RALLIS INDIA LTD.
v.
PODURU VIDYA BHUSAN & ORS.
(Criminal Appeal No. 924 of 2011)

APRIL 13, 2011

[DALVEER BHANDARI AND DEEPAK VERMA, JJ.]

Negotiable Instruments Act, 1881: s.141 – Offence by companies/firms – Dishonour of cheque issued by partnership firm – Complaint u/s.138 against firm and partners including respondents – Averment in the complaint that all partners were looking after day to day affairs of the accused firm and their liability was joint as well as several – Quashing of complaint sought by respondents on the ground that they had severed their connections with the firm much prior to the issuance of dishonoured cheques – High Court discharged the respondents – On appeal, held: Specific averments were made against the respondents that they were the partners of the firm, at the relevant point of time and were looking after day to day affairs of the partnership firm – Burden of proof that at the relevant point of time they were not partners, lay specifically on them – The question as to whether or not they were partners in the firm during the relevant period is one of fact, which has to be established in trial – High Court should not have interfered with the cognizance of the complaints having been taken by the trial court and discharged the respondents of the said liability at the threshold – Code of Criminal Procedure, 1973 – s.482.

Code of Criminal Procedure, 1973: s.482 – Manner in which High Courts ought to exercise their power to quash criminal proceeding when such proceeding is related to offences committed by companies – Discussed.

The appellant filed criminal complaints under

Sections 138 and 141 of the Negotiable Instruments Act, 1881 against the accused. In the complaint, the plea was raised by the appellant that the accused No. 1 was a partnership firm and accused No. 2 to 7 were partners thereof and accused No. 3 was signatory of the impugned cheques and all partners were looking after day to day affairs of the accused firm and thus the liability as raised by them was joint as well as several.

The respondents arrayed as accused nos.4, 6 and 7 in the said complaints filed applications in the High Court under Section 482, Cr.P.C. for their discharge on the ground that they had severed their connections with the accused-firm much prior to the issuance of the dishonoured cheques. The High Court discharged the respondents. Aggrieved, the appellant filed the instant appeal.

Allowing the appeal, the Court

HELD: 1. Sufficient averments were made against the respondents that they were the partners of the firm, at the relevant point of time and were looking after day to day affairs of the partnership firm. These averments were specifically mentioned by the appellant in the complaint even though denied by the respondents but the burden of proof that at the relevant point of time they were not the partners, lay specifically on them. This onus was required to be discharged by them by leading evidence and unless it was so proved, in accordance with law, they could be discharged of their liability. Consequently, High Court committed an error in discharging them. Also, by virtue of their own submissions before the High Court, the respondents had admitted the fact that the appellant had referred to them in their capacity as partners who were in-charge of the affairs of the firm in the initial

complaints. The question as to whether or not they were partners in the firm as on 31.03.2004, is one of fact, which was to be established in trial. Thus, the primary responsibility of the complainant is to make specific averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no legal requirement for the complainant to show that the accused partner of the firm was aware about each and every transaction. On the other hand, proviso to Section 141 of the Act clearly lays down that if the accused is able to prove to the satisfaction of the Court that the offence was committed without his knowledge or he had exercised due diligence to prevent the commission of such offence, he will not be liable of punishment. The final judgment and order would depend on the evidence adduced. Criminal liability is attracted only on those, who at the time of commission of the offence, were in charge of and were responsible for the conduct of the business of the firm. But vicarious criminal liability can be inferred against the partners of a firm when it is specifically averred in the complaint about the status of the partners "qua" the firm. This would make them liable to face the prosecution but it would not lead to automatic conviction. Hence, they are not adversely prejudiced – if they are eventually found to be not guilty, as a necessary consequence thereof would be acquitted. [Paras 11, 12] [297-B-H; 298-A-C]

2. At the threshold, the High Court should not have interfered with the cognizance of the complaints having been taken by the trial court and discharged the respondents of the said liability. Unless parties are given opportunity to lead evidence, it is not possible to come to definite conclusion as to what was the date when the earlier partnership was dissolved and since what date the

respondents ceased to be the partners of the firm. [Para 13] [298-D]

3. Manner in which High Courts ought to exercise their power to quash criminal proceedings when such proceeding is related to offences committed by companies. The world of commercial transactions contains numerous unique intricacies, many of which are yet to be statutorily regulated. More particularly, the principle laid down in Section 141 of the Act (which is pari materia with identical sections in other Acts like the Food Safety and Standards Act, the erstwhile Prevention of Food Adulteration Act etc. etc.) is susceptible to abuse by unscrupulous companies to the detriment of unsuspecting third parties. In the instant case, there were several disputed facts involved such as the date when the partnership came into being, who were the initial partners and if and when the respondents had actually retired from the partnership firm etc. [Para 14] [298-E-H]

4. The ratio of the SMS Pharmaceuticals as regards the specific averment of vicarious liability can be followed only, after the factum that accused were the Directors or Partners of a Company or Firm respectively at the relevant point of time, stands fully established. However, in cases like the instant one, where there are allegations and counter-allegations between the parties regarding the very composition of the firm, the said rule of 'specific averment' must be broadly construed. Indeed, it would be nothing short of a travesty of justice if the Directors of a Company of Partners of a Firm, who, having duped a third-party by producing false documents (like a fake partnership deed) or making false statements (that some others were in charge of the Company/Firm), at a subsequent stage, seek protection from prosecution on the ground that they were not directly indicted in the

complaint – such a proposition strikes against one of the very basic tenets of the law of natural justice, which is, that none shall be allowed to take advantage of his own default. Of course, such observation is of a general nature, and has no bearing on the instant case, but nonetheless, the power to quash a criminal proceeding with respect to an offence under Section 141 of the Act, must be exercised keeping this advisory note and caveat in mind. The impugned judgment and order passed by Single Judge exercising the jurisdiction conferred on him under Section 482, Cr.P.C. cannot be sustained in law. The same are hereby set aside and quashed. The trial court is directed to dispose of the criminal complaints filed by appellant at an early date, after giving opportunity of hearing to both sides, in accordance with law. However, the trial court would not be influenced by any of the observations made and would decide the matters in accordance with law. [Paras 15 and 16] [299-A-G]

SMS Pharmaceuticals Limited v. Neeta Bhalla and Anr. **2005(8) SCC 89 – relied on.**

Case law reference:

2005(8) SCC 89	**relied on**	**Paras 10, 15**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 924 of 2011.

From the Judgment & Order dated 27.7.2007 of the High Court of Judicature at A.P. at Hyderabad in Criminal Appeal No. 3085 of 2007.

WITH

Criminal Appeal No. 925 and 926 of 2011.

Ajay Dahiya (for Shibashish Misra) for the Appellant.

G.V.R. Choudhary, K. Shivraj Choudhuri, D. Bharathi Reddy and Ramesh Allanki (for D. Mahesh Babu) for the Respondents.

The Judgment of the Court was delivered by

DEEPAK VERMA, J. 1. Leave granted.

2. This and the connected matters arise out of the order dated 27.07.2007 in exercise of the jurisdiction conferred under Section 482 of the Code of Criminal Procedure [for short, 'Cr.P.C.'], passed by learned Single Judge of the High Court of Judicature of Andhra Pradesh at Hyderabad in Criminal Petitions No. 3085 of 2007, 3082 of 2007 and 3084 of 2007 all titled *Poduru Vidya Bhushan and Others Vs. Rallis India Ltd. and Another,* whereby and whereunder Accused No. 4, 6 and 7 (arraigned as Respondents Nos. 1, 2 and 3 herein) have been discharged of the offences contained under Sections 138 and 141 of the Negotiable Instruments Act, 1881 (hereinafter shall be referred to as 'Act').

3. For the sake of convenience, facts mentioned in SLP (Crl.) No. 1874 of 2008 are taken into consideration.

4. Appellant as Complainant filed a criminal complaint before the Chief Judicial Magistrate, Gautam Budh Nagar, Noida (U.P.) on 23.7.2004, under Sections 138 and 141 of the Act. It was alleged in the said complaint that cheques bearing nos.382874 and 382875 dated 31.03.2004 for Rs.15,00,000/- each drawn on Union Bank of India, Vijaywada Main Branch were issued by the accused persons. The said cheques, when presented to their banker, were returned as unpaid vide Cheques Return Advices dated 29.05.2004, with the remarks, 'Payment stopped by Drawer'. In the said complaint, the following specific plea is raised by the Appellant:

"That the Accused No. 1 is a partnership firm and Accused No. 2 to 7 are partners thereof and Accused No. 3 is signatory of the impugned cheques and all partners

are looking after day to day affairs of the accused firm and thus the liability as raised by them is joint and several."

5. It may be pertinent to mention here that the Appellant herein had filed substantially similar complaints before the Criminal Courts of competent Jurisdiction at Chandigarh, Vijayawada and Jammu & Kashmir as well. The partnership firm M/s Sri Lakshmi Agency was therefore, constrained to file T.P. (Crl.) Nos. 161-171 of 2005, which came to be disposed of by this Court on 03.03.2006 and all criminal cases (excluding those pending in the State of Jammu & Kashmir) filed by Appellant against Respondents were directed to be tried by Competent Criminal Court at Hyderabad as a series of composite criminal complaints. Consequently all the complaints are now pending before XIV Additional Chief Metropolitan Magistrate, Nampally, Hyderabad, for disposal in accordance with law. The Respondents herein arrayed as Accused Nos. 4, 6 and 7 in the said complaints thereafter filed applications in the High Court of Judicature of Andhra Pradesh at Hyderabad under Section 482 of the Cr.P.C. for their discharge.

6. It was, inter alia, contended by the Respondents before the High Court as under :

"That the aforesaid complaint depicted the applicants as the partners of M/s Sri Lakshmi Agencies.

That the aforesaid averments is a false one. Particularly when the complainant M/s Rallis India Ltd. was fully aware that the applicants had severed their connections with M/s Lakshmi agencies much prior to the execution of the Memorandum of Understanding dated 31.03.2004 and also the issuance of the dishonoured cheques on 31.03.2004."

The learned Single Judge of the High Court after perusal of the record and hearing the parties found it fit and proper to discharge the Respondents. Hence this Appeal.

7. We have, accordingly, heard learned counsel, Mr. Ajay Dahiya for Appellant and Mr. G.V.R. Choudary, for Respondents at length and perused the record.

8. At the outset, learned counsel appearing for Appellant contended that in the light of the aforesaid averments having been made categorically in the original complaints, no case was made out for discharge of the Respondents. It was also contended that Respondents have denied their vicarious liability for the offences under Section 138/141 of the Act, on the ground that they had retired from the partnership firm in 2001/2002, i.e., much prior to the issuance of the cheques in question in 2004. It is further contended by the learned counsel for the Appellant that the said denial cannot be accepted as it would be a matter of evidence to be considered by the Trial Court. Even the question whether or not they would be responsible for the impugned liabilities would be required to be answered only after the parties go to trial as it is disputed question as to when the Respondents had actually retired from the partnership firm, before the issuance of dishonoured cheques.

9. On the other hand, learned Counsel appearing for Respondents strenuously contended that the Appellant had failed to impute criminal liability upon the Respondents specifically, which is a matter of record and therefore, at the very threshold, High Court was justified in discharging them rather than directing them to face the Criminal prosecution unnecessarily. According to them, in this view of the matter, no interference is called for against the impugned order and Appeals deserve to be dismissed.

10. To analyze the case before us in proper perspective, it is necessary to scrutinize all the Criminal Complaints one by one. On perusal of the complaints, we observe that the specific averment of vicarious criminal liability as mandated by the three Judge Bench of this Court in the case of *S.M.S. Pharmaceuticals Limited Vs. Neeta Bhalla and Another,*

reported in 2005 (8) SCC 89, is contained in them in the form mentioned in Para 4 hereinabove.

11. Thus, in the light of the aforesaid averments as found by us in the Criminal Complaint, we are of the considered opinion that sufficient averments have been made against the Respondents that they were the partners of the firm, at the relevant point of time and were looking after day to day affairs of the partnership firm. This averment has been specifically mentioned by the Appellant in the complaint even though denied by the Respondents but the burden of proof that at the relevant point of time they were not the partners, lies specifically on them. This onus is required to be discharged by them by leading evidence and unless it is so proved, in accordance with law, in our opinion, they cannot be discharged of their liability. Consequently, High Court committed an error in discharging them. Also, at the cost of repetition, by virtue of their own submissions before the High Court (reproduced in Para 6 above), the Respondents have admitted the fact that the Appellant had referred to them in their capacity as partners who were incharge of the affairs of the firm in the initial complaints. The question as to whether or not they were partners in the firm as on 31.03.2004, is one of fact, which has to be established in trial. The initial burden by way of averment in the complaint has been made by the Appellant.

12. The primary responsibility of the complainant is to make specific averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no legal requirement for the complainant to show that the accused partner of the firm was aware about each and every transaction. On the other hand, proviso to Section 141 of the Act clearly lays down that if the accused is able to prove to the satisfaction of the Court that the offence was committed without his knowledge or he had exercised due diligence to prevent the commission of such offence, he will not be liable of punishment. Needless to say, final judgment and order would

depend on the evidence adduced. Criminal liability is attracted only on those, who at the time of commission of the offence, were in charge of and were responsible for the conduct of the business of the firm. But vicarious criminal liability can be inferred against the partners of a firm when it is specifically averred in the complaint about the status of the partners "qua" the firm. This would make them liable to face the prosecution but it does not lead to automatic conviction. Hence, they are not adversely prejudiced – if they are eventually found to be not guilty, as a necessary consequence thereof would be acquitted.

13. At the threshold, the High Court should not have interfered with the cognizance of the complaints having been taken by the trial court. The High Court could not have discharged the respondents of the said liability at the threshold. Unless parties are given opportunity to lead evidence, it is not possible to come to definite conclusion as to what was the date when the earlier partnership was dissolved and since what date the Respondents ceased to be the partners of the firm.

14. Before concluding the present discussion, we also take this opportunity to strike a cautionary note with regard to the manner in which High Courts ought to exercise their power to quash criminal proceedings when such proceeding is related to offences committed by companies. The world of commercial transactions contains numerous unique intricacies, many of which are yet to be statutorily regulated. More particularly, the principle laid down in Section 141 of the Act (which is *pari materia* with identical sections in other Acts like the Food Safety and Standards Act, the erstwhile Prevention of Food Adulteration Act etc. etc.) is susceptible to abuse by unscrupulous companies to the detriment of unsuspecting third parties. In the present case, there are several disputed facts involved – for instance, the date when the partnership came into being, who were the initial partners, if and when the Respondents had actually retired from the partnership firm etc.

15. Strictly speaking, the ratio of the *SMS Pharmaceuticals* (supra) can be followed only, after the *factum* that accused were the Directors or Partners of a Company or Firm respectively at the relevant point of time, stands fully established. However, in cases like the present, where there are allegations and counter-allegations between the parties regarding the very composition of the firm, the above rule of 'specific averment' must be broadly construed. Indeed, it would be nothing short of a travesty of justice if the Directors of a Company of Partners of a Firm, who, having duped a third-party by producing false documents (like a fake partnership deed) or making false statements (that some others were in charge of the Company/Firm), at a subsequent stage, seek protection from prosecution on the ground that they were not directly indicted in the complaint – such a proposition strikes against one of the very basic tenets of the law of natural justice, which is, that none shall be allowed to take advantage of his own default. Of course, the above observation is of a general nature, and has no bearing on the present case, but nonetheless, the power to quash a criminal proceeding with respect to an offence under Section 141 of the Act, must be exercised keeping this advisory note and caveat in mind.

16. On account of foregoing discussion, we are of the considered opinion that the impugned judgment and order passed by learned Single Judge exercising the jurisdiction conferred on him under Section 482 of the Cr.P.C. cannot be sustained in law. The same are hereby set aside and quashed. The trial court is directed to dispose of the Criminal complaints filed by Appellant at an early date, after giving opportunity of hearing to both sides, in accordance with law. However, the Trial Court would not be influenced by any of the observations made hereinabove and would decide the matters in accordance with law. The appeals are allowed. Parties to bear their respective costs.

D.G. Appeal allowed.

VEERAN & ORS.
v.
STATE OF M.P.
(Criminal Appeal No. 923 of 2011)

APRIL 13, 2011

[DALVEER BHANDARI AND DEEPAK VERMA, JJ.]

Penal Code, 1860 – s. 300 exceptions 1, 4; s.304 Part I /149, s. 323/149, s. 147 and 148 – Altercation between the parties, resulted in fatal blow to victim and injuries to prosecution witnesses – Conviction u/s. 302/149, 147 and 148 by courts below – On appeal held: Appellant No.1 inflicted fatal blow to victim – No specific overt acts attributed to the remaining three accused except omnibus statement – Death caused by the accused was not pre-meditated as the incident took place as a result of sudden and grave provocation – Accused had no common intention to cause death of the victim as only appellant No. 1 had hit the victim with Gandasa on head, without there being any pre-meditation amongst themselves – Injuries were not sufficient in the ordinary course of nature to have caused death – Some of the accused also sustained injuries on their persons, which were caused by complainant party – Thus, the instant case falls under the Exceptions 1 and 4 to s. 300 – Appellant No.1 held guilty for commission of offences u/ss. 304 Part I /149, 147, 148 and awarded sentence already undergone that is around 15 years – Other accused held guilty for commission of offences u/ss. 323/149, 147 and 148 and awarded sentences already undergone which is more than 2 ½ years.

The parties were in inimical terms. On the fateful day, altercation between the parties, resulted in fatal blow to 'D' and injuries to prosecution witnesses who tried to intervene when the accused were inflicting the injuries to

the complainant party. After altercation between the parties, appellant No. 1, accused-O, R, L, A and G went back to their house and came out armed with Gandasa, Farsa and Lathis. Eight accused were charged and prosecuted for commission of offences under Sections 147, 148, 302 or 302/149 and 325 IPC. Accused nos.6 and 7 were acquitted. The remaining six accused were convicted for the said offences. They filed appeal before the High Court. 'R' and 'L' expired during the pendency of the appeal. As regards the remaining four accused, the High Court convicted them under Sections 302/149, 147 and 148 IPC and awarded life imprisonment and one year each respectively for the commission of the said offences. Therefore, the appellants filed the instant appeal.

Partly allowing the appeal, the Court

HELD: 1.1 Appellant No. 1 had caused a fatal injury to 'D' and other injuries were not grievous. It has neither been disputed nor challenged that deceased 'D' had met with homicidal death. [Para 10] [307-C-D]

1.2 Perusal of the record shows that in the same incident some of the accused had also sustained injuries on their persons, which were caused by the complainant party. These injuries were proved by DW 4 and DW 5-doctors by their injury reports. [Para 11] [307-E-F]

1.3 Evidence of all the three main eye witnesses, PW-6, PW-7 and PW-12 is consistent that appellant No. 1 had hit the deceased with Gandasa and the blow inflicted by him had proved to be fatal. As regards other accused, there appears to be omnibus statement that they all had hit the deceased but details of the same have not been given specifically. No specific overt acts have been attributed to the other remaining three accused except

omnibus statement. Thus, from the analysis of the said evidence, it is clear that it was appellant No. 1 who had caused the fatal blow on the person of deceased. [Paras 12 and 13] [307-H; 308-A-E-F]

1.4 A close look at the evidence of the main witness-PW 12 makes it clear that the accused were not already armed with lethal weapons to cause the death of 'D'. As per his own admission, when they reached in front of the house of 'R', wives of accused started abusing them, meaning thereby, at that time none of the accused were there. [Para 14] [308-G]

1.6 Under the scheme of IPC, "culpable homicide" is the genus and "murder" its species wherein all "murder" is "culpable homicide" but all "culpable homicide" is not "murder". [Para 16] [309-E]

1.7 In the instant case, it can be inferred that the fight between both the parties was not pre-meditated as the incident took place due to heated arguments and altercations between them and could be termed as a result of sudden and grave provocation; that there was no intention to cause death of the deceased; that they had no common intention to cause death of the deceased as only appellant No. 1 had hit 'D' deceased with Gandasa on head, without there being any pre-meditation amongst themselves; and that they were not aware that the injuries caused by them were sufficient in ordinary course of nature to cause death. [Para 17] [310-C-F]

Thangaiya vs. State of T.N. **(2005) 9 SCC 650 – referred to.**

1.8 From the evidence of doctors examined by prosecution, it is clear that PW-6, PW-7 and PW-12 had

also sustained injuries, which were caused by other accused. It appears that the death caused by the accused was not pre-meditated, accused had no common intention to cause death of deceased, the injuries were not sufficient in the ordinary course of nature to have caused his death, thus, the instant case falls under the Exceptions 1 and 4 to Section 300 IPC. Thus, appellant No. 1 is held guilty for commission of offences under Section 304 Part I /149 and under Section 147, 148 IPC and awarded the sentence already undergone that is around 15 years whereas others are held guilty for commission of offences under Section 323/149, 147 and 148 I.P.C. and awarded the sentences already undergone which is more than 2 ½ years. [Paras 19, 20 and 21] [312-C-G]

Case Law Reference:

(2005) 9 SCC 650 Referred to Para 18

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 923 of 2011.

From the Judgment & Order dated 16.7.2009 of the High Court of Madhya Pradesh at Jabalpur in Crl. Appeal No. 472 of 1994.

R.P. Gupta, Parmanand Gaur for the Appellants.

Vibha Datta Makhija for the Respondent.

The Judgment of the Court was delivered by

DEEPAK VERMA, J. 1. Leave granted.

2. The perennial question whether accused deserve to be convicted under Section 302 of the Indian Penal Code (hereinafter shall be referred as 'I.P.C.') as held by the trial court and upheld by the High Court or whether the conviction should

be converted under Section 304 of the I.P.C, has once again cropped up for consideration before us, in this Appeal.

3. In the instant case, eight accused were charged and prosecuted for commission of offences under Section 147, 148, 302 or 302/149 and 325 of the IPC. After trial, giving benefit of doubt, Suresh and Badelal – accused nos.6 & 7 respectively, were acquitted by Additional Sessions Judge, Gadarwara, Narsingpur in Sessions Case No. 21/93 vide its Judgment and Order dated 21.4.1994. Six convicted accused preferred Criminal Appeal No. 472 of 1994 in the High Court of Madhya Pradesh at Jabalpur. During the pendency of the appeal, Accused No. 3 - Rewaram and Accused No. 4 - Lakhan Lal died. Thus, appeal in respect of these two accused stood abated. However, as regards the remaining four accused, the High Court upheld the conviction and sentence awarded by the Trial Court. Now, in this appeal, it is prayed before us to consider, in the peculiar facts and circumstances of this case, whether, the four surviving convicted Appellants Veeran, Onkar, Ganesh and Ashok deserve to be convicted under Section 302/149, 147 and 148 of the IPC, who have been awarded life imprisonment and one year each respectively for the commission of the aforesaid offences or it deserves to be converted under Section 304 of the IPC.

4. Prosecution story in nutshell is as under :

It is said, PW-6 Mayabai, real sister of deceased Daddu had become pregnant on account of accused Onkar and Ganesh. Panchayat was called to resolve the dispute. Panchayat passed a resolution to outcaste deceased Daddu, PW-6 Mayabai and their family members. On account of this, they were in inimical terms. On 4.11.1992, Radhelal, uncle of deceased Daddu, was not in his house. Deceased Daddu, and Narmada @ Narbadi were required to sleep at Radhelal's house and hence were proceeding towards his house at about 8:00 p.m for this purpose. Narmada @ Narbadi was brother-in-law of deceased Daddu. When they reached the house of

Radhelal, wives of accused Veeran, Onkar and Rewaram started abusing them saying that these persons had lost their reputation because of the misconduct committed by PW-6 - Mayabai, sister of deceased Daddu, after which Daddu (deceased) asked the ladies not to abuse them. At that time accused Veeran, Onkar and Rewaram came out from their house but went back to their respective houses. However, before leaving they challenged deceased Daddu, to come out of the house. Daddu came out of his house and at that point of time, accused Lakhan, Ashok and Ganesh also came to the spot armed with Gandasa, Farsa and Lathis. etc. All of them told Daddu that he was crossing all limits and he should behave in proper and orderly manner. After some altercation, they started beating Daddu (deceased) with the weapons they were carrying.

5. It is said that Veeran caused injuries on the head of Daddu. On account of injuries sustained by Daddu, he fell down. Even though, Narmada @ Narbadi raised protest but they did not stop. Mayabai - PW6, Rambai and Trivenibai – PW7 (sisters of deceased Daddu), Shiv Prasad and Kailash – PW9, (cousin of deceased) of the same village came to intervene but the accused persons did not stop. After inflicting injuries on Daddu, thinking him to be dead, accused left the spot. Narmada @ Narbadi and Mayabai also sustained injuries as they were trying to intervene. Daddu was then taken in a bullock cart to Police Station, Gotetoriya, Narsinghpur by Mayabai and others. FIR was lodged by Mayabai on 4.11.92 at 23.30 Hrs. naming all the eight accused in the same and giving details of the injuries caused by each one of them, with the weapons they were carrying. Thereafter, Daddu was taken to Civil Hospital, Gadarwara but before any medical help could be provided to him, he was declared 'brought dead' by the Doctors attending on him.

6. After completion of investigation, the accused were prosecuted for commission of the aforesaid offences by the Trial Court. As mentioned hereinabove, accused Suresh and

Badelal were acquitted, whereas Rewaram and Lakhan expired during the pendency of the appeal before the High Court. Thus, now only four accused are before us. In Criminal Appeal, High Court confirmed the judgment and order of conviction against all the four Appellants and found them guilty for commission of offences under Section 302/149, 147 and 148 of the IPC. Hence, this appeal.

7. We have, accordingly, heard Shri R.P.Gupta, learned Senior Counsel assisted by Shri Parmanand Gaur, for the Appellants, Smt. Vibha Datta Makhija for Respondent-state and perused the record.

8. At the outset, learned counsel for the Appellants contended that looking to the nature of the injuries sustained by deceased, both the courts below, committed grave error in finding the Appellants guilty for commission of offences under Section 302/149, 147 and 148 of the IPC. It was further submitted that Appellant No. 1 - Veeran, the so called main accused has already undergone a sentence of more than 15 years, whereas others are in jail for over 2 ½ years. It has also been submitted that some of the accused had also sustained injuries, which have not been explained properly by the prosecution. The incident had occurred at the spur of the moment and there was neither common object nor common intention in the mind of accused to commit murder of deceased Daddu. According to them, thus, the offence deserves to be converted under Section 304 of the IPC as far as Veeran is concerned, more so when he has already undergone more than 15 years in Jail and others deserve to be convicted for lesser offences as no specific overt act could be attributed to them.

9. On the other hand, Smt. Vibha Datta Makhija, learned Counsel for Respondent State, vehemently opposed and contended that looking to the nature of injuries inflicted on vital parts of the body of the deceased, with deadly weapons, no scope of doubt remains that they had common intention to kill the deceased. In any event, the accused were aware of the fact

that the nature of injuries caused by them would be sufficient in ordinary course of nature to cause death. It was, therefore, contended that no case for showing any leniency was made out and the concurrent findings of the two courts below need not be disturbed. Consequently, this Appeal deserves to be dismissed.

10. Post Mortem Report shows that deceased Daddu had sustained in all, eight injuries, out of the which four were incised wounds and others were either contusion or abrasion. As per this report, deceased had died of shock and Haemorrhage. Injury No. 8 was sufficient to cause death. This Post Mortem Report has been duly proved by autopsy surgeon. It has neither been disputed nor challenged before us that deceased Daddu had met with homicidal death. Now, the question that arises for consideration in this Appeal is whether, in the facts and circumstances of the case, conviction of the Appellants under Section 302/149 of the IPC can still be upheld or it deserves to be converted under Section 304 of the IPC.

11. Perusal of the record shows that in the same incident some of the accused i.e. Suresh, Badelal, Rewaram and Ganesh had also sustained injuries on their persons, which were caused by the complainant party. These injuries have been proved by D.W.4 - Dr. O.P. Nayak & D.W. 5 - Dr. Patel, vide their injury reports. It is also clear from the record that accused did not try to cause any pre-determined injuries on the person of deceased, which could have proved fatal. There does not appear to be any premeditation on the part of accused to commit the crime. It occurred all of a sudden and at the spur of the moment. There is nothing to suggest that the accused were already aware that the deceased and his brother-in-law were to come at the spot where the crime was committed.

12. Evidence of all the three main eye witnesses, PW-6 Mayabai, PW-7 Trivenibai and PW-12 Narmada @ Narbadi is consistent that Veeran had hit the deceased with *Gandasa* and the blow inflicted by him had proved to be fatal. As regards

other accused, there appears to be omnibus statement that they all had hit the deceased but details of the same have not been given specifically. No specific overt acts have been attributed to the other remaining 3 accused except omnibus statement as mentioned hereinabove.

13. PW-6 Mayabai, has deposed that on reaching the spot, she had seen eight persons, namely, Veeran, Rewaram, Ganesh, Lakhan, Onkar, Ashok, Badelal, Suresh, beating her brother Daddu. Veeran was having Gandasa, Rewaram, Onkar and Ashok were armed with Farsas, while Ganesh and Lakhan had Lathis. Similar is the statement of PW-7 Trivenibai, who has deposed that Mayabai, Rambai, Kailash had reached the spot where Veeran, Ganesh, Rewaram, Lakhan, Ashok, Suresh and Badelal were beating her brother Daddu. Veeran was having Gandasa, Ashok - Farsa, Onkar – Rewaram - Farsa, Badelal - Ganesh and Suresh had Lathis. PW-12 Narmada @ Narbadi was in fact with Daddu, when they were going to the house of Radhelal to sleep at night. According to him, Veeran was having Gandasa and he had hit with it on the head of Daddu. His evidence appears to be convincing and natural as he was accompanying the deceased Daddu, when the incident had taken place. Recovery of Gandasa was made from the possession of Veeran. Thus, from the analysis of the aforesaid evidence, it is clear that it was Veeran, who had caused the fatal blow on the person of deceased.

14. A close look at the evidence of the said main witness makes it clear that the accused were not already armed with lethal weapons to cause the death of Daddu. As per his own admission, when they reached in front of the house of Radhelal, wives of accused started abusing them, meaning thereby, at that time none of the accused were there. The contention of the learned counsel for the State that the accused had common intention to cause death of Daddu thus stands repelled.

15. Looking to the facts and feature of the case and also keeping in mind that it was Accused No. 1 - Veeran who had

caused a fatal injury to deceased Daddu and other injuries were not grievous, it would be in the fitness of things to convert the conviction of the Appellant No. 1 under Section 304 Part I of IPC and to award him sentence already undergone, which is about 15 years.

16. To understand the legal complexities of the matter, we would consider the import of Sec 299 and 300 of IPC, reproduced hereinbelow:

Section 299 of IPC reads as follows:

"299. Culpable homicide.- Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

In the instant case, there has been death of Daddu caused on account of injuries by aforementioned accused. The two courts below have convicted accused for the offence of murder under Section 302 of IPC. In plethora of cases, this Court has held that under the scheme of IPC, "culpable homicide" is the genus and "murder" its species wherein all "murder" is "culpable homicide" but all "culpable homicide" is not "murder".

Exception 1 to 5 to Section 300 of IPC indicate the circumstances where "culpable homicide" is not "murder". Exception 1 and 4 which are relevant for the present appeal read as follows :

"Section 300. Murder : …. …. ….

Exception 1.-**When culpable homicide is not murder.**- Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by

mistake or accident.

Exception 2. - …. …. ….

Exception 3. - …. …. ….

Exception 4. - Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Exception 5. - …. …. …."

17. In the instant case, it can be inferred that :

(i) The fight between both the parties was not premeditated as the incident took place due to heated arguments and altercations between them and could be termed as a result of sudden and grave provocation.

(ii) There was no intention to cause death of the deceased.

(iii) They had no common intention to cause death of the deceased as only Veeran had hit Daddu (Deceased) with Gandasa on head, without there being any premeditation amongst themselves.

(iv) They were not aware that the injuries caused by them were sufficient in ordinary course of nature to cause death.

18. Also, fine distinction between Section 299 and Section 300 of IPC has been eloquently and beautifully carved out by Hon'ble Dr. Justice Arijit Pasayat in a recent judgment, after considering all the previous judgments of this Court. We may quote profitably the following paras of the judgment reported in (2005) 9 SCC 650 titled *Thangaiya Vs. State of T.N. :*

"17. These observations of Vivian Bose, J. have become locus classicus. The test laid down by Virsa Singh v. State of Punjab AIR 1959 SC 465:1958 SCR 1495 for the applicability of clause "thirdly" is now ingrained in our legal system and has become part of the rule of law. Under clause "thirdly" of Section 300 IPC, culpable homicide is murder, if both the following conditions are satisfied: i.e. (*a*) that the act which causes death is done with the intention of causing death or is done with the intention of causing a bodily injury; and (*b*) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must be proved that there was an intention to inflict that particular bodily injury which, in the ordinary course of nature, was sufficient to cause death viz. that the injury found to be present was the injury that was intended to be inflicted.

18. Thus, according to the rule laid down in *Virsa Singh case* even if the intention of the accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be murder. Illustration (*c*) appended to Section 300 clearly brings out this point.

19. Clause (*c*) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons — being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring

the risk of causing death or such injury as aforesaid.

20. The above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the court. But sometimes the facts are so intertwined and the second and the third stages so telescoped into each other that it may not be convenient to give a separate treatment to the matters involved in the second and third stages".

19. From the evidence of doctors examined by prosecution, it is clear that PW-6 Mayabai, PW-7 Trivenibai, and PW-12 Narmada @ Narbadi had also sustained injuries, which were caused by other accused. Thus, Appellant No. 1 Veeran is held guilty for commission of offences under Section 304 Part I/149 of the IPC and others are held guilty under Section 323/149 of the IPC together with Section 147, 148 of the IPC. All of them are awarded the sentences already undergone by them i.e. Veeran about 15 years and others more than 2 ½ years.

20. From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated, accused had no common intention to cause death of deceased, the injuries were not sufficient in the ordinary course of nature to have caused his death, hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC.

21. In the light of the foregoing discussion, appeal is allowed in part. Appellant No. 1, Veeran is held guilty for commission of offences under Section 304 Part I /149 and under Section 147, 148 of the IPC and awarded the sentence already undergone whereas others are held guilty for commission of offences under Section 323/149, 147 & 148 of the I.P.C. and awarded the sentences already undergone. The Appellants be thus, released forthwith, if not required in any other case.

N.J. Appeal partly allowed.

BABULAL SAHU
v.
STATE OF CHHATISGARH
(Criminal Appeal No. 1523 of 2007)

APRIL 13, 2011

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

Penal Code, 1860 – s. 302 – Refusal of wife to have sexual relation with her husband, infuriating him and he committed the murder of his wife by strangulating her – Conviction and sentence u/s. 302, by the courts below – Appeal before Supreme Court – Plea of the husband that the case fell under Exception (4) to s. 300 and thus, he was liable for conviction u/s. 304 Part (I) or (II) – Held: Husband caused as many as 14 injuries on the neck of the deceased and strangulated her with enormous force – He took undue advantage of the fact that he was male and was much stronger physically and the murder was committed in a revolting and cruel manner – Medical evidence to the effect that murder had been committed after sex between the couple – Deceased had already obliged her husband and the cause for quarrel no longer existed – Thus, all the conditions for the applicability of Exception 4 to s.300 not fulfilled – Appeal dismissed.

Ghan Sham v. State of Maharashtra **(1996) 1 CRL. LJ 27 – referred to.**

Case Law Reference:

(1996) 1 CRL. LJ 27	**Referred to**	**Para 1**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1523 of 2007.

From the Judgment & Order dated 15.6.2007 of the High Court of Chatisgarh at Bilaspur in Criminal Appeal No. 58 of 2011.

Vijay Panjwani (AC) for the Appellant.

D.K. Sinha and Atul Jha for the Respondent.

The following Order of the Court was delivered

O R D E R

This appeal challenges the concurrent finding of conviction and sentence awarded to the appellant under Section 302 IPC for having murdered his wife Basanti Bai. In the light of the fact that leave had been granted in this matter on the 29th October, 2007, only as to the nature of the offence, only the bare facts are required to be given. Suffice it to say that on the intervening night of 3rd and 4th January, 2000, the appellant sought to have sex with his wife. She, however, retorted that she would not oblige him for the reason that whenever his bhabhi was around he would prefer having sex with her. As per the prosecution story this infuriated the appellant and he committed the murder of his wife by strangulating her. During the course of the investigation, it was found that there were no eye witnesses to the incident and the entire case hinged on six pieces of circumstantial evidence. The trial court and the High Court have both found that the circumstances aforesaid have been proved and have led to the conviction of the appellant. Mr. Vijay Panjwani, the learned Amicus Curiae taking a clue from the leave granted has argued that the case would fall under Exception (4) to Section 300 of the Indian Penal Code and the appellant was, therefore, liable to be convicted under Section 304 Part (i) or Part (ii) thereof and the appeal to that extent should be allowed. The learned counsel has also placed reliance on the judgment of the Bombay High Court reported as *Ghan Sham v. State of Maharashtra* (1996) 1 CRL.LJ 27. We have gone through the evidence on record and considered

the submissions made by the learned counsel for the parties. It will be seen that as per the prosecution story the incident happened because the deceased refused to have sex with the appellant who was her legally wedded husband and this refusal apparently had annoyed him, leading to the murder. Exception 4 to Section 300 of IPC reads as under:

> "S.300 Exception 4- Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.
>
> Explanation- It is immaterial in such cases which party offers the provocation or commits the first assault."

A bare reading of this provision would indicate that it refers to certain specific ingredients which have to be kept in mind before it can be taken as applicable. The last two points that are relevant are that the offender should not have taken undue advantage of his position or acted in a cruel or unusual manner. We find that these conditions are not satisfied in this case. We have gone through the evidence and the post mortem report and see that the appellant caused as many as 14 injuries on the neck of the deceased and strangulated her with enormous force. He had, therefore, taken undue advantage of the fact that he was a male and was much stronger physically and the murder had also been committed in a revolting and cruel manner. It is true that the refusal of a wife to have sexual relations with her husband had led to the quarrel between the spouses but we find that in the circumstances all the conditions for the applicability of Exception 4 have not been fulfilled.

Mr. D.K. Sinha, learned counsel for the respondent-State of Chhattisgarh has also pointed out that the demand of the appellant for sex had apparently been satisfied as was clear from the medical evidence which showed that semen had been

found on the clothes of the victim as well as of the appellant, which is, indicative that the murder had been committed after sex between the couple. In other words, the deceased had already obliged her husband and the cause for the sudden quarrel no longer existed. We, therefore, find no merit in the appeal which is dismissed accordingly.

The learned Amicus Curiae will have his fee of Rs. 7,000/-.

N.J. Appeal dismissed.

CMD/CHAIRMAN, B.S.N.L. AND ORS.

v.

MISHRI LAL AND ORS.

(Civil Appeal No. 1405 of 2007)

APRIL 15, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Raj Bhasha Adhikari Recruitment Rules 2005 – Quashing of – Challenge to –High Court quashing 2005 Rules as also the letters whereby the petitioners were told to appear in the Limited Internal Competitive Examination for promotion to the post of Raj Bhasha Adhikari AD(OL) – Held: The approach of the High Court was totally incorrect – High Court had quashed 2005 Rules without service of any notice of the writ petition on the appellants, that too at the preliminary stage of admission – Respondents were never regularly promoted as Hindi Officer at any point of time nor had been regular appointees – They were appointed purely on local officiating basis under delegated powers on the basis of administrative instructions – Thus, they had no vested rights for promotion to the post of Hindi Officer under the Recruitment Rules of 2002, which, in fact were never in operation at any point of time – Moreover, a conscious decision was taken by formulating 2005 Rules which provided that all the posts should be filled up by a Limited Internal Competitive Examination – This was a policy decision and the High Court could not have found fault with it – When Rules are framed under Article 309 of the Constitution, no undertaking need be given to anybody and the Rules can be changed at any time – Thus, the order of the High Court is set aside – Constitution of India, 1950 – Article 309 – Administrative Law.

Practice and Procedure: Writ Petition seeking quashing of Rules – Summary disposal of, without calling for counter affidavit and examining the matter in detail – Held: Was totally

against any established procedure of law.

Equity – When available – Held: Law prevails over equity if there is a conflict – Equity can only supplement the law, and not supplant it – Maxim – Dura lex sed lex.

The respondents 1 to 9 filed a writ petition before the High Court praying for quashing of the Raj Bhasha Adhikari Recruitment Rules 2005 as well as the letters by which they were told to appear in the Limited Internal Competitive Examination for promotion to the post of Raj Bhasha Adhikari AD(OL) which was to be held under the supervision of the CGMT UP(East), Circle , Lucknow as well as issuing a writ of mandamus restraining the appellants from interfering in the working of the respondents as AD(OL) on their respective posts and to continue to pay them their salaries. The writ petition was allowed. Therefore, the appellants filed the instant appeals.

Allowing the appeals, the Court

HELD: 1. When Rules are challenged it is necessary to have the matter gone into in depth by inviting a counter affidavit and examining the matter in detail. A summary disposal of a writ petition by allowing it without even calling for a counter affidavit and quashing the Rules, is totally against any established procedure of law. The submission that the Raj Bhasha Adhikari Recruitment Rules 2005 were quashed by the High Court without service of any notice of the writ petition on the appellants-respondents 3 to 6 in the writ petition and that too at the preliminary stage of admission on the basis of an alleged submission of a counsel who did not have any authority and Vaklatnama in his favour by the appellants and who had not been given any instruction to appear on their behalf, is accepted. [Paras 4 and 5] [322-H; 323-A-B]

2.1 Rules under Article 309 of the Constitution can be changed even during the subsistence of the old Rules. A Rule made under the proviso to Article 309 is a legislative act (though made by the executive). It is not a piece of delegated legislation like a Rule made under a statute. Thus, it can be amended retrospectively. Thus, Rules under the proviso to Article 309 are Constitutional Rules, not like Rules under a statute. Thus, they have the same force as a Statute, though made by the executive. The legislature can legislate retrospectively. Thus, the approach of the High Court was totally incorrect. [Paras 12, 13, 14 and 20] [325-C-G; 327-D]

Raj Kumar vs. Union of India **AIR 1975 SC 1116;** *M.P.V. Sundararamier and Co. vs. State of Andhra Pradesh* **AIR 1958 SC 468;** *J.K. Jute Mills vs. State of Uttar Pradesh* **AIR 1961 SC 1534;** *Jadao Bahuji vs. Municipal Committee* **AIR 1961 SC 1486;** *Government of Andhra Pradesh vs. Hindustan Machine Tools Ltd.* **AIR 1975 SC 2037;** *Nandumal Girdharilal vs. State of Uttar Pradesh* **AIR 1992 SC 2084;** *State of Punjab and Ors. vs. Arun Aggarwal and Ors.* **(2007) 10 SCC 402 – relied on.**

2.2 The expression 'vested right' could only mean a vested Constitutional right, since a Constitutional right cannot be taken away by amendment of the Rules. Thus, a vested Constitutional right cannot be taken away by amendment of the Rules. It follows that if the vested right is not a Constitutional right it can be taken away by retrospective amendment of the Rules. A legislative act can destroy existing rights, (unless it is a Constitutional right). Thus, even a taxing statute can be made retrospectively, and this usually affects existing rights. [Paras 15, 17, 19] [326-B-C, E, H; 327-A-B]

Chairman, Railway Board vs. C.R. Rangadhamaiah **(1997) 6 SCC 623 – followed.**

Union of India vs. Madangopal **AIR 1954 SC 158;** *Jawaharlal vs. State of Rajasthan* **AIR 1966 SC 764;** *Tata Iron and Steel Co. Ltd. vs. State of Bihar* **AIR 1958 SC 452;** *D.G. Gouse and Co. vs. State of Kerala* **AIR 1980 SC 271;** *Shetkari Sahkari Sakhar Karkhana Ltd. vs. Collector* **AIR 1979 SC 1972 – relied on.**

2.3 The respondents were never regularly promoted as Hindi Officer at any point of time either under the 1984 Rules or Recruitment Rules, 2002. They had never been appointed on the basis of the recommendation of the Departmental Promotion Committee duly approved by the Union Public Service Commission. In fact, they were appointed purely on a local officiating basis under the powers delegated to the Heads of Telecom Circles on the basis of administrative instructions dated 28.4.1994. Thus, they were never regular appointees and thus, had no vested rights for promotion to the post of Hindi Officer under the Recruitment Rules of 2002, which, in fact, were never in operation at any point of time. Besides this, when the revised Recruitment Rules 2005 were formulated, 120 posts were classified as Executive, and for the Executive cadre posts, the mode of recruitment was changed and it was now to be filled up by a Limited Internal Competitive Examination. It cannot now be allowed to be filled up by promotion of persons working on officiating basis. There was nothing illegal in this change of policy. This was a policy decision and the High Court could not have found fault with it. The court cannot ordinarily interfere with policy decisions. Thus, the approach of the High Court was totally incorrect. [Paras 11 and 15] [324-G-H; 325-A-C; 326-B-C]

2.4 The observations by the High Court are not sustainable. When Rules are framed under Article 309 of the Constitution, no undertaking need be given to anybody and the Rules can be changed at any time.

Thus, the view taken by the High Court cannot be accepted. There is no question of equity in the instant case because the law prevails over equity if there is a conflict. Equity can only supplement the law, and not supplant it. As the Latin maxim states "Dura lex sed lex"' which means "thus, the law is hard, but it is the law". The impugned judgment and order of the High Court is set aside. [Paras 22, 23] [328-D-F]

Case Law Reference:

AIR 1975 SC 1116	**Relied on**	**Para 12, 16**
AIR 1958 SC 468	**Relied on**	**Para 13**
AIR 1961 SC 1534	**Relied on**	**Para 13**
AIR 1961 SC 1486	**Relied on**	**Para 13**
AIR 1975 SC 2037	**Relied on**	**Para 13**
AIR 1992 SC 2084	**Relied on**	**Para 13**
(2007) 10 SCC 402	**Relied on**	**Para 14**
(1997) 6 SCC 623	**Followed**	**Para 18**
AIR 1954 SC 158	**Relied on**	**Para 19**
AIR 1966 SC 764	**Relied on**	**Para 19**
AIR 1958 SC 452	**Relied on**	**Para 19**
AIR 1980 SC 271	**Relied on**	**Para 19**
AIR 1979 SC 1972	**Relied on**	**Para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1405 of 2007.

From the Judgment & Order dated 16.12.2005 of the High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 73843 of 2005.

WITH

C.A. No. 427 of 2008

K.C. Kaushik, Rahul Kaushik for the Appellants.

C. Mukund, Pankaj Jain, Ashok Jain, Amit Keseri, Raja, Bijoy Kumar Jain for the Respondents.

The Judgment of the Court was delivered by

MARKANDEY KATJU, J.

Civil Appeal No. 1405 of 2007

1. This appeal has been filed against the impugned judgment and order dated 16.12.2005 in Civil Misc. Writ Petition No. 73843 of 2005 of the Division Bench of the Allahabad High Court.

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

3. The respondents 1 to 9 herein, filed a writ petition before the High Court praying for quashing of the Recruitment Rules 2005 as well as the letters by which the writ petitioners were told to appear in the Limited Internal Competitive Examination for promotion to the post of Raj Bhasha Adhikari AD(OL) which was to be held under the supervision of the CGMT UP(East), Circle , Lucknow as well as issuing a writ of mandamus restraining the appellants herein from interfering in the working of the respondents as AD(OL) on their respective posts and to continue to pay them their salaries. The aforesaid writ petition was allowed by the impugned judgment and hence this appeal.

4. It was pointed out by learned counsel for the appellants that the impugned Raj Bhasha Adhikari Recruitment Rules 2005 were quashed by the High Court without service of any notice of the writ petition on the appellants (respondents 3 to 6 in the writ petition) and that too at the preliminary stage of

admission on the basis of an alleged submission of a counsel who did not have any authority and Vaklatnama in his favour by the appellants and who had not been given any instruction to appear on their behalf. We agree with this submission.

5. When rules are challenged it is necessary to have the matter gone into in depth by inviting a counter affidavit and examining the matter in detail. A summary disposal of a writ petition by allowing it without even calling for a counter affidavit and quashing the rules, in our opinion, is totally against any established procedure of law.

6. Apart from the above, on merits also we are of the opinion that the writ petition deserved to be dismissed and was wrongly allowed.

7. Article 343(1) of the Constitution of India states that the official language of the Union of India shall be Hindi in Devnagari script. To fulfill the mandate of this provision the Government of India, Ministry of Communications, decided to have a Hindi Cell in each Central Government department and Central Government instrumentality with the object of promoting progressive use of Hindi in the official notings and communications. Accordingly, it framed Rules in 1983 under Article 309 of the Constitution. In 1983, there were 43 posts of Hindi Officers in the department and it was provided that 50% of the posts will be filled up by direct recruitment, 30% by promotion and 20% by transfer on deputation. The essential qualification for holding the post was Masters Degree in the concerned subject and 5 years' experience of teaching, research, writing or journalism in Hindi. As far as promotions were concerned, it was stipulated that Hindi Translator Grade-I with 3 years' regular service in the grade could be selected by a Departmental Promotion Committee in consultation with the Union Public Service Commission.

8. In April 1994, the Department of Telecommunications decided that since the subordinate units (Telecom Circles) were

facing difficulties in filling up the posts as per the existing provisions, the posts of Hindi Officers may be filled up amongst the cadre of Hindi Translator Grade-I/Grade-II/Grade-III with 3, 5 or 8 years' service respectively in the Circle/District concerned, failing which the posts may be filled up from amongst the Group 'C' cadres based on length of service possessing the qualifications in the Recruitment Rules.

9. On 1.10.2000, the Department of Telecommunications was reorganized with the formation of Bharat Sanchar Nigam Limited (in short 'BSNL') as a Government Company to take charge of the operations and maintenance of telecom and telegraph network of the entire country. The respondents herein after formation of BSNL were given option for absorption in the Corporation in the level of Junior Hindi Translators, which option they exercised and they were absorbed accordingly.

10. There were some objections to the Recruitment Rules of 2002 which had been circulated departmentally, but allegedly these Rules were never in operation at any point of time. Accordingly, the revised Recruitment Rules 2005 were formulated and issued on 5.8.2005 whereby 120 posts were classified as Executive with the nomenclature of Raj Bhasha Adhikari. While the educational qualifications remained the same as before, the mode of recruitment was totally changed in the Recruitment Rules of 2005. The entire cadre was to be filled up by a Limited Internal Competitive Examination. It is these Rules which have been struck down by the High Court.

11. It may be mentioned that the respondents herein were never regularly promoted as Hindi Officer at any point of time either under the 1984 Rules or Recruitment Rules, 2002. They had never been appointed on the basis of the recommendation of the Departmental Promotion Committee duly approved by the Union Public Service Commission. In fact, they were appointed purely on a local officiating basis under the powers delegated to the Heads of Telecom Circles on the basis of administrative instructions dated 28.4.1994. Thus, they were

never regular appointees and hence had no vested rights for promotion to the post of Hindi Officer under the Recruitment Rules of 2002, which, in fact, were never in operation at any point of time. Besides this, when the revised Recruitment Rules 2005 were formulated, 120 posts were classified as Executive, and for the Executive cadre posts, the mode of recruitment was changed and it was now to be filled up by a Limited Internal Competitive Examination. It cannot now be allowed to be filled up by promotion of persons working on officiating basis. In our opinion there was nothing illegal in this change of policy.

12. Rules under Article 309 can be changed even during the subsistence of the old Rules. As held in *Raj Kumar vs. Union of India,* AIR 1975 SC 1116 (vide para 7), "Rules made under the proviso to Article 309 of the Constitution are legislative in character, and therefore can be given effect to retrospectively." Thus, rules under the proviso to Article 309 are Constitutional rules, not like rules under a statute. Hence they have the same force as a Statute, though made by the executive.

13. It is well settled that the legislature can legislate retrospectively vide *M.P.V. Sundararamier & Co. vs. State of Andhra Pradesh,* AIR 1958 SC 468, *J.K. Jute Mills vs. State of Uttar Pradesh,* AIR 1961 SC 1534, *Jadao Bahuji vs. Municipal Committee,* AIR 1961 SC 1486, *Government of Andhra Pradesh vs. Hindustan Machine Tools Ltd.,* AIR 1975 SC 2037 (para 8), *Nandumal Girdharilal vs. State of Uttar Pradesh,* AIR 1992 SC 2084, etc.

