……..			
(c)	……			

The jurisdiction of the Disciplinary Authority shall be determined with reference to the Company/Unit where the alleged misconduct was conducted.

20. This Court while interpreting the provisions of Article 311(1) of the Constitution of India, has consistently held that as per the requirement of the said provisions, a person holding a civil post under the State cannot be dismissed or removed from service by an authority subordinate to that by which he was appointed. "However, that Article does not in terms require that the authority empowered under the provision to dismiss or remove an official, should itself initiate or conduct enquiry proceeding".

(See: *Sampuran Singh v. State of Punjab,* AIR 1982 SC 1407; and *State of U.P. & Anr. v. Chandrapal Singh & Anr.,* (2003) 4 SCC 670)

21. Admittedly, the delinquent has been an officer in E-2 Grade and has been posted in Subsidiary Company, i.e. ECL. Therefore, there is no doubt that disciplinary proceedings could be initiated by the CMD, CIL or by the CMD of the concerned Subsidiary Company, i.e., ECL. As the delinquent was working in the Subsidiary Company, the High Court erred in holding that in such an eventuality the CMD of the concerned Subsidiary Company was not competent to initiate the proceedings.

22. Similarly, we find no force in the submission made by the delinquent that he did not participate in the disciplinary proceedings and did not make any comment on receiving the inquiry report along with the second show cause notice as the notices had not been served upon him in accordance with law. The second show cause notice and the copy of the inquiry report had been sent to him under registered post. Therefore, there is a presumption in law, particularly, under Section 27 of the General Clauses Act, 1897 and Section 114 Illustration (f) of the Evidence Act, 1872 that the addressee has received the

materials sent by post. (vide*: Greater Mohali Area Development Authority & Ors. v. Manju Jain & Ors.,* AIR 2010 SC 3817).

23. In the instant case, proceedings were held ex-parte against the delinquent as he failed to appear in spite of notice and such a course of the inquiry officer was justified (See: *State of U.P. v. Saroj Kumar Sinha,* AIR 2010 SC 3131). There is no averment by the delinquent that he did not receive the said notice and the copy of the inquiry report. The plea taken by the delinquent shows that he has adopted a belligerent attitude and kept the litigation alive for more than two decades merely on technical grounds. The delinquent waited till the conclusion of the purported fresh enquiry initiated on 17.1.2002, even though he could have challenged the same having been initiated by a person not competent to initiate the proceedings and being in contravention of the orders passed by the High Court earlier. In such a fact-situation, the High Court ought to have refused to entertain his writ petition. More so, the writ petition could not have been proceeded with and heard on merit when the statutory appeal was pending before the Board of Directors, CIL. (See: *Transport and Dock Workers Union & Ors. v. Mumbai Port Trust & Anr.,* (2011) 2 SCC 575).

Unfortunately, both the parties proceeded with the case without any sense of responsibility, as subsequent to disposal of the writ petition and appeal by the High Court, the statutory appeal filed by the delinquent after 15 months of imposition of punishment was entertained, though the limitation prescribed under the Rules 1978 is only 30 days and appeal has been dismissed on merit without dealing with the issue of limitation. It clearly shows that both sides considered the litigation as a luxury and that the appellants have been wasting public time and money without taking the matter seriously.

24. The Statutory rules clearly stipulate that the enquiry could be initiated either by the CMD, CIL or by the CMD of the

Subsidiary Company. In the first round of litigation, the learned Single Judge of the High Court vide judgment and order dated 22.2.2001 after quashing the orders impugned therein, had given liberty to the appellants to start the proceedings *de-novo* giving adequate opportunity to the delinquent. The Division Bench vide judgment and order dated 8.8.2001 dismissed the appeal filed by the present appellants. Therefore, the question does arise as to what is the meaning of *de-novo* enquiry.

25. There can be no quarrel with the settled legal proposition that the disciplinary proceedings commence only when a chargesheet is issued to the delinquent employee. (Vide: *Union of India etc. etc. v. K.V. Jankiraman etc. etc.,* AIR 1991 SC 2010; and *UCO Bank & Anr. v. Rajinder Lal Capoor,* (2007) 6 SCC 694).

26. The High Court had given liberty to the appellants to hold *de-novo* enquiry, meaning thereby that the entire earlier proceedings including the chargesheet issued earlier stood quashed. In such a fact-situation, it was not permissible for the appellants to proceed on the basis of the chargesheet issued earlier. In view thereof, the question of initiating a fresh enquiry without giving a fresh chargesheet could not arise.

27. The proceedings were purported to have been revived by the CMD, ECL and the said order dated 17.1.2002 reads as under:

> "In the matter of C.R. No.11177/W of 1993, *Dr. Ananta Saha Vs. ECL & Ors.,* Hon'ble High Court, Calcutta has passed an order upon the appellant to start enquiry proceedings, de-novo, giving adequate opportunity to the petitioner and in the light of the order passed by the Hon'ble High Court Calcutta on 8.8.2001, it will depend on a fresh order to be passed by the Disciplinary Authority/ CMD, ECL.
>
> In the above circumstances, it is proposed that an

Inquiring Authority and a Presenting Officer may be appointed to conduct the departmental enquiry in terms of the order dated 8.8.2001 of Division Bench of Calcutta High Court for a fresh enquiry into the chargesheet No.ECL-5(D)/113/1070/320 dated 26.7.1991 issued to Dr. Ananta Saha, M,O. Kalla Hospital, for this purpose the following names are furnished.

1. Dr. R.N. Kobat, CMO, Sanctoria Hospital – Inquiring Authority

2. Sri M.N. Chatterjee, S.O., Admn. Dept. – Presenting Officer

Put up for kind approval.

Sd/-

CMD OSD(PA & PR)Sd/-

Sd/- 17.8.2002"

28. The aforesaid order reveals that the OSD had prepared the note which has merely been signed by the CMD, ECL. The proposal has been signed by the CMD, ECL in a routine manner and there is nothing on record to show that he had put his signature after applying his mind. Therefore, it cannot be held in strict legal sense that the proceedings had been properly revived even from the stage subsequent to the issuance of the charge sheet. The law requires that the disciplinary authority should pass some positive order taking into consideration the material on record.

29. This Court has repeatedly held that an order of dismissal from service passed against a delinquent employee after holding him guilty of misconduct may be an administrative order, nevertheless proceedings held against such a public servant under the Statutory Rules to determine whether he is guilty of the charges framed against him are in the nature of quasi-judicial proceedings. The authority has to give some

reason, which may be very brief, for initiation of the inquiry and conclusion thereof. It has to pass a speaking order and cannot be an ipse dixit either of the inquiry officer or the authority. (Vide *Bachhittar Singh v. State of Punjab & Anr.,* AIR 1963 SC 395; *Union of India v. H.C. Goel,* AIR 1964 SC 364; *Anil Kumar v. Presiding Officer & Ors.,* AIR 1985 SC 1121; and *Union of India & Ors. v. Prakash Kumar Tandon,* (2009) 2 SCC 541).

Thus, the above referred to order could not be sufficient to initiate any disciplinary proceedings.

30. It is a settled legal proposition that if initial action is not in consonance with law, subsequent proceedings would not sanctify the same. In such a fact-situation, the legal maxim *"sublato fundamento cadit opus"* is applicable, meaning thereby, in case a foundation is removed, the superstructure falls.

31. In *Badrinath v. Govt. of Tamil Nadu & Ors.,* AIR 2000 SC 3243, this Court observed that once the basis of a proceeding is gone, all consequential acts, actions, orders would fall to the ground automatically and this principle of consequential order which is applicable to judicial and quasi-judicial proceedings is equally applicable to administrative orders.

(See also *State of Kerala v. Puthenkavu N.S.S. Karayogam & Anr.,* (2001) 10 SCC 191; and *Kalabharati Advertising v. Hemant Vimalnath Narichania & Ors.* AIR 2010 SC 3745).

32. As in the instant case, there had been no proper initiation of disciplinary proceedings after the first round of litigation, all other consequential proceedings stood vitiated and on that count no fault can be found with the impugned judgment and order of the High Court.

33. In respect of the allegation of bias/prejudice/malafide, ground no.9 has been taken by the delinquent in his writ petition before the High Court, which reads as under:-

> "For that the charge sheet was recommended with pre-determination of inflicting punishment of major penalty for which it can be proved by the remarks of the authority concerned on the situation report dated 29.6.1991 and as such, the sanctity and integrity of the proceedings are lost."

The delinquent could not point out any material on record to substantiate the said averment.

34. The issue of *"malus animus"* was considered by this Court in *Tara Chand Khatri v. Municipal Corporation of Delhi & Ors.,* AIR 1977 SC 567, wherein it was held that the Court would be justified in refusing to carry on an investigation into the allegation of *mala fides*, if necessary particulars of the charge making out a *prima facie* case are not given in the writ petition and the burden of establishing *mala fides* lies very heavily on the person who alleges it and that there must be sufficient material to establish *malus animus*.

35. Similarly, in *E.P. Royappa v. State of Tamil Nadu & Anr.,* AIR 1974 SC 555, this Court observed:

> "Secondly, we must not also over-look that the burden of establishing mala fides is very heavy on the person who alleges it..... The Court would, therefore, be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration. Such is the judicial perspective in evaluating charges of unworthy conduct against ministers and other, not because of any special status.... but because otherwise, functioning effectively would become difficult in a democracy."

36. In *M. Sankaranarayanan, IAS v. State of Karnataka & Ors.,* AIR 1993 SC 763, this Court observed that the Court may "draw a reasonable inference of *mala fide* from the facts pleaded and established. But such inference must be based on factual matrix and such factual matrix cannot remain in the realm of insinuation, surmise or conjecture."

37. There has to be a very strong and convincing evidence to establish the allegations of *mala fides* specifically alleged in the petition, as the same cannot merely be presumed. The presumption is in favour of the *bona fides* of the order unless contradicted by acceptable material. (Vide: *M/s. Sukhwinder Pal Bipan Kumar & Ors. v. State of Punjab & Ors.,* AIR 1982 SC 65; *Shivajirao Nilangekar Patil v. Dr. Mahesh Madhav Gosavi & Ors.,* AIR 1987 SC 294; and *Samant & Anr. v. Bombay Stock Exchange & Ors.,* (2001) 5 SCC 323).

38. In *State of Punjab v. V.K. Khanna & Ors.,* (2001) 2 SCC 330, this Court examined the issue of bias and *mala fide* and observed as under:–

> "Whereas fairness is synonymous with reasonableness-bias stands included within the attributes and broader purview of the word 'malice' which in common acceptation means and implies 'spite' or 'ill will'. One redeeming feature in the matter of attributing bias or malice and is now well settled that mere general statements will not be sufficient for the purposes of indication of ill will. There must be cogent evidence available on record to come to the conclusion as to whether in fact, there was existing a bias or a mala fide move which results in the miscarriage of justice..... In almost all legal inquiries, 'intention as distinguished from motive is the all-important factor' and in common parlance a malicious act stands equated with an intentional act without just cause or excuse."
> (Emphasis added)

39. In *Jasvinder Singh & Ors. v. State of J & K & Ors.,* (2003) 2 SCC 132, this Court held that the burden of proving *mala fides* lies very heavily on the person who alleges it. A mere allegation is not enough. The party making such allegations is under the legal obligation to place specific materials before the Court to substantiate the said allegations.

40. We could not find any material on record on the basis of which the High Court could be justified in recording a finding of fact that disciplinary proceedings had been initiated against the delinquent with pre-determined mind only to punish him. In view of the fact that inquiry officers have consistently found the delinquent guilty of committing a serious misconduct, such an observation was totally unwarranted, particularly in view of the fact that there is nothing on record to substantiate such an averment made by the delinquent.

41. Even in criminal law a complaint cannot be "thrown over board on some unsubstantiated plea of malafides". That "a criminal prosecution, if otherwise, justifiable and based upon adequate evidence does not become vitiated on account of malafides or political vendetta of the first informant or the complainant." (See *Sheo Nandan Paswan v. State of Bihar & Ors.,* AIR 1987 SC 877; and *State of Haryana & Ors. v. Ch. Bhajan Lal & Ors.,* AIR 1992 SC 604).

42. Therefore, the finding of bias i.e. predetermination of the disciplinary authority to punish the delinquent is set aside holding that it is totally perverse being based on no evidence.

43. In the facts and circumstances of the case, the appeal stands allowed to the extent explained hereinabove. The finding recorded by the High Court regarding malice is unwarranted and hereby set aside. Further, the finding that CMD, ECL was not competent to initiate the proceeding is also not sustainable in the eyes of law and thus, hereby set aside. It is open to the appellants to initiate fresh disciplinary proceedings, i.e., issuing

a fresh chargesheet by the competent authority as per the Rules 1978 and concluding the proceedings under all circumstances within a period of 6 months from today. It is made clear that in case the delinquent does not participate or co-operate in the inquiry, the inquiry officer, may proceed ex-parte passing such an order recording reasons.

44. In the last, the delinquent has submitted that this Court must issue directions for his reinstatement and payment of arrears of salary till date. Shri Bandopadhyay, learned senior counsel appearing for the appellants, has vehemently opposed the relief sought by the delinquent contending that the delinquent has to be deprived of the back wages on the principle of "no work – no pay". The delinquent had been practicing privately i.e. has been gainfully employed, thus, not entitled for back wages. Even if this Court comes to the conclusion that the High Court was justified in setting aside the order of punishment and a fresh enquiry is to be held now, the delinquent can simply be reinstated and put under suspension and would be entitled to subsistence allowance as per the Service Rules applicable in his case. The question of back wages shall be determined by the disciplinary authority in accordance with law only on the conclusion of the fresh enquiry. It is settled legal proposition that result of the fresh inquiry in such a case relates back to the date of termination.

45. The submissions advanced on behalf of the appellants that the result of the inquiry in such a fact-situation relates back to the date of imposition of punishment, earlier stands fortified by the large number of judgments of this Court and particularly in *R. Thiruvirkolam v. Presiding Officer & Anr.,* AIR 1997 SC 637; *Punjab Dairy Development Corporation Ltd. & Anr. v. Kala Singh etc.,* AIR 1997 SC 2661; and *Graphite India Ltd. & Ors. v. Durgapur Project Ltd. & Ors.,* (1999) 7 SCC 645.

46. In *Managing Director, ECIL, Hyderbad etc. etc. v. B. Karunakar etc. etc.,* (Supra); and *Union of India v. Y.S.*

Sandhu, Ex. Inspector, AIR 2009 SC 161, this Court held that where the punishment awarded by the disciplinary authority is quashed by the court/tribunal on some technical ground, the authority must be given an opportunity to conduct the inquiry afresh from the stage where it stood before alleged vulnerability surfaced. However, for the purpose of holding the fresh inquiry, the delinquent is to be reinstated and may be put under suspension. The question of back wages etc. is determined by the disciplinary authority in accordance with law after the fresh inquiry is concluded.

47. The issue of entitlement of back wages has been considered by this Court time and again and consistently held that even after punishment imposed upon the employee is quashed by the court or tribunal, the payment of back wages still remains discretionary. Power to grant back wages is to be exercised by the court/tribunal keeping in view the facts in their entirety as no straitjacket formula can be evolved, nor a rule of universal application can be laid for such cases. Even if the delinquent is re-instated, it would not automatically make him entitled for back wages as entitlement to get back wages is independent of re-instatement. The factual scenario and the principles of justice, equity and good conscience have to be kept in view by an appropriate authority/court or tribunal. In such matters, the approach of the court or the tribunal should not be rigid or mechanical but flexible and realistic. (Vide: *U.P.SRTC v. Mitthu Singh,* AIR 2006 SCC 3018; *Secy., Akola Taluka Education Society & Anr. v. Shivaji & Ors.,* (2007) 9 SCC 564; and *Managing Director, Balasaheb Desai Sahakari S.K. Limited v. Kashinath Ganapati Kambale,* (2009) 2 SCC 288).

48. In view of the above, the relief sought by the delinquent that the appellants be directed to pay the arrears of back wages from the date of first termination order till date, cannot be entertained and is hereby rejected. In case the appellants choose to hold a fresh inquiry, they are bound to reinstate the delinquent and, in case, he is put under suspension, he shall

be entitled for subsistence allowance till the conclusion of the enquiry. All other entitlements would be determined by the disciplinary authority as explained hereinabove after the conclusion of the enquiry. With these observations, the appeal stands disposed of. No costs.

R.P. Appeal disposed of.

AKHIL BHARTIYA UPBHOKTA CONGRESS
v.
STATE OF MADHYA PRADESH AND ORS.
(Civil Appeal No. 2965 of 2011)

APRIL 6, 2011

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

Constitution of India, 1950:

Article 14 – Principle of equality – Exercise of power by political entities and officers/officials – Scope of – Held: For achieving the goals of Justice and Equality set out in the Preamble, the State and its agencies/instrumentalities have to function through political entities and officers/officials at different levels – The exercise of power by political entities and officers/officials for providing different kinds of services and benefits to the people always has an element of discretion, which is required to be used in larger public interest and for public good and in a rational and judicious manner without any discrimination against anyone – In Indian constitutional structure, no functionary of the State or public authority has an absolute or unfettered discretion – The very idea of unfettered discretion is totally incompatible with the doctrine of equality enshrined in the Constitution and is an antithesis to the concept of rule of law – Administrative law.

Part III; IV; Article 39(b) – Role of the State – Discussed.

Administrative law: State and/or its agencies/ instrumentalities – Action/decision of, to give largesse or confer benefit on any person – Held: Must be founded on a sound, transparent, discernible and well defined policy, which shall be made known to the public by publication in the Official Gazette and other recognized modes of publicity and such policy must be implemented/executed by adopting a non-

discriminatory or non-arbitrary method irrespective of the class or category of persons proposed to be benefitted by the policy – Distribution of largesse such as allotment of land by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favoritism or nepotism should not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State – By entertaining applications made by individuals, organisations or institutions for allotment of land or for grant of any other type of largesse, the State cannot exclude other eligible persons from lodging competing claim – The competent authority should, as a matter of course, issue an advertisement incorporating therein the conditions of eligibility so as to enable all similarly situated eligible persons, institutions/organisations to participate in the process of allotment, whether by way of auction or otherwise – The allotment of land which carry the tag of caste, community or religion is not only contrary to the idea of Secular Democratic Republic but is also fraught with grave danger of dividing the society on caste or communal lines – The allotment of land to such bodies/organisations/institutions on political considerations or by way of favoritism or nepotism is constitutionally impermissible – In the instant case, reservation and allotment of land to respondent no.5 was not preceded by any advertisement in the newspaper or by any other recognized mode of publicity inviting applications from organizations/institutions for allotment of land and everything was done by the political and non-political functionaries of the State as if they were under a legal obligation to allot land to respondent No.5 – The advertisements issued by the State functionaries were only for inviting objections against the proposed reservation and/or allotment of land in favour of respondent no.5 and not for participation in the process of allotment – Therefore, allotment of land to respondent No.5 was not done by following a procedure consistent with Article 14 of the Constitution.

Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973:

Object of its enactment – Discussed.

s.23-A – Development Plan – Modification of – Whether notifications by which the Bhopal Development Plan was modified and land use was changed were ultra vires the provisions of s.23-A – Held: The power of modification of development plan can be exercised only for specified purposes – In terms of s.23-A(1)(a), the development plan can be modified by the State Government either suo motu or at the request of the Authority for any proposed project of the Government of India or the State Government and its enterprises or for any proposed project relating to development of the State or for implementing a scheme of the Authority – In the instant case, in the Bhopal Development plan, the use of land which was reserved and allotted to respondent No.5 was shown as public and semi-public (health) – State Government modified the plan by invoking s.23-A(1)(a) for facilitating establishment of an institute by respondent No. 5 – The exercise undertaken for the change of land use, which resulted in modification of the development plan was an empty formality because land was allotted to respondent No.5 almost two years prior to the issue of notification u/s.23–A (1)(a) and the objects for which respondent No.5 was registered as a trust had no nexus with the purpose for which modification of development plan could be effected under that section – Therefore, modification of the development plan was ultra vires the provisions of s.23–A(1)(a) – Urban development.

Madhya Pradesh Revenue Book Circular: Unregistered societies and private trusts are not eligible for allotment of land.

Writ petition: Locus standi – Held: Even if a person files a writ petition for vindication of his private interest but raises question of public importance involving exercise of power by men in authority then it is the duty of the Court to enquire into the matter.

On 18.6.2004, one 'KJ' made a written request to the Principal Secretary, Housing describing himself as a Convenor of a Memorial Trust for reservation of 30 acres land comprised in village Bawadiya Kalan, in favour of the Memorial Trust to enable it to establish an All India Training Institute. Although said letter was addressed to the Principal Secretary, Housing, the same was handed over to the then Minister of Housing who forwarded it to the Principal Secretary, Housing for immediate action. Subsequently, 'KJ' applied for registration of the trust in the name of respondent No. 5. The certificate of registration was issued on 24.12.2004. In the meanwhile, 'KJ' sent letter dated 11.8.2004 to the Principal Secretary, Housing wherein he described himself as the Managing Trustee of respondent No.5 and submitted fresh proposal for reservation of 30 acres land out of Khasra Nos.82/1 and 83 of village Bawadiya Kalan in favour of respondent No.5.

The Director, Town Planning (Respondent No.3) informed the Principal Secretary, Housing stating that in the Bhopal Development Plan, 2005, land comprised in Khasra No.82 of Bawadiya Kalan village was earmarked for public and semi-public (health) purpose and land comprised in Khasra No.83 was earmarked for residential purpose and if land was to be allotted to the Memorial Trust, then the earlier land use would be required to be cancelled. However, without effecting change of land use by following the procedure prescribed under the Act, the State Government issued order reserving 30 acres land comprised in Khasra Nos. 82/1 and 83 of village Bawadiya Kalan in favour of the Memorial Trust.

In view of the directive issued by the State Government , Tehsildar, Capital Project (Nazul) issued advertisement dated 4.10.2004 and invited objections against the proposed allotment to the Memorial Trust. The same was published in newspaper. However just after two days, the Collector (respondent No.4) submitted proposal for allotment of 30 acres land to the Memorial Trust wherein it clearly indicated that the land fell within the limits of Bhopal Municipal Corporation and, as such, in terms of Chapter IV-1 of the Madhya Pradesh Revenue Book Circular (RBC), the same should not be allotted at a price less than the minimum price. He also indicated that price of the land would be Rs.7,84,8000/-, of which 10 per cent should be deposited as a condition for allotment. After 2½ months, respondent No. 4 sent letter to the Additional Secretary, Revenue Department informing about non-deposit of 10 per cent of the premium by the Memorial Trust. On coming to know about the said communications, 'KJ' sent letters to respondent No. 4 and Secretary, Revenue Department respectively assuring that the premium would be deposited immediately after the allotment of land. After about 8 months of the submission of proposal for allotment of land to the Memorial Trust, 'KJ' sent letter to respondent No. 4 mentioning therein that the institute would require only 20 acres land. Thereupon, Nazul Officer sent letter informing 'KJ' that the premium of 20 acres land would be Rs.5,22,72,000/- and 10 per cent thereof i.e. Rs.52,27,200/- should be deposited as earnest money. However, the deposit of only Rs. 25,00,000/- was made on behalf of respondent No. 5. For next about seven months, the matter remained under correspondence between different departments of the State Government. During the interregnum, the Minister of Housing became Chief Minister of the State. On 24.10.2005, Chief Minister of the State directed that matter relating to allotment of

land to respondent No.5 be put up in the next meeting of the Cabinet scheduled to be held on 26.10.2005. On the same day, Secretary, Revenue Department submitted a detailed note and suggested that keeping in view the limited resources available with the State Government, land should be auctioned so that the administration may garner maximum revenue. His suggestion was not accepted by the Council of Ministers, which decided to allot 20 acres land in the name of the Memorial Trust at the rate of Rs.40 lakhs per hectare. The decision of the State Government was communicated to respondent No. 4. As a sequel to the allotment of land, Nazul Officer called upon 'KJ' to deposit Rs. 55,94,000/-. However, instead of depositing the amount 'KJ' addressed letter to the Revenue Minister with the request that the premium may be waived because the Institute was being established in public interest and would be training the elected representatives and undertaking research on important issues and it would have no source of income. The political set up of the State Government readily obliged him inasmuch as the issue was considered in the meeting of Council of Ministers held and it was decided that the amount of Rs. 25,00,000/- may be treated as the total premium and land be given to the Memorial Trust by charging annual lease rent of Re.1 only. Subsequently, on a representation made by 'KJ', earlier orders/ communications were amended and the name of respondent No. 5 was inserted in place of the Memorial Trust. Thereafter, lease agreement was executed between the State Government and Secretary of respondent No.5 in respect of 20 acres land for a period ending on 05.12.2037 at a premium of Rs. 25,00,000/- and an yearly rent of Re.1. Since the use of land comprised in Khasra Nos. 82/1 and 83 of village Bawadiya Kala was shown in the Bhopal Development Plan as public and semi-public (health) and the same could not have been utilized for the

purpose of respondent No. 5, the State Government issued notification dated 6.6.2008 under Section 23-A(1)(a) of the Act proposing change of land use from public and semi-public (health) to public and semi public and invited objections/suggestions. The notification was published in the Official Gazette and two newspapers. Objections were filed by various persons against the proposed change of land use which were held untenable after giving opportunity of hearing. Thereafter, final notification dated 5.9.2008 was issued under Section 23-A(2) of the Act.

The appellant, engaged in public and consumer welfare activities challenged the allotment of land to respondent No.5 in writ petition on the grounds of violation of Article 14 of the Constitution and arbitrary exercise of power. The High Court summarily dismissed the writ petition by observing that land belonged to the Government and it was for the Government to decide whom the same should be allotted as per its policy and that no case of violation of any legal or constitutional right was made out.

The question which arose for consideration in the instant appeal was whether the decision of the State Government to allot 20 acres land comprised in Khasra Nos. 82/1 and 83 of village Bawadiya Kalan, Tehsil Huzur, District Bhopal to the Memorial Trust without any advertisement and without inviting other similarly situated organisations/institutions to participate in the process of allotment was contrary to Article 14 of the Constitution and the provisions of the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 and whether modification of the Bhopal Development Plan and change of land use was ultra vires the mandate of Section 23A of the Act.

Allowing the appeal, the Court

HELD: 1.1. The Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 (the Act) was enacted to make provisions for planning and development and use of land; to make better provisions for the preparation of development plans and zoning plans with a view to ensure that town planning schemes are made in a proper manner and they are effectively executed. The Act also provides for constitution of Town and Development Authority for proper implementation of Town and Country Development Plan and for the development and administration of special areas through Special Area Development Authority and also to make provisions for the compulsory acquisition of land required for the purpose of the development plans and for achieving the objects of the Act. In exercise of the powers conferred upon it under Section 58 read with Section 85, the State Government framed the Rules. There is no provision in the Act or the Rules for disposal and/or transfer of land in respect of which a regional plan or development plan or zonal plan has been prepared. The only provision which has nexus with the Government land is contained in Rule 3 which imposes a bar against the transfer of Government land vested in or managed by the Authority except with the general or special sanction of the State Government. [Paras 10, 11, 12] [108-F-H; 116-C-H; 117-A-B]

1.2. Part IV of the RBC deals with the management and regulation of Nazul land falling within the limits of municipal corporations, municipal councils and notified areas; and transfer thereof by lease, sale etc. In terms of paragraph 13(1), permanent lease can be granted either by auction or without auction. Paragraph 13(2) enumerates the contingencies in which permanent lease cannot be granted by auction. If the plot of land is to be sold by auction then the same is required to be advertised or publicized by a recognized method.

Paragraph 21 prescribes the mode of auction of lease rights. Any person desirous of participating in the auction is required to deposit 10 per cent of the premium. Once the bid is approved by the competent authority, the bidder has to deposit the balance amount within 30 days. Paragraph 24 lays down the procedure to be followed for disposal of plot without auction. If any plot is proposed to be transferred at a concessional premium then the approval of the State Government is sine qua non. In case, the Collector is satisfied that the plot of land should be given without auction then the allottee is required to pay premium equivalent to average market price determined on the basis of the sale instances of last five years. Paragraph 26 lays down that when Nazul land is allotted to non-government organisations or persons on favourable terms then the conditions specified therein should be scrupulously observed and there should be rigorous scrutiny of the proposal. Under this paragraph, land can be allotted to educational, cultural and philanthropic institutions/organisations or Cooperative Societies, Housing Board and Special Area Authority constituted by the State Government. However, unregistered societies and private trusts are not eligible for allotment of land. [Para 13] [117-B-E; 118-A-H]

1.3. The concept of 'State' has changed in recent years. In all democratic dispensations the State has assumed the role of a regulator and provider of different kinds of services and benefits to the people like jobs, contracts, licences, plots of land, mineral rights and social security benefits. In his work "The Modern State" MacIver (1964 Paperback Edition) advocated that the State should be viewed mainly as a service corporation. When the Constitution was adopted, people of India resolved to constitute India into a Sovereign Democratic Republic. The words 'Socialist' and 'Secular' were added by the

Constitution (Forty-second Amendment) Act, 1976 and also to secure to all its citizens Justice - social, economic and political, Liberty of thought, expression, belief, faith and worship; Equality of status and/or opportunity and to promote among them all Fraternity assuring the dignity of the individual and the unity and integrity of the Nation. The expression 'unity of the Nation' was also added by the Constitution (Forty-second Amendment) Act, 1976. The idea of welfare State is ingrained in the Preamble of the Constitution. Part III of the Constitution enumerates fundamental rights, many of which are akin to the basic rights of every human being. This part also contains various positive and negative mandates which are necessary for ensuring protection of the Fundamental Rights and making them real and meaningful. Part IV contains 'Directive Principles of State Policy' which are fundamental in the governance of the country and it is the duty of the State to apply these principles in making laws. Article 39 specifies certain principles of policy which are required to be followed by the State. Clause (b) thereof provides that the State shall, in particular, direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good. Parliament and Legislatures of the States have enacted several laws and the governments have, from time to time, framed policies so that the national wealth and natural resources are equitably distributed among all sections of people so that have-nots of the society can aspire to compete with haves. For achieving the goals of Justice and Equality set out in the Preamble, the State and its agencies/instrumentalities have to function through political entities and officers/officials at different levels. The laws enacted by Parliament and State Legislatures bestow upon them powers for effective implementation of the laws enacted for creation of an

egalitarian society. The exercise of power by political entities and officers/officials for providing different kinds of services and benefits to the people always has an element of discretion, which is required to be used in larger public interest and for public good. In principle, no exception can be taken to the use of discretion by the political functionaries and officers of the State and/or its agencies/instrumentalities provided that this is done in a rational and judicious manner without any discrimination against anyone. In Indian constitutional structure, no functionary of the State or public authority has an absolute or unfettered discretion. The very idea of unfettered discretion is totally incompatible with the doctrine of equality enshrined in the Constitution and is an antithesis to the concept of rule of law. [Paras 15, 16, 18] [119-H; 120-D-H; 121-A-B; 122-C-E]

R.D. Shetty v. International Airport Authority of India **(1979) 3 SCC 489 – relied on.**

Ugar Sugar Works Ltd. v. Delhi Administration **(2001) 3 SCC 635;** *State of U.P. v. Chaudhary Ram Beer Singh* **(2005) 8 SCC 550;** *State of Orissa v. Gopinath Dash* **(2005) 13 SCC 495;** *Meerut Development Authority v. Association of Management Studies* **(2009) 6 SCC 171;** *State of Uttar Pradesh v. Bansi Dhar* **(1974) 1 SCC 447;** *Canbank Financial Services Ltd. v. Custodian* **(2004) 8 SCC 355;** *Harsh Dhingra v. State of Haryana* **(2001) 9 SCC 550 – referred to.**

Administrative Law' **(6th) Edition, Prof. H.W.R. Wade – referred to.**

1.4. The State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/decision of the State

and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well defined policy, which shall be made known to the public by publication in the Official Gazette and other recognized modes of publicity and such policy must be implemented/executed by adopting a non-discriminatory or non-arbitrary method irrespective of the class or category of persons proposed to be benefitted by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favoritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State. There cannot be any policy, much less, a rational policy of allotting land on the basis of applications made by individuals, bodies, organizations or institutions de hors an invitation or advertisement by the State or its agency/instrumentality. By entertaining applications made by individuals, organisations or institutions for allotment of land or for grant of any other type of largesse the State cannot exclude other eligible persons from lodging competing claim. Any allotment of land or grant of other form of largesse by the State or its agencies/instrumentalities by treating the exercise as a private venture is liable to be treated as arbitrary, discriminatory and an act of favoritism and nepotism violating the soul of the equality clause embodied in Article 14 of the Constitution. This, however, does not mean that the State can never allot land to the institutions/organisations engaged in educational, cultural, social or philanthropic activities or are rendering service to the Society except by way of auction. Nevertheless, it is necessary to observe that once a piece of land is earmarked or identified for allotment to institutions/organisations engaged in any

such activity, the actual exercise of allotment must be done in a manner consistent with the doctrine of equality. The competent authority should, as a matter of course, issue an advertisement incorporating therein the conditions of eligibility so as to enable all similarly situated eligible persons, institutions/organisations to participate in the process of allotment, whether by way of auction or otherwise. In a given case the Government may allot land at a fixed price but in that case also allotment must be preceded by a wholesome exercise consistent with Article 14 of the Constitution. The allotment of land by the State or its agencies/ instrumentalities to a body/organization/institution which carry the tag of caste, community or religion is not only contrary to the idea of Secular Democratic Republic but is also fraught with grave danger of dividing the society on caste or communal lines. The allotment of land to such bodies/organisations/institutions on political considerations or by way of favoritism or nepotism or with a view to nurture the vote bank for future is constitutionally impermissible. [Paras 31-34] [134-C-H; 135-A-G]

S.G. Jaisinghani v. Union of India **AIR 1967 SC 1427 – relied on.**

Padfield v. Minister of Agriculture, Fishery and Food **(1968) A.C. 997;** *Breen v. Amalgamated Engineering Union* **(1971) 2 QB 175;** *Laker Airways Ltd. v. Department of Trade* **1977 QB 643;** *V. Punnen Thomas v. State of Kerala* **AIR 1969 Ker. 81 (Full Bench);** *Eursian Equipments and Chemicals Ltd. v. State of West Bengal* **(1975) 1 SCC 70;** *Kasturi Lal Lakshmi Reddy v. State of J And K* **(1980) 4 SCC 1;** *Common Cause, A Registered Society v. Union of India* **(1996) 6 SCC 530;** *Shrilekha Vidyarthi v. State of U.P.* **(1991) 1 SCC 212;** *L.I.C. of India v. Consumer Education & Research Centre* **(1995) 5 SCC 482;** *New India Public School*

v. HUDA **(1996) 5 SCC 510;** *Seven Seas Educational Society v. HUDA* **AIR 1996 P&H) 229 – referred to.**

2.1. Admittedly, the application for reservation of land was made by 'KJ', in his capacity as convener of the Memorial Trust. The respondents have not placed on record any document to show that on the date of application, the Memorial Trust was registered as a public trust. During the course of hearing also no such document was produced before the Court. It is also not in dispute that respondent No. 5 was registered as a public trust only on 6.10.2004 i.e. after the order for reservation of land in favour of the Memorial Trust was passed. The allotment was also initially made in the name of trust, but, later on, the name of respondent No. 5 was substituted in place of the Memorial Trust. The exercise for reservation of 30 acres land and allotment of 20 acres was not preceded by any advertisement in the newspaper or by any other recognized mode of publicity inviting applications from organizations/institutions like the Memorial Trust or respondent No.5 for allotment of land and everything was done by the political and non-political functionaries of the State as if they were under a legal obligation to allot land to the Memorial Trust and/or respondent No.5. The advertisements issued by the State functionaries were only for inviting objections against the proposed reservation and/or allotment of land in favour of the Memorial Trust and not for participation in the process of allotment. Therefore, allotment of land to respondent No.5 was not done after following a procedure consistent with Article 14 of the Constitution. [Para 35] [135-H; 136-A-F]

2.2. Although, the objectives of respondent No. 5 are laudable and the institute proposed to be established by it is likely to benefit an important segment of the society but the fact remains that all its trustees are members of a particular party and the entire exercise for the reservation

and allotment of land and waiver of major portion of the premium was undertaken because political functionaries of the State wanted to favour respondent No. 5 and the officers of the State at different levels were forced to toe the line of their political masters. [Para 36] [136-G-H]

2.3. There is no provision in the Act or the Rules and even in the RBC for allotment of land without issuing advertisement and/or without inviting applications from eligible persons to participate in the process of allotment. If there would have been such a provision in the Act or the Rules or the RBC the same could have been successfully challenged on the ground of violation of Article 14 of the Constitution. The argument that the impugned allotment may not be annulled because the State has a definite policy of allotting land to religious, social, educational and philanthropic bodies, organisations/institutions without any advertisement or inviting applications and without even charging premium is liable to be rejected. From the lists annexed with the affidavits, it did appear that the State and its functionaries have allotted various parcels of land to different institutions and organizations between 1982 to 2008. Large number of these allotments were made to the departments/establishments of the Central Government/ State Governments and their agencies/instrumentalities. Some plots were allotted to the hospitals and charitable institutions. Some were allotted to different political parties, but quite a few were allotted to the caste/ community based bodies. Allotments were also made without charging premium and at an annual rent of Re. 1/- only. These allotments cannot lead to an inference that the State Government has framed a well-defined and rational policy for allotment of land. The RBC also does not contain any policy for allotment of land without issuing any advertisement and without following a procedure in which all similarly situated persons can

stake their claim for allotment. Part IV of the RBC contains the definition of Nazul land and provides for allotment of land at market price or concessional price. The authorities competent to allot land for different purposes have also been identified and provisions have been made for scrutiny of applications at different levels. However, these provisions have been misinterpreted by the functionaries of the State for several years as if the same empowered the concerned authorities to allot Nazul land without following any discernible criteria and in complete disregard to their obligation to act in accordance with the constitutional norms. Unfortunately, the High Court overlooked that the entire process of reservation of land and allotment thereof was fraught with grave illegality and was nothing but a blatant act of favoritism on the part of functionaries of the State and summarily dismissed the writ petition. [Paras 37 to 39] [137-A-H; 138-A-C]

3.1. <u>Whether notifications dated 6.6.2008 and 5.9.2008 by which the Bhopal Development Plan was modified are ultra vires the provisions of Section 23-A of the Act.</u>

3.1. A reading of the provisions contained in Chapter-IV of the Act would make it clear that a development plan shall take into account the draft-five year and annual development plan of the district, if any, prepared under the Madhya Pradesh Zila Yogana Samiti Adhiniyam and broadly indicated the land use proposed in the planning area, allocation of areas or zones of land for residential, industrial, commercial or agricultural purpose; open spaces, parks and gardens, green-belts, zoological gardens and playgrounds; public institutions and offices and other special purposes as the Director may deem it fit. The development plan prepared under Chapter IV is the foundation of development of the

particular area for a specified number of years. No one can use land falling within the area for which the development plan has been prepared for a purpose other than for which it is earmarked. Section 23-A was inserted in 1992 and amended in 2005 with a view to empower the State Government to modify the development plan or zoning plan. However, keeping in view the basic objective of planned development of the areas to which the Act is applicable, the Legislature designedly did not give blanket power to the State Government to modify the development plan. The power of modification of development plan can be exercised only for specified purposes. In terms of Section 23-A(1)(a), the development plan can be modified by the State Government either suo motu or at the request of the Authority for any proposed project of the Government of India or the State Government and its enterprises or for any proposed project relating to development of the State or for implementing a scheme of the Authority. Under clause (b), the State Government can entertain an application from any person or association of persons for modification of development plan for the purpose of undertaking any activity or scheme which is considered by the State Government or the Director, on the advice of the committee constituted for this purpose, to be beneficial to the society. This is subject to the condition that the modification so made shall be an integral part of the revised development plan. Section 23-A(2) provides for issue of public notice inviting objections against the proposed modification of the plan. Such notice is required to be published along with the modified plan continuously for two days in two daily newspapers which are on the list of the Government and which have circulation in the area. A copy of the notice is also required to be affixed in a conspicuous place in the office of the Collector. After considering the objections and

suggestions, if any received, and giving reasonable opportunity of hearing to the affected persons, the State Government can confirm the modification. [Para 40] [138-D-H; 139-A-F]

3.2. It is not in dispute that in the Bhopal Development plan, the use of land which was reserved and allotted to respondent No.5 was shown as public and semi public (health). The State Government modified the plan by invoking Section 23-A(1)(a) of the Act for the purpose of facilitating establishment of an institute by respondent No. 5 and not for any proposed project of the Government of India or the State Government and its enterprises or for any proposed project relating to development of the State or for implementation of the Town Development Scheme. As a matter of fact, the exercise undertaken for the change of land use, which resulted in modification of the development plan was an empty formality because land had been allotted to respondent No.5 almost two years prior to the issue of notification under Section 23–A (1)(a) and the objects for which respondent No.5 was registered as a trust have no nexus with the purpose for which modification of development plan can be effected under that section. Therefore, modification of the development plan was ultra vires the provisions of Section 23–A(1)(a) of the Act. [Para 41] [139-G-H; 140-A-C]

3.3. The challenge to the locus standi of the appellant merits rejection because it has not been disputed that the appellant is a public spirited organization and has challenged other similar allotment made in favour of Punjabi Samaj, Bhopal. Even if a person files a writ petition for vindication of his private interest but raises question of public importance involving exercise of power by men in authority then it is the duty of the Court to enquire into the matter. [Para 42] [140-D-E]

Shivajirao Nilangekar Patil v. Mahesh Madhav Gosavi **(1987) 1 SCC 227 – relied on.**

3.4. The argument that the doctrine of prospective overruling should be invoked and the allotment made in favour of respondent No.5 may not be quashed sounds attractive but cannot be accepted because that the impugned allotment was held to be the result of an exercise undertaken in gross violation of Article 14 of the Constitution and was an act of favoritism and nepotism. The impugned order of the High Court is set aside and the writ petition filed by the appellant is allowed. The allotment of 20 acres land to respondent No.5 is declared illegal and quashed. Notifications dated 6.6.2008 and 5.9.2008 issued by the State Government under Section 23-A(1)(a) and (2) are also quashed. The Commissioner, Town and Country Planning, Bhopal is directed to take possession of the land and use the same strictly in accordance with the Bhopal Development Plan. The State Government is directed to refund the amount deposited by respondent No.5 within a period of 15 days. [Paras 43-45] [140-F-H; 141-A-E]

S.R. Dass v. State of Haryana **(1988 PLJ 123) – referred to.**

Case Law Reference:

(2001) 2 SCR 630	**referred to**	**Para 7**
(2005) 8 SCC 550	**referred to**	**Para 7**
(2005) 5 Suppl SCR 699	**referred to**	**Para 7**
(2009) 6 SCC 663	**referred to**	**Para 7**
(1974) 1 SCC 447	**referred to**	**Para 7**
(2004) 4 Suppl SCR 60	**referred to**	**Para 7**
(2001) 3 Suppl SCR 446	**referred to**	**Para 8**

(1968) A.C. 997	**referred to**	**Para 20**
(1971) 2 QB 175	**referred to**	**Para 21**
1977 QB 643	**referred to**	**Para 22**
1967 SCR 703	**relied on**	**Para 23**
AIR 1969 Ker. 81	**referred to**	**Para 24**
(1975) 2 SCR 674	**referred to**	**Para 25**
(1980) 3 SCR 1338	**referred to**	**Para 25**
(1996) 6 Suppl SCR 719	**referred to**	**Para 26**
(1990) 1 Suppl SCR 625	**referred to**	**Para 28**
(1995) 1 Suppl SCR 349	**referred to**	**Para 29**
(1996) 3 Suppl SCR 597	**referred to**	**Para 30**
AIR 1996 P&H) 229	**referred to**	**Para 30**
(1987) 1 SCC 227	**relied on**	**Para 42**
(1988 PLJ 123)	**referred to**	**Para 43**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2965 of 2011.