14. Hence, the approach of the High Court, in our opinion, was totally incorrect. In *State of Punjab and others vs. Arun Aggarwal and others* (2007) 10 SCC 402, it was observed (in para 30):

> "There is no quarrel over the proposition of law that the normal rule is that the vacancy prior to the new Rules would be governed by the old Rules and not the new Rules. However, in the present case, we have already held that the Government has taken a conscious decision not to fill the vacancy under the old Rules and that such decision has been validly taken keeping in view the facts and circumstances of the case".

15. In the present case, a conscious decision was taken in 2005 providing that all the posts in question should be filled up by Limited Internal Competitive Examination. This was a policy decision and we cannot see how the High Court could have found fault with it. It is well settled that the Court cannot ordinarily interfere with policy decisions.

16. No doubt in some decisions it was held that a vested right cannot be taken away by amendment of the rules. But what does this really mean? Since a rule under the proviso to Article 309 is legislative in character vide *Raj Kumar vs. Union of India* (supra) the rule can be amended, even with retrospective effect, just as a legislation can be amended with retrospective effect.

17. In our opinion the expression 'vested right' could only mean a vested Constitutional right, since a *Constitutional* right cannot be taken away by amendment of the rules.

18. This is evident from the Constitution Bench decision of this Court in *Chairman, Railway Board vs. C.R. Rangadhamaiah* (1997) 6 SCC 623. It was held therein that pension is no longer treated as a bounty but was a valuable Constitutional right under Articles 19(1)(f) and 31(1) of the Constitution, which were available on 1.1.1973 and 1.4.1974 (that is before the 44th Constitution Amendment). Since this was a Constitutional right it could not be taken away by amendment of the rules. The Constitution is the supreme law of the land, and hence a Constitutional right can only be taken away by amending the Constitution, not by amending the rules or even by amending the statute.

19. Hence in view of the aforesaid Constitution Bench

decision the other decisions of this Court of smaller benches must be understood to mean that a vested *Constitutional* right cannot be taken away by amendment of the rules. It follows that if the vested right is not a Constitutional right it can be taken away by retrospective amendment of the rules. A legislative act can destroy existing rights, (unless it is a Constitutional right). Thus, even a taxing statute can be made retrospectively, and this usually affects existing rights vide *Union of India vs. Madangopal,* AIR 1954 SC 158, *Jawaharlal vs. State of Rajasthan,* AIR 1966 SC 764(770), *Tata Iron & Steel Co. Ltd. vs. State of Bihar,* AIR 1958 SC 452, *D.G. Gouse & Co. vs. State of Kerala,* AIR 1980 SC 271 (para 16), *Shetkari Sahkari Sakhar Karkhana Ltd. vs. Collector,* AIR 1979 SC 1972 (para 6-7), etc.

20. A rule made under the proviso to Article 309 is a legislative act (though made by the executive). It is not a piece of delegated legislation like a rule made under a statute. Hence it can be amended retrospectively.

21. In para 8 & 9 of the impugned judgment, the High Court has observed:

> "The main and the central contention from the side of the petitioners is that since the Old Rules specifically stated that since these Rules will remain effective for three years, it was not for the respondent No. 3 to change these Rules before three years, and to formulate new set of rules, changing the basic structure of promotion, as petitioners who were already working on the post of AD (OL) as far back as since 10.7.1995 on local officiating basis.
>
> We agree with the contention of the learned counsel for the petitioner, because, Law and Equity as well as Honesty and Fair Play jointly provide support of the petitioners' contention, that once it has been laid down in the old Rules (Rule 10(iv) that they will not be changed for three years, respondent No. 3 BSNL, who is a Government of India

> enterprise, cannot change the Rules before expiry of three recruitment years, and cannot formulate a new set of Rules detrimental to the interests of the petitioners. This undertaking given by the respondent No. 3 in the earlier Rules, is sacrosanct, and the respondent No. 3 is bound to honour the same. They cannot and should not be allowed to say, a good-bye from the same. If they wanted to retain the right to change the Rules, they should not have given an undertaking by framing sub-rule(iv) of Rule 10 of the Old Rules. But once they have given this assurance in the Rules, they respondents cannot and should not be allowed to turn around and resile from the same".

22. We are of the opinion that the above observations are not sustainable. When Rules are framed under Article 309 of the Constitution, no undertaking need be given to anybody and the Rules can be changed at any time. For instance, if the retirement age is fixed by rules framed under Article 309, that can be changed subsequently by an amendment even in respect of employees appointed before the amendment. Hence, we cannot accept the view taken by the High Court. There is no question of equity in this case because it is well settled that law prevails over equity if there is a conflict. Equity can only supplement the law, and not supplant it. As the Latin maxim states "Dura lex sed lex"' which means "The law is hard, but it is the law".

23. For the aforementioned reasons, the appeal is allowed. The impugned judgment and order of the High Court is set aside. There shall be no order as to costs.

Civil Appeal No. 427 of 2008

24. In view of the decision in Civil Appeal No. 1405 of 2007, this appeal is allowed. The impugned judgment and order of the High Court is set aside. No costs.

N.J. Appeals allowed.

MUTHU KARUPPAN
v.
PARITHI LLAMVAZHUTHI AND ANR.
(Criminal Appeal No. 1376 of 2004)

APRIL 15, 2011

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

Contempt of Courts Act, 1971:

s.2(c) – Giving false evidence by filing false affidavit – Criminal case registered against respondent-MLA – Sessions Judge granted him conditional bail for attending the Legislative Assembly to take oath as MLA – Respondent-MLA filed contempt application alleging that on the direction, supervision and knowledge of the appellant (Commissioner of Police), respondent no.2 (Inspector) filed an application for cancellation of conditional bail granted to respondent no.1 and obtained stay of the bail order on the basis of false statement/false affidavit thereby preventing him from attending the Assembly and taking oath as MLA – High Court held the appellant and respondent no.2 guilty and sentenced them to imprisonment for seven days – On appeal, held: Mere suspicion cannot bring home the charge of making false statement – Contempt proceedings being quasi criminal in nature, burden and standard of proof is the same as required in criminal cases – There was no material that the affidavit containing wrong information filed by respondent no.2 was made at the instance of the appellant – Affidavit of the government counsel also showed that he drafted the affidavit purely on the instructions of respondent no. 2 and that the appellant had no personal knowledge of it – Respondent no. 2 also specifically denied that the application for cancellation of bail was moved under the direction, supervision and knowledge of the appellant – Apart from specific information

in the form of an affidavit highlighting his stand before the High Court which dealt with the contempt petition, the appellant had also tendered unconditional apology which was not even referred to, before passing orders sentencing the appellant to imprisonment – In the absence of specific reference about consultation with the appellant, it cannot be presumed and concluded that the appellant was responsible for incorrect information given by respondent no. 2 before the High Court – Further s.15 of the Act as well as the Madras High Court Contempt of Court Rules insist that for initiation of criminal contempt, consent of the Advocate General is required – Any deviation from the prescribed Rules should not be accepted or condoned lightly and must be deemed to be fatal to the proceedings taken to initiate action for contempt – These provisions were not strictly adhered to – Therefore, the order of High Court convicting and sentencing the appellant is not sustainable and is set aside – Constitution of India – Articles 215 and 225 – Madras High Court Contempt of Court Rules, 1975.

s.2(c) – Criminal contempt – Jurisdiction of court to initiate proceedings for contempt – Held: While dealing with criminal contempt in terms of s.2(c) of the Act, strict procedures are to be adhered – The jurisdiction to initiate proceedings for contempt as also the jurisdiction to punish for contempt are discretionary with the court – Contempt generally and criminal contempt certainly is a matter between the court and the alleged contemnor – The person filing an application or petition before the court does not become a complainant or petitioner in the proceedings – He is just an informer – His duty ends with the facts being brought to the notice of the court – It is thereafter for the court to act on such information or not – Madras High Court Contempt of Court Rules.

Respondent no.1 was elected as Member of Legislature Assembly in the elections. On the day of

election, large scale violence and several attempts of booth capturing were reported. A case was registered against respondent no.1 for various offences. He filed an application for anticipatory bail which was dismissed. On 17.5.2001, respondent no.1 was arrested and remanded to judicial custody. On the same day, the appellant was appointed as the Commissioner of Police. Respondent no.1 moved an application for bail before the MM which was dismissed on the same day. On 22.5.2001, respondent no.1 moved an application for bail before the Sessions Court mainly on the ground that he had to attend the Assembly on 22.5.2001 to take oath as MLA. On 23.5.2001, respondent no.1 was granted conditional bail by the Sessions Court.

On 24.5.2001, respondent no.2, the Inspector of Police filed an application for cancellation of bail before the High Court and sought for stay of bail granted to respondent no.1 on the ground that the victim namely 'D' was in a serious condition and respondent no.1 was in police custody. The Single Judge of the High Court stayed the order of grant of bail and ordered notice to respondent no.1.

On 28.5.2001, on receipt of the said notice, respondent no.1 filed a counter affidavit stating that the statement of respondent no.2 regarding the police custody was false. On 29.5.2001, Respondent no.2 filed his reply affidavit admitting that it was a mistake by oversight and the same was neither willful nor wanton. On 30.5.2001, the High Court dismissed the petition for cancellation of bail. After the said order, respondent no.1 filed contempt application before the High Court stating that on the direction, supervision and knowledge of the appellant, respondent no.2 moved an application on the basis of a false statement to cancel the bail granted to him

thereby preventing him from attending the Assembly. On 29.10.2004, the Division Bench of the High Court held the appellant and respondent no.2 guilty of the offence punishable under Section 2(c) of the Contempt of Courts Act and sentenced them to undergo simple imprisonment for 7 days under Section 12 of the Act.

Aggrieved, the appellant filed the instant appeal which was admitted on 13.12.2004 and operation of impugned order of the High Court was stayed insofar as it related to the appellant. Respondent no.2 also filed appeal before the Supreme Court which was dismissed on 5.1.2005 on the ground that the case of the appellant, the Commissioner of Police stood entirely on different footing.

Allowing the appeal, the Court

HELD: 1. Giving false evidence by filing false affidavit is an evil which must be effectively curbed with a strong hand. Prosecution should be ordered when it is considered expedient in the interest of justice to punish the delinquent, but there must be a prima facie case of "deliberate falsehood" on a matter of substance and the court should be satisfied that there is a reasonable foundation for the charge. The enquiry/contempt proceedings should be initiated by the court in exceptional circumstances where the court is of the opinion that perjury has been committed by a party deliberately to have some beneficial order from the court. There must be grounds of a nature higher than mere surmise or suspicion for initiating such proceedings. There must be distinct evidence of the commission of an offence by such a person as mere suspicion cannot bring home the charge of making false statement, more so, the court has to determine as on facts whether it is expedient in the interest of justice to enquiry into offence

which appears to have been committed. [Paras 7, 8] [341-B-F]

2. The contempt proceedings being quasi criminal in nature, burden and standard of proof is the same as required in criminal cases. The charges have to be framed as per the statutory rules framed for the purpose and proved beyond reasonable doubt keeping in mind that the alleged contemnor is entitled to the benefit of doubt. Law does not permit imposing any punishment in contempt proceedings on mere probabilities, equally, the court cannot punish the alleged contemnor without any foundation merely on conjectures and surmises. In exercise of the powers conferred on the High Court under Articles 215 and 225 of the Constitution of India and in terms of Section 23 of the Contempt of Courts Act, the Madras High Court Contempt of Court Rules, 1975 have been framed. The said Rules prescribe procedure for initiating contempt and various steps to be adhered to. [Paras 9, 10] [341-F-H; 342-A-C]

R.S. Sujatha v. State of Karnataka & Ors. **2010 (12) Scale 556 – relied on.**

3. In the instant case, contempt proceeding was initiated mainly on the basis of a false statement made on oath by Respondent No. 2 which resulted in stay of the bail order passed by the Sessions Judge in favour of the Respondent No. 1, and prevented him from taking oath in the Assembly. The analysis of affidavits of the Inspector of Police, Assistant Commissioner and Deputy Commissioner of Police showed that there was no acceptable material that the affidavit containing wrong information filed by respondent No. 2 for cancellation of bail and stay of bail order was made at the instance of the appellant, the Commissioner of Police. The appellant had assumed charge as the Commissioner of Police only

on 17.05.2001 i.e. after formation of the new government. The violence in respect of election that took place on 10.05.2001, particularly, the incident relating to respondent No. 1 was one week before his taking over charge as Commissioner of Police. The relevant time i.e. in 2001, the office of the Commissioner of Police was headed by him and there were 4 Joint Commissioners of Police, 15 Deputy Commissioners of Police, 64 Assistant Commissioners of Police besides 235 Inspectors of Police including SHOs of 83 Police Stations, 6 out posts and under whom there were 803 Sub-Inspectors of police and Spl. Sub-Inspectors and 9665 Head Constables and Police Constables. The City of Chennai is divided into six districts and each one of them is headed by Deputy Commissioner of Police of the rank of Superintendent of Police. When the information about mentioning wrong statement in the affidavit filed by respondent No. 2 against the grant of bail order was brought to the notice of the appellant on 28.05.2001 by Deputy Commissioner of Police, the appellant immediately asked him to direct respondent No.2 to file proper affidavit before the High Court and clarify the matter by placing proper facts. It is also clear from the affidavit of the government counsel that he himself drafted the affidavit purely on the instructions of respondent No. 2 and that the appellant had no personal knowledge nor did he instruct the counsel to prepare affidavit or petition to move for cancellation of the bail. In the later part of the order dated 20.06.2001, the then Division Bench ordered notice to the Commissioner of Police (the appellant) seeking an explanation about the serious allegations made by respondent No. 1 in the contempt petition. Pursuant to the same, the appellant filed counter affidavit setting out hierarchy of officials functioning under the Commissioner of Police, Greater Chennai City, the circumstances under which he was informed about the incorrect affidavit filed by respondent No. 2 in the case

and the directions issued by him to correct the mistake in the proceedings relating to the cancellation of bail of respondent No. 1. Respondent No. 2 has specifically denied the allegation that the application for cancellation of bail was moved under the direction, supervision and knowledge of the appellant. The two officers, namely, Assistant Commissioner of Police and Deputy Commissioner of Police without specifying the name of Commissioner of Police have merely mentioned that they had consulted their "superior officers" before filing the application for cancellation of bail. Apart from specific information in the form of an affidavit highlighting his stand before the Division Bench which dealt with the contempt petition, the appellant had also tendered unconditional apology which was not even referred to before passing orders sentencing the appellant to imprisonment. When a city like Chennai is managed by several police officers from the level of police constable to the Commissioner of Police, in the absence of specific reference about consultation with the Commissioner of Police or direction to the two officers, namely, Assistant Commissioner of Police and Deputy Commissioner of Police merely because both of them attended the office of the Public Prosecutor for preparation of an application for cancellation of bail based on the affidavit of the Inspector of Police, it cannot be presumed and concluded that the appellant was responsible for giving incorrect information by respondent No. 2 before the High Court. [Paras 15, 21, 22] [344-B-C; 349-H; 350-A-H; 351-A-H]

State of Kerala v. M.S. Mani & Ors. **(2001) 8 SCC 82;** *Bal Thackreyv. Harish Pimpalkhute & Anr.* **AIR 2005 SC 396;** *Amicus Curiae v. Prashant Bhushan and Anr.* **(2010) 7 SCC 592 – relied on.**

4. While dealing with criminal contempt in terms of Section 2(c) of the Act, strict procedures are to be

adhered. The jurisdiction to initiate proceedings for contempt as also the jurisdiction to punish for contempt are discretionary with the court. Contempt generally and criminal contempt certainly is a matter between the court and the alleged contemnor. No one can compel or demand as of right initiation of proceedings for contempt. The person filing an application or petition before the court does not become a complainant or petitioner in the proceedings. He is just an informer or relator. His duty ends with the facts being brought to the notice of the court. It is thereafter for the court to act on such information or not. Further Section 15 of the Act as well as the Madras High Court Contempt of Court Rules insist that, particularly, for initiation of criminal contempt, consent of the Advocate General is required. Any deviation from the prescribed Rules should not be accepted or condoned lightly and must be deemed to be fatal to the proceedings taken to initiate action for contempt. In the instant case, these provisions were not strictly adhered to and even the notice issued by the then Division Bench merely sought for explanation from the appellant about the allegations made by Respondent No. 1. The Inspector of Police who made an incorrect/false statement for cancellation of bail was rightly punished by the Division Bench of the High Court and this Court affirmed the same by dismissing his special leave petition. The order of the High Court convicting the appellant under Section 2(c) of the Act and sentencing him under Section 12 to undergo simple imprisonment for seven days is set aside. [Paras 23, 24, 25] [352-A-H]

Om Prakash Jaiswal vs. D.K. Mittal **(2000) 3 SCC 171 – relied on.**

Case Law Reference:

2010 (12) Scale 556	**relied on**	**Para 10**

(2001) 8 SCC 82	**relied on**	**Para 11**
AIR 2005 SC 396	**relied on**	**Para 12**
(2010) 7 SCC 592	**relied on**	**Para 13**
(2000) 3 SCC 171	**relied on**	**Para 23**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1376 of 2004.

From the Judgment & Order dated 29.10.2004 of the High Court of Madras in Contempt Petition No. 397 of 2001.

A.K. Ganguli, V. Giri, Altaf Ahmed, M.A. Chinnasamy, K. Krishna Kumar, V.G. Pragasam, S.J. Aristotle, Praburama Subramanian, S. Ravi Shankar for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. This appeal is filed against the final judgment and order dated 29.10.2004 passed by the Division Bench of the High Court of Judicature at Madras in Contempt Petition No. 397 of 2001 whereby the High Court held the respondents therein guilty of the offence punishable under Section 2 (c) of the Contempt of Courts Act, 1971 (in short 'the Act') and sentenced to undergo simple imprisonment for 7 days under Section 12 of the Act.

2. Brief Facts:

(a) Parithi Ilamvazhuthi-Respondent No. 1 herein was elected as Member of Legislative Assembly (in short 'MLA') of the Egmore Constituency, Chennai in the Elections held on 10.05.2001 to the Tamil Nadu State Legislative Assembly. Large scale violence and several attempts of booth capturing were reported on the day of election. In respect of the same, Crime No. 958 of 2001 was registered against his opposite party candidate John Pandian and others for various offences. Similarly, Crime No. 960 of 2001 was registered against

Respondent No. 1 by one David for various offences. John Pandian was arrested on 10.05.2001 and remanded to judicial custody. Respondent No. 1 filed an application for anticipatory bail being Crl. M.P. No. 6244 of 2001 before the Sessions Court, Chennai and the same was dismissed on 16.05.2001 stating that the investigation is at an early stage and enlargement would hamper the investigation.

(b) On 17.05.2001, Respondent No. 1 was arrested and remanded to judicial custody. On the same day, Muthu Karuppan-the appellant herein was appointed as Commissioner of Police, Greater Chennai City and assumed charge. On 21.05.2001, Respondent No. 1 moved an application for bail being Crl. M.P. No. 1379 of 2001 before the XIV Metropolitan Magistrate which was dismissed on the same day. On 22.05.2001, Respondent No. 1 moved an application for bail being Crl. M.P. No. 6277 of 2001 before the Principal Sessions Court, Chennai mainly on the ground that he has to attend the Assembly which has commenced on 22.05.2001 to take oath as MLA. On 23.05.2001, Respondent No. 1 was granted conditional bail by the Sessions Judge.

(c) On 24.05.2001, Rajendra Kumar, Inspector of Police, (L&O), Tamil Nadu-Respondent No. 2 herein, filed an application for cancellation of bail being Crl. O.P. No. 9352 of 2001 before the High Court of Madras and sought for stay of bail granted to Respondent No. 1 herein. On the same day, learned single Judge of the High Court stayed the order of grant of bail and ordered notice to Respondent No. 1 on the ground that the victim, namely, David is in a serious condition and the accused is in police custody. On 28.05.2001, on receipt of the said notice, Respondent No. 1 filed a counter affidavit submitting that the statement of Respondent No. 2 regarding police custody is false. On 29.05.2001, Respondent No. 2 filed his reply affidavit admitting that it was a mistake by oversight and the same is neither willful nor wanton.

(d) On 30.05.2001, the petition for cancellation of bail was

dismissed by the High Court holding that no ground was made out for cancellation of the bail. After the order dated 30.05.2001, Respondent No. 1 filed Contempt Application No. 397 of 2001 before the High Court stating that on the direction, supervision and knowledge of the appellant herein, Respondent No. 2 moved an application to cancel the bail granted to him on the basis of false statement thereby prevented him from attending the Assembly.

(e) On 29.10.2004, the Division Bench of the High Court held the respondents therein guilty of the offence punishable under Section 2(c) of the Act and sentenced them to undergo simple imprisonment for 7 days under Section 12 of the Act.

(f) Aggrieved by the judgment and order of the High Court, appellant herein filed Criminal Appeal No. 1376 of 2004 before this Court and on 13.12.2004, this Court admitted the appeal and stayed the operation of the impugned order insofar as it relates to the appellant. Respondent No. 2 also filed Criminal Appeal No. 1500 of 2004 before this Court and by order dated 05.01.2005, this Court dismissed the appeal on merits holding that the case of the Commissioner of Police stands entirely on a different footing.

3. Heard Mr. A.K. Ganguli, learned senior counsel for the appellant and Mr. Altaf Ahmed, learned senior counsel for respondent No.1 and Mr. S. Ravi Shankar, learned counsel for respondent No.2.

4. Before going into the correctness or otherwise of the impugned order of the Division Bench punishing the appellant for the offence under Section 2(c) of the Act and sentencing him under Section 12 of the Act to undergo simple imprisonment for 7 days, it is useful to refer the facts leading to initiation of contempt proceeding. It is the grievance of Respondent No. 1 that after the grant of bail, Respondent No. 2 filed a false affidavit in Criminal O.P. No. 9352 of 2001 that the police custody had been ordered by the XIV Metropolitan

Magistrate on 23.05.2001, based on which, the learned single Judge of the High Court stayed the order of grant of bail passed in favour of Respondent No. 1. After preliminary examination, the Division Bench, by order dated 20.06.2001, issued notice to Respondent No. 2 herein to show cause as to why contempt proceeding against him should not be initiated for having made false statement with intent to mislead the Court. In the same proceeding, the Division Bench directed issuance of notice to the Commissioner of Police-appellant herein as to the averments of an elected MLA being in police custody could not reasonably have been made prima facie without the knowledge of the Commissioner, more so, when the election had just taken place and the elected member was required to take oath, but by reason of his detention was being prevented from taking oath. In the same paragraph, it was further stated that the extent to which the Commissioner had knowledge about the filing of the petition for cancellation of bail, the instructions, if any, he had given in that regard, the persons to whom such instructions had been given and the nature of instructions shall also be disclosed by the Commissioner in his affidavit.

5. Based on the notice issued by the Division Bench in its order dated 20.06.2001, the appellant-Commissioner of Police, Chennai City, at the relevant time and the second respondent Inspector of Police (L&O), Chennai filed separate affidavits explaining their stand.

6. In order to understand the above issue, it is relevant to refer Section 2(c) of the Act which defines criminal contempt as:

> "(c) "criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which-
>
> (i) scandalizes or tends to scandalize, of lowers or tends to lower the authority of, any court; or

(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or

(iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner."

7. Giving false evidence by filing false affidavit is an evil which must be effectively curbed with a strong hand. Prosecution should be ordered when it is considered expedient in the interest of justice to punish the delinquent, but there must be a prima facie case of "deliberate falsehood" on a matter of substance and the court should be satisfied that there is a reasonable foundation for the charge.

8. In a series of decisions, this Court held that the enquiry/ contempt proceedings should be initiated by the court in exceptional circumstances where the court is of the opinion that perjury has been committed by a party deliberately to have some beneficial order from the court. There must be grounds of a nature higher than mere surmise or suspicion for initiating such proceedings. There must be distinct evidence of the commission of an offence by such a person as mere suspicion cannot bring home the charge of making false statement, more so, the court has to determine as on facts whether it is expedient in the interest of justice to enquire into offence which appears to have been committed.

9. The contempt proceedings being quasi criminal in nature, burden and standard of proof is the same as required in criminal cases. The charges have to be framed as per the statutory rules framed for the purpose and proved beyond reasonable doubt keeping in mind that the alleged contemnor is entitled to the benefit of doubt. Law does not permit imposing any punishment in contempt proceedings on mere probabilities, equally, the court cannot punish the alleged contemnor without any foundation merely on conjectures and surmises. As observed above, the contempt proceeding being quasi criminal

in nature require strict adherence to the procedure prescribed under the rules applicable in such proceedings.

10. In exercise of the powers conferred on the High Court under Articles 215 and 225 of the Constitution of India and in terms of Section 23 of the Act, the Madras High Court Contempt of Court Rules, 1975 (in short 'the Rules') have been framed. The said Rules prescribe procedure for initiating contempt and various steps to be adhered to. By drawing our attention to the Rules, Mr. Ganguli, learned senior counsel for the appellant submitted that Rules 4 and 8 have not been complied with. By emphasizing the principles in paras 12 and 16 of the decision of this Court in *R.S. Sujatha vs. State of Karnataka & Ors.,* 2010 (12) Scale 556, learned senior counsel submitted that the contempt proceedings being quasi criminal in nature require strict adherence to the procedure prescribed under the rules applicable to such proceedings. He also pointed out that while sending notice, relevant documents have not been enclosed and the consent of Advocate General was not obtained for initiating contempt proceedings against the appellant. Insofar as the documents referred to being certain orders of the court, no serious objection was taken note of for not sending the same.

Consent of the Advocate General

11. The relevant provision which deals with cognizance of criminal contempt in other cases is Section 15 of the Act which reads as under:

"15. Cognizance of criminal contempt in other cases.—(1) In the case of a criminal contempt, other than a contempt referred to in Section 14, the Supreme Court or the High Court may take action on its own motion or on a motion made by—

(a) the Advocate-General, or

(b) any other person, with the consent in writing to

the Advocate-General, or

(c) in relation to the High Court for the Union territory of Delhi, such Law Officer as the Central Government may, by notification in the Official Gazette, specify in this behalf, or any other person, with the consent in writing of such Law Officer."

The whole object of prescribing procedural mode of taking cognizance is to safeguard the valuable time of the Court from being wasted by frivolous contempt petitions. In *State of Kerala vs. M.S. Mani & Ors.,* (2001) 8 SCC 82, this Court held that the requirement of obtaining prior consent of the Advocate General in writing for initiating proceedings of criminal contempt is mandatory and failure to obtain prior consent would render the motion non-maintainable. In case, a party obtains consent subsequent to filing of the petition, it would not cure the initial defect and thus, the petition would not become maintainable.

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

13. However, in *Amicus Curiae vs. Prashant Bhushan and Anr.,* (2010) 7 SCC 592, this Court has considered the earlier judgments and held that in a rare case, even if the cognizance is deemed to have been taken in terms of Rule 3(c) of the Rules to Regulate Proceedings for Contempt of the Supreme Court, 1975, without the consent of the Attorney General or the Solicitor General, the proceedings must be held to be maintainable in view of the fact that the issues involved in the proceedings had far reaching greater ramifications and impact on the administration of justice and on the justice delivery system and the credibility of the court in the eyes of general public.

14. It is clear from the recent decision of this Court in

Prashant Bhushan's case (supra) that if the issue involved in the proceedings had greater impact on the administration of justice and on the justice delivery system, the court is competent to go into the contempt proceedings even without the consent of the Advocate General as the case may be.

15. Now, coming to the merits of the impugned order of the High Court, contempt proceeding was initiated mainly on the basis of a false statement made on oath by Respondent No. 2 which resulted in stay of the bail order passed by the Sessions Judge, Chennai in favour of the Respondent No. 1, and prevented him from taking oath in the Assembly. Inasmuch as the High Court has dealt with the issue elaborately on factual aspects and we also adverted to the same in the earlier part of our judgment, there is no need to traverse the same once again. In respect of violence on the day of election, Respondent No. 1 was arrested and remanded to judicial custody on 17.05.2001. On the same day, that is, on 17.05.2001, the appellant was appointed as Commissioner of Police, Greater Chennai City and assumed charge. On 21.05.2001, Respondent No. 1 moved an application for bail in Crl. M.P. No. 1379 of 2001 before the XIV Metropolitan Magistrate which was dismissed on the same day. On 22.05.2001, Respondent No. 1 moved an application for bail before the Sessions Judge in Crl. M.P. No. 6277 of 2001 mainly on the ground that as the new Assembly Session commences on 22.05.2001, he has to take oath and further the victim, namely, David has also been discharged from the hospital. On 23.05.2001, Respondent No. 1 was granted conditional bail by the Sessions Judge mainly on the ground that he has to take oath as MLA. It is further seen that against grant of bail to Respondent No. 1, Inspector of Police-Respondent No. 2 filed an application being Crl. O.P. No. 9352 of 2001 on 24.05.2001 for cancellation of bail with application for stay before the High Court. On the same day, vacation Judge of the High Court stayed the order of grant of bail to Respondent No. 1 till 29.05.2001 on the ground that victim, namely, David is in serious condition and the accused

Respondent No. 1 is in police custody. By pointing out that the information furnished by Respondent No. 2 in his affidavit filed in support of the application for stay of the order of grant of bail regarding his police custody is false, Respondent No. 1 filed a counter affidavit praying for vacation of the stay granted by the High Court. On 29.05.2001, Respondent No. 2 filed his reply affidavit submitting that on 23.05.2001 application seeking police custody of other 8 accused were made and in the affidavit filed in support of the petition to cancel the bail, by oversight, it was mentioned that police custody was also obtained in respect of the Respondent No. 1. He also conveyed to the court that it is a mistake by oversight and the same is neither willful nor wanton. On going through the material placed, the learned Single Judge, by order dated 30.05.2001, dismissed Crl. O.P. No. 9352 of 2001 filed by Respondent No. 2 to cancel the bail granted to the first respondent by the Sessions Judge.

16. The Division Bench, based on the materials placed by Respondent Nos. 1 and 2 concluded that Respondent No. 2 has filed a false affidavit knowing well the contents of the same are false in order to mislead the court for preventing the petitioner therein, an MLA, from coming out of the jail thereby restrained him from attending the Assembly. Though Respondent No. 2 filed Crl. Appeal No. 1500 of 2004, the same was dismissed by this Court on 05.01.2005. While dismissing the appeal of Respondent No. 2, this Court made the following observation which is relevant and is reproduced hereunder:

> "Heard learned counsel for the appellant.
>
> It has been pointed out that the appeal filed by the Commissioner of Police has been admitted by this Court. In our view, the case of the Commissioner of Police stands entirely on a different footing. So far as the appellant is concerned, we do not find any merit in his appeal.
>
> Accordingly, the appeal is dismissed."

17. The Division Bench, by the impugned order, proceeded on the fact that the Commissioner of Police-appellant herein was aware of the arrest of Respondent No. 1 and also of the fact that as an elected MLA because of the wrong information by Respondent No. 2, the High Court stayed the order of bail and he was prevented from assuming office as MLA and dealt with the matter and finally convicted him under Section 2(c) of the Act. It is the definite stand of the appellant that he was never consulted by the subordinate police officers before filing of the application for cancellation of bail and he was not aware of the contents of the said affidavit and as such he was not responsible. It is also his claim that when the incorrect statement made in the affidavit filed in support of the petition was brought to his notice by Mr. Christopher Nelson, Deputy Commissioner of Police on 28.05.2001, he directed him to give instruction to Respondent No. 2 to file a proper affidavit and as such, he was never a party to the said false affidavit and, therefore, he is not liable for contempt.

18. It is seen from the written statement made by the appellant before the High Court that he was informed about the arrest of MLA-Respondent No. 1 and the same has been conveyed to the Speaker as well as the Chief Secretary. It is the stand of the Division Bench that the Commissioner of Police must have been informed by the subordinate Police Officers not only about the arrest of Respondent No. 1 but also his release by the Sessions Judge to enable him to inform the Speaker and the Government. However, according to the Division Bench, the Commissioner did not clearly indicate either in the counter affidavit or in the written statement that he was informed about the bail order passed by the Sessions Judge on 23.05.2001. The High Court has also referred to the general powers of the Commissioner of Police with reference to certain standing orders issued by the Government. There is no dispute that the Commissioner of Police being Head of the Police Force of the City, if he comes across the arrest/release of an elected MLA, he is duty bound to inform the Speaker as

well as the Government. However, it is his definite case and asserted that he was not aware of the information furnished by Respondent No. 2 for cancellation of bail granted by the Sessions Judge and the ultimate stay order passed by the High Court.

19. In order to refute the claim of the Commissioner of Police, the Division Bench heavily relied on the presence of K. Anthonisamy, Assistant Commissioner of Police and C. Chandrasekar, Deputy Commissioner of Police in the office of the Public Prosecutor along with Respondent No. 2 who filed an affidavit praying for cancellation of the bail. It is true that both Assistant Commissioner of Police and Deputy Commissioner of Police in their respective affidavits admitted their presence in the office of the Public Prosecutor and their interaction with one Mr. Raja, the then government counsel. It is relevant to refer the information furnished in the form of an affidavit dated 04.04.2003 by Christopher Nelson. According to him, he joined as Deputy Commissioner of Police, Law and Order, Triplicane, District Chennai City on 26.05.2001. He asserted that he was not aware of the details of the case in question prior to 26.05.2001. The last two paragraphs, namely, paras 6 and 7 of his affidavit filed before the Division Bench are relevant which read thus:

> "6. I respectfully state that Thiru K. Antony Samy, who was then Assistant Commissioner of Police, (Law & Order), Kilpauk Range, Chennai-7 informed me on 28052001, that the aforesaid Parithi Ilamvazhuthi had filed a counter affidavit before the Hon'ble High Court, seeking to reject the application of cancellation of bail on the ground that some incorrect information was filed by the first respondent I was further informed that in the affidavit filed by the first respondent seeking cancellation of bail on 24.05.2001. It has been stated that for granting police custody the XIV Metropolitan Magistrate by his order dated 23.052001 had directed that some accused to be produced on 28.052001.

> 7 I, respectfully submit that on the very same day, I informed the commissioner of Police, the second respondent about the allegations of mistake in the affidavit filed by the investigation officer, the first respondent herein, I was directed by the second respondent herein to instruct the Assistant Commissioner of Police to file a fresh affidavit, if necessary before the High Court, explaining the alleged mistake in the affidavit filed by the first respondent earlier. In compliance thereof, I instructed Thiru Antony Samy, the Assistant Commissioner of Police, Law & Order, Kilpauk Range, to see that a proper affidavit is filed by the inspector concerned before the Hon'ble High Court, explaining the circumstances under which alleged mistake appeared in the affidavit filed earlier by him. Accordingly, such an affidavit was filed before the Hon'ble High Court on 29.052001."

It is clear at least from para 7 that when the information relating to making wrong statement at the instance of Respondent No. 2 was brought to the notice of the Commissioner of Police, he directed the Deputy Commissioner of Police to instruct the Assistant Commissioner of Police and Inspector of Police to file fresh affidavit explaining the alleged mistake in the affidavit filed by Respondent No. 2 earlier. It is also seen that pursuant to the said direction of the Commissioner of Police, the Deputy Commissioner of Police instructed one K. Anthonisamy, Assistant Commissioner of Police to see that proper affidavit is filed by the Inspector concerned before the High Court explaining the circumstances under which the mistake appeared in the affidavit filed on earlier occasion. Pursuant to the notice by the Division Bench of the High Court, C. Chandrasekar, Deputy Commissioner of Police at Triplicane also filed an affidavit to the effect that after knowing the grant of bail by the Principal Sessions Judge, Chennai releasing Respondent No. 1 after considering seriousness of the case and after discussion with "superior officers" it has been decided to move an application for cancellation of the bail in the High

Court. The Division Bench relying on the statement of the above officer concluded that the Commissioner of Police was consulted and it was he who instructed the subordinate Police Officers to move an application for stay of grant of bail. Though in para 4, the deponent of the affidavit, namely, C. Chandrasekar has mentioned that "after discussion with superior officers" it is not clear whether he consulted the Commissioner of Police i.e. appellant herein on the relevant issue.

20. K. Anthonisamy, Deputy Commissioner of Police, CBCID, Chennai Range who was working as an Assistant Commissioner of Police at Kilpauk Chennai during the relevant period also swore an affidavit on 24.09.2004. In para 4, he also mentioned that after discussion with "superior officers" and on instructions, it was decided to file an application for cancellation of bail in the High Court. Here again, the Division Bench has concluded that the Commissioner of Police ought to have been consulted by the Assistant Commissioner of Police and only with his knowledge petition was filed for cancellation of bail. The above averment in para 4 merely mentions discussion with "superior officers" and there is no specific reference to the Commissioner of Police who is the Head of the Police Force in the Chennai City. In the same way, in para 5 also, the deponent of the affidavit has mentioned that after the grant of stay by the High Court, he intimated the development to his superior officers. Here again, he has not specifically informed the court that he had intimated to the Commissioner of Police. Like Mr. Nelson, Deputy Commissioner of Police, he also informed the court that on coming to know the discrepancy in the affidavit dated 24.05.2001 filed by the Inspector of Police for cancellation of the bail, he was directed by the Commissioner of Police to rectify the discrepancy immediately. Accordingly, Respondent No. 2 filed the reply affidavit narrating all the facts on 29.05.2001.

21. The analysis of affidavits of the Inspector of Police, Assistant Commissioner and Deputy Commissioner of Police

show that there is no acceptable material that the affidavit containing wrong information filed by Respondent No. 2 for cancellation of bail and stay of bail order was made at the instance of the Commissioner of Police. We have already pointed out that the appellant has assumed charge as the Commissioner of Police only on 17.05.2001 i.e. after formation of the new government. The violence in respect of election that took place on 10.05.2001, particularly, the incident relating to Respondent No. 1 was one week before his taking over charge as Commissioner of Police. It is brought to our notice that at the relevant time i.e. in 2001, the office of the Commissioner of Police was headed by him and there were 4 Joint Commisioners of Police, 15 Deputy Commissioners of Police, 64 Assistant Commissioners of Police besides 235 Inspectors of Police including SHOs of 83 Police Stations, 6 out posts and under whom there were 803 Sub-Inspectors of police and Spl. Sub-Inspectors and 9665 Head Constables and Police Constables. It is further brought to our notice that the City of Chennai is divided into six districts and each one of them is headed by Deputy Commissioner of Police of the rank of Superintendent of Police. It is also clear that when the information about mentioning wrong statement in the affidavit filed by Respondent No. 2 against the grant of bail order was brought to the notice of the appellant on 28.05.2001 by Deputy Commissioner of Police, namely, Christopher Nelson, the appellant herein immediately asked him to direct Respondent No.2 to file proper affidavit before the High Court and clarify the matter by placing proper facts. It is also clear from the affidavit of the government counsel E. Raja that he himself drafted the affidavit purely on the instructions of Respondent No. 2 and that the appellant herein had no personal knowledge nor did he instruct the counsel to prepare affidavit or petition to move for cancellation of the bail. As rightly pointed out by Mr. Ganguli, learned senior counsel for the appellant, in the later part of the order dated 20.06.2001, the then Division Bench ordered notice to the Commissioner of Police (the appellant herein) seeking an explanation about the serious allegations

made by Respondent No. 1 in para 12 of the contempt petition. Pursuant to the same, the appellant filed counter affidavit setting out hierarchy of officials functioning under the Commissioner of Police, Greater Chennai City, the circumstances under which he was informed about the incorrect affidavit filed by Respondent No. 2 in the case and the directions issued by him to correct the mistake in the proceedings relating to the cancellation of bail of Respondent No. 1. We have already pointed out that the author of the affidavit, namely, Respondent No. 2 has not stated that it was filed under the instructions of the appellant herein, in fact, this fact was accepted by the Division Bench. As a matter of fact, Respondent No. 2 has specifically denied the allegation that the application for cancellation of bail was moved under the direction, supervision and knowledge of the appellant. The two officers, namely, Assistant Commissioner of Police and Deputy Commissioner of Police without specifying the name of Commissioner of Police have merely mentioned that they had consulted their "superior officers" before filing the application for cancellation of bail.

22. Apart from specific information in the form of an affidavit highlighting his stand before the Division Bench which dealt with the contempt petition, the appellant had also tendered unconditional apology which was not even referred to before passing orders sentencing the appellant herein to imprisonment. When a city like Chennai is managed by several police officers from the level of police constable to the Commissioner of Police, in the absence of specific reference about consultation with the Commissioner of Police or direction to the two officers, namely, Assistant Commissioner of Police and Deputy Commissioner of Police merely because both of them attended the office of the Public Prosecutor for preparation of an application for cancellation of bail based on the affidavit of the Inspector of Police, it cannot be presumed and concluded that the appellant was responsible for giving incorrect information by Respondent No. 2 before the High Court.

23. We have already pointed out that while dealing with criminal contempt in terms of Section 2(c) of the Act, strict procedures are to be adhered. In a series of decisions, this Court has held that jurisdiction to initiate proceedings for contempt as also the jurisdiction to punish for contempt are discretionary with the court. Contempt generally and criminal contempt certainly is a matter between the court and the alleged contemnor. No one can compel or demand as of right initiation of proceedings for contempt. The person filing an application or petition before the court does not become a complainant or petitioner in the proceedings. He is just an informer or relator. His duty ends with the facts being brought to the notice of the court. It is thereafter for the court to act on such information or not. [Vide *Om Prakash Jaiswal vs. D.K. Mittal,* (2000) 3 SCC 171] Further Section 15 of the Act as well as the Madras High Court Contempt of Court Rules insist that, particularly, for initiation of criminal contempt, consent of the Advocate General is required. Any deviation from the prescribed Rules should not be accepted or condoned lightly and must be deemed to be fatal to the proceedings taken to initiate action for contempt. In the present case, the above provisions have not been strictly adhered to and even the notice issued by the then Division Bench merely sought for explanation from the appellant about the allegations made by Respondent No. 1.

24. We have already noted that Rajendra Kumar, Inspector of Police, (L&O), G-1, Vepery Police Station, Chennai-7 who made an incorrect/false statement for cancellation of bail has been rightly punished by the Division Bench of the High Court and this Court affirmed the same by dismissing his special leave petition.

25. In view of the above discussion and conclusion, the order of the High Court convicting the appellant under Section 2(c) of the Act and sentencing him under Section 12 to undergo simple imprisonment for seven days is set aside. The appeal is allowed.

D.G. Appeal allowed.

BACHPAN BACHAO ANDOLAN
v.
UNION OF INDIA & OTHERS
(Writ Petition (C) No. 51 of 2006)

APRIL 18, 2011

[DALVEER BHANDARI AND A. K. PATNAIK JJ.]

CHILD WELFARE:

Children engaged in circuses – Protection, from physical and sexual abuse – HELD: Government of India is fully aware about the problems of children working in various places, particularly, in circuses – Right of children to free and compulsory education has been made a fundamental right under Article 21-A of the Constitution – Directions given to the Central Government to issue suitable notifications prohibiting employment of children in circuses within two months – Further directions issued to conduct simultaneous raids in all the circuses to liberate the children and check the violation of their fundamental rights and to take steps for their rehabilitation – The Secretary of Ministry of Human Resources Development, Department of Women and Child Development directed to file a comprehensive affidavit of compliance – Court also accepted the submission and recommendations of the Solicitor General of India – Each State should issue a Circular indicating how the recommendations will be implemented – Constitution of India, 1950 – Article 21-A read with Articles 14 - 17,21,23 and 24 – Juvenile Justice (Care and Protection of Children) Act, 2000- s.33(3) – Public interest litigation – U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, i.e. the PALERMO Protocol on Trafficking.

The instant writ petition was filed in public interest by the petitioner, namely, "Bachpan Bachao Andolan", in

order to protect the children in circuses from serious violations and sexual and physical abuse.

Pursuant to the notice issued by the Court, the Union of India, and various States and the Union Territories filed replies. The Solicitor General of India broadened the scope of the petition in order to deal with also the problem of trafficking in women and children. During the course of hearing suggestions and recommendations were made by the Solicitor General of India for preventing child abuse, commercial sexual abuse of women and children, human trafficking, and for rehabilitation of rescued children, effective functioning of Child Welfare Committees under the Juvenile Justice (Care and Protection of Children) Act, 2000, proper implementation of adoption schemes and Integrated Child Programme Schemes, interface between National Commission for Protection of Child Rights, State Governments and the Ministry of Woman and Child Development.

Directing the matter to be listed on 19th July, 2011, the Court

HELD: 1.1 From the comprehensive submissions made on behalf of the respondents, it is abundantly clear that the Government of India is fully aware about the problems of children working in various places, particularly, in circuses. It may be pertinent to mention that the Right of children to free and compulsory education has been made a fundamental right under Article 21A of the Constitution. Now every child of the age of 6 to 14 years has right to have free education in neighbourhood school. [para 67] [395-G-H]

1.2 The submissions of the Solicitor General of India are accepted. Each State must issue a circular within four weeks effectively indicating how the recommendations will be implemented. [para 66] [395-D-F]

2.1 This Court plans to deal with the problem of children's exploitation systematically. In this order the directions are limited to regarding children working in the Indian Circuses. Consequently, it is directed:

(i) In order to implement the fundamental right of the children under Article 21A, it is imperative that the Central Government must issue suitable notifications prohibiting the employment of children in circuses within two months;

(ii) The respondents are directed to conduct simultaneous raids in all the circuses to liberate the children and check the violation of fundamental rights of the children. The rescued children be kept in the Care and Protective Homes till they attain the age of 18 years;

(iii) The respondents are also directed to talk to the parents of the children and in case they are willing to take their children back to their homes, they may be directed to do so after proper verification;

(iv) The respondents are directed to frame proper scheme of rehabilitation of rescued children from circuses;

(v) The Secretary of Ministry of Human Resources Development, Department of Women and Child Development to file a comprehensive affidavit of compliance within ten weeks. [para 68] [396-A-G]

N.R. Nair & Others v. Union of India & Others **2001 (3) SCR 353 = (2001) 6 SCC 84 - cited**

UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, **i.e. the PALERMO Protocol on Trafficking – cited**

Case Law Reference:

2001 (3) SCR 353 cited para 11

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

Writ Petition (Civil) No. 51 of 2006.

Gopal Subramanium, S.G. Shail Kumar Dwibedi, ASG, Colin Gonsalves and Pramod Swarup, Jayshree Anand, Dr. Manish Singhvi, Manjit Singh, AAG., Divya Jyoti, Jyoti Mendiratta, Aananat Asthana, A.K. Srivistava, Anand Varma, Sushma Suri, Anubhav Kumar, Sunita Verma, Sadhana Sandhu, S.N. Terdal, K.K. Mahalik, Noorjahan, Ajay Pal, Sanjay R. Hegde, Amit Kr. Chawla, A. Rohen Singh, Tara Chandra Sharma, Neelam Sharma, S.W. Qadri, Rajeev K. Dubey, Kamlendra Mishra, Anil Kumar Jha, Anis Suharawardy, S. Mehdi Imam, T. Ahmad, Momota Oinam (for Corporate Law Group), Mohanprasad Meharias, Devanshu Kumar Devesh, R. Gopalankrishan, Milind Kumar, Gopal Singh, Manish Kumar, Rituraj Biswas, Chandan Kumar, Janaranjan Das, Swetaketu Mishra, P.P. Nayak, Hemantika Wahi, Somanath Padhan, Ashok Bhan, Savitri Pandey, Varuna Bhandari, D.S. Mahra, S. Wasim A. Qadri, Sunita Sharma, Gunwant Dara, Anil Katiyar, D.S. Mahra, Ramesh Babu M.R., T. Harish Kumar, Prasanth P., V. Vasudevan, V.G. Pragasam, S.J. Aristotle, Prabu Ramasubramanian, Pradeep Purohit, B.S. Banthia, Kamini Jaiswal, Naresh K. Sharma, Arun K. Sinha, Enatoli Sena, Edward Belho, Pragayan Pradip Sharma, P.V. Yogeswaran, R.N. Upadhya, Anil Shrivastav, Suparna Srivastava, Sudarshini Ray, Ram Swarup Sharma, Rajesh Srivastava, Khwairapam Nobin Singh, Ratan Kumar Choudhuri, Anuradha Rustagi, D. Bharathi Reddy, G. Prakash, S.S. Shamshrey, P.N. Gupta, Aruna Mathur, Amarjeet Singh Girsa, Viman Dubey (for Arputham Aruna & Co.), Dr. Indira Pratap Singh, Anuvrat Sharma, Alka Sinha, Naresh K. Sharma, Manoj K. Mishra, Balaji Srinivasan, Madhusmita Bora, B.D. Vivek, A. Subhashini,

Kamal Mohan Gupta, K.N. Madhusoodhanan and R. Sathish for the appearing parties.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. This petition has been filed in public interest under Article 32 of the Constitution in the wake of serious violations and abuse of children who are forcefully detained in circuses, in many instances, without any access to their families under extreme inhuman conditions. There are instances of sexual abuse on a daily basis, physical abuse as well as emotional abuse. The children are deprived of basic human needs of food and water.

2. It is stated in the petition that the petitioner has filed this petition following a series of incidents where the petitioner came in contact with many children who were trafficked into performing in circuses. The petitioner found that circus is one of the ancient forms of indigenous entertainment in the world, with humans having a major role to play. However, the activities that are undertaken in these circuses deprive the artists especially children of their basic fundamental rights. Most of them are trafficked from some poverty-stricken areas of Nepal as well as from backward districts of India. The outside world has no meaning for them. There is no life beyond the circus campus. Once they enter into the circuses, they are confined to the circus arena, with no freedom of mobility and choice. They are entrapped into the world of circuses for the rest of their lives, leading a vagrant tunnelled existence away from the hub of society, which is tiresome, claustrophobic and dependent on vicissitudes.

3. It is submitted that the petitioner is engaged in a social movement for the emancipation of children in exploitative labour, bondage and servitude. Bachpan Bachao Andolan has been able to liberate thousands of children with the help of the judiciary and the executive as well as through persuasion, social mobilization and education.

4. It is submitted that for the first time the petitioner came to know about the plight of children in Indian circuses way back in 1996. At that time, the petitioner had rescued 18 girls from a circus performing in Vidisha District of Madhya Pradesh. This was possible after a complaint made by a 12 year old girl, who managed to escape from the circus premises. Her complaint was that she and several other Nepalese girls had been trafficked and forced to stay and perform in the circus where they were being sexually abused and were kept in most inhuman conditions.

5. Following this incident, an organised attempt was made by the petitioner to understand and learn more about the problem of child labour in Indian Circuses and how to eradicate the same. This began in July 2002 with the initiation of a research on the problem of child labour in Indian circuses. The findings in the abovementioned research were compiled in a report termed “Eliminating Child Labour from Indian Circuses”.

6. Once all the above facts and figures were established, the petitioner decided to implement a multi-pronged strategy to eradicate the practice of employing children in Indian circuses. Simultaneously, preparations were made to put across the problem in front of circus owners to make them aware of the moral and legal questions pertaining to the use of children in circuses. The petitioner initiated a dialogue with all the major circus owners and appealed to them to stop trafficking, bondage, Child labour and other violations of child rights. The Indian Circus Federation (for short ‘I.C.F.’) responded positively but ironically this body has a very thin representation from the circus industry with approximately less than 10% of the big circuses and probably less than 20% of all the circuses were members of this Federation.

7. It is submitted that the petitioner convened a meeting with the circus owners on the 18th and 19th August, 2003 where a few owners under the umbrella of I.C.F. agreed to make a

declaration that there shall be no further use of children in the circuses in India and a full list of the children employed by them will be provided to the petitioner and that they would voluntarily phase out all the children from their circuses in a time bound manner. It was also decided that the petitioner and its partner Non-Governmental Organizations (for short, NGOs) in Nepal will help in repatriation and rehabilitation of liberated children.

8. The petitioner submitted that since the I.C.F. does not have enough influence even on its own members, the agreement did not get implemented. However, the petitioner kept on receiving information and complaints from several parents through the NGOs working in Nepal. The petitioner sent the staff of his organization to cross-check and reconfirm the facts in Bhairawa, Hetauda in Nepal and Siliguri in India and found that organized crime of trafficking of children for Indian circuses, particularly from Nepal is rampant. In February and March, 2004, the petitioner received complaints from many Nepalese parents whose children have been trapped in circuses for more than 10 years and had never been allowed to meet them on one pretext or the other even after repeated requests to the circus owners. Majority of the complaints were for the children in the Great Indian circus (a non-federation circus) which was found to be located in Palakkad, Kerala. In June, 2004, the petitioner came to know through credible NGOs and individuals working in Hetauda, Nepal that the daughters of 11 parents were trapped into Great Roman Circus in India. The petitioner has since then conducted several studies and interviews with various people who are engaged in circus.

9. The petitioner further found that life of these children begins at dawn with training instructors' shouting abuses, merciless beatings and two biscuits and a cup of tea. After 3 to 5 shows and of lot of pervert comments of the crowds, the young girls are allowed to go back to their tents around midnight. Even then, life might have something else in store, depending upon the nature and mood swings of the circus

owners and managers. If any child complains about the inadequate amount of food or the leaking tent in the rain or if a child is scared on the rope while performing the trapeze, he/she is scolded and maltreated by the managers or employers and sometimes even caned on one pretext or the other.

10. There are no labour or any welfare laws, which protect the rights of these children. Children are frequently physically, emotionally and sexually abused in these places. The most appalling aspect is that there is no direct legislation, which is vested with powers to deal with the problems of the children who are trafficked into these circuses. The Police, Labour Department or any other State Agency is not prepared to deal with the issue of trafficking of girls from Nepal holding them in bondage and unlawful confinement. There is perpetual sexual harassment, violation of the Juvenile Justice Act and all International treaties and Conventions related to Human Rights and Child Rights where India is a signatory.

11. The petitioner submitted that this Court in the case of *N.R. Nair & Others v. Union of India & Others* (2001) 6 SCC 84 upheld the rights of animals who are being made to perform in these circuses after understanding their plight. The situation of children in circuses is no different if not worse.

12. The petitioner has made various attempts to regulate and improve the conditions of children in circuses including engaging the circus owners association. However, none of them have derived good results. It is categorically submitted that the petitioner does not want the circuses to be completely banned or prohibited but there is a strong need to regulate this as any other industry including ensuring safety and other welfare measures of all those who are working in circuses, particularly the children. Almost all the circuses employ at least 50 persons and therefore a large number of labour laws should be applied.

13. The petitioner seeks application of the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000

and also suggests that intra-state trafficking of young children, their bondage and forcible confinements, regular sexual harassment and abuses should be made cognizable offences under the Indian Penal Code as well as under section 31 of the Juvenile Justice Act. Children Welfare Committees under the Juvenile Justice (Care and Protection of Children) Act, 2000 should be empowered to award compensation to all those victims rescued from the circuses with a time bound rehabilitation packages and the State Government to create a fund of the same.

14. Mostly, these children are sold to the circus owners either by the agents or their relatives or sometimes the poor parents are lured into the web by promising high salaries, luxurious life etc. However, some exceptional circuses were also found (only 4) that treated their employees marginally better and allowed them to avail the privilege of limited movement outside the circus campus for limited time, but child labour was prevalent in these circuses as well and artists were not given minimum wages.

15. The petitioner has complained about living and working conditions of the children and has enumerated the following broad categories which are setout as under:

i. **Insufficient Space**

In almost all the circuses visited by the research team, the living conditions were quite similar, but nonetheless deplorable. There are separate sleeping arrangements for males and females, with the Company Girls segregated from the rest of the circus troupe by a boundary. There are also separate tents for the families working in the circuses. Usually 5 to10 and sometimes even more people are crammed into a single tent, thus most of the child artists complain of insufficient space and lack of personal space and privacy.

ii) **Meals**

Most of the circuses provide two meals - lunch and dinner to the artists and tea also two times from the canteen run by the management. The quantity and quality of the food is variable, depending on the management. Most often, the food is inadequate to satisfy the appetite of young growing children.

iii) **Sleep Timings**

Sleep timings are also very erratic, depending upon the nature of the work being performed by the child artists, though on a general trend most go to bed at midnight after the last show is over, to be woken up at dawn for practise.

iv) **Poor Sanitation**

There are no proper toilets and bathrooms. Make-shift toilets are created on the circus ground near the tents and all the company girls have to share it and the stench around them is unbearable. In general, condition of sanitation in circuses is most pathetic. It also precipitates unhygienic conditions that could lead to diseases. Invariably all the artists voiced their dissatisfaction on the issue of sanitation and hygiene.

v) **No Health Care Personnel**

Another important issue concerning the artists is the lack of any health care personnel to look into their day-to-day health care needs as well as the accidents that are so common in the circuses. The manger or the keeper usually provides medication for common ailments such as fever, cold etc. and looks into the first-aid needs of the artists. For a serious medical condition or an accident during

training or performance, the trainer or the manager usually accompanies the patient to the nearest medical help. The management bears the charges of the treatment during that time, but later deducts it from the salary of the incumbent. However, some managements do bear the medical bill of the artists if a mishap occurs during the performance or training.

Overall, it can be said that the living conditions inside the premises of the circus arena are squalid and deplorable, with no facilities and basic amenities being provided to the circus artists, not even proper sanitation.

vi) **High Risk Factor**

Nature of the activities in circuses is such that the risk factor for the artists is very high as accidents and mishaps during practise sessions and shows are common phenomenon. On top of that, there are no health care personnel employed by the circuses to look into the health care needs of the artists, even at the time of emergency. It was found that the lives of the children was endangered due to the risk factor involved in the circuses, especially those who were involved in items like ring of death, well of death, sword items, rope dance etc. They constituted 10% of the total number of children. Rest 60% fell in the medium risk category while 30% were not involved in any risky items. Moreover, some circuses either fail to or are ignorant about taking the necessary precautions, which further heightens the risk involved. In fact, the research team witnessed an accident while visiting one of the circuses.

vii) **Remuneration**

Besides paying meagre salaries to the children, the management of some circuses holds back the salaries of the children saying that they would be paid only to their parents when they visit them, which rarely happens. Salary accounts are often manipulated and the loss due to accidents or mishaps is not compensated.

viii) **Bound by Contract**

The child artists are brought to the circuses to be contracted for 3 to 10 years and once the contract is signed/agreed upon by the parents or guardians of the children, these young ignorant children are bound and indebted to the circus management and are unable to break away from the circus, even if they are discontented with their lives in the circus.

ix) **Daily Routine hindering their All-round Development**

In the circus, their daily routine starts with practising even before the sunrise (rigorous training session initially) mostly accompanied with verbal and physical abuse and harsh physical punishments at times, for the slightest error or no error at all. From afternoon onwards until midnight, they are on the stage, performing and enthralling the audience with their vivacity and wit. They cannot share their agony and grievances or raise their voice against the torturous life they are forced to lead. For them, there is no education, no play, no recreation and their life is confined to the circuses without any exposure to the outside world. All this prohibits them from knowing the other opportunities available, as they are aware of and are exposed to just one aspect

of life, that is the aspect they see in the circuses they work in. Due to the cruel and inhuman attitude of the management in some circuses, which imposes restrictions on the children for meeting their folks, and also due to the traveling nature of the troupe, most of the children end up losing contact with their parents, especially those across the border or residing at far off places even within the country. And those fortunate few, who get a chance to meet their parents, do so once or twice a year, either when their parents visit or when they are allowed to go home. Consequently, they are exposed to a world which hinders their psychological, spiritual and socio-economic development, with no knowledge of their rights, duties and scope for a better future and thus, are left with no other option but to continue working in the circuses for the rest of their lives. Instability in life, due to the circus's nomadic existence, makes it difficult for them to pursue formal education, resulting in a large number of illiterate children and adults in circuses.

16. The employment of the children in circus involves many legal complications and in that respect major complications are as under:

1. Deprivation of the children from getting educated thereby violates their fundamental right for education enshrined under Article 21A of the Constitution.

2. Deprivation of the child from playing and expression of thoughts and feelings, thereby violating the fundamental right to freedom of expression.

3. Competency to enter into contract for working in circus.

4. Violation of statutory provisions of law like Employment of Children's Act, 1938, The Children (Placing of Labour) Act, 1933, The Child Labour (Prohibition and Regulation) Act, 1986, Minimum Wages Act, 1976, The Prevention of Immoral Traffic Act, Equal Remuneration Act, 1976 and Rules made thereunder and the Bonded Labour System (abolition) Act, 1976 read with rules made their under, the Factories Act, 1948, Motor Transport Workers Act, 1961 etc.

5. Existing labour laws and legitimacy of contracts of employment for children.

6. The legitimacy of contracts of employment for children and working conditions.

17. The petitioner has given innumerable instances in the petition of abuse of children in the circuses. All those instances demonstrate under what horrible and inhumane conditions the children have to perform in the circuses.

18. The experiences of the petitioner are only a scratch on the surface and there are many children who are being trafficked regularly into circuses. While it is not the case of the petitioner that circuses should be completely banned and prohibited, there is a strong need to regulate this as any other industry including ensuring safety gears and other measures as are done in other countries.

19. The petitioner has filed the petition with the following prayers:

1. Issue a writ of mandamus or any other appropriate writ, order or direction, directing the respondents to frame appropriate guidelines for the persons engaged in circuses;

2. Issue a writ of mandamus or any other appropriate

writ, order or direction directing the respondents to conduct simultaneous raids in all the circuses by CBI to liberate the children and to check the gross violation of all fundamental rights of the children;

3. Issue a writ of mandamus or any other appropriate writ order or direction to appoint special forces in the borders to ensure action and to check on the cross border trafficking;

4. Issue a writ of mandamus or any other writ order or direction applying the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 and make intra-state trafficking of young children, their bondage and forcible confinements, regular sexual harassments and abuses cognizable offences under the Indian Penal Code as well as under section 31 of the Juvenile Justice Act.

5. Issue a writ of mandamus or any other appropriate writ order or direction to empower child welfare committee under the Juvenile Justice (Care and Protection of Children) Act, 2000 to award compensation may be awarded to all those victims rescued from the circuses with a time bound rehabilitation package and the State Government to create a fund for the same;

6. Issue a writ of mandamus or any other appropriate writ order or direction to lay out a clear set of guidelines prohibiting the employment/engagement of children up to the age of 18 years in any form in the circuses.

20. This court issued notices to the Union of India and other States and Union Territories. Replies have been filed on behalf of various States and the Union Territories.

21. Shri Gopal Subramanium, the learned Solicitor General appearing for the Union of India has filed written submissions with the heading "The Indian Child : India's Eternal Hope and Future".

22. Learned Solicitor General has broadened the scope of this petition and has tried to deal with the problem of children trafficking. He submitted that:

1. Trafficking in human beings is not a new phenomenon. Women, children and men have been captured, bought and sold in market places for centuries. Human trafficking is one of the most lucrative criminal activities. Estimates of the United Nations state that 1 to 4 million people are trafficked worldwide each year. Trafficking in women and children is an operation which is worth more than $ 10 billion annually. The NHRC Committee on Missing Children has the following statistics to offer:-

   a. 12.6 million (Governmental sources) to 100 million (unofficial sources) stated to be child labour;

   b. 44,000 children are reported missing annually, of which 11,000 get traced;

   c. About 200 girls and women enter prostitution daily, of which 20% are below 15 years of age.

2. International conventions exist to punish and suppress trafficking especially women and children. (Refer: UN Protocol to Prevent, Suppress and Punish Trafficking in Persons also referred as the PALERMO Protocol on Trafficking). Trafficking is now defined as an organized crime and a crime against humanity. The convention being an

international convention is limited to cross border trafficking but does not address trafficking within the country. The definition of trafficking is significant:-

> " ….. The recruitment, transportation, transfer, harboring or receipt of persons by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation….".

3. Exploitation shall include at a minimum, the exploitation of the prostitutes of others or other forms of sexual exploitation, forced labour or service, slavery or practices similar to slavery, servitude or the removal of organs.

4. It is submitted that children under 18 years of age cannot give valid consent. It is further submitted that any recruitment, transportation, transfer, harbouring or receipt of children for the purpose of exploitation is a form of trafficking regardless of the means used. Three significant elements constitute trafficking:-

   a. The action involving recruitment and transportation;

   b. The means employed such as force, coercion, fraud or deception including abuse of power and bribes; and

   c. The purpose being exploitation including prostitution.

5. Internationally, there is a working definition of child trafficking. The working definition is clear because it incorporates the above three elements. In June 2001, India has adopted the PALERMO Protocol to evolve its working definition of child trafficking.

6. The forms and purposes of child trafficking may be:-

   a. Bonded labour;

   b. Domestic work;

   c. Agricultural labour;

   d. Employment in construction activity;

   e. Carpet industry;

   f. Garment industry

   g. Fish/Shrimp Export;

   h. Other sites of work in the formal and informal economy.

7. Trafficking can also be for illegal activities such as:-

   a. Begging;

   b. Organ trade;

   c. Drug peddling and smuggling;

8. Trafficking can be for sexual exploitation, i.e.

   a. Forced prostitution;

   b. Socially and religiously sanctified forms of prostitution;

   c. Sex tourism;

   d. Pornography;

9. Child trafficking can be to aid entertainment in sports:-

   a. Circus/dance troupes;

   b. Camel jockeying;

10. Trafficking can be for and through marriage. Trafficking can be for and through adoption. It is submitted that intervention is possible in cases of child trafficking only if fundamental principles are kept in mind. The fundamental principles are the following:-

   a. The child has to perform to the best of his ability. The growth of a child to its potential fulfillment is the fundamental guarantee of civilization;

   b. Empathy for troubled children by adopting non-discriminatory and attitudes free of bias;

   c. Children must be protected in terms of well-being under all circumstances;

   d. Right to freedom from all forms of exploitation is a fundamental right;

   e. Confidentiality of the child in respect of the child's privacy must be maintained;

   f. Trafficking is an organized crime which could have multiple partners including syndicates.

11. Intervention must be a joint initiative of government and non-governmental organizations which can be, in some cases, potential partners. An effective intervention must in all circumstances lead to effective and enduring protection of children from exploitation, abuse and violence.

23. According to the Solicitor General it is the bounden duty of the police to discharge its obligation. He submitted that the following guidelines should be mandated:

   i. Care must be taken to ensure the confidentiality of the child and due protection must be given to her/him as a witness;

   ii. The detailed interview of the victim should be done preferably by crisis intervention centres/members of the Child Welfare Committee under the Juvenile Justice Act. There should be adequate breaks and intervals during the interview with a child victim;

   iii. If the police employ a child friendly approach to the entire investigation, the possibility of getting all relevant information gets higher. This can be done by having a supportive environment for the child at the police station wherein attention is paid to his needs. This can be done at the police station itself or at any other place co-managed by police any NGO/CBO. Support persons for the child should be contacted and in their absence, any civil society group working with/for children or members of CWC (whoever the child feels comfortable with) could be asked to the present;

   iv. Due care must be maintained to attend the issues like interpreters, translators, record maintaining personnel, audio-video recording possibilities etc.;

   v. As far as possible, the same investigation officer must follow up the case from investigation stage to the trial stage;

   vi. There should be provision of good and water as well as toilet facilities for the child in the police station and the hospital;

vii. No child should be kept in a Police Station;

viii. Where a special juvenile police unit or a police officer has been designated to deal with crimes against children and crimes committed by children, cases relating to children must be reported by such officer to the Juvenile Justice Board or the child welfare committee or the child line or an NGO as the case may be.

24. It is submitted that Articles 23, 39, 14 and 21 of the Constitution of India guarantee every child to be freed from exploitation of any form. Article 23 prohibits traffic in human beings, 'beggar' and other forms of forced labour.

25. Force, assault, confinement can be dealt with under sections 319 to 329 for simple and grievous hurt, sections 339 to 346 for wrongful restraint and wrongful confinement; sections 350 to 351 for criminal force and criminal assault; section 370 for import, export, removal, disposing/accepting, receiving, detaining of any person as a slave; section 361 to 363 kidnapping and abduction; section 365 for kidnapping, abduction for wrongful confinement; section 367 for kidnapping, abduction for slavery or to subject a person to grievous injury; sections 41, 416, 420 for fraud, cheating by personation; sections 465, 466, 468 and 471 for forgery and using forged documents as genuine; section 503 and 506 for criminal intimidation. It is submitted that a direction must be issued to the Commissioner of Police, Delhi and the State Governments and Union Territories that their police force are required to be sensitized to the above provisions while dealing with safety and freedom of children.

26. The Juvenile Justice (Care and Protection of Children) Act, 2000 was amended in 2006 by Act 33 of 2006. It is a special legislation for children and defines children as 'a person upto the age of 18 years'. The Juvenile Justice Act is build upon

a model which addresses both children who need care and those who are in conflict with law.

27. According to the learned Solicitor General, the Goa Children's Act, 2003 must be viewed as a model legislation. He submitted that not only does it define child trafficking but also seeks to provide punishment for abuse and assault of children through child trafficking for different purposes such as labour, sale of body parts, organs, adoption, sexual offences of pedophilia, child prostitution, child pornography and child sex tourism. All state authorities such as airport authorities, border police, railway police, traffic police, hotel owners are made responsible under the law for protection of children and for reporting offences against children. It is submitted that until a suitable legislation is enacted, directions of a preventive nature may be issued against the police authorities in all States to protect the rights of children.

28. Learned Solicitor General submitted that there is blatant violation of Child Labour (Prohibition and Regulation) Act, 1986, Children Pledging of Labour Act, 1933, the Bonded Labour System Abolition Act, 1976, the Factories Act, 1948, the Plantation Labour Act, 1951, the Mines Act, 1952, the Merchant Shipping Act, 1958, the Apprentices Act, 1961, the Motor Transport Workers Act, 1961, the Bidi and Cigar Workers (Conditions of Employment) Act, 1966, the West Bengal Shops and Establishment Act, 1963.

29. Learned Solicitor General submitted that each State Government must constitute committees for the purpose of preventing child labour. It is submitted that there should be an apex committee constituted by each State Government with the following:

(a) The Chief Secretary of the State;

(b) Secretary incharge of Child and Women Development;

(c) Director of Health and Family Welfare;

(d) Commissioner of Police of the State;

(e) Two Psychiatrists to be nominated by the Indian Psychiatric Society.

30. The State Government with the assistance of the said committee by a transparent process will constitute committees for each district consisting of health workers, police personnel, factory inspectors and people from the civil society/NGO. The committee will be able to inspect and determine whether there is forced employment of children.

31. All dhabas/restaurants must be prohibited from employing children. It is necessary that this stipulation which already exists must be effectively enforced.

32. Learned Solicitor General submitted that in the Ministry of Family Welfare and Child Development, a division needs to be created to deal with issues arising out of dissemination of publications which are harmful to young persons, publishing pornographic material in electronic form as well as the enforcement of section 293 of the Penal Code. It is submitted that a further research study must be undertaken on the efficacy of the provisions of the Young Persons Harmful Publications Act, 1956, Section 67 of the Information Technology Act, 2000 and Section 293 of the Penal Code.

33. The Transplantation of Human Organ Act, 1994 makes removal of human organs without authority and commercial dealing in human organs criminally liable.

34. In a brilliant study undertaken by the Government of Indian in coordination with UNICEF, areas relating to trafficking have been acknowledged. It is submitted that the central government acknowledges the increasing prevalence of trafficking for the purpose of commercial sexual exploitation of

children. In a study[1] published by the Department of women and child development, Ministry of Human Resource Development, Govt. of India, the objectives were:-

a) To obtain a better understanding of rescue and rehabilitation processes;

b) To gain a more complete understanding of the involvement of the state, the judiciary, law enforcement agencies, and NGOs engaged in rescue and rehabilitation;

c) To make recommendations on the need for developing guidelines for rescue and rehabilitation. These guidelines should represent a common denominator of nationally agreed standards in this area as well as take regional variations into account.

The following statistics are alarming:-

i) There are an estimated two million children, aged between 5 and 15, forced into CSE around the world;

ii) Girls between the ages of 10 and 14 years are most vulnerable;

iii) 15% of commercial sexual workers in India are believed to be below 15 years old and 25% are estimated to be between the ages of 15 and 18;

iv) 500,000 children worldwide are forced into this profession every year.

35. It is submitted that the report dealt with cross border trafficking in the following way:-

1. Rescue and Rehabilitation of Child Vicrtims Traficked for Commercial Sexual Exploitation, a Report by UNICEF.

> "Research on cross-border trafficking has indicated that 5000-7000 young Nepali girls were trafficked into India annually. This research also highlighted the fact that in the last decade, the average age of the trafficked girl has steadily fallen from 14 to 16 years to 10 to 14 years. These findings are supported by studies conducted by Human Rights Watch – Asia in 1995, which stated that the average age of Nepali girls trafficked into India dropped from 14 to 16 years in the 1980s to 10 to 14 years in 1991 despite the introduction of laws designed to combat trafficking of minors. Ghosh's study estimated that Nepali children constitute 20 per cent (40,000) of the approximately 2,00,000 Nepalese commercial sexual workers in India. Young girls are trafficked from economically depressed neighbourhoods in Nepal and Bangladesh to the major prostitution centres in Delhi, Mumbai and Calcutta. Social workers have reported encountering children as young as nine in Kamathipura, a red light area in Mumbai."

36. The promise of marriage, employment is often used for luring young children into sexual trade. The report also talks about the trafficking of children in urban brothels and the regional variations. The report describes how trafficking is undertaken.

37. Trafficking in women and children has become an increasingly lucrative business especially since the risk of being prosecuted is vey low. Women and children do not usually come to the brothels on their own will, but are brought through highly systematic, organized and illegal trafficking networks run by experienced individuals who buy, transport and sell children into prostitution. Traffickers tend to work in groups and children being trafficked often change hands to ensure that neither the trafficker nor the child gets caught during transit. Different groups of traffickers include gang members, police, pimps and even politicians, all working as a nexus. Trafficking networks are well organized and have linkages both within the country

and in the neighbouring countries. Most traffickers are men. The role of women in this business is restricted to recruitment at the brothels.

38. The typical profile of a trafficker is a man in his twenties or thirties or a woman in her thirties or forties who have travelled the route to the city several times and know the hotels to stay in and the brokers to contact. They frequently work in groups of two or more. Male and female traffickers are sometimes referred to as dalals and dalalis (commission agents) respectively and are either employed by a brothel owner directly or operate independently. Often collusion of family members forms an integral part of trafficking with uncles, cousins and stepfathers acting as trafficking agents. In March, 1994 Human Rights Watch Asia interviewed several trafficked victims of whom six were trafficked into India from Nepal with the help of close family friends or relatives. In each case, the victim complained of deception.

39. The Suppression of Immoral Trafficking Act was enacted after the Geneva Convention on Immoral Trafficking of Women and Children was signed by India in 1956. In order to have data on the success of rehabilitation strategies, delivery points in rehabilitation strategy would have to be strengthened as would be seen in the later parts of this report. It is submitted that a trafficker never blows the gaff. It is done in silence and quiet. It becomes necessary to involve police authorities by means of acute sensitization to a realm of illegality. Therefore, there has to be a special initiative taken by police with reference to children.

40. The Central Government has evolved the national plan of action to combat trafficking and commercial sexual exploitation of women and children in 1998.

41. It is submitted that there has now been a very careful realization that the plan for rescue and rehabilitation must be through a conceptual map. The said map gives a very good

indication of the initiatives and possibly its positive and negative outcomes.

42. Learned Solicitor General submitted that a trafficked child can be brought before the Magistrate under two circumstances:

a) when the raid/search or removal takes place by a police action under section 15 of the ITPA or when the Magistrate herself/himself passes rescue orders;

b) the trafficked child can also be brought before the Magistrate as an accused under section 8A and 8B of the ITPA.

The following directions are necessary:-

a. Every Magistrate before whom a child is brought must be conscious of the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000;

b. He must find out whether the child is below the age of 18 years;

c. If it is so, he cannot be accused of an offence under section 7 or 8 of ITPA;

d. The child will then have to be protected under Juvenile Justice Authority;

e. The Magistrate has a responsibility to ascertain and confirm that the person produced before her or him is a child by accurate medical examination;

f. The definition of a child in section 2K means a juvenile or a child as a person who has not completed 18 years of age;

g. Once the age test is passed under section 17(2) establishes that the child is a child/minor less than 18 years of age, the Magistrate/Sessions Judge while framing charges must also take into account whether any offences have been committed under sections 342, 366, 366A, 366B, 367, 368, 370, 371, 372, 373, 375 and if so, he or she must also frame charges additionally;

h. The child should be considered as a child in the protection of the Child Welfare Act.

i. The child should be handed over to the Child Welfare Committee to take care of the child. The performance of the Child Welfare Committees must be reviewed by the High Court with a committee of not less than three Hon'ble Judges and two psychiatrists;

j. A child must not be charged with any offence under the ITPA or IPC;

k. A minor trafficked victim must be classified as a child in need of care and protection. Further, the Magistrate must also order for intermediate custody of minor under section 17(3) of the ITPA, 1956;

l. There should not be any joint proceedings of a juvenile and a person who is not a juvenile on account of section 18 of the Juvenile Justice (Care and Protection) Act, 2002;

m. It is necessary that Courts must be directed that the same lawyer must not represent the trafficker as well as the trafficked minor;

n. Evidence of child should be taken in camera. Courts must protect the dignity of children. The children's best interest should be the priority.

43. Learned Solicitor General submitted that Child Welfare Committees are empowered committees under section 31(1) of the Juvenile Justice Act. However, the standards employed by the Child Welfare Committees are not the same across the country. In order to set up uniform standards, the direction relating to review of Child Welfare Committees must be re-examined. All Superintendents of Jail must report upon a review within 15 days from today whether any person who is a child is in custody of the jail, if so, the said person must be produced immediately before the Magistrate empowered to try offences under the Juvenile Justice (Care and protection) Act, 2000. The said Magistrate must set out a report in relation to the circumstances under which such a child has been lodged in jail to the Chief Justice of the concerned High Court. Thereafter the High Court may forward a report to this Court for passing of appropriate orders in relation to the welfare of the child.

44. Learned Solicitor General submitted that the power of rehabilitation is necessary. The said power has been conferred under section 33(3) of the Juvenile Justice (Care and Protection) Act, 2000. The said provision provides that:-

> "….. After the completion of the enquiry if the Committee is of the opinion that the said child has no family or ostensible support, it may allow the child to remain in the children's home or shelter home till suitable rehabilitation is found for him or till he attains the age of 18 years….".

45. It is further submitted that rehabilitation will be the measure of success of the Juvenile Justice (Care and Protection) Act, 2000. Reintegration into society by means of confident and assertive occupations leading to a sense of self-worth will have to be devised. This requires innovative strategies and not any high flown claims to social development.

46. The Juvenile Welfare Board will have no competence to deal with cases of children who are in prostitution or have

been trafficked. Such children are to be considered as children in need of care and protection. However, in states where the Child Welfare committees have not been constituted, these matters should be referred to the Juvenile Welfare Board. It is submitted that the book on Trafficking in Women and Children in India edited by Shanker Sen along with P.M. Nair, IPS is a useful document. In a report called "Abolition of Child Labour in India" submitted by the NCPCR to the planning commission, certain useful perspectives are to be found.

47. It is submitted that India is home to 19% of world's children. More than one-third of the country's population around 440 million is below 18 years. India's children are India's future. They are the harbingers of growth, potential fulfillment, change, dynamism, innovation, creativity. It is necessary that for a healthy future, we must protect, educate and develop the child population so that their citizenry is productive. Resources must be invested in children proportionate to their huge population.

48. As far as the total expenditure on children in 2005-2006 is concerned, it was 3.86% and in 2006-2007 it was increased to 4.91%. It is highly inadequate looking to the population of children.

49. In a report submitted by the Ministry of Women and Child Development, 40% of India's children have been declared to be vulnerable or experiencing difficult circumstances. They are entitled to special protection under Articles 14, 15, 16, 17, 21, 23 and 24 of the Constitution. The concerns of child and the paradigm of child rights have been addressed suitably in various international conventions and standards on child protection including the UN Convention on the Rights of the Child (UNCRC), 1989, the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), 1985, the UN Rules for the Protection of Juveniles Deprived of their Liberty, 1990, the Hague Convention on Inter Country Adoption, 1993. India has ratified the UN Convention on the Rights of the Child in 1992. The Convention inter alia prescribes standards

to be adhered by all state parties in securing the best interest of the child.

50. Learned Solicitor General submitted that the millennium development goals cannot be secured unless child protection is an integral part of programmes, strategies and plans for their achievement. The newly constituted Ministry of Women and Child Development has rightly remarked that child protection is an essential part of the country's strategy to place 'Development of the child at the Centre of the 11th Plan'. The National Plan of Action for Children articulates a rights agenda for the development of children.

51. Learned Solicitor General further submitted that the existing child protection mechanisms have to be first noticed. The delivery points however need to be strengthened. To review the delivery of these programmes, there must be nodal agencies. Points of responsibility have to be identified and strengthened. The programme for juvenile justice is to enable children in need of care and protection and those in conflict with law to be secured. The central governments provide financial assistance to the state governments/UT administrations for establishment and maintenance of various homes, salary of staff, food, and clothing for children in need of care and protection of juveniles in conflict with law. Financial assistance is based on proposals submitted by States on a 50:50 cost sharing basis.

52. It is submitted by the learned Solicitor General that in order to give effect to the programme for juvenile justice, it is necessary that nodal points have to be identified. The child welfare committee is one such body, but it is necessary that the working of the child welfare committee must be overseen by either the Executive Chairman of the Legal Services Authority or by the High Court itself. It is also necessary that the financial assistance being provided for children in need and care must result in tangible results to the children whose future is sought to be rehabilitated. For that purpose, it is appropriate

that a Court monitored mechanism is established. For every juvenile home, a District Judge or a Judge nominated by the Chief Justice of the High Court should be a visitor. There must be periodic internal reports which are given to the High Court and just as in case of prisons, juvenile homes must be monitored by courts and their living conditions must also be carefully examined.

53. It is also submitted by the learned Solicitor General that the point of responsibility for overseeing the conditions in the juvenile home must also be shared by the District Magistrate of each district. It is necessary that there should be dual reporting – one to the Judicial Section of the High Court; and the other to the District Magistracy and onwards to the State Government. Each State Government must open a Juvenile Justice Cell which will receive periodic reports of juvenile homes, the number of children, the status of children, the manner of rehabilitation and the current status. The State Government must also ensure that therapeutic help as well as psychiatric assistance wherever necessary is offered to the juveniles on a top priority basis. District Collectors must submit their reports to the Secretary of the Department concerned who in turn must report to the Chief Secretary. The Chief Secretary must be constructively responsible for the administration of the programme for juvenile justice and also must supervise the monetary spending and the manner in which the money spent has been duly accounted. Thus a certification programme for spending monies based on central schemes must be introduced. This certification must be by an independent authority that will ensure that the monies allocated have in fact been spent for the benefit and welfare of the children. If the home is situated within a panchayat area, then the chairman of the panchayat or the zila parishad must be also made responsible for certifying that all the monies which were intended for the home in terms of grants or subventions have been duly utilised.

54. It is further submitted by the learned Solicitor General

that the Integrated Child Protection Programme for Street Children is also a scheme by which NGOs are supposed to run 24 hour shelters and to provide food, clothing, shelter, non-formal education, recreation, counseling, guidance and referral services for children. Considering the vulnerability of the children, all NGOs must be directed to be registered with the concerned Collector. There must be a database of every NGO including details of all the functionaries of the NGO with full particulars including their addresses. In order to enable the enrolment in schools of street children, vocational training, occupational placement and to mobilize preventive health services including reduction of drug and substance abuse, a nodal point is necessary. The nodal point must be either a Sub Divisional Magistrate/Executive Magistrate whose work will be countersigned by a subordinate Judge appointed by the District Judge of the District. Similarly, database must be maintained in relation to the children, their parentage, present status and the present condition of their educational qualifications and whether they are capable of vocational training. It is important that occupational therapists must be able to assess on the basis of modern IQ and aptitude tests about the way in which such children can be taken forward to mainstream living by offering vocational guidance. Offering children under difficult circumstances, relevant support is an obligation and should not be a matter of charity fortuitousness in terms of magnanimous dispensation.

55. Learned Solicitor General also gave suggestions as under:

Child-line services are provided for children in distress: These should be catalogued and there should be a central registry which will provide information about the status of the child-line services at the local level. It should be the District Magistrate who must be responsible for the effect running of the child-line service. All District Magistrates in the country must post on the website their child-line service number

and must give effective publicity to the services available and invite members of civil society to report any child in distress at numbers.

Shishu Griha to promote in-country adoption: Details of the working of the said scheme need to be collected and a database must be maintained in respect of orphans/ abandoned / destitute infants or children upto 6 years. The adoptive parents must be obliged to give reports to the District Judge who will in turn examine whether the adoptive parents have taken care of the child failing which adequate court-monitored measures may be necessary.

Schemes for working children in need of care and protection: This scheme is very important. Children who are engaged as domestic labour, working at roadside dhabas and mechanic shops have to be rescued and a bridge education has to be provided including vocational training. This must be undertaken again by identifiable points of responsibility. It is necessary that an Executive Magistrate must be allocated a certain area to be covered where children are rescued. This should be undertaken by a District Magistrate dividing his district in suitable divisions where such Executive Magistrates can rescue working children. They need to be rehabilitated. It is important that rescue will be effective only when there is scope for rehabilitation. It should not happen that in the name of rehabilitation children are put in detention homes or remand homes. That would be an act of cruelty.

56. Learned Solicitor General further gave suggestions including Pilot Project to combat the trafficking of women and children for commercial sexual exploitation as under:

Pilot Project to combat the trafficking of women and children for commercial sexual exploitation: This is a source and destination area for providing care and protection to trafficked and sexually abused women and children. Components of the scheme include networking with law

enforcement agencies, rescue operation, temporary shelter for the victims, repatriation to hometown and legal services, etc.

Central Adoption Resource Agency (CARA): It is an autonomous body under the Ministry of Women and Child Development to promote in-country adoption and regulate inter-country adoption. CARA also helps both Indian and foreign agencies involved in adoption of Indian children to function within a regulated framework, so that such children are adopted legally through recognised agencies and no exploitation takes place.

National Child Labour Project (NCLP) for rehabilitation of child labourers: Under the Scheme, project societies at the district level are fully funded for opening up of Special Schools/Rehabilitation centers provide non-formal education, vocational training, supplementary nutrition, stipends, etc. to children withdrawn from employment.

The Ministry of Women and Child Development has actually in an outstanding report identified the shortcomings and gaps in existing child protection institutions. The reasons for limitations in effective implementation of programmes have been properly identified. The reasons are as follows:

Lack of Prevention: Policies, programmes and structures to prevent children from falling into difficult circumstances are mostly lacking. This pertains both to policies to strengthen and empower poor and vulnerable families to cope with economic and social hardship and challenges and thus be able to take care of their children, as well as to efforts to raise awareness of all India's people on child rights and child protection situation.

Poor planning and coordination:

i) Poor implementation of existing laws and legislations;

ii) Lack of linkages with essential lateral services for children, for example, education, health, police, judiciary, services for the disabled etc;

iii) No mapping has been done of the children in need of care and protection or of the services available for them at the district, city and state levels;

iv) Lack of coordination and convergence of programmes/services;

v) Weak supervision, monitoring and evaluation of the juvenile justice system.

Services are negligible relative to the needs:

i) Most of the children in need of care and protection, as well as their families do not get any support and services;

ii) Resources for child protection are meagre and their utilization is extremely uneven across India;

iii) Inadequate outreach and funding of existing programmes results in marginal coverage even of children in extremely difficult situations;

iv) Ongoing large scale rural urban migration creates an enormous variety and number of problems related to social dislocation, severe lack of shelter and rampant poverty, most of which are not addressed at all;

v) Lack of services addressing the issues like child marriage, female foeticide, discrimination against the girl child, etc;

vi) Little interventions for children affected by HIV/AIDs, drug abuse, militancy, disasters (both manmade and natural), abused and exploited children and

children of vulnerable groups like commercial sex workers, prisoners, migrant population and other socially vulnerable groups, etc;

vii) Little interventions for children with special needs, particularly mentally challenged children.

Poor infrastructure

i) Structures mandated by legislation are often inadequate;

ii) Lack of institutional infrastructure to deal with child protection;

iii) Inadequate number of CWCs and JJBs.

iv) Existing CWCs and JJBs not provided with requisite facilities for their efficient functioning, resulting in delayed enquiries and disposal of cases.

Inadequate human resources

i) Inappropriate appointments to key child protection services leading to inefficient and non-responsive services;

ii) Lack of training and capacity building of personnel working in the child protection system;

iii) Inadequate sensitization and capacity building of allied systems including police, judiciary, health care professions, etc;

iv) Lack of proactive involvement of the voluntary sectors in child protection service delivery by the State UT Administrations;

v) Large number of vacancies in existing child

protection institutions.

Serious service gaps

i) Improper use of institution in contravention to government guidelines;

ii) Lack of support services to families at risk making children vulnerable;

iii) Overbearing focus on institutional (residential care) with non-institutional (i.e. non-residential) services neglected;

iv) Inter-state and Intra-state transfer of children especially for their restoration to families no provided for in the existing schemes;

v) Lack of standards of care (accommodation, sanitation, leisure, food etc.) in all institutions due to lower funding;

vi) Lack of supervision and commitment to implement and monitor standards of care in institutions;

vii) Most 24-hour shelters do not provide all the basic facilities required, especially availability of shelter, food and mainstream education;

viii) Not all programmes address issues of drug abuse, HIV/AIDS and sexual abuse related vulnerabilities of children;

ix) None of the existing schemes address the needs of child beggars or children used for begging;

x) Minimal use of non-institutional care options like adoption, foster care and sponsorship to children without home and family ties;

xi) No mechanism for child protection at community level or involvement of communities and local bodies in programmes and services;

xii) Serious services and infrastructure gaps leading to few adoptions;

xiii) Cumbersome and time consuming adoption services;

xiv) Lack of rehabilitation services for old children not adopted through regular adoption processes;

xv) Aftercare and rehabilitation programme for children above 18 years are not available in all states, and where they do exist they are run as any other institution under the JJ Act, 2000.

57. It is further submitted by the learned Solicitor General that the above needs to be addressed by interventional orders of this Court in the exercise of its extraordinary jurisdiction under the Constitution. Points of implementation must be identified.

58. Learned Solicitor General further submitted that each State Government must identify an officer who is responsible for implementation of schemes in relation to children. There must be a parallel linkage between a point of contact of the Collectorate/Executive Administration with a point in Legal Aid i.e. the Executive Chairman of the State Legal Services Authority and a point in the NGO Sector/Civil Society. Similarly, points must be identified in each Zila Parishad and Panchayat Samiti and Gram Panchayats. In fact, the Presiding Officers of the gram Nyayalayas may also be encouraged to identify children who are vulnerable and who need protection. The Integrated Child Protection Scheme is presently in place. It seeks to institutionalize essential services and strengthen structures; it seeks to enhance capacities at all levels; it seeks to create database and knowledge base for child protection services; it needs to strengthen child protection at family and

community level. The guiding principles are neatly formulated in this scheme. These must be implemented. The adoption programme will be governed by the following guiding principles:

i. Best interest of the child is paramount;

ii. Institutionalization (e.g. placement into residential care) of the child should be for the shortest possible period of time;

iii. All attempts should be made to find a suitable Indian family within the district, state or country;

iv. The child shall be offered for inter-country adoption only after all possibilities for national adoption, or other forms of family based placement alternatives such as placement with relatives (kinship care), sponsorship and foster care arrangements have been exhausted;

v. All institutions should disclose details about children in their care and make sure that those free for adoption are filed and recorded with the State Adoption Resource Agency (SARA) and CARA, with all supporting documentation of authorization of such adoption from CWC;

vi. Inter-state coordination to match the list of Prospective Adoption Parents (PAPs) with that of available children should be done by SARAs;

vii. No birth mother/parent(s) should be forced/coerced to give up their child for monetary or any other consideration;

viii. Adoption process from the beginning to end shall be completed in the shortest possible time;

ix. Monitoring, regulating and promoting the concept

and practice of ethical adoptions in the country should be ensured;

x. Agencies involved in the adoption process should perform their duties in a transparent manner, following rules of good governance and adhering to the professional and ethical code of conduct. Those agencies shall be reporting to and will be subject to rigorous auditing and supervision by responsible State bodies.

59. The most outstanding feature of this scheme which needs to be implemented on a full-time and firm basis is the government civil society partnership. This will involve active involvement of the voluntary sector, research and training institutions, law college students, advocacy groups and the corporate sector. It should be the duty of the Health Secretary of each state government including under the chairmanship of the Health Secretary, Government of India to have a blueprint for implementing the Government – Civil Society initiative. It is necessary that there must be a 6-monthly strategy plan which must be prepared by the state government and also by the central government in this regard.

60. The ICPS programmes are now brought under one umbrella and are as follows:

a) Care, support and rehabilitation services through child-line;

b) Open shelters for children in need in urban/semi-urban areas;

c) Family based non-institutional care through sponsorship, foster care, adoption and aftercare.

61. It is necessary that poor families must be discouraged from placing their children into institutional care as a poverty coping measure. Institutionalized children have to be re-

integrated into families. The following portion of the sponsorship scheme is relevant:-

"3.1 It is submitted that this can be monitored by a representative of the Comptroller and Auditor General/ Accountant General of each State as well as the Health Secretary incharge of Child Development in each State."

62. The scheme shall provide support for foster care through the Sponsorship and Foster Care Fund available with the District Child Protection Society. The Child Welfare Committee either by itself or with the help of SAA, shall identify suitable cases and order placement of the child in foster-care. Once the Child Welfare Committee orders the placement of the child in foster care, a copy of the order shall be marked to the DCPS for release of funds and to SAA for follow up and monitoring. The SAA shall periodically report about the progress of the child of the Child Welfare committee and DCPS.

63. In view of the directions suggested, the Child Welfare Committee must directly come under the supervision of the District Judge/Judge of the High Court, it is submitted that the above implementation must also be overseen by a Court-monitored mechanism.

64. There must be an annual report by CARA. The said report must be scrutinized by a Secretary incharge of family and social welfare. On 9th September, 2009, an office memorandum was issued by the Ministry of Home Affairs.

65. The provisions of the Right of Children to Free and Compulsory Education Act, 2009 are material. By virtue of Section 3 of the Act, every child of the age of 6-14 years shall have a right to free and compulsory education in a neighbourhood school till completion of elementary education. The Central Government has notified the Act in the Gazette on 27th August, 2009 and the Act has been brought into force with

effect from 1st April, 2010. It may also be noted that Chapter 6 of the Act has special provisions for protection of the right of children. The National Commission for Protection of Child Rights has already been constituted. The said Commission now receives a statutory status by virtue of this Act. In view of the performance of the present National Commission for Protection of Child Rights, which has taken pioneering efforts, it is expected that on a close interface between the National Commission for Protection of Child Rights, the State Governments and the Ministry of Women and Child Development, positive outcomes should actually be worked out.

66. It is, therefore, necessary that a coordinated effort must be made by the three agencies, namely, the Commission, the Ministry and the State Governments. Learned Solicitor General submitted that the recommendations be implemented by the concerned agencies. In the State/Union Territory, the responsibility must be vast either on the Chief Secretary or a Secretary Incharge of Children, Women and Family Welfare. It would be open to the State Government in appropriate cases to nominate a special officer for the said purpose not lower than the rank of a Secretary to the State Government. Each State must issue a circular effectively indicating how the recommendations will be implemented. We accept the submissions of the learned Solicitor General and direct that the said circular shall be issued within 4 weeks from today and a compliance report be filed by the Chief Secretary of each State to this Court.

67. From the above comprehensive submissions made by the learned Solicitor General it is abundantly clear that the Government of India is fully aware about the problems of children working in various places particularly in circuses. It may be pertinent to mention that the right of children to free and compulsory education has been made a fundamental right under Article 21A of the Constitution Now every child of the age of 6 to 14 years has right to have free education in neighbourhood school till elementary education.

68. We have carefully mentioned comprehensive submissions and suggestions given by the learned Solicitor General and others. We plan to deal with the problem of children's exploitation systematically. In this order we are limiting our directions regarding children working in the Indian Circuses. Consequently, we direct:

(i) In order to implement the fundamental right of the children under Article 21A it is imperative that the Central Government must issue suitable notifications prohibiting the employment of children in circuses within two months from today.

(ii) The respondents are directed to conduct simultaneous raids in all the circuses to liberate the children and check the violation of fundamental rights of the children. The rescued children be kept in the Care and Protective Homes till they attain the age of 18 years.

(iii) The respondents are also directed to talk to the parents of the children and in case they are willing to take their children back to their homes, they may be directed to do so after proper verification.

(iv) The respondents are directed to frame proper scheme of rehabilitation of rescued children from circuses.

(v) We direct the Secretary of Ministry of Human Resources Development, Department of Women and Child Development to file a comprehensive affidavit of compliance within ten weeks.

69. This petition is directed to be listed for further directions on 19th July, 2011.

R.P. Matter adjourned.

UNION OF INDIA & ORS.

v.

TANTIA CONSTRUCTION PVT. LTD.

(Special Leave Petition (C) No.18914 of 2010)

APRIL 18, 2011

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

CONTRACT :

Tender – Risk and Cost Tender – Construction of Rail Over-Bridge – Tender of respondent-company accepted and agreement entered into between the parties – Changes in design thereafter whereby Viaduct had to be extended involving additional cost – Respondent-company declining to take up the construction work of extended Viaduct which was not covered in agreement and for which a separate tender was floated – Railways directing the Company to carry out the complete work including the additional work – Held: The work relating to construction of Rail Over-bridge after the revised design consisted of two parts, one which the respondent-company was executing and the other to be executed by a different contractor – Respondent-company has satisfactorily explained its position regarding its offer being confined only to the balance work of the original tender and not to the extended work – To proceed on the basis that the respondent-company was willing to undertake the entire work at the old rates was an error of judgment and the termination of the contract in relation to original Tender on the basis of said supposition was unjustified and was rightly set aside by the Single Judge of the High Court, which order was affirmed by the Division Bench.

CONSTITUTION OF INDIA, 1950:

Articles 226 and 32 – Writ petition – Maintainability of in

view of the plea of alternative remedy –Held : An alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court – Constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy – Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution – The Court endorses the view of the High Court that notwithstanding the provisions relating to the Arbitration Clause contained in the agreement, it was fully within its competence to entertain and dispose of the writ petition filed on behalf of the respondent-company – Contract – Alternative remedy.

The East Central Railways, on 12-12-2006, invited tenders by Risk and Cost Tender No. 76 of 06-07 for the work of construction of a Rail Over-Bridge. The tender of the respondent-company was accepted at a cost of Rs. 19,11,02,221.84p. and an agreement dated 30-4-2007 was entered into between the parties in respect of the contract work. On account of some of the procedural work, including the change of the span of the bridge, change in the design of the peir cap, the requirement of shifting obstacles and also due to heavy rains, the construction of wall was delayed. The delay in preparation of the designs and drawings which involved the work of a specialized agency also contributed to the delay. On account of changes in the design whereby the Viaduct had to be extended involving an additional cost of Rs. 36.11 crores, petitioner No. 6 requested the respondent-company to convey its consent for execution of the complete work including the revised work. By letter dated 13.2.2008, the respondent- company apprised petitioner No. 6 of its inablility to take up the construction work of the extended Viaduct which was not covered in the Agreement dated 30.4.2007. Thereupon, the Railways floated a separate Tender No. 189 of 2008 for the

additional work of extended portion of the Viaduct for the Road Over-Bridge. The approximate cost earmarked for the said work was raised from Rs. 24.50 crores to Rs.26,35,96,878.63p. Two tenderes from two different companies for Rs. 34,11,16,279.39p. and Rs. 35,89,93,215.66p. were submitted. While the tender process for the extended contract on the Viaduct was going on, the respondent-company wrote to petitioner No. 6 on 12.4.2008, agreeing to execute the varied contract at the same rate, terms and conditions of the contract agreement, but on condition that the price increase due to Price Variation Clause, would be payable to the company. The petitioners by their letter dated 15.6.2008 called upon the respondent-company to execute the varied quantity of work. The respondent-company by its letter dated 1.7.2008 informed the petitioner that they had given their consent to execute only the reduced quantity of work, the cost of which worked out to Rs. 12,3749,888/-. However, the Railways by its letter dated 18.8.2008 asked the respondent-company to carry out the complete work, including the additional work of the Viaduct, at an approximate cost of Rs. 36.11 crores. The respondent-company filed a writ petition before the High Court challenging the directions of the Railway authorities for completion of the entire work including the extended work. The Single Judge of the High Court held that the respondent-company had completed the earlier work and the entire work could not be thrust upon it, and the Railways was free to get the Viaduct constructed separately by another contractor. The Single Judge allowed the writ petition and directed the Railway Authorities to expeditiously clear the payments of the respondent-company in respect of the work already completed by it. The Division Bench of the High Court declined to interfere in the Letters Patent Appeal. Aggrieved , the Railway authorities filed the special leave petition.

Dismissing the petition, the Court

HELD: 1.1 The facts disclosed reveal that on the basis of the tender floated by the petitioners for construction of a Rail Over-Bridge, the respondent-company had been awarded the contract at an approximate cost of Rs.15.42 crores and it was stipulated that the contract was to be completed within 15 months from the date of issuance of the letter of acceptance. Admittedly, on the contract being awarded to the respondent-company, the letter of acceptance was issued on 12th/13th February, 2007, and an agreement was thereafter entered into between the East Central Railways and the respondent-company in respect of the contract work. Admittedly, on account of the procedural delays, the work could not be completed within the stipulated period of 15 months from the date of issuance of the letter of acceptance. The procedural delay was mainly on account of the fact that the work on the approach road could commence only after the design, which was to be initially prepared by the respondent-company, was approved by the Railways. The respondent-company appointed the Central Road Research Institute, Delhi, as its consultant for designing the plan for execution. During the above process, it was found that each earth filled approach road could not be raised above 7 meters and, as a result, the remaining 8 meters was to be made of complete cement casting known as a Viaduct. The Railways got the matter examined by its own associate, RITES, and, thereafter, approved the plan. The consequence of the said change was that the Tender which was of Rs.19 crores stood increased to Rs.36 crores on account of the additional work which was to be undertaken as a result of the modified design. In fact, the Railways themselves decided to float a fresh Tender for the additional work at an estimated cost of Rs. 24.50 crores separately. [para 22] [412-E-H; 413-A-D]

1.2 As a result, the work relating to construction of the Rail Over-Bridge now consisted of two parts, one of which the respondent-company was executing and the other to be executed by a different contractor. However, as there was hardly any response to the tender floated, and seeing that the quantum of work under Tender No.76 of 06-07 stood reduced, the respondent-company wrote to the petitioners on 12-4-2008, agreeing to undertake the varied work at the same rate and on the same terms and conditions, subject to the Price Variation Clause but on the basis of the said letter dated 12-4-2008, the petitioners directed the respondent-company to continue with the unfinished portion of the plan. [para 22] [413-C-F]

1.3 The letter dated 12-4-2008, did not cover the extended work on account of the alteration of the design and was confined to the work originally contracted for. The Court cannot lose sight of the fact that while the initial cost of the tender was accepted for Rs. 19,11,01,221.84p., the costs for the extended work only was assessed at Rs.24.50 crores and that two offers were received, which were for Rs. 34,11,16,279.39p. and Rs.35,89,93,215.66 p. respectively. This was only with regard to the extended portion of the work on account of change in design. The respondent-company was expected to complete the entire work which comprised both the works covered under the initial tender and the extended work covered by the second tender. The respondent had all along expressed its unwillingness to take up the extended work and for whatever reason, it agreed to complete the balance work of the initial contract at the same rates as quoted earlier, despite the fact that a long time had elapsed between the awarding of the contract and the actual execution thereof. [para 24] [414-B-D]

1.4 The respondent-company has satisfactorily

explained their position regarding their offer being confined only to the balance work of the original tender and not to the extended work. The delay occasioned in starting the work was not on account of any fault or lapses on the part of the respondent-company, but on account of the fact that the project design of the work to be undertaken could not be completed and, ultimately, involved change in the design itself. The respondent-company appears to have agreed to complete the varied work of tender No.76 of 06-07 which variation had been occasioned on account of the change in the design as against the entire work covering both the first and second tenders. To proceed on the basis that the respondent-company was willing to undertake the entire work at the old rates was an error of judgment and the termination of the contract in relation to original Tender No.76 of 06-07 on the basis of said supposition was unjustified and was rightly set aside by the Single Judge of the High Court, which order was affirmed by the Division Bench. [para 25] [414-F-H; 415-A]

2. As regards maintainability of the writ petition on account of the Arbitration Clause in the agreement between the parties, it is now well-established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable. The various decisions of this Court would clearly indicate that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution. This Court endorses the view of the High Court that notwithstanding the provisions relating to the

Arbitration Clause contained in the agreement, it was fully within its competence to entertain and dispose of the writ petition filed on behalf of the respondent -company. [para 27] [415-D-F]

3. There is no reason to interfere with the views expressed by the High Court on the maintainability of the writ petition and also on its merits. [para 28] [415-G]

Harbanslal Sahnia vs. Indian Oil Corporation Ltd. **(2003) 2 SCC 107;** *Modern Steel Industries vs. State of U.P. and others* **(2001) 10 SCC 491;** *Whirlpool Corporation vs. Registrar of Trade Marks* **(1998) 8 SCC 1;** *National Sample Survey Organisation and Another vs. Champa Properties Limited and Another* **(2009) 14 SCC 451 and** *Hindustan Petroleum Corporation Limited and Others vs. Super Highway Services and Another* **(2010) 3 SCC 321 - relied on.**

Case Law Reference:

(2003) 2 SCC 107	**relied on**	**para 19**
(2001) 10 SCC 491	**relied on**	**para 19**
(1998) 8 SCC 1	**relied on**	**para 20**
(2009) 14 SCC 451	**relied on**	**Para 20**
(2010) 3 SCC 321	**relied on**	**para 20**

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 18914 of 2010.