From the Judgment & Order dated 10.03.2008 of the High Court of Judicature at Jabalpur (MP) in Writ Petition No. 10617 of 2007.

Raju Ramchandran, Santosh Kumar for the Appellant.

Ravi Shankar Prasad, Ranjit Kumar, B.S. Banthia, Vikas Upadhyay, Navin Chawla, Tushar Singh for the Respondents.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. Leave granted.

2. Whether the decision of the Government of Madhya Pradesh to allot 20 acres land comprised in Khasra Nos. 82/1 and 83 of village Bawadiya Kalan, Tehsil Huzur, District Bhopal to late Shri Kushabhau Thakre Memorial Trust (for short, "the Memorial Trust")/Shri Kushabhau Thakre Training Institute (respondent No. 5) without any advertisement and without inviting other similarly situated organisations/institutions to participate in the process of allotment is contrary to Article 14 of the Constitution and the provisions of the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 (for short, "the Act") and whether modification of the Bhopal Development Plan and change of land use is ultra vires the mandate of Section 23A of the Act are the questions which arise for consideration in this appeal filed against the order of the Madhya Pradesh High Court dismissing the Writ Petition filed by the appellant.

3. That facts necessary for deciding the aforementioned questions have been culled out from the pleadings of the parties and the records produced by the learned counsel for the State. The same are enumerated below:

(i) On 18.6.2004, Shri Kailash Joshi made a written request to the Principal Secretary, Housing Department, Government of Madhya Pradesh (for short, "the Principal Secretary, Housing") by describing himself as a Convenor of the Memorial Trust for reservation of 30 acres land comprised in Khasra Nos.83, 85/1 and 85/2 of village Bawadiya Kalan, in favour of the Memorial Trust to enable it to establish an All India Training Institute in the memory of late Shri Kushabhau Thakre.

(ii) Although, letter dated 18.6.2004 was addressed to the Principal Secretary, the same was actually handed over to Shri Babu Lal Gaur, the then Minister, Housing and Environment, Madhya Pradesh. He forwarded the same to the Principal Secretary for immediate action. The latter directed that steps be taken for placing the matter before the reservation committee. Simultaneously, letters were issued to

Commissioner-cum-Director, Town and Country Planning, Bhopal (respondent No.3) and Collector, Bhopal (respondent No. 4) to send their respective reports.

(iii) Respondent No.3 submitted report dated 8.7.2004 indicating therein that as per Bhopal Development Plan, land comprised in Khasra Nos.83 and 85/1 was reserved for residential and plantation purposes and Khasra No.85/2 was non government land. After going through the same, the Principal Secretary, Housing opined that land cannot be reserved for the Memorial Trust. However, Shri Rajendra Shukla, State Minister, Housing and Environment recorded a note that he had requested the Coordinator of the trust to send a revised proposal to the Government and directed that the new proposal be put up before him.

(iv) In his report dated 26.7.2004, respondent No. 4 mentioned that land measuring 11.96 acres comprised in Khasra No.86 and land measuring 22.06 acres comprised in Khasra No.85/1 (total area 34.02 acres) was Nazool land and the same was recorded in the name of the State Government and Khasra No.85/2 belonged to Bhoomidar. He also mentioned that the land in question is covered by the Capital Project but there are no trees, religious structure or electricity lines, though a road was proposed by the Town and Country Planning Department.

(v) While the process initiated for reservation of land was at a preliminary stage, Shri Kailash Joshi submitted an application dated 31.7.2004 to the Registrar, Public Trust, Bhopal (for short, 'the Registrar') under the Madhya Pradesh Public Trusts Act, 1951 (for short 'the 1951 Act') for registration of a trust in the name of respondent No. 5 by escribing himself and S/Shri M. Venkaiah Naidu, Lal Krishna Advani, Balwant P. Apte and Sanjay Joshi as Trustees. In the application, Shri M. Venkaiah Naidu was shown as the first President of the trust and Shri Kailash Joshi as its Secretary and Managing Trustee.

(vi) After complying with the procedure prescribed under the 1951 Act, the Registrar passed order dated 6.10.2004 for registration of the trust. The certificate of registration was issued on 24.12.2004.

(vii) In the meanwhile, Shri Kailash Joshi sent letter dated 11.8.2004 to the Principal Secretary, Housing by describing himself as Managing Trustee of respondent No.5 and submitted fresh proposal for reservation of 30 acres land out of Khasra Nos.82/1 and 83 of village Bawadiya Kalan in favour of respondent No.5.

(viii) By letter dated 20.9.2004, respondent No. 3 informed the Secretary, Housing and Environment Department (respondent No.2) that 4665 acres land of villages Bawadiya Kalan and Salaiya had already been notified in Madhya Pradesh Gazette dated 2.5.2003 for town development scheme at Misrod. He also indicated that land in Khasra Nos.82 and 83 is included in the Scheme and notice to this effect had already been published under Section 50 of the 1973 Act.

(ix) After some time, respondent No.3 sent letter dated 3.9.2004 to the Principal Secretary, Housing and pointed out that in the Bhopal Development Plan, 2005, land comprised in Khasra No.82 of Bawadiya Kalan village is earmarked for public and semi-public (health) purpose and land comprised in Khasra No.83 is earmarked for residential purpose. He also indicated that out of the total area of Khasra No.83 i.e. 11.96 acres, 24 metre wide road is proposed and 33 metres land adjacent to the bank of Kaliasot river is included in the green belt and out of 6 acres land for residential purpose, 2 acres had been reserved for office of the Madhya Pradesh Sanskrit Board and thus, only 4 acres land was available. He sent another letter dated 21.9.2004 to the Principal Secretary, Housing mentioning therein that use of land comprised in Khasra No. 82/1 of village Bawadiya Kalan is shown as "health under public and semi-public" in the Bhopal Development Plan

2005 and use of the land comprised in Khasra No.83 is shown as residential and if land is to be allotted to the Memorial Trust, then the earlier land use will be required to be cancelled.

(x) However, without effecting change of land use by following the procedure prescribed under the Act, the State Government issued order dated 25.9.2004 and reserved 30 acres land comprised in Khasra Nos. 82/1 and 83 of village Bawadiya Kalan in favour of the Memorial Trust in anticipation of approval by the land reservation committee, which was duly granted.

(xi) As a sequel to the reservation of land, Deputy Secretary, Revenue Department vide his letter dated 30.9.2004 directed respondent No.4 to immediately send proposal to respondent No.3 for allotment of land to the Memorial Trust.

(xii) In view of the directive issued by the State Government, Tehsildar, Capital Project (Nazul), Bhopal, on being instructed to do so, issued advertisement dated 4.10.2004 and invited objections against the proposed allotment of 30 acres land to the Memorial Trust from Khasra Nos.82/1 and 83 of village Bawadiya Kalan. The same was published in "Dainik Pradesh Times". However just after two days, respondent No.4 vide his letter dated 8.10.2004 submitted proposal for allotment of 30 acres land to the Memorial Trust. In paragraph 6 of his letter, respondent No.4 clearly indicated that the land falls within the limits of Bhopal Municipal Corporation and, as such, in terms of Chapter IV-1 of the Madhya Pradesh Revenue Book Circular (for short, "the RBC") , the same should not be allotted at a price less than the minimum price. He also indicated that price of the land would be Rs.7,84,8000/-, of which 10 per cent should be deposited as a condition for allotment. After 2½ months, respondent No. 4 sent letter dated 23.12.2004 to the Additional Secretary, Revenue Department and informed him that the Memorial Trust has not deposited 10 per cent of the premium.

(xiii) On coming to know the aforesaid communications, Shri Kailash Joshi sent letters dated 19.2.20005 and 20.3.2005 to respondent No. 4 and Secretary, Revenue Department respectively and assured that the premium will be deposited immediately after the allotment of land.

(xiv) After about 8 months of the submission of proposal for allotment of 30 acres land to the Memorial Trust, Shri Kailash Joshi sent letter dated 16.5.2005 to respondent No. 4 mentioning therein that the institute would require only 20 acres land. Thereupon, Nazul Officer, Capital Project, Bhopal sent letter dated 24.6.2005 to Shri Kailash Joshi and informed him that the premium of 20 acres land would be Rs.5,22,72,000/- and 10 per cent thereof i.e. Rs.52,27,200/- should be deposited as earnest money. However, the needful was not done and only Rs. 25,00,000/- were deposited on behalf of respondent No. 5.

(xv) For next about seven months, the matter remained under correspondence between different departments of the State Government. During the interregnum, Shri Babu Lal Gaur became Chief Minister of the State. On 24.10.2005, he directed that matter relating to allotment of land to respondent No.5 be put up in the next meeting of the Cabinet scheduled to be held on 26.10.2005. On the same day, Secretary, Revenue Department submitted a detailed note and suggested that keeping in view the limited resources available with the State Government, land should be auctioned so that the administration may garner maximum revenue. His suggestion was not accepted by the Council of Ministers, which decided to allot 20 acres land in the name of the Memorial Trust at the rate of Rs.40 lakhs per hectare. The decision of the State Government was communicated to respondent No. 4 vide order dated 27.1.2006.

(xvi) As a sequel to the allotment of land, Nazul Officer, Capital Project vide his letter dated 29.2.2006 called upon Shri

Kailash Joshi (Secretary of respondent No. 5) to deposit Rs. 55,94,000/-. However, instead of depositing the amount Shri Kailash Joshi addressed letter dated 31.3.2006 to the Revenue Minister with the request that the premium may be waived because the Institute was being established in public interest and will be training the elected representatives and undertaking research on important issues and it will have no source of income. The political set up of the State Government readily obliged him inasmuch as the issue was considered in the meeting of Council of Ministers held on 9.5.2006 and it was decided that the amount of Rs. 25,00,000/- may be treated as the total premium and land be given to the Memorial Trust by charging annual lease rent of Re.1 only. This decision was communicated to respondent No. 4 vide letter dated 19.6.2006.

(xvii) Subsequently, on a representation made by Shri Kailash Joshi, orders/communications dated 25.9.2004, 27.1.2006 and 19.6.2006 were amended and the name of respondent No. 5 was inserted in place of the Memorial Trust. Thereafter, lease agreement dated 6.1.2007 was executed between the State Government and Secretary of respondent No.5 in respect of 20 acres land for a period ending on 05.12.2037 at a premium of Rs. 25,00,000/- and an yearly rent of Re.1.

(xviii) Since the use of land comprised in Khasra Nos. 82/1 and 83 of village Bawadiya Kala was shown in the Bhopal Development Plan as public and semi-public (health) and the same could not have been utilized for the purpose of respondent No. 5, the State Government issued notification dated 6.6.2008 under Section 23-A(1)(a) of the Act proposing change of land use in respect of 19.75 acres land of Khasra No.82/1(part) of Village Bawadiya Kalan from public and semi-public (health) to public and semi public and invited objections/suggestions. The notification was published in the Official Gazette and two newspapers, namely, “Dainik Bhaskar” and

"Sandhya Prakash" dated 9th and 10th June, 2008. Five persons representing Bawadiya Uthaan Samiti, "Sangwari" - Society for the Resource Companion, Koshish Society, Neeraj Housing Society, Satpura Vigyan Sabha and Swadesh Developers and Colonizers filed their objections against the proposed change of land use. They were given opportunity of hearing by Deputy Secretary, Housing and Environment Department, who opined that the objections were untenable. Her recommendation was approved by the Secretary, Housing and Environment Department and the concerned Minister. Thereafter, final notification dated 5.9.2008 was issued under Section 23-A(2) of the Act.

4. The appellant, who is engaged in public welfare activities in general and consumers welfare in particular and claims to have received awards for good and meritorious performance including Swami Vivekananda Award challenged the allotment of land to respondent No.5 in Writ Petition No.10617 of 2007, on the grounds of violation of Article 14 of the Constitution and arbitrary exercise of power. The Division Bench of the High Court summarily dismissed the Writ Petition by observing that land belongs to the Government and it is for the Government to decide whom the same should be allotted as per its policy and no case of violation of any legal or constitutional right has been made out by the petitioner.

5. In response to the notice issued by this Court, counter dated 23.3.2010 was filed on behalf of respondent Nos.1 to 4 with an affidavit of Shri Kishore Kanyal, Nazul Officer/SDO, T.T. Nagar, Bhopal. After the arguments were heard on 3.1.2011, additional affidavit dated 10.1.2011 was filed by Shri Umashankar Bhargav, Nazul Officer, Bhopal giving the details of various proceedings which culminated in the allotment of land to the Memorial Trust, subsequent change in the name of the allottee and change of land use under Section 23-A. Along with his affidavit, Shri Umashankar Bhargav enclosed list showing allotment of land to various institutions, organizations and

individuals and copy of order dated 28.10.2009 passed by the Division Bench of the High Court in Writ Petition No.4088 of 2009. In paragraph 13 of his affidavit, the deponent made a categorical statement that neither the petitioner nor any member of the public submitted any objection against the proposed change of land use.

On 13.1.2011, the Court directed the State Government to file an affidavit to show as to how many allotments have been made at an yearly rent of Re. 1/-. Thereupon, Shri Anil Srivastava, Principal Secretary, Revenue Department, Government of Madhya Pradesh filed an affidavit along with list of 69 institutions and organizations to whom land was allotted at an annual rent of Re. 1 only without charging any premium.

After the arguments were concluded, another affidavit of Shri Umashankar Bhargav was filed on 18.1.2011. He tendered apology for making a wrong statement in paragraph 13 of affidavit dated 10.1.2011 and filed copies of the following documents:

i) Application dated 18.09.2007 made by Shri Kailash Joshi for erection of building in Khasra No. 82/1, Bawadiya Kalan;

ii) Letter dated 04.02.2008 sent by respondent No.3 to the Principal Secretary, Housing, proposing change of land use of Khasra No.82/1 (part) from public and semi public (health) and road to public and semi public and road;

iii) Paper publications dated 09.06.2008 and 10.06.2008;

iv) Notice dated 04.08.2008 issued to the objectors;

v) Note-sheets dated 01.09.2009 and 02.09.2009 of the Housing and Environment Department;

vi) Letter dated 13.09.2006 sent by respondent No.4 to the Principal Secretary, Housing, letter dated 06.10.2006 issued

by the State Government for amending memo dated 25.09.2004 and letter dated 02.11.2006 sent by the State Government to respondent No.4 for amendment of orders dated 27.01.2006 and 19.06.2006.

Learned counsel for the appellants also placed on record xerox copy of the cover page of Writ Petition No. 933 of 2005 filed by the appellant by way of public interest litigation challenging the allotment of land, which was reserved for park, lawn, parking and open spaces by Madhya Pradesh Housing Board to Punjabi Samaj, Bhopal as also copy of the interim order passed by the High Court whereby the allottee was restrained from raising further construction.

Arguments:

6. Shri Raju Ramchandran, learned senior counsel for the appellant, criticized the impugned order and argued that the High Court committed serious error by summarily dismissing the writ petition without examining and adjudicating the important questions of law relating to violation of Article 14 of the Constitution and the provisions of the Act and the Rules. Learned senior counsel submitted that the exercise undertaken by the State Government for reservation of land and allotment of a portion thereof to respondent No.5 without any advertisement and without adopting a procedure consistent with the doctrine of equality enshrined in Article 14 of the Constitution and waiver of a substantial portion of the premium are acts of gross favoritism and, therefore, the allotment in question should be declared as nullity. Shri Ramchandran then argued that the notifications issued by the State Government for change of land use are liable to be quashed because the same are ultra vires the provisions of Section 23A(1) and (2) of the Act. Learned senior counsel referred to notification dated 06.06.2008 to show that the same did not contemplate modification of Bhopal Development Plan for any proposed project of the Government of India or the State Government and

its enterprise or for any proposed project relevant to development of the State or for implementing a scheme framed by the Town and Country Development Authority (for short 'the Authority') and argued that the development plan cannot be modified under Section 23A(1) for the benefit of a private individual, or group of persons or organization or institution. Learned senior counsel submitted that the notice issued under Section 23A(2) was incomplete inasmuch as the draft modified plan was not published so as to enable the members of public to effectively oppose the proposed modification of the development plan. In the end, Shri Ramchandran argued that the decision of the State Government to indirectly reserve the land in favour of Respondent No.5 with retrospective effect is liable to be quashed because as on the date of reservation the said respondent had not been registered as a trust.

7. Shri Ravi Shanker Prasad, learned senior counsel appearing for the State of Madhya Pradesh and other official respondents, challenged the locus standi of the appellant on the premise that the averments contained in the writ petition were vague to the core and the High Court rightly refused to entertain the same as a petition filed in public interest. Learned senior counsel then referred to the provisions of the Act, the Madhya Pradesh Government Rules of Business, the RBC and argued that the impugned allotment cannot be termed as arbitrary or vitiated due to violation of Article 14 because the State Government has a long standing policy of allotting land to social, cultural, religious, educational and other similar organizations/ institutions without issuing advertisement or inviting applications from the public. In support of this argument, learned senior counsel referred to the list of the allottees annexed with affidavit dated 10.1.2011 of Shri Umashankar Bhargav. Learned senior counsel relied upon the judgments of this Court in *Ugar Sugar Works Ltd. v. Delhi Administration* (2001) 3 SCC 635, *State of U.P. v. Chaudhary Ram Beer Singh* (2005) 8 SCC 550, *State of Orissa v. Gopinath Dash* (2005) 13 SCC 495 and *Meerut Development Authority v. Association of Management*

Studies (2009) 6 SCC 171 and argued that the Court cannot exercise the power of judicial review to nullify the policy framed by the State Government to allot Nazul land without advertisement. Shri Ravi Shanker Prasad referred to paragraph 26 of the RBC and argued that the State Government is possessed with the power to make allotment without charging premium or waive the same. Learned senior counsel then relied upon a passage from Chapter IV of the Law of Trusts and Charities by Atul M Setalvad, judgments of this Court in *State of Uttar Pradesh v. Bansi Dhar* (1974) 1 SCC 447 and *Canbank Financial Services Ltd. v. Custodian* (2004) 8 SCC 355 and argued that intention to create a trust was sufficient for making an application for reservation and allotment of land in favour of respondent No.5. He submitted that while making request for reservation of land in favour of the Memorial Trust, Shir Kailash Joshi had made it clear that the same will be used for establishing a training institute in the name of late Shri Khushabhau Thakre and this was a clear indication to the State Government that a trust will be created for managing the institute.

8. Shri Ranjit Kumar, learned senior counsel appearing for respondent No.5, submitted that this Court should not interfere with the impugned allotment because at every stage of the proceedings i.e. reservation of land, formation of trust and change of land use, objections were invited from public but at no stage the appellant had filed any objection. The learned counsel extensively referred to the RBC, the provisions of the Act and Madhya Pradesh Nagar Tatha Gram Nivesh Viksit Bhoomiyo, Griho, Bhavano Tatha Anya Sanrachanao Ka Vyayan Niyam, 1975 (for short 'the Rules') and argued that the allotment of land to respondent No.5 and change of land use are not vitiated due to violation of any constitutional or legal principle warranting interference by the Court. Shri Ranjit Kumar relied upon Sections 3,5 and 6 of the Indian Trusts Act, 1882 and Sections 2,4,5,6,8,11,32 and 33 of the 1951 Act and argued that intention to create trust was sufficient to enable Shri

Kailash Joshi to make applications for reservation and allotment of land in the name of the institute and, in any case, the appellant cannot take advantage of non-registration of the trust up to 6.10.2004 because on the date of actual allotment i.e. 27.01.2006 the trust stood registered. Learned senior counsel also emphasized that once the trust was registered, the factum of registration will relate back to the date of application i.e. 31.07.2004, which was prior to the reservation of land by the State Government. In the end, Shri Ranjit Kumar submitted that the Court may not nullify the impugned allotment at the instance of the appellant because it did not question hundreds of similar allotments made in favour of other organizations/institutions. Learned senior counsel also relied upon the judgment of this Court in *Harsh Dhingra v. State of Haryana* (2001) 9 SCC 550 and argued that the impugned allotment may not be quashed and the law which may be laid down by this Court should govern the allotments, which may be made in future.

9. We have considered the respective submissions. For deciding the questions arising in the appeal, it will be useful to notice the relevant provisions of the Act, the Rules and the RBC.

10. The Act was enacted to make provisions for planning and development and use of land; to make better provisions for the preparation of development plans and zoning plans with a view to ensure that town planning schemes are made in a proper manner and they are effectively executed. The Act also provides for constitution of Town and Development Authority for proper implementation of Town and Country Development Plan and for the development and administration of special areas through Special Area Development Authority and also to make provisions for the compulsory acquisition of land required for the purpose of the development plans and for achieving the objects of the Act. Chapter IV of the Act (Sections 13 to 19) contains provisions relating to planning areas and development plans. Under Section 13(1), the State Government is

empowered to constitute planning areas for the purposes of the Act and define limits thereof. In terms of Section 13 (2), the State Government can alter the limits of the planning area, amalgamate two or more planning areas, divide any planning area into two or more planning areas and also declare that whole or part of the area constituting the planning area shall cease to be so. Section 14 casts a duty on the Director of Town and Country Planning to prepare an existing land use map, a development plan and do other activities specified in clauses (d) and (e) of that section. Section 15 contains the procedure for preparation of existing land use map. Section 16 lays down that after publication of the existing land use map under Section 15 no person shall change the use of any land or carry out any development of land for any purpose other than those indicated in the existing land use map without prior permission of the Director. It also lays down that no local authority or any officer or other authority shall grant permission for change in use of land in violation of the existing land use map. Section 17 (as amended by M.P. Act No. 8 of 1996) lays down that a development plan shall take into account any draft five-year and Annual Development plan of the district prepared under the Madhya Pradesh Zila Yojana Samiti Adhiniyam, 1995 in respect of the planning area and shall broadly indicate the land use proposed in the planning area; allocate broadly areas or zones of land, keeping in view the regulations of natural hazard prone areas, for residential, industrial, commercial or agricultural purposes; open spaces, parks and gardens, green-belts, zoological gardens and playgrounds; public institutions and offices and such special purposes as the Director may consider proper. Other factors enumerated in clauses (c) to (j) are also required to be taken into consideration while preparing a development plan. Section 17-A(1) mandates the constitution of a Committee consisting of various persons specified in clauses (a) to (i) thereof. The role of the Committee is to hear the objections received after publication of the draft development plan under Section 18 and suggest modifications or alterations, if any. Section 18 provides for publication of the

draft development plan for inviting objections and suggestions from public. The objections and suggestions, if any, received are required to be placed before the Committee constituted under Section 17-A(1) which shall, after giving opportunity of hearing to the affected persons, suggest appropriate modifications in the draft development plan. After receiving the report of the Committee, the Director is required to submit the development plan for approval of the Government. Section 19 provides for approval of the development plan with or without modifications by the State Government. In a given case the State Government can return the development plan with a direction that fresh development plan be prepared. Where the State Government approves the development plan with modification, a notice is required to be published in the Gazette inviting objections and suggestions in respect of such modification and final plan is to be published after considering the objections and suggestions, if any, received and giving opportunity of hearing to those desirous of being heard. In terms of sub-section (5) of Section 19 the development plan comes into operation from the date of publication of the notice in the Gazette. Chapter V deals with zoning plan. Section 20 lays down that the local authority may, on its own motion, prepare a zoning plan after publication of the development plan. If the State Government sends a requisition for that purpose then also the local authority is required to prepare a zoning plan. Section 21 specifies the matters which are to be incorporated in the zoning plan. By virtue of Section 22, the provisions of Sections 18 and 19 have been made applicable for the purpose of preparation, publication, approval and operation of zoning plan. Section 23(1) empowers the Director to undertake a review and evaluation of the development plan either on his own motion or in terms of the directions given by the State Government. Likewise, under Section 23(4) the local authority can undertake review and evaluation of the zoning plan on its own motion or as per the direction of the State Government or the Director. Section 23-A was inserted in the Act by M.P. Act 22 of 1992

and was substituted by M.P. Act 22 of 2005. In terms of Section 24(1), the overall control of development and use of land in the State vests in the State Government. Section 24(2) lays down that subject to the control of the State Government under sub-section (1) and the rules made under the Act, the overall control of development and use of land in the planning area shall vest in the Director from the date appointed by the State Government by notification. Sub-section (3) empowers the State Government to make rules to regulate control of development and use of land in planning area. Section 25(1) lays down that after coming into force of the development plan, the use and development of land shall be in accordance with the development plan. Section 26 lays down that after coming into operation of the development plan, no person shall change the use of any land or carry out any development without written permission of the Director. Proviso to this section contains some exceptions in which works can be carried out without prior permission of the Director. Chapter VII (Sections 38 to 63A) provides for establishment of Town and Country Development Authority and its status as a body corporate, constitution of the Authority, tenure and remuneration etc. of Chairman and Vice Chairman, appointment of Chief Executive Officer and other officers and servants. Section 49 specifies the factors which may be included in a town development scheme. Section 50 regulates preparation of a town development scheme and publication thereof in the Gazette etc. Section 58 empowers the authority to make regulation for disposal of developed lands, houses, buildings and other structures. This is subject to the rules which may be made by the State Government in this behalf. Section 85, which finds place in Chapter XI, confers power upon the State Government to make rules for carrying out the purposes of the Acts. For the sake of reference, Sections 14(a), (b), 15, 17(a), (b), 23-A, 25(1), 26 and 58 of the Act are reproduced below:

"14. **Director to prepare development plans.** —Subject to the provisions of this Act and the rules made thereunder,

the Director shall, —

(a) prepare an existing land use map;

(b) prepare a development plan;

15. Existing land use maps -

(1) The Director shall carry out the survey and prepare an existing land use map indicating the natural hazard prone areas] and, forthwith publish the same in such manner as may be prescribed together with public notice of the preparation of the map and of place or places where the copies may be inspected, inviting objections and suggestions in writing from any person, with respect thereto within thirty days from the date of publication of such notice.

(2) After the expiry of the period specified in the notice published under sub-section (1), the Director may, after allowing a reasonable opportunity of being heard to all such persons who have filed the objections or suggestions, make such modifications therein as may be considered desirable.

(3) As soon as may be after the map is adopted with or without modifications the Director shall publish a public notice of the adoption of the map and the place or places where the copies of the same may be inspected.

(4) A copy of the notice shall also be published in the Gazette and it shall be conclusive evidence of the fact that the map has been duly prepared and adopted.

17. Contents of development plan.— A development plan shall take into account any draft five-year and Annual Development plan of the district prepared under the Madhya Pradesh Zila Yojana Samiti Adhiniyam, 1995 (No. 19 of 1995) in which the planning area is situated and shall,

(a) indicate broadly the land use proposed in the planning area;

(b) allocate broadly areas or zones of land, keeping in view the regulations for natural hazard prone areas, for–

(i) residential, industrial, commercial or agricultural, purpose;

(ii) open spaces, parks and gardens, green-belts, zoological gardens and playgrounds;

(iii) public institutions and offices;

(iv) such special purposes as the Director may deem fit;

23-A. Modification of Development Plan or zoning Plan by State Government in certain circumstances.–

(1)(a) The State Government may, on its own motion or on the request of a Town and Country Development Authority, make modification in the development plan or the zoning plan for any proposed project of the Government of India or the State Government and its enterprises or for any proposed project related to development of the State or for implementing a scheme of a Town and Country Development Authority and the modification so made in the development plan or zoning plan shall be an integral part of the revised development plan or zoning plan.

(b) The State Government may, on an application from any person or an association of persons for modification of development plan or zoning plan for the purpose of undertaking an activity or scheme which is considered by the State Government or the Director, on the advice of the Committee constituted by the State Government for this purpose, to be beneficial to the society, make such modification in the development plan or zoning plan as may be deemed necessary in the circumstances of the

case and the modification so made in the development plan or zoning plan shall be an integral part of the revised development plan or zoning plan.

(2) The State Government shall publish the draft of modified plan together with a notice of the preparation of the draft modified plan and the place or places where the copies may be inspected, continuously for two days in such two daily newspapers which are in the approved list of Government for advertisement purpose having circulation in the area to which it relates and a copy thereof shall be affixed in a conspicuous place in the office of the Collector, inviting objections and suggestions in writing from any person with respect thereto within fifteen days from the date of publication of such notice.

After considering all the objections and suggestions as may be received within the period specified in the notice and shall, after giving reasonable opportunity to all persons affected thereby of being heard, the State Government shall confirm the modified plan.

(3) The provisions of Sections 18, 19 and 22 shall not apply for modification made by the State Government."

25. Conformity with development plan. –(1) After the coming into force of the development plan, the use and development of land shall conform to the provisions of the development plan:

[Provided that the [Director] may, as its discretion, permit the continued use of land for the purpose for which it was being used at the time of the coming into operation of the development plan:]

Provided further than such permission shall not be granted for a period exceeding seven years from the date of coming into operation of the development plan.

26. Prohibition of development without permission.- After the coming into operation of the development plan, no person shall change the use of any land or carry out any development of land without the permission in writing of the Director.

Provided that no such permission shall be necessary,-

(a)for carrying out works for the maintenance, repair or alteration of any building which does not materially alter the external appearance of the building;

(b)for carrying out of work for the improvement or maintenance of a highway, road or public street by the Union or State Government or an authority established under this Act or by a local authority having jurisdiction, provided that such maintenance or improvement does not change the road alignment contrary to the provisions of the development plan;

(c)for the purpose of inspecting, repairing or renewing any drains, sewers, mains, pipes, cables, telephone or other apparatus including the breaking open of any street or other land for that purpose;

(d) for the excavation or soil-shaping in the interest of agriculture;

(e) for restoration of land to its normal use where land has been used temporarily for any other purposes;

(f) for use, for any purpose incidental to the use of building for human habitation, or any other building or land attached to such building;

(g) for the construction of a road intended to give access to land solely for agricultural purposes:

[Provided further that in a planning area to which rules made under sub-section (3) of Section 24 are made

applicable, such permission may be given by such authority as may be provided in the said rules.]

58. Disposal of land, buildings and other development works.- Subject to such rules as may be made by the State Government in this behalf, the Town and Country Development Authority shall, by regulation, determine the procedure for the disposal of developed lands, houses, buildings and other structures."

11. In exercise of the powers conferred upon it under Section 58 read with Section 85, the State Government framed the Rules. Rule 3 declares that no Government land vested in or managed by the Authority shall be transferred except with the general or special sanction of the State Government. Rule 4 lays down that all other land i.e. "the Authority Land" shall be transferred in accordance with the following rules. Rule 5 prescribes four modes of transfer of the Authority land. These are:

(a) By direct negotiations with the party; or

(b) By public auction; or

(c) By inviting tenders; or

(d) Under Concessional terms."

Rules 5-A to 27 enumerate the steps required to be taken for transfer of land by different modes. Rule 28 lays down that transfer of the Authority land under Rule 27 shall be made on such terms and conditions as may be fixed by the Authority. Rules 29 to 48 provide for matters ancillary to the transfer of the Authority land i.e. execution of lease, payment of rent by the transferee etc.

12. What is significant to be noted is that there is no provision in the Act or the Rules for disposal and/or transfer of land in respect of which a regional plan or development plan

or zonal plan has been prepared. The only provision which has nexus with the Government land is contained in Rule 3 which, as mentioned above, imposes a bar against the transfer of Government land vested in or managed by the Authority except with the general or special sanction of the State Government.

13. We may now notice the relevant provisions of the RBC some of which have been relied upon by the learned senior counsel appearing for the respondents to justify the reservation and allotment of land in favour of respondent No. 5. Part IV of the RBC deals with the management and regulation of Nazul land falling within the limits of municipal corporations, municipal councils and notified areas; and transfer thereof by lease, sale etc. Paragraph 12 of this part lays down that Nazul land can be disposed of by way of permanent lease, temporary lease, on Bedawa karar, annual licence and also by transfer to the State Administration and department of any other State Government or Government of India or by vesting in any local authority. In terms of paragraph 13(1), permanent lease can be granted either by auction or without auction. Paragraph 13(2) enumerates the contingencies in which permanent lease cannot be granted by auction. These include when the land in question is used for religious, educational, co-operative, public or social purposes. Paragraph 14 provides for reservation of the plots which are sold with the approval of the State Government on the conditions separately decided for each such plot. Paragraph 17 specifies the authorities who are competent to pass orders in respect of Nazul land. Under this paragraph, the power to grant lease of Nazul land for educational institutions, playgrounds, hospitals and other public purposes on concessional rate as also the power to grant lease of Nazul land for 30 years or less with a right of renewal vests with the State Government, if the mode of disposal is otherwise than auction. The residuary power also vests with the State Government. Paragraph 18 lays down that a petition can be submitted to the higher authority against any order which may be passed by an officer subordinate to the State Government. Paragraph 19

lays down that every application for permanent lease of Nazul land should be made to the District Collector along with the relevant documents, maps etc. Under paragraph 20, the Collector is empowered to reject the application by recording reasons. If the application is not rejected then the Collector has to adopt the procedure specified in clauses (a), (b), (c), (d), (e) and (f) of this paragraph. If the plot of land is to be sold by auction then the same is required to be advertised or publicized by a recognized method. Paragraph 21 prescribes the mode of auction of lease rights. Any persons, desirous of participating in the auction is required to deposit 10 per cent of the premium. Once the bid is approved by the competent authority, the bidder has to deposit the balance amount within 30 days. This paragraph also provides for forfeiture of the premium and recovery of the amount from the defaulter. Paragraph 23 specifies the minimum premium for different categories of plots. Paragraph 24 lays down the procedure to be followed for disposal of plot without auction. If any plot is proposed to be transferred at a concessional premium then the approval of the State Government is sine qua non. In case, the Collector is satisfied that the plot of land should be given without auction then the allottee is required to pay premium equivalent to average market price determined on the basis of the sale instances of last five years. In terms of paragraph 25, the Collector is required to submit report to the Commissioner or to the Government through the Commissioner after scrutiny of the matter at different stages. Paragraph 26 lays down that when Nazul land is allotted to non-government organisations or persons on favourable terms then the conditions specified therein should be scrupulously observed and there should be rigorous scrutiny of the proposal. Under this paragraph, land can be allotted to educational, cultural and philanthropic institutions/organisations or Cooperative Societies, Housing Board and Special Area Authority constituted by the State Government. However, unregistered societies and private trusts are not eligible for allotment of land. This paragraph also

contemplates allotment of land for religious purposes or to Jain Temple, Mosque, Church, Gurdwara etc. provided that there is no similar place within two kilometers of the site proposed to be allotted. Clause 1(a) and (b) of this paragraph prescribes the premium required to be paid by different types of bodies and institutions. Clause 3 prescribes the condition relating to construction of the building and Clause 5 provides for resumption of land in certain eventualities. By Circular No.6/16/91/Sat/SA/2B, the Government prescribed the revised rates for allotment of Nazul land to caste and non-caste based social, religious and philanthropic organizations, the organizations engaged in welfare of women, educational and cultural organizations, public hospitals, co-operative societies, agriculture market committee, municipal corporation etc. By Circular No. F.6-173/96/Sat/SA/2B/Nazul dated 31.5.1996, the State Government prescribed the premium and rent to be charged for allotment of land to caste based and social institutions. By Circular No. F No. 6-140/07/SAT/Nazul dated 31.8.2007, the State Government decided to allot land without charging any premium at an annual rent of Re. 1/- for housing schemes meant for slum dwellers.

14. We shall now consider whether the State Government could allot 20 acres of land to respondent No.5 without issuing an advertisement or adopting a procedure consistent with the doctrine of equality so as to enable other similar organizations/institutions to participate in the process of allotment.