From the Judgment and Order dated 29.07.2009 of the High Court of Patna in LPA No. 603 of 2009.

Indira Jaisingh, ASG, R.K. Rathore, Sonam Anand, Supriya Jain and Arvind Kumar Sharma for the Appellants.

Soumya Chakrobarty, Sanjay Baid and Dharma Bir Raj Vohra for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. The sole Respondent, M/s. Tantia Construction Pvt. Ltd., filed writ petition, being CWJC No.14055 of 2008, against the Petitioners herein, inter alia, for the issuance of a writ in the nature of Certiorari for quashing the order dated 18th August, 2008, passed by the Deputy Chief Engineer (Construction), Ganga Rail Bridge, East Central Railway, Dighaghat, Patna, calling upon the Respondent Company to execute the enlarged/extended quantity of the contract work pursuant to Tender No.76 of 06-07. Further relief has been prayed for by the Respondent Company for a writ in the nature of Mandamus directing the Petitioners herein to let it complete the reduced quantity of work relating to the construction of the Rail Over-Bridge at Bailey Road, which did not include the additional work in respect of the extended portion of the Viaduct and to close the contract and, thereafter, to make payment for the contract work which it had executed pursuant to the aforesaid Tender.

2. During the hearing of the writ petition several issues were identified regarding the Petitioners' right to force the Company to execute the additional work of constructing the Viaduct which was neither within the scope of the work nor within the schedule of work comprised in Tender No.76 of 06-07. A connected issue was also identified as to whether in a Risk and Cost Tender, the nature of work provided for in the Tender could be altered and whether such action would be in violation of Articles 14 and 19(1)(g) of the Constitution of India, besides being against the principles of natural justice and contrary to the clauses in the General Conditions of Contract included in the Tender document.

3. It appears that on 12th December, 2006, the East Central Railways (ECR) invited Risk and Cost Tender No.76 of 06-07 for the work of construction of a Rail Over-Bridge at Bailey Road over the proposed Railway Alignment over the

Ganga Bridge at Patna for an approximate cost of 15.42 crores. The Tender documents provided that the contract ˇwork was to be completed within 15 months from the date of issuance of the letter of acceptance. Upon the tenders being opened on 27th December, 2006, the contract was awarded to the Respondent Company and a letter of acceptance was issued to the Respondent Company on 12th/13th February, 2007. The contract work was accepted at a cost of 19,11,02,221.84p. and an agreement was thereafter entered into between the East Central Railways and the Respondent Company in respect of the contract work, whereby a Rail Over-Bridge was to be constructed with two abutments on both sides and three piers in between. The work also included 500 meters of approach road with Reinforced Earth Retaining Walls to a maximum height of 15 meters on both sides of the Rail Over-Bridge.

4. On account of some of the procedural work, including the change of the span of the bridge, change in the design of the pier cap, the requirement of shifting obstacles like a temple, police station, electrical pole, etc. and also due to heavy rains, the construction of the wall was delayed. The delay in preparation of the designs and drawings which involved the work of a specialized agency also contributed to the delay. On account of changes in the design whereby the Viaduct had to be extended involving an additional cost of Rs. 36.11 crores, the Petitioner No.6 requested the Respondent Company to convey its consent for execution of the complete work, including the revised work. By its letter dated 13th February, 2008, the Respondent Company wrote back to the Petitioner No.6 that they did not want to take up the construction of the extended Viaduct which was not covered in the Agreement dated 30th April, 2007. The Respondent Company refused to give their consent for the execution of the complete work at the revised cost of Rs. 36.11 crores. On such refusal the Railways floated a separate Tender No.189 of 2008 for the additional work of the extended portion of the Viaduct for the Road Over-Bridge

at Bailey Road. The approximate cost earmarked for the said work was Rs. 24.50 crores. As there was not much response to the said Tender, the date for submission of the Tender was extended from 9.4.2008 till 23.5.2008 and the assessed cost of work was revised and re-assessed at Rs. 26,35,96,878.63p. Corrigendums were issued from time to time in connection with the said Tender for the additional work and ultimately two firms, namely, Allied Infrastructures and Projects Pvt. Ltd. and Arvind Techno Engineers Pvt. Ltd. quoted the rate for execution of the works as Rs. 34,11,16,279.39p. and Rs. 35,89,93,215.66p. respectively, for the additional work only.

5. While the Tender process for the extended contract on the Viaduct was going on, keeping in view their long relationship, the Respondent Company wrote to the Petitioner No.6 on 12th April, 2008, agreeing to execute the varied contract at the same rate, terms and conditions of the contract agreement, but on condition that the price increase, due to the Price Variation Clause, would be payable to the company. It was also indicated that the Company would have no claim for reduction in quantity by more than 25% in the agreement. 6. In the meantime, the Respondent Company, vide its letter dated 27th April, 2008, submitted the revised work programme for the left-over work. The same was accepted and the time for the execution of the left-over work was extended till 31st December, 2008.

7. In response to the letter written on behalf of the Respondent Company on 12th April, 2008, the Petitioners called upon the Respondent Company by its letter dated 15th June, 2008, to execute the varied quantity of work.

8. In response to the said letter dated 15th June, 2008, the Respondent Company wrote back to the Railways on 1st July, 2008, stating that they had given their consent to execute only the reduced quantity of work, the cost of which worked out to Rs. 12,37,49,888/-. However, the Railways once again asked

the Respondent Company by its letter dated 18th August, 2008, to carry out the complete work, including the additional work of the Viaduct, at an approximate cost of Rs. 36.11 crores.

9. Aggrieved by the stand taken by the Railways, the Respondent Company filed a Writ Petition, being CWJC No.14055 of 2008, before the Patna High Court, challenging the directions given by the Railway Authorities for completion of the entire work, including the extended work. It was the contention of the Respondent Company that having failed to get any suitable response to the fresh Tender floated in respect of the additional work, it was not open to the Petitioners to compel it to complete the same at an arbitrarily low price, particularly when the additional work was not part of the original Tender.

10. The learned Single Judge accepted the case made out by the Respondent Company, holding that there was no breach of the agreement entered into between the Petitioners and the Respondent Company, since it was the Petitioners themselves who had altered the agreement by separately tendering the extended work. The learned Single Judge observed that consequently the entire work could not be thrust upon the Respondent Company and the Railways was free to get the Viaduct constructed separately by any other contractor, as it had contemplated earlier. The learned Single Judge further observed that since the Respondent Company was ready to do the balance work from the left-over tender, the rescinding of the entire work by the Railways and to re-tender the entire block could not certainly be at the risk and cost of the Respondent Company. The learned Single Judge also observed that the Respondent Company could not be saddled with the cost of work which it had never undertaken to execute.

11. On such findings, the Writ Petition was allowed and the Railways was advised to expeditiously clear the payments of the Respondent Company in respect of the work already completed by it.

12. The matter was taken in appeal to the Division Bench by the Petitioners herein in LPA No.603 of 2009. The Division Bench by its judgment and order dated 29th July, 2009, upheld the judgment of the learned Single Judge and dismissed the Appeal. It is against the said order of the Division Bench dismissing the appeal filed by the Petitioners that the present Special Leave Petition has been filed.

13. The same submissions, as had been advanced before the High Court, were also advanced before us by the learned Additional Solicitor General, Ms. Indira Jaising. She urged that the contract of the Respondent Company had been rightly terminated in accordance with clause 62 of the General Conditions of Contract upon the Respondent's refusal to comply with the forty eight hours' notice served on it. The learned ASG submitted that since under the terms of the Agreement entered into between the parties, the Petitioners were entitled to vary or alter the nature of the work for which the contract was given, the Respondent Company was under a contractual obligation to complete the work, including the varied work under the contract.

14. The learned ASG submitted that the Petitioners had no intention of compelling the Respondent Company from completing the work. On the other hand, it was the Respondent Company's obligation to complete the work under the contract. It was the Respondent Company which had, by its letter dated 12th April, 2008, agreed to do the varied work at the same rate, terms and conditions, subject to the applicability of the Price Variation Clause. It was only thereafter that by his letter dated 15th June, 2008, the Petitioner No.6 asked the Respondent Company to execute the varied quantities of work on the Rail Over-Bridge at the same rate and on the same terms and conditions. It was upon the Respondent Company's failure to do so that notice was given to it under clause 62 of the General Conditions of Contract on 10th October, 2008, indicating that after the expiry of the notice, the contract would stand rescinded

and the work under the contract would be carried out at the risk and cost and consequences of the Respondent Company. The said notice was followed by a letter dated 17th October, 2008 sent to the Respondent Company by the Petitioners rescinding the contract and informing ˇthe company that the work under the contract would be carried out at the company's risk and cost.

15. It was also submitted that the agreement between the parties provided for arbitration in respect of all disputes and differences of any kind arising out of or in connection with the contract whether during the progress of work or after its completion and whether before or after the termination of the contract. It was urged that in view of the said arbitration clause, the Writ Court was not competent to decide the issue involved in the dispute which had been raised by the Respondent Company.

16. It was lastly contended that the scope of the work did not change, despite the variation of the design and planning. It was submitted that it was only a case where the quantity of the work was decreased in one sense, but increased in another, and the costs involved on account of such variation was worked out and a fresh figure was computed which the Respondent Company was bound to accept under the terms of the contract. It was submitted that the same would be evident from Clause 23.2 relating to the quotation of rates whereby the Railway Administration reserved the right to modify any or all the schedules, either to increase or to decrease the scope of the work. It was submitted that the termination of the contract on account of violation of the terms thereof could not be quashed by the Writ Court to resurrect the contract which had already been terminated and the only recourse available to the Respondent Company was to have the matter decided in arbitration

17. Appearing for the Respondent-Company, Mr. Soumya Chakraborty, e learned Advocate, submitted that from the facts as revealed during the hearing of the Writ Petition and the

Letters Patent Appeal, it would be apparent that the initial contract signed between the parties on 27.12.2006 was ultimately abandoned. Mr. Chakraborty submitted that on account of an alteration in the design of the Rail Over-Bridge, which included a completely new work project, a fresh Tender had to be floated since the new work could not be treated to be part of the initial contract. Having regard to the estimated cost of the variation involved, the Petitioners did not receive adequate response to the said Tender. On the other hand, two Tenderers submitted their offers at a much higher rate than was fixed as the estimated cost of the work which had been added to the existing work on account of the alteration in the design of the Rail Over-Bridge. Noting the problem that the Petitioners were faced with, with regard to the completion of the Rail Over-Bridge, the Respondent Company, keeping in mind its long association with the Railways, offered to complete the varied work at the same rates and conditions of contract, subject to the applicability of the Price Variation Clause. Mr. Chakraborty submitted that by its letter dated 12th April, 2008, the Respondent Company had referred to the variation of the work by the agreement entered into between the Railways and the Respondent Company on account of the alteration of the original design. Mr. Chakraborty submitted that it had never been the Respondent Company's intention to execute the entire work, including the variation on account of the alteration of the design, at the same rates and the terms and conditions and that such offer was confined only in respect of the balance work left over from the contract executed on 27th December, 2006. Mr. Chakraborty submitted that the same would be evident from the fact that in the letter of 12th April, 2008, it had also been indicated that the Respondent Company would have no claim for reduction in quantity by more than 25% in the agreement. Mr. Chakraborty submitted that the Petitioners had clearly misunderstood the scope and intent of the letter dated 12th April, 2008, written on behalf of the Respondent Company and had interpreted the same to mean that its offer also covered

the extended work on account of the change in the design of the Rail Over-Bridge.

18. It was also contended that since the Petitioners had illegally terminated the contract with the Respondent Company, the Writ Court had stepped in to correct such injustice. In fact, Mr. Chakraborty also submitted that the objection taken on behalf of the Petitioners that the relief of the Respondent Company lay in arbitration proceedings and not by way of a Writ Petition was devoid of substance on account of the various decisions of this Court holding that an alternate remedy did not place any fetters on the powers of the High Court under Article 226 of the Constitution.

19. In support of his aforesaid submissions Mr. Chakraborty firstly relied and referred to the decision of this Court in *Harbanslal Sahnia vs. Indian Oil Corporation Ltd.* [(2003) 2 SCC 107], wherein this Court observed that the Rule of exclusion of writ jurisdiction by availability of an alternative remedy, was a rule of discretion and not one of compulsion and there could be contingencies in which the High Court exercised its jurisdiction inspite of availability of an alternative remedy. Mr. Chakraborty also referred to and relied on the decision of this Court in *Modern Steel Industries vs. State of U.P. and others* [(2001) 10 SCC 491], wherein on the same point this Court had held that the High Court ought not to have dismissed the writ petition requiring the Appellant therein to take recourse to arbitration proceedings, particularly when the vires of a statutory provision was not in issue.

20. Reference was also made to the decision of this Court in *Whirlpool Corporation vs. Registrar of Trade Marks* [(1998) 8 SCC 1]; *National Sample Survey Organisation and Another vs. Champa Properties Limited and Another* [(2009) 14 SCC 451] and *Hindustan Petroleum Corporation Limited and Others vs. Super Highway Services and Another* [(2010)3 SCC 321], where similar views had been expressed.

21. Mr. Chakraborty submitted that while enacting the Arbitration and Conciliation Act, 1996, the Legislature had intended that arbitration being the choice of a private Judge agreed upon by the parties themselves to settle their disputes, there should be minimum interference by the regular Courts in such proceedings. In this regard, Mr. Chakraborty referred to Section 5 of the aforesaid Act which indicates that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part I, no judicial authority shall intervene except where so provided in the said Part. Mr. Chakraborty urged that upon revival a contract can at best be modulated to any change in circumstances but the termination of the contract with the Respondent Company was not warranted, since the decision to terminate the contract was based on an erroneous interpretation of the contents of the letter dated 12th April, 2008, written on behalf of the Respondent Company and the termination had, therefore, been rightly quashed by the High Court.

22. The facts disclosed reveal that on the basis of the Tender floated by the Petitioners for construction of a Rail Over-Bridge at Bailey Road over the proposed Railway Alignment over the Ganga Bridge, Patna, the Respondent Company had been awarded the contract at an approximate cost of Rs. 15.42 crores and it was stipulated that the contract was to be completed within 15 months from the date of issuance of the letter of acceptance. Admittedly, on the contract being awarded to the Respondent Company, the letter of acceptance was issued on 12th/13th February, 2007, and an agreement was thereafter entered into between the East Central Railways and the Respondent Company in respect of the contract work. Admittedly, on account of the procedural delays, the work could not be completed within the stipulated period of 15 months from the date of issuance of the letter of acceptance. The procedural delay was mainly on account of the fact that the work on the approach road could commence only after the design, which was to be initially prepared by the Respondent Company, was

approved by the Railways. The Respondent Company appointed the Central Road Research Institute, Delhi, as its consultant for designing the plan for execution. During the above process, it was found that each earth filled approach road could not be raised above 7 meters and, as a result, the remaining 8 meters was to be made of complete cement casting known as a Viaduct. The Railways got the matter examined by its own associate, RITES, and, thereafter, approved the plan. The consequence of the said change was that the Tender which was of Rs. 19 crores stood increased to Rs. 36 crores on account of the additional work which was to be undertaken as a result of the modified design. In fact, the Railways themselves decided to float a fresh Tender for the additional work at an estimated cost of Rs. 24.50 crore separately. As a result, the work relating to construction of the Rail Over-Bridge now consisted of two parts, one of which the Respondent Company was executing and the other to be executed by a different contractor. However, as mentioned hereinbefore, there was hardly any response to the Tender floated. Seeing that the quantum of work under Tender No.76 of 06-07 stood reduced, the Respondent Company wrote to the Petitioners on 12th April, 2008, agreeing to undertake the varied work at the same rate and on the same terms and conditions, subject to the Price Variation Clause. The problem appears to have begun at this stage when, on the basis of the said letter dated 12th April, 2008, the Petitioners directed the Respondent Company to continue with the unfinished portion of the plan.

23. Admittedly, the work which had to be completed within 15 months from the date of issuance of the letter of acceptance, could not be completed within the said period and, on the other hand, a new element was introduced into the design of the Rail Over-Bridge. It is the case of the Respondent Company that any item of work directed to be performed could not be covered by the original contract dated 12th/13th February, 2007, and realizing the same, the Railways themselves floated a fresh Tender No.189 of 2008 for the additional work of the extended

portion of the Viaduct.

24. We are of the view that the letter dated 12th April, 2008, did not cover the extended work on account of the alteration of the design and was confined to the work originally contracted for. We cannot lose sight of the fact that while the initial cost of the Tender was accepted for 19,11,01,221.84p., the costs for the extended work only was assessed at Rs. 24.50 crores and that two offers were received, which were for Rs. 34,11,16,279.39p. and Rs. 35,89,93,215.66p. respectively. This was only with regard to the extended portion of the work on account of change in design. The Respondent Company was expected to complete the entire work which comprised both the work covered under the initial Tender and the extended work covered by the second Tender. The Respondent had all along expressed its unwillingness to take up the extended work and for whatever reason, it agreed to complete the balance work of the initial contract at the same rates as quoted earlier, despite the fact that a long time had elapsed between the awarding of the contract and the actual execution thereof.

25. In our view, the Respondent Company has satisfactorily explained their position regarding their offer being confined only to the balance work of the original Tender and not to the extended work. The delay occasioned in starting the work was not on account of any fault or lapses on the part of the Respondent Company, but on account of the fact that the project design of the work to be undertaken could not be completed and ultimately involved change in the design itself. The Respondent Company appears to have agreed to complete the varied work of Tender No.76 of 06-07 which variation had been occasioned on account of the change in the design as against the entire work covering both the first and second Tenders. To proceed on the basis that the Respondent Company was willing to undertake the entire work at the old rates was an error of judgment and the termination of the contract in relation to Tender No.76 of 06-07 on the basis of said supposition was unjustified

and was rightly set aside by the learned Single Judge of the High Court, which order was affirmed by the Division Bench.

26. The submissions made on behalf of the Petitioners that in terms of Clause 23(2) of the Agreement, the Petitioners were entitled to alter and increase/decrease the scope of the work is not attracted to the facts of this case where the entire design of the Rail Over-Bridge was altered, converting the same into a completely new project. It was not merely a case of increase or decrease in the scope of the work of the original work schedule ˇcovered under Tender No.76 of 06-07, but a case of substantial alteration of the plan itself.

27. Apart from the above, even on the question of maintainability of the writ petition on account of the Arbitration Clause included in the agreement between the parties, it is now well-established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable. The various decisions cited by Mr. Chakraborty would clearly indicate that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution. We endorse the view of the High Court that notwithstanding the provisions relating to the Arbitration Clause contained in the agreement, the High Court was fully within its competence to entertain and dispose of the Writ Petition filed on behalf of the Respondent Company.

28. We, therefore, see no reason to interfere with the views expressed by the High Court on the maintainability of the Writ Petition and also on its merits. The Special Leave Petition is, accordingly, dismissed, but without any order as to costs.

R.P. Special Leave Petition dismissed.

BHOLANATH MUKHERJEE & ORS.
v.
R.K. MISSION V. CENTENARY COLLEGE & ORS.
(Civil Appeal No. 2457 of 2006)

APRIL 18, 2011

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

Service law:

Appointment – Appointment of respondent No. 3, a monk as Principal of Missionary College – Challenged by appellants-teachers in the College – On the ground that respondent no.3 was junior to them and did not possess the requisite qualifications – Writ Petition allowed by the Single Judge of the High Court – However, dismissed by the Division Bench of the High Court – On appeal held: Litigation in the instant case does not survive as the appellants have retired – Even if the writ petition is allowed and the appointment of respondent No.3 is declared null and void, none of the appellants could be appointed on the post of Principal – By the retirement of all the appellants the issues raised have been rendered academic – More so, no interim relief was granted by the High Court or Supreme Court restraining respondent No.3 from performing the functions of a Principal – By now respondent No. 3 has acquired the requisite experience for the post of principal – Instant dispute is a pure and simple service dispute – Merely because the writ petitioners are senior most teachers in the same institution, would not necessarily give rise to the presumption, that they had filed the writ petition in public interest – Also, the submission that the writ petition can be treated as a writ in the nature of a quo warranto cannot be accepted – Appellants did not claim a writ of quo warranto either before the Single Judge or before the Division Bench of the High Court – The said

submission was made as a weapon of last resort – Constitution of India, 1950 – Article 226.

Appellants-teachers in respondent No. 1 College, filed a writ petition challenging the appointment of respondent no. 3, a monk at RK Mission as principal of respondent No. 1 College on the ground that he was junior to the appellants and did not possess the requisite qualifications for the post of principal as laid down in the Government Order. The Single Judge of the High Court allowed the writ petition holding that the appointment of the Principal was not made under the provisions of the West Bengal Act of 1975, West Bengal Act of 1978 and the Calcutta University First Statute, 1979. The Governing Body of the College was directed to take steps to fill the post either temporarily or permanently in accordance with laws in force. Aggrieved, respondent No. 1 College filed an appeal before the Division Bench of the High Court and the same was allowed. Therefore, the appellants filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1 There is much substance in the submissions that at this stage, litigation in the instant case does not survive as the appellants have retired. Even if the writ petition is allowed and the appointment of respondent No.3 is declared null and void, none of the appellants could be appointed on the post of Principal. A perusal of the averments made in the writ petition before the High Court would show that the gravamen of the grievances of the writ petitioners/appellants was that they were all senior to respondent No. 3; that he had only six years of teaching experience, while G.O. No. 149-Edn(CP) dated 22nd February, 1994 prescribes a minimum teaching experience of sixteen years with administrative experience; that on the one hand,

respondent No.3 did not possess the necessary experience and was appointed as the Principal, and on the other hand, the applications of the petitioner Nos. 1, 9 and 12 for the post of Principal made through appropriate channel were not at all considered at any stage by the appropriate authority, though they were more qualified and senior to respondent No. 3; that the petitioners are suffering irreparable loss in the form of deprivation from being promoted as a Teacher-in-Charge and compelled to serve under a junior in service and possessing lesser qualifications; that respondent No. 3 is junior to all the petitioners; that 'BK' was the then petitioner No. 1 and the then senior most Teacher who had put in more than three decades of lawful and approved service to the Institution, therefore, he was lawful claimant to the post of Teacher-in-Charge of the college. Therefore, it was a matter of great humiliation and injustice to all the petitioners to be forced to serve under an illegally appointed person, who is junior to all of them. It becomes evident that the grievances of the writ petitioners were that they have been compelled to work under a person, who was junior to them. The petitioners having retired from service, no relief could possibly be granted to them, even if the appointment of respondent No.3 is held to be illegal or void. In such circumstances, it would be an exercise in futility to examine the merits of the controversy raised in the appeal. By the retirement of all the appellants the issues raised have been rendered academic. [Paras 18] [437-E-G; 438-A-H; 439-A-B]

M.L. Binjolkar vs. State of M.P. **(2005) 6 SCC 224;** *State of Manipur and Ors. vs. Chandam Manihar Singh* **(1999) 7 SCC 503;** *Sumedico Corporation and Anr. vs. Regional Provident Fund Commr.* **(1998) 8 SCC 381 – relied on.**

1.2 Throughout the proceedings before the High

Court as well as before this Court, no interim relief was granted by restraining respondent No.3 from performing the functions of a Principal. He has continued to function on the said basis since his appointment on 14th May, 1999 as Acting Principal and then from 23rd March, 2001 onward as Principal. Even according to the appellants, at the time of his appointment, respondent No.3 had possessed the experience of only six years. Therefore, by now, he would have more than fifteen years of required experience for the post of Principal. Therefore, the ground that the respondent No.3 was not qualified as he did not possess the necessary experience would also no longer be available to the appellants. [Para 19] [441-F-H]

Ram Sarup vs. State of Haryana and Ors. **(1979) 1 SCC 168 – relied on.**

1.3 The submission that the appeal would not be rendered infructuous by the mere retirement of the appellants; that all the appellants have been engaged in the field of education throughout their lives and are deeply interested in ensuring that the standards of education are maintained and that the appointment for the post of Principal should be made in accordance with the statutory provisions, therefore, the appellants would have the locus standi to continue the proceedings, cannot be accepted. The entire pleadings in the writ petition are founded on the personal grievance of the writ petitioners/ appellants. The writ petitioners have not come before this Court as educationists. Merely because they are senior most teachers in the same institution, would not necessarily give rise to the presumption, that they had filed the writ petition in public interest. A pure and simple service dispute is sought to be camouflaged as a public interest litigation. Therefore, the said submission cannot

be accepted as it is tantamount to treating the writ petition as a public interest litigation. The entire grievance of the writ petitioners/appellants was personal. They were all aggrieved and humiliated for being compelled to serve under a Principal junior to them in service. Therefore, it could not be treated as a public interest litigation. [Paras 21, 22 and 23] [443-C-G; 445-G-H; 446-A-B]

Gurpal Singh vs. State of Punjab and Ors. **(2005) 5 SCC 136;** *Seshadri vs. S.Mangati Gopal Reddy and Ors.* **2011 (4) SCALE 41;** *Dr. B. Singh vs. Union of India and Ors.* **(2004) 4 SCC 363 – referred to.**

1.4 The submission that the writ petition can be treated as a writ in the nature of a quo warranto cannot be accepted. It appears that the appellants had not claimed a writ of quo warranto either before the Single Judge or before the Division Bench of the High Court. Even in this Court, it appears that the said submission was made as a weapon of last resort. During the pendency of the proceedings, respondent No. 3 has acquired the experience of sixteen years. The requirement under Rules was of fifteen years experience, it would, therefore, not be appropriate to go into the question as to whether a writ of quo warranto would lie in the instant case or not. It would be an exercise in futility. The issue has become purely academic [Para 24] [446-G-H; 447-A-B]

Bramchari Sidheswar Shai and Ors. vs. State of West Bengal and Ors. **(1995) 4 SCC 646;** *Dr. Duryodhan Sahu and Ors. vs. Jitendra Kumar Mishra and Ors.* **(1998) 7 SCC 273 – referred to.**

Case Law Reference:

(1995) 4 SCC 646	**Referred to**	**Para 5**

(2005) 6 SCC 224	**Relied on**	**Para 18**
(1979) 1 SCC 168	**Relied on**	**Para 20**
(1998) 7 SCC 273	**Referred to**	**Para 17**
(2005) 5 SCC 136	**Relied on**	**Para 22**
(1998) 8 SCC 381	**Relied on**	**Para 18**
(1999) 7 SCC 503	**Relied on**	**Para 18**
2011 (4) SCALE 41	**Relied on**	**Para 22**
(2004) 4 SCC 363	**Relied on**	**Para 23**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2457 of 2006.

From the Judgment and Order 21.09.2004 of the Division Bench of the High Court of Calcutta in M.A.T. 476 of 2004.

Prashant Bhushan, Rohit Kumar Singh and Bhanoo Sood for the Appellants.

L.N. Rao, Dipankar P. Gupta and Bhaskar P. Gupta, D.N. Ray, Lokesh K. Choudhary, Sumita Ray, Kishan Datta and Tara Chandra Sharma for the Respondents.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. This appeal is directed against the final judgment and order of the Calcutta High Court dated 21st September, 2004 in M.A.T. No. 476 of 2004 arising out of Writ Petition No. 29805(W) of 1997 vide which the order of the learned Single Judge of the High Court was set aside.

2. We may notice the essential facts, which would have a bearing on the determination of the issues raised in this appeal. Admittedly, there has been a controversy with regard to the special status enjoyed by the Ramakrishna Mission

Vivekananda Centenary College at Rahara (hereinafter referred to as 'respondent No.1') for a long period of time. The College was initially established in the year 1961 with a grant of Rs.2 lakhs given by the Government of West Bengal in the Education Department. The additional cost for establishing the College had been borne by the State Government. Subsequently on 25th April, 2002, the Government of West Bengal, in order to advance collegiate education and with a view to reduce the overcrowding in good colleges in Calcutta decided to set up a three year degree college at Rahara. Such college was to be set up on the recommendations of the University Grants Commission (for short 'UGC'). The college was duly established and granted affiliation to Calcutta University on 13th May, 1963. It is a fully aided college; being sponsored and financed by the State Government.

3. The controversy herein relates to the appointment of the Principal of the College. The post of Principal is included in the definition of Teacher, as contained in Section 2 Clause 9 of the aforesaid Act. The aforesaid Clause defines the term Teacher to include a Professor, Assistant Professor, Lecturer, Tutor, Demonstrator, Physical Instructor or any other person holding a teaching post of a college recognised by the University to which such college is affiliated and appointed as such by such college and includes its Principal and Vice-Principal. Section 3 of the Act provides "appointment to the post of a Teacher shall be made by the Governing Body on the recommendations of the University and College Service Commission to be constituted by the State Government in the manner prescribed". The appointment on the post of Teachers of a college is governed by the College Service Commission established under the West Bengal College Service Commission Act, 1978. Section 3 of the aforesaid Act is as under:-

> "(1) The State Government shall, with effect from such date as may by notification, appoint, constitute Commission by the name of the West Bengal College Service Commission

consisting of five members of whom one shall be the Chairman.

(2) Of the members one shall be person who, not being an educationist, occupies or has occupied in the opinion of the State Government, a position of eminence in public life or in Judicial or administrative service and the other shall have teaching experience either as a Professor of a University or as a Principal for a period of not less than ten years or as a teacher, other than Principal of a College, for a period of not less than fifteen years."

Section 7(1) and Proviso (ii) are as under:-

"Notwithstanding anything contained in any other law for the time being in force or in any contract, custom or usage to the contrary, it shall be the duty of the Commission to select persons for appointment to the post of Teachers of a College:

Provided that-

(i)..

(ii) For selection of a person for appointment to the post of Principal, the Commission shall be aided by the vice-Chancellor of the University to which such college is affiliated or his nominee and a nominee of the Chancellor of such University."

4. Section 15 provides that "nothing contained in the Act shall apply in relation to any college not receiving any aid from the State Government or any college established and administered by a minority, whether based on religion or language." The State Government issued Memo No. 752–Edn (CS) to revise the existing pattern for the composition of the governing bodies of the Government sponsored colleges excepting in cases where the college has a special constitution on the basis of Trust Deeds or where the colleges are run by

Missionary Societies on the basis of agreement with the respective missions. The academic qualification prescribed for appointment on the post of Principal by the Government of West Bengal vide a G.O. No. 149-Edn(CP) dated 22nd February, 1994.

5. It appears that earlier the controversy with regard to the appointment on the post of Principal was subject matter of the decision rendered by this Court in the case of *Bramchari Sidheswar Shai & Ors. Vs. State of W.B. & Ors.*[1]. In deciding the controversy raised in the aforesaid case, this Court has extensively traced the history with regard to the setting up of three year degree colleges under the auspicious of Ramakrishna Mission Boy's Home at Rahara. Therefore, it is not necessary for us to recapitulate the entire sequence of events in the present proceedings.

6. Suffice it to say that the aforesaid controversy had arisen in the context of a challenge made in Writ Petition being C.O.No. 12837(W) of 1980 to the appointment of Swami Shivamayananda, who was till then Head of Ramakrishna Mission, Vidya Mandir, Bellur Math, as the Principal of Ramakrishna Mission College. The petitioners had claimed that Shivamayananda did not have the requisite qualifications for being appointed as the Principal and that he had not been appointed by a duly constituted Governing Body. The prayers in the writ petition were for the issue of (i) a writ in the nature of mandamus commanding the Government of West Bengal to reconstitute the Governing Body of the Ramakrishna Mission College according to standard pattern for Governing Bodies of sponsored colleges as per Government Memo No. 752-Edn (CS)/C. S. 30-3/77 dated 18th April, 1978; (ii) a writ declaring that the Ramakrishna Mission College is governed by West Bengal Act of 1975 and West Bengal Act of 1978; (iii) a writ in the nature of quo warranto restraining Swami

1. (1995) 4 SCC 646.

Shivamayananda as Principal of Ramakrishna Mission College and other incidental writs.

7. During the pendency of this writ petition, the University of Calcutta issued three notices to the Ramakrishna Mission to reconstitute the Governing Bodies of the Ramakrishna Mission Residential College, Narendrapur, Ramakrishna Mission Shiksha Mandir, Howrah and Ramakrishna Mission Vidya Mandir, Howrah. The legality of these notices was challenged by the Ramakrishna Mission by filing an Interlocutory Application in the writ petition. The writ petition was resisted by the Ramakrishna Mission on the ground that being a minority based on religion, the institutions established by it would be protected under Article 30(1) of the Constitution. Therefore, the West Bengal Act of 1975 and West Bengal Act of 1978 would not be applicable. The Ramakrishna Mission had also claimed its right to establish and maintain institutions for religious and charitable purposes and to manage its own religious affairs; to own and acquire movable and immoveable property; and to administer such property in accordance with the law. The aforesaid rights were claimed under Article 26 of the Constitution of India. The writ petition was dismissed by the learned Single Judge. It was held that institutions established by Ramakrishna Mission were protected under Article 30(1) of the Constitution of India. It was also held that the West Bengal Act of 1975 and West Bengal Act of 1978 would not be applicable. It quashed the three notices issued by the Calcutta University. It, however, rejected the claim of Ramakrishna Mission under Article 26(a) of the Constitution of India. The aforesaid judgment was carried in appeal before the Division Bench by the writ petitioners as well as the State of West Bengal and Calcutta University. The Division Bench heard all the appeals together, and by a common judgment dismissed all the appeals. The Division Bench upheld the conclusion of the learned Single Judge that Ramakrishna Mission being a minority based on religion was protected under Article 30(1) of the Constitution of India. It further held that the Ramakrishna

Mission had the right to establish educational institutions as religious denomination under Article 26(a) of the Constitution of India. It further held that both the West Bengal Act of 1975 and West Bengal Act of 1978 would not be applicable as these enactments did not contain any express provision indicating their application to educational institutions established and maintained by the Ramakrishna Mission. It further observed that to hold otherwise would lead to infringement of the rights enjoyed by the Ramakrishna Mission under Article 26(a) and 26(b) of the Constitution. However, it left open the question of legality or otherwise of the direction contained in the notices issued by the Calcutta University to the Ramakrishna Mission for reconstitution of Governing Bodies of the Ramakrishna Mission Residential College, Narendrapur, Ramakrishna Mission Shiksha Mandir, Howrah and Ramakrishna Mission Vidya Mandir, Howrah.

8. The aforesaid judgment of the Division Bench was challenged before this Court in a number of appeals, which has been noticed above. These appeals were decided by this Court by a common judgment dated 2nd July, 1995 in the case of *Bramchari Sidheswar Shai* (supra).

9. This Court formulated six points arising for consideration in the appeals, which were as follows:-

> "1. Can the citizens of India residing in the State of West Bengal who are professing, practising or propagating the religious doctrines and teachings of Ramakrishna and have become his followers, claim to belong to a minority based on Ramakrishna religion which was distinct and different from Hindu religion and as such entitled to the fundamental right under Article 30(1) of the Constitution of India, of establishing and administering educational institutions of their choice through Ramakrishna Mission or its branches in that State ?
>
> 2. Do persons belonging to or owing allegiance to

Ramakrishna Mission belong to a religious denomination or any section thereof as would entitle them to claim the fundamental rights conferred on either of them under Article 26 of the Constitution of India ?

3. If persons belonging to or owing allegiance to Ramakrishna Mission is a religious denomination or a section thereof, have they the fundamental right of establishing and maintaining institutions for a charitable purpose under Article 26(a) of the Constitution of India?

4. If Ramakrishna Mission as a religious denomination or a section thereof establishes and maintains educational institutions, can such institutions be regarded as institutions established and maintained for charitable purpose within the meaning of Article 26(a) of the Constitution of India ?

5. Is Ramakrishna Mission College at Rahara established and maintained by Ramakrishna Mission and if so, will the constitution of its governing body by the Government of West Bengal amount to infringement of Ramakrishna Mission's fundamental right to establish and maintain an educational institution under Article 26(a) of the Constitution of India?

6. Can the court direct the West Bengal Government because of W.B. Act 1975 and W.B. Act 1978, to constitute governing body on a "standard pattern" of sponsored college envisaged under its Memo dated 18-4-1978 in respect of Ramakrishna Mission College when that memo itself says that colleges established and maintained by Missions on the basis of agreements cannot be treated as sponsored colleges for the purpose of constituting governing bodies for them on a "standard pattern" ?"

10. Upon consideration of the entire matter, the conclusions recorded were as under :-

Point 1

(i) For the foregoing reasons, we hold that the citizens of India residing in the State of West Bengal, who are professing, practising or propagating the religious doctrines and teachings of Ramakrishna and have become his followers, cannot claim to belong to a minority based on Ramakrishna religion which was distinct and different from Hindu religion and as such are not entitled to the fundamental right under Article 30(1) of the Constitution of India, of establishing and administering educational institutions of their choice through Ramakrishna Mission or its branches in that State and answer Point 1 accordingly, in the negative.

Point 2

(ii) For the said reasons, we hold that persons belonging to or owing their allegiance to Ramakrishna Mission or Ramakrishna Math belong to a religious denomination within Hindu religion or a section thereof as would entitle them to claim the fundamental rights conferred on either of them under Article 26 of the Constitution of India and answer Point 2, accordingly, in the affirmative.

Point 3

(iii) Since we have held while dealing with Point 2 which arose for our consideration that the persons belonging to or owing allegiance to Ramakrishna Mission or Ramakrishna Math as followers of Ramakrishna, form a religious denomination in Hindu religion, as a necessary concomitant thereof,

we have to hold that they have a fundamental right of establishing and maintaining institutions for a charitable purpose under Article 26(a) of the Constitution of India, subject, of course, to public order, morality and health envisaged in that very article. Point 3 is, accordingly answered, in the affirmative.

(iv) **On Point Nos. 4 & 5,** it was observed as follows:-

"We think that the learned Judges of the High Court should not have decided on the general question whether educational institutions established and maintained by religious denomination including those established and maintained by Ramakrishna Mission for general education get the protection of Article 26(a) of the Constitution when that question in a general form, was not really at issue before them. Therefore, the views expressed on the question shall, according to us, ought to be treated as non est and the question is left open to be decided in proper case, where such question really arises and all the parties who might be concerned with it are afforded adequate opportunity to have their say in the matter."

(v) **On Point No. 6,** it was observed as follows:-

"67. As stated above, the State Government has excepted the Ramakrishna Mission College at Rahra in the matter of constituting a Governing Body on a standard pattern for the obvious reason that constituting such a governing body for a college like Ramakrishna Mission College which was all through allowed to have a governing body constituted by Ramakrishna Mission, which had built the College on its land conceding to the request made in that behalf by the State

Government itself on the initiation of the Central Government, may not be just. Thus when Ramakrishna Mission College had come to be built, established and managed by the Ramakrishna Mission, it is difficult for us to think that the learned Judges of the Division Bench of the High Court were not right in holding that the Government should not be directed by issue of a mandamus, to constitute a governing body for the Ramakrishna Mission College on a standard pattern taking recourse to the W.B. Act of 1975 and the W.B. Act of 1978, although for its own reasons. Therefore, in the peculiar facts and circumstances in which Ramakrishna Mission College at Rahra was established on Ramakrishna Mission's land and allowed to be administered by the Ramakrishna Mission through its own governing body, we feel that interests of justice may suffer by directing the State Government to constitute its own governing body on a standard pattern of the usual sponsored colleges, as prayed for by the writ petitioners. However, the view we have expressed in the matter shall not come in the way of the State Government to change their earlier arrangement with the Ramakrishna Mission in the matter of governance of the Ramakrishna Mission College, if on objective considerations such change becomes necessary in the larger interests of students, teachers and other employees of that College and is so permitted by law.

68. In the said view we have taken in the matter of constituting a Governing Body by the Government of West Bengal in respect of the Ramakrishna Mission College at Rahra, there is no need to go into the question that there has been infringement by the Government of Ramakrishna Mission's

fundamental rights to establish and maintain educational institutions under Article 26(a) of the Constitution of India inasmuch as such a question does not arise, in view of the answer already given by us on Point 3 above. So also, question of directing the West Bengal Government because of the W.B. Act of 1975 and the W.B. Act of 1978, to constitute governing body on "standard pattern" of sponsored college envisaged under its Memo dated 18-4-1978 in respect of Ramakrishna Mission College, cannot arise.

69. Points 4 to 6 are accordingly answered."

11. After the decision in the aforesaid case, again Writ Petition No.29805(W) of 1997 was filed in the Calcutta High Court challenging initially the appointment of Swami Shivamayananda (Respondent No.16 herein) and Swami Divyananda (respondent No.17 herein) as Principal and Honorary Vice-Principal respectively. It was alleged that appointment of both the respondents had been made without following the provisions of the West Bengal Act of 1975 and West Bengal Act of 1978. However, both the persons during the pendency of the writ petition before the High Court went on open ended leave from their respective posts. Thereafter on 14th May, 1999, by an Office Order No.RKMVCC/21/99, the college authorities elevated Swami Sukadevananda (respondent No. 3 herein) Vice-Principal of the college to the post of Acting Principal with immediate effect, again without following the West Bengal Act of 1975 and West Bengal Act of 1978. He was designated as the Principal of the College on 20th March, 2001 vide Office Order No.3/RKMVCC/21/2001. The appointment of Swami Sukhadevananda, as Principal of the College led to the amendment of the writ petition incorporating a challenge to his appointment.

12. It is the case of the appellants, that the respondent No.

3 was only First class M.Sc. in Biochemistry from Karnataka University and had worked as Scientific Officer in Bhabha Atomic Research Centre, Bombay for about four years. As far as teaching experience in the college is concerned, he had only six years of such experience. Thus, according to the appellants, he did not possess the requisite qualifications for the post of Principal as laid down in the above mentioned Government order dated 22nd February, 1994. The learned Single Judge by his judgment dated 29th September, 2003 allowed the writ petition and it was observed as under;

"Therefore, I hold that as regard management, administration and maintenance of this Institution the State government at present has denuded itself its authority or right to interfere with. But the provisions of the Acts namely West Bengal College Teachers (Security of Service) Act, 1975, West Bengal College Service Commission Act, 1978 and the Calcutta University First Statute, 1979 will have application unless these laws by themselves exempt these organizations from being applicable. I do not find any such exception."

The appointment of the Principal was declared not to have been made under the provisions of the West Bengal Act of 1975, West Bengal Act of 1978 and the Calcutta University First Statute, 1979. A direction was issued to the Governing Body of the College to take steps to fill the post either temporarily or permanently in accordance with laws in force. Aggrieved, the Ramakrishna Mission College went in appeal before the Division Bench. In order to consider the entire matter, the Division Bench analyzed the judgment of this Court in Bramchari *Sidheswar Shai's* case (supra) extensively. It noticed the conclusions recorded by this Court as extracted by us above. The Division Bench concluded as under:-

"Thus, from the questions raised by the Hon'ble Court and the answers given to each of them by the Hon'ble Court as indicated above, we are fully convinced that although

the Hon'ble Court declined to give protection of Article 30(1) or protection under Section 26(a) of the Constitution to the Ramakrishna Mission and the college established by it, the Court certainly decided in a most assertive manner that having regard to the background of the establishment of the college and having regard to the stand taken by the Government of West Bengal since inception of the college in the matter of its governance and management with special reference to office memo dated 18th April, 1978, there is no need to ask for implementation of the provisions of the Act of 1975 or the Act of 1978."

13. The Division Bench negated the contentions of the learned counsel for the writ petitioners/ appellants that in view of the provisions contained in the West Bengal Act of 1975, West Bengal Act of 1978 and the Calcutta University First Statute, 1979, the college could not be allowed to have the Monk as Principal. It is observed that the Government was very much aware of the fact that in the matter of this college, the general procedure for selection of a Principal through the College Service Commission shall not be made applicable. It is further observed that natural consequence of the aforesaid conclusion was that there would be no application under the provisions of the Calcutta University First Statute, 1979, aimed at filling up of temporary vacancy of the post of Principal like other Government sponsored colleges. In the concluding paragraphs, the Division Bench observed as follows:-

"After close examination of the judgment of the Apex Court rendered in the case of *Bramchari Sidheswar Shai's* (supra), we are seriously contemplating whether the present writ petition at all was maintainable before the learned Single Judge as the parties of the present writ petition are almost identical of the previous writ petition and almost same issues as raised in the present petition were matter of consideration before the Apex court and

further we are of the view that following the long established principle of judicial discipline and binding precedent, it was not at all permissible to make any departure from the conclusion reached by the Apex court which has a binding effect upon the writ petitioners who were parties to the earlier adjudication and that apart, the present writ petition is also barred under the principle of res judicata.

Thus, having regard to the submissions of contesting parties and on examination of the materials placed before us, we are of firm view that following the judgment of the Apex Court rendered in the case of *Bramchari Sidheswar Shai's* (supra) and in view of the recent office memo of the Government of West Bengal dated 30th April, 2004, it was not permissible to reopen the issue once again and to issue any writ dishonouring the mandate of the Apex Court when admittedly the State Government has not deviated form its earlier stand relating to the special status accorded to the college. We, therefore, find sufficient merit in the present appeal and in the stay petition and we are inclined to allow the both.

Accordingly, both the appeal and the stay petition are allowed resulting in dismissal of the writ petition and setting aside the judgment and order of the learned Single Judge delivered in connection with Writ Petition No. 29805(W) of 1997. We, however, make no order as to costs considering the fact and circumstances of the case."

14. This judgment is the subject matter of the present appeal. We have heard the learned counsel for parties.

15. Mr. Prashant Bhushan, learned counsel appearing for the appellants submitted that even if the College established by the Ramakrishna Mission enjoys a special status, the appointment on the post of Principal would still has to be made in conformity with the qualifications prescribed by the

Government of West Bengal in its Order dated 22nd February, 1994. Respondent No.3 does not even possess the qualifications prescribed by the University Grants Commission. Moreover, respondent No.3 has not cleared the eligibility test N.E.T./S.L.E.T. for Lecturer as required by the UGC. His initial appointment as Acting Principal and thereafter his appointment as permanent Principal was null and void having been made without following the provisions contained in the West Bengal Act of 1975 and West Bengal Act of 1978. Learned counsel submits that the qualifications prescribed under the Government Order dated 22nd February, 1994 were in fact amended by the subsequent G.O.s being G.O. No. 625-Edn (CS) dated 16th June, 1999 read with G.O. No.1047-Edn (CS) dated 20th August, 2002. These qualifications were duly published through advertisement No. 2 of 2004. For the post of Principal, the qualifications prescribed are as under:-

"I. For General Degree Colleges:

(A) Academic qualifications:

(a) Master degree in Arts/Science/ Commerce/Music/Fine Arts with at least 55% marks or its equivalent grade and good academic record; Ph.D. Degree or evidence of its equivalent published work of high standard and teaching/ research experience in an affiliated degree college or University/Other Institutions of Higher Education for at least 15 (fifteen) years preferably with administrative experience. Or

(b) Serving as reader in any affiliated degree College or University/research Institute with total teaching experience of not less than 15 years. Or

(c) Serving as Selection Grade Lecturer in any affiliated degree college with at least 55% marks at the Master's level and good academic record with teaching experience not less than 15 years in any academic Institution with

authenticated administrative experience of at least five years and further having published work equivalent to Ph.D. degree, the equivalence be evaluated by the University/ Selection Committee consisting of the subject experts who in turn will have to mainly look in to the following aspects:-

1. Number of research paper published,
2. Quality of research paper,
3. Relevance of the topic,
4. Journals where these have been published."

16. It is submitted that respondent No.3 does not possess the Ph.D, degree. He also did not possess fifteen years administrative experience at the time of his appointment. Learned counsel further submitted that respondent No.3 has been appointed on the said post merely because he is a monk at the Ramakrishna Mission. The very purpose of prescribing minimum qualifications and method of selection for an important post like Principal of an educational institution has been defeated. Learned counsel further submitted that the Division Bench has wrongly relied on the judgment of *Bramchari Sidheswar Shai's* case (supra). The aforesaid judgment had no relevance to the issue which has been raised in the present proceedings.

17. On the other hand, Mr. L.N. Rao, learned senior counsel appearing for the respondent Nos.1, 2 and 3 submits that the litigation in this case does not survive as the appellants have retired. He further submits that the appellants have not sought a writ of quo warranto rather the relief sought is that one of the senior teachers should be appointed as Principal. The writ petition was based on individual grievances. The relief claimed is also for the redressal of individual grievances. All the appellants had made a claim based on their seniority and qualifications. Since all the appellants have retired in the mean time, the issue has become academic. This Court will,

therefore, decline to examine the matter on merits. He relies on the judgment of this Court in the case of *M.L. Binjolkar Vs. State of M.P.*[2]. On merits, the learned counsel submits that the grievances of the appellants were that the respondent No.3 lacked fifteen years of experience. However, by now respondent No.3 possesses the required fifteen years experience. He also relies on certain observations made by this Court in the case of *Ram Sarup Vs. State of Haryana & Ors*[3]. The entire controversy has been rendered academic in the peculiar facts and circumstances of this case. In the alternative, the learned senior counsel submits that the writ petition would have to be treated as public interest litigation. It is, however, settled by this Court that public interest litigation would not be maintainable in service law cases. In support of this submission, he relies on the judgments of this Court in the cases of *Dr. Duryodhan Sahu & Ors. Vs. Jitendra Kumar Mishra & Ors*[4] and *Gurpal Singh Vs. State of Punjab & Ors.*[5]. Therefore, again no relief can be granted to the writ petitioners/appellants.