15. The concept of 'State' has changed in recent years. In all democratic dispensations the State has assumed the role of a regulator and provider of different kinds of services and benefits to the people like jobs, contracts, licences, plots of land, mineral rights and social security benefits. In his work "The Modern State" MacIver (1964 Paperback Edition) advocated that the State should be viewed mainly as a service corporation. He highlighted difference in perception about the theory of State in the following words:

> "To some people State is essentially a class-structure, "an organization of one class dominating over the other classes"; others regard it as an organisation that transcends all classes and stands for the whole community. They regard it as a power-system. Some view it entirely as a legal structure, either in the old Austinian sense which made it a relationship of governors and governed, or, in the language of modern jurisprudence, as a community "organised for action under legal rules". Some regard it as no more than a mutual insurance society, others as the very texture of all our life. Some class the State as a great "corporation" and others consider it as indistinguishable from society itself."

16. When the Constitution was adopted, people of India resolved to constitute India into a Sovereign Democratic Republic. The words 'Socialist' and 'Secular' were added by the Constitution (Forty-second Amendment) Act, 1976 and also to secure to all its citizens Justice - social, economic and political, Liberty of thought, expression, belief, faith and worship; Equality of status and/or opportunity and to promote among them all Fraternity assuring the dignity of the individual and the unity and integrity of the Nation. The expression 'unity of the Nation' was also added by the Constitution (Forty-second Amendment) Act, 1976. The idea of welfare State is ingrained in the Preamble of the Constitution. Part III of the Constitution enumerates fundamental rights, many of which are akin to the basic rights of every human being. This part also contains various positive and negative mandates which are necessary for ensuring protection of the Fundamental Rights and making them real and meaningful. Part IV contains 'Directive Principles of State Policy' which are fundamental in the governance of the country and it is the duty of the State to apply these principles in making laws. Article 39 specifies certain principles of policy which are required to be followed by the State. Clause (b) thereof provides that the State shall, in particular, direct its policy towards securing that the ownership and control of the material

resources of the community are so distributed as best to sub-serve the common good. Parliament and Legislatures of the States have enacted several laws and the governments have, from time to time, framed policies so that the national wealth and natural resources are equitably distributed among all sections of people so that have-nots of the society can aspire to compete with haves.

17. The role of the Government as provider of services and benefits to the people was noticed in *R.D. Shetty v. International Airport Authority of India* (1979) 3 SCC 489 in the following words:

> "Today the Government in a welfare State, is the regulator and dispenser of special services and provider of a large number of benefits, including jobs, contracts, licences, quotas, mineral rights, etc. The Government pours forth wealth, money, benefits, services, contracts, quotas and licences. The valuables dispensed by Government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationships to Government are of many kinds. They comprise social security benefits, cash grants for political sufferers and the whole scheme of State and local welfare. Then again, thousands of people are employed in the State and the Central Governments and local authorities. Licences are required before one can engage in many kinds of businesses or work. The power of giving licences means power to withhold them and this gives control to the Government or to the agents of Government on the lives of many people. Many individuals and many more businesses enjoy largesse in the form of Government contracts. These contracts often resemble subsidies. It is virtually impossible to lose money on them and many enterprises are set up primarily to do business with Government. Government owns and controls hundreds of

> acres of public land valuable for mining and other purposes. These resources are available for utilisation by private corporations and individuals by way of lease or licence. All these mean growth in the Government largesse and with the increasing magnitude and range of governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms. Some of these forms of wealth may be in the nature of legal rights but the large majority of them are in the nature of privileges……."

18. For achieving the goals of Justice and Equality set out in the Preamble, the State and its agencies/instrumentalities have to function through political entities and officers/officials at different levels. The laws enacted by Parliament and State Legislatures bestow upon them powers for effective implementation of the laws enacted for creation of an egalitarian society. The exercise of power by political entities and officers/officials for providing different kinds of services and benefits to the people always has an element of discretion, which is required to be used in larger public interest and for public good. In principle, no exception can be taken to the use of discretion by the political functionaries and officers of the State and/or its agencies/instrumentalities provided that this is done in a rational and judicious manner without any discrimination against anyone. In our constitutional structure, no functionary of the State or public authority has an absolute or unfettered discretion. The very idea of unfettered discretion is totally incompatible with the doctrine of equality enshrined in the Constitution and is an antithesis to the concept of rule of law.

19. In his work 'Administrative Law' (6th) Edition, Prof. H.W.R. Wade, highlighted distinction between powers of public authorities and those of private persons in the following words:

> "... The common theme of all the authorities so far mentioned is that the notion of absolute or unfettered

discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, no absolutely - that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms."

Prof. Wade went on to say:

"..... *The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.*

There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed. Nor is this principle an oddity of British or American law; it is equally prominent in French law. Nor is it a special restriction which fetters only local authorities: it applies no less to ministers of the Crown. Nor is it confined to the sphere of administration: it operates wherever discretion is given for some public purpose, for example where a judge has a discretion to order jury trial. It is only where powers are given for the personal benefit of the person empowered that the discretion is absolute. Plainly this can have no application in public law.

For the same reasons there should in principle be no such thing as unreviewable administrative discretion, which should be just as much a contradiction in terms as unfettered discretion. The question which has to be asked is what is the scope of judicial review, and in a few special cases the scope for the review of discretionary decisions may be minimal. It remains axiomatic that all discretion is

capable of abuse, and that legal limits to every power are to be found somewhere."

(emphasis supplied)

20. *Padfield v. Minister of Agriculture, Fishery and Food* (1968) A.C. 997, is an important decision in the area of administrative law. In that case the Minister had refused to appoint a committee to investigate the complaint made by the members of the Milk Marketing Board that majority of the Board had fixed milk prices in a way that was unduly unfavourable to the complainants. The Minister's decision was founded on the reason that it would be politically embarrassing for him if he decided not to implement the committee's decision. While rejecting the theory of absolute discretion, Lord Reid observed:

"Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reasons, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court."

21. In *Breen v. Amalgamated Engineering Union* (1971) 2 QB 175, Lord Denning MR said:

“The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevantly. It its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision

cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside. That is established by Padfield v. Minister of Agriculture, Fisheries and Food which is a landmark in modern administrative law."

22. In *Laker Airways Ltd. v. Department of Trade* 1977 QB 643, Lord Denning discussed prerogative of the Minister to give directions to Civil Aviation Authorities overruling the specific provisions in the statute in the time of war and said:

"Seeing that prerogative is a discretion power to be exercised for the public good, it follows that its exercise can be examined by the Courts just as in other discretionary power which is vested in the executive."

23. This Court has long ago discarded the theory of unfettered discretion. In *S.G. Jaisinghani v. Union of India* AIR 1967 SC 1427, Ramaswami, J. emphasised that absence of arbitrary power is the foundation of a system governed by rule of law and observed:

"In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. (See Dicey-"Law of the Constitution" - Tenth Edn., Introduction ex.). 'Law has reached its finest moments', stated Douglas, J. in United States v. Underlick (1951 342 US 98:96 Law Ed 113),

"when it has freed man from the unlimited discretion of some ruler..... Where discretion is absolute, man has always suffered'. It is in this sense that the rule of law maybe said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in the case of John Wilkes (1770 98 ER 327),'means sound discretion guided by law. It must be governed by rule, not humour it must not be arbitrary, vague and fanciful"

24. In *Ramana Dayaram Shetty v. International Airport Authority of India* (supra), Bhagwati, J. referred to an article by Prof. Reich “The New Property” which was published in 73 Yale Law Journal. In the article, the learned author said, “that the Government action be based on standard that are not arbitrary or unauthorized.” The learned Judge then quoted with approval the following observations made by Mathew, J. (as he then was) in *V. Punnen Thomas v. State of Kerala* AIR 1969 Ker. 81 (Full Bench):

"The Government is not and should not be as free as an individual in selecting recipients for its largesses. Whatever its activities, the Government is still the Government and will be subject to the restraints inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal."

Bhagwati, J. also noticed some of the observations made by Ray, C.J. in *Eursian Equipments and Chemicals Ltd. v. State of West Bengal* (1975) 1 SCC 70 who emphasized that when the Government is trading with public the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions and held:

“…….This proposition would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. It must, therefore, be taken to be the law that where the Government

is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. *The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences, etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.*"

(emphasis supplied)

25. In *Kasturi Lal Lakshmi Reddy v. State of J And K* (1980) 4 SCC 1, Bhagwati J. speaking for the Court observed:

"Where any governmental action fails to satisfy the test of reasonableness and public interest discussed above and is found to be wanting in the quality of reasonableness or lacking in the element of public interest, it would be liable to be struck down as invalid. It must follow as a necessary corollary from this proposition that the Government *cannot act in a manner which would benefit a private party at the cost of the State; such an action would be both unreasonable and contrary to public interest. The Government, therefore, cannot, for example, give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so.* Such

considerations may be that some directive principle is sought to be advanced or implemented or that the contract or the property is given not with a view to earning revenue but for the purpose of carrying out a welfare scheme for the benefit of a particular group or section of people deserving it or that the person who has offered a higher consideration is not otherwise fit to be given the contract or the property. We have referred to these considerations only illustratively, for there may be an infinite variety of considerations which may have to be taken into account by the Government in formulating its policies and it is on a total evaluation of various considerations which have weighed with the Government in taking a particular action, that the court would have to decide whether the action of the Government is reasonable and in public interest. But one basic principle which must guide the court in arriving at its determination on this question is that there is always a presumption that the governmental action is reasonable and in public interest and it is for the party challenging its validity to show that it is wanting in reasonableness or is not informed with public interest. This burden is a heavy one and it has to be discharged to the satisfaction of the court by proper and adequate material. The court cannot lightly assume that the action taken by the Government is unreasonable or without public interest because, as we said above, there are a large number of policy considerations which must necessarily weigh with the Government in taking action and therefore the court would not strike down governmental action as invalid on this ground, unless it is clearly satisfied that the action is unreasonable or not in public interest. *But where it is so satisfied, it would be the plainest duty of the court under the Constitution to invalidate the governmental action. This is one of the most important functions of the court and also one of the most essential for preservation of the rule of law. It is imperative in a democracy governed by the rule of law that governmental action must be kept*

within the limits of the law and if there is any transgression, the court must be ready to condemn it. It is a matter of historical experience that there is a tendency in every Government to assume more and more powers and since it is not an uncommon phenomenon in some countries that the legislative check is getting diluted, it is left to the court as the only other reviewing authority under the Constitution to be increasingly vigilant to ensure observance with the rule of law and in this task, the court must not flinch or falter. It may be pointed out that this ground of invalidity, namely, that the governmental action is unreasonable or lacking in the quality of public interest, is different from that of mala fides though it may, in a given case, furnish evidence of mala fides."

(emphasis supplied)

26. In *Common Cause, A Registered Society v. Union of India* (1996) 6 SCC 530 the two Judge Bench considered the legality of discretionary powers exercised by the then Minister of State for Petroleum and Natural Gas in the matter of allotment of petrol pumps and gas agencies. While declaring that allotments made by the Minister were wholly arbitrary, nepotistic and motivated by extraneous considerations the Court said:

"The Government today — in a welfare State — provides large number of benefits to the citizens. It distributes wealth in the form of allotment of plots, houses, petrol pumps, gas agencies, mineral leases, contracts, quotas and licences etc. Government distributes largesses in various forms. A Minister who is the executive head of the department concerned distributes these benefits and largesses. He is elected by the people and is elevated to a position where he holds a trust on behalf of the people. He has to deal with the people's property in a fair and just manner. He cannot commit breach of the trust reposed in him by the people."

27. The Court also referred to the reasons recorded in the orders passed by the Minister for award of dealership of petrol pumps and gas agencies and observed:

"24……..While Article 14 permits a reasonable classification having a rational nexus to the objective sought to be achieved, it does not permit the power to pick and choose arbitrarily out of several persons falling in the same category. A transparent and objective criteria/ procedure has to be evolved so that the choice among the members belonging to the same class or category is based on reason, fair play and non-arbitrariness. It is essential to lay down as a matter of policy as to how preferences would be assigned between two persons falling in the same category. If there are two eminent sportsmen in distress and only one petrol pump is available, there should be clear, transparent and objective criteria/procedure to indicate who out of the two is to be preferred. Lack of transparency in the system promotes nepotism and arbitrariness. It is absolutely essential that the entire system should be transparent right from the stage of calling for the applications up to the stage of passing the orders of allotment."

28. In *Shrilekha Vidyarthi v. State of U.P.* (1991) 1 SCC 212, the Court unequivocally rejected the argument based on the theory of absolute discretion of the administrative authorities and immunity of their action from judicial review and observed:

".... We have no doubt that the Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the Preamble. In our opinion, it would be alien to the Constitutional Scheme to accept the argument of exclusion of Article 14 in contractual matters. The scope and permissible grounds of judicial review in such matters and the relief which may be available are

different matters but that does not justify the view of its total exclusion. This is more so when the modern trend is also to examine the unreasonableness of a term in such contracts where the bargaining power is unequal so that these are not negotiated contracts but standard form contracts between unequals……..

Even assuming that it is necessary to import the concept of presence of some public element in a State action to attract Article 14 and permit judicial review, we have no hesitation in saying that the ultimate impact of all actions of the State or a public body being undoubtedly on public interest, the requisite public element for this purpose is present also in contractual matters. We, therefore, find it difficult and unrealistic to exclude the State actions in contractual matters, after the contract has been made, from the purview of judicial review to test its validity on the anvil of Article 14.

It can no longer be doubted at this point of time that Article of the Constitution of India applies also to matters of governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional. (See *Ramana Dayaram Shetty v. The International Airport Authority of India* [(1979) 3 SCR 1014: AIR 1979 SC 1628] and *Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir* [(1980) 3 SCR 1338: AIR 1980 SC 1992], In *Col. A.S. Sangwan v. Union of India* [(1980 (Supp) SCC 559 : AIR 1981 SC 1545], while the discretion to change the policy in exercise of the executive power, when not trammelledly the statute or rule, was held to be wide, it was emphasised as imperative and implicit in Article 14 of the Constitution that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action

qualifying for its validity on this touch-stone, irrespective of the field of activity of the State, has long been settled. Later decisions of this Court have reinforced the foundation of this tenet and it would be sufficient to refer only to two recent decisions of this Court for this purpose."

29. Similarly, in *L.I.C. of India v. Consumer Education & Research Centre* (1995) 5 SCC 482, the Court negatived the argument that exercise of executive power of the State was immune from judicial review and observed:

"…. Every action of the public authority or the person acting in public interest or its acts give rise to public element, should be guided by public interest. It is the exercise of the public power or action hedged with public element becomes open to challenge. If it is shown that the exercise of the power is arbitrary, unjust and unfair it should be no answer for the State, its instrumentality, public authority or person whose acts have the insignia of public element to say that their actions are in the field of private law and they are free to prescribe any conditions or limitations in their actions as private citizens, similicitor, do in the field of private law. Its actions must be based on some rational and relevant principles. It must not be guided by traditional or irrelevant considerations.....

This Court has rejected the contention of an instrumentality or the State that its action is in the private law field and would be immune from satisfying the tests laid under Article 14. The dichotomy between public law and private law rights and remedies, though may not be obliterated by any straight jacket formula, it would depend upon the factual matrix. The adjudication of the dispute arising out of a contract would, therefore, depend upon facts and circumstances in a given case. The distinction between public law remedy and private law filed cannot be demarcated with precision. Each case will be examined on its facts and circumstances to find out the nature of the

activity, scope and nature of the controversy. The distinction between public law and private law remedy has now become too thin and practicably obliterated.....

In the sphere of contractual relations the State, its instrumentality, public authorities or those whose acts bear insignia of public element, action to public duty or obligation are enjoined to act in a manner i.e. fair, just and equitable, after taking objectively all the relevant options into consideration and in a manner that is reasonable, relevant and germane to effectuate the purpose for public good and in general public interest and it must not take any irrelevant or irrational factors into consideration or arbitrary in its decision. Duty to act fairly is part of fair procedure envisaged under Articles 14 and 21. Every activity of the public authority or those under public duty or obligation must be informed by reason and guided by the public interest."

30. In *New India Public School v. HUDA* (1996) 5 SCC 510, this Court approved the judgment of the Division Bench of the Punjab and Haryana High Court in *Seven Seas Educational Society v. HUDA* AIR 1996 (P&H) 229 : (1996) 113 PLR 17, whereby allotment of land in favour of the appellants was quashed and observed:

".... A reading thereof, in particular Section 15(3) read with Regulation 3(c) does indicate that there are several modes of disposal of the property acquired by HUDA for public purpose. One of the modes of transfer of property as indicated in Sub-section (3) of Section 15 read with sub-regulation (c) of Regulation 5 is public auction, allotment or otherwise. When public authority discharges its public duty the word "otherwise" would be construed to be consistent with the public purpose and clear and unequivocal guidelines or rules are necessary and not at the whim and fancy of the public authorities or under their garb or cloak for any extraneous consideration. It would

depend upon the nature of the scheme and object of public purpose sought to be achieved. In all cases relevant criterion should be pre-determined by specific rules or regulations and published for the public. Therefore, the public authorities are required to make necessary specific regulations or valid guidelines to exercise their discretionary powers, otherwise, the salutory procedure would be by public auction. The Division Bench, therefore, has rightly pointed out that in the absence of such statutory regulations exercise of discretionary power to allot sites to private institutions or persons was not correct in law."

31. What needs to be emphasized is that the State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well defined policy, which shall be made known to the public by publication in the Official Gazette and other recognized modes of publicity and such policy must be implemented/executed by adopting a non-discriminatory and non-arbitrary method irrespective of the class or category of persons proposed to be benefitted by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favoritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State.

32. We may add that there cannot be any policy, much less, a rational policy of allotting land on the basis of applications made by individuals, bodies, organizations or institutions de hors an invitation or advertisement by the State or its agency/instrumentality. By entertaining applications made by individuals, organisations or institutions for allotment of land

or for grant of any other type of largesse the State cannot exclude other eligible persons from lodging competing claim. Any allotment of land or grant of other form of largesse by the State or its agencies/instrumentalities by treating the exercise as a private venture is liable to be treated as arbitrary, discriminatory and an act of favoritism and/or nepotism violating the soul of the equality clause embodied in Article 14 of the Constitution.

33. This, however, does not mean that the State can never allot land to the institutions/organisations engaged in educational, cultural, social or philanthropic activities or are rendering service to the Society except by way of auction. Nevertheless, it is necessary to observe that once a piece of land is earmarked or identified for allotment to institutions/organisations engaged in any such activity, the actual exercise of allotment must be done in a manner consistent with the doctrine of equality. The competent authority should, as a matter of course, issue an advertisement incorporating therein the conditions of eligibility so as to enable all similarly situated eligible persons, institutions/organisations to participate in the process of allotment, whether by way of auction or otherwise. In a given case the Government may allot land at a fixed price but in that case also allotment must be preceded by a wholesome exercise consistent with Article 14 of the Constitution.

34. The allotment of land by the State or its agencies/instrumentalities to a body/organization/institution which carry the tag of caste, community or religion is not only contrary to the idea of Secular Democratic Republic but is also fraught with grave danger of dividing the society on caste or communal lines. The allotment of land to such bodies/organisations/institutions on political considerations or by way of favoritism and/or nepotism or with a view to nurture the vote bank for future is constitutionally impermissible.

35. We may now revert to the facts of this case. Admittedly,

the application for reservation of land was made by Shri Kailash Joshi, in his capacity as convener of Memorial Trust. The respondents have not placed on record any document to show that on the date of application, the Memorial Trust was registered as a public trust. During the course of hearing also no such document was produced before the Court. It is also not in dispute that respondent No. 5 was registered as a public trust only on 6.10.2004 i.e. after the order for reservation of land in favour of the Memorial Trust was passed. The allotment was also initially made in the name of trust, but, later on, the name of respondent No. 5 was substituted in place of the Memorial Trust. The exercise for reservation of 30 acres land and allotment of 20 acres was not preceded by any advertisement in the newspaper or by any other recognized mode of publicity inviting applications from organizations/institutions like the Memorial Trust or respondent No.5 for allotment of land and everything was done by the political and non-political functionaries of the State as if they were under a legal obligation to allot land to the Memorial Trust and/or respondent No.5. The advertisements issued by the State functionaries were only for inviting objections against the proposed reservation and/or allotment of land in favour of the Memorial Trust and not for participation in the process of allotment. Therefore, it is not possible to accept the argument of Shri Ranjit Kumar that land was allotted to respondent No.5 after following a procedure consistent with Article 14 of the Constitution.

36. Although, the objectives of respondent No. 5 are laudable and the institute proposed to be established by it is likely to benefit an important segment of the society but the fact remains that all its trustees are members of a particular party and the entire exercise for the reservation and allotment of land and waiver of major portion of the premium was undertaken because political functionaries of the State wanted to favour respondent No. 5 and the officers of the State at different levels were forced to toe the line of their political masters.

37. At the cost of repetition, we consider it necessary to reiterate that there is no provision in the Act or the Rules and even in the RBC for allotment of land without issuing advertisement and/or without inviting applications from eligible persons to participate in the process of allotment. If there would have been such a provision in the Act or the Rules or the RBC the same could have been successfully challenged on the ground of violation of Article 14 of the Constitution.

38. The argument of Shri Ravi Shanker Prasad that the impugned allotment may not be annulled because the State has a definite policy of allotting land to religious, social, educational and philanthropic bodies, organisations/institutions without any advertisement or inviting applications and without even charging premium is being mentioned only to be rejected. From the lists annexed with the affidavits of Shri Uma Shankar Bhargav and Shri Anil Srivastava it does appear that the State and its functionaries have allotted various parcels of land to different institutions and organizations between 1982 to 2008. Large number of these allotments have been made to the departments/establishments of the Central Government/State Governments and their agencies/instrumentalities. Some plots have been allotted to the hospitals and charitable institutions. Some have been allotted to different political parties, but quite a few have been allotted to the caste/community based bodies. Allotments have also been made without charging premium and at an annual rent of Re. 1/- only.

39. In our view, these allotments cannot lead to an inference that the State Government has framed a well-defined and rational policy for allotment of land. The RBC also does not contain any policy for allotment of land without issuing any advertisement and without following a procedure in which all similarly situated persons can stake their claim for allotment. Part IV of the RBC contains the definition of Nazul land and provides for allotment of land at market price or concessional price. The authorities competent to allot land for different

purposes have also been identified and provisions have been made for scrutiny of applications at different levels. However, these provisions have been misinterpreted by the functionaries of the State for several years as if the same empowered the concerned authorities to allot Nazul land without following any discernible criteria and in complete disregard to their obligation to act in accordance with the constitutional norms. Unfortunately, the Division Bench of the High Court overlooked that the entire process of reservation of land and allotment thereof was fraught with grave illegality and was nothing but a blatant act of favoritism on the part of functionaries of the State and summarily dismissed the writ petition.

40. The next question which needs consideration is whether notifications dated 6.6.2008 and 5.9.2008 by which the Bhopal Development Plan was modified are ultra vires the provisions of Section 23-A of the Act. A reading of the provisions contained in Chapter-IV of the Act makes it clear that a development plan shall take into account the draft-five year and annual development plan of the district, if any, prepared under the Madhya Pradesh Zila Yogana Samiti Adhiniyam and broadly indicate the land use proposed in the planning area, allocation of areas or zones of land for residential, industrial, commercial or agricultural purpose; open spaces, parks and gardens, green-belts, zoological gardens and playgrounds; public institutions and offices and other special purposes as the Director may deem it fit. The development plan shall also lay down the pattern of National and State Highways connecting the planning area with the rest of the region, ring roads, arterial roads and the major roads within the planning area etc. The development plan prepared under Chapter IV is the foundation of development of the particular area for a specified number of years. No one can use land falling within the area for which the development plan has been prepared for a purpose other than for which it is earmarked. Section 23-A was inserted in 1992 and amended in 2005 with a view to empower the State Government to modify the development plan or zoning plan.

However, keeping in view the basic objective of planned development of the areas to which the Act is applicable, the Legislature designedly did not give blanket power to the State Government to modify the development plan. The power of modification of development plan can be exercised only for specified purposes. In terms of Section 23-A(1)(a), the development plan can be modified by the State Government either suo motu or at the request of the Authority for any proposed project of the Government of India or the State Government and its enterprises or for any proposed project relating to development of the State or for implementing a scheme of the Authority. Under clause (b), the State Government can entertain an application from any person or association of persons for modification of development plan for the purpose of undertaking any activity or scheme which is considered by the State Government or the Director, on the advice of the committee constituted for this purpose, to be beneficial to the society. This is subject to the condition that the modification so made shall be an integral part of the revised development plan. Section 23-A(2) provides for issue of public notice inviting objections against the proposed modification of the plan. Such notice is required to be published along with the modified plan continuously for two days in two daily newspapers which are on the list of the Government and which have circulation in the area. A copy of the notice is also required to be affixed in a conspicuous place in the office of the Collector. After considering the objections and suggestions, if any received, and giving reasonable opportunity of hearing to the affected persons, the State Government can confirm the modification.

41. It is not in dispute that in the Bhopal Development plan, the use of land which was reserved and allotted to respondent No.5 was shown as public and semi public (health). The State Government modified the plan by invoking Section 23-A(1)(a) of the Act for the purpose of facilitating establishment of an institute by respondent No. 5 and not for any proposed project

of the Government of India or the State Government and its enterprises or for any proposed project relating to development of the State or for implementation of the Town Development Scheme. As a matter of fact, the exercise undertaken for the change of land use, which resulted in modification of the development plan was an empty formality because land had been allotted to respondent No.5 almost two years prior to the issue of notification under Section 23–A (1)(a) and the objects for which respondent No.5 was registered as a trust have no nexus with the purpose for which modification of development plan can be effected under that section. Therefore, there is no escape from the conclusion that modification of the development plan was ultra vires the provisions of Section 23–A(1)(a) of the Act.

42. The challenge to the locus standi of the appellant merits rejection because it has not been disputed that the appellant is a public spirited organization and has challenged other similar allotment made in favour of Punjabi Samaj, Bhopal, That apart, as held in *Shivajirao Nilangekar Patil v. Mahesh Madhav Gosavi* (1987) 1 SCC 227 even if a person files a writ petition for vindication of his private interest but raises question of public importance involving exercise of power by men in authority then it is the duty of the Court to enquire into the matter.

43. The argument of Shri Ranjit Kumar that the doctrine of prospective over ruling should be invoked and the allotment made in favour of respondent No.5 may not be quashed sounds attractive but cannot be accepted because we have found that the impugned allotment is the result of an exercise undertaken in gross violation of Article 14 of the Constitution and is an act of favoritism and nepotism. The judgment in *Harish Dhingra v. State of Haryana* (supra) on which reliance was placed by Shri Ranjit Kumar is clearly distinguishable. In that case the Court had noted that plots had been allotted by the Chief Minister out of his discretionary quota in the backdrop of an

earlier judgment of the Division Bench of the High Court in *S.R. Dass v. State of Haryana* (1988 PLJ 123) and several allottees had altered their position.

44. In view of the above discussion, we do not consider it necessary to deal with the argument of Shri Ravi Shanker Prasad and Shri Ranjit Kumar that the land could have been allotted to the Memorial Trust even though it has not been registered as a trust under the 1951 Act or the Indian Trusts Act.

45. In the result, the appeal is allowed. The impugned order of the Division Bench of the High Court is set aside and the writ petition filed by the appellant is allowed. The allotment of 20 acres land to respondent No.5 is declared illegal and quashed. Notifications dated 6.6.2008 and 5.9.2008 issued by the State Government under Section 23-A(1)(a) and (2) are also quashed. Commissioner, Town and Country Planning, Bhopal is directed to take possession of the land and use the same strictly in accordance with the Bhopal Development Plan. The State Government is directed to refund the amount deposited by respondent No.5 within a period of 15 days from today.

D.G. Appeal allowed.

MANINDERJIT SINGH BITTA

v.

UNION OF INDIA & ORS.

I.A. Nos. 10 and 11 of 2010

In

Writ Petition (Civil) No. 510 of 2005 & Ors.

APRIL 07, 2011

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

Motor Vehicles Act, 1988 – s.41(6) r/w r. 50 of MV Rules, 1989– Issuance of notification under – For implementation of a new Scheme regulating issuance and fixation of new High Security Registration Plates (HSRP) – Invitation of tenders by various States to implement the Scheme – Writ petition filed challenging the power of the Central Government to issue such Notification as well as terms and conditions of the tender process – Dismissal of writ petition as also the connected matters by Supreme Court – Despite the aforesaid directions, non-implementation of the Scheme in its true spirit by most of the States – Various interim applications filed before Supreme Court – Held: As regards the status of implementation of HSRP Scheme in the respective States and Union Territories, the States of Meghalaya, Sikkim and Goa have implemented the Scheme, some of the States have initiated the process but could not complete it and some have not taken any steps in this regard – All those States which have invited tenders but have not finalized the same need to be cautioned that just taking a step in furtherance to the order of the Court cannot be even called substantial compliance much less complete compliance of the same in its true spirit and substance – Thus, they are directed to complete the process within the stipulated time and ensure implementation of HSRP Scheme at the earliest as also file affidavits before

this Court showing complete compliance – As regards the category of States which have not even initiated any process for compliance of their statutory duty, it is an intentional disobedience of the orders of the Court – Obedience of orders of this Court is necessary for preserving the integrity of the constitutional institution – It is not only desirable but an essential requirement of law – Such course attains greater significance since it is in relation to attainment of a public purpose and public interest – Thus, the Secretary, Transport/ Commissioner, State Transport Authority of the defaulting States of Delhi, Punjab and Uttar Pradesh directed to be present on the next date of hearing and show cause why proceedings under the provisions of the Contempt of Courts Act, 1971 be not initiated against them, and also comply with other directions contained in the said Order – Senior officers of the other defaulting States which have not taken any steps directed to file a personal affidavit stating the reasons for not complying with the said Order – In the event of default, proceedings would be initiated against them under the provisions of the Contempt of Courts Act and costs would also be imposed, recoverable from the defaulting officers personally – Motor Vehicles Rules, 1989 – r.50 – Contempt of Courts Act, 1971.

Association of Registration Plates v. *Union of India* **(2004) 5 SCC 364;** *Maninderjit Singh Bitta* v. *Union of India* **(2008) 7 SCC 328;** *Achhan Rizvi (II)* v. *State of U. P.* **(1994) 6 SCC 752 – referred to.**

Case Law Reference:

(2004) 5 SCC 364	**Referred to.**	**Para 2**
(2008) 7 SCC 328	**Referred to.**	**Para 3**
(1994) 6 SCC 752	**Referred to.**	**Para 14**

CIVIL ORIGINAL JURISDICTION : IA Nos.10 and 11 of 2010

IN

WRIT PETITION (CIVIL) NO.510 OF 2005.

Under Article 32 of the Constitution of India.

WITH

I.A. No. 12 in I.A.No. 10.

In

Writ Petition (C) No. 510 of 2005.

R.F. Nariman, S. Hari Haran, Pradhuman Gohil, Vikas Singh, Taruna Singh, Charu Mathur for the Petitioner.

A. Mariarputham, Adv. Genl. T.S. Doabia, Jayshree Anand, Manjit Singhvi, V. Madhukar, AAG, S.W.A. Qadri, Sunita Sharma, C.K. Sharma, Gunwant Dara, B. Krishna Prasad, D.S. Mahra, Anil Katiyar, Aruna Mathur, Yusuf Khan, Avneesh Arputham, Megha Gaur (for Arputham, Aruna & Co.), Hemantika Wahi, Nupur Kanungo, V.G. Pragasam, S.J. Aristotle, Prabu Ramasubramanian, Krishnanad Pandeya, Sanjay R. Hegde, Abhishek Malviya, Radha Shyam Jena, Aruneshwar Gupta, Ranjan Mukherjee, S. Bhowmick, S.C. Ghosh, Naveen Sharma, B.S. Banthia, Avijit Bhattachajee, Sarbani Kar, Debjani Das Purkayashta, Bidyabrata Acharya, K.N. Madhusoodhanan, R. Sathish, Gopal Singh, Manish Kumar, Chandan Kumar, Gopal Singh, Rituraj Biswas, Atul Jha, Rajesh Srivastava, Ramesh Babu M.R., D. Bharathi Reddy, Kamini Jaiswal, Arun K. Sinha, Atul Jha, D.K. Sinha, Ekta Singh, Kuldip Singh, Vikas Mehta, T.V. George, A. Subhashini, Khwairakpam Nobin Singh, Sapam BIswajit Meitei, Ratan Kumar Choudhuri, Vartika Sahay (for Coporate Law Group), Jatinder Kumar Bhatia, Balaji Srinivasan, Anil Shrivastav, Naresh K. Sharma, G. Prakash, Beena Prakash, V. Senthil, Vivekta Singh, Kamal Mohan Gupta, Edward Belho, K. Enatolli

Sema, VIjaya, Balaji Srinivasan, Sanjay Kharde, Asha G. Nair, Devesh Kumar Devesh, Milind Kumar, T. Harish Kumar, P. Prasanth, V. Pattabhiram, G.N. Reddy, Jayshree Anand, K.K. Mahalik, Ajay Pal for the Respondents.

The following order of the Court was delivered

O R D E R

Government of India, on 28th March, 2001, issued a notification under the provisions of Section 41(6) of the Motor Vehicles Act, 1988 (for short, 'the Act') read with Rule 50 of the Motor Vehicles Rules, 1989 (for short, 'the Rules') for implementation of the provisions of the Act. This notification sought to introduce a new scheme regulating issuance and fixation of number plates. In terms of sub-section (3) of Section 109 of the Act, the Central Government issued an order dated 22nd August, 2001 which dealt with various facets of manufacture, supply and fixation of new High Security Registration Plates (HSRP). The Central Government also issued a notification dated 16th October, 2001 for further implementation of the said order and the scheme. Various States had invited tenders in order to implement the scheme.

A writ petition being Writ Petition (C) No.41 of 2003 was filed in this Court challenging the Central Government's power to issue such notification as well as terms and conditions of the tender process. In addition to the above writ petition before this Court, various other writ petitions were filed in different High Courts raising the same challenge. These writ petitions came to be transferred to this Court. All the transferred cases along with Writ Petition (C) No. 41 of 2003 were referred to a larger Bench of three Judges of this Court by order of reference dated 26th May, 2005 in the case of *Association of Registration Plates v. Union of India* [(2004) 5 SCC 364], as there was difference of opinion between the learned Members of the Bench dealing with the case. The three Judge Bench finally

disposed of the writ petitions vide its order dated 30th November, 2004 reported in (2005) 1 SCC 679. While dismissing the writ petition and the connected matters, the Bench rejected the challenge made to the provisions of the Rules, statutory order issued by the Central Government and the tender conditions and also issued certain directions for appropriate implementation of the scheme.

The matter did not rest there. Different States did not comply with the Rules, scheme and/or statutory order which resulted in filing of the present writ petition, being Writ Petition (C) No.510 of 2005. This writ petition also came to be disposed of by a three Judge Bench of this Court in its judgment titled as *Maninderjit Singh Bitta v. Union of India* [(2008) 7 SCC 328]. It will be appropriate to refer to the operative part of the judgment:

> "5. Grievance of the petitioner and the intervener i.e. All India Motor Vehicles Security Association is that subsequent to the judgment the scheme of HSRP is yet not implemented in any State except the State of Meghalaya and other States are still repeating the processing of the tender. The prayer therefore is that the purpose of introducing the scheme should be fulfilled (sic-in) letter and spirit. The objective being public safety and security there should not be any lethargy. It is pointed out that most of the States floated the tenders and thereafter without any reason the process has been slowed down…
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> XXX XXX `XXX
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> 9. Needless to say the scheme appears to have been introduced keeping in view the public safety and security of the citizens. Let necessary decisions be taken, if not already taken, within a period of six months from today. While taking the decision the aspects highlighted by this Court in the earlier decision needless to say shall be kept in view."

Despite the above judgments of the Court, most of the States have failed to implement the scheme in its true spirit. This resulted in filing of IA No.5 in Writ Petition (C) No.510 of 2005 where the applicant prayed for a clarification of order dated 8th May, 2008 stating that some of the States were carrying the impression as if they had the discretion to give effect to the amended Rules and the scheme. Vide order dated 5th May, 2009, the Court clarified the doubt and unambiguously stated that there is no discretion given to the States/Union Territories not to give effect to the amended Rule 50, the scheme of HSRP and modalities to be followed in pursuance thereof.

In the meanwhile, IA No. 10 of 2010, in Writ Petition No. 510 of 2005, was filed by the State of Kerala seeking extension of time to comply with the scheme and orders of this Court. They prayed for six months' extension with effect from 1st June, 2010. One of the main grounds taken by the State of Kerala was that it was finalizing the modalities needed for implementation of the HSRP scheme in the State and was also finding out the cheapest rate in the market for benefit of public. This application was opposed by the petitioner and during the course of arguments, applicant State of Kerala also pointed out that it had financial constraints as well in implementation of the scheme. An order was passed by this Court on 13th August, 2010 noticing the grounds taken up by the State of Kerala and they were permitted to implement the scheme phase-wise and at the places indicated in that order.

The petitioner filed IA No.12 of 2010 in IA No.10 of 2010 in Writ Petition (C) No. 510 of 2005 praying for modification of the order dated 13th August, 2010 stating that the State of Kerala has no such financial crisis that it could not implement the scheme immediately. In that application, case was also made out that a large number of States were not carrying out the orders of the Court and, in fact, had violated the same with impunity. Prayer was also made for issuance of a direction to

the State Governments/Union Territories to implement the scheme and statutory provisions within the time already extended.

The State of Himachal Pradesh has also filed an application being IA No.11 of 2010 in Writ Petition (C) No. 510 of 2005 praying for extension of at least six months to complete the process and file the compliance in this Court.

This is how all these three applications came up for hearing before the Court. The matter was heard and reserved for orders on 11th March, 2011. During the course of hearing, learned counsel appearing on behalf of the State of Kerala, had pointed out that in three cities, i.e. Trivandrum, Cochin and Calicut, the tender documents for manufacture and procurement of HSRP have already been issued and further steps are being taken to implement the scheme. It was not pressed by the State of Kerala that it should be allowed to complete the implementation of the scheme and the statutory provisions in a phased manner as it would ensure its best to implement the same in the extended period or at the earliest.

In the affidavit filed on behalf of the petitioner dated 11th August, 2010, it has been specifically averred that despite repeated directions and extensions granted by this Court to implement the scheme, several States/Union Territories have not carried out their statutory functions for implementation of HSRP scheme as per law. In fact, except the States of Meghalaya, Sikkim and Goa, no other State or Union Territory had implemented the said scheme. A chart depicting the status of implementation of the HSRP scheme in respective States and Union Territories was separately filed on record which reads as under :

S. No.	State	Status as on Date
1.	Andhra Pradesh	No Action yet.
2.	Arunachal Pradesh	No Action yet.
3.	Assam	Tender issued on 07.06.10 but bid submission date is deferred till further notice.
4.	Andaman & Nicobar	Tender issued and submission on 18 March 2011
5.	Bihar	Tender issued in Apr'08 and cancelled on June 2010. Fresh tender yet to be issued.
6	Chhattisgarh	Tender NIT issued in November 07. The submissions of the bids were deferred after the pre bid meeting. No further action has been taken by the State
7.	Chandigarh	No action yet.
8.	Daman & Diu	Tender issued in Apr'09 and cancelled in Apr' 2010. Fresh tender yet to be issued.
9.	Dadar & Nagar Haveli	Tender issued in Apr'09 and cancelled in Apr' 2010. Fresh tender yet to be issued.
10.	Delhi	No Action yet.
11.	Government of India	No direct action for implementation of the scheme required to be taken by GOI.
12.	**Goa**	**Scheme has been implemented in August 2009**
13.	Gujarat	No Action yet.
14.	Haryana	No Action yet.
15.	Himachal Pradesh	No Action yet.
16.	Jharkhand	No Action yet.
17.	J&K	No Action yet.
18.	Karnataka	Agreement for implementation signed with the Vendor in 2006. Price Notification and Implementation date is pending since last 4 years. Now State govt, cancelled the agreement and matter is pending before the Karnataka High court against cancellation of tender.
19	Kerala	Notice Inviting Tender issued on 06.10.10 submission date for tenders for 3 districts was fixed on 31st Jan 2011, but Tonnjes Eastern Security Technologies Pvt. Ltd. challenge the tender conditions at High Court of Kerala and the Hon'ble High Court has granted stay on the proceedings till further order.
20	Lakshadweep	Tender issued in April 2008 and financial bids of technically qualified bidders were opened. Subsequently the tender has been cancelled.
21	Manipur	The State Government had floated the tender and after processing

		and has identified the lowest bidder. No further progress in terms of implementation.
22	**Meghalaya**	**Scheme has been implemented in August 2006.**
23	Mizoram	The State Government had floated the tender and after processing and has identified the lowest bidder. No further progress.
24	Madhya Pradesh	No action yet.
25	Maharashtra	Tender issued in June'07. Financial bids were open in 2008.Now State Government wants to add new RFID technology in HSRP and they cancelled the Tender. But Ministry of Road Transport & Highway filed a Review petition at Bombay High Court and Stating that Modus operandi of State Government is illegal and no power to add/delete any feature of HSRP or to amend/modify any provision of the rule made under a Central Statute.
26	Nagaland	Contract signed. Implementation in progress. Price Notification awaited.
27	Orissa	Pre-Qualification Bid got opened on 04.06.2010 and further the evaluation process is currently going on by the State Government.