18. We have considered the submissions made by the learned counsel for the parties. In our opinion, there is much substance in the submissions made by Mr. L.N. Rao, Mr. Dipankar P. Gupta and Mr. Bhaskar P. Gupta, learned senior counsel that at this stage, litigation in this case does not survive as the appellants have retired. Even if the writ petition is allowed and the appointment of respondent No.3 is declared null and void, none of the appellants could be appointed on the post of Principal. A perusal of the averments made in the writ petition before the High Court would show that the gravamen of the grievances of the writ petitioners/appellants was that they were all senior to Swami Sukhadevananda. It was further pointed out that he had only six years of teaching experience, while G.O. No. 149-Edn(CP) dated 22nd February, 1994

2. (2005) 6 SCC 224.
3. (1979) 1 SCC 168.
4. (1998) 7 SCC 273.
5. (2005) 5 SCC 136.

prescribes a minimum teaching experience of sixteen years with administrative experience. It was pointed out that on the one hand, respondent No.3 did not possess the necessary experience and was appointed as the Principal. On the other hand, the applications of the petitioner Nos. 1, 9 and 12 for the post of Principal made through appropriate channel were not at all considered at any stage by the appropriate authority, though they are more qualified and senior to Swami Sukhadevananda. It was further pointed out that petitioners are suffering irreparable loss in the form of deprivation from being promoted as a Teacher-in-Charge and compelled to serve under a junior in service and possessing lesser qualifications. Again in Paragraph 41, it is stated that Swami Divyananda is junior to all the petitioners. It was further pointed out that Dr. Biman Kumar Mukherjee, was the then petitioner No. 1 and the then senior most Teacher. He had put in more than three decades of lawful and approved service to the Institution. He was, therefore, lawful claimant to the post of Teacher-in-Charge of the college. Therefore, it was a matter of great humiliation and injustice to all the petitioners to be forced to serve under an illegally appointed person, who is junior to them all. In Ground 3 of the writ petition, it is specially pleaded as follows:-

> "For that, it is incumbent upon the respondents to appoint the senior most teacher, as Teacher-in-Charge of the college in terms of the order contained in the letter No.C/31/Cir dated 1st January, 1995 and Statute 101B (as amended) and for such failure of the respondents to act in accordance with law the petitioners have been deprived of their rights to the post and have suffered demotion and financial loss."

From the above, it becomes evident that the grievances of the writ petitioners were that they have been compelled to work under a person, who was junior to them. The petitioners having retired from service, no relief could possibly be granted to them, even if the appointment of respondent No.3 is held to be

illegal or void. In such circumstances, in our opinion, it would be an exercise in futility to examine the merits of the controversy raised in the appeal. By the retirement of all the appellants herein, the issues raised herein have been rendered academic. In M.L. Binjolkar's case (supra), this Court was considering the legality of the orders passed by the Madhya Pradesh State Administrative Tribunal, Jabalpur, setting aside the orders of compulsory retirement passed against a number of employees by the State of Madhya Pradesh. The four employees were directed to be reinstated. The writ petition filed by the State of Madhya Pradesh was dismissed. The employees concerned were permitted to join back pursuant to the orders of reinstatement passed by the Administrative Tribunal. All the four employees, who were so reinstated, retired during the pendency of proceedings. The appeal filed by the State was dismissed by this Court with the following observations:-

> "In view of the undisputed position that the four employees who were directed to be reinstated had, in fact, joined back service and have retired on reaching the age of superannuation, therefore, examination in their cases as to the correctness of the view expressed by the High Court would be an exercise in futility. Though, implementation of the Court's order does not render challenge to an order infructuous, yet the fact situation of the present case makes the issue academic. This Court did not grant stay on the High Court's order. The employees concerned, as noted above after reinstatement have retired. In these peculiar circumstances, we do not think it necessary to examine correctness of the High Court's order on merits. Therefore, the appeals filed by the State — Civil Appeals Nos. 8695-97 of 2002 and 8663 of 2002 are dismissed. We make it clear that we have not expressed any opinion on the correctness of the High Court's judgment as we have dismissed the appeals only on the ground that the employees concerned have already retired and it would not be in the interest of anybody to go into the merits."

Similarly, in the case of *Sumedico Corporation & Anr. Vs. Regional Provident Fund Commr.*[6], this Court declined to go into the vires of Section 7(a) of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 as during the pendency of the appeal, the Legislature itself amended the provisions of the Act by inserting Section 7(d) providing for remedy of an appeal before the Appellate Tribunal. In view of this development, it was observed that the question of challenge to the vires of Section 7(a) on the ground that there was no appeal provided under the Act does not survive and it has become academic. In the case of *State of Manipur & Ors. Vs. Chandam Manihar Singh*[7], the respondent had been removed from the post of Chairman of the Manipur State Pollution Control Board by the Governor of Madhya Pradesh in exercise of the powers under Section 5(3) read with Section 6(1)(g) of the Act by the order dated 19th October, 1998. The respondent carried the matter in a writ petition before the High Court of Assam, Imphal Branch. The learned Single Judge, who heard this writ petition was pleased to allow the same on 30th April, 1999. It may be noted that the learned Single Judge had directed that the respondent has continued to hold the office of the Chairman as his removal was set aside and his tenure will end on 15th October, 1999 counting three years from 16th October, 1996 when he was appointed as the Chairman of the Board pursuant to earlier order. The State of Manipur unsuccessfully carried the matter in an appeal before the Division Bench. When the appeal filed by the State of Manipur came up for hearing before this Court, the learned counsel for the respondent submitted that pursuant to the orders of the High Court, the respondent has continued as a Chairman of the Board and his tenure is almost coming to end and he does not intend to continue as Chairman beyond 15th October, 1999. It was submitted by the learned counsel for the respondent that the issue raised by the State of Manipur has almost become academic as no interim relief

6. (1998) 8 SCC 381.
7. (1999) 7 SCC 503.

was granted by this Court against the order of the High Court. Nor any interim relief had been granted pending appeal against the order of the learned Single Judge by the Division Bench of the High Court. In these circumstances, this Court observed as follows:-

> "Having given our anxious consideration to the rival contentions, we find that as the High Court's direction in favour of the respondent's tenure which is to expire on 15-10-1999 has almost worked itself out and less than a month remains for him to act as Chairman of the Board, the first grievance raised by learned Senior Counsel for the appellants in connection with the removal of the respondent by order dated 19-10-1998 has become of academic interest. We, therefore, did not permit learned Senior Counsel for the appellants to canvass this point any further before us. That takes us to the consideration of the second point."

In our opinion, the aforesaid observations of this Court would be clearly applicable in the facts and circumstances of this case.

19. There is another reason why no relief, at present could perhaps be granted to the appellants. Throughout the proceedings before the High Court as well as before this Court, no interim relief was granted by restraining respondent No.3 from performing the functions of a Principal. He has continued to function on the aforesaid basis since his appointment on 14th May, 1999 as Acting Principal and then on from 23rd March, 2001 onward as Principal. Even according to the appellants, at the time of his appointment, respondent No.3 had possessed the experience of only six years. Therefore, by now, he would have more than fifteen years of required experience for the post of Principal. Therefore, the ground that the respondent No.3 was not qualified as he did not possess the necessary experience would also no longer be available to the appellants.

20. In similar circumstances, this Court, in the case of *Ram Sarup* (supra), observed as follows:-

> "The question then arises as to what was the effect of breach of clause (1) of Rule 4 of the Rules. Did it have the effect of rendering the appointment wholly void so as to be completely ineffective or merely irregular, so that it could be regularised as and when the appellant acquired the necessary qualifications to hold the post of Labour-cum-Conciliation Officer. We are of the view that the appointment of the appellant was irregular since he did not possess one of the three requisite qualifications but as soon as he acquired the necessary qualification of five years' experience of the working of Labour Laws in any one of the three capacities mentioned in clause (1) of Rule 4 or in any higher capacity, his appointment must be regarded as having been regularised. The appellant worked as Labour-cum-Conciliation Officer from January 1, 1968 and that being a post higher than that of Labour Inspector, or Deputy Chief Inspector of Shops or Wage Inspector, the experience gained by him in the working of Labour Laws in the post of Labour-cum-Conciliation Officer must be regarded as sufficient to constitute fulfilment of the requirement of five years' experience provided in clause (1) of Rule 4. The appointment of the appellant to the post of Labour-cum-Conciliation Officer, therefore, became regular from the date when he completed five years after taking into account the period of about ten months during which he worked as Chief Inspector of Shops. Once his appointment became regular on the expiry of this period of five years on his fulfilling the requirements for appointment as Labour-cum-Conciliation Officer and becoming eligible for that purpose, he could not thereafter be reverted to the post of Statistical Officer. The order of reversion passed against the appellant, was, therefore, clearly illegal and it must be set aside."

A perusal of the above would show that the appellant therein did not possess the necessary experience of five years of the working of labour laws. It was held that his appointment was irregular since he did not possess the necessary experience. However, during the pendency of the proceedings, he had acquired the necessary experience and, therefore, the appointment must be regarded as having been regularised. The aforesaid ratio would be squarely applicable to the appointment of respondent No.3.

21. Mr. Prashant Bhushan, however, submitted that the appeal would not be rendered infructuous by the mere retirement of the appellants. Learned counsel submitted that all the appellants have been engaged in the field of education throughout their lives. Therefore, deeply interested in ensuring that the standards of education are maintained. They are deeply concerned that of appointment for the post of Principal shall be made in accordance with the statutory provisions. Therefore, the appellants would have the locus standi to continue the proceedings.

22. We are unable to accept the aforesaid submission made by the learned counsel. As noticed in the earlier part of the judgment, the entire pleadings in the writ petition are founded on the personal grievance of the writ petitioners/ appellants. The writ petitioners have not come before this Court as educationists. Merely because they are senior most teachers in the same institution, would not necessarily give rise to the presumption, that they had filed the writ petition in public interest. In our opinion, a pure and simple service dispute is sought to be camouflaged as a public interest litigation. This Court on numerous occasions negated such efforts in disguising the personal grievances as public interest litigation. It is, however, not necessary to recapitulate the oft quoted caution, save and except the observations made by this Court in the case of *Gurpal Singh* (supra). In paragraphs 10, 11 and 12 it is observed as follows :

"10. Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity-seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be allowed to be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity-oriented or founded on personal vendetta. As indicated above, court must be careful to see that a body of persons or member of the public, who approaches the court is acting bona fide and not for personal gain or private motive or political motivation or other oblique consideration. The court must not allow its process to be abused for oblique considerations by masked phantoms who monitor at times from behind. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives and try to bargain for a good deal as well as to enrich themselves. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busybodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.

11. The Council for Public Interest Law set up by the Ford Foundation in USA defined "public interest litigation" in its Report of Public Interest Law, USA, 1976 as follows:

"Public interest law is the name that has recently been given to efforts which provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in the recognition that ordinary marketplace for legal services fails to provide such services to significant segments of the population and to significant interests. Such groups and interests include the

proper environmentalists, consumers, racial and ethnic minorities and others." [See *B. Singh (Dr.) v. Union of India*[7], SCC p. 373, para 13.]

12. When a particular person is the object and target of a petition styled as PIL, the court has to be careful to see whether the attack in the guise of public interest is really intended to unleash a private vendetta, personal grouse or some other mala fide object. Since in service matters public interest litigation cannot be filed there is no scope for taking action for contempt, particularly, when the petition is itself not maintainable. In any event, by order dated 15-4-2002 this Court had stayed operation of the High Court's order."

The aforesaid observations have been reiterated by this Court in the case of *P.Seshadri Vs. S.Mangati Gopal Reddy & Ors*[8], in the following words:-

"The High Court has committed a serious error in permitting respondent No.1 to pursue the writ petition as a public interest litigation. The parameters within which Public Interest Litigation can be entertained by this Court and the High Court, have been laid down and reiterated by this Court in a series of cases. By now it ought to be plain and obvious that this Court does not approve of an approach that would encourage petitions filed for achieving oblique motives on the basis of wild and reckless allegations made by individuals, i.e., busybodies; having little or no interest in the proceedings. The credentials, the motive and the objective of the petitioner have to be apparently and patently aboveboard. Otherwise the petition is liable to be dismissed at the threshold."

23. We are, therefore, unable to accept the aforesaid submission as it is tantamount to treating the writ petition as a public interest litigation. As noticed above, the entire grievance

8. 2011 (4) SCALE 41.

of the writ petitioners/appellants was personal. They were all aggrieved and humiliated for being compelled to serve under a Principal junior to them in service. Therefore, it could not be treated as a public interest litigation. This Court has repeatedly disapproved the tendency of disgruntled employees disguising pure and simple service dispute as public interest litigation. The observations made by this Court in the case of *Dr. B. Singh vs. Union of India & Ors.*[9] would be of some relevance and we may notice the same. In paragraph 16, it is observed as follows:

"As noted supra, a time has come to weed out the petitions, which though titled as public interest litigations are in essence something else. It is shocking to note that courts are flooded with a large number of so-called public interest litigations, whereas only a minuscule percentage can legitimately be called as public interest litigations. Though the parameters of public interest litigation have been indicated by this Court in a large number of cases, yet unmindful of the real intentions and objectives, courts at times are entertaining such petitions and wasting valuable judicial time which, as noted above, could be otherwise utilized for disposal of genuine cases. Though in Duryodhan Sahu (Dr) v. Jitendra Kumar Mishra8 this Court held that in service matters PILs should not be entertained, the inflow of the so-called PILs involving service matters continues unabated in the courts and strangely are entertained. The least the High Courts could do is to throw them out on the basis of the said decision."

24. We are also unable to accept the submission of Mr. Prashant Bhushan that the writ petition can be treated as a writ in the nature of a quo warranto. It appears that the appellants had not claimed a writ of quo warranto either before the learned Single Judge or before the Division Bench of the High Court. Even in this Court, it appears to us that Mr. Prashant Bhushan has made the submission as a weapon of last resort. As noticed

9. (2004) 4 SCC 363.

earlier, during the pendency of the proceedings, respondent No. 3 has acquired the experience of sixteen years. The requirement under Rules was of fifteen years experience, it would, therefore, not be appropriate to go into the question as to whether a writ of quo warranto would lie in the present case or not. In our opinion, it would be an exercise in futility. The issue has become purely academic.

25. Before we part with this judgment, we make it clear that we have not expressed any opinion on the correctness of the High Court's judgment as we have dismissed the appeal only on the ground that the concerned appellants have already retired from service and it would not be in the interest of anybody to go into the merits.

26. In view of the above, the appeal is dismissed.

N.J. Appeal dismissed.

WAIKHOM YAIMA SINGH

v.

STATE OF MANIPUR

(Criminal Appeal No. 802 of 2006)

APRIL 18, 2011

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

Penal Code, 1860 – s.302 – Murder – Dying declaration by the victim in the hospital that appellant was guilty of assaulting him and the next day the victim expired – Acquittal by the trial court – However, conviction u/s. 302 by the High Court, on basis of the dying declaration of the deceased – On appeal, held: Factum of the dying declaration is suspicious – Dying declaration is oral – No evidence about the fitness of the victim to make the dying declaration – Exact words of the dying declaration not available – They differ from witness to witness – Though the witnesses claimed to have reported to the informant about such dying declaration and the name of the assailant, there is no reflection of the name in the FIR – Trial court took a perfectly probable view which could not have been set aside for the mere fact that some other view could be taken on the basis of the dying declaration – Thus, the High Court erred in holding that the dying declaration was creditworthy – Order of acquittal by the trial court is restored.

Evidence Act, 1872 – s. 32 – Dying declaration – Evidentiary value – Held: Dying declaration can be the sole basis for conviction, however, it has to be proved to be wholly reliable, voluntary, and truthful – Maker of the dying declaration must be in a fit medical condition to make it – Oral dying declaration is a weak kind of evidence, where the exact words uttered by the deceased are not available, particularly because of the failure of memory of the witnesses who are said to have heard it.

According to the prosecution, PW-4 found the victim lying in an unconscious state on the road. He alongwith his friends and relatives took the victim to the hospital around 10 pm. The victim was given some treatment and he came to his senses and gave a dying declaration that he was assaulted by the appellant. The victim expired the next day at about 3 am. The dying declaration was made in the presence of PW-1, PW-2, PW-4, PW-5 and PW-7. PW-14 relative of the victim, was present with the victim almost till 3 am but not when the dying declaration was made. The aforesaid witnesses reported to PW-14 about the dying declaration and the FIR was lodged. The trial court did not believe the prosecution case and acquitted the appellant. However, the High Court relying on the dying declaration, convicted the appellant. Therefore, the appellant filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1 There is the evidence of some prosecution witnesses who claimed that the deceased made a dying declaration after he regained consciousness which was within 1 to 1½ hours after the deceased reached the hospital. The witnesses have generally stated that the deceased reached the hospital by about 10 or 11 pm. This is in sharp contradiction to the evidence of PW-14, the cousin of the deceased, who claimed that till 3 pm, there was no dying declaration made. This is the first circumstance which would make the factum of the said dying declaration suspicious. It is also to be seen that the deceased was very seriously injured, so much so that according to the witnesses, he died immediately after allegedly making the said dying declaration, the time of which is not fixed by the prosecution. The most important circumstance about the dying declaration is that, firstly, it is oral and secondly, there is no medical evidence

suggesting that the deceased was in a fit medical condition to make such a dying declaration. [Para 13 and 14] [457-E-H; 458-A]

1.2 The dying declaration can be the sole basis for conviction, however, such a dying declaration has to be proved to be wholly reliable, voluntary, and truthful and further that the maker thereof must be in a fit medical condition to make it. The oral dying declaration is a weak kind of evidence, where the exact words uttered by the deceased are not available, particularly because of the failure of memory of the witnesses who are said to have heard it. In the instant case also, the exact words are not available. They differ from witness to witness. Some witnesses say about the name of the village of the appellant having been uttered by the deceased and some others do not. PW-12, doctor who cross-examined the deceased, was also not cross-examined by the Public Prosecutor about the medical condition of the deceased and further fact as to whether he was in a fit condition to make any statement. Though the witnesses claimed to have reported to PW-14 about such dying declaration and the name of the assailant, there is no reflection of the name in the FIR. [Para 15] [458-B-E]

1.3 Had the witnesses heard the dying declaration and reported the matter to PW-14 who made the FIR, he would never have failed to mention the name. Instead, in the FIR it is stated that it was some unknown person who had beaten up the deceased. The FIR was almost immediately after PW-14 came to know about the death of his cousin (deceased). If under such circumstances, the trial court felt it unsafe to rely on the so-called dying declaration, the trial court was justified in taking that view. A perfectly probable view has been taken by the trial court which could not have been set aside for the mere fact that some other view could be taken on the

basis of the dying declaration. It cannot be understood as to how the High Court held in that the victim was in a fit state of mind to make the declaration. In fact, there is absolutely no evidence about the fitness of the victim to make the said declaration. [Paras 16 and 17] [458-H; 459-A-B]

1.4 The only reason why the High Court found fault with the judgment of the trial court was that the trial court had misconstrued and misunderstood the evidential value of the FIR. According to the High Court, the dying declaration was neglected/ignored on the ground that in the FIR, the name of the accused was not mentioned. In fact, that, was a good reason. The High Court is also not correct in observing that PW-14 was not present throughout the night of 30.10.1989 at the Hospital. The High Court has given reasons that the FIR could not be used to discredit the testimony of the other reliable witnesses. The High Court has ignored the fact that if in reality the dying declaration had been made and PW-14 was informed about the name of the assailant, he would never have failed to mention the same in the FIR. Therefore, the High Court was wholly wrong in observing that the dying declaration was creditworthy and that the trial court had erred in acquitting the accused. The judgment of the High Court is, therefore, set aside and that of the trial court is restored confirming the acquittal of the appellant/accused. [Paras 18 and 19] [459-B-G]

Ravi Kumar vs. State of Punjab AIR (2005) SC 1929 – referred to.

Case Law Reference:

AIR (2005) SC 1929 Referred to Para 18

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 802 of 2006.

Ranjit Kumar, Pukhrambam Ramesh Kumar and Rajiv Kumar for the Appellant.

Khwairakpam Nobin Singh for the Respondent.

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. The appellant herein is challenging the judgment of the High Court, whereby his acquittal as ordered by the trial Court, was set aside and he was convicted for the offence of murder punishable under Section 302 of the Indian Penal Code (IPC).

2. Shortly stated, the prosecution story is that one Lourembam Biren Singh (since deceased) was lying in an unconscious state on the road when he was found by one Oinam Deben Singh (PW-4) at about 8 pm on 30.10.1989. He was attracted by a strange sound when he was passing near the gate of one Ahongshangbam Herachandra Singh. Oinam Deben Singh (PW-4) informed this to some of his friends and relatives and when he came back on the spot with other people with a light, they found the said deceased in an unconscious condition. The deceased was then immediately taken to Regional Medical College (RMC) Hospital at about 10 pm, where the unconscious Lourembam Biren Singh was given some treatment because of which he came to his senses and gave a dying declaration. However, the deceased expired at about 3'O clock in the next morning. According to the prosecution, in that dying declaration, the appellant was accused of having assaulting the deceased and the same was made in presence of L. Jiten Singh (PW-1), L. Ranachandra Singh (PW-2), Oinam Deben Singh (PW-4), L. Chanbi Singh (PW-5) and L. Subhaschandra Singh (PW-7). L. Ningthouren Singh (PW-14), who is the relative of the deceased, lodged the First Information Report (FIR). In fact, L. Ningthouren Singh (PW-14) was there alongwith the injured (deceased) almost till 3 am. However, he was not present at the time when the dying

declaration was made to the other witnesses. On the basis of the said FIR, further investigation ensued, wherein the necessary panchanamas were drawn up and the statements of the witnesses were also recorded. After filing of the chargesheet, the accused/appellant abjured the guilt. In support of the prosecution, 15 witnesses came to be examined. The prosecution heavily relied on the dying declaration made by the deceased in presence of L. Jiten Singh (PW-1), L. Ranachandra Singh (PW-2), Oinam Deben Singh (PW-4), L. Chanbi Singh (PW-5) and L. Subhaschandra Singh (PW-7). The trial Court did not believe the prosecution case. According to the trial Court, if after the death of the deceased, the witnesses who had heard the dying declaration of the deceased had gone back to the house of the deceased and informed L. Ningthouren Singh (PW-14), his cousin, of the death, then certainly L. Ningthouren Singh (PW-14) would have come to know of the name of the person who assaulted the deceased and in that case he could not have failed to mention that name in the FIR. On this basis, the trial Court acquitted the accused/appellant. However, the High Court upset this acquittal and believed the dying declaration and ultimately convicted the accused/appellant necessitating this appeal.

3. We have been taken through the evidence as also the judgments of the Courts below. Shri Ranjit Kumar, learned Senior Counsel appearing on behalf of the appellant, took us through the evidence. His contention was that the judgment of the trial Court did not suffer from any illegality and the trial Court had taken a probable view. He pointed out that the High court has hardly given any reason to show that the view taken by the trial Court was perverse and not possible at all. He also pointed out that the FIR was given by L. Ningthouren Singh (PW-14) who was the elder cousin of the deceased and on being informed by Oinam Deben Singh (PW-4) and L. Chanbi Singh (PW-5) about the deceased lying in the darkness, he himself had gone and on finding the deceased in an injured condition, took him to the hospital. The learned Senior Counsel pointed

out that this witness was present in the hospital for some time and then left; however, at about 6' O clock in the next morning, Oinam Deben Singh (PW-4) and L. Subhaschandra Singh (PW-7) went to him to inform about the death of the deceased in the hospital. The learned Senior Counsel pointed out that L. Ningthouren Singh (PW-14) was specifically informed by Oinam Deben Singh (PW-4) and L. Subhaschandra Singh (PW-7) that the deceased had made a dying declaration involving the appellant herein; however, when he thereafter went to Thoubal Police Station, very surprisingly, he did not name the accused in the FIR. The learned Senior Counsel, therefore, argued that either the said witness was never informed of the names by Oinam Deben Singh (PW-4) and L. Subhaschandra Singh (PW-7) or in fact there was no dying declaration made at all by the deceased.

4. We have seen the whole evidence. The only explanation that this witness has given is that he did not mention the name of the accused in the FIR as he could not properly hear the name of the culprit when the matter was informed to him by his younger brother. This witness has specifically admitted that he was in the hospital from 10 pm to 3 am and he looked after the injured person. He also asserted that he never went outside the hospital during that period. He also admitted that when he found the deceased, the deceased was unconscious and could not speak. The witness also admitted that till 3 am, inspite of the medical treatment by the doctor at RMC Hospital, the injured (deceased) could not speak. He also admitted that there was another person in the village who was related to them bearing the same name as that of the appellant. A specific suggestion was given to him that Oinam Deben Singh (PW-4) and L. Subhaschandra Singh (PW-7) had never informed him about the dying declaration made by the deceased involving the present appellant. The learned Senior Counsel pointed out that the whole story of the so-called dying declaration was a myth and that if the dying declaration was made in presence of the prosecution witnesses, they would never have failed to mention

the name of the assailant and eventually the name was bound to appear in the FIR.

5. The learned Public Prosecutor, however, strongly supported the evidence of Oinam Deben Singh (PW-4) and contended that merely because the name of the accused was not there in the FIR, that by itself could not wipe out the evidence of the witnesses who had heard the dying declaration.

6. In this backdrop, we would first examine the evidence of the other witnesses who claimed to have heard the alleged dying declaration as also the evidence of the doctor, namely, Dr. Ningombam Shyamjai Singh (PW-12), who attended the deceased.

7. Dr. Ningombam Shyamjai Singh (PW-12), in his evidence, specifically alleged that he was posted at Casualty Department of the RMC Hospital at Lamphelpat and that the deceased L. Biren Singh was brought to him in an injured condition. The witness also asserted that he gave him whatever assistance he could, by giving him first aid treatment. He also asserted that the injured person "gained some consciousness". He, however, further stated that he could not remember as to whether the injured person stated or uttered anything during his brief conscious period. He also named one House Surgeon, namely, Thokchom Ibomcha to be present alongwith some relatives of the deceased. He was declared hostile. He denied his statement to the effect that the injured person regained sense and took the name of the accused. Since he was declared hostile, the trial Court ignored his evidence. The house surgeon is not examined by the prosecution.

8. That leaves the evidence of Oinam Deben Singh (PW-4) who claimed that on hearing the unusual sound at about 8' O clock in the evening, he rushed to the house of L. Hementa Singh (PW-3), but not finding him there, he narrated the incident to L. Chanbi Singh (PW-5) and after gathering some other persons, he reached the spot, where L. Biren Singh (deceased)

was lying in an injured condition. He then claimed that he alongwith some other persons, took the injured (deceased) to the hospital. He claimed that after about "one and half hours", the injured gathered senses and said in presence of L. Jiten Singh (PW-1), L. Ranachandra Singh (PW-2), L. Chanbi Singh (PW-5), L. Subhaschandra Singh (PW-7) and one medical officer that the injured was assaulted by Waikhom Yaima Singh (appellant herein), a resident of Thokpam Khunou Arong Thongkhong Manak. In his cross-examination, he denied that the injured never regained his consciousness. He contradicted his earlier statement that the deceased had merely stated that he was assaulted by Waikhom Yaima Singh of Thokpam Khunou Arong Thongkhong Manak. His explanation was that the police might have shortened his statement. He also admitted that there was one other person called Yaima Singh in their locality.

9. L. Jiten Singh (PW-1) also referred to the incident of finding the deceased in an injured condition. He also referred to the dying declaration. He is none other, but the son of the deceased. He claimed that his father came to senses at about 1½ am and that after giving the dying declaration, his father died within 10-20 minutes. This is in sharp contradiction with the evidence of PW-14 according to whom Biren Singh was alive till 3 p.m. In his cross-examination, he denied that his father was speaking in delirium. He also denied that his father had never made dying declaration or that his father died without speaking any word as he had got serious bleeding injuries which incapacitated him to speak.

10. L. Ranachandra Singh (PW-2) also reiterated about the dying declaration. The evidence of L. Hementa Singh (PW-3) is of no consequence as he has not referred to the dying declaration. He, however, admitted that in the next morning, Oinam Deben Singh (PW-4) and L. Subhaschandra Singh (PW-7) had come to the house and reported about the death of the victim.

11. L. Chanbi Singh (PW-5) also claimed that he was with the injured (deceased) in the hospital and that the injured took the name of the accused and that this was in presence of L. Jiten Singh (PW-1), L. Ranachandra Singh (PW-2), Oinam Deben Singh (PW-4) and L. Subhaschandra Singh (PW-7). This witness asserted that Oinam Deben Singh (PW-4) and L. Subhaschandra Singh (PW-7) were sent to the house for giving the information of the death. Though the other witnesses have admitted, this witness denied that there was any other person called Yaima Singh or Waikhom in the village. This witness admitted that in his earlier statement, he had not mentioned the surname of Yaima Singh.

12. L. Subhaschandra Singh (PW-7) is still another witness who had accompanied the deceased to the hospital. He claimed that the deceased had made a dying declaration in his presence. He also asserted that after making the dying declaration, the injured (deceased) died. In his cross-examination, he was also given the similar suggestion that he had not stated the name of L. Jiten Singh (PW-1) being present, which he denied. The other witnesses are not relevant.

13. We, therefore, have the evidence of some prosecution witnesses who claimed that the deceased made a dying declaration after he regained consciousness which was within 1 to 1½ hours after the deceased reached the hospital. The witnesses have generally stated that the deceased reached the hospital by about 10 or 11 pm. This is in sharp contradiction to the evidence of L. Ningthouren Singh (PW-14), the cousin of the deceased, who claimed that till 3 pm, there was no dying declaration made. We have referred to the evidence of this witness in details. This is the first circumstance which would make the factum of the said dying declaration suspicious.

14. It is also to be seen that the deceased was very seriously injured, so much so that according to the witnesses, he died immediately after allegedly making the said dying declaration, the time of which is not fixed by the prosecution.

The most important circumstance about this dying declaration is that, firstly, it is oral and secondly, there is no medical evidence suggesting that the deceased was in a fit medical condition to make such a dying declaration.

15. There can be no dispute that dying declaration can be the sole basis for conviction, however, such a dying declaration has to be proved to be wholly reliable, voluntary, and truthful and further that the maker thereof must be in a fit medical condition to make it. The oral dying declaration is a weak kind of evidence, where the exact words uttered by the deceased are not available, particularly because of the failure of memory of the witnesses who are said to have heard it. In the present case also, the exact words are not available. They differ from witness to witness. Some witnesses say about the name of the village of the appellant having been uttered by the deceased and some others do not. Further, Dr. Ningombam Shyamjai Singh (PW-12) was also not cross-examined by the Public Prosecutor in this case about the medical condition of the deceased and further fact as to whether he was in a fit condition to make any statement. Last, but not the least, though the witnesses claimed to have reported to L. Ningthouren Singh (PW-14) about such dying declaration and the name of the assailant, there is no reflection of the name in the FIR.

16. In our opinion, had the witnesses heard the dying declaration and reported the matter to L. Ningthouren Singh (PW-14) who made the FIR, he would never have failed to mention the name. Instead, we have it in the FIR that it was some unknown person who had beaten up the deceased. It must be remembered that the FIR was almost immediately after L. Ningthouren Singh (PW-14) came to know about the death of his cousin Biren Singh (deceased).

17. If under such circumstances, the trial Court felt it unsafe to rely on the so-called dying declaration, we do not think that the trial Court was not justified in taking that view. In our view, a perfectly probable view has been taken by the trial Court

which could not have been set aside for the mere fact that some other view could be taken on the basis of the dying declaration. We are at a loss to understand as to how the High Court held in paragraph 26 of its judgment that the victim was in a fit state of mind to make the declaration. In fact, there is absolutely no evidence about the fitness of the victim to make the said declaration.

18. The only reason why the High Court found fault with the judgment of the trial Court was that the trial Court had misconstrued and misunderstood the evidential value of the FIR. According to the High Court, the dying declaration was neglected/ignored on the ground that in the FIR, the name of the accused was not mentioned. In fact, that, in our opinion, was a good reason. The High Court is also not correct in observing that L. Ningthouren Singh (PW-14) was not present throughout the night of 30.10.1989 at the RMC Hospital. The High Court has given reasons that the FIR could not be used to discredit the testimony of the other reliable witnesses. The High Court has ignored the fact that if in reality the dying declaration had been made and L. Ningthouren Singh (PW-14) was informed about the name of the assailant, he would never have failed to mention the same in the FIR. The reliance of the High Court on the reported decision in *Ravi Kumar Vs. State of Punjab* [AIR (2005) SC 1929] is wholly uncalled for. In our opinion, therefore, the High Court was wholly wrong in observing that the dying declaration was creditworthy and that the trial Court had erred in acquitting the accused.

19. The judgment of the High Court is, therefore, set aside and that of the trial Court is restored confirming the acquittal of the appellant/accused. The appellant shall be set to liberty forthwith unless required in any other matter.

N.J. Appeal allowed.

J.S. YADAV
v.
STATE OF U.P. & ANR.
(Civil Appeal No. 3299 of 2011)

APRIL 18, 2011

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

Protection of Human Rights Act, 1993: ss.21, 23, 25, 26 – Protection of Human Rights (Amendment) Act, 2006 – Appellant, District Judge appointed as Member of the State Human Rights Commission in 2006 for a period of 5 years under the provisions of the Act of 1993 – After coming into force of Amendment Act of 2006, the eligibility criteria for appointment of Member was changed and it required experience of seven years as District Judge – State Government issued Notification declaring that appellant did not fulfill the criteria of the Amendment Act and, therefore, incurred disability to hold the office as a Member of the Commission – Validity of Notification challenged – Held: An employee appointed for a fixed period under a statute is entitled to continue till the expiry of the tenure – Moreover, s.26 specifically provided that neither the salary and allowances nor other terms and conditions of service of a Member shall be varied to his disadvantage after his appointment – As the appellant was fully eligible and competent to be appointed under the Act of 1993 and he was duly appointed and worked for about 2 years including the period after the commencement of the Amendment Act 2006, the declaration that he ceased to hold the post as a Member of the Commission, was in flagrant violation of the statutory provisions contained in s.26 of the Act of 1993 itself – The Notification was, thus, patently illegal – However, the vacancies of the Members were already filled – Appellant had also not impleaded any person who had been appointed in

his place as a Member of the Commission – In the light of that the public exchequer cannot be burdened with the liability to pay the salary of two persons against one sanctioned post – Therefore, appellant is not granted any other relief except the declaration in his favour that the impugned Notification is illegal – However, in the peculiar facts and circumstances of the case, the appellant is awarded cost to the tune of Rs. 1 lakh – Constitution of India, 1950 – Article 236(a) – Costs.

Protection of Human Rights (Amendment) Act, 2006: The amendment would apply prospectively, particularly in view of the fact that the Amendment Act 2006 does not expressly or by necessary implication gives retrospective effect to the Amendment Act – Prospective effect.

U.P. Higher Judicial Service Rules 1975: r.4 – Post of District Judge and Additional District Judge in the State of U.P. is neither inter-changeable nor inter-transferable.

Service law: Appointment – Tenure appointment – Held: An employee appointed for a fixed period under the Statute is entitled to continue till the expiry of the tenure and in such a case there can be no occasion to pass the order of superannuation for the reason that the tenure comes to an end automatically by afflux of time.

Repeal: Accrued rights cannot be taken away by repealing the statutory provisions arbitrarily.

Party: Necessary party – Impleadment of – Held: No order can be passed behind the back of a person adversely affecting him and such an order if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice – The principles enshrined in the proviso to Order I Rule 9, CPC provide that impleadment of a necessary party is mandatory and in case of non-joinder of necessary party, the plaintiff/

petitioner may not be entitled for the relief sought by him – In service jurisprudence, if an unsuccessful candidate challenges the selection process, he is bound to implead at least some of the successful candidates in representative capacity – In case the services of a person is terminated and another person is appointed at his place, in order to get relief, the person appointed at his place is the necessary party for the reason that even if the plaintiff/petitioner succeeds, it may not be possible for the Court to issue direction to accommodate the petitioner without removing the person who filled up the post manned by plaintiff/petitioner – Service law – Code of Civil Procedure, 1908 – O.1 r.9.

Words and phrases: cadre, 'Tenure', 'Justifiable grounds', 'vest' – Meaning of.

The appellant entered the U.P. Judicial Service as Munsif in the year 1972 and was promoted to the post of Additional District Judge in the year 1985 and further promoted to the post of District Judge w.e.f. 14.1.2003. While working as a Principal Secretary and Legal Remembrancer, Government of U.P., he was appointed as a Member of the U.P. State Human Rights Commission on 29.6.2006 for a period of five years i.e. till 30.6.2011. He joined on the said post on 1.7.2006. Sections 21, 23, 25 and 26 of the Protection of Human Rights Act, 1993 were amended by the Protection of Human Rights (Amendment) Act, 2006. The said amendment came into force on 23.11.2006. After completion of the tenure by the then Chairperson of the Commission and other Members in October 2007, the appellant remained the lone working Member of the Commission. The State of U.P. issued Notification to the effect that the appellant ceased to hold the office as a Member of the Commission. The appellant challenged the said Notification dated 28.5.2008 by filing writ petition mainly on the grounds that he had been appointed for a tenure of five years and that period could

not be curtailed and the Amendment Act 2006 could not take away the accrued rights of the appellant as he had been appointed prior to the said amendment. In the writ petition, the appellant did not implead anyone except the State of U.P. and its Principal Home Secretary as respondents. However, the vacancies on the post of the Chairperson as well as of the Members of the Commission were filled up on 6.6.2008 and, in view thereof, no interim order was passed by the High Court. The High Court dismissed the writ petition.

In the instant appeal, it was contended for the appellant that the experience of Additional District Judge can also be taken into consideration as that of a District Judge and, therefore, the appellant possessed the eligibility even under the amended provisions and thus, was not liable to be dislodged and that in view of the language of Rule 4 of the U.P. Higher Judicial Service Rules 1975, there was a single cadre comprising the posts of District and Sessions Judges and Additional District and Sessions Judges and there was no basic difference between the said two posts and the State could not issue the Notification making a declaration that the appellant ceased to be the member of the Commission and take away the accrued rights of the appellant.

Partly allowing the appeal, the Court

HELD: 1. A cadre generally denotes a strength of a service or a part of service sanctioned as a separate unit. It also includes sanctioned strength with reference to grades in a particular service. Cadre may also include temporary, supernumerary and shadow posts created in different grades. The expression "cadre", "posts" and "service" cannot be equated with each other. There is no prohibition in law to have two or more separate grades

in the same cadre based on an intelligible differentia. Admittedly, the post of District Judge and Additional District Judge in the State of U.P. is neither inter-changeable nor inter-transferable. Rule 4 of the U.P. Higher Judicial Service Rules 1975 merely provided for an integrated cadre for the said posts. Same is the position so far as the provisions of Article 236(a) of the Constitution of India are concerned. The said Article relates to the procedure of appointment on the post of the District Judge and other Civil Judicial posts inferior to the post of District Judge. The definition in Article 236 covers the higher section of the State Judicial Service both in the civil and criminal sides. In such a fact-situation, there is no cogent reason to take a view contrary to the same for the reason that in case the Legislature in its wisdom has prescribed a minimum experience of seven years as District Judge knowing it fully well the existing statutory and constitutional provisions, it does not require to be interpreted ignoring the legislative intent. Clear statutory provision in such a case is required to be literally construed by considering the legislative policy. Thus, no fault can be found with the impugned judgment and order of the High Court on this count. [Paras 10, 11, 12] [478-H; 479-A-G]

Union of India v. Pushpa Rani & Ors., **2008 (11) SCR 440: (2008) 9 SCC 242;** *State of Karnataka & Ors. v. K. Govindappa & Anr.* **2008 (16) SCR 457: AIR 2009 SC 618;** *All India Judges' Association v. Union of India & Ors.* **1991 (2) Suppl. SCR 206: AIR 1992 SC 165 – relied on.**

2.1. The appellant had joined as a member of the Commission on 29.6.2006 under the Act 1993. Section 26 of the Protection of Human Rights Act, 1993 specifically provided that neither the salary and allowances nor other terms and conditions of service of a member shall be varied to his dis-advantage after his appointment. As the

appellant was fully eligible and competent to be appointed under the Act 1993 and he had duly been appointed and worked for about 2 years including the period after the commencement of the Amendment Act 2006, the declaration that he ceased to hold the post as a Member of the Commission, was in flagrant violation of the statutory provisions contained in Section 26 of the Act 1993 itself. [Para 14] [480-B-D]

Dr. D.C. Saxena v. State of Haryana & Ors. **1987 (3) SCR 346:AIR1987 SC 1463 – relied on.**

2.2. An employee appointed for a fixed period under the Statute is entitled to continue till the expiry of the tenure and in such a case there can be no occasion to pass the order of superannuation for the reason that the tenure comes to an end automatically by afflux of time. 'Tenure' means a term during which the office is held. It is a condition of holding the office. Once a person is appointed to a tenure post, his appointment to the said post begins when he joins and when it comes to an end on the completion of tenure unless curtailed on justifiable grounds. Such a person does not superannuate. He only comes out of the office on completion of his tenure. Justifiable grounds means grounds of incurring any disqualification while holding the post i.e. the grounds incorporated in Section 23 of the Act 1993. The dictionary meaning to the said expression would be "done on adequate reasons sufficiently supported by credible evidence, when weighed by unprejudiced mind, guided by common sense and by correct rules of law. [Paras 17 to 19] [480-G-H; 481-A-G]

Dr. L.P. Agarwal v. Union of India & Ors. **1992 (3) SCR 567: AIR 1992 SC 1872;** *State of U.P. & Anr. v. Dr. S.K. Sinha & Ors.* **1994 (6) Suppl. SCR 283: AIR 1995 SC 768;** *P. Venugopal v. Union of India* **2008 (8) SCR 1: (2008) 5 SCC**

1; *Raj Kapoor v. Laxman* **1980 (2) SCR 512: AIR 1980 SC 605 – relied on.**

3.1. The word "vest" is normally used where an immediate fixed right in present or future enjoyment in respect of a property is created. With the long usage the said word "vest" has also acquired a meaning as "an absolute or indefeasible right". It had a "legitimate" or "settled expectation" to obtain right to enjoy the property etc. Such "settled expectation" can be rendered impossible of fulfilment due to change in law by the Legislature. Besides this, such a "settled expectation" or the so-called "vested right" cannot be countenanced against public interest and convenience which are sought to be served by amendment of the law. Thus, "vested right" is a right independent of any contingency. Such a right can arise from a contract, statute or by operation of law. Thus, "vested right" is a right independent of any contingency. Such a right can arise from a contract, statute or by operation of law. A vested right can be taken away only if the law specifically or by necessary implication provide for such a course. [Paras 20, 21, 22] [481-H; 482-D-G]

Howrah Municipal Corpn. & Ors. v. Ganges Rope Co. Ltd. & Ors. **(2004) 1 SCC 663;** *Mosammat Bibi Sayeeda & Ors. etc. v. State of Bihar & Ors. etc.* **1996 (1) Suppl. SCR 799: AIR 1996 SC 1936 – relied on.**

Black's Law Dictionary (6th Edition); Webster's ComprehensiveDictionary **(International Edition) – referred to.**

3.2. The appellant was appointed under the provisions of the Act 1993 which did not require seven years' experience as a District Judge. In the instant case, the Amendment Act 2006 came into force on 23.11.2006.

The State of U.P. did not take any step for discontinuation of the appellant upto May 2008 on the ground that he did not possess the eligibility as per the Amendment Act 2006. The Legislature is competent to unilaterally alter the service conditions of the employee and that can be done with retrospective effect also, but the intention of the Legislature to apply the amended provisions with retrospective effect must be evident from the Amendment Act itself expressly or by necessary implication. The said power of the Legislature is qualified further that such a unilateral alteration of service conditions should be in conformity with legal and constitutional provisions. In the instant case, the Amendment Act 2006 is not under challenge. However, the issue agitated by the appellant was that the Legislature never intended to apply the amended provisions with retrospective effect and therefore, the appellant could not be discontinued from the post. [Paras 23, 24, 26] [482-H; 483-A-C-H; 484-A]

3.3. Accrued rights cannot be taken away by repealing the statutory provisions arbitrarily. More so, the repealing law must provide for taking away such rights, expressly or by necessary implication. [Para 29] [486-A]

Roshan Lal Tandon v. Union of India & Ors. **AIR 1967 SC 1889: 1968 SCR 185 ;** *State of Mysore v. Krishna Murthy & Ors.* **AIR 1973 SC 1146: 1973 (2) SCR 575 ;** *Raj Kumar v. Union of India & Ors.* **AIR 1975 SC 1116: 1975 (3) SCR 963 ;** *Ex-Capt. K.C. Arora & Anr. v. State of Haryana & Ors.* **(1984) 3 SCC 281: 1984 (3) SCR 623 ;** *State of Gujarat & Anr. v. Raman Lal Keshav Lal Soni & Ors.* **AIR 1984 SC 161: 1983 (2) SCR 287 ;** *Union of India & Ors. v. Tushar Ranjan Mohanty & Ors.* **(1994) 5 SCC 450: 1994 (1) Suppl. SCR 651;** *P.D. Aggarwal & Ors. v. State of U.P. & Ors.* **AIR 1987 SC 1676: 1987 (3) SCR 427;** *State of Punjab v. Mohar Singh Pratap Singh* **AIR 1955 SC 84: 1955 SCR 893;** *M.S. Shivananda v. The Karnataka State Road Transport Corpn.*

& Ors. **AIR 1980 SC 77: 1980 (1) SCR 684 ;** *Commissioner of Income Tax U.P. v. M/s. Shah Sadiq & Sons* **AIR 1987 SC 1217: 1987 (2) SCR 942 ;** *Vishwant Kumar v. Madan Lal Sharma & Anr.* **AIR 2004 SC 1887: 2007 (13) SCR 804;** *State of Punjab & Ors. v. Bhajan Kaur & Ors.* **AIR 2008 SC 2276;** *Sangam Spinners v. Regional Provident Fund Commissioner* **I AIR 2008 SC 739: 2007 (12) SCR 883;** *Chairman, Railway Board & Ors. v. C.R.Rangadhamaiah & Ors.* **AIR 1997 SC 3828: 1997 (3) Suppl. SCR 63 – relied on.**

3.4. There is no specific word in the Amendment Act 2006 to suggest its retrospective applicability. Rather the positive provisions of Section 1 suggests to the contrary. Undoubtedly, the amended provisions came into force on 23.11.2006 by S.O. 2002 (E), dated 23.11.2006, published in the Gazette of India, Extra Pt.II, Section 3(ii) dated 23.11.2006. In fact, date 23.11.2006 is the pointer and put the matter beyond doubt. Thus, in view of that the Notification dated 28.5.2008 is patently illegal. [Paras 30, 31] [486-B-E]

4. No order can be passed behind the back of a person adversely affecting him and such an order if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice. The principles enshrined in the proviso to Order I Rule 9, of the Code of Civil Procedure, 1908 provide that impleadment of a necessary party is mandatory and in case of non-joinder of necessary party, the plaintiff/petitioner may not be entitled for the relief sought by him. The litigant has to ensure that the necessary party is before the Court, be it a plaintiff or a defendant, otherwise the proceedings will have to fail. In Service Jurisprudence if an unsuccessful candidate challenges the selection process, he is bound to implead at least some of the successful candidates in

representative capacity. In case the services of a person is terminated and another person is appointed at his place, in order to get relief, the person appointed at his place is the necessary party for the reason that even if the plaintiff/petitioner succeeds, it may not be possible for the Court to issue direction to accommodate the petitioner without removing the person who filled up the post manned by plaintiff/petitioner. More so, the public exchequer cannot be burdened with the liability to pay the salary of two persons against one sanctioned post. The appellant did not implead any person who had been appointed in his place as a Member of the Commission. More so, he made it clear before the High Court that his cause would be vindicated if the Court made a declaration that he had illegally been dislodged/restrained to continue as a Member of the Commission. In view of the above, he cannot be entitled for any other relief except the declaration in his favour which had been made hereinabove that the impugned Notification dated 28.5.2008 is illegal. However, in the peculiar facts and circumstances of the case, the appellant is entitled for cost to the tune of Rs. 1 lakh which the respondents must pay within a period of two months from today. [Paras 32, 33 and 34] [486-F-H; 487-A-G]

Prabodh Verma & Ors. etc. etc. v. State of U.P. & Ors. etc. **AIR 1985 SC 167: 2003 (6) Suppl. SCR 1212 ;** *Ishwar Singh & Ors. v. Kuldip Singh & Ors.* **1995 (supp) 1 SCC 179;** *Tridip Kumar Dingal & Ors. v. State of West Bengal & Ors.* **(2009) 1 SCC 768: 2008 (15) SCR 194 ;** *State of Assam v Union of India & Ors.* **(2010) 10 SCC 408: 2010 (12) SCR 413 ;** *Public Service Commission, Uttaranchal v. Mamta Bisht & Ors.* **AIR 2010 SC 2613: 2010 (7) SCR 289 – relied on.**

Case Law Reference:

(2008) 11 SCR 440	**relied on**	**Para 10**

2008 16 SCR 457	**relied on**	**Para 10**
1991 2 Suppl. SCR 206	**relied on**	**Para 11**
1987 3 SCR 346	**relied on**	**Para 15**
1992 3 SCR 567	**relied on**	**Para 17**
1994 6 Suppl. SCR 283	**relied on**	**Para 17**
(2008) 8 SCR 1	**relied on**	**Para 18**
1980 2 SCR 512	**relied on**	**Para 19**
AIR 1996 SC 1936	**relied on**	**Para 20**
(2004) 1 SCC 663	**relied on**	**Para 21**
1968 SCR 185	**relied on**	**Para 24**
1973 (2) SCR 575	**relied on**	**Para 24**
1975 (3) SCR 963	**relied on**	**Para 24**
1984 (3) SCR 623	**relied on**	**Para 24**
1983 (2) SCR 287	**relied on**	**Para 24**
1994 (1) Suppl. SCR 651	**relied on**	**Para 25**
1987 (3) SCR 427	**relied on**	**Para 25**
1955 SCR 893	**relied on**	**Para 26**
1980 (1) SCR 684	**relied on**	**Para 26**
1987 (2) SCR 942	**relied on**	**Para 26**
2007 (13) SCR 804	**relied on**	**Para 26**
2007 (12) SCR 883	**relied on**	**Para 27**
1997 (3) Suppl. SCR 63	**relied on**	**Para 28**
1997 (3) Suppl. SCR 63	**relied on**	**Para 29**

2003 (6) Suppl. SCR 1212	**relied on**	**Para 32**
1995 (supp) 1 SCC 179	**relied on**	**Para 32**
2008 (15) SCR 194	**relied on**	**Para 32**
2010 (12) SCR 413	**relied on**	**Para 32**
2010 (7) SCR 289	**relied on**	**Para 32**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3299 of 2011.

From the Judgment and Order dated 21.04.2009 of the High Court of Judicature at Allahabad in CMWP No. 27315 of 2008.

V. Shekhar, Jatin Rajput, Vinamra and Shilpa Singh for the Appellant.

Pramod Swarup, Ameet Singh, S.K. Dwivedi, Manoj Kr. Dwivedi, Pareena Swarup and Gunnam Venkateswara Rao for the Respondents.

The Judgment of the Court was delivered by

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

2. This appeal is focused animadverting upon the judgment and order dated 21.4.2009 passed by the High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 27315 of 2008, by which the High Court dismissed the writ petition filed by the appellant, challenging the Notification dated 28.5.2008, by which on the date of reconstitution of the U.P. State Human Rights Commission (hereinafter referred to as `Commission'), the appellant was declared to have ceased to hold the office as a Member of the said Commission.

3. Compendiously and concisely, the relevant facts necessary and germane to the disposal of this appeal run as under:

(A) Appellant entered the U.P. Judicial Services as Munsiff in the year 1972 and was promoted to the post of Additional District Judge in the year 1985 and further promoted to the post of District Judge w.e.f. 14.1.2003.

(B) The appellant while working as a Principal Secretary and Legal Remembrancer, Government of U.P., was appointed as a Member of the Commission on 29.6.2006 for a period of five years i.e. till 30.6.2011. The appellant joined on the said post on 1.7.2006.

(C) Sections 21, 23, 25 and 26 of The Protection of Human Rights Act, 1993 (hereinafter called `the Act 1993'), stood amended vide The Protection of Human Rights (Amendment) Act, 2006 (hereinafter referred to 'Amendment Act 2006'). The said amendment came into force on 23.11.2006.

(D) After completion of the tenure by the then Chairperson of the Commission and other Members in October 2007, the appellant remained the lone working Member of the Commission. The State of U.P. issued Notification dated 28.5.2008 to the effect that appellant ceased to hold the office as a Member of the Commission.

(E) The appellant challenged the said Notification dated 28.5.2008 by filing Writ Petition No. 27315 of 2008, mainly on the grounds that he had been appointed for a tenure of five years and that period could not be curtailed. The amendment Act 2006 could not take away the accrued rights of the appellant as he had been appointed prior to the said amendment.

(F) The appellant did not implead anyone except the State of U.P. and its Principal Home Secretary as respondents in the said writ petition. However, the vacancies on the post of the Chairperson as well as of the Members of the Commission were filled up on 6.6.2008 and, in view thereof, no interim order could be passed by the High Court.

(G) The High Court dismissed the writ petition vide impugned judgment and order dated 21.4.2009. Hence, this appeal.

4. Shri V. Shekhar, learned senior counsel with Ms. Shilpa Singh, appearing for the appellant, has submitted that as the appellant was holding the tenure post for a period of five years, he was entitled to continue till 30.6.2011; the Amendment Act 2006 could not be applied retrospectively and it could not curtail the tenure of the persons who had been appointed and continuing as a Chairperson/Member of the Commission prior to the commencement of the amended provisions in force. Appointments subsequent to 22.11.2006, could be made as per the provisions of the Amendment Act 2006. Even otherwise, the appellant fulfilled the eligibility of having seven years experience as a District Judge required under the Amendment Act 2006, in view of the fact that the U.P. Higher Judicial Service Rules, 1975 (hereinafter referred to as `the Rules 1975'), clearly provided that there would be a single cadre comprising the posts of District and Sessions Judges and Additional District and Sessions Judges. More so, Article 236(a) of the Constitution of India clearly stipulates that District Judge includes the Additional District Judge and Assistant District Judge. Thus, the appellant was fully eligible/qualified to be appointed afresh as a member of the Commission even as per the Amendment Act 2006. The appellant did not incur any disability during the period of holding the post as a Member of the Commission, thus, could not be removed from the service, except in the manner set out under Section 23 of the Act 1993. More so, it was not a case where the Commission itself stood dissolved/disbanded as a whole and new Commission has been constituted under the amended provisions of law. Thus, the impugned judgment and order is liable to be set aside. The appeal deserves to be allowed.

5. Per contra, Shri Pramod Swarup, learned senior

counsel appearing on behalf of the respondents, has opposed the appeal vehemently contending that High Court could not have entertained the writ petition on merit as no relief could be granted to the appellant for the reason that fresh appointments on the posts of Member of the Commission had been made on 6.6.2008 itself. During the pendency of the writ petition, the appellant did not amend his petition impleading the newly appointed member(s), thus, petition was liable to be dismissed only on the ground of non-joinder of necessary parties. Even this Court cannot grant pecuniary benefits to the appellant for the reason that the public exchequer of the State of U.P. cannot be fastened with liability of the payment of salary to two persons on one post. The appellant suffered the disability by virtue of operation of the amended law and ceased to be competent to hold the post in view of the Amendment Act 2006. Thus, he has rightly been declared to have ceased to hold the post as a Member of the Commission. The Legislature is competent to alter the service conditions of an employee unilaterally, and that too, with a retrospective effect. The appellant has submitted before the High Court that he did not want any relief so as to dislodge the newly appointed Member(s) of the Commission and was seeking only a declaration that he had unlawfully been discontinued, so as to avoid to further exercise the power so vested in the State Government. Thus, the matter remained purely academic before the High Court. Peculiar facts of the case do not warrant deciding the appeal on merit. Even otherwise, the appeal lacks merit and is liable to be dismissed.

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

7. Relevant provisions of the Act 1993 and provisions inserted by Amendment Act 2006 read as under:

Under Act No. 1 of 1994 (as it stood on the date of appointment of the appellant)	UNDER THE AMENDMENT ACT 2006 (W.E.F. 23.11.2006)
SECTION 21: (2) The State Commission shall consist of (a) …… (b) one member who is, or has been, a Judge of a High Court. (c) one member who is, or **has been, a district Judge** in that State.	(2) The State Commission shall, with effect from such date as the State Government may by Notification specify, consist of:- (a) …… (b) one member who is, or has been a Judge of a High Court or District Judge in the State **with a minimum of seven years experience as District Judge;**
SECTION 23: 23. Removal of a Member of the State Commission – (1) Subject to the provisions of Sub-section (2), the Chairperson or, any other member of the State Commission shall only be removed from his office by order of the President on the ground of proved mis-behaviour or incapacity after the Supreme Court, on a reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed in that behalf by the Supreme Court, reported that the Chairperson	23. [Resignation and Removal of Chairperson or a Member of the State Commission] [(1) The Chairperson or a Member of a State Commission may, by notice in writing under his hand addressed to the Governor, resign his office. (1A) Subject to the provisions of Sub-section (2), the Chairperson or, any other member of the State Commission shall only be removed from his office by order of the President on the ground of proved mis-behaviour or incapacity after

or such other Member, as the case may be ought on any such ground to be removed.	the Supreme Court, on a reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed in that behalf by the Supreme Court, reported that the Chairperson or such other Member, as the case may be ought on any such ground to be removed.
……	……
SECTION 26: 26. Terms and conditions of service of Members of the State Commission – The salaries and allowances payable to, and other terms and conditions of service of, the Members shall be such as may be prescribed by the State Government.	26. [Terms and conditions of service of Chairperson and Members of the State Commission- The salaries and allowances payable to, and other terms and conditions of service of, the Chairperson and Members shall be such as may be prescribed by the State Government.
Provided that neither the salary and allowances **nor the other terms and conditions of service of a Member shall be varied to his disadvantage after his appointment.**	Provided that neither the salary and allowances **nor the other terms and conditions of service of the Chairperson or a Members shall be varied to his disadvantage after his appointment.** (Emphasis added)

8. The other legal provisions which may be relevant for consideration of the Court are as under:

(i) Article 236(a) of the Constitution of India reads as under:

"(a) the expression "district judge" includes judge of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge".

(ii) Section 3(17) of the General Clauses Act, 1897 (hereinafter referred to as `the Act 1897'), provides that "District Judge" means:

"(17) "District Judge" shall mean the Judge of a principal Civil Court of original jurisdiction, but shall not include a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction."

Section 6: Effect of repeal- Where this Act or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not -

(a) ……

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) ……..

(e) ……..

(iii) Rule 4 of the Rules, 1975 reads:

Strength of the Service: (1) The service shall consist of a **single cadre** comprising the posts of –

(a) District and Sessions Judges, and

(b) Additional District and Sessions Judges. (Emphasis added)

9. Against the aforesaid backdrops and in view of the aforesaid statutory provisions, it has been canvassed on behalf of the appellant that as the experience of Additional District Judge can also be taken into consideration as that of a District Judge, the appellant possessed the eligibility even under the amended provisions and thus, was not liable to be dislodged

The High Court dealt with the issue elaborately and came to the conclusion that ordinary and natural meaning is not to be controlled by supposed intention of the Legislature. A court cannot stretch the language of a statutory provision to bring it in accord with the supposed legislative intent underlying it, unless the words are susceptible of carrying out that intention. Thus, considering the object and purpose of the amendment, it cannot be held that experience of the appellant as Additional District Judge could also be taken into consideration as that of a District Judge. Much reliance has been placed by Shri Shekhar, learned senior counsel for the appellant on the language of Rule 4 of the Rules 1975 that there is a single cadre comprising the posts of District and Sessions Judges and Additional District and Sessions Judges. Thus, there is no basic difference between the said two posts.

10. The aforesaid submission seems to be very attractive but has no substance for the reason that a cadre generally denotes a strength of a service or a part of service sanctioned

as a separate unit. It also includes sanctioned strength with reference to grades in a particular service. Cadre may also include temporary, supernumerary and shadow posts created in different grades. The expression "cadre", "posts" and "service" cannot be equated with each other. (See: *Union of India v. Pushpa Rani & Ors.,* (2008) 9 SCC 242; and *State of Karnataka & Ors. v. K. Govindappa & Anr.,* AIR 2009 SC 618). There is no prohibition in law to have two or more separate grades in the same cadre based on an intelligent differential. Admittedly, the post of District Judge and Additional District Judge in the State of U.P. is neither inter-changeable nor inter-transferable. The aforesaid Rules merely provide for an integrated cadre for the aforesaid posts. Thus, the submission is liable to be rejected being preposterous.

11. Same remains the position so far as the provisions of Article 236(a) of the Constitution of India are concerned. The said Article relates to the procedure of appointment on the post of the District Judge and other Civil Judicial posts inferior to the post of District Judge. The definition in Article 236 covers the higher section of the State Judicial Service both in the civil and criminal sides. (See: All India Judges' *Association v. Union of India & Ors.,* AIR 1992 SC 165).

12. In such a fact-situation, we do not see any cogent reason to take a view contrary to the same for the reason that in case the Legislature in its wisdom has prescribed a minimum experience of seven years as District Judge knowing it fully well the existing statutory and constitutional provisions, it does not require to be interpreted ignoring the legislative intent. We cannot proceed with an assumption that Legislature had committed any mistake enacting the said provision. Clear statutory provision in such a case is required to be literally construed by considering the legislative policy. Thus, no fault can be found with the impugned judgment and order of the High Court on this count.

13. The question does arise as to whether the State could

issue the Notification making a declaration that the appellant ceased to be the member of the Commission and whether the said Notification could take away the accrued rights of the appellant?

14. The appellant had joined as a member of the Commission vide order dated 29.6.2006 under the Act 1993. Section 26 of the Act 1993 specifically provided that neither the salary and allowances nor other terms and conditions of service of a member shall be varied to his dis-advantage after his appointment. The submission so made on behalf of the appellant in this regard has not been considered by the High Court taking into consideration the provisions of Section 26 at all. As the appellant was fully eligible and competent to be appointed under the Act 1993 and he had duly been appointed and worked for about 2 years including the period after the commencement of the Amendment Act 2006, the declaration that he ceased to hold the post as a Member of the Commission, is in flagrant violation of the statutory provisions contained in Section 26 of the Act 1993 itself.

15. Needless to say that "the expression `terms of service' clearly includes tenure of service". (Vide: *Dr. D.C. Saxena v. State of Haryana & Ors.,* AIR 1987 SC 1463).

16. The view taken by the High Court in this respect is not in consonance with the statutory provisions. The amendment would apply prospectively, particularly in view of the fact that the Amendment Act 2006 does not expressly or by necessary implication suggest that such a drastic step is permissible giving retrospective effect to the Amendment Act 2006.

17. An employee appointed for a fixed period under the Statute is entitled to continue till the expiry of the tenure and in such a case there can be no occasion to pass the order of superannuation for the reason that the tenure comes to an end automatically by afflux of time. (Vide: *Dr. L.P. Agarwal v. Union*

of India & Ors., AIR 1992 SC 1872; and *State of U.P. & Anr. v. Dr. S.K. Sinha & Ors.,* AIR 1995 SC 768).

18. In *P. Venugopal v. Union of India,* (2008) 5 SCC 1, this Court considered the case wherein the Director of All India Institute of Medical Sciences, New Delhi, having been duly appointed for a period of five years had been removed prior to completion of the said period. The court observed as under:

> "Service conditions make the post of Director a tenure post and as such the question of superannuating or prematurely retiring the incumbent of the said post does not arise at all….. The appointment is for a tenure to which the principle of superannuation does not apply. 'Tenure' means a term during which the office is held. It is a condition of holding the office. Once a person is appointed to a tenure post, his appointment to the said post begins when he joins and when it comes to an end on the completion of tenure unless curtailed on justifiable grounds. Such a person does not superannuate. He only comes out of the office on completion of his tenure." (Emphasis added)

19. J*ustifiable grounds,* as referred to hereinabove by this Court in *P. Venugopal* (supra), means the grounds of incurring any disqualification while holding the post i.e. the grounds incorporated in Section 23 of the Act 1993. If we give the dictionary meanings to the said expression, it means: "done on adequate reasons sufficiently supported by credible evidence, when weighed by unprejudiced mind, guided by common sense and by correct rules of law. The showing in court that one had sufficient reason for doing that which he is called to answer; the ground for such a plea. Lexically, the sense is clear. An act is "justified by law" if it is warranted, validated and made blameless by law". (Vide: *Raj Kapoor v. Laxman,* AIR 1980 SC 605).

20. "The word 'vested' is defined in Black's Law Dictionary (6th Edition) at page 1563, as vested; fixed; accrued; settled;

absolute; complete. Having the character or given the rights of absolute ownership; not contingent; not subject to be defeated by a condition precedent.' Rights are 'vested' when right to enjoyment, present or prospective, has become property of some particular person or persons as present interest; mere expectancy of future benefits, or contingent interest in property founded on anticipated continuance of existing laws, does not constitute vested rights. In Webster's Comprehensive Dictionary (International Edition) at page 1397, 'vested' is defined as (law held by a tenure subject to no contingency; complete; established by law as a permanent right; vested interest." (See: *Mosammat Bibi Sayeeda & Ors. etc. v. State of Bihar & Ors. etc.,* AIR 1996 SC 1936).

21. The word "vest" is normally used where an immediate fixed right in present or future enjoyment in respect of a property is created. With the long usage the said word "vest" has also acquired a meaning as "an absolute or indefeasible right". It had a "legitimate" or "settled expectation" to obtain right to enjoy the property etc. Such "settled expectation" can be rendered impossible of fulfilment due to change in law by the Legislature. Besides this, such a "settled expectation" or the so-called "vested right" cannot be countenanced against public interest and convenience which are sought to be served by amendment of the law. (Vide: *Howrah Municipal Corpn. & Ors. v. Ganges Rope Co. Ltd. & Ors.,* (2004) 1 SCC 663).

22. Thus, "vested right" is a right independent of any contingency. Such a right can arise from a contract, statute or by operation of law. A vested right can be taken away only if the law specifically or by necessary implication provide for such a course.

23. The appellant had been appointed under the provisions of the Act 1993 which did not require seven years' experience as a District Judge. In the instant case, the Amendment Act 2006 came into force on 23.11.2006. The State of U.P. did not take any step for discontinuation of the appellant

upto May 2008 on the ground that he did not possess the eligibility as per the Amendment Act 2006.

24. The Legislature is competent to unilaterally alter the service conditions of the employee and that can be done with retrospective effect also, but the intention of the Legislature to apply the amended provisions with retrospective effect must be evident from the Amendment Act itself expressly or by necessary implication. The aforesaid power of the Legislature is qualified further that such a unilateral alteration of service conditions should be in conformity with legal and constitutional provisions. (Vide: *Roshan Lal Tandon v. Union of India & Ors.,* AIR 1967 SC 1889; *State of Mysore v. Krishna Murthy & Ors.,* AIR 1973 SC 1146; *Raj Kumar v. Union of India & Ors.,* AIR 1975 SC 1116; *Ex-Capt. K.C. Arora & Anr. v. State of Haryana & Ors.,* (1984) 3 SCC 281; and *State of Gujarat & Anr. v. Raman Lal Keshav Lal Soni & Ors.,* AIR 1984 SC 161).

25. In *Union of India & Ors. V. Tushar Ranjan Mohanty & Ors.,* (1994) 5 SCC 450, this Court declared the amendment with retrospective operation as ultra vires as it takes away the vested rights of the petitioners therein and thus, was unreasonable, arbitrary and violative of Articles 14 and 16 of the Constitution. While deciding the said case, this Court placed very heavy reliance on the judgment in *P.D. Aggarwal & Ors. v. State of U.P. & Ors.,* AIR 1987 SC 1676, wherein this Court has held as under:

> "…the Government has power to make retrospective amendments to the Rules but if the Rules purport to take away the vested rights and are arbitrary and not reasonable then such retrospective amendments are subject to judicial scrutiny if they have infringed Articles 14 and 16 of the Constitution."

26. In the instant case, the Amendment Act 2006 is not under challenge. However, the issue agitated by the appellant has been that the Legislature never intended to apply the

amended provisions with retrospective effect and therefore, the appellant could not be discontinued from the post. His rights stood protected by the provisions of Section 6 of the Act 1897.

The issue of applicability of the said provision has been considered by this Court in *State of Punjab v. Mohar Singh Pratap Singh,* AIR 1955 SC 84; *M.S. Shivananda v. The Karnataka State Road Transport Corpn. & Ors.,* AIR 1980 SC 77; *Commissioner of Income Tax U.P. v. M/s. Shah Sadiq & Sons,* AIR 1987 SC 1217; and *Vishwant Kumar v. Madan Lal Sharma & Anr.,* AIR 2004 SC 1887, wherein it has been held that the rights accrued under the Act/Ordinance which stood repealed would continue to exist unless it has specifically or by necessary implication been taken away by the repealing Act.

27. This Court in *State of Punjab & Ors. v. Bhajan Kaur & Ors.,* AIR 2008 SC 2276, while dealing with the provisions of Section 6 of the Act 1897 held as under:

> "A statute is presumed to be prospective unless held to be retrospective, either expressly or by necessary implication. A substantive law is presumed to be prospective. It is one of the facets of the rule of law…..Where a right is created by an enactment, in the absence of a clear provision in the statute, it is not to be applied retrospectively."

28. In *Sangam Spinners v. Regional Provident Fund Commissioner I,* AIR 2008 SC 739, this court held as under:

> "It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. The absence of a saving clause in a new enactment preserving the rights and liabilities under the repealed law is neither material nor decisive of the question. In terms of Section 6(c) of the General Clauses Act 1897 unless a different intention appears the repeal

shall not affect any right, privilege or liability acquired, accrued or incurred under the enactment repealed."

29. A Constitution Bench of this Court in *Chairman, Railway Board & Ors. v. C.R.Rangadhamaiah & Ors.,* AIR 1997 SC 3828, dealt with the case where the pension admissible under the Rules in force at the time of retirement was reduced with retrospective effect. This Court held such an action to be unreasonable and arbitrary being violative of Articles 14 and 16 of the Constitution of India. The Court observed as under:

"It can, therefore, be said that a rule which operates in futuro so as to govern future rights of those already in service cannot be assailed on the ground of retroactivity as being violative of Articles 14 and 16 of the Constitution, but a rule which seeks to reverse from an anterior date a benefit which has been granted or availed of, e.g., promotion or pay scale, can be assailed as being violative of Articles 14 and 16 of the Constitution to the extent it operates retrospectively…….

In many of these decisions the expressions "vested rights" or "accrued rights" have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment, etc., of the employees. The said expressions have been used in the context of a right flowing under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the rule in force at that time. It has been held that such an amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution."

Thus, from the above, it is evident that accrued rights cannot be taken away by repealing the statutory provisions arbitrarily. More so, the repealing law must provide for taking away such rights, expressly or by necessary implication.

30. There is no specific word in the Amendment Act 2006 to suggest its retrospective applicability. Rather the positive provisions of Section 1 suggests to the contrary as it reads:-

Short Title and Commencement-

(1)…….

"(2)It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint".

Undoubtedly, the amended provisions came into force on 23.11.2006 vide S.O. 2002 (E), dated 23.11.2006, published in the Gazette of India, Extra Pt.II, Section 3(ii) dated 23.11.2006. In fact, date 23.11.2006 is the pointer and put the matter beyond doubt.

31. Thus, in view of the above, we do not have any hesitation to declare that the Notification dated 28.5.2008 is patently illegal.

32. No order can be passed behind the back of a person adversely affecting him and such an order if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice. The principles enshrined in the proviso to Order I Rule 9, of the Code of Civil Procedure, 1908 provide that impleadment of a necessary party is mandatory and in case of non-joinder of necessary party, the plaintiff/petitioner may not be entitled for the relief sought by him. The litigant has to ensure that the necessary party is before the Court, be it a plaintiff or a defendant, otherwise the proceedings will have to fail. In Service Jurisprudence if an unsuccessful candidate challenges the

selection process, he is bound to implead at least some of the successful candidates in representative capacity. In case the services of a person is terminated and another person is appointed at his place, in order to get relief, the person appointed at his place is the necessary party for the reason that even if the plaintiff/petitioner succeeds, it may not be possible for the Court to issue direction to accommodate the petitioner without removing the person who filled up the post manned by plaintiff/petitioner. (Vide: *Prabodh Verma & Ors. etc. etc. v. State of U.P. & Ors. etc.,* AIR 1985 SC 167; *Ishwar Singh & Ors. v. Kuldip Singh & Ors.,* 1995 (supp) 1 SCC 179; *Tridip Kumar Dingal & Ors. v. State of West Bengal & Ors.,* (2009) 1 SCC 768; *State of Assam v Union of India & Ors.,* (2010) 10 SCC 408; and *Public Service Commission, Uttaranchal v. Mamta Bisht & Ors.,* AIR 2010 SC 2613).

More so, the public exchequer cannot be burdened with the liability to pay the salary of two persons against one sanctioned post.

33. The appellant did not implead any person who had been appointed in his place as a Member of the Commission. More so, he made it clear before the High Court that his cause would be vindicated if the Court made a declaration that he had illegally been dislodged/restrained to continue as a Member of the Commission. In view of the above, he cannot be entitled for any other relief except the declaration in his favour which had been made hereinabove that the impugned Notification dated 28.5.2008 is illegal.

34. In view of above, the appeal is allowed to the extent as explained hereinabove. However, in the peculiar facts and circumstances of the case, the appellant is entitled for cost to the tune of Rs. 1 lakh which the respondents must pay within a period of two months from today.

D.G. Appeal partly allowed.

ARUMUGAM SERVAI
v.
STATE OF TAMIL NADU
(Criminal Appeal No. 958 of 2011)

APRIL 19, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – s.3(1)(x) – Complainants-PWs 1 and 2 belonged to "Pallan" caste, a Scheduled Caste in Tamil Nadu – Altercation between them and accused-appellant – Appellant insulted PW1 by calling him a "Pallapayal" and thereafter the appellants caused injuries to both PW1 and PW2 – Conviction of appellants by courts below – Justification of – Held: Justified – The word 'pallan' no doubt denotes a specific caste, but it is also a word used in a derogatory sense to insult someone – Even calling a person a 'pallan', if used with intent to insult a member of the Scheduled Caste, is, an offence u/s.3(1)(x) – To call a person as a 'pallapayal' in Tamilnadu is even more insulting, and hence is even more an offence – Similarly, in Tamilnadu there is a caste called 'parayan' but the word 'parayan' is also used in a derogatory sense – The word 'paraparayan' is even more derogatory – Uses of the words 'pallan', 'pallapayal' 'parayan' or 'paraparayan' with intent to insult is highly objectionable and also an offence under the SC/ST Act – It is just unacceptable in the modern age – The appellants behaved like uncivilized savages, and hence deserve no mercy.

Scheduled Castes and Scheduled Tribes – Prevention of atrocities – Two tumbler system prevalent in State of Tamil Nadu – Separate tumblers for serving tea or other drinks to Scheduled Caste persons and non-Scheduled Caste persons in tea shops and restaurants – Held: This is highly objectionable, and is an offence under the SC/ST Act, and

hence those practicing it must be criminally proceeded against and given harsh punishment if found guilty.

Honour Killings – 'Khap Panchayats' (known as Katta Panchayats in Tamil Nadu) – Institutionalized crime on boys and girls of different castes and religion, who wish to get married or have been married, and interference with the personal lives of people – Held: This is wholly illegal and has to be ruthlessly stamped out – There is nothing honourable in honour killing or other atrocities and, in fact, it is nothing but barbaric and shameful murder – Hence, administrative and police officials directed to take strong measures to prevent such atrocious acts.

According to the prosecution, there was an altercation between the appellants and complainants-PW1 and PW2 (who belonged to a Scheduled Caste in the State of Tamil Nadu) whereafter appellant insulted PW1 by calling him a pallapayal and that he ate deadly cow beef and that then the accused-appellants attacked PW1 and PW2 causing them injuries. The appellants were convicted by the courts below under Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. Hence the present appeals.

Dismissing the appeals, the Court

HELD: 1. Both the Courts below believed the prosecution case, and this Court sees no reason to differ. There is no reason to disbelieve the testimony of the witnesses. [Para 6] [494-D]

2.1. The accused belong to the 'servai' caste which is a backward caste, whereas the complainants belong to the 'pallan' caste which is a Scheduled Caste in Tamil Nadu. The word 'pallan' no doubt denotes a specific caste, but it is also a word used in a derogatory sense to insult someone (just as in North India the word 'chamar'

denotes a specific caste, but it is also used in a derogatory sense to insult someone). Even calling a person a 'pallan', if used with intent to insult a member of the Scheduled Caste, is, an offence under Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. To call a person as a 'pallapayal' in Tamilnadu is even more insulting, and hence is even more an offence. Similarly, in Tamilnadu there is a caste called 'parayan' but the word 'parayan' is also used in a derogatory sense. The word 'paraparayan' is even more derogatory. [Paras 7, 8 and 9] [494-E-H; 495-A]

2.2. Uses of the words 'pallan', 'pallapayal' 'parayan' or 'paraparayan' with intent to insult is highly objectionable and is also an offence under the SC/ST Act. It is just unacceptable in the modern age, just as the words 'Nigger' or 'Negro' are unacceptable for African-Americans today (even if they were acceptable 50 years ago). In the present case, it is obvious that the word 'pallapayal' was used by accused No. 1 to insult PW1. Hence, it was clearly an offence under the SC/ST Act. The appellants in the present case behaved like uncivilized savages, and hence deserve no mercy. [Paras 10, 11, 18] [495-B-C; 499-H]

Swaran Singh and Ors. vs. State thr' Standing Counsel and Anr. **(2008) 12 SCR 132 – referred to.**

3. In the modern age nobody's feelings should be hurt. In particular in a country like India with so much diversity one must take care not to insult anyone's feelings on account of his caste, religion, tribe, language, etc. A large section of Indian society still regard a section of their own countrymen as inferior. This mental attitude is simply unacceptable in the modern age, and it is one

of the main causes holding up the country's progress. [Paras 1, 12] [495-E-F; 499-G-H]

4. There is the highly objectionable two tumbler system prevalent in many parts of Tamilnadu. This system is that in many tea shops and restaurants there are separate tumblers for serving tea or other drinks to Scheduled Caste persons and non-Scheduled Caste persons. This is highly objectionable, and is an offence under the SC/ST Act, and hence those practicing it must be criminally proceeded against and given harsh punishment if found guilty. All administrative and police officers will be accountable and departmentally proceeded against if, despite having knowledge of any such practice in the area under their jurisdiction they do not launch criminal proceedings against the culprits. [Para 14] [496-G-H; 497-A-B]

5. 'Khap Panchayats' (known as katta panchayats in Tamil Nadu) often decree or encourage honour killings or other atrocities in an institutionalized way on boys and girls of different castes and religion, who wish to get married or have been married, or interfere with the personal lives of people. This is wholly illegal and has to be ruthlessly stamped out. There is nothing honourable in honour killing or other atrocities and, in fact, it is nothing but barbaric and shameful murder. Other atrocities in respect of personal lives of people committed by brutal, feudal minded persons deserve harsh punishment. Only in this way such acts of barbarism and feudal mentality can be stamped out. Moreover, these acts take the law into their own hands, and amount to kangaroo courts, which are wholly illegal. [Para 16] [499-B-D]

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

6. Hence, the administrative and police officials are directed to take strong measures to prevent such atrocious acts. If any such incidents happen, apart from instituting criminal proceedings against those responsible for such atrocities, the State Government is directed to immediately suspend the District Magistrate/ Collector and SSP/SPs of the district as well as other officials concerned and chargesheet them and proceed against them departmentally if they do not (1) prevent the incident if it has not already occurred but they have knowledge of it in advance, or (2) if it has occurred, they do not promptly apprehend the culprits and others involved and institute criminal proceedings against them, as they will be deemed to be directly or indirectly accountable in this connection. [Para 17] [499-E-G]

8. Copy of this judgment shall be sent to all Chief Secretaries, Home Secretaries and Director Generals of Police in all States and Union Territories of India with the direction that it should be circulated to all officers up to the level of District Magistrates and S.S.P./S.P. for strict compliance. Copy will also be sent to the Registrar Generals/Registrars of all High Courts who will circulate it to all Hon'ble Judges of the Court. [Para 19] [500-A-B]

Case Law Reference:

(2008) 12 SCR 132	**Referred to**	**Para 13**
(2006) 5 SCC 475	**Referred to**	**Para 15**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 958 of 2011.

From the Judgment and Order dated 25.01.2008 of the High Court of Madras in Criminal Appeal No. 536 of 2001.

WITH

Criminal Appeal No. 959 of 2011.

C.S. Rajan, S.D. Dwarakanath (for Dr. Kailash Chand) P.V. Yogeswaran and S. Thananjayan for the appearing parties.

The Judgment of the Court was delivred by

MARKANDEY KATJU, J.

"Har zarre par ek qaifiyat-e-neemshabi hai

Ai saaki-e-dauraan yeh gunahon ki ghadi hai"

- Firaq Gorakhpuri

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator by certain inalienable rights, that among these are life, liberty, and the pursuit of happiness"

- American Declaration of Independence, 1776

1. Over two centuries have passed since Thomas Jefferson wrote those memorable words, which are still ringing in history, but a large section of Indian society still regard a section of their own countrymen as inferior. This mental attitude is simply unacceptable in the modern age, and it is one of the main causes holding up the country's progress.

2. Leave granted.

3. These appeals have been filed against the common judgment and order of the Madras High Court dated 25.1.2008 in Criminal Appeal Nos. 536-37 of 2001 upholding the judgment of the Leaned 4th Additional District and Sessions Judge, Madurai.

4. The allegation against the appellants is that on 1.7.1999, there was an altercation between the appellants and the complainants PW1 Panneerselvam and PW2 Mahamani in a Temple Festival regarding the method of tying bullocks in the Jallikattu. The appellant Arumugam Servai then insulted PW1 by saying "you are a pallapayal and eating deadly cow beef". Then accused 1, 7 and 9 attacked PW1 with sticks causing him injuries on his left shoulder. When PW2 Mahamani intervened he was attacked by the accused with sticks, and he sustained a fracture on his head, on which there was a lacerated wound.

5. Apart from the two injured eye-witnesses, there are 3 other eye-witnesses to the occurrence. The doctor has testified to the injuries. The head fracture on Mahamani indicates the deadly intent of the accused.

6. Both the Courts below have believed the prosecution case, and we see no reason to differ. We have carefully perused the testimony of the witnesses, and we see no reason to disbelieve them.

7. The accused belong to the 'servai' caste which is a backward caste, whereas the complainants belong to the 'pallan' caste which is a Scheduled Caste in Tamilnadu.

8. The word 'pallan' no doubt denotes a specific caste, but it is also a word used in a derogatory sense to insult someone (just as in North India the word 'chamar' denotes a specific caste, but it is also used in a derogatory sense to insult someone). Even calling a person a 'pallan', if used with intent to insult a member of the Scheduled Caste, is, in our opinion, an offence under Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities Act), 1989 (hereinafter referred to as the 'SC/ST Act'). To call a person as a 'pallapayal' in Tamilnadu is even more insulting, and hence is even more an offence.

9. Similarly, in Tamilnadu there is a caste called 'parayan'

but the word 'parayan' is also used in a derogatory sense. The word 'paraparayan' is even more derogatory.

10. In our opinion uses of the words 'pallan', 'pallapayal' 'parayan' or 'paraparayan' with intent to insult is highly objectionable and is also an offence under the SC/ST Act. It is just unacceptable in the modern age, just as the words 'Nigger' or 'Negro' are unacceptable for African-Americans today (even if they were acceptable 50 years ago).

11. In the present case, it is obvious that the word 'pallapayal' was used by accused No. 1 to insult Paneerselvam. Hence, it was clearly an offence under the SC/ST Act.

12. In the modern age nobody's feelings should be hurt. In particular in a country like India with so much diversity (see in this connection the decision of this Court in Kailas vs. State of Maharashtra in Crl. Appeal No. 11/2011 decided on 5.1.2011) we must take care not to insult anyone's feelings on account of his caste, religion, tribe, language, etc. Only then can we keep our country united and strong.

13. In *Swaran Singh & Ors. vs. State thr' Standing Counsel & Anr.* (2008) 12 SCR 132, this Court observed (vide paras 21 to 24) as under:

> "21. Today the word `Chamar' is often used by people belonging to the so-called upper castes or even by OBCs as a word of insult, abuse and derision. Calling a person `Chamar' today is nowadays an abusive language and is highly offensive. In fact, the word `Chamar' when used today is not normally used to denote a caste but to intentionally insult and humiliate someone.
>
> 22. It may be mentioned that when we interpret section 3(1)(x) of the Act we have to see the purpose for which the Act was enacted. It was obviously made to prevent

> indignities, humiliation and harassment to the members of SC/ST community, as is evident from the Statement of Objects & Reasons of the Act. Hence, while interpreting section 3(1)(x) of the Act, we have to take into account the popular meaning of the word `Chamar' which it has acquired by usage, and not the etymological meaning. If we go by the etymological meaning, we may frustrate the very object of the Act, and hence that would not be a correct manner of interpretation.
>
> 23. This is the age of democracy and equality. No people or community should be today insulted or looked down upon, and nobody's feelings should be hurt. This is also the spirit of our Constitution and is part of its basic features. Hence, in our opinion, the so-called upper castes and OBCs should not use the word `Chamar' when addressing a member of the Scheduled Caste, even if that person in fact belongs to the `Chamar' caste, because use of such a word will hurt his feelings. In such a country like ours with so much diversity - so many religions, castes, ethnic and lingual groups, etc. - all communities and groups must be treated with respect, and no one should be looked down upon as an inferior. That is the only way we can keep our country united.
>
> 24. In our opinion, calling a member of the Scheduled Caste `Chamar' with intent to insult or humiliate him in a place within public view is certainly an offence under section 3(1)(x) of the Act. Whether there was intent to insult or humiliate by using the word `Chamar' will of course depend on the context in which it was used".

14. We would also like to mention the highly objectionable two tumbler system prevalent in many parts of Tamilnadu. This system is that in many tea shops and restaurants there are separate tumblers for serving tea or other drinks to Scheduled Caste persons and non-Scheduled Caste persons. In our

opinion, this is highly objectionable, and is an offence under the SC/ST Act, and hence those practicing it must be criminally proceeded against and given harsh punishment if found guilty. All administrative and police officers will be accountable and departmentally proceeded against if, despite having knowledge of any such practice in the area under their jurisdiction they do not launch criminal proceedings against the culprits.

15. In *Lata Singh vs. State of U.P. & Anr* (2006) 5 SCC 475, this Court observed (vide paras 14 to 18) as under:

> "14. This case reveals a shocking state of affairs. There is no dispute that the petitioner is a major and was at all relevant times a major. Hence she is free to marry anyone she likes or live with anyone she likes. There is no bar to an inter-caste marriage under the Hindu Marriage Act or any other law. Hence, we cannot see what offence was committed by the petitioner, her husband or her husband's relatives.
>
> 15. We are of the opinion that no offence was committed by any of the accused (the couple who had an inter caste marriage) and the whole criminal case in question is an abuse of the process of the Court as well as of the administrative machinery at the instance of the petitioner's brothers who were only furious because the petitioner married outside her caste. We are distressed to note that instead of taking action against the petitioner's brothers for their unlawful and high-handed acts (details of which have been set out above) the police has instead proceeded against the petitioner's husband and his relatives.
>
> 16. Since several such instances are coming to our knowledge of harassment, threats and violence against young men and women who marry outside their caste, we feel it necessary to make some general comments on the matter. The nation is passing through a crucial transitional period in our history, and this Court cannot remain silent

> in matters of great public concern, such as the present one.
>
> 17. The caste system is a curse on the nation and the sooner it is destroyed the better. In fact, it is dividing the nation at a time when we have to be united to face the challenges before the nation unitedly. Hence, inter-caste marriages are in fact in the national interest as they will result in destroying the caste system. However, disturbing news are coming from several parts of the country that young men and women who undergo inter-caste marriage, are threatened with violence, or violence is actually committed on them. In our opinion, such acts of violence or threats or harassment are wholly illegal and those who commit them must be severely punished. This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter- religious marriage. We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple are not harassed by any one nor subjected to threats or acts of violence, and any one who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law.
>
> 18. We sometimes hear of `honour' killings of such persons who undergo inter-caste or inter-religious marriage of their own free will. There is nothing honourable in such killings, and in fact they are nothing but barbaric and shameful acts

of murder committed by brutal, feudal minded persons who deserve harsh punishment. Only in this way can we stamp out such acts of barbarism".

16. We have in recent years heard of 'Khap Panchayats' (known as katta panchayats in Tamil Nadu) which often decree or encourage honour killings or other atrocities in an institutionalized way on boys and girls of different castes and religion, who wish to get married or have been married, or interfere with the personal lives of people. We are of the opinion that this is wholly illegal and has to be ruthlessly stamped out. As already stated in *Lata Singh's* case (supra), there is nothing honourable in honour killing or other atrocities and, in fact, it is nothing but barbaric and shameful murder. Other atrocities in respect of personal lives of people committed by brutal, feudal minded persons deserve harsh punishment. Only in this way can we stamp out such acts of barbarism and feudal mentality. Moreover, these acts take the law into their own hands, and amount to kangaroo courts, which are wholly illegal.

17. Hence, we direct the administrative and police officials to take strong measures to prevent such atrocious acts. If any such incidents happen, apart from instituting criminal proceedings against those responsible for such atrocities, the State Government is directed to immediately suspend the District Magistrate/Collector and SSP/SPs of the district as well as other officials concerned and chargesheet them and proceed against them departmentally if they do not (1) prevent the incident if it has not already occurred but they have knowledge of it in advance, or (2) if it has occurred, they do not promptly apprehend the culprits and others involved and institute criminal proceedings against them, as in our opinion they will be deemed to be directly or indirectly accountable in this connection.

18. The appellants in the present case have behaved like uncivilized savages, and hence deserve no mercy. With these observations the appeals are dismissed.

19. Copy of this judgment shall be sent to all Chief Secretaries, Home Secretaries and Director Generals of Police in all States and Union Territories of India with the direction that it should be circulated to all officers up to the level of District Magistrates and S.S.P./S.P. for strict compliance. Copy will also be sent to the Registrar Generals/Registrars of all High Courts who will circulate it to all Hon'ble Judges of the Court.

B.B.B. Appeals dismissed.

GOPAL

v.

STATE OF KARNATAKA

(Criminal Appeal No. 29 of 2006)

APRIL 19, 2011

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

Penal Code, 1860: s.302 – Conviction under – Allegation that accused-husband poured kerosene on the body of his wife and set her on fire – Dying declaration recorded by police officer and endorsed by the doctor to the effect that victim was in a fit mental condition to depose before the police – Conviction by courts below, on the basis of dying declaration – Justification of – Held: Justified – The dying declaration was rightly made the sole basis for the conviction of accused – There was no explanation by the accused anywhere as to how the presence of kerosene was found on the inner and outer garments of his wife – FSL Report endorsed the said fact – It was not the defence of the accused that the death was suicidal or accidental – The circumstances clinched the proof that it was the accused alone who committed this offence – Evidence – Dying declaration.

The prosecution case was that the appellant poured kerosene on the body of his wife and set her on fire. The victim was rushed to hospital. The doctor, PW-5 intimated the police station. The police officer, PW-13 recorded the statement of the victim. After few days, the victim succumbed to the burn injuries. The trial court convicted the appellant under Section 302 IPC. The High Court upheld the same. The instant appeal was filed challenging the conviction.

Dismissing the appeal, the Court

HELD: 1. The findings of the trial court as well as of the High Court that the dying declaration can be made the sole basis for the conviction of accused is a correct inference. There was no explanation by the accused anywhere as to how the presence of kerosene was found on the brassiere, saree and peti-coat of the unfortunate lady. The FSL Report endorsed this fact. It was not the defence of the accused that the death was suicidal or accidental. There was nothing on record even to entertain such doubt. The presence of kerosene residue on the inner and outer garments provided strong corroboration of the version in the dying declaration. The witnesses, who carried the deceased to the hospital, turned hostile during their examinations but that may not be an escape route for the accused because the man may lie but the circumstances do not. The circumstances in this case clinches the proof that it is the accused and accused alone who committed this offence. The investigating officer did not make any attempt to get recorded the second dying declaration of the deceased by a Magistrate. It would have been better if the investigating officer had made an attempt to get recorded the second dying declaration of the victim by a Magistrate. But, the dying declaration recorded by PW-13 and supported by PW-5 and the endorsement made by him to the effect that the victim was in a fit mental condition to depose before the police convinces that the dying declaration itself was a good dying declaration and could have been acted upon. [Paras 3 to 6] [503-G-H; 504-A-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 29 of 2006.

From the Judgment & Order dated 03.11.2003 of the High Court of Karnataka (DB) in Criminal Appeal No. 460 of 2000.

Ram Lal Roy for the Appellant.

Gurudatta Ankolekar, Azeem Kalebudde, V.N. Raghuparthy for the Respondent.

The Judgment of the Court was delivered by

SIRPURKAR, J. 1. The appellant - Gopal challenges his conviction under Section 302 I.P.C. in this appeal. The allegation against the appellant-accused are that on 29.12.1998 at about 5 p.m., he poured kerosene on the body of his wife Mallavva and set her on fire. It has come in the evidence that Mallavva was immediately taken to the hospital by PW-8 Nagavva and PW-15 Sushila and she was treated by PW-5 - Dr. Noor Ahmed. PW-5 is said to have intimated to the police station on which PW-13 PSI Ravi came there and recorded her dying declaration. In that dying declaration, the deceased has clearly alleged that the accused used to drink liquor and quarrel with her. He also used to assault the deceased in a drunken state. On 29.12.1998, accused had given Rs. 200/- to her for purchase of ration. He immediately took back Rs. 100 out of Rs. 200/- . She purchased the ration of the remaining amount of Rs. 100/-.

At about 5 p.m., on the same day, accused returned to the house and demanded Rs. 100/- from her. Thereupon, the deceased told the accused that she had already purchased the ration but the accused asked her to return the ration and get him Rs. 100/- back. On her refusal, the accused became angry and tied her hands and poured kerosene on her body and set her ablaze. On 19.1.1999, Mallavva succumbed to the injuries.

2. We have heard learned counsel appearing for the parties and gone through the record and judgments of the courts below.

3. We are convinced that the findings of the trial court as well as of the High Court that this dying declaration can be made the sole basis for the conviction of accused is a correct inference drawn by the courts below.

4. We have ourselves examined the dying declaration. What impresses us is that there is solely no explanation by the accused anywhere as to how the presence of kerosene has been found on the brassiere, saree and petti-coat of the unfortunate lady. We have seen the FSL Report – Exhibit P-25 for that purpose which endorses this fact. It is not the defence of the accused that the death was suicidal or accidental. There is nothing on record even to entertain such doubt. The presence of kerosene residue on the inner and outer garments provides strong corroboration of the version in the dying declaration.

5. It is true that the witnesses, who carried the deceased to the hospital, turned hostile during their examinations but that may not be an escape route for the accused because the man may lie but the circumstances do not. The circumstances in this case clinches the proof that it is the accused and accused alone who has committed this offence.

6. Mr. Ram Lal Roy, learned counsel appearing for the accused pointed out that the investigating officer did not make any attempt to get recorded the second dying declaration of the deceased by a Magistrate. It is really true. It would have been better if the investigating officer had made an attempt to get recorded the second dying declaration of the deceased by a Magistrate. But, in our opinion, the dying declaration recorded by PW-13 and supported by PW-5 Dr. Noor Ahmed and the endorsement made by him to the effect that the deceased was in a fit mental condition to depose before the police convinces us that the dying declaration itself was a good dying declaration and could have been acted upon.

7. We find no merit in this appeal. It is, accordingly, dismissed.

D.G. Appeal dismissed.

CENTRAL COUNCIL FOR RESEARCH IN HOMEOPATHY

v.

BIPIN CHANDRA LAKHERA & ORS.

(Civil Appeal no.3286 of 2007)

APRIL 20, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Service Law: Seniority – Adhoc service for the period before regularisation cannot be counted for seniority – In the instant case, respondent no.1 appointed as Research Assistant on adhoc basis in 1984 was selected on regular post w.e.f. 5.1.1996 – Adhoc service from 1984 till regularisation could not be added for the purpose of seniority.

Ch. Narayana Rao v. Union of India & Ors. **(2010) 10 SCC 247 – relied on.**

State of West Bengal & Ors. v. Aghore Nath Dey & Ors. **(1993) 3 SCC 371 – referred to.**

Case Law Reference:

(2010) 10 SCC 247	**Relied on**	**Paras 9, 12**
(1993) 3 SCC 371	**Referred to**	**Para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3286 of 2007.

From the Judgment & Order dated 24.03.2004 of the High Court of Sikkim at Gangtok in Writ Petition (C) No. 542 of 1998.

S.N. Bhat for the Appellant.

Shrish Kumar Misra, Mukul Singh, Ajay Kr, Singh for the Respondents.

The following order of the Court was delivered

O R D E R

1. Heard learned counsel for the appellant and respondent No. 1. As regards the other respondents in respect of whom service is complete no one has entered appearance on their behalf so far.

2. This Appeal has been filed against the impugned judgment & order dated 24.03.2004 passed by the High Court of Sikkim in Writ Petition (Civil) No. 542 of 1998.

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

4. The short question in this Appeal is whether ad hoc service of respondent No. 1 from 1984 before his regularisation with effect from 05.01.1996 can be added for the purpose of seniority. We are of the opinion that it cannot.

5. Admittedly, respondent No. 1 was appointed as Research Assistant (Homeopathy) in the service of the appellant on purely ad hoc basis by order dated 03.02.1984 till 31.03.1984 or till the post is filled on a regular basis whichever was earlier. This appointment was done without any regular selection.

6. It may be noted that respondent No. 1 herein (Writ petitioner before the High Court) had not applied for appointment in response to any advertisement issued by the appellant. In his application respondent No. 1 stated that "I have come to know through some reliable sources that there is a post of Research Assistant lying vacant in the Central Council for Research in Homeopathy." Accordingly, respondent No. 1 was offered the post on a purely ad hoc basis vide order dated 03.02.1984 clearly stating that his appointment was till 31.03.1984 or till a regularly selected candidate joins, whichever was earlier. Thus, this appointment was made without following

any procedure. The tenure was extended by the appellant from time to time.

7. The post of Research Assistant was advertised in 1986 and respondent No. 1 applied for the post and was called for an interview before a Selection Committee on 29.06.1987 but was not found suitable. However, he was continued on ad hoc basis in view of an interim order passed by the High Court in a writ petition.

8. The post was again advertised in 1995 for regular appointment and respondent No. 1 again applied, and this time he was successful and given regular appointment with effect from 05.01.1996.

9. It has been held by this Court in *Ch. Narayana Rao Vs. Union of India & Ors., (2010) 10 SCC 247, and State of West Bengal & Ors. Vs. Aghore Nath Dey & Ors.,* (1993) 3 SCC 371, that ad hoc service before regularisation cannot be counted for seniority.

10. It was contended by learned counsel for respondent No. 1 that some others similarly situate have been given retrospective regularisation. This is not correct. No one has been given benefit of ad hoc service for the purpose of seniority. The persons mentioned in the writ petition are those persons who had been selected earlier, whereas respondent No. 1 had not been selected. Such persons have been given seniority only from the date of their regular appointment after selection.

11. It has been pointed out in paragraph 17 of the counter affidavit filed by the Council before the High Court that these persons were given seniority from the date of their regular appointment after a regular selection. Thus, Dr. Gautam Rakshit was appointed on ad hoc basis on 10.08.1987, but thereafter he faced a regular selection and was selected and given regular appointment on 12.04.1988. He has been given seniority from 12.04.1988 and not from 10.08.1987. Similar is the case of Dr.

(Miss) I.M. Kumar, Dr. G.K. Mathew and Dr. Mohan Singh. Hence, their cases are clearly distinguishable.

12. In view of the decision of this Court in *Ch. Narayana Rao's* case (supra), we allow this Appeal and set aside the impugned judgment and order of the High Court and dismiss the writ petition. No costs.

D.G. Appeal allowed.

STATE OF U.P. AND ORS.

v.

M/S. MAHINDRA AND MAHINDRA LTD.

(Civil Appeal No. 3405 of 2011)

IN

Special Leave Petition (C) No. 2190 of 2008

APRIL 20, 2011

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

Jurisdiction: Jurisdiction of courts to issue a mandate to legislate an Act and to make subordinate legislation in a particular manner – Scope of – Assessment order – Sales tax exemption not granted to respondent – Challenged – High Court held that the wordings of central excise notification be read into the sales tax notification issued by the State Government – Held: The exclusive domain of legislation is with the legislature – Subordinate legislations are framed by the executive – The judiciary has been vested with the power to interpret the said legislations and to give effect to them – It is always appropriate for each of the organs to function within its domain – It is inappropriate for the courts to issue a mandate to legislate an Act and to make subordinate legislation in a particular manner – In the instant case, High Court had directed the subordinate legislation to substitute wordings in a particular manner, thereby assuming to itself the role of a supervisory authority, which is not a power vested in the High Court – Exemption clauses should be strictly interpreted – Since High Court exceeded its jurisdiction in passing the said order and in issuing the directions for inserting certain additional words into notification of exemption issued by the Uttar Pradesh Government, the judgment by the High Court and also by the Tribunal are set aside – Matter remitted to the First Appellate Court for consideration afresh

– Sales tax – Interpretation of statutes – Administrative law – Doctrines/Principles of separation of powers – Legislation.

Bhai Jaspal Singh and another v. Assistant Commissioner ofCommercial Taxes and others **(2011) 1 SCC 39;** *Commissioner of Central Excise, New Delhi v. Hari Chand Shri Gopal and others* **(2011) 1 SCC 236;** *Novopan India Ltd. Hyderabad v. Collector of Central Excise and Customs, Hyderabad* **1994 Supp (3) SCC 606 – relied on.**

Supreme Court Employees' Welfare Association v. Union of India and another **(1989) 4 SCC 187;** *Bal Ram Bali and another v. Union of India (2007) 6 SCC 805; Municipal Committee, Patiala v. Model Town Residents Association and others* **(2007) 8 SCC 669;** *M/s. Narinder Chand Hem Raj and others v. Lt. Governor, Administrator, Union Territory, Himachal Pradesh and others* **(1971) 2 SCC 747 – referred to.**

Case Law Reference:

(1989) 4 SCC 187	**referred to**	**Para 8**
(2007) 6 SCC 805	**referred to**	**Para 8**
(2007) 8 SCC 669	**referred to**	**Para 8**
(1971) 2 SCC 747	**referred to**	**Para 8**
(2011) 1 SCC 39	**relied on**	**Para 10**
(2011) 1 SCC 236	**relied on**	**Para 10**
1994 Supp (3) SCC 606	**relied on**	**Para 10**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3405 of 2011.

From the Judgment & Order dated 12.12.2006 of the High Court of Judicature at Allahabad, Lucknow Bench Lucknow in Writ Petition No. 1760 of 1992.

Kavin Gulati, S.K. Dwivedi, Shail Kumar Dwivedi, Manoj Kumar Dwivedi, Gunnam Venkateswara Rao for the Appellants.

Dhruv Agarwal, Praveen Kumar for the Respondent.

The following order of the Court was delivered

O R D E R

1. Leave granted.

2. We have heard learned counsel appearing for the parties in this appeal, which is filed challenging the legality of the judgment and order passed by the Allahabad High Court in a writ petition filed by the respondent, praying for issuance of a writ of mandamus to read in the exemption notification, the words "Tractor Engine specifying Cubic Capacity (CC) of the Tractor Engine not exceeding 1800 CC. The Government of India had issued notification on 16th April, 1985, making an amendment in the notification of the Government of India in respect of the table annexed to the notification, inserting by way of substitution the words "Tractors of Draw-Bar Horse Power not exceeding 25". Another notification was subsequently issued by the Government of India on 17th July, 1985, substituting the words "Draw-Bar" with the words "Power Take-off Horse". Be it stated here that all such notifications relate to the payment of excise duty.

3. The Government of Uttar Pradesh, however, for the purpose of levy of sales tax issued a notification on 12th September, 1986, in which it was stated that under Section 4 of the Uttar Pradesh Sales Tax Act, 1948, Tractors with Power Take-off Horse Power not exceeding 25 would stand exempted from payment of tax under the Sales Tax Act, subject, however, to the condition that the said tractors are exempted from payment of Central Excise Duty.

4. A show cause notice was issued to the respondent from

the Office of the Assistant Commissioner (Assessment)-I Sales Tax, Lucknow, stating therein that at the time of survey made, and as per the literature made available it was found that the, horse power of the tractors of the respondent had been disclosed as 30 Horse Power. In the aforesaid show cause notice it was stated that in view of the facts mentioned in the said notice, the respondent may submit a reply as to why the return filed by the respondent would not be rejected and a provisional assessment order for the period in question may not be completed under Rule 41(5) of the Rules.