28	Pondicherry	Tender floated in Apr'07. Financial bids were open but final decision yet to be taken.
29	Punjab	No action yet.
30	Rajasthan	The G.O. was issued on 29th September 2008 notifying 11th March 2009 as the implementation date. But due to the political rivalry the new Government suspended the contract on 6 March'09 for an indefinite period.
31	**Sikkim**	**Scheme implemented in March 2009.**
32	Tripura	Fresh tender issued on 15 January 2011 but unqualified bidder challenge the earlier tender which was cancelled. Matter is pending before Guahati High Court at Agartalla Bench.
33	Tamil Nadu	No action yet.
34	Uttar Pradesh	No action yet.
35	Uttarakhand	Fresh tender was issued in 07 July 2010. Submission of bids deferred indefinitely.
36	West Bengal	Tender issued but final decision yet to be taken.

A bare reading of this chart shows that a large number of States have not yet taken any action whatsoever for implementation of the scheme.

In other States, though tenders have been issued long time back, no further step has been taken to complete the implementation of the scheme and ensure installation of HSRP within their respective jurisdictions. In other words, all the States/ Union Territories can be categorised into three different classes. Firstly, the ones who have completely implemented the scheme and this fact is not disputed by the petitioner. These are States of Meghalaya, Sikkim and Goa. Secondly, the States where tenders have been invited quite some time ago but they could not be finalized for one reason or the other. Some States in this category, i.e. Tripura, Karnataka, Maharashtra and Kerala, have referred to proceedings in regard to tender process being pending before the High Courts of the respective States as cause of the delay in implementation of the scheme. In this category, there are States which had invited tenders some time back but thereafter no further step has been taken by them to complete the implementation of the scheme without any reasonable explanation. Thirdly, the States which have not taken any action whatsoever, despite judgments and specific orders of this Court right from the year 2004 till date.

Of course, conduct of all these States cannot be painted with the same brush and they deserve to be dealt with in their respective categories and in accordance with law. The States which have implemented the scheme deserve a word of appreciation from this Court with a further observation that they should continue to implement the scheme more effectively to ensure public safety.

All those States which have invited tenders but have not finalized the same resulting in non-implementation of the scheme and the statutory provisions needs to be cautioned that just taking a step in furtherance to the order of the Court cannot

be even called substantial compliance much less complete compliance of the same in its true spirit and substance. Thus, they need to be directed to complete the process and ensure implementation of HSRP scheme at the earliest. Such directions that too with a time bound programme are necessary as that alone would be in the interest of the State as well as public at large.

The last and the most disobedient category is of the States which have not even initiated any process for compliance of their statutory duty, obedience to the orders of this Court and implementation of a duly notified scheme. Till date, several of these States have not even approached this Court, during this long period, for any extension of time giving reasons for non-compliance of the orders of this Court or the statutory provisions as they have not filed any application for the same to enable them to fulfill their statutory obligations and obedience of the orders of the Court. The irresistible and only conclusion that can be drawn from the facts on record and the above circumstances is that it is an intentional disobedience of the orders of the Court by the concerned Authorities in the respective States. The obedience of orders of this Court is necessary for preserving the integrity of this constitutional institution and to put forward this point reference can be made to the following paragraph appearing in the judgment of this Court in the case of *Achhan Rizvi (II) v. State of U.P.* [(1994) 6 SCC 752] :

> "**7.** It appears to us that if no assurance of an effective implementation of the Court's orders is forthcoming from the State Government, it will be our constitutional duty not merely to expect but to exact obedience in an appropriate manner. This step, we believe, would become necessary to preserve the meaning and integrity of the constitutional institutions and their interrelationships, essential to the preservation of the chosen way of life of the Indian people under the Constitution."

Disobedience of Court orders, more so persistent

disobedience, has been viewed very seriously by the concerned Courts. It is not only desirable but an essential requirement of law that the concerned authorities/executive should carry out their statutory functions and comply with the orders of the Court within the stipulated time. Such course attains greater significance where the statutory law is coupled with the directions issued by a Court of law in relation to attainment of a public purpose and public interest. In the present days, safety of the citizens is of paramount concern for the State and all its authorities. The directions issued by this Court for implementation of HSRP scheme sought to achieve such interest as well as it would be a step forward even in the field of investigation in case a vehicle is used in commitment of an offence or a crime. As already noticed, there are large number of States who have not taken any action in furtherance to judgments and directions of this Court and their statutory obligations. This conduct of the States compels us at least to begin with direction for the presence of the senior officers in charge of such affairs in the respective State Governments before this Court. At the first instance, we would restrict this direction only to defaulting States of Delhi, Punjab & Uttar Pradesh. Therefore, we direct Secretary, Transport/ Commissioner, State Transport Authority of these States to be present in this Court on the next date of hearing and show cause why the Court should not initiate proceedings against them under the provisions of the Contempt of Courts Act, 1971. De hors the issuance of the above show cause notice, these States are also ordered to comply with other directions contained in this Order.

In regard to other defaulting States, before we invoke the extra ordinary jurisdiction of this Court for initiation of contempt proceedings against the concerned authorities of the respective defaulting States, we consider it appropriate to require the Secretary (Transport) and/or Commissioner, State Transport Authority of each of the States in the third category to file a personal affidavit stating the reasons for not complying with the

orders of this Court. If any steps of any kind in furtherance to the judgments of this Court afore-referred, satisfying requirements of amended Rule 50 of the Rules for implementation of the notified scheme have already been taken by these States, then those steps should specifically be stated in the affidavits with supporting documents. In the event of default, the Secretary (Transport)/Commissioner, State Transport Authority shall be present personally in the Court on the next date of hearing.

The above are the directions of the Court for immediate compliance. Affidavit on behalf of the States mentioned in this order should be filed within four weeks from the date of the order. We make it clear that now, in the event of default, this Court shall not only initiate proceedings under the provisions of the Contempt of Courts Act, 1971 but may also impose costs, exemplary or otherwise, recoverable from the defaulting officers personally.

The States falling under the second category, i.e. which have initiated the steps but have not completed the same despite lapse of considerable time, are hereby granted six weeks time to complete the remaining process and also file affidavits before this Court showing complete compliance.

All the applications to stand over for six weeks.

N.J. Matter Pending.

BOARD OF TRUSTEES OF THE PORT OF MUMBAI
v.
M/S BYRAMJEE JEEJEEBHOY PVT. LTD. & ANR.
(Civil Appeal No. 3147 of 2011)

APRIL 8, 2011

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

Bombay Rent Act, 1947: ss.13(1)(e), 15(1), (2), 22 – Unlawful sub-letting – Suit for eviction on the ground of unlawful sub-letting by the tenant of leasehold property – Held: Sub-letting, assignment, transfer of interest in any manner or licencing made by the tenant after February 1, 1973 without there being any sanctioning clause in the contract or without any express consent of the landlord would constitute a ground for eviction u/s.13(1)(e) – In the instant case, the tenant made a sub-lease and parted with the possession of suit land in favour of sub-tenant – Sub-lease though executed on June 17, 1978 was made effective retrospectively from June 15, 1964 – Material on record showed that sub-tenant was in possession of suit premises long before February 1, 1973 and had continued to be in possession on that date – Subletting, thus, clearly fell within the protective ambit of s.15(2) – There was no material change in the status of sub-tenant or in the terms and conditions on which it was in possession of suit land on February 1, 1973 or in the inter se relationship between the tenant and sub-tenant – Execution of sub-lease on June 17, 1978 would not, therefore, militate against the protection offered by s.15(2) – Ground for eviction u/s.13(1)(e) not made out – Eviction suit dismissed – Transfer of Property Act, 1882 – ss.106, 108(j), 114A – Rent control and eviction.

The plaintiff-respondent no.1 was the landlord of the suit premises. The defendant no.1-appellant trustee was the tenant in the suit premises. The plaintiff filed a suit for

eviction against defendant no.1. Later on by way of amendment, defendant no.2 was joined in as the sub-tenant under the defendant no.1. In the suit, plaintiff averred that the suit land was given to defendant no.1 on lease for 999 years by its predecessors-in-interest under a registered lease deed dated May 10, 1866. The plaintiff sought eviction of defendants from the suit premises on the grounds of breach of the terms and conditions of the said lease deed mainly the condition against assignment of any portion of the leasehold land to any third party.

The trial court decreed the suit holding that respondent no.1 had failed to establish the breach of any other terms of the lease but had successfully proved the breach of the covenant against assignment of the leasehold property to the third party. The trial court pointed out that under clause 4 of the lease deed, defendant no.1 was not supposed to part with possession of the leasehold or to induct any third person into the suit property unless it obtained a licence in writing from the lessor, the plaintiff and there was no material to show that it had obtained any licence from the plaintiff before parting with possession of the leasehold in favour of defendant no.2, the sub-lessee. The trial court also observed that for inducting defendant no.2 into the suit premises, defendant no.1 had charged compensation higher than the rent/compensation it paid to the plaintiff and, therefore, the act of defendant no.1 was contrary to clause 4 of the original lease deed and defendant no.1 was guilty of committing its breach. The trial court also upheld the validity of the notice issued by the plaintiff to defendant no.1 determining and forfeiting the lease. It further held that the transaction between the plaintiff and defendant no.1 was covered by the provisions of the Transfer of Property Act and, therefore, the suit could not be said to be barred by limitation. Dealing with the question of the decree being binding on defendant no.2,

the trial court observed that once it was held that the sub-lease created in favour of defendant no.2 was unlawful and illegal, the decree of eviction passed against the lessee would fully bind the sub-lessee.

The appellate court dismissed the appeals filed by defendant nos.1 and 2. The High Court affirmed the findings of the courts below. The instant appeals were filed challenging the order of the High Court.

Allowing the appeals, the Court

HELD: 1. The instant case proceeded on a completely wrong course. The suit was adjudicated on by the courts, right up to the High Court on the basis of the provisions of the Transfer of Property Act. The provisions of law that must actually determine the rights and liabilities of the parties did not find mention in the pleadings of the parties or even the judgments of the courts. In the plaint, at one place it was stated that for committing breach of the terms and conditions of the lease the defendants had lost the protection of the Bombay Rent Act. Further, for invoking the jurisdiction of the Small Causes Court, it was stated in the plaint that the suit was for recovery of possession of land situated at Bombay to which the Bombay Rent Act was applicable. Beyond this there was no reference to the provisions of the Bombay Rent Act. The three courts below discussed sections 106, 108 (j) and 114A of the Transfer of Property Act but there was hardly any reference to the provisions of the Bombay Rent Act. It would appear that the provisions of the Bombay Rent Act which have a direct bearing on the case were completely overlooked by the three courts. From the judgment of the first appellate court it indeed appeared that defendant no.2 had sought the protection of section 15(2) of the Bombay Rent Act but the court brushed aside the

submission observing that since the suit premises belonged to defendant no.1, which was a local authority and since defendant no.2 was the lessee under defendant no.1, the provisions of the Bombay Rent Act would not be applicable and the defendant no.2 was not entitled to the protection of section 15(2) of that Act. The appellate court clearly failed to appreciate the way the provision of section 15 along with some other provisions of the Act applied to the case set up by the three parties to the suit. [Para 15] [174-G-H; 175-A-E]

2. At the material time the relationship between the landlord, tenant and sub-tenant was regulated and fully governed by the Bombay Rent Act, 1947 (which came into force on January 19, 1948 and expired on March 31, 2000 when it was replaced by the Maharashtra Rent Control Act 1999). The preamble to the Act described it as an Act to amend and consolidate the law relating to the control of rents and repairs of certain premises, of rates of hotels and lodging house and of evictions and also to control the charges for licence of premises, etc. It was not denied that the plaintiff was a "landlord" as defined in section 5(3) and the suit land "premises" as defined in section 5(8) of the Act to mean "any land not being used for agricultural purposes". Section 13 of the Act had the marginal title, "When landlord may recover possession" and enumerated the grounds on which alone a landlord would be entitled to recover possession of any premises. One of the grounds, enumerated in clause (e) of the section, was unlawful sub-letting by the tenant. Section 13(1)(e) provided that any unlawful sub-letting by the tenant since January 19, 1948, the date of coming into operation of the Act or after February 1, 1973, the date of commencement of the Amendment Act (Maharashtra Act 17 of 1973) any licence given by the tenant unlawfully or any unlawful assignment or transfer

of his interest in any other manner in the whole or part of the demised premises would make the tenant liable to eviction. Section 15, in sub-section (1) then laid down what would make the sub-letting, assignment, transfer or licence unlawful. It said that any sub-letting or assignment or transfer of his interest in any manner made by the tenant after January 19, 1948 or any licence given by him after February 1, 1973 for the whole or part of the premises, unless sanctioned by the contract, would not be lawful, notwithstanding anything contained in any law. Section 15(1), thus, took away any protection given to the tenant by any other law, e. g., section 108 (j) of the Transfer of Property Act and prohibited him from any sub-letting or licensing or assignment or transfer of his interest in any other manner in the absence of a sanctioning provision in the contract unless, of course, the demised premises came under the proviso to section 15(1). But it was no one's case here that the proviso to section 15(1) had any application to the suit land. In light of section 15(1), so much emphasis put on behalf of the plaintiff on clause 4 of the lease deed dated May 10, 1886 would appear to be rather out of place because even without clause 4, in the absence of a sanctioning clause in the lease the subletting by the tenant would not be lawful and would come within the mischief of section 13(1)(e). But then came section 15 (2) that removed the "unlawful" tag from any sub-letting, assignment, transfer of interest in any other manner or licensing, though contrary to sub-section (1), that were made before the 1st day of February, 1973. The second part of section 15(2) laid down that regardless of the prohibition in sub-section (1) and notwithstanding anything contained in any contract or in the judgment, decree or order of a court a sub-lease, assignment or transfer of interest in any other manner shall be deemed to be valid if the person in whose favour transfer is made entered into

possession of the demised property and continued to be in possession on February 1, 1973. The second part of section 15(2) overruled a contract by saying at the beginning, "Notwithstanding any thing contained in any contract...". This means that clause 4 of the lease deed would be ineffective and inoperative if the sub-lease made by defendant no.1 in favour of defendant no.2 otherwise conformed to the conditions laid down in section 15(2) of Bombay Rent Act. More importantly, section 15(2) further provided that any sub-letting, assignment or transfer of interest in any other manner made by the tenant that came within its protective ambit would save him from eviction under section 13(1)(e). Thus, any sub-letting, assignment, transfer of interest in any other manner or licensing made by the tenant after February 1, 1973 without there being any sanctioning clause in the contract or without the express consent of the landlord would constitute a ground for eviction under section 13(1)(e) of the Act. [Paras 16-19] [175-G-H; 176-A-C; 178-F-H; 179-A-H; 180-A-C]

3. It was not disputed that defendant no.1 made a sub-lease and parted with the possession of the suit land in favour of defendant no.2. The plaintiff in its pleadings and evidence was completely silent on the question as to when did this transaction take place and when was defendant no.2 inducted into the suit land. The trial court also did not advert to the said question. But, the first appellate court recorded a finding. It observed that defendant no.2 was in possession of the premises since prior to 1/2/1973 and therefore, they were protected. The evidence on record showed that the fact of possession of the defendant no.2 in the premises prior to 1/2/1973 was admitted. Having come to this finding, the appellate court misdirected itself by misconstruing the provision of section 15(2) of the Bombay Rent Act. But the finding of fact that defendant no.2 came in possession of the suit

land from before February 1, 1973 and continued to be in its possession on that date was very much there. The finding was arrived at for good reasons and it was supported by both oral and documentary evidences. A charge certificate issued by the Estate Manager's Department, Mumbai Port Trust dated February 1, 1963 was on record. There were receipts of the years 1963 and 1965 issued by the Mumbai Port Trust acknowledging the payment of rent from defendant no.2. More importantly the sub-lease deed that formed the sheet-anchor of the plaintiff's case, though executed on June 1, 1978, was made effective retrospectively from June 15, 1964. It came to an end on February 26, 1985. The materials on record showed that defendant no.2 was in occupation of the suit land long before February 1, 1973 and had continued to be in its possession on that date. The sub-letting by defendant no.1 in favour of defendant no.2, thus, clearly fell within the protective ambit of section 15(2) of Bombay Rent Act. Section 15(2), apart from others uses the expression 'transfer of interest in any other manner'. It is sufficiently wide to include even an oral arrangement pursuant to which the sub-lessee might enter upon the land and continue in its possession. The initial induction of defendant no.2 on the suit land was covered by section 15(2) of the Act. [Paras 20 to 23 & 25] [180-D-H; 181-A-B;182-C-E; 183-B-C]

4. Section 22 provided for the landlord to have full information concerning the sub-lessee/licensee who might be in occupation of the demised premises on February 1, 1973, including the rent charged from him by the tenant. The provisions of section 22 clearly suggested that after the cut off date, i.e., February 1, 1973 there should be no material change, to the detriment of the landlord in the terms and conditions on which the sub-tenant was in possession of the demised premises on that date and in case after that date, any material change

was brought about in the status of the sub-tenant, to the prejudice of the landlord that might not have the protection of section 15(2) but may come within the mischief of section 13(1)(e). In pith and substance, the sub-lease deed of 1978, was simply a formalization and continuation of the arrangement as existing between the defendants prior to February 1, 1973. There was no material change in the status of defendant no.2 or in the terms and conditions on which it was in possession of the suit land on February 1, 1973 or in the inter se relationship between the two defendants. The execution of the sub-lease on June 17, 1978 by defendant no.1 in favour defendant no.2 would not, therefore, militate against the protection offered by section 15(2) of the Act. The execution of the lease would not constitute a ground for eviction against defendant no.1 in terms of section 13(1)(e) of the Act. The judgments and orders passed by the High Court are not sustainable. [Paras 28, 29] [184-D-H; 185-A-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3147 of 2011 etc.

From the Judgment & Order dated 1704.2008 of the High Court of Judicature at Bombay in Civil Revision Application No. 183 of 2007.

WITH

C.A. No. 3148 of 2011.

Parag P. Tripathy, ASG, C.A. Sundaram, Buddy A. Ranganadhan, A.V. Rangam, Jay Savla, Sumit Ghosh, Rohini Musa, Bhargava V. Desai, Rahul Gupta, Nikhil Sharma, Zafar Inayat for the appearing parties.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. Leave granted.

2. These two appeals, though coming from separate judgments and orders passed by the Bombay High Court, arise from the same suit for eviction instituted by the landlord which figures in both the appeals as respondent no.1. The appellant in the appeal arising from SLP (C) No.19522 of 2008 is the Board of Trustees of the Port of Mumbai (hereinafter "Mumbai Port Trust"). It was the sole defendant, described as the tenant, in the suit for eviction as it was originally filed. Later on, by an amendment M/s Wadi Bunder Cotton Press Company (hereinafter "WBC Company"), the appellant in the appeal arising from SLP (C) No.36246 of 2010, was joined in as defendant no.2 as the sub-tenant under the defendant, the Board of Trustees of the Port of Mumbai. From that stage, Mumbai Port Trust, the principal tenant and WBC Company, the sub-tenant came to be arrayed in the suit as defendants 1 & 2 respectively.

3. The plaintiff respondent no.1 filed a suit in the court of Small Causes at Bombay registered as RAE suit no.83/197 of 1993, seeking inter alia a decree of eviction, against the defendants from the suit land admeasuring about 3273.394 square yards, situated at Santacruz Estate, Mazgaon, Bombay. According to the plaintiff-respondent no.1, the suit land was given to defendant no.1 on lease for 999 (nine hundred and ninety nine) years by the plaintiff's predecessors-in-interest under a registered lease deed dated May 10, 1886[1]. In terms of the lease deed, defendant no.1, the lessee had the right to renewal but it had no right to assign the leased out land to any third party. As a matter of fact, there was an express prohibition against assignment in clause 4 of the lease deed which is as

1. As a result of acquisition of a part of the leasehold lands and for other reasons, the 1986 lease was followed by subsequent leases in which the area of the lease hold lands was considerably reduced. But the stipulation against assisgnment on which the case of the plaintiff-respondent is based remained unaltered. In the pleadings of the parties and the judgments of the courts the reference is made to the above quoted clause in the 1886 deed. It is, therefore, unnecessary to go into the details of the subsequent leases.

under:

> "4. That they the said Trustees their successors or assigns will not (subject never the less as hereinafter mentioned) assign the said premises or any part thereof without the licence in writing of the lessors their heirs executors administrators assigns first obtained."

[The only exception to the above prohibition was the right given to the lessee to part with and dedicate some portions, up to a specified limit, from the aggregate of the lands covered by the lease for public roads and ways with the consent of the lessors. But in that case the lessors agreed to give such consent upon the reasonable applications of the lessee from time to time and within the limit (prescribed under the lease).]

4. The plaintiffs sought eviction of the defendants on grounds of breach of the terms and conditions of the lease dated May 10, 1886, mainly the condition against assignment of any portion of the lease hold land to any third party. In paragraph 4 of the plaint as it was originally filed it was stated that the defendant had committed breach of several terms and conditions of the lease and had unlawfully and illegally parted with the possession of the lease hold property without any licence in writing from the lessor. It was further stated that by an advocate's notice dated December 7, 1991 the plaintiff had put on record the several acts of omission and commission by the defendant that were in breach of the terms and conditions of the lease and for that reason had determined and forfeited the lease. Despite the notice the defendant did not remedy but persisted in the breach of the terms and conditions of the lease. It had, therefore, lost the protection of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short "the Bombay Rent Act") and had made itself liable to quit the suit premises and hand over its vacant, peaceful possession to the plaintiff. It was further alleged in paragraph 7 of the plaint that in consideration of a large sum as rent/compensation the

defendant had created sub-leases in favour of sub-lessees/ tenants and had unlawfully, clandestinely and surreptitiously parted with possession of the lease-hold land in favour of the sub-lessees/tenants. In the transaction, the lessee, defendant no.1, had made huge profits. It was, therefore, liable to eviction for committing breach of the covenant in the lease deed of May 10, 1886. In paragraph 9 of the plaint, injunction was sought against the defendant restraining it from sub-letting and/or parting with the possession of the suit land in any manner whatsoever and in that connection it was once again stated that the defendant had no right to assign any part of the suit land without the licence in writing of the lessors. In paragraph 12 of the plaint it was stated that the suit was for recovery of possession of the suit land to which the Bombay Act, 1947 was applicable and the claim of the plaintiff fell within section 28 of the Act. Hence, the court of Small Causes, Bombay, had the exclusive jurisdiction to try the suit.

5. Later on, after the sub-lessee was joined in as the second defendant, paragraph 7A and 7B were added by an amendment in the plaint. In paragraph 7A, reiterating the earlier allegation it was said that in respect of the suit land, defendant no.1 had unlawfully created sub-lease in favour of defendant no.2 and had wrongfully inducted defendant no.2 into the suit land. Defendant no.1 had thereby committed breach of the lease and had also violated the provisions of the Transfer of Property Act, and also the terms of tenancy. In paragraph 7B it was submitted that the plaintiff was entitled to a decree of eviction against defendant no.1 as it had unlawfully created sub-lease and/or given sub-tenancy and/or transferred its interest in the suit land to defendant no.2 and defendant no.2 was equally liable to be evicted and would be equally bound by the decree as it had no independent right, title or interest in the suit land and it had been unlawfully and illegally inducted into the suit land.

6. Defendant no.1 in its written statement, denied having

committed any breach of the terms and conditions of the lease deed dated May 10, 1886. The defendant denied that it had unlawfully and illegally parted with possession of the property in breach of the covenant in the lease deed and/or in the manner as alleged by the plaintiff. In paragraph 14 of the written statement it was stated that the advocate's notice sent to the defendant at the instance of the plaintiff was quite invalid. In different paragraphs of the notice, the area of the lease hold lands was stated differently. The notice gave wrong description of the lease hold property; it was vague, unintelligible and suffered from serious legal and factual infirmities. It was not possible to act upon it or to even give any proper reply to it. On account of its vagueness it was not possible for the defendant to know what was the breach alleged and whether it was capable of being remedied in terms of section 114-A of the Transfer of Property Act. The defendant denied that it had either surreptitiously or clandestinely parted with possession by creating sub-lease in respect of the leasehold land in favour of a third party in the manner as alleged by the plaintiff. The defendant further denied having demanded huge rent/ compensation from the alleged sub-lessees in respect of the building and the suit land, making huge profits. The defendant denied any breach of clause 4 of the lease deed. According to the defendant, clause 4 of the lease deed enjoined against assignment. There was no covenant in the lease deed prohibiting sub-lease. The defendant stated that it had not "assigned" the premises or any part thereof as alleged by the plaintiff and had not committed any breach of clause 4 of the lease deed. The plaintiff's allegation was based on a misreading and misinterpretation of clause 4 of the lease deed. Reiterating that there was no assignment of the leasehold interest the defendant once again denied that it had committed any breach of clause 4 of the deed in the manner as alleged by the plaintiff. The defendant further stated that the plaint nowhere stated when or in whose favour the alleged breach was committed. The allegations made by the plaintiff were

imaginary and fanciful, the averments in the plaint were quite vague and devoid of particulars and did not disclose the precise breach of the lease of which it was being accused.

7. After the impleadment of defendant no.2 in the suit, defendant no.1 filed an additional written statement. In paragraph 3 of the additional written statement, it took the plea that defendant no.2 was neither a necessary party nor a proper party to be joined in the suit and its addition had made the suit liable to be dismissed for misjoinder of parties. In paragraph 4, in answer to paragraph 7A of the plaint, defendant no.1 denied that the sub-lease in respect of the suit land was created unlawfully in favour of defendant no.2. It further denied that there was any breach of the lease or any violation of the provisions of the Transfer of Property Act. The defendant stated that no agreement of terms of tenancy was executed and hence, there was no question of violation of any terms of tenancy as alleged by the plaintiff. In paragraph 5 of the additional written statement, in answer to paragraph 7B of the plaint, defendant no.1 denied that it had illegally and unlawfully created sub-lease and/or given sub-tenancy and/or transferred its interest in the suit land to defendant no.2. It denied that defendant no.2 was an unlawful and illegal sub-lessee/licensee.

8. **Defendant No.2,** M/s WBC Company, in its written statement took the plea that the plaintiff's suit was barred by limitation and it was further liable to be dismissed because the plaintiff had not set out any cause of action against defendant no.2. The second defendant denied that the sub-lease created by defendant no.1 in its favour was unlawful or in breach of the lease or in violation of the provisions of the Transfer of Property Act and the terms of tenancy. The main thrust of the case of the second defendant, however, was that it had been in physical possession of the suit premises for several years prior to 1963 and this fact was fully within the knowledge of the plaintiff. The second defendant stated that in October, 1977 the suit premises was inspected by a representative of the plaintiff

along with an architect and even at that time, the answering defendant was found to be in physical possession of the suit premises and the fact was acknowledged in a letter of November 7, 1977, written at the instance of the plaintiff. The plaintiff was, therefore, fully aware that defendant no.2 was in occupation of the suit premises long before the filing of the suit. The suit was, thus, clearly barred by limitation. Giving reply to the statement made in paragraph 9 of the written statement the second defendant denied that the plaintiff was entitled to a decree of eviction against defendant no.1 for inducting the answering defendant as a sub-lessee/sub-tenant into the suit land. The second defendant denied that it was an unlawful and illegal sub- lessee/licensee/inductee and it had no independent right, title or interest in the suit land and hence, it too would be bound by the decree against defendant no.1. In this connection, the second defendant further stated that by a registered lease deed dated June 17, 1978 executed by defendant no.1 an area of 4596.47sq.mts. (that included the suit land together with building(s) standing thereon) had been demised in its favour. The sub-lease was for the term of 20 years 8 months and 14 days commencing from June 15, 1964 with the clear acknowledgement that the sub-lessee (defendant no.2) was in occupation and possession of the demised property from that date. The second defendant further stated that even before the filing of the plaintiff's suit, defendant no.1 had filed L.E. & C. suit no.271/309 of 1987 seeking its eviction from the demised premises and the suit was pending before the same court, i.e. the court of Small Causes, Bombay. In paragraph 11 of the written statement, in answer to paragraph 12 of the plaint, defendant no.2 (quite strangely!) denied that the suit was between the landlord and tenant, relating to the possession of the suit land to which the Bombay Rent Act was applicable.

9. On the basis of the pleadings of the parties, the trial court framed as many as 12 issues and later on, 3 additional issues. But of relevance for the present are issues 4, 5 and 7 which are as under:

4. Whether the plaintiffs prove that, the defendants have committed breaches of terms and conditions of lease as alleged in para 4 (a) to (d) of the plaint?

5. Whether the plaintiffs prove that that they have validly determined and forfeited the lease by a notice dated 7th December 1991?

7. Whether the defendants prove that the suit is barred by law of limitation?

Of the three additional issues, additional issue no.1 was allied to issue no.4 and additional issue no.3 to issue no.7 as quoted above. Additional issue no.2 which was independent of the earlier issues was as under:

"2. Whether the defendant no.2 is bound by decree against the defendant no.1?"

10. The trial court answered issue nos.4 and 5 and additional issue nos.1 and 2 in the affirmative. And issue no.7 and additional issue no.3 in the negative.

11. Discussing the question of breach of the terms and conditions of the lease deed dated May 10, 1886 by defendant no.1, the trial court held that the plaintiff had failed to establish the breach of any other term of the lease but had successfully proved the breach of the covenant against assignment of the leasehold property to a third party. The trial court pointed out, that under clause 4 of the lease deed defendant no.1 was not supposed to part with possession of the leasehold or to induct any third person into the suit property unless it obtained a licence in writing from the lessor, the plaintiff. There was no material to show that it had obtained any licence from the plaintiff before parting with possession of the leasehold in favour of defendant no.2, the sub-lessee. The trial court found it was undeniable that defendant no.1 had inducted defendant no.2 into the suit premises by executing a sub-lease on June

17, 1978 for a term of 20 years 8 months and 14 days. The only plea raised on behalf of the defendants was that defendant no.2 was inducted over the suit premises in full knowledge of the plaintiff and defendant no.2 was in possession of and hence, it could not be said that the induction of defendant no.2 into the suit premises was illegal. The trial court also observed that for inducting defendant no.2 into the suit premises, defendant no.1 had charged compensation higher than the rent/compensation it paid to the plaintiff. The act of defendant no.1 was, therefore, undoubtedly, contrary to clause 4 of the original lease deed and defendant no.1 was guilty of committing breach of the covenant as contained in clause 4 of the lease deed. The trial court also upheld the validity of the notice issued by the plaintiff to defendant no.1 determining and forfeiting the lease. It further held that the transaction between the plaintiff and defendant no.1 was covered by the provisions of the Transfer of Property Act and, therefore, by no stretch of imagination the suit could be said to be barred by limitation. Dealing with the question of the decree being binding on defendant no.2, the trial court observed that once it was held that the sub-lease created in favour of defendant no.2 was unlawful and illegal, the decree of eviction passed against the lessee would fully bind the sub-lessee. The trial court decreed the suit by judgment and order dated June 12, 2002.

12. Against the judgment and order passed by the trial court, both defendant nos. 1 and 2 filed their separate appeals (no.741 and 742 of 2002 respectively). The appellate court formulated a number of points for its consideration of which point no.2 related to the breach of the terms and conditions of the lease by defendant no.1 and point nos.4 and 5 related to the protection that might be available to defendant no.2 under section 15(1) of the Bombay Rent Act, 1947 and whether defendant no.2 would be bound by the decree of eviction passed against defendant no.1. Dealing with the breach of the terms of the tenancy by defendant no.1, the appeal court held the evidence on record showed that there was no written

permission from the plaintiff to defendant no.1 for sub-letting the lease hold in favour of defendant no.2 in the year 1978. The appellate court observed that on behalf of the defendants, it was sought to be shown that defendant no.2 was in possession of the premises from before February 1, 1973, and, therefore, they were protected by the provisions of Bombay Rent Act, 1947. It went to the extent of saying that the evidence on record showed that the possession of the suit premises by defendant no.2 from before February 1, 1973 was admitted but since the premises belonged to defendant no.1 which was a Local Authority, the protection envisaged under the Bombay Rent Act, 1947 was not available to defendant no.2 and it, therefore, could not claim protection under section 15(2) of the Act. In this connection, the appellate court said as follows:

> "Evidence on record shows that the fact of possession of the Defendant No.2 in the premises prior to 1.2.1973 is admitted but when the premises belongs to the local authority i.e. the Defendant No.1 and Defendant No.2 is the lessee of the Defendant No.1, the provisions of the Bombay Rent Act, 1947 will not be applicable and, therefore, the Defendant No.2 are not entitled for protection of amendment of 1987 in Sec.15(2) of the Act. There is no dispute about the legal position that amended section 15(2) gives protection to the unlawful occupant who were in possession on 1.2.1973 but when the provisions of the said Act are not applicable to the sub-lease between the Defendant No.1 and 2, there is no question of giving protection of the amended provisions of the Bombay Rent Act. When it is admitted that the premises are sub-let by Defendant No.1 to Defendant No.2 in the year 1978 and it is also admitted that there is no written permission granted by the Plaintiffs for sub-letting, it is clear cut breach of the terms and conditions of the lease agreement. After careful scrutiny of the evidence on record, we are of the view that Plaintiffs established sub-letting by Defendant No.1 to Defendant No.2 in the year 1978 without prior

> permission in writing and, therefore, the Plaintiffs are entitled for a decree on the ground of breach of terms and conditions of the tenancy."

In light of its findings, the appellate court dismissed both the appeals by judgment and order dated 31st March and April 1, 2004.

13. Both, defendants 1 and 2 sought to challenge the orders passed by the Small Causes Court by filing civil revisions before the Bombay High Court. The two civil revisions were dealt with separately in the High Court. The civil revision filed by defendant no.1 (no.183 of 2007) was first dismissed by a reasoned order dated April 17, 2008 and later on the civil revision filed by defendant no.2 (no.21 of 2009) by order date October 29, 2010, primarily following the order passed in the case of the first defendant.

14. In the case of the first defendant, the High Court affirmed the findings of the courts below that the execution of the sub-lease by defendant no 1 in favour of defendant no.2 without obtaining the permission in writing from the plaintiff was in breach of clause 4 of the lease deed. The High Court also dealt with the plea of defendant no.1 based on section 114A of Transfer of Property Act, and held that the provision had no application to a case of sub-letting or under letting. It further held that the suit filed by defendant no.1 for the eviction of defendant no.2 would not remedy the breach committed by it, more so as at the time of hearing of the Civil Revision the suit still remained pending. On these findings, the High Court dismissed the civil revision.

15. The strange thing about this case is the completely wrong course on which it has proceeded thus far. The suit was framed by the plaintiff and it was contested by the defendants and adjudicated on by the courts, right up to the High Court on the basis of the provisions of the Transfer of Property Act. The provisions of law that must actually determine the rights and

liabilities of the parties find no mention in the pleadings of the parties or even the judgments of the courts. In the plaint, at one place it is stated that for committing breach of the terms and conditions of the lease the defendants had lost the protection of the Bombay Rent Act. Further, for invoking the jurisdiction of the Small Causes Court, it is stated in the plaint that the suit was for recovery of possession of land situated at Bombay to which the Bombay Rent Act is applicable. (Interestingly even this statement made in the plaint is rather unmindfully denied by defendant no.2 vide paragraph 11 of its written statement!). Beyond this there is no reference to the provisions of the Bombay Rent Act. In the three judgments of the courts there are discussions on sections 106, 108 (j) and 114A of the Transfer of Property Act but there is hardly any reference to the provisions of the Bombay Rent Act. It seems that the provisions of the Bombay Rent Act which have a direct bearing on the case were completely overlooked by the three courts. From the judgment of the first appellate court it indeed appears that defendant no.2 had sought the protection of section 15(2) of the Bombay Rent Act but the court brushed aside the submission observing that since the suit premises belonged to defendant no.1, Mumbai Port Trust, which is a local authority and since defendant no.2 was the lessee under defendant no.1, the provisions of the Bombay Rent Act would not be applicable and the second respondent was not entitled to the protection of section 15(2) of that Act. The appellate court clearly failed to appreciate the way the provision of section 15 along with some other provisions of the Act applied to the case set up by the three parties to the suit.

16. At the material time the relationship between the landlord, tenant and sub-tenant was regulated and fully governed by the Bombay Rent Act, 1947 (which came into force on January 19, 1948 and expired on March 31, 2000 when it was replaced by the Maharashtra Rent Control Act 1999). The preamble to the Act described it as an Act to amend

and consolidate the law relating to the control of rents and repairs of certain premises, of rates of hotels and lodging house and of evictions and also to control the charges for licence of premises, etc. It is undeniable that the plaintiff is a "landlord" as defined in section 5(3) and the suit land "premises" as defined in section 5(8) of the Act to mean "any land not being used for agricultural purposes". Section 13 of the Act had the marginal title, "When landlord may recover possession" and enumerated the grounds on which alone a landlord would be entitled to recover possession of any premises. One of the grounds, enumerated in clause (e) of the section, was unlawful sub-letting by the tenant. Clause 13(1)(e) in so far as relevant for the present is as under:

"13. When landlord may recover possession.

(1)Notwithstanding anything contained in this Act but subject to the provisions of sections 15 and 15A, a landlord shall be entitled to recover possession of any premises if the Court is satisfied-

(a) xxxxxxx

(b) xxxxxxx

(c) xxxxxxx

(d) xxxxxxx

(e) that the tenant has, since the coming into operation of this Act, unlawfully sub-let or after the date of commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Act, 1973, unlawfully given on licence, the whole or part of the premises or assigned or transferred in any other manner his interest therein; or"

Section 14 of the Act afforded protection to sub-tenants and licensees and provided as follows:

"14. Certain sub-tenants and licensees to become tenant on determination of tenancy

(1) When the interest of a tenant of any premises is determined for any reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let before the 1st day of February 1973 shall subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms and conditions as he would have held from the tenant, if the tenancy had continued.

(2) Where the interest of a licensor, who is a tenant of any premises is determined for any reason, the licensee, who by section 15A is deemed to be a tenant shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the terms and conditions of the agreement consistent with the provisions of this Act."

Then came section 15 which is reproduced below:

"15. In absence of contract to the contrary, tenant not to sub-let or transfer or to give on licence.

(1) Notwithstanding anything contained in any law but subject to any contract to the contrary, it shall not be lawful after the coming into operation of this Act for any tenant to sub-let the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein and after the date of commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Act, 1973, for any tenant to give on licence the whole or part of such premises:

Provided that the State Government may by notification in the Official Gazette, permit in any area the transfer of interest in premises held under such leases or class of leases or the giving on licence any premises or class of premises and no such extent as may be specified in the notification.

(2) The prohibition against the sub-letting of the whole or any part of the premises which have been let to any tenant, and against the assignment or transfer in any other manner of the interest of the tenant therein, contained in sub-section (1), shall, subject to the provisions of this sub-section be deemed to have had no effect before the 1st day of February, 1973, in any area in which this Act was in operation before such commencement; and accordingly, notwithstanding anything contained in any contract or in the judgment, decree or order a Court, any such sub-lease, assignment or transfer of any such purported sub-lease, assignment or transfer in favour of any person who has entered into possession, despite the prohibition in sub-section (1) as purported sub-lessee, assignee or transferee and has continued in a possession on the date aforesaid shall be deemed to be valid and effectual for all purposes, and any tenant who has sub-let any premises or part thereof, assigned or transferred any interest therein, shall not be liable to eviction under clause (e) of sub-section (1) of section 13.

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

17. It is important to clearly understand the interplay between sections 13(1)(e) and section 15 of the Act. Section 13(1)(e) provided that any unlawful sub-letting by the tenant since January 19, 1948, the date of coming into operation of the Act or after February 1, 1973, the date of commencement of the Amendment Act (Maharashtra Act 17 of 1973) any licence given by the tenant unlawfully or any unlawful assignment or transfer of his interest in any other manner in the whole or part of the demised premises would make the tenant liable to eviction.

18. Section 15, in sub-section (1) then laid down what would make the sub-letting, assignment, transfer or licence

unlawful. It said that any sub-letting or assignment or transfer of his interest in any manner made by the tenant after January 19, 1948 or any licence given by him after February 1, 1973 for the whole or part of the premises, unless sanctioned by the contract, would not be lawful, notwithstanding any thing contained in any law. Section 15(1), thus, took away any protection given to the tenant by any other law, e. g., section 108 (j) of the Transfer of Property Act and prohibited him from any sub-letting or licensing or assignment or transfer of his interest in any other manner in the absence of a sanctioning provision in the contract unless, of course, the demised premises came under the proviso to section 15(1). But it is no one's case here that the proviso to section 15(1) has any application to the present suit land. In light of section 15(1), so much emphasis put on behalf of the plaintiff on clause 4 of the lease deed dated May 10, 1886 would appear to be rather out of place because even without clause 4, in the absence of a sanctioning clause in the lease the subletting by the tenant would not be lawful and would come within the mischief of section 13(1)(e).

19. But then came section 15 (2) that removed the "unlawful" tag from any sub-letting, assignment, transfer of interest in any other manner or licensing, though contrary to sub-section (1), that were made before the 1st day of February, 1973. The second part of section 15(2) laid down that regardless of the prohibition in sub-section (1) and notwithstanding anything contained in any contract or in the judgment, decree or order of a court a sub-lease, assignment or transfer of interest in any other manner shall be deemed to be valid if the person in whose favour transfer is made entered into possession of the demised property and continued to be in possession on February 1, 1973. It needs to be emphasised here that the second part of section 15(2) overruled a contract by saying at the beginning, "Notwithstanding any thing contained in any contract…". This means that clause 4 of the

lease deed would be ineffective and inoperative if the sub-lease made by defendant no.1 in favour of defendant no.2 otherwise conformed to the conditions laid down in section 15(2) of Bombay Rent Act. More importantly, section 15(2) further provided that any sub-letting, assignment or transfer of interest in any other manner made by the tenant that came within its protective ambit would save him from eviction under section 13(1)(e). To sum up, any sub-letting, assignment, transfer of interest in any other manner or licensing made by the tenant after February 1, 1973 without there being any sanctioning clause in the contract or without the express consent of the landlord would constitute a ground for eviction under section 13(1)(e) of the Act.

20. It is in the light of the legal position as explained above that we may now proceed to examine the findings of fact recorded in this case. It is undeniable that defendant no.1 made a sub-lease and parted with the possession of the suit land in favour of defendant no.2. But the crucial question is when did this transaction take place and when was defendant no.2 inducted into the suit land? The plaintiff in its pleadings and evidence is completely silent on this question. The trial court also did not advert to the question. But, the first appellate court has recorded a finding. The appellate court observed:

> "The learned advocate for both the appellants took us to the evidence to show that defendant no.2 is in possession of the premises since prior to 1/2/1973 and therefore, they are protected. **Evidence on record shows that the fact of possession of the defendant no.2 in the premises prior to 1/2/1973 is admitted** but…."
>
> (Emphasis Added)

Having come to this finding, the appellate court misdirected itself by misconstruing the provision of section 15(2) of the Bombay Rent Act. But the finding of fact that defendant no.2 came in possession of the suit land from before

February 1, 1973 and continued to be in its possession on that date is very much there.

21. The finding is arrived at for good reasons and it is supported by both oral and documentary evidences. A charge certificate issued by the Estate Manager's Department, Mumbai Port Trust dated February 1, 1963 is on record as Annexure P5. It is as under:

No.551

MUMBAI PORT TUST

ESTATE MANAGER'S DEPARTMENT

CHARGE CERTIFICATE

This is to certify that the Plot of Land i.e. position of old RR No.736 situated at Wadi Bunder Road Santa Cruz Estate & agreed to be leased by Trustees' Resolution No.1121 dated 11/12/1962 to M/s Morarji Dharamsey Bhawanji & Ors. (Wadi Bunder Cotton Press Company) has been pegged out to the dimensions measuring 5571 5/6 square yards and handed over to Mr. Morarji Dharamsey Bhawanji this day the 1st of February 1963 by me with effect from 1st March 1955.

Signed_____(illegible)_____Surveyor

and taken over and acknowledged correct by me.

Signed Morarji Dharamsey Bhawanji Lessee

Sd/-

Assistant Manager

North/ South District

Forwarded to the Lessee/s M/s Morarji Dharamsey Bhawanji & others trading in the name and style of M/s Wadi Bunder Cotton Press Co. for information and record.

No building operations on the plot mentioned on the

reverse should be commenced until the plans in respect thereof are previously approved by the Trustees.

This permit should be produced for inspection whenever demanded by an Officer of the Port Trust.

Dated 1/2/1963

Sd/-
Estate Manager"

22. There are receipts of the years 1963 and 1965 issued by the Mumbai Port Trust acknowledging the payment of rent from defendant no.2. More importantly the sub-lease deed that forms the sheet-anchor of the plaintiff's case, though executed on June 1, 1978, was made effective retrospectively from June 15, 1964. It came to an end on February 26, 1985.

23. On the basis of the materials on record, we must accept and proceed on the basis that defendant no.2 was in occupation of the suit land long before February 1, 1973 and had continued to be in its possession on that date. The sub-letting by defendant no.1 in favour of defendant no.2, thus, clearly fell within the protective ambit of section 15(2) of Bombay Rent Act.

24. Faced with this situation, Mr. Sundaram, learned senior advocate, appearing for the plaintiff-respondent no.1 contended that in order to claim protection under section 15(2) of the Act, it was incumbent upon the claimant to show that there was a sub-lease, assignment or transfer in his favour prior to 1973 and it was in pursuance of such sub-lease, assignment or transfer that it came in possession and continued to be in possession of the demised property and was actually in possession of the demised property on February 1, 1973. In this case, according to Mr. Sundaram, apart from the sub-lease dated June 17, 1978, there was no other sub-lease or any other instrument of transfer to show that defendant no.2 came in possession of the suit land in pursuance of any sub-lease,

assignment or transfer, etc.

25. We find no force in this submission. Section 15(2), apart from others uses the expression 'transfer of interest in any other manner'. It is sufficiently wide to include even an oral arrangement pursuant to which the sub-lessee might enter upon the land and continue in its possession. We have no manner of doubt that the initial induction of defendant no.2 on the suit land was covered by section 15(2) of the Act.

26. Mr. Sundaram next contended that the possession of the suit land by defendant no.2 on February 1, 1973 might have had the protection of section 15(2) of the Act. But a basic change was brought about by the execution of the lease deed on June 17, 1978 which gave rise to a new relationship between the two defendants, the lessee and the sub-lessee. Mr. Sundaram submitted that the execution of the sub-lease by defendant no.1 in favour of defendant no.2 on June 17, 1978 and the continued possession of the suit land by defendant no.2 on the basis of that sub-lease would certainly not come under the protection of section 15(2) of the Act.

27. In order to appreciate Mr. Sundaram's submission it would be apposite to refer to section 22 of the Bombay Rent Act, which is as follows:

> **"22. Particulars to be furnished by tenant of tenancy sub-let or transferred before the 1st day of February 1973.**
>
> (1) Every tenant who before the 1st day of February 1973, has without the consent of the landlord given in writing sub-let the whole or any part of the premises let to him or assigned or transferred in any other manner his interest therein, and every sub-tenant to whom the premises are so sub-let or the assignment or transfer is so made, shall furnish to the landlord, within a month of the receipt of a notice served upon him by the landlord by post or in any

> other manner, a statement in writing signed by him giving full particulars of such sub-letting assignment or transfer including the rent charged or paid by him.
>
> (2) Any tenant or sub-tenant who fails to furnish such statement or intentionally furnishes a statement which is false in any material particular shall, on conviction, be punished with the fine which may extend to one thousand rupees."

28. Section 22 provided for the landlord to have full information concerning the sub-lessee/licensee who might be in occupation of the demised premises on February 1, 1973, including the rent charged from him by the tenant. The provisions of section 22 clearly suggest that after the cut off date, i.e., February 1, 1973 there should be no material change, to the detriment of the landlord in the terms and conditions on which the sub-tenant was in possession of the demised premises on that date and in case after that date, any material change is brought about in the status of the sub-tenant, to the prejudice of the landlord that might not have the protection of section 15(2) but may come within the mischief of section 13(1)(e). And hence, the point raised by Mr. Sundaram appears to be theoretically correct. But in the facts of the case the point does not seem to arise. Mr. Parag Tripathi, learned Additional Solicitor General, appearing for the Mumbai Port Trust, rightly submitted that in pith and substance the sub-lease deed of 1978, was simply a formalization and continuation of the arrangement as existing between the defendants prior to February 1, 1973. There was no material change in the status of defendant no.2 or in the terms and conditions on which it was in possession of the suit land on February 1, 1973 or in the inter se relationship between the two defendants. The execution of the sub- lease on June 17, 1978 by defendant no.1 in favour defendant no.2 would not, therefore, militate against the protection offered by section 15(2) of the Act. The execution of the lease would not constitute a ground for eviction against

defendant no.1 in terms of section 13(1)(e) of the Act.

29. In light of the discussion made above, we find that the judgments and orders passed by the High Court and the two courts below are quite unsustainable. We, accordingly, set aside the judgments and orders passed by the High Court and the court of Small Causes and dismiss the suit filed by the plaintiff-respondent no.1.

30. The appeals are allowed but with no order as to costs.

D.G. Appeals allowed.

KULDIP YADAV & ORS.

v.

STATE OF BIHAR

(Criminal Appeal No. 531 of 2005 etc.)

APRIL 11, 2011

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

CODE OF CRIMINAL PROCEDURE, 1973 :

s. 223 – Persons accused of offences committed in the course of same transaction –In an incident of death of one person caused by members of accused group, FIR lodged for offences punishable inter alia, u/ss. 302 and 324 read with s. 149 IPC –The following day on the statement of one of the accused, another FIR lodged against members of complainant party for offences punishable, inter alia, u/s. 307/ 149 IPC –Prosecution of accused of the first FIR –Conviction by trial court –Affirmed by High Court –Held : For several offences to be part of the same transaction, the test which has to be applied is whether they are so related to one another in point of purpose or of cause and effect, or as principal and subsidiary, so as to result in one continuous action –Thus , where there is a commonality of purpose or design, where there is a continuity of action, then all those persons involved can be accused of the same or different offences "committed in the course of the same transaction"-Penal Code, 1860 –s. 302 and 24 read with s. 149.

PENAL CODE, 1860 :

ss. 302 and 324 read with s. 149 –FIR against 11 persons for causing death of one of the members of complainant party and causing injuries to others – On the following day cross-FIR registered against complainant party –Conviction by trial court of accused –Upheld by High Court –Held: The

statements of prosecution witnesses u/s. 164 CrPC and their evidence before the court clearly show their improvements with due deliberation and consultation; and in the absence of credible explanation, conviction based on their testimony cannot be sustained – The prosecution has not presented true version on most of the material parts and, therefore, the evidence of the witnesses and material placed on their side does not inspire confidence and cannot be accepted on its face value – The place of occurrence has been shifted by informant and the Investigating Officer has admitted not making any site plan of the place of occurrence – The injuries on the accused, particularly, fire arm injury on A-1 has not been explained by the prosecution despite the fact that members of the informant party were charge-sheeted for causing injuries to four accused – The findings of the High Court and ultimate conclusion dismissing the appeals are perverse and resulted in failure of justice – Under the circumstances, the judgments of the High Court and the trial court are set aside – Accused acquitted.

s.149 – Member of unlawful assembly guilty of offence committed in prosecution of common object – Held: s.149 creates a specific offence and deals with punishment of that offence – Whenever the court convicts any person or persons of an offence with the aid of s. 149, a clear finding regarding the common object of the assembly must be given and the evidence discussed must show not only the nature of the common object but also that the object was unlawful – In the absence of such finding as also any overt act on the part of the accused persons, mere fact that they were armed would not be sufficient to prove common object – In the instant case, there is no material to show that all the accused shared in common object, the object itself not being proved and their participation in it is not made out by credible evidence – Without a clear finding regarding common object and participation therein by each one of the accused members, there can be no conviction with the aid of s. 149.

The appellant in Crl. A. No. 531 of 2005 along with 10 others was prosecuted for causing death of one 'SY' the brother of PW-9. The case of the prosecution was that on 28.4.1997 at about 9.00 A.M. when 'SY' was getting his diesel machine repaired, all the 11 accused came there. A-1 fired at 'SY' in his abdomen, and when PW-9 went to help him, A-9 gave a 'saif' blow causing injury on his lips. When PW-3, PW-4 and PW-7 on hearing alarm reached there, they were also subjected to assault by the accused party.

PW-9 told that the victim died on the way to hospital. On the basis of the 'fard bayan' of PW-9, FIR No. 11/97 was registered. Charge sheet No. 12/97 was submitted in FIR No. 11/97. On 29.4.1997, on the basis of statement of A-9, cross-FIR No. 12 of 1997 was also registered. Charge sheet No. 36/97 was filed in FIR No. 12/97. The trial court convicted all the accused u/ss. 302, 324 read with s. 149 IPC and sentenced them to rigorous imprisonment for life. The appeals filed by the accused were dismissed by the High Court.

Allowing the appeals, filed by the accused, the Court

HELD: 1.1 In the case of *Balbir**, **this Court considered clauses (a) and (d) of s. 223 of the Code of Criminal Procedure, 1973 and held that the primary condition is that persons should have been accused either of the same offence or of different offences "committed in the course of the same transaction". The expression advisedly used is "in the course of the same transaction". That expression is not akin to saying "in respect of the same subject-matter". For several offences to be part of the same transaction, the test which has to be applied is whether they are so related to one another in point of purpose or of cause and effect, or as principal and subsidiary, so as to result in one continuous action. Thus, where there is a commonality of purpose or**

design, where there is a continuity of action, then all those persons involved can be accused of the same or different offences "committed in the course of the same transaction". [para 11] [200-G-H; 201-A-B]

Balbir vs. State of Haryana & Anr.* **1999 (4) Suppl. SCR 120 = (2000) 1 SCC 285 - relied on

Harjinder Singh vs. State of Punjab and Ors. ***(1985) 1 SCC 422;*** *Lalu Prasad vs. State thr. CBI* **2003 (2) Suppl. SCR 1032 = (2003) 11 SCC 786** and *Pal @ Palla vs. State of U.P.* **2010 (11) SCR 716 = (2010) 10 SCC 123 –referred to**

1.2 In the case on hand, the investigation was conducted by the same I.O. in respect of the incident that took place on 28.04.1997. Though in the cross-case, that is, FIR No. 12/97, a complaint was made on the next day i.e. on 29.04.1997 at about 5:30 A.M., from the materials available, both the cases relate to the incident that took place at 9 A.M. on 28.04.1997. In view of the factual details coupled with the statements made by prosecution witnesses and in the light of the principles enunciated by this Court, the Investigating Officer ought to have brought to the notice of the trial court about the two FIRs arising out of the same incident to avoid gross injustice to the parties concerned. Though both the FIRs (11/97 and 12/97) were investigated by the very same IO, he had not acted in good discipline and has not drawn the attention of the trial court about the cross cases arising out of the same incident. [para 14, 15 and 32(a)] [202-F-G; 204-A-B; 214-E-F]

2.1 The analysis of witnesses examined on the side of the prosecution clearly shows that they were not able to identify the actual place of occurrence, namely, whether the incident happened near the diesel engine or in the field of 'AM'. They all had different versions about

the nature of injuries and they are not consistent whether the deceased died at the spot or on the way to hospital or in the hospital. The evidence of the doctor (PW-2) and the evidence of injured persons about the nature of injuries contradict each other. All these contradictions and uncertainties cannot be ignored lightly when some of the accused also suffered bullet injuries in the same incident, which is a cross-case, namely, FIR No. 12/97. [para 24] [209-C-D]

2.2 A reading of the statement of prosecution witnesses u/s. 164 CrPC and their evidence before the court clearly shows their improvements with due deliberation and consultation; and in the absence of credible explanation, conviction based on their testimony cannot be sustained. [para 32(b)] [214-G]

2.3 The version given by eye-witnesses who were also interested witnesses on account of their relationship with the deceased and being inimically disposed against the accused persons is highly exaggerated, contrary to each other and not fully corroborated with medical evidence and there are discrepancies about the number of accused persons, weapons and ammunitions carried by them and they are not in tune with what the informant (PW-9) has stated in his deposition. The prosecution has not presented true version on most of the material parts and, therefore, the witnesses and material placed on their side does not inspire confidence and cannot be accepted on its face value. [para 32(n)] [216-E-F]

2.4 The prosecution is not sure, especially about the actual place of occurrence since some witnesses demonstrated that it occurred near diesel engine and some said the occurrence had taken place in the field of 'AM'. There are contradictions among the prosecution witnesses on material facts and it is not safe to convict all the accused based on the same. [para 32(c)] [214-H; 215-A]

2.5 Even, on description of injuries alleged to have been sustained, the details furnished by the prosecution witnesses and the medical evidence vary on material aspects. [para 32(d)] [215-B]

2.6 Non-examination of diesel mechanic is fatal to the prosecution case. Though his presence at the scene of occurrence was mentioned by the prosecution witnesses in their statements u/s. 164, it is not clear why the prosecution did not examine him. [para 32(e)] [215-C]

2.7 Likewise, though the IO collected blood stained clothes and other objects including earth from the site, there is no information whether the same were examined by the forensic science laboratory and what was the outcome of the same. [para 32(f)] [215-D]

2.8 The place of occurrence has been shifted by informant and the Investigating Officer has admitted not making any site plan of the place of occurrence and he casually acted on the basis of the statement of the informant without carrying his own investigation to ascertain the actual place of occurrence. [para 32(h)] [215-F-G]

2.9 As it was morning time, at least some villagers in their routine work must have been present in neighbouring field who could have deposed regarding the occurrence and manner in which it did take place, if they were examined. [para 32(i)] [215-G-H]

2.10 The injuries on the accused, particularly, fire arm injury on A-1 has not been explained by the prosecution despite the fact that the informant parties were chargesheeted for causing injuries on the person of four accused. [para 32(j)] [216-A]

2.11 The weapons alleged to have been used in the

offence were not seized and no effort was made to recover them. Thus, there is nothing on record to link the accused persons to the crime. [para 32(k)] [216-B]

2.12 The bullet found by the doctor who conducted the post-mortem of the deceased was not seized and preserved for court's observation. [para 32(m)] [216-C]

3.1 Section 149 IPC makes it clear that before convicting the accused with its aid, the court must give clear finding regarding nature of common object and that the object was unlawful. In the absence of such finding as also any overt act on the part of the accused persons, mere fact that they were armed would not be sufficient to prove common object. Section 149 creates a specific offence and deals with punishment of that offence. Whenever the court convicts any person or persons of an offence with the aid of s. 149, a clear finding regarding the common object of the assembly must be given and the evidence discussed must show not only the nature of the common object but also that the object was unlawful. Before recording a conviction u/s. 149, essential ingredients of s. 141 must be established. [para 26] [210-C-F]

Bhudeo Mandal and Others vs. State of Bihar **1981 (3) SCR 291 = (1981) 2 SCC 755;** *Allauddin Mian and others Sharif Mian and another vs. State of Bihar* **1989 (2) SCR 498 = (1989) 3 SCC 5 – relied on.**

3.2 It is not the intention of the legislature in enacting s. 149 to render every member of unlawful assembly liable to punishment for every offence committed by one or more of its members. In order to attract s. 149, it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as the one likely to be committed in prosecution of the common

object. If the members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of the common object, they would be liable for the same u/s. 149 IPC. [para 29] [212-B-C]

Rajendra Shantaram Todankar vs. State of Maharashtra and others **2003 (1) SCR 10 = (2003) 2 SCC 257 =2003 SCC (Crl.) 506 and** *State of Punjab vs. Sanjiv Kumar alias Sanju and others* **2007 (7) SCR 1025 = (2007) 9 SCC 791-relied on.**

Ranbir Yadav vs. State of Bihar **1995 (2) SCR 826 = (1995) 4 SCC 392 - referred to.**

3.3 In the instant case, There are several infirmities in the prosecution evidence. No overt act had been attributed to any other accused persons except A-1 towards the murder of 'SY'. Had the other accused persons intended or shared the common object to kill 'SY', they must have used the weapons allegedly carried by them to facilitate the alleged common object of committing murder. The Sessions Judge, on analysis, held that no case u/s. 307/149 against the accused persons could be made out for causing murderous assault and hurt to prosecution witnesses. He further observed that it appears that at least 4 of the accused persons were armed with gun but no gun shot injury was inflicted against any of the injured prosecution witnesses. Had the accused persons intended to kill the witnesses, they must have used the surest weapon of committing murder i.e. gun against any of the witnesses. In view of the fact that common object was not known to anybody and in the light of the principles enunciated over application of s. 149 IPC and with the available material on the side of the prosecution, it is not safe to convict the accused persons u/s. 149 IPC. [para 31] [213-H; 214-A-D]

3.4 There is no material to show that all the accused shared in common object, the object itself not being proved and their participation in it is not made out by credible evidence. Without a clear finding regarding common object and participation therein by each one of the accused members, there can be no conviction with the aid of s. 149 IPC. [para 32(g)] [215-E]

4.1 The findings of the High Court and ultimate conclusion dismissing the appeals are perverse and resulted in failure of justice. Under the circumstances, the impugned judgment of the High Court and the judgment and order of the trial court are set aside Accused are acquitted. [para 32(o) and 33] [216-G-H; 217-A-B]

Case Law Reference:

(1985) 1 SCC 422	**referred to**	**para 10**
1999 (4) Suppl. SCR 120	**relied on**	**para 11**
2003 (2) Suppl. SCR 1032	**referred to**	**para 12**
2010 (11) SCR 716	**referred to**	**para 13**
1981 (3) SCR 291	**relied on**	**para 26**
1995 (2) SCR 826	**referred to**	**para 27**
1989 (2) SCR 498	**relied on**	**para 28**
2003 (1) SCR 10	**relied on**	**para 30**
2007 (7) SCR 1025	**relied on**	**para 30**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 531 of 2005 etc.

From the Judgment & Order dated 26.09.2003 of the High Court of Patna in Criminal Appeal No. 311 of 2003.

WITH

Crl. A. Nos. 532 & 534 of 2005.

Rajan K. Chourasia, Rakesh Kumar, C. Balakrishna, J.P.N. Gupta, Pankaj Kumar Singh, Manish Kumar, Gopal Singh, Chandan Kumar for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM,J. 1. These appeals are directed against the common judgment and final order dated 26.09.2003 passed by the Division Bench of the High Court of Patna in Criminal Appeal Nos. 293, 307, 311 and 371 of 2000 whereby the High Court upheld the judgment and order dated 26/27.06.2000 passed by the Ist Addl. District & Sessions Judge, Nawadah in Sessions Trial No. 333/97/40/97 convicting the appellants herein for the offence punishable under Section 302 of the Indian Penal Code (in short the "IPC") read with Section 27 of the Arms Act, 1959, Section 302 read with Section 149 of the IPC and Section 324 read with Section 149 of the IPC and maintained the sentences imposed upon them.

2 **Brief facts:**

(a) The present group of appeals arises out of FIR No. 11 of 1997 registered at Police Station Govindpur, at the instance of one Naresh Yadav (PW-9) leading to Session Trial No. 333/97/40/97 at the Court of Ist Addl. District & Sessions Judge, Nawadah.

(b) There was a cross FIR No. 12 of 1997 registered at the same Police Station at the instance of one Sunil Yadav (accused No.9 in FIR No. 11 of 1997) which was lodged at the instance of the accused in FIR No. 11 of 1997.

(c) According to Naresh Yadav (PW-9)-the informant in FIR No. 11 of 1997, on 28.04.1997, at 9:00 a.m., all of a sudden, Brahamdeo Yadav, Darogi Mahto, Maho Yadav, Paro Mahto, Kuldeep Yadav, Sudhir Yadav, Sunil Yadav s/o Bale Yadav, Bale Yadav, Shiv Nandan Yadav, Sunil Yadav s/o Musafir Yadav and Suraj Yadav armed with Saif, Bhala, lathis and gun came

in a mob where Suresh Yadav- informant's elder brother, since deceased, was getting his diesel machine repaired through a mechanic Mohan Yadav. It was alleged that accused Brahamdeo Yadav @ Bhonu Yadav shot a fire at Suresh Yadav in the abdomen and when he went to help him, Sunil Yadav gave a saif blow causing injury on his lips. It was also alleged that on hearing alarm Munshi Yadav, Ganuari Yadav and Bindeshwar Yadav had come and they were also subjected to assault by the accused persons. He also told that the victim Suresh Yadav died on the way while being taken to the hospital.

(d) On the basis of the farde bayan of Naresh Yadav-the informant, FIR No. 11/97 was registered with Govindpur Police Station under Sections 147, 148, 149, 323, 324, 307 and 302 IPC against Brahamdeo Yadav, Sunil Yadav s/o Bale Yadav, Darogi Mahto, Maho Yadav, Paro Mahto, Kuldeep Yadav, Sudhir Yadav, Bale Yadav, Shiv Nandan Yadav and Suraj Yadav. Sunil Yadav s/o Musafir Yadav was instituted. On 29.04.1997, S.I. Anil Kumar Gupta recorded the statement of Sunil Yadav s/o Musafir Yadav at Nawadah Sadar Hospital and on the basis of his statement FIR No. 12/97 was registered with Govindpur Police Station under Sections 147, 148, 149, 323, 324, 307 and 447 IPC against (i) Upendra Yadav (ii) Rambalak Yadav (iii) Basudev Yadav (iv) Anil Yadav (v) Ganuari Yadav (vi) Damodar Yadav (vii) Suresh Yadav (viii) Umesh Yadav (ix) Muni Yadav (x) Naresh Yadav and (xi) Manager Yadav. The investigations in both the FIRs were taken by S.I. Mohd. Shibli, Officer-in-charge of Govindpur Police Station.

(e) After investigation, charge sheet No. 12/97 was submitted in FIR No. 11/97 and charge sheet bearing No. 36/97 was submitted in FIR No. 12/97 against the accused persons and thereafter the case was committed to the Court of Sessions Judge and registered as Sessions Trial No. 333/97/40/97.

(f) The prosecution examined ten witnesses in support of

its claim, namely, Dr. Bipul Kumar, PW-1, Dr. R.K. Bibhuti, PW-2, Ganuari Yadav, PW-3, Bindeshwar Prasad @ Manager Yadav, PW-4, Basudeo Yadav, PW-5, Kesho Yadav, PW-6, Munshi Yadav, PW-7, Minta Devi, PW-8, Naresh Yadav, PW-9 and Md. Shibli, Officer-in-Charge, Nawadh PS. PW-10.

(g) After completion of the trial, learned Sessions Judge convicted all the accused for the offences punishable under Sections 302, 324 read with 149 IPC and sentenced them to undergo rigorous imprisonment for life and further imprisonment of two years.

(h) Aggrieved by the order passed by the trial Judge, the accused preferred different sets of appeals, namely, Criminal Appeal Nos. 293, 307, 311 and 371 of 2000 before the High Court of Patna. By the impugned judgment and order, after accepting the prosecution case, the Division Bench of the High Court upheld the judgment of the Sessions Judge and dismissed all the appeals.

(i) Aggrieved by the decision of the High Court, Paro Mahto (A5), Kuldip Yadav (A6), Sudhir Yadav (A7) filed Criminal Appeal No. 531 of 2005, Brahamdeo Yadav (A1) filed Criminal Appeal No. 532 of 2005 and Darogi Mahto (A2), Bale Yadav (A8) and Suraj Yadav (A11) filed Criminal Appeal No. 534 of 2005 before this Court.

3. Heard Mr. Rajan K. Chourasia learned counsel for the appellants in Criminal Appeal Nos. 531 & 534 of 2005, Mr. J.P.N Gupta, learned *amicus curiae* for the appellant in Criminal Appeal No. 532/2005 and Mr. Manish Kumar, learned counsel for the respondent-State.

FIR Nos. 11/97 and 12/97

4. On the basis of the farde bayan of the informant Naresh Yadav, F.I.R. No. 11/97 was registered with Govindpur P.S. under Sections 147, 148, 149, 323, 324, 307 and 302 IPC

against Brahmdeo Yadav, Sunil Yadav, Darogi Mahto, Maho Yadav, Paro Mahto, Kuldeep Yadav, Sudhir Yadav, Bale Yadav, Shiva Nandan Yadav and Suraj Yadav. Sunil Yadav was instituted.

5. On 29.04.1997, about 5:30 a.m., at Nawada Sadar Hospital, SI Anil Kumar Gupta recorded the statement of Sunil Yadav s/o Musafir Yadav and on the basis of his statement FIR No 12/97 was registered with Govindpur P.S under Sections 147, 148, 149, 323, 324, 307, 447 IPC against Upendra Yadav, Rambalak Yadav, Basudev Yadav, Anil Yadav, Manager Yadav, Ganuari Yadav, Damodar Yadav, Suresh Yadav, Umesh Yadav, Muni Yadav and Naresh Yadav.

6. The investigation in both FIRs was taken by SI Md. Shivli, Officer-in-charge, Govindpur Police Station. The charge-sheet bearing no. 12/97 was submitted in FIR No. 11/97 P.S. Govindpur, on 30.06.1997 against Brahamdeo Yadav, Sunil Yadav, Darogi Mahto, Maho Yadav, Paro Mahto, Kuldeep Yadav, Sudhir Yadav, Bale Yadav, Shivan Yadav and Suraj Yadav and Sunil Yadav who was later instituted.

7. The charge sheet bearing no. 36/97 was also submitted in FIR No. 12/97 P.S. Govindpur, on 17.12.1997 against Upendra Yadav, Rambalak Yadav, Basudev Yadav, Anil Yadav, Manager Yadav, Ganuari Yadav, Damodar Yadav, Umesh Yadav, Muni Yadav and Naresh Yadav except Suresh Yadav s/o Kesho Yadav as he had died. The cognizance was taken by the Court and charge was framed under Section 307 and 149 IPC.

8. It was highlighted that the prosecution witnesses are not certain about the place of death of the deceased Suresh Yadav. At least three eye-witnesses stated, either in their statement under Section 164 of the Code of Criminal Procedure, 1973 (in short the "Code") or during their examination under Section 313 that the deceased died at the spot which is contrary to the statement of Naresh Yadav (PW-9) eye-witness who stated that

he died on the way to hospital and which is consistent with the statement of Sunil Yadav informant in FIR No 12/97. Sunil Yadav stated in his farde bayan that during altercation Suresh Yadav received fire-arm injury which was shot by Upendra Yadav and died. A perusal of the documents and cross examination on behalf of the accused persons probabilize the version of the accused as set up in FIR No. 12/97 which culminated into charge sheet No. 36/97 against the informant/ prosecution party.

Procedure in respect of cross cases

9. In order to understand the above issue, it is useful to refer Section 223 (d) of the Code which reads as under:

> "**223. What persons may be charged jointly.—The following persons may be charged and tried together, namely:—**
>
> (a) xx
>
> (b) xx
>
> (c) xx
>
> (d) persons accused of different offences committed in the course of the same transaction;
>
> (e) xx
>
> (f) xx
>
> (g) xx"

10. The above provision has been interpreted by this Court in the following decisions. In *Harjinder Singh vs. State of Punjab and Ors.* (1985) 1 SCC 422, the question before the Court was whether under Section 223 of the Code it is permissible for the Court to club and consolidate the case on a police challan and the case on a complaint where the

prosecution versions in the police challan case and the complaint case are materially different, contradictory and mutually exclusive. The question was whether the Court should in the facts and circumstances of the case direct that the two cases should be tried together but not consolidated i.e. the evidence be recorded separately in both cases and they may be disposed of simultaneously except to the extent that the witnesses for the prosecution which are common to both may be examined in one case and their evidence be read as evidence in the other. After analyzing the factual details, this Court has concluded:-

> "8**.** In the facts and circumstances of this particular case we feel that the proper course to adopt is to direct that the *two cases should be tried together by the learned Additional Sessions Judge but not consolidated i.e. the evidence should be recorded separately in both the cases one after the other except to the extent that the witnesses for the prosecution who are common to both the cases be examined in one case* and their evidence be read as evidence in the other. The learned Additional Sessions Judge should after recording the evidence of the prosecution witnesses in one case, withhold his judgment and then proceed to record the evidence of the prosecution in the other case. Thereafter he shall proceed to simultaneously dispose of the cases by two separate judgments taking care that the judgment in one case is not based on the evidence recorded in the other case….."
>
> (underlining supplied)

11. In *Balbir vs. State of Haryana & Anr.* (2000) 1 SCC 285, this Court considered clauses (a) and (d) of Section 223 of the Code and held that the primary condition is that persons should have been accused either of the same offence or of different offences "committed in the course of the same transaction". The expression advisedly used is "in the course of the same transaction". That expression is not akin to saying

"in respect of the same subject-matter". For several offences to be part of the same transaction, the test which has to be applied is whether they are so related to one another in point of purpose or of cause and effect, or as principal and subsidiary, so as to result in one continuous action. Thus, where there is a commonality of purpose or design, where there is a continuity of action, then all those persons involved can be accused of the same or different offences "committed in the course of the same transaction".

12. In *Lalu Prasad vs. State thr. CBI* (2003) 11 SCC 786, this Court held that amalgamation of cases under Section 223 is discretionary on the part of trial Magistrate and he has to be satisfied that persons would not be prejudicially affected and that it is expedient to amalgamate cases.

13. Regarding the argument based on Section 210(2) of the Code, it is useful to refer the decision of this Court reported in *Pal @ Palla vs. State of U.P.* (2010) 10 SCC 123 which reads as under:-

> **"27.** Sub-section (2) of Section 210 provides that if a report is made by the investigating officer under Section 173 and on such report cognizance of any offence is taken by the Magistrate against any person, who is an accused in a complaint case, the Magistrate shall inquire into or try the two cases together, as if both the cases had been instituted on a police report. Sub-section (3) provides that if the police report does not relate to any accused in the complaint case, or if the Magistrate does not take cognizance of any offence on a police report, he shall proceed with the inquiry or trial which was stayed by him, in accordance with the provisions of the Code.
>
> **28.** Although it will appear from the above that under Section 210 CrPC, the Magistrate may try the two cases arising out of a police report and a private complaint

> together, the same, in our view, contemplates a situation where having taken cognizance of an offence in respect of an accused in a complaint case, in a separate police investigation such a person is again made an accused, then the Magistrate may inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report. That, however, is not the fact situation in the instant case, since the accused are different in the two separate proceedings and the situation has, in fact, arisen where prejudice in all possibility is likely to be caused in a single trial where a person is both an accused and a witness in view of the two separate proceedings out of which the trial arises.
>
> **30.** .....As was observed in *Harjinder Singh case*[1] clubbing and consolidating the two cases, one on a police challan and the other on a complaint, if the prosecution versions in the two cases are materially different, contradictory and mutually exclusive, should not be consolidated but should be tried together with the evidence in the two cases being recorded separately, so that both the cases could be disposed of simultaneously."

14. In the case on hand, we have already noted that the investigation was conducted by the same I.O. in respect of the incident that took place on 28.04.1997 at Khalihan. Though in the cross-case, that is, FIR No. 12/97, a complaint was made on the next day i.e. on 29.04.1997 at about 5:30 A.M., from the materials available, both the cases relate to the incident that took place at 9 A.M. on 28.04.1997 which is also clear from the following information.

FIR No. 11/97 P.S. GOVINDPUR	FIR No. 12/97 P.S. GOVINDPUR
Informant-Naresh Yadav (PW-9)	Informant-Sunil Yadav (A9 in FIR 11/97)
Chargesheet submitted on 30.06.1997 Charge was framed on 19.03.1999 Date of Judgment of Trial Court: 27.06.2000	Chargesheet submitted on 17.12.1997 Date of Judgment of Trial Court: 18.11.2009
Accused Persons 1. Brahamdeo Yadav @ Bhonu Yadav (Gun) 2. Darogi Mahto (Gun) 3. Maho Yadav (Gun) 4. Sunil Yadav s/o Bale Yadav (Gun) 5. Paro Mahto (Lathi) 6. Kuldip Yadav (Gandassa) 7. Sudhir Yadav (Bhala) 8. Balle Yadav (Gandassa) 9. Sunil Yadav s/o Musafir Yadav (Saif) (Informant in FIR No. 12/97) 10. Shivan Yadav (Gandassa) 11. Suraj Yadav (Bhala)	Accused Persons 1. Upendra Yadav (Pistol) 2. Rambalak Yadav (Gun) 3. Basudev Yadav (Gandassa) 4. Anil Yadav (Gandassa) 5. Bindeshwar Yadav @ Manager Yadav (Gandassa) 6. Ganori Yadav (Gandassa) 7. Damodar Yadav (Stick) 8. Suresh Yadav (Stick) 9. Umesh Yadav (Stick) 10. Muni Yadav (Gandassa) 11. Naresh Yadav (Gandassa)
Injury to deceased Suresh 1. An oral lacerated wound of ½" diameter With inverted and charred margin, ½" right to umbilicus of uncertain depth i.e. wound of entry 2. Multiple bruises of size 3" x 2" to 1" x ½" four in number over back right lower chest and abdomen Injured person 1. PW-3 Ganauri Yadav (A6 in FIR 12/97) 2. PW-4 Bindeshwar Yadav @ Yadav (A5 in FIR 12/97) Manager 3. PW-7 Munshi Yadav (A10 in FIR 12/97) 4. PW-9 Naresh Yadav (A11 in FIR 12/97)	Injured person 1. Brahamdeo Yadav @ Bhonu Yadav (A1 in FIR 11/97) 2. Sunil Yadav (A9 in FIR 11/97) 3. Musafir Yadav

15. In view of the above factual details coupled with the statements made by prosecution witnesses and in the light of the principles enunciated by this Court, the Investigating Officer ought to have brought to the notice of the trial Judge about the two FIRs arising out of the same incident to avoid gross injustice to the parties concerned.

Discrepancies in the prosecution witnesses

16. Among various witnesses examined by the prosecution, it heavily relied on the evidence of Naresh Yadav (PW-9), Ganauri Yadav (PW-3), Bindeshwar Yadav (PW-4), Kesho Yadav (PW-6), Munshi Yadav (PW-7), Minta Yadav (PW-8) and Dr. R.K. Bibhuti (PW-2).