5. Pursuant to the aforesaid show cause notice issued, a detailed reply was filed by the respondent. The Assessment Officer considered the entire records and, thereafter, by his order dated 21st March, 1992, passed an assessment order on the basis of the contents of the notification dated 12th September, 1986, denying exemption from payment of sales tax to the tractors of the respondent.

6. After the aforesaid assessment order was passed, the respondent filed a writ petition before the Allahabad High Court with the following reliefs:

"1. A Writ of certiorari or any other suitable Writ, Order of direction be issued to modify or amend, the notification so as to bring in conformity with the Central Government and conformity in respect of measuring strength or engine by all manufacturer as contained in Annexure-1 to this Writ Petition.

2. A Writ of mandamus directing the Opposite Party No.2 to clearly state in the said notification the basis of exemption being cubic capacity of the Tractor Engine not exceeding 1800 CC for exemption for Sales Tax in place of 25 P.T.O.H.P., and directing the Opposite Party No.2 to exempt the petitioners, tractor engine and specify the C.C. (Cubic Capacity) of the Tractor engine not exceeding 1800 C.C. And bring it at Par with Circular No.89/87/CE

dated 01.03.1987 issued by Central Government to clear the anomaly and ambiguity in both the circulars, which creates discrimination among manufacturer of Fuel Efficient engines and rest ones, and refrain the Opposite Party No.2 to desist from recovering disputed Sales Tax of Rs.2,34,00,965.400 from April' 91 to Feb. 92 created by Annexure II dated 21.03.1991, and stay operation thereof."

7. Interestingly, in the said writ petition there was no challenge to the assessment order passed. Be that as it may, the Division Bench of the Allahabad High Court proceeded to hear the aforesaid writ petition and by a detailed order passed held that since the Central Government has by notification dated 28th February, 1987, replaced the word 25 PTOHP by the word 1800 CC and thereby exempted the tractor having capacity not exceeding 1800 from Excise Duty, the same wordings, namely, Tractors with Power Take-off Horse Power not exceeding 25 should also be read as Tractors not exceeding 1800 CC, which would stand exempted from levy of Sales Tax. The aforesaid findings recorded by the High Court are under challenge in this appeal.

8. The first contention of the counsel appearing for the appellant is that there is no power vested on the High Court to issue such a direction to the Executive to re-frame the subordinate legislation, and that therefore the High Court exceeded its jurisdiction by issuing such directions in a field where the High Court cannot and should not tread. In support of the said contention, the counsel has relied upon the decision of this Court in Supreme Court *Employees' Welfare Association v. Union of India and another* (1989) 4 SCC 187, *Bal Ram Bali and another v. Union of India* (2007) 6 SCC 805 and *Municipal Committee, Patiala v. Model Town Residents Association and others* (2007) 8 SCC 669 as also the decision in *M/s. Narinder Chand Hem Raj and others v. Lt. Governor, Administrator, Union Territory, Himachal Pradesh and others*

(1971) 2 SCC 747. Wherein this Hon'ble court held as follows:

"The power to impose tax is undoubtedly a legislative power. That power can be exercised by the legislature directly or subject to certain conditions, the legislature may delegate that power to some other authority. But the exercise of that power whether by the legislature or by its delegate is an exercise of a legislative power. The fact that the power was delegated to the executive does not convert that power into an executive or administrative power. No court can issue a mandate to a legislature to enact a particular law. Similarly no court can direct a subordinate legislative body to enact or not to enact a law which it may be competent to enact. [945 F-G] Article 265 of the Constitution lays down that no tax can be levied and collected except by authority of law. Hence the levy of a tax can only be done by the authority of law and not by any executive order. Unless the executive is specifically empowered by law to give any exemption, it cannot say that it will not enforce the law as against a particular person. No Court can give a direction to a Government to refrain from enforcing a provision of law".

9. In Supreme Court *Employees' Welfare Association v. Union of India and another* (supra), in paragraph 51, this Court stated as follows:

"51. There can be no doubt that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which he has been empowered to do under the delegated legislative authority.

10. Within our Constitution, we have specifically demarcated the ambit of power and the boundaries of the three organs of the Society by laying down the principles of

separation of powers, which is being adhered to for carrying out democratic functioning of the country. So far as the legislation is concerned, the exclusive domain is with the legislature. Subordinate legislations are framed by the executive by exercising the delegated power conferred by the Statue, which is rule making power. The judiciary has been vested with the power to interpret the aforesaid legislations and to give effect to them since the parameters of the jurisdiction of both the organs are earmarked. Therefore, it is always appropriate for each of the organs to function within its domain. It is inappropriate for the courts to issue a mandate to legislate an Act and also to make a subordinate legislation in a particular manner. In this particular case, the High Court has directed the subordinate legislation to substitute wordings in a particular manner, thereby assuming to itself the role of a supervisory authority, which according to us, not a power vested in the High Court. It is also by now settled law that so far exemption clauses are concerned, there should be strict interpretation of the same as has been held by this Court repeatedly. Suffice will be to refer to very recent decisions of this Court in *Bhai Jaspal Singh and another v. Assistant Commissioner of Commercial Taxes and others* (2011) 1 SCC 39 and *Commissioner of Central Excise, New Delhi v. Hari Chand Shri Gopal and others* (2011) 1 SCC 236. We would also extract a passage from the decision of the Supreme Court in *Novopan India Ltd. Hyderabad Vs. Collector of Central Excise and Customs, Hyderabad,* reported at 1994 Supp (3) SCC at page 606, wherein this Court has held that:

> "16. ……such a notification has to be interpreted in the light of the words employed by it and not on any other basis. This was so held in the context of the principle that in a taxing statute, there is no room for any intendment, that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification i.e. by the plain terms of the exemption."

11. During the course of the arguments, it was also brought to our notice that subsequent to the order of assessment, an appeal was filed, which came to be dismissed, subsequent to which a second appeal was filed before the Tribunal, which allowed the appeal giving effect to the orders of the High Court. Since, in our considered opinion, the High Court exceeded its jurisdiction in passing the aforesaid orders and in issuing the directions for inserting certain additional words into notification of exemption issued by the Uttar Pradesh Government, we set aside the impugned judgment and order passed by the High Court and also the order passed by the Tribunal. As the Tribunal had given effect to the order of the High Court, the order of the Tribunal is hereby set aside. Even otherwise Courts can always take notice of the subsequent events and developments that had taken place subsequent to the filing of the writ petition or filing of the special leave petition and it is also within the jurisdiction of this Court to pass consequential orders to give effect to the remedies available to the parties. Considering these facts and circumstances from the aforesaid angle, we after setting aside the order passed by the High Court and also by the Tribunal as also by the First Appellate Court, remit back the matter to the First Appellate Court to consider the matter de novo taking into consideration the notification as existing and which was issued on 12th September, 1986, and decided the matter without making any addition/alternation thereto.

12. However, counsel appearing for the respondent has submitted before us that it would be possible for the respondent to prove and establish that the tractor manufactured by the respondent is below 25 PTOHP. If certain exemption is available on the factual aspect, such benefit must be provided to an assessee but that is possible only when the respondent is able to prove and establish with cogent and reliable materials that he is entitled to the benefit of the exemption notification. Therefore, we allow the parties to lead additional evidence before the appellate authority, which shall be allowed to be filed within four weeks from their date of appearance and,

thereafter, the appellate authority shall proceed to decide the matter de novo in the light of the records available and also in the light of the exemption notification.

13. This appeal stands allowed to the aforesaid extent as indicated and leave the parties to bear their own costs. The parties shall appear before the appellate authority on 2nd May, 2011, for obtaining further dates in the appeal. We also request the appellate authority to take up the matter and dispose of the same as expeditiously as possible, preferably within a period of three months from the date of receipt of the additional evidence, if produced by the parties.

D.G. Appeal allowed.

MD. MANNAN @ ABDUL MANNAN

v.

STATE OF BIHAR

(Criminal Appeal No. 379 of 2009)

APRIL 20, 2011

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

Penal Code, 1860: ss. 366, 376, 302, 201 – Rape and murder of a seven year old girl – Conviction based on circumstantial evidence –Allegation that the accused was working as a mason in the house of victim's grandfather – Accused sent victim to the betel shop to get betel for him – Few minutes after the victim left, accused proceeded towards the betel shop and got the victim seated on his bicycle – Victim was last seen with the accused – Confession by accused that he raped the victim and thereafter killed her – The dead body of the victim found pursuant to the statement given by the accused – Courts below convicted the accused and ordered death sentence – Held: The circumstances unerringly pointed towards the guilt of the accused and the chain was so complete that there was no escape from the conclusion that the crime was committed by the accused and none else – Conviction upheld – As regards the sentence, accused was a matured man aged about 43 years and held a position of trust and misused the same in a calculated and preplanned manner – The postmortem report showed various injuries on the face, nails and body of the child – These injuries showed the gruesome manner in which she was subjected to rape – Victim was an innocent child who did not provide even an excuse, much less a provocation for murder – This act no doubt invited extreme indignation of the community and shocked the collective conscience of the society – The case in hand fell in the category of the rarest

of the rare cases and the courts below had correctly imposed the death sentence – Sentence/Sentencing.

Evidence: Circumstantial evidence – Held: In a case based on circumstantial evidence, the circumstances from which an inference of guilt is sought to be drawn are to be cogently and firmly established – The circumstances so proved must unerringly point towards the guilt of the accused – It should form a chain so complete that there is no escape from the conclusion that the crime was committed by the accused and none else – It has to be considered within all human probability and not in fanciful manner – Such evidence should not only be consistent with the guilt of the accused but inconsistent with his innocence.

Sentence/Sentencing: Broad guidelines for imposition of death sentence – Discussed.

The prosecution case was that the victim was 7 years old girl. The appellant was working as mason in the house PW-8 who was grandfather of the victim. On the fateful day, the appellant sent the victim to the betel-shop to get betel and after few minutes he proceeded towards the betel-shop and got the victim seated on the carrier of his bicycle. PW-5 and other women saw the victim going with the appellant on his bicycle. The victim did not return home. The uncle of the victim along with other family members went in search of the victim and saw the appellant. The appellant tried to escape but was caught. The appellant gave confessional statement that he raped the victim and then killed her. The statement given by him led to the recovery of the dead body of the victim.

The trial court held that all the circumstances pointed towards the guilt of the appellant and convicted him under sections 366, 376, 302, 201 IPC and passed the death sentence. The High Court affirmed the conviction

and the death sentence. The instant appeal was filed challenging the order of conviction and sentence.

Dismissing the appeal, the Court

HELD: 1.1. In a case based on circumstantial evidence, the circumstances from which an inference of guilt is sought to be drawn are to be cogently and firmly established. The circumstances so proved must unerringly point towards the guilt of the accused. It should form a chain so complete that there is no escape from the conclusion that the crime was committed by the accused and none else. It has to be considered within all human probability and not in fanciful manner. Such evidence should not only be consistent with the guilt of the accused but inconsistent with his innocence. No hard and fast rule can be laid to say that particular circumstances are conclusive to establish guilt. It is basically a question of appreciation of evidence which exercise is to be done in the facts and circumstances of each case. [Para 11] [528-A-D]

1.2. From the evidence of the witnesses it is evident that the appellant was working as a mason in the house of the grandfather of the deceased, PW.8 and the deceased was sent by him to the betel shop to get betel. Evidence of the prosecution witnesses further proved beyond all reasonable doubt that appellant proceeded towards the betel shop few minutes after the deceased left and it was the appellant who was last seen with the deceased going together on a bicycle. There was overwhelming evidence which proved beyond any shadow of doubt that the statement given by the appellant led to the recovery of the dead body of the deceased from the field. The circumstances so proved unerringly pointed towards the guilt of the appellant and the chain was so complete that there is no escape from the conclusion that the crime was committed by the

appellant and none else. Accordingly, the conviction of the appellant is upheld. [Paras 15] [530-B-D]

2.1. It is trite that death sentence can be inflicted only in a case which comes within the category of rarest of the rare cases but there is no hard and fast rule and the parameter to decide this vexed issue. Nevertheless it is widely accepted that in deciding this question the number of persons killed is not decisive. Further crime being brutal and heinous itself do not turn the scale towards the death sentence. When the crime is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community and when collective conscience of the community is petrified, one has to lean towards the death sentence. But this is not the end. If these factors are present the court has to see as to whether the accused is a menace to the society and continue to be so, threatening its peaceful and harmonious co-existence. The court has to further enquire and believe that the accused condemned cannot be reformed or rehabilitated and shall continue with the criminal acts. In this way a balance-sheet is to be prepared while considering the imposition of penalty of death of aggravating and mitigating circumstances and just balance is to be struck. So long the death sentence is provided in the statute and when collective conscience of the community is petrified, it is expected that the holders of judicial power do not stammer, de hors their personal opinion and inflict death penalty. [Para 17] [530-F-H; 531-A-E]

2.2. The case in hand fell in the category of the rarest of the rare cases. Appellant was a matured man aged about 43 years. He held a position of trust and misused the same in calculated and preplanned manner. He sent the girl aged about 7 years to buy betel and few minutes

thereafter in order to execute his diabolical and grotesque desire proceeded towards the shop where she was sent. The girl was aged about 7 years of thin built and 4 feet of height and such a child was incapable of arousing lust in normal situation. The appellant had won the trust of the child and she did not understand the desire of the appellant which would be evident from the fact that while she was being taken away by the appellant no protest was made and innocent child was made prey of the appellant's lust. The postmortem report showed various injuries on the face, nails and body of the child. These injuries showed the gruesome manner in which she was subjected to rape. The victim of crime was an innocent child who did not provide even an excuse, much less a provocation for murder. Such cruelty towards a young child is appalling. The appellant had stooped so low as to unleash his monstrous self on the innocent, helpless and defenceless child. This act no doubt had invited extreme indignation of the community and shocked the collective conscience of the society. Their expectation from the authority conferred with the power to adjudicate, is to inflict the death sentence which is natural and logical. The appellant is a menace to the society and shall continue to be so and he can not be reformed. The case in hand fell in the category of the rarest of the rare cases and the trial court had correctly inflicted the death sentence which had rightly been confirmed by the High Court. [Para 18] [531-E-H; 532-A-D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 379 of 2009.

From the Judgment & Order dated 19.08.2008 of the High Court of Patna in CRADB No. 963 of 2007.

Aftab Ali Khan, M.Z. Chaudhary for the Appellant.

Gopal Singh for the Respondent.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. Appellant was put on trial for offence under Sections 366, 376, 302 and 201 of the Indian Penal Code, 1860 (hereinafter referred to as the 'Penal Code'). The Trial Court by its judgment and order dated 29th of May, 2007 passed in Sessions Trial No.220 of 2004 arising out of the Manigachi P.S. Case No.13 of 2004 held the appellant guilty of all the charges and sentenced him to undergo rigorous imprisonment for 10 years for offence under Section 366 of the Penal Code, life imprisonment under Section 376 of the Penal Code, rigorous imprisonment for 7 years for offence under Section 201 of the Penal Code and death penalty for offence under Section 302 of the Penal Code. The trial court made Reference to the High Court for confirmation of the death sentence which led to registration of Death Reference No. 6 of 2007. Appellant aggrieved by his conviction and sentence also preferred appeal which was registered as Criminal Appeal (DB) No. 963 of 2007. Both, the reference and appeal were heard together and by a common judgment dated 19th of August, 2008, the Division Bench of the Patna High Court accepted the reference and dismissed the appeal.

2. This is how the appellant is before us with the leave of the Court.

3. According to the prosecution, the appellant Md. Mannan was working as mason and engaged for the plaster work at the residence of informant's uncle PW-8 Devikant Jha. On 28th of September, 2004, the appellant gave Rs.2/- to the niece of the informant, namely, Kalyani Kumari aged about 8 years to bring betel from a shop at Hanuman Chowk. After some time, appellant left the work, went to the Hanuman Chowk and got seated Kalyani Kumari on the carrier of his bicycle. PW-5 Maya Devi and other women heard the conversation which the

appellant was having with Kalyani Kumari. Appellant, according to women folk, asked Kalyani Kumari as to where her father lives to which she replied that he stays at Bombay. A search was made when Kalyani Kumari did not return home for sometime and in the course thereof, it surfaced that she was seen going on a bicycle with a man. The informant Sharwan Kumar Jha (PW-10) and his family members set out in search of the girl and while they were returning from Bahera saw the appellant going towards Bahera. Appellant tried to escape but was apprehended and on enquiry he showed ignorance about the girl. Appellant was brought to the residence of the informant where PW-5 Maya Devi disclosed that she had seen the appellant who had taken away Kalyani Kumari on his bicycle. Thereafter, the appellant was brought to the Police Station and handed over to the officer-in-charge with a written report, for taking suitable action, alleging that the appellant had kidnapped Kalyani Kumari. On the basis of the aforesaid information, a case was registered and PW-11 Hari Ram, the officer-in-charge took up the investigation.

4. During the course of investigation, the appellant gave a confessional statement in the presence of the witnessess Amar Kishore Jha (PW-2) and Devi Kant Jha (PW-8) and other villagers. The appellant confessed his guilt and disclosed the place where he had raped and killed Kalyani Kumari. The statement given by the appellant led to the recovery of the dead body of Kalyani Kumari from a field. She was identified by the informant and other villagers. The dead body of Kalyani Kumari had injury on the private parts, her nails were munched and there were marks of bruises all over the body. The Inquest Report was prepared and the dead body was sent for post-mortem examination which was conducted by PW-4 Dr. Prafulla Kumar Das, a Tutor in the department of Forensic Medicine and Toxicology at Darbhanga Medical College and Hospital. Police, after usual investigation, submitted charge-sheet against the appellant for kidnapping, raping and killing a minor girl and causing disappearance of evidence of offence.

Appellant was ultimately committed to the Court of Sessions to face the trial, where charges under Sections 366, 376, 302 and 201 of the IPC were framed against him. Appellant denied to have committed any offence and claimed to be tried.

5. The prosecution in order to bring home the charge has examined altogether 11 witnesses besides a large number of documentary evidence, including the First Information Report, the Post-mortem Report and the Inquest Report, were exhibited. The plea of the appellant in the statement under Section 313 of the Code of Criminal Procedure is denial simplicitor and false implication. However, no defence witness has been examined.

6. There is no eye-witness to the occurrence and the prosecution sought to bring home the charge on the basis of the circumstantial evidence.

Those are:

(i) Appellant was working as Mason in the House of Devi Kant Jha (PW-8);

(ii) Appellant sent the deceased to the betel-shop to get betel;

(iii) Appellant proceeded towards the betel-shop few minutes after the deceased left;

(iv) Appellant was last seen with the deceased going together on a bicycle and

(v) Appellant's confession leading to the recovery of dead body from a field.

7. All these circumstances led the trial Court to hold that the chain is complete which points towards the guilt of the appellant and accordingly convicted him as above. In the opinion of the trial court, the case fell in category of the rarest of the rare cases and accordingly it inflicted the death penalty.

The High Court concurred with the finding of the trial court and affirmed the conviction and while doing so, it observed as follows:

> "…..as per disclosure made by the appellant and on his disclosure the dead body was recovered from a lonely place surrounded and concealed by standing crops of wheat and rahar. Hence the part of the confession made by appellant which is disclosure regarding the place where the dead body could be found, is clearly admissible as evidence under Section 27 of the Indian Evidence Act. Since the rape and murder on the victim girl has been proved by medical evidence and since such offences were committed against the victim soon after her kidnapping by the appellant, a presumption arises against the appellant that he committed rape and murder of the victim and tried to conceal the evidence of such offence by hiding the body at a lonely place concealed by standing crops. No doubt such presumption can be rebutted if reasonable explanation could be given by the appellant. But in this case no such explanation has been brought on record. There is neither any defence witness nor any reasonable suggestion to the witnesses nor any explanation by the appellant under Section 313 of the Code of Criminal Procedure. Hence, the presumption remains un-rebutted. The evidence on record and the entire facts and circumstances coupled with disclosure made by the appellant which is admissible under Section 27 of the Indian Evidence Act prove beyond any doubt that after kidnapping the victim, the appellant committed the offence of rape followed by murder upon the deceased and also committed offence of destroying evidence by concealing the dead body."

8. While accepting the reference and upholding the death sentence, High Court observed as follows :

"I have considered the entire facts and the aforesaid submissions for deciding whether the death penalty awarded to the appellant should be confirmed or not. In this regard, it is noticed that appellant is a matured man aged about 42-43 years. He has committed the heinous and barbarous crime of rape and murder of a girl aged about 7 years who was thin built and of 4' height. Such a child was incapable of arousing lust in normal situation. She was kidnapped in a planned manner because she was innocent and could not understand the design of the appellant. She became helpless victim of a diabolic middle aged man whom the child could trust as an elder person. The medical evidence shows the cruel manner of causing injuries on the face, nails and body of the child at the time of committing rape which was followed by murder. This was all pre-planned as is apparent from the manner of kidnapping and selection of a lonely place where crime was committed and body concealed. Crime of this nature against the child girl is definitely a crime against the society. The facts of the case, the offences taken together along with the age of the victim and the age of the appellant clearly bring the case in the category of "rarest of the rare cases" in which interest of justice requires award of maximum penalty."

9. The deceased had met homicidal death and was subjected to rape have not been questioned before us. However, learned Counsel for the appellant has contended that the circumstances brought on record do not lead to one and the only conclusion towards the guilt of the appellant and therefore the appellant deserves to be given the benefit of doubt.

10. Mr. Gopal Singh, learned Counsel representing the State, however, supports the judgment of conviction and sentence.

11. We have bestowed our consideration to the rival

submissions. In our opinion to bring home the guilt on the basis of the circumstantial evidence the prosecution has to establish that the circumstances proved lead to one and the only conclusion towards the guilt of the accused. In a case based on circumstantial evidence the circumstances from which an inference of guilt is sought to be drawn are to be cogently and firmly established. The circumstances so proved must unerringly point towards the guilt of the accused. It should form a chain so complete that there is no escape from the conclusion that the crime was committed by the accused and none else. It has to be considered within all human probability and not in fanciful manner. In order to sustain conviction circumstantial evidence must be complete and must point towards the guilt of the accused. Such evidence should not only be consistent with the guilt of the accused but inconsistent with his innocence. No hard and fast rule can be laid to say that particular circumstances are conclusive to establish guilt. It is basically a question of appreciation of evidence which exercise is to be done in the facts and circumstances of each case.

12. Bearing in mind the principles aforesaid, we now proceed to consider the circumstantial evidence available on the record. PW-1 Rajkumar Jha claimed to be Mukhia of the Gram Panchayat having shop at Hanuman Chowk and has stated in his evidence that appellant was doing work of a mason in the house of Devi Kant Jha (PW-8) who was grand-father of deceased Kalyani. He has claimed to have seen the appellant coming to Hanuman chowk and getting seated Kalyani on his bicycle and taking her towards village Igharata. Thereafter Kalyani never returned nor the appellant came back till evening when the search started. He has further stated that appellant led the witnesses to the wheat field and showed the dead body of deceased Kalyani. There was only a panty on the person of the dead body and no other clothes.

13. PW.2, Amar Kishore Jha, owned a shop at Hanuman Chauk and has stated in his evidence that he had seen the

appellant getting Kalyani seated on his bicycle at the Chauk. He has further stated that Kalyani did not return till evening and then he along with PW.1, Raj Kumar Jha had gone to search her. He is further a witness to the statement given by the appellant which led to the recovery of the dead body of Kalyani with marks of bruises at different places of her body. According to this witness her nails were munched.

14. PW.3, Phul Jha, is the owner of the betel shop from where Kalyani had bought the betel. According to his evidence Kalyani purchased betel from his shop and when he was returning 50 paise she asked for the toffee for the said amount. According to his evidence when Kalyani got down from the shop, appellant came on a bicycle, took betel from her, got her seated on the carrier of the bicycle and took her towards the southern direction. He is also a witness to the confession of the appellant leading to the recovery of the dead body at the place pointed by the appellant. PW.5, Maya Devi, is another witness who had seen the appellant along with the deceased in his bicycle and even the conversation she had with the appellant. She has deposed that the appellant asked Kalyani as to where her father resides to which she replied that her father lives in Bombay. PW.6, Radhey Shyam Jha, is another witness who had seen the appellant and the deceased together on a bicycle. He is further witness to the disclosure statement made by the appellant leading to recovery of the dead body of the Kalyani. PW.8, Debikant Jha, is the grandfather of the deceased and is a witness to the recovery of the dead body of the Kalyani on the basis of the confessional statement of the appellant. PW.9, Tapeshwar Prasad, is another witness who owned the shop at Hanuman Chauk and supported the case of the prosecution. He has stated that after Kalyani purchased the betel, the appellant reached there on bicycle, got her seated on the carrier of the bicycle and went towards the southern direction. He is also a witness to the recovery of the dead body of Kalyani on the basis of the statement given by the appellant.

PW.10, Sharwan Kumar Jha, is the informant of the case and also supported the case of the prosecution.

15. From the evidence of the aforesaid witness it is evident that the appellant was working as a mason in the house of the grandfather of the deceased, PW.8 Debi Kant Jha and the deceased was sent by him to the betel shop to get betel. Evidence of the prosecution witnesses further prove beyond all reasonable doubt that appellant proceeded towards the betel shop few minutes after the deceased left and it was the appellant who was last seen with the deceased going together on a bicycle. There is overwhelming evidence which proves beyond any shadow of doubt that the statement given by the appellant led to the recovery of the dead body of Kalyani from the field. In our opinion, the circumstances so proved unerringly point towards the guilt of the appellant and the chain is so complete that there is no escape from the conclusion that the crime was committed by the appellant and none else. Accordingly we uphold the conviction of the appellant.

16. As observed earlier the trial court as also the High court had found the case in hand to be one of the rarest of the rare cases and accordingly inflicted the death sentence. It is contended by the learned counsel for the appellant that the case in hand does not fall within such category and as such the extreme penalty of death is not called for.

17. It is trite that death sentence can be inflicted only in a case which comes within the category of rarest of the rare cases but there is no hard and fast rule and the parameter to decide this vexed issue. This Court had the occasion to consider the cases which can be termed as rarest of the rare cases and although certain comprehensive guidelines have been laid to adjudge this issue but no hard and fast formula of universal application has been laid down in this regard. Crimes are committed in so different and distinct circumstances that it is impossible to lay down comprehensive guidelines to decide this issue. Nevertheless it is widely accepted that in deciding

this question the number of persons killed is not decisive. Further crime being brutal and heinous itself do not turn the scale towards the death sentence. When the crime is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community and when collective conscience of the community is petrified, one has to lean towards the death sentence. But this is not the end. If these factors are present the court has to see as to whether the accused is a menace to the society and continue to be so, threatening its peaceful and harmonious co-existence. The court has to further enquire and believe that the accused condemned cannot be reformed or rehabilitated and shall continue with the criminal acts. In this way a balance-sheet is to be prepared while considering the imposition of penalty of death of aggravating and mitigating circumstances and just balance is to be struck. So long the death sentence is provided in the statute and when collective conscience of the community is petrified, it is expected that the holders of judicial power do not stammer, de hors their personal opinion and inflict death penalty. These are the broad guidelines with this Court has laid down for imposition of the death penalty.

18. When we test the present case bearing in mind what has been observed, we are of the opinion that the case in hand falls in the category of the rarest of the rare cases. Appellant is a matured man aged about 43 years. He held a position of trust and misused the same in calculated and preplanned manner. He sent the girl aged about 7 years to buy betel and few minutes thereafter in order to execute his diabolical and grotesque desire proceeded towards the shop where she was sent. The girl was aged about 7 years of thin built and 4 feet of height and such a child was incapable of arousing lust in normal situation. Appellant had won the trust of the child and she did not understand the desire of the appellant which would be evident from the fact that while she was being taken away by the appellant no protest was made and innocent child was made prey of the appellant's lust. The postmortem report shows

various injuries on the face, nails and body of the child. These injuries show the gruesome manner in which she was subjected to rape. The victim of crime is an innocent child who did not provide even an excuse, much less a provocation for murder. Such cruelty towards a young child is appalling. The appellant had stooped so low as to unleash his monstrous self on the innocent, helpless and defenceless child. This act no doubt had invited extreme indignation of the community and shocked the collective conscience of the society. Their expectation from the authority conferred with the power to adjudicate, is to inflict the death sentence which is natural and logical. We are of the opinion that appellant is a menace to the society and shall continue to be so and he can not be reformed. We have no manner of doubt that the case in hand falls in the category of the rarest of the rare cases and the trial court had correctly inflicted the death sentence which had rightly been confirmed by the High Court.

19. In the result, we do not find any merit in this appeal and same is dismissed accordingly.

D.G. Appeal dismissed.

STATE OF H. P. AND ORS.
v.
HIMACHAL PRADESH NIZI VYAVSAYIK PRISHIKSHAN KENDRA SANGH
(Civil Appeal No. 3385 of 2011)

APRIL 20, 2011

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

EDUCATION/EDUCATIONAL INSTITUTIONS:

Vocational Training Centres (VTCs) – Permitted to run various courses in the State – Cabinet decision dated 25.11.2008 to wind up certain courses – Writ petition filed before the High Court – Subsequently, Cabinet decision dated 18.7.2009 discontinuing three courses, namely, Art and Craft, Library Science and PTI – High Court quashing the Cabinet decision dated 18.7.2009 – HELD: The Cabinet considered the proposal of the State Council for Vocational Training and after deliberation, took the decision to continue various courses under SCVT except the said three courses – Inasmuch as the Cabinet decision dated 18.7.2009 was not the subject matter or issue of the writ petition, State was not in a position to highlight all details before the High Court – High Court was not justified in interfering with the Cabinet decision dated 18.7.2009 – The quashing of Cabinet decision without analyzing the pros and cons restricts the State's constitutional authority and powers to frame policy especially in such vital areas like imparting technical education, and, therefore, is not acceptable– Administrative law.

CONSTITUTION OF INDIA, 1950:

Article 226 – Writ petition – Judgment reserved on 3.7.2009 – Subsequent Cabinet decision dated 18.7.2009 – Quashed by High Court – HELD: There was no prayer in the

writ petition for quashing of any policy or scheme or decision of the Government but the petitioner only prayed for certain directions for admission of the students in courses under SCVT for the session 2007-2008 – The conclusion of the High Court quashing the Cabinet decision dated 18.7.2009 without reopening the case and hearing both the sides about the matter as to the subsequent development and as a consequence issuing several directions is unacceptable and contrary to well established principles – It was but appropriate to reopen the case, permit the petitioner- association to amend the relief portion, afford adequate opportunity to the State to put forth their stand for modifying the 'policy' curtailing certain courses under SCVT – The decision of the Cabinet ought not to be interfered with in judicial review so lightly as has been done in the instant case – Education/Educational Institutions – Administrative Law – Policy decision – Judicial Review – Subsequent event.

ADMINISTRATIVE LAW:

Legitimate expectation – Vocational Training Centres (VTCs) permitted to run various courses – Subsequently, decision taken to wind up certain courses – High Court holding that VTCs were entitled to run all the courses under the principles of legitimate expectation – HELD: Education is a dynamic system and courses/subjects have to keep changing with regard to market demand, employability, potential availability of infrastructure etc. – No institute can have a legitimate right to run a particular course for ever and it is the pervasive power and authority vested in the Government to frame policy and guidelines for progressive and legitimate growth of the society and create balances in the arena inclusive of imparting technical education from time to time.

JUDICIAL REVIEW:

Policy decision of State Government with regard to

permitting Vocational Training Centres to run technical courses – Judicial review of – HELD: Inasmuch as ultimately it is the responsibility of the State to provide good education, training and employment, it is best suited to frame a policy or either modify/alter a decision depending on the circumstance based on relevant and acceptable materials – Government is free to frame its policy, alter or modify it with regard to manpower requirement in various professional and technical fields – The course do not substitute its views an the decision of the State Government with regard to policy matters.

Members of the respondent-Association, pursuant to the invitation of the appellant-State Government in the year 2004, applied for opening Vocational Training Centres (VTCs) at different places in the State and were permitted to run various courses including Art and Craft, Hotel Management, Ayurveda, Pharmacist, Physical Training Instructor (PTI), Library Science etc. However, on 27.4.2006 a decision was taken in the meetings of the State Council for Vocational Training (SCVT) to wind up certain courses and, ultimately, in the Cabinet meeting held on 25.11.2008 decision was taken not to allow admission to some courses for the academic session 2007-2008. The respondent filed a writ peetition before the High Court. Subsequently, the Government constituted eight inspection committees for inspection of Vocational Training Centres and the recommendations of the Committees were placed before the State Cabinet in its meeting dated 18.7.2009. The High Court allowed the writ petition and quashed the subsequent Cabinet decision dated 18.7.2009 by which the three courses, namely, Art and Craft, Library Science and PTI, were discontinued.

In the instant appeal filed by the State Government, it was contended for the appellant that the High Court

committed an error in considering and quashing the Cabinet decision dated 18.7.2009, which was a subsequent event, when the writ petitioner had not so pleaded or amended the original prayer in the writ petition. It was also submitted that the High Court, without appreciating the stand of the State Government in modifying the 'policy', not only quashed the Cabinet decision, but also issued various directions which were all unacceptable.

Allowing the appeal, the Court

HELD: 1. A perusal of the prayers in the writ petition clearly shows that the respondent-association had not sought for quashing of any policy or scheme or decision or order of the State Government but only prayed for certain directions for admission of students in SCVT courses for the session 2007-08. It is relevant to point out that after hearing the matter at length, the Division Bench reserved it for judgment on 03.07.2009. Before the pronouncement of the judgment, that is, on 12.08.2009, the Cabinet of the State Government after taking note of various aspects took a decision on 18.07.2009 discontinuing three courses under SCVT, namely, i) Art and Craft, ii) Library Science and iii) PTI. The High Court, after getting the said decision through the Advocate General, without reopening the case and hearing both sides about the matter as to the subsequent development, i.e., the decision of the Cabinet taken on 18.07.2009, simply quashed and set aside the same by issuing various directions. Such a course is unacceptable and contrary to the well established principles. [para 7-8] [544-F-H; 545-F-H; 546-B]

1.2 Since there was no prayer for quashing of any decision of the State Government much less the subsequent Cabinet decision dated 18.07.2009, and if the

High Court was interested in going into the said decision that too after reserving the judgment on 03.07.2009, it was but appropriate to reopen the case, permit the respondent-association to amend the relief portion, afford adequate opportunity to the State to put-forth their stand for modifying the "policy" curtailing certain courses under SCVT. Admittedly, the High Court has not resorted to such recourse and simply quashed the decision of the Cabinet dated 18.07.2009 and issued various directions which is impermissible. [para 8] [546-B-D]

2.1 The decision of the Cabinet generally ought not to be interfered with in judicial review so lightly as has been done in the instant case. The quashing of the Cabinet decision without analyzing the pros and cons in a manner seeks to restrict the State's constitutional authority and powers to frame policy especially in such vital areas like imparting technical education, and, therefore, is not acceptable. The Cabinet considered the proposal of the State Council for Vocational Training and after deliberation, took the decision to continue various courses under SCVT except the courses at Sl. No. 1 (Art and Craft), Sl. No. 4 (Library Science) and Sl. No. 7 (PTI). Though in the supplementary affidavit, the State has not highlighted the reason for discontinuing the three courses, the High Court presumed that the State is precluded from taking fresh/revised policy in the matter of imparting technical education. In fact, in the said decision, the State has not barred all the institutions from continuing the courses already notified under SCVT. The Cabinet decided to discontinue only three courses. Inasmuch as the said Cabinet decision dated 18.07.2009 was not the subject-matter or issue of the writ petition, the State was not in a position to highlight all the details before the Court. Accordingly, the High Court was not justified in interfering with the Cabinet decision dated

18.07.2009 which was not the issue or challenge in the writ petition. [para 9-10] [546-F-G; 547-F-H; 548-A-B]

2.2 Inasmuch as, ultimately, it is the responsibility of the State to provide good education, training and employment, it is best suited to frame a policy or either modify/alter a decision depending on the circumstance based on relevant and acceptable materials. The courts do not substitute its views in the decision of the State Government with regard to policy matters. In fact, the courts must refuse to sit as appellate authority or super legislature to weigh the wisdom of legislation or policy decision of the Government unless it runs counter to the mandate of the Constitution. [para 11] [548-F-G]

2.3 With regard to the importance of human resources, especially manpower requirement in various professional and technical fields, the Government is free to frame its policy, alter or modify the same as to the needs of the society. In such matters, the courts cannot interfere lightly as if the Government is unaware of the situation. [para 12] [548-H; 549-A]

3. The High Court also erred in coming to the conclusion that the respondent-association was entitled to run all the courses under the principle of 'legitimate expectation'. The High Court has lost sight of the fact that education is a dynamic system and courses/subjects have to keep changing with regard to market demand, employability potential, availability of infrastructure, etc. No institute can have a legitimate right or expectation to run a particular course forever and it is the pervasive power and authority vested in the Government to frame policy and guidelines for progressive and legitimate growth of the society and create balances in the arena inclusive of imparting technical education from time to time. Inasmuch as the institutions found fit were allowed

to run other courses except the three mentioned above, the doctrine of legitimate expectation was not disregarded by the State. [para 10-11] [548-C; 548-D-E]

4. The impugned order of the High Court quashing the Cabinet decision dated 18.07.2009 and issuing various directions including awarding cost of Rs.25,000/- in favour of the respondent-association are set aside. [para 13] [549-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3385 of 2011.

From the Judgment and Order dated 12.08.2009 of the High Court of H.P. at Shimla in CWP No. 2948 of 2008.

Altaf Ahmed, S.P. Jain and Himinder Lal for the Appellants.

Anoop Chaudhary, Ashish Mohan and K.K. Mohan for the Respondent.

The Judgment of the Court was delivered by

P.SATHASIVAM,J. 1. Leave granted.

2. This appeal is directed against the final judgment and order dated 12.08.2009 passed by the High Court of Himachal Pradesh at Shimla in C.W.P. No. 2948 of 2008 wherein the Division Bench of the High Court allowed the writ petition filed by the respondent herein.

3. Brief facts:

(a) In pursuance of the recommendation of the All India Council for Technical Education (AICTE), the Government of India appointed a Committee called the National Trade Certification Investigation Committee in the year 1951 with instructions to prepare a scheme for the establishment of an

All India Trades Board which would award certificates of proficiency to craftsmen in various engineering and building trades. The said Committee made certain recommendations and while accepting the same, a central agency for coordinating the training programmes and awarding certificates of proficiency in craftsmanship on an all-India basis was created. The Government of India decided to transfer the administration of the training organization under the Directorate General of Resettlement and Employment to the control of the State Government concerned, retaining for itself the function of coordinating craftsmen training and laying down the training policy.

(b) Accordingly, in consultation with the State Governments and other concerned parties, National Council for Vocational Training (NCVT) was set up in the year 1956 and was entrusted with the functions relating to establishing and awarding National Trade Certificates to craftsmen, prescribing standards and curriculum for craftsmen training in the technical and vocational trades throughout the country and advising and assisting the Central Government on the overall training policy and programmes. On similar lines, State Council for Vocational Training (SCVT) was created to deal with all the matters relating to Vocational Training at the level of the State. The Government of Himachal Pradesh, in consonance with National Policy of Education (NPE) 1986, as revised from time to time, decided to adopt a policy for producing manpower in the conventional as well as in emerging areas of the Engineering and Technology and in other professional disciplines. The Government, keeping in view the financial constraints to meet the immense requirement of investment in the field, also decided to encourage private sector participation in the State for which the Government was to extend all possible facilities and also to provide for some concessions for arranging the necessary infrastructural facilities for the establishment of technical and other professional institutions in the State. In order

to fulfill this objective, the State Government framed Technical Education Policy and the Department of Technical Education issued guidelines for Vocational Training Centres (VTCs) in Himachal Pradesh.

(c) In the year 2004, the State Government through its Department of Technical Education invited private parties/ institutions to open Vocational Training Centres (VTCs) within the State of Himachal Pradesh. These Centres were permitted to admit students for the permitted courses on such terms and conditions as provided under the said guidelines. In pursuance of the said invitation, the members of the respondent-Association applied for opening VTCs at different places within the State of Himachal Pradesh. The Letters of Intent were issued to the members of the respondent-Association permitting them to run various courses including Art and Craft, Hotel Management, Ayurveda Pharmacist, Physical Training Instructor, Library Science etc.

(d) A decision was taken in the meeting of SCVT held on 27.04.2006 to wind up certain courses for which there was little scope of employment or self employment and in its place new courses as per demand of the market/industry be started. Thereafter, in the meeting held on 21.08.2007, while confirming the proceedings of earlier meeting dated 27.04.2006, the State Council granted approval to the opening of 161 new VTCs and for renewal of 112 already existing VTCs.

(e) Despite the endeavour of the State Government to promote and encourage the participation of the private sector, it had not accorded permission to the institutions to run the vocational courses for the academic Session 2007-08. The members of the respondent's Association made representations to the State Government with regard to the same. Thereafter, in the meeting held on 23.10.2008, after detailed deliberation on various issues, it was decided that all the issues raised in the meeting including cancellation of

affiliation, permission for fresh admissions and starting of fresh courses in different VTCs would be examined by a Sub-Committee to be constituted and headed by the Chief Secretary. Accordingly, the Sub-Committee was constituted on 25.10.2008. On 22.11.2008, the Sub-Committee, so constituted, submitted its report to the Government and the matter was taken up in the Cabinet meeting held on 25.11.2008. The effect of the decision of the Cabinet was that for the academic session 2007-08 there would be no admission for the courses which are being taught by the respondent herein and subsequent to the Cabinet decision, Government Order dated 19.12.2008 was issued. In compliance with the Cabinet decision dated 25.11.2008 and the Government Order dated 19.12.2008, eight Inspection Committees were constituted by the Director, Technical Education for the inspection of Vocational Training Centres (VTCs) and recommendations of these Committees were sent to the Government and placed before the State Cabinet in its meeting dated 18.07.2009.

(f) Challenging the decision of the Cabinet dated 25.11.2008, the respondent herein filed writ petition being CWP No. 2948 of 2008 before the High Court of Himachal Pradesh. On 12.08.2009, the High Court, by the impugned order, allowed the writ petition and quashed subsequent cabinet decision dated 18.07.2009 discontinuing the three courses, namely, Sl. No. 1 (Art and Craft), Sl. No. 4 (Library Science) and Sl. No. 7 (PTI). In addition, the Court also issued various directions and awarded cost of Rs. 25,000/-. Aggrieved by the said decision, the appellants have preferred this appeal before this Court by way of special leave petition.

4. Heard Mr. Altaf Ahmed, learned senior counsel for the appellant-State and Mr. Anoop Chaudhary, learned senior counsel for the respondent.

5. Mr. Altaf Ahmed, learned senior counsel appearing for

the State, after taking us through the relief prayed for in the writ petition and the stand of the State submitted that after hearing arguments and reserving the judgment on 03.07.2009, the Division Bench of the High Court committed an error in considering the Cabinet decision dated 18.07.2009 which is a subsequent event and quashing the same when the writ petitioner has not pleaded or amended the original prayer in the writ petition. He also pointed out that without appreciating the stand of the State in modifying the "policy", the High Court not only quashed the Cabinet decision but also issued various directions which are all unacceptable. On the other hand, Mr. Anoop Chaudhary, learned senior counsel for the respondent submitted that on the principle of 'legitimate expectation', the State is not justified in altering the policy to promote private institutions for vocational training on various subjects.

6. Admittedly, the respondent herein which is an unregistered association of Vocational Training Centres (VTCs) filed writ petition before the High Court of Himachal Pradesh at Shimla through its President seeking certain reliefs. According to the respondent-Association, their members are imparting training in different Vocational Training Centres and are also recognized by the Himachal Pradesh SCVT. In order to appreciate the rival contentions, it is useful to refer the relief prayed for in the writ petition which reads as under:-

> "It is, therefore, humbly prayed that this writ petition may be allowed, -
>
> (i) the respondents may be directed by issuing writ of mandamus to hold admission test for admitting students in SCVT Courses for the session 2007-08 and consequently sponsor the candidates to the Vocational Training Centres (VTCs) approved by the respondents for SCVT Courses;
>
> (ii) that in case it is felt by the respondents that there are certain other formalities which are required to be completed or there are shortcomings required to be removed by a particular Vocational Training Centre (VTC), the respondents may take corrective measures themselves and the concerned VTC may be allowed to remove the shortcoming within reasonable time and the course may continue uninterruptedly;
>
> (iii) that the respondents may be directed to commence admissions process forthwith for all the permitted courses for which the Vocational Training Centres (VTCs) were affiliated/approved in the past and the students may be allocated to the concerned PTC at the earliest;
>
> (iv) that in case the central counseling has become difficult for the respondents, the concerned Vocational Training Centre (VTC) may be permitted to admit students of its own by giving due regard to the minimum standards as fixed by the respondents for a particular course;
>
> (v) Any other relief deemed fit in the facts and circumstances of the case may also be granted, in the interest of justice. Costs may also be awarded."

7. A perusal of all the prayers clearly shows that the respondent-association had not sought for quashing of any policy or scheme or decision or order of the State Government but only prayed for certain directions for admission of students in SCVT courses for the session 2007-08. The State has filed reply conveying its stand. It was highlighted that the institution established must fulfill the requirements of the norms and guidelines of various apex bodies like AICTE, Pharmacy Council of India, NCVT and SCVT. It was also averred in the reply that the whole issue of admission to VTCs was taken up in the Cabinet meeting dated 25.11.2008 and, consequently,

a G.O. was issued on 19.12.2008. It is seen from the impugned order of the High Court that while hearing the matter, the Division Bench, on 28.05.2009, directed learned Addl. Advocate General to seek instructions from the State as to what was the stand of the Government with regard to holding of examination for these institutions. A supplementary affidavit was filed by the State Government on 02.07.2009. The Court also recorded the stand of the Government that for the year 2008-09, institutions were permitted to run the courses except Art and Craft, Library Science and Physical Training Instructor (PTI). Ultimately, the High Court has concluded that the State, by permitting the members of the petitioner's association to open the institution in the State of Himachal Pradesh after investing huge amount of money have generated legitimate expectation in them that in future also they shall be permitted to run the courses, which were permitted at the time of setting up of the institutions and further that the members of the petitioner's association cannot be permitted to be left in a lurch by the arbitrary action of the State Government by denying them running of these courses. The Court has also observed that there is no explanation why the State Government has not permitted the running of these courses. After arriving at such conclusion in the last paragraph, the High Court allowed the petition and quashed the decision taken by the Cabinet on 18.07.2009. It is relevant to point out that after hearing the matter at length, the Division Bench reserved it for judgment on 03.07.2009. Before the pronouncement of the judgment, that is, on 12.08.2009, the Cabinet of the State Government after taking note of various aspects took a decision on 18.07.2009 discontinuing three courses under SCVT, namely, i) Art and Craft, ii) Library Science and iii) PTI. The High Court, after getting the said decision through the Addl. Advocate General, without reopening the case and hearing both sides about the matter as to the subsequent development, i.e., the decision of the Cabinet on 18.07.2009, simply quashed and set aside the same by issuing various directions.

8. We have already adverted to the relief prayed for by the respondent-association in the said writ petition. Admittedly, there is no prayer for quashing of even earlier Cabinet decision or order of the government. The conclusion of the High Court quashing the Cabinet decision dated 18.07.2009 and as a consequence issuing several directions is unacceptable and contrary to the well established principles. First of all, there was no prayer for quashing of any decision of the State Government much less the subsequent Cabinet decision dated 18.07.2009. If the High Court was interested in going into the said decision that too after reserving the judgment on 03.07.2009, it is but appropriate to reopen the case, permit the petitioner's association to amend the relief portion, afford adequate opportunity to the State to put-forth their stand for modifying this "policy" curtailing certain courses under SCVT. Admittedly, the High Court has not resorted to such recourse and simply quashed the decision of the Cabinet dated 18.07.2009 and issued various directions which are impermissible.

9. As rightly pointed out by Mr. Altaf Ahmed, without any arguments having been heard, without there being any question raised by any party as to the validity of the Cabinet decision dated 18.07.2009 and without the same being in question, or any relief sought for in the writ petition, the High Court has gone into the said decision of the Cabinet having taken place after the judgment was reserved. The decision of the Cabinet generally ought not to be interfered with in judicial review so lightly as has been done in the present case. The quashing of the Cabinet decision without analyzing the pros and cons in the manner seeks to restrict the State's constitutional authority and powers to frame policy especially in such vital areas like imparting technical education is not acceptable. The following is the outcome of the Cabinet decision dated 18.07.2009:

"Dated: 18.07.2009

ITEM NO.37

Government of Himachal Pradesh
Department of General Administration
(Confidential & Cabinet)

Subject:- Regarding State Council for vocational Training

In the meeting of Cabinet held on 18.07.2009, the above proposal has been discussed and the following decision has been taken:

"Points for consideration 1, 2 and 4 has been approved with following amendments:-

(i) All courses shown in Annexure-"Gha" except S.No.1,4 and 7 are approved.

(ii) One institution must not be allowed to start more than 4 courses.

The implementation report may sent to this Department within 15 days.

Sd/-
Special Secretary (GAD) to the
Government of Himachal Pradesh

Additional Chief Secretary (Technical Education)"

10. It is seen that the Cabinet considered the proposal of the State Council for Vocational Training and after deliberation, the decision has been taken to continue various courses under SCVT except for the courses at Sl. No. 1 (Art and Craft), Sl. No. 4 (Library Science) and Sl. No. 7 (PTI). Though in the supplementary affidavit, the State has not highlighted the reason for discontinuing the three courses in the State of Himachal Pradesh, the High Court presumed that the State is precluded from taking fresh/revised policy in the matter of imparting technical education. In fact, in the said decision, the State has

not barred all the institutions from continuing the courses already notified under SCVT. The Cabinet decided to discontinue only three courses. Inasmuch as the said Cabinet decision dated 18.07.2009 not being the subject-matter or issue of the writ petition, the State was not in a position to highlight all the details before the Court. Accordingly, we are satisfied that the High Court was not justified in interfering with the Cabinet decision dated 18.07.2009 which was not the issue or challenge in the writ petition. We are also unable to accept the conclusion of the High Court that the petitioner's association (respondent herein) is entitled to run all the courses under the principle of 'legitimate expectation'.

11. The High Court has lost sight of the fact that education is a dynamic system and courses/subjects have to keep changing with regard to market demand, employability potential, availability of infrastructure, etc. No institute can have a legitimate right or expectation to run a particular course forever and it is the pervasive power and authority vested in the Government to frame policy and guidelines for progressive and legitimate growth of the society and create balances in the arena inclusive of imparting technical education from time to time. Inasmuch as the institutions found fit were allowed to run other courses except the three mentioned above, the doctrine of legitimate expectation was not disregarded by the State. Inasmuch as ultimately it is the responsibility of the State to provide good education, training and employment, it is best suited to frame a policy or either modify/alter a decision depending on the circumstance based on relevant and acceptable materials. The Courts do not substitute its views in the decision of the State Government with regard to policy matters. In fact, the Court must refuse to sit as appellate authority or super legislature to weigh the wisdom of legislation or policy decision of the Government unless it runs counter to the mandate of the Constitution.

12. With regard to the importance of human resources,

especially manpower requirement in various professional and technical fields, the Government is free to frame its policy, alter or modify the same as to the needs of the society. In such matters, the Courts cannot interfere lightly as if the Government is unaware of the situation. Apart from these aspects, procedurally also the High Court has committed an error in quashing the Cabinet decision dated 18.07.2009 which was not challenged in the writ petition by raising valid grounds. Further, both parties were not afforded opportunity to put-forth their stand as to the subsequent development, namely, Cabinet decision dated 18.07.2009. For all these reasons, the impugned order of the High Court is to be interfered with. However, we permit the respondent's association or its members to challenge the said decision/order of the Government by way of fresh proceeding, if they so desire.