17. First, let us discuss the evidence of Naresh Yadav (PW-9). He is the informant and Suresh Yadav- the deceased was his brother. According to him, on Monday, i.e. on 28.04.1997, he along with Suresh, Ganauri Yadav and Bindeshwar Yadav were busy in getting the diesel machine repaired. Brahmdeo Yadav, Darogi Mahto, Sunil S/o Bale Yadav, Maho Yadav, Kuldeep Yadav, Bale Yadav, Suraj Yadav, Shiv Nandan Yadav, Sunil Yadav S/o Musafir Yadav, Sudhir Yadav and Paro Mahto, total 11 persons forming a group came there and surrounded them. Brahmdeo Yadav, Sunil Yadav, Darogi Mahto and Maho Yadav were armed with rifle. Bale Yadav, Kuldeep Yadav, Shiv Nandan Yadav and Suraj Yadav were armed with Gandassa. Sunil Yadav S/o Musafir Yadav was having saif in his hand. Sudhir Yadav was having spear with him and Paro Mahto was having lathi in his hand. The abovesaid persons surrounded them whereupon they started running when Brahmdeo Yadav fired shot from rifle hitting the abdomen of Suresh Yadav. He further deposed that when he went to help Suresh to get up, Sunil Yadav (A-4) using his saif hit him on his upper lip. Bale Yadav (A-8) gave a Gandassa blow on the neck of Ganauri Yadav and while stopping the blow with his right hand, he sustained injury on his palm. Kuldeep Yadav also gave him a

Gandassa blow on the right hand. Shiv Nandan and Suraj Yadav too gave Gandassa blows to Ganauri Yadav. Sudhir Yadav using Gandassa hit on the forehead of Bindeshwar Yadav. Kuldeep Yadav gave gandassa blow to Munshi Yadav. Paro Mahto also beat Ganauri Yadav with lathi. While they were taking Suresh to Govindpur Hospital, just after some distance, he died on the way. When they reached Govindpur Hospital, S.I. recorded his statement. In his statement under Section 164 of the Code, he has not mentioned all the above details. According to him, Suresh was alive at the spot but he died on the way to Govindpur Hospital. Even, in respect of use of weapons by the accused, he was not consistent with his earlier statement made under Section 164 of the Code. He also admitted that S.I. seized blood stained earth in his presence. He also stated that even though S.I. saw the clothes having blood spots but he did not seize them. He also asserted that at the relevant time, he was repairing diesel engine and Mohan-Mechanic was present at that time. In cross-examination, he also admitted that there is another counter case against the very same incident and he informed the court that on that day he did not see any injury on the person of Brahmdeo (A-1), Sunil Yadav (A-9) and Musafir Yadav. He also answered that when Suresh was running ahead of all of them, he was hit by a bullet on his abdomen. It is not the case of any one that Suresh was running towards the accused. On the other hand, it is their definite case that the accused persons were chasing and Suresh and others were running to escape from them. In such circumstances, there is no plausible explanation how the bullet hit Suresh Yadav – the deceased, on his abdomen. From his evidence, it is clear that though diesel mechanic-Mohan was present, he denied his relationship with him in the statements made later on. It was put to him that incident did not actually take place as stated and all accused were not present. It is also clear from his evidence that injury on the accused was not seen by him.

18. The next witness heavily relied on by the prosecution is Munshi Yadav (PW-7). According to him, accused persons were armed and Brahmdeo Yadav (A1) fired a shot from gun which hit Suresh Yadav on his abdomen and he fell on the ground and when Ganauri Yadav (PW-3) went for his rescue, five accused persons, namely, Bale Yadav (A8), Kuldeep Yadav (A6), Sunil Yadav (A4), Suraj Yadav (A11) and Shiv Nandan Yadav (A10), all armed with deadly weapons, started beating him. Suresh Yadav died on the way to hospital. His evidence also makes it clear that he did not deny the presence of mechanic-Mohan at the place of occurrence. According to him, the incident started when diesel engine was about to start. A specific suggestion was put to him that Suresh Yadav died from the bullet fired by Upendra Yadav. It is relevant to note the conduct of (PW-7). He admitted in his evidence that after the incident, he went to take the cow for grazing. It is unnatural that after having seen the incident, without associating with his fellow villagers about the crime, he coolly went for grazing his cow which is unbelievable.

19. Another witness relied on by the prosecution is Bindeshwar Prasad @ Manager Yadav (PW-4). In his evidence, he mentioned 17 persons as accused who were present at the place of occurrence and, according to him, on seeing them, he got afraid of his life but did not run away and remained standing. He said, when bullet hit Suresh, they started running. He further deposed that except Suresh Yadav, no other fell down due to beating, all continued running and some of them reached their homes and some remained there. He has not only added more names as accused persons but also asserted that the bomb was exploded after firing of shots. He also mentioned that Suresh Yadav died on the way to hospital. A specific suggestion was also given to this witness that Suresh Yadav died from the bullet fired by Upendra Yadav. Here again, by drawing our attention to his statement under Section 164 of the Code, it was pointed out that there were lot of contradictions and inconsistencies in respect of vital aspects.

20. The next witness relied on by the prosecution is Ganauri Yadav (PW-3). Like Bindeshwar Yadav (PW-4), he also named 17 persons as accused who came at the place of occurrence and (A1) fired from gun hitting the abdomen of Suresh Yadav and other accused persons started beating. He said when he fell down, he was not hit on neck with gandassa. He asserted that Suresh Yadav died on the spot. He received one blow of spear and two blows of gandassa. He explained that the said blow of spear was given by poking it into his body and not like hitting with a lathi. He further deposed that the attack with spear caused a hole in the vest also. As stated earlier, he asserted that Suresh Yadav died at the place of occurrence itself, which is not in tune with the statement of other prosecution witnesses. He said that blood did not fall on diesel engine, however, it fell at the spot. He also informed the Court that the blood oozed out from the wounds of all the injured and its stains were present up to Govindpur hospital. He admitted that he did not see any injury on the persons of accused. He admitted that he was not in full sense when he made the statement to S.I. under Section 164 of the Code. He also referred to the use of bomb which was kept in a bag, though, he did not say the same before the court.

21. Another witness relied on by the prosecution is Kesho Yadav (PW-6)-father of the deceased. He admitted that he had diesel engine in the field towards north of village. His sons, namely, Suresh Yadav and Naresh Yadav were repairing the said engine for irrigation purposes. At that time, all the accused Brahmdeo Yadav (A1), Darogi Mahto (A2), Maho Yadav (A3), Sunil Yadav (A4) armed with guns in their hands, accused Kuldip Yadav, Shiv Nandan Yadav, Baleshwar, Suraj with gandassas, Sunil Yadav with saif, Sudhir yadav with spear and Paro Mahto with lathi came there. He further explained that immediately on coming there, the accused persons surrounded them and when they started running, they were caught in the field of Aziz Mian. Accused Brahmdeo Yadav (A1) fired from

gun and the bullet hit the abdomen of Suresh Yadav and he fell down. Naresh Yadav went to lift Suresh from the ground when Sunil Yadav hit him with saif causing injury to his lips. When Ganauri Yadav went to pick him up, Kuldeep Yadav hit on his neck using gandassa. He also asserted that his son Suresh Yadav died at the spot itself. He further informed the court that the bullet made a hole in the vest of his son and the cloth got cut edges and that was handed over to the police.

22. Another witness examined on the side of the prosecution is Dr. Basudeo Yadav (PW-5). He attested the seizure memo which was prepared by SI before him. He also admitted that Naresh Yadav affixed his thumb impression before him and he was present there. He did not say anything about the occurrence. Minta Devi (PW-8)-wife of the deceased, also did not elaborate anything about the incident.

23. Dr. R.K. Bibhuti, who treated injured Naresh Yadav (PW-9) and other injured witnesses was examined as (PW-2). He examined Naresh Yadav, Munshi Yadav, Ganauri Yadav, Bindeshwar Yadav and after treatment issued a certificate about the same. Dr. Bipul Kumar, who conducted the autopsy on the body of the deceased was examined as PW-1 and found the following ante-mortem injuries:-

> "(1) An oval lacerated wound of 1/2" diameter with inverted and charred margin, half inch right to illeg. of uncertain depth, i.e. wound of entry.
>
> (2) Multiple bruises of size 3"x2" to 1"x1/2", in four in number over back, right lower chest and abdomen.
>
> On dissection abdominal cavity filled with blood and blood clot, multiple perforations four in number of small intestine locum and transverse colon, linear ruptured, a metallic foreign body like bullet of 1 ½" length and 1/6" in diameter was lodged at L/1 spine after piercing the abdominal aorta.

Rest viscera were intact and pale, stomach contains fluids about 100 ml. Bladder empty, heart all chambers empty.

Cause of death – hemorrhage and shock produced by above noted injuries. Injury No. 1 caused by firearm such as gun. Injury No. 2 caused by hard and blunt object such as lathi."

24. The analysis of the evidence of R.K. Bibhuti (PW-2) and the evidence of injured persons about the nature of injury contradict each other. The analysis of witnesses examined on the side of the prosecution clearly show that they were not able to identify the actual place of occurrence, namely, whether the incident happened near the diesel engine or in the field of Aziz Mian. They all had a different version about the nature of injuries and they are not consistent whether the deceased died at the spot or on the way to hospital or in the hospital. All these contradictions, uncertainties cannot be ignored lightly when some of the accused also suffered bullet injuries in the same incident, which is a cross case, namely, FIR No. 12/97.

Conviction under Section 149 IPC

25. Apart from conviction under Section 302, all the accused were also convicted under Section 149 IPC. Learned counsel appearing for the appellants demonstrated that, first of all, there was no common object, even if, it is admitted that there was a common object, the same was not known to anybody, in such circumstances, punishment under Section 149 IPC is not warranted. On the other hand, learned counsel appearing for the State submitted that when the charge is under Section 149 IPC, the presence of the accused as part of unlawful assembly is sufficient for conviction, even if, no overt act is imputed to them. In other words, according to him, mere presence of the accused as part of unlawful assembly is sufficient for conviction. In order to understand the rival claim, it is useful to refer Section 149 which reads as follows:-

"149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.—If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

26. The above provision makes it clear that before convicting accused with the aid of Section 149 IPC, the Court must give clear finding regarding nature of common object and that the object was unlawful. In the absence of such finding as also any overt act on the part of the accused persons, mere fact that they were armed would not be sufficient to prove common object. Section 149 creates a specific offence and deals with punishment of that offence. Whenever the court convicts any person or persons of an offence with the aid of Section 149, a clear finding regarding the common object of the assembly must be given and the evidence discussed must show not only the nature of the common object but also that the object was unlawful. Before recording a conviction under Section 149 IPC, essential ingredients of Section 141 IPC must be established. The above principles have been reiterated in *Bhudeo Mandal and Others vs. State of Bihar* (1981) 2 SCC 755.

27. In *Ranbir Yadav vs. State of Bihar* (1995) 4 SCC 392, this Court highlighted that where there are party factions, there is a tendency to include the innocent with the guilty and it is extremely difficult for the court to guard against such a danger. It was pointed out that the only real safeguard against the risk of condemning the innocent with the guilty lies in insisting on acceptable evidence which in some measure implicates such accused and satisfies the conscience of the court.

28. In *Allauddin Mian and others Sharif Mian and another vs. State of Bihar* (1989) 3 SCC 5, this Court held:-

"….Therefore, in order to fasten vicarious responsibility on any member of an unlawful assembly the prosecution must prove that the act constituting an offence was done in prosecution of the common object of that assembly or the act done is such as the members of that assembly knew to be likely to be committed in prosecution of the common object of that assembly. Under this section, therefore, every member of an unlawful assembly renders himself liable for the criminal act or acts of any other member or members of that assembly provided the same is/are done in prosecution of the common object or is/are such as every member of that assembly knew to be likely to be committed. This section creates a specific offence and makes every member of the unlawful assembly liable for the offence or offences committed in the course of the occurrence provided the same was/were committed in prosecution of the common object or was/were such as the members of that assembly knew to be likely to be committed. Since this section imposes a constructive penal liability, it must be strictly construed as it seeks to punish members of an unlawful assembly for the offence or offences committed by their associate or associates in carrying out the common object of the assembly. What is important in each case is to find out if the offence was committed to accomplish the common object of the assembly or was one which the members knew to be likely to be committed. There must be a nexus between the common object and the offence committed and if it is found that the same was committed to accomplish the common object every member of the assembly will become liable for the same. Therefore, any offence committed by a member of an unlawful assembly in prosecution of any one or more of the five objects mentioned in Section 141 will render his companions constituting the unlawful assembly

liable for that offence with the aid of Section 149, IPC…."

29. It is not the intention of the legislature in enacting Section 149 to render every member of unlawful assembly liable to punishment for every offence committed by one or more of its members. In order to attract Section 149, it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object. If the members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of the common object, they would be liable for the same under Section 149 IPC.

30. In *Rajendra Shantaram Todankar vs. State of Maharashtra and others* (2003) 2 SCC 257=2003 SCC (Crl.) 506, this Court has once again explained Section 149 and held as under:

"14. Section 149 of the Indian Penal Code provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of the committing of that offence, is a member of the same assembly is guilty of that offence. The two clauses of Section 149 vary in degree of certainty. The first clause contemplates the commission of an offence by any member of an unlawful assembly which can be held to have been committed in prosecution of the common object of the assembly. The second clause embraces within its fold the commission of an act which may not necessarily be the common object of the assembly, nevertheless, the members of the assembly had knowledge of likelihood of the commission of that offence in prosecution of the common object. The common object may be commission of one offence while there may be

likelihood of the commission of yet another offence, the knowledge whereof is capable of being safely attributable to the members of the unlawful assembly. In either case, every member of the assembly would be vicariously liable for the offence actually committed by any other member of the assembly. A mere possibility of the commission of the offence would not necessarily enable the court to draw an inference that the likelihood of commission of such offence was within the knowledge of every member of the unlawful assembly. It is difficult indeed, though not impossible, to collect direct evidence of such knowledge. An inference may be drawn from circumstances such as the background of the incident, the motive, the nature of the assembly, the nature of the arms carried by the members of the assembly, their common object and the behaviour of the members soon before, at or after the actual commission of the crime. Unless the applicability of Section 149 — either clause — is attracted and the court is convinced, on facts and in law, both, of liability capable of being fastened vicariously by reference to either clause of Section 149 IPC, merely because a criminal act was committed by a member of the assembly every other member thereof would not necessarily become liable for such criminal act. The inference as to likelihood of the commission of the given criminal act must be capable of being held to be within the knowledge of another member of the assembly who is sought to be held vicariously liable for the said criminal act…."

The same principles have been reiterated in *State of Punjab vs. Sanjiv Kumar alias Sanju and others* (2007) 9 SCC 791.

Summarization of the principles attracting S.149

31. In the earlier part of our order, we have analysed the evidence led in by the prosecution and also pointed out several infirmities therein. In our view, no overt act had been attributed

to any other accused persons except Brahmdeo Yadav (A1) towards the murder of Suresh Yadav. Had the other accused persons intended or shared the common object to kill Suresh Yadav, they must have used the weapons allegedly carried by them to facilitate the alleged common object of committing murder. The Sessions Judge, on analysis, held that no case under Section 307/149 against all the 11 accused persons be made out for causing murderous assault and hurt to Naresh Yadav, Munshi Yadav, Bindeshwar Yadav and Ganauri Yadav. The learned Judge further observed that it appears that at least 4 of the accused persons were armed with gun but no gun shot injury was inflicted against any of the aforesaid injured prosecution witnesses. Had the accused persons intended to kill the witnesses, they must have used the surest weapon of committing murder i.e. gun against any of the aforesaid witnesses. In view of the fact that common object was not known to anybody and in the light of the principles enunciated over application of Section 149 IPC and with the available material on the side of the prosecution, we hold that it is not safe to convict the accused persons under Section 149 IPC.

32. Summary of all the issues:

(a) Though both the FIRs (11/97 and 12/97) were investigated by the very same IO, he had not acted in good discipline and not drawn the attention of the trial Judge about the cross cases arising out of the same incident.

(b) By reading the statement of prosecution witnesses under Section 164 of the Code and their evidence before the Court clearly show their improvements with due deliberation and consultation and in the absence of credible explanation, conviction based on their testimony cannot be sustained.

(c) The prosecution is not sure, especially about the actual place of occurrence since some witnesses demonstrated that it occurred near diesel engine and some said the occurrence

had taken place in the field of Aziz Mian. We have already noted down the contradictions among the prosecution witnesses on material facts and it is not safe to convict all the accused based on the same.

(d) Even, on description of injuries alleged to have been sustained, the details furnished by the prosecution witnesses and the medical evidence vary on material aspects.

(e) Non-examination of diesel mechanic-Mohan Yadav is fatal to the prosecution case. Though, his presence at the scene of occurrence was mentioned by the prosecution witnesses under Section 164, it is not clear why the prosecution did not examine him.

(f) Likewise, though the IO collected blood stained clothes and other objects including earth from the site, there is no information whether the same were examined by the forensic science laboratory and the outcome of the same.

(g) There is no material to show that all the accused shared in common object, the object itself not being proved and their participation in it is not made out by credible evidence. Without a clear finding regarding common object and participation therein by each one of the accused members, there can be no conviction with the aid of Section 149 IPC.

(h) The place of occurrence has been shifted by informant and the investigating officer has admitted not making any site plan of the place of occurrence and casually acted on the basis of the statement of the informant without carrying its own investigation to ascertain the actual place of occurrence.

(i) As it was morning time, at least some villagers in their routine work must have been present in neighbouring field who could have deposed regarding the occurrence and manner in which it did take place, if they were examined.

(j) The injuries on the accused, particularly, fire arm injury on Brahmdeo Yadav has not been explained by the prosecution despite the fact that the informant parties were chargesheeted for causing those injuries on the person of Brahmdeo Yadav, Darogi Mahto, Musafir Yadav and Sunil Yadav.

(k) The weapons alleged to be used in the offence were not seized and no effort was made to recover them. Hence, there is nothing on record to link the accused persons to the crime.

(l) The blood stained clothes, blood stained earth of the place of occurrence were not sent to forensic laboratory for chemical examination.

(m) The bullet found by the doctor who conducted the post-mortem of the deceased was not seized and preserved for court's observation.

(n) The version given by eye-witnesses who were also interested witnesses on account of their relationship with the deceased and being inimically deposed against the accused persons is highly exaggerated, contrary to each other and not fully corroborated with medical evidence and there are discrepancies about the number of accused persons, weapons and ammunitions carried by them and they are not in tune with what (PW-9) informant has stated in his deposition. In other words, the prosecution has not presented true version on most of the material parts and therefore the witnesses and material placed on their side does not inspire confidence and cannot be accepted on its face value.

(o) The findings of the High Court and ultimate conclusion dismissing the appeals are perverse and resulted in failure of justice.

33. Under these circumstances, the impugned judgment

of the High Court dated 26.09.2003 in Criminal Appeal Nos. 293, 307, 311 and 371 of 2000 and the judgment and order dated 26/27.06.2000 passed by the Ist Addl. District & Sessions Judge, in Sessions Trial No. 333/97/40/97 are set aside. All the accused are directed to be released forthwith unless their presence is required in some other case. Appeals are allowed.

R.P. Appeals allowed.

B.R. SURENDRANATH SINGH
v.
DEPUTY DIRECTOR, DEPARTMENT OF MINES & GEOLOGY, KARNATAKA AND ORS.
(Civil Appeal Nos. 3187-3188 of 2011)

APRIL 11, 2011

[DALVEER BHANDARI AND DEEPAK VERMA, JJ.]

Mines and minerals:

Mines and Minerals (Development and Regulation) Act, 1957 – s. 21 read with s. 4(1)(a) – Illegal mining of iron ore – Department detected unauthorized mining operation in Government land – Action taken to seize iron ore illegally quarried and deposited on the leased area of appellant-mining lease holder – Department taking a decision to auction the seized iron ore – Complaint by the appellant that instead of the illegally mined iron ore, the department was contemplating to sell the iron ore which was legally mined and accumulated by the appellant – Writ petition by the appellant – Report of the Court Commissioner to the effect that the dump stacked near the crusher in two lots was extracted from the pit located in the area leased to the appellant; and that no illegally extracted iron ore from the pit located in the Government land was stacked on the leased area of the appellant – Dismissal of writ petition by High Court holding that the appellant did not have any right over the seized iron ore – Review petition also dismissed – On appeal, held: Appellant could legally mine upto 5500 metric tons only in a year which was increased to 41000 metric tons a year – Audit report indicates that the appellant had quarried and produced around one lakh ton of iron ore – Theory of somebody putting one lakh ton of iron ore of mining lease is totally untenable and beyond comprehension – One lakh ton of iron ore cannot be kept on any mining lease all of a sudden without the

knowledge of the appellant – It is possible only when the appellant had indulged in massive illegal mining – Thus, the appellant cannot claim any right over seized iron ore – Interference u/Art. 136 not called for – Constitution of India, 1950 – Article 136.

The appellant is a mining lease holder and an area of 58 acres was leased in favour of the appellant. The appellant is continuing with the quarrying operation and is also filing monthly reports with respondent No. 1-Deputy Director, Department of Mines and Geology. The appellant wrote to the respondents that adjacent to the property leased in favour of the appellant, certain person had illegally conducted mining operations and extracted iron ore. The respondents found that about one lakh ton of iron ore had been illegally quarried and was kept in the appellant's land and the appellant was directed to protect the said one lakh ton of iron ore. Action was taken to seize the unauthorized mining iron ore which was deposited on the leased area of the petitioner. The respondent No. 1 took a decision to auction the seized iron ore. Thereafter, the appellant made a complaint that instead of illegally mined iron ore, respondent No. 1 was contemplating to sell the iron ore which was legally mined and accumulated by the appellant. The appellant filed a writ petition seeking a prayer to restrain the respondents from auctioning the iron ore fines stacked in Survey No. 130, and direct the respondents to conduct an inspection and determine the iron ore fines, legally extracted by the appellant, and the iron ore fines, illegally dumped in the area of the appellant. The High Court directed respondent No. 1 not to confirm the auction, however, respondent No. 1 invited bids for auctioning the iron ore legally quarried by the appellant. Thereafter, respondent No. 1 issued a letter in pursuance to the complaint of illegal mining activity that the Joint Director had visited

the site and had found that in an area adjacent to the lease of appellant, 'BP' and contractor 'S' of 'B' Company were involved in the act of committing illegal quarrying. Respondent No. 1 then filed a criminal complaint against 'KM' Company; 'B' Company and their contractor 'S'; and the appellant alleging that they were involved in committing the act of illegal quarrying. Thereafter, the respondents filed an application before the High Court for appointment of a Court Commissioner to identify and submit a report as to whether the iron ore stacked in the leased area of the appellant was extracted by the appellant from the land leased to him or was illegally extracted from the abutting government lands. The Court Commissioner submitted a report that after analyzing the chemical qualities of the iron ore it was found that the dump stacked near the crusher in two lots was extracted from the 'K' pit (appellant) located in the area leased to the appellant; and that no illegally extracted iron ore from the 'Biscuit Pit' located in the Government land was stacked on the leased area of the appellant. The High Court directed the Court Commissioner to go to the spot and collect the samples from three points in the Biscuit Pit, which were to be identified by the respondents. The Court Commissioner submitted a report that material from the Biscuit Pit was distinctly different from the material in the dump. Thereafter, the High Court dismissed the writ petition holding that the appellant did not have any right over the seized iron ore fines and the report of the Commissioner was not helpful to the appellant to substantiate the contention that the seized iron ore fines are legally extracted by the appellant from his lease. The appellant filed Review Petition and the same was also dismissed. Therefore, the appellant filed the instant appeals.

Dismissing the appeals, the Court

HELD: 1.1 The respondents submitted that at that point of time the appellant could legally mine upto to 5500 metric tons only in a year. That limit was increased to 41000 metric tons a year. It is beyond comprehension how illegal iron ore could be found on the Mining Lease No.2187 to the tune of about one lakh ton legally mined by the appellant. This was possible only when the appellant had indulged in massive illegal mining. The audit report clearly indicate that the appellant had quarried and produced iron ore several times more than its permissible limit particularly in the years from 2003 to 2006. [Paras 35 and 36] [242-A-C]

1.2 The theory of somebody had put one lakh ton of iron ore of mining lease is totally untenable and beyond comprehension. One lakh ton of iron ore cannot be kept on any mining lease all of a sudden without the knowledge of the appellant. Thousands of trucks have to transport the said quantity of iron ore and if it did not belong to the appellant he ought to have complained immediately after someone started dumping iron ore on his mining lease. According to the respondent-State, this is a clear case of illegal mining on a massive scale by the appellant. [Para 37] [242-D]

1.3 This Court ought not to exercise its extra-ordinary jurisdiction under Article 136 of the Constitution in a matter of this nature. Interim order, if any, stands vacated. [Para 39] [242-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3187-3188 of 2011.

From the Judgment and Order dated 25.06.2009 of the High Court of Karnataka at Bangalore in R.P. No. 418 of 2009 & W.P. No. 27521 of 2005.

WITH

C.A. No. : 3189 of 2011.

Shanti Bhushan, A. Raghunath, Hemant Raj, A.D. Sikri, Anitha Shenoy, Ravi B. Naik, Anand Sanjay M. Nuli, Rajshekhar and Suvidutt Sundram (for Debasis Misra) for the appearing parties.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. Leave granted.

2. Since the common questions of law arise in these appeals, they are being disposed of by a common judgment.

3. These appeals emanate from the order dated 25.06.2009 passed in Writ Petition No. 27521 of 2005, order dated 12.04.2010 passed in Review Petition No. 418 of 2009 in Writ Petition No. 27521 of 2005 and interim order dated 29.04.2010 passed in Writ Petition No. 15079 of 2010 by Division Bench of the High Court of Karnatka at Bangalore.

4. The appellant aggrieved by the said orders passed by the High Court of Karnataka has preferred these appeals.

5. For the sake of convenience the facts of Civil Appeal Nos. 3187-3188 of 2011 arising out of Special Leave Petition (Civil) NoS. 22023-22024 of 2010 entitled *B.R. Surendranath Singh v. Deputy Director Department of Mines & Geology & Ors.* are recapitulated as under.

6. Brief facts according to the appellant are as under:

A mining lease was granted during the year 1958 in favour of B.K.R.N. Singh, the father of the appellant herein, with respect of a land measuring 58 acres situated at Honnebagi and Bellenahalli village, Chikkanayakanahalli Taluk, Tumkur District, Karnataka. The lease was initially for a period of 20

years and the said period expired in the year 1978. Thereafter, the mining lease was renewed for a further period of 10 years upto 19-10-1988, in the name of Smt. Kamalabai, wife of B.K.R.N. Singh. After the death of Smt. Kamalabai, the appellant is continuing as the lessee and an application for renewal has also been made by the appellant.

7. The appellant is continuing with the quarrying operations and accordingly the appellant has been filing monthly reports with the first respondent – Deputy Director, Department of Mines and Geology, Railway Station Road, Tumkur.

8. Adjacent to the property leased in favour of the appellant, certain persons have illegally conducted mining operations and extracted iron ore. According to the appellant he immediately wrote a letter-cum-undertaking to the respondents that this iron ore of approximately one lakh ton can be taken away by the respondents and the appellant herein has no claim whatsoever over it. The letter/undertaking dated 20-12-2004 of the appellant is setout as under:

"20-12-2004

From

B.R. Surendranath Singh,
194, 4th Main Road,
Chamarajpet,
Bangalore – 18.

To

The Director,
Dept of Mines and Geology,
Division Road,
Bangalore.

I would like to bring to your kind notice that approximately about 1 lakh ton of iron ore fines has been dumped in my ML area No.2187 and the same material

you can take possession and do whatever you deem for and further I have no claim on the above stock.

Thanking you,

Yours faithfully,

Sd/-
B.R. Surendranath Singh"

9. During the month of January, 2005, the respondents found that about one lakh ton of iron ore has been illegally quarried and this illegal material was kept in the appellant's land and the appellant was directed to protect the said one lakh ton of iron ore. The appellant immediately acknowledged the approximate stock of one lakh ton of iron ore for which the appellant gave an undertaking to protect the same. The relevant portion of the undertaking is reproduced as under:

"AFFIDAVIT

I, B.R. Surendranath Singh son of late Kamalabai, aged about 70 years, residing at No. 195, 4th Main Road, Chamarajpet, Bangalore 560 019, do hereby solemnly affirm and declare the following:

Whereas the Department of Mines and Geology is having a stock of approximately one lakh ton of iron ore lying at Survey No. 130 of Honnebagi Village, Chikkanaikanahalli Taluk.

We undertake to protect, safeguard and keep safe the said stocks.

BANGALORE
DATED 10/012005

B.R. SURENDRANATH SINGH"

10. It is the case of the appellant that after extracting the

iron ore the appellant is required to submit a monthly report and the monthly report indicates the production and dispatch and remaining balance iron ore on the mining lease.

11. It is also the case of the appellant that he was in possession of iron ore which have been legally extracted by him from his leased area and also he is in possession of another one lakh ton of iron ore which is seized by the State Government.

12. According to the appellant, the Deputy Director - the first respondent brought some people on 22.12.2005 who were interested in purchasing the iron ore, for which the first respondent herein actually showed the iron ore legally quarried and stacked by the appellant instead of showing the illegally mined iron ore lying within the borders of the appellant's leased land.

13. The appellant submitted a representation to the respondent No. 1 stating that the error has been rectified and appropriate action be taken in this regard. The appellant made a complaint that instead of illegally mined iron ore, the respondent no. 1 was contemplating to sell the iron ore which was legally mined and accumulated by the appellant.

14. The appellant wrote a letter to the Chief Minister of Karnataka on 23.12.2005 and thereafter filed a writ petition No. 27521 of 2005 before the High Court of Karnataka at Bangalore with the prayer to issue a writ of mandamous restraining the respondents from auctioning the iron ore fines stacked in Survey No. 130, Honnebagi and Bellenhali Village, Chikkanayakanahalli Taluk, Tumkur District and direct the respondents to conduct an inspection, and thereafter determine the iron ore fines, which have been legally extracted by the appellant, and the iron ore fines, which are illegally dumped in the area of the appellant.

15. The High Court by the order dated 27.12.2005 directed

respondent No. 1 not to confirm the auction till 30.12.2005. In spite of the interim order granted by the High Court, respondent No. 1 issued another notification dated 21.01.2006, inviting bids for auctioning the iron ore legally quarried by the appellant. The appellant also filed a contempt petition in the High Court that when the matter was pending, the respondents had no authority to issue subsequent notification for auctioning the iron ore.

16. A letter dated 25.02.2006 was issued by the respondent – Deputy Director, Department of Mines and Geology, Tumkur, stating that on a complaint of illegal mining activity and on a visit to the site by the Joint Director, Mysore, it was found that in an area adjacent to the lease of appellant, one Basanth Poddar was doing illegal mining in the area using sophisticated mining machineries and the said Basanth Poddar transported the iron ore, illegally removed it, by using permits of Mining Lease No. 2187 which belongs to the appellant. The letter further states that after inspecting the stock of iron ore unauthorisedly piled by the accused persons the same was quantified at about one lakh metric ton. The letter further states that from the preliminary enquiry it was learnt that one M/s. Balaji Producing Company has been granted the mining lease under Mining Lease No. 2208 covering Survey No. 130 of Honnebagi Village and in Survey No. 12 of Gollarahalli Village and he had given the raising contract for extraction of iron ore to Selvaraj of Sun Minerals and the said Selvaraj claims to have dug a pit at 'Biscuit Pit' and removed the iron ore and stacked the ore in the area of Mining Lease No. 2187, which is adjacent and owned by the appellant herein. The first respondent thereafter submitted the complaint for prosecution of M/s. Karnataka Mining Company, M/s. Balaji Produce Company, Chennai and their contractor Selvaraj of M/s. Sun Minerals and the appellant herein, who are involved in committing the act of illegal quarrying. The above complaint was registered as Crime No. 52/2006 before the Chikkanayakanahalli Police Station.

17. The appellant filed an application for amendment in the

High Court praying for a writ of certiorari and to quash the FIR dated 25.02.2006 registered as Crime NO. 52/2006.

18. The appellant submitted that the respondents filed an application for appointment of a Court Commissioner to identify the iron ore extracted from the area covered by the lease of the appellant. The High Court on 12.10.2006 passed the following order:

"The respondents have filed a memo dated 15.4.2006 for appointment of a Court Commissioner, which reads as follows:-

> The petitioner is a mining lease holder and out of large extent of area in Survey No. 130 of Honnebagi Village an area of 58 acres is leased in favour of the petitioner. Apart from the petitioner, others also leased certain extent of land in the same Survey Number. The remaining extent of land in the same survey number continued to be the Government holding, which is rich in mineral deposit. The petitioner who is granted the lease is adjoins by the land retained by the State Government.

It is submitted that unauthorized mining operation in the Government land was detected by the department authorities. Immediately, action has been taken to seize the unauthorized mining iron ore which was deposited on the leased area of the petitioner. After holding mahazar same was handed over to the petitioner for safe custody. The respondent has taken decision to auction the seized iron ore, same was questioned by the petitioner claiming right over the same.

It is humbly submitted that, there is a claim and counter claim in regard to the iron ore stocked on the petitioner's leased area. This can be identified by appointing a Commissioner. The Commissioner requires certain

knowledge to ascertain the area by examining the field condition.

It is further submitted that, the iron ore deposited which is illegally mined in the Government land is fine in nature, but iron ore deposited in petitioner's lease area is lumps and fine in nature. The material stocked by the petitioner is nothing but waste and low grade material.

Wherefore, it is requested to appoint any one the following as a commissioner, in the interest of justice and equity.

1. S. Ray Chaudri,
   Regional Controller of Mines,
   No.29, Industrial Suburb,II Stage,
   Tumkur Road, Goraguntepalya,
   Bangalore-560 072.

2. Dr. S.K. Bhushan,
   Deputy Director General,
   Geology Survey of India,
   Goa and Karnataka Circle,
   Vasudha Bhavan,
   Kumaraswamy Layout,
   Bangalore – 560 078.

2. As could be seen from the above, there is claim and counterclaim with regard to certain iron ore stacked on the petitioner's leased area. To determine the controversy, Shri Ashok haranahalli, learned counsel appearing for the petitioner and Shri B.N. Prasad, learned H.C.G.P. submit that Dr. S.K. Bhushan, named in the memo may be appointed as a Court Commissioner.

3. In view of the joint submission made by the learned counsel appearing for the parties, I deem it appropriate to appoint Dr. S.K. Bhushan as the Court Commissioner to submit his report to this court relating to the aforesaid

controversy between parties, namely as to whether the iron stacked on the petitioner's leased area was extracted by the petitioner from the land leased to him or was illegally extracted from the abutting Government lands. In other words, the Commissioner shall have to identify the illegally extracted iron ore, if any, stacked on the petitioner's leased area after holding spot inspection by issuing notice to the petitioner and R1. This shall be done within three months from the date of receipt of a copy of this order by the Commissioner. The parties shall serve a copy of this order on the commissioner to enable him to do the commission work.

4. The memo filed by the respondents & I.A. 4/2006 filed by the petitioner for appointment of a Court Commissioner stand disposed of in the above terms.

(H.G. Ramesh)
Judge"

19. The High Court appointed Dr. SK Bhushan, Deputy Director General, Geological Survey of India, as the Court Commissioner to inspect and submit a report relating to the controversy between the parties namely, as to whether the iron ore stacked in the leased area of the appellant was extracted by the appellant from the land leased to him or was illegally extracted from the abutting government lands.

20. On 10.01.2007 report was submitted by the Court Commissioner after inspecting and verifying the iron ore found in the area of the lease of the appellant. The Commissioner, after analyzing the chemical qualities of the iron ore found that the dump-in dispute stacked near the crusher in two lots was extracted from the Kamalabai pit (appellant) located in the area leased to the appellant i.e. M.L. No. 2187. The Commissioner further found that no illegally extracted iron ore from the 'Biscuit Pit' located in the Government land is stacked on the leased area of the appellant.

21. On 21.08.2007 the High Court of Karnataka passed the following order:

"Shri R.B. Sathyanarayana Singh, learned Government Pleader appearing for the respondents submits that adequate number of samples are not extracted from the Biscuit Pit. He, therefore, submits that the same Court Commissioner be directed to go to the spot and collect the samples from 3 points in the Biscuit Pit, which are to be identified by the respondents. In this regard, he undertakes to file the memo of instructions for the Court Commissioner.

2. Shri Ashok Haranahalli, learned counsel for the petitioner submits that the earlier appointment of the Court Commissioner was at the instance of the respondents only. The concerned officials of the respondents, who were present on the spot, did not object to the Court Commissioner collecting the samples from the two points in the Biscuits Pit. They did not even suggest that more samples be collected from other points in Biscuit Pit. Despite all these, Shri Ashok Haranahalli fairly submits that he is agreeable to sending the same Court Commissioner to the spot again for collecting the samples from 3 points in Biscuit Pit to be identified by the concerned officials of the respondents with the understanding that the respondents would not raise objection to the second report of the commissioner. He submits that although there is no need for sending the Court Commissioner for the second time to the spot, he is conceding to the respondent's request for the purpose of ensuring finality in the litigation.

3. The Court Commissioner, Dr. SK Bhushan, Deputy Director General, Geological Survey of India, Goa and Karnataka Circle, Vasudha Bhavan, Kumarasamy layout, Bangalore-560078 is hereby directed to go to the spot namely, Biscuit Pit situated in Surveyy. No. 130 of

Honnebagi and Ballenahalli Village, Chikkanayakanabhalli Taluk, Tumkur district and collect the samples from 3 points, to be identified by the respondents. On getting the samples tested in authorized laboratory, he shall file his reports as to whether the dump in dispute (SCK-1, SCK-2 and SCK-3) is extracted from the Biscuit Pit.

4. The office is directed to communicate this order alongwith a copy of the terms of reference filed on behalf of the respondents and also his earlier report, dt. 10.01.2007 to the Court Commissioner forthwith. The office is also directed to prepare the necessary warrant in this regard and issue the same to the court commissioner. The Court Commissioner is directed to go to the spot at 10.30 a.m. on 1.9.2007 for the purpose of collecting the samples. The parties and their respective learned advocates are directed to co-operate with the Court Commissioner in executing the warrant. It is made clear that there is no need for the Court Commissioner to notify the parties of the time and date of inspection. However, if the date and time specified herein does not suit the convenience of the Court Commissioner for whatever reason, then he has to inform the parties of the date and time of holding the spot inspection by him.

5. Further it is also made clear that any intimation sent by the Court Commissioner to the learned Advocates, S/Shri Ashok Haranahalli and Sathayanarayana Singh shall be deemed to have been sent to the parties to the petition. The office shall furnish the mail address of the advocates for the petitioner and the respondents to the Court Commissioner.

6. The Court Commissioner shall submit his report within two weeks from the date of his holding the spot inspection. Tentatively, the Court Commissioner's fees is fixed at Rs.15,000/-. As the Commissioner is being sent for the

second time at the instance of the respondents and as the Commissioner's fees were borne by the petitioner's side on the earlier occasion, I deem it fit and necessary to direct both the petitioner and the respondents to bear the Commissioner's fee on 50:50 basis. Both the petitioner and the respondent No. 1 shall deposit Rs.7500/- each with the Court Commissioner within 5 days from today.

7. Call the case immediately after the receipt of the Court Commissioner's report for further submissions.

xxx xxx xxx xxx

xxx xxx xxx xxx

(ASHOK B. HINCHIGRI)
Judge"

22. On 26.11.2007 a further report was submitted by the Court Commissioner in which it is mentioned that material from the Biscuit Pit is distinctly different from the material in the dump in dispute. According to the material in the dump in dispute, the Commissioner further stated that similar inferences were arrived at in the earlier observations also and the presently obtained additional details confirms and compliments the conclusions drawn in the first report.

23. The writ petition was heard by the Division Bench and while dismissing the writ petition the High Court held that the appellant does not have any right over the seized iron ore fines and the report of the Commissioner was not helpful to the appellant to substantiate the contention that the seized iron ore fines are legally extracted by the appellant from his lease. The appellant also filed Review Petition before the High Court, which was also dismissed.

24. The appellant, aggrieved by the said judgment of the High Court, has preferred these appeals.

25. In pursuance to the notice issued by this court, reply has been filed on behalf of respondents - State of Karnataka. Learned counsel appearing for the State of Karnataka, Ms. Anitha Shenoy has invited our attention to some portions of the counter affidavit.

26. She submits that the entire controversy arose after receiving a complaint from one Selvaraju. The complaint was sent by him to the Secretary of the Mining Department. The complaint reads as under:-

"From :

Selvaraju,
Raising Contractor,
Hind Mercantile Corporation,
Opp. : Taluk Office,
Chikkanayakanahalli Taluk,
Timkur District,
Karnatka State

To

Smt. Latha Krishna Rao
Secretary to Mining Department
Karnataka Government,
M.S. Building,
Bangalore.

Madam,

Sub.:Large scale illegal Mining in Chikkanayakanahalli encouraged and supported by Mr. Basappa Reddy, Director Mines and Geology, Bangalore.

***

I am bringing to your notice large scale illegal mining operation by Deepchand Kishanlal, Mining Lease No.2333 and late Kamalabai, Mining Lease No.2187 by her representative Surendra Singh, G.P.A. holder in the

rejected Mining lease application belonging to Ganapathi Singh. The illegal working area is called as Biscuit pit. The M.L. Application (earlier PL. No.3317) has been rejected by the Government. The issue and matter is pending in the court. In the meantime, BASANT PODDAR of Deepchand Kishanlal and SURENDRA SINGH have engaged themselves in large scale illegal mining and already moved thousands of tones of iron ore power using the permit of M.L. No.2187 and 2333. The M.L. No.2187 is under renewal and working permission granted by the Director. Illegal mining is done very badly all most creating deaths. The illegal operation is done by the support of the Director Basappa Reddy who is getting Rs.200 per ton commission.

I request you to stop this illegal mining. Refer this illegal mining to the D.C., Tumkur for stoppage. If the issue is referred to Director, no justice will be done as he is totally and fully involved in this illegal act. I hope justice will be upheld at your end.

Many thanks

Yours faithfully

SELVARAJU

Copy to :

1. Sri. T.N. Chaturvedi, Governor of Karnataka, Bangalore
2. Sri. N. Dharam Singh, Chief Minister of Karnataka, Bangalore
3. Sri. K.K. Mishra, Chief Secretary, Government of Karnataka, Bangalore
4. Sri. Mallikarjun Dyaberi, D.C., Tumkur District

5. The Secretary, Government of India, Ministry of Mines, New Delhi."

27. In pursuance to the said complaint, the officials of the Department of Mines and Geology visited Mining Lease No.2187 on 17.12.2004 and found illegal mining and as such the same was seized and stored in Survey No.130, which is the subject matter of the lease in Mining Lease No.2187. The illegal mining ore which is stored is also depicted in the mahazar dated 17.12.2004 and the same is endorsed by the representative of the holder of Mining Lease No.2187. Perhaps, on the appellant fearing some action on the complaint of Selvaraju, sent a letter dated 20.12.2004 wherein he disowned the iron ore seized. The letter dated 20.12.2004 has been set out earlier in which it is mentioned that 1 lakh ton of iron ore was found lying in Mining Lease No.2187 and the department can take possession and do whatever they deem it fit. He also mentioned that the appellant has no claim of the above stock. Thereafter on 10.1.2005 the appellant submitted an affidavit with the Government of Karnataka in which it is mentioned that the appellant is undertaking to safeguard and safe keep the said stocks. Respondent no.1 issued a notification on 23.12.2004 but the same could not be acted upon due to various reasons resulting in another notification of 14.12.2005. It seems that the appellant from this point wanted to take advantage of the l lakh ton iron ore which could not be lifted by the respondent or sold by him. The notification dated 14.12.2005 was challenged in writ petition No.27521/2005 by the appellant. The appellant obtained an interim stay. The said writ petition was dismissed on 25.06.2009. Thereafter, he filed a Review Petition No.418 of 2009 in writ petition No. 27521 of 2005 which was also dismissed on 12.04.2010. All these orders are the subject matter of these appeals. Since there was no stay granted in the review petition No.418 of 2009, the third notification regarding public auction was issued on 09.12.2009 fixing the date of auction on 24.02.2010. The appellant again moved an interim application in review petition No.418 of 2009 seeking

for stay of auction. The same was declined by the court. From the record of the case, it is quite evident that the appellant went on filing writ petition, review petition and the interim application challenging the third public notification resulting in a direction issued by the High Court for getting an inventory of quantity of iron ore lifted and to be lifted by the successful bidder and surveyed by the Deputy Director of Mines and Geology. The appellant was ready to deposit a sum of Rs.15 crores as to the value of the material and execute an undertaking not to lift the material. This is another new contention raised by him in Writ Petition No.15079 of 2010. The High Court did not grant any interim relief at that stage resulting in filing of these appeals against the order dated 29.04.2010 and subsequently writ petition no. 15079 of 2010 was dismissed as withdrawn reserving liberty to raise all contentions in Criminal Petition No.2104 of 2010.

28. The respondents further submitted that the averments in para 5.4 of the appeal are contrary to what is pleaded in para 5.1 of the appeals resulting in exposure of appellant's claim of the dumps. Thus, according to the respondents, when the appellant himself is not sure of the iron ore stated to be illegally mined by him, the appellant cannot seek any relief from this court. The respondents submitted that the appellant was required to submit monthly report showing the details of the quantity of iron ore stacked under the mining lease. It must also mention the total production, dispatch and the opening balance. The respondents submitted that the appellant's lease period having expired in the year 1998 itself and filing of renewal application in compliance of Rule 24A of Minor Concession Rules 1960 and failure to produce the statutory requirement like clearance from competent authority for availing the benefit under Rule 24 (A)(6), the appellant has not produced deliberately the working permissions obtained by him for the period from 1998 to 2004 for establishing a fact that he was legally mining. In the absence of renewed mining lease and also failure to produce certificates from the competent authority

would indicate that the appellant is not a legal holder of the mining lease.

29. The respondents also submitted that the averments regarding non-transporting the mine ore during the relevant period on the ground of alleged agitation in the period is totally false. In fact, during the years 2003-2004, the appellant has transported huge quantity of iron ore and so also for the period 2004-05. Copy of the statement disclosing the transportation of iron ore from the years 2001-02 to 2005-06 has also been produced with the reply.

30. The respondents submitted that it is clear that the appellant had produced 290960 tons of ore and transported 245372 tons of iron ore than what was permissible at that time which was 5500 metric tons per annum as per IMB plan and also this statement discloses the fact that the appellant is denying any illegal mining and claiming relief for which he is not entitled to in law. In other words, the respondents clearly focused that the appellant had illegally mined iron ore much more than the sanctioned capacity in a clandestine manner and according to the respondents the appellant was not entitled to any relief from this court. The respondents further submitted that the appellant has invented entirely a new story alleging that somebody has illegally mined and stacked the iron ore in his leased area without his knowledge. According to the respondents it is a false statement and cannot be accepted. According to the respondents, to accumulate 1 lakh ton of iron ore, one has to use thousands of vehicles for transportation and accumulation. Failure on the part of the appellant to disclose the same leads to the presumption that the appellant was involved in illegal mining activity and these activities would result in an action to be taken under section 21 read with section 4(1)(a) of The Mines and Minerals (Development and Regulation) Act, 1957. According to the respondents, the appellant is playing the game of hide and seek and trying to justify this action without compliance of the provisions of the Act.

The respondents further submitted that for the first time in the above petition the appellant has introduced a theory of situation of iron ore dumps in northern side and southern side of leased area without disclosing as to where he has stacked the waste produced during the mining activities as per the mining plan. This also substantiates the contention of the respondents, the reason for non production of mining plan issued from the competent authority along with the map.

31. According to the respondents, the seizure of 1 lakh ton of iron ore from the leased area of the appellant on 17.12.2004 and after the appellant gave a letter dated 20.12.2004 invented new theory to claim the iron ore seized by the department taking undue advantage of the waste dumps stored by him on the northern side of the leased area. The appellant had also filed an affidavit dated 10.01.2005 wherein he has undertaken to protect and save the seized iron ore and pursuant to the said undertaking the appellant was permitted to lift the iron ore produced in his own mine.

32. It may be relevant to submit that the Deputy Director of Mines and Geology, Tumkur, on the instructions from the Director of Mines and Geology, had visited the leased area of Mining Lease No.2187 on 03.01.2006 along with the technical staff and found that the appellant had put a board on his waste dump (stock belonging to Mines and Geology). It is also relevant to mention that the department has not erected any board and this fact was also reported to the Director on 04.01.2006. The respondents further submitted that on 05.01.2006 in the presence of the persons who were present at the time of seizure Mahazar on 17.12.2004, a detailed location of the seized iron ore was undertaken and in this regard an affidavit of V. Selvaraju was also given. It may be relevant to mention that the appellant filed an affidavit dated 15.02.2006 along with the letter addressed to the Director of Mines and Geology in which he has sworn to the contents that he will not transport either the material which was seized on 17.12.2004

to the extent of 1 lakh ton illegally mined from biscuit pit or stacked illegally near the boundary of Mining Lease No.2187 located at Survey No.130 of the Honnebagi Village, Chikkanayakanahalli Taluk, Tumkur District for 1 lakh ton material that was found lying near the crusher plant and which was mined from Mining Lease No.2187.

33. The respondents further submitted that the continuous act of the appellant involving himself to grab the iron ore from the seized dump resulted in the Deputy Director of Mines and Geology to visit once again the leased area on 28.01.2006 and found that though the appellant was not permitted to carry out any mining activity or using of crushing unit factually, it was seen that the appellant was engaged in such activities resulting in a notice issued to the appellant on 29.3.2006. The respondent filed a criminal complaint on 25.2.2006 before the Chikkanayakanahalli Police against six persons including the appellant for having indulged in illegal mining activities and committed theft of iron ore and the same was registered in Criminal No.20 of 2006 for an offence punishable under section 21 of The Mines and Minerals (Development and Regulation) Act, 1957 and under section 379 of the Indian Penal Code. It is also mentioned in the affidavit that the auction was completed on 24.02.2010. The respondents also mentioned that the appellant has also filed criminal petition under section 482 Cr.P.C. before the High Court when the court directed the Fast Track Court to dispose of the criminal revision petition within a stipulated period. At this juncture, the appellant withdrew his Criminal Petition No.2104 of 2010 seeking liberty to file criminal revision petition before the District Court, Tumkur challenging the order of the learned Magistrate dated 30.03.2010 and he has filed criminal revision petition before the District Judge, Tumkur against the order of the learned Magistrate dated 30.03.2010 alleging that the order passed by the learned Magistrate was one behind his back. Though the order specifically stated that the counsel for the appellant was present and produced the copy of the order passed by the High

Court of Karnataka in Review Petition No.418 of 2009, the respondent also mentioned that the appellant is venturing all kinds of petitions suppressing the facts. The appellant has an evil desire to grab the iron ore seized and auctioned. According to the respondent, filing of this petition is an ultimate result of abuse of the process of law.

34. The respondents also mentioned that the seizure mahazar drawn on 17.12.2004 shows that the iron ore were lying within the boundaries mentioned in the said mahazar. This is the very same boundary mentioned in mahazar drawn by the police in the year 2006 and the mahazar drawn at the time of handing over of the iron ore to the possession of the highest bidder also reveals the same boundaries. Thus, boundaries in all the three mahazars are one and the same, thereby, establishing that the stand of the respondent regarding the place where actually iron ore auctioned is situated also negates the stand taken by the appellant in regard to his claim. The respondents further submitted that even the prayer sought in these appeals was never a subject matter in Writ Petition No. 27521 of 2005 and thus the appellant is estopped from seeking this claim as the auction process dated 24.2.2010 is completed and further he had challenged the auction proceedings in writ petition No.15079 of 2010 wherein the High Court refused to interfere with the auction proceedings and the appellant having withdrawn the writ petition No.15079 of 2010. It is mentioned by the respondents that auction of 24.2.2010 was in consonance with the rules and regulations. The respondents also submitted that the appellant having failed in all attempts to stop the public auction, came forward with a plea to deposit Rs.15 crores in Writ Petition No.15079 of 2010, spent some time and allowed the successful bidder to commence lifting of iron ore after depositing the entire amount of Rs.10.10 crores and allowing the bidder to transport the iron ore. The respondents relied on the Audit Report of Kamalabai, Mining Lease No.2187 from 2000-01 to 2005-06. The same is reproduced as under :

AUDIT REPORT OF SMT. KAMALA BAI, ML NO.2187 FROM 2000-01 TO 2005-06 IS AS BELOW

Year	Production	Dispatch	Opening Balance			Current Year Demand		Total	Recovery		Closing Balance	
			Balance	Inter-est	Fixed Rent	Royalty	Interest		Royalty/ Fixed Rent	Interest	Royalty/ Fixed Rent	Interest
2000-01	21600	22160	37055	40388	0	145300	8893	231636	107579	49261	74776	0
2001-02	8900	8900	74776	0	0	79400	17946	172122	61406	17946	92770	0
2002-03	9725	9925	92770	0	0	81475	4745	178990	154682	4745	19563	0
2003-04	150340	121865	19563	0	0	1319807	3393	1342763	1337863	3393	1507	0
2004-05	290960	245372	45582	0	0	2786598	262	2788367	5674011	262	1507	2285906 Excess paid
2005-06	50201	49436	0	0	0	619425	0	619425	3207972	0	0	2588547 Excess paid

Deputy Director
Mines and Geology Department
Tumkur

P.S. : In the years 2004-05, the balance indicated in this Chart is 1507, but it should be 45582.

35. The respondents submitted that at that point of time the appellant could legally mine upto to 5500 metric tons only in a year. That limit was increased to 41000 metric tons a year. It is beyond comprehension how illegal iron ore could be found on the Mining Lease No.2187 to the tune of about 1 lakh ton legally mined by the appellant. This was possible only when the appellant had indulged in massive illegal mining.

36. The audit report extracted above clearly indicate that the appellant had quarried and produced iron ore several times more than its permissible limit particularly in the years from 2003 to 2006.

37. The theory of somebody had put 1 lakh ton of iron ore of mining lease is totally untenable and beyond comprehension. 1 lakh ton of iron ore cannot be kept on any mining lease all of a sudden without the knowledge of the appellant. Thousands of trucks have to transport the said quantity of iron ore and if it did not belong to the appellant he ought to have complained immediately after someone started dumping iron ore on his mining lease. According to the respondent - State, this is a clear case of illegal mining on a massive scale by the appellant.

38. Mr. Ram Naik, learned senior advocate appearing for the auction purchaser contended that the appellant has not approached this court with clean hands. He submitted that the auction purchaser had purchased the entire iron ore and also lifted part of it and has already paid huge money to the respondent. The auction purchaser cannot be denied right to lift the remaining iron ore.

39. We have heard the learned counsel for the parties at length and examined these appeals from various angles. In our considered view, this court ought not to exercise its extraordinary jurisdiction under Article 136 of the Constitution in a matter of this nature. Interim order, if any, stands vacated. These appeals are totally devoid of any merit and are accordingly dismissed with costs.

N.J. Appeals dismissed.

THE COMMISSIONER, CORPORATION OF CHENNAI
v.
R. SIVASANKARA MEHTA AND ANOTHER
(Civil Appeal No(s). 5740-5741 of 2005)

APRIL 13, 2011

[ASHOK KUMAR GANGULY AND SWATANTER KUMAR, JJ.]

LAND ACQUISITION ACT, 1894:

s.48, and s.48-B (as inserted by Land Acquisition (Tamil Nadu Amendment) Act, 1996 – Release of acquired land – Land acquired in 1949 and transferred to Municipal Corporation – Government, by order dated 19.3.1995, directing reconveyance of a portion of the land to land-owners – However, subsequently, by order dated 25.7.1995, the order dated 10.3.1995 cancelled – Writ petition of land owners allowed by High Court – HELD: When the order of re-conveyance was made on 10.3.1995, s.48 of the Act was holding the field – Under the provisions of s.48 the land-owners had no right of asking for re-conveyance in 1995 as the possession had been taken in 1949 and land vested in Government in 1962 – Further, the Government divested itself by giving the land over to the Corporation – So, exercise of power by Government in cancelling the previous reconveyance cannot be faulted – Section 48-B is not retrospective in operation – Even before making release of land u/s 48-B, Government must be satisfied that the land is not required for any public purpose – Corporation needs the land for parking space, which is certainly a public purpose – In view of clear provisions of s.48, there is no question of promissory estoppel which is an equitable doctrine and has no application to the facts of the case – Promissory estoppel – Equity.

Lands of the respondents were acquired pursuant to notification dated 3.1.1949 issued under the Land Acquisition Act, 1894. On getting the enhanced compensation in reference proceedings, the land owners did not take the matter further. The lands acquired vested in the State u/s 16 in 1962. In 1995 the respondents made a representation for release/reconveyance of a portion of the land, inter alia, on the ground that the appellant-Corporation was not utilising the same. The Government by its order dated 10-3-1995 directed the Corporation to reconvey a portion of the lands admeasuring 5 grounds and 416 sq. ft. to the land owners or their legal heirs or nominees under ex-owner category. The Corporation made a representation to the Government for utilization of the said land as parking space. Accordingly, the Government by order dated 25-7-1995 cancelled the order of reconveyance passed on 10-3-1995. The writ petitions filed by the respondents challenging the order were allowed by the Single Judge of the High Court. The Division Branch of the High Court referred to the provisions of s.48-B which was introduced by the Land Acquisition (Tamil Nadu Amendment) Act 1996, and declined to interfere. Aggrieved, the Corporation filed the appeals.

Allowing the appeals, the Court

HELD: 1.1 Admittedly, s. 48-B came on the statute book in 1997 by the Land Acquisition (Tamil Nadu Amendment) Act, 1996 (being Act 16 of 1997). The assent of the President to the said Act was received on 14.3.1997. On perusal of s. 48-B, it is clear that the same is not retrospective in operation. The said provision, which is a departure from s. 48 can apply only prospectively. [para 7 and 8] [249-F-G; 250-B]

Tamil Nadu Housing Board v. Keeravani Ammal and

Ors., **2007 (3) SCR 1062 = AIR 2007 SC 1691 – referred to.**

1.2 Section 48 of the Land Acquisition Act, 1894 was holding the field when re-conveyance was purportedly ordered by the State Government by its order dated 10-3-1995. Under the provisions of s. 48 of the principal Act, the respondent(s) had no right of asking for re-conveyance in 1995 in as much as it was the admitted case of the parties that possession of the property had been taken over by the State as early as in 1949 when the Award was passed and the land vested in the State Government in 1962. Thereafter it was transferred to the Corporation. This aspect of the case, which goes to the root of the question, was totally missed by the High Court. [para 11-12] [250-E; 251-C-D]

1.3 Even assuming, that s. 48-B was available in 1995 when re-conveyance was ordered, even then the respondent(s) has no case. In a recent judgment rendered by this Court in L. Chandrasekaran's case*, it has been held that before an order of release can be made u/s 48-B, the Government must be satisfied that the land which is sought to be released is not required for the purpose for which it was acquired or for any public purpose. Admittedly, in the instant case, such condition has not been satisfied in view of the representation of the appellant-Corporation that they need the land for utilising it as parking space in view of ever increasing growth of car population in the city of Chennai. This is certainly a public purpose. An affidavit has been filed on behalf of the Metro Rail to the effect that the Government is contemplating the use of the said land for its ongoing project which is again, very much a public purpose. [para 13-16] [251-D-H; 252-A]

Tamil Nadu Housing Board v. L. Chandrasekaran (Dead) by Lrs. and Others.,* **2010 (2) SCC 786 – relied on.

1.4 Further, the land is no longer vested in the Government as it divested itself by giving it over to the Corporation. Therefore, the conditions stated in L. Chandrasekaran are not satisfied in the instant case. So, the exercise of power by the State Government in cancelling its previous order of re-conveyance cannot be faulted. [para 17] [252-B]

1.5 Besides, in L. Chandrasekaran, this Court held that if any re-conveyance is to be made that has to be done on the basis of the market value. The purported order of re-conveyance initially made by the Government was not made on that basis either. [para 20] [253-A-B]

1.6 No case of malafide or perversity has been made out in the writ petitions. Specific pleadings with particulars must be there to make out a case of malafide and the person against whom malafide is alleged must be impleaded. No such pleadings are at all present in this case. [para 18-19] [252-C; G-H]

1.7 In the facts of the case, there can be no question of promissory estoppel which is an equitable doctrine. In the context of the clear provision of s. 48 of the principal Act which was governing the field in 1995, when re-conveyance was purportedly ordered, equity has no application. Nor is there any scope for principle of natural justice to operate when the person complaining of its infraction cannot show any right of his which has been violated. In the given facts of the case and the clear mandate of s. 48 of the principal Act, no right of the landowners can be discerned to apply for re-conveyance in respect of a land which had vested in the Government long ago. [para 21] [253-B-D]

1.8 There is no reason to sustain the impugned judgment passed by the High Court and the same is set aside. [para 22-23] [253-E-F]

Case Law Reference:

2007 (3) SCR 1062	**referred to**	**Para 10**
2010 (2) SCC 786	**relied on**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 5740-5741 of 2005.

From the Judgment and Order dated 18.1.2005 of the Division Bench of High Court of Judicature at Madras in Writ Appeal No. 2485 and 2487 of 1999.

K. Ramaurthy, Promila and S. Thananjayan for the Appellant.

Dhruv Mehta and R. Balasubramanina, E.C. Agrawala, P.B. Suresh, Vipin Nair, Vivek Sharma, Sriram Krishna (for Temple Law Firm), V. Ramajagdeesan, Karunakaran and Senthil Jagadeesan (for Mahalakshmi Balaji & Co.) for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. We have heard learned counsel for the parties including the learned senior counsel appearing for Chennai Metro Rail Limited. The Interlocutory Application Nos. 5-6 filed on behalf of the Chennai Metro Rail Limited for being impleaded are allowed.

2. The Commissioner, Municipal Corporation of Chennai is in appeal before us, impugning the judgment and order passed by the Division Bench of the Madras High Court dated 18.1.2005, whereby the learned Judges of the Division Bench affirmed the order of the learned Single Judge dated 24th September, 1999 on two writ petitions filed by the land owners

who are respondent(s) herein. The facts leading to this case are that by notification dated 3rd January, 1949 an Award was passed by the Special Secretary for Land Acquisition, Madras in respect of the land which was acquired under the provisions of the Land Acquisition Act. It is not in dispute that reference proceedings were initiated in 1949 itself and upon getting the enhanced compensation, the land owners did not take the challenge any further. Under Section 16 of the Act, the land acquired, vested in the State in 1962, free from all encumbrances. Long thereafter, in 1995 representation was made by the respondent(s) herein for release/re-conveyance of a portion of the land which was acquired in 1949 inter alia on the ground that the appellant-Corporation was not utilising the same.

3. On such a representation, the Government by an Order dated 10th March, 1995 directed the appellant-Corporation to re-convey a portion of the lands measuring 5 grounds and 416 sq. ft. in R.S. No.324/2 to Thiruvalargal R. Neelakanta Mehta and R. Sivasankara Mehta and to their legal heirs or their nominees under ex-owner category, on collection of the compensation amount paid by the government for the acquisition of lands measuring 5 grounds and 416 sq. ft. in R.S. No. 324/2 with interest after completing all formalities. After the said order was passed, a representation was made by the appellant-Corporation to the Secretary, Government of Tamil Nadu, M.A. and W.S. Department to the effect that the said area can be better utilised for the purpose of parking of vehicles in view of manifold increase in traffic in that part of the city. A request was, therefore, made to stay the operation of the notification relating to re-conveyance for consideration of the request of the Corporation.

4. Upon such representation from the appellant-Corporation, the Government of Tamil Nadu by an Order dated 25th July, 1995 cancelled the order of re-conveyance issued in G.O. Ms. No.45, M.A. & W.S. dated 10th March, 1995.

5. This order of 25th July, 1995 was impugned by the respondent(s) herein by filing two writ petitions. The learned Single Judge allowed the writ petitions inter alia on the ground that the Government is bound by provisions of promissory estoppel and also by reason of the fact that the order of cancellation of re-conveyance was passed without affording any opportunity of hearing to the land owners. The said decision of the learned Single Judge was challenged by the present appellant before the Division Bench of the High Court. The Division Bench of the High Court, in paragraph 17 of its judgment quoted from the judgment of the learned Single Judge and in paragraph 19 of the judgment quoted the provisions of Section 48-B which was introduced by Tamil Nadu Amendment Act, 1996 (Act 16 of 1996). Ultimately, the Division Bench held that the decision of the Government in rescinding its initial order of re-conveyance is bad. The Division Bench was not, therefore, inclined to interfere with the order passed by the learned Single Judge and dismissed the appeal of the Corporation and affirmed the decision of the learned Single Judge.

6. Assailing both these judgments, learned senior counsel for the appellant urged various contentions before us. The first question which was urged before us was that at the time when the exercise was made by the Government for re-conveyance, Section 48-B was not in existence.

7. Admittedly, Section 48-B came on the statute book in 1997 by the Land Acquisition (Tamil Nadu Amendment) Act, 1996 (being Act 16 of 1997). The assent of the President to the said Act was received on 14th March, 1997.

8. Section 48-B runs as follows:-

"48-B. Transfer of land to original owner in certain cases.- Where the Government are satisfied that the land vested in the Government under this Act is not required for the purpose for which it was acquired, or for any other public

purpose, the Government may transfer such land to the original owner who is willing to repay the amount paid to him under this Act for the acquisition of such land inclusive of the amount referred to in sub-section (1-A) and (2) of Section 23, if any, paid under this Act."

9. On perusal of Section 48-B it is clear that the same is not retrospective in operation. The said provision, which is a departure from Section 48 can apply only prospectively.

10. This Court also considered the purport of that provision in *Tamil Nadu Housing Board v. Keeravani Ammal and Ors.,* reported in AIR 2007 SC 1691. The learned Judges in paragraph 11 of *Keeravani Ammal* (supra) held as follows:-

"Section 48-B introduced into the Act in the State of Tamil Nadu is an exception to this rule. Such a provision has to be strictly construed and strict compliance with its terms insisted upon. Whether such a provision can be challenged for its validity, we are not called upon to decide here."

11. In this connection, it is necessary to have a look at provisions of Section 48 of the Land Acquisition Act, 1894, which was holding the field in 1995, when re-conveyance was purportedly ordered by the State Government vide its order dated 10.3.1995. Section 48 of the Act is set out below:

"48. Completion of acquisition not compulsory, but compensation to be awarded when not completed.- (1) Except in the case provided for in section 36, the Government shall be at liberty to withdraw from the acquisition of any land of which possession has not been taken.

(2) Whenever the Government withdraws from any such acquisition, the Collector shall determine the amount of compensation due for the damage suffered by the owner in consequence of the notice or of any proceedings

thereunder, and shall pay such amount to the person interested, together with all costs reasonably incurred by him in the prosecution of the proceedings under this Act relating to the said land.

(3) The provisions of Part III of this Act shall apply, so far as may be, to the determination of the compensation payable under this section."

12. Under the provisions of Section 48 of the principal Act, we are afraid, the respondent(s) has no right of asking for re-conveyance in 1995 inasmuch as it is an admitted case of the parties that possession of the property was taken over by the State as early as in 1949 when the Award was passed and the land vested in the State Government in 1962. Thereafter it was transferred to the Corporation. This aspect of the case, which goes to the root of the question, was totally missed by the High Court.

13. Even if we accept, for the sake of argument, that Section 48-B was available in 1995 when re-conveyance was ordered even then the respondent(s) has no case.

14. In a recent judgment rendered by this Court in the case of *Tamil Nadu Housing Board v. L. Chandrasekaran (Dead) by Lrs. and Others* reported in 2010 (2) SCC 786, it has been held that before an order of release can be made under Section 48-B, the Government must be satisfied that the land which is sought to be released is not required for the purpose for which it was acquired or for any public purpose.

15. Admittedly, in the instant case such condition has not satisfied in view of the representation of the appellant-Corporation that they need the land for utilising it as parking space in view of ever increasing growth of car population in the city of Chennai. This is certainly a public purpose.

16. The learned Counsel for the Metro Rail has filed an

affidavit to the effect that the Government is contemplating the use of the said land for its ongoing project which is again, very much a public purpose.

17. The second question is that the land is no longer vested in the Government as it divested itself by giving it over to the Corporation. Therefore, the conditions stated in *L. Chandrasekaran* (supra) are not satisfied herein. So the exercise of power by the State Government in cancelling its previous order of re-conveyance cannot be faulted.

18. No case of malafide or perversity has been made out in the writ petitions. The learned counsel for the respondent(s) stated that its only case of alleged malafide has been made out in ground (c) at page 35 of the paper book. The said ground is set out herein below:-

"Cancellation of reconveyance order is colourable exercise of power. All materials have been considered including the views of the Corporations in detail in G.O. Ms. No. 48 dated 10.3.1995. Corporation stated that there is a proposal to construct fully air conditioned office cum shopping complex. However, Government has rejected the proposal and ordered reconveyance. As per the impugned order, Corporations has given a proposal for using it as parking space. It is submitted that above proposal is dated 5.6.1998, long after Bankers pay order has been received from the petitioner. It is submitted that facts set out above make it very clear that impugned order is based on extraneous considerations and purely colourable exercise of power."

19. Unfortunately we are of the opinion that the said ground does not make out any case of malafide exercise of power by the Government. Specific pleadings with particulars must be there to make out a case of malafide and the person against whom malafide is alleged must be impleaded. No such pleadings are at all present in this case.

20. Apart from the aforesaid question, in *L. Chandrasekaran* (supra), this Court held that if any re-conveyance is to be made that has to be done on the basis of the present market value. The purported order of re-conveyance initially made by the Government was not made on that basis either.

21. In the facts of this case there can be no question of promissory estoppel which is an equitable doctrine. In the context of the clear provision of Section 48 of the principal Act which was governing its field in 1995, when re-conveyance was purportedly ordered, equity has no application. Nor is there any scope for principle of natural justice to operate when the person complaining of its infraction cannot show any right of his which has been violated. In the given facts of the case and the clear mandate of Section 48 of the principal Act, we do not discern any right of the landowners to apply for re-conveyance in respect of a land which had vested in the Government long ago.

22. Therefore, examining the matter from all its angles, we do not find any reason to sustain the impugned judgment passed by the High Court.

23. The appeals are, therefore, allowed. The judgment of the High Court is set aside.

24. No order as to costs.

R.P. Appeals allowed.

P.H. PAUL MANOJ PANDIAN

v.

MR. P. VELDURAI

(Civil Appeal No. 4129 of 2009)

APRIL 13, 2011

[J.M. PANCHAL AND GYAN SUDHA MISRA, JJ.]

REPRESENTATION OF THE PEOPLE ACT, 1951

s. 9-A read with G.O. No. 4682 (PWD) dated 16.11.1951 issued by the Government of Tamil Nadu – Disqualification for Government contracts – Election to Legislative Assembly – Candidate filing nomination papers – Objections that the candidate had subsisting contracts with the government, thus, disqualified for filing nomination papers and contesting election – Overruled by Returning Officer – Candidate declared elected – Writ petition challenging the election on the ground of the said disqualification – Dismissed by High Court – Held : On true interpretation of the Government Order dated 16.11.1951 only the Chief Engineer was competent to terminate the contracts and, therefore, the termination of the contracts by the Divisional Engineer, which was subsequently ratified by the Superintending Engineer, cannot be treated as valid termination of contracts – On the date of submission of nomination papers as well as on the date of scrutiny thereof, the contracts entered into by the returned candidate with the Government were subsisting and, therefore, he was disqualified from filing the nomination papers and contesting the election – The returned candidate having incurred disqualification under the provisions of s. 9A of the Act, his election will have to be declared as illegal – Accordingly, it is declared that the returned candidate had incurred disqualification u/s. 9A of the Act and, therefore, his election from the Constituency in question is declared to be illegal, null and void – Constitution of India, 1950.

CONSTITUTION OF INDIA, 1950

Article 162 – Issuance of Government Orders/Circulars – Extent of executive power of State – Explained – Held : In the instant case, there was neither any enactment nor any statutory rule nor any constitutional provision as to how the contractor, who has entered into contracts with the Government, should be permitted to contest election, more particularly, when a request is made by the contractor to terminate his contracts so as to enable him to contest the election – There is no manner of doubt that in this branch of jurisdiction there was absence of statutory enactment, regulations and rules and, therefore, the Government had all authority to issue Government Order dated November 16, 1951 to fill up the gaps – Government of Tamil Nadu, public Works Department GO No. 4682 dated 16.11.1951 – Representation of the People Act, 1951 – s.9-A.

The appellant filed an election petition challenging the election of the returned candidate, the respondent, to the State Legislative Assembly, on the ground that on the date of filing of nomination papers i.e. on 17.4.2006, the respondent had subsisting contracts with the Government and in the absence of termination of the said contract in accordance with the Government Order dated 16.11.1951, he was disqualified for submitting nomination papers and consequently, contesting the election. It was the case of the election petitioner that he had filed objection before Returning Officer, but he overruled the same and accepted the nomination papers of the respondent. The High Court dismissed the election petition. Aggrieved, the election petitioner filed the appeal.

Allowing the appeal, the Court

HELD: 1.1 Normally, the Superintending Engineer would be competent to terminate the contracts when

breach of the terms and conditions is committed by a contractor. However, in the instant case, the Court finds that the contracts were to be brought to an abrupt end because the respondent was intending to contest the election. Such an eventuality was never contemplated under the contracts and the contracts entered into by the respondent with the Government could have been terminated only as per the terms and conditions stipulated in Government Order dated November 16, 1951. A reasonable reading of the stipulations and conditions mentioned in the said Government Order makes it evident that only the Chief Engineer was competent to terminate the existing contracts where the contractor was desirous of contesting election. It is wrong to say that an instruction had been issued to the Chief Engineer to see that another contractor was available as substitute to perform the remaining part of the contract without any loss to the Government and that the Order dated November 16, 1951 did not provide that an order of termination of a subsisting contract should be issued only when the Chief Engineer had accepted a person, who was available and was willing to enter into a contract on the same terms and conditions to which the existing contractor had agreed. [para 12 and 21] [277-B-D; 287-F-G]

1.2 The evidence of the witnesses clearly indicates that the power to terminate the contract in terms of Government Order dated November 16, 1951 was only with the Chief Engineer and neither the Divisional Engineer was competent to terminate the contracts awarded to the respondent nor was the Superintending Engineer competent to ratify an order passed by the Divisional Engineer cancelling the contracts awarded to the respondent. The record nowhere shows that the contracts entered into between the respondent and the

Superintending Engineer, were ever terminated by the Chief Engineer in terms of Government Order dated November 16, 1951 by passing an order. On a true interpretation of the Government Order dated November 16, 1951, only the Chief Engineer was competent to terminate the contracts and, therefore, the termination of the contracts by the Divisional Engineer, which was subsequently ratified by the Superintending Engineer, cannot be treated as valid termination of contracts. Therefore, the assertion made by the respondent that his contracts were terminated by the Divisional Engineer by passing an order, which was subsequently ratified by the Superintending Engineer is of no avail. There is no manner of doubt that the contracts entered into between the Superintending Engineer, and the respondent were not terminated as required by Government Order dated November 16, 1951 and, therefore, it will have to be held that they were subsisting on the date of filing of the nomination papers by the respondent as well as on the date on which those papers were scrutinized. [para 15] [280-F-H; 281-A-B]

1.3 One of the conditions to be fulfilled before termination of the contract of a contractor, who was desirous to contest election, was that he must offer a substitute, who was willing to undertake unfinished work on the same terms and conditions but without causing any loss to the Government. The former Chief Engineer, who was examined in this case as PW-2, has, without mincing the words, stated that the contractor offered by the respondent as substitute contractor was substituted in place of the respondent on June 1, 2006. It means that the contracts could not have been terminated earlier than June 1, 2006 and were subsisting at least as on June 1, 2006, which was the date beyond the last date of filing

of the nomination papers and scrutiny thereof. Therefore, the finding recorded by the High Court that on the date of filing of the nomination the contractor was already substituted in place of the respondent is not borne out from the record of the case nor does the record show that before June 1, 2006 the contracts were terminated by the authority contemplated under Government Order dated November 16, 1951. [para 16] [281-C-F]

1.4 The Divisional Engineer at the relevant point of time, has, in terms, mentioned that under Ext. C-12 it was noted that a sum of Rs.98,227/- payable to the respondent should be kept in the deposit and the contract should be permanently terminated seeking orders from the Superintending Engineer. The record further shows that on April 19, 2006 the Divisional Engineer had forwarded a letter to the Superintending Engineer mentioning inter alia that since the contract of the respondent was cancelled, the fourth and final list of approval was given to him and deposit amount of Rs.2,02,341 was kept in kind-IV deposit. The Government Order dated November 16, 1951, clearly requires that no sum of money should remain payable to the contractor and nothing should remain liable to be supplied or done by the contractor. Keeping the amount of more than two lakhs in kind-IV deposit can hardly be said to be compliance of clause 1 of the Government Order dated November 16, 1951. In fact, everything was required to be done by the Chief Engineer himself. There is nothing on record to show that the steps and/or actions, which were taken by the Divisional Engineer, were ever ratified by the Chief Engineer except that the Chief Engineer had accepted the proposal of the Superintending Engineer to accept the substitute contractor. Thus, this Court finds that on the date of filing of nomination papers and

scrutiny of the same, the respondent had not validly terminated the contracts entered into by him with the Government. [para 17] [282-A-F]

2.1 The High Court has brushed aside the Government Order dated November 16, 1951 by stating that it was only an administrative instruction circulated to the Engineers (Highways) NABARD and Rural Roads for information and guidance, forgetting the important fact that in the last clause of the Government Order it is specifically mentioned that the instructions issued by the said Government Order would also apply to the termination of the contracts under similar circumstances entered into with the Public Works and Electricity Departments. Therefore, the High Court was wrong in holding that though Government Order dated November 16, 1951 was an order by the Government, at best it must be construed as an administrative order for the guidance of the Engineers (Highways) NABARD and Rural Roads in various hierarchies. [para 18] [282-G-H; 283-A-B]

2.2 Departmental circulars are a common form of administrative document by which instructions are disseminated. Many such circulars are identified by serial numbers and published, and many of them contain general statement of policy. They are, therefore, of great importance to the public, giving much guidance about governmental organization and the exercise of discretionary powers. In themselves they have no legal effect whatever, having no statutory authority. But they may be used as a vehicle in conveying instructions to which some statute gives legal force. It is now the practice to publish circulars which are of any importance to the public and for a long time there has been no judicial criticism of the use made of them. [para 19] [283-C-E]

2.3 Under Article 162 of the Constitution, the

executive power of the State extends to matters with respect to which the State Legislature has power to make laws. Yet the limitations of the exercise of such executive power by the Government are two fold; first, if any Act or Law has been made by the State Legislature conferring any function on any other authority – in that case the Governor is not empowered to make any order in regard to that matter in exercise of his executive power nor can the Governor exercise such power in regard to that matter through officers subordinate to him. Secondly, the vesting in the Governor with the executive power of the State Government does not create any embargo for the Legislature of the State from making and/or enacting any law conferring functions on any authority subordinate to the Governor. Once a law occupies the field, it will not be open to the State Government in exercise of its executive power under Article 162 of the Constitution to prescribe in the same field by an executive order. However, it is well recognized that in matters relating to a particular subject in absence of any parliamentary legislation on the said subject, the State Government has the jurisdiction to act and to make executive orders. The executive power of the State would, in the absence of legislation, extend to making rules or orders regulating the action of the Executive. But, such orders cannot offend the provisions of the Constitution and should not be repugnant to any enactment of the appropriate Legislature. Subject to these limitations, such rules or orders may relate to matters of policy, may make classification and may determine the conditions of eligibility for receiving any advantage, privilege or aid from the State. [para 19] [283-E-H; 284-A-D]

2.4 The powers of the executive are not limited merely to the carrying out of the laws. In a welfare state

the functions of Executive are ever widening, which cover within their ambit various aspects of social and economic activities. Therefore, the executive exercises power to fill gaps by issuing various departmental orders. The executive power of the State is co-terminus with the legislative power of the State Legislature. Thus, if the State Legislature has jurisdiction to make law with respect to a subject, the State Executive can make regulations and issue Government Orders with respect to it, subject, however, to the constitutional limitations. Such administrative rules and/or orders shall be inoperative if the Legislature has enacted a law with respect to the subject. Thus, the High Court was not justified in brushing aside the Government Order dated November 16, 1951 on the ground that it contained administrative instructions. The respondent could not point out that the said order was repugnant to any legislation enacted by the State Government or the Central Government or to any statutory rules or the Constitution. [para 19] [284-D-H]

2.5 In fact, there was neither any enactment nor any statutory rule nor any constitutional provision as to how the contractor, who has entered into contracts with the Government, should be permitted to contest election, more particularly, when a request is made by the contractor to terminate his contracts so as to enable him to contest the election. There is no manner of doubt that in this branch of jurisdiction there was absence of statutory enactment, regulations and rules and, therefore, this Court is of the firm opinion that the Government had all authority to issue Government Order dated November 16, 1951 to fill up the gaps. Thus, the case of the respondent that his three contracts were terminated before he filed nomination papers will have to be judged in the light of the contents of Government Order dated

November 16, 1951. There is no manner of doubt that there was no valid termination of the contracts by the Government and those contracts were subsisting on the date when the respondent had filed his nomination papers and also on the date when the nomination papers of the respondent with other candidates were scrutinized by the Returning Officer. [para 19] [284-H; 285-A-D]

2.6 In the circumstances and facts of the case, on the date of submission of nomination papers by the respondent as well as on the date of scrutiny of the nomination papers, the contracts entered into by the respondent with the Government were subsisting and, therefore, the respondent was disqualified from filing the nomination papers and contesting the election. The respondent having incurred disqualification under the provisions of s. 9A of the Act, his election will have to be declared to be illegal. Accordingly, it is declared that the respondent had incurred disqualification u/s. 9A of the Act and, therefore, his election from the Constituency in question is declared to be illegal, null and void. [para 22] [288-B-C]

Competent Authority vs. Bangalore Jute Factor and Ors. **(2005) 13 SCC 477 – cited.**

Case Law Reference:

(2005) 13 SCC 477	**cited**	**para 5**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4129 of 2009.