13. Under these circumstances, the impugned order of the High Court quashing the Cabinet decision dated 18.07.2009 and issuing various directions including awarding cost of Rs.25,000/- in favour of the respondent-association are set aside. As observed earlier, the respondent's association or its members are free to challenge the order of the Government in the High Court by way of an appropriate writ by projecting valid grounds, if any. In such event, the State Government is equally entitled to highlight its policy, need for the change, and demand of the society insofar as courses prescribed under SCVTs.

14. With the above observations, the civil appeal is allowed with no order as to costs.

R.P. Appeal allowed.

GURMAIL SINGH

v.

STATE OF PUNJAB

(Criminal Appeal No. 974 of 2008)

APRIL 20, 2011

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

Penal Code, 1860 – ss.302/149, 302, 324/149 and 323/149 – Murder – Common intention – Enmity between the parties as daughter of one of the accused was teased – Seven accused armed with weapons raised lalkara threatening retribution – Injuries inflicted on 'RS' and 'BS' by accused-'GS' and 'SS' – 'BS' succumbed to his injuries – Conviction of accused 'GS', 'SS' and two others whereas acquittal of the remaining accused – Upheld by the High Court – On appeal, held: Injury was caused directly and deep into the stomach of the victim, a very vital part, which led to death within a short time – Thus, it cannot be said that there was no intention to cause that very injury which ultimately led to the death of the victim – Accused were all of one family and they were annoyed with the members of the victim family – They lived close together in the same locality and had come out armed and raised a lalkara that the opposite party be done away with and thereafter, the injuries had been caused to 'RS' as well 'BS' – One injury proved fatal for 'BS' – Thus, a case of common intention is made out – Perusal of the injury attributed to 'SS' on the person of deceased would indicate that it is of very small dimensions and there is a clear doubt as to whether an abrasion could be caused with a lathi which 'SS' was said to be carrying – Therefore, 'SS' is given benefit of doubt and is acquitted – However, conviction of the other accused is upheld.

Virsa Singh v. State of Punjab **AIR 1958 SC 465;**

Laxman Karlu Nikalje v. The State of Maharashtra **1968 (3) SCR 685;** *Harjinder Singh v. Delhi Administration* **AIR 1968 SC867;** *Randhir Singh alias Dhire v. State of Punjab* **1981 (4) SCC 484,** *Tholan v. State of Tamil Nadu* **1984 (2) SCC 133;** *Arun Nivalaji More v. State of Maharashtra* **2006 (2) SCC 613 – Referred to.**

Case Law Reference:

AIR 1968 SC 867	**Referred to**	**Para 6**
1984 (2) SCC 133	**Referred to**	**Para 6**
AIR 1958 SC 465	**Referred to**	**Para 7**
1968 (3) SCR 685	**Referred to**	**Para 7**
1981 (4) SCC 484	**Referred to**	**Para 7**
2006 (2) SCC 613	**Referred to**	**Para 7**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 974 of 2008.

From the Judgment & Order dated 19.01.2007 of the High Court of Punjab & Haryana at Chandigarh in Crl. Appeal No. 609-DB of 1997.

WITH

Crl. A. No. 975 of 2008 & 981 of 2011.

P.N. Puri, Manu Sharma, Sanjay Jain, D.P. Singh, Avneet Toor, Kuldip Singh for the appearing parties.

The following order of the Court was delivered

O R D E R

1. This judgment will dispose of three appeals, being Criminal Appeal Nos. 974 of 2008, 975 of 2008 and 981 of 2011 @ SLP(Crl) 4898 of 2008.

2. The facts are being taken from the paper book of Criminal Appeal No. 974 of 2008 entitled *Gurmail Singh v. State of Punjab*.

3. The facts leading to these appeals are as under:

3.1 Sohan Singh, P.W., the complainant, and his co-accused Nachhattar Singh and Parshotam Singh, are married to real sisters. Nindo is the daughter of Sher Singh, accused. Darshan Singh accused is the son of Sher Singh. A few days prior to the incident which happened on the 25th March, 1996 a message was received with regard to the proposed marriage of the son of Parshottam Singh accused, on which the accused had got together in his house to celebrate the occasion by taking liquor. At about 10:00p.m. the accused came out in the street and raised a lalkara that they would teach the complainant party a lesson for having teased Nindo. At that time accused Gurnam Singh and Gurmail Singh were both armed with small knives (kirch) and Sher Singh, Nachhattar Singh, Parshottam Singh, Dharampal Singh and Avtar Singh were armed with lathis. Sohan Singh came out into the street to persuade them not to abuse and that they would sort out the dispute in the morning. While he was still talking to the accused Rajwinder Singh PW and Baljinder Singh also arrived there. Nachhattar Singh, Sher Singh, Dharam pal Singh and Avtar singh then raised a lalkara saying that they should not be allowed to go alive and should be taught a lesson for having teased Nindo. Gurnam Singh thereupon gave a knife blow on the right side of the abdomen of Baljinder Singh and when Rajwinder Singh came forward to help Baljinder Singh, Gurmail Singh gave a knife blow on the right side just below his chest whereas Gurcharan Singh gave a knife blow on the lower portion of his right flank. Rajwinder Singh fell down whereupon Sher Singh gave a dang blow on his right shoulder. In the meantime, the women folk came out into the street and hurled brickbats in self-defence. As a consequence of this counter attack the accused ran away from the spot. Baljinder Singh and

Rajwinder Singh were shifted to the A.P. Jain Hospital at Rajpura in a truck but the former succumbed to his injuries on the way. After investigation, the accused, eight in number were broguht to trial for offences punishable under Sections 302/149, 302, 324/149 and 323/149 of the IPC. The prosecution placed primary reliance on the evidence of Sohan Singh PW 5, Rajwinder Singh PW6, the injured eye witnesses, and also on the evidence of Dr. Charanjit Singh, PW1 whereby he, had at the initial stage, declared Rajwinder Singh unfit to make a statement, Dr. S.M. Birdi who had conducted the medical examination on the injured and Dr. O.P. Agarwal PW 4 who had conducted the post mortem on the dead body of Baljinder Singh. The accused in their defence, pleaded false implication and further that the dispute had arisen because of some election rivalries. Some of the accused also claimed alibis. The trial court on a consideration of the evidence, acquitted Avtar Singh, Dharam Pal Singh, Nacchtar Singh and Parshottam Singh whereas Gurnam Singh, Gurmail Singh, Gurcharan Singh and Sher Singh were convicted for having committed the murder of Baljinder Singh. This judgment has been affirmed by the High Court leading to these appeals by way of special leave.

4. Before us, the main argument raised by the learned counsel for the appellants is that even assuming the prosecution case to be true the matter would still not fall within the definition of murder but would fall be culpable homicide not amounting to murder punishable under Section 304 Part I of the IPC. It has also been submitted that in the facts and circumstances of the case, the provisions of Section 34 of the IPC were not made out as there was no intention on the part of the accused to commit murder. It has finally been submitted that Sher Singh accused, appellant was similarly situated as those acquitted by the trial court as the injury attributed to him on the shoulder of Rajwinder Singh could have caused as a result of a scuffle during the incident and was not possible with a lathi.

5. The learned counsel for the State has, however, supported the judgment of the trial court.

6. Mr. D.P. Singh has submitted that in the light of the judgments of this Court reported as *Virsa Singh v. State of Punjab* AIR 1958 465, *Laxman Karlu Nikalje v. The State of Maharashtra* 1968 (3) SCR 685, *Harjinder Singh v. Delhi Administration* AIR 1968 867, *Randhir Singh alias Dhire v. State of Punjab* 1981 (4) SCC 484, *Tholan v. State of Tamil Nadu* 1984 (2) SCC 133 the injury caused to the deceased would not fall under clause "thirdly" of Section 300 and as such the conviction ought to have been recorded under 304 Part I or II of the Indian Penal Code. We have considered the submissions very carefully and have examined the judgments aforesaid with the assistance of the learned counsel.

7. It is true that clause thirdly of Section 300 of the IPC deals with a case where the intention was to cause the very injury found on the dead body. In the case of Virsa Singh, Laxman Karlu's case and Arun Nivalji More's case, the injuries had been caused on non vital parts but the death had occurred because of the fact that some artery beneath the injured part had been cut. The Court, in that eventuality, held that it could not have been presumed that the appellants wanted to cause that very injury which ultimately led to death. It is true that in Randhir Singh's case the injury had been caused by a kassi on the head of the deceased. It appears, however, that what had weighed very heavily with the Court was the fact that attack was not pre-planned, the accused was only 18 years of age and the kassi had been brought by his father and given to him to cause a blow on the victim, only one injury had been caused and that the death had occurred after six days of the incident. In Tholan's case it was held that though the injury had been caused in the chest but the facts were that the appellant had not intended to give the blow with a knife in the chest. In the case before us, we find that a lalkara had been raised by the accused threatening retribution on account of the misbehaviour of Darshan Singh, son of Sher Singh with Nindo a few days earlier and that the accused had been drinking together in the house of Parshottam Singh and had thereafter come out leading to

the incident. It has been held in all the afore-cited cases that the question as to whether the injury had been caused with the intention to cause death would be a matter of objective satisfaction of the Court. We are, therefore, of the opinion, that the injury in the present case had been caused directly and deep into the stomach of the deceased, a very vital part, which had led to death within a short time. It cannot, therefore, be said that there was no intention to cause that very injury which had led ultimately to the death of the deceased. In a somewhat similar situation, it has been held in Arun Nivalaji More v. State of Maharashtra 2006 (2) SCC 613 that where the injury had been caused in the stomach which was a vital part of the body, it could be said that the injury had been caused with the intention of causing death in the background of the facts that preparations for the attack on the deceased had earlier been made.

8. We now take up the question of common intention in the facts of the case. Once again it needs to be highlighted that the accused were all of one family and they were annoyed with the members of the victim family as they had teased Nindo. They also lived close together in the same locality and had come out armed and raised a lalkara that the opposite party be done away with and that the injuries had been caused thereafter. It is also clear that several injuries had been caused to Rajwinder Singh PW as well and that one injury had been proved fatal for Baljinder Singh. A case of common intention is, thus, spelt out.

9. We, however, find some merit in the argument of the learned counsel that Sher Singh appellant should be given the benefit of doubt in the circumstances. The injury attributed to him on the person of Baljinder Singh is a "Red abrasion 2.5cm X 0.5cm on the right super scapular region obliquely placed 3 cm back ward from the upper tip of the right shoulder joint." A perusal of this injury would indicate that it is of very small dimensions and there is a clear doubt as to whether an

abrasion could be caused with a lathi which Sher Singh was said to be carrying. We are, therefore, of the opinion that Sher Singh is similarly placed as the accused who have been acquitted by the trial court.

11. We, accordingly, allow the appeal of Sher Singh. The appeals of the other accused are dismissed.

N.J. Appeal allowed.

V. RAMAKRISHNA RAO

v.

SINGARENI COLLIERIES COMPANY LTD. & ANR.

I.A. No. 2

IN

(Civil Appeal No. 7655 of 2004)

APRIL 21, 2011

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

Land Acquisition Act, 1894 – s.28A(3) – Appeal before Supreme Court allowed and the application u/s.28A(3) held maintainable – Application for correction of typographical errors in the judgment passed by the Supreme Court – Held: In view of the agreement between the counsel for the appellant and the respondents, direction issued that the errors be corrected.

CIVIL APPELLATE JURISDICTION : I.A.NO.2

IN

Civil Appeal No. 7655 of 2004.

From the Judgment & Order 19.07.2001 of the High Court of Judicature of Andhra Pradesh at Hyderabad in Writ Appeal No. 997 of 2001.

Sridhar Potaruju, D. Julius Riamei, Faichang P. Gangmei for the Appellant.

P. Parmeswaran, C.K. Sucharita, Nirada Das for the Respondents.

The following order of the Court was delivered

ORDER

This is an application for correction of typographical errors in paragraphs 3, 12 and 13 of judgment dated October 5, 2011 vide which this Court allowed the appeal preferred by the appellant-applicant, reversed the judgment of the Division Bench of the Andhra Pradesh High Court and held that the application filed by the appellant under Section 28A(3) of the Land Acquisition Act, 1894 is maintainable.

We have heard learned counsel for the applicant and the respondents who agree that the typographical errors in paragraphs 3, 12 and 13 of judgment dated October 5, 2010 may be corrected. In view of the above we direct that:

i) The last 4 lines of paragraph 3 shall stand substituted with the following:

"The Reference Court reconsidered the matter and passed order dated 17.7.2000, whereby it fixed market value of the acquired land at Rs.30,000/- per acre and also granted compensation at the rate of Rs.15,000/- towards subsoil mineral rights apart from 30% solatium on enhanced compensation with 12% interest on additional market value from the date of notification to the date of award and 9% interest per annum from the date of taking possession for a period of one year and thereafter 15% per annum till realisation of the enhanced compensation. The appeals filed by the parties against the fresh determination of market value by the Reference Court are pending before the High Court."

ii) The last 7 lines of paragraph 12 of judgment dated October 5, 2010 shall stand substituted with the following:

"If the High Court dismisses both the appeals, then too the appellant will be entitled to compensation at the rate of Rs.30,000/- per acre for the acquired land and

compensation at the rate of Rs.15,000/- per acre towards subsoil mineral rights with other benefits. If, on the other hand, the amount of compensation payable in terms of order dated 17.7.2000 passed by the Reference Court is reduced by the High Court then the amount payable to the appellant will have to adjusted accordingly."

iii) In paragraph 13, the number of Appeal Suit shall be substituted and shall always be deemed to have been substituted as 1634 instead of 1643.

I.A. is allowed in the manner indicated above.

N.J. I.A. allowed.

AMRIK SINGH LYALLPURI

v.

UNION OF INDIA AND ORS.

(Civil Appeal No. 5075 of 2005)

APRIL 21, 2011

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

Delhi Municipal Corporation Act, 1957: s.347D – Appeal against order of Appellate Tribunal – Under s.347D of the DMC Act and s.256 of NDMC Act appeal against orders of Appellate Tribunal shall lie to the Administrator – Under both the Acts, the jurisdiction of the Civil Court has been barred – Constitutionality of s.347D of the DMC Act and s.256 of NDMC Act, challenged – Held: s.347D of the DMC Act and s.256 of NDMC Act are not constitutionally valid – Both the said provisions are, therefore, declared unconstitutional being violative of Article 14 of the Constitution – In view of this, till a proper judicial authority is set up under the said Acts, the appeals to the Administrator u/s.347D of the DMC Act and s.256 of NDMC Act shall lie to the District Judge – All pending appeals filed under the erstwhile provisions, as said, shall stand transferred to the Court of District Judge, Delhi – However, the decisions which have already been arrived at by the Administrator under the said two provisions would not be reopened in view of the principles of prospective overruling – New Delhi Municipal Corporation Council Act, 1994 – s.256.

The questions which arose for consideration in the instant appeal were whether an appeal from an order of the Appellate Tribunal constituted under the Delhi Municipal Corporation Act, 1957 and New Delhi Municipal Corporation Council Act, 1994 can be heard and decided by the Administrator and whether Section 347D of DMC Act and Section 256 of NDMC Act are constitutionally valid.

Allowing the appeal, the Court

HELD: 1. A perusal of the provisions of Section 347A and 347C, sub-clause (7) of the Delhi Municipal Corporation Act, 1957, (DMC Act) shows that the Appellate Tribunal shall be manned by a person who is or has been a District Judge or an Additional District Judge or has, for at least ten years, held a judicial office in India [Section 347A, sub-clause (3)]. Insofar as Section 347C is concerned, it is very clear that such Tribunal shall have in certain matters, the trappings of a Civil Court trying a suit under the Civil Procedure Code. Clause (f) of sub-section (7) of Section 347 further provides that proceedings before such Tribunal shall be judicial proceedings within the meaning of Section 193 and Section 228 for the purpose of Section 196 of the Indian Penal Code and every Appellate Tribunal shall be deemed to be a Civil Court for the purpose of Section 195 and Chapter XXVI of the Code of Criminal Procedure. The provisions of Section 253 of the NDMC Act are virtually on the same lines. Under sub-section (3) of Section 253 of the NDMC Act, a person shall not be qualified for appointment as a presiding officer of an Appellate Tribunal unless he is, or has been, a District Judge or an Additional District Judge or has, for at least ten years, held a judicial office. Similarly, Section 255 of the NDMC Act virtually is pari materia with sub-section (7) of Section 347C of the DMC Act. Therefore, on a reading of the said two provisions, it is clear that the Appellate Tribunals created under the said statutes are quasi judicial bodies with the trappings of the Civil Court and that they are manned by judicial officers of considerable experience. In discharging their functions, such bodies are acting as a Civil Court in respect of some of its functions, and the proceedings before such bodies are judicial proceedings. An appeal is provided against the order of such Appellate Tribunals under both the statutes. [Paras 5, 6, 7] [567-B-H; 568-A]

2.1. Under Section 347D of the DMC Act, such appeal shall lie to the Administrator. Similarly, under Section 256 of the NDMC Act, appeal also lies to the Administrator. Both the sections, namely, Section 347D of the said Act and Section 256 of the NDMC Act are couched in similar terms. Under both the Acts, the jurisdiction of the Civil Court has been barred; vide Section 347E of the said Act and Section 257 of the NDMC Act. On a comparison of the definitions of term 'administrator' in DMC Act and NDMC Act, it is clear that there is not much difference in the two definitions and by Administrator is meant "Lieutenant Governor of the National Capital Territory of Delhi". [Paras 8, 9, 12] [568-A-B; F-G; 569-D-E]

Indo-China Steam Navigation Company Limited v. Jasjit Singh,Additional Collector of Customs, Calcutta, and Others **AIR 1964 SC 1140;** *Harinagar Sugar Mills Ltd. v. Shyam Sunder Jhunjhunwala and others* **AIR 1961 SC 1669 – held inapplicable.**

2.2. Even though the Administrator under the said two Acts may be the Lieutenant Governor of the National Capital Territory of Delhi which may be a high constitutional authority, it cannot be disputed that the said authority is an executive authority. [Para 21] [573-C-D]

2.3. It is not suggested for a moment that the Administrator, who is the Lieutenant Governor in Delhi is not acting independently. The question is: having regard to the concept of rule of law and judicial review, whether a review by an executive authority of a decision taken by the judicial or quasi-judicial authority which has the trappings of the Court is permissible. In view of the consistent opinion expressed by this Court in P. Sambhamurty and L. Chandra Kumar, Section 347D of Delhi Municipal Corporation Act, 1957 and Section 256 of the NDMC Act are not constitutionally valid. Both the said

provisions are, therefore, declared unconstitutional being violative of Article 14 of the Constitution. In view of this decision, till a proper judicial authority is set up under the said Acts, the appeals to the Administrator under Section 347D of the Delhi Municipal Corporation Act, 1957 and also under Section 256 of the NDMC Act shall lie to the District Judge, Delhi. All pending appeals filed under the erstwhile provisions, as said, shall stand transferred to the Court of District Judge, Delhi. However, the decisions which have already been arrived at by the Administrator under the said two provisions will not be reopened in view of the principles of prospective overruling. [Paras 24, 25] [574-F-H; 575-A-B; G-H; 576-A-B]

P. Sambamurthy and others v. State of Andhra Pradesh and another **(1987) 1 SCC 362;** *L. Chandra Kumar v. Union of India and others* **AIR 1997 SC 1125;** *Union of India v. R. Gandhi, President, Madras Bar Association* **(2010) 11 SCC 1 – relied on.**

Case Law Reference:

AIR 1964 SC 1140	**held inapplicable**	**Para 17**
AIR 1961 SC 1669	**held inapplicable**	**Para 19**
(1987) 1 SCC 362	**relied on**	**Para 14, 24**
AIR 1997 SC 1125	**relied on**	**Para 16, 24**
(2010) 11 SCC 1	**relied on**	**Para 24**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5075 of 2005.

From the Judgment & Order dated 07.01.2004 of the High Court of Delhi at New Delhi in C.W. 42 (Civil) of 2004.

Harish N. Salve, Indra Sawhney (Amicus Curiae) for the Appellant.

Harish Chandra, Nagendra Rai, Rakesh Kumar Khanna, Chetan Chawla, Rekha Pandey, Mukesh Verma, Praveen Swarup, Sanjiv Sen, Surya Kant, Seema Rao, Purnima Jauhari for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. The principal question raised in this appeal is the constitutional validity of Section 347D of Delhi Municipal Corporation Act, 1957 (hereinafter referred to as, 'the said Act'). Similar provisions are also there in Section 256 of New Delhi Municipal Council Act, 1994 (hereinafter referred to as, 'the NDMC Act').

2. The question was raised in a writ petition filed by the appellant who is a journalist by profession and the editor of Urdu Weekly called 'Lalkar'. In the petition it has been urged that one Shri B.S. Mathur, Additional District and Sessions Judge was appointed the Presiding Officer of the MCD/NDMC Appellate Tribunal in terms of sub-sections (1) and (2) of Section 347 of the said Act. His appointment was made for deciding appeals preferred under Section 343 or Section 347B of the said Act. Shri B.S. Mathur was appointed in Appellate Tribunal to hear and dispose of all appeals from the order passed by the Zonal Engineer (Buildings) of the respective zones of Municipal Corporation of Delhi and that of New Delhi Municipal Council. However, the grievance of the appellant is that orders of the Appellate Tribunal are appealable before the Administrator of Delhi i.e. Lt. Governor under Section 347D of the said Act. The main grievance in the public interest litigation is when an appeal is decided by an Appellate Authority which is manned by a Judge of the Civil Court, appeal from the decision of such authority cannot be heard and by an executive authority, however high such executive authority may be.

3. In order to appreciate this controversy it is necessary to consider the relevant statutory provisions. The provision for

constitution of an Appellate Tribunal under Section 347A of the said Act are as follows:-

"347A. Appellate Tribunal . - (1) The Central Government shall, by notification in the Official Gazette, constitute one or more Appellate Tribunals with headquarters at Delhi, for deciding appeals preferred under section 343 or section 347B.

(2) An Appellate Tribunal shall consist of one person to be appointed by the Central Government on such terms and conditions of service as may be prescribed by rules.

(3) A person shall not be qualified for appointment as the presiding officer of an Appellate Tribunal unless he is, or has been, a district judge or an additional district judge or has, for at least ten years, held a judicial office in India.

(4) The Central Government may, if it so thinks fit, appoint one or more persons having special knowledge of, or experience in, the matters involved in such appeals, to act as assessors to advise the Appellate Tribunal in the proceedings before it, but no advice of the assessors shall be binding on the Appellate Tribunal.

(5) The Central Government shall, by notification in the Official Gazette, define the territorial limits within which an Appellate Tribunal shall exercise its jurisdiction, and where different Appellate Tribunals have jurisdiction over the same territorial limits, the Central Government shall also provide for the distribution and allocation of work to be performed by such Tribunals.

(6) For the purpose of enabling it to discharge its functions under this Act, every Appellate Tribunal shall have a Registrar and such other staff on such terms and conditions of service as may be prescribed by rules :

Provided that the Registrar and staff may be employed

jointly for all or any number of such Tribunals in accordance with the rules."

4. For the purpose of deciding the controversy of this case, the provisions of Sections 343 and 347B are not relevant, but Section 347C which provides for the procedure before such Appellate Tribunal is relevant. Particularly, the provision of 347C sub-section (7) which is relevant for the purpose of deciding the controversy is set out below:-

"Section 347C - Procedure of the Appellate Tribunal -

xxx xxx xxx

(7) Every Appellate Tribunal, shall, in addition to the powers conferred on it under this Act, have the same powers as are vested in a Civil Court while trying a suit under the Code of Civil Procedure, 1908 (5 of 1908), in respect of the following matters, namely:--

(a) summoning and enforcing the attendance of persons and examining them on oath;

(b) requiring the discovery and inspection of documents;

(c) receiving evidence on affidavits;

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

(e) issuing commisisons for the examination of witnesses or documents; and

(f) any other matter which may be prescribed by rules, and every proceeding of an Appellate Tribunal in hearing or deciding an appeal or in connection with execution of its order, shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for the purpose

of section 196, of the Indian Penal Code (45 of 1860), and every Appellate Tribunal shall be deemed to be a Civil Court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973, (2 of 1974)."

5. From a perusal of the provisions of Section 347A and 347C, sub-clause (7), it is clear that the said tribunal shall be manned by a person who is or has been a District Judge or an Additional District Judge or has, for at least ten years, held a judicial office in India [Section 347A, sub-clause (3)]. Insofar as Section 347C is concerned, it is very clear that such tribunal shall have in certain matters, the trappings of a Civil Court trying a suit under the Civil Procedure Code. Clause (f) of sub-section (7) of Section 347 further provides that proceedings before such tribunal shall be judicial proceedings within the meaning of Section 193 and Section 228 for the purpose of Section 196 of the Indian Penal Code and every Appellate Tribunal shall be deemed to be a Civil Court for the purpose of Section 195 and Chapter XXVI of the Code of Criminal Procedure.

6. The provisions of Section 253 of the NDMC Act are virtually on the same lines. Under sub-section (3) of Section 347A and sub-section (3) of Section 253 of the NDMC Act, a person shall not be qualified for appointment as a presiding officer of an Appellate Tribunal unless he is, or has been, a District Judge or an Additional District Judge or has, for at least ten years, held a judicial office. Similarly, Section 355 of the NDMC Act virtually is pari materia with sub-section (7) of Section 347C of the said Act. Therefore, on a reading of the aforesaid two provisions it is clear that the Appellate Tribunals created under the aforesaid statutes are quasi judicial bodies with the trappings of the Civil Court and that they are manned by judicial officers of considerable experience. In discharging their functions, such bodies are acting as a Civil Court in respect of some of its functions, and the proceedings before such bodies are judicial proceedings.

7. However, an appeal is provided against the order of such Appellate Tribunals under both the statutes.

8. Under Section 347D of the said Act, such appeal shall lie to the Administrator. The relevant provision is set out below:-

"Section 347D - Appeal against orders of Appellate Tribunal - (1) An appeal shall lie to the Administrator against an order of the Appellate Tribunal, made in an appeal under section 343 or section 347B, confirming, modifying or annulling an order made or notice issued under this Act.

(2) The provisions of sub-sections (2) and (3) of section 347B and section 347C and the rules made thereunder, shall, so far as may be, apply to the filing and disposal of an appeal under this section as they apply to the filing and disposal of an appeal under those sections.

(3) An order of the Administrator on an appeal under this section, and subject only to such order, an order of the Appellate Tribunal under section 347B, and subject to such orders of the Administrator or an Appellate Tribunal, an order or notice referred to in sub-section (1) of that section, shall be final."

9. Similarly, under Section 256 of the NDMC Act, appeal also lies to the Administrator. Both the sections, namely, Section 347D of the said Act and Section 256 of the NDMC Act are couched in similar terms. Under both the Acts, the jurisdiction of the Civil Court has been barred; vide Section 347E of the said Act and Section 257 of the NDMC Act.

10. The main question which was raised in the writ petition moved before the High Court was whether an appeal from an order of the Appellate Tribunal constituted under the aforesaid two Acts can be heard and decided by the Administrator. The

term "Administrator" has been defined under Section 2(1) of the said Act as follows:-

> "Section 2 – Definitions.- In this Act, unless the context otherwise requires,--
>
> (1) "Administrator" means the Lieutenant Governor of the National Capital Territory of Delhi;"

11. Under Section 2(1) of the NDMC Act, the term "Administrator" has been defined as follows:-

> "Section 2 – Definitions.- In this Act, unless the context otherwise requires,
>
> (1)"Administrator" means the Administrator of the National Capital Territory of Delhi;"

12. On a comparison of the aforesaid definitions, it is clear that there is not much difference in the aforesaid two definitions and by Administrator is meant "Lieutenant Governor of the National Capital Territory of Delhi".

13. Mr. Harish Salve, learned senior counsel, who on the request of the Court appeared as an Amicus Curie in this matter, contended that the aforesaid provision of hearing of the appeal by the Administrator from an order of the Appellate Tribunal is violative of the concept of judicial review which is enshrined in our Constitution. The learned counsel submitted that the order of the Appellate Tribunal is certainly a quasi judicial one being passed by Judicial Authority which has the trappings of the Court and the appeal from such an order cannot lie to any authority except a judicial authority.

14. Under our constitutional scheme it was contended, an executive authority cannot entertain an appeal from an order passed by the judicial authority even though such judicial authority is acting in a quasi-judicial capacity. In support of this contention, reliance was placed on the judgment of this Court

in the case of *P. Sambamurthy and others v. State of Andhra Pradesh and another,* (1987) 1 SCC 362, wherein a Constitution Bench of this Court speaking through Chief Justice Bhagwati examined the constitutional validity of Article 371D (5) of the Constitution, inserted by 32nd Constitution Amendment Act, 1973. In *P. Sambamurthy* (supra), this Court was called upon to decide an issue similar to the one at hand. Clause (3) of Article 371-D provided for the creation of an administrative tribunal for the State of Andhra Pradesh so as to exercise jurisdiction with respect to the matters mentioned in sub clauses (a), (b) and (c). Clause (5) however, subjected the decision of the said administrative tribunal to the confirmation of the State Government. The Court held it as violative of the principle of 'rule of law', insofar it placed the power of reviewing the decision of a quasi judicial tribunal in the hands of the executive which according to this Court, contravened the principle of judicial review. This Court said:

> "…The State Government is given the power to modify or annul any order of the Administrative Tribunal before it becomes effective either by confirmation by the State Government or on the expiration of the period of three months from the date of the order….It will thus be seen that the period of three months from the date of the order is provided in clause (5) in order to enable the State Government to decide whether it would confirm the order or modify or annul it. Now almost invariably the State Government would be a party in every service dispute brought before the Administrative Tribunal and the effect of the proviso to clause (5) is that the State Government which is a party to the proceeding before the Administrative Tribunal and which contests the claim of the public servant who comes before the Administrative Tribunal seeking redress of his grievance against the State Government, would have the ultimate authority to uphold or reject the determination of the Administrative Tribunal….Such a provision is, to say the least, shocking and is clearly

subversive of the principles of justice." (See page 368)

15. This Court further explained that "…Now if the exercise of the power of judicial review can be set at naught by the State Government by overriding the decision given against it, it would sound the death knell of the rule of law. The rule of law would cease to have any meaning, because then it would be open to the State Government to defy the law and yet to get away with it. The proviso to clause (5) of Article 371-D is therefore clearly violative of the basic structure doctrine."

16. In a subsequent Constitution Bench decision of this Court in L. Chandra Kumar v. Union of India and others, AIR 1997 SC 1125, Chief Justice Ahmadi, after an analysis of different decisions of this Court, affirmatively held that judicial review is one of the basic features of our Constitution. Such a finding of this Court, obviously means that there cannot be an administrative review of a decision taken by a judicial or a quasi judicial authority which has the trappings of a court. Since judicial review has been considered an intrinsic part of constitutionalism, any statutory provision which provides for administrative review of a decision taken by a judicial or a quasi judicial body is, therefore, inconsistent with the aforesaid postulate and is unconstitutional.

17. The learned senior counsel for the Union of India in this case has sought to support the impugned judgment by referring to the decision of this Court in the case of *Indo-China Steam Navigation Company Limited v. Jasjit Singh, Additional Collector of Customs, Calcutta, and Others* (AIR 1964 SC 1140). The said decision deals with the provisions of the Sea Customs Act, 1878, which is a pre-Constitutional law. Apart from that, the scheme of the Sea Customs Act would show that when a dispute is raised by an aggrieved party either by way of an appeal or revision, that dispute has to be decided in the light of the facts adduced in the proceedings. And this Court held that the decision of such an authority amounts to a decision which is given in accordance with the principles of natural justice

and such proceedings are quasi judicial in nature. This Court also accepted that even though the status of the customs officer who adjudicates under Section 167 (12A) and Section 183 of the Act is not that of the tribunal, that does not make a difference when the matter reaches the stage of appeal and revision. On the basis of such reasoning, this Court held that when such disputes are decided by appellate or revisional authority, it becomes a tribunal within the meaning of Article 136 of the Constitution and such tribunals being invested with the judicial power of the State are required to act judicially and that they are tribunals within the meaning of Article 136 of the Constitution.

18. In the instant case, the issue is totally different. Here the issue is whether an order passed by a quasi judicial authority, which has the trappings of a civil court, can be reviewed by an administrative authority. Therefore, the ratio in *Indo-China Steam Navigation Company* (supra) does not support the case of the Union of India.

19. Mr. Nagendra Rai, learned senior counsel for the third respondent also wanted to support the impugned judgment by relying on the Constitution Bench decision of this Court in the case of *Harinagar Sugar Mills Ltd., v. Shyam Sunder Jhunjhunwala and others* (AIR 1961 SC 1669). In that case the issue raised was that of a company's power to refuse registration of transfer of share. On the refusal to register the transfer of shares, the aggrieved party has two remedies for seeking relief under the Companies Act. One was to apply to the Court for rectification of register and the other was to appeal to the Central Government under Section 111 of the Act against the resolution of the company refusing to register the share. In such a situation, this Court held that when Government, in exercise of its power of appeal under Section 111 Clause (3) is acting it is invested with the judicial power of the State to decide disputes according to law. In such a case, the Central

Government is acting as a Tribunal and it is amenable to the jurisdiction of this Court under Article 136. (See paras 10 and 23 of the report).

20. As noted above, the issue in this case is not whether the administrator under the aforesaid statutory provision is a tribunal under Article 136 of the Act. The issue is, as discussed above, whether the administrative authority can sit in appeal over the decisions of a judicial or quasi judicial authority which has the trappings of the Civil Court. Therefore, the decision in *Harinagar* (supra) cannot sustain the impugned judgment.

21. Even though the Administrator under the aforesaid two Acts may be the Lieutenant Governor of the National Capital Territory of Delhi which may be a high constitutional authority, it cannot be disputed that the said authority is an executive authority.

22. Learned senior counsel for Delhi Municipal Corporation argued by referring to the provisions of Article 239AA of the Constitution, where provisions in respect to Delhi have been made. For a proper appreciation of this question, Article 239AA, sub-article (1) is set out below:-

> **"239AA. Special provisions with respect to Delhi.-** (1) As from the date of commencement of the Constitution (Sixty-ninth Amendment) Act, 1991, the Union territory of Delhi shall be called the National Capital Territory of Delhi (hereafter in this Part referred to as the National Capital Territory) and the administrator thereof appointed under Article 239 shall be designated as the Lieutenant Governor."

23. In this connection, we can also refer to the provision of Government of National Capital Territory of Delhi Act, 1991, namely, Section 41 and particularly Section 41(3). Section 41 runs as under:

> **"41. Matters in which Lieutenant Governor to act in his discretion.**
>
> (1) The Lieutenant Governor shall act in his discretion in a matter-
>
> (i) which falls outside the purview of the powers conferred on the Legislative Assembly but in respect of which powers or functions are entrusted or delegated to him by the President; or
>
> (ii) in which he is required by or under any law to act in his discretion or to exercise any judicial or quasi-judicial functions.
>
> (2) If any question arises as to whether any matter is or is not a matter as respects which the Lieutenant Governor is by or under any law required to act in his discretion, the decision of the Lieutenant Governor thereon shall be final.
>
> (3) If any question arises as to whether any matter is or is not a matter as respects which the Lieutenant Governor is required by any law to exercise any judicial or quasi-judicial functions, the decision of the Lieutenant Governor thereon shall be final.

24. By referring to the aforesaid two provisions, the learned counsel argued that the Administrator, who is none other than the Lieutenant Governor, has no connection with the State and is totally independent. Therefore, when he hears the appeal, he does it as an independent appellate authority. This Court is unable to accept the aforesaid contention. It is not suggested for a moment that the Administrator, who is the Lieutenant Governor in Delhi is not acting independently. The question is: having regard to the concept of rule of law and judicial review, whether a review by an executive authority of a decision taken by the judicial or quasi-judicial authority which has the trappings of the Court is permissible. In view of the consistent opinion

expressed by this Court in *P. Sambhamurty* (supra) and *L. Chandra Kumar* (supra), discussed above, we are unable to uphold the constitutional validity of Section 347D of Delhi Municipal Corporation Act, 1957 and Section 256 of the NDMC Act. Both the aforesaid provisions are, therefore, declared unconstitutional being violative of Article 14 of the Constitution. In a recent Constitution Bench judgment of this Court in *Union of India v. R. Gandhi, President, Madras Bar Association* [(2010) 11 SCC 1], Justice Raveendran, speaking for the unanimous Bench held:-

> "102. The fundamental right to equality before law and equal protection of laws guaranteed by Article 14 of the Constitution, clearly includes a right to have the person's rights, adjudicated by a forum which exercises judicial power in an impartial and independent manner, consistent with the recognised principles of adjudication. Therefore wherever access to courts to enforce such rights is sought to be abridged, altered, modified or substituted by directing him to approach an alternative forum, such legislative Act is open to challenge if it violates the right to adjudication by an independent forum. Therefore, though the challenge by MBA is on the ground of violation of principles forming part of the basic structure, they are relatable to one or more of the express provisions of the Constitution which gave rise to such principles. Though the validity of the provisions of a legislative Act cannot be challenged on the ground it violates the basic structure of the Constitution, it can be challenged as violative of constitutional provisions which enshrine the principles of the rule of law, separation of powers and independence of the judiciary."

25. In view of this decision by this Court, till a proper judicial authority is set up under the aforesaid Acts, the appeals to the Administrator under Section 347D of the Delhi Municipal Corporation Act, 1957 and also under Section 256 of the

NDMC Act shall lie to the District Judge, Delhi. All pending appeals filed under the erstwhile provisions, as aforesaid, shall stand transferred to the Court of District Judge, Delhi. However, the decisions which have already been arrived at by the Administrator under the aforesaid two provisions will not be reopened in view of the principles of prospective overruling.

26. The judgment of the High Court is, therefore, set aside and the appeal is allowed. There will be, however, no orders as to costs.

D.G. Appeal allowed.

FAHIM KHAN

v.

STATE OF BIHAR NOW JHARKHAND

(Criminal Appeal No. 2081 of 2009)

APRIL 21, 2011

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

PENAL CODE, 1860:

s. 302 – Murder – Victim shot dead by three accused in presence of his mother –Acquittal by trial court – Two accused died during pendency of appeal before High Court – Conviction by High Court of the surviving accused who had fired the shot – Held: Evidence of the mother of the deceased has been supported by other witnesses – Her evidence inspires full confidence – Delay in registration of FIR and sending the special report, explained – Conviction upheld – Code of Criminal Procedure, 1973 – ss. 157(3) and 313 – Appeal against acquittal.

CODE OF CRIMINAL PROCEDURE, 1973:

s. 313 – Power of trial court to examine accused – Held : Though statements of accused recorded are extremely perfunctory, but no prejudice to the accused has been pointed out at any stage even before the Supreme Court – It must, therefore, be presumed that no prejudice has in fact occurred – Penal Code, 1860 – s. 302.

Appeal against acquittal – Murder – Acquittal by trial court – Conviction by High Court u/s 302 IPC – Held: High Court can re-appraise the entire evidence and if it is found that the judgment of the trial court was perverse or against the evidence, the High court has to interfere in the matter – Penal Code, 1860 –s. 302.

The appellant-accused along with two others, at about 11.30 p.m. on 10.5.1989, went to the place where the son of PW-4 was sleeping. PW-4 stated that her son after going to bed asked her for a glass of water and when she took out a bottle for him she saw the three accused surrounding him. When she questioned them, the appellant-accused shot her son on his head killing him instantaneously. PW-2 informed the police. The statement of PW-4 was recorded by the police at 0:10 hours on 11-5-1989 and formal FIR was recorded at the police station at 3.00 a.m. The trial court acquitted the accused. But, on appeal by the State, the High Court convicted the accused-appellant u/s 302, as the other two accused had died pending appeal.

In the instant appeal filed by the convict, it was contended for the appellant that once the trial court had acquitted the accused, the High Court should not have interfered with the acquittal; that there was delay in lodging the FIR as the inquest report did not bear the FIR number; that the statement of PW-4 that she tried to lift her son was wrong as there was no evidence that her clothes had blood stains; that the statements of the accused u/s 313 were recorded in a perfunctory manner.

Dismissing the appeal, the Court

HELD: 1. It is true that the High Court's interference in an appeal against acquittal is somewhat circumscribed, and interference should be made only in a case where the judgment of the trial court was perverse and not based on the evidence. It is, however, well-settled that the High Court can re-appraise the entire evidence to test the judgment rendered by a trial court and if two views are possible, the one taken by the trial court should not be interfered with. On the contrary, if it is found that the judgment of the trial court was perverse or against the evidence, it would be a travesty of justice if the High

Court was to sit back and not interfere in the matter. [para 5] [583-G-H; 584-A-B]

2.1 The plea of delay in the lodging of the FIR, as the inquest report did not bear the FIR number, cannot be accepted as it flows from a presumption that the FIR had been lodged at the site. This can never be the position as an FIR is always recorded in the police station. It has come in the evidence that PW-4's statement had been recorded at the site at about 0:10 hours on 11.5.1989 by the Sub-Inspector (PW-7). This statement had been carried to the police station and the formal FIR recorded at 3:00 a.m. It is significant that as per the post mortem report the dead body had been received in the hospital at 6:30 a.m. on the 11.5.1989 i.e. within 3 hours of the F.I.R. with all relevant papers which would include the inquest papers. It is true that the special report u/s 157 (3) Cr.P.C. was received by the Magistrate after two days but it is told that in the State of Bihar this is a normal process. [para 6] [584-C-F]

2.2 The plea that PW-4 was not present at the place of occurrence, is equally without merit. In her evidence she has categorically stated that when her son had called for a glass of water she had taken a bottle out for him and witnessed the shooting. She also stated that relations between the appellant and her son-in-law were strained and that her son was killed on that account. She also explained that she had come to her daughter's house as she was to give birth to a child and in that process she had been present when the incident had happened. She also identified the three accused in court when questioned. Her evidence also reveals that she had indeed tried to lift her son after he had been shot but from this assertion it cannot be inferred that her clothes would have been heavily blood stained. [para 7] [584-F-H; 585-A-B]

2.3 It is also significant that the statement of PW-4 is supported by the evidence of PW-2. It was this witness who had conveyed the information of the murder to the police station which had brought the police party to the place of incident. PW-2 stated that as he returned home after seeing a film, he saw the dead body of the victim lying there and his mother crying on it. He also stated that the deceased used to live in the house of his brother-in-law and that his mother was living with them. The prosecution story is also supported by the evidence of PW-7, the Sub-inspector. It was this officer who had recorded the statement of PW-4 at the site and then sent the same to the police station for registration of the FIR. Therefore, the prosecution story given by PW-4 inspires full confidence notwithstanding the fact that PW-1 outside whose house the incident happened, did not support the prosecution. [para 7-8] [585-B-E]

3. It is indeed true that the statements of the accused recorded u/s 313 Cr.P.C. are extremely perfunctory and do not satisfy the requirement of the Section. However, no argument whatsoever in this regard had been raised at any stage although the matter had travelled up and down the appellate ladder several times earlier. Even no such ground has been raised in the SLP. In the absence of any complaint on this score, it must be assumed that the appellant had suffered no prejudice on account of a defective 313 statement. [para 9] [585-F-H; 586-A]

Shobit Chamar & Anr. vs. State of Bihar **1998 (2) SCR 117 = 1998 (3) SCC 455;** *Shivaji Sahebrao Bobade vs. State of Maharashtra* **AIR 1973 SC 2622; and** *Santosh Kumar Singh Versus State through CBI* **2010 (13) SCR 901 = 2010 (9) SCC 747- relied on.**

Asraf Ali Versus State of Assam **2008 (16) SCC 328 and** *Ranvir Yadav Versus State of Bihar* **2009 (6) SCC 595- cited.**

Case Law Reference:

2009 (6) SCC 595	**cited**	**para 3**
2008 (16) SCC 328	**cited**	**para 3**
1998 (2) SCR 117	**relied on**	**para 9**
(AIR 1973 SC 2622)	**relied on**	**para 9**
2010 (13) SCR 901	**relied on**	**para 9**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2081 of 2009.

From the Judgment & Order dated 25.06.2009 of the High Court of Jharkhand at Ranchi in Government Appeal No. 3 of 1992 (R).

Sushil Kumar, Feroz Ahmad, R.S. Sharma, Aditya Kumar, Anmol Thakral, Ranjan Dwivedi for the Appellant.

Ratan Kumar Choudhuri, Brahmajeet Mihra, Akshay Shukla for the Respondent.

The Judgment of the Court was delivered by

HARJIT SINGH BEDI, J. 1. The facts leading to this appeal by way of special leave are as under :

Fahim Khan-the appellant, herein alongwith two others Chotna @ Chottu @ Karim Khan and Arsad Hussain @ Arsad @ Arsad Kadri Hussain was put on trial for having committed the murder of Sagir Hasan Siddique. The Trial Court by its judgment dated 15th June, 1991 in Sessions Trial No.122 of 1990 acquitted all the accused holding that the prosecution story had not been proved. The State of Bihar challenged this judgment in the High Court in appeal. The appeal was allowed by a Division Bench by its judgment dated 13th April, 2000 and the matter was remitted to the trial court to pass a fresh judgment on the evidence already adduced by the parties after

hearing them denovo. The accused, however, approached this court in Criminal Appeal No.661 of 2001. The order of the High Court was set aside on the 12th May, 2001 and the matter was sent back with a direction that the High Court should itself go into the merits of the case and take a decision thereon. Pursuant to the orders of the Supreme Court, the matter was heard and the High Court, has, by the impugned judgment, set aside the acquittal of the appellant herein holding that the Trial Court's judgment was perverse, and sentenced him to undergo imprisonment for life for the offence punishable under Section 302 of the Indian Penal Code. It is relevant, that Karim Khan and Arsad Hussain-accused died during the proceedings before the High Court and as of today we are left with the appellant-Fahim Khan alone.

2. The facts of the case are as under :

At about 11:30 p.m. on the 10th May, 1989, Sagir Hasan Siddique, deceased, after taking his meal, went to sleep in front of the house of Alamgir (PW-1) on a cot which had been made ready for him. A short time later, he called out to his mother Mst. Habibul Nisa (PW-4) asking for some water. As she came out to hand him a glass of water, she saw the three accused Fahim Khan, Chotna and Arsad Kadri surrounding her son. She questioned them as to why they had come to that place whereupon Fahim Khan-appellant suddenly fired his pistol at the deceased, hitting him on his head and killing him instantaneously.

On information received by the police from PW-2 Hanif, a police party reached the place of incident. The statement of PW-4 Habibul Nisa was recorded at the site at 0:10 hours on the 11th May, 1989 whereas the formal FIR was recorded at the police station at 3:00 a.m. The accused were arrested in due course and were brought to trial leading to the events already given above.

3. In the course of the hearing of this appeal, Mr. Sushil

Kumar, the learned senior counsel for the appellant, has raised primarily four arguments. He has first submitted that the trial court had acquitted the accused and the High Court, therefore, should not have interfered in an appeal against acquittal as the circumstances of the case did not warrant interference. He has also pleaded that the FIR had apparently been lodged after a delay and the proceedings had been interpolated to cover up the fact of delay. It has been highlighted on this aspect that if the inquest report had been recorded after the registration of the FIR in which case the inquest report ought to have borne number of the FIR and as this detail was missing, it indicated that the FIR had not been registered at its purported time. It has finally been pleaded that the story given by PW-4 that she had tried to lift her son was wrong as if that had been so, her clothes would have been blood-stained but there was no evidence to that effect, which cast a doubt on her presence. It has finally been pleaded that the statements of the accused under Section 313 of the Cr.P.C. had been recorded in a very perfunctory manner and for this reason as well the appellant was entitled to acquittal. In support of this plea Mr. Sushil Kumar has relied on *Asraf Ali Versus State of Assam* [2008 (16) SCC 328] and *Ranvir Yadav Versus State of Bihar* [2009 (6) SCC 595].

4. The learned counsel for the State of Bihar (now Jharkhand) has however supported the judgment of the High Court and has pointed out that the High Court had opined that the judgment of the trial judge acquitting the accused was perverse and in this situation interference was not only called for but was infact imperative.

5. We have heard learned counsel for the parties and gone through the record. It is true that the High Court's interference in an appeal against acquittal is somewhat circumscribed and interference should be made only in a case where the judgment of the trial court was perverse and not based on the evidence. It is, however, well-settled that the High Court can re-appraise the entire evidence to test the judgment rendered by a trial court

and if two views are possible, the one taken by the trial court should not be interfered with. On the contrary if it is found that the judgment of the trial court was perverse or against the evidence, it would be a travesty of justice if the High Court was to sit back and not interfere in the matter. We have gone through the judgment of the High Court and the Sessions Judge in the light of this broad principle and have accordingly re-examined the evidence in this background.

6. The first argument raised by Mr. Sushil Kumar is with regard to the delay in the lodging of the FIR, as the inquest report did not bear the FIR number. This argument however flows from a presumption that the FIR had been lodged at the site. This can never be the position as a FIR is always recorded in the police station. It has come in the evidence that the PW-4's statement had been recorded at the site at about 0:10 hours on the 11th May, 1989 by Sub-Inspector S.N. Das-PW. This statement had been carried to the police station and the formal FIR recorded at 3:00 a.m. It is significant that as per the post mortem report the dead body had been received in the hospital at 6:30 a.m. on the 11th May, 1989 i.e. within 3 hours of the F.I.R. with all relevant papers which would include the inquest papers. It is true that the special report under Section 157 (3) of the Cr.P.C. had been received by the Magistrate after two days but we are told that in the State of Bihar this is a normal process. We, therefore, find no merit in Sushil Kumar's first argument.

7. The second argument with regard to the lack of blood on the clothes of PW-4 leading to the conclusion that she was not an eye-witness to the incident, is equally without merit. In her evidence PW-4 has categorically stated that when her son had called for a glass of water she had taken a bottle out for him and witnessed the shooting. She also stated that relations between the appellant-Fahim Khan and her son-in-law Mahfooz Khan were strained and that her son had been killed on that account. She also explained that she had come to her

daughter's house as she was to give birth to a child and in that process she had been present when the incident had been happened. She also identified the three accused in court when questioned. Her evidence also reveals that she had indeed tried to lift her son after he had been shot but from this assertion it cannot be inferred that her clothes would have been heavily blood stained. It is significant also that the statement of PW-4 is supported by the evidence of Hanif Khan-PW-2. It was this witness who had conveyed the information of the murder to the police station which had brought the police party to the place of incident. Hanif stated that as he returned home after seeing a film, he had seen the dead body of Sagir Hasan Siddique lying there and his mother crying on it. He also stated that the deceased used to live in the house of Mahfooz Ahmed his brother-in-law and that his mother was living with them. The prosecution story is also supported by the evidence of PW-7 Sub-inspector S.N. Das. It was this officer who had recorded the statement of PW-4 at the site and then sent the same to the police station for the registration of the FIR.

8. We are, therefore, of the opinion that the prosecution story given by PW-4 inspires full confidence notwithstanding the fact that Alamgir-PW-1 outside whose house the incident happened, did not support the prosecution.

9. It is indeed true that the statements of the accused recorded under Section 313 of the Cr.P.C. are extremely perfunctory and do not satisfy with the requirement of Section 313 of the Cr.P.C. We however find that that no argument whatsoever in this regard had been raised at any stage although the matter had travelled up and down the appellate ladder several times earlier. We should not however be held to mean that an argument with regard to a defective 313 cannot be raised at the SLP stage but we have gone through the grounds of SLP in this matter and find that no ground has been raised even before us in the SLP. In the absence of any complaint on this score, we must assume that the appellant had suffered no

prejudice on account of a defective 313 statement. The cases cited by Mr. Sushil Kumar, undoubtedly talk about the importance of a 313 statement and the implications for the prosecution, should there be some defect. It is, however, equally well-settled that an objection as to prejudice must be taken at the earliest [see *Shobit Chamar & Anr. Versus State of Bihar* (1998 (3) SCC 455)] and prejudice must be shown before a trial could be said to be invalidated [see in this connection *Shivaji Sahebrao Bobade Versus State of Maharashtra* (AIR 1973 SC 2622) and *Santosh Kumar Singh Versus State through CBI* (2010 (9) SCC 747)]. No prejudice to the accused has been pointed out even this belated stage. It must therefore be presumed that no prejudice has in fact occurred.

11. We are therefore of the opinion that there is no merit in this appeal. It is accordingly dismissed.

R.P. Appeal dismissed.