From the Judgment & Order dated 2.12.2008 of the High Court of Judicature at Madras in Election Petition No. 2 of 2006.

Gurukrishna Kumar, Shweta Mazumdar, Shyam D. Nanda,

Rajat Khaltry, Subramonium Prasad for the Appellant.

R. Balasubramanian, S. Nanda Kumar, R. Satish Kumar, Anjali Chauhan, V.N. Raghupathy for the Respondent.

The Judgment of the Court was delivered by

J.M. PANCHAL, J. 1. This appeal, under Section 116A of the Representation of People Act, 1951, is directed against judgment dated December 2, 2008, rendered by the learned Single Judge of the High Court of Judicature at Madras in Election Petition No. 2 of 2006 by which the prayer of the appellant to declare the election of the Returned Candidate, viz., the respondent, from 220 – Cheranmahadevi Assembly Constituency of the Tamil Nadu Legislative Assembly as null and void, is refused.

2. The relevant facts emerging from the record of the case are as under: -

The Election Commission notified election schedule for the Thirteenth Tamil Nadu Legislative Assembly on March 3, 2006. Pursuant to the said notification, the Returning Officer, Cheranmahadevi called for nominations for Cheranmahadevi Assembly Constituency. The last date for filing the nomination papers was April 20, 2006. The date of scrutiny of the nomination papers was April 21, 2006 and the election was to be held on May 8, 2006. The appellant filed his nomination papers on April 17, 2006. So also the respondent filed his nomination papers on April 17, 2006. The nomination papers, filed by both, i.e., the appellant and the respondent were accepted by the Returning Officer. During the scrutiny of the nomination papers on April 21, 2006, the appellant raised an objection that since the respondent had subsisting contracts with the Government, his nomination papers should not be accepted. The respondent filed his counter stating that the contracts entered into by him with the Government were

terminated before filing of the nomination papers and, therefore, his nomination papers were not liable to be rejected. The Returning Officer passed an order dated June 26, 2006 over-ruling the objections filed by the appellant.

The election for the Tamil Nadu Legislative Assembly took place on the scheduled date, i.e., on May 8, 2006. The results were declared on May 11, 2006 and the respondent was declared elected. Therefore, feeling aggrieved, the appellant filed Election Petition No. 2 of 2006 under Sections 80 to 84 read with Section 100(1)(a) and Section 9A of the Representation of People Act, 1951 ("the Act" for short) read with Rule 2 of the Rules of Madras High Court – Election Petition, 1967, challenging the election of the respondent on the ground that the respondent was disqualified from submitting nomination papers and consequently from contesting the election as he had subsisting contracts with the Government. The appellant made reference to G.O.Ms. No. 4682 of Public Works Department dated November 16, 1951 and stated that in the light of the contents of the said G.O. a contractor would be entitled to terminate a subsisting contract only if other contractor acceptable to the Chief Engineer was available and that another contractor was willing to enter into a contract to execute the works under the existing terms and conditions so that no loss was suffered by the Government. The case of the appellant was that as per the said G.O. dated November 16, 1951, termination of a subsisting contract would take place only after settlement of the rights and liabilities between the Government and the existing contractor, but in the present case no such settlement had taken place between the respondent and the Government and, therefore, the election of the respondent was liable to be set aside. What was maintained in the Election Petition was that the respondent had not terminated his subsisting contracts in terms of G.O. dated November 16, 1951 and mere removal of the name of the respondent from the list of approved contractors should not be

construed as termination of the contracts as long as the contracts were not specifically terminated in terms of the aforesaid G.O. The main prayer in the Election Petition of the appellant was to set aside the election of the respondent.

3. On service of notice, the respondent contested the Election Petition by filing reply affidavit. In the reply it was stated that the respondent was not having any subsisting contract with the Government on the date of filing of his nomination papers as well as on the date of the scrutiny of the nomination papers. According to the respondent it was not necessary to follow the procedure contemplated under the G.O. dated November 16, 1951 before termination of contracts for contesting the election. What was maintained by the respondent was that even if it was assumed that the conditions enumerated in the G.O. were not followed, that would not nullify the termination of the contracts if made. According to the respondent the Divisional Engineer (Highways) NABARD and Rural Roads, Nagercoil had terminated the contract on April 17, 2006 and had freezed as well as forfeited the deposits of the amount made by him for crediting the same into Government account. Thus, according to the respondent, it was not correct to say that any contract was subsisting as far as the works relating to Tirunelveli Division was concerned. After mentioning that only a procedure as mentioned in G.O. dated November 16, 1951, was left to be followed by the subordinate officials of the Government, it was stated that non-observance of the said G.O. would not nullify the order terminating the contract issued by the Divisional Engineer on April 17, 2006. The respondent maintained that he was no longer a registered contractor with the Tamil Nadu State Highways Department nor was he having any subsisting contract in respect of the works referred to in the Election Petition and, therefore, his election was not liable to be set aside. It was further stated in the reply that balance work not executed by him was completed by the substitute contractor S. Rajagopalan on the same terms and conditions, which were agreed upon by him with the Government to execute the works

concerned and thus no loss was suffered by the Government. The averment made in the Election Petition that the respondent had not made any alternative arrangement for another contractor was emphatically denied by him. By filing reply, the respondent had demanded the dismissal of the Election Petition.

4. Having regard to the pleadings of the parties, the learned Single Judge of the High Court, framed necessary issues for determination. In order to prove his case, the appellant examined four witnesses including himself and produced documentary evidence at Exhibits P-1 to P-21. The respondent examined himself as RW-1 and one another witness as RW-2 and also produced documents at Exhibits R-1 to R-21 in support of his case pleaded in his written statement. The record further shows that Exhibits C-1 to C-32 were marked as Exhibits at the instance of the learned Single Judge.

5. On perusal of the election petition filed by the appellant, the learned Judge held that it was pertinent to note that the appellant had never set up a plea that the Divisional Engineer, Nagercoil had no authority to terminate the contract entered into with the respondent nor any plea was raised to the effect that there was collusion between the respondent and the Divisional Engineer, who was examined as RW-2 nor was it averred in the Election Petition that the respondent had mounted pressure on the Divisional Engineer, Nagercoil to terminate the contract and the Divisional Engineer had yielded to such pressure. Having noticed the above mentioned defects in the pleadings, the learned Judge observed that in view of the failure of the appellant to plead necessary facts and raise contentions, it was not necessary for him to decide the issues regarding which no averments were made in the Election Petition. The learned Judge took into consideration the evidence adduced by the parties and the principle laid down by this Court in *Competent Authority vs. Bangalore Jute Factory and others* (2005) 13 SCC 477, wherein it is held that

where a statute requires a particular act to be done in a particular manner, the act has to be done in that manner alone and in no other manner and concluded that the G.O. dated November 16, 1951, issued by the Government of Tamil Nadu, was only an administrative instruction but not a statute enacted by the Legislature and, therefore, the ratio laid down in the above mentioned decision was not applicable to the facts of the case. The learned Judge held that it was rightly pointed out that the Government Order dated November 16, 1951 contained only administrative instructions and while communicating the said Government Order to the Superintending Engineers and Divisional Engineers, it was specifically mentioned that the said administrative instruction was for information and guidance. What was deduced by the learned Single Judge was that the Government Order did not say that the Chief Engineer was the authority to terminate the contract of a contractor, entered into with the Government, nor the Government Order stated that an order of termination could be issued only when Chief Engineer had accepted a person, who was available and was willing to enter into a contract on the same terms and conditions. The learned Judge was of the opinion that a contractor, who wanted to terminate his contract, had nothing to do with the administrative instructions issued by the Government Order dated November 16, 1951. After referring to Exhibit C-11 it was held by the learned Judge that the agreements were entered into between the Governor of Tamil Nadu on the one hand and the respondent on the other and on behalf of the Governor, Superintending Engineer, NABARD had signed the agreement. The learned Judge found that when the Sub-Division was brought under the direct domain of the Superintending Engineer, the clause in agreement entered into between the parties that in the event of transfer of work to another circle/division/sub-division/ Superintending Engineer/Divisional Engineer/Assistant Divisional Engineer, who was in charge of the circle/ division/sub-division having the jurisdiction over the works would be competent to exercise all the powers and privileges reserved in favour of the

Government, would not be applicable. According to the learned Judge, the record produced showed that the Divisional Engineer had terminated the contract only under the blessings of the Superintending Engineer, NABARD, which order was subsequently ratified by the Superintending Engineer by his proceedings dated April 26, 2006 and, therefore, it was wrong to say that the contracts were not terminated as required by G.O. dated November 16, 1951. The learned Judge referred to Exhibit P-17 dated April 17, 2006 and concluded that the contract with the respondent was already terminated by the Divisional Engineer whereas Exhibit C-12, the office note, was wrongly prepared on the footing that the order of termination was yet to be passed. The learned Judge found that the order of ratification passed by the Superintending Engineer PW-4 being Exhibit P-19 dated April 26, 2006 validated the order of termination of contracts passed by the Divisional Engineer on April 17, 2006 and the contracts stood validly terminated as on the date of filing of nomination papers by the appellant. According to the learned Judge the substitute contractor S. Rajagopalan was a registered contractor as on April 17, 2006 and at the time when the contract with the respondent was terminated by the Divisional Engineer, a substitute contractor, who was willing to perform the remaining work left behind by the respondent, was made available and having made available a substitute contractor to step into his shoes to perform the remaining part of the contract, the respondent had got the contract validly terminated. The learned Judge interpreted the Government Order dated November 16, 1951 to mean that the Chief Engineer was not vested with the power to terminate the contract. According to the learned Judge the said G.O. did not say that only after the Chief Engineer had accepted such a substitute contractor, an order terminating contracts should be passed. The learned Judge noticed that the Chief Engineer was not a party to the contract and even if it was assumed for the sake of argument that there was a breach of the conditions laid down in the Government Order dated November 16, 1951, failure to follow the procedure or breach of the said Order would

not nullify the order terminating the contracts passed by the Divisional Engineer and subsequently ratified by the Superintending Engineer.

6. In view of the above mentioned conclusions and findings, the learned Judge has dismissed the Election Petition by judgment dated December 2, 2008, which has given rise to the instant appeal.

7. This Court has heard the learned counsel for the parties at length and in great detail. This Court has also considered the documents forming part of the appeal.

8. From the pleadings of the parties, it is evident that the controversy centres around the Government Order dated November 16, 1951 and, therefore, it would be advantageous to reproduce the said Government Order, which reads as under: -

"Government of Madras
Abstract

Contracts – Highways Department – Ensuing General Elections to Legislature – Request of Contractors for withdrawal from Subsisting Contracts and removal of the name from list of approved contractors – instructions – issued.

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Public Works Department

G.O.Ms. No. 4682

Dated 16th November, 1951

Read the following:

From the Chief Engineer (Highways) Lr. No. 56703/D2/51-1 dated 8th November, 1951.

From the Chief Engineer (Highways) Lr. No. 55865/D2/51-2 dated 13th November, 1951.

@@@@@

Order:

In his letter first cited the Chief Engineer (Highways) has reported that several contractors in the State who have got subsisting contracts under Government and District Boards have applied for closing their accounts and for removal of their names from the list of approved contractors in order to enable them to stand for election as a candidate. As the existing provisions in the preliminary specification to Madras Detailed Standard Specifications do not permit the contractors to withdraw from their existing contracts for the reasons now given by them, the Chief Engineer has requested instructions on the general policy to be adopted in such cases.

2. After careful examination His Excellency the Governor hereby directs that the contractors who desire to stand for election as candidates for the Legislatures be permitted to terminate their subsisting contracts and also get their names deleted from the list of approved contractors provided other persons acceptable to the Chief Engineer are available and are willing to enter into a contract to execute the works under the existing terms and conditions without any loss to the Government.

3. The Chief Engineer is informed in this connection that the following points should be considered in the termination of contracts referred to in para 2 above.

1. There should be a final and complete settlement of rights and liabilities between the Government and the existing contractor. No sum of money should remain payable to him and nothing should remain

liable to be supplied or done by him;

2. Substitution of a fresh contract in regard to the unfinished part of the work should not involve the Government in loss or extra expenditure with a view to enabling any particular person to stand for election as a candidate; and

3. The contractor who is allowed to back out of his contract should do so at his own risk and should be made liable to make good any loss to the Government arising out of the necessity to enter into a fresh contract.

4. The instructions now issued will apply also to the termination of contracts under similar circumstances in the Public Works and Electricity Departments.

M. Gopal Menon
Deputy Secretary to Government

To

The Chief Engineer (Highways)

/True Copy/

Copy of Endt. No. 55868/D2/51 HR dated 16.11.1951 from the Chief Engineer (Highways and Rural Works) Madras-5 to the Superintending Engineers and Divisional Engineers (H)

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Copy communicated to the Superintending Engineers (H) and Divisional Engineers (H) for information and guidance.

K.K. Nambiar

Chief Engineer (Highways)"

According to the appellant the respondent was disqualified because the contracts entered into by him in the course of his trade or business with the appropriate Government, were subsisting at the time when he filed his nomination papers on April 17, 2006 and, therefore, his Election Petition should have been allowed. Therefore, it would be relevant to notice statutory provision which deals with disqualification of a candidate having subsisting contracts with the Government. Section 9-A of the Act, which deals with disqualification for Government contracts etc., reads as under: -

> *"9A. Disqualification for Government contracts, etc.* – A person shall be disqualified if, and for so long as, there subsists a contract entered into by him in the course of his trade or business with the appropriate Government for the supply of goods to, or for the execution of any works undertaken by that Government.
>
> *Explanation.* – For the purposes of this section, where a contract has been fully performed by the person by whom it has been entered into with the appropriate Government, the contract shall be deemed not to subsist by reason only of the fact that the Government has not performed its part of the contract either wholly or in part."

9. According to the appellant, the respondent had following three contracts subsisting with the Government on the date of his filing of the nomination papers, which was quite evident from communication dated April 17, 2006 addressed by the Divisional Engineer (Highways) NABARD and Rural Roads, Nagercoil to Mr. S. Madasamy, the learned advocate of the appellant: -

(a) Strengthening Pothaiyadi Road Km 0/0-2/2

Estimate Rs.14.50 lakhs;

(b) Strengthening Bethaniya Road Km 0/0-3/0

Estimate Rs.19.00 lakhs;

(c) Strengthening Eruvadi – Donavoor Road to Kattalai Road, Km 0/0-1/4 estimate Rs.9.50 lakhs.

10. Before considering the effect of abovementioned contracts entered into between the respondent and the Government, it would be essential to analyze the Government Order dated November 16, 1951. The Chief Engineer (Highways) had reported to the State Government that several contractors in the State, who had got subsisting contracts under the Government and District Boards, had applied for closing their accounts and for removal of their names from the list of approved contractors in order to enable them to stand for election as a candidate. However, the then existing provisions in the preliminary specification to Madras Detailed Standard Specifications did not permit the contractors to withdraw from their existing contracts so as to enable them to contest the election. Therefore, the Chief Engineer by letter dated November 13, 1951 requested the Government to issue instructions and general policy to be adopted in such cases. The Government considered the proposal made by the Chief Engineer and provisions of Madras Detailed Standard Specifications. After careful examination, His Excellency the Governor of Madras issued directions that the contractors, who desired to stand for election as candidates for the Legislature, be permitted to terminate their subsisting contracts and also get their names deleted from the list of approved contractors, provided other persons acceptable to the Chief Engineer were available and were willing to enter into a contract to execute the works under the existing terms and conditions so that no loss was suffered by the Government. In view of the directions given by His Excellency the Governor of Madras, the Government issued G.O. dated November 16, 1951. By the said G.O. the Chief Engineer was informed that while terminating subsisting contracts of the contractors the facts and/or following points mentioned should be considered: -

(i) There should be a final and complete settlement of rights and liabilities between the Government and the existing contractor. No sum of money should remain payable to the contractor and nothing should remain liable to be supplied or done by the contractor;

(ii) The substitution of a fresh contract in regard to the unfinished part of the work should not result into loss to the Government or extra expenditure merely because a particular contractor was to stand for election as a candidate; and

(iii) The contractor, who was allowed to back out of his contract, should do so at his own risk and should be made liable to make good any loss to the Government arising out of the necessity to enter into a fresh contract with another contractor only because the existing contractor was to stand for election as a candidate.

11. Normally, a contract entered into between two parties would come to an end (1) by performance, (2) by express agreement, (3) under the doctrine of frustration, (4) by breach and (5) by novation. Such contingencies and eventualities are always contemplated while entering into an agreement between the two persons and a contract can be brought to an end in any of the aforementioned methods. However, in view of the fact that several contractors had applied for closing their accounts and for removal of their names from the list of approved contractors in order to enable them to stand for the election, a recommendation was made by the Chief Engineer (Highways) to the Government to issue instructions and lay down general policy to be adopted in such cases. When a contract was brought to an end because contractor was desirous of contesting election, it was not a case of either

breach of the contract or performance of the same or novation of the same or frustration of the same and, therefore, a special method was required to be devised by the Government before terminating the existing contract to enable the contractor to contest the election. The method devised was that the G.O. dated November 16, 1951 was issued/addressed only to the Chief Engineer (Highways). In order to see that the unfinished work of the Government did not suffer nor Government suffered any loss, a special care was required to be taken and, therefore, the Chief Engineer was directed that the contractors, who desired to stand for election as candidates for the Legislature, should be permitted to terminate their subsisting contracts and also get their names deleted from the list of approved contractors only if other contractor acceptable to the Chief Engineer was available and was willing to enter into contract to execute the works under the existing terms and conditions so that no loss was suffered by the Government. The Government specifically mentioned in paragraph 3 of the said Government Order that the Chief Engineer should consider the following three points before terminating the contracts existing: -

(a) that there should be final and complete settlement of rights and liabilities between the Government and the existing contractor;

(b) the Chief Engineer must ensure that no sum of money remained payable to the contractor; and

(c) nothing remained liable to be supplied or done by the contractor.

The G.O. further required the Chief Engineer to ensure that the substitution of a fresh contract in regard to the unfinished part of work should not cause any loss to the Government nor the Government should be made to incur extra expenditure merely to enable a particular contractor to stand for election as a candidate. What was highlighted in the said Order was that

the contractor, who was allowed to back out of his contract, was to do so at his own risk and was liable to make good any loss that may be suffered by the Government out of necessity to enter into a fresh contract.

12. A reasonable reading of the above mentioned stipulations and conditions mentioned in the Government Order dated November 16, 1951 makes it evident that only the Chief Engineer was competent to terminate the existing contracts where the contractor was desirous of contesting election. It is wrong to say that an instruction had been issued to the Chief Engineer to see that another contractor was available as substitute to perform the remaining part of the contract without any loss to the Government and that the Order dated November 16, 1951 did not provide that an order of termination of a subsisting contract should be issued only when the Chief Engineer had accepted a person, who was available and was willing to enter into a contract on the same terms and conditions to which the existing contractor had agreed.

13. One of the accepted principles of interpretation is as to how those, who are conversant with the Government Order and are expected to deal with the same, construe and understand the Order. The opinion expressed by the Government officials, who are expected to have sufficient knowledge and experience as to how a Government Order should be operated and/or implemented, may be relied upon. In order to ascertain this, it would be necessary to refer to the evidence on record. Though the High Court has concluded that the Chief Engineer had no power to terminate contracts in terms of Government Order dated November 16, 1951, this Court finds that the High Court has not adverted to the evidence on record at all. In this case evidence of G. Shanmuganandhan was recorded as PW-3. His evidence indicates that in April, 2006, he was Superintending Engineer, Highways Projects, Madurai. According to him, Tirunelveli Division Projects were under his jurisdiction. It is mentioned by him that he had issued

Exhibit P-12 by which name of the respondent was deleted from the list of contractors. After looking at Exhibit P-13 it was stated by him that it was an erratum and he had marked copy of Exhibit P-13 to the Superintending Engineer, Tirunelveli with instructions to take appropriate action. He explained to the Court that appropriate action meant cancelling of ongoing contract works of the respondent. He further stated that the Superintending Engineer, NABARD and Rural Roads, Tirunelveli, had entered into the contracts. In cross-examination this witness clarified that there was no connection between the act of removal of name of contractor from the list and termination of the contract and the two issues were different. In his further examination-in-chief by the learned counsel for the appellant, he was put a question as to who was the competent authority for approving the substitute contract as per G.O.Ms. 4682. In answer to the said question he replied that the Chief Engineer, NABARD and Rural Roads, was competent authority for approving the substitute contract. Again, Mr. P. Velusamy, who was Superintending Engineer, NABARD and Rural Roads, Tirunelveli, was examined by the appellant as PW-4. He stated in his testimony that between September, 2005 and August, 2006, he was Superintending Engineer, NABARD and Rural Roads, Tirunelveli and was working under Chief Engineer, NABARD and Rural Roads, Chennai. According to him, three divisions were under his control and they were (1) Nagercoil, (2) Tirunelveli and (3) Paramakudi. He further mentioned in his testimony that the Divisional Engineer, NABARD and Rural Roads, Nagercoil was under his control. He was shown Exhibit C-11 and after looking to the same, he stated that it was the original agreement in respect of three works awarded to the respondent in respect of Nagercoil Division. After looking to Exhibit C-12, he mentioned that they were the proceedings of the Divisional Engineer, NABARD and Rural Roads, Nagercoil wherein the Divisional Engineer had sought his orders. According to him, Exhibit C-13 was a letter dated April 18, 2006 addressed by

the Divisional Engineer to him informing about the order of termination of contracts passed by him in respect of the contracts entered into by the respondent and by the said letter the Divisional Engineer had also sought ratification from him of the order terminating the contract. According to him, the ratification sought for under Exhibit C-13 was granted by him vide Exhibit P-19 letter dated April 26, 2006. He further stated that he had the power either to ratify or to refuse the ratification of any orders of the Divisional Engineer. The witness stated that Exhibit C-9 was the proceeding issued by him making recommendation that the term of Rajagopal as a contractor be renewed. According to him Mr. Rajagopal had made an application on April 18, 2006 with a request to mention his name in the list of contractors again and under Exhibit C-14 dated June 1, 2006, his requested was granted. According to him by Exhibit C-6 dated May 2, 2005 he had requested the Chief Engineer to ratify the action of the Divisional Engineer to substitute Rajagopal in place of the respondent to do the balance work whereas Exhibit C-15 were the proceedings dated June 19, 2006 forwarded by him to the Chief Engineer recommending the name of Rajagopal as a substitute for the respondent. According to him, pursuant to the Order dated June 26, 2006 issued by the Chief Engineer, he had imposed certain conditions for accepting Rajagopal as substituted contractor. The witness further explained that Exhibit C-8 were his proceedings dated June 26, 2006 pursuant to the orders of the Chief Engineer contained in Exhibit C-7 whereas Exhibit C-16 dated July 4, 2006 was the original agreement entered into with Rajagopal with respect to three balance works to be completed in Nagercoil Division. The witness stated that under Exhibit C-7 the Chief Engineer had required him to send his acknowledgement for having received the ratification order passed by him. In his examination-in-chief the witness had mentioned that every contractor was required to take steps to bring his name on the list of approved contractor from 1st April of every year within a period of three months therefrom and if

a criminal case was pending against any contractor, his name would not be included in the list of approved contractors. The witness in no uncertain terms admitted that from the file he was able to say that in the year 2000 Rajagopal was involved in a criminal case of assault but there was no data available in the records showing that pursuant to the said criminal case his name was ever removed from the list of contractors. He denied the suggestion that on April 17, 2006 Rajagopal was not a registered contractor.

14. Mr. Y. Christdhas, who was Divisional Engineer at the relevant time, was examined on behalf of the respondent as RW-2. According to him, the respondent was working as a contractor in his Division and was nominated as a contractor for the works mentioned by him in his examination-in-chief. According to this witness, the respondent had addressed a letter dated April 10, 2006 and another letter dated April 17, 2006 to him with the request to terminate his subsisting contracts and both the letters of the respondent were forwarded by him to the Superintending Engineer by forwarding letter dated April 17, 2006, with his endorsement that order terminating contracts passed by him be ratified. The witness stated in his testimony that the respondent wanted to contest the election and, therefore, he had addressed a letter dated April 10, 2006 to him for termination of contracts. The witness further mentioned that pursuant to his letters the Superintending Engineer had instructed him to pass the order terminating the contract and to get ratification. The witness stated that accordingly he had terminated the contracts awarded to the respondent. He also stated that he had sent a letter Exhibit C-13 seeking ratification of the order terminating the contracts awarded to the respondent. The witness mentioned in his testimony that the Superintending Engineer accorded ratification through Exhibit P-19 whereas under Exhibit C-21 Rajagopal was appointed as substituted contractor. According to him by letter dated April 19, 2006 he had recommended Rajagopal's appointment as substituted contractor and along

with the said recommendation he had also sent Exhibit R-4, which was a letter of the respondent for agreeing to compensate the Government for the loss, if any, which might take place. This witness also mentioned that Exhibit C-7 were the proceedings drawn by the Chief Engineer approving the substitution of Rajagopal in the place of the respondent. It was also stated by the witness that Exhibit R-18 dated September 21, 2006 was the reply given by him to the letter of the appellant Exhibit R-17 dated September 16, 2006, wherein he had mentioned that the account with the respondent was settled and no cash payment was made to the respondent. In his cross-examination this witness in no uncertain terms admitted that the power to terminate the contract awarded to a contractor, who proposed to contest the election, was only with the Chief Engineer and since he had no power to terminate the contract, he had forwarded the papers to his superior officers. The witness stated that Exhibit C-13 was forwarded to the Superintending Engineer only after he passed order Exhibit P-17 cancelling the contracts awarded to the respondent. According to him the urgency of the situation was also the reason for making Exhibit P-17 order. He further clarified that in Exhibit P-17 he had not mentioned that his order was subject to ratification by the Superintending Engineer.

15. The evidence of the above mentioned witnesses clearly indicates that the power to terminate the contract in terms of Government Order dated November 16, 1951 was only with the Chief Engineer and neither the Divisional Engineer was competent to terminate the contracts awarded to the respondent nor the Superintending Engineer was competent to ratify an order passed by the Divisional Engineer cancelling the contracts awarded to the respondent. The record nowhere shows that the contracts entered into between the respondent and the Superintending Engineer, Tirunelveli were ever terminated by the Chief Engineer in terms of Government Order dated November 16, 1951 by passing an order. Therefore, the assertion made by the respondent that his contracts were

terminated by the Divisional Engineer by passing an order, which was subsequently ratified by the Superintending Engineer is of no avail. There is no manner of doubt that the contracts entered into between the Superintending Engineer, Tirunelveli and the respondent were not terminated as required by Government Order dated November 16, 1951 and, therefore, it will have to be held that they were subsisting on the date of filing of the nomination papers by the respondent as well as on the date on which those papers were scrutinized.

16. As noticed earlier, one of the conditions to be fulfilled before termination of the contract of a contractor, who was desirous to contest election, was that he must offer a substitute, who was willing to undertake unfinished work on the same terms and conditions but without causing any loss to the Government. The former Chief Engineer, who was examined in this case as PW-2, has, without mincing the words, stated that Mr. Rajagopal offered by the respondent as substitute contractor was substituted in place of the respondent on June 1, 2006. It means that the contract could not have been terminated earlier than June 1, 2006 and were subsisting at least as on June 1, 2006, which was the date beyond the last date of filing of the nomination papers and scrutiny thereof. Therefore, the finding recorded by the learned Judge of the High Court that on the date of filing of the nomination Mr. Rajagopal was already substituted in place of the respondent is not born out from the record of the case nor the record shows that after June 1, 2006 the contracts were terminated by the authority contemplated under Government Order dated November 16, 1951.

17. At this stage, it would be relevant to again reproduce clause 1 of Government Order dated November 16, 1951, which is as under: -

> "1. There should be a final and complete settlement of rights and liabilities between the Government and the existing contractor. No sum of money should remain payable to him and nothing should remain liable to be supplied or done by him."

Mr. Y. Christdhas, who was the Divisional Engineer at the relevant point of time, has, in terms, mentioned that under Exhibit C-12 it was noted that a sum of Rs.98,227/- payable to the respondent should be kept in the deposit and the contract should be permanently terminated seeking orders from the Superintending Engineer. The record further shows that on April 19, 2006 the Divisional Engineer had forwarded a letter to the Superintending Engineer, Tirunelveli mentioning inter alia that since the contract of the respondent was cancelled, the fourth and final list of approval was given to him and deposit amount of Rs.2,02,341 was kept in kind-IV deposit. The Government Order dated November 16, 1951, which is quoted above, clearly requires that no sum of money should remain payable to the contractor and nothing should remain liable to be supplied or done by the contractor. Keeping the amount of more than two lakhs in kind-IV deposit can hardly be said to be compliance of clause 1 of the Government Order dated November 16, 1951. In fact as held earlier, everything was required to be done by the Chief Engineer himself. There is nothing on record to show that the steps and/or actions, which were taken by the Divisional Engineer, were ever ratified by the Chief Engineer except that the Chief Engineer had accepted the proposal of the Superintending Engineer to accept Rajagopal as substitute of the respondent. Thus, this Court finds that on the date of filing of nomination papers and scrutiny of the same, the respondent had not validly terminated the contracts entered into by him with the Government and was disqualified not only to file his nomination papers but also to contest the election in question.

18. The learned Single Judge has brushed aside the Government Order dated November 16, 1951 by stating that it was only an administrative instruction circulated to the Engineers (Highways) NABARD and Rural Roads for information and guidance, forgetting the important fact that in the last clause of the Government Order it is specifically

mentioned that the instructions issued by the said Government Order would also apply to the termination of the contracts under similar circumstances entered into with the Public Works and Electricity Departments. Therefore, the High Court was wrong in holding that though Government Order dated November 16, 1951 was an order by the Government, at best it must be construed as an administrative order for the guidance of the Engineers (Highways) NABARD and Rural Roads in various hierarchies.

19. Departmental circulars are a common form of administrative document by which instructions are disseminated. Many such circulars are identified by serial numbers and published, and many of them contain general statement of policy. They are, therefore, of great importance to the public, giving much guidance about governmental organization and the exercise of discretionary powers. In themselves they have no legal effect whatever, having no statutory authority. But they may be used as a vehicle in conveying instructions to which some statute gives legal force. It is now the practice to publish circulars which are of any importance to the public and for a long time there has been no judicial criticism of the use made of them. Under Article 162 of the Constitution, the executive power of the State extends to matters with respect to which the State Legislature has power to make laws. Yet the limitations of the exercise of such executive power by the Government are two fold; first, if any Act or Law has been made by the State Legislature conferring any function on any other authority – in that case the Governor is not empowered to make any order in regard to that matter in exercise of his executive power nor can the Governor exercise such power in regard to that matter through officers subordinate to him. Secondly, the vesting in the Governor with the executive power of the State Government does not create any embargo for the Legislature of the State from making and/or enacting any law conferring functions on any authority subordinate to the Governor. Once a law occupies the field, it

will not be open to the State Government in exercise of its executive power under Article 162 of the Constitution to prescribe in the same field by an executive order. However, it is well recognized that in matters relating to a particular subject in absence of any parliamentary legislation on the said subject, the State Government has the jurisdiction to act and to make executive orders. The executive power of the State would, in the absence of legislation, extend to making rules or orders regulating the action of the Executive. But, such orders cannot offend the provisions of the Constitution and should not be repugnant to any enactment of the appropriate Legislature. Subject to these limitations, such rules or orders may relate to matters of policy, may make classification and may determine the conditions of eligibility for receiving any advantage, privilege or aid from the State. The powers of the executive are not limited merely to the carrying out of the laws. In a welfare state the functions of Executive are ever widening, which cover within their ambit various aspects of social and economic activities. Therefore, the executive exercises power to fill gaps by issuing various departmental orders. The executive power of the State is co-terminus with the legislative power of the State Legislature. In other words, if the State Legislature has jurisdiction to make law with respect to a subject, the State Executive can make regulations and issue Government Orders with respect to it, subject, however, to the constitutional limitations. Such administrative rules and/or orders shall be inoperative if the Legislature has enacted a law with respect to the subject. Thus, the High Court was not justified in brushing aside the Government Order dated November 16, 1951 on the ground that it contained administrative instructions. The respondent could not point out that the said order was repugnant to any legislation enacted by the State Government or the Central Government nor could he point out that the instructions contained in the said Government Order dated November 16, 1951 were repugnant to any statutory rules or the Constitution. In fact, there was neither any enactment nor any statutory rule nor any constitutional provision as to how the

contractor, who has entered into contracts with the Government, should be permitted to contest election, more particularly, when a request is made by the contractor to terminate his contracts so as to enable him to contest the election. There is no manner of doubt that in this branch of jurisdiction there was absence of statutory enactment, regulations and rules and, therefore, this Court is of the firm opinion that the Government had all authority to issue Government Order dated November 16, 1951 to fill up the gaps. Thus the case of the respondent that his three contracts were terminated before he filed nomination papers will have to be judged in the light of the contents of Government Order dated November 16, 1951. Viewed in the light of the contents of the Government Order dated November 16, 1951, there is no manner of doubt that there was no valid termination of the contracts by the Government and those contracts were subsisting on the date when the respondent had filed his nomination papers and also on the date when the nomination papers of the respondent with other candidates were scrutinized by the Returning Officer.

20. The argument that the contracts were validly terminated by the Divisional Engineer, which action was subsequently ratified by the Superintending Engineer and, therefore, it should be held that there were no subsisting contracts on the date of submission of the nomination papers, has no merits and cannot be accepted. On true interpretation of the Government Order dated November 16, 1951 this Court has held that only the Chief Engineer was competent to terminate the contracts and, therefore, the termination of the contracts by the Divisional Engineer, which was subsequently ratified by the Superintending Engineer, cannot be treated as valid termination of contracts. The record of the case shows that on April 10, 2006, the respondent had addressed a letter to the Divisional Engineer, NABARD informing him about his intention to contest the Assembly election and requesting him to cancel the contracts immediately. In the said letter a request

was made to issue a certificate indicating that the contracts entered into by the respondent with the Government were cancelled. Obviously, the Divisional Engineer had no authority to cancel the contracts and, therefore, he had forwarded the letter of the respondent to the Superintending Engineer immediately for necessary action. The record shows that in view of the request made by the respondent, an orders was passed by the Office of Superintending Engineer cancelling the registration of the respondent as a contractor permanently and the respondent was informed that if any work was pending on his side, he should obtain a separate work cancellation order for the work pending from the concerned Highways Division. It was also informed to the respondent that the cancellation of registration of contractor would be final only after obtaining such separate work cancellation order from the concerned Division and the order passed for cancellation of registration as contractor from the Register would not be treated as work cancellation order for any pending work. The proceedings of the Divisional Engineer (H) NABARD and Rural Roads, Nagercoil dated April 17, 2006 mention that the contracts were absolutely terminated as per Government Order dated November 16, 1951 and the respondent was informed that the works entrusted to him would be got executed at his risk and cost and that orders for entrustment of the works to the new contractor would be issued separately. It was also mentioned in the said letter that the deposits available in favour of the respondent for the works, which were determined, were freezed and forfeited for crediting the same into Government account. Thereafter, the Divisional Engineer had addressed a communication dated April 18, 2006 to the Superintending Engineer informing that as the respondent was desirous to contest Assembly election and had requested to cancel the contracts in the present position and issue termination certificate for the said works, he had conducted proceedings for cancelling the contract on April 17, 2006. By the said letter the Divisional Engineer had requested the Superintending

Engineer to accord ratification to the order dated April 17, 2006 for cancelling the contracts. The record shows that thereafter by an order dated April 26, 2006 the Superintending Engineer (N) NABARD and Rural Roads, Tirunelveli had ratified the order dated April 17, 2006 by which the Divisional Engineer (H) NABARD had terminated the contracts entered into by the respondent with the Government. The Superintending Engineer had informed the respondent that the Divisional Engineer was competent to terminate the contracts. However, it is an admitted position that the contracts were entered into by the respondent with the Superintending Engineer and under the terms and conditions of the contracts, the Superintending Engineer was competent to terminate the contracts. The Government Order dated November 16, 1951 nowhere provides that the Divisional Engineer was competent to terminate the contracts. Having noticed the Government Order dated November 16, 1951 the Superintending Engineer could not have informed the respondent that the Divisional Engineer was competent to terminate the contracts entered into by him with the Government nor the Divisional Engineer was competent to terminate the contracts entered into by the respondent with the Government.

21. Normally, the Superintending Engineer would be competent to terminate the contracts when breach of the terms and conditions is committed by a contractor. However, in the present case the court finds that the contracts were to be brought to an abrupt end because the respondent was intending to contest the election. Such an eventuality was never contemplated under the contracts and the contracts entered into by the respondent with the Government could have been terminated only as per the terms and conditions stipulated in Government Order dated November 16, 1951. Therefore, neither the Divisional Engineer had authority to terminate the contracts nor the Superintending Engineer had any authority to terminate the contracts. Thus, the action of the Superintending Engineer in ratifying the cancellation of the

contracts made by the Divisional Engineer is of no consequence.

22. The net result of the above discussion is that on the date of submission of nomination papers by the respondent as well as on the date of scrutiny of the nomination papers, the contracts entered into by the respondent with the Government were subsisting and, therefore, the respondent was disqualified from filing the nomination papers and contesting the election. The respondent having incurred disqualification under the provisions of Section 9A of the Act, his election will have to be declared to be illegal. Accordingly, it is declared that the respondent had incurred disqualification under Section 9A of the Act and, therefore, his election from the Constituency in question is declared to be illegal, null and void.

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

R.P. Appeal allowed.